

## American Law and Transnational Corruption: Is There a Need for Lincoln's Law Abroad?

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### A. Introduction

The endemic corruption of weak governments in poor nations is a major impediment not only to the economic development of ill-served peoples, but also to the development of world trade that could benefit both those who work for a living and those who manage them. Public corruption, like private greed, is a problem everywhere. It was a typical feature not only of the Roman Empire,<sup>1</sup> but also of many and perhaps most colonial regimes from their beginnings through the twentieth century.<sup>2</sup> According to Judith Shklar, wherever there is a self-serving elite, there is a need to “guard the guardians” against this form of original sin.<sup>3</sup> Benjamin Franklin wisely observed, “[t]here is no kind of dishonesty into which otherwise good people more easily and frequently fall, than that of defrauding the government.”<sup>4</sup> This is so in part because the line of moral conduct in public service is not always clearly drawn. The faint line between a campaign contribution and a bribe provides an example of this lack of clarity.<sup>5</sup> Family interests, longstanding friendships and political alliances constitute other examples. However, such complexities do not cloud the simple problem of plain bribery of public officers by the private firms with whom they deal.

Corruption is an especially difficult problem in poor nations endowed with natural resources highly valued by people in wealthier nations.<sup>6</sup> According to reports from the

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1 *Murphy*, *Are We Rome? The Fall of An Empire and the Fate of America*, Boston 2007, *passim*.

2 See, e.g., *Dirks*, *The Scandal of Empire: India and the Creation of Imperial Britain*, Cambridge (Mass.) 2006.

3 *Shklar*, *Ordinary Vices*, 1984, 243-244.

4 *Jackson*, *Historical Review of the Constitution and Government of Pennsylvania, 1759*; *Benjamin Franklin*, “F.B.”: On Smuggling, *London Chron.*, 21-24 November 1767 (draft), available at <<http://franklinpapers.org/franklin/framedVolumes.jsp>>.

5 See *Stark*, *Conflict of Interest in American Public Life*, Cambridge (Mass.) 2000, 152-177.

6 *Stiglitz*, *Making Globalization Work: The Next Steps to Global Peace*, New York 2006, 158-159; *Huntington*, *Political Order in Changing Societies*, New Haven 1968, 59-71. See generally *Holmes*, *Rotten States: Corruption, Post-Communism and Neoliberalism*, Durham 2006; Rose-Ackerman (ed.), *International Handbook on the Economics of Corruption*, Cheltenham 2006. But a nation need not have vast natural resources to have a problem with the corruption of underpaid judges. See, e.g., *Widner*, *Building the Rule of Law*, New York 2001, 273-290.

World Bank, bribes totaling a trillion dollars were paid out in 2002.<sup>7</sup> The larger proportion of that amount was undoubtedly paid by firms that extract and export natural resources for sale in the developed world. A timely example of the evil is provided by the “*biggest heist in modern history*”,<sup>8</sup> the United Nations’ Oil-for-Food Program in Iraq. Major corporate enterprises around the planet shared in illicit benefits from, and in the responsibility for, schemes leaving the Iraqi population undernourished despite the many billions of dollars theoretically deployed to feed them. Only a few of the many offenders have been punished for participating in that heist.<sup>9</sup> The governments of most oil-producing nations are squalid in bribery; Nigeria and Kazakhstan serve as additional premier examples of nations in which the national wealth has been appropriated for the personal benefit of a few officials and the foreign firms with which they deal.<sup>10</sup> Strenuous efforts within the World Bank to deal with the problem have resulted in turmoil within the Bank’s leadership; we are told that “*many in the bank*” have remained “*allegic*” to the prosecution of the borrowers they deal with.<sup>11</sup>

The prevention or deterrence of corruption by law, where substantially achieved, requires cultural traditions of mutual respect sufficient to bring about the professional independence of judges and other civil servants responsible for law enforcement,<sup>12</sup> and also requires an investment of public resources sufficient to maintain legal institutions with the requisite measure of independence. Poor nations often lack both the resources and the traditions. Their judiciaries might be likened, as an old metaphor has it, to low-wage waiters in elegant hotels who were absolutely forbidden to accept tips.<sup>13</sup> Under-

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7 *Rose-Ackerman*, Governance and Corruption, in: Lornborg (ed.), *Global Crises, Global Solutions*, Cambridge 2004, 301.

8 Syria and the United Nations Oil-For-Food Program: Joint Hearing before the H. Subcomm. on Oversight and Investigations and the H. Subcomm. on the Middle East and Central Asia of the Comm. on Int’l Relations, 109th Cong. 15 (2005) (statement of Rep. Ros-Lehtinen, Chair, H. Comm. on the Middle East and Central Asia), available at <[http://commdocs.house.gov/committees/intrel/hfa22654.000/hfa22654\\_0f.htm](http://commdocs.house.gov/committees/intrel/hfa22654.000/hfa22654_0f.htm)>. And see *Soussan*, *Backstabbing for Beginners*, New York, 2008.

9 *E.g.*, Texas oil man Oscar Wyatt pleaded guilty to conspiracy to commit the federal crime of wire fraud in 2007; *Gelsi*, Oscar Wyatt Pleads Guilty in Oil-for-Food Scandal, *MarketWatch*, 1 October 2007. At the age of 83, he will serve a year in prison and is required to disgorge his profits. *Leonard*, Oscar Wyatt Jailed Over Oil-for-Food Bribes, *Telegaph*, 20 November 2007. Another Texas oil man will serve three to four years in prison and will have to disgorge \$9.1 million. *Feurer*, Texas Trader Admits Guilt in Oil-for-Food Fraud, *New York Times*, 17 August 2007, at 3. Also, Ingersoll-Rand has agreed to pay a \$2.5 million fine. Press Release, United Press International, Ingersoll Rand Fined in Oil-for-Food Probe (31 October 2007). See also: *Australians Who Bribe*, *Economist*, 2 December 2006, at 46; *Preston*, Former Chief of U.N. Effort Faces Charges of Corruption, *N.Y. Times*, 17 January 2007, at A1.

10 *Stodghill*, Oil, Cash and Corruption: How Influence Flowed Through Political Pipelines, *N.Y. Times*, 5 November 2006, *Sunday Business* at 1.

11 *Weisman*, Head of World Bank Fraud Unit Resigns, *N.Y. Times*, 17 January 2008 at A10.

12 On the indispensability of trust, see *Fukuyama*: *Trust, Social Virtues, and the Creation of Prosperity*, New York 1995.

13 To be distinguished are tips paid to low-level public employees. Such “grease” may be indispensable to functioning of public institutions in some impoverished lands. *Nye*, Corruption and Political Development: A Cost-Benefit Analysis, 61 *American Political Science Review* 1967, 417 (420).

enforcement of law is therefore chronic and often grave in such nations.<sup>14</sup> Unless some form of redress is provided, it would result in a “failing” and then a “failed” state. It has been explained thus:

“Corruption is fundamental to failed states. Not only does it flourish in failed states, but in them it thrives on an unusually destructive scale. Widespread petty or lubricating corruption exists as a matter of course, but failed states are noted for rising levels of venal corruption: kickbacks on anything that can be put out to fake tender or bid (medical supplies, textbooks, constructions, roads, railways, tourism concessions, new airports, and so on); unnecessarily wasteful construction projects arranged so as to maximize the rents that they are capable of generating; licenses for existing or imaginary enterprises and activities; and a persistent and generalized extortion. Moreover, corrupt ruling elites invest their profits overseas, not at home, thus contributing yet further to the economic attrition of their own states.”<sup>15</sup>

Unless and until a means can be devised to deter bribery in impecunious nations, globalisation could be of minimal benefit to a majority of the inhabitants of those nations for they are destined to be governed weakly, if at all, and to serve as havens for all sorts of gangsters and terrorists. One need not be a humanitarian to take the transnational corruption problem seriously.

This essay responds to that concern. It considers some possible reforms of international law that might serve to deter the corruption of weak governments. All its suggestions entail the use of the American practice of private enforcement of public law, a system that minimises dependence on public officials who are subject to capture by wealthy outsiders.<sup>16</sup> Privatised law enforcement in the American tradition generally threatens legal consequences of harmful practices *ex post* rather than preventing harmful practices *ex ante*. It offers the advantage of greater freedom to businesses in the conduct of transactions. However, the immense costs associated with it have generated resistance from many businessmen in the United States against whom law is often privately enforced and from wise lawyers of other lands endowed with public institutions that can be and are trusted to enforce public law.<sup>17</sup>

The relevance of the American practice of privatised law enforcement to the corruption problem may result from the historical fact that it is a product of a nineteenth-century culture that shared very limited trust in government and its officers. Its cultural situation thus bears some resemblance to situations both in impoverished lands and in the community of nations hoping for the enforcement of a mechanism of international

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14 See, e.g., *Oko*, Seeking Justice in Transnational Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria, 31 *Brook. J. Int'l L.* 2006, 1 (25).

15 *Rotberg*, The Challenge of Weak, Failing, and Collapsed States, in: Crocker et al. (eds.), *Leashing the Dogs of War*, Washington 2007, 87.

16 Similar ideas for protecting against corruption by public officials are advanced in *Berger/Holland*, Why the Private Sector is Likely to Lead the Next Stage in the Global Fight Against Corruption, 30 *Fordham Int'l L. J.* 2006, 69-74. See also *Hodges*, Europeanization of Civil Justice: Trends and Issues, 26 *Civil Justice Q.* 2007, 96.

17 I have in recent years been on a campaign to elevate transnational awareness of this fundamental difference. See, e.g., *Carrington*, The American Tradition of Private Law Enforcement, in: *Bitburger Gespräche, Jahrbuch 2003*, 33; *Carrington*, Foreign Plaintiffs in U.S. Courts: Private Enforcement of Public Law, 9 *Waseda Bull. of Comp. L.* 2007, 149.

law which prohibits corrupt practices. It is a system of law enforcement that reduces the law's dependence on the integrity of judges, prosecutors, and other public servants. Wherever public integrity is in great doubt, the American experience may possibly offer useful instruction.<sup>18</sup>

## B. The Foreign Corrupt Practices Act

Recognition in the United States of the problem of transnational corruption dates back to the Cold War period. American firms had long been accustomed to offering bribes to officials of foreign governments, in violation of their laws, in order to secure profitable public contracts. It was fair to assume that such payments were sometimes indispensable conditions of foreign trade because contracts were often awarded to the highest bidder, that is, the most generous briber.<sup>19</sup> Although bribes paid in violation of state or federal laws were not treated as business expenses deductible from income for tax purposes (and so were paid with after-tax dollars), bribes paid to foreign officials were deductible, regardless of their illegality under foreign law (and thus in a sense subsidised by the United States government).<sup>20</sup>

Securities regulation laws enacted in the 1930s imposed public-law standards on accounting practices of corporations whose shares are sold publicly.<sup>21</sup> Even foreign firms listing securities on American exchanges were required to file accurate financial information to be made available to investors. Problems arose in accounting for foreign bribes paid by firms so listed: was it necessary to reveal such payments to investors? If so, recipients and informers were put at risk. Compliance was imperfect.

The Watergate scandal and the misuse of corporate money to fund President Nixon's 1972 presidential campaign led to an investigation by the Securities and Exchange Commission (SEC) of reported expenses that might have been payments made for the purpose of gaining illicit advantage with government officials. The investigation revealed widespread use of false accounting methods aimed at concealing bribes paid to foreign officials.<sup>22</sup> The SEC initiated the practice of investigating such reporting and seeking injunctions to compel companies to make full disclosures in the financial statements distributed to investors.<sup>23</sup> It also initiated a voluntary disclosure program that led to the revelation that more than 450 companies had concealed at least \$400 million in

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18 For another proposal bearing some resemblance to the one advanced here, see Moore (ed.), *Civil Litigation Against Terrorism*, Durham 2004 (suggesting that the civil justice system may be able to play a role in the war against terrorism).

19 For reflection on the problem, see *Reisman*, *Folded Lies: Bribery, Crusades, and Reforms*, New York 1979, 161-73.

20 Internal Revenue Code 26 U.S.C. § 162(c)(1) (2000).

21 Securities Act of 1933, 48 Stat. 74 (1933) (codified at 15 U.S.C. § 77a *et seq.* (2000)).

22 See *Sec. & Exch. Comm'n*, Report of the SEC on Questionable and Illegal Corporate Payments and Practices to the Senate Committee on Banking, Housing, and Urban Affairs, May 1976.

23 *E.g.*, *SEC v. Joseph Schlitz Brewing Co.*, 452 F. Supp. 824, 829-30 (E.D. Wis. 1978).

bribes paid to foreign officials. Among the scandals revealed was the payment of a million dollars by The Lockheed Aircraft Corporation to Prince Bernhard of the Netherlands to secure a sale of military aircraft.<sup>24</sup>

The political reaction to these scandals was instigated by Senator William Proxmire of Wisconsin.<sup>25</sup> He observed that the revelation diminished the moral stature of the United States in the competition of the Cold War by “*eroding public confidence in our institutions.*”<sup>26</sup> He proposed to make more explicit the SEC responsibility for disclosure. Thus, the provisions of the Foreign Corrupt Practices Act (FCPA) enacted in 1977 required transparent accounting by

“any issuer that has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 780(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce ...”<sup>27</sup>

It was observed that the SEC had authority only over firms filing public accounting statements, and not over those American firms that were privately owned. Accordingly, a mechanism of criminal law to be enforced by the Department of Justice was deemed essential, and was also enacted.<sup>28</sup> It was adopted by a unanimous vote in both Houses of Congress and signed by President Carter in 1977.<sup>29</sup>

Thus, while the SEC retained authority to seek injunctions against accounting practices that concealed such payments, the task was assigned to the Department of Justice to prosecute serious offenders. These two institutions were expected to collaborate in the enforcement of the law. Firms in which Americans were likely to invest faced punishment for concealing illegal payments or offers of payment to officers of foreign governments as well as those paid in the United States.

As other investment markets have grown in Europe and Asia, global firms have relied more frequently on investors in markets outside the United States. Some firms in the United States have been able to avoid accounting regulations by trading their investments privately through investment vehicles such as hedge funds.<sup>30</sup> These developments diminish the effectiveness of the SEC and its disclosure requirements as instruments to deter the bribery of foreign officials. Moreover, this trend may be growing as a result of

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24 Obituary: Prince Bernhard of the Netherlands, BBC NEWS, 2 December 2004, <<http://news.bbc.co.uk/2/hi/europe/749465.stm>>.

25 *Towell/Hagen*, Foreign Bribes: Stiff Penalties Proposed, 35 Cong. Q. Wkly. Rep. 14 May 1997, 929.

26 *Towell/Hagen*, *ibid.*

27 15 U.S.C. § 78dd-1 (2000).

28 For a chronicle of the legislative history, see *Cruver*, *Complying with the Foreign Corrupt Practices Act: A Guide for U.S. Firms Doing Business in the International Marketplace*, 2d ed., Chicago 1999, 1-12.

29 1977 U.S.C.C.A.N. (91 Stat.) 1494 (1977) (codified as amended at 15 U.S.C. § 78m(b) (2000)).

30 See, e.g., *Coffee, Jr.*, *Privatization and Corporate Governance: The Lessons from Securities Market Failure* (Columbia Law Sch., Center for Law and Econ. Studies, Working Paper No. 158, 1999), available at <<http://ssrn.com/abstract=190568>>.

the elevated standards imposed by the Sarbanes-Oxley reforms of 2002,<sup>31</sup> which have led to the withdrawal of numerous firms from the American investment market. Firms departing from the public investment market in the United States thereby avoid the disclosure requirements and therefore have less cause for concern about the possible enforcement of the Foreign Corrupt Practices Act.

The criminal-law provisions of the FCPA that are enforced by the Department of Justice prohibit “corruptly in furtherance of an offer, payment, [any] promise to pay, or authorisation of the payment of any money, or offer, gift, promise to give, or authorisation of the giving of anything of value” directly or indirectly to a foreign official for the purpose of influencing an official decision with respect to securing or retaining business.<sup>32</sup> These prohibitions are applicable to all American domestic concerns whether or not they were registered on a stock exchange, so long as any part of the transaction occurred in the United States (or in its territorial waters), in interstate commerce, or by post. Regulated firms are generally responsible for the corrupt conduct of their employees.<sup>33</sup> However, the prohibitions of the 1977 law would not apply to citizens of foreign nations acting on behalf of foreign subsidiaries of American firms if the citizens’ conducts occurred outside the United States.<sup>34</sup>

The FCPA was written only as public law to be enforced by the SEC and as criminal law to be enforced by the Department of Justice; no provision was made for enforcement in civil actions brought by private plaintiffs.<sup>35</sup> However, a violation of the Act resulting in harm to competing firms exposes the offender to civil liability under the federal Racketeer Influenced and Corrupt Organization Act (RICO).<sup>36</sup> Furthermore, bribery is also a violation of state tort law if it causes foreseeable harm to a business competitor or others.<sup>37</sup> As Judge Richard Posner opined: “[B]ribery is a deliberate tort, and one way to deter it is to make it worthless to the tortfeasor by stripping away all his gain.”<sup>38</sup> Indeed, it is the sort of deliberate tort that may expose the wrongdoer to liability for punitive damages calculated and awarded to discourage repetition of the misdeed.

Of course, plaintiffs in civil actions in state or federal courts may be represented by lawyers who have agreed to charge fees contingent on success, and under the “American Rule”, they would be subjected to a low level of risk of liability for the defendants’

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31 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); see generally *Armour/McCahey*, After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US. Amsterdam Center for Law & Economics Working Paper No. 2006-07. Available at SSRN: <<http://ssrn.com/abstract=910205>>.

32 The Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (1998). See generally *Deming*, The Foreign Corrupt Practices Act and the New International Norms, Chicago 2005, 7-20.

33 To some it seems unjust that innocent shareholders should bear a resulting loss caused by the criminal misconduct of their employees. *Coffee, Jr.*, No Soul to Damn, No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Michigan Law Review 1981, 386 *et seq.*

34 *Deming* (*op. cit.* fn. 32), 8.

35 See generally *Lamb v. Phillip Morris Inc.*, 915 F. 2d 1024 (6th Cir. 1990); *United States v. Kay*, 359 F. 3d 738 (5th Cir. 2004).

36 *W.S. Kirkpatrick & Co. v. Env'tl. Techtronics Corp.*, 493 U.S. 400 (1990). *Cf. Kensington Int'l Ltd. v. Société Nat. des Pétroles du Congo*, No. 05 Civ. 5101, 2006 WL 846351 (S.D.N.Y. 31 March 2006).

37 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29 (2003).

38 *Williams Elec. Games, Inc. v. Garrity*, 366 F. 3d 569 (7th Cir. 2004).

fees if they were to lose their cases. There are therefore few disincentives for plaintiffs having reason to believe that they have been victims of corrupt decisions to file a suit. Moreover, in the United States, plaintiffs also have recourse to rules of civil procedure that facilitate private investigation of disputed facts.<sup>39</sup> Such recourse is comparable to that available to civil servants conducting governmental investigations. That an official act of a foreign sovereign may be called into question is not an impediment to such civil enforcement.<sup>40</sup>

Also, if the occasion requires, possibilities exist in the United States for multiple plaintiffs to aggregate their claims thereby presenting them more efficiently and effectively. In cases where plaintiffs or defendants are apprehensive of the political sensitivities of the judiciary, they may demand trial by jury, an institution that is virtually immune to bribery or intimidation.

All these familiar provisions of American law facilitate the role of private plaintiffs as the primary enforcers of many laws enacted to serve such public aims as those served by the FCPA. Not least among the national laws privately enforced are the securities laws prohibiting fraud.<sup>41</sup> So far, private claims in American courts relating to damages resulting from foreign corruption have been few. However the Act's criminal-law provisions are reinforced by the prospect of possible civil liability and that prospect may add materially to its deterrent effect.

At the time of the enactment of the FCPA, the United States Internal Revenue Code was revised to prohibit income-tax deductions for bribes paid in violation of foreign law.<sup>42</sup> The federal government would no longer bear part of the cost of foreign corrupt practices.

The International Chamber of Commerce paid tribute to the American FCPA when a year later it promulgated its Rules of Conduct to Combat Extortion and Bribery. These were "*ineffective as a practical matter*,"<sup>43</sup> but reflected the policy of the FCPA.

Because the FCPA was unique to the United States, it was a continuing source of unrest among American businessmen whose ability to compete in many markets was threatened by a reluctance to engage in corruption. It was alleged that contracts with foreign governments worth billions of dollars were not concluded because of the inability of American firms to match the bribes offered by their foreign competitors. Given the ease with which the law could be evaded through the use of employees of foreign corporate subsidiaries trained to conceal their corrupt practices from top management,

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39 See, e.g., FED. R. CIV. P. 30(a) (permitting parties to take depositions).

40 E.g., W.S. Kirkpatrick & Co., (*supra* fn. 36).

41 See generally *Hazen*, The Law of Securities Regulation, 5th ed., St. Paul 2006.

42 26 U.S.C. § 162(c)(1) (1998): "No deduction shall be allowed under subsection (a) for any payment made, directly or indirectly, to an official or employee of any government, or of any agency or instrumentality of any government, if the payment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment is unlawful under the Foreign Corrupt Practices Act of 1977."

43 *Cruver* (*op. cit.* fn. 28), 81.

claims of enormous economic loss must be approached with caution. However, some lost deals could well have been substantial ones.<sup>44</sup>

Although the FCPA was enforced by both the SEC and the Department of Justice, there were very few cases of enforcement prosecutions, and most of the cases brought in the first three decades were privately settled with guilty pleas.<sup>45</sup> There were, however, a few notable exceptions. For example, a case brought against ten defendants accused of bribing officials of a Mexican national oil company went to trial; all were convicted.<sup>46</sup> Another highly publicised case was brought against General Electric in 1992 for its corrupt links with an Israeli general; the company pleaded guilty to four federal offenses and paid \$69 million in fines. General Electric was also convicted of violating the Money Laundering Control Act.<sup>47</sup> Another striking example was the civil suit filed by the SEC in 1996 against an Italian firm listed on the New York Stock Exchange which had been accused of concealing millions of dollars in bribes paid to Italian politicians; it was enjoined by accounting practices which concealed the corruption.<sup>48</sup>

The FCPA was first amended in 1988.<sup>49</sup> American firms who had “reason to know”<sup>50</sup> that their money was finding its way into unworthy pockets, had faced the likelihood of punishment under the 1977 Act. Businessmen had found this phrase daunting, and Congress responded to the concern by reducing the phrase to “punish only those aware that the [corrupt] result is substantially certain to occur.”<sup>51</sup> In one of the more recent reported criminal cases, it was held that officers of an accused firm should have known that a bribe was being paid.<sup>52</sup> Liability under the amended Act may arise if the firm authorises the misdeed explicitly or implicitly or merely acquiesces. The bribe may assume the modest form of an airline ticket.<sup>53</sup> Liability is to be imposed even if the misdeed had been performed by a foreign partner or an affiliated firm. One may be guilty of a conspiracy to corrupt a foreign official. Individuals within a firm need not have all the requisite information enabling the employee to assess the likelihood that a bribe is being paid.<sup>54</sup> In these latter respects, the 1988 amendments toughened the criminal law in-

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44 For an assessment of the consequences, see *Prasad*, Impact of the Foreign Corrupt Practices Act of 1977 on U.S. Export, 1993 (presenting and analysing data on the impact of anti-corruption measures on U.S. trade).

45 See *Deming* (*op. cit.* fn. 32), 6.

46 See generally *United States v. Crawford Enterprises, Inc.* 645 F. Supp. 570 (S.D. Tex. 1986). For an account of the extensive practice of bribery in Mexico in the 1980s, see *Riding*, Distant Neighbors: A Portrait of the Mexicans, 1989, 112-33 (describing the necessity of corruption in the Mexican political system).

47 See generally *United States v. Gen. Elec. Co.*, 808 F. Supp. 580 (S.D. Ohio 1992).

48 *Cruver* (*op. cit.* fn. 28), 67.

49 Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1415 (1988).

50 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified in scattered sections of 15 U.S.C.).

51 15 U.S.C.S. § 78dd-2(h)(3)(i) (1998).

52 *United States v. King*, 321 F. 3d 859 (8th Cir. 2003).

53 *E.g.*, *United States v. Liebo*, 923 F. 2d 1308 (8th Cir. 1991).

54 See generally *United States v. Bank of New England*, 821 F. 2d 844 (1st Cir. 1987).



tended to deter private corruption of foreign governments. But it did not result in numerous prosecutions and convictions in a world filled with offenders.

That may change very soon. The Department of Justice no longer relies on self-reporting and has substantially increased the number of its investigative staff. According to reports, American businesses creating joint ventures with Chinese companies or acquiring Chinese outfits are particularly susceptible to liability because of the probability of such ventures being corrupt.<sup>55</sup> Moreover, the Department has now for the first time not only begun to prosecute individual officers who participate in such bribes, but also requires their employers to disgorge profits from deals acquired through their crimes. Among those presently being prosecuted is a member of Congress.<sup>56</sup> And in 2009, the Halliburton Company agreed to pay \$559 million to settle charges for bribes paid to Nigerian officials.<sup>57</sup>

### **C. The New International Conventions**

The FCPA was amended again in 1998 as the International Anti-Bribery and Fair Competition Act<sup>58</sup> in order to bring American law into line with the new international Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

One change of substance made to the 1998 amendment was to legitimate “grease”, that is, small rewards or tips to lower-ranking officers “to expedite or to secure the performance of a routine governmental action...”.<sup>59</sup> At the lower levels, “grease” may be indispensable to the operation of some impoverished governments.<sup>60</sup> Another change was to extend the law to forbid payments to officials of “public international organizations.”<sup>61</sup> Furthermore, foreign nationals working for American firms were brought within the scope of those subject to criminal liability for illicit payments or those classified as officers. However, those working for foreign subsidiaries were still not included.

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55 See *Qualters*, Risk of Bribe Probe Grows for Business, National Law Journal 9 January 2008, at 8.

56 See *Coyle*, Jefferson Case Shows SEC, DOJ Targeting Individuals: Foreign Corrupt Act Case Reflects A Trend, National Law Journal, 11 June 2007, at 6.

57 *Driver*, Halliburton to pay \$559 million to settle bribery probe, Reuters, Jan. 26, 2009, <<http://www.reuters.com/article/OUSIV/idUSTRE50P5ZE20090126>>.

58 International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998). On the state of the law at that time, see Symposium – A Review of the Foreign Corrupt Practices Act on its Twentieth Anniversary: Its Application, Defense and International Aftermath, 18 Nw. J. Int'l L. & Bus. 1998, 263; *Salbu*, Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act, 54 Wash. & Lee L. Rev. 1997, 229.

59 15 U.S.C. § 78dd-1(b) (1998). See also The Etiquette of Bribery: How to Grease a Palm, Economist, 23 December 2006, at 115 (noting that tactful strategies are used to ensure that bribes go undetected).

60 *Nye*, APSR 1967, 417 *et seq.*

61 15 U.S.C. § 78dd-1(f)(1).

The 1997 Convention to which these changes respond is part of an international movement. Much energy and rhetoric is now being expended around the globe in a campaign aimed at deterring transnational corrupt practices. The campaign can be seen and heard in such august venues as the World Bank, the International Chamber of Commerce, and highly respected non-governmental organisations such as Transparency International.

The present campaign has its origins in the Asian financial crisis of the 1990s. That event elevated interest in the international regulation of trade to provide greater stability in developing economies. The United States was especially interested in regulating transnational bribery in order to level the playing field for American firms subject to the FCPA. As a result, the Organisation for Economic Cooperation and Development (OECD) (a group supported by the United States and the International Chamber of Commerce) promulgated requirements for signatories to the new Convention.

That Convention obligates signatory nations to enact criminal laws “functionally equivalent” to those prescribed and to cooperate with the enforcement efforts of other signatory nations.<sup>62</sup> In support of the latter obligation, a system of private peer review was established by the OECD. The organisation subjects signatory nations to periodic reviews carried out by teams of specialists from at least two other states.<sup>63</sup> There is, however, a substantive difference between the Convention and the FCPA in that the former does not forbid campaign contributions to foreign candidates, as the FCPA does. Moreover, the Convention does not obligate signatory nations to enact accounting and record-keeping standards corresponding to those enforced in the United States by the SEC.

As of 2008, thirty-seven nations had ratified this OECD Convention, including most of the major players in international commerce.<sup>64</sup> Also in 1997, the Organization of American States promulgated the Inter-American Convention Against Corruption;<sup>65</sup> it is even more explicit in requiring the enactment of specified criminal laws. In 2002, the Council of Europe’s Criminal Law Convention on Corruption entered into force, with forty-six signatories.<sup>66</sup> In 2003, the African Union opened for signature a similar convention.<sup>67</sup>

In 1999, the Council of Europe adopted the Civil Law Convention on Corruption. Its aim, as stated by the Council, is to take “into account the need to fight corruption and in particular provide for effective remedies for those whose rights and interests are af-

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62 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 18 December 1997, S. Treaty Doc. 105-43, Art. 1.1 (1998). For a brief account, see *Low/McGlone*, Avoiding Problems Under the Foreign Corrupt Practices Act, U.S. Antiboycott Laws, OFAC Sanctions, Export Controls, and the Economic Espionage Act, in: Sandstrom/Goldsweig (eds.), *Negotiating and Structuring International Commercial Transactions*, Chicago 2003, 200-203.

63 Peer review is said to be “*at the very heart of OECD*”. See, e.g., *Pagani*, Peer Review: A Tool For Co-Operation and Change – An Analysis of an OECD Working Method (September 2002), available at <<http://www.oecd.org/dataoecd/33/16/1955285.pdf>>.

64 Public Procurement: Spotting the Bribe, OECD Observer (April 2007), available at <[http://www.oecdobserver.org/news/fullstory.php/aid/2170/Public\\_procurement:\\_Spotting\\_the\\_bribe.htm](http://www.oecdobserver.org/news/fullstory.php/aid/2170/Public_procurement:_Spotting_the_bribe.htm)>.

65 *Deming* (op. cit. fn. 32), 101-04.

66 *Deming* (op. cit. fn. 32), 105.

67 See African Union Convention on Combating Corruption, 11 July 2003, available at <[http://www.african-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.african-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf)>.

fectured by corruption.”<sup>68</sup> Its signatories are obliged to authorise civil actions to compensate those firms suffering damage as a result of corrupt practices.<sup>69</sup> This Convention entered into force in 2003.

And in 2003, the United Nations Convention Against Corruption was opened<sup>70</sup> – negotiated by the U.N. Office on Drugs and Crime – in Vienna; it has been ratified and is now in force in over one hundred countries. Its general tone is reflected in Art. 17:

“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.”

A similarly tentative tone is expressed in suggestions that each State Party take action to proscribe deliberate concealment of bribes<sup>71</sup> or obstruction of justice,<sup>72</sup> and provide for civil liability if “necessary”.<sup>73</sup> It has been said that this UN Convention is to serve as a “*focal point*” in the United States’ campaign against corruption.<sup>74</sup>

One may admire all the efforts of those who have secured the promulgation and ratification of these international conventions, and yet question whether they have been effective in serving their stated purposes. An empirical study of their effect on the practices of the officials of weak governments is yet to be carried out: if all the nations ratifying one or more of these conventions have enacted criminal laws forbidding their nationals to corrupt weak foreign governments, so what? Are public prosecutors in these nations likely to prosecute their fellow nationals or local firms that employ many of their fellow nationals? For offering bribes to foreign officials in order to secure contracts or other benefits that would indirectly serve the interests of their fellow nationals? How much effort can prosecutors reasonably be expected to expend investigating possible violations of such criminal laws? How much money will impoverished parliaments and legislatures facing competing demands on public resources appropriate to fund such investigations and prosecutions? Can the system of peer review established by the OECD assure adequate answers to these questions?

In 2006, the United States undertook to reinforce these efforts of foreign governments to enforce these laws. It reiterated a promise made in 2004 to deny entry into the United States to any person guilty of corrupting a foreign government. It also announced that

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68 Council of Europe, Civil Law Convention on Corruption Ch. 1, Art. 3, 4 November 1999, available at <<http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>>.

69 Council of Europe, Civil Law Convention on Corruption, Explanatory Report Art. 1(a)(6) (1999) available at <<http://conventions.coe.int/Treaty/EN/Reports/Html/174.htm>>.

70 See U.N. Convention Against Corruption, 31 October 2003, available at <[http://www.unodc.org/pdf/crime/convention\\_corruption/signing/Convention-e.pdf](http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf)>.

71 *Id.* at Art. 24.

72 *Id.* at Art. 25.

73 *Id.* at Art. 26.

74 *Dep't of State Bureau for Int'l Narcotics & Crime Control*, Press Release, U.S. Contributes \$500,000 to Support Implementation of the United Nation Convention Against Corruption (14 December 2004), available at <<http://www.state.gov/p/inl/rls/other/39714.htm>>.

“[t]he U.S. will also work bilaterally and multilaterally to immobilize kleptocratic foreign public officials using financial and economic sanctions against them and their network of cronies.”<sup>75</sup> And it promised to widen the scope of its efforts to seize assets acquired through corrupt practices.

However, the weakness in the global resolve to punish foreign corrupt practices by means of criminal law, which is enforced by public servants, was recently and fully revealed by the British government. In 2001, the United Kingdom enacted a criminal law Act as required by the OECD Convention. In 2004, its Serious Fraud Office initiated an inquiry into bribes allegedly offered by BAE Systems, a British weapons firm to secure contracts with the government of Saudi Arabia. In November 2006, it was reported that Saudi Arabia would break diplomatic relations with the United Kingdom if the investigation was not dropped.<sup>76</sup> In December 2006, the investigation was dropped. Prime Minister Blair justified the action by calling attention to the dual needs of securing the help of Saudi Arabia in dealing with Palestinian affairs and securing thousands of jobs for workers hired to perform the corrupt contract,<sup>77</sup> considerations said to outweigh the rule of law.

Perhaps Mr. Blair’s successor will pursue a different course.<sup>78</sup> We are told that the issue is one now receiving public attention and has constituted the subject matter of a visit to the United Kingdom by members of the Saudi royal family. Meanwhile, it has been revealed that Prince Bandar deposited two billion dollars in an American bank account, money that had apparently been received from BAE Systems. Consideration may still be given to an American prosecution of the case against that firm.<sup>79</sup>

However, such cases entailing transnational politics also sometimes present some difficulty for the United States. A pending case illustrates not only the problem, but also the difficulty associated with its solution. James Giffen, an American citizen, was indicted in 2005 for offering bribes to President Nursultan Nazarbaev of Kazakhstan on behalf of Mobil, Texaco, Phillips/Conoco, and BP. His alleged offense had gained public attention in 2000. After four years of investigation, Giffen was charged with thirteen counts of violating the FCPA and thirty-three counts of money laundering. It was alleged that fees paid by the oil companies were used by Giffen to purchase an array of luxury items, including millions of dollars in jewelry; fur coats for President Nazarbaev’s wife, Sara, and a daughter, costing nearly \$30,000; \$45,000 for tuition at an exclusive Swiss high school; and tuition at George Washington University in the U.S. capital for Nazarbaev’s daughter, Aliya. Giffen also allegedly bought an \$80,000 Donzi speedboat for one Balgimbaev to present to Nazarbaev, and two American snowmobiles for Nazarbaev and his wife. Giffen claimed to have been acting as a CIA agent or perhaps a mere “bag man” for the president. President Nazarbaev, who is a friend of

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75 Fact Sheet, The White House National Strategy to Internalize Efforts Against Kleptocracy (10 August 2006), available at <<http://www.whitehouse.gov/news/releases/2006/08/20060810-1.html>>.

76 *Leppard*, Blair Hit By Saudi ‘Bribery’ Threat, Sun. Times (London), 19 November 2006, at 1.

77 Barefaced, *Economist*, 23 December 2006, at 18.

78 See *Swanson*, Note, Greasing the Wheels: British Deficiencies in Relation to American Clarity in International Anti-Corruption Law, 35 Ga. J. Intl. & Comp L. 2007, 431.

79 See *Schwartz/Bergman*, Payload: Taking Aim at Corporate Bribery: Inquiry Shows A New Reach for an Old Law, N.Y. Times, 26 November 2007 at B1.

American foreign policy in the Middle East, is severely critical of the prosecution and might lose his office as a result of it.<sup>80</sup> Government witnesses have received death threats. The trial has repeatedly been postponed but will perhaps be held in 2008.

Given such experiences, a skeptic may doubt that these enactments pose a truly serious threat of punishment to the many firms around the world whose profits seem to depend on their willingness to participate in the corrupt practices of foreign governments. Of course, such laws imply a moral judgment, and businessmen are not immune to moral suasion. However, as Adam Smith explained centuries ago, moral constraints lose their impact as they are applied over greater distances.<sup>81</sup> Thus, Benjamin Franklin's dictum<sup>82</sup> applies to a greater extent when the government being corrupted is not one's own. Corrupt practices are by definition secret crimes that can be prevented or deterred only through the application of rigorous investigative methods and forceful legal sanctions.

With its new Civil Law Convention, the Council of Europe acknowledged the need for an enforcement mechanism imposing real, adverse economic consequences on firms that offer bribes to foreign governments. Moreover, there appears to be rising concern in Germany that German firms have elevated profits through illicit methods: "[g]lobalization", we are told, "has become a vehicle through which corruption is channeled in Germany."<sup>83</sup> Civil liability is surely the primary legal sanction deterring firms from offering bribes to one another's employees in the private sector, and it is the integrity of governments that is the global problem in greatest need of a plausible threat of civil liability.

The Civil Law Convention is another step forward, but there is as yet no report of civil actions against offenders. It brings the Council of Europe into line with the law of the United States, as manifested by the Foreign Corrupt Practices Act and the case law recognizing bribery of foreign officials by American firms as a tort remediable under RICO or the common law of American states.<sup>84</sup> However, unlike the FCPA, it does not appear to provide a forum for foreign governments seeking compensation from defendants who are equally foreign to the nations of the Council whose courts may exercise jurisdiction.

There is also the very substantial problem that many of the European courts opened to claims seeking compensation for harms resulting from corrupt practices, generally show less empathy to plaintiffs bringing civil cases. Few if any adhere to the "American rule" that a losing plaintiff is not liable for the defendant's expenses, including attorneys' fees. Although there are variations in laws governing attorneys' fees, European plaintiffs in cases arising under the Civil Law Convention would not likely be permitted to retain counsel for a fee contingent upon his or her success in the case. And although European courts often conduct penetrating factual inquiries, private plaintiffs enforcing

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80 *Telvick*, Kazakhstan: United States v. James H. Giffen, <[http://kazhegeldin.addr.com/2004en/engl\\_03\\_06\\_04.html](http://kazhegeldin.addr.com/2004en/engl_03_06_04.html)>. *Telvick* reports that Giffen is charged with thirteen counts of violating the FCPA and thirty-three counts of money laundering. The indictment also revealed that Swiss authorities began investigating accounts "nominally owned by offshore companies but beneficially owned, directly or indirectly, by Balgimbaev and Nazarbaev ... into which Mr. Giffen had made tens of millions of dollars in unlawful payments" in 1999. *Id.*

81 *Smith*, *The Theory of Moral Sentiments*, 1976 ed., 136.

82 See *Franklin* (*op. cit.* fn. 4).

83 So we are told by a German prosecutor. *Dougherty*, Germany Battling Rising Tide of Corporate Corruption, N.Y. Times, 15 February 2007, at C1.

84 Racketeering Influenced and Corrupt Organization (RICO) Act, 18 U.S.C. § 1961 (1994).

public law in most of the member nations are rarely empowered to conduct private investigations of the sort permitted by the discovery rules used in American courts. It is also questionable whether a plaintiff would have access to government records of the sort opened to plaintiffs by “Freedom of Information” or state “sunshine” legislation in the United States. Seldom if ever would plaintiffs in European courts be permitted to aggregate their claims to make their assertion more economic. And few European courts are empowered to issue injunctions enforceable by fines or imprisonment. On account of these differences in civil procedure, the European courts are unlikely to interpret the Civil Law Convention in a way that would sufficiently and seriously deter European firms motivated by the marketplace from engaging in corrupt practices, except for blatant misdeeds.

One might therefore reasonably assess the enactments of the United States and other nations who have since 1998 conformed to all these conventions as a benign but largely inconsequential gesture. If an act of corruption should attract substantial public notice, the signatory nations have empowered themselves to stand on the side of integrity in government by conducting a criminal prosecution. The United States is no longer alone in taking that moral stand. Perhaps the many enactments will also serve to increase the force of moral suasion against corrupt practices. However, the threat of punishment, even in the United States, is often remote and evadable. Besides this, the threat of civil liability for resulting harm is no less remote, at least outside the United States.

#### **D. The False Claims Acts: Qui Tam**

The United States has had ample experiences of its own in confronting problems of corrupt governments,<sup>85</sup> and has long sought to deter it through the means of privately enforced law with citizens being rewarded for their efforts.

Corruption was rampant during the American War of Independence; for example, Samuel Chase (later Mr. Justice Chase of the United States Supreme Court), was dismissed from the Continental Congress for his illicit use of inside information to achieve a personal profit.<sup>86</sup> As a result of such experiences of the wartime government, the first Congress of the United States recognised an ancient English practice identified by the Latin phrase *qui tam*, describing actions brought on behalf of the Crown by one of its subjects.<sup>87</sup> This law authorised private citizens to represent the United States in claims

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85 Glasser/Goldin (eds.), *Corruption and Reform: Lessons from America’s Economic History*, Chicago 2006.

86 See *Haw et al.*, *Stormy Patriot: The Life of Samuel Chase*, Baltimore 1980, 105-08 (discussing in detail Chase’s disclosure of a secret resolution of Congress to his business partners).

87 *Qui tam* is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur* translated as “he who pursues this action on our Lord the King’s behalf as well as his own”. See *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 n. 1 (2000). The history of the law is recounted in *Helmer, Jr.*, *False Claims Act: Whistleblower Litigation*, 3rd ed., 2002, 29-61. See also *Labaton*, *The Federal False Claims Act: A Primer for Lawyers Pursuing Actions on Behalf of Whistle Blowers*, Advocate 1 (March 2006) (reviewing the federal False Claims Act and defining

against those who defraud it, and provided incentives for doing so by assuring them a share of any recovery resulting from their efforts.<sup>88</sup>

Qui tam was rarely invoked before the Civil War, surely in part because the federal government in those decades was not spending large sums exposed to diversion for private use. However, because military expenditures in times of war are especially vulnerable to corruption, the Civil War appeared to generate a series of public scandals reaching the cabinet level. Secretary of War Simon Cameron was dismissed by President Lincoln for paying his friends twice the going rate for 1,000 cavalry horses that turned out to be afflicted with “every disease horse flesh is heir to.”<sup>89</sup> Such scandals led to the enactment in 1862 of the False Claims Act, then known as “Lincoln’s Law.”<sup>90</sup> That law required the offender guilty of defrauding the government to pay double damages, half of which would be paid to the relator, that is, the citizen who maintained the case on behalf of the United States. Thereafter, numerous relators came forward to pursue claims against contractors who were proven to have sold army rifles without triggers, gunpowder diluted with sand, or uniforms that could not endure a single rainfall. Perhaps their lawsuits produced some deterrent effects, elevating the integrity of government contractors and the quality of arms supplied to Union soldiers. It certainly restored some revenue to the Union treasury from those who had raided it.

Yet the practice of bringing such suits again fell into disuse. Notorious forms of corruption resumed once again in the federal government of former General Ulysses Grant,<sup>91</sup> but none of those who were responsible were sued, either by a relator or by the government. A civilian contractor who sold poisoned meat to the Army as it invaded Cuba in 1898 was likewise never sued nor prosecuted by the Department of Justice, notwithstanding the fact that the formaldehyde with which they preserved the meat killed more American soldiers than did the army of Spain that was defending its imperial hold on that island.<sup>92</sup>

The occurrence of similar but perhaps less lethal fraudulent crimes was frequent during both World Wars, but generally received little attention from the inadequately staffed Department of Justice. In 1942, “Lincoln’s Law” was momentarily revived. A *qui tam* action was brought by a perceptive lawyer who as a result of reading his daily newspaper’s report of a criminal case brought against the offender by the Department of Justice, was alerted to an incident of fraudulent crime against the government. He sued the offender for damages and won,<sup>93</sup> to the benefit of both himself and the federal treasury. However, the event resulted in threatened government contractors putting pressure

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*qui tam*); *Labaton*, Twenty Years Later, False Claims Amendments Keep Working, Daily J., 26 October 2006, at 6, available at <[http://www.kreindler.com/kreindler\\_publications.html](http://www.kreindler.com/kreindler_publications.html)> (follow “read article” link under article title) (reviewing the effect of the federal False Claims Act twenty years after enactment of the 1986 amendments).

88 A useful account of the early legislation and its colonial antecedents is *Note*, The History and Development of Qui Tam, 1972 Wash. U. L. Q. 81 (1972).

89 *Scammell*, Giantkillers: The Team and the Law that Help Whistle-Blowers Recover America’s Stolen Billions, New York 2004, 37-38.

90 Act of 2 March 1863, 12 Stat 696-699 (codified as amended at 31 U.S.C. §§ 3729-33 (2000)).

91 *Bunting*, III, Ulysses S. Grant, New York 2004, 129-39.

92 *Scammell* (*op. cit.* fn. 89), 40.

93 *United States ex. rel. Marcus v. Hess*, 317 U.S. 537 (1943).

on Congress for a 1943 revision of the law to prevent “parasitic” private enforcement actions based on previously publicised information already available to the government.<sup>94</sup> *Qui tam* actions again subsided. A legislative committee led by Senator (later President) Harry Truman exposed many abuses and induced repayment of billions of dollars from wartime contractors. However, it did this without imposing any civil liability or criminal accountability on the individuals involved.<sup>95</sup> Entrepreneurs were also otherwise, to a great extent, at liberty to sell weapons or parts of weapons that were useless or worse, at prices that bore no relation to the costs of production.

The larcenous practices continued through wars in Korea and Viet Nam. Industrial firms intentionally sold to the United States aircrafts whose wings were shorter than prescribed under safety rules, radar systems that were near-sighted, all-terrain vehicles ready to explode on contact, and countless other worthless weapons. It was perhaps acute awareness of such problems that prompted President Dwight Eisenhower in his farewell address to caution the people of the United States against the greed and ambition of the “*military industrial complex*”.<sup>96</sup> It is said that many American soldiers in Viet Nam were killed with munitions made by the Vietnamese from American bombs that had failed to explode.<sup>97</sup> The Department of Defense employed officers to resist plunder by those with whom it contracted, but they were often outnumbered and overborne by private experts highly paid to confound the government and sell products of disappointing quality at the highest possible price. The problem abides; in 2006, the United States Coast Guard reported that it had spent billions on a worthless fleet of new ships.<sup>98</sup>

During the Cold War, ever more elaborate weaponry was sold to the United States at ever-rising prices. By the 1980s, most of the largest defense contractors were under investigation for defrauding the Department of Defense (not to mention scores of other federal programs buying goods or services). Four (General Electric, GTE (later assimilated into Verizon), Rockwell, and Gould) were convicted.<sup>99</sup> The Department of Justice was confronted with more cases than it could handle. Senator Chuck Grassley, a conservative Republican farmer from Iowa, developed a keen interest in the problem. The result was a revision of the False Claims Act – drafted by public-interest lawyers and the Department of Justice. It was signed by President Reagan on the eve of the Congressional election, despite desperate protests by the defense industry.<sup>100</sup>

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94 Act of 23 December 1943, Ch. 67, § 3491, Pub. L. No. 213, 57 Stat. 608 (codified as amended at 31 U.S.C.A. §§ 3729-33 (1986)).

95 For an account of Truman’s efforts, see *McCullough*, Truman, New York 1992, 270-88.

96 *President Dwight Eisenhower*, Farewell to the Nation (17 January 1961), available at <[http://www.eisenhower.archives.gov/speeches/farewell\\_address.html](http://www.eisenhower.archives.gov/speeches/farewell_address.html)>.

97 *Scammell* (*op. cit.* fn. 89), 14. A case involving a misfiring of a weapon in Cambodia reached the Supreme Court. *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975).

98 *Lipton*, Billions Later, Plan to Remake the Coast Guard Fleet Stumbles, N.Y. Times, 9 December 2006, at A1. See also Editorial, Ships That Don’t Dare to Sail, N.Y. Times, 8 December 2006, at A34.

99 S. Rep. No. 99-345, at 2-3 (1986).

100 False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. § 3739(d)(1)-(2) (2000)). A celebration of this legislation is found in *Scammell* (*op. cit.* fn. 89). A similar provision rewarding whistle-blowers who reveal private fraud was enacted in the Corporate and Criminal Fraud Accountability Act, Pub. L. 107-204, 116 Stat. 745 (2002) (codified at 18 U.S.C. § 1514A(a)(1)), also known as the Sarbanes-Oxley Act.



This 1986 version of the False Claims Act provided for the recovery of treble damages for defrauding the United States, with fifteen to twenty-five percent of the recovery to be paid to the private plaintiff-relator. Proceedings under the Act are not criminal proceedings and so proof “beyond a reasonable doubt” is not required; a “preponderance of proof” will, if credited, suffice to support a judgment against the defendant. The civil procedural right to compel disclosure of possible evidence<sup>101</sup> and to compel non-party witnesses to supply their evidence as well, may be invoked in its entirety.<sup>102</sup> Moreover, much of the government’s files are exposed to private investigation as a result of the Freedom of Information Act enacted in 1966.<sup>103</sup> The Department of Justice is entitled to intervene and preside in matters relating to false claim proceedings, but even if it does, the case continues as a civil action and the relator remains a party.<sup>104</sup> And if the Department of Justice does not intervene, the relator is entitled to maintain the action in the name of the United States. Such a relator, if successful, is then entitled to receive at least twenty-five percent of the treble damages proceeds, plus reimbursement for costs including attorneys’ fees.<sup>105</sup> And if the relator is unsuccessful in proving the case, there is of course ordinarily no liability for the legal expenses of the defense.<sup>106</sup> This scheme serves to assure the availability of private legal counsel for plaintiffs with credible claims based at least in part, on some bit of personal knowledge. The relator is also afforded rights protecting him or her from retaliation by an employer.<sup>107</sup>

The provision enacted in 1942 that requires a plaintiff seeking compensation as a whistle-blower to be an “original source” of the information on which the claim rests has been retained.<sup>108</sup> In 2007, the Supreme Court held that the relator is not entitled to compensation where the Department of Justice assumes leadership over the case and also if won on a ground different from that initially advanced by the relator.<sup>109</sup>

By 2005, almost 9,000 false-claim cases had been filed pursuant to the 1986 statute. A majority of these cases were initiated by whistle-blowing citizen-relators; thirty-three whistle-blowers came forward in 1987 and by 2002 the number had risen to 326.<sup>110</sup> The number has continued to rise. Although historically, the bulk of the false claims actions were directed at those who provide goods or services to the military, other industries have become frequent targets for *qui tam* claims. At present, four out of five current

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101 See FED. R. CIV. P. 26-37.

102 See FED. R. CIV. P. 45.

103 5 U.S.C. § 552 (2000).

104 31 U.S.C. § 3730(c)(1) (2000).

105 31 U.S.C. § 3730(d)(2) (2000).

106 For an account of the history of this distinctive “American rule,” see *Leubsdorf*, *Toward A History of the American Rule on Attorney Fee Recoveries*, 47 *Law & Contemp. Probs.* (LCP) 1984, 9.

107 31 U.S.C. § 3730(h) (2000).

108 31 U.S.C. § 3730(e)(4)(A) (2000).

109 *Rockwell International Corp. v. United States*, 127 S. Ct. 1397 (2007). *Cf.* *United States ex. rel. Bly-Magee v. Premo*, 470 F. 3d. 914 (9th Cir. 2006). Congress might reconsider that question, for it weakens the incentives provided to whistleblowers and thus diminishes the prospect that the proceeds of false claims judgments will ease its budgetary constraints. That the government lawyer finds a factual basis for the claim different from that advanced by the relator is hardly disproof of the merit of the relator’s claim.

110 *Scammell* (*op. cit.* fn. 89), 304-305.

false-claims cases are brought against health-care providers accused of overpricing goods or services paid for by the Department of Health and Human Services.<sup>111</sup>

In 2006, Congress enacted a provision rewarding states for enacting similar laws applicable especially to health care providers.<sup>112</sup> Other applications have also evolved; for example, educational institutions are being sued to recover the value of student loans provided by the Department of Education and used for tuition to fund programs that failed to meet the minimum standards of accreditation organisations. A whistle-blower could possibly represent the United States in making a claim against a bank or other creditors who lent money to the United States with the knowledge that such funds would be used to finance corrupt practices, such as the purchase of goods or services at twice their market price, or to fund the Governor's Swiss bank account.

A charitable organisation, Taxpayers Against Fraud Education Fund, provides tips, information, and support to a variety of relators.<sup>113</sup> It has criticised the Department of Justice for failing to invest sufficient resources in the enforcement of the law, even failing to expend funds that have been appropriated specifically for that purpose. It has also directed criticism at government contractors for failing to provide their employees with information about the law so as to make them aware of rewards offered to whistle-blowing relators.<sup>114</sup>

The False Claims Act is, of course, applicable to transactions between the United States and foreign providers of goods or services. The statute provides for personal service of process anywhere in the world so long as it is in conformity with the Federal Rules of Civil Procedure.<sup>115</sup> Subject only to the limits imposed by the constitutional requirement of Due Process, jurisdiction over firms outside the United States is established in the United States District Court for the District of Columbia.<sup>116</sup> Anyone in the world with such close links to the federal government to defraud it should surely have sufficient contacts to satisfy the requirements of Due Process, and would thus be subject to personal jurisdiction in that court. The discovery of evidence abroad is available and facilitated by foreign governments, or at least by those committed to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.<sup>117</sup> A foreign

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111 *Coyle*, High Court Vets False Claims Act, Nat'l L. J. 27 November 2006, 13. The Department of Justice has now taken a heightened interest in frauds committed by medical doctors and health care executives. 76 Bureau of National Affairs Legal News 2344, 11 December 2007.

112 See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified at 42 U.S.C. § 1398h). Section 6031 provides that the federal contribution to Medicare programs is to be increased to ten percent for states enacting appropriate false claims laws applicable to health care providers. Section 6032 requires states to include provisions notifying health care employees of their right to become whistle blowers.

113 See generally Taxpayers Against Fraud Education Fund, <<http://www.taf.org>>.

114 Taxpayers Against Fraud Education Fund, Press Release, Fighting Medicaid Fraud By Drug Manufacturers (28 June 2005).

115 FED. R. CIV. P. 4 provides for service anywhere in the world, in compliance with treaties where available. *E.g.*, Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 15 November 1965, 658 U.N.T.S. 163; 20 U.S.T. 361.

116 31 U.S.C. § 3733(c)(2) (2000).

117 Convention on the Taking of Evidence Abroad In Civil or Commercial Matters, 27 July 1970, 847 U.N.T.S. 231; 23 U.S.T. 2555.

party who refuses to provide documents or other evidence upon demand is subject to an adverse judgment on the merits of the dispute, it being reasonably inferred that the evidence the party refuses to produce on request would confirm the allegation of the adversary.<sup>118</sup> Presumably such a civil action could proceed even against a foreign government under the “commercial exception” provision of the Foreign Sovereign Immunity Act.<sup>119</sup> Whether the final judgment of a federal court against a false-claims defendant would be effectively enforced abroad is, however, questionable.<sup>120</sup>

Of the fifteen billion dollars recovered by the United States in the 9,000 false-claims cases pursued from 1987 to 2005, about two-thirds were recovered in *qui tam* cases initiated by citizen-relators.<sup>121</sup> In 2003, the United States recovered eighty-five million dollars in *qui tam* cases that the Department of Justice declined to pursue and left to the solitary efforts of relators and their private counsel. The median recovery in such private *qui tam* cases was \$784,597, and the median relator's share was \$123,885. Substantial legal treatises have been generated to record the numerous decisions interpreting the Act.<sup>122</sup>

As one would expect, the business and industry sectors have sought to undermine the development of the False Claims Act as a scheme for rewarding self-seeking trouble-makers, unfaithful employees, and greedy tort lawyers. It is a development contrary to the aim of American Business to achieve “tort reform” by diminishing its exposures to civil liability and thus its accountability for the harms it imposes on others.

In 1993, Attorney General William Pelham Barr, with the approval of President George H. W. Bush, questioned the constitutionality of the 1986 law as a violation of separation of powers because it interfered with the prosecutorial discretion of the Department of Justice.<sup>123</sup> This argument struck at the primary reason for the law, that is, public mistrust of prosecutors. All prosecutors and government attorneys in the United States, even those with job security as civil servants, are, like the British prosecutor, subject to the oversight of political officeholders. Most of these political officeholders were, or are, dependent on the political and monetary support of businesses, especially those businesses that deal with the government. Such firms are, with few exceptions, not only major contributors to political campaigns but also major employers of lobbyists, two practices that seem to have displaced bribery as the primary methods through which capitalists profitably influence American government.<sup>124</sup> As the Supreme Court has steadily increased the First Amendment right on the expenditure of money to influ-

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118 *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-09 (1982).

119 28 U.S.C. § 1605(a)(2) (2000). *Cf. Guevara v. Republic of Peru*, 468 F. 3d 1289 (11th Cir. 2006).

120 Efforts to create a Hague Convention obligating nations to enforce one another's judgments failed. A major reason was the reluctance of other nations to enforce American judgments they deem to be public-law enforcement, such as punitive-damages judgments. *Teitz*, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 *Am. J. Comp. L.* 2006, 549; *Burbank*, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 *J. Private Int'l L.* 2006, 287.

121 *Coyle*, *Nat'l L. J.* 27 November 2006, 13.

122 *E.g., Androphy*, *Federal False Claims Act and Qui Tam Litigation*, New York 2006; *Boese*, *Civil False Claims*, 3rd ed., New York 2006.

123 *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 *Op. O.L.C.* 249 (1989) (preliminary print).

124 See *Stiglitz (op. cit. fn. 6)*, 191.

ence political outcomes,<sup>125</sup> the sums of money spent on political campaigns have elevated beyond levels that could have been imagined even a few decades ago.<sup>126</sup> Prosecutors and other government lawyers do still instigate proceedings against businessmen who offend the law and defraud the government, but they are inevitably constrained from doing so by political realities and their limited office budgets. What Attorney General Barr sought to secure was the discretion of government lawyers to look the other way when their political supervisors' friends, supporters, and campaign contributors were suspected of resorting to improper means of acquiring government contracts. In rejecting Attorney General Barr's argument, the Ninth Circuit upheld the law and the Supreme Court denied certiorari.<sup>127</sup>

Nevertheless, firms in the health-care industry who have been beset with fraud claims in the last decade were still keen in 2007 to undermine the False Claims Act as enacted in 1986.<sup>128</sup> Some did prevail in getting the Supreme Court to rule in 2000 that state hospitals cannot be exposed to liability under the statute for overcharging Medicare because of their defense of sovereign immunity, but in that case the Court also unreservedly acknowledged the constitutionality of the Act, rejecting the earlier argument made by Attorney General Barr and his supporters that it interfered with the discretion of the Executive Branch.<sup>129</sup> Firms have had better luck in evading the federal law protecting whistle-blowers from retaliation, but Congress may soon withdraw jurisdiction from the federal court that seems to be hostile to their claims.<sup>130</sup>

Claims for the benefit of state governments arising from the same transactions as those defrauding the federal government may be conjoined with a *qui tam* action brought in the name of the United States.<sup>131</sup> By 2006, there were eighteen state enactments similar to the federal law.<sup>132</sup> However, three of those states have restricted the laws to the health-care industry,<sup>133</sup> presumably to shield those who build highways or other public works from the increased threat of liability for corrupt practices. Perhaps the distinction reflects greater trust in highway contractors, or perhaps their greater influence on state legislatures. And perhaps such laws might serve to modify the corrupt "*way things are done*" in Illinois, as presently reported.<sup>134</sup>

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125 For a summary and critique of this development, see *Carrington*, Our Imperial First Amendment, 34 U. Richmond L. Rev. (RLV) 2007, 1167.

126 For specific data, see the annual campaign finance reports of the Federal Election Commission.

127 *United States ex rel. Kelly v. Boeing Co.*, 9 F. 3d 743 (9th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994).

128 See *Androphy* (*op. cit.* fn. 122), 5-1 *et seq.*

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

130 See Marcia Coyle, Federal Circuit a 'Hostile Forum', Nat'l L. J. 17 January 2008, 1.

131 31 U.S.C. § 3732(b) (2000).

132 *Broderick*, Note, Qui Tam Provisions and the Public Interest: An Empirical Analysis, 107 Colum. L. Rev. 2007, 949 (956), n. 47-77. Governor Spitzer of New York favours *qui tam* legislation in his state. Press Release, Office of the New York State Attorney General, Spitzer Calls for Passage of State False Claims Act (12 June 2003), available at <[http://www.oag.state.ny.us/press/2003/jun/jun12a\\_03.html](http://www.oag.state.ny.us/press/2003/jun/jun12a_03.html)>.

133 Louisiana, New Mexico, and Texas.

134 *Marek*, Corruption Boom, NATL. L. J. 5 December 2006, 1.

In December 2006, the idea of rewarding whistle-blowers was extended by the United States to reward private enforcement of the Internal Revenue Code. No longer will the federal government rely solely on the beleaguered and understaffed Internal Revenue Service to detect unreported or underreported income.<sup>135</sup> Advocates predicted that this reform will increase federal tax revenue by many billions of dollars a year,<sup>136</sup> and perhaps enable the United States to balance its budget at reduced tax rates. The optimism might be realistic if all citizens are made fully aware of their entitlement upon performance of the public duty to correct and deter tax cheating, which is surely one of the most popular of the nation's indoor sports.

The United Kingdom, Korea, and the Netherlands, and perhaps some other nations, have enacted laws to encourage and protect whistle-blowers who alert prosecutors to frauds committed against their governments.<sup>137</sup> The resistance of businessmen to such legislation tends to confirm the need for it, but quantifying deterrent effects is a difficult task. There is no doubt that businesses and industries in the United States have incurred substantial legal costs in defending 10,000 civil actions brought under the False Claims Act since 1986. Yet it is also apparent that the federal treasury and its taxpayers have benefited immensely, and that state governments are likely to benefit in the same manner. For citizens who dislike paying taxes, especially more taxes than identically situated tax cheaters, claims and recoveries won by whistle-blowing relators are without question a comfort.

Certainly, the False Claims Act is not without its critics. There is some anxiety about the frequency of false claims.<sup>138</sup> However, the data invoked in support of such concern is not convincing; the proportion of claims that prevail is reasonably close to the average for civil claims. No doubt the best cases are presided over by the Department of Justice, but there is no reason to believe that it has the resources and energy to identify such winning cases without the help of whistle-blowers. Moreover, some cases declined by the Department have been won by private lawyers. There is, of course, a litigation cost borne by defendants, but it does not appear to be significantly greater when compared to those costs associated with other numerous endeavors of private law enforcers. There is no data whereby the deterrent effect of such law can be measured, but there is little reason to doubt that a fair assessment of the deterrent effect should add to the billions recovered from false claimants - along with other billions that the government

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135 Tax Relief and Health Care Act of 2006, H.R. 6111, Pub. L. No. 109-432 (2006), 120 Stat. 2922.

136 Radio Broadcast, Marketplace, IRS Sweetens Reward for Whistle Blowers (21 December 2006), available at <<http://www.marketplace.org/shows/2006/12/21/AM200612216.html>>.

137 *Heine/Rose*, Private Commercial Bribery: A Comparison of National and Supranational Legal Structures, Freiburg 2003, 81, 161-262, 311, 648 (discussing the United Kingdom, Korea, and the Netherlands, respectively). And at 230, it is reported that Japan has the beginnings of a movement to enact legislation protecting whistle-blowers.

138 See, e.g., *Callahan/Dworkin*, Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act, 37 Vill. L. Rev. 1992, 333-35; *Krause*, "Promises to Keep": Health Care Providers and the Civil False Claims Act, 23 Cardozo L. Rev. 2002, 1363; *Broderick (op. cit. fn. 132)*, 964-80; *Terry*, Note, Private Attorneys General vs. "War Profiteers": Applying the False Claims Act to Private Security Contractors in Iraq, 30 Seattle U. L. Rev. 2007, 809.

would have paid if those with whom it were dealing were confident that no one other than the Department of Justice would notice and draw attention to their misdeeds.<sup>139</sup>

## E. A Comparison: The Byrd Amendment

A cautionary note about the American model of law enforcement by private plaintiffs was sounded by the law enacted by Congress in 2000 to encourage whistle-blowing in regard to other illicit practices in international trade. The Continued Dumping and Subsidy Offset Act of that year,<sup>140</sup> generally known as the Byrd Amendment, deeply troubled those committed to free trade. It provides an example of a whistle-blowing reward system not to be replicated in addressing the problem of corruption of foreign governments.

The Byrd Amendment rewarded whistle-blowing firms who were critics of the practice whereby imports were allegedly sold to American buyers at prices below production cost. Such practice was facilitated by according the buyers the status of beneficiaries of any tariff imposed and collected by United States Customs in response to their complaints. Grievances lodged against the United States with the World Trade Organization (WTO) in response to this legislation were entirely justified. “Anti-dumping” law, although permitted by the WTO,<sup>141</sup> is at best a questionable policy.<sup>142</sup> Businesses world-wide do not regularly sell goods below cost unless perhaps monopolisation or the extermination of competitors is a price in view. The American law against dumping was originally enacted as part of the antitrust law; it has allowed the Customs Office to impose tariffs on allegedly dumped goods by assuming that the cost of making them is the same everywhere; if the goods in question cannot be produced in the most costly place, say, Canada, for less than the import price, then they are being “dumped” within the meaning of this highly questionable law. The real cost borne by the manufacturer is irrelevant. The Byrd Amendment then directs that all the proceeds of this protective tariff be distributed to the protected firms who “blew the whistle” by calling the attention of the Customs Office to the fact that an imported product could not be made in the most costly foreign place for the price being paid by American purchasers. A domestic competitor who failed to blow the whistle on the low price would not share in the largesse of Customs. Hundreds of millions of dollars were collected annually by Customs in response to such complaints and then distributed only to those who blew a whistle. The taxpayers gained nothing.

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139 *Stringer*, *Taxpayers Against Fraud: The 1986 False Claims Act Amendments: An Assessment of Economic Impact*, Washington 1996, 32-36.

140 Pub. L. No. 106-387, 114 Stat. 1549.

141 Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994, 15 April 1994, WTO Agreement, Annex 1A, 1867 U.N.T.S. 183; 33 I.L.M. 1153 (1994).

142 For a brief account of the economics, see *Stiglitz (op. cit. fn. 6)* 91-94; see also *Bentley/Silberston*, *Anti-Dumping and Countervailing Action: Limits Imposed by Economic and Legal Theory*, Cheltenham 2007; *Debroy/Chakraborty (eds.)*, *Anti-Dumping: Global Abuse of a Trade Policy Instrument*, New Delhi 2007.

Byrd Amendment whistle-blowers, unlike those who enforce the False Claims Act, bore no costs and took no risks. The federal government would conduct an administrative proceeding to hear accusations of dumping, without charge to the complaining party. Such proceeding was simple: the hearing officer would merely estimate the costs of manufacture likely to occur if the product were made in the nation designated by the relator. This law may perhaps, in all fairness, be regarded as corruption in reverse. The Government expends efforts to pay to American firms sums that they have not earned in the marketplace. Should one even consider this as a reverse bribe? Is it not likely that some of what has been distributed to such whistle-blowers could find its way into campaign contributions of those politicians who devised the scheme or those responsible for enforcement beneficial to their whistle-blowing patrons?

Eleven nations vigorously voiced their protests against the Byrd Amendment to the World Trade Organization; they were authorised by the WTO to retaliate against the United States.<sup>143</sup> Canada was the first to do so; it imposed sanctions on American trade.<sup>144</sup> And in 2006 Congress relented,<sup>145</sup> although not immediately.

However, the idea of private enforcement of international trade law may have merits that the Byrd Amendment conceals. If the factual issue of dumping were to be presented to a disinterested forum, and if the relator and his or her lawyer were willing to risk incurring the expense of presenting the case, the scheme might make sense. It might even be the best method of enforcing such laws, assuming that anti-dumping laws serve a valid public purpose of preventing monopolisation. Its advantage would be that the rights of firms competing in the marketplace would be less dependent on their amiable relations with politicians and the government lawyers they employ.

## **F. Lincoln's Law for Foreign Plaintiffs?**

Notwithstanding this cautionary tale, might the FCPA, in light of the frailty of the international efforts to date, be amended to authorise *qui tam* proceedings on behalf of foreign governments? Although the FCPA is only a mechanism of criminal law, it does, as noted above, provide civil plaintiffs, including foreign governments seeking compensation for harms resulting from tortious corrupt practices, with access to American courts. A possible additional basis for jurisdiction in such cases in the federal courts of the United States is provided by the Alien Tort Act enacted in 1789.<sup>146</sup> That Act opened the courts of the United States to civil tort claims brought to correct violations of international law wherever they occurred. The Supreme Court has recently clarified the eighteenth-century law to assure that the international law invoked by the plaintiff is truly embedded in a treaty, and not in a principle of natural law invented by judges to condemn what they perceive to

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143 *Meller*, W.T.O. Authorizes Trade Sanctions Against the United States, N.Y. Times, 27 November 2004, at C3.

144 *Meller/Austen*, Duties to Rise on Some Items from U.S., N.Y. Times, 1 April 2005, at C6.

145 Deficit Reduction Act of 2005, Pub. L. 109-171, 120 Stat. 4 (2006).

146 1 Stat. 73.

have been a misdeed.<sup>147</sup> Surely the ratifications of the many previously enumerated treaties confirm (if the question was ever in doubt) that bribery is now an international tort of the sort remedied by the old Alien Tort Act. Like piracy on the high seas, it is forbidden by the laws of every government in the world. And it was so in 1789, even if transnational bribery had not yet been widely acknowledged or forbidden in the nations of the bribers.

All manner of human-rights claims have been brought to the United States under the Alien Tort Act, but few if any commercial tort claims have been brought.<sup>148</sup> A pertinent example of the former type of claim is a case presently pending in the federal court in Manhattan brought by Nigerian plaintiffs claiming that the Royal Dutch Petroleum Company paid officers of the Nigerian government to punish Nigerians demonstrating against environmental harms allegedly caused by Royal Dutch, resulting in the death of the plaintiff's decedent.<sup>149</sup>

A victimised foreign government could under the existing law invoke jurisdiction in American courts in an action to recover any payments it may have made for goods or services in excess of what it would have paid if the corruption of its officials by the defendants had not occurred. There are thus a number of governments that may have been negligent in not commencing such civil actions in American courts. Doubtless a disincentive to such actions by foreign governments is that their lawyers would need to produce evidence in an American court challenging the integrity of their own fellow nationals. But at least in times following a change of regime, that obstacle might be regarded as a political incentive to proceed.

Congress could also, at least possibly, make the False Claims Act process available to foreign governments and their citizens. Foreign nationals could be permitted to sue in the name of their governments that have been corrupted by a defendant who is subject to the personal jurisdiction of the court in which the action is brought. Congress also could prescribe an award of damages commensurate with the damages provisions of the False Claims Act in order to provide individuals and their lawyers – as well as governments – with the incentives needed to investigate apparent corrupt practices and to advance their claims.

Perhaps citizens of Kazakhstan could thus be encouraged to proceed in the name of their republic with a claim against American oil companies for the damages resulting from the bribery of their president. Such a foreign subject or citizen could be equipped with procedural rights equal to those conferred on American citizens by American courts, procedural rights that are not generally available in courts of most other nations. These include (1) the “American Rule” that losers do not pay winners’ attorneys’ fees in the absence of specific legislation to the contrary; (2) access to contingent-fee lawyers; (3) the right to discover evidence in the United States and abroad; (4) trial by jury; (5) a

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147 See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (disclaiming federal jurisdiction under the Act over a claim arising from alleged police misconduct not prohibited by federal law).

148 *Markels*, Showdown for a Tool in Rights Lawsuits, N.Y. Times, 15 June 2003, § 3, at 11.

149 *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW) (HBP), 2006 U.S. Dist. LEXIS 68133 (S.D.N.Y. 22 September 2006) (order denying protective order); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW) (HBP), 01 Civ. 1909 (KMW) (HBP) 2006 U.S. Dist. LEXIS 65601 (S.D.N.Y. 12 September 2006) (order denying defendants’ Rule 37 motion); *Wiwa v. Royal Dutch Petroleum Co.*, 392 F. 3d 812 (5th Cir. 2004) (ruling on procedural issues and remanding to district court).



standard of proof requiring no more than a demonstration of probability of guilt; and (6) the possibility of a class action where many firms or persons have suffered harms as a result of one proven bribe. These are, as previously noted, among the instruments through which much American public law is often enforced by private plaintiffs, and they could be made available to foreign plaintiffs representing their governments.

The United States should have no reason to dread the financial cost of providing its judicial services to protect weak foreign governments in this way. The income-tax revenue generated by American lawyers representing the parties in such cases would surely offset the costs incurred by federal courts. And the foreign whistle-blowers could, if need be, quite reasonably be required to pay additional court costs to protect the federal treasury from loss.

There are, however, at least three limitations on the effectiveness of such a solo effort by the United States to correct the international problem.<sup>150</sup> One is the limit of the long arm of American courts. Personal jurisdiction would be lacking over many of the defendants who ought to be subject to suit if the law is to be effective in discouraging world wide transnational corruption. Jurisdictional limits would obviously present no problems for suits against American defendants, but would serve to prevent the deterrent effects on those foreign firms not subject to the personal jurisdiction of American courts, that is, those lacking the "minimum contacts" required by the constitutional Due Process. Foreign whistleblowers could use American courts to enforce their laws against American firms but not against many foreign competitors.

There is a possible partial solution to this problem. It is to make the extended FCPA available only to citizens and governments of nations that have enacted similar legislation requiring international firms with whom they do business to consent to the jurisdiction of an American court in private actions brought to enforce the international law against corrupt practices. Surely there would be no rush on the part of sovereign nations to seize the opportunity provided. Moreover, such sovereign nations might be expected to encounter serious difficulty in concluding favourable contracts with many foreign firms unwilling to expose themselves to suit in the United States. Nevertheless, such an invitational enactment by the United States might be recognised as an additional and earnest effort to lend a hand to weak governments beset by corruption, an effort more earnest than the FCPA. It is also at least theoretically possible that the World Bank might condition some of its loans on such local legislation in order to reduce the likelihood that proceeds from its loans are wasted on corrupt practices.

A second limitation on the effectiveness of such a solo effort by the United States is the limited ability of American courts to enforce judgments against defendants whose assets are beyond American reach. One might hope that foreign courts would lend a hand in collecting the judgments rendered pursuant to such legislation and against firms that are within the constitutional reach of American courts, but experience suggests that this is unlikely unless perchance a change could be made in the governing transnational law to commit foreign courts to enforce judgments rendered in the United States. Recent experience with efforts at The Hague to reach an agreement on the enforcement of

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<sup>150</sup> For the speculations of *Wedgwood* on the similar problems presented by private enforcement of laws against terrorism, see Moore (*op. cit.* fn. 18), 247-252.

foreign judgments provides little encouragement.<sup>151</sup> A possible impediment to agreement is a longstanding international tradition that the courts of one nation do not enforce the public revenue laws of another,<sup>152</sup> a tradition reflecting the sharp distinction between public and private law common to the legal systems of many nations.

Is it possible that such an agreement on the enforcement of foreign judgments could be achieved more easily if it were limited to judgments arising from civil actions brought to enforce the international law against bribery? If the “developed nations” of OECD are serious about putting an end to the corrupt practices that so disable governments in “developing nations,” then such a revision of the present conventions on the enforcement of foreign judgments might be possible. Then the state victims of corruption and even their whistleblowers could choose any forum.

A problem to be confronted in such a negotiation of a revised OECD convention on judgments is that most plaintiffs usually choose American courts. Whereas the courts of other nations that have ratified the Civil Law Convention of the Council of Europe would also be open to private enforcement of the international law, and might thus also impose the risk of civil liability on offenders who engage in bribery and on those firms that employ them, they do not generally offer the same package of procedural rights available to plaintiffs in American courts. As an eminent English Master of the Rolls put it, “*as a moth is drawn to the light*,”<sup>153</sup> plaintiffs are attracted to American courts. The proposal would therefore be likely to elevate the concerns of Europeans who resent the pretentiousness of American courts esteemed as “world courts,” as they are sometimes prone to do.<sup>154</sup>

A third limitation on the application of such American law is the limited ability of the American government to protect foreign whistle-blowers from retaliation to the degree they are able to offer to American whistle-blowers. Perhaps whistle-blowers could be provided asylum under existing international laws. That possibility might provide excessive incentives to citizens of failing states who would acquire not only the proceeds of their suits against former employers, but would also be assured access to a better lifestyle in a “developed” country.

We may conclude that the extension of the FCPA to provide for *qui tam* proceedings on behalf of foreign governments is still a “work in progress”, at least until a narrowly framed judgments convention has been negotiated to assure effective enforcement in foreign courts of resulting judgments against firms who consented to jurisdiction as a condition of doing business with the weak government to be protected. However, until some forum of this sort is provided, one is entitled to be skeptical about the commitment of OECD nations to efforts aimed at deterring the corrupt practices of weak national governments.

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151 See *supra* fn. 120.

152 See, e.g., *Planche v. Fletcher* (1779) 99 Eng. Rep. 164, 165; Her Majesty the Queen *In re The Province of British Columbia v. Gilbertson*, 597 F. 2d 1161, 1165 (9th Cir. 1979).

153 *Smith Kline & French Lab., Ltd v. Bloch*, [1983] 2 All E.R. 72, 74 (C.A.) (Lord Denning, Master of the Rolls).

154 *Michaels*, *Gerichte als Weltgerichte – Die Avantgarde der Globalisierung*, 31 DAJV-Newsletter 46 (2006).

## G. A Transnational Forum for Private Enforcement?

In any case, a solo effort by the United States to address the problem of corruption of foreign states by foreign firms is obviously far less attractive than one engaging the support of the whole community of nations having a stake in international trade and in the stability of weak governments. Could an international court which is as hospitable as American courts, be devised as a solution to help plaintiffs seeking to impose civil liability on those who corrupt foreign governments? Alas, effective world government remains a distant vision, but modest steps in that direction are gradually being taken.<sup>155</sup>

For example, the International Center for Settlement of Investment Disputes (ICSID) was created in 1965 in response to an initiative of the World Bank.<sup>156</sup> Its jurisdiction is presently limited to claims against member states, but 155 nations have agreed to enforce its awards. Perhaps the World Bank could devise a similar institution to deal with the transnational corruption problem. It has been suggested that the World Bank could refuse to fund government contracts to be performed by firms identified as corrupt;<sup>157</sup> a process for identifying corrupt contractors might impose other consequences on the firms identified. However, it would be confronted with the necessity of securing ratification of the scheme by the nations expected to enforce its awards.

Or possibly the International Chamber of Commerce might create a comparable arbitral institution whose awards would also be enforceable worldwide, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>158</sup> An obvious problem is that the Convention providing for enforcement of international arbitration awards assumes that the forum's jurisdiction rests on the consent of the parties, a condition that would be lacking in all international *qui tam* cases. Possibly, as suggested above in regard to the prospect of jurisdiction in American courts, the consent problem might be addressed by individual governments enacting laws giving consent to arbitration before the ICC corrupt practices panel – a condition of all public contracts, including contracts of employment.<sup>159</sup>

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155 See *Slaughter*, *A New World Order*, 2004, urging that transnational governance may work where global does not. But see *Anderson*, Book Review, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 *Harv. L. Rev.* 2005, 1255 (reviewing *Slaughter's A New World Order*).

156 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 27 August 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (1965). For an account, see *Reisman*, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair*, Durham 1992.

157 See e.g., *Williams*, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 *PUB. CONT. L. J.* 2007, 277.

158 E.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), opened for signature 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1958); see also 9 U.S.C. §§ 201-08 (1970) (ratifying the Convention).

159 This might be seen as a fitting use of another American legal novelty, the mandatory arbitration clause. For critical comment on that institution, see *Carrington/Haagen*, *Contract and Jurisdiction*, 1996 *Sup. Ct. Rev.* 331; *Carrington*, *Self-Deregulation, The "National Policy" of the Supreme Court*, 3 *Nevada L. Rev.* 2002, 259.

Another possible concern is that the present Convention on Foreign Awards vests discretion in the enforcing court to refuse enforcement of awards offending its notions of sound public policy.<sup>160</sup> Moreover, there is no treaty requiring courts around the world to enforce civil judgments that offend local laws. Firms planning to engage in corrupt practices might therefore be able to find sanctuary nations in which assets could be kept beyond the reach of plaintiffs seeking to enforce their awards.

If the World Bank, the World Trade Organization, the OECD, or the International Chamber of Commerce were to provide an effective forum for the private enforcement of corruption law, they would need to empower the whistle-blowing relator and his or her lawyer representing a government to conduct a factual investigation much as a public prosecutor might. American rules of procedure bearing on discovery<sup>161</sup> surely need not be incorporated, but they serve to illustrate what would be needed to empower private counsel to investigate and reveal corrupt conducts. Truly effective international law would also foreclose government secrecy in those nations to be protected so that officials and their files could be subject to judicial scrutiny.

Perhaps international lawmakers also need to take another leaf from the False Claims Act and provide for double or treble damages to be divided among the relator, his or her counsel, and the victimised government. The class action would also merit consideration. Finally, the lawmakers would need to consider means of protecting whistle-blowers by imposing further liability on employers who might be tempted to retaliate against their disloyalty to the firm. The possibility of a whistle-blower's right to migrate would be appropriate in some circumstances.

If such a forum were established to facilitate private enforcement of laws prohibiting bribery, it could also be given jurisdiction to decide factual issues arising in the application of the odious debt doctrine, thereby lending some legitimacy to decisions appropriately refusing to honor corrupt debts. Furthermore, private citizens could possibly be permitted to present odious debt claims on behalf of their governments.

There seems to be no immediate prospect of the ICC or the World Bank or the United Nations, or any other organisation taking on the task of creating a forum through which effective private enforcement of international corruption law could occur. However, it may be that the time has arrived for deliberation on the possibilities. Others have noted the difficulty and the need for transnational institutions to find a means of gaining a measure of trust from the citizens on whose behalf they presume to govern.<sup>162</sup> If a court were to be created, the American tradition would be ripe for study.

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160 Convention (*supra* fn. 158) Art. V(2)(b).

161 Fed. R. Civ. P. 26-37, 45.

162 See *Dahl*, On Political Equality, New Haven 2006, 87-92.

## **H. Conclusion**

Perhaps those institutions invited to this conference to enact legislation or to ratify a treaty establishing the means for effective private enforcement of international laws forbidding corrupt practices might take comfort from the knowledge that the *qui tam* device proposed has an ancient and honorable history. Such legislation is rooted in the recognition of the frailties of government, and the limits of what can be demanded from government lawyers in a fragmented social order. The world has long known that when developing nations are forced to rely wholly on their public prosecutors to impose criminal punishment on their fellow nationals and their partners in crime, corrupt practices are expected to flourish. This is especially true in those developing nations blessed with natural resources that can be stripped for the benefit of firms, and for those politicians able to extract bribes from such firms. This reality is now widely acknowledged, but the responses of developed nations have not been adequate in addressing it.

Shocking though the thought is, what the world may need and what effective globalisation of the marketplace requires, are thousands of plaintiffs' lawyers (yes, just the American sort so despised by Business) who are motivated and empowered to investigate the bribery of officials of weak governments and present their evidence to a forum that is in turn invulnerable to bribery or intimidation.