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Legal Forum Editors

LegalForum@chicagounbound.edu

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## Combating Corruption

In November of 2011, *The University of Chicago Legal Forum*, joining forces with the American Bar Association's Global Anti-Corruption Task Force, hosted its annual Symposium to discuss the challenges of combating corruption on multiple fronts. Against the backdrop of the *Citizens United* decision, recurrent global bribery, and corporate scandals, fifteen speakers debated the merits and deficiencies of various anticorruption strategies. As the dust settled following the 2008 financial crisis, the Symposium also offered speakers the opportunity to comment on the ensuing litigation and legislation. Some participants looked for evidence of corruption—and corresponding prophylactic measures—in the wind-up to the 2008 crisis.

Former US Attorney Patrick Fitzgerald delivered the keynote speech, describing anticorruption prosecutions occurring during his eleven-year tenure as US Attorney for the Northern District of Illinois, including the investigations of Governors George Ryan and Rod Blagojevich. Fitzgerald's speech—the text of which is included in this Volume—highlights the costs of public corruption, both economic and non-economic, and reminds readers of the stakes in the fight against corruption. Fitzgerald advocates for citizen vigilance and against complacency and the kind of fatalistic attitude that regards corruption as an inevitable condition for political or commercial activity.

The first set of Articles in this Volume concerns the scope and deterrence of public sector corruption. Professor Richard Myers grapples with the potential for prosecutorial discretion to hinder effective punishment of public corruption. At the heart of this problem, he notes, is the fact that enumerating the victims of public corruption is not always as straightforward an exercise as it is in most criminal matters. Moreover, prosecutors are public—and sometimes elected—officials, and their status as such may tempt them to be either overly lenient to a fellow political insider, or overly harsh to appease angry constituents. Pervasive press accounts, which stir public sympathy, also complicate public corruption proceedings. Professor Myers proposes an alternative mechanism: a proxy victim panel, consisting of a representative sample of victims, to consult with the prosecutor and weigh in on sentencing.

Professor Paul Carrington also voices concern about the effective punishment of public-sector corruption, but his scope is global. Professor Carrington outlines the history and effectiveness of the US False Claims Act (FCA), focusing on the private enforcement mechanism employed by qui tam relators, which he regards as a valuable anticorruption weapon. As an alternative to the current system, in which domestic entities like the Department of Justice and international entities like the World Bank face jurisdictional problems, Professor Carrington envisions a global regime of private enforcement—an international army of qui tam relators.

Professor Philip Nichols examines many of the issues raised by his fellow contributors—including systemic political corruption and over-broad prosecutorial discretion—through the lens of a case study: the corruption trials of two former Ukrainian prime ministers. Professor Nichols identifies the intersection of and distinction between theoretical conceptions of corruption and specific legal rules aimed at ameliorating corruption’s symptoms: wire fraud, money laundering, and so forth. Professor Nichols, though, calls for legal theorists to de-emphasize these latter mechanisms—legal rules aimed at specific behaviors—and to embrace broader understandings of corruption as systemic and intricately interwoven into some political spheres, particularly in developing economies like Ukraine’s.

The second set of Articles in this Volume addresses the challenge of combating corporate corruption, a Symposium panel topic that sparked lively debate in the wake of the global financial crisis. Professor Peter Henning identifies an accountability gap in the field of serious corporate wrongdoing: absent clear criminal conduct, an executive will often go unpunished for fraud or misconduct that occurred during her tenure. Professor Henning advocates for broader SEC authority to bar executives who may not be directly responsible for fraud, but on whose watches misconduct has repeatedly occurred. Though SEC debarment may not carry the same weight as criminal conviction, Professor Henning argues, it would increase executive accountability for passive disregard of corrupt behavior.

Lisa Noller examines another anticorruption mechanism: the whistleblower suit. Unlike Professor Henning, who calls for greater use of his weapon of choice, Noller cautions that prosecutors should seek balance in their pursuit of whistleblower claims. Noller questions whether the enormous monetary rewards paid to whistleblowers provide truly necessary encouragement, and

she notes that whistleblower claims often lead to investigations whose costs are borne by the government (and, by extension, taxpayers). She also speculates that whistleblower rewards minimize a corporation's incentives to develop a robust internal compliance program, since the company may have to pay large settlements to whistleblowers regardless of whether it had internal enforcement mechanisms in place. To remedy these incentive alignment problems, Noller proposes a dollar cap on plaintiff recovery and a jurisdictional requirement that whistleblowers report their claims internally first.

Ryan Rohlfen explores the reach of US laws aimed at deterring corporate corruption in the form of criminal commercial bribery statutes. Though the Volume contains multiple discussions of laws forbidding *government* bribery—such as the Foreign Corrupt Practices Act (FCPA)—Rohlfen's Article addresses illicit payments to *commercial* actors. Rohlfen speculates that, as US companies widen their global reach, prosecutors will increasingly turn to mechanisms like the federal Travel Act and state commercial bribery laws to combat illicit and corrupt corporate influence.

The last set of Articles looks at corruption on a global scale, often highlighting parallels to domestic efforts to combat corruption. Pascale Dubois, for instance, draws on her experience at the World Bank to compare the Bank's sanctioning mechanism of debarment to the US Federal Acquisition Regulation, a set of guidelines for transacting with government contractors. These two anticorruption devices vary in their particulars, but have both yielded results. Dubois suggests, accordingly, that differing approaches to corrupt entities may be equally effective.

Charles Smith and Britney Parling also look at a US statute in the global context, exploring the extraterritorial boundaries of the FCPA. Beginning with the Department of Justice's prosecution of Norwegian company Statoil in 2006, Smith and Parling trace the history of FCPA enforcement actions against foreign companies. Smith and Parling question the legitimacy of these extraterritorial extensions of the statute and speculate that such investigations have led to claims that US prosecutors are engaging in "imperialist" imposition of American values. To remedy this perceived problem, Smith and Parling recommend measures prosecutors might implement when investigating foreign corruption, including respecting data privacy laws, conducting industry-wide sweeps, and deferring more to local authorities.

Finally, Andrew Boutros and T. Markus Funk are concerned not with situations in which the US prosecutes foreign companies in lieu of local enforcement, but with situations in which local entities duplicate US charges in so-called “carbon copy” prosecutions. Procedural and constitutional considerations arise from these duplicate prosecutions. Boutros and Funk predict that this trend—which often leaves companies facing liability in multiple jurisdictions—will continue and they discuss the practical implications for companies that make disclosures to US investigators.

The Volume’s student contributions trace the contours of some of the legal weapons useful for combating corruption; from the FCPA to the Federal Anti-Bribery Statute to RICO, these Comments attempt to resolve unsettled questions arising from interpretation and implementation. Joshua Mahoney evaluates a recent constitutional challenge to the Civil War-era False Claims Act, one of the oldest federal anticorruption statutes. The FCA requires that private qui tam relators’ claims be kept under seal for at least sixty days—and in some cases for over a year. In 2010, the ACLU challenged the constitutionality of the sealing provision for relators’ claims, arguing that the provision violated the “right of access” doctrine under the First Amendment. The Fourth Circuit was unconvinced and held that the government had a “compelling interest” in keeping the records under seal. Though he ultimately agrees with the outcome, Mahoney questions the premise: he contends that the court should not have determined the applicability of the First Amendment using the “right of access” doctrine. Instead, Mahoney reexamines the statute through the lens of the “public employment” doctrine, which he determines is better suited to the inquiry.

Melanie Harmon also addresses an anticorruption device from a constitutional perspective, though her Comment deals not with qui tam relators but with wiretap evidence. She looks to the intersection of the Fourth Amendment and Title III, the federal wiretapping statute passed in 1968, to determine the admissibility of evidence in instances in which a wiretap investigation was flawed in some respect. Harmon identifies a circuit split over the question of whether specific language about evidence admissibility in Title III precludes judicial invocation of the good faith exception to the Fourth Amendment exclusionary rule. Finding the arguments in favor of rejecting the good faith exception ill-conceived, Harmon concludes that courts should apply the good

faith exception and admit wiretap evidence derived from some certain types of “flawed” investigations.

Unlike Harmon, who advocates for a broader reading of a statutory provision, Stephen Hagenbuch calls for a narrower reading of the phrase “foreign official” in the FCPA. Hagenbuch examines competing prosecutorial and judicial interpretations of the word “instrumentality” in the statute’s definition of “foreign official” and voices concern that the vagueness of the word has the potential to broaden prosecutorial discretion to an untenable level. Without a clear and comprehensive understanding of the category of foreign entities described by the word “instrumentality,” nearly any actor could be deemed a foreign official subject to the FCPA or relevant corrupt entities could be omitted. Ultimately, Hagenbuch argues that courts should perform a “control analysis”—or an evaluation of the degree to which a foreign government controls the entity in question—to determine whether an actor is a “foreign official” for purposes of the FCPA.

Like Hagenbuch, Diane Shrewsbury addresses the problem of potential over-inclusiveness arising from ambiguous statutory language. Shrewsbury catalogs differing interpretations of the phrase “corruptly persuades” in a provision of the Victim and Witness Protection Act of 1982 aimed at deterring improper witness tampering. Shrewsbury attempts to identify the types of witness interaction that qualify as “corrupt” persuasion and finds that the approach advanced by some courts may include innocuous exchanges like a defendant informing her witness spouse of the existence of marital privilege. Shrewsbury concludes that courts should require evidence of both knowledge and intent to hold that a defendant attempted to “corruptly persuade” a witness.

In their Comments, Christine Woodin and Cara Chomski each evaluate another product of the 1980s: the Federal Anti-Bribery Statute. Woodin examines the provision of the statute forbidding theft of, or bribery using, funds provided by the federal government and notes the difficulty of determining the appropriate unit of prosecution under the statute. In particular, the text of the relevant statute contains dollar thresholds for the punishable corrupt acts. Courts have struggled to determine whether the jurisdictional dollar amounts are a floor or a ceiling—that is, whether the amounts are indicative of the prescribed unit of prosecution. To resolve the resulting circuit split, Woodin proposes an alternative reading that applies one unit of prosecution to bribery and another to embezzlement.

Chomski addresses the extraterritorial reach of the Federal Anti-Bribery Statute, which she regards as a critical tool for limiting the corrupt behavior of individuals and entities working as civilian contractors for the US government abroad. Applying a US statute to foreign entities, though, raises due process concerns, and Chomski identifies a circuit split among federal courts attempting to determine the appropriate standard by which to evaluate jurisdiction over foreigners. Chomski ultimately concludes that this circuit split is illusory and makes the novel suggestion that courts should use a *Worldwide Volkswagon* minimum contacts test to determine whether they have jurisdiction over foreign entities.

Finally, Eliza Riffe looks at the effect of the Private Securities Litigation Reform Act of 1996 (PSLRA) on the anticorruption mechanism created by the Racketeer Influenced and Corrupt Organizations Act (RICO). In particular, the PSLRA forbids plaintiffs from suing under RICO's civil provision for conduct that otherwise "would have been actionable" as securities fraud. Federal courts have failed to reach a consensus on what the phrase "would have been actionable" means. Riffe first identifies two distinct methodologies judges have used to answer this question. Then, citing legislative history, the need for anticorruption measures in the enforcement arsenal, and the importance of preserving jurisprudential legitimacy, Riffe argues that all courts should make use of the more rigorous of the two approaches—what she calls an "actionability analysis."

Running throughout all of this Volume's Articles and Comments is a call for balance. Every Symposium participant or student author voiced concern—overtly or through implication—about being over- or under-inclusive when devising methods for combating corruption. As Fitzgerald highlights in his keynote, the stakes are high, as corruption results in costly societal damage—particularly loss of institutional trust. As several Symposium participants noted, though, high stakes alone might not justify broad strokes.