

CONVENTIONAL AND UNCONVENTIONAL CORRUPTION

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*“A Prince who wishes to remain in power is often forced to be other than good. When the group whose support he deems vital to his survival is corrupt – be it the common people, the soldiers, or the nobility – he must follow their inclinations in order to satisfy them. In such a case, good deeds become his enemies.”*

– Niccolo Machiavelli, *The Prince*

The history of corruption is as old as the history of government. Although the concept of corruption can invoke a variety of thoughts, it is most appropriately defined as the exercise of official powers without regard for the public interest. Corruption, as defined, does not exist without variance in all political systems. While many countries experience high levels of “conventional corruption,” others, especially developed countries that have successfully implemented measures to combat conventional corruption, are more likely to have problems with “unconventional corruption.”

Conventional corruption occurs when public officials illegally accumulate public funds for unrestricted personal use or involve themselves in specific *quid pro quo* transactions without regard for the public interest. This is the kind of activity that modern institutions typically associate with the concept of corruption and it exists in both “grand” and “petty” forms. Alternatively, unconventional corruption, which is unique to democratic forms of government, occurs when a public official makes a decision without regard for the public interest in order to achieve a specific kind of private gain – re-election to public office. This kind of corruption often involves decision-making that is done with the purpose of inducing private individuals and entities to make contributions and expenditures

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for the benefit of a re-election campaign. Many countries do not have effective laws prohibiting the types of activities that induce unconventional corruption. The label “unconventional” does not imply that this type of corruption occurs less frequently than conventional corruption; rather, the label “unconventional” reflects the fact that many academic and judicial definitions of corruption do not account for such activities.

There is no blanket solution for dealing with both conventional and unconventional corruption. These different forms of corruption require different solutions. Specifically, in regard to conventional corruption, a separation of powers, complete with a system of checks and balances, must exist in government so that anti-corruption statutes may be appropriately enacted by the legislature, effectively enforced by the executive, and impartially interpreted by the judiciary. When protections against conventional corruption are properly implemented, private parties who have become accustomed to offering bribes to induce conventional corruption must seek alternative means to influence public policy. Such alternative means often take the form of campaign contributions and expenditures.

Public officials in countries that have recently implemented protections against conventional corruption are especially susceptible to the influence of potential campaign contributions and expenditures because they can no longer illegally accumulate public funds to be used for campaign purposes. From this, it is easy to see how public officials in such countries are likely to develop improper dependencies on campaign cash. Therefore, once a country effectively reduces conventional corruption, it must then set its sights on combating unconventional corruption. In order to curtail unconventional corruption, legislatures (or the people themselves) must gather the political will to end improper dependencies on private campaign contributions and expenditures.

This article will analyze corruption in the United States and Kenya, two countries at different stages in their development, with the purpose of providing solutions based on the specific forms of corruption that have thrived, and continue to exist, within each country. Part I introduces various definitions of corruption and promotes a definition that accounts for many of the actions that are causing great societal harm. Part II highlights ancient and modern concerns about corruption along with its negative societal consequences. Part III describes the two forms of corruption that are the focus of this article: conventional corruption and unconventional corruption. Part IV provides the different solutions for conventional and unconventional corruption. Part V highlights the history of conventional and unconventional corruption in a developed country, the United States, and provides solutions for the United States to effectively combat the unconventional form of corruption that now prevails within its borders. Part VI highlights the history of conventional corruption in a developing country, Kenya,

and provides solutions for Kenya to effectively combat an inevitable rise in unconventional corruption.

## I. DEFINING CORRUPTION

Giving a specific definition to a concept associated with actions that are detrimental to society can be useful not only for research purposes, but also for purposes of identifying solutions. In order to solve a problem, it must first be defined.<sup>2</sup> Corruption has a powerful meaning, yet history has shown that it is not an easy word to define.<sup>3</sup> No definition of corruption is completely clear-cut.<sup>4</sup> Although corruption certainly exists outside the confines of government, this article will focus on the actions of public office holders.<sup>5</sup> While corruption in the private sector is a growing concern, the general population perceives the public sector as being most corrupt.<sup>6</sup> For example, when 577 Kenyans were asked to identify where one is most likely to come across corruption, 96.2% identified government or parastatal offices.<sup>7</sup>

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<sup>2</sup> See Kimberly Ann Elliott, *Corruption as an International Policy Problem: Overview and Recommendations*, Institute for International Economics, p. 177, available at [http://www.piie.com/publications/chapters\\_preview/12/10ie2334.pdf](http://www.piie.com/publications/chapters_preview/12/10ie2334.pdf) (“The challenges facing corruption analysts begin with how to define it.”).

<sup>3</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 373 (2009).

<sup>4</sup> Jakob Svensson, *Eight Questions about Corruption*, 19 *The Journal of Economic Perspectives* 19, 21 (Summer 2005); see also Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 *CARDOZO L. REV.* 2365, 2383 (2010) (“Corruption is in the eye of the beholder, and many varied and nuanced definitions of corruption have been offered.”); Mark Jorgensen Farrales, *What is Corruption? A History of Corruption Studies and the Great Definitions Debate*, at 1 (2005), available at <http://ssrn.com/abstract=1739962> (“But what is corruption, anyway? As simple as this question may appear, there seems to be no clear and easy answer.”); Shang-Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?*, at 4, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=604923](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=604923) (“Like pornography, corruption is difficult to quantify, but you know it when you see it.”).

<sup>5</sup> See KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIAL PERSPECTIVES* 34 Clairpress Limited (1996).

<sup>6</sup> Giorgio Sacerdoti, *Corruption in Investment Transactions: Policy Initiatives, Legal Principles, and Arbitral Practice*, at 4, electronic copy available at <http://ssrn.com/abstract=1931598> (citing Transparency International, *Global Corruption Barometer 2009*, at 3, available at [http://www.transparency.org/news\\_room/in\\_focus/2009/gcb2009](http://www.transparency.org/news_room/in_focus/2009/gcb2009)).

<sup>7</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIAL PERSPECTIVES* 143-144 Clairpress Limited (1996); but see James Forole Jarson, *The Media and the Anti-Corruption Crusade in Kenya: Weighing the Achievements, Challenges, and Prospects*, 26 *AM. U. INT’L L. REV.* 33, 83 (2010) (indicating that such recognition of public sector corruption in Kenya may be due to the Kenyan media’s disproportionate emphasis on public sector corruption).

A number of writers, in defining corruption, have focused solely on the actions of public authorities.<sup>8</sup> D. H. Bayley, for example, writes that corruption “is a general term covering misuse of [public] authority as a result of considerations of personal gain, which need not be monetary.”<sup>9</sup> Stanislaw Andreski writes that the word corruption “designates the practice of using the power of office for making private gain in breach of laws and regulations nominally in force.”<sup>10</sup> Notably, these definitions make no reference to the public interest. As recognized by Ralph Ketchum, however, the universally understood meaning of “corruption” is “the opposite of the public good.”<sup>11</sup> In order to completely tackle the problem of corruption, it has to be recognized for what it is – activity that is detrimental to society *as a whole*, not merely activity that results in private gain for a corrupt public official.<sup>12</sup> Therefore, a definition of corruption requires some reference to the public interest.

Carl Friedrich contends that corruption exists “whenever a power-holder who is charged with doing certain things ... is by monetary or other rewards not legally provided for induced to take actions which favour whoever provides the rewards and thereby does damage to the public and its interest.”<sup>13</sup> The Friedrich

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<sup>8</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIAL PERSPECTIVES* 28 Clairpress Limited (1996).

<sup>9</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIAL PERSPECTIVES* 28 Clairpress Limited (1996) (quoting D. H. Bayley, *The Effects of Corruption in Developing Nations*, 19 *WESTERN POLITICAL QUARTERLY*, at 719-32 (December 1996)); *see also* M. McMullen, *A Theory of Corruption*, *SOCIOLOGICAL REVIEW* 9(2): 181-201 (1961) (“A public official is corrupt if he accepts money or money’s worth for doing something that he is under duty to do anyway, that he is under duty not to do, or to exercise a legitimate discretion for improper reasons.”); Joseph Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, *AMERICAN POLITICAL SCIENCE REVIEW* 61(June): 417-27 (1967) (“[Corruption is] ... behavior which deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains; or violates rules against the exercise of certain types of private-regarding influence.”).

<sup>10</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIAL PERSPECTIVES* 28 Clairpress Limited (1996) (quoting Stanislaw Andreski, *Kleptocracy as a System of Government in Africa*, in A.J. HEIDENHEIMER, *POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS* 319 New Brunswick Books (1978)).

<sup>11</sup> RALPH KETCHUM, *FRAMED FOR POSTERITY* 58 University Press of Kansas (1993).

<sup>12</sup> According to Zephyr Teachout, the Framers of the United States Constitution, who were obsessed with preventing corruption, believed that civic virtue exists when there is an orientation toward the public interest. Zephyr Teachout, *The Anti-Corruption Principle*, 94 *CORN. L. REV.* 341, 374 (2009).

<sup>13</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIAL PERSPECTIVES* 28 Clairpress Limited (1996) (quoting Carl Friedrich, *Political Pathology*, 37 *POLITICAL QUARTERLY*, at 74 (1966)); *see also* Arnold A. Rogow and Harold D. Lasswell, *POWER, CORRUPTION, AND RECTITUDE*, Englewood Cliffs:

definition appropriately mentions the public interest. Markedly, it also refers to illegality as a necessary condition for corruption. The reference to illegality is a common characteristic for definitions of corruption in more recent writings as well. Jakob Svensson, for example, defines corruption as “the misuse of public office for private gain,” with “misuse” referring to the application of a legal standard.<sup>14</sup> However, in order to provide solutions for corruption that will be most beneficial to the public interest, illegality should not be a necessary condition for a definition of corruption. Common understandings of corruption, both classical and modern, have involved displacement of the public interest for a private one, plain and simple.<sup>15</sup> Governments are not always able to effectively criminalize all acts that are contrary to the public interest.<sup>16</sup> Therefore, corruption, for purposes of this article, is defined simply as the exercise of official powers without regard for the public interest. Although this definition is relatively similar to the modern, public understanding of corruption, it is still quite different from many academic and judicial definitions.

## II. CONSEQUENCES OF CORRUPTION

Corruption, a distinctly ancient practice,<sup>17</sup> has remained one of the most destructive phenomena in human history.<sup>18</sup> From Plato to Shakespeare in the

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Prentice Hall (1963) (“A corrupt act violates responsibility toward at least one system of public or civic order and is in fact incompatible with (destructive of) any such system. A system of public or civic order exalts common interest over special interest: violations of the common interest for special advantage are corrupt.”).

<sup>14</sup> Jakob Svensson, *Eight Questions about Corruption*, 19 THE JOURNAL OF ECONOMIC PERSPECTIVES, 19, 20 (Summer 2005) (“A common definition of public corruption is the misuse of public office for private gain. Misuse, of course, typically involves applying a legal standard.”); *see also* Robin Theobald, *CORRUPTION, DEVELOPMENT AND UNDERDEVELOPMENT*, Durham, North Carolina: Duke University Press (1990) (“[Corruption is] the illegal use of public office for private gain.”).

<sup>15</sup> RALPH KETCHUM, *FRAMED FOR POSTERITY* 58 University Press of Kansas (1993).

<sup>16</sup> United States President Barack Obama recently stated that much of the activity that caused the country’s recent economic recession was not necessarily illegal, but rather just immoral, inappropriate, or reckless. Jake Tapper, “Wall Street Corruption, Solyndra, and Fast & Furious: Today’s Q’s for O.” (October 6, 2011), *available at* <http://abcnews.go.com/blogs/politics/2011/10/wall-street-corruption-solyndra-and-fast-furious-todays-qs-for-o-1062011/>.

<sup>17</sup> Mark Jorgensen Farrales, *What is Corruption? A History of Corruption Studies and the Great Definitions Debate* at 4 (2005), *available at* <http://ssrn.com/abstract=1739962> (citing Robert Klitgaard, *CONTROLLING CORRUPTION*, Berkeley: University of California Press at 7 (1988)) (“[C]orruption is as old as organized human life, and indeed perhaps as old as government itself.”).

<sup>18</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIAL PERSPECTIVES* 118 Clairpress Limited, 1996; *see also*

West, and from Confucianism to Hinduism in the East, one can find repeated expressions of distaste for corruption.<sup>19</sup> Aristotle, recognizing the destructive aspects of corruption in 350 B.C., wrote: “To protect the treasury from being defrauded, let all money be issued openly in front of the whole city, and let copies of the accounts be deposited in various wards.”<sup>20</sup> Aristotle further warned that states wishing to prevent revolutions had better reduce social inequalities arising out of corrupt practices by those in public affairs, and that, “Every state should be so regulated by law that its magistrates cannot possibly make money .... People do not take great offense at being kept out of government; ... what irritates them is to think that their rulers are stealing the public money.”<sup>21</sup> Polybius, who is reputed as the most widely read philosopher of his time, compared the lenient political standards of Carthage where “nothing which results in profit is regarded as disgraceful,” with Roman standards that condemned “unscrupulous gain from forbidden sources,” and concluded that the laxity of political standards in Carthage led to the ruin of its political kingdom, whereas the high discipline of the Romans, more than anything else, accounted for its prosperity.<sup>22</sup>

Present day institutions, as well, have identified the destructive aspects of corruption.<sup>23</sup> The United Nations General Assembly, in adopting the United

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Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 347, 382 (2009) (“Like depression or a virus, corruption is both metaphor and a single word, an effort to use ongoing analogy to describe a very real and dangerous human experience in the truest way possible.”).

<sup>19</sup> Shang-Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?*, at 15, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=604923](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=604923) (citing Denis Osborne, 1997, “Corruption as Counter-Culture: Attitudes to Bribery in Local and Global Society,” p. 22, in Barry Rider, ed., *Corruption: The Enemy Within*, Hague: Kluwer Law International, pp. 9-34).

<sup>20</sup> Anwar Shah, *Tailoring the Fight Against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 234 The World Bank, Washington, D.C., 2007.

<sup>21</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIAL PERSPECTIVES* 118 Clairpress Limited, 1996 (citing William Ebenstein, *GREAT POLITICAL THINKERS* 108 Third Edition, Holt, Rinehard and Wilson, New York, 1962).

<sup>22</sup> *Id.* (citing William Ebenstein, *GREAT POLITICAL THINKERS* 108, 119 Third Edition, Holt, Rinehard and Wilson, New York, 1962). However, the fall of the Roman Empire can also be said to have occurred due to corruption. See Ramsay MacMullen, 1988, *Corruption and the Decline of Rome*. New Haven: Yale University Press; Duane Smith, *An Introduction to the Political Philosophy of the Constitution*, Center for Civic Education, available at <http://www.civiced.org/papers/political.html> (“The classical historians related in chilling detail the corruption of Rome, both moral and political, and its ultimate decline to a nation denounced by Sallust as ‘Easy to be bought, if there was but a purchaser.’”).

<sup>23</sup> David S. Brown, Michael Touchton, and Andrew B. Whitford, *Political Polarization as a Constraint on Government: Evidence from Corruption*, at 3, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=782845](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=782845) (“Multilateral lending agencies and

Nations Convention Against Corruption, expressed its concern “about the seriousness of problems and threats posed by corruption to the stability and security of societies ....”<sup>24</sup> The harmful effects of corruption are especially detrimental to the poor, who are hardest hit by economic turndown and are least capable of paying the extra costs related to bribery, fraud, and the misappropriation of economic privileges.<sup>25</sup> It is no wonder that the World Bank, whose overarching mission is poverty reduction, has identified corruption as among the greatest obstacles to economic and social development.<sup>26</sup> In 1996, World Bank President, James Wolfensohn, propelled corruption onto the world stage by declaring that corruption was “one of the greatest inhibiting forces to equitable development and to the combating of poverty.”<sup>27</sup>

As noted by Anwar Shah in the World Bank’s Public Sector Governance and Accountability Series, many studies have shown that, in the long run, acts of corruption have a multitude of damaging effects. Corruption slows GDP growth,<sup>28</sup> adversely affects capital accumulation,<sup>29</sup> lowers the quality of

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international aid organizations now consider corruption to be one of the biggest obstacles to economic development.”).

<sup>24</sup> Giorgia Sacerdoti, *Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice*, at 3, electronic copy available at <http://ssrn.com/abstract=1931598> (citing United Nations Convention Against Corruption (entered into force Dec. 14, 2005), available at <http://www.unodc.org/unodc/en/treaties/CAC/index.html>).

<sup>25</sup> Giorgia Sacerdoti, *Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice*, at 5-6, electronic copy available at <http://ssrn.com/abstract=1931598>. See also Anwar Shah, *Tailoring the Fight against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 234 The World Bank, Washington, D.C., 2007; PETER N. ANASSI, CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE 19, Trafford Publishers (2004).

<sup>26</sup> Giorgia Sacerdoti, *Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice*, at 5, electronic copy available at <http://ssrn.com/abstract=1931598> (citing The World Bank’s anti-corruption web page, available at <http://www.worldbank.org/anticorruption>); PETER N. ANASSI, CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE 114-15, Trafford Publishers (2004) (recognizing that the Transparency International corruption ratings show a very close nexus between corruption and development in many countries).

<sup>27</sup> Mark Jorgensen Farrales, *What is Corruption? A History of Corruption Studies and the Great Definitions Debate* at 10 (2005), available at <http://ssrn.com/abstract=1739962>.

<sup>28</sup> Anwar Shah, *Tailoring the Fight against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 235 The World Bank, Washington, D.C., 2007 (citing George T. Abed and Hamid R. Davoodi. *Corruption, Structural Reforms, and Economic Performance in the Transition Economies*, International Monetary Fund Working Paper 00/132, Washington, D.C., 2000).

<sup>29</sup> Anwar Shah, *Tailoring the Fight against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 234 The World Bank, Washington, D.C., 2007 (citing Johann Graf Lambsdorff, *Corruption in Empirical Research: A*

education,<sup>30</sup> public infrastructure,<sup>31</sup> health services,<sup>32</sup> and reduces the effectiveness of development aid.<sup>33</sup> Corruption may also affect macroeconomic stability, when, for example, the allocation of debt guarantees based on cronyism or fraud in financial institutions leads to a loss in confidence by savers, investors, and foreign exchange markets.<sup>34</sup>

Counter-arguments that corruption can have a positive effect on economic growth do exist. Nathaniel Leff, in a 1964 article from the *American Behavioral Scientist*, argued that there is such a thing as “efficient corruption” whereby bribery allows firms to get things done in an economy plagued by bureaucratic hold-ups and bad, rigid laws.<sup>35</sup> It is admittedly conceivable that individual acts of bribery could have positive short-term effects in an economy plagued by bureaucratic hold-ups. Today, however, arguments associating corruption with

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*Review*, 1999 (paper presented at the Ninth International Anti-corruption Conference, Durban, South Africa)).

<sup>30</sup> Anwar Shah, *Tailoring the Fight against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 234 The World Bank, Washington, D.C., 2007 (citing Sanjeev Gupta, Hamid Davoodi, and Erwin Tiongson, *Corruption and the Provision of Health Care and Education Services*, 2000, International Monetary Fund Working Paper 00/116, Washington, D.C.).

<sup>31</sup> Anwar Shah, *Tailoring the Fight against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 234 The World Bank, Washington, D.C., 2007 (citing Vito Tanzi and Hamid Davoodi, *Corruption, Public Investment, and Growth*, 1997, International Monetary Fund Working Paper 97/139, Washington, D.C.).

<sup>32</sup> Anwar Shah, *Tailoring the Fight against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 234 The World Bank, Washington, D.C., 2007 (citing Ewa Tomaszewska and Anwar Shah, *Phantom Hospitals, Ghost Schools, and Roads to Nowhere: The Impact of Corruption on Public Service Delivery Performance in Developing Countries*, 2000, Working Paper, World Bank, Operations Evaluation Department, Washington, D.C.).

<sup>33</sup> Anwar Shah, *Tailoring the Fight against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 234 The World Bank, Washington, D.C., 2007 (citing Sanjeev Gupta, Hamid Davoodi, and Rosa Alonso-Terme, *Does Corruption Affect Income Inequality and Poverty?*, 1998, International Monetary Fund Working Paper 98/76, Washington, D.C.); Kimberly Ann Elliott, “Corruption as an International Policy Problem: Overview and Recommendations,” Institute for International Economics, p. 192, available at [http://www.piie.com/publications/chapters\\_preview/12/10ie2334.pdf](http://www.piie.com/publications/chapters_preview/12/10ie2334.pdf).

<sup>34</sup> Anwar Shah, *Tailoring the Fight against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 234 The World Bank, Washington, D.C., 2007; see also Mark Jorgensen Farrales, *What is Corruption? A History of Corruption Studies and the Great Definitions Debate* at 1 (2005), available at <http://ssrn.com/abstract=1739962> (citing Alberto Ades and Rafael Di Tella, 1997. “The Causes and Consequences of Corruption.” *IDS Bulletin* 2: 6-10) (“[Corruption] also hampers economic development and growth, especially since it negatively impacts rates of investment.”).

<sup>35</sup> See Nathaniel H. Leff, *Economic Development through Bureaucratic Corruption*, 82 *American Behavioral Scientist* at 337-41 (1964); see also Samuel P. Huntington, *POLITICAL ORDER IN CHANGING SOCIETIES*, New Haven, Yale University Press (1968).



economic growth have been largely abandoned.<sup>36</sup> Many modern theories link corruption to long-term economic decline due to improper dependencies and misallocations of capital that stem from corrupt activities.<sup>37</sup> When potential profits are taken away from firms through corruption, entrepreneurs choose not to start firms or to expand less rapidly. Entrepreneurs may also choose to transfer their savings to the informal sector or to organize production in a way so as to not rely on public services. Furthermore, if entrepreneurs know that they will have to give bribes in the future, they will have incentives to adopt inefficient “fly-by-night” technologies of production with a high measure of reversibility, allowing them to be more flexible in regard to future demands and more credible when they threaten to shut down operations.<sup>38</sup>

### III. CONVENTIONAL AND UNCONVENTIONAL CORRUPTION

Despite the fact that it can be given a specific definition, corruption is not a phenomenon that exists without variance in all countries. While many countries experience high levels of “conventional corruption,” others, especially developed countries that have successfully implemented measures to combat conventional corruption, are more likely to have problems with “unconventional corruption.”

#### A. CONVENTIONAL CORRUPTION

Conventional corruption occurs when public officials illegally accumulate public money for unrestricted personal use or involve themselves in specific *quid pro quo* transactions.<sup>39</sup> Bribery is thus a form of conventional corruption. Conventional corruption is the kind of activity that modern institutions typically associate with the notion of corruption. This is because conventional corruption,

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<sup>36</sup> James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT’L L. 407, 426 (1999).

<sup>37</sup> Jakob Svensson, 19 THE JOURNAL OF ECONOMIC PERSPECTIVES 19, 37 (Summer 2005) (citing Kevin Murphy, Andrei Shleifer and Robert Vishny, *Why is Rent-seeking so Costly to Growth?*, 83 American Economic Review at 409-14 (1993)); Kimberly Ann Elliott, “Corruption as an International Policy Problem: Overview and Recommendations,” Institute for International Economics, p. 186-87, available at [http://www.piie.com/publications/chapters\\_preview/12/10ie2334.pdf](http://www.piie.com/publications/chapters_preview/12/10ie2334.pdf); see also Shang Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle*, at 14, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=604923](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=604923) (finding that corruption does not act as beneficial “grease.”).

<sup>38</sup> Jakob Svensson, 19 THE JOURNAL OF ECONOMIC PERSPECTIVES 19, 37 (Summer 2005) (citing Jay P. Choi and Marcel P. Thum, *The Economics of Repeated Extortion*, Columbia University Working Paper No. 9899-03 (1998)).

<sup>39</sup> In its definition of “quid,” Webster’s Third New International Dictionary (1992) references “quid pro quo” and defines it as “something given or received for something else.”

as opposed to unconventional corruption, is illegal by definition. Transparency International, for example, in its effort to measure graft worldwide,<sup>40</sup> defines corruption as the *abuse* of entrusted power for private gain.<sup>41</sup> “Abuse,” in this sense, implies “misuse” or “illegality.” Therefore, Transparency International specifically measures conventional corruption.

Conventional corruption can be further broken down into two basic kinds: grand corruption and petty corruption. Grand corruption involves theft or misuse of vast amounts of public resources by government officials.<sup>42</sup> This type of corruption most often originates with high-level officials who recognize and exploit opportunities that are presented through government work.<sup>43</sup> Because grand corruption involves high-level officials, it is often the subject of popular scandals.<sup>44</sup> Grand corruption can be perfected in many different ways. For example, public officials might issue government contracts to private businesses for excessive prices with an arranged kickback scheme so that both the public officials and the private businesses benefit. Also, public officials might form companies to perform public works projects, put such companies in the names of their friends and family members to avoid detection, and then inflate prices to ensure maximum returns.<sup>45</sup> In addition, it is all too common for public officials to engage in grand corruption by leveraging political banks in order to defraud the unsuspecting public.<sup>46</sup>

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<sup>40</sup> Mark Jorgensen Farrales, “What is Corruption? A History of Corruption Studies and the Great Definitions Debate, at 12 (2005), available at <http://ssrn.com/abstract=1739962> (stating that Transparency International’s yearly Corruption Perception Index is arguably the most ambitious attempt to measure corruption to date).

<sup>41</sup> Transparency International, Corruption Perceptions Index 2010 In Detail, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/in\\_detail](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/in_detail) (emphasis added).

<sup>42</sup> Anwar Shah, *Tailoring the Fight Against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 235 (2007); Mark Jorgensen Farrales, *What is Corruption? A History of Corruption Studies and the Great Definitions Debate*, at 28 (2005), available at <http://ssrn.com/abstract=1739962>.

<sup>43</sup> See James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT’L L. 407, 412 (1999); Kimberly Ann Elliott, *Corruption as an International Policy Problem: Overview and Recommendations*, Institute for International Economics, p. 178, available at [http://www.piie.com/publications/chapters\\_preview/12/10ie2334.pdf](http://www.piie.com/publications/chapters_preview/12/10ie2334.pdf).

<sup>44</sup> See Monica Davey, “Blagojevich Sentenced to 14 Years in Prison,” *The New York Times*, Dec. 7, 2011, available at <http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html>; David Pallister, “Scandals cast shadow over Kenya’s government,” *The Guardian*, July 5, 2004, available at [www.guardian.co.uk/world/2004/jul/06/kenya.davidpallister](http://www.guardian.co.uk/world/2004/jul/06/kenya.davidpallister).

<sup>45</sup> PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 138 Oxford University Press (2007).

<sup>46</sup> PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYA EXPERIENCE* 17 Trafford Publishing (2004).

In contrast to grand corruption, petty corruption involves isolated transactions by non-elected public officials, particularly lower-level administrative bureaucrats, who abuse their office by demanding bribes, diverting public funds, or awarding favors in return for personal considerations.<sup>47</sup> The individual transactions that constitute petty corruption may involve very little money, but in the aggregate, a substantial amount of public resources can be involved.<sup>48</sup> Examples of petty corruption include bureaucrats establishing red tape to induce private parties to offer bribes, civil servants withdrawing licenses in an arbitrary manner to create a crisis where bribes can be easily solicited, and court officers jailing people for small, routine offenses so that money can be extorted in return for freedom.<sup>49</sup>

## B. UNCONVENTIONAL CORRUPTION

In contrast to conventional corruption, unconventional corruption occurs when a public official acts without regard for the public interest in order to achieve a specific kind of private gain – re-election to public office. This kind of corruption often involves discriminatory decision-making that is done with the purpose of inducing private individuals and entities to make contributions and expenditures on behalf of a re-election campaign. Unconventional corruption is not necessarily illegal, as many statutory prohibitions on corruption are defined so as to merely encompass the *quid pro quo* transactions that constitute conventional corruption.<sup>50</sup> Due to such statutory definitions of corruption, courts and

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<sup>47</sup> See James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT'L L. 407, 412 (1999); Kimberly Ann Elliott, *Corruption as an International Policy Problem: Overview and Recommendations*, Institute for International Economics, p. 178, 189, available at [http://www.piie.com/publications/chapters\\_preview/12/10ie2334.pdf](http://www.piie.com/publications/chapters_preview/12/10ie2334.pdf).

<sup>48</sup> Anwar Shah, *Tailoring the Fight Against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 235 (2007); Mark Jorgensen Farrales, *What is Corruption? A History of Corruption Studies and the Great Definitions Debate*, at 28 (2005), available at <http://ssrn.com/abstract=1739962>.

<sup>49</sup> PETER N. ANASSI, CORRUPTION IN AFRICA: THE KENYA EXPERIENCE 86, 188, Trafford Publishing (2004).

<sup>50</sup> See United States, 18 U.S.C. § 201(b)(2) (“Whoever ... being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, *in return for*: (A) being influenced in the performance of any official act; (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) being induced to do or omit to do any act in violation of the official duty of such official or person ... shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.”) (emphasis added); Kenya, The Prevention of Corruption

academics often assume that government power can only be corrupted through a series of illegal *quid pro quo* transactions.<sup>51</sup> Corruption, however, does not require a transaction in order to impose significant costs on society. As will be shown, perhaps the most powerful form of corruption today is the unconventional form, which does not depend on the existence of a *quid pro quo* transaction.<sup>52</sup>

To be clear, the unconventional corrupt act is not the spending of money by private individuals and entities or the intermediary actions of lobbyists; rather it is a public official's decision to act without regard for the public interest in order to induce private individuals and entities to make contributions and expenditures for the benefit of a re-election campaign. Unconventional corruption is not a problem associated with gratitude; it is a problem associated with incentives – the wrong incentives. Instead of decisions made with the incentive of serving the public interest, decisions are made with the incentive of receiving future campaign contributions and expenditures. The underlying problem is not so much what happens in regard to candidates pre-election but what incentives are offered to public officials post-election.<sup>53</sup> Therefore, unconventional corruption does not represent an *ex-post* effect whereby public officials take a position on a particular issue because of past contributions and expenditures; rather, it represents an *ex-ante* effect whereby public officials take a position on a particular issue in anticipation of future contributions and expenditures. As Daniel Lowenstein explains, “Legislators know of past contributions *and the possibility of future ones*.”<sup>54</sup> In the same vein, former United States Congressman Eric Fingerhut acknowledged that “people consciously or subconsciously tailor their views to where they know the sources of campaign funding to be.”<sup>55</sup>

Unconventional corruption is not necessarily done by evil souls. Rather, this kind of corruption is often practiced by good souls who have intentions of

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Act, *amended* (1967) Cap. 65 §3(2) (“Any person who shall by himself or in conjunction with any other person, corruptly give, promise or offer any gift, loan, fee, reward, consideration or advantage whatever to any person, whether for the benefit of that person or otherwise *on account of*, any member officer or servant of any public body doing or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the said public body is concerned shall be guilty of a felony.”) (emphasis added).

<sup>51</sup> LAWRENCE LESSIG, REPUBLIC, LOST 105 Twelve (2011).

<sup>52</sup> LAWRENCE LESSIG, REPUBLIC, LOST 107 Twelve (2011).

<sup>53</sup> Samuel Issacharoff, *On Political Corruption*, in MONEY, POLITICS, AND THE CONSTITUTION, BEYOND *CITIZENS UNITED* 124 The Century Foundation Press (New York) (2011).

<sup>54</sup> LAWRENCE LESSIG, REPUBLIC, LOST 121 Twelve (2011) (citing Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, HOFSTRA L. REV. 18 (1989): 325) (emphasis added).

<sup>55</sup> LAWRENCE LESSIG, REPUBLIC, LOST 149 Twelve (2011) (citing Martin Schram, *Speaking Freely*, Center for Responsive Politics (1995), 48-49).

serving a democracy with honor. In order to stay in office and make decisions that benefit the public interest, well-meaning public officials often believe that it is necessary, in the short-term, to induce private parties to make large contributions and expenditures for campaign finance purposes. These beliefs are unrealistic. The unfortunate truth is that such public officials lack the nerve to stand up and reform their democratic institutions. In this regard, it must be acknowledged that great societal harm does not always stem from evil intentions; sometimes it comes from timid, or even pathetic, souls.<sup>56</sup>

Unconventional corruption, as described, has been classified as a subset of *political corruption*, whereby the decisions of public officials are affected by legal and illegal campaign contributions.<sup>57</sup> Unconventional corruption is also similar to, but not the same as, *negative corruption*, in which a public official makes biased decisions in order to avoid incurring the wrath of a powerful actor, such as a politician or a private businessperson with connections sufficient to have the official transferred, reprimanded, or even charged with a crime.<sup>58</sup> Lawrence Lessig in *Republic, Lost* describes this form of non-*quid pro quo* corruption as *dependence corruption*, due to public officials' dependence on campaign contributions and expenditures in order to be re-elected.<sup>59</sup> As Lessig insightfully observes, public officials in a democracy should be dependent upon the people alone, but they can sometimes be distracted by a competing dependency on money for re-election purposes, which is an improper dependency.<sup>60</sup> Public officials can only feed this improper dependency if they can provide something of value to their suppliers, who are often large private entities or lobbyists.<sup>61</sup>

Unconventional corruption is associated with lobbying efforts, but lobbying and unconventional corruption are not identical concepts. There are two basic reasons for this: first, unconventional corruption is focused on the acts of public officials, while lobbying encompasses the actions of private individuals and entities outside of government; second, lobbying is not merely the private counterpart to unconventional corruption; it is a broader concept that can involve

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<sup>56</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 7 Twelve (2011).

<sup>57</sup> Shang-Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?*, at 4 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=604923](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=604923) (describing political corruption, as opposed to corruption involving bribery, as vote buying in an election or decisions that are affected by legal and illegal campaign contributions by the wealthy and other special interest groups to influence laws and regulations).

<sup>58</sup> Rob Jenkins, "The Roles of Political Institutions in Promoting Accountability," in *PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION*, at 142 (2007).

<sup>59</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 17 Twelve (2011) (citing Richard L. McCormick, *The Discovery That Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, *AMERICAN HISTORICAL REVIEW* 86 (1981): 247, 265).

<sup>60</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 19-20 Twelve (2011).

<sup>61</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 104 Twelve (2011).

things other than making campaign contributions and expenditures. For example, lobbying can also involve the offering of expertise to public officials.<sup>62</sup> More than ever before, most lobbyists are just well paid policy wonks, expert in a field and able to advise and guide public officials.<sup>63</sup>

Still, lobbying is relevant to unconventional corruption. Lobbyists can provide campaign contributions to public officials directly. In addition, lobbyists can provide campaign contributions to public officials indirectly, acting as intermediaries between the public officials and their clients. There is a coherent and sensible argument to be made that money from lobbyists does not literally buy an election; it merely buys speech that helps persuade voters to side with one candidate over another. The focus of unconventional corruption, however, is not about what the money does; rather, it is about what has to be done in order to obtain the money. The money does not necessarily contradict democratic principles. What must be done to secure the money, however, corrupts a democracy to its core.<sup>64</sup>

Unconventional corruption is a problem associated with developed countries. Developing countries often have more fundamental problems associated with conventional corruption. However, when protections against conventional corruption are properly implemented, and countries begin to develop economically and politically, private parties who have become accustomed to offering bribes in order to induce conventional corruption must seek alternative means of influencing public policy, such as lobbying, which includes campaign contributions and expenditures.<sup>65</sup> According to a study by Nauro Campos and Francesco Giovannoni involving 3,954 firms in 25 transition economies, “there is substantial evidence that lobbying and [conventional] corruption are substitutes. That is, lobbying is an important alternative instrument of influence to [conventional] corruption in transition countries.”<sup>66</sup> Lobbying activities, including campaign contributions and expenditures, lead to unconventional corruption within the government. Public officials in such countries are especially susceptible to the influence of potential campaign contributions and expenditures because they can no longer illegally accumulate public funds to be

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<sup>62</sup> Nauro F. Campos and Francesco Giovannoni, *Lobbying, Corruption and Political Influence*, 131 PUBLIC CHOICE 1, 2 (2007).

<sup>63</sup> LAWRENCE LESSIG, REPUBLIC, LOST 103 Twelve (2011).

<sup>64</sup> LAWRENCE LESSIG, REPUBLIC, LOST 161-62 Twelve (2011).

<sup>65</sup> See Nauro F. Campos and Francesco Giovannoni, *Lobbying, Corruption and Political Influence*, 131 PUBLIC CHOICE 1, 3 (2007); B. Harstad & J. Svensson (2006), *Bribes, Lobbying and Development*, CEPR Discussion Paper 5759, Centre for Economics Policy Research, London, UK (“[F]irms prefer bribing to lobbying early in the development process but at later states ... they are more likely to lobby the government.”).

<sup>66</sup> Nauro F. Campos and Francesco Giovannoni, *Lobbying, Corruption and Political Influence*, 131 PUBLIC CHOICE 1, 2 (2007).

used for campaign purposes. Therefore, as is argued *infra* in the case of Kenya, once a country effectively reduces conventional corruption, it must then set its sights on combating unconventional corruption.<sup>67</sup>

#### IV. SOLUTIONS FOR CONVENTIONAL AND UNCONVENTIONAL CORRUPTION

##### A. SOLUTIONS FOR CONVENTIONAL CORRUPTION

In order to curb conventional corruption, the people must impose upon their government a separation of powers, complete with a system of checks and balances. When powers are separated and limited, the government can effectively enact laws prohibiting public officials from entering into *quid pro quo* transactions against the public interest, enforce such laws, and impartially determine when the laws have been violated. In such a system, each branch of government has an independent, but restricted, role to play.<sup>68</sup>

The first step in combating conventional corruption is to separate powers within government. This principle, where the legislative, executive, and judicial functions of government are divided among separate and independent bodies, has long been a cornerstone of governance in democratic nations.<sup>69</sup> In fact, arguments that a separation of powers can reduce corruption date back to Locke, Montesquieu, and the framers of the United States Constitution.<sup>70</sup>

Conventional corruption is a problem that is most often associated with the executive branch of government.<sup>71</sup> Executive branch officials who carry out the laws are in a unique position to engage private parties in *quid pro quo* transactions whereby public funds become diverted from their intended use. A dispersal of power between the executive and the legislature prevents corruption and abuse of power by enabling the legislature to contest the actions of executive

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<sup>67</sup> See *infra* pp. 68-74.

<sup>68</sup> See Victoria Nourse, *Toward a 'Due Foundation' for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 451 (1996) (citing James Madison, *The Federalist* No. 51, at 322-23) (“[T]he most important requirement for a system of separated institutions is a set of independent persons exercising incomplete power.”).

<sup>69</sup> Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1732 (1996); James E. Alt and David Dreyer Lassen, *Political and Judicial Checks on Corruption: Evidence from American State Governments*, August 2005, at 1, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=816045](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=816045).

<sup>70</sup> Omar Azfar and William Robert Nelson Jr., *Transparency, Wages, and the Separation of Powers: An Experimental Analysis of Corruption*, 130 PUBLIC CHOICE 471, 486 (Mar. 2007).

<sup>71</sup> See, e.g., the history of corruption in Kenya, *infra* pp. 49-59.

branch officials.<sup>72</sup> As Montesquieu wrote in *The Spirit of Laws* in the 18<sup>th</sup> century, “When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.”<sup>73</sup>

A separation of powers between the executive and the judiciary is also imperative to combat conventional corruption. As is often seen in developing countries, corrupt executive officials are not susceptible to punishment for their actions because of the influence that the executive branch holds over the judiciary.<sup>74</sup> A judiciary is ineffective if it is not independent.<sup>75</sup> Without independence, the judge is simply an impotent actor who enables the executive to exercise oppressive and corrupt power. In recognition of this, Montesquieu wrote, “If [the judiciary] were joined to executive power, the judge could have the force of an oppressor.”<sup>76</sup>

In itself, however, a system of separation of powers does not prevent the misuse of power. Procedures that enable actors to stop or block the actions of other actors are required to prevent the misuse of power.<sup>77</sup> Such procedures, known as checks and balances, empower the separate actors of government to contest each other’s corrupt actions. Checks are exercised, for example, through vetoes, judicial review, or regulatory oversight, with the aim of preventing misuse of power.<sup>78</sup> These procedures limit the ability of any one political group to

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<sup>72</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?*, 18 IND. J. GLOBAL LEGAL STUD. 341, 349 (2011) (citing N.W. Barber, *Prelude to the Separation of Powers*, 60 Cambridge L. J. 59, 61 (2001)).

<sup>73</sup> MONTESQUIEU, *THE SPIRIT OF LAWS* 157, translated and edited by Anne M. Cohler, Basia C. Miller, and Harold S. Stone, Cambridge University Press (1989).

<sup>74</sup> See generally Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341 (2011).

<sup>75</sup> Sahr J. Kpundeh, (2007) *Political Will in Fighting Corruption*, p. 102, UNDP-PACT and OECD Development Centre Workshop on Corruption and Integrity Improvement Initiatives in the Context of Developing Economies, Paris, available at <http://mirror.undp.org/magnet/Docs/efa/corruption/Chapter06.pdf>; Kimberly Ann Elliott, “Corruption as an International Policy Problem: Overview and Recommendations,” Institute for International Economics, p. 210-11, available at [http://www.piie.com/publications/chapters\\_preview/12/10ie2334.pdf](http://www.piie.com/publications/chapters_preview/12/10ie2334.pdf).

<sup>76</sup> MONTESQUIEU, *THE SPIRIT OF LAWS* 157, translated and edited by Anne M. Cohler, Basia C. Miller, and Harold S. Stone, Cambridge University Press (1989).

<sup>77</sup> RALPH KETCHUM, *FRAMED FOR POSTERITY* 108 University Press of Kansas (1993); PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 147 Oxford University Press (2007).

<sup>78</sup> James E. Alt and David Dreyer Lassen, *Political and Judicial Checks on Corruption: Evidence from American State Governments*, August 2005, at 1, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=816045](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=816045).



dominate the apparatus of government for its own benefit.<sup>79</sup> For example, when the legislative branch is given oversight over the executive, friction is created between the branches, thereby facilitating accountability of the executive.<sup>80</sup> In addition, checks and balances ensure that no single institution can thwart an investigation into wrongdoing and punishment for violating laws.<sup>81</sup> On checks and balances, Montesquieu wrote, “So that one cannot abuse power, power must check power by the arrangement of things.”<sup>82</sup> Also, James Madison, a prominent framer of the U.S. Constitution who drew upon the writings of Montesquieu, stated that formal checks and balances “oblige the government to control itself.”<sup>83</sup>

The primary focus on fighting conventional corruption in the past has been to promote democratic elections.<sup>84</sup> The idea has been that if a public official engages in corrupt conduct against the interest of the public, the public can simply express its dissatisfaction by voting the public official out of power, thereby giving incentives against corruption. The mere existence of democracy, however, is neither an absolute cure nor an impermeable barrier to corruption.<sup>85</sup> In order to control conventional corruption, a democracy must also have a separation of powers with checks and balances that limit the power of a government once elected. Paul Collier writes that, “Some of the rules of democracy do indeed determine how power is *achieved*, and that’s where elections come in. But other

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<sup>79</sup> Sahr J. Kpundeh, (2007) *Political Will in Fighting Corruption*, p. 102, UNDP-PACT and OECD Development Centre Workshop on Corruption and Integrity Improvement Initiatives in the Context of Developing Economies, Paris, available at <http://mirror.undp.org/magnet/Docs/efa/corruption/Chapter06.pdf>.

<sup>80</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?*, 18 IND. J. GLOBAL LEGAL STUD. 341, 349 (2011) (citing Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L. J. 2314 (2006)).

<sup>81</sup> Sahr J. Kpundeh, (2007) *Political Will in Fighting Corruption*, p. 105, UNDP-PACT and OECD Development Centre Workshop on Corruption and Integrity Improvement Initiatives in the Context of Developing Economies, Paris, available at <http://mirror.undp.org/magnet/Docs/efa/corruption/Chapter06.pdf>.

<sup>82</sup> MONTESQUIEU, *THE SPIRIT OF LAWS* 155, translated and edited by Anne M. Cohler, Basia C. Miller, and Harold S. Stone, Cambridge University Press (1989); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1766 (1994) (“Montesquieu, the authority used by the critics, had not advocated a separation of powers pure and simple.”).

<sup>83</sup> RALPH KETCHUM, *FRAMED FOR POSTERITY* 31 University Press of Kansas (1993) (citing *The Federalist Papers*, Nos. 10 & 51, Clinton Rossiter, ed., (New York, 1961), pp. 84, 322).

<sup>84</sup> PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 146 Oxford University Press (2007).

<sup>85</sup> Sahr J. Kpundeh, (2007) *Political Will in Fighting Corruption*, p. 92, UNDP-PACT and OECD Development Centre Workshop on Corruption and Integrity Improvement Initiatives in the Context of Developing Economies, Paris, available at <http://mirror.undp.org/magnet/Docs/efa/corruption/Chapter06.pdf>; PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 146 Oxford University Press (2007).

rules of democracy limit how power is *used*. These rules are concerned with checks and balances on government abuse of power.”<sup>86</sup> Once power is *achieved*, the winner of an election cannot be given an opportunity to *use* power in a corrupt manner to crush the defeated. If there are no limits on the power of the winner, the election becomes a matter of life and death in which the contestants are driven to extremes.<sup>87</sup>

The public does not often adore a political leader who engages in corrupt practices. Therefore, without checks and balances, a political leader who engages in corrupt practices while in office will likely engage in further corrupt practices leading up to an election, such as miscounting votes, in order to stay in power.<sup>88</sup> The recent history of Kenya, a country without effective checks and balances until very recently, provides an illustrative example of this phenomenon.<sup>89</sup> In the election of 2007, as the parliamentary constituency results came in, the Kenyan political opposition appeared destined to win the presidency. However, by the time these constituency votes were added to the national total by the electoral commission, the incumbent president had won by a considerable margin.<sup>90</sup> In one district, the vote for the president had first been announced as 50,145 before being entered as 75,261 in the final tally.<sup>91</sup> In another district, turnout was first shown at 115%, but was later changed to 85%.<sup>92</sup> This example from Kenya shows that democracy, like other systems of governance, is simply a set of rules guiding the appointment of power and conduct of transitions. The benefits can only be realized with an adequate system of checks and balances.<sup>93</sup>

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<sup>86</sup> PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 44 Oxford University Press (2007).

<sup>87</sup> PAUL COLLIER, *WARS, GUNS & VOTES, DEMOCRACY IN DANGEROUS PLACES* 15 Vintage Books (2009).

<sup>88</sup> PAUL COLLIER, *WARS, GUNS & VOTES, DEMOCRACY IN DANGEROUS PLACES* 35-36 Vintage Books (2009).

<sup>89</sup> See James T. Gathii, *Kenya's Long Anti-Corruption Agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution*, Albany Law School, Working Paper Series, p. 64, available at <http://ssrn.com/abstract=1718620> (“The President and his incumbent ministers may have even resorted to corruption to retain their hold on Kenyan politics in the 2007 Presidential elections.”).

<sup>90</sup> PAUL COLLIER, *WARS, GUNS & VOTES, DEMOCRACY IN DANGEROUS PLACES* 36 Vintage Books (2009).

<sup>91</sup> PAUL COLLIER, *WARS, GUNS & VOTES, DEMOCRACY IN DANGEROUS PLACES* 36 Vintage Books (2009).

<sup>92</sup> Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, p. 8, June 8, 2011, available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf).

<sup>93</sup> Sahr J. Kpundeh, (2007) *Political Will in Fighting Corruption*, p. 93, UNDP-PACT and OECD Development Centre Workshop on Corruption and Integrity Improvement Initiatives in the Context of Developing Economies, Paris, available at <http://mirror.undp.org/magnet/Docs/efa/corruption/Chapter06.pdf>.

## B. SOLUTIONS FOR UNCONVENTIONAL CORRUPTION

While long-term benefits in regard to conventional corruption can be derived from a separation of powers with checks and balances, such solutions are not sufficient to combat unconventional corruption. In fact, as has been described by Campos and Giovannoni, when protections against conventional corruption are properly implemented, private parties who have become accustomed to bribery often seek alternative means to influence public policy, such as lobbying, which includes election campaign contributions and expenditures.<sup>94</sup> These kinds of activities lead to unconventional corruption within the government. Therefore, once a country effectively reduces conventional corruption, it must then set its sights on combating unconventional corruption. In order to curtail unconventional corruption, legislatures (or the people themselves) must gather the political will to limit large private campaign contributions and expenditures so that public officials will be less likely to act against the public interest. Unconventional corruption is a problem of integrity and virtue in regard to public officials. As Montesquieu stated, “It is not only crimes that destroy virtue, but also ... the seeds of corruption, that which does not run counter to the laws but eludes them, that which does not destroy them but weakens them: all these should be corrected by censors.”<sup>95</sup> In our modern society, lobbyists and large private campaign contributions and expenditures are the “seeds of corruption,” and they require censors.

The first step towards combating unconventional corruption is to establish rules that require public officials to disclose the source of their campaign contributions.<sup>96</sup> Effective disclosure rules require: (1) that candidates report their contributions in detail; and (2) that campaign reports are provided to the public in a timely manner.<sup>97</sup> With such rules, the voting public gains necessary access to information that may be indicative of a public official’s tendencies to act against

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<sup>94</sup> See Nauro F. Campos and Francesco Giovannoni, *Lobbying, Corruption and Political Influence*, 131 PUBLIC CHOICE 1, 3 (2007); B. Harstad & J. Svensson, *Bribes, Lobbying and Development*, CEPR Discussion Paper 5759, Centre for Economics Policy Research, London, UK (“Firms prefer bribing to lobbying early in the development process but at later stages ... they are more likely to lobby the government.”) (This has been published as Bård Harstad and Jakob Svensson, *Bribes, Lobbying and Development*, AMERICAN POLITICAL SCIENCE REVIEW 46 (2011): 105).

<sup>95</sup> MONTESQUIEU, THE SPIRIT OF LAWS 71, translated and edited by Anne M. Cohler, Basia C. Miller, and Harold S. Stone, Cambridge University Press (1989).

<sup>96</sup> PAUL COLLIER, THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT 149 Oxford University Press (2007) (“Probably parliaments should also set some ceilings on contributions, and require some transparency in party finances. This is not a very ambitious agenda, but it would at least get the issue of campaign finance started.”).

<sup>97</sup> USAID, Office of Democracy and Governance, “Money in Politics Handbook: A Guide to Increasing Transparency in Emerging Democracies,” p. 15, November 2003, available at [www.usaid.gov/our\\_work/democracy\\_and.../pdfs/pnacr223.pdf](http://www.usaid.gov/our_work/democracy_and.../pdfs/pnacr223.pdf).

the public interest.<sup>98</sup> Disclosure rules, however, although necessary, are not sufficient for eliminating unconventional corruption. As has been described by Marcos Chamon and Ethan Kaplan, the influence of campaign contributions may be independent of any actual amounts spent because the influence could also depend on the credible threat of contributions to benefit the public official's opponent.<sup>99</sup> For example, imagine that a corporation announced that it intended to spend millions of dollars to defeat any public official who supported an increase in the capital gains tax. If the public official learned of the corporation's intent, and decided to change his or her position in regard to the capital gains tax, there would be little doubt that such change was the result of the corporation's threat. Disclosure rules, however, would not be able to quantify the corporation's influence or the public official's unconventional corruption.

In order to effectively combat the corrupting influence of campaign contributions, such contributions must be limited in their amounts. As noted by Samuel Issacharoff, problems arise when there are only a few large contributors, not when there are many contributors who may be substantial but not critical.<sup>100</sup> This is not to say that campaign contributions must be prohibited. In fact, it is critical that contributions not be totally prohibited; otherwise candidates for public office would not be able to effectively communicate their message to their constituencies. To the extent that this remains a concern when campaign contributions are merely limited in their amounts, a public financing system of elections provides an effective remedy. Under such a system, candidates who collect a set number of signatures and a set number of small contributions are eligible to receive substantial amounts of public funding for their campaigns as long as they agree not to accept private contributions over a specified amount. A public financing system, in order to be successful, must provide candidates with enough money to control the agenda of their campaigns.<sup>101</sup>

Although public financing of elections, as described, addresses problems of unconventional corruption associated with contributions, it does not solve the problems associated with expenditures. In order to effectively combat

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<sup>98</sup> See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (“[Disclosure] allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predications of future performance in office.”).

<sup>99</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 258 Twelve (2011) (citing Marcos Chamon and Ethan Kaplan, *The Iceberg Theory of Campaign Contributions: Political Threats and Interest Group Behavior*, (April 2007), 2-5).

<sup>100</sup> Samuel Issacharoff, *On Political Corruption*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 133 The Century Foundation Press (New York) (2011).

<sup>101</sup> Samuel Issacharoff, *On Political Corruption*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 133 The Century Foundation Press (New York) (2011).

unconventional corruption, both contributions and expenditures by outside parties must be limited. Unfortunately, in countries with strong protections for free speech, restrictions on campaign expenditures sometimes receive pushback from the courts.<sup>102</sup> A common argument is that money spent on campaign activities is the equivalent of political speech, which, in order to maintain a proper democracy, should only be limited in the most rare of circumstances.<sup>103</sup> Prevention of corruption is one such deserving circumstance. Courts, however, do not always agree with this conclusion. When this occurs, reformers concerned with the effects of unconventional corruption must gather the political will to amend and clarify the foundational principles of their democracy.<sup>104</sup>

## V. CORRUPTION IN THE UNITED STATES

### A. CONVENTIONAL CORRUPTION IN THE UNITED STATES

In regard to conventional corruption, the United States is a success. From the beginning, Americans have shared a suspicion of government power.<sup>105</sup> The people have cooperated to build and sustain a government that is not easily undermined by conventional corruption. This is not to say that the United States has not experienced conventional corruption. Even the best safeguards and practices can give way to abuses.<sup>106</sup> Congressmen associated with lobbyist Jack Abramoff, who pled guilty to corrupting public officials, were certainly involved

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<sup>102</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>103</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“The Act’s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on qualifications of candidates are integral to the operation of the system of government established by our Constitution.”); *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (“Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”); *McComish v. Bennett*, 564 U.S. \_ (2011) (slip. op. p. 8) (“Laws that burden political speech are accordingly subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”) (citations omitted).

<sup>104</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 34 W.W. Norton & Company (1972) (“Had not Machiavelli and Sidney both written that ‘all human Constitutions are subject to Corruption and must perish, unless they are *timely renewed* by reducing them to their first Principles?’”).

<sup>105</sup> PAUL COLLIER, *WARS, GUNS & VOTES, DEMOCRACY IN DANGEROUS PLACES* 199 Vintage Books (2009).

<sup>106</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES*, Clairpress Limited 38 (1996) (citing Sadig Rasheed and Dele Olowu (Eds.) “Ethics and Accountability in African Public Services, Nairobi, ICIPE Science Press, 1993, p. 301).

with conventional corruption.<sup>107</sup> More recently, Rod Blagojevich, the former Governor of Illinois, was sentenced to 14 years in prison on 18 counts of corruption, which included trying to sell or trade the Senate seat that became vacant when Barack Obama was elected president.<sup>108</sup> But in this basic form, such crimes are rare in the United States. Bribery at the federal level has nearly vanished. There are, undoubtedly, a handful of public officials trading government favors for private kickbacks, but these public officials are few and far between.<sup>109</sup>

Conventional corruption has been kept at a minimum due to the structure of government that is provided by the Constitution. As Zephyr Teachout has written, the Framers of the Constitution had an obsession with corruption.<sup>110</sup> It is not an overstatement to say that, above all else, the Framers envisioned the document as providing a structure to fight corruption.<sup>111</sup> Corruption was discussed more often at the Constitution Convention of 1787 than factions, violence, or instability.<sup>112</sup> As the Constitutional Convention got under way, George Mason proclaimed, “If we do not provide against corruption, our government will soon be at an end.”<sup>113</sup> George Mason’s concern was echoed by many voices throughout the summer of 1787. There was near unanimous agreement that corruption was to be avoided, that its presence in the political system produced a degenerative effect, and that the new Constitution was designed in part to insulate the political system from corruption.<sup>114</sup> In fact,

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<sup>107</sup> Jack Abramoff, “The Lobbyist’s Playbook,” CBS News, Nov. 6, 2011, [http://www.cbsnews.com/8301-18560\\_162-57319075/jack-abramoff-the-lobbyists-playbook/?tag=currentVideoInfo;videoMetaInfo](http://www.cbsnews.com/8301-18560_162-57319075/jack-abramoff-the-lobbyists-playbook/?tag=currentVideoInfo;videoMetaInfo).

<sup>108</sup> Monica Davey, “Blagojevich Sentenced to 14 Years in Prison,” The New York Times, Dec. 7, 2011, <http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html>.

<sup>109</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 8 Twelve (2011).

<sup>110</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 347 (2009); Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 148-49 The Century Foundation Press (New York) (2011); *but see* Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1, 4-10 (2012) (arguing that the Framers were not “obsessed” with corruption).

<sup>111</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 347 (2009); Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 148-49 The Century Foundation Press (New York) (2011).

<sup>112</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 352 (2009).

<sup>113</sup> Notes of Robert Yates (June 23, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 392 (“FARRAND’S RECORDS”).

<sup>114</sup> James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 181 (1994).

according to James Madison's notes, 15 delegates at the Constitutional Convention used the term "corruption" no less than 54 times.<sup>115</sup>

The Framers, in discussing ways to prevent corruption, considered both ancient and modern examples of government corruption. Their primary guidance, however, came from their experience under the British crown.<sup>116</sup> For example, during the Convention, Pierce Butler stated, "Look at the history of the government of Great Britain ... a man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows great veniality and corruption."<sup>117</sup> George Mason remarked, "I admire many parts of the British constitution and government, but I detest their corruption."<sup>118</sup> With corruption in Britain as a backdrop, some of the Convention's most extensive debates were about the relative strength of different constitutional designs to withstand corruption.<sup>119</sup>

To the Framers, a key component of a government without corruption was the separation of powers.<sup>120</sup> The Framers understood that one branch could become dependent upon another and that private citizens might be tempted to create dependent and corrupt public officials. Therefore, powers were divided in order to create a structural maze in the Senate, House, Judiciary, and Presidency so that private citizens looking to "own" public officials would find it too burdensome to buy off enough of them.<sup>121</sup> Thus, the separation of powers comported with Alexander Hamilton's view that "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption."<sup>122</sup>

The Framers' views on separation of powers were primarily sourced from the writings of Montesquieu, whose name appears more frequently than any other

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<sup>115</sup> James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 177 (1994); see also John M. Murrin, *Escaping Perfidious Albion: Federalism, Fear of Aristocracy, and the Democratization of Corruption in Postrevolutionary America*, in VIRTUE, CORRUPTION, AND SELF-INTEREST: POLITICAL VALUES IN THE EIGHTEENTH CENTURY 103, 104 (Richard K. Matthews ed. 1994) (stating that at the Founding, concern over corruption was "the common grammar of politics").

<sup>116</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 349 (2009); Gordon S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 29-36 W.W. Norton & Company (1972).

<sup>117</sup> Notes of Robert Yates (June 22, 1787), in 1 FARRAND'S RECORDS 379.

<sup>118</sup> Notes of Robert Yates (June 22, 1787), in 1 FARRAND'S RECORDS 380.

<sup>119</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 353 (2009).

<sup>120</sup> Victoria Nourse, "Toward a 'Due Foundation' for the Separation of Powers: The Federalist Papers as Political Narrative," 74 TEX. L. REV. 447, 459 (1996).

<sup>121</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 381 (2009).

<sup>122</sup> THE FEDERALIST No. 68, 411 (Clinton Rossiter ed. 2003).

authority in all of the literature on the Constitution.<sup>123</sup> Montesquieu was cited often by the delegates to the Constitutional Convention and his philosophy permeated the debates.<sup>124</sup> Corruption plays the lead antagonist to a flourishing polity in Montesquieu's writings.<sup>125</sup> For example, Book 8 of The Spirit of Laws is devoted solely to corruption within government. In Chapter I of Book 8, Montesquieu clearly states, "The corruption of each government almost always begins with that of its principles."<sup>126</sup>

The Framers' concern for corruption can be seen not only in regard to having a separation of powers between and within the branches; it can be seen throughout the Constitution. Specifically, it can be seen in Article I of the Constitution with regard to the legislature. A recurring discussion among the delegates about corruption concerned the size of the legislative bodies. James Wilson warned that "it is a lesson we ought not to disregard, that the smallest bodies are notoriously the most corrupt."<sup>127</sup> Notably, George Washington's only contribution to the Constitutional Convention arose in the context of a debate about the size of the House of Representatives. He argued that it should be larger, to ensure accountability to the people.<sup>128</sup> As a result of this discourse, the delegates decided to make the House of Representatives larger to protect against corruption.<sup>129</sup>

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<sup>123</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*, at xiii (enlarged ed. 1992); Duane Smith, "An Introduction to the Political Philosophy of the Constitution," Center for Civic Education, *available at* <http://www.civiced.org/papers/political.html> ("The modern reader must be struck, for instance, by the frequency with which the authors of the numerous pamphlets and newspaper articles published during the ratification controversy, appealed to the authority of the man they called 'the celebrated Montesquieu.'"); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L. J.* 1725, 1764 (1994).

<sup>124</sup> FORREST McDONALD, *NOVUS ORDO SECLORUM, THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 7 University of Kansas Press (1985) (citing FARRAND'S RECORDS, volumes 1, 2, and 3).

<sup>125</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 *CORN. L. REV.* 341, 347 (2009).

<sup>126</sup> MONTESQUIEU, *THE SPIRIT OF LAWS* 112-28, translated and edited by Anne M. Cohler, Basia C. Miller, and Harold S. Stone, Cambridge University Press (1989).

<sup>127</sup> Notes of James Madison (June 16, 1787), in 1 FARRAND'S RECORDS 254.

<sup>128</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 *CORN. L. REV.* 341, 356 (2009) (citing James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 *J. POL.* 181 (1994)).

<sup>129</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 *CORN. L. REV.* 341, 356 (2009) (citing U.S. CONST. art. I, § 2, cl. 3); Corruption was also a focal point regard to the duration of a legislator's term in office. In arguing (unsuccessfully) against a limit for a senator's term in office, Alexander Hamilton stated, "In Republics trifling Characters obtrude – they are easily corrupted – the most Important Individuals ought to be drawn forth for Government – the can only be effected by establishing upper House for good Behaviour." Notes of John Lansing (June 18, 1787), in SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 83-84 (James H. Hutson ed., 1987) (FARRAND'S RECORDS SUPP.).



In addition, some of the Convention's most heated discussions involved the Ineligibility Clause. There was a concern that the executive's power to appoint legislators to positions within the civil service would cause an improper legislative dependency on the executive.<sup>130</sup> As recognized by historian Forrest McDonald, corruption was the focus of the Convention's debates surrounding the ineligibility of Congressmen to hold other offices.<sup>131</sup> Pierce Butler, arguing against the executive's ability to appoint legislators to positions within the civil service, stated, "Executive may be as corrupt as Legislature – It would place too pervading an Influence in him."<sup>132</sup> New Jersey's Constitution of 1776 had an Ineligibility Clause that expressly tied such concerns to the concept of corruption – "That the legislative department of this government may, as much as possible, be preserved from all suspicion of corruption, none of the Judges of the Supreme or other Courts, Sheriffs, or any other person or persons possessed of any post of profit under government ... shall be entitled to a seat in the Assembly."<sup>133</sup>

In order to address such concerns of corruption, Article I, Section 6, Clause 2 of the United States Constitution provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."<sup>134</sup> At the Convention, the delegates explained that this provision would "preserv[e] the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption."<sup>135</sup> Specifically, James McHenry explained that the purpose of the provision was "to avoid as much as possible every motive for Corruption."<sup>136</sup>

The Framers' concern for corruption can also be seen in Article II of the Constitution with regard to the executive. The executive's power to appoint judicial officers was seen as a potential avenue for corruption. The initial draft of the Constitution had no requirement for the approval of appointments. In light of this, James Madison suggested that the Senate approve judicial appointments in

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<sup>130</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 129 Twelve (2011).

<sup>131</sup> FORREST McDONALD, *NOVUS ORDO SECLORUM, THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 199 University of Kansas Press (1985).

<sup>132</sup> Notes of John Lansing (June 23, 1787), in *FARRAND'S RECORDS SUPP.* 109.

<sup>133</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 129 Twelve (2011) (citing New Jersey Constitution of 1776, article XX, cited in John Joseph Wallis, "The Concept of Systematic Corruption in American History," in Glaeser and Goldin, eds., *Corruption and Reform*, 34); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L. J.* 1725, 1761-65 (1994) ("The first [state] constitutions consequently sought to prohibit the executive from corrupting the legislature through informal influence, commonly prohibiting any person holding government office or receiving government patronage from sitting in the assembly.").

<sup>134</sup> U.S. CONST., art. I, § 6, cl. 2.

<sup>135</sup> Notes of James Madison (June 23, 1787), in 1 *FARRAND'S RECORDS* 386 (quoting Rutledge).

<sup>136</sup> James McHenry, *Speech before the Maryland House of Delegates* (Nov. 29, 1787), in 3 *FARRAND'S RECORDS* 148.

order to forestall “any incautious or corrupt nomination by the Executive.”<sup>137</sup> As a result, Article II, Section I of the Constitution requires that the Senate approve judicial appointments.<sup>138</sup> The impeachment process was also intended to guard against corruption in the executive. If a President could not be removed from office until the next election, a President’s “loss of capacity or corruption ... might be fatal to the Republic.”<sup>139</sup> In fact, the initial terms under which a President could be impeached were “Treason[,] bribery[,] or *Corruption*.”<sup>140</sup>

The Framers’ concern for corruption also extended to the judiciary. An independent judiciary was seen as critical to a thriving republic. The determination that judges were to hold their office during good behavior meant that corruption would not be viewed with a blind eye.<sup>141</sup> Also, juries were provided for in order to curtail corruption. Elbridge Gerry “urged the necessity of Juries to guard agst. Corrupt Judges.”<sup>142</sup> Unlike judges, who could be regularly and predictably bought, juries were larger, and therefore more difficult to corrupt. Juries also did not depend upon their role for their livelihood, which created fewer temptations.<sup>143</sup> As a result of the Framers’ obsession with corruption, the United States gained a structure of government that has protected the people against a great deal of conventional corruption.

## B. UNCONVENTIONAL CORRUPTION IN THE UNITED STATES

### 1. *The Framers’ Definition of Corruption*

If conventional corruption were the only possible form of corruption, then the United States is a success – it does not have a corrupt government. Unfortunately, corruption has an “unconventional” form, and in the United States, it is rampant. The United States government, in this regard, is very corrupt, in spite of the fact that the Framers were obsessed with fighting corruption.<sup>144</sup> The Framers’ obsession was not solely focused on “conventional corruption”; rather, it

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<sup>137</sup> Notes of James Madison (July 18, 1787), in 2 FARRAND’S RECORDS 42-43.

<sup>138</sup> U.S. CONST., art. II, § 1.

<sup>139</sup> Notes of James Madison (July 20, 1787), in 2 FARRAND’S RECORDS 66.

<sup>140</sup> 3 FARRAND’S RECORDS 600; Edmund Randolph, Draft Sketch of Constitution (July 26, 1787), in FARRAND’S RECORDS SUPP. 189-90.

<sup>141</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 369 (2009).

<sup>142</sup> Notes of James Madison (September 12, 1787), in 2 FARRAND’S RECORDS 587.

<sup>143</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 369 (2009).

<sup>144</sup> Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law*, in MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED 148-49 The Century Foundation Press (New York) (2011).

was an obsession that also encompassed what has been termed “unconventional corruption.”<sup>145</sup>

Ultimately, the Framers intended to ensure the integrity and virtue of public officials.<sup>146</sup> The term “corruption,” according to the Framers, represented the use of government power in “the displacement of the public good by private interest.”<sup>147</sup> Thus, corruption meant much more than illegal theft, which was covered by the term “peculation.”<sup>148</sup> Gouverneur Morris explicitly stated that the corruption concern encompassed lawful abuses of power, not merely unlawful abuses or “usurpations.”<sup>149</sup> At the core of the Framers’ emphasis on integrity and virtue was the idea that public officials should be dependent upon the people alone.<sup>150</sup> Federalist Tench Coxe pointed out that “[t]he people will remain ... the fountain of power and public honour .... The president, the Senate, and the House of Representatives will be the channels through which the stream will flow – but it will flow from the people, *and from them only.*”<sup>151</sup>

Of course, the Framers’ beliefs should not be the be-all, end-all of the issue.<sup>152</sup> Many of the Framers had beliefs that do not comport with contemporary notions of freedom and justice (slavery comes to mind). It is helpful, however, to

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<sup>145</sup> See Lawrence Lessig, *Democracy After Citizens United*, BOSTON REV., Sept.-Oct. 2010 (referring to the Framers’ concern for protecting public officials from becoming dependent on anything other than the people alone).

<sup>146</sup> See FORREST McDONALD, *NOVUS ORDO SECLORUM, THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 71-72 University of Kansas Press (1985).

<sup>147</sup> RALPH KETCHUM, *FRAMED FOR POSTERITY* 58 University Press of Kansas (1993); see also Samuel Issacharoff, *On Political Corruption*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 126 The Century Foundation Press (New York) (2011) (“The Framers appear to have conceptualized corruption as a derogation of the public trust more than as the narrow opportunity for surreptitious gain.”).

<sup>148</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 375 (2009) (citing Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 KAN. L. REV. 1, 48 (2003)).

<sup>149</sup> Notes of James Madison (July 19, 1787), 2 FARRAND’S RECORDS 52.

<sup>150</sup> See THE FEDERALIST, No. 52.

<sup>151</sup> Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1804 (1994) (quoting Tench Coxe, *An Examination of the Constitution for the United States of America*, reprinted in *PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES* 131, 147 (Paul L. Ford ed., Da Capo Press 1968) (1888)) (emphasis added).

<sup>152</sup> See Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1, 10 (2012) (criticizing the original intent approach to constitutional interpretation in regard to corruption and stating, “The democratically enacted public text of the Constitution recedes, only to be replaced by amorphous normative principles whose contours are ‘discovered’ in documents that were not widely – or even publicly – available during the ratification process. If those normative principles have deep support in the present day, they arguably might have some strong claim on the modern interpreter. But a generalized fear that the other is corrupt or disloyal seems an odd and, perhaps, a dangerous place to begin our long march back to the lost world of 1787.”).

use the Framers' ideas as the standard against which to judge current practices.<sup>153</sup> If the Framers' standard appears to be just, or sensible, then Americans should ask whether any deviation from that standard is something to praise or condemn. If current laws allow for the integrity of public officials to be continually compromised, then Americans must ask whether the laws are inhibiting the kind of democracy that the Framers envisioned.<sup>154</sup>

## 2. *The Effect of Money and Lobbying in Modern Campaigns*

The problem of unconventional corruption in the United States is related to the staggering amount of money involved in modern campaigns. In 2008, the average amount it took to run for re-election in the House of Representatives was \$1.3 million, 23 times the average amount in 1974.<sup>155</sup> Why such an increase? One of the primary reasons is the advance in campaign technology and the related costs of such advances. Modern campaigns that are dependent on pollsters, consultants, and television commercials are many times more expensive than the simpler campaigns of the past. As technologies have advanced, congressional representatives have required more money than ever before to run for re-election.<sup>156</sup> Consequently, many of these public officials have developed a dependency upon contributions and expenditures from private individuals and entities – a dependency that the Framers would have deemed improper.

In addition to problems of integrity, this development has also produced greater problems of public policy. As fundraising has become more important, congressional representatives have shifted to the political extremes. It is now evident that a strong message to the party base is more likely to induce a financial response than a balanced, moderate message to the middle. In other words, extremism pays – literally.<sup>157</sup> As Bertram Johnson's study concludes, "An incumbent's ideological extremism improves his chances of raising a greater

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<sup>153</sup> Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1745 (1994) ("Nearly every theory of constitutional interpretation ... agrees that history merits some consideration.").

<sup>154</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 131 Twelve (2011).

<sup>155</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 91 Twelve (2011) (citing Arianna Huffington, *THIRD WORLD AMERICA* 130 (New York: Crown Publishers, 2010)).

<sup>156</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 95 Twelve (2011) (citing Robert Kaiser, *SO DAMN MUCH MONEY* 201 (New York: Knopf Books, 2009)); Mark C. Alexander, *Citizens United and Equality Forgotten*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 160 The Century Foundation Press (New York) (2011) ("Candidates are locked in an escalating cycle of fund-raising for campaigns that consumes their time. They spend more money each election, therefore they must start fund-raising earlier and do so more often in order to raise more for the next election.").

<sup>157</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 97 Twelve (2011).

proportion of funds from individual donors.”<sup>158</sup> So long as there is a constant demand for endless campaign cash, congressional representatives will sing the message that inspires the most money – even if that message is far from the views of most.<sup>159</sup>

Lobbying has played a key role in the rise of unconventional corruption in the United States. Lobbying, of course, is not new to the American republic, but it has undergone a transformation in recent times.<sup>160</sup> As Robert Kaiser describes the situation, in at least the last thirty years, the demand for campaign cash has turned the lobbyist into an essential supplier for elected public officials.<sup>161</sup> The lobbyist is not necessarily a direct supplier; rather, the lobbyist is more often an indirect supplier of campaign cash to the public official from private entities that hire lobbyists to produce the policy results that benefit such private entities.<sup>162</sup> Statistics show that when private entities hire lobbyists to produce policy results they are likely to receive great benefits. According to a recent Sunlight Foundation study of the 200 largest U.S. companies, the companies that spent the most on lobbying were most successful in reducing their reported tax rates between 2007 and 2010. While the average tax rate reduction for the largest 200 U.S. companies between 2007 and 2010 was 0.6 percent, six of the eight largest spenders on lobbying enjoyed a decrease of at least seven percentage points.<sup>163</sup> In order to maintain the prospect of beneficial campaign contributions and expenditures, public officials are likely to make decisions that benefit the private parties and lobbyists who have provided campaign cash in the past, and are likely to provide campaign cash in the future, regardless of whether such decisions benefit the public interest.

In spite of this, the current Supreme Court tolerates the effects of lobbying, and a number of academics even celebrate lobbying as a fundamental First Amendment right that is a necessary part of the legislative process.<sup>164</sup>

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<sup>158</sup> LAWRENCE LESSIG, REPUBLIC, LOST 97 Twelve (2011) (citing Bertram Johnson, *Individual Contributions: A Fundraising Advantage for the Ideologically Extreme?*, AMERICAN POLITICS RESEARCH 38 (2010): 890, 906).

<sup>159</sup> LAWRENCE LESSIG, REPUBLIC, LOST 99 Twelve (2011).

<sup>160</sup> LAWRENCE LESSIG, REPUBLIC, LOST 100-07 Twelve (2011).

<sup>161</sup> LAWRENCE LESSIG, REPUBLIC, LOST 103 Twelve (2011) (citing Robert Kaiser, *SO DAMN MUCH MONEY* (New York: Knopf Books, 2009), 291).

<sup>162</sup> LAWRENCE LESSIG, REPUBLIC, LOST 103 Twelve (2011).

<sup>163</sup> Lee Drutman, “Lobby more, pay less in taxes,” Sunlight Foundation (April 16, 2012), available at <http://sunlightfoundation.com/blog/2012/04/16/lobby-more-pay-less-in-taxes/>; see also Brian Kelleher Richter, Krislert Samphantharak, and Jeffrey F. Timmons, *Lobbying and Taxes*, 53 AMERICAN JOURNAL OF POLITICAL SCIENCE 893, 907 (2009) (indicating that, in 2009, the average firm received a return between \$6 and \$20 for every \$1 spent on lobbying for targeted tax benefits).

<sup>164</sup> Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth-Century Contract Law*, in MONEY, POLITICS, AND THE CONSTITUTION, BEYOND *CITIZENS UNITED* 144 The

However, this has not always been the prevailing view. In 1874, the Court stated: “If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to produce the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment infamous.”<sup>165</sup>

### 3. *The Effects of Unconventional Corruption: Troubles Unresolved*

The clue that something is currently very wrong is the endless list of troubles that are never resolved: a financial system composed of improper incentives;<sup>166</sup> nutrition standards that promote obesity;<sup>167</sup> environmental policies that exempt producers of the greatest environmental harms;<sup>168</sup> and unnecessary regulations that exist purely so that public officials can leverage private parties in order to receive campaign contributions.<sup>169</sup> A notable example of the negative effects of unconventional corruption can be seen in regard to the recent financial crisis in the United States. Government regulations, or lack of regulations, allowed banks, and even gave them incentives, to engage in risky behavior. The banks correctly recognized that they would not have to bear the losses of their risky behavior because they knew that their failure would be a failure for the

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Century Foundation Press (New York) (2011) (citing Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105, 107 (2008); Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J. L. & PUB. POL’Y 1, 9 (2006)).

<sup>165</sup> *Trist v. Child*, 88 U.S. 441, 451 (1874).

<sup>166</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, Public Law No: 111-203 (2010); Michael Beckel, “Campaign Cash from Wall Street Favored Representatives Who Opposed Finance Reform Bill,” Center for Responsive Politics, *available at* <http://www.opensecrets.org/news/2009/12/campaign-cash-from-wall-street.html> (“And a Center for Responsive Politics analysis shows that these industries, which aggressively fought to water down Democrats’ plans for new regulations and oversight, have long lined the pockets of lawmakers who voted against the bill.”); William Grieder, “Still No End to ‘Too Big to Fail,’” *The Nation*, February 15, 2012, *available at*, <http://www.thenation.com/blog/166277/still-no-end-too-big-fail>; LAWRENCE LESSIG, REPUBLIC, LOST 186-89 Twelve (2011).

<sup>167</sup> See Associated Press, “Congress pushes back on healthier school lunches,” November 15, 2011, *available at* [http://www.cbsnews.com/2102-505245\\_162-57324748.html?tag=contentMain;contentBody](http://www.cbsnews.com/2102-505245_162-57324748.html?tag=contentMain;contentBody); Ron Nixon, “School Lunch Proposals Set Off a Dispute,” *The New York Times*, *available at* <http://www.nytimes.com/2011/11/02/us/school-lunch-proposals-set-of-a-dispute.html?sq=pizzaisavevegetable&st=cse>.

<sup>168</sup> See, e.g., 42 U.S.C. § 9601(14); 53 Fed.Reg. 25, 447; 71 Fed.Reg. at 33631-22632; Renee Lewis Kosnik, Oil and Gas Accountability Project, EarthWorks, “The Oil and Gas Industry’s Exclusions and Exemptions to Major Environmental Statutes,” *available at* [www.earthworksactions.org/pubs/PetroleumExemptions1c.pdf](http://www.earthworksactions.org/pubs/PetroleumExemptions1c.pdf).

<sup>169</sup> See LAWRENCE LESSIG, REPUBLIC, LOST 196-99 Twelve (2011).

United States economy, and thus, the government would be forced to bail them out.<sup>170</sup> This was the problem of banks being “too big to fail.”

In 2010, the federal government passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) in order to address financial sector problems.<sup>171</sup> Dodd-Frank was intended “to end ‘too big to fail.’”<sup>172</sup> One simple way to provide incentives against risky behavior, and end “too big to fail,” would have been to put a hard cap on the size of banks so that their collapse would not trigger destruction of the national economy to the point where the government would be obligated to bail them out.<sup>173</sup> Unfortunately, Congress was not able to effectively accomplish such reform. While Dodd-Frank mandates that regulators label any bank with over \$50 billion in assets as “systemically important financial institutions,”<sup>174</sup> and includes measures to ensure that these institutions do not receive a bailout, such measures are based on the regulators’ discretion,<sup>175</sup> and thus, are not guaranteed to be effective.<sup>176</sup> As a result, the banks have only become larger since the enactment of Dodd-Frank,<sup>177</sup> and the government’s “promise” not to bail out banks has become illusory. If, today, any of the six largest banks were to face bankruptcy, there would be huge costs for the country’s economy. Government intervention to save a collapsing

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<sup>170</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 80 Twelve (2011).

<sup>171</sup> H.R. 4173, Public Law No: 111-203 (2010).

<sup>172</sup> H.R. 4173, Public Law No: 111-203 (2010).

<sup>173</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 188 Twelve (2011).

<sup>174</sup> H.R. 4173, Public Law No: 111-203, § 112(a)(2)(J); H.R. 4173, Public Law No: 111-203, § 116 (2010).

<sup>175</sup> H.R. 4173, Public Law No: 111-203, §§ 201-17 (2010).

<sup>176</sup> See Statement of Christy Romero, Acting Special Inspector General, Office of the Special Inspector General for the Troubled Asset Relief Program, “Does The Dodd-Frank Act End ‘Too Big To Fail?’” U.S. House of Representatives Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services, p. 10, June 14, 2011 (“It is too early to tell whether Dodd-Frank will ultimately be successful in ending ‘too big to fail’ .... In order to end ‘too big to fail,’ the regulators must take effective action using the tools that have been given them under the Dodd-Frank Act.”).

<sup>177</sup> Statement of Congresswoman Shelley Moore Capito, Chairwoman of the Subcommittee on Financial Institutions and Consumer Credit, “Does The Dodd-Frank Act End ‘Too Big To Fail?’” U.S. House of Representatives Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services, p. 1, June 14, 2011 (“The financial regulatory reform debate of 2009 and 2010 provided a forum for this change, but I believe it had a missed opportunity for Congress, the large institutions continue to grow, and I feel that we have done nothing but further embed the idea of an institution being ‘too big to fail.’”); “A Year After Dodd-Frank, Too Big To Fail Remains Bigger Problem Than Ever,” *The Huffington Post*, September 19, 2011, *available at* [http://www.huffingtonpost.com/2011/07/20/-dodd-frank-too-big-to-fail\\_n\\_903969.html](http://www.huffingtonpost.com/2011/07/20/-dodd-frank-too-big-to-fail_n_903969.html);

LAWRENCE LESSIG, *REPUBLIC, LOST* 188 Twelve (2011).

bank would not only be justified, it would be necessary. In the face of such a disaster, it would be irrational for the government not to offer a bailout.<sup>178</sup>

The failure of the federal government to end “too big to fail” was a victory for the banks, accomplished with the influence of their lobbyists. Notably, groups opposed to reform contributed more than \$25 million to members of Congress, more than two and a half times the contributions of groups supporting reform.<sup>179</sup> Similarly, in 2010, lobbying by interests opposed to reform was more than \$205 million, which dwarfed the \$5 million of lobbying for groups that supported reform.<sup>180</sup> Members of Congress recognized that if they did not vote in line with the interests of their contributors, they would not likely receive the benefit such contributions and expenditures in the future, and thus, would not likely be re-elected. Therefore, the interests of the people were ignored due to the influence of money in campaigns, as is the case with unconventional corruption.

An even more recent example of the negative effects of unconventional corruption can be seen in regard to federal government’s nutritional standards for school lunches. According to members of the nutritionist community, childhood obesity is a significant problem in the United States.<sup>181</sup> In fact, according to the U.S. Department of Health & Human Services, childhood obesity has tripled in the past three decades.<sup>182</sup> One would think that public officials would address this problem by promoting healthier school lunches. However, in November 2011, Congress passed a spending bill that rejected the U.S. Department of Agriculture’s proposal to require a half-cup of tomato paste for any food item to be classified as a vegetable.<sup>183</sup> The Department of Agriculture’s proposal was based on recommendations from the Institute of Medicine, the health arm of the National Academy of Sciences.<sup>184</sup>

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<sup>178</sup> LAWRENCE LESSIG, REPUBLIC, LOST 188 Twelve (2011).

<sup>179</sup> LAWRENCE LESSIG, REPUBLIC, LOST 189 Twelve (2011); *see also* Michael Beckel, “Campaign Cash from Wall Street Favored Representatives Who Opposed Finance Reform Bill,” Center for Responsive Politics, *available at* <http://www.opensecrets.org/news/2009/12/campaign-cash-from-wall-street.html>.

<sup>180</sup> LAWRENCE LESSIG, REPUBLIC, LOST 189 Twelve (2011).

<sup>181</sup> Associated Press, “Congress pushes back on healthier school lunches,” November 15, 2011, *available at* [http://www.cbsnews.com/2102-505245\\_162-57324748.html?tag=contentMain:contentBody](http://www.cbsnews.com/2102-505245_162-57324748.html?tag=contentMain:contentBody); Ron Nixon, “School Lunch Proposals Set Off a Dispute,” The New York Times, *available at* <http://www.nytimes.com/2011/11/02/us/school-lunch-proposals-set-of-a-dispute.html?sq=pizzaisavegetable&st=cse>.

<sup>182</sup> U.S. Department of Health & Human Services, [aspe.hhs.gov/health/reports/child\\_obesity/](http://aspe.hhs.gov/health/reports/child_obesity/).

<sup>183</sup> Associated Press, “Congress pushes back on healthier school lunches,” November 15, 2011, *available at* [http://www.cbsnews.com/2102-505245\\_162-57324748.html?tag=contentMain:contentBody](http://www.cbsnews.com/2102-505245_162-57324748.html?tag=contentMain:contentBody).

<sup>184</sup> Associated Press, “Congress pushes back on healthier school lunches,” November 15, 2011, *available at* [http://www.cbsnews.com/2102-505245\\_162-57324748.html?tag=contentMain:contentBody](http://www.cbsnews.com/2102-505245_162-57324748.html?tag=contentMain:contentBody).



Instead of following the recommendations of the Institute of Medicine, Congress voted to allow just two tablespoons of tomato paste to count as a serving of vegetables, which has the effect of classifying a slice of pizza as a vegetable.<sup>185</sup> Why would Congress do this when childhood obesity is such a pressing problem? The answer is money and its corrupting effect on members of Congress. Corporate lobbyists, including many from the frozen food industry, spent \$5.6 million influencing members of Congress to relax school lunch standards.<sup>186</sup> This is a clear example of public officials acting against the public interest, not because they were doing what they thought was right, but because they wanted to continue receiving financial support from private donors.

The previous examples might imply that unconventional corruption is something that only frustrates the interests of those who desire increased government regulation. Unconventional corruption, however, frustrates the interests of those who push for less government regulation as well. Reforms targeted at reducing the size of government or the complexities of government regulation are difficult to achieve. There is a simple reason for this. When government regulation is decreased or simplified, there is a corresponding decrease in the number of individuals and entities that have an incentive to contribute campaign cash to public officials.<sup>187</sup> As long as public officials have a dependency on campaign cash, there is a conflict between the interests of small government activists and the interests of the dependent public officials.<sup>188</sup>

A prominent example of the government's constant refusal to reduce and simplify regulation is the increasing complexity of the federal tax code. Between 1987 and 2011, the number of pages in the CCH Standard Federal Tax Reporter more than doubled, growing from 33,030 to 72,574 pages, with more than half of those pages being added since 2001.<sup>189</sup> In 2005, the President's Advisory Panel of Tax Reform counted approximately 15,000 separate changes to the tax code since 1986, which amounts to more than two changes per day.<sup>190</sup> By showing

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<sup>185</sup> Associated Press, "Congress pushes back on healthier school lunches," November 15, 2011, available at [http://www.cbsnews.com/2102-505245\\_162-57324748.html?tag=contentMain:contentBody](http://www.cbsnews.com/2102-505245_162-57324748.html?tag=contentMain:contentBody).

<sup>186</sup> Ron Nixon, "School Lunch Proposals Set Off a Dispute," The New York Times, available at <http://www.nytimes.com/2011/11/02/us/school-lunch-proposals-set-of-a-dispute.html?sq=pizzaisavegetable&st=cse>.

<sup>187</sup> LAWRENCE LESSIG, REPUBLIC, LOST 196-99 Twelve (2011).

<sup>188</sup> LAWRENCE LESSIG, REPUBLIC, LOST 198 Twelve (2011).

<sup>189</sup> Lee Drutman, "Lobby more, pay less in taxes," Sunlight Foundation (April 16, 2012), available at <http://sunlightfoundation.com/blog/2012/04/16/lobby-more-pay-less-in-taxes/> (citing CCH Standard Federal Tax Reporter, [http://www.cchgroup.com/webapp/wcs/stores/servlet/product\\_Standard-Federal-Tax-Reporter\\_10151\\_-1\\_10053\\_TEMP0326](http://www.cchgroup.com/webapp/wcs/stores/servlet/product_Standard-Federal-Tax-Reporter_10151_-1_10053_TEMP0326)).

<sup>190</sup> Lee Drutman, "Lobby more, pay less in taxes," Sunlight Foundation (April 16, 2012), available at <http://sunlightfoundation.com/blog/2012/04/16/lobby-more-pay-less-in-taxes/> (citing

their willingness to make constant, and often irrational, changes to an already complicated tax code, members of the Congress have been able to persistently induce private entities to make campaign contributions and expenditures. Such acts of inducement would not be necessary if the members of Congress did not have an improper dependency on campaign cash.

Each side of the political divide assumes that their policies are not being achieved because there are too many liberals or too many conservatives in government. In reality, the current system prevents both sides from getting their way. Change for those who desire increased government protection is thwarted by powerful private interests who use their leverage to block changes in the status quo, while change for those who desire a decrease in unnecessary government regulation is thwarted by powerful public interests that work to block any change that would weaken their fundraising machine.<sup>191</sup> The existing system will always block the changes championed by each side. Both sides should therefore have the same interest in changing the system.<sup>192</sup>

#### 4. *The Supreme Court on Corruption and Campaign Finance*

The Supreme Court, unfortunately, has held, in essence, that there is little that the people can do through Congress to address problems of unconventional corruption without offending the Constitution. Although the Supreme Court has recognized that anti-corruption interests carry constitutional weight, the Court has limited its recognition to anti-corruption measures targeted at *quid pro quo* transactions. Thus, the Court has failed to acknowledge the improper dependencies of public officials associated with unconventional corruption.

Since the Tillman Act of 1907, corporations have been prohibited from making campaign contributions in U.S. elections.<sup>193</sup> In 1974, the Federal Election Campaign Act of 1971 (FECA) was amended in order to, among other things, limit campaign contributions and expenditures in regard to all private individuals and entities.<sup>194</sup> At the time, the 1974 amendments to FECA were described as “by far the most comprehensive legislation (ever) passed by Congress concerning election of the President, Vice-President, and members of Congress.”<sup>195</sup> One of the Court’s most prominent campaign finance decisions, *Buckley v. Valeo*,<sup>196</sup>

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President’s Advisory Panel on Tax Reform, <http://govinfo.library.unt.edu/taxreformpanel/final-report/index.html>)

<sup>191</sup> LAWRENCE LESSIG, REPUBLIC, LOST 211 Twelve (2011).

<sup>192</sup> LAWRENCE LESSIG, REPUBLIC, LOST 212 Twelve (2011).

<sup>193</sup> 34 Stat. 864 (January 26, 1907).

<sup>194</sup> 2 U.S.C. § 431 (1974).

<sup>195</sup> *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (quoting the U.S. Court of Appeals for the District of Columbia, 1519 F.2d 821, 831 (1975)).

<sup>196</sup> 424 U.S. 1 (1976).

came in response to this legislation. In addition to upholding disclosure requirements and a system of public financing for presidential elections, *Buckley*, which is often seen as the fountainhead of modern campaign finance jurisprudence,<sup>197</sup> addressed the constitutionality of limits on campaign contributions and expenditures. The Court’s guiding principle was that money used for campaign purposes could be equated with political speech, and thus afforded broad protection under the First Amendment.<sup>198</sup> With this principle in mind, the Court struck down the limits on campaign expenditures,<sup>199</sup> while upholding the limits on contributions.<sup>200</sup>

FECA’s limitations on contributions were upheld because the Court concluded that they served the government interests of limiting “corruption” and “the appearance of corruption.”<sup>201</sup> The limits on expenditures, on the other hand, were struck down because the Court concluded that the anti-corruption interests advanced by limiting expenditures did not outweigh the damage done to First Amendment freedoms.<sup>202</sup> In justifying this conclusion, the Court introduced the notion of *quid pro quo* corruption as being the core harm against which anti-corruption measures are intended to fight, stating, “The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”<sup>203</sup>

Although *Buckley* may be seen as the fountainhead of campaign finance jurisprudence, *Citizens United v. FEC*,<sup>204</sup> decided in 2010, is currently the most discussed and debated decision in the realm of campaign finance. In *Citizens United*, a nonprofit corporation brought an action against the Federal Election Commission (FEC), asserting that it feared it could be subject to civil and criminal penalties if it made a feature-length documentary available for free download by cable subscribers “on demand” within 30 days of primary

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<sup>197</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585 (2011); Mark C. Alexander, *Citizens United and Equality Forgotten*, MONEY, POLITICS, AND THE CONSTITUTION, BEYOND *CITIZENS UNITED* 157 The Century Foundation Press (New York) (2011) (“*Buckley* is the seminal modern-era campaign reform decision.”).

<sup>198</sup> *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“The Act’s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . .”).

<sup>199</sup> *Buckley v. Valeo*, 424 U.S. 1, 28-29 (1976).

<sup>200</sup> *Buckley v. Valeo*, 424 U.S. 1, 58 (1976).

<sup>201</sup> *Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976).

<sup>202</sup> *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976).

<sup>203</sup> *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (emphasis added).

<sup>204</sup> *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

elections.<sup>205</sup> The documentary, entitled *Hillary: The Movie*, contained no express advocacy, but did contain a number of negative statements about Hillary Clinton, who was at the time a candidate for president.<sup>206</sup> The FEC argued that the documentary was the equivalent of express advocacy, and therefore not eligible to be paid for with corporate treasury funds under the FEC regulations to Bipartisan Campaign Reform Act of 2002.<sup>207</sup> When *Citizens United* reached the Supreme Court, rather than addressing the narrow issue of whether the FEC regulations should be construed to apply to video-on-demand cable broadcasts, the Court asked for supplemental briefing on whether it should overrule past cases upholding the validity of legislation restricting campaign expenditures.<sup>208</sup>

Independent expenditure limits were held not to survive constitutional scrutiny because expenditures “including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>209</sup> In distinguishing *FEC v. National Right to Work Committee*,<sup>210</sup> which held that a nonprofit corporation could be limited in terms of who it could solicit for contributions to its political action committee, the Court stated that *National Right to Work Committee* had “little relevance,” because it “involved contribution limits, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.”<sup>211</sup> The Court notably distinguished *Caperton v. Massey*, a case in which the Court required the recusal of a state court judge in a matter in which one of the parties had spent considerable amounts on the judge’s campaign, as “limited to the rule that the judge [who benefited from significant spending on his behalf] must be recused, not that the litigant’s political speech could be banned.”<sup>212</sup> The Court acknowledged that it did not reach the question “whether

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<sup>205</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

<sup>206</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

<sup>207</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 594 (2011) (citing Brief for Appellee, No. 08-205, *Citizens United v. FEC*, 130 S. Ct. 876, available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205\\_Appellee.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_Appellee.pdf)); The Court had previously concluded that the only corporate funded advertisements that could be constitutionally barred were those that were the “functional equivalent of express advocacy.” *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 454-82 (2007).

<sup>208</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 592-93 (2011) (citing *Citizens United v. FEC*, 129 S. Ct. 2893 (2009) (“For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?”)).

<sup>209</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010); This holding was re-affirmed by the Court in *McComish v. Bennett*, 564 U.S. \_ (2011) (slip op., at 26) (“We have also held that ‘independent expenditures ... do not give rise to corruption or the appearance of corruption.’”).

<sup>210</sup> 459 U.S. 197 (1982).

<sup>211</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

<sup>212</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010).

the Government has a compelling interest in preventing foreign individuals or associates from influencing our Nation’s political process.”<sup>213</sup>

The reasoning behind *Citizen United*’s “crabbed” definition of corruption,<sup>214</sup> which fails to account for unconventional corruption, is faulty for multiple reasons. First, the Court in *Citizens United* neglected the Framers vision and concern regarding corruption. Instead of turning to the Framers, the Court turned to *Buckley*, which was treated as if it were its own beginning – sprung from itself, carrying enormous doctrinal weight.<sup>215</sup> The result is a modern framework for analyzing corruption that is lacking fidelity to the Constitution, previous case law, and common sense.<sup>216</sup> Starting as it does from *Buckley*, the *Citizens United* majority can be said to make a logical argument that leads to a logical conclusion. However, if you start from a flawed premise, then you finish with a flawed result.<sup>217</sup>

*Buckley* is a flawed premise because it does not ground the concept of corruption in constitutional history.<sup>218</sup> *Buckley* discussed the Framers extensively in some contexts. For example, in regard to whether the FEC was a legitimate institution, the Court stated, “Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution ....”<sup>219</sup> Yet the Court failed to consider the Framers’ views in the context of understanding corruption.<sup>220</sup> Attempting to understand the Framers’ views on political integrity simply by reading *Buckley* would likely lead the reader to believe that the Framers did not spend much time discussing corruption, which, of course, would be a false conclusion. Constitutional history, if referenced and relied upon, should be used consistently and coherently.<sup>221</sup>

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<sup>213</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010).

<sup>214</sup> *Citizens United v. FEC*, 130 U.S. 876, 961 (2010) (Stevens, J., dissenting) (referring the majority opinion as espousing a “crabbed view of corruption.”).

<sup>215</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 384 (2009); Even the *Citizens United* dissent only looks back as far as the 20<sup>th</sup> century. The Stevens dissent concluded by alluding to the troubled U.S. economy in 2010 driven by corporate excess, declaring that it was “a strange time to repudiate” the “common sense” of the American people dating back to Theodore Roosevelt’s efforts to fight “against the distinctive corrupting potential of corporate electioneering.” *Citizens United v. FEC*, 130 S. Ct. 876, 979 (2010) (Stevens, J., dissenting).

<sup>216</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 384 (2009).

<sup>217</sup> Mark C. Alexander, “*Citizens United* and Equality Forgotten,” MONEY, POLITICS, AND THE CONSTITUTION, BEYOND *CITIZENS UNITED* 159 The Century Foundation Press (New York) (2011) (arguing that the flawed premise was that the *Buckley* Court did not appreciate the importance of equality in regard to campaign speech).

<sup>218</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 385, 386 (2009).

<sup>219</sup> *Buckley v. Valeo*, 424 U.S. 1, 120 (1976).

<sup>220</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 398 (2009).

<sup>221</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 400 (2009).

In addition, *Buckley* introduced the notion of *quid pro quo* corruption as being the core harm against which anti-corruption measures are designed to fight, thus providing an opportunity for future Courts to hold that corruption and *quid pro quo* transactions might be interchangeable notions.<sup>222</sup> Even after the founding era, in cases involving corruption, *quid pro quo* corruption was merely hinted at; it was not seen as the core harm against which anti-corruption measures were designed to fight.<sup>223</sup> In the nineteenth century, courts frequently refused to enforce contracts involving corruption, not because they involved illegal *quid pro quo* transactions, but because they undermined the integrity of the political process.<sup>224</sup> For example, in the 1874 case of *Trist v. Child*,<sup>225</sup> the Supreme Court refused to enforce a contract between a client and his lawyer because the lawyer was hired to petition the government on behalf of the client, which was considered to be a lobbying action associated with corruption.<sup>226</sup> The Court held that the entire contract was against public policy and that the letters written to Congressmen by the lawyer were “if not corrupt, . . . illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy.”<sup>227</sup>

In addition to erroneously treating *Buckley* as if it were its own beginning, *Citizens United* is inconsistent with the reasoning of contemporary Supreme Court opinions, specifically *Caperton v. Massey*.<sup>228</sup> *Caperton* stemmed from a verdict returned against Massey Coal Company for the sum of \$50 million by a West Virginia jury in August 2002.<sup>229</sup> After the verdict, but before the appeal, West Virginia held its 2004 judicial elections, in which Don Blankenship, Massey’s CEO, donated almost \$2.5 million to “And For Sake Of The Kids,” a political organization that supported the election of Brent Benjamin to the West Virginia Supreme Court of Appeals.<sup>230</sup> In addition, Blankenship spent over \$500,000 on

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<sup>222</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 385, 386 (2009).

<sup>223</sup> See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 385, 386 (2009) (citing *Ex Parte Yarbrough*, 110 U.S. 651 (1884); *Trist v. Child*, 88 U.S. (21 Wall.) 441 (1874); *Bartle v. Nutt*, 29 U.S. (4 Pet.) 184 (1830); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)).

<sup>224</sup> Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth-Century Contract Law*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 135-52 The Century Foundation Press (New York) (2011).

<sup>225</sup> 88 U.S. 441 (1874).

<sup>226</sup> Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth-Century Contract Law*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 142 The Century Foundation Press (New York) (2011).

<sup>227</sup> Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth-Century Contract Law*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 142 The Century Foundation Press (New York) (2011).

<sup>228</sup> 129 S. Ct. 2252 (2009).

<sup>229</sup> *Caperton v. Massey*, 129 S. Ct. 2252, 2257 (2009).

<sup>230</sup> *Caperton v. Massey*, 129 S. Ct. 2252, 2257 (2009).

independent expenditures for advertisements supporting Benjamin.<sup>231</sup> Benjamin won the election, and in November 2007, the West Virginia Supreme Court of Appeals reversed the \$50 million verdict against Massey.<sup>232</sup> Justice Benjamin, who declined to recuse himself from the case, was the deciding vote in the 3 to 2 decision.<sup>233</sup>

The United States Supreme Court, in ruling that the Due Process Clause of the Fourteenth Amendment required Justice Benjamin to recuse himself, found that even “though no[] ... bribe or criminal influence” was involved, “Justice Benjamin would nevertheless feel a debt of gratitude to [CEO] Blankenship for his extraordinary efforts to get him elected.”<sup>234</sup> Maybe even more than gratitude, there is the possibility that Justice Benjamin acted on an incentive to reverse the original verdict so that campaign expenditures would continue to be made in the future. Regardless of whether the ultimate concern was gratitude or incentive, the Court in *Caperton* effectively equated campaign contributions and expenditures, recognizing that expenditures, as well as contributions, can have a corrupting influence on public officials. In fact, the Court repeatedly described the CEO as having made “contributions” to the candidate, even though virtually all of his money went to fund independent expenditures, not contributions.<sup>235</sup>

According to the dissent in *Citizens United*, the reason for such conflation by the majority in *Caperton* was a recognition that campaign expenditures are the “functional[] equivalent” of campaign contributions.<sup>236</sup> In distinguishing *Caperton*, the majority in *Citizens United* stated, “The remedy of recusal was based on a litigant’s due process right to a fair trial before an unbiased judge. *Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”<sup>237</sup> However, it seems appropriate to ask why the Court believed the litigant’s due process rights were being violated, and to this, it seems appropriate to answer that the Court recognized that the judge, because of the litigant’s campaign expenditures, had an incentive to act without regard for the public interest. This reasoning cannot be rectified with the *Citizens United* majority’s flat-out empirical statement that independent spending cannot corrupt.<sup>238</sup>

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<sup>231</sup> *Caperton v. Massey*, 129 S. Ct. 2252, 2257 (2009).

<sup>232</sup> *Caperton v. Massey*, 129 S. Ct. 2252, 2257-58 (2009).

<sup>233</sup> *Caperton v. Massey*, 129 S. Ct. 2252, 2258 (2009).

<sup>234</sup> *Caperton v. Massey*, 129 S. Ct. 2252, 2262 (2009).

<sup>235</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 612 (2011).

<sup>236</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 968 (2010) (Stevens, J., dissenting).

<sup>237</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010).

<sup>238</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 605 (2011) (citing *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010)).

Also, as has been written by Richard Hasen, the Court's crabbed definition of corruption poses likely problems of coherence for future case law.<sup>239</sup> As framed by the majority, the question before the Court in some future case would be whether the government has a compelling interest in "limiting foreign influence over our political process."<sup>240</sup> Foreign influence on the political process is a concern because, as compared to American citizens, it is less likely that foreign individuals, governments, and associations will have allegiance to the United States.<sup>241</sup> Thus, it is easy to see why governments would enact laws barring foreign individuals, governments, and associations from spending money on candidate elections. It is difficult, however, to see how limiting foreign spending could be constitutional, given the reasoning of the majority in *Citizens United*.<sup>242</sup>

The majority in *Citizens United* declared that independent expenditures cannot corrupt public officials.<sup>243</sup> The Court was not specifically referring to independent *corporate domestic* expenditures, or even *domestic* expenditures in general; rather, it was referring to *all* independent expenditures. But, even if the Court somehow manages to retrospectively narrow its reasoning in order to justify a limit on foreign spending on anti-corruption grounds, the Court would have to find that foreign expenditures are more likely to corrupt public officials than domestic corporate expenditures. This would be a hard sell. All spending can help a candidate, but if the source of foreign spending were disclosed, there could be public backlash.<sup>244</sup> Because of the potential for public backlash, a public official would rather have a domestic entity spending money on a campaign than a foreign entity. Therefore, a public official is more easily compromised by the prospect of foreign spending than domestic spending.

So, what will happen if this issue comes before the Court? Because at least some of the Justices appear to care about public opinion, and the public outcry over *Citizens United* could well pale in comparison to a Court decision allowing unlimited foreign funds in American elections, the Court will most likely uphold foreign spending limits as constitutional, and simply ignore the

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<sup>239</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

<sup>240</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 605 (2011) (citing *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010)).

<sup>241</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 607 (2011).

<sup>242</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 606 (2011).

<sup>243</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

<sup>244</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 609 (2011).



inconsistent parts of *Citizens United*, leading to even more incoherent case law.<sup>245</sup> If the Court were to correctly recognize the corrupting effects of all independent campaign expenditures, it would not have to promote incoherent case law.

## 5. *Solutions for Unconventional Corruption in the United States*

Unconventional corruption is rampant in the United States, and the courts have not helped the efforts of the American people to find solutions. Unless and until the problem of unconventional corruption is addressed, the endless list of problems facing the United States will remain unresolved. As Montesquieu wrote, “When a republic has been corrupted, none of the ills that arise can be remedied except by removing the corruption and recalling the principles; every other correction is either useless or a new ill.”<sup>246</sup> In reference to the word’s Latin derivation *radix*, meaning “root, base, foundation,” reformers in the United States need to be “radical.”<sup>247</sup> To be radical is to get at the root of the matter.<sup>248</sup>

The root of the matter is unconventional corruption and the improper dependency on campaign cash within government. Public officials must ask whether that dependency too severely weakens the independence of the government institutions in which they serve. If they do not ask that question, then they betray such institutions.<sup>249</sup> Unfortunately, the improper dependency is not easily curable. Due to the Court’s decisions striking down campaign finance legislation, Americans must be creative and look to other means of dealing with the corrupting influence of money on public officials.<sup>250</sup>

To begin with, the corrupting effect of campaign *contributions* must be limited. Since *Buckley*, it has been clear that Congress may limit campaign

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<sup>245</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 609-10 (2011) (citing Memorandum from Joel Benenson, President, Benenson Strategy Grp., to Interested Parties (June 21, 2010), available at <http://www.scribd.com/doc/33452341/Citizens-United-Survey> (“When voters learn that the ruling would make it easier for foreigners to spend money in U.S. elections, only 13% support it, while 82% oppose it.”); but see Sean Parnell, *More biased polling on Citizens United*, CTR. FOR COMPETITIVE POL. (June 23, 2010), <http://www.campaignfreedom.org/blog/detail/more-biased-polling-on-citizens-united> (criticizing methodology)).

<sup>246</sup> MONTESQUIEU, *THE SPIRIT OF LAWS* 121, translated and edited by Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, Cambridge University Press (1989).

<sup>247</sup> FORREST McDONALD, *NOVUS ORDO SECLORUM, THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 261 University of Kansas Press (1985).

<sup>248</sup> FORREST McDONALD, *NOVUS ORDO SECLORUM, THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 261 University of Kansas Press (1985).

<sup>249</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 17 Twelve (2011).

<sup>250</sup> Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth-Century Contract Law*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 138 The Century Foundation Press (New York) (2011).

contributions. However, according to the Court's case law, Congress is not permitted to enact significant limits on contributions that would contravene First Amendment freedoms.<sup>251</sup> Thus, individuals in the United States are still able to contribute large amounts of money directly to campaigns. In 2012, individuals will be able to contribute \$5,000 to a candidate; \$2,500 for a primary, and \$2,500 for the general election.<sup>252</sup>

In order to limit the corrupting effect of contributions, past solutions have focused on disclosure rules. Federal law requires all political contributions greater than \$200 to be recorded and disclosed.<sup>253</sup> The enactment of disclosure rules, which survived the scrutiny of *Buckley*,<sup>254</sup> was a necessary first step towards ending unconventional corruption in the United States. Without such rules, champions of reform would not have statistics and figures to support their arguments.

However, disclosure rules, while necessary, are not sufficient for eliminating unconventional corruption. As has been described by Marcos Chamon and Ethan Kaplan, the influence of campaign contributions may be independent of any actual amounts spent because the influence could also depend on the credible threat of contributions to benefit the public official's opponent.<sup>255</sup> For example, imagine that a corporation announced that it intended to spend millions of dollars to defeat any public official who supported workers' rights legislation. If the public official learned of the corporation's intent, and decided to change his or her position in regard to workers' rights, there would be little doubt that such change was the result of the corporation's threat. Yet, disclosure rules would not be able to quantify the corporation's influence nor the public official's unconventionally corrupt act.

The challenge in crafting solutions for unconventional corruption in the context of campaign finance reform is straightforward. As Justice Kagan recently acknowledged, "Campaign finance reform over the last century has focused on

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<sup>251</sup> *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) ("Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.").

<sup>252</sup> 14 U.S.C. § 441a(a)(1)(A); 14 U.S.C. § 441a(c).

<sup>253</sup> 14 U.S.C. § 434(b)(3)(A).

<sup>254</sup> *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) ("The strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are government interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved .... The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude.").

<sup>255</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 258 Twelve (2011) (citing Marcos Chamon and Ethan Kaplan, *The Iceberg Theory of Campaign Contributions: Political Threats and Interest Group Behavior* (April 2007), 2-5).

one key question: how to prevent massive pools of private money from corrupting our political system.”<sup>256</sup> Solutions must be devised in order to accommodate the need for funding sufficient to enable candidates to mount competitive races without rendering them unduly dependent on massive pools of private money.<sup>257</sup> One way of meeting this challenge is through a voluntary public financing system of elections. Such a system is premised on the idea that candidates should be rewarded for engaging the voting public and should receive public funds to the extent that they expand the network of citizens who participate through small contributions.<sup>258</sup> With the exception of public financing systems that provide for “trigger funds” that are released to a candidate in response to an opponent’s spending or hostile independent expenditures and are seen as imposing on free speech interests,<sup>259</sup> such systems have been upheld as constitutional by the Court.<sup>260</sup> Justice Kagan, dissenting from the Court’s invalidation of Arizona’s “trigger fund” provision in *McComish v. Bennett*, stated, “We recognized in *Buckley* that ... public financing of elections ‘facilitate[s] and enlarge[s] public discussion,’ in support of First Amendment values.”<sup>261</sup>

While the Presidential Election Campaign Fund Act and the 1974 Amendments to FECA provide for public financing of presidential elections,<sup>262</sup> there is currently no public financing system for members of Congress. The reason for this is not that certain members of Congress have not tried to pass such a statute; the reason is that they have not been successful. Proposed legislation, re-introduced as recently as 2011, known as the Fair Elections Now Act,<sup>263</sup> would amend FECA and allow candidates to run for public office without relying on large contributions. In order to qualify for public funding under the Fair Elections Now Act, a candidate for the United States House of Representatives would have to collect 1,500 contributions of \$100 or less from the people in their state and raise a total of \$50,000.<sup>264</sup> The qualified candidate would then receive public funding equal to 80% of the national average spent by winning candidates over

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<sup>256</sup> *McComish v. Bennett*, 564 U.S. \_\_ (2011) (slip op, p. 3) (Kagan, J., dissenting).

<sup>257</sup> Samuel Issacharoff, *On Political Corruption*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 131 The Century Foundation Press (New York) (2011) (citing Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting With Dollars*, 91 CAL. L. REV. 643, 645 (2003)).

<sup>258</sup> Samuel Issacharoff, *On Political Corruption*, in *MONEY, POLITICS, AND THE CONSTITUTION, BEYOND CITIZENS UNITED* 132 The Century Foundation Press (New York) (2011).

<sup>259</sup> See *McComish v. Bennett*, 564 U.S. \_\_ (2011) (slip op., at 2) (“We hold that Arizona’s matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.”).

<sup>260</sup> See *Buckley v. Valeo*, 424 U.S. 1, 85-109 (1976).

<sup>261</sup> *McComish v. Bennett*, 564 U.S. \_\_ (2011) (Kagan, J., dissenting) (slip op. at 9).

<sup>262</sup> 26 U.S.C. § 9001 et seq.

<sup>263</sup> Fair Elections Now Act, H.R. 1404, Sec. 501 (2011).

<sup>264</sup> Fair Elections Now Act, H.R. 1404, Sec. 512 (2011).

the previous two election cycles that would be split 40% for the primary and 60% for the general election.<sup>265</sup>

Under the proposed Fair Elections Now Act, a qualified candidate would also be eligible to receive additional matching public funds if he or she continued to raise small donations from their home state.<sup>266</sup> In turn, the candidate would be prohibited from accepting outside contributions other than the small donations from individuals in their home state.<sup>267</sup> This proposed Act, and its matching funds provision, stands on strong constitutional footing because, in place of provisions for additional funding triggered by an opponent's spending or hostile independent expenditures, such as those struck down by the Court in *McComish*, the Act conditions additional public funding on the candidate's own ability to raise funds in small amounts, thus empowering candidates to respond to a high-spending opponent or hostile independent expenditures at any point by simply raising more small donations from constituents.<sup>268</sup>

Robert Brooks, in 1910, stated, "It is highly improbable that the question of campaign funds would ever have been raised in American politics if party contributions were habitually made by a large number of persons each giving a relatively small amount."<sup>269</sup> Congress, therefore, could take a big step towards curing its improper dependency by passing a simple statute providing for public financing of elections.<sup>270</sup> Unfortunately, reform such as the Fair Elections Now Act that gives incentives for public officials to only accept small contributions from donors faces an immense obstacle. Every incumbent has been successful under the current system. No incumbent can be certain that he or she will be able to maintain such success under a radically different system. It is unlikely that incumbents are going to voluntarily reform the system.<sup>271</sup> For this reason, neither the House of Representatives nor the Senate has been able to pass the Fair Elections Now Act.

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<sup>265</sup> Fair Elections Now Act, H.R. 1404, Sec. 502 (2011).

<sup>266</sup> Fair Elections Now Act, H.R. 1404, Sec. 503 (2011).

<sup>267</sup> Fair Elections Now Act, H.R. 1404, Sec. 521 (2011).

<sup>268</sup> See "Fair Elections: A Constitutional Safe Harbor," Brennan Center for Justice, September 15, 2010, available at [http://brennan.3cdn.net/115f40822288b1bbd2\\_onm6bn0oy.pdf](http://brennan.3cdn.net/115f40822288b1bbd2_onm6bn0oy.pdf).

<sup>269</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 103 Twelve (2011) (quoting Robert C. Brooks, *CORRUPTION IN AMERICAN POLITICS AND LIFE* (New York: Dodd, Mead and Company, 1910), 228).

<sup>270</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 273 Twelve (2011).

<sup>271</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 274 Twelve (2011); USAID, Office of Democracy and Governance, "Money in Politics Handbook: A Guide to Increasing Transparency in Emerging Democracies," p. 50, November 2003, available at [www.usaid.gov/our\\_work/democracy\\_and.../pdfs/pnac223.pdf](http://www.usaid.gov/our_work/democracy_and.../pdfs/pnac223.pdf) ("Parties that are not in power are usually in the best position to benefit from reform, and may supply the largest number of reform-minded politicians with whom to work.").

But, there should be hope. The medical profession has dealt with similar issues, and they have reformed their institutions from within, despite the incentives for keeping the status quo. Physicians have the option of choosing amongst numerous pharmaceuticals to prescribe. In turn, pharmaceutical companies attempt to influence the decisions of physicians by offering well-paid speaking opportunities, free pharmaceutical samples, large gifts such as vacations, and small gifts like pens and notepads.<sup>272</sup> The physician begins to depend upon such gifts. And while there is no *quid pro quo* agreement that the physician will recommend the pharmaceutical company's treatment over others, the physician is more likely to have a positive attitude in regard to the pharmaceutical company and its representatives.<sup>273</sup> Social science data confirms what many pharmaceutical representatives already know: physicians are, in fact, quite susceptible to influence by the use of even small gifts, such as pens and notepads.<sup>274</sup>

The decision-making of physicians is very similar to the unconventional corruption that takes place with public officials. The physician is supposed to make judgments objectively, dependent upon the best available science about the benefits and costs of various treatments. Instead, the physician becomes dependent upon a pharmaceutical company. This is an improper dependence.<sup>275</sup> Like the public official, the physician is not an evil person. If the physician has committed an irresponsible act, it is at least an irresponsible act that can be understood. The problem is not the intention of the physician; the problem is the system, the institution as a whole.<sup>276</sup>

In the medical profession, however, those responsible for the effectiveness of the profession have acknowledged medical professionals' corrupted dependency on pharmaceutical companies, and have made reforms, despite the fact that many physicians and medical professionals had success under the gift-giving system. For example, in 2008, the University of Pittsburgh Medical

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<sup>272</sup> Andrew Lee Younkins, *The Physician Payments Sunshine Act and the Problem of Pharmaceutical Companies' Influence Over Prescribing Physicians*, at 7-12 (Fall 2008), available at <http://ssrn.com/abstract=1331022>.

<sup>273</sup> LAWRENCE LESSIG, REPUBLIC, LOST 15 Twelve (2011); Andrew Lee Younkins, *The Physician Payments Sunshine Act and the Problem of Pharmaceutical Companies' Influence Over Prescribing Physicians*, at 9-10 (Fall 2008), available at <http://ssrn.com/abstract=1331022> (citing Troyen Brennan & David J. Rothman et al., *Health Industry Practices That Create Conflicts of Interest: A Policy Proposal for Academic Medical Centers*, 295 J. AM. MED. ASS'N 429, 431 (2008)).

<sup>274</sup> Andrew Lee Younkins, *The Physician Payments Sunshine Act and the Problem of Pharmaceutical Companies' Influence Over Prescribing Physicians*, at 9 (Fall 2008), available at <http://ssrn.com/abstract=1331022> (citing Jason Dana & George Lowenstein, *A Social Science Perspective on Gifts to Physicians From Industry*, 290 J. AM. MED. ASS'N 252, 254 (2003)).

<sup>275</sup> LAWRENCE LESSIG, REPUBLIC, LOST 16 Twelve (2011).

<sup>276</sup> LAWRENCE LESSIG, REPUBLIC, LOST 15 Twelve (2011).

Center, a \$9 billion integrated global nonprofit health enterprise that has 54,000 employees, 20 hospitals, and 3,000 physicians, implemented a conflicts-of-interest policy aimed at making physicians' decisions free from influence created by gifts or improper relationships with the pharmaceutical and medical device industries.<sup>277</sup> The new policy bans gifts such as pens, notepads, and food provided by industry representatives.<sup>278</sup> It also includes stipulations on consulting relationships with industry, attendance at off-campus industry-sponsored meetings, and industry support for scholarships and fellowships.<sup>279</sup>

Revamped policies in the medical profession provide an example of freedom-restricting rules being self-imposed because of the realization that such restrictions are in the long-term interests of the institution. The medical profession recognized that in order to preserve the public's trust, it had to thwart the corrupting effect of money in the wrong place. If properly insulated, money within an institution can be fine. However, when money is in a place where it causes even the most dependable compass to deviate, there exists cause for concern.<sup>280</sup> Like the improper dependencies that existed in the medical profession, there exist improper dependencies for public officials in the United States. Public officials are responsible for effectiveness of their institutions. If they do not gather the political will to address this improper dependency, then they betray the institution that they serve.<sup>281</sup>

Still, a simple statute that attempts to limit campaign contributions from large donors by establishing a publicly-funded election system would not cure unconventional corruption in the United States because it would not combat the unconventional corruption that occurs due to independent expenditures. Because the Supreme Court has held that independent expenditures, "including those made by corporations, do not give rise to corruption or the appearance of corruption," limits on third party independent expenditures can now only be achieved through a change in the Constitution.<sup>282</sup> Sometimes a constitutional change is warranted, and necessary. As historian Gordon Wood wrote in The Creation of the American

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<sup>277</sup> UPMC Fast Facts, available at <http://www.upmc.com/aboutupmc/fast-facts/Pages/default.aspx>; Joe Fahy, "Implications of UPMC's ethics policy far-reaching," Pittsburgh Post-Gazette, February 10, 2008, available at <http://www.post-gazette.com/pg/08041/856084-28.stm>.

<sup>278</sup> Joe Fahy, "Implications of UPMC's ethics policy far-reaching," Pittsburgh Post-Gazette, February 10, 2008, available at <http://www.post-gazette.com/pg/08041/856084-28.stm>.

<sup>279</sup> Joe Fahy, "Implications of UPMC's ethics policy far-reaching," Pittsburgh Post-Gazette, February 10, 2008, available at <http://www.post-gazette.com/pg/08041/856084-28.stm>. In another example of reform, the Wisconsin Medical Society, in 2008, implemented a policy of no gifts from pharmaceutical companies. "Wisconsin medical society bans gifts from pharma companies," HCPRO, available at <http://www.hcpro.com/LFS-221943-356/Wisconsin-medical-society-bans-gifts-from-pharma-companies.html>.

<sup>280</sup> LAWRENCE LESSIG, REPUBLIC, LOST 35-36 Twelve (2011).

<sup>281</sup> LAWRENCE LESSIG, REPUBLIC, LOST 17 Twelve (2011).

<sup>282</sup> Citizens United v FEC, 130 S. Ct. 876, 909 (2010).

Republic, 1776-1787, “Had not Machiavelli and Sidney both written that ‘all human Constitutions are subject to Corruption and must perish, unless they are *timely renewed* by reducing them to their first Principles’?”<sup>283</sup>

According to Article V of the Constitution, there are two methods for proposing amendments to the Constitution. The first involves a path through Congress – “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution.”<sup>284</sup> This has been the exclusive path for each of the amendments to our Constitution, and it was used most recently in an attempt to amend the Constitution for purposes of eliminating the corruption associated with campaign contributions and expenditures. The amendment, proposed by Senator Tom Udall of New Mexico, would simply have given Congress the power to set limits for campaign contributions and expenditures.<sup>285</sup> This proposed amendment did not earn the support of two thirds of both Houses. It did not earn such Congressional support for many of the same reasons that the Fair Elections Now Act did not earn Congressional support. No incumbent can be certain that he or she will be able to maintain such success under a radically different system.<sup>286</sup>

Fortunately, there is a second method for proposing amendments to the Constitution. This method involves a path through the states – “[O]n the Application of the Legislatures of two thirds of the several States, [the states] shall call a Convention for proposing Amendments.”<sup>287</sup> The Framers created this second method of amending the Constitution in order to address situations in which reform through Congress was not possible – when the subject of reform is ... Congress. During the Constitutional Convention of 1787, many believed that Congress should have a very limited role in passing amendments, since it was possible that Congress “would be the very occasion for moving to amend.”<sup>288</sup>

While the first method for amending the Constitution through Congress would focus solely on the proposed amendment, a call for a convention could involve broader interests. As noted by Lawrence Lessig, “[D]ifferent souls with different objectives could agree on the need for a convention without agreeing on the particular proposals that a convention should recommend.”<sup>289</sup> Some people, for example, may desire an amendment allowing the states to prohibit flag burning, or abortion. Others may want a balanced budget amendment. These

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<sup>283</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 34 W.W. Norton & Company (1972).

<sup>284</sup> U.S. CONST. art. V.

<sup>285</sup> S.J. Res. 29, Nov. 1, 2011.

<sup>286</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 274 Twelve (2011).

<sup>287</sup> U.S. CONST. art. V.

<sup>288</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 294-95 Twelve (2011) (citing William W. Van Alstyne, *The Limited Constitutional Convention: The Recurring Answer*, *DUKE L. J.* 4 (1979): 985, 987).

<sup>289</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 293 Twelve (2011)

interests would contribute to the call for a convention. And while a number of issues could be discussed at a convention, only the causes with great public support would receive recommendations for ratification. An amendment giving Congress the ability to limit campaign expenditures is one such cause. According to a 2010/2011 survey conducted by Hart Research Associates, 79% of Americans support the passage of an amendment to overturn *Citizens United*.<sup>290</sup> Once public opinion manifests itself in an amendment, Congress' desire to maintain the status quo will be inadequate to thwart the movement for change. In order to reform American institutions and combat unconventional corruption, it must be recognized that those at the heart of power are not going to change how things are done. If the Constitution is to be renewed to reflect its first principles, a movement from outside is needed.

## VI. CORRUPTION IN KENYA

### A. CONVENTIONAL CORRUPTION IN KENYA

#### 1. *Kenya's Special Status*

Kenya is one nation in Africa that has always been monitored by outsiders for indications as to which course the entire continent is taking. Long before Barack Obama's ancestry intrigued Western societies, Kenya was fantasized through Ernest Hemingway's tales of adventure and stories of man-eating lions.<sup>291</sup> Also, Kenya's dysfunctional neighbors have always made it look good in comparison. Kenya has never exhibited the chaos of Uganda, the failed socialism of Tanzania, nor the genocide of Rwanda and Sudan.<sup>292</sup> In place of Somalia's

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<sup>290</sup> Hart Research Associates, "Impressions Of The Citizens United Decision And A Proposed Constitutional Amendment To Overturn It," available at <http://theconstitution.org/text-history/2700>. From December 27, 2010, to January 3, 2011, Hart Research Associates conducted a survey among 500 registered voters on behalf of Free Speech For People with support from the Nathan Cummings Foundation. The interviews were conducted online among a nationally representative sample of voters. As a caveat, the survey focused on Congress's authority to limit the amount of money *corporations* can spend on election, rather than Congress's authority to limit contributions and expenditures in general.

<sup>291</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER*, 8 (2009).

<sup>292</sup> BARACK OBAMA, *DREAMS FROM MY FATHER* 312 Crown Publishers (2004); MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER*, 8-9 (2009); PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 55, 57 Oxford University Press (2007).



feuding warlords and Ethiopia's feeding stations, Kenya offered safari parks and five-star coastal hotels.<sup>293</sup>

Kenya became locked in a symbiotic relationship with the developed world and the lending institutions set up to fight global poverty after the Second World War.<sup>294</sup> With independence in 1963, Kenya became the West's most stalwart pupil in Africa,<sup>295</sup> a model developing country in a continent where civil wars raged and authoritarian governments reigned.<sup>296</sup> Seen as too important to fail, Kenya became the first sub-Saharan country to receive structural adjustment funding from the International Monetary Fund (IMF) in the 1980s. Between 1970 and 2006, Kenya received \$U.S. 17.26 billion from foreign allies, roughly one and a quarter times what the United States spent on the Marshall Plan. At its height in the early 1990s, aid from both multinational lending institutions and donor nations accounted for 45 percent of the Kenyan government budget.<sup>297</sup>

By the end of the 20<sup>th</sup> century, however, Kenya was beginning to look dreadfully unimpressive; the stalwart pupil had become a surly delinquent.<sup>298</sup> Once ranked a middle-income country, Kenya trailed towards the bottom of the international league tables, its early potential unfulfilled.<sup>299</sup> An editorial in the *Financial Times* from 2002 stated, "Kenya is now one of the most disappointing performers in sub-Saharan Africa .... There is barely an economic or social indicator that does not testify to the country's decline."<sup>300</sup> Given that Kenya had never been invaded, never experienced a civil war, and had started out with so

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<sup>293</sup> MICHAELA WRONG, IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER, 9 (2009).

<sup>294</sup> MICHAELA WRONG, IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER, 183-84 (2009); Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, pp. 2-3 (June 8, 2011), available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf).

<sup>295</sup> BARACK OBAMA, DREAMS FROM MY FATHER 312 Crown Publishers (2004).

<sup>296</sup> Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, p. 2 (June 8, 2011), available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf); James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT'L L. 407, 411 (1999); Pia Anthonymuttu, *Democracy in Practice – Campaigns, Elections and Voters, Policy Perspectives, Kenya*, 13 GEO. PUB. POL'Y REV. 125 (2007-2008).

<sup>297</sup> MICHAELA WRONG, IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER, 183-84 (2009).

<sup>298</sup> Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, pp. 2-3 (June 8, 2011), available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf).

<sup>299</sup> MICHAELA WRONG, IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER, 10 (2009).

<sup>300</sup> MICHAELA WRONG, IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER 11, (2009) (citing "Kenya's Chance for a New Beginning," *Financial Times*, (30 December 2002)).

much in its favor, the source of the problem was obvious – the government was overflowing with corruption.<sup>301</sup>

## 2. *Kenya's History of Corruption*

Although Kenya's history as a sovereign nation is relatively short, it has fought many battles with corruption. Corruption was a concern being addressed by tribes in Kenya even before the arrival of Europeans. As documented by Kenya's first president, Jomo Kenyatta, in his anthropological account of tribal life in Kenya, ceremonial elders of the Kikuyu tribe would utter curses on anyone who might try to obtain a faulty judgment in a dispute resolution proceeding through the influence of bribery and corruption. This curse acted as a check against the evils of bribery and corruption.<sup>302</sup> The arrival of Europeans, however, brought new problems of corruption. Kenyatta accounted that Europeans discouraged the oaths of the Kikuyu, regarding them as mere superstition. Instead, the Europeans adopted what Kenyatta described as "a form of raising hands or kissing the Bible as symbols of oath," which had no meaning at all to the Africans. The result was "fabrication of evidence in courts of justice, and furthermore, bribery and corruption [as] the order of the day ...."<sup>303</sup>

The arrival of Europeans brought other challenges as well. Kenyatta described the Kikuyu as being "put under the ruthless domination of European imperialism through the insidious trickery of hypocritical treaties."<sup>304</sup> The reward for sacrificing African lives in the First World War was the confiscation of Africa's best lands, imposition of heavy taxation, denial of free speech, and the introduction of the *kipande* with its diabolical system of fingerprints, as if the Africans were criminals.<sup>305</sup> The native Kenyans had come to expect little from the government of the colonial occupiers besides extortion and harassment. Anyone who followed the straight path died a poor man, so Kenyans had no

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<sup>301</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 11, (2009).

<sup>302</sup> JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE GIKUYU* 212 Vintage Books, New York (1965).

<sup>303</sup> JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE GIKUYU* 216 Vintage Books, New York (1965).

<sup>304</sup> JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE GIKUYU* 47 Vintage Books, New York (1965).

<sup>305</sup> JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE GIKUYU* 204 Vintage Books, New York (1965); *see also* PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 51, Trafford Publishers (2004) ("When the white man came, he literally displaced the black man from all the prime land and occupied it by force. The most fertile land in Central, Coast and Rift Valley Provinces was occupied by the white settlers, making the natives become squatters in their own country.").

option but to glorify corruption.<sup>306</sup> Thus, it is essential to appreciate that present day corruption in Kenya has a history that stems from outside, as well as within, the country. This, however, cannot be an excuse for justifying the continued existence of corruption. Regardless of the problem's source, the primary responsibility to solve it must lie with Kenya.<sup>307</sup>

Because corruption was a concern even before independence,<sup>308</sup> the Kenyan Independence Constitution was designed to instill checks and balances within the government, especially in terms of Parliament, an independent judiciary, an efficient police force, and a free press.<sup>309</sup> However, when Kenyatta took over as president, the powers of the legislature became increasingly diminished as most of the checks and balances were dismantled.<sup>310</sup> The diminished power of the legislature was accomplished through a series of constitutional amendments, the purpose of which was to consolidate power in the presidency.<sup>311</sup> The amendments gave the president the power to suspend

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<sup>306</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 55, (2009) (quoting a community worker from Kisumu, Kenya); PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 47, Trafford Publishers (2004) (“The black people that worked for the white government saw the government as a foreign entity, which was there to suppress the black man. [Therefore], the black public servant had ... no respect for government property and other utilities.”).

<sup>307</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 38 Clairpress Limited (1996); PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 19, Trafford Publishers (2004); PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 180 Oxford University Press (2007) (“Change in the societies at the very bottom must come predominantly from within; we cannot impose it on them.”).

<sup>308</sup> The first piece of anti-corruption legislation in Kenya was the Prevention of Corruption Act in 1956, passed by the Kenyan government prior to independence. *See* The Prevention of Corruption Act, (1956) Cap. 65 (repealed).

<sup>309</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 172 Clairpress Limited (1996) (citing Swedish Development Cooperation Office, “Corruption in Kenya: a Review of Literature,” p. 14, 1993); *see also* PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 80, Trafford Publishers (2004).

<sup>310</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 125 Clairpress Limited (1996); Zareen Iqbal, *Kenya's New Constitution: Erasing the Imperial Presidency*, International Institute for Justice and Development (September 22, 2010), available at <http://www.iijd.org/index.php/news/entry/kenyas-new-constitution-erasing-the-imperial-presidency>.

<sup>311</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 *IND. J. GLOBAL LEGAL STUD.* 341, 366 (2011); Alicia L. Bannon, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 *YALE L. J.* 1824, 1830 (2007); *see also* *Jesse Kamau & 25 Others v. Attorney General* [2010] p. 78 eKLR (citing Professors Ghai and McAuslan, *PUBLIC LAW AND ADMINISTRATION IN KENYA*, p. 215); Zareen Iqbal, *Kenya's New Constitution: Erasing the Imperial Presidency*, International Institute for

proceedings and dissolve the legislature, causing the legislature to lose control of its calendar and operate at the will of the president.<sup>312</sup> In addition, there were few incentives for legislators to enforce their checks on the executive. This is because legislators who were deemed loyal to the executive were appointed as ministers, assistant ministers, or chairmen of public corporations.<sup>313</sup> Also, because the Ministry of Finance ensured that the legislature was starved of funds when determining its budget, the legislators often had to rely on cash handouts from the president to meet the demands of their constituents.<sup>314</sup> Due to such circumstances, the legislature has played a relatively insignificant role in the government's policymaking.

The Kenyan judiciary, from independence until just recently, was also weakened. In order to create an impartial and independent judiciary, the Independence Constitution established a Judicial Service Commission (JSC) to regulate judicial appointments and disciplinary actions. The chief justice was appointed by the governor-general, acting in accordance with the advice of the prime minister, while other judges were appointed by the governor-general, acting in accordance with the advice of the JSC.<sup>315</sup> Following the constitutional amendments, the power to appoint the chief justice was transferred to the president, who was no longer required to seek advice from anyone.<sup>316</sup> While the president was required to consult the JSC in appointing other judges, little consultation occurred in practice.<sup>317</sup>

As acknowledged recently by Migai Akech, this system was open to abuse because it contained no standards for vetting candidates.<sup>318</sup> The Task Force on Judicial Reforms, in 2010, noted that “[t]he process through which candidates for

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Justice and Development, September 22, 2010, *available at*

<http://www.iijd.org/index.php/news/entry/kenyas-new-constitution-erasing-the-imperial-presidency>.

<sup>312</sup> See CONSTITUTION OF KENYA 1963, art. 30; The Constitution of Kenya (Amendment) Act, No. 40 of 1966).

<sup>313</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 367 (2011).

<sup>314</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 367 (2011).

<sup>315</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 376-77 (2011).

<sup>316</sup> See CONSTITUTION OF KENYA 1963, art. 61(1); Zareen Iqbal, “Kenya’s New Constitution: Erasing the Imperial Presidency,” International Institute for Justice and Development, September 22, 2010, *available at* <http://www.iijd.org/index.php/news/entry/kenyas-new-constitution-erasing-the-imperial-presidency>.

<sup>317</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 377 (2011) (citing CONSTITUTION OF KENYA 1963, art. 61(2)).

<sup>318</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 377 (2011).

appointment are currently identified and vetted by the JSC is neither transparent, nor based on any publicly known or measurable criteria.”<sup>319</sup> As a result, the individuals who have become judges have not necessarily been the most qualified or deserving candidates.<sup>320</sup> Such unqualified judicial officers are likely to perceive it to be in their best interest to protect their appointing authority.<sup>321</sup> They are also likely to be susceptible to bribes. It thus comes as no surprise that the Kwach Judicial Reform Committee reported numerous allegations of actual payments to judges and magistrates intended to influence their decisions.<sup>322</sup>

With respect to the removal of judges, the Independence Constitution provided that judges could be dismissed by the president for cause if an impartial tribunal recommended their removal.<sup>323</sup> Unfortunately, the Independence Constitution failed to establish due process mechanisms to ensure that the process of removal was fair. Thus, in practice, judges served at the will of the president.<sup>324</sup> The lack of judicial independence has had consequences on the Kenyan people. According to a report from the Robert F. Kennedy Memorial Center for Human Rights, the government used the courts to victimize people and punish political dissent.<sup>325</sup> In addition, Kenya’s loss of judicial independence caused foreign investors to lose confidence in the country’s courts as impartial

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<sup>319</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 377-78 (2011) (citing Final Report of the Task Force on Judicial Reforms 24 (2010), available at <http://www.kenyalaw.org/Downloads/FinalReportoftheTaskForceonJudicialReforms.pdf>).

<sup>320</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 378 (2011); see also PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 83, Trafford Publishers (2004) (noting that the Kwach Judicial Reform Committee “spoke of having confirmed incompetence, drunkenness, racketeering, neglect of duty, sexual harassment and corruption among magistrates, judiciary staff, advocates and the police.”).

<sup>321</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 378 (2011).

<sup>322</sup> PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 84, Trafford Publishers (2004).

<sup>323</sup> PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 81, Trafford Publishers (2004) (citing Constitution of Kenya 1963, Section 62(3)).

<sup>324</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 378 (2011) (citing Int’l Comm’n of Jurists [ICJ], *Kenya: Judicial Independence, Corruption and Reform* 16 (2005) (“The possibility that they could be next in line to be publicly castigated and removed from office without due process has lowered the general *esprit de corps* of the judiciary as a whole.”)).

<sup>325</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 49 Clairpress Limited (1996).

arbitrators in business-related cases, which exacerbated the declining foreign investment in Kenya.<sup>326</sup>

The Public Service has also been compromised over the years. The Independence Constitution made elaborate provisions to ensure independence and neutrality in the Public Service. For example, it created an autonomous Public Service Commission (PSC) and put it in charge of recruitment, promotion, discipline, and dismissal.<sup>327</sup> The Independence Constitution also gave security of tenure to members of the PSC and ensured that they would be neither public officers nor political figures.<sup>328</sup>

Under the Independence Constitution, the president was permitted to instruct the Public Service to execute policy decisions if such decisions had been made jointly and pursuant to the deliberations of the cabinet, which was composed of ministers who were accountable to the legislature for all things done by the president.<sup>329</sup> Unfortunately, the Independence Constitution did not impose an obligation on the president to seek the aid and advice of the cabinet. Thus, in practice, the president was an “executive with unshared responsibility for policy.”<sup>330</sup>

Besides strengthening the executive in relation to the legislature and the judiciary, the constitutional amendments of the 1960s also enhanced the president’s control over the Public Service. One amendment empowered the president to appoint members of the PSC without reference to anyone.<sup>331</sup> Another amendment gave the president the ability to constitute and abolish offices in the Public Service, to make appointments to any such office, and to terminate any such appointment.<sup>332</sup> Consequently, Kenyan public servants held their offices at the pleasure of the president. Security of tenure had disappeared.

After President Kenyatta assumed control over the Public Service, he quickly began to destabilize its independence. The principle of meritocracy was

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<sup>326</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 114 Clairpress Limited (1996).

<sup>327</sup> See CONSTITUTION OF KENYA 1963, art. 106; Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 354 (2011) (citing C. Odhiambo-Mbai, *Public Service Accountability and Governance in Kenya Since Independence*, 8 AFR. J. POL. SCI. 113, 138-39 (2003)).

<sup>328</sup> See CONSTITUTION OF KENYA 1963, art. 106(3), (7)).

<sup>329</sup> See CONSTITUTION OF KENYA 1963, art. 17(3)).

<sup>330</sup> Migai Akech, *Abuse of Power and Corruption in* IND. J. GLOBAL LEGAL STUD. *Journal of Global Legal Studies* 341, 355 (2011) (citing B.O. Nwabueze, *PRESIDENTIALISM IN COMMONWEALTH AFRICA* 43, 199 (1974)).

<sup>331</sup> CONSTITUTION OF KENYA 1963, art. 106(2); Constitution of Kenya (Amendment) Act, No. 28 of 1964).

<sup>332</sup> Constitution of Kenya (Amendment) (No. 3) Act, No. 28 of 1964); Muthomi Thiankolu, *Landmarks for El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation in Kenya*, 1 KENYA LAW REVIEW 188, 188 (2007).

promptly set aside as the president filled key positions and granted promotions without due regard to merit.<sup>333</sup> Public servants who actually disapproved of corrupt activity were not empowered to question the illegal instructions of ministers before implementing such instructions, which often caused public servants to become accomplices in schemes of grand corruption.<sup>334</sup> For example, the Government Financial Regulations required public servants to obey the instructions of ministers, even if the public servants found such instructions to be illegal or improper.<sup>335</sup> These regulations even obliged public servants to implement verbal instructions, although they could ask for written confirmation afterwards.<sup>336</sup>

Kenya enacted a number of laws over the last decade with the purpose of increasing accountability in the Public Service.<sup>337</sup> Unfortunately, these new laws have not been effective. Perhaps the most manifest illustration was the behavior of the head of the Public Service in relation to the 2007 general elections in Kenya.<sup>338</sup> The Commission of Inquiry into Post-Election Violence found that the head of Public Service ordered the Administration Police to train its officers to act as agents for the Party of National Unity (PNU), the incumbent president's party, on election day.<sup>339</sup> The Commission also found that the role of these officers "was to disrupt polling and where possible ensure that government supporters amongst the candidates and voters prevailed."<sup>340</sup>

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<sup>333</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 355 (2011) (citing C. Odhiambo-Mbai, *Public Service Accountability and Governance in Kenya Since Independence*, 8 AFR. J. POL. SCI. 113, 118 (2003)).

<sup>334</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 362-63 (2011).

<sup>335</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 363 (2011) (citing Report of the Jud. Comm'n of Inquiry into the Goldenberg Affair ¶ 591 (2005) (Kenya), available at <http://www.tikenya.org/documents/Goldenberg%20Report.pdf>).

<sup>336</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 363 (2011) (citing Ministry of Fin., Government Financial Regulations and Procedures ¶¶ 5-8 (1989) (Kenya)).

<sup>337</sup> See, e.g., Public Officer Ethics Act, (2003) Cap. 183 (Kenya); Pub. Serv. Comm'n of Kenya, L.N. 28/2005, The Public Service Commission Regulations (2005); Public Procurement and Disposal Act, No. 3 (2005), Kenya Gazette Supplement No. 77.

<sup>338</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 358-59 (2011).

<sup>339</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 359 (2011) (citing Report of the Comm'n of Inquiry into Post-Election Violence 405-06 (2008) (Kenya), available at <http://www.dialoguekenya.org/docs/PEVReport1.pdf>).

<sup>340</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 IND. J. GLOBAL LEGAL STUD. 341, 359 (2011) (citing Report of

The calculated weakening of political and civil society institutions that could act as pressure groups against the executive dealt a severe blow to the country's ability to control corruption.<sup>341</sup> The Parliament as a structure remained in existence, as did the judiciary and Public Service, but they were no more than vessels of the ruling cliques, unable to effect checks on corruption in the executive branch.<sup>342</sup> According to Transparency International's corruption indices, Kenya routinely trailed near the bottom during the 1990s, viewed as only slightly less sleazy than Nigeria or Pakistan.<sup>343</sup> As a result, foreign governments began to cut aid to Kenya.<sup>344</sup> In deciding to cut aid, the Danish government stated, "In the past, corruption in Kenya was not that widespread, and the number of people involved was rather limited. However, in recent years it pervades the whole society. The reason is ... primarily a political structure which allows and

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the Comm'n of Inquiry into Post-Election Violence 406 (2008) (Kenya), available at <http://www.dialoguekenya.org/docs/PEVReport1.pdf>; see also Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, pp. 7-8 (June 8, 2011), available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf).

<sup>341</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 172, Clairpress Limited (1996) (citing Swedish Development Cooperation Office, "Corruption in Kenya: a Review of Literature," October 1993, p. 14); DANIEL BRANCH, *KENYA – BETWEEN HOPE AND DESPAIR, 1963-2011* Yale University Press 103 (2011) ("By the government's own admission in 1967, cases of fraud involving public figures and bodies had doubled in the independence era.").

<sup>342</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 83, Clairpress Limited (1996) (citing W.N. Wamalwa, "Causes and Consequences of Ethical Crisis in Africa's Public Services," (1993: 41, 44-45)); PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 31, Trafford Publishers (2004) ("Corruption in the judiciary has actually compounded the problem of police corruption.").

<sup>343</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 11, (2009); see also PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 188, Trafford Publishers (2004) ("A report by Transparency International in August 2002 rated Kenya as one of the world's most corrupt countries-ranking sixth behind Bangladesh, Nigeria, Paraguay, Madagascar and war-ravaged Angola."); No doubt, the most publicized corruption scandal in Kenya prior to 2002 was the Goldenberg scandal in which a Kenyan businessman, Kamlesh Pattni, was alleged to have conspired with government officials to have his company, Goldenberg International, be awarded government contracts to export fictitious amounts of gold and diamonds from Kenya to the rest of the world. In return, the government officials were allegedly compensated with a percentage of the money that Kenya made from the sale. See James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 *CONN. J. INT'L L.* 407, 427-35 (1999).

<sup>344</sup> PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 338, Trafford Publishers (2004); Kimberly Ann Elliott, "Corruption as an International Policy Problem: Overview and Recommendations," Institute for International Economics, p. 192, available at [http://www.piie.com/publications/chapters\\_preview/12/10ie2334.pdf](http://www.piie.com/publications/chapters_preview/12/10ie2334.pdf).



at times even encourages corruption.”<sup>345</sup> Also, in 1997, the IMF suspended its enhanced structural adjustment facility program in Kenya, citing poor governance and corruption in the public sector as the basis for the suspension.<sup>346</sup> According to survey data from the 1990s, 83 percent of the Kenyan respondents said that corruption was “very damaging” to the country.<sup>347</sup>

The statements of the newly sworn in Kenyan president, Mwai Kibaki, in 2002, reflected the country’s recognition of a growing corruption problem. President Kibaki stated, “The era of ‘anything goes’ is gone forever. Government will no longer be run on the whims of individuals. Corruption will now cease to be a way of life in Kenya.”<sup>348</sup> However, such words were not new; they had been uttered in the past. President Daniel T. arap Moi, in 1994, had stated, “On corruption, my government is committed to fighting it at all levels. Kenyans must stop the habit of inducing public officials with money and other items for services that should be rendered free of charge.”<sup>349</sup>

Yet, Kenyans were optimistic that a change in leadership would bring accountability in government.<sup>350</sup> When Gallup conducted a poll shortly after Kibaki’s election, it found that Kenyans were the most optimistic people in the world, with 77 percent saying they had high hopes for the future.<sup>351</sup> In fact, after

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<sup>345</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 171, Clairpress Limited (1996) (citing Report to the Danish Auditors of Public Accounts on the Use of Funds for the Rural Development Fund in Kenya, 1975-1991, October 1991, p. 41).

<sup>346</sup> See James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 *CONN. J. INT’L L.* 407, 408 (1999).

<sup>347</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 111, Clairpress Limited (1996).

<sup>348</sup> MICHAELA WRONG, *IT’S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 5, (2009); see also Francis Openda, “I’ll be the first to declare wealth, says Kibaki,” *East African Standard*, Thursday, July 24, 2003 (President Kibaki stated, “Corruption starts from the top, let’s not make any mistake about it.”).

<sup>349</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 2, Clairpress Limited (1996) (citing President Daniel T. arap Moi’s Jamhuri Day Speech, 12 December 1994); President Daniel T. arap Moi’s “anti-corruption efforts” were largely seen as “big shows” that were performed purely to win the donor community’s approval. See James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 *CONN. J. INT’L L.* 407, 444 (1999).

<sup>350</sup> James T. Gathii, *Kenya’s Long Anti-Corruption Agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution*, Albany Law School, Working Paper Series, pp. 33-34, available at <http://ssrn.com/abstract=1718620> (“To many, [Kibaki’s] election in 2002 signaled a time of hope in which government reform would bring about a new way of life in Kenya.”).

<sup>351</sup> MICHAELA WRONG, *IT’S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 7, (2009).

Kibaki's election, there were reports of citizens storming an upcountry police station to demand refunds of bribes paid over the years.<sup>352</sup> Even academics were optimistic. Peter Anassi, an advocate for social justice in Kenya, in 2004, described a "genesis of the war against corruption,"<sup>353</sup> in which the new government has a "mandate to fight corruption and has shown the willingness and the capacity to deal with the vice."<sup>354</sup> Unfortunately, the new found hope was short lived, as Kibaki was not able to deliver on his promises of ending corruption.

Perhaps the most notorious example of Kibaki's failure to end corruption is the Anglo Leasing scandal. This scandal involved 18 government contracts that were described as "sensitive" due to their military or security-related nature. As calculated by the Auditor General, the 18 contracts were worth a total of 56.3 billion Kenyan Shillings (\$751 million).<sup>355</sup> In fact, the value of the contracts amounted to five percent of Kenya's GDP, and over 16 percent of the government's gross expenditure over the two-year period in which the contracts were signed. This was enough money to supply every HIV-positive Kenyan with anti-retrovirals for the next ten years.<sup>356</sup>

Anglo Leasing was a classic government procurement scam. A crucial component was the military nature of the contracts. In every other sector, contracts had to be put to open tender. Contracts within the military sector, however, were secretive and able to escape scrutiny.<sup>357</sup> These contracts were a rudimentary device for extracting large amounts of money from the Kenyan treasury. As an example of the greed involved, Kenya was paying nine million U.S. dollars for MI 17 helicopters, while a quick internet search revealed them to

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<sup>352</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 6, (2009); PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 181 Oxford University Press (2007).

<sup>353</sup> PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 98, Trafford Publishers (2004).

<sup>354</sup> PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 14, Trafford Publishers (2004).

<sup>355</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 165 (2009); James T. Gathii, *Kenya's Long Anti-Corruption Agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution*, Albany Law School, Working Paper Series, pp. 50-51, available at <http://ssrn.com/abstract=1718620>.

<sup>356</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 166 (2009).

<sup>357</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 168, (2009); James T. Gathii, *Kenya's Long Anti-Corruption Agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution*, Albany Law School, Working Paper Series, p. 52, available at <http://ssrn.com/abstract=1718620>.

be simultaneously selling in Asia for just 3.9 million U.S. dollars.<sup>358</sup> Where the extra funds ultimately settled is a mystery, but it is safe to presume that they were split between those in government who authorized the deals and the entrepreneurs who provided the essential smokescreen of legitimate sounding shell companies that acted as “looting pipes.”<sup>359</sup>

As reported by Michaela Wrong in *It's Our Turn to Eat*, when the Permanent Secretary in the Office of the President for Governance and Ethics, John Githongo, briefed President Kibaki on the corruption surrounding Anglo Leasing, the president exuded a look that could only be described as sheepish, like a boy caught with his hand in a biscuit tin.<sup>360</sup> Kibaki urged the corruption czar to slow down, and by all means, not to hand over his information to the Attorney General.<sup>361</sup> As a result, in October 2006, Attorney General Amos Wako declared that he would not prosecute suspects in the corruption case against Anglo-Leasing.<sup>362</sup> The unwillingness of the Kibaki administration to deal with corruption did not go unnoticed. Transparency International described Anglo Leasing as “the albatross around the Kibaki government’s neck.”<sup>363</sup> Also, in a 2004 speech to the British Business Association of Kenya, British High Commissioner Edward Clay famously stated: “We never expected corruption to be vanquished overnight. We all implicitly recognized that some would be

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<sup>358</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 169 (2009).

<sup>359</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 171 (2009).

<sup>360</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 174 (2009).

<sup>361</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 174 (2009); see also David Pallister, “Scandals cast shadow over Kenya’s government,” *The Guardian* (July 5, 2004), available at [www.guardian.co.uk/world/2004/jul/06/kenya.davidpallister](http://www.guardian.co.uk/world/2004/jul/06/kenya.davidpallister) (“John Githongo, the government anti-corruption chief, has warned in the Kenyan press that ‘the corrupt networks that held the stage hostage under the former regime have started attempting to regroup.’”); James T. Gathii, *Kenya’s Long Anti-Corruption Agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution*, Albany Law School, Working Paper Series, pp. 51-52, available at <http://ssrn.com/abstract=1718620>.

<sup>362</sup> Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, pp. 13-14 (June 8, 2011), available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf); Inaction by the Attorney General’s office in such circumstances is not rare. See James T. Gathii, *Kenya’s Long Anti-Corruption Agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution*, Albany Law School, Working Paper Series, p. 50, available at <http://ssrn.com/abstract=1718620> (“The Attorney General’s office has long dragged its feet and been unwilling to prosecute corruption cases recommended to it by the anti-corruption bodies it supposedly worked in concert with.”).

<sup>363</sup> Mwalimu Mati, “It’s Time to Tell the Kenyan People the Truth About the Anglo-Leasing Corruption Scandal,” Transparency International (January 22, 2006), available at [http://www.transparency.org/news\\_room/latest\\_news/press\\_releases\\_nc/2006/2006\\_01\\_23\\_kenya\\_githongo](http://www.transparency.org/news_room/latest_news/press_releases_nc/2006/2006_01_23_kenya_githongo).

carried over to the new era. We hoped it would not be rammed in our faces. But it has.” Those in government were now eating “like gluttons,” he proclaimed. “They may expect we shall not see, or notice, or will forgive them a bit of gluttony, but they can hardly expect us not to care when their gluttony causes them to vomit all over our shoes.”<sup>364</sup> Clay’s statement, while colorful, was not terribly exaggerated – Transparency International, in its 2010 Corruption Perceptions Index, ranked Kenya as one of the most corrupt countries in the world, occupying a rank of 154 out of 178 countries.<sup>365</sup>

### 3. *Issues of Tribalism*

It could be argued that tribal favoritism, rather than corruption, is the true cause of social and economic problems in Kenya. There are about 42 distinct tribes in Kenya.<sup>366</sup> According the United States Central Intelligence Agency World Factbook, the largest tribes by population in Kenya include the Kikuyu (22%), Luhya (14%), Luo (13%), Kalenjin (12%), Kamba (11%), Kisii (6%), and Meru (6%), among others.<sup>367</sup> The history of these tribes is the history of Kenya; they have cultivated the country’s unique identity. Tribal identities, however, have also been the cause of much division in Kenya.

Inhabitants of pre-colonial Kenya were certainly aware of their different ethnic languages and customs.<sup>368</sup> When friction occurred between the tribes, it was primarily caused by economic necessity.<sup>369</sup> In *Facing Mt. Kenya*, Jomo Kenyatta described instances where the threat of starvation forced the Masai to raid the cattle stock of the Kikuyu when cattle disease invaded Masai country.<sup>370</sup>

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<sup>364</sup> MICHAELA WRONG, *IT’S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 202 (2009) (quoting British High Commissioner Edward Clay’s July 2004 speech to the British Business Association of Kenya); Paul Collier, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 181 Oxford University Press (2007).

<sup>365</sup> Transparency International, *Corruption Perceptions Index 2010 Results*, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results).

<sup>366</sup> Kenya Information Guide, <http://www.kenya-information-guide.com/index.html>; see also Kristin MacDougall, *Tribal Rights in Kenya and Zimbabwe: To Promote or Not to Promote, That is the Question*, 27 CONN. J. INT’L L. 167, 185 (2011).

<sup>367</sup> Central Intelligence Agency, *The World Factbook, Kenya* <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>; see also Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, p. 12, June 8, 2011, available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf).

<sup>368</sup> MICHAELA WRONG, *IT’S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 48 (2009).

<sup>369</sup> JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE GIKUYU* 200, Vintage Books, New York (1965).

<sup>370</sup> JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE GIKUYU* 200, Vintage Books, New York (1965).

However, such raids were rare, with long intervals in between.<sup>371</sup> While tribes, such as the Kikuyu and Masai, sometimes fought each other, they also traded with one another, intermarried, and utilized the same lands.<sup>372</sup>

Colonialism had a definite effect on the tribes of Kenya. Although it would not be accurate to assert that colonialism created Kenya's tribal distinctions, colonialism definitely ensured that ethnic affiliation became the key factor determining a citizen's life chances.<sup>373</sup> The tribes began to feel the effects of colonialism as early as 1885, when Kenya was established under the British "sphere of influence" at the Berlin Conference.<sup>374</sup> By 1938, the British had divided Kenya into 24 congested native reserves, leaving the fertile "White Highlands" for exclusive use by Europeans. Furthermore, Africans were no longer permitted to own the one thing that had played such a large role in defining the uniqueness of the tribes – land.<sup>375</sup>

Maybe the most despised aspect of colonialism was the *kipande*, an identity card that was worn around the neck in a copper basket, which prevented African males from traveling outside of their reserve.<sup>376</sup> The colonial government manipulated the tribes for its own advantage.<sup>377</sup> The settlers wanted Africans to act small and think local so that they would be more manageable. Kenyans from outside of a particular reserve were considered as "foreigners" who posed threats to the economic sustainability of the community. The missionaries also played a role in this process of self-definition, standardizing local dialects into formal tribal languages through their translations of the Bible.<sup>378</sup>

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<sup>371</sup> JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE GIKUYU* 201, Vintage Books, New York (1965).

<sup>372</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 48 (2009).

<sup>373</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 44 (2009).

<sup>374</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 12, Clairpress Limited (1996); Kristin MacDougall, *Tribal Rights in Kenya and Zimbabwe: To Promote or Not to Promote, That is the Question*, 27 *CONN. J. INT'L L.* 167, 170 (2011).

<sup>375</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 48-49 (2009).

<sup>376</sup> JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE GIKUYU* 67, Vintage Books, New York (1965) ("[F]ree visiting is now prohibited, and only those who have a special pass from the British Government can visit either Gikuyu or Wakamba country or other tribes.").

<sup>377</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 23, Clairpress Limited (1996); Kristin MacDougall, *Tribal Rights in Kenya and Zimbabwe: To Promote or Not to Promote, That is the Question*, 27 *CONN. J. INT'L L.* 167, 171 (2011).

<sup>378</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 48-49 (2009).

The tribal stereotypes of modern-day Kenya faithfully reflect the roles that were once imposed on the tribes by the colonial government. Growing up on a white-owned farm in the Rift Valley in the 1940s, the future Nobel Peace Prize-winner Wangari Maathai noticed how the colonial experience reinforced ethnic distinctions. In her autobiography, she records that “Kikuyus worked in the fields, Luos laboured around the homestead as domestic servants, and Kipsigis took care of the livestock and milking .... Most of us on the farm rarely met people from other communities, spoke their languages or participated in their cultural practices.”<sup>379</sup> These tribal divisions did not automatically disappear with independence.<sup>380</sup> United States President Barack Obama, in Dreams From My Father, notes that his Kenyan Luo father had political ambitions, “[b]ut by 1966 or 1967, the divisions in Kenya had become more serious. President Kenyatta was from the largest tribe, the Kikuyus. The Luos, the second largest tribe, began to complain that Kikuyus were getting all the best jobs.”<sup>381</sup>

It could be argued that such tribal tension, and not government corruption, was the root cause of the Kenyan post-election violence that occurred in 2007 and 2008, and eventually led to the International Criminal Court prosecution of six people, including three government officers, for crimes against humanity.<sup>382</sup> The violence occurred following the December 27, 2007 election, when supporters of the challenger, Raila Odinga, alleged electoral manipulation by the incumbent government. In fact, it was widely confirmed that both sides perpetrated electoral manipulation during the election.<sup>383</sup> Targeted ethnic violence escalated initially

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<sup>379</sup> MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 49-50 (2009) (quoting WANGARI MUTA MAATHAI, *UNBOWED: ONE WOMAN'S STORY*, Heinemann, 2004); see also Jeffrey Gettleman, “Kenians Approve New Constitution,” *New York Times* (August 5, 2010), available at <http://www.nytimes.com/2010/08/06/world/africa/06kenya.html> (“Kenya has a long legacy of ethnic rivalries. It has more than 40 different ethnic groups and the British colonizers shamelessly typecast them: the Maasai were the guards; the Kikuyu the farmhands; the Luo the teachers; the Kamba the bureaucrats; etc.”).

<sup>380</sup> See generally Kristin MacDougall, *Tribal Rights in Kenya and Zimbabwe: To Promote or Not to Promote, That is the Question*, 27 *CONN. J. INT'L L.* 167 (2011).

<sup>381</sup> BARACK OBAMA, *DREAMS FROM MY FATHER* 214 Crown Publishing Group (2004).

<sup>382</sup> See “Kenya’s Post-Election Violence: ICC Prosecutor Presents Cases Against Six Individuals for Crimes Against Humanity.” International Criminal Court. 2010-12-15. <http://www.icc-cpi.int/NR/exeres/BA2041D8-3F30-4531-8850-431B5B2F4416.htm>; “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.” International Criminal Court. 2011-03-08. <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf>; “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.” International Criminal Court. 2011-03-08. <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf>; Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, p. 1 (June 8, 2011), available at [www.fas.org/spp/crs/row/RL34378.pdf](http://www.fas.org/spp/crs/row/RL34378.pdf).

<sup>383</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya’s Post-2007 Election Violence*, Final Report, p. 3, Aug. 15, 2008,

against the Kikuyu people, the community of which President Kibaki is a member.<sup>384</sup> The different ethnic groups all coalesced into pro-Kikuyu and anti-Kikuyu coalitions.<sup>385</sup> The violence peaked with the killing of over 30 civilians in a church near Eldoret on New Years Day.<sup>386</sup> Some Kikuyu coalitions also engaged in retaliatory violence against groups supportive of Odinga, primarily Luos and Kalenjin.<sup>387</sup>

If tribal self-awareness and tension is at the heart of the societal problems in Kenya, then corruption can be explained as a mere by-product of public officials' instinct for tribal patronage. That is, public officials have an incentive to extort monies against the public interest only because they are expected to provide for their kinsman over the interests of other Kenyans, or Kenyans as a whole. With this perspective, it would follow that any big picture solution for Kenya must initially target a reduction in tribal identities and self-awareness.

However, there are positive, in addition to the negative, aspects of the tribal identities in Kenya. As stated by Jomo Kenyatta, "The key to this culture is the tribal system."<sup>388</sup> Within the tribal system are family groups and age-grades, which shape the character of every member of the society. In this system, nobody is an isolated individual.<sup>389</sup> The people of Kenya collectively recognized the importance of their tribal history as recently as 2010, when they established a new

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<http://www.knchr.org/dmdocuments/KNCHR%20doc.pdf>; Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, p. 11 (June 8, 2011), available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf).

<sup>384</sup> Samir Elhawary, *Crisis in Kenya: land, displacement and the search for 'durable solutions,'* Overseas Development Institute, 2008; Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, p. 11 (June 8, 2011), available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf).

<sup>385</sup> PAUL COLLIER, *WARS, GUNS & VOTES, DEMOCRACY IN DANGEROUS PLACES* 57 Vintage Books (2009).

<sup>386</sup> See Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11, p. 88 (23 January 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>.

<sup>387</sup> See Summary of decision in the two Kenya cases, International Criminal Court, 23 January 2012, available at <http://www.icc-cpi.int/NR/exeres/7036023F-C83C-484E-9FDD-0DD37E568E84.htm> (determining that the Prosecutor of the International Criminal Court had provided enough evidence of crimes against humanity for trial in regard to for four Kenyan suspects - William Ruto, Joshua Arap Sang, Francis Muthaura, and Uhuru Kenyatta - collectively referred to after the prosecutor, Luis Moreno Ocampo, as the "Ocampo four").

<sup>388</sup> JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE GIKUYU* 297, 305 Vintage Books, New York (1965) ("A culture has no meaning apart from the social organization of life on which it is built.").

<sup>389</sup> JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE GIKUYU* 297, 298 Vintage Books, New York (1965) ("The Gikuyu does not think of his tribe as a group of individuals organized collectively, for he does not think of himself as a social unit. It is rather the widening-out of the family by a natural process of growth and division.").

constitution. The Preamble to the Constitution of Kenya now reads, “We, the people of Kenya ... *proud of our ethnic, cultural and religious diversity*, ... adopt, enact and give this Constitution to ourselves and to our future generations.”<sup>390</sup>

In light of this, solutions focused on erasing tribal identities are not ideal, nor practical. However, a big picture solution that initially targets the detection and enforcement of corrupt acts will reduce the amount of tribal patronage that occurs in government, and in turn, reduce the feelings of hostility that may occasionally exist between the tribes. The perception that government favoritism is based on tribal associations is an *effect* of corruption, not a *cause*.<sup>391</sup> It is possible to preserve tribal heritage while decreasing the kind of conduct that ultimately leads to hostilities.

There is a need for the people to be informed about corrupt practices in government.<sup>392</sup> A free press is essential for fighting corruption,<sup>393</sup> and can play a key role in the detection of corruption.<sup>394</sup> The press in Kenya has been detecting corruption in government for years.<sup>395</sup> As noted in James Forole Jarso’s account of the Kenyan media’s relationship to anti-corruption efforts, “In Kenya, hardly a day passes without the media highlighting corruption in the government.”<sup>396</sup> Nearly all of the Kenyan newspapers have featured a litany of articles citing occurrences of corruption that are eating into the very fabric of Kenyan society, yet corruption continues.<sup>397</sup> Thus, detection is not sufficient to effectively combat

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<sup>390</sup> Constitution of Kenya (2010), Preamble (emphasis added).

<sup>391</sup> DANIEL BRANCH, *KENYA – BETWEEN HOPE AND DESPAIR, 1963-2011* Yale University Press 21-22 (2011) (“Rather than using their control of institutions like parliament, the presidency or the judiciary to protect Kenyans and their livelihoods, elites in power have tended to use their power to seize resources, of which the most important has been land. The *symptoms* of this crisis, including ethnic division and political violence, are all too often confused with its *cause*.”); KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 110, Clairpress Limited (1996).

<sup>392</sup> PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* xxi Oxford University Press (2007).

<sup>393</sup> PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 48 Oxford University Press (2007).

<sup>394</sup> USAID, Office of Democracy and Governance, “Money in Politics Handbook: A Guide to Increasing Transparency in Emerging Democracies,” p. 43, November 2003, available at [www.usaid.gov/our\\_work/democracy\\_and.../pdfs/pnacr223.pdf](http://www.usaid.gov/our_work/democracy_and.../pdfs/pnacr223.pdf).

<sup>395</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 168, Clairpress Limited (1996).

<sup>396</sup> James Forole Jarson, *The Media and the Anti-Corruption Crusade in Kenya: Weighing the Achievements, Challenges, and Prospects*, 26 AM. U. INT’L REV. 33, 35 (2010).

<sup>397</sup> KIVUTHA KIBWANA, SMOKIN WANJALA, OKETCH-OWITI, *THE ANATOMY OF CORRUPTION IN KENYA, LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 123, Clairpress Limited (1996) (citing Muthoni Kamau, *et al*, “Media Coverage of Corruption in Kenya, 1963-1994,” (March 1994)); see also DANIEL BRANCH, *KENYA – BETWEEN HOPE AND DESPAIR, 1963-2011* Yale



corruption. Solutions for corruption must be preemptive. Power sharing institutions, complete with checks and balances, must be established in order to prevent corruption from occurring in the first place. This was the goal of the framers, and the hopes of the citizens, when they wrote and voted into law the Kenya Constitution of 2010.<sup>398</sup>

#### 4. *A New Constitution To Combat Corruption*

An entrenched culture of corruption is exceedingly difficult to transform.<sup>399</sup> Reducing corruption requires a reform of political institutions that are often difficult to change.<sup>400</sup> Public officials often resist change, because corruption of the status quo serves their self-interest.<sup>401</sup> Although some institutions change over time, constitutional features, such as executive relations with the legislative and judicial branches, are often difficult to replace.<sup>402</sup> Thus, it is not impossible to understand how countries with corrupt governments can become caught in a downward spiral of hopelessness.<sup>403</sup> In spite of this, Kenya

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University Press 20-21 (2011) (noting the existence of a fairly open press and the ability of elites to commit corrupt acts remaining unchecked).

<sup>398</sup> DANIEL BRANCH, *KENYA – BETWEEN HOPE AND DESPAIR, 1963-2011* Yale University Press 21 (2011) (“What the culture of impunity meant in practice was that the government’s control over the police, judiciary and electoral system ensured that there was no possibility of punishment for major crimes, even if they attracted considerable attention and censure in the press. The constitution ratified in 2010 is meant to address these matters ....”); Zareen Iqbal, *Kenya’s New Constitution: Erasing the Imperial Presidency*, International Institute for Justice and Development (September 22, 2010), available at <http://www.iijd.org/index.php/news/entry/kenyas-new-constitution-erasing-the-imperial-presidency>; Jeffrey Gettleman, “Kenyans Approve New Constitution,” *New York Times* (August 5, 2010), available at <http://www.nytimes.com/2010/08/06/world/africa/06kenya.html>.

<sup>399</sup> Mark A. Glaser, “Networks and Collaborative Solutions for Performance Measurement and Improvements in Sub-Saharan Africa,” in *PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION*, at 124 (2007); PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 143 Oxford University Press (2007).

<sup>400</sup> David S. Brown, Michael Touchton, and Andrew B. Whitford, *Political Polarization as a Constraint on Government: Evidence from Corruption*, at 23, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=782845](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=782845).

<sup>401</sup> Matthew Andrews and Anwar Shah, *Citizen-Centered Governance: A New Approach to Public Sector Reform*, in *BRINGING CIVILITY IN GOVERNANCE*, ed. Anwar Shah. Washington, DC: World Bank (2003).

<sup>402</sup> David S. Brown, Michael Touchton, and Andrew B. Whitford, *Political Polarization as a Constraint on Government: Evidence from Corruption*, at 23, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=782845](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=782845).

<sup>403</sup> Mark A. Glaser, “Networks and Collaborative Solutions for Performance Measurement and Improvements in Sub-Saharan Africa,” in *PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION*, at 124 (2007).

has made real efforts to free itself from such a downward spiral by enacting a new constitution that alters the relations between the executive and the other branches of government. After extensive vetting sessions, the new constitution was presented to the public for approval, which it obtained by an overwhelming majority, on August 4, 2010.<sup>404</sup> These constitutional changes were implemented in an effort to control corruption and maintain an appropriate balance of power within the government.<sup>405</sup>

In the time leading up to the Kenya Constitution of 2010, the negative effects of corruption were evident to those in power, in addition to the people generally. For example, The Kenyan Court of Appeals, in a 2006 decision concerning an alleged corrupt act of a public official, declared:

Corruption is equally a cancer which robs the society in general but more particularly the poor when resources of a country whether public or privately controlled are siphoned into local or foreign accounts for the benefit of a few individuals or groups thereof, when for instance goods supposed to be procured are not in fact procured, but the price or part of it is paid, when goods to be procured do not meet the contractual specification, but the price of the original specifications is paid, when a bridge is certified to be completed, but is in fact incomplete, but the price is paid out when class rooms and dormitories are constructed with shoddy materials, and CDF funds are paid out at inflated rates, it is a cause of great pain and sorrow and lamentation in a country such as Kenya where the vast majority lives on less than Kshs.80/= or a dollar, a day. It is a form of terrorism and tyranny to the poor, the majority of our population.<sup>406</sup>

The Kenya Constitution of 2010 provides for greater separation of powers within the government. Specifically, the legislative branch is now more independent of the executive. Previously, there were few incentives for

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<sup>404</sup> Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, p. 1 (June 8, 2011), available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf); Jeffrey Gettleman, "Kenyans Approve New Constitution," *New York Times* (August 5, 2010), available at <http://www.nytimes.com/2010/08/06/world/africa/06kenya.html>.

<sup>405</sup> See CONSTITUTION OF KENYA 2010, art. 10(2) ("The national values and principles of governance include ... good governance, integrity, transparency and accountability."); Zareen Iqbal, *Kenya's New Constitution: Erasing the Imperial Presidency*, International Institute for Justice and Development (September 22, 2010), available at <http://www.ijid.org/index.php/news/entry/kenyas-new-constitution-erasing-the-imperial-presidency>;

<sup>405</sup> Jeffrey Gettleman, "Kenyans Approve New Constitution," *New York Times* (August 5, 2010), available at <http://www.nytimes.com/2010/08/06/world/africa/06kenya.html>.

<sup>406</sup> *Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another* (No. 2) [2006], p. 47, eKLR.

legislators to enforce checks on the executive due to a lack of separation between the branches that allowed the executive to appoint legislators to be government ministers. To remedy this situation, the new constitution provides that, “cabinet secretaries shall not be legislators.”<sup>407</sup> In addition, cabinet secretaries can now be removed without approval by the president if a majority of the members of the National Assembly adopt a resolution based on recommendations of a select committee.<sup>408</sup> This provision seals a loophole that allowed the president to keep ministers even if the ministers were individuals with whom the legislature had lost confidence.<sup>409</sup> Also, cabinet secretaries must now appear before committees of the legislature whenever they are summoned and provide the legislature with “full and regular” reports concerning matters under their control.<sup>410</sup>

The new constitution also changes the relations between the executive and the judiciary. Previously, undue influence on the judiciary from the executive was a significant catalyst for corruption. Fortunately, the new constitution gives the judiciary autonomy from the executive by providing that the president will now appoint the chief justice and the judges of the superior courts subject to the recommendation of the JSC and the approval of the National Assembly.<sup>411</sup> This new procedure was recently challenged when President Mwai Kibaki attempted to appoint the chief justice without approval of the National Assembly. However, after a public outcry, the Constitution was enforced to prevent such action.<sup>412</sup> In addition, the new constitution circumscribes the power to dismiss judges. Unlike before, the process of removal of the chief justice and judges will now be initiated by the JSC. Acting on its own motion, or on the petition of “any person,” the JSC is required to hold a hearing regarding the judge in question and to send the petition to the president only when there are legitimate grounds for removal.<sup>413</sup> Upon receiving the petition, the president is then required to establish a tribunal to

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<sup>407</sup> CONSTITUTION OF KENYA 2010, art. 132(2)(a).

<sup>408</sup> CONSTITUTION OF KENYA 2010, art. 152(5)(c), (6)-(10).

<sup>409</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?*, 18 IND. J. GLOBAL LEGAL STUD. 341, 384 (2011).

<sup>410</sup> CONSTITUTION OF KENYA 2010, art. 153(3), (4)(b); Zareen Iqbal, *Kenya’s New Constitution: Erasing the Imperial Presidency*, International Institute for Justice and Development (September 22, 2010), available at <http://www.ijid.org/index.php/news/entry/kenyas-new-constitution-erasing-the-imperial-presidency>.

<sup>411</sup> CONSTITUTION OF KENYA 2010, art. 166(1)(a); Zareen Iqbal, *Kenya’s New Constitution: Erasing the Imperial Presidency*, International Institute for Justice and Development (September 22, 2010), available at <http://www.ijid.org/index.php/news/entry/kenyas-new-constitution-erasing-the-imperial-presidency>.

<sup>412</sup> Ted Dagne, *Kenya: Current Conditions and the Challenges Ahead*, Congressional Research Service, p. 2 (June 8, 2011), available at [www.fas.org/sgp/crs/row/RL34378.pdf](http://www.fas.org/sgp/crs/row/RL34378.pdf); Anthony Kariuki, “Kenya: Kibaki Withdraws List of Nominees,” Daily Nation on the Web, February 22, 2011, available at <http://allafrica.com/stories/201102230005.html>.

<sup>413</sup> CONSTITUTION OF KENYA 2010, art. 168(2)(4).

inquire into the matter.<sup>414</sup> Thus, the new constitution introduces due process and certainty in the exercise of the power to dismiss judges and is therefore likely to enhance the independence of judges.<sup>415</sup>

The Public Service, and its relation to the executive, is also affected by the new constitution, which establishes a new Public Service Commission, consisting of a chairperson, vice chairperson, and seven other members appointed by the president with the approval of the National Assembly.<sup>416</sup> Unlike before, members of the commission can only be removed from office pursuant to the recommendation of a tribunal established by the president with the approval of the National Assembly.<sup>417</sup> Also, in an effort to protect public officers from intimidation, the new constitution provides that public officers will not be “dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”<sup>418</sup> Therefore, public officers will no longer hold office “during the pleasure of the president,” as the previous constitution proclaimed.<sup>419</sup> In addition, the new constitution provides that the decisions of the cabinet and the president must be in writing.<sup>420</sup> Accordingly, the new constitution fills a significant loophole in the framework governing the Public Service, namely that public officers were not empowered to resist the illegal instructions of their seniors, ministers, or the president, with the result that they would often become accomplices in grand corruption schemes.<sup>421</sup>

So, while an entrenched culture of corruption is exceedingly difficult to transform, and no reform can completely eradicate corruption, Kenya’s recent efforts are to be commended. The passing of a new constitution in Kenya has brought about renewed faith in the political process.<sup>422</sup> A system of government strengthened with a greater separation of powers that is complete with checks and

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<sup>414</sup> CONSTITUTION OF KENYA 2010, art. 168(5).

<sup>415</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?*, 18 IND. J. GLOBAL LEGAL STUD. 341, 390 (2011).

<sup>416</sup> CONSTITUTION OF KENYA 2010, art. 233(1)-(2); *see also* James T. Gathii, *Kenya’s Long Anti-Corruption Agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution*, Albany Law School, Working Paper Series, p. 70, available at <http://ssrn.com/abstract=1718620>.

<sup>417</sup> CONSTITUTION OF KENYA 2010, art. 251(2)-(6).

<sup>418</sup> CONSTITUTION OF KENYA 2010, art. 236.

<sup>419</sup> *See* CONSTITUTION OF KENYA 1963, art. 25(1).

<sup>420</sup> CONSTITUTION OF KENYA 2010, arts. 135, 153).

<sup>421</sup> Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?*, 18 IND. J. GLOBAL LEGAL STUD. 341, 386 (2011).

<sup>422</sup> Zareen Iqbal, *Kenya’s New Constitution: Erasing the Imperial Presidency*, International Institute for Justice and Development (September 22, 2010), available at <http://www.iijd.org/index.php/news/entry/kenyas-new-constitution-erasing-the-imperial-presidency>.

balances cannot but reduce the occurrence of conventional corruption within the country.

## B. UNCONVENTIONAL CORRUPTION IN KENYA

The Kenya Constitution of 2010 provides beneficial reforms that have the potential to lead to reductions in conventional corruption. However, if Kenya is successful in this regard, unconventional corruption, which is not necessarily cured with a system of separation of powers complete with checks and balances, will likely become more prominent. When protections against conventional corruption are properly implemented, private parties who have become accustomed to bribery must seek alternative means to influence public policy, such as election campaign contributions and expenditures.<sup>423</sup> As noted *supra*, a prominent study by Nauro Campos and Francesco Giovannoni involving 3,954 firms in 25 transition economies, found that “there is substantial evidence that lobbying and [conventional] corruption are substitutes. That is, lobbying is an important alternative instrument of influence to [conventional] corruption in transition countries.”<sup>424</sup> Activities, such as lobbying, lead to unconventional corruption within the government. Public officials in such countries are especially susceptible to the influence of potential campaign contributions and expenditures because they can no longer illegally accumulate public funds to be used for campaign purposes.

Kenya is currently very susceptible to an epidemic of unconventional corruption. There are multiple reasons for this. First, Kenya has implemented measures to combat conventional corruption. As noted, when conventional corruption declines, private parties accustomed bribery will be forced to seek alternative means of influencing public policy, such as campaign contributions and expenditures, which are likely to induce unconventional corruption within government. Second, public officials in Kenya are currently more dependent on campaign cash than at any other time in the country’s history due to the escalating costs of elections.<sup>425</sup> According to a Coalition for Accountable Political Funding (CAPF) monitoring report from the general election of 2007, interviews of 32

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<sup>423</sup> See Nauro F. Campos and Francesco Giovannoni, *Lobbying, Corruption and Political Influence*, 131 PUBLIC CHOICE 1, 3 (2007); B. Harstad & J. Svensson, *Bribes, Lobbying and Development*, CEPR Discussion Paper 5759, Centre for Economics Policy Research, London, UK (2006) (“[F]irms prefer bribing to lobbying early in the development process but at later stages ... they are more likely to lobby the government.”).

<sup>424</sup> Nauro F. Campos and Francesco Giovannoni, *Lobbying, Corruption and Political Influence*, 131 PUBLIC CHOICE 1, 2 (2007).

<sup>425</sup> Coalition for Accountable Political Financing (CAPF), “Campaign Finance and Corruption: A Monitoring Report on Campaign Finance in the 2007 General Election (Kenya),” p. 53, available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>.

retired politicians and former members of Parliament revealed a rise in campaign contributions and expenditures from KSH 4,000 in 1963 to KSH 8,000,000 in 2007 – a rise of 200,000 percent since independence.<sup>426</sup> Third, public officials in Kenya are currently very susceptible to the influence of potential campaign contributions and expenditures because they are less likely to be able to illegally accumulate public funds to be used for campaign purposes. According to the CAPF report from the general election of 2007, which took place before Kenya's new constitution came into force, each of Kenya's 71 constituencies indicated that the misuse of state resources was dominant among incumbent politicians.<sup>427</sup> And finally, Kenya currently lacks a comprehensive institutional framework for governing campaign contributions and expenditures to individual candidates.<sup>428</sup> In regard to individual candidates, Kenya has no limits on contributions,<sup>429</sup> limits on expenditures,<sup>430</sup> or even any disclosure requirements.<sup>431</sup>

The lack of disclosure requirements is most troubling. As noted *supra*, disclosure rules are a necessary first step towards effectively combating unconventional corruption.<sup>432</sup> Effective disclosure rules require accurate reporting of the amounts, sources, and destinations of money in election campaigns, and the reporting must be accessible to the public.<sup>433</sup> Campaign finance disclosure reports are to politics what financial statements are to business

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<sup>426</sup> Coalition for Accountable Political Financing (CAPF), "Campaign Finance and Corruption: A Monitoring Report on Campaign Finance in the 2007 General Election (Kenya)," p. 54, available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>.

<sup>427</sup> Coalition for Accountable Political Financing (CAPF), "Campaign Finance and Corruption: A Monitoring Report on Campaign Finance in the 2007 General Election (Kenya)," p. 35, available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>.

<sup>428</sup> Coalition for Accountable Political Financing (CAPF), "Campaign Finance and Corruption: A Monitoring Report on Campaign Finance in the 2007 General Election (Kenya)," p. 6, 9, available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>.

<sup>429</sup> Coalition for Accountable Political Financing (CAPF), "Campaign Finance and Corruption: A Monitoring Report on Campaign Finance in the 2007 General Election (Kenya)," p. 26, available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>.

<sup>430</sup> Coalition for Accountable Political Financing (CAPF), "Campaign Finance and Corruption: A Monitoring Report on Campaign Finance in the 2007 General Election (Kenya)," p. 22, available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>.

<sup>431</sup> Coalition for Accountable Political Financing (CAPF), "Campaign Finance and Corruption: A Monitoring Report on Campaign Finance in the 2007 General Election (Kenya)," p. 21, available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>.

<sup>432</sup> See *supra*, pp. 19-20.

<sup>433</sup> Coalition for Accountable Political Financing (CAPF), "Campaign Finance and Corruption: A Monitoring Report on Campaign Finance in the 2007 General Election (Kenya)," p. 61, available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>.

– without them, there is simply no way to follow the money.<sup>434</sup> However, a campaign finance system that requires disclosure without limiting contributions and expenditures is not sufficient for eliminating unconventional corruption. The influence of potential campaign contributions and expenditures may be independent of any actual amounts spent because the influence could also depend on the credible threat of contributions and expenditures to benefit the public official’s opponent.<sup>435</sup> Still, disclosure rules are necessary to effectively fight unconventional corruption. Without such rules, the links between campaign finance and politics in Kenya will be obscure, and voters will have absolutely no way of gauging the influence of campaign finance on the politicians they elect.<sup>436</sup>

The Political Parties Act of 2007, which became law on January 1, 2008, after the 2007 presidential election, makes a considered attempt to regulate campaign finance in Kenya.<sup>437</sup> Section 33 of the Political Parties Act states: “A political party shall, within three months of its financial year, publish the sources of its funds stating – (a) the amount of money received from the Political Parties Fund; (b) the amount of money received from its members and supporters; and (c) the amounts and sources of the donations given to the party.”<sup>438</sup> The Political Parties Act, however, comes up short of providing disclosure rules necessary to combat unconventional corruption for a number of reasons. First, in regard to disclosing individual sources, the Act merely regulates donations “given to the party,” not the individual candidates.<sup>439</sup> Second, the Act requires parties to make disclosures only once per year, “within three months of its financial year.”<sup>440</sup> This is not an example of funding reports being provided in a “timely manner.”<sup>441</sup> Third, the Act fails to provide detail in regard to how such disclosure rules will be

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<sup>434</sup> Coalition for Accountable Political Financing (CAPF), “Campaign Finance and Corruption: A Monitoring Report on Campaign Finance in the 2007 General Election (Kenya),” p. 61, available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>.

<sup>435</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 258 Twelve (2011) (citing Marcos Chamon and Ethan Kaplan, *The Iceberg Theory of Campaign Contributions: Political Threats and Interest Group Behavior* (April 2007), 2-5).

<sup>436</sup> Coalition for Accountable Political Financing (CAPF), “Campaign Finance and Corruption: A Monitoring Report on Campaign Finance in the 2007 General Election (Kenya),” p. 61, available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>; USAID, Office of Democracy and Governance, “Money in Politics Handbook: A Guide to Increasing Transparency in Emerging Democracies,” pp. 7-8 (November 2003), available at [www.usaid.gov/our\\_work/democracy\\_and.../pdfs/pnacr223.pdf](http://www.usaid.gov/our_work/democracy_and.../pdfs/pnacr223.pdf).

<sup>437</sup> The Political Parties Act of 2007, Chapter 7A, available at [www.kenyalaw.org](http://www.kenyalaw.org).

<sup>438</sup> The Political Parties Act of 2007, Chapter 7A, § 33, available at [www.kenyalaw.org](http://www.kenyalaw.org).

<sup>439</sup> The Political Parties Act of 2007, Chapter 7A, § 33(1)(c), available at [www.kenyalaw.org](http://www.kenyalaw.org).

<sup>440</sup> The Political Parties Act of 2007, Chapter 7A, § 33, available at [www.kenyalaw.org](http://www.kenyalaw.org).

<sup>441</sup> USAID, Office of Democracy and Governance, “Money in Politics Handbook: A Guide to Increasing Transparency in Emerging Democracies,” p. 15, November 2003, available at [www.usaid.gov/our\\_work/democracy\\_and.../pdfs/pnacr223.pdf](http://www.usaid.gov/our_work/democracy_and.../pdfs/pnacr223.pdf).

enforced.<sup>442</sup> The main challenge of the Act is that it provides only for objectives such as financial disclosure of income and expenditure without providing sufficient detail as to how to implement those objectives. Left this way, there is too little substance to ensure adequate enforcement.<sup>443</sup>

In recognition of the shortcomings of the Political Parties Act, many leaders in Kenya have supported the enactment of new legislation, the Campaign Financing Bill of 2011 (Draft Bill), which is Kenya's most ambitious attempt to regulate campaign finance and unconventional corruption to date.<sup>444</sup> The Draft Bill, if enacted, would regulate individual candidates, as opposed to only parties, and even provide for certain contribution and expenditure limits.<sup>445</sup> Unfortunately, even this proposed legislation does not go far enough. Section 29 of the Draft Bill requires candidates to keep records of funds received and funds spent, along with the names of donors, yet states only that the Auditor General shall inspect such records.<sup>446</sup> There are no further guidelines as to when or how the Auditor General will inspect records, which means that satisfactory enforcement may not always occur, and thus, there is no guarantee that such records will be made available to the public. Sections 12(2) and 12(3) of the Bill also touch on disclosure requirements, and state that a "candidate who intends to contest in party nominations [or the general election] shall, at least twenty days before the party nomination day [or general election day], disclose to the Party Nomination [or Campaign] Expenditure Committee – (a) the amount of funds in

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<sup>442</sup> The 2007 Elections in Kenya: Introduction, p. 95, *available at* [http://www.dialoguekenya.org/docs/FinalReport\\_consolidated.pdf](http://www.dialoguekenya.org/docs/FinalReport_consolidated.pdf).

<sup>443</sup> The 2007 Elections in Kenya: Introduction, p. 95, *available at* [http://www.dialoguekenya.org/docs/FinalReport\\_consolidated.pdf](http://www.dialoguekenya.org/docs/FinalReport_consolidated.pdf); USAID, Office of Democracy and Governance, "Money in Politics Handbook: A Guide to Increasing Transparency in Emerging Democracies," p. 18 (November 2003), *available at* [www.usaid.gov/our\\_work/democracy\\_and.../pdfs/pnacr223.pdf](http://www.usaid.gov/our_work/democracy_and.../pdfs/pnacr223.pdf) ("Even the best drafted laws to reform political finance depend on effective enforcement to achieve impact. If disclosure exposes money in politics, it is enforcement that controls actual flow. Little or no enforcement equals no compliance, which is almost the same as having no laws.").

<sup>444</sup> Campaign Financing Bill, 2011, *available at* <http://cickenya.org/sites/default/files/bills/Campaign%20Financing%20Bill,%20211-2nd%20Draft%2029.10.11.pdf>; Centre for Multiparty Democracy – Kenya, Response to Campaign Finance Bill 2011, p. 1, *available at* [www.cmd-kenya.org/files/Campaign\\_Finance\\_Bill\\_Analysis.pdf](http://www.cmd-kenya.org/files/Campaign_Finance_Bill_Analysis.pdf) ("The Campaign Financing Bill, 2011 sets out major reforms for funding of election campaigns, use of campaign funds in the nomination process, election campaign and elections.").

<sup>445</sup> Campaign Financing Bill, 2011, § 13, 16, *available at* <http://cickenya.org/sites/default/files/bills/Campaign%20Financing%20Bill,%20211-2nd%20Draft%2029.10.11.pdf>.

<sup>446</sup> Campaign Financing Bill, 2011, § 29, *available at* <http://cickenya.org/sites/default/files/bills/Campaign%20Financing%20Bill,%20211-2nd%20Draft%2029.10.11.pdf>.



the account of the candidate; (b) the donations which the candidate has received; (c) the donations which have been pledged to the candidate in cash or in-kind; and (d) the funds the candidate intends to use in the campaign.”<sup>447</sup>

At first glance, Sections 12(2) and 12(3) appear to be a wonderful step in the right direction, but when examined closely, it is evident that candidates contesting for party nominations and candidates nominated by a party are merely required to disclose *amounts*, and not *sources*, of contributions. This provision is to be contrasted with Section 12(3) of the bill, which governs independent candidates and requires such candidates to disclose “*sources* of the funds.”<sup>448</sup> Furthermore, the disclosure of funds is only required to be made to the Party Nomination or Campaign Expenditure Committees, and not to the public. Section 12(7) of the bill states, “The disclosure of funds shall be confidential and shall not be divulged except when such information is the subject of a complaint or an investigation or if it is the subject of proceedings in the court of law.”<sup>449</sup> In recognition of this shortcoming, the Centre for Multiparty Democracy in Kenya, in its Response to the Draft Bill, recommended that “consideration should be made to allow public access to records in accordance with the Constitutional rights to access information.”<sup>450</sup> Additionally, the Article 19 Law Programme, in its 2012 legal analysis of the Bill, observed that “the obligation to maintain the confidentiality of these records is contrary to international standards on freedom of information, and runs counter to the objectives of the law to inculcate accountability in the financing of election and nomination campaigns.”<sup>451</sup>

In regard to limits on campaign contributions and expenditures, the Draft Bill makes a considered, yet ultimately ineffective, effort to combat corruption. According to Section 16 of the Bill, a donation contributed to a candidate “shall

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<sup>447</sup> Campaign Financing Bill, 2011, § 12(1), available at <http://cickenya.org/sites/default/files/bills/Campaign%20Financing%20Bill,%202011-2nd%20Draft%2029.10.11.pdf>.

<sup>448</sup> Campaign Financing Bill, 2011, § 12(3), available at <http://cickenya.org/sites/default/files/bills/Campaign%20Financing%20Bill,%202011-2nd%20Draft%2029.10.11.pdf>; see also Article 19 Law Programme, Kenya: Draft Campaign Financing Bill, 2011, April 2012, p. 16, available at <http://www.article19.org/resources.php/resource/3077/en/kenya:-draft-campaign-financing-bill> (“However, it appears that only independent candidates are required to submit the identities of their donors, despite the prohibition on anonymous donations applying uniformly.”).

<sup>449</sup> Campaign Financing Bill, 2011 § 12(7), available at <http://cickenya.org/sites/default/files/bills/Campaign%20Financing%20Bill,%202011-2nd%20Draft%2029.10.11.pdf>.

<sup>450</sup> Centre for Multiparty Democracy – Kenya, Response to Campaign Finance Bill 2011, p. 4, available at [www.cmd-kenya.org/files/Campaign\\_Finance\\_Bill\\_Analysis.pdf](http://www.cmd-kenya.org/files/Campaign_Finance_Bill_Analysis.pdf).

<sup>451</sup> Article 19 Law Programme, Kenya: Draft Campaign Financing Bill, 2011, April 2012, p. 17, available at <http://www.article19.org/resources.php/resource/3077/en/kenya:-draft-campaign-financing-bill>.

not exceed five percent of the total contribution [to the candidate].”<sup>452</sup> The nature of Section 16, tying individual contribution limits to a percentage of overall contributions, while signifying a step in the right direction,<sup>453</sup> provides uncertain restrictions on contribution amounts and is thus not guaranteed to reduce corruption associated with campaign contributions. In regard to expenditures, the Draft Bill requires any person or organization (including corporations) wishing to support a particular candidate to channel their support through the candidate’s campaign account, and provides for the Electoral Commission to set limits on the amounts that candidates can spend.<sup>454</sup> Such regulation, while interesting, is problematic for a couple of reasons. First, the Commission, although required to take certain factors into consideration,<sup>455</sup> is given a great deal of discretion in determining the expenditure limits; and second, regulation of what a *candidate* may ultimately spend could present problems in regard the candidate’s ability to communicate his or her message, depending upon the limits set by the Commission.<sup>456</sup>

As Kenya begins to effectively combat conventional corruption, issues of unconventional corruption are sure to emerge, and if Kenya is to limit such corruption, it would do well to look to the root causes of unconventional corruption in the United States and do what the United States has not yet been unable to do – implement comprehensive measures, free of loopholes, to ensure

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<sup>452</sup> Campaign Financing Bill, 2011 § 16, *available at* <http://cickenya.org/sites/default/files/bills/Campaign%20Financing%20Bill,%202021-2nd%20Draft%2029.10.11.pdf>

<sup>453</sup> See Article 19 Law Programme, Kenya: Draft Campaign Financing Bill, 2011, April 2012, p. 15, *available at* <http://www.article19.org/resources.php/resource/3077/en/kenya:-draft-campaign-financing-bill> (“Restricting campaign donations minimizes the influence that wealthy individuals can hold over a political campaign, as their financial contribution will not be essential for the campaign’s viability. The restriction also incentivizes candidates to pursue a greater number of less affluent individuals for small campaign contributions, thus increasing engagement between political candidates and a broader section of society. The limit on donations therefore acts against a culture in which elections become a contest to attract the largest donors rather than to appeal to the largest number of voters.”).

<sup>454</sup> Campaign Financing Bill, 2011 §§ 13 & 19(1), *available at* <http://cickenya.org/sites/default/files/bills/Campaign%20Financing%20Bill,%202021-2nd%20Draft%2029.10.11.pdf>.

<sup>455</sup> Campaign Financing Bill, 2011 § 13(3), *available at* <http://cickenya.org/sites/default/files/bills/Campaign%20Financing%20Bill,%202021-2nd%20Draft%2029.10.11.pdf>

<sup>456</sup> See Article 19 Law Programme, Kenya: Draft Campaign Financing Bill, 2011, April 2012, p. 13, *available at* <http://www.article19.org/resources.php/resource/3077/en/kenya:-draft-campaign-financing-bill> (noting that while a restriction on campaign expenditure may be justified to the extent that the restriction is provided by law, pursues a legitimate aim, and is necessary and proportionate, a restriction of the amount of money a candidate has to spend necessarily restricts candidates’ freedom to communicate their message).

that its democracy does not persist with improper dependencies. One lesson to be learned from the United States experience is that fighting unconventional corruption is a process of reform, evasion, identifying loopholes, and then more reform. Like most anti-corruption efforts, the fight against unconventional corruption requires constant vigilance and is not for the easily discouraged.<sup>457</sup> That said, periods of transition that accompany a new constitution are intervals when political will is strong and there is a real chance to combat corruption in all forms.<sup>458</sup> Statutes in the mold of the Political Parties Act and the Campaign Financing Bill are helpful, but unconventional corruption is extremely difficult to combat – it requires comprehensive reform that targets the root causes of corruption.

## CONCLUSION

Corruption is one of the most destructive phenomena in the history of government. It is, however, a phenomenon that can be overcome. In order to provide solutions for corruption within government, it must be recognized for what it is – the exercise of official powers without regard for the public interest. Under such a definition, corruption exists in two specific forms. The more rudimentary form, conventional corruption, occurs when public officials illegally accumulate public funds for unrestricted personal use or involve themselves in specific *quid pro quo* transactions. This form of corruption is most common in developing countries that lack a separation of powers and appropriate checks and balances within government.

An entrenched culture of conventional corruption is exceedingly difficult to transform. However, as can be seen in the case of Kenya, it is possible for developing countries to fundamentally change their institutions in an effort to control conventional corruption and maintain an appropriate balance of power within government. When protections against conventional corruption are properly implemented, private parties who have become accustomed to bribery (a form of conventional corruption) must seek alternative means to influence public policy. Most often these alternative means include campaign contributions to public officials and campaign expenditures for the benefit of public officials.

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<sup>457</sup> USAID, Office of Democracy and Governance, “Money in Politics Handbook: A Guide to Increasing Transparency in Emerging Democracies,” p. 37, November 2003, available at [www.usaid.gov/our\\_work/democracy\\_and.../pdfs/pnacr223.pdf](http://www.usaid.gov/our_work/democracy_and.../pdfs/pnacr223.pdf); see also James Forole Jarson, *The Media and the Anti-Corruption Crusade in Kenya: Weighing the Achievements, Challenges, and Prospects*, 26 AM. U. INT’L L. REV. 33, 82 (2010).

<sup>458</sup> Sahr J. Kpundeh, *Political Will in Fighting Corruption*, p. 94, UNDP-PACT and OECD Development Centre Workshop on Corruption and Integrity Improvement Initiatives in the Context of Developing Economies, Paris (2007), available at <http://mirror.undp.org/magnet/Docs/efa/corruption/Chapter06.pdf>.

These alternative efforts induce unconventional corruption, which occurs when a public official makes a decision without regard for the public interest in order to achieve re-election to public office. Public officials in such countries are especially susceptible to the influence of potential campaign contributions and expenditures because they can no longer illegally accumulate public funds to be used for campaign purposes.

Countries that have established measures to effectively combat conventional corruption, such as the United States and Kenya (hopefully), are susceptible to a great deal of unconventional corruption. Too often, unconventional corruption goes unsolved because courts do not recognize the threat to democracy posed by an improper dependency on campaign cash, and public officials refuse to reform a system in which they have had electoral success. However, where there is an improper dependency within government, public officials have a duty to correct such a dependency. If they do not, then they betray the institutions that they serve. It must be recognized that when a government has been corrupted, no troubles that arise can be appropriately remedied until corruption is effectively reduced.