

THE GEORGE
WASHINGTON
UNIVERSITY
WASHINGTON DC

**THE CONTRIBUTION OF THE PUBLIC PARTICIPATION TO AVOID
THE MISUSE OF PUBLIC FUNDS: A COMPARISON OF BRAZIL AND
THE UNITED STATES CASES**

José Leonardo Ribeiro Nascimento
Minerva Program – Spring 2012
Advisor: Timothy Fort

**WASHINGTON
2012**

SUMMARY

1 INTRODUCTION.....	5
2 PUBLIC PARTICIPATION: A BRIEF ANALYSIS OF ITS RELEVANCE IN BRAZILIAN AND U. S. CONTEXT.....	8
2.1 Accountability	8
2.2 Public Participation: concept and relevance to democracy.....	10
2.3 Brazilian case	14
2.3.1 The conquest of democracy through the years	15
2.3.2 1988: The Citizen Constitution	17
2.4 United States case.....	20
3 CORRUPTION: A NEVER ENDING ISSUE	28
3.1 The costs of corruption.....	33
3.2 Fighting corruption in Brazil.....	38
3.2.1 Horizontal Accountability	41
3.2.1.1 The Public Ministry.....	41
3.2.1.2 The External Control System.....	42
3.2.1.3 The Internal Control System.....	42
3.2.1.4 Control Network.....	43
3.2.1.5 Other institutions.....	44
3.2.2 International Commitments	44
3.2.2.1 Inter-American convention Against Corruption (OAS).....	44
3.2.2.2 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD)	45
3.2.2.3 United Nations Convention against Corruption (UN).....	46
3.2.3 Laws	46
3.3 Fighting corruption in the United States	48
3.3.1 A brief context of corruption in the U.S.	48
3.3.2 Agencies	51
3.3.3 Laws and International Commitments.....	55
4 THE FALSE CLAIMS ACT, CONSTITUTIONALITY, AND FIGHT AGAINST CORRUPTION	59
4.1 History and context of <i>Qui Tam</i> and False Claims Act	61
4.2 Constitutionality of <i>Qui Tam</i> Provision.....	65
4.2.1 Article III	65

4.2.2 Article II	70
4.2.2.1 The Separation of Powers	70
4.2.2.2 The Take Care Clause	73
4.2.2.3 The Appointments Clause.....	75
4.3 Results of the False Claims Act.....	79
5 CONCLUSION.....	84

“You will not be unjust in administering justice as regards measures of length, weight or capacity. You will have just scales, just weights, a just ephah and a just hin.”

Leviticus, 19, 35-36

1 INTRODUCTION

Fiodor Dostoievski wrote, in 1877, a short story about a ridiculous man, or at least about a man who judges himself as being ridiculous. He decides to commit suicide a certain night, after a whole life without being interested in anything. Before he can finish his plan, however, he falls asleep and dreams, the dream of a ridiculous man. He dreams about being buried and after some time he is taken to another planet by some humanoid creature. On this planet, a perfect replica from Earth, he is welcome by everyone, and all the people love each other and, among other things, they do not know envy, pride, malice or lies. The ridiculous man doesn't know how to handle this situation. He loves all that people, but, at the same time, thinks about the other Earth, his Earth, wondering if it would be possible to live in that manner there.

Earlier in the text, he makes a strange reflection that is directly linked to his dream:

If I had lived before on the moon or on Mars and there had committed the most disgraceful and dishonorable action and had there been put to such shame and ignominy as one can only conceive and realize in dreams, in nightmares, and if, finding myself afterwards on earth, I were able to retain the memory of what I had done on the other planet and at the same time knew that I should never, under any circumstances, return there, then looking from the earth to the moon — should I care or not? Should I feel shame for that action or not?¹

This reflection makes sense when, talking about his dream, he says:

*The fact is that I . . . corrupted them all.*²

He doesn't say exactly how it happened, but suggests that everything began with the best intentions, with some jest or a germ that resulted in lies, and they "grew fond of lying" and soon blood was shed and that planet became, as time went by, equal to his Earth, the tainted one.

He wakes up and, instead of trying suicide, he now can see a meaning for his life, and convinces himself that he needs to tell the truth for everyone. It is impossible, the ridiculous man thinks, but he believes, and he finishes his story saying:

*If only everyone wants it, it can all be arranged at once.*³

¹ DOSTOIEVSKI, Fiodor. *The Dream of a Ridiculous Man*. In: Short stories [electronic book]. New York, Books, Inc . Available at: <http://www.archive.org/>.

² Idem.

³ Ibidem.

Sometimes I find myself thinking like a ridiculous man. It is so hard to fight corruption, but, at the same time, it would be easier if everyone wanted to fight it. This, rather than to stimulate me, discourages me. There is, although, another perspective, less extreme and more palpable. Maybe it is not necessary that everyone wants it, just a good number of people. This possibility makes sense when we think about public participation and the so-called “social accountability”⁴. The fight against corruption will be easier (or less difficult) as more people join this cause, so it is essential to strengthen the role of civil society and the private sector, since these actors will work as “the anticorruption watchdogs on a large scale”⁵.

Facing the impossibility of everyone coming together to end corruption, this paper aims to analyze what can happen when many come together. Thus, I will study the contribution of public participation in the fight against corruption in Brazil and make some appointments about how this contribution can be more effective. In order to accomplish this goal, I will present some aspects of the situation of public participation in the United States, with emphasis on the complaints made by citizens based on the qui tam provision of False Claims Act, “the single most important tool U.S. taxpayers have to recover the billions of dollars stolen through fraud by U.S. government contractors every year”⁶. To briefly demonstrate the relevance of this provision, a report from the Department of Justice over Fraud Statistics⁷, from 1987 to 2011 shows that about 69% of the total amount of money recovered comes from qui tam provision. In currency, this is more than 21 billion dollars.

Thus, the focus of this paper is the contribution of people to avoid the misuse of public funds comparing situation in Brazil and in the U. S., with the purpose of presenting some alternatives to improve the results in the Brazilian case, especially through the U.S. experience with the qui tam provision of the False Claims Act, which will be analyzed in order to answer if a similar law would have place in Brazil.

⁴ It is a concept introduced by Enrique Peruzzotti. According to him, the Social Accountability encompasses “a diverse set of initiatives undertaken by NGOs, social movements, civic associations and independent media guided by a common concern to improve the transparency and accountability of government action”. PERUZZOTTI, Enrique. **La política de accountability social en América Latina**. Documento de Trabajo. Universidad Torcuato Di Tella, Buenos Aires. 2005.

⁵ MARTINEZ-VAZQUEZ, Jorge. **Fighting corruption in the public sector** / Jorge Martinez-Vazquez, Javier Arze del Granado, Jameson Boex. Amsterdam; Boston : Elsevier. 2007.

⁶ Information extracted from <http://www.taf.org/>, the Taxpayers Against Fraud Education Fund website, a nonprofit, public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the Federal False Claims Act and its qui tam provisions.

⁷ The full report is available at <http://www.taf.org/DoJ-fraud-stats-FY2011.pdf>.

Considering the historical and cultural particularities each country has, in the first part of this paper I will delve into the two concepts that guide this work: public or popular participation and corruption. Besides the theoretical approach, I will present a view about how public participation works and how corruption has been fought in both countries. In the second part I will analyze the history, the results and the constitutionality challenges of the False Claims Act, compare its features with the complains data in Brazil, trying to identify patterns and significant differences or similarities that can help to answer if Brazil should adopt a tool like qui tam provision and, if the answer is yes, if Brazil would be able to implement it.

2 PUBLIC PARTICIPATION: A BRIEF ANALYSIS OF ITS RELEVANCE IN BRAZILIAN AND U. S. CONTEXT

2.1 Accountability

Before talking about public participation, it is necessary to understand the concept of accountability. When referring to democracy, Schedler says:

Political accountability, we stipulated, represents a broad, two-dimensional concept that denotes both answerability – the obligation of public officials to inform about their activities and to justify them – and enforcement – the capacity to impose negative sanctions on officeholders who violate certain rules of conduct. In experiences of political accountability, both aspects are usually present⁸.

According to him, thus, the two dimensions related to accountability are essential, and both contribute to fighting corruption: government is obliged to inform and explain its activities and it must be capable to impose sanctions when officeholders violate rules, something normally linked to corruption acts.

Accountability can be political, when dealing with the relationship between representatives and represented, and legal, that is not related to the people, but to representatives, that must respond and take responsibility for their actions if they violate the laws⁹.

Two other broadly accepted concepts for accountability are formulated by Guillermo O'Donnell: vertical and horizontal accountability¹⁰.

Vertical accountability is similar to the previous concept of political accountability, but is a little broader. It relates both to people and their representatives, and it is performed by means of social claims, independent media to cover the social demands and the allegedly unlawful acts of the authorities, and, especially, through elections. The vote is the mechanism that citizens use to

⁸ SCHEDLER, Andréas. **Conceptualizing accountability**. In: Andreas Schedler, Larry Diamond, Marc F. Plattner (eds.) *The self-Restraining State. Power and Accountability in new democracies*. Boulder and London, Lynne Rienner Publishers. 1999. Available at: <http://books.google.com.br/books?id=MD8Vx1HLOZgC&printsec=frontcover>.

⁹ ARATO, Andrew. **Representação, soberania popular, e accountability**. Lua Nova, São Paulo, n. 55-56, 2002. Available from <[http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-64452002000100004](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-64452002000100004&lng=en&nrm=iso)&lng=en&nrm=iso>. access on 08 July 2009. doi: 10.1590/S0102-64452002000100004.

¹⁰ O'DONNELL, Guilherme. **Accountability Horizontal e Novas Poliarquias**. *Lua Nova*, 44. 1998. p. 27-52.

theoretically reward or punish the representatives who met or violated its commitments during the election campaign.

Horizontal accountability, in turn, refers to relations within the Public Administration itself, especially the institutionalized control mechanisms, conducted by agencies that have the independence, expertise and power to perform routine supervision, apply legal sanctions to those who commit unlawful acts in public administration or even impeachment against the actions of other agents or agencies of the State when they could be qualified as criminal. For O'Donnell, this type of accountability is so important that corruption is partly expression and partly consequence of the weakness of horizontal accountability¹¹.

The author lists some actions that increase horizontal accountability:

- The opposition parties that have a reasonable electoral support should have an important role in the direction of the agencies to investigate alleged cases of corruption;
- Agencies essentially preventive, as the Courts of Auditors should be professionalized and highly resourced, so as to be as independent as possible from the government;
- Information provided by these agencies should be reliable and appropriate;
- The Judiciary must also be professional and resourced, being autonomous from the Executive branch and Congress.

One of the most important features of the horizontal accountability is that it increases the costs of the practice of corruption, meaning that organized institutions allow citizens to monitor the exercise of power, making it difficult for corrupt officeholders to erase their tracks¹².

Social accountability, a complementary concept, has been presented in the beginning of this work. Enrique Peruzzotti asserts that it happens usually through civil associations, social movements and journalistic reporting, and impacts both the functioning of the vertical accountability mechanisms (elections) and the horizontal accountability mechanisms (government agencies)¹³. Social accountability has become stronger in countries in which there is not confidence in the horizontal accountability mechanisms, since the polls, the main form of vertical accountability, is

¹¹ Idem.

¹² ANASTASIA, Fátima & SANTANA, Luciana. **Sistema Político**. In: STARLING, H.M.M.; AVRITZER, L; GUIMARÃES, J; BIGNOTTO, N.. (Org.). *Corrupção: ensaios e críticas*. Belo Horizonte: Editora UFMG, 2008, v. 1, p. 363-371.

¹³ PERUZZOTTI, Enrique. **La política de accountability social en América Latina**. Documento de Trabajo. Universidad Torcuato Di Tella, Buenos Aires. 2005.

insufficient to ensure that the represented punish representatives who did not meet their demands, mainly because elections occur every four years, which generates a lapse of representation.

2.2 Public Participation: concept and relevance to democracy

The ridiculous man from Dostoievski believed in everyone participating together to make a better world. Scholars say that this can be true, at least in order to make a better democracy, because the more people participate, “healthier” the democracy. In its origins, in Athens, citizens participated (not everyone, only who was considered a citizen) directly in the Assembly, and they discussed and decided together. This model of democracy was valid to a city with a small number of inhabitants. Over the course of time, cities got larger and countries with many cities emerged, rendering impossible for everyone to participate directly. Since democracy is a work in progress¹⁴, it became representative democracy, and people’s participation was restricted almost entirely to the ballot. Only recently, especially from the third wave of democratization¹⁵, some democracies around the world began to develop other forms of participation, in a way to include civil society in the decisions concerning public policies. A new conception for democracy was conceived to include actors that have been historically excluded and now demanded participation. Robert Dahl¹⁶ presented the widely-accepted concept of democratic institutions as polyarchies: “a political regime characterized by free and open elections with low barriers to participation, genuine political competition, and wide protection of civil liberties”.

Public participation beyond the ballot is nowadays a prerequisite for any democracy, and many studies try to define or to classify it. Creighton, in his Public Participation Handbook, defines public participation as:

¹⁴ CREIGHTON, James L. ***The public participation handbook: making better decisions through citizen involvement***. San Francisco: Jossey-Bass, c2005.

¹⁵ The so-called third wave of democratization begin with “a group of authoritarian regimes that have made (or attempted) a generally recognized transition since the 1970s to political systems characterized more or less by fair and competitive elections with universal (or near-universal) suffrage, the rule of law and protection of basic civil liberties, and a robust civil society.” KING, Desmond, LIEBERMAN, Robert C. ***American Political Development as a Process of Democratization***. In: KING, Desmond S. *Democratization in America: a comparative-historical analysis* / edited by Desmond King ... [et al.]. Baltimore : Johns Hopkins University Press, 2009.

¹⁶ Idem.

[...] the process by which public concerns, needs and values are incorporated into governmental and corporate decision making. It is two-way communication and interaction, with the overall goal of better decisions that are supported by the public¹⁷.

In this same way, Zittel¹⁸ contributes affirming that the engagement of a great number of citizens who share a sense of collective responsibility is necessary. He goes further¹⁹, trying to identify the individual characteristics of good citizens who are motivated and capable to participate. Possible answers include: a “basic disposition in relation to the possibility of exerting political influence”; the idea of unitary democracy, “which means a focus on common interests and social cooperation on an equal basis as the most basic feature of the good citizen”; and the Habermasian idea of individual autonomy, that “combines both notions of individual empowerment and social responsibility”.

Zittel gives us three other important contributions to the debate about public participation: first²⁰, he reminds us that

[...] expanding rights to participate clearly has qualitative rather than quantitative connotations. It cannot be increased solely by increasing the number of opportunities or channels to participate. It is rather increased by allowing for certain forms of participation in contrast to others.

The criteria, he says, is access to policy decisions and the ability to influence these decisions. Second²¹, he questions the reluctance of the citizen to participate in politics, affirming that one of the main reasons of this is the “erosion of legitimacy of these democracies”. Finally, he raises²² the trusting issue: among other questions, corruption weakens the citizen trust in government, and they are not willing to participate. And distrust is a vicious circle²³. Another point to consider about trust is

¹⁷ CREIGHTON, James L. *The public participation handbook: making better decisions through citizen involvement*. San Francisco: Jossey-Bass, c2005.

¹⁸ ZITTEL, Thomas. **Participatory democracy and political participation**. In: FUCHS, Dieter and ZITTEL, Thomas. *Participatory democracy and political participation: can participatory engineering bring citizens back in? /* edited by Thomas Zittel and Dieter Fuchs. London ; New York : Routledge, 2007.

¹⁹ Idem.

²⁰ Ibidem.

²¹ Ibidem.

²² Ibidem.

²³ “Public administrators decry the lack of trust that the public, at least in the United States, has in government and its bureaucracy, but the problem will continue to exist as long as Kaifeng Yang’s missing link, that is, public administrators’ trust in citizens, is absent. Before the public will trust the public service, it must be transparent regarding its activities. But public administrators are skeptical of the public’s ability to understand them, so they are reluctant to be overly transparent concerning their

the feedback the citizen receives when he participates. First of all, he needs information, which implies that government has to be transparent. Public information, thus, is an essential component of an effective public participation program, since “people cannot participate unless they receive complete and objective information on which to base their judgments”²⁴. So, if government fails when providing information to citizens, their trust decreases. Besides this, it is essential that the citizen really influences the decision. Participate demands the citizen, among other things, abdicate some part of his leisure time, and if he thinks he is wasting his precious time, not seeing the results of his participation, he will abandon the politics arena. Because of this Warren²⁵ says that for participation to function democratically, “all affected by the decisions of a government should have the opportunity to influence those decisions, in proportion to their stake in the outcome”. In this case, when people don’t see their participation counting, “more participation can actually decrease democratic legitimacy”²⁶. He lists then three perspectives for the democratic deficit of the government:

From a normative perspective, governments are in democratic deficit when political arrangements fail the expectation that participation should elicit government responsiveness. From an empirical perspective, governments are in democratic deficit when their citizens come to believe that they cannot use their participatory opportunities and resources to achieve responsiveness. From a functional perspective, governments are in democratic deficit when they are unable to generate the legitimacy from democratic sources they need to govern.²⁷

policies, procedures, and budgets. The lack of transparency, in turn, contributes to a distrust of government. That distrust is exacerbated when the ethical breaches and professional lapses of public officials occur, because the public has no concept of the enormous mass of good behavior of public administrators who are reluctant to discuss what they do because they are afraid that they will be misunderstood. The few bad apples appear enormous when there is nothing else visible in the barrel”. GAROFALO, Charles and GEURAS, Dean. **Administrative Leadership and Transparency**. In: COX, Raymond W. *Ethics and integrity in public administration: concepts and cases* / edited by Raymond W. Cox III. Armonk, N.Y. : M.E. Sharpe, c2009.

²⁴ CREIGHTON, James L. **The public participation handbook: making better decisions through citizen involvement**. San Francisco: Jossey-Bass, c2005.

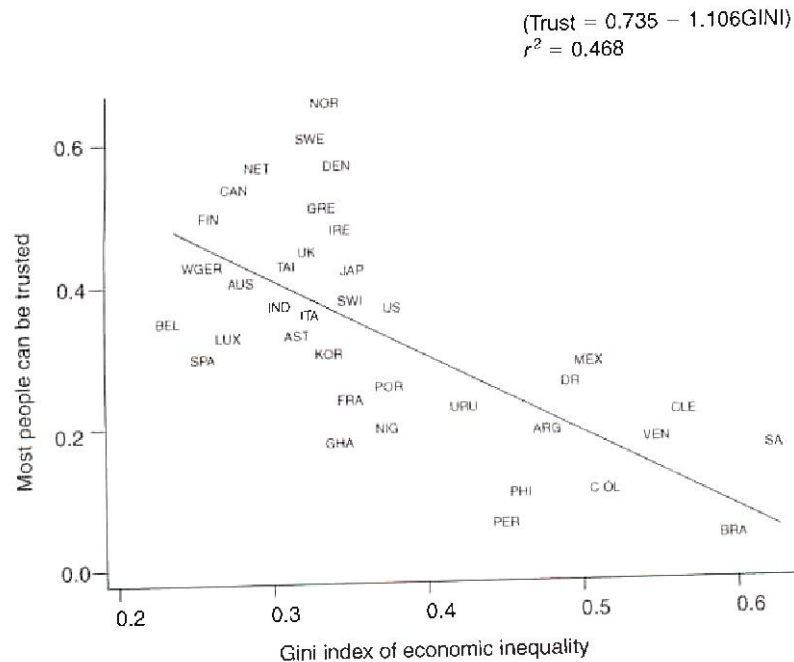
²⁵ WARREN, Mark E. **Citizen Participation and Democratic Deficits**. In: *Activating the Citizen*. Edited by Joan DeBardeleben and Jon Pammett. Palgrave MacMillan. Forthcoming. Available at: <http://www.politics.ubc.ca/>

²⁶ Idem.

²⁷ Ibidem.

Concluding the trusting problem, Zittel²⁸ says that “trusting societies have more effective governments, higher growth rates, less corruption and crime, and are more likely to redistribute resources from the rich to the poor”, and he presents a graph that helps him in this argument:

Figure 1: Trust and inequality for countries without a communist legacy



Source: ZITTEL, Thomas. **Participatory democracy and political participation.**

As shown in the graph, Brazil appears in the worst position among the countries examined, being the country in which people trust one another less and the second most unequal country, indicating how long we still have to go.

Public participation, thus, requires interaction and communication between government and citizens, interest of the citizens in participation and interest of the government in citizen’s participation, manifested through transparency, creation of several mechanisms of participation other than the vote, and responsiveness. Responsiveness means that when deciding, government must take into consideration what citizens said through participatory mechanisms.

²⁸ ZITTEL, Thomas. **Participatory democracy and political participation.** In: FUCHS, Dieter and ZITTEL, Thomas. *Participatory democracy and political participation: can participatory engineering bring citizens back in? /* edited by Thomas Zittel and Dieter Fuchs. London ; New York : Routledge, 2007.

The International Association for Public Participation developed the “IAP2 Core Values for Public Participation”²⁹, for use in the development and implementation of public participation processes. They condense the issues presented above:

1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
2. Public participation includes the promise that the public's contribution will influence the decision.
3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
5. Public participation seeks input from participants in designing how they participate.
6. Public participation provides participants with the information they need to participate in a meaningful way.
7. Public participation communicates to participants how their input affected the decision.

Democratic institutions, thus, ensure public participation in a way that attends to those core values and, according to Smith³⁰, produces some goods, like inclusiveness, popular control, considered judgment and transparency.

2.3 Brazilian case

Brazil has nowadays an increasing number of participatory institutions, and there are efforts from both government and civil society to amplify public participation. A good example of this is the 1st Consocial (National Conference on Transparency and Social Control), a huge series of meetings that since July, 2012 mobilizes federal, state and local governments and civil society in the whole country to discuss and propose measures of improvement in public transparency, social control and fight against corruption. The preparatory conferences occur first at the local level and then at the state level. The federal conference will be realized in May, 2012 and will be integrated by delegates from all the states of Brazil, elected in the previous conferences. The Office of the Comptroller General (CGU), which has the

²⁹ Content available at <http://iap2.affiniscap.com/displaycommon.cfm?an=4>

³⁰ SMITH, Graham. *Democratic innovations: designing institutions for citizen participation*. Cambridge, UK ; New York : Cambridge University Press, 2009.

responsibility for the realization of the Consocial, believes that the mobilization and discussion involved in the process bring positive results for the public participation. Beyond that, the Consocial will produce a Book of Proposals (Caderno de Propostas) with the propositions selected by the delegates. This book will be sent to the Legislative and the Executive branches, in order to subsidize the creation/alteration of laws and public policies more consonant to the spirit of public participation³¹.

Of course the democratic scenario evolved in great amount through years, and Brazil's history has more moments of exclusion than public participation in the political decision-making process.

2.3.1 The conquest of democracy through the years

Brazilian people don't have a history of participation. Up to 1889, we were a monarchist slaved-based country, with some few nobles and powerful aristocrats ruling the country. The Proclamation of the Republic, on November, 15, 1889, a historical event, should bring the citizens to the political arena, but in reality, nothing changed, since the proclamation was a bureaucratic act, and the people didn't even know what was happening³². The levels of popular participation did not increase, and "the patrimonial state remained the dominant influence in the development of Brazil"³³. The term *patrimonial state* was used by Raymundo Faoro in an attempt to capture the style and content of the Brazilian political system. Roett agrees with the use of the term because "it summarizes the difficulty of mobilization in the political system and the consensus among the elites on limiting popular participation"³⁴.

Carvalho³⁵ gives a good example of the popular participation in Brazil during the first years of Republic:

³¹ More information about 1st Consocial can be found at <http://www.consocia1.cgu.gov.br/>

³² In a free translation: Independence was a trade agreement. There were few uprisings, none eminently popular and that came to disgruntle the people across the country. The transition from Monarchy to Republic was a bureaucratic act, so described in the words of Aristides Lobo (1889): "the people watched bestialized, stunned, surprised, not knowing what it meant. Many sincerely believed to be seeing a parade". NASCIMENTO, José L. R. **A atuação dos Conselhos Municipais de Alimentação escolar: análise comparativa entre o controle administrativo e o controle público.** Available at: http://www.cgu.gov.br/Concursos/5_ConcursoMonografias.asp

³³ ROETT, Riordan. **Brazil: politics in a patrimonial society.** 5th ed. Westport, Conn.: Praeger, 1999.

³⁴ For more information about the term *patrimonial state*, see:

ROETT, Riordan. **Brazil: politics in a patrimonial society.** 5th ed. Westport, Conn.: Praeger, 1999.

FAORO, Raymundo. **Os donos do poder: formação do patronato político brasileiro.** 3rd Ed. Globo. 2001.

³⁵ CARVALHO, José Murilo de. **Os bestializados: o Rio de Janeiro e a República que não foi.** 3.ed. São Paulo: Companhia das Letras, 1987.

In 1910 presidential election, in Rio de Janeiro, Brazil's capital, only 2.7% of the population could vote. Of these, only 34% went to the polls. Moreover, at the end of the vote counting, about 18% of the votes were annulled. Result: in a presidential election, only 0.5% of the population of the capital voted. By way of comparison, while in 1888, 88% of the adult male population of New York voted for president, in Rio de Janeiro in 1896, the percentage was 7.5%.

People were excluded from politics, they were not citizens. Thus, for the appropriate understanding of the democracy in Brazil, it is necessary to think about the meaning of citizenship. A classical approach³⁶ divides it in three elements:

Civil, which consists of individual liberty and the right to equal justice; political, inhering in 'the right to participate in the exercise of political power'; and social, meaning 'the whole range from the right to a modicum economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society.

It is possible to have the civil element without the others (some dictatorial governments), or to have the social element, but not political and civil (a welfare dictatorship), but full citizenship requires all of them³⁷.

The Marshall's approach³⁸ of citizenship also orders the three elements as a pyramid, which is constructed based on conquers of the citizens: at the base, the civil rights, in the middle, the political, and then, at the top, the social rights. Carvalho³⁹ remarks a fundamental difference in Brazilian's pyramid: social rights came when civil and political rights were not fully granted to citizens. Besides this, social rights were provided as a gift to people, instead of have been conquered by them. Since social

³⁶ This is the concept of citizen by T. H. Marshall. For more details, see: KING, Desmond, LIEBERMAN, Robert C. ***American Political Development as a Process of Democratization***. In: KING, Desmond S. *Democratization in America: a comparative-historical analysis* / edited by Desmond King ... [et al.]. Baltimore : Johns Hopkins University Press, 2009.

³⁷ CARVALHO, José Murilo de. ***Cidadania no Brasil: o longo caminho***. 10.ed. Rio de Janeiro: Civilização Brasileira, 2008.

³⁸ It is important to note that Marshall developed this theory thinking about England's case: According to him, development of citizenship was slow, in the following order: 18th Century: Civil rights; 19th Century: Political rights; 20th Century: Social rights. He reminds that it is a logical issue, not only chronological. From the conquer of freedom – civil rights – Englishmen claimed political rights – to vote and to participate of his country government. With political participation granted, working class could be elected, introducing social rights. NASCIMENTO, José L. R. ***A atuação dos Conselhos Municipais de Alimentação escolar: análise comparativa entre o controle administrativo e o controle público***. Available at: http://www.cgu.gov.br/Concursos/5_ConcursoMonografias.asp

³⁹ CARVALHO, José Murilo de. ***Cidadania no Brasil: o longo caminho***. 10. ed. Rio de Janeiro: Civilização Brasileira, 2008.

rights were given to the people, they didn't feel the need to fight for possible improvements in political and civil rights.

From 1964 to 1985, during the military dictatorship, democracy suffered even more, and the consequences of so much time of exclusion were, among others, an enormous distrust towards the government and disinterest in participation. Another result of the military dictatorship was the weakening of the idea of republicanism. People didn't feel part of a nation; rule of law wasn't applied, since not everybody was under the law; and common good was a fiction, everybody seemed to care only about his own benefit.

2.3.2 1988: The Citizen Constitution

Although in general Brazilian people lacked the idea of republicanism, some resistance sectors of society, like journalists, artists and students fought to conquer democracy, and after years of pressure from these actors, dictatorship ended and society needed a new rule, according to the democratic aspirations of that time. Thus, in 1988 the new Constitution, called Citizen Constitution, was promulgated, because it would not only allow, but stimulate public participation.

The new Constitution has brought several innovations in order to improve public participation. Its First Article defines citizenship as a cornerstone of the Federative Republic of Brazil and grants that "all power emanates from the people, who exercise it through elected representatives or *directly*, under this Constitution" (emphasis added). Beyond these general assertions, the Citizen Constitution also expanded political rights, making voting optional for illiterate people and correcting the historical absence of the participation of this class of citizens from the electoral process, and civil rights, providing a fairly extensive list of constitutional remedies, like *habeas corpus*, *habeas data*, *writ*, *people action*, among others⁴⁰.

Besides, Brazilian legislators included in the Constitution "some devices that imposed collective and parity management of some public policies under the Federal Government authority"⁴¹, especially those related to health, social aid and education. Thus, quoting Avritzer:

⁴⁰ OLIVEIRA, Frederico Resende de. **Comparative study between the North American and Brazilian systems of combating corruption**. 2011. Available at <http://www.gwu.edu/~ibi/>

⁴¹ VIEIRA JR. Ronaldo Jorge Araujo. **Social Control of the State: Some mechanisms and experiences of popular participation**. 1997. Available at <http://www.gwu.edu/~ibi/>

The 1988 Constitution opened the way for important changes in Brazil regarding access to social services and the creation of participatory institutions. It has 14 devices that allow for participation, starting with its article on sovereignty, which allows a mixture of representation and participation. The key participatory articles concern healthcare, social assistance, the environment, and urban organization. These articles prompted the emergence of a large participatory infrastructure in contemporary Brazil⁴².

As a result of this, at least two very important participatory institutions are now present in Brazil, especially in local governments: participatory budgeting and public policy councils.

As the name suggests, participatory budgeting inserts the society in the elaboration of the government budget. The first known experience occurred in Porto Alegre, Brazil, in 1990 and became an international reference point for participation during the late 1990s, with several important works published about it. According to Avritzer⁴³, its influence was considerable not only on the political participation literature, but also on participatory practice, since many Brazilian cities have imitated this practice, expanding public participation.

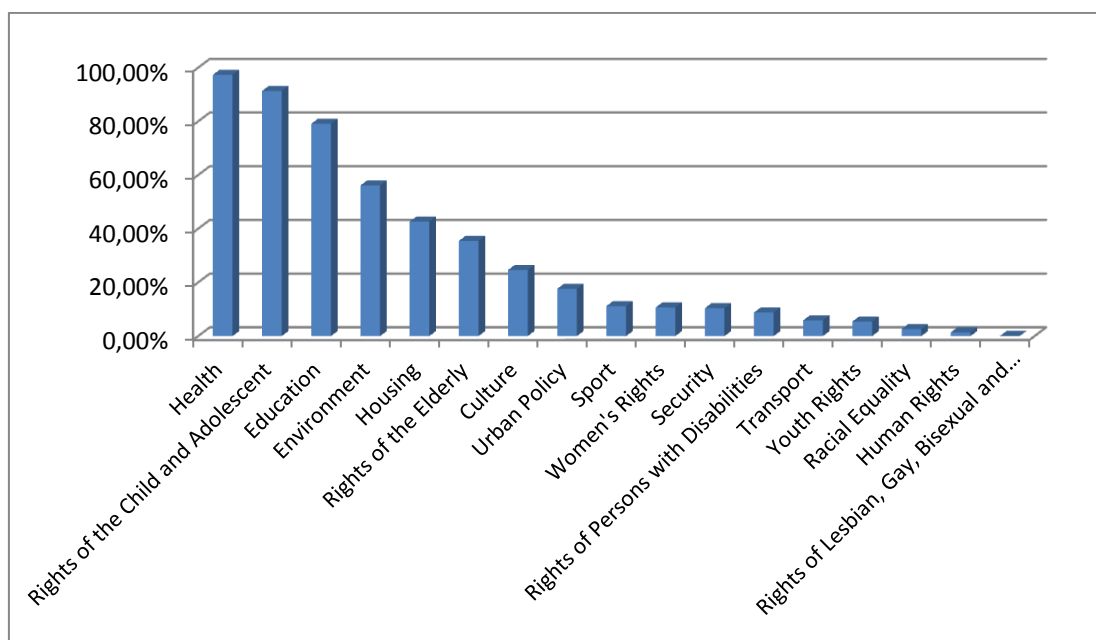
Public policy councils are the most wide spread participatory institution in Brazil. They emerged in 1990, with the creation of the Federal Health Council, followed by the creation of the Health Council in São Paulo, the largest city of Brazil, and in few years there were councils related to several public policies in almost every city of the country. Parity is the usual rule for the councils: half the members represent government institutions and the other half, civil society. The goal is to elaborate more suitable public policies through the discussion between these two sectors.

The following chart shows the percentage of cities with councils for several public policies:

⁴² AVRITZER, Leonardo. *Participatory Institutions in Democratic Brazil*. 2009.

⁴³ For an extensive work about participatory budgeting, see: AVRITZER, Leonardo. *Participatory institutions in democratic Brazil*. Washington, D.C.: Woodrow Wilson Center Press; Baltimore : Johns Hopkins University Press, c2009.

Figure 2: Percentage of Public Policy Councils related to municipalities in Brazil



Source: Profile of Brazilian Municipalities – 2009. IBGE.

According to the IBGE (Brazilian Institute of Geography and Statistics), areas like Health, Rights of the Child and Adolescent, Education and Environment have these kind of participatory institutions working in more than half of the municipalities. The table below shows the total number of councils up to 2009:

Table 1: Number of municipal Public Policy Councils in Brazil

Area	Total
Health	5,417
Rights of the Child and Adolescent	5,084
Education	4,403
Environment	3,124
Housing	2,373
Rights of the Elderly	1,974
Culture	1,372
Urban Policy	981
Sport	623
Women's Rights	594
Security	579
Rights of Persons with Disabilities	490
Transport	328
Youth Rights	303
Racial Equality	148
Human Rights	79
Rights of Lesbian, Gay, Bisexual and Transgender	4
TOTAL OF PUBLIC POLICY COUNCILS	27,876

Source: Profile of Brazilian Municipalities – 2009. IBGE.

This numbers doubtless show an advance in public participation in Brazil, and Avritzer explains that “participatory institutions in Brazil became well known worldwide because of their capacity to attract the participation of poor citizens and to redistribute public goods”⁴⁴. Given the complexity of Public Administration, citizens in general wouldn’t be able to understand the bureaucracy, the public policies or the budget. Participatory budgeting and the public policy councils allow integration and discussion with government sectors and present more intelligible public policies. Thus, the citizen doesn’t need to be a specialist, like asserts Smith:

We are interested here in whether institutions can be designed to directly engage what have been termed ‘lay’ or ‘non-partisan’ citizens, as opposed to experts and partisan campaigners.[...] We are interested in democratic institutions that engage citizens because they are citizens, rather than because they claim expert authority or are the representatives of an organized group within society.⁴⁵

We are back to the present: the outlook for public participation is auspicious, especially with the advent of the 1st Consocial, that will probably contribute good propositions for improving transparency, participatory institutions and the fight against corruption.

2.4 United States case

James A. Morone says, in the introduction to his book:⁴⁶

At the heart of American politics lies a dread and a yearning. The dread is notorious. Americans fear public power as a threat to liberty. Their government is weak and fragmented, designed to prevent action more easily than to produce it. The yearning is an alternative faith in direct, communal democracy.

His book is about this yearning, that he names the “democratic wish”, the central image of which is “the direct participation of a united people pursuing a shared communal interest”⁴⁷.

⁴⁴ AVRITZER, Leonardo. *Participatory institutions in democratic Brazil*. Washington, D.C. : Woodrow Wilson Center Press ; Baltimore : Johns Hopkins University Press, c2009.

⁴⁵ SMITH, Graham. *Democratic innovations: designing institutions for citizen participation*. Cambridge, UK ; New York : Cambridge University Press, 2009.

⁴⁶ MORONE, James A. *The democratic wish: popular participation and the limits of American government*. Rev. ed. New Haven : Yale University Press, 1998.

He reflects about how participation had its ups and downs throughout American history – and consequently this democratic wish was less or more distant. One of his conclusions is that civil society “does not flourish in a vacuum”. In other words, a rich democracy is made with citizens as responsible agents and a strong, popular, but limited government on every level.

Our past offers us an overarching ideal – the people. Contemporary challenges push us toward a more coherent and accountable government. These two – the people and the state, citizens and ministers – have balanced each other through American time. Turning democratic wishes into stronger government will require new variations on old myths – variations that lead more directly to the state that Americans have long deprecated.⁴⁸

One of the most well known aspects of United States democracy is its age: it's the “world's longest-standing constitutional regime, in which governing power is granted and taken away by the votes of citizens⁴⁹”, but, at the same time, “the new republic's democratic aspirations, the principles of equality and political rights expressed in the Declaration of Independence, remained, for many Americans, unfulfilled for two centuries”⁵⁰, making United States at once an old and a new democracy, in King and Lieberman words.

The United States has a very different story from Brazil, in most aspects more favorable to the development of a solid democracy. The feature that really struck Alexis de Tocqueville is, doubtless, one of the most important. Like a real republic, in the United States there was a general equality of conditions⁵¹, something he didn't find in Europe. The United States never faced a dictatorial government and, as Tocqueville said:

The social condition and the constitution of the Americans are democratic, but they have not had a democratic revolution. They arrived upon the soil they occupy in nearly the condition in which we see them at the present day; and this is of very considerable importance.

⁴⁷ Idem.

⁴⁸ Ibidem.

⁴⁹ KING, Desmond, LIEBERMAN, Robert C. ***American Political Development as a Process of Democratization***. In: KING, Desmond S. *Democratization in America: a comparative-historical analysis* / edited by Desmond King ... [et al.]. Baltimore : Johns Hopkins University Press, 2009.

⁵⁰ Idem.

⁵¹ TOCQUEVILLE, Alexis de. ***Democracy in America*** [electronic book]. Available at <http://www.gutenberg.org/>

Tocqueville remarked the importance of the religion to Americans, and stressed how “the observance of the divine laws leads man to civil freedom”⁵². The French political thinker saw the character of Anglo-American civilization as result of the interaction between the “spirit of Religion” and the “spirit of Liberty”. While in the political arena Americans were bold and innovative, they needed the stability of the religion – the moral world – to keep them together. While in the moral world everything is “classed, adapted, decided, and foreseen” and is a “passive, though voluntary obedience”, in the political world everything is “agitated, uncertain, and disputed” and is “independence scornful of experience and jealous of authority”⁵³.

Religion plays the fundamental role of guiding each citizen inclinations, being the safeguard of morality, which is “the best security of law and the surest pledge of freedom”. Without the Christian ethic, with its norms and restraints, the United States would founder into anarchy and despotism⁵⁴. Americans could exercise their freedom because of these norms and restraints, which taught principles like respecting their neighbors and to restrain their own baser instincts. “The law”, wrote Tocqueville, “permits Americans to do what they please, religion prevents them from conceiving, and forbids them to commit, what is rash or unjust”. The innovative character of Americans in politics, and their democratic government led to a “relaxation of the political tie”. The equilibrium was reached through a proportionate strengthening in the “moral tie”, represented by the religion⁵⁵.

Despite its importance, Tocqueville remarks that religion is kept separate from the state, which, according to the American model, makes it more effective:

If the Americans, who change the head of the Government once in four years, who elect new legislators every two years, and renew the provincial officers every twelvemonth; if the Americans, who have abandoned the political world to the attempts of innovators, had not placed religion beyond their reach, where could it abide in the ebb and flow of human opinions? Where would that respect which

⁵² Idem.

⁵³ Ibidem.

⁵⁴ GOLDSTEIN, Doris S. *Alexis de Tocqueville's Concept of Citizenship*. Proceedings of the American Philosophical Society, Vol. 108, No. 1 (Feb. 28, 1964), pp.39-53. American Philosophical Society. Available at: <http://www.jstor.org/stable/985995>

⁵⁵ BATHORY, Peter Dennis. *Tocqueville on Citizenship and Faith: A Response to Cushing Strout*. Political Theory, Vol. 8, No. 1 (Feb., 1980), pp. 27-38. Sage Publications, Inc. Available at: <http://www.jstor.org/stable/190765>

belongs to it be paid, amidst the struggles of faction? And what would become of its immortality, in the midst of perpetual decay? The American clergy were the first to perceive this truth, and to act in conformity with it. They saw that they must renounce their religious influence, if they were to strive for political power; and they chose to give up the support of the State, rather than to share its vicissitudes.

The religiosity of the American people, to Tocqueville, was deeply linked to their political or daily actions by the same moral and philosophical principle: self-interest rightly understood. Tocqueville observed:

The majority of them believe that a man will be led to do what is just and good by following his own interest rightly understood. They hold that every man is born in possession of the right of self-government, and that no one has the right of constraining his fellow-creatures to be happy. They have all a lively faith in the perfectibility of man⁵⁶.

Republican notions govern the greater part of human actions, and even the religion of most of the citizens is republican, since each citizen “is allowed freely to take that road which he thinks will lead him to heaven”, just as each American has the right of choosing his government, according to the law.

The United States has one of the oldest written constitutions, much older than Brazil’s, and that stabilized the political “rules of the game”. This same Constitution has been actively interpreted for more than two centuries by an “authoritative and assertive Supreme Court,” and another important factor concerning the Constitution is:

This ‘constitutional order’ preceded most of the provisions that we currently associate with a modern democracy (no slavery, universal suffrage, race and gender equality), but from the period of enactment it incorporated a reasonably specific Bill of Rights. So, if U. S. democracy is conceived as an impersonal system of sovereign government, with division of powers, federalism, a permanent and effective Bill of Rights, and stable rules of the game ensuring the periodic and routinized alternation of all public officeholders, this has existed (and indeed flourished) in North America longer than anywhere else⁵⁷.

⁵⁶ TOCQUEVILLE, Alexis de. *Democracy in America* [electronic book]. Available at <http://www.gutenberg.org/>

⁵⁷ WHITEHEAD, Laurence, KING, Desmond and RITTER, Gretchen. *American political development and comparative democratization*. In: KING, Desmond S. *Democratization in America: a comparative-historical analysis* / edited by Desmond King ... [et al.]. Baltimore : Johns Hopkins University Press, 2009.

Both Brazilian and U. S. Constitutions begin with “We.” There is, nevertheless, a crucial distinction between what follows this pronoun:

The American Constitution says “We the people,” while Brazilian’s says “We, representatives of the Brazilian people.” Of course it would be naive to believe that the U. S. Constitution is more democratic than Brazil’s because of this. But it illustrates well what was presented about Brazilian history of patrimonial state.

The Bill of Rights was an indispensable tool that framed the process of democratization in United States. Whitehead, King and Ritter say this happened by three different ways⁵⁸:

I – The original vision of the Bill of Rights:

The key political values expressed in the Bill are those of liberty for individuals and for democratic majorities and the rule of law as a restraint on government authority. “The People” of the Preamble are also “the People” of the Bill. They are the democratic sovereigns imagined in the principle of popular sovereignty. Married women and slaves were not seen as members of that political community and, in all likelihood, neither were white men without property.

II – The Bill of Rights over time:

Before the war, the federal government was seen as the greatest threat to rights, and the rights that were protected were both individual and majoritarian in nature. After the war, state governments were viewed as potential sources of abusive authority, and the federal government as the defender of individual rights, including the rights of minorities who were threatened by overbearing majorities.

III – The Bill of Rights as an instrument of democracy:

Three factors are relevant in determining the impact of the Bill on rights and democratic inclusion: institutional structures, political culture, and political contestation. It matters that rights are enforceable in the United States, under the terms of a political structure that gives a strong role to the judiciary as a potential check on the power of the two branches of government. With regards to American political culture [...] the vibrancy of a political tradition in which claims of freedom and equality resonate widely.

These remarks clarify the previous assertion that the United States is at once an old and a new democracy. Although the Bill of Rights has granted civil rights and the rule of law to “we the people” since the beginning, who are the people changed

⁵⁸ Idem.

during time. Thus, the United States became more democratic as more people could join the “we.”

This process, however, has been anything but steady and linear⁵⁹, but it is possible to identify two milestones in the 1920s and the 1960s. King and Lieberman consider the United States a case of

[...] restricted democracy making a long-term transition to something approaching full liberal democracy, which it approached – although not without limitations – only in the twentieth century with adoption of the Nineteenth Amendment to the Constitution in 1920 (guaranteeing women right to vote) and passage of the Civil Rights and Voting Rights Acts in the mid-1960s⁶⁰.

To O’Donnell and Whitehead,⁶¹ the American political democracy emerged only in the 1960s, according to the narrow neo-Schumpeterian and Dahlian criteria, since only then all people joined the “we the people”.

Something remarkable, though, is the fact that after World War II the United States turned its democracy into an “export commodity.”⁶²

American officials wrote the constitutions of reconstructed Germany, and in the wake of the Soviet regime’s collapse, constitution-writing and what one might call “democratic engineering” became veritable cottage industries for American scholars, diplomats, and foundations, especially in eastern Europe and the former Soviet republics, but also elsewhere in the developing world.

This role of the United States as a sort of framer of democracy in the world helped to solidify its own democracy even more, but as a representative democracy. Public participation usually occurs through representatives, not directly. Recognizing this issue, Karl T. Kurtz, Director of the Trust for Representative Democracy of the National Conference of State Legislators presented in an article some ways of

⁵⁹ METTLER, Suzanne. ***The development of democratic citizenship: toward a new research agenda***. In: KING, Desmond S. *Democratization in America: a comparative-historical analysis* / edited by Desmond King ... [et al.]. Baltimore : Johns Hopkins University Press, 2009.

⁶⁰ KING, Desmond, LIEBERMAN, Robert C. ***American Political Development as a Process of Democratization***. In: KING, Desmond S. *Democratization in America: a comparative-historical analysis* / edited by Desmond King ... [et al.]. Baltimore : Johns Hopkins University Press, 2009.

⁶¹ O’DONNELL, Guillermo and WHITEHEAD, Laurence. ***Two comparative democratization perspectives: “Brown Areas” and “Immanence”***. In: KING, Desmond S. *Democratization in America: a comparative-historical analysis* / edited by Desmond King ... [et al.]. Baltimore : Johns Hopkins University Press, 2009.

⁶² KING, Desmond, LIEBERMAN, Robert C. ***American Political Development as a Process of Democratization***. In: KING, Desmond S. *Democratization in America: a comparative-historical analysis* / edited by Desmond King ... [et al.]. Baltimore : Johns Hopkins University Press, 2009.

improving public participation in order to achieve more confidence in the Legislature. He suggests means of direct communication, better media relations, incentives to experience of practices of direct democracies, as plebiscites or initiatives, investments in civil education, among others.

Finally, he presents a checklist for public participation and affirms that probably no legislature in the world meets all of the standards set forth in the table, although the U.S. Congress, the British Parliament and many American state legislatures, notably Minnesota and Georgia, come close⁶³.

Table 2: Check list for public participation

Conditions Promoting Public Participation and Confidence in the Legislature	Check
1. The legislative building and galleries are open and inviting to the public.	
2. Committee meetings are open to the public with adequate notice of meeting times and agendas.	
3. Records of committee meetings and plenary sessions are available to the public and distributed to libraries or other public facilities.	
4. Committees aggressively seek public input by such means as holding hearings inside and outside the capital and utilizing remote conferencing technology.	
5. The legislature publishes basic information about the legislative process and distributes it to the public, media and libraries.	
6. Legislative sessions can be viewed on television or heard on radio or via the Internet in unedited form.	
7. Freedom of the press is guaranteed in the constitution and practiced.	
8. The legislature and society in general encourages voluntary media restraint, openness and independence.	
9. Journalists have adequate access to the legislature, are supplied with timely information and receive training and education about the legislative process.	
10. The legislature responds to public problems in a timely manner and operates in a decorous fashion.	
11. The legislature has a code of conduct and legislators are trained in how to meet high standards of ethical behavior.	
12. Appropriately limited forms of direct democracy exist to allow voters to make their own decisions on vital constitutional and policy matters.	
13. The legislature supports civic education in schools and provides curriculum materials to help children learn about the legislative process.	
14. Both the legislature and NGOs have ground rules of acceptable and ethical lobbying practices and abide by them.	

Source: <http://www.ncsl.org/>

⁶³ KURTZ, Karl T. *Legislatures and Citizens: Public Participation and Confidence in the Legislature*. 1997. Available at: <http://www.ncsl.org/>

Recently the United States showed at least one good example that it is possible to learn how to become more democratic from countries in which democracy is much younger.

In 2009, the Alderman Joe Moore and the residents of Chicago's 49th Ward launched an experiment: after several public meetings and voting over six months, the community members decided how to spend Moore's US\$ 1.3 million discretionary budget. It was the first time in the US history that local people were able to directly decide where to invest the public money⁶⁴. An institution named The Participatory Budgeting Project⁶⁵ has accompanied this initiative, which brought together more than 30 local organizations and institutions, such as schools, religious institutions and NGOs. After the whole process, more than 1,600 people expressed their opinions about how to spend that money to improve their ward.

As remarked before, participatory budgeting is a Brazilian experience initiated in Porto Alegre that, because of its good results for participatory democracy, it has spread around the world.

The Participatory Budgeting Project cites a brand new experience of participatory budgeting in New York City, which has begun in October 2011 and goes up to March, 2012. This experience involves four City Council districts and an amount of US\$ 6 million. The website of the project⁶⁶ says in his home page:

YOU DECIDE HOW TO SPEND TAXPAYER DOLLARS

New York City is experiencing a new kind of democracy. Through Participatory Budgeting, residents of four Council Districts are directly deciding how to spend around \$6 million of public money. From October 2011 to March 2012, community members are exchanging ideas, working together to turn ideas into project proposals, and voting to decide what proposals get funded.

Of course this is just the beginning. The projection for the New York City total budget for 2012 is above US\$ 69 billion⁶⁷, which means that the total amount of the budget subject to participatory budgeting equals 0.0087%. But it is at least a good beginning that New York and Chicago, the first and third cities by GDP in the United States respectively, have opened their budget for public participation.

⁶⁴ More information about this experience is available at <http://participatorybudgeting49.wordpress.com/>

⁶⁵ More information available at: <http://www.participatorybudgeting.org/>

⁶⁶ Participatory Budgeting in New York City: <http://pbnyc.org/>

⁶⁷ Source: Independent Budget Office of the City of New York - <http://www.ibo.nyc.ny.us/index.html>

3 CORRUPTION: A NEVER ENDING ISSUE

Virgil guides Dante through the eighth circle of Hell. They are passing through the fifth ditch, where lie the corrupt politicians, a crime for which Dante himself was falsely charged when he was forced into exile. A very short sentence about the behavior of those sinners defines precisely the meaning of corruption and is still valid nowadays:

“No into Yes for money there is changed.”⁶⁸

Only a genius could say so much in so few words, and Dante did it. Corruption, after all, is about money and about doing what it was not supposed to do. There are several approaches of the evolution of the term *corruption*, but about this I will bring only the following remark by Kleinig⁶⁹:

Perhaps corruption is one of those ideas, like civilization, that does not lead itself easily to comparison. Maybe all we can say is that the eighteenth century saw corruption as a serious problem in terms of its own lights and the late twentieth century saw it as a serious problem in terms of its lights, but that not everything one saw as corruption the other saw as corruption – or, more likely, that some of what one saw as corruption the other the other did not. Frustrating as such assessments might be, they may be the best that we can do.

In 1997, Philp⁷⁰ published an article in which he dealt with the problem of defining politic corruption. In fact, the problem, he said, was to make a distinction between corruption and improper conduct, since in the politics almost nothing in this area is crystal clear. Some years later, in Russia, Mikhail Khodorkovsky, a young billionaire, would be arrested charged of tax evasion and fraud. In 2011 Cyril Tuschi released a documentary about this case, in which accusations of corruption were made involving Khodorkovsky, but also people at the highest levels of the Russian government. At some point of the film, a letter sent by Khodorkovsky himself is read. He says something like the following:

⁶⁸ ALIGHIERI, Dante. *Divine Comedy* [electronic book]. English Edition, translated by Henry Wadsworth Longfellow. Inferno – Canto XXI. Available at: <http://www.divinecomedy.org/>

⁶⁹ HEFFERNAN, William C. and KLEINIG, John. *The corruptibility of corruption*. In: HEFFERNAN, William C. and KLEINIG, John. *Private and public corruption* / edited by William C. Heffernan and John Kleinig. Lanham, MD : Rowman & Littlefield, c2004.

⁷⁰ PHILP, M. *Defining Political Corruption*. Political Studies, 45: 436–462. 1997 doi: 10.1111/1467-9248.00090. Available at: <http://onlinelibrary.wiley.com/>

I did things wrong, I have adopted unethical attitudes and disrespected some moral issues. But I did nothing different from what is normal in my country.⁷¹

Affirming this, the Russian billionaire was in some manner confirming the existence of a functional corruption in his country, a theory that “justifies” corruption in low to moderate levels in some circumstances in order to compensate for the inefficiency of the state. People would be unable to meet targets and deliver services without systematically breaking the rules, thus corruption was functional both to the economy and to continuing political stability, albeit in the short to medium term⁷². A famous expression says that corruption “greases” the wheels of development and through that fosters growth, but Aidt says that, in fact, corruption “sands” the wheels of development and it makes economic and political transitions difficult. The fallacy, according to him, lies in the fact that the “very purpose of many of the most unwieldy and inefficient government interventions are caused by corrupt government officials in the first place”⁷³.

Philps finishes his article and does not dare to conceptualize corruption, but points what it involves:

Most commonly, political corruption involves substituting rule in the interests of an individual or group for those publicly endorsed practices which effect an ordered resolution to conflicting individual or group interests⁷⁴.

Richard D. White, Jr., in his article *Corruption in the United States*, and Jim Wesberry, former head of the anti-corruption project of the United States Agency for International Development (USAID), gave two of the most original and curious definitions of corruption. The first said:

⁷¹ **Khodorkhovsky** (Film), by Cyril Tuschi. Official website: <http://www.kinolorber.com/khodorkovsky/>

⁷²This theory is supported by Jon Elster in *The Cement of Society*, and is more deeply analyzed in: PHILP, M. ***Defining Political Corruption***. *Political Studies*, 45: 436–462. 1997 doi: 10.1111/1467-9248.00090. Available at: <http://onlinelibrary.wiley.com/>

⁷³ AIDT, Toke S.. ***Corruption, Institutions and Economic Development***. *Oxford Review of Economic Policy*, Volume 25, Number 2, 2009, pp.271–291. Available at: <http://oxrep.oxfordjournals.org/>

⁷⁴ PHILP, M. ***Defining Political Corruption***. *Political Studies*, 45: 436–462. 1997 doi: 10.1111/1467-9248.00090. Available at: <http://onlinelibrary.wiley.com/>

To many, corruption is like pornography; they know it when they see it but have a much more difficult time describing it⁷⁵.

The second said:

Corruption is colorless, shapeless, odorless, collusive, secret, stealthy, shameless. Even when it becomes pervasive, it still retains those qualities. It often leaves no trail but that impressed in human minds, memories and perceptions....⁷⁶

When trying to say what exactly corruption is, the first point is to agree that it is a failure in ethics and moral standards of public officials⁷⁷. Warren draws a common flow to “virtually all meanings of political corruption, ancient and modern alike”⁷⁸:

- A. An individual or group of individuals is entrusted with collective decisions or actions.
- B. Common norms exist regulating the ways individuals and groups use their power over collective decisions or actions.
- C. An individual or group breaks with the norms.
- D. Breaking with the norms normally benefits the individual or group and harms to the collectivity.

Caiden presents a list of universal generalizations that, regardless of being lengthy, elucidates corruption⁷⁹:

⁷⁵ WHITE, Richard D., Jr.. **Corruption in the United States**. In: CAIDEN, Gerald E., DWIVEDI, O. P. and JABBARA, Joseph G.. *Where corruption lives* / Gerald E. Caiden, O.P. Dwivedi, and Joseph Jabbara, editors. Bloomfield, Conn.: Kumarian Press, 2001.

⁷⁶ JIM WESBERRY wrote a letter to Washington Times in January 06, 2001, in response to an article by Rachel Ehrenfeld, who claimed that the fight against corruption was failing because: “there is no clear definition of corruption; there is no objective, uniform standard for identifying countries that are vulnerable to corruption and for measuring their resilience; with no firm agreement on what constitutes corruption, the surveys, indexes and analyses that have been developed to assess the phenomenon are not comprehensive enough because they are mostly based on perceptions and anecdotal information; most international agreements on corruption lack teeth and are impossible to enforce. She finished his column suggesting the creation of “International Integrity Standard (IIS)” that would form the benchmark against which countries’ actions to fight corruption could be tested. Wesberry, in his answer, says that fighting corruption is not so simple, because of its peculiar characteristics, quoted here. He finishes his letter with two considerations: 1- there are no superweapons or superpowers in the war on corruption because it is rooted in human nature; 2 Incorruptible governments can be constructed only using incorruptible citizens as their bricks and mortar. Are our educational, familial, social and spiritual systems helping form incorruptible new citizens? Or are they doing just the opposite? Full letter available at <http://www.washingtontimes.com/news/2001/jan/6/20010106-020538-9807r/?page=3>

⁷⁷ MARTINEZ-VAZQUEZ, Jorge. **Fighting corruption in the public sector** / Jorge Martinez-Vazquez, Javier Arze del Granado, Jameson Boex. Amsterdam; Boston : Elsevier. 2007.

⁷⁸ WARREN, Mark E.. **What Does Corruption Mean in a Democracy?** *American Journal of Political Science*, 48:2 (April 2004): 327-342. Available at: <http://www.politics.ubc.ca/>

⁷⁹ CAIDEN, Gerald E. **Corruption and Governance**. In: CAIDEN, Gerald E., DWIVEDI, O. P. and JABBARA, Joseph G.. *Where corruption lives* / Gerald E. Caiden, O.P. Dwivedi, and Joseph Jabbara, editors. Bloomfield, Conn.: Kumarian Press, 2001.

1. Corruption has been found in all political systems, at every level of government, and in the delivery of all scarce public goods and services;
2. Corruption varies in origin, incidence, and importance among different geographic regions, sovereign states, political cultures, economies and administrative arrangements;
3. Corruption is facilitated or impeded by the societal context (including international and transnational influences) in which power is exercised;
4. Corruption has multitudinous causes, assumes many different patterns and guises and cannot be accurately measured because of its often indeterminate and conspiratorial nature;
5. Corruption is deeply rooted, cancerous, contaminating, and impossible to eradicate because controls tend to be formalistic, superficial, temporary, and even counterproductive;
6. Corruption is directed at real power, key decision points, and discretionary authority. It commands a price for both access to decision makers and influence in decision making;
7. Corruption is facilitated by unstable polities, uncertain economies, maldistributed wealth, unrepresentative government, entrepreneurial ambitions, privatization of public resources, factionalism, personalism, and dependency;
8. Corruption favors those who have (over those who have not), illegal enterprises, underground economies, and organized crime;
9. Corruption persists substantially as long as its perpetrators can coerce participation, public attitudes towards it vary widely, and it greatly benefits a privileged few at the expense of the disadvantaged mass or benefits all participants at the cost of nonparticipants;
10. Corruption can be contained within acceptable limits through political will, democratic ethos, fragmented countervailing power, legal-rational administrative norms, inculcation of personal honesty and integrity, and effective enforcement of public ethics – although its complete elimination is still beyond human capability.

There is corruption in Brazil, in the United States and certainly in every country in the world, and, in broad lines, it happens like pointed above. It is not a cultural issue, like many Brazilians unfortunately have been used to say: “Corruption is in our blood”. On the contrary, most economic studies point that corruption is an economic choice made by public officials. This wrong approach – corruption being taken as part of the nature of a country, as exogenous as its geography –, along with the immense difficulty of measuring corruption and of getting rid of it caused the issue of corruption to be, for a long time, downplayed by governments, international organizations, and policy experts⁸⁰.

⁸⁰ MARTINEZ-VAZQUEZ, Jorge. *Fighting corruption in the public sector* / Jorge Martinez-Vazquez, Javier Arze del Granado, Jameson Boex. Amsterdam; Boston : Elsevier. 2007.

This does not mean that to fight corruption one can ignore the cultural and historical characteristics of a country. Instead corruption “is a problem that can be studied, at least in part, in objective and systematic ways, which can facilitate the design of effective policy responses and remedies”⁸¹.

In an attempt to properly identify the process of corruption, Evans presents the following equation⁸²:

Corruption equals Monopoly plus Discretion minus Accountability

$(C=M+D-A)$.

He explains:

[...] one party to a transaction may operate from a position of greater strength. He/she is an ‘insider’. If this position is misused it makes the transaction corrupt. For example, the strength of one party may arise because they control the supply of a good, have discretion in giving or withholding that good, and are not held properly accountable for the choices they make. [...] The party in a position of strength is often a public official, hence the common definition of corruption as “the abuse of public office for private gain”⁸³.

In addition, he presents the three categories of corruption according to Riley⁸⁴:

- Incidental corruption:

This is small-scale. It involves junior public officials, such as policemen or customs officers; it produces profound public alienation; it has little macro-economic cost, but it is often hard to curb.

- Systematic corruption:

This is corruption that affects, for example, a whole government department or parastatal. It can have a substantial effect on government revenues; it may divert trade and/or development; it can only be dealt with by sustained reform.

- Systemic corruption:

It is kleptocracy or government by theft. In this situation honesty becomes irrational, and there is a huge developmental impact.

⁸¹ Idem.

⁸² EVANS, Bryan R. *The cost of corruption: a discussion paper on corruption, development and the poor*. Available at: <http://www.tearfund.org/>

⁸³ Idem.

⁸⁴ Ibidem.

3.1 The costs of corruption

One important question when facing the problem of corruption is its cost. There are huge financial costs, of course, related to the public money that is embezzled, but there are several other problems caused by corruption, such as:

- Political instability and a weakened democratic process⁸⁵;
- Corruption corrodes rule of law and government transparency and accountability, all underpinnings of free society and human progress⁸⁶;
- Corruption undermines financial accountability, discourages foreign investment, stifles economic performance, and diminishes trust in legal and judicial systems⁸⁷.

Sullivan and Shkolnikov present an almost exhaustive list of consequences of corruption⁸⁸:

- Misallocates resources
- Fosters misguided and unresponsive policies and regulations
- Lowers investment levels
- Reduces competition and efficiency
- Lowers public revenue for essential goods and services
- Increases public spending
- Lowers productivity and discourages innovation
- Increases costs of doing business (serves as a tax on business)
- Lowers growth levels
- Lowers private sector employment levels
- Reduces the number of quality public sector jobs
- Exacerbates poverty and inequality
- Undermines the rule of Law
- Hinders democratic, market-oriented reforms
- Increases political instability
- Contributes to high crime rates

The figure below shows how corruption imposes an extra cost on households and firms in the purchase of publicly provided services⁸⁹:

⁸⁵ MARTINEZ-VAZQUEZ, Jorge. *Fighting corruption in the public sector* / Jorge Martinez-Vazquez, Javier Arze del Granado, Jameson Boex. Amsterdam; Boston : Elsevier. 2007.

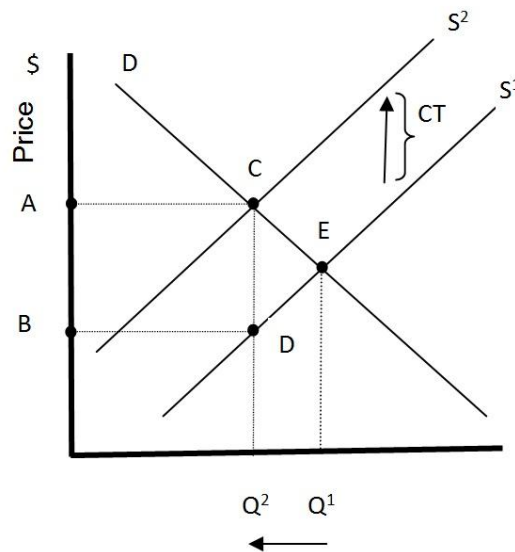
⁸⁶ *Transforming the Culture of Corruption* – U. S. Department of State – Bureau of International Information Program. 2006. Available at: http://usinfo.org/enus/government/govt_forpolicy.html

⁸⁷ Idem.

⁸⁸ SULLIVAN, John and SHKOLNIKOV, Aleksandr. *The Costs of Corruption*. In: *Transforming the Culture of Corruption* – U. S. Department of State – Bureau of International Information Program. 2006. Available at: http://usinfo.org/enus/government/govt_forpolicy.html

⁸⁹ MARTINEZ-VAZQUEZ, Jorge. *Fighting corruption in the public sector* / Jorge Martinez-Vazquez, Javier Arze del Granado, Jameson Boex. Amsterdam; Boston : Elsevier. 2007.

Figure 3: Socially optimum amount of corruption



Source: MARTINEZ-VAZQUEZ, Jorge. **Fighting corruption in the public sector**

This is a classic Demand and Supply graph for public goods and services. Corruption cost effect is visible in the upwards shift of the supply curve from S^1 to S^2 . Without corruption, the amount of public goods and services would be Q^2 and would cost price B . With corruption, the same amount now costs price A . The equilibrium point is also changed, reducing quantity of public service and increasing costs. An economic analysis points that corruption “generates an efficiency loss (also known as deadweight loss) represented by the triangular area CDE ”⁹⁰.

The many negative consequences of corruption show that fighting it is an urgent necessity. Two other questions arise: how to fight corruption and for how long (meaning how much to spent to fight corruption)?

For the first question, the most obvious answer is: with all available means, including the institutional apparatus of the Government, the organized civil society, and the private companies. Some political systems have better internal resources for combating corruption than others, like democratic regimes, in which the transparency is greater because of some factors, like free elections and free press, for example⁹¹.

⁹⁰ Idem.

⁹¹ HEFFERNAN, William C. and KLEINIG, John. **The corruptibility of corruption**. In: HEFFERNAN, William C. and KLEINIG, John. *Private and public corruption* / edited by William C. Heffernan and John Kleinig. Lanham, MD : Rowman & Littlefield, c2004.

Noonan, Jr. cites some tools necessary to tackle corruption and that are not available in a communist or dictatorial regime⁹²:

A judiciary that is honest, well paid, and secure in tenure; a free press educated to look critically at government; blocking of the banking system to bribers and bribes; procurement procedures that disqualify bribegiving companies; administrative agencies subject to judicial review; police subject to external supervision; public access to government financial records and government contracts; the restitution to the country plundered of the fruits of corruption deposited abroad by the plunderers. The list could continue.

Although public participation is fundamental for fighting corruption, Warren asserts that “corruption control in democracies is never going to rely heavily on democratic participation”⁹³.

This means that the most important step must be initiated by the government itself. He appoints the reasons for this:

- Where citizens resent or resist corruption, they face a public goods problem: no citizen has sufficient interest in combating corruption to make the investment in doing so.
- Where citizens manage to organize anyway, elections are insufficient to empower them to combat corruption, especially when all parties are, or appear to be, implicated in a corrupt system.
- Because corruption is secretive, citizens are unlikely to have the knowledge they need to combat corruption⁹⁴.

In order to avoid this mistrust in democracy, government must adopt some strategies to minimize corruption. One strategy can be to identify what can motivate the corruption, in other words, what are the weak points. Some possible alternatives are the following⁹⁵:

- a) Absence of a culture of honesty, ethics, and political will;
- b) Weak mechanisms for monitoring and expenditure tracking;
- c) Weak penalization and prosecution;
- d) Inadequate wages and incentive-compatible compensation.

⁹² NOONAN, John T., Jr.. ***Struggling against corruption***. In: HEFFERNAN, William C. and KLEINIG, John. *Private and public corruption* / edited by William C. Heffernan and John Kleinig. Lanham, MD : Rowman & Littlefield, c2004.

⁹³ WARREN, Mark E. ***Democracy Against Corruption***. 2005. Available at: <http://www.politics.ubc.ca/>

⁹⁴ Idem.

⁹⁵ MARTINEZ-VAZQUEZ, Jorge. ***Fighting corruption in the public sector*** / Jorge Martinez-Vazquez, Javier Arze del Granado, Jameson Boex. Amsterdam; Boston : Elsevier. 2007.

The first factor, especially the absence of political will, discourages people from participating and thus weakens democracy, in a vicious circle, as described below:

Corruption itself weakens society's institutions and mechanisms that would otherwise help strengthen the development of political will. As such, the political will to keep probity in government is lower where democracy is weak. This is because civil society may be unable to vote out of office their corrupt leaders, while corruption may be also entrenched in the electoral system. Corrupt electoral processes also undermine citizens' perception of government legitimacy and therefore their own attitude toward corruption⁹⁶.

Heffernan and Kleinig present other three strategies in three groups, each one of them indispensable⁹⁷:

Cultural – The most general strategy, though the most difficult to implement and sustain, especially in societies that are most affected by corruption – the *cultures of corruption*, in which “even institutional *raison d'être* have been corrupted”. This includes civil education, campaigns about ethics and all sort of initiatives that depict corruption as an anomaly that must be combated by every citizen in all levels.

Administrative – It might include procedures that make it difficult for people to exploit the system for personal advantage or otherwise pervert it, and do not have to be negative (transparency as an example).

Legal – It will involve the outlawing of certain kinds of behavior by attaching punitive sanctions to kinds of conduct deemed to be corrupt. Anti-bribery and anti-extortion laws constitute obvious examples, though the net might be cast more broadly.

As a mixture of cultural, administrative and legal initiatives, government can assure political representation and electoral accountability, make public budgets comprehensive, create or strengthen Independent Audit Institutions or the Controller-Accountant-General Office, and strengthen the role of civil society and the private sector⁹⁸.

⁹⁶ Idem.

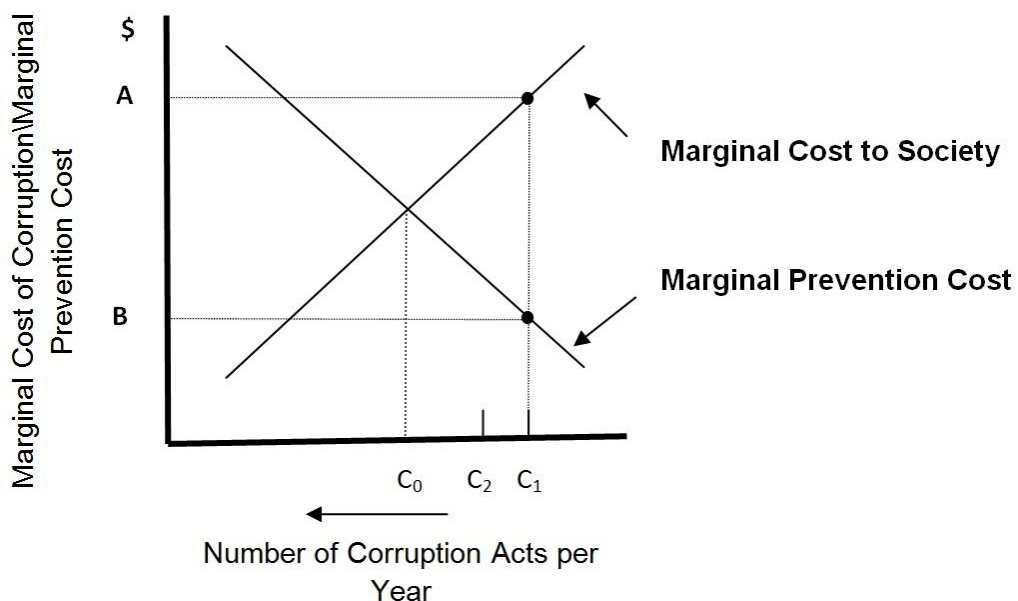
⁹⁷ HEFFERNAN, William C. and KLEINIG, John. *The corruptibility of corruption*. In: HEFFERNAN, William C. and KLEINIG, John. *Private and public corruption* / edited by William C. Heffernan and John Kleinig. Lanham, MD : Rowman & Littlefield, c2004.

⁹⁸ MARTINEZ-VAZQUEZ, Jorge. *Fighting corruption in the public sector* / Jorge Martinez-Vazquez, Javier Arze del Granado, Jameson Boex. Amsterdam; Boston : Elsevier. 2007.

All these actions represent costs, and here appears again the second question presented some paragraphs before: how much should be spent to fight corruption? The first thing to have in mind, Heffernan and Kleinig alert, is that “corruption may be a bad thing, but it is not necessarily the worst thing, and the costs of rooting it out may be excessively high”. In other words, they say that a certain level of corruption should be tolerated, as a “cost of efficient societal organization”⁹⁹. Beyond a certain level, they conclude, “the minimization of corruption will depend on a culture that does not tolerate it”.

A step further in this discussion, Martinez-Vasques, Granado, and Boex appeal to economic concepts of Marginal Cost to show the optimal point of fighting corruption. They claim that “from an economic and budgetary point of view the costs of prevention or reducing corruption to zero may be too high (if not infinite)”¹⁰⁰.

Figure 4: Socially optimum amount of corruption



Source: MARTINEZ-VAZQUEZ, Jorge. *Fighting corruption in the public sector*

The amount of corruption that is tolerable for a society may be determined by comparing the costs of preventing corruption with the costs that corruption imposes on society.

⁹⁹ HEFFERNAN, William C. and KLEINIG, John. *The corruptibility of corruption*. In: HEFFERNAN, William C. and KLEINIG, John. *Private and public corruption* / edited by William C. Heffernan and John Kleinig. Lanham, MD : Rowman & Littlefield, c2004.

¹⁰⁰ MARTINEZ-VAZQUEZ, Jorge. *Fighting corruption in the public sector* / Jorge Martinez-Vazquez, Javier Arze del Granado, Jameson Boex. Amsterdam; Boston : Elsevier. 2007.

The vertical axis in the figure represents the costs in currency and the horizontal axis, the number of corruption acts per year. The Marginal Prevention Cost is a downward-sloping curve. This means that the cost for prevent one singular act of corruption is lower when there are more corruption cases. Thus, the cost for prevent one singular act of corruption is higher if there are less corruption cases. As an example, is less costly prevent 10 cases of corruption in a scenario with 300 corruption cases per year than in a scenario with only 50 corruption cases per year. The explanation for this is that when the number of corruption cases is high, the first cases detected will be less sophisticated, most visible, and consequently, less costly. The subsequent cases will grow in complexity, turning each case more difficult than the previous one. With this representation is easy to imagine how expensive would be to prevent the last act of corruption, following the zero tolerance policy.

The Marginal Cost of Corruption to Society, on the contrary, has an upward-sloping curve. This means that as higher the number of corruption acts, higher the damage of one additional act of corruption for the society.

According to this representation, at point C1 it is worthy to prevent corruption, because the cost associated with this (point B) is lower than the cost of corruption to society (point A). The optimal point of preventing corruption then will be at point C0, where cost of prevention equals the cost of corruption for society. Any point at left of C0 will not be economically justifiable, since preventing corruption will be so high that will cost more than the cost of corruption itself. Where this optimal point or point of equilibrium is located depends on the reality of each country, but certainly will be where the corruption has a very limited impact on the economy (for instance, it doesn't affect economic growth),¹⁰¹ and does not weakens people's trust in democracy and in the government.

3.2 Fighting corruption in Brazil

Brazil, as showed in the chapter 2, has a non-orthodox relation with public participation: throughout its history, since its discovery in 1500, Brazilian history is full of episodes of exclusion, inequality, privileges and lack of respect for the rule of law. This young democracy seems to try to recover the lost time, and as a consequence

¹⁰¹ MARTINEZ-VAZQUEZ, Jorge. *Fighting corruption in the public sector* / Jorge Martinez-Vazquez, Javier Arze del Granado, Jameson Boex. Amsterdam; Boston : Elsevier. 2007.

of this, several participatory mechanisms arise, one after another. At the same time, the patrimonial state tradition results in a strong state, difficult to control, and that requires sophisticated mechanisms of horizontal accountability.

Although public participation and horizontal accountability should work especially for improving the quality of public policies, increasing their efficiency, the main purpose – or the main worry – of both mechanisms in Brazil is corruption.

In 2002, the Center for Strategic and International Studies (CSIS) published a report named *Corruption in Brazil: Defining, Measuring and Reducing*. This report cited a study from the Getúlio Vargas Foundation in São Paulo (FGV-SP) that estimated that the direct and indirect economic impact of corruption on Brazil's economy was some R\$ 6,000 per capita per year. Considering that Brazil's population in 2000 numbered nearly 170 million, the impact would reach impressive R\$ 1 trillion. Another FGV study, funded by the Tinker Foundation, and also cited in the report, revealed that if Brazil's judicial system were less dysfunctional, its GDP could be 25 percent higher. The study also concluded that if corruption were reduced, Brazil's per capita GDP in 2000 would have been US\$13,700 rather than US\$10,100¹⁰².

This criticism about Brazilian judicial system is recurrent, and the CSIS report presents a series of conditions that allows acts of corruption and finds its bottleneck in an inefficient judicial system (my emphasis)¹⁰³:

In very broad terms, corruption usually occurs in situations where either internal controls are ineffective or the findings are unheeded or not processed by the external control organization. Also, in political systems where press censorship is strong, the public has limited information concerning corruption by public agents. Even where little or no press censorship exists, and investigative reporting uncovers corruption practices on a grand scale, if public prosecutors are ineffective none of those involved are ever brought to trial. *In cases where the police and prosecutors are effective in gathering evidence and bringing corruption cases to trial, if the penal code is weak and full of legal loopholes within a judicial system that is generally "dysfunctional", then impunity is the order of the day. Finally, if the corruption has been perpetrated by officials who are covered by statutory (or even constitutional) "political immunity" from prosecution, then none of the above restraints will be effective.*

¹⁰² FLEISCHER, David V. *Corruption in Brazil: defining, measuring and reducing*. Washington, D.C.: CSIS, c2002.

¹⁰³ Idem.

The report points out two major problems when facing corruption in Brazil: the “dysfunctionality” of the judicial system and a broad political immunity from prosecution for high level officials in all three branches. Thus, Brazil’s judicial system needs thorough reform, with an external control body and deep revisions to the penal code and the penal code process to enable prosecutors to end “impunity”.

One of the most well-known measurement tools of corruption – the Corruption Perception Index (CPI), from Transparency International (TI)¹⁰⁴ – measures corruption from 0 (highly corrupt) to 10 (very clean). It puts Brazil in a bad position globally, helping to understand why corruption is always a concern among Brazilians. The table below shows that in the last four years Brazil has not improved considerably in the index - Brazil remains in the middle, an uncomfortable place for a country which has just become the fifth largest economy in the world. As a comparison, the United States remained in a stable position during this five years period, with an index that indicates a “clean country”.

Table 3: Brazil’s and United States’ Corruption Perception Index

Year	Brazil		United States		# of Countries
	CPI	Global Position	CPI	Global Position	
2007	2.5	72	7.2	20	179
2008	3.5	80	7.3	18	180
2009	3.7	75	7.5	19	180
2010	3.7	69	7.1	22	178
2011	3.8	73	7.1	24	183

Source: <http://www.transparency.org>

This index, however, is strongly controversial in Brazil. Among its most severe critics is Jorge Hage, the Minister of the Office of the Comptroller-General (CGU). In 2008 he released a note at the CGU website that showed great discontentment with the Transparency International¹⁰⁵. He affirmed that the CPI is not reliable, and nobody took it seriously. The main reasons for this, according to the minister, are that TI does not know Brazil, does not do its own research, and just compiles research from several sources, each one of them with different criteria. Additionally, the CPI does not take into consideration that when the fight against corruption is increased,

¹⁰⁴ Information about the Corruption Perception Index is available from 1995 to 2011 at <http://cpi.transparency.org/cpi2011/>

¹⁰⁵ The whole article is available at <http://www.cgu.gov.br/imprensa/Noticias/2008/noticia10308.asp>

people will hear more about it (and, consequently, will have a higher perception of it). He cites a research from the Vox Populi, demanded by the Federal University of Minas Gerais (UFMG)¹⁰⁶. According to the research, 77% of the interviewees thinks corruption as a very serious problem in Brazil, and 73% have the perception that corruption has increased in the last five years. Both studies seem to confirm the CPI index and the Global Corruption Barometer, from the TI¹⁰⁷, but a third question raises a subject ignored by TI: 75% of interviewees agree that what had increased, in fact, was not corruption, but the fight against it, that has brought about new cases of corruption that otherwise would remain hidden.

The research result confirms Minister Hage's assertion that CPI will increase as the fight against corruption increases, and thus, CPI is not a reliable index. Both actors – society, responsible for the public participation, and government, responsible for the horizontal accountability – see corruption as a serious problem that is being cracked down upon. Since public participation has already been mentioned in chapter 2, hereafter is possible to see how government is acting against corruption.

3.2.1 Horizontal Accountability

3.2.1.1 The Public Ministry

According to the Federal Constitution of 1988, the defense of law, of democratic regime and of the inalienable social and individual interests rests on the Public Ministry. The fight against corruption is included in its work to protect the diffuse and collective interests of the Brazilian Society.

The clash between control, supervision and accountability systems and corruption schemes creates a balance of power without the Public Ministry. The Public Ministry, however, would destabilize the framework in favor of the fight against corruption¹⁰⁸. The Public Ministry has an exclusive tool, the public penal prosecution,

¹⁰⁶ The integral text, from journalist Maria Cristina Fernandes, was published in the Valor Econômico/Valor Online in 08/01/2008. Available at <http://www.valoronline.com.br>

¹⁰⁷ According to Global Corruption Barometer 2010, 64% of Brazilians thinks corruption has increased in the last three years. To Brazilians, the most corrupted institutions are Political Parties and Parliament/Legislature. To read all the information about Global Corruption Barometer 2010, see <http://www.transparency.org>

¹⁰⁸ Quoted from a monograph that won the second place (Public Ministry role in the fight against corruption) in a contest promoted by the Public Ministry. This denotes how Public Ministry sees its duties in relation to corruption. MEDEIROS, Humberto Jacques de. **O Papel do Ministério Público no Combate à Corrupção**. 2003. Available at: <http://ccr5.pgr.mpf.gov.br/documentos-e-publicacoes/>

that is used to fight corruption, in addition to other tools, such as the public civil prosecution or the act of misconduct.

Due to the functional independence of the prosecutors and their active character, the Public Ministry enjoys great confidence among the people.

3.2.1.2 The External Control System

The Brazilian model of external control is based on Courts of Accounts, which total 34 nationwide (1 National Court of Audit, 27 State Court of Audit, 4 Municipal Court of Audit in the states of Ceará, Bahia, Pará and Goiás and 2 Court of Audit exclusive to the municipalities of Rio de Janeiro and São Paulo).

The Constitution of 1988 expanded jurisdiction and powers of the Federal Court of Audit, empowering it to, in aid of the National Congress, exercise accounting, financial, budgetary, operational and patrimonial supervision of the Union and entities of the direct and indirect administration, as regards to the legality, legitimacy and the economy and oversee the implementation of grants and waiver of revenues.

3.2.1.3 The Internal Control System

The constitution text refers to the internal control system in several articles, especially the article 70 and 74. The first one, the same that establishes the competence of External Control, says that the accounting, financial, budgetary, operational and property control, in the Brazilian Federal level and entities of direct and indirect Public Administration, is exercised by the Congress. This control regards the legality, legitimacy, economy, application of subsidies and waiver of revenues, through external and internal control systems of each branch.

Article 74 establishes that the Legislative, Executive and Judicial branches will maintain an integrated system of internal control for the purpose of evaluating compliance with the goals of the four year budget plan; the implementation of government programs and budgets of the federal government level; evaluation of the lawfulness and the results, regarding the effectiveness and efficiency of budget, finance and property in the entities of the federal administration; the application of public funds by private entities; control of loans, guarantees, as well as the rights and

assets of the federal government level; support of the external control system in the exercise of its institutional mission.

The Office of the Comptroller-General (CGU) is responsible for the Internal Control of the Federal Executive branch, and its powers are defined in Law n. 10,683, of May 28, 2003. Its main task is to assist directly and immediately to the President regarding matters within the executive branch. This assistance relates to the protection of public property and increasing the transparency of management, through the activities of internal control, public auditing, correction, preventing and combating corruption and ombudsman.

There is a specific department at CGU to develop activities related to the promotion of public transparency and training and encourage the civil society to participate in the public arena in order to prevent corruption.

Another remarkable feature regarding the fight against corruption is that it is CGU that is responsible for monitoring the implementation of international commitments, such as the Inter-American Convention against Corruption from the Organization of American States (OAS) signed on March 29, 1996; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions from the Organization for Economic Cooperation and Development, signed on December 17, 1997; Convention against Corruption from the United Nations, signed on December 9, 2003.

3.2.1.4 Control Network

The Control Network is an inter-organizational decision-making agency that aims to improve the effectiveness of the function of state control over public management. It is composed of 17 institutions, including the Attorney's General Office, the Parliament, the Office of the Comptroller-General, the Court of Audit, the Public Ministry and several federal departments of the executive branch.

The Control Network was created through the signing of a intentions protocol, which aims the coordination of efforts, forming strategic partnerships and definition of common guidelines. These goals are achieved through the establishment of joint commitments and actions of public agencies and entities focused on the supervision and control of public administration.

The main objective of the Control Network is to develop actions directed to the surveillance of public management, diagnosis and combating corruption, the encouragement and strengthening of social control (public participation), sharing of information and documents, exchange of experience, and training of its staff¹⁰⁹.

3.2.1.5 Other institutions

Another institution that has fought corruption successfully is the Brazilian Federal Police, which has triggered a large number of operations against criminals involved in corruption scandals.

The Attorney General's Office (AGU) is the institution that represents the federal level of government at the court and has also had a significant role in litigation arising from the fight against corruption¹¹⁰.

3.2.2 International Commitments

3.2.2.1 Inter-American convention Against Corruption (OAS)

This was the first international commitment to fight corruption that dealt both with preventive and punitive measures. It was adopted at Caracas, Venezuela, on March 29, 1996 and signed by all the members of the Organization of American States. The purposes of the Convention are:

1. To promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and
2. To promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance¹¹¹.

Among the initiatives of Brazil to reach the purposes of the Convention are¹¹²:

- Change in legislation to typify the crime of transnational bribery;

¹⁰⁹ Information available at the official website of the Control Network:

<http://www.rededecontrole.gov.br/>

¹¹⁰ OLIVEIRA, Frederico Resende de. **Comparative study between the North American and Brazilian systems of combating corruption**. 2011. Available at <http://www.gwu.edu/~ibi/>

¹¹¹ The full text of the Convention is available at <http://www.oas.org/>

¹¹² To see all the initiatives of Brazilian Government, check <http://www.cgu.gov.br/oea/>

- Creation of the Council of Public Transparency and Combat of Corruption;
- Creation of the National Strategy of Combat of Corruption and Money Laundering (Enccla), with a coalition of more than 50 institutions;
- Encouraging the public participation, through the creation of several public policies that include motivational actions and training to engage students, teachers, public employees and citizens in general;
- Making the public administration more transparent, through the creation of the Transparency Portal, which makes data from the federal budget available to the population through the Internet. The Transparency Portal is visited by more than 300 thousand people a month and it stores more than 1 billion types of information about the federal budget¹¹³. Besides this, currently there are 112 Transparency Portals of federal agencies or offices, all of them giving detailed information about the budget.
- The Council of Public Transparency and Combat of Corruption has wrote a bill that criminalizes illicit enrichment, sent to the House of the Representatives.

3.2.2.2 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD)

The OECD Anti-Bribery Convention establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions, and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction¹¹⁴. The 34 OECD member countries and four non-member countries - Argentina, Brazil, Bulgaria, and South Africa - have adopted this Convention.

CGU has recommended a set of practices that help companies to contribute to the implementation of the recommendations¹¹⁵:

- To join Codes of Best Corporative Practices, in order to improve the corporative governance of national companies;
- To give incentive for the creation of internal controls;

¹¹³ The Transparency Portal address at Internet is <http://www.portaltransparencia.gov.br/>

¹¹⁴ The full text of the Convention is available at <http://www.oecd.org/>

¹¹⁵ Available at <http://www.cgu.gov.br/ocde/>

- To offer courses and seminars about corruption;
- To create and to execute integrity programs based on conduct codes;
- To orient and to train employees in order to know the law about corruption, making them able to distinguish what is active and passive corruption, misconduct, fraud, embezzlement etc.;
- To make it clear that every employee is forbidden to give or to offer bribes.

3.2.2.3 *United Nations Convention against Corruption (UN)*

Composed of 71 articles, is the largest legally binding text to combat corruption¹¹⁶. The Convention was signed on December 9, 2003, in Mérida, Mexico, and so it is also known as the Merida Convention. This day also marks the International Day of Fight against Corruption around the world. In Brazil, the United Nations Convention against Corruption was ratified by Legislative Decree No. 348 of May 18, 2005, and promulgated by Presidential Decree No. 5687 of January 31, 2006. The Convention is divided in four great areas: preventive measures; penalty and enforcement; international cooperation; and recovery of assets.

Among the initiatives of Brazil to achieve the goals of the Convention are¹¹⁷:

- Creation of the Secretary of Prevention of Corruption and Strategic Information (SPCI) inside the structure of CGU, aiming to put Brazil in the forefront of combating and preventing corruption;
- Strengthening of the Council of Public Transparency and Combat of Corruption;
- Extension of the operation of Enccla, including the corruption issue in the strategy;
- Improving the legal framework for preventing and combating corruption.

3.2.3 **Laws**

Brazilian regulatory system, related to corruption crimes, typifies in its Criminal Code the following offenses¹¹⁸:

¹¹⁶ The full text of the Convention is available at <http://www.unodc.org/>

¹¹⁷ Available at <http://www.cgu.gov.br/onu/>

- ✓ Embezzlement - appropriation or diversion by a public official, who has goods in his possession due to the exercise of his public function.
- ✓ Violation of functional secrecy - revelation of the fact which is known due to a public official position and that should remain secret.
- ✓ Influence-peddling - requesting, demanding, charging or obtaining advantage for influencing an act committed by a public officer.
- ✓ Accepting bribes - requesting, receiving or accepting a promise of an undue advantage, because of the civil servant position.
- ✓ Offering bribery - offering the promise of advantage to a public official to influence him to practice, omit or delay any official act.
- ✓ Offering bribery in international business transaction - promising, offering or granting undue advantage to an international official to influence him to practice, to omit or to delay any official act relating to international business transaction.
- ✓ Trafficking in influence in international business transaction - requesting, demanding, charging or obtaining advantage or its promise, under the pretext of influencing an act practiced by foreign public officials in the exercise of his functions, among others.

Besides the express text of Criminal Code, the contents of Article 37, § 4 of the Constitution, establishes the principle of administrative probity. It says that the acts of administrative malfeasance will be punished by the suspension of political rights, the loss of civil service, a lock on personal property, and the reimbursement to the Treasury, grading as provided by law, without prejudice to applicable criminal action.

The Law 8.429/92, so-called “Administrative Misconduct Law”, regulates the Article 37, § 4 of the Constitution, systematizing the cases of administrative misconduct in three types, namely:

- ✓ Administrative acts that involve illicit enrichment - dealt with in Article 9 of Law;
- ✓ Administrative acts which cause injury to the public treasury - covered by Article 10;

¹¹⁸ OLIVEIRA, Frederico Resende de. **Comparative study between the North American and Brazilian systems of combating corruption**. 2011. Available at <http://www.gwu.edu/~ibi/>

- ✓ Administrative acts that violate the principles of public administration - governed by Article 11 of the Law 8.429/92.

3.3 Fighting corruption in the United States

3.3.1 A brief context of corruption in the U.S.

Eric M. Uslander launches a theory about corruption in his book *Corruption, Inequality and the Rule of Law: the bulging pocket makes the easy life*. He names it “the inequality trap”¹¹⁹. According to this theory:

The roots of corruption [...] rest upon economic inequality and low trust in people who are different from yourself. Corruption, in turn, leads to less trust in other people and to more inequality. The trap is the reason why corruption persists in societies over long periods of time and why it is so difficult to eradicate¹²⁰.

The inequality trap follows this sequence:

Inequality -> Low trust -> Corruption -> More inequality

Analyzing the U.S. case, he points out that this country is in the middle range of inequality and trust (both decreasing over time), but has modest levels of corruption. This situation seems to challenge Uslander’s own theory, because inequality should lead to low trust, resulting in corruption and, finally, more inequality. There is, although, one American characteristic that makes the difference:

Americans are far less committed to reducing economic inequality than are Europeans. They are less likely to acknowledge widespread disparities in wealth than are people in other nations, they believe that people can work their way up the economic ladder without government support, and, most critically, they do not link corruption to inequality.¹²¹

Another reason pointed by the author is that the U.S., together with Hong Kong, Singapore and Botswana, show evidences that institutions may indeed matter. Rising living standards and great equality went hand in hand with more honesty in government and business. The rising middle class was less likely to tolerate corruption and this provided a foundation for stronger institutions.

¹¹⁹ USLANER, Eric M.. **Corruption, inequality, and the rule of law: the bulging pocket makes the easy life**. Cambridge; New York: Cambridge University Press, 2008.

¹²⁰ Idem.

¹²¹ Idem.

The U.S. should be analyzed on a state-by-state basis, because corruption varies in a wide range from one state to another. Some states have relatively clean governments, while others are more corrupt. Louisiana is regarded as the most corrupt U.S. state, and, confirming the Uslander's theory, has one of the highest levels of inequality and is one of the less trusty states. Among the "good examples" are the Prairie states (North Dakota, South Dakota, Minnesota and Wisconsin). Once more, enforcing Uslander's theory, the four states have large shares of trusting citizens and are among the most equal distributions of income in the country.

When thinking about corruption throughout American history, many agree that the early years of the republic were relatively corruption free, "as America was still largely an agricultural country with reduced resources and fewer opportunities for corruption"¹²². The first major scandal in American history was the Yazoo land fraud in 1797 that revealed that large amounts of money were used to influence and undermine political decisions. The fraud involved the sale of over 40 million acres covering the present-day states of Alabama and Mississippi¹²³.

Nepotism has been a "way of life"¹²⁴ in American government for centuries, points out White. An anecdotal example comes from Louisiana, in the Long's reign, when most pro-Long legislators had relatives, including wives and children, with state jobs, and Long himself placed at least 23 relatives on the state payroll during his first year as governor.

The American political machine, a unique aspect in the history of corruption, is defined by the Encyclopedia Britannica¹²⁵ as:

In U.S. politics, a party organization, headed by a single boss or small autocratic group, that commands enough votes to maintain political and administrative control of a city, county, or state.

Three famous cases of political machines in the U.S. history are the Long "The Kingfish" reign over Louisiana in the 1930s, the Boss Tweed reign of New York in the mid-1800s and the Daly machine in Chicago a century later¹²⁶.

¹²² WHITE, Richard D., Jr.. ***Corruption in the United States***. In: CAIDEN, Gerald E., DWIVEDI, O. P. and JABBARA, Joseph G.. *Where corruption lives* / Gerald E. Caiden, O.P. Dwivedi, and Joseph Jabbara, editors. Bloomfield, Conn.: Kumarian Press, 2001.

¹²³ Idem.

¹²⁴ Ibidem.

¹²⁵ Encyclopædia Britannica [electronic version]. Available at <http://www.britannica.com/>

Probably the most widespread American political scandal, Watergate, involves a very polemic issue usually related to corruption in the U.S.: the electoral campaign finance system. Hohenstein draws attention to Nixon's peculiar conception of corruption practiced in his political campaigns, something that contributed heavily to shape the Federal Election Campaign Act of 1971 and 1974¹²⁷. He tells the history of a controversy in which Nixon was found in 1952, when he was running as President Eisenhower's vice presidential nominee. The *New York Post* announced a sensational revelation about a "secret rich men's fund" that "keeps Nixon in style far beyond his salary"¹²⁸. This almost ended Nixon's political career, and Hohenstein says that when he decided to appear on national television to explain the nature of the fund, and to defend his actions to the American public, he was having his "do or die moment of high political theater"¹²⁹. Nixon then explained that the fund was not corrupt because he did not personally gain anything from it, and that it had helped him pay for campaign expenses that "were primarily political business"¹³⁰.

In 1973, already deeply embroiled in the Watergate scandal, he showed his "myopic" understanding of political corruption when said to White House Counsel Charles Colson:

"They say this is the greatest corruption in history. That's baloney. Nobody stole anything. The whole point about this, nobody has made any money. And I haven't seen one of our little boys make that point."¹³¹

Regardless the fact that corruption has been always present throughout American history, most observers do not see corruption of the professional public service as endemic or widespread¹³². The level of corruption in the U.S. has been seen as acceptable, or, at least, low enough to not damage economy and society. This situation led to a lapse in the study of corruption, as White points out:

So little is known about the important relationship between corruption and the democratic process, or indeed if there is a significant

¹²⁶ WHITE, Richard D., Jr.. *Corruption in the United States*. In: CAIDEN, Gerald E., DWIVEDI, O. P. and JABBARA, Joseph G.. *Where corruption lives* / Gerald E. Caiden, O.P. Dwivedi, and Joseph Jabbara, editors. Bloomfield, Conn.: Kumarian Press, 2001.

¹²⁷ HOHENSTEIN, Kurt. *Coining corruption: the making of the American campaign finance system*. DeKalb, Ill. : Northern Illinois University Press, c2007.

¹²⁸ Idem.

¹²⁹ Ibidem.

¹³⁰ Ibidem.

¹³¹ Ibidem.

¹³² Ibidem.

relationship. Is corruption in the United States crippling democratic rule, as is the case in South American drug-producing countries, or is corruption merely a friction that reduces the efficiency of government as may be the case in relatively clean Scandinavian governments? Scholarship on corruption in the U.S. does not come close to answering such critical questions. While revisionists suggest that corruption may be so trivial as not to warrant serious attention, there is little evidence to either support or refute their argument. Most agree that the United States has a corruption problem, but they are unsure how bad the problem is and whether it is getting better or worse.

Of course this does not mean that the U.S. did not fight corruption throughout its history. On the contrary, as mentioned before, it shows that a strong society has helped to build healthy institutions. White remarks that the U.S. has to present a corruption-free government due to its role as the most powerful nation in the world:

The United States, as a leader of the free world and as the most powerful nation, carries an additional burden to set an example of democratic and constitutional governance at its best. Corruption-free government is one of the standards that the American political system must uphold and epitomize for the developing world to emulate.¹³³

The following section shows some more recent initiatives from the U.S. to fight corruption locally and globally.

3.3.2 Agencies

The Executive branch of the U.S. uses the following structure in combating corruption:

a) Prevention

The main agency for prevention is the Office of Government Ethics (OGE), whose mission is “to foster high ethical standards for executive branch employees and strengthen the public’s confidence that the Government’s business is conducted with impartiality and integrity”¹³⁴.

OGE was established by the Ethics in Government Act of 1978, and is an agency that provides overall direction, oversight and accountability of Executive

¹³³ WHITE, Richard D., Jr.. *Corruption in the United States*. In: CAIDEN, Gerald E., DWIVEDI, O. P. and JABBRA, Joseph G.. *Where corruption lives* / Gerald E. Caiden, O.P. Dwivedi, and Joseph Jabbara, editors. Bloomfield, Conn.: Kumarian Press, 2001.

¹³⁴ For more information about Office of Government Ethics, see <http://www.oge.gov/>

Branch policies designed to prevent and resolve conflicts of interest, besides being also charged with promoting high ethical standards for Executive Branch employees.

Due to the limited size of OGE, each agency of the Executive Branch has a Designated Agency Ethics Official responsible for the implementation of the ethics program. Currently there are approximately 5,700 ethics officials working across 133 agencies.

b) Investigation

Each agency of the Executive Branch has an Office of Inspector General, who, according to the Inspector General Act of 1978, has the following purposes (our emphasis)¹³⁵:

- (1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 12(2) [Executive Branch];
- (2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) **to prevent and detect fraud and abuse in, such programs and operations**; and
- (3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.

In 1988 came the establishment of IGs in smaller, independent agencies and there are now 73 statutory IGs. Although the creation Act is the same for each IG, each IG also has its particularities, in accordance with the agency in which it is located. The establishment of the Council of the Inspectors General on Integrity and Efficiency by the IG Reform Act of 2008 aimed to “address integrity, economy, and effectiveness issues that transcend individual Government agencies” and “increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of the Inspectors General”.

Another agency with an important role is the Federal Bureau of Investigations, whose number one criminal priority is the investigation of public corruption¹³⁶. FBI justifies the high position of public corruption in its priorities because of its impact:

¹³⁵ Information available at <http://www.ignet.gov/>

Corrupt public officials undermine our country's national security, our overall safety, the public trust, and confidence in the U.S. government, wasting billions of dollars along the way. This corruption can tarnish virtually every aspect of society¹³⁷.

c) Prosecution

The United States has 102 federal judicial districts, each one headed by a U.S. Attorney appointed by the President. These regional offices of federal courts have the mandate to prosecute those involved in the crime of corruption. A U.S. Attorney may request the FBI or an IG Office's help in cases involving crimes of corruption.

The Public Integrity Section (PIN) is a special section within the Justice Department created to deal with sensitive cases of corruption, like high profile political cases, cases involving large sums of money, and cases involving abuse of power by the government. The PIN carries out the following activities¹³⁸:

The Public Integrity Section (PIN) oversees the federal effort to combat corruption through the prosecution of elected and appointed public officials at all levels of government. The Section has exclusive jurisdiction over allegations of criminal misconduct on the part of federal judges and also supervises the nationwide investigation and prosecution of election crimes. Section attorneys prosecute selected cases against federal, state, and local officials, and are available as a source of advice and expertise to other prosecutors and investigators.

Pursuant to the Ethics in Government Act of 1978, the PIN annually submits a report to Congress on the activities and operations. The last report is from 2010 and, among others, highlights two important pieces of data:

¹³⁶ Information available at <http://www.fbi.gov/about-us/investigate/corruption>

¹³⁷ Idem.

¹³⁸ More information about Public Integrity Section in <http://www.justice.gov/criminal/pin/>

Figure 5: Public Integrity Section's federal prosecutions of corrupt public officials in 2010

	Charged	Convicted	Awaiting Trial
FEDERAL OFFICIALS	15	30	13
STATE OFFICIALS	8	3	8
LOCAL OFFICIALS	9	2	9
PRIVATE CITIZENS INVOLVED IN PUBLIC CORRUPTION OFFENSES	7	4	5
TOTALS	39	39	35

Source: Report to Congress on the activities and operations of the Public Integrity Section for 2010.

Figure 6: Progress over the last decade: federal prosecutions by United States Attorney's Offices of corrupt public officials

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Totals
FEDERAL OFFICIALS											
Charged	502	478	479	424	445	463	426	518	425	422	10,012
Convicted	414	429	421	381	390	407	405	458	426	397	8,993
Awaiting Trial as of 12/31	131	119	129	98	118	112	116	117	107	103	✕
STATE OFFICIALS											
Charged	95	110	94	111	96	101	128	144	93	168	2,067
Convicted	61	132	87	81	94	116	85	123	102	108	1,810
Awaiting Trial as of 12/31	75	50	38	48	51	38	65	61	57	105	✕
LOCAL OFFICIALS											
Charged	224	299	259	268	309	291	284	287	270	296	5,253
Convicted	184	262	119	252	232	241	275	246	257	280	4,429
Awaiting Trial as of 12/31	110	118	106	105	148	141	127	127	148	146	✕
PRIVATE CITIZENS INVOLVED IN PUBLIC CORRUPTION OFFENSES											
Charged	266	249	318	410	313	295	303	355	294	298	5,855
Convicted	261	188	241	306	311	266	249	302	276	251	5,140
Awaiting Trial as of 12/31	121	126	139	168	136	148	179	184	161	200	✕
TOTALS											
Charged	1,087	1,136	1,150	1,213	1,163	1,150	1,141	1,304	1,082	1,184	23,187
Convicted	920	1,011	868	1,020	1,027	1,030	1,014	1,129	1,061	1,036	20,372
Awaiting Trial as of 12/31	437	413	412	419	453	439	487	489	473	554	✕

Source: Report to Congress on the activities and operations of the Public Integrity Section for 2010.

d) Protection of Whistleblowers

The Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency, and is part of the structure of the American system to combat corruption. The basic authority of OSC comes from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA).

OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing¹³⁹. Its top manager is appointed by the President, has a term of five years and must have the name confirmed by the Senate.

Besides these agencies within the Executive Branch, the Government Accountability Office (GAO), often called the "congressional watchdog", is an independent, nonpartisan agency that works for Congress. It also plays a fundamental role in the fight against corruption, since its main activity is to investigate how the federal government spends taxpayer dollars.

Its work supports congressional oversight by:

- ✓ auditing agency operations to determine whether federal funds are being spent efficiently and effectively;
- ✓ investigating allegations of illegal and improper activities;
- ✓ reporting on how well government programs and policies are meeting their objectives;
- ✓ performing policy analyses and outlining options for congressional consideration; and
- ✓ issuing legal decisions and opinions, such as bid protest rulings and reports on agency rules.

3.3.3 Laws and International Commitments

Some U.S. Laws governing corruption are listed below¹⁴⁰:

- *Racketeer Influenced and Corrupt Organizations Act*

¹³⁹ More information on Office of Special Counsel available at <http://www.osc.gov/>

¹⁴⁰ OLSEN, William P. *The anti-corruption handbook: how to protect your business in the global marketplace*. Hoboken, N.J.: John Wiley & Sons, c2010.

Commonly referred to as the RICO Act or RICO, is a U.S. federal law that provides for extended criminal penalties and a civil cause of action for acts performed as part of an ongoing criminal organization. Under RICO, a person who is a member of an enterprise that has committed any 2 of 35 crimes – 27 federal crimes and 8 state crimes - -within a 10-year period can be charged with racketeering. Although its primary intent was to deal with organized crime, prosecutors and regulators often use this law when piling on the charges in a corruption case. Often, the simple collusion is all it takes to make the charges stick.

- *Sherman Antitrust Act*

Is often used to prosecute acts of price fixing, bid rigging, and market allocation.

- *Anti-Kickback Act of 1986*

It modernized and closed the loopholes of previous statutes applying to government contractors. This is another act that prosecutors often use when piling on the charges in a corruption case.

- *Foreign Corrupt Practices Act (FCPA)*

It is the mother of all anti-corruption legislation, and it was originally enacted in the post-Watergate era as a response to widespread global corruption that was identified during that period. The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business.

An important initiative of the federal government was the establishment of the National Procurement Fraud Task Force on October 10, 2006, specifically dedicated to promote the prevention, early detection, and prosecution of procurement fraud. The principal focus of the task force includes several types of procurement and related fraud, such as:

- Kickbacks
- Vendor fraud
- Bid rigging
- Defective pricing
- Price fixing
- Contract fraud
- Cost/labor mischarging
- Product substitution
- Misuse of classified and sensitive information

- False claims
- Ethics and conflict of interest violations

In November 2009 Executive Branch established the Financial Fraud Enforcement Task Force to hold accountable those who helped bring about the last financial crisis as well as those who would attempt to take advantage of the efforts at economic recovery.

The main goal of the task force is to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, recover proceeds for victims and address financial discrimination in the lending and financial markets.

In its official website the task force says¹⁴¹:

With more than 20 federal agencies, 94 US Attorneys Offices and state and local partners, it's the broadest coalition of law enforcement, investigatory and regulatory agencies ever assembled to combat fraud. The Task Force has established Financial Fraud Coordinators in every US Attorney's Office around the country to help make these broad mandates a reality on the ground.

United States, as Brazil, has made efforts to combat global corruption, being signatory of the Inter-American Convention against Corruption (OAS), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OCDE) and UN Convention against Corruption (UN). The Department of Commerce defines some key goals of U.S. anti-corruption policy¹⁴²:

- Full ratification, implementation, and enforcement of the OECD Bribery Convention by all signatories;
- Full ratification, implementation, and enforcement of the Inter-American Convention against Corruption by all hemispheric partners;
- Nurture stability in democratic institutions and strengthen the rule of law in transitional economies;
- Promote global and regional anti-corruption norms and initiatives that deter and punish corruption;
- Ensure transparency in government procurement procedures to enhance openness, disclosure, and predictability;
- Develop ethical and administrative codes of conduct that promote the highest levels of professionalism and integrity in government;
- Engage the business community to join the United States and other governments in promoting corporate governance, transparency, and integrity in business operations;

¹⁴¹ Information available at <http://www.stopfraud.gov/>

¹⁴² OLSEN, William P. *The anti-corruption handbook: how to protect your business in the global marketplace*. Hoboken, N.J.: John Wiley & Sons, c2010.

- Foster an active civil society that is involved in participatory governance and upholds democratic principles.

The False Claims Act, also called the “Lincoln Law”, is one key tool for fighting corruption in the U.S., especially through the qui tam provision, which includes citizens directly in this fight. The follow chapter will approach this law in depth.

4 THE FALSE CLAIMS ACT, CONSTITUTIONALITY, AND FIGHT AGAINST CORRUPTION

Although it is a very old statute, the False Claims Act – especially the qui tam provision – is regarded as the “primary litigative tool for combating fraud against the federal government”¹⁴³, and a brief look at its results shows that the U.S. federal budget is really being protected, since more than \$21 billion were recovered through qui tam actions between October 1, 1987 and September 30, 2011¹⁴⁴.

The False Claims Amendments Act of 1986 basically says that any person who knowingly submits or causes the submission of a false claim, record, or statement which results in the payment of money from the United States government, is liable for (1) a civil penalty of at least \$ 5,000 and not more than \$ 10,000, (2) three times the amount of damages which the government sustains, and (3) the costs of the action. It is important to remember that each false claim counts as a separate violation, and generates one civil penalty. Considering that many cases involve hundreds of false claims, the penalties assessed can usually exceed the damages¹⁴⁵.

There is a possibility that a person may bring a false claims civil action against an individual on behalf of the United States Government. It is the qui tam provision, named by Henry Scammell as *the Giant Killer*¹⁴⁶.

To initiate a qui tam action, the whistleblower files a complaint with a federal district court, sending a copy to the Department of Justice, including all material information that formed the basis of the complaint. The complaint is kept under seal by the court for at least sixty days, a period in which the DOJ will evaluate if it wants to intervene and take over the suit, thus informing the court about this decision. If the DOJ decides not to intervene, the whistleblower may conduct the suit on his own. On the other hand, when it intervenes, the DOJ has the primary responsibility for prosecuting the action, which includes the right to control discovery, admissions, and

¹⁴³ BALES, Richard A. **A Constitutional defense of Qui Tam**. Wisconsin Law Review. Wis. L. Rev. 381 (2001). Available at: <http://www.lexisnexis.com/>

¹⁴⁴ Fraud Statistics available at: <http://www.justice.gov/>

¹⁴⁵ HAMER, Sean. **Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act**. 6 Kan. J.L. & Pub. Pol'y 89 (1997). Kansas Journal of Law & Public Policy. Available at: <http://www.lexisnexis.com/>

¹⁴⁶ SCAMMELL, Henry. **Giantkillers: the team and the law that help whistle-blowers recover America's stolen billions**. New York : Atlantic Monthly Press, c2004.

the presentation of evidence¹⁴⁷. Even though the informer still retains the right to continue as a party to the action, which includes, for example, participate at trial, calling and cross-examining witnesses.

The relator is entitled to receive an award for his participation in the plaintiff. If the Government intervenes, this award will be at least 15%, but no more than 25% of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. The relator's share is limited to 10%, however, if a court finds that the information contributed is not substantial or is based on information provided from other sources. The act also grants that:

Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

When Government decides not to intervene, the relator's share is between 25% and 30% of the proceeds, plus reasonable attorney's fees, expenses and costs.

An important feature of the qui tam lawsuits, created to encourage citizens to "blow the whistle" is the separate cause of action for employment discrimination. The Act grants protection for whistleblowers who disclose unlawful acts of his employer, including reinstatement, two times the amount of back pay, and compensation for any special damages.

Besides the overview of the False Claims Act role in the fight against corruption in the U.S., this work aims to analyze if the Act could be a good alternative for Brazilian case. In order to reach this, however, it is necessary to delve into three points: I - the history of the False Claims Act and the context in which it appeared in the U.S.; II - the constitutionality of the Act – some commentators say that despite its long history, the False Claims Act constitutionality is still open to question¹⁴⁸; III – the results of the Act, especially the qui tam provision in more recent years, to see what kind of frauds are more likely to be monitored by citizens.

¹⁴⁷ BALES, Richard A. **A Constitutional defense of Qui Tam**. Wisconsin Law Review. Wis. L. Rev. 381 (2001). Available at: <http://www.lexisnexis.com/>

¹⁴⁸ Idem.

4.1 History and context of *Qui Tam* and False Claims Act

The first registries of qui tam actions are in the Roman criminal law, which permitted prosecution by private citizens and offered a portion of the defendant's property as a reward for successful prosecution. Among English laws containing qui tam provisions are an AD 695 law that prohibited labor on the Sabbath and the 1318 Statute of York, which established price controls for certain consumer goods¹⁴⁹.

The name by which the law became well-known – qui tam – is originated from the Latin phrase “*Qui tam pro domino rege quam pro se ipso in hac parte sequitor*” (Who brings an action for the king brings it for himself). These laws come from a time when there were virtually no police forces. It was in that time that:

[...] an otherwise obscure Yorkshire yeoman, taking the law into his own hands to right a financial wrong, gave rise to the legendary figure of Robin Hood. The main difference between Robertus Hood, fugitivus, listed on the Pipe Roll of 1230, and the first qui tam litigants of that same era was that the latter worked within the law and with the open encouragement of the king.

In England, qui tam legislation became to fall into disfavor in the early 1600s, due especially to abuses by the informers, such as fraudulent prosecutions and extortion. After several years of controversy, the qui tam provision was entirely abolished by the Parliament in 1951.

In the United States, qui tam origins are closely linked to wars, due to their relevance in the government spending. Henry Scammell begins his book *Giantkillers: the team and the law that help whistle-blowers recover America's stolen billions*¹⁵⁰ telling the story of a soldier in Vietnam War who was the only survivor between ten soldiers in the explosion of a 155mm howitzer shell. This bomb was launched by an American aircraft, but it didn't work due probably to a faulty impact fuse. The Vietnam soldiers rearmed it, as they used to do with several malfunctioning pieces of American equipment.

After the war this soldier, Emil Stache, went to work at Teledyne Relays. The soldier himself explains what relays are:

¹⁴⁹ Ibidem.

¹⁵⁰ SCAMMELL, Henry. *Giantkillers: the team and the law that help whistle-blowers recover America's stolen billions*. New York : Atlantic Monthly Press, c2004.

Relays are electronic switches. Teledyne's were used in the space shuttle, military satellites and in a wide array of our most sophisticated weapons systems including the Nike nuclear missile and the Patriot missile¹⁵¹.

Stache begins his work in the testing lab as a supervisor of the Qualified Products List, where, after some time, he discovered that even though failure rates in the test were high, the reports were filled as if the products were adequate, and thus the government bought them. After several years, that included frustrated attempts of fixing the products, being moved from his original department, and being in doubt about what to do, Emil Stache ended up filing a lawsuit under the False Claims Act with his friend Almon Muehlhausen against Teledyne Industries, on behalf of the U.S. government. As a result of the action, Teledyne agreed to pay the government \$112.5 million and, pursuant to the Act, the plaintiffs (Stache and Muehlhausen) were awarded \$18.5 million as a portion of the settlement for their participation in the lawsuit¹⁵².

Neither the incident with the howitzer in the Vietnam War, nor the problem with the relays, involving Teledyne, were isolated cases. Early, during the American Civil War, the Union faced problems with corruption:

Gunpowder was frequently adulterated with sawdust. Rifles didn't fire. At the start of the Civil War, Union uniforms exposed to rain would often dissolve and fall from the wearer in clots of sodden fiber.¹⁵³

Because of the poor quality, "shoddy" was a word commonly applied to almost everything the government bought. There was no control, what led to situations like this:

When the government bought carbines that didn't shoot, instead of forcing the makers to fix them, it sold them off in wholesale lots for \$2 a piece just to get them out of inventory. The speculators who bought the defective weapons did nothing to repair them either, but instead turned around and sold them back to cooperative quartermasters at

¹⁵¹ Part of the story as told by Emil Stache to the Senate subcommittee in 1993. Available at: <http://www.phillipsandcohen.com/>

¹⁵² HAMER, Sean. *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*. 6 Kan. J.L. & Pub. Pol'y 89 (1997). Kansas Journal of Law & Public Policy. Available at: <http://www.lexisnexis.com/>

¹⁵³ SCAMMELL, Henry. *Giantkillers: the team and the law that help whistle-blowers recover America's stolen billions*. New York : Atlantic Monthly Press, c2004.

other locations – for eleven times the price they had paid for them as junk.¹⁵⁴

One of the reasons of this disarray is that there was no Justice Department in those days, and no effective national law enforcement agency. A Republican senator, Jacob Howard, presented the idea of financial incentives to private citizens who complained about companies that they knew were stealing from the government. It was a way to “make integrity almost as profitable as theft” in his own words. President Lincoln embraced the new legislation, which became known as Mr. Lincoln’s Law.

The terms of the Lincoln’s Law were:

Actionable offenses under the law included the filing of a false invoice or voucher, conspiring to defraud, stealing, embezzling, concealing property, and delivering bogus receipts. Each individual act was punishable by a fine of \$2,000 – astronomical for its time – and in addition the offender had to repay two dollars for every dollar stolen, as well as all court costs incurred by the government or the private litigant acting on the government’s behalf. Any such citizen who filed a successful false claims lawsuit was allowed to keep half of whatever was recovered, with the other half going to the federal treasury. The law also carried criminal penalties with a maximum fine of \$5,000 and up to five years in prison. Not all such suits would be certain to prevail, of course, so a qui tam action was not without risk for the litigants on both sides¹⁵⁵.

A historical example of fraud involving the Department of Defense occurred during the Spanish-American War, when unscrupulous civilian contractors sold beef that had been preserved in deadly formaldehyde. More U.S. soldiers died victims of the spoiled beef than in the battlefield. Although the False Claims Act was in existence, no one was held to account for this fraud, and between 1853 and the start of World War II, the number of recorded qui tam cases stood at only ten¹⁵⁶.

In the 1940s, the False Claims Act faced some problems related to the misuse of the qui tam provision, which led to “parasitic suits”, in which lawyers followed stories of federal indictments just to file lawsuits in the hope of earning “easy money”.

This situation ended with the Congress amending the Act, resulting in its undermining, especially because the new requirement that the relator be the original source of the underlying information. Between the date of the revision, in 1943, and

¹⁵⁴ Idem.

¹⁵⁵ Ibidem.

¹⁵⁶ Ibidem.

the next substantial rewriting of the law, in 1986, there were about a hundred qui tam cases, but almost the totality of them failed¹⁵⁷.

In the 1980s, a series of new scandals in the military spending gave the strength necessary to the review of the False Claims Act. Some examples cited by Scammell include:

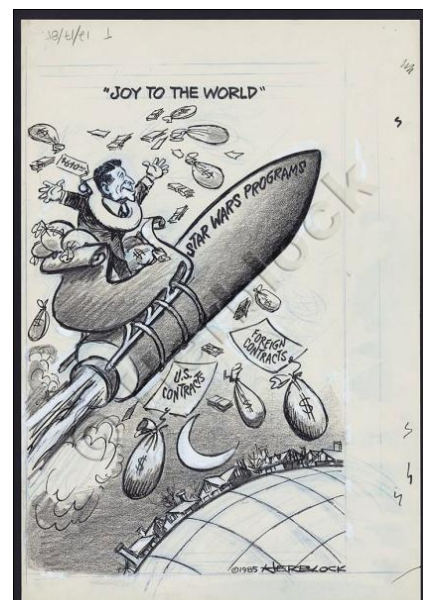
- On the B-52 bomber, a small plastic cap for the navigator's tool, worth approximately 17 cents, was sold to the government for \$1,118.26, or 6,578 times its real cost.
- The C5-A transport carried a ten-cup coffee maker, easily replaced at Woolworth's, for which the American taxpayer was billed \$7,622.
- When the navy needed an ordinary claw hammer, instead of going to the hardware store and buying it off the shelf for \$7.66 retail, it paid a defense contractor \$435 for the exact same product.

The most famous revelation, however, was the flying toilet seat, a simple accessory for the P-3 subhunting aircraft sold to the government for \$640. Cartoonist Herblock made the case even more remarkable when he regularly included a toilet seat in his caricatures of the Secretary of Defense Caspar Weinberger, as shown below:

Figure 7: Herblock's cartoon



Figure 8: Herblock's cartoon



Source: <http://www.loc.gov/rr/print/swann/herblock/>

¹⁵⁷ Ibidem.

After a long process of reviewing, in 1986 the False Claims Act gained its current form, granting more incentives to whistleblowers, as pointed early in this chapter.

4.2 Constitutionality of *Qui Tam* Provision

Defendants in False Claims Act lawsuits have argued four constitutional provisions or doctrines that would have been violated by the qui tam provision: the standing doctrine (as demanded by Article III), the separation of powers doctrine, the Take Care Clause, and the Appointments Clause (these three are within Article II)¹⁵⁸.

In this section I will show how doctrine has analyzed each provision.

4.2.1 Article III

The standing doctrine originates from the Article III of the United States Constitution, which limits federal judicial power to “cases or controversies”. It means that federal courts can act only on disputes when a plaintiff has standing, in other words, there is a case or a controversy.

Standing is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?' If a party has no standing to sue, he has not presented the court with a case or controversy as required by the Constitution¹⁵⁹.

According to Bales, one of the main purposes of the standing doctrine is to assure truly adverse litigants, so that when the court needs to resolve some legal question, the context is concrete and factual, not a general discussion in which it is not possible to identify the parts¹⁶⁰. Another important purpose is to ensure that the

¹⁵⁸ BALES, Richard A. **A Constitutional defense of Qui Tam**. Wisconsin Law Review. Wis. L. Rev. 381 (2001). Available at: <http://www.lexisnexis.com/>

¹⁵⁹ BERNER, Nancy Gausewitz. **The Uninjured Plaintiff: Constitutional Standing of Qui Tam Plaintiffs After Vermont Agency of Natural Resources v. United States ex rel. Stevens**. 35 U.S.F. L. Rev. 783 (2001). University of San Francisco Law Review. Available at: <http://www.lexisnexis.com/>

¹⁶⁰ The other two purposes are: Separation of powers, since the standing doctrine prevents the judicial aggrandizement of power at the expense of the other branches of government, and federalism, since standing requirements keep federal courts from meddling in areas of law that should be left to state or local governments.

BALES, Richard A. **A Constitutional defense of Qui Tam**. Wisconsin Law Review. Wis. L. Rev. 381 (2001). Available at: <http://www.lexisnexis.com/>

plaintiff “has enough of a personal stake in the outcome of the case to pursue the litigation vigorously and maintain an adversarial presentation of the issues”¹⁶¹.

The Supreme Court has articulated a three-part test for Article III standing¹⁶²:

- First, there must be an "injury in fact" that is both (a) concrete and particularized and (b) actual and imminent rather than conjectural or hypothetical;
- Second, there must be a causal connection between the injury and the defendant's conduct (not of a third party);
- Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a decision favorable to the plaintiff.

The Court points, in addition to these three requirements, two “prudential” limitations to standing: the first is when the injury is a “generalized grievance”, meaning that a large class of citizens is equally damaged, and the second is when the plaintiff claims legal rights of a third party, instead of her own.

To Hamer, standing claims are the strongest challenges to the constitutionality of the Act, since “virtually all defendants who have raised constitutional claims have challenged the standing of relators”¹⁶³.

One of the defendants’ arguments is that in qui tam suits the injuries are inflicted upon the federal treasury, not the whistleblowers, who are taxpayers who suffer the generalized type of harm when a fraud occurs. Because of this, qui tam informers do not have Article III standing, and the FCA’s qui tam provisions, by granting standing to uninjured parties, are unconstitutional¹⁶⁴.

Caminker¹⁶⁵ first analyzes this question by showing that qui tam suits satisfy the imperative of “concrete factual setting”, since qui tam statutes impose penalties for specific misconduct. Thus, when a false claim is submitted to the government, it creates a “fact-bound legal controversy between the miscreant and the United

¹⁶¹ HAMER, Sean. *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*. 6 Kan. J.L. & Pub. Pol'y 89 (1997). Kansas Journal of Law & Public Policy. Available at: <http://www.lexisnexis.com/>

¹⁶² BALES, Richard A. *A Constitutional defense of Qui Tam*. Wisconsin Law Review. Wis. L. Rev. 381 (2001). Available at: <http://www.lexisnexis.com/>

¹⁶³ HAMER, Sean. *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*. 6 Kan. J.L. & Pub. Pol'y 89 (1997). Kansas Journal of Law & Public Policy. Available at: <http://www.lexisnexis.com/>

¹⁶⁴ BALES, Richard A. *A Constitutional defense of Qui Tam*. Wisconsin Law Review. Wis. L. Rev. 381 (2001). Available at: <http://www.lexisnexis.com/>

¹⁶⁵ CAMINKER, Evan. *The Constitutionality of Qui Tam Actions*. The Yale Law Journal, Vol. 99, No. 2 (Nov., 1989), pp. 341-388. The Yale Law Journal Company, Inc. Available at: <http://www.jstor.org/stable/796589>

States”, granting that U.S. has standing to sue the defendant. There is a remaining question, however: whether a qui tam plaintiff can act as an U.S.’ representative.

Continuing his argument, he says that Congress usually assigns the “responsibility to attorneys within the Department of Justice, other executive or independent agencies, or even to private attorneys hired by the government” to act on behalf of the U.S. government. The only difference with qui tam statutes is that it allows that a citizen “invoke the standing of the government to collect a civil penalty”. Thus, it does not matter who brought the action, since the case or controversy will always be present.

Against the defendant’s argument that private citizens lack “personal stake” in the controversy, Caminker points recent developments in Court’s position in the sense that “the essence of standing is not a question of motivation, but of possession of the requisite... interest that is, or is threatened to be, injured”¹⁶⁶.

Many of the arguments posed against relator standing focus on the Supreme Court’s decision in *Defenders of the Wildlife v. Lujan*. In this case, the Court considered whether the plaintiffs had standing to challenge regulations that limited the application of one specific section of the Endangered Species Act (ESA). In the end, the decision was that the plaintiffs had suffered no injury-in-fact and the Court concluded that, despite the citizen-suit provision, the plaintiffs did not have standing¹⁶⁷.

Hamper emphasizes the two reasons why the Court decision in *Lujan* is important, especially concerning qui tam provisions:

¹⁶⁶ *Idem*.

¹⁶⁷ The Section in question was 7(a)(2), which “requires all federal agencies to consult the Secretary of Interior to ensure that certain funded activities do not result in the destruction or modification of the critical habitat of endangered or threatened species. The challenged regulation limited the application of section 7(a)(2) to activities in the United States or on the high seas. The plaintiffs claimed that not imposing a consultation requirement for activities in foreign countries allowed agency-funded projects that threatened the critical habitats of endangered species to proceed.

The plaintiffs in *Lujan* claimed to be injured because projects in foreign countries disrupted specific areas that they intended to visit, and, as a result, they were prohibited from observing endangered species. In addition to their injury claims, the plaintiffs alleged that they had standing to challenge the regulation pursuant to the citizen-suit provision of the ESA. This provision provides that any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter. The Court found that the plaintiffs had suffered no injury-in-fact and concluded that, despite the citizen-suit provision, the plaintiffs did not have standing.”

HAMER, Sean. ***Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act***. 6 Kan. J.L. & Pub. Pol’y 89 (1997). Kansas Journal of Law & Public Policy. Available at: <http://www.lexisnexis.com/>

First, the Court strictly enforced the standing requirement. The Court defined the modern standing doctrine as a rigid three-prong test that is an indispensable part of a plaintiff's case and requires that at an absolute minimum a plaintiff establish an injury-in-fact, causation, and redressability. For relators, this means that there is no justification to depart from the injury-in-fact requirement for qui tam cases filed under the Act. Perhaps more significant than the Court's application of the standing doctrine is its analysis of the citizen-suit provision as a basis for standing. The Court rejected the argument that the provision created a procedural right to consultation in all persons so that anyone could file suit to challenge the failure to follow the proper consultation procedure. In rejecting the plaintiff's so-called procedural injury argument, the court stated that the interest in the proper administration of the laws by the government was an interest that was generally available and could not serve as an individual basis for standing¹⁶⁸.

While defendants point these questions in an analogy with the False Claims Act to sustain its unconstitutionality, Hamer asserts that Congress created a concrete private interest in the outcome of a suit involving a private party and the government when provided a cash bounty for the victorious plaintiff.

Other argument used to support the constitutionality of the relator standing is the historical justification, which appears as two factors: first, the First Congress authorized several qui tam statutes. Since many of the members of the First Congress took part in drafting the Constitution, this would give constitutional meaning to their decisions. Second, there is a long record of federal court precedent which consistently validated qui tam actions, rejecting standing challenges.

Historical justification alone, however, is a fragile argument for standing, since modern standing doctrine has to be satisfied. Because of this, it is usually coupled with other bases, like in *United States ex rel. Stillwell v. Hughes Helicopters*, in which the court recognized the history argument, but based relator standing on two other theories: (1) the Act creates a de facto assignment of the government's interest in the action; and (2) relators have a personal stake in the action by virtue of the statutory bounty and their exposure to the fraud they report¹⁶⁹.

Hamer stands against these theories, arguing that for the latter, the statutory bounty can be a motivation for filing the lawsuit, but cannot be considered a substitute for the constitutional requirement of personal injury. The other theory says that the personal stake can be found through the consequences to the relator's employment status when he initiates an action. While in *Stillwell* case the Court held

¹⁶⁸ *Idem*.

¹⁶⁹ *Idem*.

that the award was sufficient to create a concrete and identifiable interest, in *United States ex rel. Burch v. Piqua Engineering*, the plaintiffs were fired after they filed their qui tam action. The Court concluded that this fact was sufficient to satisfy the standing requirement, adding that even if the plaintiffs were not fired, there would still have standing because of the risk they assumed of losing their jobs or facing some harassment as a retaliation. For Hamer, this is not a valid argument, since the possibility of retaliation is an injury distinct from the false claims that are the basis of the lawsuit, as recognized by Congress, which provided a separate anti-discrimination cause of action in the Act.

Thus, concludes Hamer, the “only meaningful injury directly connected to false claims is to the government”¹⁷⁰, and noticing this, several courts have accepted standing for relators that bases standing on the injury to the government. This basis for standing assumes that the Act essentially creates a de facto assignment of a portion of the government’s interest in the action.

Because the government can satisfy the standing requirement, relators, as assignees of a portion of the government’s claim, have standing based on the underlying injury to the government [...]. In cases under the Act, the government has suffered a concrete injury by virtue of the defendant’s alleged fraudulent conduct. Standing is based on the adversarial relationship between the government and the defendant. It is unnecessary for relators, who stand in the shoes of the government as assignees, to establish a separate and distinct injury. Therefore, the assignment theory does not run afoul of the injury-in-fact requirement because a case or controversy is ensured by the underlying standing of the government¹⁷¹.

An example of this trend is *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, in which Justice Scalia concluded that the long history of qui tam actions combined with the notion that the United States has assigned its injury were sufficient to find standing¹⁷².

Usually four counter-arguments are presented by courts and commentators against the argument of unconstitutionality of qui tam provision, due to lack of Article III standing:

¹⁷⁰ Ibidem.

¹⁷¹ Ibidem.

¹⁷² BERNER, Nancy Gausewitz. *The Uninjured Plaintiff: Constitutional Standing of Qui Tam Plaintiffs After Vermont Agency of Natural Resources v. United States ex rel. Stevens*. 35 U.S.F. L. Rev. 783 (2001). University of San Francisco Law Review. Available at: <http://www.lexisnexis.com/>

- The first justifies the standing simply because Congress stated so, through the False Claims Act. As Congress may authorize the Department of Justice or another executive or independent agency to act on behalf of the United States, it could authorize a citizen to do the same. The problem with this argument is that Congress has no authorization to grant standing to persons who have not suffered particularized injury¹⁷³.

- The second, as shown before, bases the standing in the informer's right to a bounty, which would grant a concrete personal stake in the litigation. There are problems with this argument, since the interest must arise from the defendant's misconduct, not from something inherent to the structure of the litigation.

- The third argument is the historical, and the flaws, related to the modern concept of the standing doctrine, were already discussed.

- The fourth argument is that the injury is suffered by the government, and the False Claims Act creates an assignment to the informer of the government's interest in the action. As discussed here, this seems to be the strongest argument, and has been accepted as proof of constitutionality of the qui tam provision, at least concerning Article III standing.

4.2.2 Article II

Some defendants base their charges of unconstitutionality of the qui tam provision on Article II, arguing about three topics: the separation of powers, the appointment clause and the take care clause.

4.2.2.1 The Separation of Powers

One of the first formal arguments about the separation of powers was made by William Barr, when he was head of DOJ's Office of Legal Counsel, in 1989. He said that qui tam provisions were indeed unconstitutional because they violated the constitutional separation of powers, since Congress could not authorize a qui tam relator to perform a function reserved for the executive branch¹⁷⁴.

¹⁷³ BALES, Richard A. **A Constitutional defense of Qui Tam**. Wisconsin Law Review. Wis. L. Rev. 381 (2001). Available at: <http://www.lexisnexis.com/>

¹⁷⁴ SCAMMELL, Henry. **Giantkillers: the team and the law that help whistle-blowers recover America's stolen billions**. New York : Atlantic Monthly Press, c2004.

One of the arguments favoring qui tam provision is that Congress made a “macro-level policy determination”, in the sense that:

On balance, rampant fraud against the government (particularly in military contracting) poses threats to the nation's security and foreign policy interests more grave than those potentially raised by particular qui tam suits challenging such fraud¹⁷⁵.

The Supreme Court has set forth a standard about the separation-of-powers issue in *Morrison v. Olson*. In this case, the Court held that “the independent counsel provisions of the Ethics in Government Act did not violate the separation of powers principle by interfering with the law enforcement functions of the executive branch”¹⁷⁶.

The main argument held by the Court was that the provisions allowed the Attorney General to maintain a good level of control over any investigation made by an independent court. The provisions give basically three powers to the Attorney General:

I – To initiate an investigation by the independent counsel;

II - After the counsel is appointed, the scope of the investigation is determined with reference to facts submitted by the Attorney General and the counsel is required to comply with Justice Department policy;

III - The Attorney General has the power to remove the counsel with good cause.

To the Court, thus, the “control was the touchstone for the inquiry into the separation-of-powers issue”¹⁷⁷. In the case of qui tam provisions, the discussion about the control held by the executive branch focuses on the rights of the Government in initiating the suit, conducting the litigation, and terminating it. Hamer asserts:

[...] the Attorney General is vested with the primary responsibility of investigating false claims and filing actions for violations of the Act. If a relator files an action, however, the Government has discretion to intervene and assume primary control of the proceeding. If the Government initially turns down the opportunity to intervene, it may

¹⁷⁵ CAMINKER, Evan. *The Constitutionality of Qui Tam Actions*. The Yale Law Journal, Vol. 99, No. 2 (Nov., 1989), pp. 341-388. The Yale Law Journal Company, Inc. Available at: <http://www.jstor.org/stable/796589>

¹⁷⁶ HAMER, Sean. *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*. 6 Kan. J.L. & Pub. Pol'y 89 (1997). Kansas Journal of Law & Public Policy. Available at: <http://www.lexisnexis.com/>

¹⁷⁷ Idem.

intervene later upon a showing of good cause. No person other than the Government may intervene or file a similar action¹⁷⁸.

The author remarks that even if the government does not intervene in the action, and the relator insists by himself, it still maintains some control, since: a) the relator must provide copies of pleading and transcripts, and the action may be delayed if it interferes with another suit being conducted by the Government; b) the Government may exert ultimate control over a qui tam action by dismissing or settling the action notwithstanding the objections of the relator; c) the Government may also elect to pursue its claim through another remedy, and the relator cannot object to its decision.

Hamer concludes his thought arguing that the control exercised by the executive branch over the qui tam provisions is greater than the control which the Morrison Court found to be sufficient, which is enough to grant its constitutionality, at least concerning the separation of powers issue.

Bales makes an important point when emphasizes that the Court continuously recognized that the Constitution does not contemplate total separation of the three branches. Justice Scalia noted this in *Defenders of the Wildlife v. Lujan*, when he affirmed that the “separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts”¹⁷⁹.

Bales then gives some examples of decisions held by the Court that are not so simple to understand¹⁸⁰:

The Court has held that Congress may not retain sole removal power over an officer who performs executive functions, may not limit the president's authority to remove principal executive officers, may not place its members on boards and commissions that exercise executive powers, may not retain a legislative veto over administrative decisions, may not give Article I bankruptcy judges the power to hear tort and contract claims, and may not encroach on the Supreme Court's power to interpret the Constitution. On the other hand, the Court has held that Congress may place the Federal Sentencing Commission within the judicial branch, may vest considerable prosecutorial discretion over criminal proceedings against high-ranking executive officers in a court-appointed independent counsel, may grant the General Services Administration control over Richard Nixon's presidential papers, and may grant the

¹⁷⁸ Ibidem.

¹⁷⁹ BALES, Richard A. **A Constitutional defense of Qui Tam**. *Wisconsin Law Review*. Wis. L. Rev. 381 (2001). Available at: <http://www.lexisnexis.com/>

¹⁸⁰ Idem.

Commodity Futures Trading Commission jurisdiction over state-law counterclaims in administrative hearings.

As he asserts, formalists, like Justice Scalia, “focuses almost exclusively on constitutional text” and on an “original understanding” of what the constitutional framers intended by the text”. To them, “powers are not shared and do not overlap among the branches unless the Constitution so specifies”. To functionalists, on the other hand, “formalistic and unbending rules in the area of separation of powers may unduly constrict Congress’ ability to take needed and innovative action”.

Bales points out several reasons why the qui tam provisions do not violate separation of powers principles:

First [...] there is some question as to whether the retention of absolute prosecutorial powers is "inherently executive." Second, courts have interpreted the FCA judicial oversight provisions, such as the good cause requirement, narrowly in order to minimize or avoid the constitutional issue (though there is some question as to whether these interpretations are correct). Third, other statutes similarly constrain the executive branch's ability to dismiss suits. Fourth, and perhaps most persuasive, the extent of judicial branch involvement in a qui tam action is no greater than that in the special counsel provisions approved by Morrison.

Concluding his defense, he remembers that qui tam provisions does not transfer power from one power to another, but disperse the power among the citizens, and considering that “we are, after all, a government of the people, by the people and for the people”, the true party interested in a qui tam action is the citizenry.

4.2.2.2 The Take Care Clause

Article II, Section 3 of the Constitution of the United States, grants that the executive power “shall take care that the Laws be faithfully executed”. Bales points out that this clause is at the center of one of the oldest debates in American constitutional law¹⁸¹. The issue is that:

The Supreme Court has suggested occasionally that the "take Care" clause vests the President with prosecutorial discretion over Federal law enforcement, but this clause is better viewed as a mandate to

¹⁸¹ Ibidem.

follow the will of Congress than as a grant of exogenously defined power¹⁸².

The discussion is, after all, about separation of powers: does the Congress have “the power to structure much of the executive branch” or is a “unitary executive” in charge of all administration of federal law?

Berner presents some critics to the constitutionality of the qui tam provisions, which, according to her, rests on “three legs”: the historical and theoretical justifications for finding the Article III standing, already discussed earlier in this chapter, and a third leg, which requires that a qui tam statute be in accord with the Appointments and take care clauses. To the author, this third leg does not exist, since if a qui tam relator can appoint himself as a prosecutor for the purposes of enforcing federal legislation, the Article II duties of the Executive Branch have been bypassed¹⁸³. Besides this, the author says that the qui tam provision undermines the executive power by taking it away from the Attorney General and placing it in private hands:

When the government refuses to intervene in a suit and a private citizen then sues on behalf of the government anyway, it removes from the Executive Branch the prosecutorial discretion that is at the heart of the President's power to execute the laws¹⁸⁴.

Caminker presents two favorable arguments for the constitutionality of qui tam provisions¹⁸⁵: the first is again a historical approach, since qui tam actions have been authorized by Congress and adjudicated by courts for over two hundred years in the United States. He emphasizes that this argument is used because it has influenced constitutional interpretations. The second is:

Qui Tam statutes authorize the executive branch to bring its own enforcement actions and Qui Tam suits do not force the executive to take any significant affirmative actions such as initiating or joining litigation.

¹⁸² CAMINKER, Evan. *The Constitutionality of Qui Tam Actions*. The Yale Law Journal, Vol. 99, No. 2 (Nov., 1989), pp. 341-388. The Yale Law Journal Company, Inc. Available at: <http://www.jstor.org/stable/796589>

¹⁸³ BERNER, Nancy Gausewitz. *The Uninjured Plaintiff: Constitutional Standing of Qui Tam Plaintiffs After Vermont Agency of Natural Resources v. United States ex rel. Stevens*. 35 U.S.F. L. Rev. 783 (2001). University of San Francisco Law Review. Available at: <http://www.lexisnexis.com/>

¹⁸⁴ Idem.

¹⁸⁵ CAMINKER, Evan. *The Constitutionality of Qui Tam Actions*. The Yale Law Journal, Vol. 99, No. 2 (Nov., 1989), pp. 341-388. The Yale Law Journal Company, Inc. Available at: <http://www.jstor.org/stable/796589>

Continuing with his argument, he points out that the False Claims Act provides the executive with specific means of enforcing limits on qui tam plaintiff's conduct, and the fact that litigants can be self-selected citizens does not "hamper the executive's ability to take Care that congressional goals are fulfilled through execution of the law". Thus, he concludes, at least with respect to Article II, it is clear that "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it".

Bales is another author that presents favorable arguments to the constitutionality of the qui tam provisions concerning to the take care clause¹⁸⁶. The key in this issue is how the clause is viewed. One more formalistic approach holds that the take care clause, in conjunction with the vesting clause, gives the president exclusive authority over all executive powers. The other approach, more functionalist and usually followed by the Supreme Court when interpreting the take care clause, envisions a much more limited role for the president:

The clause (as originally understood) obliges the president to follow the full range of laws that Congress enacts, both (a) laws regulating conduct outside the executive branch, and (b) laws regulating execution by regulating conduct within the executive branch. Congressional authority for (b) derives, under this reading, from the Necessary and Proper Clause¹⁸⁷.

He then cites *Morrison v. Olson* as the "Court's most thorough analysis of the Take Care clause and its relationship to the separation of powers doctrine" and the case "most closely applicable to constitutional issues raised by qui tam statutes"¹⁸⁸, holding his arguments in the control that the Executive Branch has over the independent counsel, as shown earlier in this chapter.

4.2.2.3 The Appointments Clause

Even considering that Article II permits citizens to represent the United States in court, affronting neither the separation of powers nor the take care clause, some critics of qui tam provisions hold that these citizens must "at least be government officers selected pursuant the appointments clause". This would assure that the

¹⁸⁶ BALES, Richard A. **A Constitutional defense of Qui Tam**. *Wisconsin Law Review*. Wis. L. Rev. 381 (2001). Available at: <http://www.lexisnexis.com/>

¹⁸⁷ *Idem*.

¹⁸⁸ *Ibidem*.

Executive Branch has some oversight of private litigants and that the interests of the United States “not be defined by self-interested individuals lacking a commitment to public values”¹⁸⁹.

According to the Constitution, the executive branch has the power to appoint superior officers of the United States, while the legislative branch can vest the appointment power of inferior officers in “the President alone, in the Courts of Law, or in the Heads of Departments”¹⁹⁰. In the case of qui tam provisions, though, relators are not appointed by Congress or by the President, since the False Claims Act allows relators to appoint themselves as prosecutors for the United States. Berner points to a similar attempt to evade the Appointments Clause that was rejected by the Supreme Court, in *Printz v. United States*, a case involving the Brady Handgun Violence Prevention Act:

The Brady Bill required the chief law enforcement officer ("CLEO") of each state to set up a means for performing background checks on potential gun buyers. The Court held the appointment of state officials by Congress to execute federal laws violated the Appointments Clause. If the Legislative Branch is prohibited from appointing state officers to carry out federal laws, private individuals who appoint themselves are even further removed¹⁹¹.

About the False Claims Act, Berner says that the Supreme Court has “clearly mandated that litigation on behalf of the United States may be discharged only by persons who are Officers of the United States”. Since relators are not officers (because they were not appointed), they cannot prosecute.

In his defense of the constitutionality of qui tam provisions, Bales reminds that the Framers “were concerned primarily with the dispersal of power and with whether Congress or the president would have the authority to appoint”¹⁹². He remarks on the two usual approaches to this clause:

Formalists tend to look at the appointee and ask whether the particular mode of appointment violates the overall structure of a strictly-applied separation of powers. Functionalists tend to ask

¹⁸⁹ CAMINKER, Evan. *The Constitutionality of Qui Tam Actions*. The Yale Law Journal, Vol. 99, No. 2 (Nov., 1989), pp. 341-388.

¹⁹⁰ BERNER, Nancy Gausewitz. *The Uninjured Plaintiff: Constitutional Standing of Qui Tam Plaintiffs After Vermont Agency of Natural Resources v. United States ex rel. Stevens*. 35 U.S.F. L. Rev. 783 (2001). University of San Francisco Law Review. Available at: <http://www.lexisnexis.com/>

¹⁹¹ Idem.

¹⁹² BALES, Richard A. *A Constitutional defense of Qui Tam*. Wisconsin Law Review. Wis. L. Rev. 381 (2001). Available at: <http://www.lexisnexis.com/>

whether there are countervailing checks and balances that can be used to justify and permit the appointment at issue¹⁹³.

He recognizes that qui tam informers are not appointed in conformance with the Appointments Clause, as remarked by Berner, since they are nominated neither by the president, nor by the Congress, but are “self-appointed”. An important observation is that when a qui tam relator files a suit, it is in the name and on behalf of the United States. The question, says Bales, is “whether unappointed qui tam informers wield so much governmental power that they must be appointed in accordance with the Appointments Clause”.

There are two most common arguments holding that qui tam violates the Appointments Clause: the first is based in *Buckley v. Valeo*, in which FEC members had been unconstitutionally appointed because “only persons who are Officers of the United States can have primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights”; the second sustains that citizens should not receive prosecutorial powers because they are not politically accountable and, in the case of qui tam provisions, have a direct financial stake in the outcome of the litigation¹⁹⁴.

The counter-argument used by Bales to refuse the latter argument is the same used in the separation of powers issue: Congress made a policy choice when passing the False Claims Act, in the sense that the benefits of laws prohibiting fraud against the government “outweigh the drawbacks of dispersing prosecutorial power among the public”.

To refute the former argument, he presents three grounds upon which courts and commentators distinguish *Buckley v. Valeo* from qui tam suits, the third being the most consistent:

The first is that the primary concern of the *Buckley* Court was that Congress had aggrandized its own power, at the expense of the executive branch, by retaining for itself the power to appoint FEC members. [...] Because qui tam informers are essentially self-appointed rather than appointed by Congress, the argument goes, the anti-aggrandizement principle does not apply, and *Buckley* does not prohibit qui tam. [...] A second basis [...] is that *Buckley* is primarily concerned with the allocation of the appointment power among the three branches, and that the *Buckley* rationale therefore does not apply when power is given to private parties. On this rationale, lower

¹⁹³ *Idem*.

¹⁹⁴ *Ibidem*.

courts consistently have upheld the constitutionality of citizen-suit provisions in the face of Appointments Clause challenges. [...] The third basis upon which Buckley has been distinguished is that the FEC members at issue in Buckley were appointed to an established office with "primary responsibility" for enforcing the Ethics in Government Act. Qui tam informers, on the other hand, hold no established position, have no formal duties, receive no federal salary, serve for no specified term, litigate with their own resources (absent government intervention), and their enforcement authority extends only to the fraud case of which they have unique knowledge. Some lower courts have concluded from this that qui tam informers are not "officers" under the Appointments Clause, but instead are better classified as "agents" of the United States, as suggested by the Germaine and Auffmordt cases¹⁹⁵.

Although there are controversies among the constitutionality of qui tam provisions, based, as shown here, in Article III standing and in Article II separation of powers, Appointments Clause and Take Care Clause, there is a fundamental question presented by Caminker, the answer of which leads him to hold the constitutionality of qui tam provisions:

Whether the qui tam concept conforms to contemporary constitutional doctrines reflects a specific variation on this larger theme: Does the Constitution empower only the executive branch to define and then secure through Federal litigation the interests of the United States with respect to particular public grievances, or does our "constitutional system [which] imposes upon the Branches a degree of overlapping responsibility" permit Congress to diffuse this power by authorizing private citizens to represent the United States in Federal litigation?¹⁹⁶

He concludes, thus, by saying that, with only limited exceptions, "important constitutional values underlying Articles II and III are no more threatened by "public" qui tam actions than by conventional "private" citizens' suits"¹⁹⁷.

Hamer is more emphatic: to him, "despite the abundance of commentary to the contrary, the qui tam provisions are constitutional". His main argument, which I follow, is that "courts have unanimously rejected challenges to the constitutionality of

¹⁹⁵ Ibidem.

¹⁹⁶ CAMINKER, Evan. *The Constitutionality of Qui Tam Actions*. The Yale Law Journal, Vol. 99, No. 2 (Nov., 1989), pp. 341-388. The Yale Law Journal Company, Inc. Available at: <http://www.jstor.org/stable/796589>

¹⁹⁷ Idem.

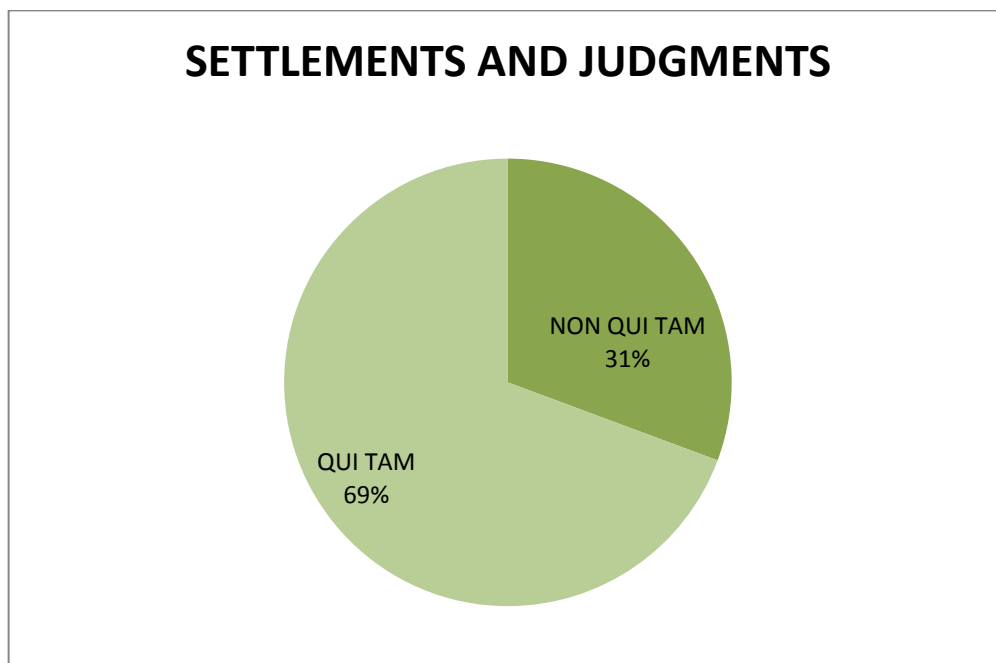
the qui tam provisions”, either related to constitutional principles of standing or separation-of-powers¹⁹⁸.

4.3 Results of the False Claims Act

As a final point in the False Claims Act discussion, I will present a brief analysis of its results, especially the qui tam provision, since 1987, in order to see what kinds of fraud are more likely to be monitored by citizens and to establish a ground to properly compare complaints in the United States with complaints in Brazil.

The Civil Division of the U. S. Department of Justice released a report of Fraud Statistics, including the period between October 1, 1987 and September 30, 2011, with annual data about new matters (meaning newly received referrals, investigations, and qui tam actions), settlements and judgments, and relator share awards¹⁹⁹. The summation of settlements and judgments of qui tam and non qui tam actions in this period, meaning money brought back for U.S. treasury, is more than \$30 billion, distributed as shown in the picture below:

Figure 9: Proportions of the False Claims Act



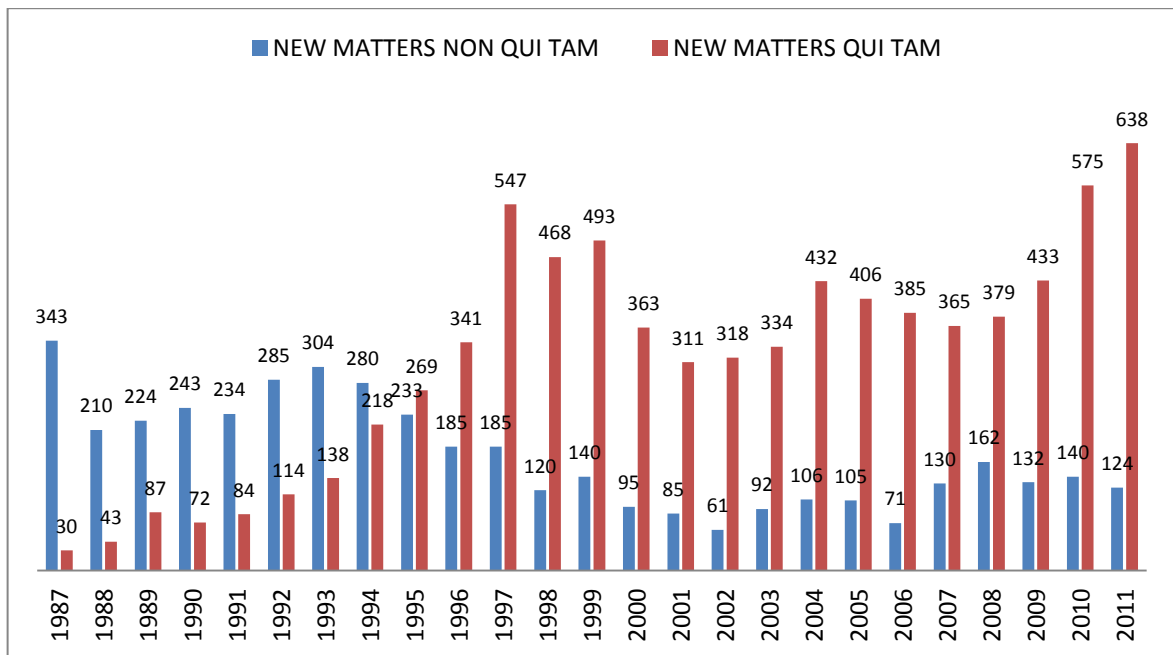
Source: <http://www.justice.gov/>

¹⁹⁸ HAMER, Sean. *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*. 6 Kan. J.L. & Pub. Pol'y 89 (1997). Kansas Journal of Law & Public Policy. Available at: <http://www.lexisnexis.com/>

¹⁹⁹ Fraud Statistics available at: <http://www.justice.gov/>

It is important to note the evolution of qui tam actions through the years. While in 1987, from the total of 373 new matters, 343 were non qui tam and only 30 were qui tam, this proportion was changing, in that, in 2011 (counting the data available up to September), from the 762 new matters, 638 were qui tam and 124 were non qui tam. The picture below shows how this relation changed:

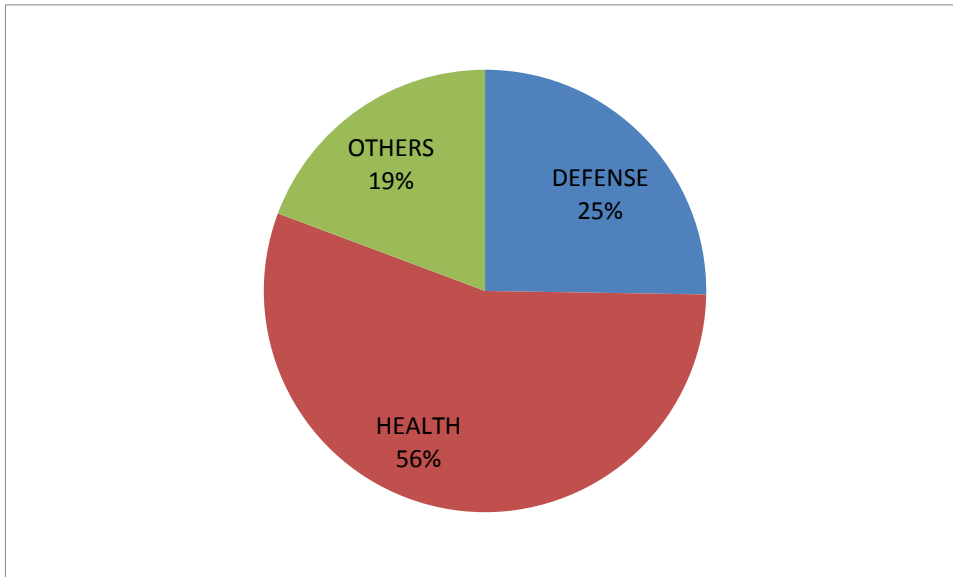
Figure 10: Evolution of qui tam provisions



Source: <http://www.justice.gov/>

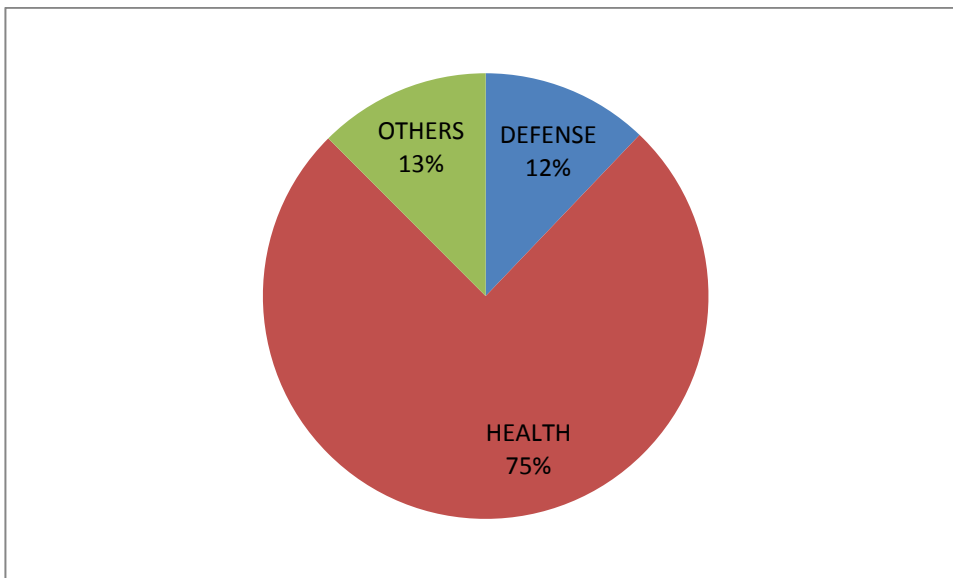
Other important information is the concentration of the qui tam actions. The Department of Health and Human Services answer for 75% of the total of qui tam settlements and judgments and for 55% of total qui tam new matters, especially because of Medicare and Medicaid. In second place is the Department of Defense, which in the past was the main reason for the enactment of the qui tam provision. While the qui tam actions in Department of Defense correspond to 12% of the total, qui tam new matters correspond to 16% of total new matters. The pictures below show how these two departments concentrate both qui tam and non qui tam actions:

Figure 11: Distribution of non qui tam actions



Source: <http://www.justice.gov/>

Figure 12: Distribution of qui tam actions



Source: <http://www.justice.gov/>

In the Department of Defense there is equilibrium between qui tam and non qui tam actions: the latter corresponds to 48% of the total actions, while the former corresponds to 52%. In the Department of Health and Human Services qui tam actions are 75% of total, showing how important is citizen participation to protect the government against frauds.

The Taxpayers Against Fraud Education Fund (TAF), a nonprofit public interest organization dedicated to combating fraud against the Federal Government

through the promotion and use of the federal False Claims Act and its qui tam provisions, lists in its website the top False Claims Act cases. These cases include impressive amounts, like \$1 billion paid by Pfizer, \$900 million paid by Tenet Healthcare, and \$731 million paid by HCA, The Healthcare Company. It is interesting to note that from the 26 cases listed, only one is not related to health. It is a case involving New York State and New York City, which agreed to pay, in July of 2009, a total of \$540 million to resolve civil liabilities in connection with improperly billed pre-school and older students' speech, physical and occupational therapy, psychological counseling and transportation over a seven-year period²⁰⁰.

To finish this section, I add the TAF prediction of recovery of \$9 billion in False Claims Act cases in 2012²⁰¹. According to them, the following big cases are queued up or already settled:

- Merck: The Vioxx off-label marketing fraud has been settled for \$950 million;
- GlaxoSmithKline: A series of drug frauds is said to be settled in principle for \$3 billion;
- Abbott: The company has reserved \$1.5 billion to settle litigation associated with the illegal marketing of Depakote;
- Amgen: The company has reserved \$780 to settle litigation associated with the illegal marketing of Aranesp;
- Oracle: The company has settled a GSA price-gouging case for \$200 million;
- NYC: New York City will pay \$70 million for Medicare billing fraud;
- LHC Groups, a home health care provider, will pay \$65 million for billing fraud;
- Pfizer: The company is expected to either go to trial or settle a case dealing with the illegal marketing of Protonix. The minimum recovery under either scenario is expected to be in excess of \$500 million;
- Ranbaxy: A settlement in excess of \$400 million is expected for adulteration of HIV drugs;
- Sandoz (Novartis): The company has agreed to pay \$150 million for Average Wholesale Price fraud involving a series of drugs;

²⁰⁰ Information available at <http://www.taf.org/>

²⁰¹ Idem.

- Maxim: The company has agreed to pay \$150 million for Medicaid home health care fraud;
- Johnson & Johnson: The company has agreed to settle a criminal charge related to illegal marketing of Risperdal, and a civil settlement in excess of \$1 billion is expected.;
- Agility/Public Warehouse. The Kuwaiti-based defense contractor is expected to settle a price-gouging case for a sum in excess of \$500 million;
- WellCare Health Plans: The company has reached a preliminary deal with DoJ for a sum in excess of \$137 million, to settle a case involving billing for newborn health care services;
- Medtronic: The company has agreed to pay over \$23 million for fraud related to cardiac defibrillators and pacemakers.

The numbers and results talk for themselves, and show that the False Claims Act helps to protect the U.S. government's and taxpayers' interests. The qui tam provision, more than an accessory part of the Act, became the main figure, accounting for a huge amount of money that otherwise would not come back to the U.S. treasury.

5 CONCLUSION

Throughout this paper I have made two basic comparisons between Brazil and the United States: how the idea of citizenship has evolved and how corruption has been fought in both countries. In addition, I deeply analyzed the False Claims Act, which, as shown, greatly contributes to the recovery of money stolen from the U.S. treasury.

This paper has two main goals, as described in its introduction: first, considering the differences between both countries, it tries to figure out how Brazil and the United States has fought against corruption, both institutionally and with the participation of citizens, and also checks if public participation (or the lack of it) can have a sensitive impact over the degree of corruption in a country. The second main goal is to figure whether the False Claims Act could be a valid alternative for Brazil and, in the case of a positive answer, if Brazil has a “demand” for qui tam actions. Although an analysis of the judiciary system in Brazil would be important, either to check the constitutionality challenges qui tam actions could face, or to check whether judiciary in Brazil would be fast in judging this kind of statute, for the purpose of this work I analyzed only the constitutional challenges faced by qui tam actions in the United States, showing that the Supreme Court has confirmed the constitutionality of the False Claims Act.

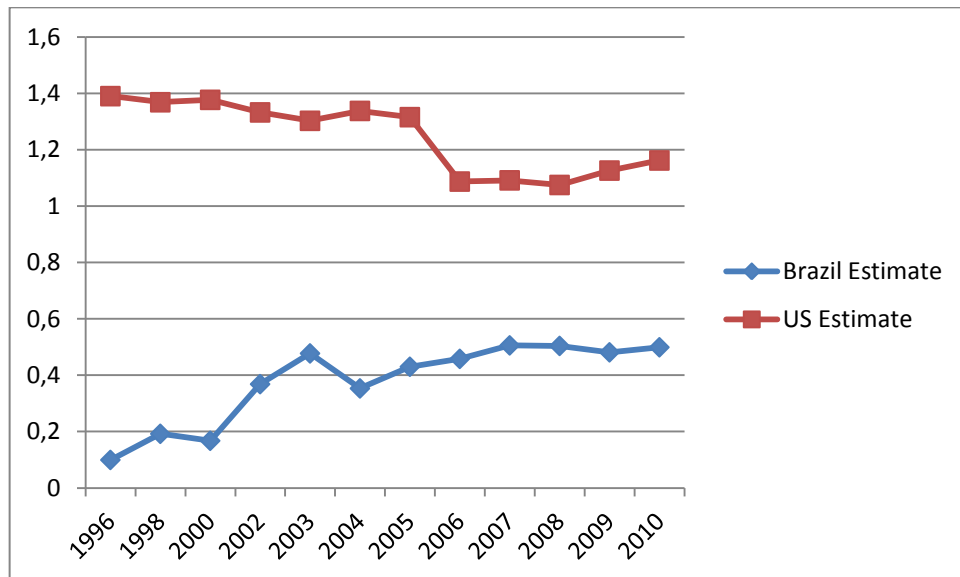
Regardless of the differences in the democratic history of Brazil and the United States, which led to different levels of historic corruption and historic public participation, I have shown throughout this paper that Brazil has improved public participation in public policies, and this has been reflected also in the fight against corruption. I will use here some of the Worldwide Governance Indicators (WGI) of the World Bank, which show that, despite the long way still to go, Brazil is going in the right direction²⁰².

The first indicator is Voice and Accountability, which “reflects perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media”.

²⁰² Besides the four indicators used here, the WGI measures Political Stability and Absence of Violence/Terrorism and Regulatory Quality, which are not directly related to the purposes of this paper. All the indicators are measured with variation between -2.5 (weak) to +2.5 (strong). Information available at: <http://info.worldbank.org/governance/wgi/index.asp>

The picture below shows that while Brazil has slightly improved, United States has decreased, though globally is still in a very good position:

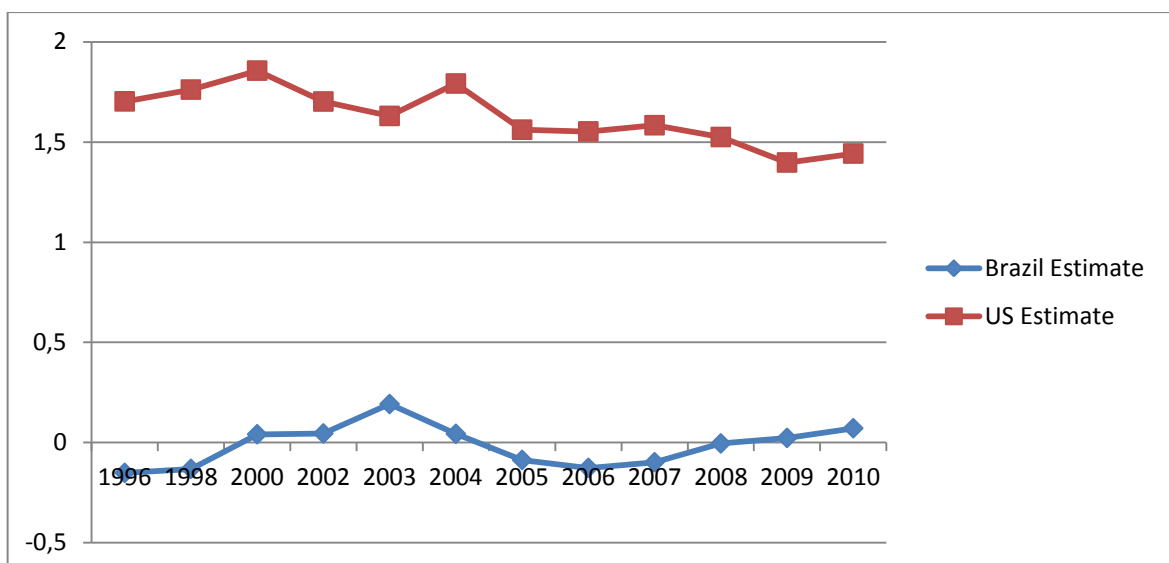
Figure 13: World Bank Indicator: Voice and Accountability (WGI)



Source: <http://info.worldbank.org/governance/wgi/index.asp>

The second indicator is Government Effectiveness, which “reflects perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government’s commitment to such policies”.

Figure 14: World Bank Indicator: Government Effectiveness (WGI)



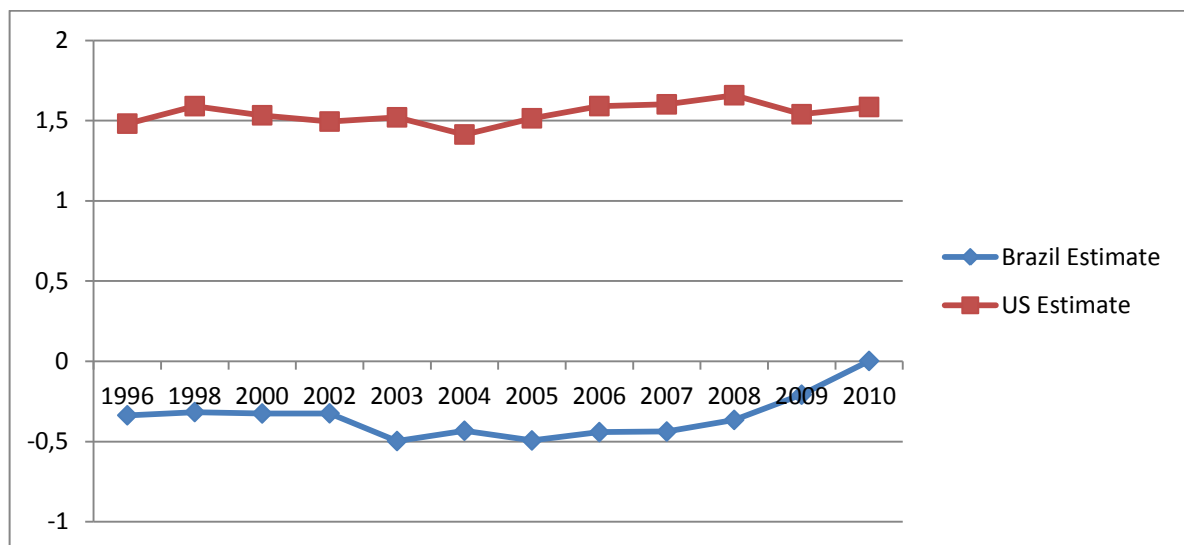
Source: <http://info.worldbank.org/governance/wgi/index.asp>

Once more, the United States has slightly decreased, but, differently from the first indicator, Brazil has faced a cyclical trend, reaching a peak in 2003, falling below zero between 2005 and 2008 and recovering slightly in 2010. In the world ranking, Brazil stands in an intermediate position, reflecting the lack of trust of citizens in the effectiveness of government.

The third indicator is the Rule of Law, which “reflects perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence”. Throughout this work it has been demonstrated that the United States democracy is founded in the rule of law, while Brazil’s historic of dictatorship, privileges and citizen’s exclusion led people to believe more in the “jeitinho brasileiro”²⁰³ than in the law.

The indicator confirms this trend:

Figure 15: World Bank Indicator: Rule of Law (WGI)



Source: <http://info.worldbank.org/governance/wgi/index.asp>

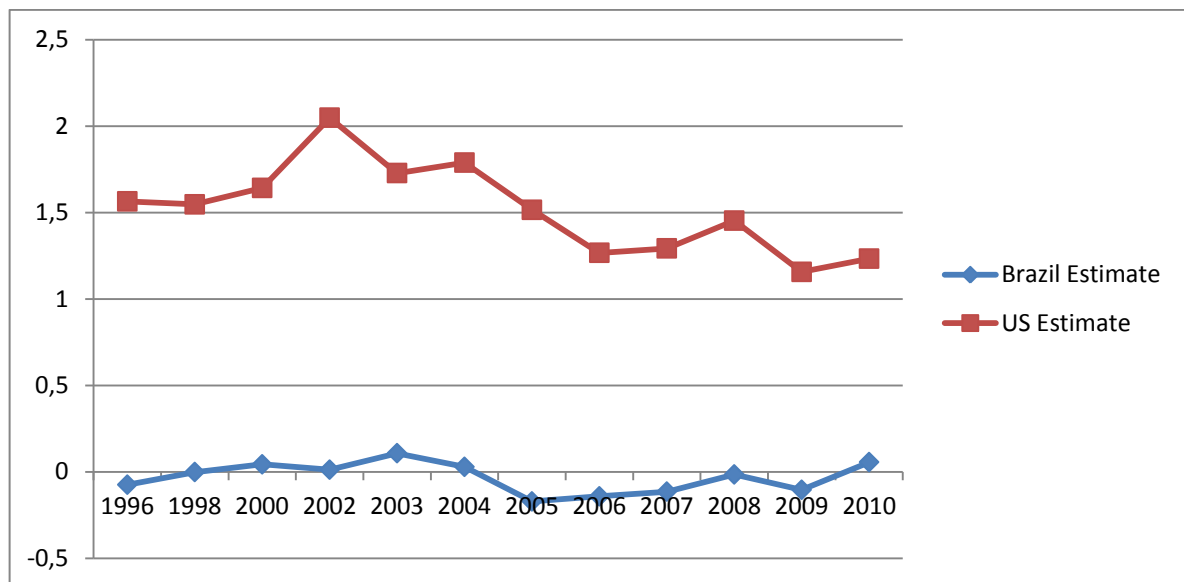
²⁰³ According to Livia Barbosa, the “Brazilian way”, or the “jeitinho brasileiro”, “belongs to a family of phenomena of which favors and corruption are also a part. [...] A continuum in which the positive pole are the favors, in the negative, corruption, and in the intermediate position, the “Brazilian way” (or the “knack”). As political scandals pile up in front of Brazilian society, the Brazilian way is most often identified with corruption or at least as a face of it. BARBOSA, Livia. *O jeitinho brasileiro: a arte de ser mais igual que os outros*. Editora Campus, 2006.

Roberto DaMatta, a Brazilian anthropologist, has made several studies about the Brazilian way, which he defines as “persuasion against equality: this is the jeitinho brasileiro, the Brazilian way of doing things”. ALMEIDA, Alberto Carlos. *Core values, education and democracy: an empirical tour of DaMatta’s Brazil*. In: *Democratic Brazil Revisited*, by Peter R. Kingstone and Timothy J. Power. University of Pittsburgh Press; 1st ed. (October 28, 2008).

The gap between both countries is huge, the highest between all the WGI indicators, and while the United States remains stable in the top of the chart, Brazil has remained many years below zero, showing some signals of recovery only in the last two years, even though only to reach zero in the index and stand again in an intermediate position globally.

The last indicator, Control of Corruption, “reflects perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence”.

Figure 16: World Bank Indicator: Control of Corruption (WGI)



Source: <http://info.worldbank.org/governance/wgi/index.asp>

This is the indicator in which the gap between the U.S. and Brazil is the smallest, unfortunately not for a significant improvement of Brazil, but for a decrease in the United States. Brazil has remained seven years below zero, and five years above it, but always without great variation. As remarked by the Minister of the Office of the Comptroller-General (CGU) when criticizing the Corruption Perception Index, an index based on perception of corruption can mean the opposite of what it suggests: if there are no efforts from the government for fighting corruption, that corruption remains hidden, and the perception will be low; on the other hand, if government fights corruption, than scandals appear in the media and people become aware of corruption, resulting in a high value of the index.

The fact is that Brazil has indeed a lot to conquer in the fight against corruption, and this also includes the government's need to gain citizens' trust, and one of the greatest contributions for this is to strengthen the rule of law, making the judiciary effective, ending impunity.

About the False Claims Act, considering the recent history of public participation and the continuous effort of the government to include citizens in the public policies arena, is reasonable to conclude that a law similar to the False Claims Act would be welcomed by citizens in Brazil.

Currently, when a citizen discovers some fraud against the government, his basic choice is to present a complaint to the responsible agency. As shown in earlier chapters, these agencies can be the Office of the Comptroller-General, the Public Ministry, the Court of Audits or even the internal control of each Department. To demonstrate how the citizens have complained to agencies about the corruption issue, I will use the data from the Federal Executive Branch Ombudsman Office, the main Brazilian agency for the receiving of complaints²⁰⁴.

From January, 2006 to December, 2011, 48,992 complaints were registered. Unfortunately, the Ombudsman system does not allow the registry of the estimated value involved, but even though, there is some very useful information that it is possible to extract.

The number of complaints has increased through the years, though not linearly:

Table 4: Number of Complaints received per year

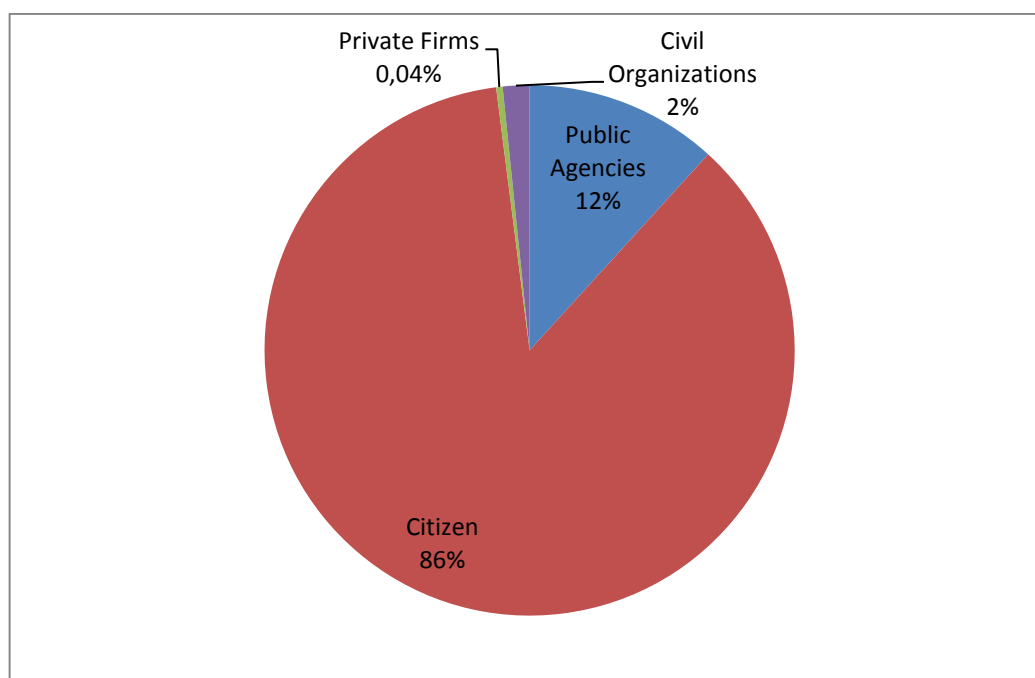
Year	Complaints
2006	6,103
2007	7,472
2008	6,595
2009	10,943
2010	8,402
2011	9,477

Source: Executive Branch Ombudsman Office

Over 75% of the complaints were made through the internet, either by e-mail, or through the complaint form available at the Transparency Portal, a website maintained by the Federal Government.

²⁰⁴ The data was obtained directly from the Federal Executive Branch Ombudsman Office, and it is not available through the internet.

Figure 17: Complaints by Author



Source: Executive Branch Ombudsman Office

A great part of the complaints are made by citizens, while public agencies respond for 12% and civil organizations, like NGO's, respond for 2%. Private firms contribute with a small number of complaints (193), equivalent to 0.04% of the total.

When comparing the distribution of complaints by state of the federation, it is possible to see that some states have a greater concentration of complaints in relation to their number of inhabitants.

Table 5: Distribution of Complaints among Brazilian states

State	Region	Complaints	% of Complaints	% of Inhabitants
Acre	North	192	0.4%	0.4%
Alagoas	Northeast	1,572	3.3%	1.6%
Amazonas	North	1,072	2.2%	1.8%
Amapá	North	184	0.4%	0.4%
Bahia	Northeast	6,684	14.0%	7.3%
Ceará	Northeast	2,888	6.0%	4.4%
Distrito Federal	Midwest	2,132	4.5%	1.3%
Espírito Santo	Southeast	656	1.4%	1.8%
Goiás	Midwest	1,518	3.2%	3.1%
Maranhão	Northeast	3,652	7.6%	3.4%
Minas Gerais	Southeast	4,130	8.6%	10.4%
Mato Grosso	Midwest	1,073	2.2%	1.6%
Mato Grosso do Sul	Midwest	498	1.0%	1.3%
Pará	North	1,657	3.5%	4.0%
Paraíba	Northeast	2,155	4.5%	2.0%

Paraná	South	1,162	2.4%	5.5%
Pernambuco	Northeast	2,626	5.5%	4.6%
Piauí	Northeast	1,193	2.5%	1.6%
Rio de Janeiro	Southeast	3,308	6.9%	8.4%
Rio Grande do Norte	Northeast	1,877	3.9%	1.7%
Rio Grande do Sul	South	863	1.8%	5.6%
Rondônia	North	464	1.0%	0.8%
Roraima	North	437	0.9%	0.2%
Santa Catarina	South	810	1.7%	3.3%
Sergipe	Northeast	890	1.9%	1.1%
São Paulo	Southeast	3,385	7.1%	21.7%
Tocantins	Midwest	754	1.6%	0.7%
TOTAL		47,832	100.0%	100.00%

Source: Executive Branch Ombudsman Office

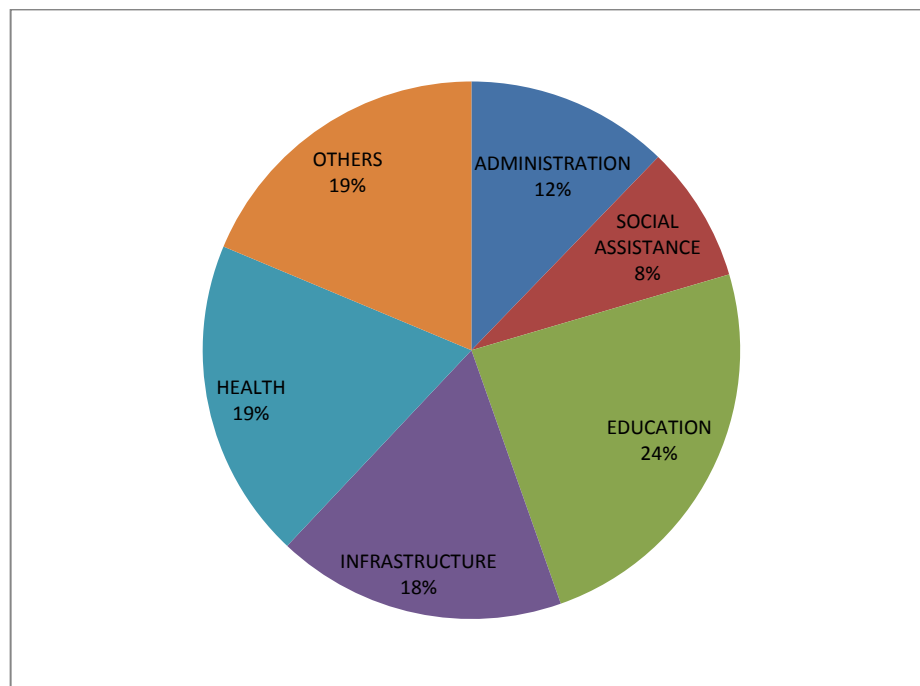
There are several reasons that could explain this situation, the most obvious being the fact that some states are more corrupt than others. Brazilian states regarded as more corrupt (almost all the states of the Northeast region, especially Alagoas, Bahia, Maranhão, Paraíba, besides Distrito Federal and Roraima) confirm this hypothesis. There is, though, paradoxical information related to these same states, except for the Distrito Federal: education level – and thus political awareness and the notion of citizenship – is much lower in the north and northeast than in south and southeast states of Brazil. Without political awareness and citizenship, people would not care about corruption, the opposite being true: even though the state is not too corrupt, once the citizen cares about public policies and know what to do in the case of fraud, he would be more capable of presenting his complaints. This situation is reflected in the Distrito Federal, where people are more educated and, thus, more likely to make complaints about corruption. States like Paraná, Rio Grande do Sul, Santa Catarina and São Paulo, regarded as the most developed states of Brazil, show results that go against the flow.

Almost half the complaints received by the Ombudsman Office are disqualified, a small part (17%) because the subject of the complaint is not competence of the Office of the Comptroller-General, which is responsible for the supervision and auditing of public policies using federal resources, and the greatest part (80%) because there are insufficient elements in the complaint that could allow the investigation.

While the predominance of complaints in the False Claims Act is over private companies, complaints in Brazil are hugely linked to public agencies and public offices, both responding for 99.3% of the total.

Unlike False Claims Act actions, in the case of complaints in Brazil there is not a concentration in the Health area. Among the complaints which are classified (71% of total), the distribution is the following:

Figure 18: Complaints by Area



Source: Executive Branch Ombudsman Office

Education and Health are the areas with the most complaints, followed by Infrastructure, which gathers several public policies, like habitation, urbanism, sanitation, transport and others. Although Administration appears as a representative area, due to the lack of public policies in this area, except for bureaucratic functions, is most likely that this field was filled improperly. Other areas, which respond for 19% of the total, include public policies in agriculture, communication, culture, environment, public safety and others.

One last point about these complaints is the absence of feedback provided by the Ombudsman Office. Since there are many more complaints that the Office of the Comptroller-General is able to investigate, it is hard to the Ombudsman Office keep track of the progress of the complaint. Thus, a citizen that sends a complaint more

likely will not receive any information about which steps the government adopted to solve that problem. This lack of accountability certainly discourages citizens to participate and be “anticorruption watchdogs”. From this perspective, the possibility of being financially rewarded by combating corruption would be a welcome incentive.

The culture of participation has been growing in Brazil since the Constitution of 1988, and even though there are some discouragements for public participation (like the lack of accountability in the case of complaints and the inefficiency of the judiciary, leading to slowness in the lawsuits and to apparent impunity for politicians), there is ground for the implementation of a law similar to the False Claims Act, which could take the public participation in the fight against corruption to a higher level.

The ridiculous man of Dostoievski ends his narrative saying that he would look for the little girl, the same who begged for his help without return, and who made him think better before committing suicide and thus, in an indirect manner, saved his life. “And I shall go on and on”, he assures, referring to his search.

For a long time, citizens in Brazil were treated by their country in the same way the ridiculous man treated that little girl: with contempt, or as a burden. Since its redemocratization, Brazil has looked for its citizens, knowing that, in fact, the only way to make things better is to include them in the process.