IN THE GLOBAL FIGHT AGAINST CORRUPTION, TRANSNATIONAL BRIBERY IS STILL WINNING

*Richard F. Connors, III**

I. INTRODUCTION

Along with treason, bribery is the only other act for which the U.S. Constitution expressly requires the removal of any and all civil officials.[1] This explicit prohibition, when coupled with historical context, reveals that the Framers of the Constitution recognized the pervasive dangers of bribery.[2] Even though the domestic economy at the time of ratification was a minute fraction of what the U.S. economy has become,[3] bribery represented such a threat to these newly-formed United States that the Framers forewarned against it during the creation of our nation.[4] Nonetheless, it is difficult to imagine that these wise men had the foresight to predict the rapid rate of economic globalization and the resulting complexities of cross-border commerce.[5]

In many ways, legislation has kept pace with the rapid growth of the international economy. Too often, however, a catalytic event is

* J.D. Candidate, 2022, Seton Hall University School of Law; B.A., 2017, Hamilton College. I would like to thank Professor Jacob Elberg for his vital assistance with the development and completion of this Comment. I would also like to thank the members of the *Seton Hall Law Review*, with special thanks to the Executive Board, for their support and trust. Finally, I need to thank my family. I would be nothing without your unwavering love and constant encouragement.

1 *See* U.S. CONST. art. II, § 4, cl. 1 ("The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

2 *Id.*; Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009) (noting that substantiated intent pointed to the "[F]ramers of the Constitution [seeing] the document as a structure to fight corruption").

3 Max Roser, *Economic Growth*, OUR WORLD IN DATA (2013), https://ourworldindata.org/economic-growth.

4 THE FEDERALIST NO. 57, at 354 (James Madison) (Clinton Rossiter ed., 1961) (expressing concern that representatives would need safeguards against "the intrigues of the ambitious, or the bribes of the rich").

5 *See* JOSEPH J. ELLIS, AMERICAN DIALOGUE: THE FOUNDERS AND US 8 (Alfred A. Knopf 2018) (declaring that, among other things, "the inherent inequalities of a globalized economy" were "unforeseen and unprecedented" from the perspective of the founders).

needed to compel meaningful change. For example, in response to the Challenger catastrophe, the National Aeronautics and Space Administration (NASA) revamped its decision-making process regarding flight readiness.[6] The United States increased its annual counterterrorism spending sixteen times over in the years following the September 11th attacks.[7] In the wake of the Watergate scandal, the Securities and Exchange Commission (SEC) discovered that over "400 U.S. companies had paid hundreds of millions of dollars" to foreign public officials to obtain and maintain advantageous business relationships.[8] As a result, Congress enacted the Foreign Corrupt Practices Act (FCPA), which broadly prohibited U.S. companies and individuals from offering or paying bribes to foreign officials in an attempt to influence political acts or business decisions.[9]

According to Stanley Sporkin, then-Director of the SEC's Division of Enforcement during the Watergate hearings, the creation and subsequent adoption of the FCPA was somewhat of a happy accident.[10] An informal investigation yielded "secret funds" that were used, among other uses, to pay "bribes to high officials of foreign governments."[11] Shockingly, 117 of the United States' Fortune 500 corporations engaged in these transactions and disguised them within various "mislabeled" accounts.[12] Given what ultimately amounted to overwhelming proof of corrupt cross-border activity, "[a] creative solution became absolutely necessary."[13]

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[6] Larry Prusak, *25 Years After Challenger, Has NASA's Judgment Improved?*, HARV. BUS. REV. (Jan. 28, 2011), https://hbr.org/2011/01/25-years-after-challenger-has.

[7] THE STIMSON STUDY GRP. ON COUNTERTERRORISM SPENDING, COUNTERTERRORISM SPENDING: PROTECTING AMERICA WHILE PROMOTING EFFICIENCIES AND ACCOUNTABILITY 5 (May 2018), https://www.stimson.org/wp-content/files/file-attachments/CT_Spending_Report_0.pdf.

[8] CRIMINAL DIV. OF THE U.S. DEP'T OF JUST. & ENFORCEMENT DIV. OF THE U.S. SEC. EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (July 2020), https://www.justice.gov/criminal-fraud/file/1292051/download [hereinafter RESOURCE GUIDE].

[9] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95–213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. § 78dd).

[10] *See* Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 271–72 (1998) ("The FCPA was not the creation of some bureaucrat who, without provocation, thought that this was a law that should be on the books. Instead, it came about as a reaction to certain highly questionable activities . . . that became public as a result of investigations . . . .").

[11] *Id.* at 272.

[12] *See id.*; *see also* H.R. REP. NO. 95–640, at 4 (1977).

[13] Sporkin, *supra* note 10, at 272.

The troubling revelation that U.S. companies were bribing foreign officials to secure business and influence was the catalytic event needed to prompt change to the country's anti-corruption enforcement efforts. Arguably, though, the United States is currently experiencing a second catalytic event within this cross-border corruption context: the rapid increase of enforcement actions and the consequential apportionment of financial sanctions has revealed the fundamental weaknesses of the United States' anti-corruption efforts. By almost all measures, 2020 was an especially noteworthy year of application, enforcement, and imposition of sanctions for FCPA actions.[14] The FCPA Units of the U.S. Department of Justice (DOJ) and the SEC "set a record in terms of corporate penalties collected in the U.S. [in 2020]. . . [with a] previous high-water mark occurr[ing] in 2019."[15] The total value of calculable settlement resolutions is estimated to be between $5 billion and $6.4 billion, but the methodologies underlying these calculations vary.[16] Notably, these criminal penalties appear to be largely a product of record-high sanctions and not a product of increased enforcement.[17] By reading between the lines, one can see that the purposes of the FCPA—

[14] *See* Dylan Tokar, *Foreign Bribery Enforcement on Track for Record-Breaking Year*, WALL ST. J. (Dec. 4, 2020, 3:40 PM), https://www.wsj.com/articles/foreign-bribery-enforcement-on-track-for-record-breaking-year-11607114397; Cuneyt A. Akay, *FCPA Year in Review 2020*, NAT'L L. REV. (Mar. 15, 2021), https://www.natlawreview.com/article/fcpa-year-review-2020.

[15] *See* Tokar, *supra* note 14.

[16] *Compare* 2020 FCPA Enforcement Digest, LEXISNEXIS (Nov. 10, 2020), https://internationalsales.lexisnexis.com/news-and-events/2020-fcpa-enforcement-digest, *with* Harry Cassin, *Getting to $6.4 Billion: 2020's Corporate FCPA Enforcement Actions Ranked by Size,* FCPA BLOG (Dec. 15, 2020), https://fcpablog.com/2020/12/15/getting-to-6-4-billion-2020s-corporate-fcpa-enforcement-actions-ranked-by-size/.

[17] In fact, enforcement actions appeared to decrease from 2019 to 2020, while fines and penalties increased during this same period. *Compare* U.S. DEP'T OF JUST., *Foreign Corrupt Practices Act and Related Enforcement Actions: Chronological List, 2019*, https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2019 (last updated Sept. 8, 2021) (listing 65 enforcement actions), *and* U.S. SEC. EXCH. COMM'N, *FCPA Cases: 2019*, https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases (last updated Sept. 29, 2021) (listing 17 enforcement actions), *with* U.S. DEP'T OF JUST., *Foreign Corrupt Practices Act and Related Enforcement Actions: Chronological List, 2020*, https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2020 (last updated Dec. 22, 2021) (listing 37 enforcement actions), *and* U.S. SEC. EXCH. COMM'N, *FCPA Cases: 2020*, https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases (last updated Sept. 29, 2021) (listing 8 enforcement actions); *see also Foreign Corrupt Practices Act Clearinghouse*, STAN. L. SCH., https://fcpa.stanford.edu/statistics-analytics.html?tab=1 (last visited Dec. 29, 2021) (showing an upward trend of sanctions and a downward trend of enforcement actions by DOJ and SEC from 2019 to 2020).

namely, prevention and deterrence[18]—are not being fulfilled. The increased application of the FCPA has publicly revealed the shortcomings of the United States' broader battle against international corruption and transnational bribery.

At its simplest, the cost of bribery reveals itself at the intersection of economics and deterrence. The FCPA crucially fails to account for the need to deter both sides of a corrupt transaction. Currently, no legal mechanism prevents or deters foreign officials from soliciting, demanding, or extorting illicit payments from U.S. companies or individuals.[19] Only the bribe-payor, not the bribe recipient, is generally at risk of prosecution under the FCPA.[20] In practice, foreign public officials can act with near impunity, save only superficial threats from their governments.[21] In response to this, scholars and legal professionals have pushed for the expansion of the FCPA's scope to allow for the prosecution of both sides of a corrupt transaction instead of solely targeting the payor of a bribe.[22]

While commentators once posited that the Biden administration would not push for this change,[23] the White House released a memorandum that publicly pushes anti-corruption efforts to the forefront of the United States' national security strategy.[24] Among the myriad listed strategies sought, Section 2(d) of the memorandum specifically contemplated addressing "the demand side of bribery."[25]

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[18] The DOJ states that the FCPA "was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business." *See Foreign Corrupt Practices Act*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act (last visited Dec. 29, 2021). The FCPA was not enacted for the purpose of fundraising for the government.

[19] *See* discussion *infra* Part II and accompanying text regarding enforcement limitations of the FCPA.

[20] *See id.*

[21] *See* discussion *infra* Section III.B and accompanying text regarding the tendency for foreign governments to prosecute their own foreign officials.

[22] *See generally* Lucinda A. Low, Sarah R. Lamoree, & John London, *The Demand Side of Transnational Bribery: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 FORDHAM L. REV. 563 (2015).

[23] Steve Spiegelhalter & Paul Fitzsimmons, *Looking Forward: Corporate Enforcement in a Biden Administration*, CORP. COMPLIANCE INSIGHTS (Jan. 6, 2021), https://www.corporatecomplianceinsights.com/corporate-enforcement-biden-administration/ ("Much of how the DOJ and SEC will enforce the FCPA is already baked in . . . .").

[24] Administration of Joseph R. Biden, Jr., 2021 Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest, DAILY COMP. PRES. DOCS. 1 (June 3, 2021).

[25] *Id.*

Through this memorandum, President Biden also ordered a multifarious interagency review of anti-corruption processes spanning enforcement and intelligence agencies alike.[26]

Pursuant to the memorandum, federal departments and agencies conducted the requested review, and the White House released the "first United States Strategy on Countering Corruption" in December of 2021.[27] This renewed approach to combatting corruption reveals "five mutually reinforcing pillars of work," each of which include narrowed "strategic objectives."[28] Notably, Strategic Objective 3.2 calls for "updat[ing] tools available to hold corrupt actors accountable at home and abroad" by "working with allies and partners on *enacting legislation criminalizing the demand side of bribery, and enforcing new and existing laws*, including in the countries where the bribery occurs."[29] With the announcement of the Biden administration's clear stance, this Comment is well-positioned to offer suggestions as to exactly how the United States can achieve the objectives of this strategy. This Comment will also preemptively confront those who oppose expanding the United States' general anti-corruption efforts.

While all instances of accepting a bribe should eventually be made illegal, this Comment argues that extorting a U.S. individual or entity should be immediately criminalized under the FCPA. The overall purpose of the FCPA cannot be wholly satisfied if foreign public officials continually victimize U.S. individuals and entities. From a deterrence, moralist, and protectionist perspective, the FCPA's anti-bribery provision has fallen behind international best practices. As a result of such inadequacy, the United States is further aggravating the global fight against international corruption and transnational bribery.

This Comment will provide a detailed evaluation of the FCPA's enforcement mechanisms to ultimately propose amendable measures that would expand the FCPA's reach to foreign public officials. Part II will discuss the origin, evolution, and current framework of the FCPA. This discussion will highlight both the tireless cost of international corruption and the statutory gaps present within an ever-growing international economy. Part III will address the often-cited criticisms of expanding the reach of the FCPA. Section III.A provides an overview of the United States' current statutory framework to combat corruption

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[26] *Id.*

[27] THE WHITE HOUSE, UNITED STATES STRATEGY ON COUNTERING CORRUPTION 4 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.

[28] *Id.* at 5.

[29] *Id.* at 26 (emphasis added).

and bribery. This overview will further emphasize the existing prosecutorial gaps and show that the United States already recognizes the culpability of the solicitation and extortion of illicit funds. Sections III.B–C refute remaining criticisms. Lastly, Part IV offers recommendations to the United States' general international anti-corruption strategies—most of which rely on FCPA expansion.

The increased globalization of the international economy has led to stronger coordination efforts between countries and the enforcement of their respective anti-bribery laws.[30] The FCPA, however, has not kept pace with this rate of globalization. Arguably, more exacting legislation, like the United Kingdom Bribery Act of 2010, has surpassed the FCPA in scope.[31] In light of rapid globalization and of the increased awareness of damaging international corruption, the overt demand of illicit payments is a largely undisturbed side of illegal transactions that should be prosecuted when viewed in the context of the United States' perceived role as a global deterrent and moral guide.

II. THE PERSISTENT PROBLEM OF CORRUPTION: AN OVERVIEW OF THE ANTIQUATED FOREIGN CORRUPT PRACTICES ACT

The vast majority of modern-day corruption scholarship unambiguously agrees that corruption damages the function and integrity of the international economy. But this same scholarship continues to implore for an investigation into the underlying causes of corruption so society can more effectively fight against it.[32] Professor Zephyr Teachout has analyzed and synthesized five broad definitions of corruption used throughout Supreme Court case law, which include "criminal bribery, inequality, drowned voices, a dispirited public, and a lack of integrity."[33] Ben W. Heineman, Jr. and Fritz Heimann describe the tendency of corruption to "distort[] markets and competition,

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[30] Andrea D. Bontrager Unzicker, *From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery*, 7 IND. J. GLOBAL LEGAL STUD. 655, 659–61 (2000) (arguing that "the process of globalization" is "the reason that a multilateral agreement against international corruption now exists").

[31] Brigid Breslin, Doron F. Ezickson, & John C. Kocoras, *The Bribery Act 2010: Raising the Bar Above the U.S. Foreign Corrupt Practices Act* 362, 362–63 (2010), Thomson Reuters (Legal) Limited.

[32] 15:2 ERIC BREIT ET AL., Critiquing Corruption: A Turn to Theory, EPHEMERA: THEORY & POL. IN ORG. 319, 320 (2015) ("The corruption literature has broken important ground for not only theoretical understandings of why corruption occurs and who it involves, but also for the development of anti-corruption policies and efforts across the globe . . . . [W]e argue that what tends to be neglected is an investigation into, and this understanding of, the underlying causes and mechanisms of the phenomenon.").

[33] Teachout, *supra* note 2, at 387.

breed[] cynicism among citizens, undermine[] the rule of law, damage[] government legitimacy, and corrode[] the integrity of the private sector."[34] Scholars and economists agree that corruption reduces economic growth by diverting public resources from societal necessities like education, healthcare, and infrastructure.[35] Corruption threatens government security and economic stability by directly and indirectly encouraging criminal activity such as smuggling, drug trafficking, and other seemingly permissible misconduct.[36] Corruption is unfair and anti-competitive because it severely disadvantages businesses that do not, or cannot, succumb to extortion or afford to pay bribes.[37] Corruption also undermines legal certainty in various business transactions because many contracts formed based on corruption are legally unenforceable.[38]

In the inaugural meeting on corruption, Secretary-General António Guterres presented to the United Nations Security Council members that, per estimates by the World Economic Forum, the "global cost of corruption is at least $2.6 trillion, or 5 percent of the global gross domestic product."[39] The White House approximates that number as "between 2 and 5 percent [of] global gross domestic product."[40] In addition, the World Bank has estimated that "businesses and individuals pay more than $1 trillion in bribes every year."[41] As mentioned, this

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[34] Ben W. Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, 85 FOREIGN AFFS. 75, 76 (2006).

[35] *See* Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, FIN. & DEV. 8 (Mar. 1998), https://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/gray.pdf (noting that bribery usually "reduces the state's ability to provide essential public goods").

[36] U.S. AGENCY FOR INT'L DEV., FOREIGN AID IN THE NAT'L INT., PROMOTING FREEDOM, SECURITY, AND OPPORTUNITY 40 (2002), https://rmportal.net/library/content/higherlevel_fani/at_download/file; *see also* United States v. Ahsani, No. 4:19-cr-00147 (S.D. Tex. Mar. 4, 2019), ECF No. 16 (noting that the executives who were involved in the bribery scheme were also paid "kickback" payments).

[37] *See* Gray & Kaufmann, *supra* note 35, at 8 (noting that bribery especially hurts "small enterprises").

[38] *See generally* Kevin E. Davis, *Contracts Procured Through Bribery of Public Officials: Zero Tolerance Versus Proportional Liability*, 50 N.Y.U. J. INT'L L. & POL. 1261, 1265 (2018).

[39] Press Release, U.N. Security Council, Global Cost of Corruption at Least 5 Per Cent of World Gross Domestic Product, Secretary-General Tells Security Council, Citing World Economic Forum Data (Sept. 10, 2018), https://www.un.org/press/en/2018/sc13493.doc.htm.

[40] 2021 Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest, *supra* note 24.

[41] Press Release, U.N. Security Council, *supra* note 39.

money represents financial potential, which should, in theory, be taxed capital and directed towards societal necessities.[42] Corruption increases the cost and exacerbates the challenges of individuals and entities doing business globally, which, in turn, deters foreign investment—especially in developing countries.[43] Simply put, corruption plagues the very structure of the world's international political economy.

In 1977, the United States enacted the FCPA and subsequently "became the first country in the world to prohibit the payment of bribes to foreign public officials."[44] Facing increasing pressure from corporations,[45] Congress amended the FCPA in 1988 to add, among other things, two affirmative defenses: the "local law" defense and the "reasonable and bona fide business expenditure" defense.[46] The "local law" defense excuses otherwise questionable contributions when "the payment was lawful under the foreign country's written laws and regulations at the time of the offense."[47] The "reasonable and bona fide business expenditure" defense allows U.S. corporate entities to provide "travel and lodging expenses to a foreign official" when the expenses "are directly related to the promotion, demonstration, or explanation of a company's products or services, or are related to a company's execution or performance of a contract with a foreign government or agency."[48]

Alongside these amendments, Congress also requested that President Ronald Reagan negotiate an international treaty with members of the Organisation for Economic Co-operation and Development ("OECD") to prohibit bribery in international business

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[42] *See* Gray & Kaufmann, *supra* note 35, at 8.

[43] Brad Graham & Caleb Stroup, *Does Anti-Bribery Enforcement Deter Foreign Investment?*, APPLIED ECON. LETTERS (May 11, 2015), https://ssrn.com/abstract=2447910.

[44] *Keeping Foreign Corruption Out of the United States: Four Case Histories: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov'tal Affs.*, 111th Cong. 8 (2010).

[45] Sporkin, *supra* note 10, at 276 ("A good many of our corporations whined that they were losing business to foreign corporations that not only were not precluded from paying bribes to foreign officials but were encouraged to do so.").

[46] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1415-25 (1988) [hereinafter Omnibus Trade and Competitiveness Act of 1988]. For more information on the 1988 amendments to the FCPA, see Adam Fremantle & Sherman Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L L. 755 (1989).

[47] RESOURCE GUIDE, *supra* note 8, at 24.

[48] *Id.*; *see also* Section 30A(c)(2)(A)–(B) of the Exchange Act, 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

transactions among economic allies.[49] Negotiations at the OECD culminated in the creation of the Convention on Combatting Bribery of Foreign Officials in International Business Transactions ("Anti-Bribery Convention"), which required participating parties to make it a crime to bribe foreign officials.[50] In 1998, Congress amended the FCPA for a second and final time to conform to the requirements of the Anti-Bribery Convention.[51] This final round of amendments expanded the scope of the FCPA to: criminalize "payments made to secure 'any improper advantage;' reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States;" include public international organizations as within the definition of "foreign official;" add an alternative jurisdictional nexus based on nationality; and "apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies."[52] Forty-four countries have ratified or acceded to the Anti-Bribery Convention, with the United States maintaining its status as a founding party.[53] The 1998 amendments to the FCPA represent the latest revision of the FCPA. To put this extensive timeline into perspective, the first handheld MP3 player was introduced to America in only 1998.[54] Clearly, much has changed since then.

Generally, the current structure of the FCPA relies on two separate but related enforcement mechanisms: the anti-bribery provision and the accounting and internal controls provision.[55] The FCPA's anti-bribery provision prohibits U.S. persons—including natural persons

[49] Omnibus Trade and Competitiveness Act of 1988, at § 5003(d) ("It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section.").

[50] *See generally* Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

[51] International Anti-Bribery and Fair Competition Act of 1988, Pub. L. 105-366, 112 Stat. 3302 (1998).

[52] RESOURCE GUIDE, *supra* note 8, at 3; *see also* S. Rep. No. 105-227, at 2–3 (1998).

[53] OECD, CONVENTION ON COMBATTING BRIBERY OF FOREIGN PUB. OFF. IN INT'L BUS. TRANSACTIONS, RATIFICATION STATUS AS OF MAY 2018 (2018), http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf.

[54] Ron Adner, *From Walkman to iPod: What Music Tech Teaches Us About Innovation*, ATLANTIC (Mar. 5, 2012), https://www.theatlantic.com/business/archive/2012/03/from-walkman-to-ipod-what-music-tech-teaches-us-about-innovation/253158/.

[55] *See* 15 U.S.C. §§ 78dd-1(a), 78ff(a), 78m. The criminal enforcement following a violation of the FCPA's accounting and internal controls provision warrants a separate analysis outside of the purpose of this Comment.

within the United States,[56] domestic concerns,[57] and issuers[58]—from making corrupt payments to foreign officials, foreign political parties or candidates, or third-parties who will knowingly forward such corrupt payment to aforementioned foreign official or entity to obtain or retain business.[59]

The FCPA also applies to non-U.S. persons and foreign non-issuer entities who have a specified jurisdictional connection.[60] Specifically, the 1998 amendments to the FCPA expanded its jurisdictional reach in two important ways.[61] First, a jurisdictional nexus can be established through any direct or indirect act or engagement in the furtherance of a corrupt payment while, or taking place, in the United States.[62] This nexus often targets those utilizing instrumentalities of interstate commerce or the U.S. mail system to further a corrupt payment.[63] Second, the 1998 amendments implemented a "nationality principle," which tied enforcement of the FCPA to U.S. companies and individuals acting entirely outside the United States, regardless of whether said U.S. companies or individuals utilize instrumentalities of interstate commerce.[64]

To reiterate, the anti-bribery provision applies to both people and payments. The FCPA applies to payments, offers, or promises to pay for the purpose of corruptly:

> (i) influencing any act or decision of a foreign official in his official capacity, (ii) inducing a foreign official to do or omit to do any act in violation of the lawful duty of such official, (iii) securing any improper advantage; or (iv) inducing a foreign official to use his influence with a foreign government or

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56 *See* § 78dd-3.

57 *See* § 78dd-2(h)(1) (defining "domestic concern" as "any individual who is a citizen, national, or resident of the United States [and] . . . any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.").

58 *See* §78c(a)(8) ("The term 'issuer' means any person who issues or proposes to issue any security . . . .").

59 *See* §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

60 *See* § 78dd-3 (territorial principle); *see also* § 78dd-2 (nationality principle).

61 *See* 15 U.S.C. § 78dd-2

62 *See* § 78dd-3.

63 *See* §§ 78dd-1, 78dd-2, 78dd-3.

64 §§ 78dd-2(i)(1), 78dd-1(g)(1); *see also* International Anti-Bribery and Fair Competition Act of 1988, Pub. L. 105-366, 112 Stat. 3302 (1998).

> instrumentality thereof to affect or influence any act or decision of such government or instrumentality.[65]

The purpose of the payment must be that of corrupt intentions, which is admittedly hard to decipher—but it is arguably no more difficult than ascertaining any other criminal mens rea element of an offense.[66] In other words, the FCPA is not a statute premised on strict liability. There are two available affirmative defenses.[67] There is one statutory exception, recognized as "facilitating or expediting payments."[68] This exception applies only when a payment is made to further "the performance of a routine governmental action,"[69] like processing visas. Additionally, the FCPA does not apply to cases of duress because the requisite mens rea is absent from such a nonconsensual exchange.[70] The FCPA does recognize extortion as an affirmative defense, but proof of duress is required.[71] The 2020 Resource Guide to the FCPA explains that duress constitutes "extortionate demands [made] under imminent threat of physical harm."[72]

At this point, it is important to note that the current statutory framework of the FCPA has not been without praise for its success. There is certainly merit behind the argument for leaving the FCPA as-is in terms of its prosecutorial reach. For one, the FCPA has largely succeeded in delegating anti-corruption enforcement efforts nationally and internationally.[73] Since the enactment of the FCPA in 1977, many other countries have adopted their own anti-corruption legislation to

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65 RESOURCE GUIDE, *supra* note 8, at 11; *see also* §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

66 *See* S. REP. NO. 95-114, at 10 ("The word 'corruptly' is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position . . . .").

67 15 U.S.C. § 78dd-1(c).

68 § 78dd-1(b).

69 *Id.*

70 RESOURCE GUIDE, *supra* note 8, at 27, 111 n.174.

71 *Id.*

72 *Id.* at 27; *see also* United States v. Kozeny, 582 F. Supp. 2d 535, 540 n.31 (S.D.N.Y. 2008) ("[A]n individual who is forced to make payment on threat of injury or death would not be liable under the FCPA.").

73 *See* Mike Koehler, *Has the FCPA Been Successful in Achieving Its Objectives?*, 2019 U. ILL. L. REV. 1267, 1275, 1299 (2019) (noting "'hard' enforcement metrics" and "'soft' enforcement metrics"); Nick Oberheiden, *10 Reasons Why FCPA Compliance Is Critically Important for Businesses*, NAT'L L. REV. (July 24, 2020), https://www.natlawreview.com/article/10-reasons-why-fcpa-compliance-critically-important-businesses (noting that the FCPA compels corporate compliance).

reduce bribery.[74] The FCPA has also encouraged—and, in some ways, mandated—corporate adherence to certain compliance guidelines, which has improved the integrity of the U.S. economy and the transparency of U.S. entities' governance.[75] Although difficult to determine, some argue that the FCPA has been successful in leveling and maintaining a fair economic playing field by encouraging cross-border cooperation against international corruption[76] and by preventing additional barriers to economic entry for smaller businesses.[77] Furthermore, the FCPA's current structure does provide a means to prosecute U.S. persons and issuers who are located outside of the United States.[78] The current framework of the FCPA also provides a means to pursue and prosecute foreign officials who utilize a recognized jurisdictional nexus.[79]

As it stands, the FCPA's current enforcement mechanisms fail to provide for the means to pursue or prosecute foreign officials who extort or demand bribes in exchange for economic access or other favorable treatment. This appears to be by design: the Fifth Circuit opined that "Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power."[80] Congress's intent may have been acceptable during the FCPA's infancy when corporations' needs conflicted with the needs of economic integrity,[81] but this plausible intention is not acceptable now.

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[74] DAVID KENNEDY & DAN DANIELSEN, OPEN SOC'Y FOUNDS., BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 54 n.9 (2011).

[75] *See* Sharon Oded, *Trumping Recidivism: Assessing the FCPA Corporate Enforcement Policy*, 118 COLUM. L. REV. ONLINE 135, 138 (2018) (noting that additional corporate incentives aimed at compelling compliance led to an increase in voluntary self-reporting).

[76] Luay Al-Khatteeb & Omar Al Saadoon, *Leveling the Transnational Playing Field*, BROOKINGS INST. (July 10, 2014), https://www.brookings.edu/opinions/leveling-the-transnational-playing-field/.

[77] Rebecca L. Perlman & Alan O. Sykes, *The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis*, 9 J. LEGAL ANALYSIS 153, 171–72 (2017).

[78] *See* 15 U.S.C. § 78dd-2 (nationality principle); *see also infra* Section III.A.

[79] *See* § 78dd-3 (territorial principle); *see also infra* Section III.A.

[80] United States v. Castle, 925 F.2d 831, 835 (5th Cir. 1991) (citing H.R. REP. NO. 640, at 12 n.3 (1977)).

[81] Leah M. Trzcinski, *The Impact of the Foreign Corrupt Practices Act on Emerging Markets: Company Decision-Making in a Regulation World*, 45 N.Y.U. J. INT'L L. & POL. 1201, 1209 (2013) (citing H.R. REP. NO. 100-576, at 916 (1988) (Conf. Rep.)) ("While taking a bold moral stance to combat bribery globally might be a good public relations move, Congress was sensitive to complaints from U.S. businesses that were operating at a disadvantage internationally.").

The FCPA expansion has been a point of discussion across several industries and political administrations for successive generations. In his Note titled *Increasing Accountability for Demand-Side Bribery in International Business Transactions*, Garen S. Marshall justifiably stresses that "[a] strategy that only targets the supply-side will not be successful if there are both alternative sources of supply and a general lack of repercussions for the actively soliciting bribe-taker."[82] Others have worked to define every possible point of origin of a bribe, hoping that such illumination will have the effect of increased enforcement efforts against any and all demand. One such resounding voice has been Professor Joseph W. Yockey, who similarly argues for the regulatory expansion into criminal enforcement of both bribe solicitation and extortion.[83] As a result of failing to target both sides of an illicit transaction, the FCPA may go so far as to incidentally incentivize foreign officials to demand bribes from U.S. entities and individuals because of the near-nonexistent risk of facing punishment for such extortion attempts.

Realizing the practical difficulties inherent in broadly amending the FCPA to prohibit the acceptance of a bribe, the recognition and subsequent criminalization of economic extortion would be sufficient to deter the demand-side of bribery and help the United States fall in line with international standards. Currently, the statutory framework set forth by the FCPA to combat bribery fails to do so.

III. ADDRESSING THE PERCEIVED CHALLENGES TO AMENDING THE FCPA AND PROSECUTING FOREIGN EXTORTIONISTS

Unsurprisingly, there is stark opposition to the idea of amending the structure of the FCPA's enforcement power. Political scholars and international economists alike have decried efforts to fill this perceived gap in the FCPA.[84] Thomas Firestone and Maria Piontovska, while

[82] Garen S. Marshall, Note, *Increasing Accountability for Demand-Side Bribery in International Business Transactions*, 46 N.Y.U. J. INT'L L. & POL. 1283, 1301 (2014).

[83] *See* Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 795–96 (2011) (quoting James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1699 (1993)).

[84] *See generally* Michael Peterson, *Amending the Foreign Corrupt Practices Act: Should the Bribery Act 2010 Be a Guideline?*, 12 RICH. J. GLOB. L. & BUS. 417, 431 (2013) (arguing that the FCPA should not be amended to mirror the [UK] Bribery Act [of] 2010"); Beverley Earle & Anita Cava, *When Is a Bribe Not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT'L COMP. L. REV. 111, 154 (2013) (concluding that "[a]mending the FCPA would be a fruitless and quixotic exercise in this political climate" and suggesting that the DOJ should instead "issue comprehensive guidelines" to clarify the current statute).

arguing for such amendments, have succinctly captured the most often-cited criticisms:

> (1) the fact that such cases can be prosecuted under other statutes, such as money laundering and wire fraud, (2) the greater interest of the bribe-taker's government in prosecuting the passive side of the offense, (3) the possible political fallout that could result from criminally charging foreign government officials for bribe-taking, and (4) the jurisdictional challenges of bringing such cases.[85]

For the purpose of this Comment, it is important to note that the idea of "passive bribery" is not, and should not be, indicative of a peaceful acceptance of illicit payment.[86] As Professor Matthew Stephenson articulated, the term "passive bribery" belittles the sense of culpability behind those demanding and accepting bribes.[87] Nonetheless, this second criticism to expanding the FCPA still exists: a foreign government may be better positioned to prosecute its foreign officials for engaging in extortion. Addressed individually below, these criticisms alone are not significant enough to support a refusal to recognize economic extortion as a criminal offense under the FCPA.

A. *The Current Legal Mechanisms Available to Combat Corruption and Bribery*

Perhaps the loudest criticism against amending the FCPA, or amending other anti-bribery statutes, finds itself in the argument that foreign officials can be prosecuted under other statutes, thus making any amendment unnecessary or redundant.[88] Within the context of this Comment, this criticism is unsubstantiated. Admittedly, the United States has many anti-corruption statutes that work to eliminate private-

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[85] Thomas Firestone & Maria Piontkovska, *Two to Tango: Attacking the Demand Side of Bribery*, AM. INT. (Dec. 17, 2018), https://www.the-american-interest.com/2018/12/17/two-to-tango-attacking-the-demand-side-of-bribery/; *see also* Blake Puckett, *Clans and the Foreign Corrupt Practices Act: Individualized Corruption Prosecution in Situations of Systemic Corruption*, 41 GEO. J. INT'L L. 815, 826 (2010) ("Perhaps the greatest immediate challenges to prosecuting foreign officials are the legal problems of sovereign immunity and achieving jurisdiction by U.S. courts.").

[86] The OECD defines "passive bribery" as "the offence committed by the official receiving the bribe." *See, e.g.*, OECD, *Glossary of Statistical Terms, Passive Bribery*, https://stats.oecd.org/glossary/detail.asp?ID=7205 (last visited Dec. 29, 2021).

[87] Matthew Stephenson, *An Almost Entirely Trivial Complaint About Terminology: Can We Please Retire the Term "Passive Bribery"?*, GLOB. ANTICORRUPTION BLOG (Aug. 27, 2019), https://globalanticorruptionblog.com/2019/08/27/an-almost-entirely-trivial-complaint-about-terminology-can-we-please-retire-the-term-passive-bribery/.

[88] Firestone & Piontkovska, *supra* note 85.

to-public domestic bribery,[89] private-to-private bribery,[90] and private-to-public foreign bribery.[91] And while it is true that these statutes provide for federal prosecution of public corruption,[92] virtually all of the statutes proffered to combat bribery do not do so by criminalizing the economic extortion of U.S. individuals or entities by foreign public officials.[93] In fact, the Supreme Court has affirmed that foreign officials "could not be charged with violating the FCPA itself, since the [FCPA] does not criminalize the receipt of a bribe by a foreign official."[94] Moreover, the currently available statutes aimed at combatting corruption and bribery require varying levels of proof. Thus, the current statutory framework yields unjustifiable gaps in the federal government's ability to deter and prosecute bribery. After all, when there is an unabated demand, there will always be a supply.

In 1946, Congress enacted the Hobbs Act, which criminalized the attempt or conspiracy to rob, extort, or commit physical violence against any person or property in order to obstruct, delay, or affect commerce or the movement of any article or commodity within commerce.[95] The Hobbs Act is predominantly used against state and local officials because more specific federal statutes deal with bribery of federal officials[96]—like 18 U.S.C. § 201, discussed below, which is colloquially referred to as the domestic bribery statute.[97]

The Hobbs Act, known for its enforcement capabilities against public corruption and commercial disputes,[98] broadly proscribes against two types of crime: robbery and extortion.[99] As the term suggests, "robbery" refers to the "unlawful taking or obtaining of

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89 *See* 18 U.S.C. § 201.

90 *See* 18 U.S.C. §§ 1951, 1341, 1343.

91 *See* 15 U.S.C. § 78dd.

92 *See* discussion *infra* Section III.A.

93 *See id.*

94 United States v. Blondek, 741 F. Supp. 116, 117 (N.D. Tex. 1990), *aff'd* United States v. Castle, 925 F.2d 831, 831 (5th Cir. 1991) ("We hold that foreign officials may not be prosecuted under 18 U.S.C. § 371 for conspiring to violate the FCPA.").

95 § 1951(a).

96 *See* Evans v. United States, 504 U.S. 255, 283–84, 290 (1992) (Thomas, J., dissenting).

97 *See* Mike Koehler, *The Uncomfortable Truths and Double Standards of Bribery Enforcement*, 84 FORDHAM L. REV. 525 (2015) (referring to 18 U.S.C. § 201 as the "domestic bribery statute" throughout).

98 *See* CHARLES DOYLE, CONG. RSCH. SERV., R45395, ROBBERY, EXTORTION, AND BRIBERY IN ONE PLACE: A LEGAL OVERVIEW OF THE HOBBS ACT (Nov. 6, 2018), https://fas.org/sgp/crs/misc/R45395.pdf.

99 18 U.S.C. § 1951(b)(1)–(2).

personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury . . . ."[100] The term "extortion," however, means the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[101] The threat of violence requirement is similar to the FCPA's affirmative defense of duress, whereby both avenues of prosecution (or lack of, in the case of the FCPA) would not cover economic extortion.[102] Put differently, the Hobbs Act does not offer the use of economic extortion as a prosecution tool because its definition of extortion requires what the FCPA *excludes* from prosecution: threats of physical violence or actual physical violence. Even more generally, the Hobbs Act does not narrow the perceived gaps of the FCPA: the Hobbs Act does not explicitly criminalize paying a bribe, and while it does criminalize accepting a bribe, such acceptance must be prompted by physical threats of, or actual, violence.

In 1961, Congress enacted the Travel Act, a federal statute that criminalizes anyone who "travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to" distribute the proceeds of unlawful activity, commit unlawful violent acts to further unlawful activity, or otherwise "promote, manage, establish, carry on, or facilitate" said unlawful activity.[103] Importantly, the statute defines "unlawful activity" as, among other things, "extortion [or] bribery . . . in violation of the laws of the State in which committed or of the United States."[104] In other words, the Travel Act allows the government to bring a state bribery charge in federal court if a jurisdictional nexus exists. As a result, there must be a territorial connection to the state where the unlawful activity occurs—for example, conducting an intrastate telephone call to further a bribery scheme. By itself, the Travel Act can only prosecute domestic actions that violate the laws of the state where the action occurs. From an international perspective, the Travel Act can only act as a complement to other violations, such as a violation of the FCPA.[105] Due to the

100 § 1951(b)(1).

101 § 1951(b)(2).

102 *Compare* RESOURCE GUIDE, *supra* note 8, at 27–28, *with* § 1951(b)(1).

103 § 1952(a).

104 § 1952(b).

105 *See* United States v. Harder, 163 F. Supp. 3d 732, 743–44 (E.D. Pa., Dec. 15, 2015); *see also* Stanley Foodman, *Violating the FCPA May Trigger Other U.S. Laws Such as the Travel Act*, JD SUPRA (Sept. 4, 2010), https://www.jdsupra.com/legalnews/violating-the-fcpa-may-trigger-other-u-86511/.

jurisdictional nexus requirement, which already exists *ad nauseam* in the FCPA, the Travel Act is somewhat redundant when utilized in light of the FCPA's reach and only comes into play in this context when a foreign public official travels to the United States, or utilizes a domestic facility, to further corruption.

In 1962, Congress adopted 18 U.S.C. § 201—the domestic bribery statute.[106] This statute criminalizes, directly or indirectly, corruptly giving, offering, or promising "anything of value to any public official" with intent to "influence any official act," influence any public official to commit fraud or influence any public official to avoid an action that would be a violation of a lawful duty.[107] In this sense, a "public official" includes officers and employees of the U.S. federal government.[108] A "public official" also broadly encompasses those who occupy positions of public trust with official federal responsibilities, whether or not they are formal employees or informal contractors.[109] Notably, the statute targets both those who give bribes and those who receive bribes, but the narrowness of "public official" only makes this law enforceable against U.S. public officials.[110] While this criminal statute is relatively inadequate in combatting foreign corruption, it does reveal that Congress recognizes the criminal culpability of those who demand, receive, and accept a bribe.[111]

Perhaps the most pointed criticism regarding the nonexistence of this statutory gap comes from the current power of federal mail fraud and wire fraud statutes. Generally, an individual's use of domestic mail, wires, or interstate commerce facilities during, or for the purpose of furthering, a corruption scheme implicates two separate statutes: the mail fraud statute[112] and the wire fraud statute.[113] These statutes

106 18 U.S.C. § 201(a)–(e).

107 § 201(b).

108 § 201(a)(1) ("[T]he term 'public official' means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.").

109 Dixson v. United States, 465 U.S. 482, 496 (1984) ("[T]he proper inquiry is . . . whether the person occupies a position of public trust with official federal responsibilities. Persons who hold such positions are public officials within the meaning of § 201 and liable for prosecution under the federal bribery statute.").

110 § 201(b)(2)–(4).

111 § 201(b)(2).

112 18 U.S.C. § 1341.

113 18 U.S.C. § 1343.

broadly criminalize the use of the domestic mail system, wire system, phone, internet, or interstate commerce facilities to execute a "scheme or artifice to defraud."[114] While the federal mail fraud and wire fraud statutes are not explicitly extraterritorial,[115] the DOJ has utilized statutes to enforce anti-corruption efforts against foreign individuals and entities who would otherwise be outside the reach of the FCPA.[116] These statutes are powerful tools that often succeed in prosecuting the bribery or attempted bribery of both domestic and foreign public officials whose illicit activity is grounded in a domestic connection, like using a U.S. financial institution to transfer money.[117] It is important to note, however, that Congress did not enact these statutes for the sole purpose of combatting transnational bribery.[118] As a result, these statutes all require the existence of additional elements that may not be present in ordinary bribery cases. For example, the mens rea element required for the application of these statutes limits action against those who "intend[] to devise any scheme or artifice to defraud."[119] Neither extortion nor bribery requires an intent to defraud,[120] so the present prosecutorial gap persists within the FCPA because the mens rea requirement and the territorial-nexus requirement pose barriers for the prosecution of foreign officials and entities.

In sum, the FCPA's unwritten weaknesses are apparent in several contexts. These weaknesses are arguably most apparent, though, in what other anti-corruption and anti-bribery legislation fail to

114 *See* §§ 1341, 1343; *see also* United States v. Frey, 42 F.3d 795, 797 (3d Cir. 1994) ("The wire fraud statute . . . is identical to the mail fraud statute except it speaks of communications transmitted by wire."); McNally v. United States, 483 U.S. 350, 358 (1987) (construing that the statute applies to any act "designed to defraud by representations as to the past or present, or suggestions and promises as to the future").

115 *See* Bascunan v. Elsaca, 927 F.3d 108, 120–21 (2d Cir. 2019).

116 *See id.* at 123 (holding that "the mail and wire fraud statutes do not give way simply because the alleged fraudster was located outside of the United States"); *see also* United States v. Napout, 963 F.3d 163, 181 (2d Cir. 2020) (finding sufficient domestic connection when defendants accepted bribes that flowed through U.S. financial institutions).

117 Christopher M. Matthews, *Prosecutors Broadly Use Mail-Fraud, Wire Fraud Statutes*, WALL ST. J. (June 9, 2015), https://www.wsj.com/articles/prosecutors-broadly-use-mail-fraud-wire-fraud-statutes-1433870788.

118 *See* CHARLES DOYLE, CONG. RSCH. SERV., R41930, MAIL AND WIRE FRAUD: A BRIEF OVERVIEW OF FEDERAL CRIMINAL LAW (Feb. 11, 2019), https://www.everycrsreport.com/files/20190211_R41930_0af1a4b3dbc5d40b0bef8f41ceae62156abe6210.pdf ("The mail and wire fraud statutes clearly protect against deprivations of tangible property.").

119 *See* 18 U.S.C. §§ 1341, 1343.

120 *See generally* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. § 78dd).

accomplish. The FCPA's criminalization of paying money for foreign influence is limited to companies in the United States (issuers),[121] individuals with U.S. citizenship and companies organized under U.S. law (domestic concerns),[122] and foreign individuals and foreign entities who are within the territory of the United States when the illicit transaction takes place (jurisdictional nexus).[123] The Hobbs Act criminalizes the extortion of money by public officials—but extortion in this instance requires physical violence or the threat of physical violence, and the Hobbs Act does not recognize economic extortion.[124] The Travel Act criminalizes foreign individuals who travel to the United States to engage in corruption schemes or bribery.[125] The wire fraud and mail fraud statutes allow the United States to pursue and prosecute foreign officials who utilize U.S. channels to further corrupt activities and corrupt payments, but the mens rea requirement may make it increasingly difficult to apply these statutes to cases involving bribery or extortion.[126] As such, there is no enforcement mechanism currently available that would deter, or altogether prevent, a foreign official from extorting an illicit payment from a U.S. individual or entity before allowing entry into a foreign market, economy, or country.

B. *The Feasibility of Foreign Governments to Prosecute Their Own Officials Who Solicit, Extort, Demand, or Accept Bribes*

Many countries are ill-equipped to prosecute their public officials for corruption and bribery. Consequently, the United States must be careful to avoid misplacing its trust in a foreign government's proclivity to prosecute one of their own public officials. A recent study by the OECD found that public officials' home countries sanction or prosecute their own in only 20 percent of uncovered bribery schemes involving acceptance or demand.[127] Developing countries, with an emphasis on kleptocracies,[128] are more likely to turn a blind eye to such uncovered

121 *See* 15 U.S.C. §§ 78dd-1, 78c(a)(8).

122 *See* § 78dd-2(h)(1).

123 *See* § 78dd-3 (territorial principle); *see also* § 78dd-2 (nationality principle).

124 *See* 18 U.S.C. § 1951(a).

125 18 U.S.C. § 1952(a)–(b).

126 *See* 18 U.S.C. §§ 1341, 1343.

127 OECD, *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?*, (Dec. 11, 2018), www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm.

128 Alexander Cooley, John Heathershaw & J.C. Sharman, *The Rise of Kleptocracy: Laundering Cash, Whitewashing Reputations*, 29 J. OF DEMOCRACY 35, 49 (2018) (noting that "[k]leptocracy depends heavily on the partial and selective use of the law . . . .").

corruption. This informal nepotism possibly stems from a country's desire to maintain a reputation of economic integrity.

In her publication, Sara C. Sàenz justifiably opines that "the worse a country is at prosecuting bribery on its own, the more an FCPA case . . . looks like legal imperialism rather than compliance with an international expectation of combatting bribery."[129] It may indeed be the case that many countries—especially those not allied with the United States—may resist prosecuting their foreign officials for extorting illicit funds from U.S. individuals and entities simply because they object to the American interference. It is important to point out that the FCPA does somewhat fall within the interpretation of what some would label as 'soft imperialism.'[130] The FCPA is supposed to be, and has been largely successful in, pushing for change in other countries. The United States is a powerful presence, and the pressure put on non-abiding countries is not insignificant.

While the desire for a foreign country to maintain their respective reputation of economic integrity is related to the United States' desire to maintain political alliances, the United States has not backed away from denouncing illegal actions and should not look to do so now because of the risk of creating political tension.[131] While certainly thought-provoking, this argument is grounded in hypocrisy because the United States already has other criminal statutes that allow enforcement agencies to target foreign officials in other situations.[132] In fact, the United States has not hesitated to charge and prosecute foreign officials and foreign nationals with wire fraud and bribery,[133] even while

129 Sara C. Sàenz, *Explaining International Variance in Foreign Bribery Prosecution: A Comparative Case Study*, 26 DUKE J. COMP. & INT'L 269, 294 (2015).

130 *See generally* Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 227 (1999) (discussing potential problems that arise from imposing "alien values").

131 *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1620 (2017) (noting that "the political costs of bringing these [FCPA] cases can overwhelm the benefits").

132 Many of these criminal statutes include, but are not limited to, those discussed in Section III.A, as well as others like the Money Laundering Control Act of 1986 and the Anti-Money Laundering Act of 2020.

133 *See* United States v. Lazarenko, 564 F.3d 1026, 1032 (9th Cir. 2009) (focusing on charges of money laundering and bribery). It is important to note that the charges against Lazarenko were rendered prior to the amendment of the Patriot Act, where the understood difference between extortion and bribery was not yet judicially clarified. Interestingly enough, the Ninth Circuit recently took note that then-Ukrainian law "did not require violence as an element" of extortion. *See* United States v. Chi, 936 F.3d 888, 894 (9th Cir. 2019).

diplomatic relations were imperfect at the time of prosecution.[134] As far as one can tell, the enforcement of statutes like the wire fraud and mail fraud statutes is not often discouraged for fear of political blowback.

Furthermore, some foreign countries may perceive bribery as a form of foreign investment and would not actively seek to deter the demand or receipt of bribery.[135] To be sure, numerous studies have found that increased enforcement of the FCPA not only increases the costs associated with U.S. corporate entities doing business in foreign countries but also broadly discourages and decreases foreign investment.[136] But to argue against amending the FCPA, or to argue against its current reach because it discourages foreign investment, is somewhat of a hollow stance to take because this specific argument goes directly towards describing the very purpose of the FCPA. From both an economic and a societal perspective, the FCPA represents Congress's decision to forgo some (hopefully negligible) amount of profit, investment, or economic activity, to have and uphold certain coveted moral and economic standards.

C. *The Legitimacy of the Extradition Requirement for Prosecuting Foreign Officials*

Lastly, some experts argue that an indictment of a foreign official without accompanying extradition is largely a waste of law enforcement resources.[137] But the allegedly symbolic act of indicting a foreign official does have practical implications that may play a large role in deterring

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134 In 2009, Ukraine–U.S. relations were not perfect. *See* Interfax-Ukraine, *Crimean Parliament Votes Against Opening U.S. Diplomatic Post*, KYIVPOST (Feb. 18, 2009), https://www.kyivpost.com/article/content/ukraine-politics/crimean-parliament-votes-against-opening-us-diplom-35722.html?cn-reloaded=1.

135 OECD, *Is Foreign Bribery an Attractive Investment in Some Countries?*, *in* OECD BUSINESS AND FINANCE OUTLOOK 208 (2016), https://www.oecd.org/daf/anti-bribery/BFO-2016-Ch7-Bribery.pdf.

136 Brad Graham & Caleb Stroup, *Does Anti-Bribery Enforcement Deter Foreign Investment?, in* APPLIED ECONOMICS LETTERS 5-7 (May 11, 2015), https://ssrn.com/abstract=2447910 ("[A]n FCPA enforcement activity is associated with a subsequent 40 percent reduction in the incidence of U.S. cross-border acquisitions of targets headquartered in that country. U.S. firms are thus significantly less likely to acquire foreign targets in countries that have been previously targeted by FCPA enforcement, consistent with the view that anti-bribery enforcement actions raise the cost of doing business for U.S. firms . . . ."); *see also* James R. Hines, *Forbidden Payment: Foreign Bribery and American Business After 1977*, 9-11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 5266, 1995) (finding that "American [foreign direct investment] grew more rapidly after 1977 in the less-corrupt countries . . ." than in the corrupt countries).

137 *See generally* Jack Goldsmith & Robert D. Williams, *The Failure of the United States' Chinese-Hacking Indictment Strategy*, LAWFARE (Dec. 28, 2018), https://www.lawfareblog.com/failure-united-states-chinese-hacking-indictment-strategy.

undesirable future conduct. A U.S. indictment against a foreign official undoubtedly carries weight that transcends national borders. Individuals and businesses will likely be more hesitant to do business with such a foreign official for fear of being associated with corruption.[138] A U.S. indictment could make it difficult for a foreign official to travel across borders.[139] A U.S. indictment would also pressure foreign governments to take action or bring domestic charges against those who demand bribes.[140] While it would be undoubtedly more effective from a deterrence perspective to extradite foreign officials who extort from U.S. individuals and entities, the geopolitical repercussions alone would likely deter enforcement of such a far-reaching and arguably imperialistic law. Additionally, indictment absent extradition would likely benefit the image of the DOJ's enforcement powers because such even-handed enforcement would be perceived as fair and just.

The FCPA is not, and Congress never intended it to be, a global law from an enforcement-capability perspective. In fact, the United Nations Convention Against Corruption ("UNCAC"), the "only legally binding universal anti-corruption instrument,"[141] appears to recognize the need for flexibility regarding extradition when corruption is found spanning international borders.[142] Under Chapter IV, Articles 43-49, States Parties are obliged to "cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Countries are bound by the convention to render specific forms of mutual legal assistance in gather and transferring evidence for use in court, to extradite offenders."[143] While opinions differ as to whether this standard of cooperation is flexible in practice, its flexibility is bolstered when read in conjunction with Article 16-2, which states that:

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138 *See* John P. Carlin, *Detect, Disrupt, Deter: A Whole-of-Government Approach to National Security Cyber Threats*, 7 HARV. NAT'L SEC. J. 391, 420 (2016) (discussing importance and overall consequences of issuing indictments).

139 *See id.*; *see also* Firestone & Piontkovska, *supra* note 85.

140 *Id.*

141 *United Nations Convention Against Corruption*, U.N. OFFICE ON DRUGS & CRIME, https://www.unodc.org/unodc/en/treaties/CAC/ (last visited Dec. 29, 2021).

142 U.N. OFFICE ON DRUGS & CRIME, UNITED NATIONS CONVENTION AGAINST CORRUPTION, G.A. Res. 58/4 of 31 Oct. 2003, https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [hereinafter UNCAC].

143 *Convention Highlights: International Cooperation*, U.N. OFFICE ON DRUGS & CRIME, https://www.unodc.org/unodc/corruption/convention-highlights.html (last visited Dec. 29, 2021); *see also* UNCAC, *supra* note 142, at 30–33.

> Each State Party shall *consider* adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.[144]

Admittedly, the notion of requiring States Parties to "consider" adopting legislation that criminalizes the solicitation or acceptance of illicit payments is relatively useless in a geopolitical sense. When read in conjunction with Articles 43-49, mandated legal cooperation to enforce extradition becomes less of a reality when the legal framework that would prompt extradition is optional. Thus, it appears that international standards are satisfied with acting on the offensive without the absolute need to carry out coordinated extraditions across borders.

IV. RECOMMENDATIONS AND REFUTATIONS FOR THE UNITED STATES' BATTLE AGAINST FOREIGN BRIBERY AND ECONOMIC EXTORTION

To be effective, or to be seen as successful, the FCPA does not have to stop every single act of induced influence or reach every illegal payment. Instead, the analysis of whether the FCPA is effective depends on if the FCPA prevents enough of the specifically targeted behavior to overcome the costs of the potential crime. This goes for the enforcement of most criminal laws—it just so happens that the cost of transnational bribery is so high that the United States needs to take a stronger stance on preventing it. To quote Senator Amy Klobuchar: the purpose of the FCPA "is not just to punish bad actors after a violation is committed, but rather to prohibit actions from happening in the first place."[145] In saying so, Senator Klobuchar stresses the importance and necessity of general deterrence.[146] This Comment suggests several plausible steps to improve the United States' overall effectiveness in combatting international corruption and transnational bribery. Each recommendation is offered in light of the Biden administration's recent broad anticorruption strategy,[147] with the goal of providing lawful

144 *Id.* at 18 (emphasis added).

145 *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. On Crime and Drugs of the S. Comm. On the Judiciary*, 111th Cong. 7 (2010) (statement of Senator Amy Klobuchar (D-MN)).

146 *Id.*

147 *See* UNITED STATES STRATEGY ON COUNTERING CORRUPTION, *supra* note 27.

mechanisms for prosecuting foreign public officials who extort U.S. individuals and businesses through economic pressure.

As argued throughout this Comment, the first suggestion is to amend the FCPA to recognize economic extortion as a criminal offense. The recognition of economic extortion would effectively close the existing gap in the current structure of the FCPA by allowing the pursuit and prosecution of foreign public officials who demand payment in exchange for entry into their respective market, economy, or country. As discussed, the present framework of the FCPA does not prevent foreign public officials from making such extortionate demands. Statutes that would otherwise prevent this are noticeably absent from the federal government's arsenal of prosecutorial tools. Complaints regarding the lack of opportunity to extradite could be met with counterarguments claiming that there is not a need for one; what's more, extradition may indeed be possible with the establishment of economic extortion as a criminal offense, an additional jurisdictional connection. And while such corrupt action would, in theory, be better left for the country in which it takes place to denounce, the fight against international corruption must be met with a consolidated effort that spans nations. The global problem of corruption and bribery requires a solution that actively and aggressively targets both sides of the transaction.

Challenges to this proposed amendment present themselves in the nuances of defining economic extortion. In light of 18 U.S.C. § 201's criminalization of accepting a bribe, there is no question that the United States recognizes the criminal culpability of those who overtly demand or otherwise accept illicit payments. However, the United States decided to exempt foreign officials who commit this already-recognized culpable act.[148] With that recognition and admission in place, a simple solution may be found by codifying the elements of economic extortion within the statutory text of the FCPA. The Court of Appeals for the Ninth Circuit has established that economic extortion requires (1) a threat of economic harm, (2) made with the purpose of obtaining money from the victim, (3) which would put the victim in reasonable fear of economic harm.[149] The codification of this offense would effectively expand the FCPA's reach to foreign public officials and foreign entities who threaten difficulty or inconvenience. Most economists would agree that the removal of corrupt actors from largely free marketplaces would yield

[148] United States v. Blondek, 741 F. Supp. 116, 117 (N.D. Tex. 1990), *aff'd* United States v. Castle, 925 F.2d 831 (5th Cir. 1991).

[149] *See* United States v. Marsh, 26 F.3d 1496, 1500 (9th Cir. 1994) (citing United States v. Greger, 716 F.2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 456 U.S. 1007 (1984)).

benefits to such marketplaces—as such, this codification would be a step in the right direction in doing so.

More broadly, the recognition and criminalization of soliciting, demanding, extorting, or accepting a bribe would largely be accomplished by adopting and ratifying the Foreign Extortion Prevention Act ("FEPA").[150] The FEPA would permit the prosecution of foreign officials who demand or accept bribes in exchange for fulfilling, disregarding, or violating of their official duties.[151] The bill proposes amending 18 U.S.C. § 201 by adopting the term "foreign official" and criminalizing a foreign official who "corruptly demands, seeks, receives, accepts, or agrees to receive or accept" bribes.[152] This bill was introduced on August 2, 2019,[153] but it did not receive a vote in the 116th Congress despite encouragement from the legal community.[154] The bill was recently re-introduced into the 117th Congress on July 28, 2021,[155] and may experience increased support due to the Biden administration's outspoken stance against corruption.[156]

The enactment of the FEPA, however, would likely prevent any amendments to be made to the FCPA, for the very reason that any amendment expanding the reach of the FCPA would therefore become

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150 *See* Press Release, Global Financial Integrity, *Congress Urged to Include Anti-Corruption Measures in Coronavirus Response Packages by Group of 10 NGOs* (Apr. 9, 2020), https://gfintegrity.org/press-release/group-of-10-ngos-urge-congress-. . .cal-anti-corruption-measures-in-future-coronavirus-response-packages/ (emphasizing the need to adopt, alongside three other anti-corruption initiatives, the Foreign Extortion Prevention Act (H.R. 4140)).

151 Foreign Extortion Prevention Act, H.R. 4737, 117th Cong. (2021); *see also* Foreign Extortion Prevention Act, H.R. 4140, 116th Cong. (2019).

152 H.R. 4737, § 2; *see also* H.R. 4140, § 2.

153 Foreign Extortion Prevention Act: All Actions Except Amendments H.R.4140 – 116th Congress (2019–2020), https://www.congress.gov/bill/116th-congress/house-bill/4140/all-actions-without-amendments.

154 It appears that H.R. 4140 was referred to the Subcommittee on Crime, Terrorism, and Homeland Security on Aug. 28, 2019, but has since died following its introduction to the House of Representatives on Aug. 2, 2019. For a record of congressional actions pertaining to this initial iteration, see Foreign Extortion Prevention Act: All Actions Except Amendments H.R.4140 – 116th Congress (2019–2020), https://www.congress.gov/bill/116th-congress/house-bill/4140/all-actions-without-amendments.

155 Foreign Extortion Prevention Act: All Actions Except Amendments H.R.4737 – 117th Congress (2021–2022), https://www.congress.gov/bill/117th-congress/house-bill/4737/all-actions-without-amendments.

156 *See* UNITED STATES STRATEGY ON COUNTERING CORRUPTION, *supra* note 27; 2021 Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest, *supra* note 24.

redundant in light of the FEPA.[157] This is significant because the enactment of the FEPA would leave a possible gap in the United States' ability to prosecute economic extortion. Since the FEPA was introduced to amend 18 U.S.C. § 201, the amendment itself would act to retain the standards of 18 U.S.C. § 201, which require the intent to "influence any official act."[158] This is a notably different standard than required under the FCPA. As a result, the factual circumstances necessary for a successful prosecution under the FCPA may be different than a successful prosecution under the FEPA. Moreover, the FEPA may be too broad in suggesting the criminalization of any and all acceptances of illicit payment. The above codification of economic extortion within the FCPA may be better situated to narrow this broadness and attract support.

In his Note, Garen S. Marshall discusses the opposition to recognizing economic extortion as a criminal offense, ultimately concluding that there are other ways to achieve deterrence in this context.[159] Specifically, Marshall suggests that the criminalization of economic extortion may lead to an increase in bribe-paying because U.S. entities will have a defensive crutch to fall back on.[160] This argument holds merit if economic extortion would only be an affirmative defense for the bribe-payor. Economic extortion as a criminal offense, however, would allow the punishment and consequential deterrent to swing both ways. U.S. companies would be deterred from paying anything that represents a bribe for fear of FCPA prosecution, and foreign officials and entities would be hesitant to solicit, demand, or accept illicit payment for fear of U.S. indictment in violation of a newly recognized economic extortion offense.

What's more, if Congress were to amend the FCPA to include economic extortion as a recognized criminal offense that reaches foreign public officials, it would incentivize U.S. individuals and entities to report on such corrupt transactions more readily without fear of

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157 The FCPA targets bribery. The FEPA would target extortion. With the adoption and enactment of the FEPA, Congress would likely be less inclined to amend the FCPA to encompass economic extortion, as argued for in this Comment.

158 18 U.S.C. § 201(b); H.R. § 4737, § 2(2) (stating that extortion requires "(A) being influenced in the performance of any official act [or] . . . (B) being induced to do or omit to do any act in violation of the official duty or person . . . ."); *see also* Daniel T. Judge, *"Receiver Beware": How the Foreign Extortion Prevention Act Could Change the Foreign Corrupt Practices Act*, 2020 U. ILL. REV. ONLINE 152, 164 (2020).

159 Marshall, *supra* note 82, at 1303.

160 *Id.* at 1304 ("Rather than responding to solicitation of bribes by foreign officials with resistance and disclosure to law enforcement, targeted companies may be more likely to pay bribes, knowing that they can fall back on an economic extortion defense.").

prosecution because an illicit payment has yet to be made. In most cases, any such reporting would yield no harm to the reporting U.S. individual or entity because they would already be at an impasse in their corporate negotiations. If anything, it would clarify yet another oft-cited ambiguity within the enforcement powers of the FCPA.[161]

After all, a large purpose of the Resources Guide, as well as the sporadic Advisory Opinions, is to clarify ambiguities present within the FCPA. Peter R. Reilly discusses the inherent difficulty in incentivizing corporate self-reporting; specifically, Reilly posits that the greatest utility of an incentive will not exist unless and until the government clarifies the "specific and calculable benefits that can be achieved through self-reporting . . . ."[162] Scholars have repeatedly criticized the FCPA's enforcement power because of its vagueness,[163] which may deter corporate entities from disclosing ambiguous transactions for fear of garnering unwanted attention. An increase in Advisory Opinions, which work to clarify the legality of questionable transactions, may be one way to increase governmental transparency. Consequentially, an effort to clarify the opaque prosecution process of the FCPA may indeed increase instances of self-reporting.

Regardless of whether this suggestion is considered, the United States could follow the example of other various States Parties to the UNCAC by criminalizing both the acceptance of a bribe and the payment of a bribe through the creation of new legislation. The United Kingdom has gone farther than this Comment suggests by enacting the UK Bribery Act in 2010.[164] By all accounts, the UK Bribery Act is the most far-reaching anti-corruption and anti-bribery law in a developed country. For example, the UK Bribery Act broadly applies to any company, regardless of its location, that "carries on a business or a part of a business, in any part of the [UK]."[165] Thus, any company that has any business dealings in the UK could be held criminally liable under the Act, even if the alleged bribe did not take place in the UK and even if the

161 *See generally* Steven R. Salbu, *Redeeming Extraterritorial Bribery and Corruption Laws*, 54 AM. BUS. L. J. 641, 680 (2017) (discussing differing interpretations of FCPA elements).

162 Peter R. Reilly, *Incentivizing Corporate America to Eradicate Transnational Bribery Worldwide: Federal Transparency and Voluntary Disclosure under the Foreign Corrupt Practices Act*, 67 FLA. L. REV. 1683, 1683 (2015).

163 *See, e.g.*, Salbu, *Redeeming Extraterritorial Bribery and Corruption Laws*, *supra* note 161, at 658–60 (discussing the noted vagueness underlying whether a state-owned or state-controlled entity is an instrumentality of a foreign government such that its employees are foreign officials).

164 Bribery Act, 2010, c.23 (U.K.).

165 *See id.*

benefit is intended to accrue to an individual or entity outside of the UK.[166]

Notably, the UK Bribery Act holds corporate entities strictly liable if they fail to prevent bribery.[167] Although the UK Bribery Act provides a potential defense if the corporate entity can show that "adequate procedures were in place to prevent bribery,"[168] this Comment is not suggesting the FCPA, or any legislation, prosecute per a strict liability standard. From a practical perspective, it would be nearly impossible to facilitate the prosecution of a company that uses two degrees of separation to bribe its way into a market, economy, or country. Instead, this Comment suggests that Congress narrow and specify the avenues available to prosecute foreign public officials and recognize economic extortion as a criminal offense because the criminalization of economic extortion would not as drastically alter business negotiations as would a complete ban on accepting payments. If anything, this would simply increase the formalities surrounding business negotiations and provide further oversight into contexts in which money changes hands.

Lastly, expanding the whistle-blower reward system in order to incentivize a higher volume of voluntary corporate reporting may be effective—after all, the FCPA's enforcement mechanism is a law based on general deterrence.[169] As to how the FCPA Whistleblower Provisions and Protections should be effectively expanded, it is best left to the experts.

V. CONCLUSION

Undeniably, the adoption and enactment of the FCPA has benefitted the ever-growing international economy, from both a financial integrity perspective and a political transparency perspective. The FCPA, however, has not kept pace with international standards pertaining to combatting transnational bribery in a technological-focused world. Bribery is a global problem and thus requires a global solution. Developed nations—namely, the United States—have a moral and legal duty to implement effective prevention and enforcement measures against international corruption. Such nations can more readily expose and prosecute foreign individuals and foreign entities.[170] The FCPA should be amended—for what would be only a third time in

166 *Id.*

167 *Id.*

168 *Id.*

169 *See* 15 U.S.C. § 78u-6(a)(6), (h)(1)(A).

170 *See* Heineman & Heimann, *supra* note 34, at 77.

43 years—to recognize and criminalize economic extortion by foreign public officials. This may indeed be the most efficient and most effective way of curbing the demand for illicit payments. As long as there is a demand for illicit payments, there will always be a supply of bribes.