
Fertile Ground for Corruption: Implementing the Foreign Corrupt Practices Act in the Fragmented State of Afghanistan

*“The American people deserve more, and should expect better, from their public officials, and I am proud of the work that our prosecutors and law enforcement agents did then, and continue to do now, to combat domestic corruption. But corruption is no less harmful when it is perpetrated abroad.”*¹

I. INTRODUCTION

Foreign corruption has run rampant for a tremendous amount of time.² To directly address this problem, Congress enacted the Foreign Corrupt Practices Act (FCPA) in 1977.³ Corruption has adverse effects on democratic institutions; it deteriorates public accountability and redirects resources away from national priorities, including public “health, education, and infrastructure.”⁴ The impact of corruption abroad can spread rapidly through the global marketplace and ultimately cause chaos domestically.⁵ Due to their

1. James M. Cole, Deputy Att’y Gen., Office of the Deputy Att’y Gen., Address at the Foreign Corrupt Practices Act Conference (Nov. 19, 2013), <http://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-speaks-foreign-corrupt-practices-act-conference> [<https://perma.cc/746A-N22A>].

2. See Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 439 (2010) (describing foreign bribery as continuing problem); see also Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 782 (2011) (describing corruption of foreign officials as top priority, “second only to fighting terrorism”).

3. See Thomas, *supra* note 2, at 439 (implementing solution as “public declaration against foreign bribery”); see also 15 U.S.C. § 78dd-1 (2012) (outlining statute enacted to address and deter against foreign bribery). Congress enacted the FCPA to constrain foreign corruption and level the playing field for all U.S. companies by eliminating the unfair advantages of bribery. See Steve Frinsko, *Recent Trends in Foreign Corrupt Practices Act Enforcement*, 55 ADVOC. 30, 30 (2012).

4. See THE CRIMINAL DIV. OF THE U.S. DEP’T OF JUSTICE AND THE ENF’T DIV. OF THE U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (Nov. 2012), <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> [<http://perma.cc/M5MJ-QXJA>] [hereinafter FCPA RESOURCE GUIDE] (stating adverse effects of corruption).

Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.

S. REP. NO. 95-114, at 4 (1977). Another debilitating effect of corruption is that it undermines national law. See FCPA RESOURCE GUIDE, *supra*, at 2.

5. See Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big To Debar?*, 80

substantial international impact, foreign bribery and corruption are deemed a threat to U.S. national security.⁶ For these reasons, enforcement of the FCPA is a continuing priority for the United States.⁷

Despite national efforts, some foreign countries—often both the government and its citizens—still blame the United States for overseas corruption.⁸ Among these is Afghanistan, a country consumed with high levels of corruption.⁹ Unfortunately, corruption within the Afghan government creates animosity between the Afghan people and their leaders, triggering a lack of confidence and a sense of insecurity among the community.¹⁰ The Afghan people are exposed to war and corruption every day.¹¹ Bribes structure the way people

FORDHAM L. REV. 775, 780 (2011) (describing spiraling “cancerous effect” on domestic economy due to corruption abroad). An estimated one trillion dollars is paid in bribes annually worldwide, which evidences the paralyzing effects of corruption. *See id.* (recounting Assistant Attorney General Lanny Breuer’s 2010 speech).

6. *See id.* at 781 (expounding upon adverse effects of foreign corruption). In his post 9/11 foreign policy decree, President George W. Bush recognized the direct impact corruption abroad has on security. *See id.* Another unfortunate byproduct of foreign bribery, further intensifying U.S. national security concerns, is that it often finances terrorism and destructive tyrants. *See id.*; *see also* Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT’L L. 129, 131 (2010) (insisting ungoverned states continue to attract “gangsters, pirates, and terrorists” because foreign bribery persists).

7. *See* FCPA RESOURCE GUIDE, *supra* note 4, at 2 (reiterating importance of Department of Justice (DOJ) and Securities and Exchange Commission (SEC) enforcement of FCPA).

8. *See* Melanie Lansakara, *Afghanistan’s Corruption Blame Game*, FCPA BLOG (Nov. 8, 2012, 7:08 AM), <http://www.fcpablog.com/blog/2012/11/8/afghanistans-corruption-blame-game.html> [<http://perma.cc/DB9V-84VP>] (noting foreign leaders’ willingness to hold United States accountable for increased corruption levels). Former Afghan President Hamid Karzai asserts, “Western allies have been complicit in the graft.” *Id.* In both August and October 2012, two United States Army Sergeants were involved in facilitating the theft of military-owned fuel in exchange for bribe money; in one of these instances the stolen fuel cost \$1.5 million. *Id.* During its subsequent investigation, the Special Inspector General for Afghanistan Reconstruction (SIGAR) revealed that financial records of fuel sales totaling \$474 million were destroyed, making it nearly impossible to follow the paper trail or determine accurate revenues generated. *Id.* Influential military analyst, Anthony H. Cordesman wrote a report in 2010 and concluded that U.S. current practices enabled colossal sums of money to enter Afghanistan with little oversight. *See id.* *See generally* ANTHONY H. CORDESMAN, ARLEIGH A. BURKE CHAIR IN STRATEGY, CTR. FOR STRATEGIC & INT’L STUDIES, *HOW AMERICA CORRUPTED AFGHANISTAN: TIME TO LOOK IN THE MIRROR* (Sept. 9, 2010), http://csis.org/files/publication/100907_American_Corruption_Afghanistan.pdf [<http://perma.cc/W2HK-84AB>] (asserting misused money from outside sources to Afghanistan as unquantifiable). Karzai and his government, however, were not blameless; in June 2012, Karzai was criticized for awarding a twenty-five-year oil extraction contract to a company that his own cousins owned. *See* Lansakara, *supra*. Furthermore, in November 2012, a notable Afghan governor and his administration allegedly obtained illegal tax revenue from a Pakistani border crossing and narcotics trafficking. *See id.*

9. *See* Lansakara, *supra* note 8 (noting purchases of petroleum, oil, and lubricants as most prominent areas plagued with Afghan corruption).

10. *See* Kevin T. Carroll, Note, *Afghan Corruption—The Greatest Obstacle to Victory in Operation Enduring Freedom*, 43 GEO. J. INT’L L. 873, 875 (2012) (explaining corruption resulted in Afghan people’s lessened confidence in country’s leadership). Government corruption also incentivizes insurgency, perhaps why the Afghan people feel obligated to depend on the Taliban, instead of the government, for justice. *See id.*

11. *See id.* at 876 (illustrating Afghan culture’s dependence on corruption in pursuit of routine matters). Bribes are paid for standard government services, including “electricity, the issuance of passports and national identification forms, and access to education.” *Id.* at 876-77. “Commissionaires” idly wait around government buildings to arrange bribes for such standard services, playing the role of intermediaries between the government and the people. *See id.* at 877. Bribery has even extended to education as students allege they feel obligated to pay teachers for passing grades. *See id.*

complete daily tasks, and those on the receiving end are unashamed, despite Islam condemning such bribery.¹² It is difficult to criticize the Afghan people for their apathy, however, because such indifference ultimately stems from a loss of faith in a peaceful future.¹³

The Afghan people, however, have not lost all hope, as newly elected President Ashraf Ghani said they “demonstrated a remarkable will for wanting transformation” during the elections.¹⁴ President Ghani said he was attracted to the position for its *nearly* impossible tasks, but confirmed it is not a “mission impossible.”¹⁵ Unsurprisingly, the elections spanned many months due to allegations of electoral fraud.¹⁶ During his presidency, Ghani is determined to change Afghanistan’s status as the third most corrupt country on Earth.¹⁷ President Ghani stated that he is personally “not corrupt” and refuses to foster the corruption that is stifling the country’s ability to progress.¹⁸

This Note will first grapple with the definition of corruption.¹⁹ This Note will then explore the background of the FCPA, as well as its purposes, provisions, and enforcement vehicles.²⁰ Next, it will discuss corruption as a global problem, investigating other global anticorruption initiatives, which have proven effective.²¹ Thereafter, it will provide a brief history of Afghanistan as a war-torn, underdeveloped, corruption-driven country.²² It will also delve into the legal history of Afghanistan.²³ It will discuss corruption’s adverse effects

12. *See id.* at 877 (describing those who accept bribes as “shameless”). Despite the government’s warnings about the consequences of bribery, it still continues. *See id.* Bribery even extends to religious matters. *See id.* Although Islam—the dominant religion in Afghanistan—condemns bribery, it is not an effective enough deterrent. *See id.* Furthermore, bribery has penetrated into the realm of religious matters; the Ministry of Remuneration and Islamic Affairs accepts bribes from pilgrims attempting to travel to Mecca for *hajj*, the holy pilgrimage. *See id.*

13. *See id.* at 878 (showing lack of faith among Afghan people). An American journalist recalled that an Afghan businessman told him that “[r]ight now, this country is all about raping and pillaging as much as you can, because there is no faith in the future.” *Id.* at 877-78. This lack of faith may ultimately lead to further insurgency in Afghanistan. *See id.*

14. *Afghan President ‘Will Not Tolerate Corruption,’* BBC NEWS (Sept. 22, 2014), <http://www.bbc.com/news/world-29312884> [<http://perma.cc/8U27-SY23>] [hereinafter *Afghan President Video*].

15. *See id.* In emphasizing Afghanistan’s status as the heart of Asia and the world’s soon-to-be largest continental economy, President Ghani said, “A lot of things that worked against us in the last 200 years now can work for us.” *Id.*

16. *See id.* (outlining election of Ghani as President of Afghanistan after months of alleged electoral fraud).

17. *See id.* (stating importance of President as Commander-in-Chief in peaceful resolution of civil war issues). President Ghani asserts that fighting corruption is mostly about accountability. *See id.*

18. *Afghan President Video, supra* note 14 (affirming Ghani’s readiness as President to take on any measure to fight corruption).

19. *See infra* Part II.A (suggesting possible definitions for corruption).

20. *See infra* Part II.B.1-3 (outlining origin, purposes, provisions, and enforcement of FCPA).

21. *See infra* Part II.C (describing effect of corruption globally).

22. *See infra* Part II.D (explaining Afghanistan’s long history of war).

23. *See infra* Part II.E (acknowledging country’s change in legal structure over many years).

on the country.²⁴ Finally, this Note will analyze the possible effectiveness of the FCPA in Afghanistan and how the United States overcomes cultural barriers, in addition to the lack of security, to do its best for a damaged country.²⁵

II. HISTORY

A. Defining Corruption

One must first understand that corruption is a multifaceted occurrence, as well as a complex and real problem.²⁶ In its simplest form, however, corruption is the misuse or abuse of “public power for private gain.”²⁷ More precisely, it is the act of a usually trusted authority figure who illegally exploits his position to secure an advantage for himself or another.²⁸ The most evident example of leveraging public power for private advancement is when officials “accept[], solicit[], or extort[] a bribe.”²⁹ Corruption’s dangerous nature not only harms the public by transferring the nation’s wealth to private bank

24. See *infra* Part II.F (exposing Afghanistan’s corruption issues).

25. See *infra* Part III (analyzing possible effects of FCPA on corruption in Afghanistan).

26. See THE WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK, POVERTY REDUCTION & ECON. MGMT. 8 (Sept. 1997), <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf> [<http://perma.cc/ZMH8-7G3W>] (discussing complex nature of corruption). The roots of corruption originate in politics and bureaucracy, and its effects directly correlate to the financial condition of the country: the more underdeveloped, the more corrupt. See *id.*

27. See *What Is Corruption?*, CORRUPTIE.ORG, <http://www.corruptie.org/en/corruption/what-is-corruption/> (last visited Nov. 11, 2014) [<http://perma.cc/4H6W-E2V4>] [hereinafter CORRUPTIE.ORG] (exploring different definitions of corruption); see also THE WORLD BANK, *supra* note 26, at 1 (defining corruption and noting it covers “a broad range of human actions”). A broader definition of corruption would likely replace “public power” with “entrusted power” in order to encompass both private and public corruption, not only reaching politicians and public servants, but also Chief Executive Officers, Chief Financial Officers, and employees. See CORRUPTIE.ORG, *supra*; see also Ibrahim F.I. Shihata, *Corruption-A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT’L L. 451, 455-56 (1997) (recognizing private effect of corruption on lives of citizens). Legal scholars regard corruption as a departure from the rules, specifically by people in power using their discretion to misuse public resources. Shihata, *supra*, at 455-56.

28. Brian C. Harms, Note, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy To Combat Corruption*, 33 CORNELL INT’L L.J. 159, 163 (2000); BLACK’S LAW DICTIONARY 345 (6th ed. 1990) (defining corruption). Corruption is ultimately a diversion of a country’s wealth from public resources into the pockets of those in power—shifting money to those who ironically should be protecting those very resources. See Harms, *supra*, at 163.

29. See THE WORLD BANK, *supra* note 26, at 1 (defining corruption). Corruption also ensues when private agents use bribes to bypass public policies and procedures in order to gain an unfair advantage. See *id.* People mostly use bribes as the main instrument for corruption. See *id.* Citizens use bribes to purchase many things that governments supply; alternatively, government agents may ask for bribes from private parties to provide those services. See *id.* Bribes are clandestine gifts, which are in turn presumed improper. See CORRUPTIE.ORG, *supra* note 27. The intent, however, behind the presentation of a gift is crucial to categorizing a gift as improper or not. See *id.* On a national scale, bribery is inefficient because it often results in officials making self-interested decisions as opposed to decisions centered on the country’s best interests. See Thomas, *supra* note 2, at 441. Furthermore, national investments also decrease because companies are skeptical of investing in nations with a reputation for corruption. See *id.*

accounts, but it also taints the government's accountability.³⁰

Those who speak of corruption in a public forum often disapprove of it.³¹ The inhabitants of most underdeveloped countries consider corruption an unchangeable fact of life, which they must accept.³² Some consider corruption an added cost of living, a necessary expense to accomplish anything.³³ Alternatively, others consider corruption an infringement on fundamental human rights.³⁴ Regardless, all agree that corruption increases the wealth of those involved while simultaneously depleting the nation's capital and general welfare.³⁵

Unfortunately, it is not easy to target specific sources of corruption because its causes are always circumstantial.³⁶ Corruption grows when institutions are weak and still developing; the transitional nature of this phase makes corruption even harder to regulate.³⁷ Many factors, such as decreasing salaries for civil service workers and promotions unrelated to performance, weaken the motivation for governmental employees to remain honest and work productively.³⁸ To fight a system plagued with corruption, one must understand the three elements that comprise the formula of corruption: "monopoly power," "discretion," and "accountability."³⁹ When government officials have monopolistic power and are not held accountable for their

30. See Harms, *supra* note 28, at 163-65 (noting corruption's damaging effects on governmental accountability and reputation). Tainting government accountability is also known as "indigenous spoliation" and is defined as "an illegal act of depredation which is committed for private ends by constitutionally responsible rulers [and] public officials." *Id.* at 163 (emphasis added) (citation omitted); see also CORRUPTIE.ORG, *supra* note 27 (explaining difficulty surrounding corruption due to its discrete nature). Corrupt parties enter transactions with the intention to keep them secret—this intent proliferates the covert nature surrounding corruption's effect on the economy and every day life. See CORRUPTIE.ORG, *supra* note 27. This inappropriate and unacceptable conduct creates an ethical problem. See *id.*

31. See Shihata, *supra* note 27, at 458 (describing public perception of corruption).

32. See *id.* (noting perceived scope "may even exceed its real dimensions").

33. See *id.* (explaining motivation behind public involvement in corrupt activities).

34. See *id.* (citation omitted) (illustrating spectrum of public perception of corruption).

35. See Shihata, *supra* note 27, at 458 (commenting on public understanding of corruption's consequences). Corruption, in various forms, persists in all societies but on a different scale of severity. See *id.* These societies have acknowledged corruption's atrocious effects and have frowned upon such practices throughout history. See *id.* Despite such efforts, corruption continues to be a part of these societies. See *id.* Ultimately, corruption impedes development as it forces governments to intervene unnecessarily, which undermines the government's ability to execute policies in areas where government involvement is essential. See THE WORLD BANK, *supra* note 26, at 1.

36. See THE WORLD BANK, *supra* note 26, at 3-5 (outlining causes of corruption). The causes of corruption are typically embedded in a country's policies, governmental practices, political progress, and social history. See *id.* at 3.

37. See *id.* at 3-4 (discussing prevalence of corruption in weakened societies).

38. See *id.* at 4 (citing lack of motivation to work honestly precipitates corruption). "Dysfunctional government budgets, inadequate supplies and equipment, delays in the release of budget funds (including pay), and a loss of organizational purpose" also cripple and discourage staff members. *Id.* When senior officials and political leaders regularly use bribes to advance selfish priorities and when there is no protection for those who denounce corruption of this kind, the incentive to stay honest is further undermined. See *id.*

39. See Harms, *supra* note 28, at 164 (creating formula for corruption).

decisions or actions, they are instead incentivized to utilize corrupt practices.⁴⁰ Furthermore, corruption prevails when the informal rules created, displace the formal rules and laws.⁴¹ Thus, the existence of proper laws is not the only solution to corruption, as the appropriate enforcement of these laws is also essential.⁴²

B. *The Foreign Corrupt Practices Act of 1977*

1. *Origins and Purposes for Statute's Enactment*

Corruption has always been a global issue, however, the international community has only recently attempted to recognize and implement solutions.⁴³ In the United States, the FCPA is most commonly portrayed as a byproduct of the Watergate scandal.⁴⁴ Congress, however, actively investigated allegations of international corruption before the Watergate scandal.⁴⁵ Congressional hearings focused predominantly on the Lockheed Corporation scandal of the early 1970s; these investigations forewarned Congress of the need for legislation barring such overseas payments.⁴⁶ Lockheed acknowledged that it paid “several multi-million dollar bribes” to multiple countries, to guarantee its government contracts in those specific countries.⁴⁷ After a long haul, President Carter signed the FCPA—then known

40. See Harms, *supra* note 28, at 165 (computing end result of formula for corruption). The formula creates a vicious cycle of undiscovered corruption, which allows inefficient practices to continue. See *id.*

41. See THE WORLD BANK, *supra* note 26, at 4 (discussing tenuous relationship and distinctions between formal and informal rules). One defining characteristic of a corrupt environment is an oscillation between the formal and informal rules that govern conduct in the public sector. See *id.* For instance, it may be technically illegal to bribe a public official, but in practice, the law may not be invoked, allowing more informal rules to triumph. See *id.* at 4-5.

42. See *id.* at 5 (noting having both formal and informal rules causes mechanism to target issue). In order to restrain corruption, it is important to shift the focus from the informal rules back on to the formal rules. See *id.*

43. See Rashna Bhojwani, Note, *Deterring Global Bribery: Where Public and Private Enforcement Collide*, 112 COLUM. L. REV. 66, 67 (2012) (describing lack of urgency in combating corruption in past).

44. See 15 U.S.C. § 78dd-1 (2012) (outlining anticorruption statute Congress enacted); Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 911 (2010) (highlighting possible origins of FCPA); see also FCPA RESOURCE GUIDE, *supra* note 4, at 3 (examining historical background of statute).

45. See Koehler, *supra* note 44, at 911 (reiterating Congress's concerns about corruption predated Watergate scandal). During the mid-1970s, congressional hearings focused mainly on the allegations of U.S. companies making or offering bribes in order to lock down foreign government contracts. See *id.* at 912. The SEC uncovered extensive instances of bribery between foreign government officials and more than four hundred American companies; “hundreds of millions of dollars” were used to generate business abroad. See FCPA RESOURCE GUIDE, *supra* note 4, at 3. Companies falsified financial reports to mask the bribery payments through use of “slush funds.” See *id.*

46. See Koehler, *supra* note 44, at 912 (discussing effects of Lockheed Corporation scandal). The fact that the conduct of Lockheed and other U.S. companies did not violate American law at that time disturbed Congress. See *id.*; see also Carolyn Lindsey, *More than You Bargained for: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 961 (2009) (stating Congress prohibited such payments due to public policy and national security issues).

47. See Koehler, *supra* note 44, at 912 n.6 (describing Lockheed Corporation scandal). The corporation

as the Foreign Corrupt Practices and Investment Disclosure Bill—into law on December 20, 1977.⁴⁸

The FCPA is largely considered an instrument to fight global corruption.⁴⁹ It was the first antibribery statute in the world, even though, initially, it was merely symbolic.⁵⁰ Congress intended the passage of the FCPA to discontinue corporate bribery, which had injured the reputation of U.S. companies and decreased the public's trust in their financial incorruptibility.⁵¹ Congress acknowledged that corruption creates enormous costs both domestically and internationally, and therefore, enacted the statute to lessen these detrimental effects, aid companies in battling corrupt demands, and, simultaneously, address the damaging foreign policy consequences of transnational bribery.⁵² Through the FCPA, Congress deemed payments to foreign officials unethical and explicitly contrary to American values.⁵³

2. Provisions of the FCPA

The FCPA is part of the Securities Exchange Act of 1934 (Securities Act) and consists of two main provisions: the antibribery provisions and the accounting provisions.⁵⁴ The antibribery provisions forbid individuals and businesses from bribing foreign government officials to acquire or maintain business, while the accounting provisions enforce specific recordkeeping and inner-control requirements on issuers, prohibiting individuals and companies

solicited bribes from countries including the Netherlands, Japan, and Italy. *See id.*

48. *See id.* at 912 (delineating timeline for enactment of statute). President Carter's signing statement asserted: "I share Congress' belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions." *Id.* at 913.

49. *See* Ivan Perkins, *Illuminating Corruption Pathways: Modifying the FCPA's "Grease Payment" Exception To Galvanize Anti-Corruption Movements in Developing Nations*, 21 *CARDOZO J. INT'L & COMP. L.* 325, 325 (2013) (noting main purpose of enacted statute). Congress enacted the FCPA specifically to discourage U.S. companies from bribing foreign officials. *See id.* The goal was for the FCPA to target bribery on the "supply side," i.e. domestically, which would theoretically aid in restoring United States company practices while simultaneously diminishing corruption abroad. *See id.*

50. *See* Robert C. Blume & J. Taylor McConkie, *Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery*, 36 *COLO. LAW.* 91, 91 (2007) (distinguishing FCPA from other similar statutes). The FCPA's symbolic nature is evidenced by the fact that the DOJ and the SEC brought a combined total of thirty-three cases under the FCPA in the twenty years since its enactment. *See id.*

51. *See* FCPA RESOURCE GUIDE, *supra* note 4, at 3. Congress originally designed the FCPA to reestablish U.S. reputation abroad and strengthen ties with allies in an effort to triumph in the Cold War. *See* Perkins, *supra* note 49, at 325-26.

52. FCPA RESOURCE GUIDE, *supra* note 4, at 3 (describing damaging consequences of corruption and Congress's subsequent efforts). Congress recognized that corruption led to "market inefficiencies and instability, sub-standard products, and an unfair playing field for honest businesses," and wanted nothing more than to confront such issues head on with the enactment of the FCPA. *Id.*

53. *See* Lindsey, *supra* note 46, at 961 (discussing Congressional intent behind FCPA enactment).

54. *See* Koehler, *supra* note 44, at 913 (explaining where FCPA resides within Act).

from knowingly fabricating issuer records.⁵⁵ The antibribery provisions concern three classes of persons or entities: “issuers, ‘domestic concerns,’ and ‘any person’ who violates the Act while in . . . the United States.”⁵⁶ A company is an “issuer” if it owns “a class of securities registered under Section 12 of [the Securities Act] or is required to file periodic and other reports with SEC.”⁵⁷ “Domestic concern” is a significantly broader term than “issuer.”⁵⁸ Non-United States nationals and corporations comprise the last category.⁵⁹ Provided that some act in furtherance of an FCPA violation occurs within the United States, the individual or entity perpetrating such an act will be subject to the jurisdiction of United States courts.⁶⁰ Therefore, given the government’s decision to expand the scope of the statute, many companies and individuals who may believe they are outside the scope of jurisdiction become subject to United States scrutiny.⁶¹

Along with the antibribery provision, the FCPA includes accounting provisions that not only apply to bribery-related violations but also to all public companies; this ensures these companies accurately account for their assets and liabilities and do so in reasonable detail.⁶² The accounting provision’s central components include the “books and records” provision and the “internal controls” provision.⁶³ The “books and records” provision compels issuers to maintain detailed records and accounts that mirror transactions, as well as

55. See FCPA RESOURCE GUIDE, *supra* note 4, at 10 (summarizing FCPA provisions); see also Thomas, *supra* note 2, at 444-45 (outlining antibribery provision).

56. See Blume & McConkie, *supra* note 50, at 92 (categorizing those FCPA affects).

57. See FCPA RESOURCE GUIDE, *supra* note 4, at 11 (defining term “issuer” under FCPA).

58. See Blume & McConkie, *supra* note 50, at 92. “Domestic concern” encompasses any individual who is a “citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the United States or is organized under the laws of any state or U.S. territory.” *Id.*; see also Jon Jordan, *The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN ST. L. REV. 89, 95 (2012) (defining “domestic concern” under FCPA).

59. See Blume & McConkie, *supra* note 50, at 92 (explaining third category of individuals FCPA affects).

60. See *id.* (describing jurisdictional reach of FCPA on specific category of individuals). Although FCPA cases are rarely based on this last category, there is precedent. See *id.*; see also Lindsey, *supra* note 46, at 962 (stating DOJ construes territorial jurisdiction broadly). The DOJ’s broad jurisdiction translates to the agency possessing jurisdiction over acts that happen outside of the United States if those acts provoke other acts to take place within the United States. See Lindsey, *supra* note 46, at 962. For example, the FCPA’s jurisdiction can reach a foreign company when that company enables a wire transfer reaching a United States bank that was intended to compensate a bribe. See *id.*

61. See Lindsey, *supra* note 46, at 962 (describing extraterritorial reach of FCPA).

62. See FCPA RESOURCE GUIDE, *supra* note 4, at 38 (explaining origins for enactment of accounting provisions). The majority of issuer disclosure and fraud cases pursued by the DOJ and the SEC arise under the accounting provisions. See *id.*; see also Blume & McConkie, *supra* note 50, at 94 (stating purpose of accounting provision as corporate expense transparency).

63. See FCPA RESOURCE GUIDE, *supra* note 4, at 38 (describing accounting provision’s two components).

issuer asset dispositions.⁶⁴ The “books and records” provision prohibits any payments of any value made with a corrupt purpose, regardless of materiality.⁶⁵ The SEC and DOJ typically enforce this provision when there has been a misrepresentation of large bribe payments or in instances of widespread, inaccurate recording of lesser payments made as part of a pattern of bribery.⁶⁶

The “internal controls” provision is used to provide “reasonable assurances” concerning the reliability of financial reporting and preparation of financial statements.⁶⁷ Rather than stipulate a particular set of controls, the provision gives companies the flexibility to acquire and preserve a system that suits their individual circumstances.⁶⁸ Companies with futile internal controls often encounter the dangers of commercial bribery, export control, employee misappropriation and self-dealing, and infractions of other laws.⁶⁹

3. Enforcement of the FCPA

Although there is ample documentation of FCPA enforcement actions, there is frequently no judicial scrutiny of the enforcement models used; this results in inconsistent applications of the FCPA, based on each specific enforcement agency’s respective interpretation.⁷⁰ Because the FCPA functions both as a civil and a criminal statute, the inconsistency is perpetuated further.⁷¹ The DOJ

64. See *id.* at 39 (quoting Section 13(b)(2)(A) of Exchange Act, 15 U.S.C. §78m(b)(2)(A)) (outlining requirements of “books and records” provision). The records must be kept “in reasonable detail,” a qualifying standard Congress adopted. See *id.*; see also Blume & McConkie, *supra* note 50, at 94 (commenting on “books and records” provision’s highlights). The “books and records” provision demands meticulous company records to maximize transparency and avoid unrecorded transactions that infringe the Act’s antibribery provisions. See Blume & McConkie, *supra* note 50, at 94. Nevertheless, it is always improper to misrepresent activities in a company’s books and records, as this is bribery: a payment camouflaged under the pretense of a legitimate transaction. See FCPA RESOURCE GUIDE, *supra* note 4, at 39 (describing possible abuse even under “reasonable detail” standard); see also *id.* (listing devices used to mask bribes).

65. See FCPA RESOURCE GUIDE, *supra* note 4, at 39 (explaining liability for mere error in recording improper payments); see also Blume & McConkie, *supra* note 50, at 94 (stating provision applies to all payments, not only those deemed material under traditional standard).

66. See FCPA RESOURCE GUIDE, *supra* note 4, at 39 (describing role of DOJ and SEC in enforcing “books and records” provision).

67. See *id.* at 40 (outlining “internal controls” provision). The Securities Act analogizes “reasonable assurances” with the “reasonable detail” standard. See *id.*; see also Blume & McConkie, *supra* note 50, at 95 (comparing provisions and stating both promote corporate accountability).

68. See FCPA RESOURCE GUIDE, *supra* note 4, at 40 (describing provisions’ flexibility).

69. See *id.* (stating outcomes for companies with “ineffective internal controls”).

70. See Koehler, *supra* note 44, at 907 (discussing disadvantage due to lack of judicial scrutiny of FCPA enforcement); see also Philip Urofsky et al., *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don’t Break What Isn’t Broken-The Fallacies of Reform*, 73 OHIO ST. L.J. 1145, 1168-69 (2012) (outlining criticisms regarding lack of judicial scrutiny). On the other hand, Congress invested millions of dollars into enforcement agencies to help fund aggressive anticorruption initiatives. See Stevenson & Wagoner, *supra* note 5, at 783.

71. See Koehler, *supra* note 44, at 923 (commenting on complexity of statute). The determination of whether the government pursues criminal, in addition to civil, charges hinges on issuer intent, as well as the satisfaction of the burden of proof. See *id.*

and the SEC share enforcement power for the FCPA's antibribery and accounting provisions.⁷² The SEC is responsible for civil enforcement of the accounting provisions and the antibribery provisions relating to issuers.⁷³ The DOJ, on the other hand, is responsible for criminal enforcement of the statute and civil enforcement of the antibribery provisions against nonissuers within the FCPA's jurisdiction.⁷⁴ No matter which agency enforces the FCPA, the enforcement process is often not subject to judicial scrutiny.⁷⁵

The government enacted the FCPA in 1977, but only recently became aggressive in its enforcement.⁷⁶ In recent years, the United States has focused more of its resources on uncovering and punishing FCPA violations.⁷⁷ This recent spike in assertive FCPA enforcement has resulted in countless challenges to companies doing business outside the United States, mainly because the statute covers such a broad range of activities.⁷⁸ The push also fostered discussion about exactly which activities the FCPA prohibits.⁷⁹ With even small businesses now operating on a global scale, many companies are exposed to business practices that the FCPA may prohibit.⁸⁰

C. Corruption as a Global Problem

The rapid growth of business globalization and the effortlessness with which small companies can enter foreign markets further complicates the issue of corruption as a global problem and not just a simple domestic concern.⁸¹

72. See FCPA RESOURCE GUIDE, *supra* note 4, at 4 (outlining tasks of DOJ and SEC in regards to FCPA enforcement).

73. See Koehler, *supra* note 44, at 924 (describing SEC's responsibilities regarding FCPA enforcement).

74. See *id.* (delineating responsibilities of DOJ regarding FCPA enforcement); see also Stevenson & Wagoner, *supra* note 5, at 782 (stating DOJ believes FCPA enforcement helps eliminate and deter foreign corruption).

75. See Koehler, *supra* note 44, at 924 (stating need for judicial scrutiny for FCPA enforcement).

76. See Frinsko, *supra* note 3, at 30 (comparing enforcement of FCPA over time). For instance, the DOJ did not take action with any FCPA cases in 2000, but filed ten cases in 2011. See *id.* The FCPA-related fines levied in 2010 totaled \$1 billion, compared with no profits in 2000. See *id.*

77. See *id.* at 31 (clarifying FCPA's recent enforcement efforts); see also *A Tale of Two Laws*, *ECONOMIST* (Sept. 17, 2011), <http://www.economist.com/node/21529103> [<http://perma.cc/FZT4-BZ5B>] (stating law passed in 1977, but only recent spike in enforcement). FCPA enforcement actions increased from five actions in 2004 to seventy-four actions in 2010. See *id.*

78. See Frinsko, *supra* note 3, at 30 (discussing challenges of aggressive enforcement); see also *A Tale of Two Laws*, *supra* note 77 (noting anger and confusion about FCPA among firms). Firms are increasingly dissatisfied with the FCPA's structure, which has contributed to confusion, as well as frustration with its vigorous application. See *id.*

79. See Frinsko, *supra* note 3, at 30 (explaining drawbacks of aggressive enforcement of FCPA); see also *A Tale of Two Laws*, *supra* note 77 (describing consequences stemming from FCPA). For instance, senior employees can be imprisoned for up to twenty years if their company violates the FCPA. See *A Tale of Two Laws*, *supra* note 77. These stiff consequences act as a serious deterrent to conducting business abroad. See *id.*

80. See Frinsko, *supra* note 3, at 32 (advising of risks and scope of FCPA). With considerable earnings at stake, it is tempting for companies to subscribe to local practices, especially with the vagueness surrounding the FCPA's application. See *id.*

81. See *id.* at 30 (describing effects of corruption on global scale). In a progressively competitive

Companies now receive notifications of certain high-risk countries that raise concerns about possible illegal activity, so that companies may avoid potential liability under the FCPA.⁸² Furthermore, corruption obstructs the economic development of nations by redirecting resources from medical, academic, and infrastructure priorities.⁸³ Extensive corruption is an encroachment on human rights because it deprives the people of basic services through the divergence of resources, perpetuating the cycle of poverty in already impoverished countries.⁸⁴ Corruption further disrupts democratic values, including public accountability, and deteriorates the power of laws.⁸⁵ Additionally, corruption threatens stability and security by enabling criminal activity both at home and abroad.⁸⁶ International corruption also weakens effective governance and hampers the efforts of the United States to encourage freedom and democracy, end poverty, and fight crime and terrorism worldwide.⁸⁷

Corruption hurts business, as it discourages and inhibits fair competition.⁸⁸ It often results in misleading prices and handicaps honest companies that do not succumb to bribery.⁸⁹ Ultimately, it escalates the cost of doing business globally.⁹⁰ Furthermore, corruption introduces substantial doubt into business transactions because contracts formed in conjunction with bribery may be legally unenforceable.⁹¹ Thus, bribes increase the risks of entering into international transactions and put company reputations in danger.⁹²

Another global issue involves U.S. criminalization of practices considered cultural norms abroad; for example, the criminalization of gift giving—an

marketplace, companies will sometimes resort to corruption in order to gain entry. *See id.*

82. *See* Blume & McConkie, *supra* note 50, at 93 (commenting on tendency of certain countries to commit corruption more frequently).

83. *See* FCPA RESOURCE GUIDE, *supra* note 4, at 2 (outlining costs of corruption); *see also* Harms, *supra* note 28, at 166 (describing consequences of corruption). In the long term, corruption cripples growth and disrupts development, creating political instability and aggravating inequalities. *See* Harms, *supra* note 28, at 166. Long-term harm occurs when private concerns govern economic policy instead of the law; this is just another instance of informal rules prevailing over formal rules. *See id.*

84. *See* Harms, *supra* note 28, at 161 (explaining corruption feeds off of impoverished countries and facilitates further poverty).

85. *See* FCPA RESOURCE GUIDE, *supra* note 4, at 2 (describing effects of corruption on law).

86. *See id.* at 2-3 (discussing impact of corruption on criminal activity).

87. *See id.* at 3 (reiterating deteriorating effects of corruption on global scale). The international community views corruption as a hazard to free markets, political systems, and society's overall prosperity. *See* Harms, *supra* note 28, at 168.

88. *See* FCPA RESOURCE GUIDE, *supra* note 4, at 3 (outlining impact corruption has on businesses).

89. *See id.* (describing effects of corruption on honest businesses).

90. *See id.* (accounting for corruption on global scale).

91. *See id.* (commenting on instability of contracts secured through bribery). The use of bribes for one contract often leads to escalating demands from corrupt officials on other contracts. *See id.*; *see also* Shihata, *supra* note 27, at 457 (describing uncertainty widespread corruption generates and how it taints business transactions).

92. *See* FCPA RESOURCE GUIDE, *supra* note 4, at 3 (emphasizing increased risk with transactions contaminated by corruption). Companies that succumb to bribery in generating or securing business frustrate their personal interests, as well as those of their investors. *See id.*

ordinary social interaction in Africa and Asia.⁹³ The characterization of such practices as a crime frustrates the locals, causing them to disrespect the law and continue to participate in their cultural traditions rather than follow the newly implemented “Western” laws.⁹⁴ The imposition of Western values on developing nations is reminiscent of cultural imperialism, and developing countries usually identify laws—like the FCPA—as a legally masked attempt to impose Western values.⁹⁵ When choosing between tradition and foreign laws, culture may prevail over new legal rules, compounding the difficulty of enforcement in countries abroad.⁹⁶

Other countries have criticized the United States, the sole enforcer against foreign corruption for many years, for securing billions of dollars in fines and settlement payments from companies that have conceded to engaging in foreign corruption.⁹⁷ The U.S. monopoly, however, may terminate as soon as the potential for financial recovery increasingly motivates the involvement of other countries.⁹⁸ As a result, supplementary punishment may, therefore, occur as multiple countries issue penalties for the same misconduct.⁹⁹

Regardless of its financial gain, the United States has encouraged other

93. See Harms, *supra* note 28, at 185 (differentiating meaning of bribes among various cultures); see also Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 231 (1997) (characterizing U.S. approach under FCPA as “severe by global standards”). The United States is the only nation to criminalize domestic companies that pay bribes to foreign countries. See *id.* Diversity abroad further aggravates these payments due to the ambiguity of what practices constitute criminal activity in different cultures and settings. See *id.* at 281.

94. See Harms, *supra* note 28, at 185 (explaining disadvantages of defining payments). For example, in Africa and Asia, gift-giving is crucial and a common interaction that fosters personal connections. See *id.* at 185-86; see also CORRUPTIE.ORG, *supra* note 27 (asserting importance of gifts between people in all cultures). In addition to gift-giving, these cultures also emphasize a strong loyalty to family and friends, signaling an affinity for nepotism. See Harms, *supra* note 28, at 186.

95. See Harms, *supra* note 28, at 186-87 (indicating why cultural imperialism hinders effective FCPA enforcement); see also Ben W. Heineman Jr., *Can America Lead the World's Fight Against Corruption?*, ATLANTIC (Feb. 3, 2012), <http://www.theatlantic.com/international/archive/2012/02/can-america-lead-the-worlds-fight-against-corruption/252448/> [<http://perma.cc/8PC6-7PSD>] (taking issue with United States leading fight against global corruption).

96. See Harms, *supra* note 28, at 186 (reiterating importance of culture and tradition when crafting solutions). An acceptable response to combat this dilemma would be to take local customs into account or implement a “non-value-based definition of corruption.” See *id.* at 187. Because most countries criminalize bribery of public officials, taking local laws into account may be very effective. See *id.* Alternatively, the international community could step in and choose what general practices should be deemed corrupt in all countries. See *id.*; see also Susan Rose-Ackerman, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, 34 U. PA. J. INT'L L. 447, 447 (2013) (asserting policies against corruption as continuously contentious). When people are subjected to heightened scrutiny they tend to criticize the new rules as politically driven and disrespectful to cultural norms. See Rose-Ackerman, *supra*, at 447.

97. See Michael K. Loucks & Alexandra M. Gorman, *Is the DOJ FCPA Enforcement Hegemony Dead?*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (June 26, 2014), <http://www.skadden.com/insights/doj-fcpa-enforcement-hegemony-dead> [<https://perma.cc/5D85-8RX3>] (recognizing United States as only enforcer against international corruption). The United States seldom gives money it recovers to the country where the corruption occurred. See *id.*

98. See *id.* (acknowledging financial recovery as incentive to fight against corruption).

99. See *id.* (asserting more consequences come with more enforcement against corruption).

nations to adopt FCPA-type laws.¹⁰⁰ The Organization of Economic Cooperation and Development (OECD), an international economic organization, comprised of thirty-four member countries, addressed and eliminated a tax policy that was known to encourage and support international bribery by deeming such payments as business deductions.¹⁰¹ The OECD sought ways to incite the support of other countries by incorporating similar reforms.¹⁰² Comparably, in March 1996, the Organization of American States—comprised of thirty-five Western-Hemisphere members—drafted the Inter-American Convention Against Corruption, an agreement designed to prevent international corruption.¹⁰³ Organizations, such as the United Nations (UN) and the World Trade Organization, have also drafted regulations against international corruption.¹⁰⁴ Notwithstanding the efforts to obliterate foreign corruption, the issue remains an overwhelming problem.¹⁰⁵

D. Overview of Afghanistan's History of War

Ahmad Shah Durrani founded Afghanistan in 1747 when he united the Pashtun tribes.¹⁰⁶ The British came to Afghanistan in 1839 in hopes of expanding the empire and countering the growth of Russian influence in the country.¹⁰⁷ The four-year conflict ended, however, with the retreat of 16,500 British soldiers; this signified that while others could try to conquer Afghanistan, the country's strength would not allow for defeat.¹⁰⁸ Despite two other attempts, Britain was unable to take over, and Afghanistan ultimately gained its independence.¹⁰⁹ Unfortunately, the country's independence was short-lived as the Soviet Union supported an armed conflict between the Afghan communist government and Muslim anticommunist rebels from 1978

100. See Salbu, *supra* note 93, at 233 (commenting on U.S. efforts to encourage other nations to adopt similar laws).

101. See *id.* (discussing some of OECD's actions against international corruption).

102. See *id.* (pointing out difficulties of encouraging nonmembers to adopt similar international anticorruption reform).

103. See *id.* at 234 (acknowledging need for Latin American presence in fight to end corruption in international business).

104. See Salbu, *supra* note 93, at 234-35 (highlighting many efforts organizations around world make to eliminate corruption). Transparency International, founded in Berlin in 1993, is the first sizeable, private organization dedicated exclusively to ending global corruption. See *id.* at 235. The organization has spread into several countries including England, the United States, Turkey, and Nepal. See *id.*

105. See *id.* at 236-37 (discussing recent prosecutions compounding problem of foreign corruption).

106. See Dana Cook-Milligan, Note, *What Is Really so Bad About a Different Rule of Law?: The Afghan Legal System Reanalyzed*, 41 HASTINGS CONST. L.Q. 205, 206 (2013) (explaining origins of Afghanistan).

107. See Gary D. Solis, *IX Law of War Issues in Ground Hostilities in Afghanistan*, 85 INT'L L. STUD. 219, 219 (2009) (outlining start of Afghanistan's decades of war); see also Cook-Milligan, *supra* note 106, at 206 (stating Afghanistan "geographical buffer" between British and Russian Empires until it gained independence in 1919).

108. See Solis, *supra* note 107, at 219 (characterizing Afghanistan as resilient country).

109. See *id.* (discussing Britain's efforts to gain control of Afghanistan).

to 1992.¹¹⁰

Armed conflict in Afghanistan commenced long before the terrorist attacks on September 11, 2001 (9/11 Attacks) and still continues today.¹¹¹ Before the 9/11 Attacks, the United States was concerned that Afghanistan was becoming a haven for terrorist groups.¹¹² Following the 9/11 Attacks, President Bush commanded Afghanistan close its terrorist camps and relinquish the names of any al Qaeda leaders in hiding; President Bush threatened to initiate armed conflict if Afghanistan did not meet the stated deadline.¹¹³

E. Afghanistan's Legal History

Three competing sources of law—local customary practice, Islamic sharia law, and the state legal code—have all occupied Afghanistan's legal traditions.¹¹⁴ Under the customary system, respected village elders use common cultural and ethical standards to settle conflicts.¹¹⁵ Since the adoption of the controversial state legal codes, each reigning regime has manipulated the code in an effort to secure the regime's power, influence, and dogma.¹¹⁶ In 1885, Abdur Rahman implemented Afghanistan's first state code of procedure and ethics, which he established to preserve Afghanistan's historical traditions of sharia law; however, the code served more as a vehicle for the ruler to interpret law as he wished.¹¹⁷

In 1919, King Amanullah made state law and sharia law legally separate from one another, and in 1923, he compiled the country's first constitution.¹¹⁸ The people, however, considered his secular reforms too radical, and within a year, they overthrew and replaced him with King Nadir Shah.¹¹⁹ King Nadir Shah abandoned most of his predecessor's controversial reforms, although, he

110. *See id.* (commenting on Soviet Union's continued efforts to control Afghanistan). Similar to the British, the Russians soon became aware of Afghanistan's resilience. *See id.*

111. *See id.* at 220 (tracing history of United States war in Afghanistan).

112. *See Solis, supra* note 107, at 220 (describing U.S. concerns with Afghanistan before 9/11 Attacks).

113. *See id.* (outlining beginning of armed conflict). The United Nations Security Council passed Resolution 1386 in support of the U.S. initiation of armed conflict. *See id.* at 221. The Resolution created the International Security Assistance Force in order to oversee security in Kabul after the Taliban's demise. *See id.*

114. *See* Carol Wang, Note, *Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability*, 55 HARV. INT'L L.J. 211, 216 (2014) (outlining sources of law in Afghanistan).

115. *See id.* (defining customary practice as source of law). The *jirga/maraca* among the Pashtuns and the *shura* among the non-Pashtuns traditionally operate as dispute settlement instruments. *See id.* An assembly of "village elders," typically known for their honor and religious devotion, integrate traditional rituals, such as *nanawate*, in their execution of the customary laws. *See id.*

116. *See id.* at 217 (describing state legal codes). In the past, Afghanistan attempted to entrust absolute power to leaders who had never successfully controlled the rural perimeter; this is evidenced in the evolving history of the country's legal codes. *See id.*

117. *See id.* (portraying shift back to sharia law as main source of law).

118. *See* Wang, *supra* note 114, at 217 (depicting yet another shift back to more secular reforms as source of law). In creating Afghanistan's first constitution, King Amanullah adopted secular laws from Egypt and Turkey. *See id.*

119. *See id.* (describing King Nadir Shah's succession to throne).

retained the principle of secular law in a new constitution in 1931.¹²⁰ Zahir Shah, Nadir Shah's son and successor, further protected secular law in 1933 by combining sharia and state courts into a single system and creating another new constitution in 1964.¹²¹ This constitution introduced the concept of the separation of powers.¹²²

Mohammad Daoud Khan ousted King Zahir Shah and declared the country a republic in 1973.¹²³ Following Daoud Khan's assassination in 1978, the People's Democratic Party of Afghanistan (PDPA) obtained power.¹²⁴ The PDPA, which the Soviet Union strongly supported, marked the climax of the reign of secular state law.¹²⁵ In 1989, the Soviets withdrew from Afghanistan, and in 1992, in the midst of the civil war, the Afghan government fell.¹²⁶ In 1996, the Taliban declared victory over the now weakened government; the regime exclusively acknowledged decisions of sharia courts and altogether renounced the need for a constitution.¹²⁷

F. Corruption in Afghanistan

In 2008, Afghanistan ratified the United Nations Convention Against Corruption (UNCAC), which bans countless types of corrupt acts, including acts of public officials and acts of private-sector-employed individuals.¹²⁸ UNCAC's goals are to fight corruption more effectively by adopting stronger methods and acquiring the aid of the international community to promote the legitimate administration of the public's interests.¹²⁹ To achieve its goals,

120. See *id.* (noting King Nadir Shah's policy changes). Again, King Nadir Shah preserved his executive influence, allowing himself to elect deputies and veto Parliament-approved laws. See *id.*

121. See *id.* (examining Zahir Shah's reign). Zahir Shah's constitution emphasized the supremacy of state law while maintaining sharia principles and, for the first time, the constitution and state statutes were legally superior to sharia law. See *id.*

122. See Wang, *supra* note 114, at 217 (discussing separation of powers between executive, legislative, and judicial branches of government).

123. See *id.* (tracing Mohammad Daoud Khan's succession to throne).

124. See *id.* (stating PDPA controlled Afghanistan after Daoud Khan's assassination).

125. See *id.* (describing Soviet Unions backing of PDPA). The people opposed the Marxist regime's judicial reforms due to the conflict between the regime's authoritarian nature and both Islamic and Afghan customs. See *id.*

126. See Wang, *supra* note 114, at 218 (recounting exacerbation of issues amidst civil war in Afghanistan).

127. See *id.* (depicting Taliban's recognition of sharia law as only law).

128. See UNITED NATIONS OFFICE ON DRUGS & CRIME, CORRUPTION IN AFGHANISTAN: RECENT PATTERNS AND TRENDS 3 (2012), http://www.unodc.org/documents/frontpage/Corruption_in_Afghanistan_FINAL.pdf [<https://perma.cc/XZR6-QE3X>] [hereinafter UNODC REPORT] (explaining Afghanistan's ratification of UNCAC); see also Adam J. Centner, Note, *Implementing International Anti-Corruption Standards To Improve Afghanistan's Education System*, 44 CASE W. RES. J. INT'L L. 847, 856 (2012) (explaining UNCAC). UNCAC, the "first and only legally binding international anti-corruption treaty," became effective on December 14, 2005. Centner, *supra*, at 856. UNCAC recognizes corruption gives rise to "human rights violations, distorts markets, allows organized crime and terrorism to flourish, and undermines democracy and the rule of law." *Id.*

129. See Centner, *supra* note 128, at 856.

UNCAC relies on four essential elements: “prevention, criminalization, international cooperation, and asset recovery.”¹³⁰

Despite ratification of the UNCAC, in 2012, the Afghan people acknowledged corruption as one of the leading problems that still plagues the country.¹³¹ As bribery has become commonplace, corruption and social practices become intertwined.¹³² Corruption is part of daily Afghan life, and bribe-takers are brazen.¹³³ In Dari, a language spoken in Afghanistan, bribery is known as *shirini* and *qalamana*, translating into positive words such as “sweets” and “penmoney,” downplaying corruption’s more negative connotations.¹³⁴ Most Afghans have lost faith in the future and are accustomed to a society abounded with bribery.¹³⁵

Since the Soviet invasion in 1979, Afghanistan has been a war-torn country.¹³⁶ In the midst of war, a North Atlantic Treaty Organization (NATO)-sponsored *loya jirga* (council) chose former President Karzai, who was in exile prior to 2002, as Afghanistan’s leader.¹³⁷ Although Karzai is a member of the largest ethnic group in Afghanistan—the Pashtun tribe—the Uzbeks, Turks, and Hazaras of northern Afghanistan view many Pashtuns as potential enemies.¹³⁸ This perspective weakened former President Karzai’s political position, offering the Afghan people another reason to turn away from the government.¹³⁹

130. See *id.* (listing four pillars required to meet ends laid out by UNCAC). These four pillars are: “prevention, criminalization, international cooperation, and asset recovery.” *Id.*

131. See UNODC REPORT, *supra* note 128, at 3 (deeming corruption main concern of Afghan people).

132. See *id.* at 5 (reiterating prevalence of corruption in daily life). For instance, in 2012, sixty-eight percent of citizens approved of civil servants accepting small bribes from service users, and sixty-seven percent of citizens found it acceptable for the government to utilize nepotism when recruiting public officials. See *id.*

133. See Carroll, *supra* note 10, at 876-77 (explaining prevalence of corruption in Afghanistan). Reports indicate that local people view the Afghan National Police as “a uniformed burglary, highway robbery, and kidnapping gang.” *Id.* at 878. Members of this police force are not embarrassed by their reputation. See *id.* An Interior Ministry spokesman said that the government must increase police pay and ensure citizens actually follow the laws in order to address police corruption issues. See *id.*

134. See *id.* at 876 (describing language Afghan people used). The Afghan press describes corruption using language that is “as colorful as it is sad.” *Id.*; see also ASIAN DEV. BANK, UK DEP’T FOR INT’L DEV., UNITED NATIONS DEV. PROGRAMME, UNITED NATIONS OFFICE ON DRUGS AND CRIME, & THE WORLD BANK, FIGHTING CORRUPTION IN AFGHANISTAN: A ROADMAP FOR STRATEGY AND ACTION 9 (2007), http://www.unodc.org/pdf/afg/anti_corruption_roadmap.pdf [<http://perma.cc/344A-Q5XS>] [hereinafter ROADMAP] (exploring conceptual problem as evidenced by local terminology likely precipitating perpetuation of corruption).

135. See Carroll, *supra* note 10, at 878 (discussing perceptions of Afghan people). These defeated attitudes could solidify themselves further as foreign troops continue to leave the country despite its weak state. See *id.*

136. See *id.* at 893 (outlining possible reasons for Afghanistan’s corrupt tendencies). “No Afghan under the age of thirty-one has known peace, in a country with an average life expectancy of only forty-five years.” *Id.* at 893.

137. See *id.* (explaining Karzai’s whereabouts before his presidency).

138. See *id.* at 893-94 (describing ethnic conflict in Afghanistan).

139. See Carroll, *supra* note 10, at 893-94 (citing Karzai’s weak political position as one reason for Afghanistan’s increased corruption).

In addition to impacting the political process, corruption also flows throughout Afghanistan's justice system.¹⁴⁰ “[I]nadequate financial compensation; lack of infrastructure, equipment, and legal resources; physical security concerns; and family, social, and political ties” are suggested reasons for why such unethical behavior is prevalent among government workers.¹⁴¹ Furthermore, judicial officials' fear of physical violence against them hinders the adjudication process's impartiality.¹⁴² Afghan judges must decide between upholding the law and facing the repercussions or complying with the corrupt officials' demands, allowing injustice to continue.¹⁴³ Consequently, as a matter of self-defense, many judges are coerced to submit to force or threats against them and, by default, act in a matter that undercuts the very hallmarks of the judicial role: ethics and fairness.¹⁴⁴

Financial security is another dominant source of corruption in Afghanistan.¹⁴⁵ For the Afghan people, it is often more financially sound to bribe a judge than pay for a lawyer.¹⁴⁶ Due to the nominal pay judges collect, a mere \$60-\$128 a month, there is a great incentive to accept bribes because it can help judges better provide for themselves and their families.¹⁴⁷ Like all civil servants in Afghanistan, judges face insufficiencies that greatly provoke the acceptance of bribes.¹⁴⁸

After conducting a survey in 2011-2012 on the extent of bribery in

140. See Marie L. Greenman, *Curbing Corruption in Afghanistan's Courts*, 26 GEO. J. LEGAL ETHICS 695, 701 (2013) (reporting substantial corruption in Afghan justice system). Afghans regard the court system as the most corrupt government establishment. See *id.* Furthermore, Afghans view the judges' unethical behavior as “routine.” See *id.*; see also Maren Christensen, Comment, *Judicial Reform in Afghanistan: Towards a Holistic Understanding of Legitimacy in Post-Conflict Societies*, 4 BERKELEY J. MIDDLE E. & ISLAMIC L. 111, 136 (2011) (commenting on prevalent nature of corruption in Afghanistan's justice system). It is common practice for both judges and prosecutors to agree to drop cases in exchange for bribes. See Christensen, *supra*, at 136. Evidence frequently goes missing, and detainees are often asked to pay a bribe to secure their freedom. See *id.*

141. Greenman, *supra* note 140, at 701.

142. See *id.* at 702 (blaming partiality of judges on lack of security).

143. See *id.* (describing dilemma Afghan judges face). Judges in Afghanistan are often victims of intimidation and violence. See *id.* More than two-fifths of employees of the Afghan justice system described insufficient security measures as the second most significant hurdle they endure. See *id.* Between 2002 and 2010, an estimated thirty to forty employees of the justice system were killed. See *id.*

144. See *id.* (justifying judges' reasons for acting dishonestly).

145. See Greenman, *supra* note 140, at 703 (stating financial security primary motivation for solicitation and acceptance of bribes).

146. See *id.* at 704 (commenting on difficulty of securing lawyers). Despite existing laws, such as Chapter Three of the Afghan Penal Code and Anti-Bribery Law and Article 21 of Code of Conduct, aimed to curb bribery and restrict the judiciary from accepting or soliciting bribes, thirty-four percent of Afghans report the need to pay off or perform a favor when seeking justice in Afghanistan. See *id.*

147. See *id.* (acknowledging deflated salary of judges as factor in accepting bribes). In 2001, the average income for a primary court judge was just \$60 a month and the average income for an appellate court judge was slightly higher at \$128, while individual bribes to judges averaged \$200; this illustrates why lower court judges have little incentive to abandon bribe payments. See *id.*

148. See Christensen, *supra* note 140, at 137 (listing inefficiencies in government relating to issues of under-compensation); see also *id.* (pointing to inefficiencies in compensation as motivation for bribes).

Afghanistan, the UNODC and the Afghan government found that bribery continues to affect the distribution of public services, majorly impacting the country's economy.¹⁴⁹ According to the study, half of Afghan citizens bribed public officials when requesting a public service in 2012, amounting to \$3.9 billion.¹⁵⁰ Since 2009, Afghanistan has made substantial headway in reducing levels of corruption in the public sector.¹⁵¹ Despite these improvements, in the past three years, trends show an increase in the frequency of bribery.¹⁵² These trends are seen across the board, affecting even nonpublic-sector entities in Afghanistan.¹⁵³ Afghan citizens pay bribes for several reasons, including to attain superior or quicker services, or to impact deliberations and actions, such as police activities or judicial decisions; thus, the rule of law and the trust in such institutions are destroyed even further.¹⁵⁴

G. Current Day Afghanistan

The United States has invested more than \$104 billion into rebuilding Afghanistan, but the homecoming of American troops, after thirteen years, has decreased Afghanistan's ability to manage itself.¹⁵⁵ The SIGAR stated that although they spent \$65 billion to prepare Afghan Security Forces, the current number of troops represents the lowest amount in recent years.¹⁵⁶ Since the departure of NATO troops, the country has become gradually more defenseless

149. See UNODC REPORT, *supra* note 128, at 5 (citing survey UNODC and Afghanistan conducted); see also CORDESMAN, *supra* note 8, at 2 (acknowledging corruption in Afghanistan as unavoidable problem by international countries, such as United States).

150. See UNODC REPORT, *supra* note 128, at 5 (totaling amount of Afghan-paid bribes when requesting public service).

151. See *id.* (assuring progress in reducing Afghan corruption levels). In 2009, fifty-nine percent of the Afghan people paid at least one bribe to a public official; that number dropped to fifty percent in 2012. See *id.* The percentage of the population that paid a bribe to a police officer dropped from fifty-two percent in 2009 to forty-two percent in 2012. See *id.*; see also Joshua D. Woda, Note, *A Thousand Thumbs in the Dike: Microlending and a New Role for International Finance in Afghanistan*, 34 SUFFOLK TRANSNAT'L L. REV. 429, 447 (2011) (describing government's efforts to fight corruption by executing laws domestically and abiding by agreements abroad).

152. See UNODC REPORT, *supra* note 128, at 5 (outlining pitfalls of last three years regarding corruption levels). Bribes escalated from 4.7 to 5.6 bribes per person with the average price increasing from \$158 United States dollars to \$214. See *id.*; see also Woda, *supra* note 151, at 447-48 (describing efforts to minimize corruption as "feeble at best and nonexistent at worst").

153. See UNODC REPORT, *supra* note 128, at 5 (reiterating corruption problem exists in both public and nonpublic sectors). Almost thirty percent of Afghans paid a bribe when seeking a service from nonpublicly employed individuals in 2012, whereas fifty percent paid bribes to public agents. See *id.*; see also Woda, *supra* note 151, at 448 (examining corruption among senior Afghan officials).

154. See UNODC REPORT, *supra* note 128, at 5 (echoing reasons people get involved with bribes). Twenty-four percent of police bribes related to either the release of a suspect or avoiding imprisonment. See *id.*

155. See Brianna Ehley, *U.S. Still Giving a Corrupt Afghanistan a Blank Check*, FISCAL TIMES (Mar. 11, 2015), <http://www.thefiscaltimes.com/2015/03/11/US-Still-Giving-Corrupt-Afghanistan-Blank-Check> [<http://perma.cc/QTF7-W9K7>] (discussing "grim outlook" of Afghanistan's future).

156. See *id.* (noting SIGAR's "gloomy reports cast a dark shadow" on U.S. efforts).

against insurgent attacks.¹⁵⁷

The present is a crucial time for Afghanistan as the country struggles to maintain peace and stability without the help of the United States and NATO troops.¹⁵⁸ Both President Ghani and Chief Executive Abdullah promised rigorous anticorruption efforts as a headline in their presidential campaigns.¹⁵⁹ Additionally, this new leadership presents an opportunity to prioritize efforts to battle corruption and improve the government's accountability to its citizens.¹⁶⁰ Afghanistan may not have another opportunity to fight corruption if this government also fails to resolve the issue.¹⁶¹

III. ANALYSIS

With the wrath of corruption crippling countries, such as Afghanistan, the United States continues to enforce the FCPA rigorously.¹⁶² When corruption is so deeply rooted in a country's daily functions, however, the people push back against reform.¹⁶³ The cultural barrier is currently the biggest challenge in enforcing the FCPA in Afghanistan.¹⁶⁴ Further complicating the problem are Afghanistan's complex legal traditions; these include competing sources of law, which caused confusion among citizens and left a loophole that fostered a lack of governmental accountability.¹⁶⁵

Enforcement of the FCPA may seem like a façade around the world due to its often conclusory resolutions that fail to provide adequate foundation for change, but this sentiment is even greater in Afghanistan.¹⁶⁶ Not every FCPA enforcement action, however, is a shallow public relations move.¹⁶⁷ Still, if such enforcement actions appear to be a façade, a foreign country is unlikely to appreciate the importance of legislation like the FCPA.¹⁶⁸

157. See *id.* (citing problem as U.S. decision to hand reign over to weak Afghan army).

158. See Mary Beth Goodman & Trevor Sutton, *Tackling Corruption in Afghanistan: It's Now or Never*, CTR. FOR AM. PROGRESS (Mar. 17, 2015), <https://www.americanprogress.org/issues/security/report/2015/03/17/108613/tackling-corruption-in-afghanistan-its-now-or-never/> [<https://perma.cc/68J5-LUPV>] (reaffirming importance of "peace and stability" in Afghanistan).

159. See *id.* (examining presidential campaigns and anticorruption efforts of Afghan leadership).

160. See *id.* (detailing future possibilities for newly elected officials of Afghanistan).

161. See *id.* (reiterating time to fight corruption as *now*).

162. See FCPA RESOURCE GUIDE, *supra* note 4 (discussing importance of FCPA's enforcement).

163. See UNODC REPORT, *supra* note 128, at 5 (explaining why Afghans view corruption as acceptable).

164. See *supra* notes 93-94 and accompanying text (noting cause of disobedience and resentment stems from defining known cultural practices as crimes).

165. See Wang, *supra* note 114, at 216 (outlining Afghanistan's sources of law).

166. See Koehler, *supra* note 44, at 959-60 (highlighting four problems contributing to U.S. façade of FCPA enforcement).

167. See *id.* at 959-60 (clarifying not all FCPA enforcement actions as façade). A majority of recent enforcement actions, however, were entirely for display and generally ineffective. See *id.* at 960.

168. See *id.* at 997 (focusing on why façade or appearance of deception in FCPA enforcement matters). It is of great concern when any area of law evolves without judicial overview. See *id.* The judicial process allows for a disinterested decision-maker to consider the facts and apply the law to those facts in order to deliver an impartial verdict. See *id.* Such crucial considerations are lacking when it comes to FCPA

Many factors, taken together, undermine U.S. anticorruption efforts.¹⁶⁹ For example, the unwillingness to pursue and prosecute high-level corruption undermines anticorruption efforts simply because the lack of prosecution guarantees a lack of justice.¹⁷⁰ USAID concluded that Afghanistan has the necessary means to fight corruption; the country has, at least, seven governmental agencies with officials assigned to prosecuting corruption, in addition to its constitution, which includes statutory language from the UNCAC.¹⁷¹ To address such a problem, however, the leadership must consider policymaking, which is a heavy burden that requires ample time and consideration.¹⁷²

Unfortunately, the Afghan people occasionally turn to the Taliban: a group viewed as incorruptible in a country where that attribute is uncommon and valued above all.¹⁷³ For instance, many Afghans rely on Taliban courts due to their frustration with the apparent corruption in government courts.¹⁷⁴ The Taliban's ability to enact swift justice has been its most significant strength.¹⁷⁵ Although the Afghan government appears weak, it does have the legal tools necessary to fight corruption; however, it ultimately lacks the moral and political resolve to employ those tools.¹⁷⁶ The new Afghan leadership must restore its people's confidence in the government by holding itself accountable so that the little faith remaining goes to the government and not the Taliban.¹⁷⁷

enforcement as agencies try to juggle the roles of "advocate, judge, and rule-maker" all into one position. *See id.* This process lets a lack of public confidence seep into the law directed at boosting public confidence. *See id.*

169. *See* Carroll, *supra* note 10, at 889 (discussing factors undermining anticorruption efforts). The State Department's U.S. Agency for International Development (USAID) concluded corruption is a constant problem in Afghanistan, undermining the country's efforts to rebuild and protect its citizens. *See id.* at 888-89. USAID points to the thirty years of conflict in Afghanistan as well as the country's leading role in opium and heroin production as potential reasons for Afghanistan's heightened vulnerability to corruption. *See id.*

170. *See id.* at 889 (outlining factors frustrating United States efforts to combat corruption). Officials and agencies intending to stop corruption are often critical proponents of said corruption. *See id.*

171. *See id.* at 889 (concluding USAID regards Afghanistan as having necessary structure to fight corruption).

172. *See* Carroll, *supra* note 10, at 889 (urging Afghanistan's leadership to tackle problem of corruption via policymaking).

173. *See id.* (explaining why Afghans may seek help from Taliban). The Taliban took advantage of the Afghan people's frustration by denouncing the prevalence of the country's widespread corruption in its propaganda. *See id.* at 890. The Taliban subjected criminals to a quick and ruthless justice system, rejecting dishonesty. *See id.* One Afghan stated, "[W]ith the Taliban, if somebody dropped \$1 million on the street, nobody would grab it. That's why people miss the Taliban"; no one dared to violate the law during the Taliban's rule. *Id.*

174. *See id.* at 890 (differentiating between Taliban courts and government courts). Unlike the corruption and incompetence plaguing government courts, Taliban courts did not allow bribery and cases progressed quickly. *See id.*; *see also supra* notes 140-148 and accompanying text (describing corruption in judicial system of Afghanistan).

175. *See* Carroll, *supra* note 10, at 890 (explaining why Afghan people turn to Taliban).

176. *See id.* at 891-92 (highlighting Afghan law prohibiting corruption and explaining how government's abandonment of responsibilities negates law's purpose).

177. *See id.* at 890 (reiterating reasons for turning to Taliban for justice).

The UN and international nongovernmental organizations (NGOs) have also tried to resolve the issue of corruption in Afghanistan; their efforts are ill-equipped for the volatile and violent environment, however.¹⁷⁸ Thus, organizations able to provide aid may be dissuaded from doing so given the inherent security risks.¹⁷⁹ In theory, the United States's efforts alone should substantially deter foreign officials from demanding and accepting bribes.¹⁸⁰ It seems, however, international cooperation will always be necessary.¹⁸¹

Corruption thrives in weak and developing countries.¹⁸² Countries enact statutes, such as the FCPA, in an attempt to restore the stability of governments.¹⁸³ Countries like Afghanistan need a similar mechanism.¹⁸⁴ The antibribery provision of the FCPA is most applicable to Afghanistan, although the accounting provision serves as an efficient check and balance.¹⁸⁵ To establish accountability—whether it is with the FCPA or any other statute implemented in a war-torn country—the government must seek judicial review, and therefore, restore the integrity and vitality of the judicial system.¹⁸⁶ Establishing accountability, however, will likely be a challenge because widespread corruption continually jeopardizes the safety of the country's judiciary members.¹⁸⁷ The FCPA statute, however, may use its appeal as the first mechanism designed to fight foreign bribery as a way to better encourage global enforcement.¹⁸⁸

IV. CONCLUSION

Congress enacted the FCPA to fight against foreign corruption, as its effects are damaging both internationally and domestically. Enforcement of this

178. See *id.* at 894 (citing possible reasons for UN and NGO failures). The UN office in Kandahar was often “on ‘lockdown’ due to actual or perceived threats.” *Id.*; see also *supra* note 160 and accompanying text (asserting need for new leadership to step up in Afghanistan and aggressively fight corruption).

179. See Carroll, *supra* note 10, at 894 (predicting worsening of local security situation).

180. See Yockey, *supra* note 2, at 836 (questioning whether DOJ's efforts considerably discourage corruption abroad).

181. See *id.* (expressing need for “international cooperation”). Fortunately, countries have recently started to adopt antibribery laws and broader international collaboration policies. See *id.* Unfortunately, the success of these international collaboration policies continues to fluctuate. See *id.* at 837.

182. See THE WORLD BANK, *supra* note 26, at 12 (describing corruption's preferred safe haven in developing countries).

183. See Urofsky et al., *supra* note 70, at 1146 (acknowledging reasons for signing FCPA into law).

184. See *supra* note 52 and accompanying text (recognizing Congressional efforts to fight corruption). Congress deemed such payments unethical and against American values. See Lindsey, *supra* note 46, at 961.

185. See Koehler, *supra* note 44, at 913 (explaining different provisions of FCPA).

186. See *id.* at 907 (discussing disadvantage of lack of judicial scrutiny); see also Bhojwani, *supra* note 43, at 75 (expressing lack of judicial review among FCPA enforcement cases). Although aggressive enforcement of public law generally leads to judicial scrutiny, the nature of FCPA enforcement diverges from this pattern. See Bhojwani, *supra* note 43, at 75.

187. See *supra* note 143 and accompanying text (describing safety concerns Afghan judges face due to corruption).

188. See Blume & McConkie, *supra* note 50, at 91 (distinguishing FCPA from other statutes of its kind).

statute must be aggressive but also coexist with the cultural norms of affected societies to have a chance at successful implementation. The corruption that flourishes due to weakened institutions in their developing stages diminishes the public morale to work both honestly and productively. To best fight corruption and, in turn, strengthen a country, a nation's leadership must work to ensure governmental accountability and transparency. Corruption can no longer be a daily occurrence in the lives of the Afghan people.

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