

**THE FOREIGN CORRUPT PRACTICES ACT:  
JUDICIAL REVIEW, JURISDICTION, AND THE “CULTURE OF  
SETTLEMENT”**

*Ezekiel K. Rediker\**

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## I. INTRODUCTION

According to World Bank estimates, more than one trillion dollars in bribes are paid each year.<sup>1</sup> In response to the growing threat of corruption in international business, the administration of George W. Bush inaugurated an era of stringent anti-bribery enforcement.<sup>2</sup> The Obama Administration continued this legacy, making it a priority to crack down on incidences of global bribery.<sup>3</sup> In a surging wave of prosecutions against multinational corporations, the Department of Justice (“DOJ”) invoked the broad jurisdictional scope of the Foreign Corrupt Practices Act (“FCPA” or “the Act”). The government’s enforcement tactics have relied heavily on the 1998 amendments to the FCPA—Sections 78 dd-1–3 specifically—which broadened the power of the DOJ to prosecute companies and individuals, both in the United States and abroad. From its very inception, however, the FCPA relied on vague language to define the recipients of bribes and the nature of bribery. The problem was compounded by the 1998 amendments, which greatly expanded jurisdiction of the FCPA. The law’s lack of clarity gave considerable power to prosecutors to interpret its reach.

Although FCPA enforcement increased in the past decade, an overwhelming number of prosecutions did not result in trials; instead, it produced a proliferation of pleas and pre-trial diversion agreements, such as Non Prosecution Agreements (“NPAs”) and Deferred Prosecution Agreements (“DPAs”).<sup>4</sup> In the overwhelming

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<sup>1</sup> *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (last visited Jan. 29, 2016).

<sup>2</sup> Mike Koehler, *FCPA 101*, FCPA PROFESSOR, <http://www.fcprofessor.com/fcpa-101#q19> (last visited Jan. 29, 2016) (arguing that the main reasons for the growth in FCPA enforcement include “companies (large and small and across a variety of industry sectors) . . . mov[ing] into international markets”; the passage of the Sarbanes Oxley Act in 2002 which “has caused issuers to more actively investigate questionable transactions particularly in foreign subsidiaries”; increased resources for enforcement agencies; stronger focus on international business by foreign law enforcement; and increased monitoring of enforcement activity by NGOs and civil society).

<sup>3</sup> According to Attorney General Eric Holder, FCPA prosecutions are necessary because “paying large monetary penalties cannot be viewed by the business community as merely ‘the cost of doing business.’” Eric Holder, U.S. Attorney Gen., Remarks at the Organization for Economic Co-Operation and Development (May 31, 2010), *available at* <http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html>.

<sup>4</sup> The FCPA has more settlement based on NPAs and DPAs than any other area of corporate criminality. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 933–34 (2010) (“While NPAs and DPAs are utilized in non-FCPA enforcement actions, the ‘lion’s share’ of these agreements are used to resolve FCPA enforcement actions”). For a discussion on Non Prosecution Agreements and Deferred Prosecution

number of FCPA prosecutions, corporations negotiate a deal before the case ever reaches the courtroom. Corporations prefer to settle, pay the fines levied, and continue to pursue business, rather than risk the high penalties and publicity that can result from a trial.<sup>5</sup> Individuals, many of whom are not U.S. citizens, are also likely to plead guilty and receive a reduced penalty, rather than risk a trial.<sup>6</sup> More importantly, unlike many areas of the law in which most cases are resolved through trial *and* settlement, there is almost a complete absence of judicial review of the FCPA.<sup>7</sup> The strong incentive to accept liability—what I call the “culture of settlement” in this Article—gives the DOJ enormous discretion in its interpretation of the FCPA.<sup>8</sup> Due to the scarcity of trials, the most frequent interpretation of the FCPA has come from the DOJ and the Securities and Exchange Commission (“SEC”), not federal judges. This lack of precedent allows FCPA investigations to be conducted largely on the DOJ’s terms. The jurisdictional language of the FCPA

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Agreements in the context of corporate criminality, *see generally* Brandon Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007) (considering the issues and strategy associated with prosecutors who seek structural reform remedies for accused corporations); Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1 (2006) (suggesting that corporations try to negotiate more lenient terms with prosecutors when given the opportunity).

<sup>5</sup> See Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434 (2007); Finder & McConnell, *supra* note 4, at 1.

<sup>6</sup> It is worth noting from the outset that the issue of whether to go to trial in an individual prosecution depends on different factors than a corporate prosecution. The strength of the evidence, the prosecutor’s offer of settlement, the threat of a harsher penalty at trial, and the accused’s beliefs about their own culpability all inform the decision of whether to go to trial.

<sup>7</sup> Koehler, *supra* note 4, at 932 (“The fact remains that every corporate FCPA enforcement action over the last two decades has been resolved through a DOJ NPA, DPA, plea (or combination thereof) or SEC settlement, and nearly every individual FCPA enforcement action has been resolved through a plea or SEC settlement.”).

<sup>8</sup> Although the FCPA is unique in its lack of judicial review, the FCPA “culture of settlement” does reflect a larger habit of settlement in other areas of corporate criminality. When compared with individual criminal defendants, corporations must protect the value of their company, have more financial resources at their disposal, and do not face the same possibilities of jail time. For a general discussion of larger trends of settlement in corporate criminality, *see* Samuel Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 507 (2006) (arguing that in choosing to settle, a corporation can “dampen[] reputational damage by portraying itself as accepting responsibility”); Andrew Weissman & David Newman, *Rethinking Corporate Criminal Liability*, 82 IND. L.J. 411, 415 (2007) (arguing that it is difficult for corporations to avoid settlement and that “even institutions as powerful in the financial world as Citigroup and JPMorgan Chase can cave under pressure to settle to avoid an indictment, even an unjust one”).

is very broad, but critics have challenged whether many defendants in these cases even belong in American courts.

This Article focuses on two weaknesses of the FCPA: the issue of jurisdiction, specifically its expansion in sections 78dd-1 through 78dd-3 in the 1998 Amendments, and second, the lack of judicial review, a result of the preference shown by both prosecution and defense to settle outside of court. These two issues are closely linked. The initially vague language of the 1977 FCPA, coupled with the later expansion of jurisdiction, gave the DOJ a wide mandate to prosecute almost anyone anywhere. The corporate “culture of settlement” led to an abundance of pleas, pretrial agreements, and a paucity of precedent.

In 2011, the DOJ launched the largest ever prosecution of individuals under the FCPA in what became known as “The Africa Sting Trials.” The prosecution had a strong expectation of settlement. But after most of the defendants collectively refused to plead, a jury trial commenced, and the FCPA was exposed to rare judicial scrutiny. The case resulted in several ‘not guilty’ verdicts, two mistrials, and the DOJ’s eventual dismissal of all charges. The trial exposed weaknesses in the government’s use of evidence, in the sting operation, and most importantly, in the vague language and the expanded jurisdiction of the Act. In the first ever ruling on section 78dd-3 of the FCPA, Judge Leon restricted the jurisdiction of the FCPA over foreigners.<sup>9</sup> Yet additional steps are still needed to clarify the language of the statute. Clarification of the vague language in section 78dd-3, in particular, would serve to define jurisdiction more precisely and to counter uncertainty created by the “culture of settlement” and lack of judicial review.

As this Article will show, much of the confusion results from a key phrase relating to acts “in furtherance of an offer” of bribery. In order to prosecute either a U.S. citizen or a foreigner either abroad or on U.S. territory for violation of the FCPA, the statutory language is not clear as to whether the act itself must be illegal or whether it can be a legal act committed *in furtherance* of an illegal bribery scheme. At present, there is no agreement about the meaning of the language and interpretations vary widely. This Article suggests one important change in that language that will make the law clearer.

This Article surveys the FCPA, its history, weaknesses, and prospects for successful enforcement. Part I reviews the history of the FCPA and its amendments, followed by a recommendation for

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<sup>9</sup> See Sections III.A–III.D.

reforming the language of section 78dd-3 of the Act. Part II examines the “culture of settlement” that has resulted from corporate prosecutions and the effect on the prosecution of foreign nationals. Part III analyzes the outcome of the Africa Sting Trials—including the role of judicial review in narrowing jurisdiction—illustrating the need for further clarification of the text of the FCPA.

## II. HISTORY OF THE FCPA AND ITS 1988 AND 1998 AMENDMENTS

This Part examines the origins of, as well as the 1988 and 1998 amendments to, the FCPA. It surveys significant arguments that have been made about the jurisdictional reach of the Act. Section I.A looks at the inception of the FCPA as a response to corruption in the Nixon era. Section I.B examines the 1988 and 1998 amendments, noting significant ambiguities in the language of the law. Section I.C surveys the debate about whether the FCPA is overly broad in its extraterritorial enforcement.

### A. *Origins of the FCPA*

The FCPA has its origins in the Watergate Scandal of 1975.<sup>10</sup> During an investigation of Nixon and his close advisors, federal agents discovered undisclosed “slush funds” established by U.S.-based multinational corporations to influence elections.<sup>11</sup> Nixon’s campaign had received money from these funds, which it used to bribe foreign officials and law enforcement agents.<sup>12</sup> After Vietnam, the Carter Administration sought to rehabilitate the global image of the United States,<sup>13</sup> and in 1977, Congress unanimously passed the FCPA. President Carter hailed the bill as historic, noting that “[c]orrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. . . . This law makes corrupt payments to foreign officials illegal under United States law.”<sup>14</sup> When the legislation was passed, the United States became the first

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<sup>10</sup> S. Rep. No. 93-981, at 445–92 (1974).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Kevin Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 499–500 (2012); see also George Esper, *Communists Take Over Saigon; U.S. Rescue Fleet is Picking Up Vietnamese Who Fleed in Boats*, N.Y. TIMES, May 1, 1975, available at <http://www.nytimes.com/learning/general/onthisday/big/0430.html#article>.

<sup>14</sup> President James E. Carter, Foreign Corrupt Practices and Investment Disclosure Bill Statement on Signing S. 305 into Law, 2 Pub. Papers 2157 (Dec. 20, 1977), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=7036>.

and only country in the world with strict penalties for companies engaged in business practices that involved bribery.<sup>15</sup>

The FCPA criminalized any use of U.S. funds to bribe foreign officials.<sup>16</sup> Its substantive sections were comprised of accounting and anti-bribery provisions.<sup>17</sup> Its accounting provisions required public companies to “make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”<sup>18</sup> Its anti-bribery provisions covered two groups: issuers of certain securities regulated by the SEC, including American Depository Receipts,<sup>19</sup> and “domestic concerns,” which included “any individual who is a citizen, national or resident of the United States or any corporation, partnership, joint-stock company, business trust, unincorporated organization, or sole proprietorship” which has its principal place of business in the United States, or is organized under the laws of the United States.<sup>20</sup> To be liable for prosecution, issuers or domestic concerns had to make use of the U.S. mails or “any instrumentality of interstate commerce” to make an offer, payment, promise to pay, or gift for the purpose “of obtaining or retaining business” to one of three recipients.<sup>21</sup> These recipient groups included “foreign officials”; foreign political parties, officials of such parties, or their candidates; or a person accepting the role of intermediary “while knowing or having reason to know” about the bribery between the issuer or domestic concern and the foreign official or political party.<sup>22</sup> Congress specifically refrained from asserting jurisdiction

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<sup>15</sup> Robert Blume & Taylor McConkie, *Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery*, 36 COLO. LAW. 91, 91 (2007).

<sup>16</sup> Melissa Kelly Hurst, *Eliminating Bribery in International Business Transactions*, 6 J. INT'L L. & PRAC. 111, 120 (1997).

<sup>17</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd (1)–(3), 78ff (2006)) [hereinafter FCPA of 1977].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> In the original version passed in 1977, the FCPA prohibited payments to third parties if an issuer “knew” or there was “reason to know” that all or a portion of the payment would be given, offered, or promised to a foreign official. This inspired serious debate, with critics stating that the term “reason to know” was ambiguous enough that negligent payments could fall within its scope. See H. Lowell Brown, *Extraterritorial Jurisdiction Under The 1998 Amendments To The Foreign Corrupt Practices Act: Does The Government's Reach Now Exceed Its Grasp?*, 26 N.C.J. INT'L L. & COM. REG. 239 (2001); Lisa Harriman Randall, *Multilateralization of the Foreign Corrupt Practices Act*, 6 MINN. J. GLOBAL TRADE 657 (1997); Robert S. Levy, *The Antibribery Provisions of the*

over non-U.S. individuals and companies.<sup>23</sup>

The language of the Act was vague from its inception. Two of the Act's greatest weaknesses were that it failed to lucidly define "foreign official" and the phrase "obtaining and retaining business" or "directing business to any person." Both of the terms from the original FCPA were unchanged by later amendments. "Foreign official" was defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality."<sup>24</sup> The definition left open the possibility that any employee or official of a state-owned enterprise might be considered a "foreign official," thus encompassing much of the population in countries with socialist governments or a preponderance of state-owned enterprises.<sup>25</sup> In *United States v. Esquenazi* (a case which will be considered below), an appellate court is expected to rule for the first time as to who can be classified a "foreign official" under the FCPA.<sup>26</sup>

The phrase "obtaining and retaining business" was also quite vague in scope. The defendant in *United States v. Kozeny* was charged with conspiring to violate the FCPA because he funneled payments to Azeri officials to encourage the privatization of a state-owned oil company in Azerbaijan.<sup>27</sup> The language left it unclear whether payments made in the direction of privatization, the first step to business, would be considered bribery.<sup>28</sup> Similarly, in *United States v. Kay*, the court ruled that the phrase "to obtain or retain business"

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*Foreign Corrupt Practices Act of 1977: Are They Really As Valuable As We Think They Are?*, 10 DEL. J. CORP. L. 71, 79-80 (1985).

<sup>23</sup> Brown, *supra* note 22, at 292 ("Congress ultimately decided not to include foreign nationals within the definition of a domestic concern. In effect, unless a foreign national was an 'issuer' or there was some other basis for the United States to assert jurisdiction, a foreign national was beyond the reach of the Act.").

<sup>24</sup> FCPA of 1977, *supra* note 17.

<sup>25</sup> DOJ Files Response Brief in Historic 11<sup>th</sup> Circuit "Foreign Official" Appeal, FCPA PROFESSOR BLOG (Aug. 21, 2012), <http://www.fcpaprofessor.com/doj-files-response-brief-in-historic-11th-circuit-foreign-official-appeal>.

<sup>26</sup> *Id.* (The 11<sup>th</sup> Circuit will determine a "host of issues, including whether the trial court erred as a matter of law in its jury instruction regarding what constitutes an 'instrumentality' of a foreign government – and thus who are 'foreign officials' under the FCPA.").

<sup>27</sup> *United States v. Kozeny*, 493 F. Supp. 2d 693 (S.D.N.Y. 2007), *aff'd*, 541 F.3d 166 (2d Cir. 2008).

<sup>28</sup> In this way, it potentially included the many businesses and NGOs that entered the former Soviet Union, Africa, and Eastern Europe with the aim of encouraging and profiting from the break up of state-owned concerns.

was “genuinely debatable and thus ambiguous.”<sup>29</sup> The court reasoned that the “most significant statutory construction problem results from the failure of the language of the FCPA to give a clear indication of the exact scope of the business nexus element.”<sup>30</sup> The hazy language of 1977 was never clarified, either through judicial review or further emendation. It has remained the core of the FCPA to the present, and its lack of clarity has been exacerbated by the expansion of jurisdiction in the amendments.

*B. The 1988 and 1998 Amendments*

The 1977 version of the FCPA was amended by the Omnibus Trade and Competitiveness Act and the International and Anti-Bribery Fair Competition Act, in 1988 and 1998, respectively. The initial purpose of the FCPA was to police only the illicit conduct of American businesses. There was nonetheless an expectation held by Congress and in policy circles that other nations would pass similar legislation in the wake of the FCPA.<sup>31</sup> International support, however, did not follow, and though FCPA enforcement was rare, some critics blamed Congress for harming American businesses.<sup>32</sup> In the eleven years following the passage of the FCPA, there was a growing sentiment in Congress that efforts to combat corruption must occur on a global, rather than national, scale.<sup>33</sup>

In 1988, Congress took concrete steps to encourage the international community to follow the lead of the United States by enacting anti-bribery legislation. The Omnibus Trade and Competitiveness Act formally called upon President Reagan to

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<sup>29</sup> *United States v. Kay*, 359 F.3d 738, 743–44 (5th Cir. 2004) (“In approaching this issue, the district court concluded that the FCPA’s language is ambiguous, and proceeded to review the statute’s legislative history. We agree with the court’s finding of ambiguity. . . .”). Some authors have argued that despite the court’s characterization of the FCPA as ambiguous, the case has led to a further increase in prosecutions. See Evan P. Lestelle, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 535 (2008) (“In the nearly three years since the Fifth Circuit’s decision in *Kay*, the SEC brought more FCPA enforcement actions than in any 36-month period since the statute’s enactment.”).

<sup>30</sup> *Kay*, 359 F.3d at 744.

<sup>31</sup> Daniel Patrick Ashe, Note, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2906 (2005).

<sup>32</sup> PIERRE CHARPIE, INTERNATIONAL BUSINESS TRANSACTIONS: INTRODUCTION TO THE INTERNATIONAL ANTI-BRIBERY LAWS 45 (2003) (citing Business Accounting and Foreign Trade Simplification Act: Hearings on S. 430 Before the Subcomm. on Int’l Fin. and Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Hous., and Urban Affairs, 99th Cong., 2d Sess. 20-21 (1986)).

<sup>33</sup> *Id.*



pursue international agreements that supported enforcement of the FCPA.<sup>34</sup> The language of the 1988 amendments sharpened the focus of the FCPA by modifying the Act's state of mind requirement<sup>35</sup> and adding two affirmative defenses.<sup>36</sup> As to the state of mind requirement, legislators sought to move away from the 1977 requirement that parties "know" or "have a reason to know" about the bribery since they did not want to encourage willful blindness on behalf of corrupt third parties, but also did not want to criminalize simple negligence.<sup>37</sup> Congress thus amended the Act to criminalize the payment of third-party bribes, but only if the payor had actual knowledge of the intended results or acted with a conscious disregard for the truth.<sup>38</sup> The affirmative defenses further protected individuals from liability in cases where their payments were legal in the country in which they were made, or considered "reasonable and bona fide expenditures."<sup>39</sup> In addition to the affirmative defenses, the law was amended to allow for "grease payments," that is, money paid to facilitate or hasten routine business transactions.<sup>40</sup> The defenses and amendments thus encouraged a more flexible standard of adherence to the FCPA,

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<sup>34</sup> Ashe, *supra* note 31, at 2906 ("Moreover, the amendment allowed an affirmative defense if the payment to the foreign public official was lawful in the jurisdiction of the bribe recipient. The 1988 amendments also created an affirmative defense for reasonable expenses directly related to legitimate promotional activities.").

<sup>35</sup> Pub. L. No. 100-418, 102 Stat. 1107 (codified at 15 U.S.C. 78dd-1 to 78dd-3 (2000)); Pub. L. No. 100-418, 102 Stat. 1107 (codified at 15 U.S.C. § 78dd-1 to 78dd-3 (2000)); FCPA of 1977, *supra* note 17, at § 78dd (1)-(3).

<sup>36</sup> Pub. L. No. 100-418, 102 Stat. 1107 (codified at 15 U.S.C. 78dd-1 to 78dd-3 (2000)); Pub. L. No. 100-418, 102 Stat. 1107 (codified at 15 U.S.C. 78dd-1 to 78dd-3 (2000)); FCPA of 1977, *supra* note 17, at §§ 78dd (1)-(3); Ashe *supra* note 31, at 2902.

<sup>37</sup> FCPA of 1977, *supra* note 17, at §§ 78dd(1)-(3); Ashe, *supra* note 31, at 2902.

<sup>38</sup> Pub. L. No. 100-418, 102 Stat. 1107 (codified at 15 U.S.C. § 78dd-1 to 78dd-3 (2000)) [hereinafter "FCPA of 1988"].

<sup>39</sup> 15 U.S.C. § 78dd-1(c) (2006) (for issuers); 15 U.S.C. § 78dd-3(c) (2006) (for domestic concerns); 15 U.S.C. § 78 dd-3(c) (2006) (for any person). Little case law exists to interpret the scope of the first affirmative defense, although one court has interpreted it rather narrowly. See *U.S. v. Kozeny*, *supra* note 27, at 697. The defendant was charged under the FCPA with bribing a government official in Azerbaijan. *Id.* The defendant argued, however, that he was not guilty of bribery under Azeri law because the bribe was extorted from him and he then reported the bribe to the authorities. *U.S. v. Kozeny*, 582 F. Supp. 2d 535, 537 (S.D.N.Y. 2008). Under Azeri law, an individual who is extorted and then reports the event cannot be held criminally liable for bribery. *Id.*

<sup>40</sup> FCPA of 1988, *supra* note 38. For instance, "grease payments" could be made for: governmental processing of foreign documents, such as visas; obtaining police protection; securing utilities; certain transportation costs; and the delivery of mail. See also Rajib Sanyal, *Patterns in International Bribery: Violations of the Foreign Corrupt Practices Act*, THUNDERBIRD INT'L BUS. REV., 1, 4 (2012).

while preserving its principles as a model for other countries.

In the 1990s, President Clinton urged the Organization of Economic Cooperation and Development (“OECD”) to adopt the Convention on Combating Bribery of Foreign Officials in International Business Transactions (“the Convention”).<sup>41</sup> The U.S. government used diplomatic pressure, empirical evidence on the negative costs of bribery, and public sentiment against corruption to make its case.<sup>42</sup> The United States and eighteen member countries ratified the Convention, pledging to pass legislation in their home countries to prohibit bribery of foreign officials.<sup>43</sup> The OECD greatly enlarged the jurisdiction of bribery investigations, using even broader language than the amendment changes to the FCPA that would soon be adopted in 1998.<sup>44</sup> The Convention called for the jurisdictional provision to be “interpreted broadly [enough] so that an extensive physical connection to the bribery act is not required.”<sup>45</sup> The FCPA, as amended, unquestionably followed this mandate.<sup>46</sup> Following ratification by the United States and other member states, the OECD Convention went into effect on February 15, 1999.<sup>47</sup>

In October 1998, Congress consequently amended the FCPA to conform to the international standards set by the OECD

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<sup>41</sup> See generally OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998) [hereinafter OECD Convention].

<sup>42</sup> See *id.* at 1. The Convention entered into force February 15, 1999 upon the ratification of eighteen countries. By the end of 2001, the OECD Convention was in force for all thirty OECD member countries except Ireland, plus five non-member countries—Argentina, Brazil, Bulgaria, Chile, and Slovenia. Lisa M. Landmeier et al., *Anti-Corruption International Legal Developments*, 36 INT’L LAW. 589, 591 (2002).

<sup>43</sup> By 2001, the OECD Convention was implemented by all 30 OECD member countries (except for Ireland), plus five non-member countries: Argentina, Brazil, Bulgaria, Chile, and Slovenia. Landmeier, *supra* note 42, at 591.

<sup>44</sup> See OECD Convention, *supra* note 41, at 1. The Convention chose to define a “foreign official” more broadly than the FCPA, as not only “any person holding a legislative, administrative or judicial office of a foreign country,” but also as officials or agents of “a public international organization.” However, the OECD Convention was not self-executing nor did it include a model law against corruption. See Padideh Ala’i, *The Legacy of Geographic Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT’L L. 877, 924 (2000) (The OECD “provides only rough guidelines for its implementing legislation. . . . In view of the functional equivalency approach, there is little the OECD Convention requires Member States to do in their implementing legislation other than criminalize bribery of foreign public officials”).

<sup>45</sup> See OECD Convention, *supra* note 41, at 10.

<sup>46</sup> Brown, *supra* note 22, at 285–88.

<sup>47</sup> Ala’i, *supra* note 44, at 923.

Convention. The 1998 amendment broadened definitions within the FCPA's first section and expanded its jurisdictional reach through the modification of sections 78dd-1-3. Sections 78dd-1 and 78dd-2 dealt with issuers and domestic concerns and introduced three main changes. First, these sections expanded the definition of "foreign official" to include public international organizations (such as the United Nations) and their employees.<sup>48</sup> Second, they broadened the definition of bribery to include illegal payments that secure "any improper advantage, not simply to obtain or retain business."<sup>49</sup> Third, and most significantly, they vastly expanded the FCPA's jurisdiction.<sup>50</sup> The FCPA originally defined jurisdiction "by use of the mails or means of interstate commerce" and applied only to American citizens and entities.<sup>51</sup> Issuers and domestic concerns, or their respective agents, could now be charged with violations of the FCPA "irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or instrumentality of interstate commerce . . . ." <sup>52</sup> The jurisdictional limits imposed by the 1977 FCPA, defined by use of mails and interstate commerce, were removed, thus criminalizing an entirely new set of acts taken by issuers, domestic concerns, or U.S. citizens while abroad.

Part (a) of section 78dd-3 further augmented the jurisdiction of the FCPA beyond the issuers, domestic concerns, and their agents who were the focus of the 1977 Act.<sup>53</sup> For the first time, it made anti-bribery provisions applicable to foreign citizens who could now be charged for violations if they made "use of the U.S. mails or any means or instrumentality of interstate commerce"<sup>54</sup> or committed any other act in furtherance of an offer, payment, promise, etc., "while in the territory of the United States."<sup>55</sup> Not only did section 78dd-3 now include foreigners in its expanded jurisdiction, such foreigners did not have to use the mails or interstate commerce to be liable for prosecution. Sections 78dd-1 through 78dd-3 thus made the U.S. mails and interstate commerce

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<sup>48</sup> The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §4, 112 Stat. 3306 (codified as amended at 15 U.S.C. §78dd-3 (2006)) [hereinafter "FCPA of 1998"].

<sup>49</sup> *Id.*

<sup>50</sup> FCPA of 1988, *supra* note 48, § 78dd-3.

<sup>51</sup> FCPA of 1977, *supra* note 17.

<sup>52</sup> FCPA of 1998, *supra* note 48, § 78dd-1.

<sup>53</sup> FCPA of 1998, *supra* note 48, § 78dd-3.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

only one of several possible avenues for prosecution. The sum of its jurisdictional changes made U.S. issuers, domestic concerns, and individuals liable for actions committed abroad, and foreigners liable for actions committed in the territory of the United States, with use of the mails or interstate commerce, or for “any other act in furtherance” of bribery.<sup>56</sup>

As it stands today, the FCPA includes the core language of 1977, along with additional provisions for a new state of mind requirement, affirmative defenses, and grease payments. It contains a broadened definition of “foreign officials,” language adding “securing any improper advantage” to the obtaining or retaining business clause, and expanded jurisdiction.<sup>57</sup> The FCPA’s proscriptions apply to three groups: “issuers” (corporations with registered securities in the United States) and individuals acting on their behalf; “domestic concerns” and individuals acting on their behalf; and any other person (including foreign citizens) who corruptly makes use of the U.S. mails and interstate commerce, or does any other act in furtherance of an offer, payment, etc. on U.S. territory.<sup>58</sup> The large extraterritorial scope of the Act engendered a vigorous academic debate about the considerable expansion of jurisdiction and the right of the United States (and the OECD) to police the business practices of other countries

### *C. Debating the 1998 Amendments and Issues of Jurisdiction*

The crux of the debate concerned the tension between prosecutorial interpretation of the FCPA’s breadth and the rights of foreign nations to combat bribery using their own domestic mechanisms. Critics maintained that the broad reach of the 1998 amendments exceeded the FCPA’s original jurisdictional mandate. They offered four major critiques of the FCPA’s extraterritorial application. First, some critics claimed that the OECD guidelines reflect the policy of only the world’s wealthiest industrialized countries.<sup>59</sup> Second, some noted that bribery is a culturally specific practice, with a less pejorative connotation in parts of the developing world.<sup>60</sup> Third, some said that enforcement of the FCPA

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> FCPA of 1998, *supra* note 48, at § 78dd-3 (for any person).

<sup>59</sup> Lestelle, *supra* note 29, at 536 (“There is a notable characteristic of the states party to the OECD Convention: the parties are the primary exporters of global capital. . . . Of the thirty-six states that have ratified the OECD Convention, these countries are responsible for approximately ninety percent of foreign direct investment.”).

<sup>60</sup> What might be considered bribery in the United States, for example, may be a

by the United States created “institutional displacement,” inhibiting the development of local institutions.<sup>61</sup> Fourth, critics noted that an overly aggressive U.S. policy against bribery might heighten diplomatic tensions.<sup>62</sup>

Proponents of the FCPA engaged these critiques, arguing that the Act did not permit an overly broad extraterritorial application of American law.<sup>63</sup> They noted that the passage of the FCPA and its subsequent amendments was the result of decades of diplomacy and initiatives to educate the global community about the deleterious effects of bribery.<sup>64</sup> After the OECD guidelines came into effect in 1999, many nations, including the United Kingdom, adopted their own anti-bribery legislation.<sup>65</sup> No significant diplomatic rifts resulted from American enforcement of the FCPA.<sup>66</sup> Indeed, a new global collaboration to police bribery in international business emerged. Proponents also contended that a clear difference between bribery and “gift giving” had always existed.<sup>67</sup> Bribery, unlike gifts, involved large sums, and FCPA prosecutions

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commonly accepted and even expected “gift giving” in other countries. See Steven Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT’L L. 419, 431–32 (1999) (“Within this culturally bound ambiguity, the subtle gradations of acceptable business practices with regard to gratuities, favors and gifts are a potential mine field for legislators seeking to exert their influence extraterritorially.”).

<sup>61</sup> Although the U.S. may be more committed to and effective in combating corruption than developing countries, the improvement of local institutions is more important in the long run than short-term enforcement. Davis, *supra* note 13, at 509 (“As a theoretical matter this concern [‘institutional displacement’] arises even in situations in which U.S. institutions are clearly more effective in combating corruption than local institutions. Even then, the net impact of relying on U.S. institutions might be negative if their operation tends to inhibit the long-term development of local institutions.”).

<sup>62</sup> Marie Dalton, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J. L. & Bus. 583, 584 (2006).

<sup>63</sup> Philip Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT’L L.J. 627, 646 (“This article reviews and rejects the claim that anti-bribery laws constitute an intrusion thrust upon other countries.”); Ashe, *supra* note 31, at 8 (“Rather than viewing recent expanded and aggressive FCPA enforcement as morally imperious, these actions should be seen as working to advance international partnership in addressing a complex and entrenched problem.”); Lauren Giudice, Note, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L. REV. 347, 360 (2011).

<sup>64</sup> Nichols, *supra* note 63, at 637–39.

<sup>65</sup> See Foreign and Commonwealth Office, Conflict of Minerals (Jun. 19, 2013) available at <http://www.fco.gov.uk/en/global-issues/conflict-minerals/legally-binding-process/uk-bribery-act>.

<sup>66</sup> Nichols, *supra* note 63, at 646 (“In . . . twenty years, not one meaningful diplomatic rift can be attributed to enforcement of the Act.”).

<sup>67</sup> *Id.*

only targeted bribes in excess of tens of thousands of dollars.<sup>68</sup> Finally, if the United States abdicated its role in regulating supply-side bribery, the problem would only worsen.<sup>69</sup>

On balance, there is some common ground among the FCPA's critics and proponents, including the widespread disapproval of major governmental corruption.<sup>70</sup> Nonetheless, the debate underscores serious issues regarding the broad jurisdictional language of sections 78dd-1 through 78dd-3.<sup>71</sup>

### III. FCPA ENFORCEMENT AND THE "CULTURE OF SETTLEMENT"

The problems stemming from the vague language and broad scope of the FCPA are compounded by the willingness of corporations to settle their cases without going to trial. Although corporate settlement is quite common in many areas of the law, the FCPA is unique in its lack of precedent. The environment of enforcement strongly informs the need for legislative reform of FCPA section 78dd-3. The legal ambiguities associated with the prosecution of foreign nationals stem from a corporate "culture of settlement" and unchecked prosecutorial discretion over jurisdiction. The expansion of the FCPA's jurisdictional scope under

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> For example, significant governmental corruption—as opposed to gift-giving—is a universally rejected practice, although cultural interpretations as to what constitutes bribery vary from region to region. See Salbu, *supra* note 60, at 423–24 (“Although some disagree, I concede the contention of FCPA supporters that a generic disdain for corruption is a universal value, transcending national borders. . . . I would . . . suggest that while all cultures eschew corruption, culture remains a critical differentiator as opinions vary on what conduct falls inside and outside of that label.”). On the issue of diplomatic tensions, there is always the possibility that FCPA enforcement could strain foreign relations, although to date, this has not occurred. This may be partly because the FCPA has been in force for nearly 35 years, yet prosecutions have only developed a significant presence since 2004.

<sup>71</sup> Some legal scholars have argued that without significant “buy in” from the developing world, effective enforcement is less likely. One compelling way for the U.S. to increase “buy in” is to take a more measured stance on foreign bribery, based on “persuasion rather than intrusion.” Salbu, *supra* note 60, at 445 (Salbu suggests there are “two important benefits to addressing the issue of bribery using persuasive rather than intrusive measures. First, persuading the world’s nations to adopt and vigorously implement effective domestic anti-bribery laws avoids legitimate charges of ethnocentrism. Second, persuasion is less likely to create global dissension than coercive, extraterritorially applied laws.”). See also Kevin Davis, *Does the Globalization of Anti-corruption Law Help Developing Countries?* in INTERNATIONAL LAW, ECONOMIC GLOBALIZATION AND DEVELOPMENT 283 (Julio Faundez & Celine Tan eds., 2010) (arguing that if the United States can help other nations to develop *their own* anti-bribery laws, developing countries would not rely solely on the U.S. and neglect their own institutions).

the 1998 amendments led to a surge in both corporate and individual prosecutions, but rarely have cases gone to trial.<sup>72</sup> This “culture of settlement” reinforces the role of federal prosecutors as the sole interpreters of the FCPA’s statutory language—especially as it concerns the jurisdiction of individual defendants. Prosecutors expect that individual defendants will settle, partly because defendants cannot look to precedent as a means by which to evaluate the risk of a trial. The statutory modification proposed by this Note is a means by which to clarify the liability of foreign nationals. Part II.A explores the major vehicles for corporate settlement—pleas, non-prosecution agreements, and deferred prosecution agreements. Part II.B examines notable cases of prosecutorial over-reaching on jurisdictional issues. Part II.C surveys the effect of the “culture of settlement” on individual prosecutions and re-examines possible outcomes for cases in light of the proposed statutory reform.

*A. A Source of the Problem: Corporate Pleas, NPAs, and DPAs*

The expansion of the FCPA’s jurisdictional reach resulted in large settlements with multinational corporations. In 2008, the largest fine in the history of the FCPA was leveled against Siemens AG Corporation after a joint investigation by American and German authorities.<sup>73</sup> The DOJ and SEC conducted parallel prosecutions of Siemens, charging the company with violations of the FCPA’s accounting provisions.<sup>74</sup> Siemens and its affiliates pleaded guilty to the charges, eventually settling for \$800 million.<sup>75</sup> Siemens also

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<sup>72</sup> Another crucial trend not addressed in this paper concerns the impact of accounting legislation, namely the Sarbanes-Oxley Act of 2002, on the self-reporting of corporate FCPA violations. A number of settlements have come from companies reporting internal violations through voluntary disclosures. For a general discussion on the impact of Sarbanes-Oxley and voluntary disclosures on FCPA enforcement, see Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 443 (2009) (analyzing the role of Sarbanes-Oxley in international bribery enforcement); Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 157 (2010) (discussing the scope of disclosure required under the Sarbanes-Oxley Act).

<sup>73</sup> Leslie Wayne, *Foreign Companies Most Affected by a U.S. Law*, N.Y. TIMES (Sept. 3, 2012), <http://www.nytimes.com/2012/09/04/business/global/bribery-settlements-under-us-law-are-mostly-with-foreign-countries.html?pagewanted=all>.

<sup>74</sup> *Id.*

<sup>75</sup> Press Release, U.S. Dep’t of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html> (“In connection with the cases brought by

settled charges with the Munich Public Prosecutor for €395 million.<sup>76</sup> When all the costs were totaled, Siemens paid approximately \$1.6 billion to both American and German authorities.<sup>77</sup>

Why would a company accept a fine of that magnitude without going to trial? The answer lies in the advantages that can be gained by corporations if they decide to plead guilty. First, a fine can be considerably greater if a corporation is convicted in a court of law. In the Siemens case, the U.S. sentencing guidelines actually recommended a significantly higher fine—up to \$2.7 billion—than the one paid.<sup>78</sup> Second, bad press and possible stock devaluation can follow a lengthy FCPA proceeding,<sup>79</sup> an outcome especially devastating for public corporations that are directly responsible to their shareholders.<sup>80</sup> Legal scholars note that corporations are faced with a “Hobson’s Choice” to either accept the DOJ’s charges or confront the negative media that accompanies a bribery trial.<sup>81</sup> Even though the prosecutor’s legal arguments may be untested, corporations have strong incentives to accept a plea deal.<sup>82</sup>

As FCPA prosecutions have increased, so have Non-Prosecution Agreements (“NPAs”) and Deferred Prosecution Agreements (“DPAs”).<sup>83</sup> An NPA is not filed with a court, but is instead privately negotiated between the accused company and the DOJ. Included in

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the Department, the SEC and the Munich Public Prosecutor’s Office, Siemens AG will pay a combined total of more than \$1.6 billion in fines, penalties, and disgorgement of profits, including \$800 million to U.S. authorities, making the combined U.S. penalties the largest monetary sanction ever imposed in an FCPA case since the act was passed by Congress in 1977.”)

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* See generally 2008 Year-End FCPA Update, GIBSON DUNN PUBLICATIONS (Jan. 5, 2009), <http://www.gibsondunn.com/publications/pages/2008YearEndFCPAUpdate.aspx>.

<sup>78</sup> Lanny A. Breuer, Assistant Att’y Gen., U.S. Dep’t of Justice, Crim. Div., Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act, at 4 (Nov. 17, 2009) available at <http://online.wsj.com/public/resources/documents/111709breuerremarks.pdf>. See also Giudice, *supra* note 63, at 349 (It is important to note that the settlement figures could have been significantly larger because the United States Sentencing Guidelines recommend a criminal fine between \$1.35 and \$2.7 billion.).

<sup>79</sup> Lestelle, *supra* note 29, at 529.

<sup>80</sup> *Id.*

<sup>81</sup> Justin Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 287 (2007).

<sup>82</sup> Koehler, *supra* note 4, at 940.

<sup>83</sup> David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT’L L. 471, 508 (2009).



the agreement are the company's acknowledgement of its FCPA violations and the compliance measures to be implemented in the future.<sup>84</sup> A DPA is also privately negotiated, although it is formally filed with a court and resembles a pleading. The DOJ agrees to defer prosecution of the company, usually for a two- to four-year period, while the company agrees to implement a series of compliance measures.<sup>85</sup>

NPAs and DPAs have begun to predominate in many different areas of criminal wrongdoing, signaling changing trends in DOJ enforcement.<sup>86</sup> The DOJ currently wields significant power in dictating the terms of these various agreements. As a result of NPAs and DPAs, companies can avoid the harshest consequences of prosecution, including debarment and suspension from government contracts.<sup>87</sup> Public corporations choose agreements over trials in the hope of evading public disputes over finances and allegations that might damage stock prices and shareholder confidence.<sup>88</sup> Although the NPAs, DPAs, and compliance agreements might "preserve the financial viability of a corporation" in the short term, they also increase regulatory uncertainty and the costs of doing business abroad in the long term.<sup>89</sup>

Since plea agreements and alternative resolution vehicles like

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<sup>84</sup> Koehler, *supra* note 4, at 934 ("These agreements often take the form of letter agreements from the DOJ to the entity's lawyer and generally include a brief—often times bare-bones—statement of facts replete with legal conclusions that the entity acknowledges responsibility for, as well as a host of compliance undertakings that the entity agrees to implement.").

<sup>85</sup> *Id.* ("A DPA, on the other hand, is filed with a court and thus has a 'look and feel' much like a pleading, although the factual allegations also are often bare-bones and replete with legal conclusions . . . . There is very little difference between an NPA and a DPA.").

<sup>86</sup> *Id.* ("Across all DOJ investigations—not just those under the FCPA—the number of settlements between defendants and the DOJ has grown substantially since 2002. From 2002 through 2005 the number of NPAs and DPAs exceeded the total number that the DOJ entered into in the ten years previous, and FCPA enforcement has been no exception."). See also Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 1–3 (2006).

<sup>87</sup> Giudice, *supra* note 63, at 360. See also Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 278–82 (2008).

<sup>88</sup> *Id.* at 157.

<sup>89</sup> Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred And Non-Prosecution Agreements Impede The Full Development Of The Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y. 137, 138 (2010) (arguing that "[w]hile these agreements provide several short-term benefits, the long-term consequences of these agreements perpetuate ambiguities surrounding enforcement of the FCPA. . . . An efficient solution to the FCPA's ambiguity problem would be a legislative fix that clarifies the uncertainties surrounding the Act while preserving deferred and non-prosecution agreements.").

NPAs and DPAs have become the dominant means of settling FCPA investigations, there is a marked absence of case law in FCPA-related litigation.<sup>90</sup> The lack of case law and judicial scrutiny of alternative methods of resolution has serious consequences for corporations in assessing their own potential risk of liability.<sup>91</sup> NPAs and DPAs do not act as binding legal precedent for a court<sup>92</sup> and there is little to no judicial scrutiny of these methods of settlement.<sup>93</sup> Since an NPA is not filed with a court, there is no “independent review” of the agreement made between the DOJ and the accused company. It is very difficult to gain insight into past prosecutions because NPAs and DPAs are not made public.<sup>94</sup> Enforcement agencies issue press releases about settlements, but these are often little more than brief announcements and do not contain crucial information about the negotiations.<sup>95</sup> In certain cases, NPAs and DPAs are offered to companies even before the prosecution has satisfied any burden of proving a crime beyond a reasonable doubt.<sup>96</sup> Additionally, no court has ever rejected an NPA or DPA, largely because the accused enters into the agreement willingly to minimize the risk of further legal punishment.<sup>97</sup> Case law would also be helpful in establishing compliance programs and developing defense strategy at trial, but there are no such precedents.<sup>98</sup>

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<sup>90</sup> Koehler, *supra* note 4, at 999–1000 (“Although FCPA resolution vehicles are not legal precedent, and although they do not necessarily represent the triumph of one party’s legal position over the other, the unfortunate reality in the FCPA context is that they do serve as *de facto* case law”).

<sup>91</sup> *Id.* at 999 (“Against the backdrop of a largely vague and ambiguous statute and a dearth of substantive FCPA case law, the gap is filled with the resolution vehicles typically used to resolve FCPA enforcement actions.”).

<sup>92</sup> Brooks, *supra* note 89, at 159 (“The DOJ’s use of DPAs and NPAs directly affects the development of case law under the FCPA because relevant precedent cannot develop from settling disputes outside the courtroom. American law depends, in part, on the judicial application of *stare decisis*.”). See also Vega, *supra* note 72, at 443 (“In addition, deferred prosecution agreements, nonprosecution agreements, and guilty pleas do not create binding precedent like a decision in a court of law.”).

<sup>93</sup> Koehler, *supra* note 4, at 935 (“Because an NPA is not filed with a court, there is absolutely no judicial scrutiny of these agreements, including the statement of facts and legal conclusions that serve as the foundation of the agreement. In other words, there is no independent review of the statement of facts to determine if evidence exists to support the essential elements of the crime ‘alleged’ or to determine whether valid and legitimate defenses are relevant to the ‘alleged’ conduct.”).

<sup>94</sup> *Id.* at 934–35. See also Brooks, *supra* note 89, at 139.

<sup>95</sup> See generally Brandon L. Garrett & Jon Ashely, Federal Organizational Prosecution Agreements, U. VA. SCH. L., [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements/](http://lib.law.virginia.edu/Garrett/prosecution_agreements/) (last updated Jun. 7, 2011) (listing several examples of various NPAs).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (All NPAs and DPAs “have been approved without judicial modification.”).

<sup>98</sup> Brooks, *supra* note 89, at 161. (“DPAs and NPAs subvert this process by

*B. Unilateral Prosecutorial Interpretation of Jurisdiction*

A number of corporate cases have raised serious questions about the “culture of settlement” and prosecutors’ interpretation of the FCPA’s jurisdictional scope. In February 2007, the DOJ announced that three U.K.-based subsidiaries of Vetco International, an oil and natural gas equipment company, pleaded guilty to violating the anti-bribery provision of the FCPA under § 78dd-3.<sup>99</sup> One of the Vetco subsidiaries, headquartered in Houston, allegedly coordinated the transfer of \$2 million in bribes to a Nigerian customs official. Jurisdiction was premised on the fact that the subsidiary’s employees used internet communication based in Houston to further the bribery scheme.<sup>100</sup> Vetco, like other corporations, decided to settle its case.<sup>101</sup> Commentators speculated that if the case had gone to trial, the prosecutor’s interpretation of jurisdiction under the FCPA might have been struck down.<sup>102</sup>

In May 2005, the FCPA brought an enforcement action against a Chinese subsidiary of the U.S.-based Diagnostic Products Corporation (“DPC”).<sup>103</sup> The DOJ alleged that DPC had paid approximately \$1.6 million in bribes to doctors and laboratory personnel employed by state-owned hospitals in China.<sup>104</sup> In exchange for the bribes, which were paid between 1991 and 2002, hospital employees agreed to buy products manufactured by DPC.<sup>105</sup> Specifically, it was alleged that DPC “made cash payments to laboratory personnel and physicians employed in certain hospitals . . . in exchange for agreements that the hospitals would obtain [DPC’s products and services].”<sup>106</sup> The plea agreement stated that jurisdiction was based on the premise that the Chinese

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preventing courts from analyzing legal and factual issues and subsequently publishing judgments defining specific points of law related to the FCPA—the very process that is the essence of developing precedent.”).

<sup>99</sup> Press Release, U.S. Dep’t of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay \$26 Million in Criminal Fines (Feb. 6, 2007), available at [http://www.justice.gov/opa/pr/2007/February/07\\_crm\\_075.html](http://www.justice.gov/opa/pr/2007/February/07_crm_075.html) [hereinafter “Vetco Press Release”].

<sup>100</sup> Lestelle, *supra* note 29, at 537.

<sup>101</sup> Vetco Press Release, *supra* note 99. The plea was filed with the U.S. District Court for the Southern District of Texas.

<sup>102</sup> Vetco Press Release, *supra* note 99.

<sup>103</sup> Press Release, U.S. Dep’t of Justice, DPC (Tianjin) LTD. Charged with Violating the Foreign Corrupt Practices Act (May 20, 2005), available at [http://www.justice.gov/opa/pr/2005/May/05\\_crm\\_282.htm](http://www.justice.gov/opa/pr/2005/May/05_crm_282.htm).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

subsidiary of DPC was acting as an agent of the U.S. parent company and was therefore liable under the FCPA as a “domestic concern.”

<sup>107</sup> The prosecutor defined the doctors and hospital employees to be “foreign officials,” another assumption that was never challenged in court.

The DPC case is an excellent example of the type of prosecutorial discretion that is used to interpret the jurisdictional language of the FCPA on a unilateral basis.<sup>108</sup> Because DPC chose to plead guilty to the charges, rather than take the case to trial, there was no judicial scrutiny of whether prosecutors overstepped the jurisdictional bounds of the FCPA.<sup>109</sup> In fact, one of the few FCPA cases with judicial scrutiny suggests that allowing “agent liability” for foreign subsidiaries is not in accordance with the legislative intent of Congress.<sup>110</sup> Unlike the Vetco case, in which the subsidiary was headquartered in the United States, the DPC subsidiary was located in China where the corrupt activity occurred. There was no participation by the U.S.-based operations of DPC.

The 1998 amendments state that foreign nationals and corporations can be liable under the FCPA as long as activity furthering the corrupt payment occurred “while in the territory of the United States.”<sup>111</sup> Legal scholars interpret the language of the FCPA and its legislative history to indicate that the FCPA should be limited to acts committed in the United States.<sup>112</sup> Yet both Vetco and DPC decided to settle, and the prosecutorial scope was never subjected to review.

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<sup>107</sup> Lestelle, *supra* note 29, at 537.

<sup>108</sup> Marceau, *supra* note 81, at 294 (“The DPC enforcement action is perhaps the clearest example of the willingness of federal prosecutors to pursue criminal charges in cases where either jurisdiction, or liability, or both, is anything but obvious. That is to say, DPC is indicative of a growing body of enforcement actions featuring federal prosecutors willing to expend resources investigating and prosecuting corruption cases where the statutory authority for such prosecutions is, at best, strained”).

<sup>109</sup> Marceau, *supra* note 81, at 294.

<sup>110</sup> Marceau, *supra* note 81, at 295 (“Indeed, courts had concluded that permitting foreign subsidiary liability under the provisions of the FCPA allowing for ‘agent’ liability contravened the clear legislative history on the question of foreign entity liability. Congress had specifically considered extending liability to foreign entities and declined to do so.”).

<sup>111</sup> FCPA of 1998, *supra* note 38, § 78dd-2.

<sup>112</sup> Marceau, *supra* note 81, at 294–95. (“It is clear from both the plain text of amendments, and the legislative history that the exercise of independent jurisdiction over a foreign entity was limited to those situations where the foreign entity committed an act in furtherance of the bribe while in the United States.”).

### C. Uneven Outcomes for Prosecutions of Foreign Nationals

From the court's perspective, judges also have little precedent to use at trial. One of the most important functions of the separation of powers is that judges can signal to legislators when legal gaps in statutes exist.<sup>113</sup> In *United States v. Kozeny*, U.S. District Judge Shira Scheindlin, who sits in the Southern District of New York, became one of the few judges to preside over an FCPA trial.<sup>114</sup> In issuing her opinion, Scheindlin noted that there were "surprisingly few decisions throughout the country on the FCPA over the course of the last thirty years."<sup>115</sup> Since courts rely on the principle of stare decisis to establish the parameters of legal conduct, lack of precedent is a serious obstacle to interpretation. Companies often accept the enforcement agencies' statutory interpretations because they are unable to confirm if a court of law would agree.<sup>116</sup>

Ambiguities in the language of the FCPA and the dearth of precedent have made it difficult for individuals, like corporations, to weigh the risks of trial. Between 2005 and 2011, the DOJ charged 79 individuals with FCPA offenses, with the majority of charges occurring since 2008.<sup>117</sup> Both American citizens and foreigners are subject to prosecution. Prosecutors have broadly interpreted section 78dd-3 to pursue foreign actors whose bribery has merely had some "effect" on business with the United States.<sup>118</sup> A study found that sixty-two percent of DOJ cases charging individual criminal defendants with foreign bribery schemes in violation of the FCPA were resolved by guilty pleas.<sup>119</sup>

The difference in sentencing outcomes in the prosecution of the following three individuals—all foreigners—shows the effect of the "culture of settlement." The cases show that the severity of penalty corresponded to a defendant's willingness to accept the charges of the prosecutor.

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<sup>113</sup> Brooks, *supra* note 89, at 160.

<sup>114</sup> *U.S. v. Kozeny*, 493 F.Supp. 2d 693, 697 (S.D.N.Y. 2007).

<sup>115</sup> *Id.*

<sup>116</sup> Vega, *supra* note 72, at 443 ("Early settlement means similarly situated individuals and corporate defendants never get the opportunity to see if a court agrees with the regulators' reading of the statute.").

<sup>117</sup> Mike Koehler, *Individual DOJ Prosecutions by the Numbers*, FCPA PROFESSOR (Sept. 20, 2011), <http://www.fcpaprofessor.com/individual-doj-prosecutions-by-the-numbers> (noting that 1 individual was prosecuted in 2005, 6 individuals in 2006, 8 individuals in 2007, 12 individuals in 2008, 19 individuals in 2009, and 31 individuals in 2010, including 22 in Africa Sting Case).

<sup>118</sup> Lestelle, *supra* note 29, at 536.

<sup>119</sup> *2008 Mid-Year FCPA Update*, GIBSON DUNN PUBLICATIONS (July 7, 2008), <http://www.gibsondunn.com/Publications/Pages/2008-Mid-YearFCPAUpdate.aspx>.

Jeffrey Tesler was a British and Israeli citizen charged with facilitating corrupt conduct involving the large-scale, systematic bribery of Nigerian officials in exchange for engineering, procurement, and construction contracts at Bonny Island.<sup>120</sup> Tesler was charged under the FCPA on the basis of alleged emails that passed through American servers and money transferred through American bank accounts. The bribes lasted over ten years and the contracts were valued at more than \$6 billion.<sup>121</sup> Tesler chose to accept a plea and received 21 months in prison and two years supervised release.<sup>122</sup>

Canadian citizen Ousama Namaan was a former agent for global chemical manufacturer Innospec, a lead player in contract negotiations with the U.N. Oil for Food Program.<sup>123</sup> Between 2004 and 2008, Naaman was charged with offering more than \$6.8 million in bribes to Iraqi officials, earning himself \$2.7 million in commission on the contracts.<sup>124</sup> The company pleaded guilty to wire fraud charges as well as violating the FCPA.<sup>125</sup> Naaman also pled guilty, and was sentenced to 30 months in prison and ordered to pay a \$250,000 fine.<sup>126</sup> Although Naaman was not a U.S. citizen, the DOJ held that Naaman's actions fell within the scope of sections 78dd-1 and 78dd-3, since he sent emails concerning bribe payments through U.S. servers, and also sent improper payments through U.S.

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<sup>120</sup> Press Release, Dep't of Justice, Two UK Citizens Charged by United States with Bribing Nigerian Government Officials to Obtain Lucrative Contract as Part of KBR Joint Venture Scheme (Mar. 5, 2009), available at [http://www.justice.gov/criminal/pr/press\\_releases/2009/03/03-05-09tesler-charge.pdf](http://www.justice.gov/criminal/pr/press_releases/2009/03/03-05-09tesler-charge.pdf); Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 405 (2010).

<sup>121</sup> Wayne, *supra* note 73.

<sup>122</sup> Laura Brubaker Calkins, *Ex-KBR CEO Stanley Gets 2 1/2 Years in Prison for Foreign Bribes*, BLOOMBERG BUSINESS (Feb. 24, 2012), <http://www.bloomberg.com/news/2012-02-23/ex-kbr-ceo-albert-stanley-gets-30-month-prison-term-in-nigeria-bribe-case> (Albert "Jack" Stanley, an American citizen and former KBR CEO, was sentenced to 60 months in prison in addition to forfeiting an illicitly-gained sum of \$10.8 million. Wojciech Chodan, a former sales officer at KBR's UK subsidiary, was sentenced to 1 year of probation and a \$20,000 fine. The cooperation of the three men led to eight felony pleas, four Deferred-Prosecution agreements, and a total of \$1.7 billion in penalties.).

<sup>123</sup> Press Release, Dep't of Justice, Innospec Agent Pleads Guilty to Bribing Iraqi Officials and Paying Kickbacks Under the Oil for Food Program (June 25, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crm-747.html>.

<sup>124</sup> *Id.*

<sup>125</sup> Christopher M. Matthews, *Judge Sentences Former Innospec Agent To 30 Months*, WALL ST. J. BLOG (Dec. 22 2011), <http://blogs.wsj.com/corruption-currents/2011/12/22/judge-sentences-former-innospec-agent-to-30-months/>.

<sup>126</sup> *Id.*

bank accounts.<sup>127</sup>

Joel Esquenazi was president of Terra Communications, based in Miami, Florida. Esquenazi was charged with paying \$890,000 in bribes to shell companies, which then transferred the money to Communications D'Haiti ("Haiti Teleco").<sup>128</sup> In exchange for the bribes, Terra Communications received preferred telecommunications rates from Haiti Teleco. Esquenazi refused to accept a plea deal and defended his innocence at trial.<sup>129</sup> Esquenazi was convicted by a jury of FCPA violations<sup>130</sup> and was sentenced to fifteen years in prison—the longest criminal sentence ever handed down in an FCPA case.<sup>131</sup>

All three prosecutions reflect the growing willingness of the DOJ to prosecute individuals, including non-U.S. nationals, for business activity occurring primarily abroad.<sup>132</sup> The sentences also show a considerable variation in outcome. Jeffrey Tesler and Ousamaa Namaan both accepted plea agreements and received 21 and 30 months in prison, respectively. Esquenazi, however, made the decision to go to trial and received 15 years. But the Bonny Island bribery scheme and the Oil for Food Scandal were much larger in scope than the incident concerning Haiti Telecom. Bonny Island involved nearly \$6 billion-worth of bribes; Oil for Food

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<sup>127</sup> Koehler, *supra* note 4, at 405.

<sup>128</sup> Press Release, Dep't of Justice, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011), <http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html>.

<sup>129</sup> Mike Koehler, *Testing Innocence*, FCPA PROFESSOR (Feb. 27 2012), <http://www.fcpaprofessor.com/testing-innocence>.

<sup>130</sup> Press Release, Dep't of Justice, *supra* note 128 (A jury trial was brought before Judge Jose Martinez in the Southern District of Florida. The jury ultimately returned a guilty verdict on one count of conspiracy to violate the FCPA and wire fraud, seven counts of FCPA violations, one count of money laundering conspiracy, and twelve counts of money laundering).

<sup>131</sup> Press Release, Dep't of Justice, *supra* note 128 (Lanny Breuer, Assistant Attorney General: "This sentence – the longest sentence ever imposed in an FCPA case – is a stark reminder to executives that bribing government officials to secure business advantages is a serious crime with serious consequence."). Prior to Judge Martinez's sentence, the longest FCPA sentence was handed down to Charles Jumet in 2010. Jumet's sentence was 87 months. Mike Scarcella, *87-Month Prison Longest Ever in FCPA Prosecution*, BLOG LEGAL TIMES (Apr. 19, 2010), <http://legaltimes.typepad.com/blt/2010/04/87month-prison-sentence-longest-ever-in-fcpa-prosecution.html>.

<sup>132</sup> Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 759 (2011) ("The recently unsealed indictment of Ousama Naaman under provides an example of the enforcement agencies' use of the FCPA's expansive jurisdiction to reach non-U.S. nationals acting outside of the United States as agents of a U.S. issuer. Importantly, recent FCPA enforcement actions demonstrate the DOJ's willingness to prosecute U.S. companies and executives for business activity occurring entirely abroad despite U.S.-based personnel's lack of knowledge and participation.").

involved \$6.8 million; and Haiti Teleco involved only \$890,000. Tesler and Namaan received much shorter sentences for conduct that was more widespread and harmful.<sup>133</sup>

These sentences were so wildly divergent because Tesler and Namaan were willing to settle with the DOJ, while Esquenazi “tested [his] innocence.”<sup>134</sup> Cooperating in order to receive a lighter penalty is often a wise move, especially for FCPA violations.<sup>135</sup> Although plea bargaining can result in a lighter penalty than one imposed at trial,<sup>136</sup> the unique circumstances created by FCPA enforcement make pleas the accepted standard in individual prosecutions. The pervasive “culture of settlement” allowed the FCPA’s vague language to go unchallenged, a weakness that would prove problematic once subject to the rigors of the courtroom and judicial review.

As it stands, the DOJ can use the ambiguities of the FCPA to indict foreigners merely because some act associated with bribery—whether legal or illegal—“took place in the territory of the United States.”<sup>137</sup> Tweaking the language of section 78dd-3 could impact individual prosecutions by giving foreign defendants clear notice of the legality of their acts, whether in the United States or abroad. Although this change to statutory language will not resolve all the FCPA’s issues of jurisdiction, the lack of judicial review, or the “culture of settlement,” it can clarify expectations for foreign defendants charged under the FCPA who are willing to take their cases to trial. And as the Africa Sting cases show, sometimes foreign defendants are willing to take this risk and force the court to confront ambiguity in the statute.

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<sup>133</sup> Koehler, *supra* note 4.

<sup>134</sup> *Id.*

<sup>135</sup> Ellen Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 77–78 (2010) (“Our existing legal system places the risk of going to trial, and in some cases even being charged with a crime so high, that innocence and guilt no longer become the real considerations . . . [rather,] maneuvering the system to receive the least onerous consequences may ensure the best result for the accused party, regardless of innocence.”).

<sup>136</sup> *Id.*

<sup>137</sup> Mike Koehler, *A Q&A With Homer Moyer, Partner at Miller Chevalier*, FCPA PROFESSOR (May 24, 2011), <http://fcpaprofessor.blogspot.com/2011/05/q-with-homer-moyer.html> (Moyer argues that narrowing the jurisdiction of the FCPA can be considered an important priority: “To be sure, in enforcing the FCPA, the government tries to overreach from time to time—exercising anti-bribery jurisdiction over foreign subsidiaries and aggressive applications of dd-3 jurisdictional on the grounds that some step in the process took place “in the territory of the United States” come to mind as occasional examples”).



## IV. THE AFRICA STING TRIALS AND THE NEED FOR LEGISLATIVE REFORM

Past prosecutions of individuals have shown that there are strong benefits to accepting a plea agreement—and thus, to accepting prosecutorial interpretation of the FCPA. But what happened when the FCPA was exposed to comprehensive judicial review in trial? The Africa Sting Trials have been, to date, one of the only examples of a court's examination of the FCPA's jurisdictional scope, and they exposed ambiguities in the law and its enforcement. Section III.A will provide background on the Africa Sting Trials. Section III.B examines the first two trials, which offered conclusive rulings on the admissibility of evidence and jurisdiction of the FCPA. Section III.C analyzes the first ever ruling on section 78dd-3 of the FCPA. Section III.D proposes a modification of statutory language of section 78dd-3 that would restrict the jurisdiction of the FCPA in light of the Africa Sting decision.

A. *Background of the Africa Sting Trials*

The Africa Sting operations began when FBI agents posing as Gabonese government officials allegedly enticed executives in the defense contracting industry to participate in a bribery scheme. According to the FBI plan, the executives would pay a \$1.5 million bribe to the Gabonese defense minister in exchange for a \$15 million contract to provide body armor, weapons, and military gear to Gabon's National Guard.<sup>138</sup> No officials from Gabon were actually involved.<sup>139</sup> The primary sting operation was carried out at a trade gathering in Las Vegas, where federal agents arrested a total of twenty one businesspeople, mostly owners and executives of military-equipment companies.<sup>140</sup> Approximately 150 FBI agents

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<sup>138</sup> Christopher Matthews & Joe Palazzalo, *Jury Clears Two Businessmen in 'Sting' Case on Bribery*, WALL ST. J. (Jan. 31, 2012), <http://online.wsj.com/article/SB10001424052970203920204577193322932194432.html>.

<sup>139</sup> *Id.* The increasing frequency of FCPA prosecutions involving Africa is noteworthy. In 2008 and 2009, DOJ received nearly \$579 million in disgorgement penalties and fines for acts of bribery with foreign officials in Africa. The figures on the scope of Africa's economic loss due to corruption are staggering. Africa loses an estimated \$148 billion annually—25% of the continent's gross domestic product—through corruption. Ndiva Kofele-Kale, *Change or the Illusion of Change: The War Against Official Corruption in Africa*, 38 GEO. WASH. INT'L L. REV. 697, 728 (2006). A 2002 study by the African Union estimated that corruption costs the continent \$150 billion per year. Reagan Demas, *Moment Of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-Corruption Initiatives*, 26 AM. U. INT'L L. REV. 315, 322 (2011).

<sup>140</sup> Mayer Brown, *Legal Update, FCPA Sting Operation: 22 Arrested in US; Search Warrants Executed Simultaneously in US and UK* (January 21, 2010), <http://www.mayerbrown.com/publications/FCPA-Sting-Operation-22-Arrested-in-US->

compiled evidence, which included more than 5,000 taped phone calls, more than 800 hours of video and audio recordings, and 231 recordings of meetings between undercover agents and the defendants.<sup>141</sup> The DOJ called the Africa Sting Case “the largest single investigation and prosecution against individuals in the history of DOJ’s enforcement of the Foreign Corrupt Practices Act.”<sup>142</sup> After the defendants were indicted by a grand jury, three pleaded guilty; but the remainder refused to plead or settle. The case was removed to the U.S. District Court for the District of Columbia, and the defendants were split into four groups for trial.<sup>143</sup>

### *B. The Africa Sting Trials*

The first trial began in the summer of 2011. Twelve jurors from Washington D.C. were asked to determine the guilt of Pankesh Patel, John Benson Wier III, Andrew Bigelow, and Lee Allen Tolleson. These defendants, a diverse group of businesspeople in the arms industry, both U.S. citizens and foreigners, were charged with conspiracy to violate the FCPA, conspiracy to engage in money laundering, and substantive violations of the FCPA.<sup>144</sup> From the start, there were discouraging signs for the prosecution. The chief witness in the trial was Richard Bistrong, who introduced the FBI sting team to a number of the defendants. Bistrong had serious credibility problems because he had pleaded guilty—on unrelated charges—to one count of conspiracy to violate the FCPA in September of 2009. In the hope of receiving a lighter sentence, Bistrong helped to orchestrate the sting and implicate the defendants in a corrupt weapons deal.<sup>145</sup> Explicit text messages between Bistrong and FBI handlers surfaced during the trial, suggesting that FBI agents had difficulties establishing appropriate boundaries with Bistrong.<sup>146</sup> The presiding judge, Richard Leon,

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Search-Warrants-Executed-Simultaneously-in-US-and-UK-01-21-2010/.

<sup>141</sup> Richard Cassin, *DOJ Ends Africa Sting Prosecution*, FCPA BLOG (Feb. 12, 2012, 1:28 PM), <http://www.fcpablog.com/blog/2012/2/21/doj-ends-africa-sting-prosecution.html>.

<sup>142</sup> Press Release, Dep’t of Justice, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010), available at <http://www.justice.gov/opa/pr/twenty-two-executives-and-employees-military-and-law-enforcement-products-companies-charged>.

<sup>143</sup> Dan Margolies & Jeremy Pelofsky, *US Judge Doubts Single Conspiracy in Bribery Case*, REUTERS (Feb. 17, 2010, 6:40 PM), <http://www.reuters.com/article/2010/02/17/arms-bribery-idUSN1715506120100217?type=marketsNews>.

<sup>144</sup> Dep’t of Justice, *supra* note 142.

<sup>145</sup> Cassin, *supra* note 141.

<sup>146</sup> Paul Friedman & Demme Doufekias, *Most Severe Setback To DOJ Thus Far in*

believed the conspiratorial link between the defendants was tenuous. At a preliminary hearing, Judge Leon asserted: "I read all sixteen indictments, and I didn't see it. I have zero sense that there was an omnibus grand conspiracy."<sup>147</sup>

The prosecution also faced difficulty with its presentation of evidence at trial. The prosecution possessed video and audiotapes showing some of the defendants actively bribing actual foreign officials.<sup>148</sup> The prosecution argued that this evidence should be admitted under Federal Rule of Evidence 404(b) to demonstrate the defendants' knowledge and intent. This evidence would have shown that these defendants were "predisposed" to commit the crime and were not "manipulated" by the government informant.<sup>149</sup> Judge Leon deemed the evidence detailing "prior bad acts" inadmissible, including past schemes to make bribery payments for weapon contracts. Critics claimed that the government exercised little restraint in the type and quantity of evidence they sought to admit under Rule 404(b).<sup>150</sup> Critics also noted that the government cast too wide a net, selecting defendants without carefully ensuring that they had the requisite "predisposition" to commit the particular crime.<sup>151</sup>

After excluding crucial evidence from trial, Judge Leon ordered what is believed to be the first-ever judicial ruling on the jurisdictional scope of § 78dd-3 of the FCPA.<sup>152</sup> Prong 3 in § 78dd was added to the statute as part of the 1998 amendments. It applied to "persons other than issuers or domestic concerns" and required that an individual, "while in the territory" of the United States, make use of the mails or any means or instrumentality of interstate

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*FCPA Prosecutions: Judge Dismisses All Charges in Africa Sting Case*, MONDAQ (February 27, 2012), <http://www.mondaq.com/unitedstates/x/166392/White+Collar+Crime+Fraud/Most+Severe+Setback+To+DOJ+Thus+Far+In+FCPA+Prosecutions+Judge+Dismisses+All+Charges+In+Africa+Sting+Case>.

<sup>147</sup> Margolies & Pelofsky, *supra* note 143.

<sup>148</sup> Eric Bruce, Matthew Menchel & David McGill, *Inside the Africa Sting Trial: Anatomy of a Failed Prosecution*, FCPA PROFESSOR (July 23, 2012), <http://www.fcpaprofessor.com/category/fcpa-trials>.

<sup>149</sup> Michael Volkov, *Lessons Learned from the Africa Sting Case, Corruption Crime Compliance*, VOLKOV LAW GROUP (Apr. 18, 2012), <http://blog.volkovlaw.com/2012/04/lessons-learned-from-the-africa-sting-case/>.

<sup>150</sup> Bruce et al., *supra* note 148 ("Seeking to admit such a wide range of prior bad acts evidence pertaining to deals outside the U.S. was, in our view, a strategic misstep by the government.")

<sup>151</sup> Bruce et al., *supra* note 148.

<sup>152</sup> Mike Koehler, *2011 Foreign Corrupt Practices Act Year in Review: Scrutiny, Reform, and Individual Prosecutions are Key Issues*, WHITE COLLAR CRIME REPORT (Jan. 27, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1992616](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1992616).

commerce or do any other act in furtherance of a bribery scheme.<sup>153</sup> Defendant Pankesh Patel, a British citizen and executive at a weapons marketing firm, filed a *Fed. R. Crim. P. 29* acquittal motion to strike the FCPA charge premised on his dispatch of a package—containing the purchase agreement in furtherance of the alleged corrupt scheme—from the United Kingdom to the United States. The court granted this motion and dismissed the charge, calling the DOJ’s jurisdictional support “novel” and lacking in precedent.<sup>154</sup> The prosecution also faced difficulties relating to its selection of court.<sup>155</sup> Commentators have suggested that it might have been more advantageous to the prosecution to bring the case to trial in the U.S. District Court for the Eastern District of Virginia, whose juries have a more conservative reputation.<sup>156</sup> The first trial ended when the jury deadlocked, and Judge Leon declared a mistrial as to all remaining counts against Patel, Bigelow, Wier, and Tolleson.<sup>157</sup>

The second trial began several months later in September of 2011. The second group of defendants was R. Patrick Caldwell, John Mushriqui, Jeana Mushriqui, John Godsey, and Marc Morales.<sup>158</sup> The DOJ was determined to proceed with the case, but once again, had difficulty proving the elements of conspiracy. Judge Leon dismissed the conspiracy counts, noting that most of the evidence indicated that the defendants had not met or spoken with each other.<sup>159</sup> The jury was again skeptical about the credibility of Richard Bistrong.<sup>160</sup> This skepticism led the jury to acquit two defendants and deadlock on charges against the remaining three. Judge Leon declared a mistrial for the second time. In dismissing the indictments, he specifically referenced the “government’s very, very aggressive conspiracy theory,” which, “in the second trial . . . snapped in the absence of the necessary evidence to sustain it.”<sup>161</sup>

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<sup>153</sup> FCPA of 1998, *supra* note 38, at § 78dd-3(a).

<sup>154</sup> Koehler, *supra* note 152, at 6.

<sup>155</sup> Volkov, *supra* note 149 (“Any federal prosecutor who worked in the District of Columbia knows one thing – undercover “stings” are extremely difficult and unpopular in front of DC juries. . .”).

<sup>156</sup> Volkov, *supra* note 149.

<sup>157</sup> Bruce et al., *supra* note 148.

<sup>158</sup> Richard Cassin, *Africa Sting Trial: After Partial Verdict, Judge Sends Jury Back*, FCPA BLOG (Jan. 24, 2012, 2:30PM), <http://www.fcpablog.com/blog/2012/1/24/africa-sting-trial-after-partial-verdict-judge-sends-jury-ba.html#>.

<sup>159</sup> *Id.*

<sup>160</sup> Friedman & Doufekias, *supra* note 146 (The explicit text messages sent between Bistrong and the FBI prompted the foreman of the jury to comment publicly that the jury found the government’s witnesses to have little credibility.).

<sup>161</sup> Friedman & Doufekias, *supra* note 146.

In short, the state failed to prove conspiracy, relied on an untrustworthy witness, and presented the FBI agents in a poor light.<sup>162</sup>

### *C. Lessons Learned About Prosecutorial Discretion and Jurisdiction*

The third trial was slated to begin in March 2012, but, in February, the DOJ dropped the FCPA charges against the remaining defendants, and even dismissed the counts against the three individuals who had pleaded guilty.<sup>163</sup> The DOJ explained that, given the outcomes of the first two trials, the inadmissibility of evidence under Rule 404(b), and the large expenditure of public resources, it was not in the interest of the U.S. government to continue the trial.<sup>164</sup> Judge Leon offered perhaps the best summary of the Africa Sting Trials: "This appears to be the end of a long and sad chapter of white-collar criminal enforcement."<sup>165</sup>

The Africa Sting Trials are excellent examples of prosecutors' overconfidence regarding the outcomes of investigations before they happen. Eric Dubelier, a partner at Reed Smith and counsel to R. Patrick Caldwell in the second Africa Sting Trial, made two significant observations about the trial.<sup>166</sup> First, he noted that many of the problems were based in the sting operation itself, since the jury never heard the defendants formally agree to be involved in a

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<sup>162</sup> Mike Koehler, *Africa Sting – A "Long and Sad Chapter in the Annals of White Collar Criminal Enforcement*, CORPORATE COMPLIANCE INSIGHTS (Feb. 23, 2012), <http://www.corporatecomplianceinsights.com/africa-sting-a-long-and-sad-chapter-in-the-annals-of-white-collar-criminal-enforcement/>. (Michael Madigan, defense counsel in the second Africa sting trial, pithily summarized the weaknesses of the prosecution, noting that the DOJ was hamstrung by its "choice of a snitch (a despicable, dishonest 30-year cocaine addict and admitted thief of millions of dollars hidden in Swiss bank accounts from his prior employer), the 'it's all just a game' commentary from the agents who disrespected the rule of law, and the structuring of the 'sting' in its documents and taped conversations to make the Defendants think it was a legal transaction they were being asked to participate in. . .").

<sup>163</sup> CM Matthews, *Justice Dept. Drops FCPA Sting Case*, WALL ST. J. L. BLOG (Feb. 21, 2012), <http://blogs.wsj.com/law/2012/02/21/justice-dept-drops-fcpa-sting-case/>.

<sup>164</sup> Pl.'s Mot. to Dismiss, at 3, *U.S. v. Goncalves*, (2008) (Criminal No. 09-335). Mot. to Dismiss pursuant to Fed. R. Crim. P. 48(a), *U.S. v. Goncalves*, (2012) Criminal No. 09-335). See also Leslie Wayne, *Bribery Case Falls Apart, and Tactics are Doubted*, N.Y. TIMES (Feb. 23, 2012), [http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html?\\_r=0](http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html?_r=0) (The DOJ also pointed to the fact that its key informant, Richard Bistrong, admitted to using cocaine and hiring prostitutes.).

<sup>165</sup> Leslie Wayne, *Bribery Case Falls Apart, and Tactics are Doubted*, N.Y. TIMES (Feb. 23, 2012), [http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html?\\_r=0](http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html?_r=0).

<sup>166</sup> Telephone Interview with Eric Dubelier, Partner, Reed Smith (Oct. 19, 2012).

crime.<sup>167</sup> According to Dubelier, the failure of the Africa Sting Trials should motivate the government to change its tactics for future stings by being more careful and explicit when collecting evidence for trial.<sup>168</sup> Second, Dubelier stated that the prevailing practice of corporate settlement and voluntary disclosures affected the attitude of federal prosecutors.<sup>169</sup> In the Africa Sting Trials, the government was quite inflexible in terms of what it offered the defendants. Dubelier noted that “[t]he only deal they were offering was jail. There was no downside to trying the case.”<sup>170</sup> Individuals charged under the FCPA may find the prospect of trial more appealing now, especially when conspiracy cannot be proven and the jurisdictional link is tenuous.<sup>171</sup> Dubelier explained, “[t]he major problem in the Africa Sting Trials was that the government thought that everyone was going to plead guilty. . . . There has been a mindset in the [DOJ] Fraud Section that these individual prosecutions will all settle.”<sup>172</sup> When defendants decided to contest the charges in court, the government was not adequately prepared to try the case.

Most importantly, Judge Leon refused to accept the DOJ’s claims for jurisdiction and provided the first ruling to ever interpret section 78dd-3. Judge Leon ruled that the purchase agreement, sent by Pankesh Patel through the mail, did not qualify as a jurisdictional hook under section 78dd-3 of the FCPA.<sup>173</sup> Patel was a citizen of the United Kingdom and director of a British company that acted as a sales agent for companies in the military products industry.<sup>174</sup> Patel had flown from the United Kingdom to the United States, where he met with a fictitious official and received a purchase agreement. He then returned to the United Kingdom and sent a package, which contained the purchase agreement, via DHL back to the United States. The DOJ charged Patel under section 78dd-3 as “a ‘person’ other than an issuer or a domestic concern” who had, while in the territory of the United States, corruptly made use of the mails or any means or instrumentality of interstate commerce or to

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (“The government has been riding a wave of voluntary disclosures and corporate settlements.”).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Telephone Interview with Eric Dubelier, Partner, Reed Smith (Oct. 19, 2012).

<sup>173</sup> Mike Koehler, *Significant dd-3 Development in Africa Sting Case*, FCPA PROFESSOR (June 9, 2011, 12:08 EST), <http://fcpaprofessor.blogspot.com/2011/06/significant-dd-3-development-in-africa.html>.

<sup>174</sup> *Id.*

do any other act in furtherance of an offer, payment, etc.<sup>175</sup>

One question before the Court was whether Patel had committed an illegal act by mailing the package from the United Kingdom. Patel's attorney, Eric Bruce, argued that, according to the provisions of section 78dd-3, Patel could only be charged for illegal activity that he committed in the United States. Bruce stated, "[h]e's a U.K. citizen, operating a U.K. company, he's not a domestic concern under the statute, he can only be liable under the FCPA statute for conduct 'while in the territory of the United States.' And that's required by statute. That's their sort of jurisdictional hook on him."<sup>176</sup> Bruce maintained that Patel had done nothing illegal in the United States. He had completed the corrupt deal only from the United Kingdom. Bruce explained, "[s]o literally they've charged him with being in London and dropping a DHL package in the mail as a substantive FCPA violation, while the statute very clearly requires that he can only be liable for something while in the territory of the United States."<sup>177</sup> According to Bruce's interpretation of section 78dd-3, an illegal act had to be taken while a foreigner was in the United States in order for such person to be charged with an FCPA violation.

Joseph Lipton ("Lipton"), the DOJ attorney, offered a very different interpretation. He argued that Patel did not need to commit an illegal act while in the territory of the United States; he just needed to commit any act. Lipton explained that Patel, as a U.K. citizen, "actually has to do less than a U.S. citizen really, because a U.S. citizen has to make use of the mails or interstate commerce. And Mr. Patel just has to take an act, any act, while he's in the United States. *Doesn't have to be an illegal act, doesn't have to be anything related to the deal going forward.*"<sup>178</sup> Lipton then went on to argue that although Patel had not done anything illegal in the United States, his act was part of the bribery scheme. Lipton noted:

He has to take any act in the United States, which he clearly does. First of all, he flies over from the U.K. to the United States, which we established through his travel records. And then he meets with the fictitious official and receives a purchase agreement. He then later takes that purchase agreement and sends it back.<sup>179</sup>

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<sup>175</sup> Indictment at ¶¶ 2, 7, United States v. Patel (D.D.C. Dec. 11, 2009) (No. 1:09-cr-00338-RJL).

<sup>176</sup> Transcript of Record at 7, United States v. Patel (D.D.C., June 6, 2011) (No. 09-0335).

<sup>177</sup> *Id.* at 7-8 (emphasis added).

<sup>178</sup> *Id.* at 8.

<sup>179</sup> *Id.* at 8-9.

Lipton claimed, “you don’t have to prove all of the elements of the offense while he’s in the United States . . . . He just has to take an act while he’s in the United States. He did take an act.”<sup>180</sup>

Judge Leon, however, was not comfortable with Lipton’s reasoning and asked him to clarify the DOJ’s position. Judge Leon urged:

Help me understand why it doesn’t have to be an act while in the territory of the United States for Count 3, whereas Count 2 [a substantive FCPA offense against Patel based on his attendance at a Washington D.C. meeting to discuss the allegedly corrupt deal], sounds like you admit that that’s the case in Count 2. In Count 3, I think your rationale is since he’s already taken one act within the United States, the subsequent act of mailing doesn’t have to be within the United States, right?<sup>181</sup>

Lipton replied, “Correct, Judge.”<sup>182</sup> Judge Leon, however, did not accept Lipton’s argument and sought authority for Lipton’s claim that *any* act taken within the United States was sufficient to prove bribery committed outside the United States. The following exchange ensued:

Judge Leon: Has the Supreme Court said that?

Lipton: Judge, no.

Judge Leon: Has the D.C. Circuit said that?

Lipton: No.

Judge Leon: How about the Second Circuit, where you used to prosecute?

Lipton: Judge, there’s not a lot of case law on the FCPA, as Your Honor I think is well aware.

Judge Leon: So is this a novel interpretation you want me to take?<sup>183</sup>

The exchange underscored the lack of case law pertaining to the FCPA. Judge Leon, unwilling to accept Lipton’s broad interpretation, noted, “I would think the more cautious, conservative interpretation would be that each act has to be while in the territory of the United States, wouldn’t it?”<sup>184</sup> Bruce, Patel’s attorney, then responded to Lipton’s claim as follows:

The statute plainly requires, Your Honor, that while in the territory of the United States he has to corruptly make use of the mails or any means or instrumentality of interstate commerce or do any act in furtherance of an offer, payment, promise to pay or authorization. It’s clear as day.<sup>185</sup>

Judge Leon, in the first judicial ruling on section 78dd-3,

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<sup>180</sup> *Id.* at 9.

<sup>181</sup> *Id.*

<sup>182</sup> Transcript of Record at 10, *United States v. Patel* (D.D.C., June 6, 2011) (No. 09-0335).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 11.

<sup>185</sup> *Id.*



granted Patel's motion for acquittal.<sup>186</sup>

*D. Reforming the Language of FCPA Section 78dd-3*

In his decision to acquit Patel, Judge Leon substantially narrowed the jurisdictional hook of section 78dd-3. Judge Leon's ruling implied that a defendant charged under this statute must commit, while in the United States, an illegal act of bribery, not simply "any act." Yet Judge Leon only issued an oral decision from the bench; he did not offer a written interpretation of section 78dd-3. The fact that Bruce and Lipton could propose such widely divergent interpretations of section 78dd-3 suggests that the language of the statute is still in need of clarification. A slight modification of the language of section 78dd-3 is needed to reconcile these varying interpretations. Such a change would be a small step toward addressing larger problems involving the lack of judicial review, vague statutory language, and the "culture of settlement" that results.

In order to be charged under the FCPA, a foreign citizen must satisfy two conditions: first, he must commit an act while in the territory of the United States and second, he must "corruptly" make use of either the U.S. mails *or* interstate commerce *or* do any other act in furtherance of an offer, etc.<sup>187</sup> Lipton made a critical mistake in failing to argue that Patel's act in the United States, while not illegal on its own, was *in furtherance* of the bribery scheme. A reasonable case could have been made that most bribery schemes unfold in stages, and that, although Patel's act in the United States was not itself illegal, it was "in furtherance" of an illegal scheme. However, Lipton chose to make a more sweeping argument. Judge Leon's exchange with Lipton and his subsequent decision to acquit Patel suggest that he interpreted the language of section 78dd-3 to mean that foreigners must commit an illegal act in the U.S in order to be held in violation of the FCPA.

Yet Judge Leon's decision does not completely dispel the reigning confusion. The language "any other act in furtherance of an offer" still retains unduly wide latitude for interpretation. "In furtherance" continues to make section 78dd-3 open to future readings that the act taken does not need to be illegal, but only needs to further an illegal scheme. This Article suggests that the language of section 78dd-3 could be clarified to read:

It shall be unlawful for any person other than an issuer or domestic

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<sup>186</sup> Koehler, *supra* note 173.

<sup>187</sup> FCPA of 1998, *supra* note 48.

concern, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other corrupt act relating to an offer, payment, promise to pay, etc.

By removing “in furtherance” and clarifying that “any other act” must also be corrupt, the statute would make clear that any act in furtherance of bribery on U.S. soil does not necessarily constitute a violation of the FCPA. This change would make it possible to delineate the illegal elements of a bribery scheme that might unfold in stages, involving both illegal and legal acts. It would provide the DOJ with a clearer mandate for prosecution and create greater transparency in the law. Most importantly, it would clarify jurisdiction and limit the ability of the DOJ to conduct overly broad prosecutions of foreigners who have committed no illegal acts on U.S. soil.

Although a small change to statutory language cannot solve the entire problem involving the FCPA’s vague language on jurisdiction, the lack of judicial review, and the “culture of settlement,” it can clarify expectations for foreign defendants charged under the FCPA who are willing to take their cases to trial. This subtle modification of the statutory language could impact individual prosecutions—like those associated with Bonny Island, Oil for Food, and Haiti Telecom—by giving foreign defendants clear notice regarding the legality of their acts, whether in the United States or abroad. The outcomes of the three individual prosecutions discussed above may not have come out differently as a result of this statutory modification, but the defendants would undoubtedly have had a clearer picture of their odds at trial. As it stands, the DOJ can use the ambiguities of the FCPA to indict foreigners merely because some act associated with bribery—whether legal or illegal—“took place in the territory of the United States.”<sup>188</sup> This suggested modification to statutory language would help to clarify jurisdiction and address problems created by the FCPA’s “culture of settlement.”

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<sup>188</sup> A Q&A with Homer Moyer, FCPA PROFESSOR (May 24, 2011), <http://www.fcpaprofessor.com/a-qa-with-homer-moyer>. (Moyer argues that narrowing the jurisdiction of the FCPA can be considered an important priority: “To be sure, in enforcing the FCPA, the government tries to overreach from time to time—exercising anti-bribery jurisdiction over foreign subsidiaries and aggressive applications of dd-3 jurisdictional on the grounds that some step in the process took place ‘in the territory of the United States’ come to mind as occasional examples.”).

## V. CONCLUSION

Between 1977, when the FCPA was enacted, and 2003, when the DOJ began to increase prosecutions, almost no cases went to trial. The FCPA was largely unenforced. After 2003, the DOJ began to prosecute more vigorously, but almost all cases were resolved through settlement routes: DPAs, NPAs, and plea agreements. If the FCPA is to remain a strong tool in combatting bribery, it must be subject to judicial review. A body of precedent must be established that both defense and prosecution attorneys can reference. The language of the act should be clarified. Phrases such as “foreign official,” “obtaining and retaining business for or with, or directing business to any person,” and “any other act in furtherance of an offer” will need further definition through the courts. This Article suggests one change in language that can serve to make the law clearer.

The FCPA has successfully spread awareness that corruption is an unacceptable way of doing business, but it has also overreached by limiting the right of other countries to regulate their own citizens’ business conduct. As the Supreme Court recognized in *Microsoft Corp. v. AT&T Corp.*: “United States law governs domestically but does not rule the world.”<sup>189</sup> Extraterritorial FCPA enforcement against foreign companies or individuals for actions taken outside the United States neglects the Supreme Court’s admonitions and may also prove short sighted in achieving the ultimate goal of eliminating corruption and bribery in an increasingly global, integrated world economy. The state’s loss in the African Sting Trials may in fact prove to be the law’s gain, encouraging corporations, individuals, judges, and the DOJ to begin the long overdue process of judicial review of the FCPA.

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<sup>189</sup> *United States v. Microsoft*, 550 U.S. 437, 454–55 (2007). The court refused to apply U.S. patent law to an infringement based claim based on software code created in the U.S. but installed by a foreign manufacturer in a computer made overseas. The court noted the distinction in enforcing U.S. law at home and abroad “applies with particular force in patent law.” *Id.* at 455.