I. INTRODUCTION

The Foreign Corrupt Practices Act (FCPA) is the common name for an American law that aims at curbing corruption of public officials around the globe.\(^1\) The law was the first time a state sought to punish it’s own citizens for bribing officials of a foreign government entity rather than the traditional restriction that the bribed governmental agencies must be under the umbrella of control the government enforcing the law.\(^2\) Exceedingly broad in both its scope and its jurisdictional reach, prosecution of offenders of the FCPA has the intended affect of promoting more efficient capitalism. The underlying economic theory is that bribery reallocates resources away from innovation and efficiency to bribery, and the end result is that the consumer gets the product or service that is most beneficial to the agent able to extract the bribe money rather than the product that is most beneficial to the consumer.\(^3\)

\(^2\) Todd Swanson, Greasing the Wheels: British Deficiencies in Relation to American Clarity in International Anti-Corruption Law, 35 GA. J. INT’L. & COMP. L. 397, 403 (2007).
While there are many questions surrounding the FCPA—the constitutional validity of its extensive jurisdiction, and international fairness of the extradition policies between nations, as two examples—this paper seeks to address a single specific point. Americans are very particular about who—both as a natural person and as a legal person in corporate or other form—can be involved in the arena of electoral speech. The United States Federal Election Commission has very strict rules and guidelines to govern who can participate in our elections; this prevents both foreign control of governmental positions, both perceived and actual, and, like all campaign finance laws, is geared toward eliminating both the appearance and existence of bribery. From the perspective of a foreign national attempting to bribe a US official vis-à-vis electoral financing and contributions, a nation need not police it’s citizens on what does and does not constitute bribery; the United States laws are protective of our own democracy and prevent this. The question is, however, how protective ought the United States be of democracies that do not protect themselves? That is, were it legal in the laws of a foreign nation for a foreign entity to contribute and influence elections by way of advertising or donating to campaigns, ought the United States allow it under the FCPA and, if not, is it suggestive that the US should remove it’s own restrictions? If we ought to
ban this type of influence where it is allowed by the foreign nation, is it something that ought to be banned more clearly by international agreements? This paper takes the position that the FCPA can and should used as a tool to promote free and fair democratic elections around the globe. Further, in order to ensure such compliance the unique pre-check portion of the FCPA should be a required step when any activity in a foreign nation may be seen as having the purpose or effect of influencing local democratic elections.

The paper unfolds in three parts. The next section will provide separate backgrounds of both corruption and elections. The portion on corruption will provide the political background for the adoption of FCPA and the international response; it will also describe the nature and extent of the FCPA in its current application. The portion on elections will provide a brief primer as to why their role in corruption is so important and a description of the restrictions on foreign nationals in the United States. The following section will detail two cases that have involved foreign influence on elections to draw out lessons for going forward as well as provide concrete evidence that the problem exists. Lastly, the paper will present a brief proposal to ensure that elections abroad remain as democratic and free from undue foreign influence as our own; viz., to put the
United States in a position to be the beacon and harbinger of democracy it so often claims to be.

II. BACKGROUND

A. Corruption and the FCPA

The FCPA stemmed from the infamous Watergate Scandal that rocked the United States during the Presidency of Richard Nixon in the early 1970s. The United States had recently passed a new act, the Election Campaign Act of 1971, which was designed to change the way that campaign money was accounted for and provide increased transparency in campaign finance. After a report that some $25,000 had been diverted from the Nixon campaign coffers to the account of a man who had burglarized the National Democratic Committee—the head offices of Nixon’s opposition party—congress began an audit of the Committee to Re-Elect the President, an organization the recipient of the funds had been a part of and which through some sense of cosmic irony had a tailor-made for journalism acronym: CREEP.⁴

⁴ Peter W. Schroth, The United States and the International Bribery Conventions, 50 AM. J. COMP. L. 593, 594 (2002). The United States wasn’t the only country to have corruption issues lead to campaign and electoral reforms. Both Italy and Japan reorganized their system of representation in the later half of the 20th century in response to corruption from political contributions. Philip M. Nichols, The Myth of Anti-Bribery Laws as Transnational Intrusion, 33 CORNELL INT’L L. J. 627, 639 (2000).
While Nixon managed to postpone much of the backlash of the investigations until after his landslide 520 to 17 electoral college reelection to the presidency, the hounds of justice were on the hunt for corruption and they would ultimately find more than they could have at first imagined. The trial of corruption ended up revealing much more than domestic misuse of campaign funds; uncovered were money laundering schemes in Mexico and a stunning and serious admission of bribery by US corporations. All told, there were over 400 American corporations that confessed to the Securities and Exchange Commission that they had been engaged in foreign bribery schemes. Bribes were as far ranged global as possible: Ghana, Iran, Honduras, Venezuela, Algeria, Italy, the Netherlands and South Korea among many others. The level of officials was as equally as broad and impressive: Japanese Prime Minister Kakuei, Italian President Giovanni Leone, the ruling political party of South Korea, Prince Bernhard of the Netherlands. Of the Forbes Fortune 500, 177 had voluntarily admitted to bribery including Gulf Oil, Bell Helicopter, Exxon and the largest American defense contractor, Lockheed Aircraft, which had given over $1 million to the Prince of the Netherlands, who was the Inspector

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5 Id.
6 Id. at 595.
General of the Dutch Armed Forces, in order to secure contracts for fighter aircraft.\(^7\)

The United States Senate took immediate action and demanded that an international code of conduct be established to prevent such corruption and the job was tasked to the various US diplomats involved in the bodies that made international law. Unfortunately, much of the response from international organizations lacked the teeth necessary to accomplish any real change and amounted in large part to nothing more than political posturing. Indeed, while the language was strong, even the United Nations General Assembly Resolution at the time was nothing more than sweeping declarations coupled with nothing in the manner of enforcement or punishment for those who continued corrupt practices.\(^8\)

The United States acted swiftly, and unilaterally, in an effort to curb corruption. In December of 1977, less than three years after the Senate had pressured US diplomats to get an international response, President Carter signed the Foreign Corrupt Practices Act into law in an effort to show the world community the seriousness with which the United States viewed the global problem of corruption. The act forbade any US person or company from using any

\(^7\) Id.

\(^8\) Id. at 596.
“instrumentality of interstate commerce . . . in furtherance of [payment] . . . to any foreign official for purpose of [] influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions . . . [or] inducing such foreign official to use his influence with a foreign government . . . to influence any act or decision of such government.”


Other provisions prevented the same to political parties and political candidates and made it illegal to use a third party to make the payments or operate under a “don’t ask, don’t tell” policy with those whom the corporation gave money to in order to secure foreign business.\(^9\) Corruption as a legitimate means of business practice for those whom the long arm of the Foreign Corrupt Practices Act could reach was over.

Perhaps because the drafters realized it would be naïve to expect an overnight change in the way business was done, a pre-check provision was established as part of the law. Under this provision, companies contemplating certain action can request that the Department of Justice review the actions which they intend to take. Within thirty days, the

Justice Department responds with an advisory opinion. If the opinion clears the conduct, it creates a rebuttal presumption that conduct is legal and, unless the circumstances were either not fully disclosed or have changed since the time of the pre-check, actions under the FCPA are incredibly unlikely to be successful.

This created an economic playing field where companies subject to the FCPA were disadvantaged because they were required to compete against foreign entities that were, essentially, free to use improper influence and bribery to gain contracts. The societal benefits of capitalism were losing to the personal benefits of cronyism, and American businesses were the biggest losers. It wasn’t until the Clinton administration made it a key issue the United States was able to pressure the international community to level this playing field. It ultimately paid of with the Organization of Economic Cooperation and Development producing recommendations about anti-bribery conventions. Ultimately, the conventions multi-national ratification created a system of statues in the signatory countries that established

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anti-bribery laws. While the laws run a broad spectrum of enforcement and clarity and the United States FCPA remained both stricter and clearer than the OECD Convention, the United States still took the occasion to strengthen the FCPA by expanding its jurisdiction to questionably constitutional lengths.\textsuperscript{12} While the OECD Convention isn’t the only multi-national convention on corruption, its development is a good indicator of the United States’ leading role in stamping out foreign corruption and the reluctance of other nations to follow suit.

The OECD is also important because it led the United States to further expand the jurisdictional reach of the FCPA to have perhaps the longest of long-arm statutes. While the detailed financial details of the transactions are beyond the scope of this brief discussion on the FCPA’s long arm provisions, the crucial facts are thus: in 2003 three employees of a British owned corporation who lived and worked solely in England were ultimately extradited to the United States despite no harm having ever occurred to a US company in their dealings.\textsuperscript{13} In fact, the harm was

\textsuperscript{12} Peter W. Schroth, The United States and the International Bribery Conventions, 50 AM. J. COMP. L. 593, 614 (2002).

mostly absorbed and inflicted on a bank in the United Kingdom, NatWest. The legality of the move ultimately went un-adjudicated in the courts as they made plea bargains with the United States.¹⁴ Many people suggest the three did this largely influenced by a desire for closure and to avoid the dogged prosecution and ruthless prosecution—some suggest the suicide of a high ranking European bank official was caused by FBI investigations—rather than belief in their guilt for the crimes.¹⁵

The case of the so-called NatWest Three is only one instance of the increasingly ruthless nature of FCPA prosecution. There are others that show this trend that need not be mentioned here, including others related to the idea of broad implications of jurisdiction or extradition and those that allow the implication of players in the scheme that are several passes removed from the ultimate bribery. Ultimately, the FCPA was not only the first law to punish domestic persons for bribing foreign nationals, it is also the most aggressively pursued and continues to set the upper boundary of government prosecution of foreign corruption. As such, it should be used as a tool to

vigorously advocate and support proper and free democratic elections in developing democracies.

B. Elections: Can Foreigners Donate Funds and Why Do They Need so Much Money Anyhow?

In a developed democracy elections are big business, even if the money spent doesn’t translate to the magnitude or type of turnout that was the hope of the founding of the philosophy of democracy. OpenSecrets.org, a respected watchdog of campaign spending in the United States, reports that over a billion dollars was spent by the top two candidates in the 2008 general election, a staggering amount that doesn’t include a wide range of periphery spending by other entities such as political action committees.\(^{16}\)

Even local senate races attract large sums of money; the January 13\(^{th}\), 2010 reporting of the Illinois Senate candidates lists over $8.2 million raised already.\(^{17}\)

With the history of Illinois politics, it’s easy for an observer to think that some of that money required to be competitive in an election comes with expectations of favors in return—particularly if you

\(^{16}\) Banking on Becoming President, OpenSecrets.org at http://www.opensecrets.org/pres08/index.php.
have, in the immortal words of Rod Blagojevich, something to offer that is “F—ing golden.”\(^\text{18}\)

The Blagojevich example is noted because with all of the money in elections and all of the power being brokered, there is not just the chance for corruption but the actual appearance of it. More importantly, however—and despite what the populous may think about the prevalence of corruption beyond that prosecuted—the United States has proved effective in uncovering and punishing corruption, even when the allegedly corrupt person or party wins the election. This has been true since the Nixon reelection and has continued to the most recent election of Barack Obama, though the latter has yet to fully play out in the courts and media.

As part of the United States attempts to prevent foreign influence and corruption in our elections, strict rules have been placed on ways in which foreigners can participate in elections.\(^\text{19}\) They prevent any foreign national from providing funds for any state, local or federal election and for any caucus to


\(^{19}\) There are, obviously, many reasons to require certain levels of citizenship for various activities. For the purposes of this paper, the presumption that corruption is a reason is taken *arguendo*. Even where it no part of the reasoning for the US regulations, this would not be detrimental to the reasoning behind enacting similar laws on American participation in foreign elections.
elect candidates for such elections. Foreign corporations and domestic subsidies of foreign corporations are prohibited from participating in Political Action Committees—a type of entity often created in the United States to promote a specific candidate or type of candidate often referred to as PACs. On top of direct monetary contributions, foreign nationals are also prohibited from acting as directors of PACs nor can they participate in the selection of persons who operate a PAC. Foreign nationals can volunteer to help campaigns as long as they aren’t compensated, but FEC Advisory Opinion 1981-51 stated that this does not extend to persons who create something of unique value for a political campaign—in this instance, an artist’s creations that were to be sold to raise funds. Ultimately, foreign participation in elections is limited to individuals who wish to volunteer their time and services in a completely uncompensated manner.

III. TWO EXAMPLES OF CROSS-BORDER ELECTION INFLUENCE

There are plenty of instances in which election influence has extended across borders. For the purposes of this paper, two different instances will be discussed. The first for its proper approach to dealing with potential exertion of influence in

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21 Id.
elections abroad; the second is mentioned for the opposite reasons and is indicative of the type of fraud that the United States could help eliminate by combining the long arm of the FCPA with stricter standards on foreign election contribution.

A. Ransom F. Shoup & Company 22

Ransom F. Shoup & Company (Shoup Co.) was a Pennsylvania corporation that was involved in the voting machine business. In the course of their operations, they came upon an opportunity to contract with the Federal Election Commission of Nigeria to sell voting machines for their elections. As part of the course of business that led to this contract, Shoup Co. wanted to know if they would be able to pay a 1% finders fee to a Mr. Ogirri, a clerk at the Nigerian Consulate in the United States.

Mr. Ogirri represented that no portion of the payments would be made to government officials and that no portion of the money was being paid for him to exert undue influence on any Nigerian official; in furtherance of this claim, it was established that he had no business or familial relationships with the Election Commission. Instead, the fee was part of a contract under which Mr. Ogirri would provide Shoup Co. with information on Nigerian customs and practices, introduce the Shoup Co. executives to

22 United States Department of Justice, Review Procedure Release 82-02.
relevant business persons in Nigeria who could assist Shoup Co. in the management of business in Nigeria; duties that were in no way connected to his duties at the Consulate.

In accordance with the FCPA, the parties submitted all of the facts pertaining to the relationship and asked for the Department of Justice to issue a formal letter advising them as to whether or not the action would violate the FCPA. In response, the Department of Justice authored and delivered Review Procedure Release 82-02 which restated the relevant facts and concluded that there was no improper behavior on behalf of any of the parties involved. This is model corporate behavior; Shoup Co. was upfront, informed the Department of Justice of their contacts and intentions and were given the government’s blessing that they were not exerting undue influence over a foreign government official under the rules of the FCPA.

B. Titan Corp. & Steve Lynwood

Titan Corp. was a United States defense contractor that obtained the rights to build a wireless telephone system in Benin, a small west-African nation between Togo and Nigeria. Steve Lynwood Head was an employee of Titan Corp. that was in charge

of their business activities in Benin and eventually became the head of Titan Africa, a separately incorporated entity that was largely correlated with Titan Corp. Benin required that part of the profits that Titan made were provided to the government as subsidies, or social payments, for the development of certain economic sectors in the country.

Eventually, Steve Lynwood Head began to suspect and later had knowledge that payments would be going toward the reelection of the Benin president who had approved the contract. The payments continued because Titan Corp. had a vested interest in the reelection as it would ensure there continued contracts with the country. The SEC alleged that in an attempt to hide the payments, Titan Corp. falsified documents for consulting services. The fees for these services were made through the business advisor to the President of Benin and were funneled to the reelection efforts.

Titan eventually plead guilty to three felonies under the FCPA and was required to pay a combined civil and criminal fine of $28.5 million, the largest in the history of FCPA enforcement. In addition, Benin agreed to stricter auditing from outside of the company to ensure future compliance. Head was sentenced to a brief term in prison and was fined $5,000 dollars for his part in the scheme.

Well it is overly simplistic and idealistic to suggest that the Benin government and the president’s
business advisor would have simply backed down on the $2 million in campaign contributions had Head or Titan Corp. requested the payment process be vetted by the Department of Justice to ensure it wasn’t undue influence, with the legal precedent on the books suggesting the very severe nature that such transactions will be treated by the US Government one can hope that in the future it will become easier for companies to explain to foreign officials why they must seek such preclearance for potentially uncouth transactions. The threat of imprisonment of those who aid in the process should also serve to encourage those responsible from the corporate side to stand their ground in requesting preclearance with potentially risky foreign deals.

IV. CONCLUSION

The United States has made clear its willingness to utilize the FCPA to root out corruption even in instances where the parties have very tenuous connections to the United States and none of the aggrieved parties are American. The extent to which the United States reaches with the FCPA to root out corruption should be leveraged to prevent election fraud in developing democracies that may not have the most sophisticated structures in place for allowing citizens and the media to monitor and approve of election practices.
In order to do this, the FCPA should be amended to require pre-approval by the Department of Justice for any corporation or person subject to the FCPA jurisdiction where government contracts or donations to foreign political organizations are concerned. There should, of course, be caveats to that to ensure that the FCPA isn’t an overly broad intrusion on functional democracies. The Department of Justice should establish a list of democratic countries that have a proven track record of responsible electoral financing policies and a proven track record of enforcing those policies. Because of the importance of elections to the democratic structure, the United States should not allow the affirmative defense of legality in a foreign country to be used in instances of foreign campaign finance fraud. Instead, any person or corporation subject to the FCPA should be required to meet the heightened standards of the US campaign finance system as it would apply where the candidate in question a federal candidate in the United States.

Simply put, the FCPA has the ability to help secure democratic elections in foreign nations by providing for civil and criminal punishment for those persons and corporations who seek to unduly influence foreign elections—even if the person is neither a US national nor harms US interests in the process. This is currently an unexplored and unutilized system for the global protection of democracy, and it is a system
that the United States should exploit to the fullest extent to increase its position as a protector of international democracy.