Enforcing the FCPA: Domestic Strategies and International Resonance

The Foreign Corrupt Practices Act ("FCPA"), which bans corporations from offering bribes to foreign government officials, was enacted during the Watergate era's crackdown on political corruption but remained only weakly enforced for its first two decades. American industry argued that the law created an uneven playing field in global commerce, which made robust enforcement politically unpopular. This Article documents how the executive branch strategically under- enforced the FCPA, while Congress and the President pushed for an international agreement that would bind other countries to rules similar to those of the United States. The Article establishes that U.S. officials ramped up enforcement only after the United States successfully concluded the Organisation for Economic Co-operation and Development ("OECD") Anti-Bribery Convention in 1997, twenty years after the enactment of the FCPA. Afterward, U.S. officials, desiring to maintain industry support for the FCPA, prosecuted both foreign and domestic corporations, thereby minimizing the statute's competitive costs for American companies.

This Article argues that the OECD Convention was critical to the dramatic expansion of FCPA enforcement because it allowed American prosecutors to adopt an "international-competitionneutral" enforcement strategy, investigating domestic corporations and their foreign rivals alike. The existence of the treaty was decisive because it established anti-bribery as a binding legal principle and legitimized U.S. prosecutions of foreign corporations. Today, seven of the ten highest FCPA penalties have been against foreign corporations.

This Article advocates, on a theoretical level, for a reevaluation of the multidirectional relationship between international and domestic law in transnational issue areas, such as foreign bribery. National laws are most often viewed as self-contained legal rules that develop or decline based on domestic officials' policy decisions. The evolution of the FCPA, however, demonstrates that some statutes may require "international resonance" to be meaningfully enforced: a domestic statute can create pressure for national leaders to conclude an international agreement, and then that agreement provides the means for the national law to develop into a robust national policy. As this Article establishes, the OECD Convention owed its existence to the FCPA and, in turn, the FCPA owes much of its development and strength to the OECD Convention. A greater appreciation for international resonance's feedback mechanisms is essential to understanding national enforcement of a wide range of transnational commercial, financial, and environmental statutes.