

**TOUGH ON CRIME? A COMPARATIVE ANALYSIS OF BRIBERY
STATUTES IN MEXICO AND THE UNITED STATES AND THEIR
PROSECUTION IN THE FIGHT AGAINST PUBLIC OFFICIAL
BRIBERY**

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I. INTRODUCTION

Prosecutors, judges, and politicians from around the world consistently comment on their desire to be tough on crime.¹ This has led to an increase in penalties and a narrowing of judicial discretion.² However, this same attitude is traditionally not extended to white-collar crimes, including bribery. Although there are fewer bribery crimes involving large sums of money, these crimes still have the potential to devastate communities.³ There is a growing trend around the world to view bribery not as a quirk in political systems, but rather as a harmful endemic that threatens democracy.⁴ Public corruption has the potential to create public cynicism, lack of government transparency, and a decline in political morality.⁵

There has not been substantial focus placed upon public-official bribery in legal scholarship.⁶ This is sometimes justified by the argument that occurrences of bribery and the prosecution of bribery are rare, but they are not.⁷ Although bribery was much more common in the past, especially in the 1970s, it has become less frequent due to an increase in global pressure to root out the practice.⁸ Efforts have been made by the United States, the European Union, the African Union, and others, to root out corruption.⁹ Anti-corruption statutes commonly differ in their specific approaches, but they all seek to establish prosecutorial guidelines to aid in rooting out corrupt public officials. This Note will examine sentencing guidelines within the codified laws of the United States and Mexico, and how they are implemented in order to determine whether lax enforcement of codified laws could be a contributing factor of increased public-official bribery.

¹ See generally *The Marshall Project*, “Tough on Crime”, *Politics*, THE RECORD, <https://www.themarshallproject.org/> (last visited Nov. 2, 2018).

² Judge K.L. McIff, *Getting Smart As Well As Tough on Crime*, 11 Nov., UTAH B. J., 41, 41 (1998).

³ See generally Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 L. & CONTEMP. PROBS. 53, 53 (2013) (citing that “crimes involving fraud, deceit, theft, embezzlement, insider trading, and other forms of deception” accounted for only 9.5% of Federal cases in 2009).

⁴ David Morrissey, *The Fight Against Corruption by International Organizations*, 39 GEO. WASH. INT’L L. REV. 165, 166 (2007).

⁵ *Id.*

⁶ Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 785–86 (1985).

⁷ *Id.*

⁸ Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance*, 42 INT’L L. 1259 (2008).

⁹ *Id.* at 1261.

II. WHAT IS BRIBERY?

Public-official bribery generally occurs when a government officer holder accepts money, gifts, or something else of value, from an offeror attempting to influence any act within that person's scope of government service.¹⁰ Countries structure their statutes differently in terms of the words they use and how they define them.¹¹ Some bribery cases are clear, but others are murky because of the open-ended wording of many bribery statutes, including those in the United States.¹² Bribery cases can be made more complicated because it is often difficult to prove that an official has received a benefit in exchange for a specific official action or inaction.¹³

The following illustrations show the many potential complications raised when applying bribery statutes. For example, has an incumbent violated a bribery statute by taking money from a campaign donor while promising to support a legislative bill that is important to that donor? The answer would be no if the campaign donor was giving the money solely to influence the election, and not for the purpose of influencing an official act of that public official.¹⁴ Although the distinction is slight, it is important to determine whether the money is influencing an official action or just the election victory. Another conventional problem is whether bribery requires an explicit quid pro quo agreement or if mutual understanding is sufficient.¹⁵ Additionally, would it be bribery to exchange political favors? For example, is it illegal to exchange a vote in a legislative body for the promise of an appointment to a cabinet level position?

Asking generalized questions about bribery like the ones above will not provide clarity. The answers to these questions vary depending upon each country's relevant statutes and their interpretations.¹⁶ It is to these relevant statutes we now turn in order to determine how the United States and Mexico deal with bribery in their respective countries. This Note begins with a discussion of criminal deterrence before turning to the relevant statutes in the United States and Mexico.

A. The Role of Criminal Deterrence

Deterrence theory traces its origins to economics and political science and, in the context of corruption, compares the marginal cost of illegal behavior with the

¹⁰ See Deborah Hellman, *A Theory of Bribery*, 38 CARDOZO L. REV. 1947, 1953-54 (2017) [hereinafter Hellman].

¹¹ See 18 U.S.C. § 201 (2019); see also Cometen el delito de cohecho [CPF], art. 222, Diario Oficial de la Federacion [DOF] 12-03-2015, (Mex.).

¹² See Hellman, *supra* note 10, at 1956; 18 U.S.C. § 201 (2019).

¹³ Lowenstein, *supra* note 6, at 786-87.

¹⁴ See Hellman, *supra* note 10, at 1956.

¹⁵ *Id.* at 1960.

¹⁶ See generally *id.*

marginal gain from such behavior.¹⁷ Legal scholarship has now concluded that deterrence effects are more likely to result from increases in the *certainty* of being caught and not increases in the severity of the punishment.¹⁸ Increasing punishment severity without increasing punishment probability can be problematic if potential criminals are more cognizant of the stagnating frequency of punishments than they are of the severity of those punishments.¹⁹ Many white collar criminals will be more aware of the extra-legal consequences of the illicit behavior, such as embarrassment and public disapproval, which can be at least as great a deterrent, if not greater, than the legal consequences of a bribery conviction.²⁰

When prosecuting bribery, the attempt to balance severity and certainty in the deterrence analysis is complicated because of the nature of prosecuting a bribe.²¹ Many bribery prosecutions rely on the “flipping” of insiders with direct knowledge of a bribery event, which means that prosecutors have to deliver some benefit to “flipping” or operate without the full body of evidence.²² In effect, to gather evidence, the severity of punishment has to be decreased for the “flipper,” which would lessen overall deterrence.²³

The deterrence analysis must also include the severity of punishment between two types of bribe players: the person paying for better-than-fair treatment, and the person who pays a bribe just to be treated fairly.²⁴ Many have argued that the best way to deter bribery is to rank the social harms of different kinds of corruption and then levy penalties according to the harm inflicted.²⁵ On this account, prosecuting those paying bribes would focus on those seeking unusual and

¹⁷ James Alt & David Lassen, *Enforcement and Public Corruption: Evidence From US States*, 2 (Univ. of Copenhagen Dep’t of Econ. EPRU Working Paper No. 2010-08, 2011); see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968); see also Gary Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1(1974).

¹⁸ Donald A. Dripps, *In General, Should Excuses be Complete or Partial? Rehabilitating Bentham’s Theory of Excuses*, 42 TEX. TECH. L. REV. 383, 413 (2009).

¹⁹ See Andrew Von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, 39 ALTA. L. REV., 597 (1999).

²⁰ See Daniel S. Nagin & Greg Pogansky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39(4) CRIMINALOLOGY 865 (2001).

²¹ See Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. & SOC. SCI. 217, 222 (2010) [hereinafter Rose-Ackerman].

²² *Id.*; see also Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875, 877 (2002) (“flipping” and “snitching” are closely related terms that convey the same general principle: a witness willing to testify, or otherwise help, the government in their prosecution of a crime in exchange for money, leniency, or immunity).

²³ See Rose-Ackerman, *supra* note 21, at 222.

²⁴ Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery*, 74 DENVER UNIV. L. REV. 1231, 1253 (1997).

²⁵ See Rose-Ackerman, *supra* note 21, at 217.

illegal advantages.²⁶ However, recent scholarship has focused on demand-side bribery (passive bribery) which increases the deterrence on the public officials who solicit or accept the prohibited payments.²⁷ This is, in part, due to the UN Convention Against Corruption (UNCAC) and the Organization for Economic Cooperation and Development (OECD) Convention adopting measures which criminalize demand-side bribery.²⁸

Understanding how to deter bribery must begin with understanding why people choose to bribe even with the known penalties. As with other financial crimes, there can be a multitude of reasons why people decide to bribe, but the primary one is the aura of power and riches; simply put, the most common reason is greed.²⁹ The greed impulse can easily overpower deterrence, as two federal prosecutors in the Bernie Madoff case observed:

Unfortunately, the way it works with these types of financial crimes is that for some individuals, greed is larger and more powerful than the deterrent effect . . . In these very large financial crimes . . . typically involving extremely powerful men who have all their lives been able to control and create whatever they wanted to, I do believe that there is some sense that they can go forward and do what they need to do, and, almost with impunity.³⁰

Another argument against increasing the severity of punishment is that more severe or maximum punishments are not always imposed on defendants, mostly because of the dominance of plea agreements.³¹ As discussed above, the need for information and evidence often encourages prosecutors to offer lenient sentences, which in turn reduces the number of people sentenced to the full extent available under the law.³² Other scholars have also used game theory to suggest that increasing the severity of punishments will only reduce the number of criminal convictions, not reduce the number of people who are willing to bribe.³³ Increasing the severity of punishment will undoubtedly increase the cost of prosecutions while

²⁶ Lindsay B. Arrieta, *Attacking Bribery at Its Core: Shifting Focus to the Demand Side of the Bribery Equation*, 45 PUB. CONT. L.J. 587, 590 (2016) [hereinafter Arrieta].

²⁷ See *id.*; see also Garen S. Marshall, *Increasing Accountability for Demand-Side Bribery in International Business Transactions*, 46 N.Y.U. J. INT'L. L. & POL. 1283 (2014).

²⁸ Arrieta, *supra* note 26, at 594.

²⁹ Daniel V. Dooley, Sr., CPA & Mark Radke, Esq., *Does Severe Punishment Deter Financial Crimes?*, 4 CHARLESTON L. REV. 619, 640 (2010) [hereinafter Dooley].

³⁰ Tomoeh Murakami Tse, *Madoff Sentenced to 150 Years*, WASH. POST (June 30, 2009), <https://advance-lexis-com.ezproxy1.library.arizona.edu/document/>.

³¹ Dooley, *supra* note 29, at 656.

³² *Id.*

³³ See Jiangnan Zhu, *Do Severe Penalties Deter Corruption? A Game-Theoretic Analysis of the Chinese Case*, 12.2 CHINA REV. 1, 2 (2012).

still not attacking the core problem of increasing the certainty of punishment.³⁴ More lengthy incarcerations are also an expensive sanction because of the costs related to longer prison sentences, which already amount to nearly \$70 billion annually.³⁵ In essence, effective anti-bribery enforcement would properly balance bribery prevention and the social harm that comes from actions.³⁶

III. BRIBERY IN THE UNITED STATES: A DUAL-PARTY PROBLEM

A. Introduction

In the United States, public officials can be charged with bribery under a variety of statutes, including the Racketeer Influenced and Corrupt Organizations Act (RICO),³⁷ Foreign Corrupt Practices Act,³⁸ and the honest services fraud provision of the Travel Act.³⁹ However, this Note will focus on the Federal Official Bribery Statute because it is the main one used by federal prosecutors and the most comparable to the statutes of other countries.⁴⁰ 18 U.S.C. § 201 defines a public official as a:

Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.⁴¹

Although the above language seems to cover a variety of federal offices, there have been a few cases where courts have found the charged person not to be

³⁴ *Id.*

³⁵ John Schmitt et al., Ctr. For Econ. & Pol'y Research, *The High Budgetary Cost of Incarceration* 1, 8 (2010), [://www.cepr.net/index.php/publications/reports/the-high-budgetary-cost-of-incarceration/](http://www.cepr.net/index.php/publications/reports/the-high-budgetary-cost-of-incarceration/).

³⁶ Sharon Oded, *Coughing Up Executives or Rolling the Dice?: Individual Accountability for Corporate Corruption*, 35 YALE L. & POL. REV. 49, 68 (2016) (“To maximize total social welfare, an anti-bribery enforcement policy should minimize the sum of the social costs associated with bribery and with its prevention, including the cost of enforcement”).

³⁷ See 18 U.S.C. §§ 1961-1968.

³⁸ See 15 U.S.C. § 78dd-1.

³⁹ See 18 U.S.C. § 1952; see generally Charles N. Whitaker, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617 (1992).

⁴⁰ 18 U.S.C. § 201 (2012).

⁴¹ *Id.*

a public official.⁴² The language has generally been interpreted broadly, but in recent years, the Supreme Court seems to have narrowed the application of the statute through the definition of “official act.”⁴³ In *United States v. Birdsall*, the Court held that an “official act” can still be established through custom,⁴⁴ but certain mundane tasks, such as setting up a meeting and hosting an event for a cause, would no longer be considered “official acts.”⁴⁵ An official act, is therefore, strictly limited to the words of the statute: “a decision or action on a ‘question, matter, cause, suit, proceeding or controversy.’”⁴⁶ The contemporary question is now focused on whether officials are acting in their official capacities.

Once it is determined who and what general acts are the potential subjects of an illegal bribe under the law, the question turns to what specific actions by the bribing party violate the law. The bribery statute prohibits actions whereby one:

directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity.⁴⁷

The offeror must have an intent to influence an official act, or to influence a public official “to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States,” or influence the public official “to do or omit to do any act in violation of the lawful duty of such official or person.”⁴⁸

More important for the purpose of this Note, the U.S. federal bribery statute prohibits a public official from any act that:

directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
 (A) being influenced in the performance of any official act;
 (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

⁴² 161 A.L.R. Fed. 491 (Originally published in 2000); see *United States v. Kenney*, 185 F.3d 1217 (11th Cir. 1999) (holding that a management employee of a government contractor, who assisted the Air Force in procuring materials and equipment for a project, was not a public official).

⁴³ See *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

⁴⁴ *United States v. Birdsall*, 34 S. Ct. 512, 514-15 (1914).

⁴⁵ *McDonnell*, 136 S. Ct. at 2371.

⁴⁶ *Id.*; 18 U.S.C. § 201 (a)(3) (2012).

⁴⁷ 18 U.S.C. § 201 (b) (1).

⁴⁸ *Id.* § 201 (b) (1) (a)-(c).

(C) being induced to do or omit to do any act in violation of the official duty of such official or person⁴⁹

In sum, prosecutors in the United States must prove the following four elements of § 201(b) to convict a public official: (1) a public official; (2) was asked to or offered to take some official act; (3) in return for a thing of value; (4) with criminal intent.⁵⁰

B. The Sentencing Guidelines

The government has a variety of punishment options at its disposal when a public official is found guilty of violating § 201. The statute specifies that the offender can be fined up to three times the value of the bribe; can be imprisoned for up to fifteen years; and could potentially face disqualification from holding an office of “honor, trust, or profit” for the United States.⁵¹ The United States government relies on the Sentencing Guidelines established by the United States Sentencing Commission to sentence criminal defendants.⁵² The Commission is an independent agency established by statute,⁵³ which has faced many constitutional challenges, but remains in place.⁵⁴

The United States Sentencing Commission, through the implementation of the Sentencing Guidelines, has sought to further “deterrence, incapacitation, just punishment, and rehabilitation.”⁵⁵ The Commission seems to have accomplished one of its main goals: limiting the wide disparity in sentences imposed, by having a rigid sentencing table which limits deviation to cases with “atypical features.”⁵⁶ For the purposes of this Note, the most consequential accomplishment of the sentencing guidelines is that much of the punishment decisions are taken out of the hands of prosecutors and judges, for better or for worse.

The Commission established a sentencing table, consisting of 43 levels, to help determine the sentences for criminal defendants.⁵⁷ There are various factors that can increase or decrease the level at which the offender is punished under the sentencing guidelines.⁵⁸ Factors that typically increase the severity of punishment

⁴⁹ *Id.* § 201 (b) (2).

⁵⁰ *Id.* § 201 (b); *see also* C. Keith Hamilton et al., *Bribery of Public Officials*, 30 Am. Crim. L. Rev. 471 (1993).

⁵¹ *Id.* § 201(b).

⁵² United States Sentencing Commission: Guidelines Manual, §1A1 (Nov. 2016) [hereinafter *The Manual*].

⁵³ *See* 28 U.S.C. § 991.

⁵⁴ *Mistretta v. United States*, 488 U.S. 361 (1989); *see also* *United States v. Booker*, 543 U.S. 220 (2005) (the most recent challenge to the Sentencing Guidelines).

⁵⁵ 1 U.S. Sentencing Guidelines Manual § 1A1.2 (U.S. Sentencing Comm’n 2016).

⁵⁶ *Id.* at 1.

⁵⁷ *The Manual*, *supra* note 52, at § 1A1.4(h).

⁵⁸ *See* C. Keith Hamilton et. al., *Bribery of Public Officials*, 30 AM. CRIM. L. REV. 471, 493 (1993).

revolve around the value of the bribe and the status of the public official convicted under § 201. Finally, as with most federal prosecutions, leniency is granted to an offender who cooperates.⁵⁹ In an effort to discourage unnecessary litigation between prosecutors and defense counsel bickering over a difference of one level, the guideline has been designed so that each level contains a sentencing range that overlaps with the level immediately below and above.⁶⁰ Per statute, if the level includes a term of imprisonment, the maximum of the range cannot be more than a 25% increase, or six months higher, than the minimum of the range.⁶¹ One goal of the Commission is creating proportionality across the levels.⁶² Therefore, an increase of six levels typically doubles the length of the term of imprisonment, no matter the level at which the defendant was initially classified.⁶³

C. Prison Terms Under the Sentencing Guidelines

Under the Federal Sentencing Guideline Manual, the base offense level for a defendant who was a public official convicted of offering, giving, soliciting, or receiving a bribe, is level 14.⁶⁴ Once the baseline offense level is determined, using the factors outlined above, there is still the possibility of an increase or decrease in the level. Adjustments can be made based on a multitude of factors including, but not limited to: the number of victims; the role played by the defendant during the offense; whether obstruction, or a related issue occurred; whether there were multiple counts; and the defendant's acceptance of responsibility.⁶⁵ Another consideration is whether the offense involved more than one bribe, which counts for an increase of two levels.⁶⁶ If the public official who committed the offense was in a high-level decision-making or sensitive position, the Guidelines suggest an increase of four levels.⁶⁷ Finally, there is the potential for the offense level to increase based on "the value of anything obtained or to be obtained by a public official or others acting with a public official,⁶⁸ or the loss to the government from

⁵⁹ See *United States v. Hill*, 197 F.3d 436 (10th Cir. 1999) (holding that the government was allowed to promise leniency in exchange for a favorable testimony).

⁶⁰ The Manual, *supra* note 52, § 1A1.4(h).

⁶¹ 28 U.S.C. § 994(b)(2) (2006) (the statute further stipulates that an exception to the general rule is when the minimum of the range is 30 years or more in which case the maximum of the range can be life imprisonment).

⁶² The Manual, *supra* note 52, § 1A1.3.

⁶³ *Id.* § 1A1.4(h).

⁶⁴ See *id.* § 2C1.1.

⁶⁵ See *id.* § 3(A)-(E).

⁶⁶ *Id.* § 2C1.1(b)(1).

⁶⁷ The Manual, *supra* note 52, § 2C1.1(b)(3) (the statute further specifies that if the resulting offense level is less than 18, there is an increase to 18).

⁶⁸ *Id.* § 2C1.1(b)(2) (under the statute "public official" is the same as defined in 18 U.S.C. § 201(a)(1)).

the offense, whichever is greatest” which relies on the sentencing table at § 2B1.1-Theft, Property Destruction, and Fraud.⁶⁹ A portion of the table is provided.⁷⁰

Loss (Apply the Greatest)	Increase in Level
\$6,500 or less	No Increase
More than \$6,500	2
More than \$3,500,000	18
More than \$9,500,000	20
More than \$25,000,000	22
More than \$250,000,000	28
More than \$550,000,000	30

Another basis for increasing the offense level is a prior criminal history.⁷¹ Three levels are added if the defendant had a prior sentence of imprisonment which exceeded one year and one month,⁷² two levels are added for a prior sentence of imprisonment of at least sixty days,⁷³ and one level is added for each sentence that was not covered in either of the above scenarios.⁷⁴ Finally, two levels are added if the defendant committed the offense at issue while under any criminal justice sentence, such as probation or supervised release, and another level is added for each prior conviction that was due to a crime of violence and was not counted previously.⁷⁵

Furthermore, even more levels can be added if the defendant was a career offender⁷⁶ or has a “criminal livelihood.”⁷⁷ A career offender is defined as follows:⁷⁸

- (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
- (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
- (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

If the public official convicted is deemed a career offender, the applicable offense’s statutory maximum is found under this section of the sentencing

⁶⁹ *Id.*

⁷⁰ *Id.* § 2B1.1.

⁷¹ U.S.S.G. § 4A1.1

⁷² *Id.* § 4A1.1(a).

⁷³ *Id.* § 4A1.1(b).

⁷⁴ *Id.* § 4A1.1(c) (under subsection (c) of the statute, the maximum number of points that can be added is four points).

⁷⁵ *Id.* § 4A1.1 (d)-(e) (for subsection (e) of the statute, the maximum number of points that can be added is three points).

⁷⁶ U.S.S.G. § 4B1.1.

⁷⁷ *Id.* § 4B1.3.

⁷⁸ *Id.* § 4B1.1 (a).

guidelines instead of the traditional sentencing table.⁷⁹ “Criminal livelihood,” refers to defendants who committed an offense “as part of a pattern of criminal conduct engaged in as a livelihood.”⁸⁰ If the court determines that the defendant pursued a criminal livelihood, then the offense level cannot be less than thirteen, unless there is an acceptance of responsibility, in which case the offense level is not less than eleven.⁸¹

The United States Sentencing Guidelines Sentencing Table contains four zones.⁸² Zone A is for offense levels and criminal history categories that result in incarceration times ranging from zero months to six months, Zone B is for those that result in incarceration times ranging from one month to twelve months, Zone C is for those that result in incarceration times ranging from eight months to sixteen months, and Zone D is for those that result in incarceration times ranging from twelve months to life.⁸³ The offense level determines the horizontal axis of the table and the criminal history determines the vertical axis.⁸⁴ The numbers listed in each corresponding section represents the range of months (minimum to maximum) that a defendant should or can be sentenced to under the Guidelines.

As an illustration, suppose there is a man who robs a federally insured bank- the base level for this crime would be twenty. If the man also used a dangerous weapon (+3), robbed a financial institution (+2), and the loss exceeded \$20,000 (+1), the offense level rises to twenty-six. Further adjustments can be made including having an accomplice (+2), who was a minor (+2), and had two prior sentences for the same crime (+4). This would lead to an offense level of thirty-four. Finally, there would be a determination of the defendant’s criminal history. A portion of Zone (D), where the defendant in this hypothetical would fall, is included below to show his sentencing range under the guidelines:

⁷⁹ *See id.* § 4B1.1 (b).

⁸⁰ *Id.*

⁸¹ U.S.S.G. § 4B1.3 (“Engaged in as a livelihood” means that (A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (B) the totality of circumstances shows that such criminal conduct was the defendant’s primary occupation in that twelve-month period (e.g., the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant’s legitimate employment was merely a front for the defendant’s criminal conduct”).

⁸² *See id.* § 5A.

⁸³ Dennis Tosh, ¶1532 SENTENCING INDIVIDUALS UNDER THE GUIDELINES, (2003).

⁸⁴ *See* U.S.S.G. § 5A (the offense levels range from 1-43, while the criminal history ranges from I-VI).

Zone D⁸⁵:

Criminal History Category (Points)						
Offense Level	I	II	III	IV	V	VI
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-237	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life

D. Fines

A public official convicted of accepting a bribe in violation of § 201 “shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater.”⁸⁶ The Federal Sentencing Guidelines Manual also includes a table that lists the base fine predicated upon the offense level for the convicted public official.⁸⁷ The base fine is the greatest amount based on the following grounds:

- (1) the amount from the table in subsection (d) below corresponding to the offense level determined under § 8C2.3 (Offense Level); or
- (2) the pecuniary gain to the organization from the offense; or
- (3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.⁸⁸

Another form of punishment allowed by the Sentencing Guidelines is mandatory restitution.⁸⁹ The statute states that mandatory restitution, in addition to or in lieu of other punishment, must be ordered by the court and the defendant makes payments to the victim.⁹⁰ The victim is a person “directly and proximately harmed as a result of the commission of an offense.”⁹¹ If the case involved a scheme, conspiracy, or pattern of criminal activity, as is often the case with bribery, the restitution payment is to anybody *directly harmed* by the defendant’s conduct.⁹² Constituents of public officials might argue they were harmed by an official’s

⁸⁵ *Id.*

⁸⁶ 18 U.S.C. § 201 (b)(4).

⁸⁷ The Manual, *supra* note 52, § 8C2.4.

⁸⁸ *Id.*

⁸⁹ 18 U.S.C. § 3663A.

⁹⁰ *Id.* (the statute also allows for the payment of restitution to the victim’s estate if the victim is deceased).

⁹¹ *Id.*

⁹² *Id.*

conduct, but the express language of the statute weeds out these arguments for lack of direct harm.⁹³ Although not discussed at length in this Note, § 201 also permits sanctions of probation, which can vary in the term of probation and the conditions imposed;⁹⁴ forfeiture of property,⁹⁵ which usually includes the proceeds of the bribery scheme,⁹⁶ and costs of prosecution.⁹⁷ We now turn to the statutes, punishments, and enforcement in Mexico.

IV. BRIBERY IN MEXICO UNDER ENRIQUE PEÑA NIETO

A. Introduction

Corruption scandals were prevalent in Mexico when Enrique Peña Nieto was President from 2012 to 2018.⁹⁸ The so-called Odebrecht scandal, which is perhaps the biggest recent political controversy in Mexico (and Latin America more generally) has its roots in Brazil.⁹⁹ The details of the scandal are discussed below, and it serves as a prime example of the problems that plague prosecutions of public official corruption in Mexico, which is one of the greatest challenges to the rule of law in the country.¹⁰⁰ The government allegedly has enough evidence to charge many officials, but has refused to press charges in many cases for fear of damaging public perception of public officials and elections in the country.¹⁰¹

B. Applicable Mexican Law

In July 2016, Peña Nieto signed a new bribery law that was hailed as an unprecedented step towards reigning in the corruption that has plagued Mexico.¹⁰²

⁹³ U.S.S.G. § 5E1.1 (as well as the requirements under § 3663A, the Restitution section under the Federal Sentencing Guidelines makes it clear that there must be an identifiable victim).

⁹⁴ See U.S.S.G. §§ 5B1.1-1.3 (these provisions detail how the court may impose probation, the length of time, and the conditions of said probation).

⁹⁵ U.S.S.G. § 5E1.4.

⁹⁶ See generally Appendix 2-A. Phase 3 Report on Implementing the OECD Anti-bribery Convention in the United States, 1 Foreign Corrupt Prac. Act Rep Ch. 2 Appendix 2-A (2d ed.).

⁹⁷ U.S.S.G. § 5E1.5.

⁹⁸ Azam Ahmed, *Mexico Could Press Bribery Charges. It Just Hasn't*, N. Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/world/americas/mexico-odebrecht-investigation.html> [hereinafter Ahmed].

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ *Id.*

¹⁰² David Agren, *Mexico Leaders' Pledges Fall Short as Graft Remains 'Heart of the Political System'*, THE GUARDIAN (July 19, 2017), <https://www.>

The National Anti-Corruption System's (SNA) objective is to coordinate and enforce anti-corruption legislation through newly enacted laws and amendments to old laws.¹⁰³ However, the early optimism over the legislation has quickly faded among many Mexicans since its passage.¹⁰⁴ Most notably, the actions of the Peña Nieto Administration in relation to the SNA were criticized by anti-corruption advocates and academics from Mexico and around the world.¹⁰⁵ This criticism, and potential future implications, will be discussed below.

The important statutes for the purposes of this Note are codified under Chapter X of the Código Penal Federal (Federal Criminal Code).¹⁰⁶ Article 222 of the Code begins by stating the persons and activities that are subject to the law:

The public servant who by himself, or by [intermediary] solicits or receives illicitly for himself or for another, money or any benefit, or accepts a promise, to make or to cease to carry out an act of his inherent functions to his employment, position or commission;

Any person who gives, promises or delivers any benefit to any of the persons referred to in article 212 of this Code¹⁰⁷, to make or omit an act related to his duties, to his employment, position or commission, and:

The federal legislator who, in the exercise of its functions or attributions, and within the framework of the approval process of the respective expenditures budget, to manage or request.¹⁰⁸

The statute clarifies the “approval process” to which the last paragraph applies:

a) The allocation of resources in favor of a public entity, requiring or obtaining, for itself or for a third party, a commission, a gift or consideration, in money or in kind, other than that for the exercise of the Commission;

theguardian.com/world/2017/jul/19/mexico-corruption-political-system-enrique-pena-nieto [hereinafter Agren].

¹⁰³ Allison Tanchyk and Humberto Padilla Gonzalez, *Significant Changes In Anti-Bribery Laws In Mexico And Colombia Signal A New Commitment To Anti-Corruption Efforts*, 2 (2017).

¹⁰⁴ See Agren, *supra* note 102.

¹⁰⁵ See *id.*

¹⁰⁶ Código Penal Federal (CPF), cap. X, Diario Oficial de la Federación (DOF) 21-06-2018 (Mex).

¹⁰⁷ See Código Penal Federal (CPF), art. 212, Diario Oficial de la Federación (DOF) 21-06-2018 (Mex).

¹⁰⁸ Código Penal Federal (CPF), art. 222, Diario Oficial de la Federación (DOF) 21-06-2018 (Mex) (the article discusses the relevant violations which constitute “corruption” under the act).

b.) The granting of contracts of public works or of services in favor of certain natural or moral persons.¹⁰⁹

This provision also applies to any person who acts on behalf of the federal legislator to influence the allocation of resources or granting of contracts.¹¹⁰

Article 222 also enumerates the penalties that apply to persons taking the actions described above. According to the Code, if the value of a gift, good, or promise does not exceed 500 times the daily value of the Unidad de Medida y Actualización (UMA (Unit of Measurement and Updating)) at the time when the offense was committed, then the prison range is three months to two years and thirty to 100 days' pay fined, which is equivalent to the offender's daily personal income.¹¹¹ The UMA is used by the Mexican government to calculate the payment of "obligations and assumptions" provided in federal laws, entities, and legal provisions.¹¹² It was created, in part, to provide a separate mechanism for determining fines and taxes, leaving the federal minimum wage to cover the needs of families.¹¹³ However, if the value does exceed 500 times the daily value of the UMA at the time the crime was committed, then the prison sentence imposed can range from two to fourteen years, and the fine can range from 100 to 150 days fined.¹¹⁴ Finally, the statute makes clear that the money or gifts at issue should not be returned to the perpetrators, even if it is "in the interest of the state."¹¹⁵

Many praised the SNA because it was a major attempt to reign in corruption through nationwide coordinated measures.¹¹⁶ Crucially, the Constitution of Mexico recognizes the sovereignty of the states relative to the federal government unless a right is specifically reserved to the federal government.¹¹⁷ To combat this problem, amendments to the Constitution of Mexico were ratified on May 27, 2015.¹¹⁸ The amendments laid the groundwork and institutionalized the anti-corruption philosophy that would lead to the signing of the SNA.¹¹⁹ The anti-corruption amendment to the Constitution of Mexico is Article 113 found in Title

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Publimetro, *What is UMA and Why Should You Care About Its Increase*, <https://translate.google.com/translate?hl=en&sl=es&u=https://www.publimetro.com.mx/mx/noticias/2018/01/04/que-es-la-uma-y-para-que-sirve.html&prev=search>.

¹¹³ *Id.*

¹¹⁴ Código Penal Federal (CPF), art. 222, Diario Oficial de la Federación (DOF) 21-06-2018 (Mex).

¹¹⁵ *Id.*

¹¹⁶ Global Legal Insights, *Bribery & Corruption 2019: Mexico* (2018) <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/mexico> [hereinafter Global Legal Insights].

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

IV, “Public Servants’ Accountability, Individuals related to Administrative Liabilities or Corruption Acts.”¹²⁰

Article 113 establishes the SNA as the coordinating entity among all government levels responsible for the “prevention, detection, and punishment” in corruption acts.¹²¹ The SNA is also responsible for surveillance and control of public resources and Article 113 sets various provisions for fulfilling these objectives.¹²² The first provision calls for the SNA to have a Coordinating Committee composed of directors from the Federal Auditing Office, the Specialized Anticorruption Prosecution Office, the Federal Ministry responsible for internal control, the President of the Administrative Justice Court, the President of the National Transparency Agency, a representative of the Federal Judicial Council, and the Citizen Participation Committee.¹²³ The Coordinating Committee is responsible for establishing cooperation among local governments, designing, and advancing comprehensive policies to prevent, control, and deter acts of corruption.¹²⁴ The Constitution further empowers the Committee to establish mechanisms for the generation, sharing, and updating of principles for coordination among authorities at different government levels.¹²⁵ Finally, the Committee is tasked with releasing an annual report showcasing the results and progress of anticorruption policies.¹²⁶

The changes in the constitution, along with the SNA, represented a major shift in the battle against corruption in Mexico. The participation of non-governmental citizens in the process also signaled an important shift.¹²⁷ The Citizen Participation Committee, which has a representative on the Coordinating Committee, is made up of five Mexican citizens.¹²⁸ Article 113 states that the five citizens will have distinguished themselves in their contributions to “transparency, accountability, and the anti-corruption movement.”¹²⁹ The original committee members were selected through a laborious process overseen by the Senate of Mexico that was designed to assure the candidates’ credentials and impartiality.¹³⁰ This process concluded on January 30, 2017, with the appointment of representatives from some of the most recognized academic institutions and civil organizations dedicated to transparency and anti-corruption in Mexico.¹³¹ One

¹²⁰ Constitución Política de los Estados Unidos Mexicanos, CP, Art. 113, Diario Oficial de la Federación (DOF) May 2, 1917(Mex).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Constitución Política de los Estados Unidos Mexicanos, CP, Art. 113, Diario Oficial de la Federación (DOF) May 2, 1917 (Mex).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Global Legal Insights, *supra* note 120.

¹²⁸ Constitución Política de los Estados Unidos Mexicanos, CP, Art. 113, Diario Oficial de la Federación (DOF) May 2, 1917 (Mex).

¹²⁹ *Id.*

¹³⁰ Global Legal Insights, *supra* note 119.

¹³¹ *Id.*

member of the Citizen Participation Committee will always chair the Coordinating Committee in an effort to insulate the Committee from political impulses.¹³²

The long-term success of the SNA has yet to be empirically analyzed but there are early signals stoking pessimism about its ability to properly regulate.¹³³ The first warning sign was the failure to appoint the anti-corruption prosecutor to the Coordination Committee at the time it started operation in April of 2017.¹³⁴ The Senate of Mexico was charged with selecting the prosecutor but failed multiple times to come to an agreement, leaving the SNA without legal strength at its inception because of partisan politics.¹³⁵ Another critical problem has been the shortage of budget allocations to the SNA by the General Congress of the United Mexican States. In 2017, the budget was roughly \$11.9 million and was slightly increased to \$12.3 million in 2018.¹³⁶ This is a measly percentage of the total expenditures of Mexico's government which were nearly \$274 billion in 2017.¹³⁷

C. Enforcement of the Laws

Ineffective legal enforcement has long been a challenge faced by Mexican institutions seeking to curb corruption in the country.¹³⁸ The SNA's structure could change the narrative by empowering existing governmental institutions and enacting new substantive laws that better outline the obligations of the government and private parties.¹³⁹ However, as was seen with the Odebrecht scandal, institutional stagnation can still hinder enforcement even with the presence of new frameworks and substantive laws established by the SNA.¹⁴⁰ The best evidence of stronger institutions can be observed in the Secretariat of Civil Service (Secretaría de la Función Pública), the Federal Tribunal of Administrative Justice (Tribunal Federal de Justicia Administrativa), and the Superior Federal Comptroller (Auditoría Superior de la Federación).¹⁴¹ A new institution, the Specialized Office of the Prosecutor (Fiscalía Especializada), is the best example of innovation in the service of investigating and indicting corrupt persons.¹⁴² The goal of these various

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Viridiana Rios, *Where is Mexico's Fight Against Corruption Now?*, Wilson Center- Mexico Institute (Sept. 26, 2017), <https://www.wilsoncenter.org/article/where-mexicos-fight-against-corruption-now> [hereinafter Rios]

¹³⁵ *Id.*; *see also* Mexico's national anti-corruption system: The politics of integrity, 2018 WL 4782347.

¹³⁶ Global Legal Insights, *supra* note 120. (The 2017 budget was MXP\$214,374,000 and the 2018 budget was MXP \$222,385,000).

¹³⁷ The World Factbook: Mexico (2018) <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/mx.html>.

¹³⁸ Global Legal Insights, *supra* note 120.

¹³⁹ *Id.*

¹⁴⁰ *See* Ahmed, *supra* note 98.

¹⁴¹ Global Legal Insights, *supra* note 120.

¹⁴² *Id.*

institutional changes is to give them the tools needed to enforce the new laws and goals implemented by the SNA, most of which are of a scope never before seen in Mexico.¹⁴³

At times, the enforcement of bribery laws in Mexico does not reflect values of justice; instead the practice appears to stem from politically driven vengeance. Recently, governors have been prosecuted after leaving office and critics claim that these prosecutions are motivated by the loss of an election.¹⁴⁴ Although most of the governors, including Tomás Yarrington, faced mounting evidence supporting the bribery accusations, the proximate cause of the prosecutions should still be worrisome.¹⁴⁵ It appears to be an unwise step for Mexico to be in the position where bribery and other corruption prosecutions only come on the heels of an election loss. This, in effect, would signal a different kind of corruption where remaining in power prevents prosecution.

After analyzing the applicable laws in both the United States and Mexico, it is important to understand their practical implementation. As the following examples show, the United States and Mexico have had different experiences when attempting to use their laws to hold public officials accountable as the public desires.

V. EXAMPLES OF CORRUPTION

A. The Story of the “Most Corrupt Congressman Ever”

Randy “Duke” Cunningham was an eight-term member of the U.S. House of Representatives.¹⁴⁶ The Vietnam War veteran represented a district in San Diego, California, and was considered a top Republican within Congress.¹⁴⁷ In 2005, Rep. Cunningham delivered a tearful confession, publicly admitting that he had evaded taxes and taken over \$2.4 million in bribes.¹⁴⁸ Cunningham was alleged to have demanded, sought, and received payments in the form of cash, cars, vacations, and a yacht.¹⁴⁹ Four co-conspirators, including two men who worked as defense contractors, were alleged to have made payments to Cunningham over a span of five years.¹⁵⁰ Cunningham signed a plea agreement through which he forfeited a home, furniture, cars, and nearly two million dollars in cash.¹⁵¹

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Charles Babcock & Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns*, WASHINGTON POST (Nov. 29, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/28/AR2005112801827.html> [hereinafter Babcock].

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Babcock, *supra* note 146.

The details of the case mesmerized prosecutors who were astonished at the level of the corruption.¹⁵² Cunningham used his position in Congress to help funnel over \$240 million in government work to a defense contracting firm, MZM, Inc., which was owned by a friend.¹⁵³ Cunningham is alleged to have sketched out “bribe menus” where he would give co-conspirators a piece of paper listing the amount of money and gifts he expected to receive for steering a specified amount of money to MZM.¹⁵⁴ Cunningham, after pleading guilty, served seven years in federal custody for his actions.¹⁵⁵ As described by prosecutors, and in various books written after the event, Cunningham might well have been the most corrupt congressman ever.¹⁵⁶

B. Money in the Freezer: William J. Jefferson

William J. Jefferson was a sitting Democratic congressman from Louisiana when he was indicted in 2007 for using his office to advance the business interests of various individuals and corporations in return for money and other things of value.¹⁵⁷ Jefferson allegedly solicited bribes in his capacity as a member of Congress and as a member of congressional committees relating to international trade matters, specifically African trade.¹⁵⁸ During the course of the alleged scheme, Rep. Jefferson used his official congressional letterhead when he wrote to the United States and foreign governments to encourage business developments on behalf of people who had made personal payments to him.¹⁵⁹ In the most substantial version of the scheme, Jefferson solicited money from the President of iGate, a telecommunications company. In return, Jefferson promoted the company to the U.S. Army and various countries in West Africa.¹⁶⁰ Jefferson contracted to receive \$90,000 a year, over 500,000 shares of iGate stock, and bonuses paid based on a percentage of the company’s profit.¹⁶¹

Rep. Jefferson was convicted and sentenced to thirteen years in federal prison, including over 200 months for the bribery-related counts of the

¹⁵² Gene Cubbison, *Former U.S. Rep. "Duke" Sprung from Lockup in Bribery Schemes*, NBC SAN DIEGO (June 4, 2013), <https://www.nbcsandiego.com/news/local/Former-US-Rep-Duke-Cunningham-Sprung-from-Lockup-in-Bribery-Schemes-210187901.html>.

¹⁵³ *Id.*

¹⁵⁴ Brian Ross, *From Cash to Yachts: Congressman's Bribe Menu*, ABC NEWS (Mar. 2, 2006), <https://abcnews.go.com/Politics/story?id=1667009&page=1>

¹⁵⁵ Cubbison, *supra* note 152.

¹⁵⁶ *See generally* Marcus Stern, et. Al., *THE WRONG STUFF: THE EXTRAORDINARY SAGA OF RANDY "DUKE" CUNNINGHAM, THE MOST CORRUPT CONGRESSMAN EVER CAUGHT* (2007).

¹⁵⁷ *United States v. Jefferson*, 634 F.Supp.2d 595, 597 (2009) [hereinafter *Jefferson*].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 598.

¹⁶⁰ *United States v. Jefferson*, 289 F.Supp. 3d 717, 722 (E.D. Va. 2017).

¹⁶¹ *Id.*

indictment.¹⁶² However, Jefferson was allowed to remain free while his appeal was pending, and thus was not required to report to prison and begin his sentence until May 2012.¹⁶³ Jefferson's conviction was eventually overturned in 2017, in light of the Supreme Court's ruling in *McDonnell v. United States*.¹⁶⁴ The conviction was overturned because the Court held that some of Jefferson's actions were not "official acts" simply because they involved setting up meetings or expressing support for companies, including iGate.¹⁶⁵ According to one federal jury instruction, official actions include "actions that have been clearly established by settled practice as part of a public official's position" and "actions taken in furtherance of longer-term goals."¹⁶⁶ The Court also instructed that an "official action is no less official because it is one in a series of steps to exercise influence or achieve an end."¹⁶⁷ Although Jefferson was caught with nearly \$90,000 cash in his freezer, alleged to be intended for the Nigerian Vice President in furtherance of a bribe, he served less than half of his original sentence.¹⁶⁸

C. Peña Nieto Ties to Odebrecht and Corruption

One of the main problems with high-level corruption in Mexico during the Peña Nieto regime is that some scandals hit close to home at Los Pinos, the official residence of the President of Mexico.¹⁶⁹ Allegations extended beyond the family of Peña Nieto, to his close advisor and former Chief of Staff, Emilio Lozoya.¹⁷⁰ Lozoya, the former CEO of Pemex (a Mexican state-owned petroleum company), allegedly accepted bribes while working for Pemex from the corruption-riddled Odebrecht.¹⁷¹ Odebrecht is a large Brazilian construction company responsible for major construction projects throughout Latin America.¹⁷² Early allegations

¹⁶² *Id.* at 727.

¹⁶³ *Id.*

¹⁶⁴ Rachel Weiner, *Judge Lets Former Louisiana Congressman William Jefferson out of Prison*, THE WASHINGTON POST (Oct. 5, 2017), https://www.washingtonpost.com/local/public-safety/judge-lets-former-louisiana-congressman-william-jefferson-out-of-prison/2017/10/05/8b53619e-aa0b-11e7-850e-2bdd1236be5d_story.html; *see also* *McDonnell v. United States*, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016).

¹⁶⁵ *Jefferson*, 289 F.Supp. 3d at 727.

¹⁶⁶ *McDonnell*, 136 S. Ct. at 2373.

¹⁶⁷ *United States v. McDonnell*, 792 F.3d 478, 505–06 (4th Cir. 2015).

¹⁶⁸ Weiner, *supra* note 164.

¹⁶⁹ *See generally* Carrie Khan, *Allegations Of Corruption Dog Mexico's First Lady Angélica Rivera*, NPR (Aug. 3, 2015), <https://www.npr.org/sections/parallels/2015/08/03/428171924/allegations-of-corruption-dog-mexicos-first-lady-ang-lica-rivera> (detailing allegations of misused money by the wife of Enrique Peña Nieto).

¹⁷⁰ Ahmed, *supra* note 98.

¹⁷¹ *Id.*

¹⁷² Nicholas Casey and Andrea Zarate, *Corruption Scandals With Brazilian Roots Cascade Across Latin America*, N. Y. TIMES (Feb. 13, 2017),

suggested Lozoya asked for five million dollars in bribes, but three top Odebrecht officials now claim that he received over ten million dollars.¹⁷³ One claim suggests that while international coordinator for the 2012 presidential campaign, Lozoya received over three million dollars in bribes from the Brazilian company.¹⁷⁴ Odebrecht officials claimed to have deposited money to an account given to them by Lozoya that was located in the British Virgin Islands.¹⁷⁵ However, Lozoya and Peña Nieto have disputed the claims and Mexican officials have yet to seriously pursue them. In fact, it could be argued that officials have done their best to bury the claims by firing the lead prosecutor involved.¹⁷⁶ The case has been stalled by bureaucracy and lawyers for Lozoya, deflating the hope of closure for many Mexican citizens.¹⁷⁷

In January 2019, Peña Nieto himself became embroiled in bribery allegations during the criminal trial of notorious drug boss Juáquin “El Chapo” Guzmán.¹⁷⁸ A former ally of El Chapo testified during his trial in the United States that Peña Nieto received a bribe of more than \$100 million from Guzmán to prevent his capture and allow him to continue to run his drug organization.¹⁷⁹ The New York Times noted that the response in Mexico was not one of shock, but one of normalcy, with the accusation not being a featured story in any of Mexico’s major newspapers.¹⁸⁰ There is an obvious reason for this reaction in Mexico: there is no direct evidence presented which would link Peña Nieto to the bribes, and criminal defendants are notorious for loose accusations during their trials, especially high-profile defendants such as Guzmán.¹⁸¹ However, another reason for the lack of interest is that these accusations are common, and the typical government response—or lack thereof—is even more common.¹⁸² The bribery allegations surrounding Peña Nieto and his associates throughout his presidency are an example of the distrust in Mexico, with one academic stating, “[w]e understand that there is weak rule of law, the lack of capacity for investigation... The names of politicians turn up in trial — but nothing happens.”¹⁸³

<https://www.nytimes.com/2017/02/13/world/americas/peru-colombia-venezuela-brazil-odebrecht-scandal.html?module=inline>.

¹⁷³ Ahmed, *supra* note 98.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Juan Montes, *Ex-Mexican Prosecutor Says He Was Fired to Stymie Corruption Probe*, WALL STREET JOURNAL (March 14, 2018), <https://www.wsj.com/articles/ex-mexican-prosecutor-says-he-was-fired-to-stymie-corruption-probe-1521062636>.

¹⁷⁷ Ahmed, *supra* note 98.

¹⁷⁸ Kirk Semple and Elisabeth Malkin, *A \$100 Million Bribe to the President? Mexicans Shrug*, N.Y. TIMES (Jan. 16, 2019), <https://www.nytimes.com/2019/01/16/world/americas/el-chapo-bribe-president-mexico.html>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Semple, *supra* note 178.

D. Governors, Cartels, and Bribes

Tomás Yarrington was elected Governor of Tamaulipas in 1999, only a year after he began receiving bribes from Mexican drug cartels in that state, mainly the Gulf Cartel and Los Zetas.¹⁸⁴ The quid pro quo arrangement was quite simple: Yarrington would receive payments for allowing the cartels to operate freely throughout the state without facing severe pressure from Mexican officials.¹⁸⁵ It is alleged that he was able to purchase valuable assets worth over seven million dollars, including cars, vehicles, airplanes, and real estate.¹⁸⁶ Yarrington, however, was not alone in receiving bribes from Los Zetas; he was dubiously followed by Fidel Herrera, the Governor of Veracruz.¹⁸⁷ The neighboring states of Veracruz and Tamaulipas served as a major drug route for Los Zetas, which allowed them to move their product into the United States through South Texas.¹⁸⁸ Yarrington was never charged in Mexico, but he was indicted in the Southern District of Texas in 2013.¹⁸⁹ Yarrington was on the run from the time of his indictment until April 2017 when he was arrested in Italy while using a fake name and documents; Yarrington eventually was extradited to the United States in April 2018.¹⁹⁰ Herrera has never been formally charged in the United States or in Mexico, and has even been considered for high-level positions within Mexico's government.¹⁹¹

VI. IMPLICATIONS

A. The Next Steps in Mexico

On December 1, 2018, Andrés Manuel López Obrador, commonly known as AMLO, assumed office as President of Mexico.¹⁹² Obrador, representing the

¹⁸⁴ Bruce Zagaris, *U.S. Indicts Former Mexican Governor of Tamaulipas and Two Former Politicians from Coahuila in Two Different Cases of Corruption and Money Laundering*, 30 No. 2 INT'L ENFORCEMENT L. REP. 48, 49-50 (2014).

¹⁸⁵ Aaron M. Muñoz, *Silver, Secret Drug Wars, & Selfies: The United States' Justification for the Use of Force Against the Mexican Drug Cartels*, 41 W. ST. U.L. REV. 643, 674 (2014) [hereinafter Muñoz].

¹⁸⁶ Staff Reporter, *Former Mexican governor extradited from Italy to U.S.*, LOS ANGELES TIMES (April 20, 2018), <http://www.latimes.com/nation/nationnow/la-na-tomas-yarrington-20180420-story.html>.

¹⁸⁷ Muñoz, *supra* note 189.

¹⁸⁸ See generally Spencer Thomas, *A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War*, 45 VAND. J. TRANSNAT'L L. 599, 622 (2012) (general discussion of Los Zetas control and operations in Northern Mexico).

¹⁸⁹ Zagaris, *supra* note 184.

¹⁹⁰ Staff Reporter, *supra* note 186.

¹⁹¹ Muñoz, *supra* note 185.

¹⁹² Mary Beth Sheridan & Kevin Sieff, *AMLO Inaugurated as Mexico's President, Vowing to Transform the Country*, THE WASHINGTON POST (Dec. 1, 2018), <https://www.washingtonpost.com/world/amlo-will-be-inaugurated-as-mexicos-president->

National Regeneration Movement (Movimiento Regeneración Nacional), took office after winning 53 percent of the vote in a three-way race and following a campaign in which he promised “profound and radical” changes to improve Mexico.¹⁹³ After corruption allegations that have diminished the authority of Peña Nieto’s regime, many in Mexico anxiously wonder whether Obrador will keep his campaign promises of rooting out corruption in Mexico and strengthening the SNA—acts his predecessor was unable, or even unwilling, to do.¹⁹⁴ Some commentators believe Obrador is off to a troubling start because he has declined to prosecute acts of corruption that occurred before he took office, despite agreeing not to halt those already underway.¹⁹⁵ Other experts believe that Obrador will play on his reputation for honesty, and personal influence to promote changes within Mexico’s government.¹⁹⁶

Another unanswered question is whether Obrador will continue promoting the basic framework of the SNA or whether he will try to implement his own anti-corruption plan on which he campaigned. Obrador released a 50-point plan to fight corruption and reduce privileges for governmental officials in Mexico.¹⁹⁷ Although much of the plan’s details have not been revealed, Obrador touts the measures as “transformative” with proposed measures including consolidating government contracts under a single office.¹⁹⁸ Another proposed measure includes allowing the President to be charged with corruption, which bolsters Obrador’s claims of fighting for real change and refusing to “cover up anyone’s misdeeds.”¹⁹⁹ Mexico has entered what could be a transformative period; the country can either continue with the status quo, or follow the public’s mandate for ridding the government of corruption. As of this writing, the decision of which path to take primarily rests in the hands of Andres Manuel Lopez Obrador.

B. The Next Steps in the United States

The future of bribery enforcement in the United States is arguably more complicated than it is in Mexico. The United States seemingly has the infrastructure in place to address the problem, but a majority of Americans feels as though the country has nevertheless regressed in the fight against corruption.²⁰⁰ Results from

vowing-to-transform-the-country/2018/11/30/d3014f4c-f267-11e8-99c2-cfa6fcf610c_story.html?utm_term=.7dd310c817d9.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Sheridan & Sieff, *supra* note 192.

¹⁹⁸ *Id.*

¹⁹⁹ *See Id.*

²⁰⁰ *See Corruption in the USA: The Difference a Year Makes*, Transparency Int’l. (Dec. 12, 2017), https://www.transparency.org/news/feature/corruption_in_the_usa_the_difference_a_year_makes.

a late 2017 Transparency International survey found that nearly 70% of Americans believe the government is failing to fight corruption—up from 50% in 2016.²⁰¹ The survey also asked about the perception of corruption in nine influential government sectors including: the national government e.g. the President and Congress, local government, e.g. judges and the police, and those outside of the government who have strong societal influence, e.g., business and religious leaders.²⁰² The results showed that Americans perceive the national government in Washington to be the most corrupt, with 44% perceiving the President and his administration to be corrupt—up from 36% the year prior.²⁰³ This could be a symptom of partisan politics, but it is also a worrying trend for a country with the institutions in place to actively fight corruption, especially with overall bribery prosecutions down in recent years.²⁰⁴

The United States has focused much of its anti-bribery attention on international problems rather than potential problems within its own borders.²⁰⁵ In the wake of massive globalization and international agreements promoted by the United Nations and the OECD, senior U.S. officials have directed resources internationally.²⁰⁶ The FBI created an International Corruption Unit in 2008 and currently has 49 Border Corruption Task Forces that devote attention to bribes relating to “national security” issues.²⁰⁷ The shift in focus has also been changed as the United States shifts more to prevent bribery because it “undermine[s] and distort[s] the marketplace and ultimately harm[s] investors.”²⁰⁸ Shifting the focus to bribes with international relevance, or focusing on the harm done to the market is not inherently negative. However, it can overshadow the work that needs to be done in reigning in the bribery among public officials, which the American public is most worried about.

VII. CONCLUSION

The prosecution of bribery considers the codified laws on the books and the enforcement of those laws in an effort to deter future similar behavior. The biggest difference between codified laws in the United States and Mexico is the

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Global Legal Insights, *supra* note 116.

²⁰⁵ See Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593 (2002); see also Steven R. Peikin, Co-Director, SEC Enforcement Division, Reflections on the Past, Present, and Future of the SEC’s Enforcement of the Foreign Corrupt Practices Act, (Nov. 9, 2017), <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

²⁰⁶ Peikin, *supra* note 205.

²⁰⁷ Federal Bureau of Investigation, *Ten Years After: The FBI Since 9/11, Public Corruption*, <https://archives.fbi.gov/archives/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/public-corruption-1>.

²⁰⁸ Peikin, *supra* note 205.

detailed sanction procedures within the United States Sentencing Guidelines. The detailed tables and sanction ranges included in the Sentencing Guidelines promise more consistent decisions from both prosecutors and judges (and potentially criminal defendants) because they reduce discretion and are public, transparent documents. The other difference discussed in this Note is the lack of enforcement of both the old and new codified laws in Mexico compared to the enforcement in the United States. Legal scholars now believe that the certainty of prosecution is much more important than the severity of punishment in achieving deterrence. The SNA has changed the codified laws in Mexico in an attempt to make sanctions stronger. Without institutional enforcement, i.e., a commitment to raising the probability of prosecutions, the changes in punishment levels might be rendered toothless.

Both the United States and Mexico can take important steps toward deterring public official bribery. Beginning with Mexico, the changes contemplated by the SNA are steps in the right direction, but Mexico still needs more consistency in enforcement and cooperation among all levels of government. This undoubtedly begins with new President Obrador, and whether his leadership will allow the country to make the turn towards more efficient enforcement of the laws or whether he will turn his back on the overriding voice of the people. With the United States, more progress could occur with greater consistency in enforcement, which could provide the public with a more favorable view of governmental anti-corruption efforts. Currently, there has been an increased media focus on corruption in the United States and the American public has increasingly grown wary. Although no specific allegations have centered around bribery, the overall appearance of corruption can be, at least partially, cleaned up by bribery prosecutions.

A comparison of each country's codified laws has revealed two different approaches to public official bribery and its prosecution. In the United States and Mexico, especially with changes based on the SNA, codified laws make relatively clear what constitutes illegal bribery and the resulting punishments. However, this Note has shown that the lack of prosecution of those codified laws leads to decreased deterrence and more public official corruption. With respect to bribery prosecution, consistency can ensure that public officials soliciting or accepting bribes do not feel above the law. The United States has more established institutions in its anti-corruption fight, and it will be important to make sure the existing institutions are not weakened, but strengthened, in the face of modern pressure. Mexico faces a similar problem, but under different circumstances. The institutions need to be strengthened, but they must be built from almost nothing. Both countries have the opportunity to increase transparency, increase the optimism of their citizens, and improve the efficiency of their governments if they are able to more consistently deter bribery of public officials.

