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GLOBAL-TECH'S "PATENT" FAILURE: WHY CONGRESS MUST REVISE THE FOREIGN CORRUPT PRACTICES ACT'S MENS REA AFTER *GLOBAL-TECH*

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INTRODUCTION

The multinational retail corporation Wal-Mart Stores, Inc. is a brand that epitomizes the American dream. Created as a single store in 1969 by Sam Walton in Bentonville, Arkansas, today the company has grown to more than 10,500 stores with over two million employees.[1] Wal-Mart stores, under a variety of names, can be found across the globe in such countries as Mexico, the United Kingdom, Japan, and India. With hundreds of billions of dollars in revenue each year and a reputation of being "the world's largest retailer," Wal-Mart has become one of the world's most valuable companies.[2]

Building 10,500 megastores in a little over forty years, or approximately 263 stores per year, is no small feat, especially when 5,500 of these stores are abroad.[3] How could a company, even with the resources that Wal-Mart has available, move and build so quickly, particularly in foreign countries, which undoubtedly have many bureaucratic obstacles? The New York Times recently raised allegations that Wal-Mart built up so quickly by bribing foreign officials.[4] In particular, the New York Times conducted an investigation unearthing information that Wal-Mart had spent more than $24 million on bribes in Mexico to obtain permits in its rush to build stores.[5] One example included bribing officials to allow the building of a store in an alfalfa field, located barely a mile away from the ancient pyramids of Teotihuacan, where the government had decided there was too much congestion.[6] Rather than accept Mexico's decision that they did not want overcrowding near the valuable and historic tourist location, Wal-Mart allegedly bribed

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1. WAL-MART CORPORATE, http://corporate.walmart.com (last visited Feb. 7, 2013).
2. *Id.*
3. *Id.*
4. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, April 21, 2012, at A1 (stating that in September 2005, a senior Wal-Mart lawyer received an email from a former executive of the company describing "how Wal-Mart de Mexico had orchestrated a campaign of bribery to win market dominance.").
5. *Id.*
6. *Id.*

zoning officials to gain permission to build exactly where they were not wanted.[7]

The unfolding of this Wal-Mart saga illustrates that corruption of foreign government officials is a serious problem. More than 400 companies have admitted to making questionable or illegal payments, with payments made out of corporate funds to foreign government officials amounting to nearly $300 million.[8] Not only does such fraud undermine public confidence in public elected officials, but it also allows certain companies, particularly those with multitudinous resources at their disposal, to obtain an unfair advantage in the marketplace. Additionally, the exposure of bribery can result in many negative implications, including damage to a company's image, costly lawsuits, the cancellation of contracts, and the appropriation of valuable assets overseas.[9] It is therefore of the utmost importance that U.S. corporations are not involved in such unlawful conduct.

To combat this, Congress created the Foreign Corrupt Practices Act (FCPA), a federal statute that allows prosecution of American companies for bribery committed both domestically and abroad.[10] Wal-Mart's alleged bribery represents a prime target for FCPA prosecution. But what evidence is necessary for Wal-Mart to be found guilty? The FCPA contains specific guidelines for the mental state (or mens rea) and guilty act (or actus reus) that are required for a finding of bribery. Specifically, under the FCPA, it is unlawful for certain people or entities to make payments to foreign government officials to assist in obtaining or retaining business. Proof must be shown, first, that some sort of payment was made (the actus reus) and second, that this payment was made corruptly (mens rea). As the actus reus component is fairly straightforward in that a payment was either attempted or not, the difficulties in successful prosecutions under the FCPA more often arise in connection with the less straightforward mens rea component.

Particularly, the FCPA states that it is unlawful "to make use of the mails . . . corruptly in furtherance of an offer."[11] Confusion surrounds what exactly the term "corruptly" means and what sort of mental state it encompasses. Pursuant to case law both specific to the FCPA and in criminal law generally, corruptly usually means that a defendant had knowledge of criminal wrongdoing. This does not connote that the defendant necessarily knew that what he was doing was a violation of

7. *Id.*
8. H.R. REP. NO. 95-640, at 1 (1977).
9. *Id.* at 2.
10. 15 U.S.C. § 78dd-1 (2012). The statute states in relevant part:
It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value . . . .
11. 15 U.S.C. § 778dd-2(a) (2012).

the FCPA or a specific criminal statute; rather, this knowledge means that the defendant knew that what he was doing was wrongful or unlawful. This element of knowledge, depending on the statute, can encompass both positive knowledge and the alternate mental state of willful blindness (traditionally known as conscious avoidance or deliberate ignorance). A person acts with willful blindness when he or she knows that wrongdoing is occurring, but purposefully avoids learning the truth about the illegal actions. In criminal law and under the FCPA, positive knowledge and willful blindness are considered legal equivalents, thus providing two potential routes to a finding of a guilty mens rea. However, the willful blindness standard has historically been an area of great confusion for the courts and recent innovations to the standard may make its application even more difficult.

Most recently, the Supreme Court in *Global-Tech Appliances, Inc. v. SEB* altered the requirements for a finding of willful blindness, narrowing the standard and making it more difficult to prove.[12] While the case is a civil action for patent infringement, the Supreme Court crafted the new willful blindness standard by borrowing heavily from criminal law. Under this new *Global-Tech* standard, the prosecution must prove two prongs to establish willful blindness. It must be shown, first, that the defendant subjectively believed there was a high probability that a fact existed and second, that the defendant took deliberate steps to avoid learning that fact.[13] The addition of the second prong requires a showing that the defendant actually took concrete, affirmative actions to avoid learning a particular fact, not only that he closed his eyes to avoid actually knowing. This innovation will likely cause many unintended consequences. In particular, statutes outside the realm of patent infringement, such as the FCPA, that contain a knowledge and willful blindness component will need to follow this new standard as well. In doing so, it will be more difficult to prove either an individual's or a company's wrongdoing under the Act.

In an era where situations such as Wal-Mart's potential bribery in Mexico occur at an alarming rate, it is essential that any hindrances to successful prosecutions under the FCPA be removed. As such, Congress should amend the FCPA and explicitly outline the components for willful blindness, removing the affirmative steps requirement imposed by *Global-Tech*. This would allow more vigilant regulation of corporate activities abroad and prevent outrageous situations such as Wal-Mart from happening in the future.

With this in mind, I will argue that Congress must step in and revise the FCPA's willful blindness standard so that it does not follow the requirements of *Global-Tech*. In Part I of this Note, I will discuss the FCPA and its mens rea requirement, particularly illustrating how corruptly refers to knowledge. In Part II, I will go through the development of the knowing form of mens rea and its incorporation of the willful blindness standard. In Part III, I will discuss the Supreme

12. Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060 (2011).
13. *Id.* at 2069–70.

Court's recent decision in *Global-Tech* and highlight the changes to the willful blindness doctrine. In Part IV, I will discuss how these changes will impact the law generally and the FCPA in particular. In Part V, I will give my recommendations, illustrating how and why Congress should step in to revise this change to the willful blindness standard in relation to the Foreign Corrupt Practices Act.

I. The Foreign Corrupt Practices Act

The FCPA was enacted in 1977 after Congress discovered that more than 400 corporations had made questionable or illegal payments in excess of $300 million to foreign officials.[14] Such payments ran the gamut from bribery of high foreign officials to obtain favorable action by a foreign government to so-called facilitating payments that were made to ensure that government functionaries discharged certain ministerial duties.[15] As such, Congress created the FCPA to generally prohibit corrupt payments to foreign officials for the purposes of creating new business or maintaining old business.[16] Particularly, two main purposes were kept in mind: first, to prohibit bribery of foreign officials and second, to establish certain accounting requirements that made companies accountable for their behavior.[17]

The bribery provisions in the FCPA prohibit both individuals and businesses from "corruptly" making use of any instrumentality of interstate commerce so as to "offer, pay, promise, or authorize to pay, either directly or indirectly, money or anything of value to any foreign official or political party."[18] A payment that is found to be a bribe can result in both civil and criminal penalties.[19] For individuals, bribery can result in civil penalties up to $10,000 and criminal penalties up to $250,000 and five years imprisonment.[20] Under the Alternative Fines Act, the fine may be increased to twice the gross financial gain or loss resulting from the corrupt payment.[21] For entities, bribery can result in civil penalties up to $10,000 and a criminal fine up to $2 million.[22] Accordingly, the Alternative Fines Act can cause the fine to be increased for entities in the same way as with individuals.[23]

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14. Robin Miller, Annotation, *Construction and Application of Foreign Corrupt Practices Act of 1977*, 6 A.L.R. Fed. 2d 351 (2005).

15. U.S. Dep't of Justice, A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. Dep't of Justice 3 (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

16. *Id.*

17. *Id.*

18. Miller, *supra* note 14, at § 2 (summarizing 15 U.S.C. §§ 78dd-1 *et seq.*).

19. *FCPA Penalties*, World Compliance (2013), http://www.worldcompliance.com/en/resources/due-diligence-legislation/fcpa-legislation/fcpa-penalties.aspx.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* Whether voluntary disclosure by a corporation results in leniency of a penalty is a topic of debate. A recent study done by New York University Law School suggests that there is no evidence in actions brought from 2004 to 2011 that voluntary disclosure resulted in lesser penalties.

With such a large price to pay for bribery, it is essential to know what the Department of Justice looks for in order to bring prosecutions under the FCPA. Overall, the Act is very specific in terms of who is subject to its jurisdiction and punishments; it is broad in scope and outlines who, what, when, and where prosecution is appropriate. At the most basic level of the FCPA, there are three elements that constitute a violation of anti-bribery provisions.[24] These include: (1) who (payers and recipients), (2) what (payment for a business purpose), and (3) how (with a corrupt intent).

A. *The "Who" of the FCPA: Payers and Recipients*

In terms of who can be liable, the FPCA defines both recipients and payers of bribes. To define recipients of a bribe, the Act prohibits payments made to a "foreign official" or a "foreign political party or official thereof or any candidate for foreign political office."[25] These prohibitions apply regardless of rank or position.[26] The purpose of the FCPA is to focus on the purpose of the payment as opposed to the duties of any particular official receiving the payment or offer.[27] Payments to intermediaries are also criminalized, meaning that it is unlawful to make a payment to a third party, including joint venture partners or agents.[28]

To define payers of the bribe, the Act applies to individuals, firms, officers, directors, employees, or agents of a firm, including stockholders, and allows prosecution of both individuals and corporations.[29] The Act applies to United States businesses and citizens, as well as foreign companies, and allows extra-territorial jurisdiction over behaviors committed outside of the country. This jurisdiction is based on whether the violator is considered an "issuer," a "domestic concern," or a foreign national or business.[30] The definitions for each of these can be found in the language of the statute itself. An "issuer" is a corporation that issues securities that are registered domestically or an entity that is required to file periodic reports with the Securities and Exchange Commission (SEC).[31] A "domestic concern" is any individual that is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States.[32] For both issuers and domestic concerns, jurisdiction for liability is created under either territorial or nationality jurisdiction principles; they may be held liable for payments

24. *Id.*
25. Gregory M. Lipper, *Foreign Corrupt Practices Act and the Elusive Question of Intent*, 47 AM. CRIM. L. REV. 1463, 1467 (2010).
26. U.S. DEP'T OF JUSTICE, *supra* note 15, at 20.
27. *Id.* at 10.
28. *Id.* at 14, 43.
29. *Id.* at 10.
30. *Id.*
31. 15 U.S.C. § 78dd-1 (2012).
32. 15 U.S.C. § 78dd-2 (2012).

made within or outside of the United States.[33] Finally, with the 1998 amendments, jurisdiction under the FCPA was expanded to foreign companies if it causes a corrupt payment to take place within a territory of the United States.[34] As such, any individual or corporation that is involved in corrupt payments within or outside of the United States may be subject to liability under the FCPA.

B. *The "What" and "How" of the FCPA: The Meaning of Corruptly*

Once the "who" has been established, it is important to consider what exactly is the illegal act, or actus reus, that the FCPA prevents. The Act prohibits paying, offering, promising to pay, or authorizing to pay or offer, money, or anything of value.[35] Such actions must be made in order to assist an individual or a firm in obtaining or retaining business.[36] This requirement is known as the "business purpose test," which the Department of Justice defines broadly, meaning it to encompass more than just the award or renewal of a contract.[37] The business purpose test is meant to encompass payments made in the conduct of business or to gain an unfair business advantage.[38] Such business does not necessarily need to be with a foreign government or foreign government instrumentality to be considered under the definition.

It is important to note that the FCPA contains a narrow exception for "facilitating or expediting payments" made in furtherance of a routine governmental action.[39] Examples of routine governmental action include such activities as processing visas, providing police protection or mail service, or supplying utilities like phone, power, or water.[40] It does not include any decisions related to awarding new business or continuing old business. The Department of Justice Handbook gives the example that a facilitating payment would be considered a small amount paid to have the power turned on at a factory as opposed to paying an inspector to avoid the fact that the factory does not have a valid permit.[41] A payment will never be seen as "facilitating" if it in any way involves a misuse of power or an act outside of an official's position. In general, this exception is tricky to apply, and courts will be hesitant

33. U.S. DEP'T OF JUSTICE, *supra* note 15, at 11.
34. *Id.* at 12.
35. 15 U.S.C. § 78dd-1 (2012). The statute states in relevant part:
It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value . . . .
36. U.S. DEP'T OF JUSTICE, *supra* note 15, at 12.
37. *Id.*
38. *Id.* at 12–13.
39. *See* 15 U.S.C. § 78dd-1(b) (2012).
40. U.S. DEP'T OF JUSTICE, *supra* note 15, at 25.
41. *Id.*

to categorize a payment as facilitating and beyond the reach of the FCPA.

For acts outside of this exception, the payment must be completed with a *corrupt* intent or mens rea. Most basically, *Black's Law Dictionary* defines *corruptly* as "[i]n a corrupt or depraved manner; by means of corruption or bribery" or as used in criminal law statutes, "a wrongful desire for pecuniary gain or other advantage."[42] While this definition appears relatively straightforward, many problems arise in the application of corruptly. In particular, not only is there no consensus on the definition of the term among the courts, but the Model Jury Instructions for the Ninth Circuit emphasize that the term "corruptly" is capable of different meanings in different statutory contexts.[43]

Accordingly, a look at the varying uses of "corruptly" can shed light on its use in the FCPA specifically. For example, 26 U.S.C. § 7212, a statute involving attempts to interfere with the administration of Internal Revenue Service (IRS) laws, describes its actus reus and mens rea as "[w]hoever corruptly or by force or threats of force . . . endeavors to intimidate or impede any officer or employee."[44] Initially, the term "corruptly" under this Act was defined as an "improper motive" or a "wicked or evil purpose."[45] However, under *United States v. Reeves*, the Fifth Circuit explained that these definitions should not be adopted, and instead corruptly should be defined to describe an act "done with an intent to give some advantage inconsistent with the official duty and rights of others."[46] The court wished to emphasize not the act in itself or acts specifically driven by an evil purpose, but the advantage to be derived from the act.[47] This illustrates one of the many ways the intent of corruptly has evolved. Additionally, under 18 U.S.C. § 1512(b)(2)(A), a statute aimed at the prevention of witness tampering, the term corruptly is understood to reflect some consciousness of wrongdoing.[48] This can be contrasted with another statute, 18 U.S.C. § 201(b)(2)(B), involving bribery of public officials and witnesses, which states that corruptly refers to the defendant's intent to be influenced to perform an act in return for financial gain.[49] These various definitions have nuances that lead to differences in application. As such, it is essential to understand the meaning of corruptly in the context of each particular statute.

In *United States v. Kay*, the Fifth Circuit defined corruptly as specifically applied to the Foreign Corrupt Practices Act. The defendants, who were the president and vice-president of a grain-exporting corpora-

42. BLACK'S LAW DICTIONARY 397 (9th ed. 2009).

43. MANUAL OF MODEL CRIM. JURY INSTR. 9TH CIR. § 3.14 (1995).

44. 26 U.S.C. § 7212 (2012).

45. KEVIN F. O'MALLEY, ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 48:04 (6th ed. 2013).

46. United States v. Reeves, 752 F.2d 995, 998 (5th Cir. 1985) (quoting United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979)).

47. *Id.* at 999.

48. Arthur Andersen LLP v. United States, 544 U.S. 696, 704–06 (2005).

49. *See* United States v. Strand, 574 F.2d 995 (9th Cir. 1978).

tion, were charged with paying Haitian officials to reduce duties and taxes on rice exports.[50] A jury found violations of the FCPA, specifically that the defendants willfully and corruptly offered payments to a foreign official for the purposes of influencing business. The court's instructions to the jury defined a corrupt act as one that is "done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means."[51] The defendants appealed, claiming that the jury instructions were inadequate relating to the mens rea requirements of the FCPA. The Fifth Circuit held this definition as adequate, but emphasized that the government must prove, and a jury must find beyond a reasonable doubt, that defendants both corruptly *and* willfully violated the FCPA.[52]

However, because the FCPA does not define the term willfully, the courts looked to the common law interpretation of the term.[53] The court stated that generally there are three levels of interpretation. Under the first level, willfulness means "committing an act, and having knowledge of that act."[54] In these instances, the defendant does not have to know of the "specific terms of the statute or even the existence of the statute"; the defendant's knowledge is sufficient.[55] At the intermediate level, willfulness requires that the defendant knew that his actions were in some way unlawful; once again, no knowledge of a specific statute is necessary, just a general feeling of "doing bad."[56] The third and strictest level requires knowledge of the precise statute, which usually is reserved for statutes of extreme complexity.[57] The court held that for the FCPA, the first or second level of willfulness is sufficient.[58]

More importantly, it is essential to note that in either instance, willfully means that the defendant acted knowingly. Thus, the Court also instructed the jury on the definition of an act done "knowingly," stating "to be guilty under the Act, defendants must have knowingly (*i.e.*, voluntarily and intentionally) acted with awareness of these unlawful ends."[59] This line of reasoning establishes that the FCPA requires a mens rea of both corruptly and willfully, which by definition means knowingly. Thus, the intent element under the FCPA dictates that the actus reus for the crime of bribery must be committed corruptly and willfully, which under the Court's holding in *United States v. Kay*, means that the bribe was done knowingly.

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50. United States v. Kay, 513 F.3d 432, 439 (5th Cir. 2007).

51. *Id.* at 446.

52. *Id.* at 446–47.

53. *Id.* at 447.

54. *Id.*

55. *Id.*

56. *Id.* at 448.

57. *Id.* This strict level of knowledge usually applies to tax evasion cases. *See, e.g.,* Cheek v. United States, 498 U.S. 192 (1991).

58. *Kay*, 513 F.3d at 450–51. *See also* Bryan v. United States, 524 U.S. 184, 193 (1998).

59. *Kay*, 513 F.3d at 449.

This is reinforced through the Department of Justice's handbook on the Foreign Corrupt Practices Act. Specifically, the handbook states that when adopting the FCPA, Congress meant "corruptly" to connote "an intent or desire to wrongly influence the recipient."[60] There is no requirement that the act being influenced succeed in its purpose.[61] The handbook further states that for an individual defendant to be criminally liable under the FCPA, he or she must act "willfully."[62] While not defined explicitly in the FCPA, the handbook states that courts have generally construed this term to "connote an act committed voluntarily and purposefully, and with a 'bad' purpose, i.e., with 'knowledge that [a defendant] was doing a bad act under the general rules of law.'"[63] The case law and Department of Justice handbook thus illustrate that the mens rea component for an FCPA crime encompasses corruptly, willfully, and most importantly knowingly.

II. The Mens Rea Knowingly: Definition and Application

In criminal law under the Model Penal Code, there are four possible mens rea levels for any given crime.[64] These include purposely, knowingly, recklessly, and negligently.[65] Following the MPC, a person is said to act knowingly with respect to a material element of an offense when, "if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result."[66] This mens rea level of knowingly, as defined by the MPC and courts, has greatly changed since its creation in 1962, broadening and narrowing depending on the given circumstances of a crime.

A. *Introduction and Evolution of Willful Blindness*

An innovation to the knowingly standard came in 1976 under *United States v. Jewell*. Under this case, the defendant was convicted in district court of a violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, and he appealed, contesting the mens rea component of knowingly.[67] The defendant argued that "knowingly" under the statute required positive knowledge to amount to a violation, and therefore, it must be proven beyond a reasonable doubt that the defendant had positive knowledge in order to result in a conviction.[68] The government claimed that it could meet the burden of proof without positive knowledge if they could show that the defendant's lack of knowledge was based on a "conscious purpose to avoid learning the

60. U.S. Dep't of Justice, *supra* note 15, at 14.
61. *Id.*
62. *Id.*
63. *Id.*
64. Model Penal Code § 2.02 (1985).
65. *Id.*
66. *Id.*
67. *See generally* United States v. Jewell, 532 F.2d 697 (9th Cir. 1976).
68. *Id.* at 698.

truth."[69] The court upheld the side of the government, stating, "If a party has suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge."[70] If a statute specifically states that positive knowledge is required under its definition of "knowingly", then nothing less than that will do. However, "knowingly" otherwise can be considered to include the mental state where "the defendant is aware that the fact in question is highly probable but consciously avoids enlightenment"; in this way, the statute can be satisfied by such proof.[71] This case was therefore a landmark in the sense that for the first time, willful blindness was held as the equivalent of knowledge. "Knowingly" as a mens rea component, thus, can refer to either positive knowledge or willful blindness to the crime or an element of the crime.

B. *Willful Blindness and the FCPA*

As applied to the FCPA, it is important to look to the statute's exact language to determine whether willful blindness is included in the statute's mens rea. In the FCPA's original form, the mens rea element was mere negligence. Congress eliminated this standard in 1988 and used the knowing standard instead. Under the bribery provisions of the FCPA, the mens rea component standard is corruptly and willfully, which according to *United States v. Kay*, referenced previously, is the equivalent of knowingly. Following a conference report on the FCPA, this corruptly/willfully/knowingly standard covers both actual knowledge as well as conscious disregard or deliberate indifference.[72] In particular, the Report stated,

> The conferees intend that the requisite "state of mind" for this category of offense include a "conscious purpose to avoid learning the truth." Thus, the "knowing" standard adopted covers both prohibited actions that are taken with "actual knowledge" of intended results as well as other actions that, falling short of what the law term "positive knowledge" nevertheless evidences a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the act.[73]

Congress thus adopted a standard for the FCPA's mens rea recognizing that actual knowledge may not be required. Instead, an awareness of a "high probability" of an illegal action, coupled with a "deliberate" decision to avoid gaining information and consciously avoiding the truth can suffice.[74] Nowhere in the legislative history is

69. *Id.* at 701.

70. *Id.* at 700, *quoting* GLANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL 157 (2d ed. 1961).

71. *Id.* at 704.

72. H.R. REP. NO. 100-576, pt. 1, at 919–20 (1977).

73. *Id. See also* Paul T. Friedman & Ruti Smithline, *Is "Conscious Avoidance" Sufficient to Establish Knowledge Under the FCPA?*, BUS. L. TODAY, Feb. 2012, at 1.

74. *Id.* at 1.

there a requirement for any concrete evidence of affirmative steps taken to avoid learning a fact. As such, the FCPA, under its mens rea, encompasses the "knowingly" standard of intent, which has been defined to include willful blindness.

C. *Difficulties with the Willful Blindness Standard*

The emphasis on what the knowing standard of mens rea encompasses under the Foreign Corrupt Practices Act is important as it can serve as a gateway to prosecutions. A too liberal or too broad knowledge standard could make prosecutions much easier under the Act, which could ultimately negatively impact American businesses. In particular, the original standard under the FCPA when it was enacted in 1977, stated that knowledge meant "while knowing or having reason to know."[75] Critics strongly opposed this standard, stating it was much too vague and fearing that it would "totally cripple U.S. corporate activities in certain countries."[76] In response to this criticism, Congress narrowed the knowing requirement to what it is today: specifically, corruptly and knowingly, also including willful blindness. Despite these legislative changes however, there still exists a great amount of uncertainty as to what level of knowledge is needed exactly for prosecutions under the FCPA. If the standard is construed too narrowly and requires a high level of knowledge, prosecutions will become more difficult and corporations could potentially get away with bribery. If the standard is too broad and requires lower levels of knowledge, the opposite effect will occur. If there is just general uncertainty, legislative intent could be forgotten, leading to inconsistent judicial guidance and haphazard prosecutions.

The theory behind the willful blindness standard illustrates some of the problems in its application. According to one commentator, "[c]ourts and criminal law scholars have struggled for decades to sort out the relationship between the basic concept of knowledge . . . and the concept of 'willful blindness.'"[77] There are a number of reasons why this is the case. Firstly, such difficultly might stem from the fact that the willful blindness standard is "more of a technical, stipulative term of legal art with no precise analogue in everyday speech."[78] Consequently, confusion arises with the theory of the doctrine as to whether the willful blindness standard is an alternative to positive knowledge or a species of positive knowledge.[79] The difference lies in whether an individual is said to have positive knowledge or not when attempting to prove she was willfully blind. If willful blindness is an alternative, then

75. Gary P. Naftalis, *Navigating the Foreign Corrupt Practices Act*, 8 No. 26 Andrews Derivatives Litig. Rep. 11, 18 (2002).

76. *Id.*

77. Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2231 (1993).

78. Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 Wis. L. Rev. 29, 35 (1994).

79. *Id.* at 34–35.

the defendant does not need to have any positive knowledge. If willful blindness is a species, then the defendant does. This choice impacts the level of proof necessary, as a requirement of positive knowledge would be harder to prove.

These difficulties likely undergirded the formation of the Model Penal Code (MPC), in that the drafters of the MPC took a different approach to willful blindness than common law based on such evidentiary issues. Under common law, which employs a strict definition of knowledge, willful blindness is considered an alternative to a positive knowledge mens rea.[80] The MPC, on the other hand, employs a broader knowledge definition. In particular, willful blindness was not viewed as "actual knowledge disguised by pretended ignorance" meaning positive knowledge still existed; instead, one who is willfully blind is considered to be "one who acts with a high level of awareness of a particular fact."[81] According to one commentator, the drafters of the MPC may have predicted the difficulties that a requirement of willful blindness creates in terms of evidence required for proof.[82] Under the common law approach, evidence is required to reveal that the defendant consciously avoided a certain fact, did not care enough to investigate, or had actual knowledge of the fact. Under the MPC, this is not necessary; it must only be shown that the defendant committed the prohibited act, and that the defendant possessed a high level of awareness of the facts in question.[83] Such an approach is, therefore, much easier, and such a straightforward application of the MPC should therefore be adopted in all courts.[84]

Further, willful blindness can be used as a substitute for positive knowledge, as the MPC maintains, because the two are moral equivalents.[85] In particular, following the theorists Professor Perkins and Professor Boyce, "[n]o honest person would deliberately fail to find out the truth for fear of learning that what he was thinking of doing would violate the law."[86] In this way, a person who deliberately ignores or avoids trying to find out the truth is just as blameworthy as an individual who had knowledge of a particular crime. Thus, the approach of the MPC using willful blindness as a substitute or alternative to positive knowledge is in theory justified.

Such a theoretical debate impacts the way in which courts apply the willful blindness standard. Since *United States v. Jewell*, all federal circuits have employed willful blindness doctrines.[87] In fact, virtually all

80. *Id.* at 36. *See also* John N. Gallo & Daniel M. Greenfield, The Corporate Criminal Defendant's Illusory Right to Trial: A Proposal for Reform, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 525 (2014) (advocating reform for the corporate criminal liability process).

81. Marcus, *supra* note 77, at 2235.

82. *Id.* at 2237.

83. *Id.* at 2237–38.

84. *Id.* at 2253.

85. Husak & Callender, *supra* note 78, at 54.

86. *Id.* at 54 (*quoting* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 873 (3d ed. 1982)).

87. O'MALLEY, *supra* note 45 at § 17:09.

courts and commentators agree that the mental state of willful blindness is sufficient to satisfy the requirements of the mens rea of knowingly.[88] The willful blindness or deliberate ignorance instruction generally is defined in the Federal Jury Instructions as:

> The government may prove that Defendant acted "knowingly" by proving, beyond a reasonable doubt, that this defendant deliberately closed *[his] [her]* eyes to what would otherwise have been obvious to *[him] [her]*. No one can avoid responsibility for a crime by deliberately ignoring what is obvious. A finding beyond a reasonable doubt of an intent of Defendant to avoid knowledge or enlightenment would permit the jury to find knowledge. Stated another way, a person's knowledge of a particular fact may be shown from a deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact.[89]

Following the establishment of this intent element under *United States v. Jewell*, it was understood that such an instruction should only be given to the jury "when a defendant claims a lack of guilty knowledge and there are facts in evidence that support an inference of deliberate ignorance."[90]

However, the circuit courts differ in the amount that they make use of the willful blindness jury instruction and many of the definitions across the circuits seem to conflict. Under *United States v. Azubike* decided in the First Circuit, the trial court stated that to infer knowledge under willful blindness, two things must be established: "first, that [the defendant] was aware of the high probability of the fact in question, second, that [the defendant] consciously and deliberately avoided learning of that fact."[91] This was furthered in *United States v. Lizardo*, where the required elements to allow an instruction for willful blindness were stated as, "[1] a defendant claims a lack of knowledge, [2] the facts suggest a conscious course of deliberate ignorance, and [3] the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge."[92] In both instances, direct evidence of willful blindness was not required; instead, it was sufficient to show warning signs that call out for investigation or reveal "flags" of suspicion.

Confusion arises under the Second Circuit as to whether a conscious avoidance instruction must include whether the defendant actually believed or did not believe the existence of a particular fact, stating:

> This court has repeatedly emphasized that, in giving the conscious avoidance charge, the district judge should instruct the jury that knowledge of the existence of a particular fact is established (1) if

88. Husak and Callender, *supra* note 78, at 33–34.

89. O'MALLEY, *supra* note 45 at § 17:09.

90. United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984).

91. United States v. Azubike, 564 F.3d 59, 63 (1st Cir. 2009).

92. United States v. Lizardo, 445 F.3d 73, 85–86 (1st Cir. 2006) (*quoting* United States v. Epstein, 426 F.3d 431, 440 (1st Cir. 2005)).

> a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist.[93]

Accordingly, the Fifth Circuit wished to establish that this definition was not to be confused with a finding of negligence stating:

> Because the instruction permits a jury to convict a defendant without a finding that the defendant was actually aware of the existence of illegal conduct, the deliberate ignorance instruction poses the risk that a jury might convict the defendant on a lesser negligence standard—the defendant *should* have been aware of the illegal conduct.[94]

Additionally, some circuits employ the MPC definition of willful blindness that the defendant must ignore a high probability that the disputed fact exists. Further, the MPC employs the concept that knowledge cannot be established if the defendant "actually believes" that the disputed fact does not exist. Other circuits do not follow this. For example, no Sixth Circuit case has required this concept to be included in jury instructions surrounding deliberate ignorance.

To complicate the issue even further, confusion comes from the idea that deliberate ignorance can be seen in two ways: first, through overt physical acts and second, through purely cognitive avoidance.[95] Courts acknowledge "[t]he ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings."[96] However, there are also instances where the defendant does not actually do anything physically to avoid learning, but instead mentally cuts off curiosity by an effort of will. In these instances, there is no "outward physical manifestation of an attempt to avoid facts"; however, the deliberate effort to avoid learning the truth is still present.[97] This makes such an individual equally guilty, but courts have had some difficulty in applying the willful blindness standard in such instances, particularly as this illustrates that the willful blindness mens rea is a subjective mental state, not necessarily evidenced by objective actions. It is also important to again note that none of the commentators' or courts' definitions of willful blindness require any kind of showing of evidence of objective, deliberate steps taken to avoid knowing.

III. *GLOBAL-TECH APPLIANCES*

Amidst this landscape of legal uncertainty comes the recently decided Supreme Court case, *Global-Tech Appliances v. SEB*, which greatly alters previous conceptions of the application of the willful blindness standard. While this case lies in the civil arena in that it deals

93. United States v. Shareef, 714 F.2d 232, 233 (2d Cir. 1983).
94. United States v. Lara-Velasquez, 919 F.2d 946, 951 (5th Cir. 1990).
95. O'MALLEY, *supra* note 45 at § 17:09.
96. United States v. Giovannetti, 919 F.3d 1223, 1228 (7th Cir. 1990).
97. *Id.*

with a patent infringement dispute, the Court directly addresses the elements necessary for a finding of willful blindness, basing their decision in the development of the standard in criminal law. With the Court's imposition of particular elements, the application of the willful blindness standard in the future may greatly change.

In *Global-Tech*, the company SEB invented an innovative deep fryer, obtained a patent in the United States for its design, and began selling the product domestically and abroad.[98] After SEB began selling the fryers, Sunbeam Products asked defendant Pentalpha Enterprises, a Hong Kong home appliance maker and wholly-owned subsidiary of defendant Global-Tech Appliances, to create fryers that matched particular specifications.[99] In creating the requested fryer, Pentalpha purchased an SEB fryer that was made for a foreign market and thus had no evidence of U.S. patenting, and mimicked the fryer's design except for the cosmetic features.[100] Pentalpha then retained an attorney to conduct a right-to-use study, without informing him that the fryer was a copy of SEB's product, and the attorney issued an opinion letter stating that the fryer did not infringe any patents that he had found.[101] Pentalpha then started to sell their fryers to Sunbeam, which resold them in the United States under its own trademarks and with a price that undercut SEB.[102]

Accordingly, SEB filed for patent infringement against Sunbeam and the case was settled.[103] Pentalpha, despite being notified of the lawsuit, continued to sell its fryers to other companies.[104] SEB therefore filed another lawsuit against Pentalpha alleging violations of 35 U.S.C. § 271(b) relating to active inducement of patent infringement.[105] This statute requires a finding of knowledge, specifically that "the alleged infringer knew or should have known that his actions would induce actual infringements."[106] The district court found for SEB, but Pentalpha appealed claiming there was no evidence that they knew of any patent infringement.[107] The Federal Circuit affirmed, holding that although there was no direct evidence that Pentalpha knew of SEB's patent before it received notice of the Sunbeam suit, there was adequate proof that it deliberately disregarded a known risk that SEB had a protective patent.[108] They held this disregard as a form of actual knowledge.

The case was then appealed again and the Supreme Court granted review. Pentalpha continued to argue that active inducement liability under § 271(b) requires more than deliberate indifference and instead

98. Global-Tech Appliances, Inc. v. SEB, 131 S. Ct. 2060, 2064 (2011).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 2065.

requires actual knowledge. The Supreme Court evaluated this argument, first by reviewing the text of the statute, which they found to be inconclusive, then by looking back through case law where they found that *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, resolved the question at issue.[109] Specifically, a badly fractured majority in *Aro Manufacturing* stated that knowledge was required for patent infringement, specifically under § 271(c), which the Supreme Court in *Global-Tech* took to apply to § 271(b) as well.[110] As such, the Court held that induced infringement under § 271(b) requires knowledge that the induced acts resulted in patent infringement.[111]

The majority then assessed the propriety of using the deliberate indifference or willful blindness doctrine. After looking back through criminal law's history, the majority stated, "Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement . . . ."[112] However, the Supreme Court did not agree with the way in which the Federal Circuit applied the standard. This is where the innovation in willful blindness emerges. The Supreme Court stated that there must be two basic requirements to a willful blindness standard.[113] First, the defendant must subjectively believe that there is a high probability that a fact exists and second, it must be shown that the defendant took deliberate steps to avoid learning that fact.[114]

The first prong of the standard remains fairly consistent with prior formulations of the willful blindness standard. The innovation comes with the second part, particularly that the defendant must take deliberate actions to avoid learning of that fact. This requires a much more stringent proof of culpability than the prior deliberate indifference standard formulations and surpasses both recklessness and negligence. The first prong of a high degree of certainty has been used, sometimes with slightly different constructions, in courts since the inception of the willful blindness standard. The second prong, however, has not. This requirement for deliberate action not only completely eliminates the form of willful blindness that is purely cognitive, but also requires evidence that will likely be very difficult to provide, no matter the subject matter of the case. The addition of this second prong raises a plethora of problems, including questions as to what type of evidence will suffice to meet the new standard. In attempting to clarify the willful blindness standard to make it easier and more concrete to apply, it seems the Supreme Court unfortunately had the opposite effect, creating a host of issues and making the standard even trickier.

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109. *Id.* at 2068.

110. *Id. See also* Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964).

111. *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2068.

112. *Id.* at 2069–70.

113. *Id.*

114. *Id.*

Ultimately, the Supreme Court affirmed the lower courts and held that there was sufficient evidence that Pentalpha acted with a willfully blind intent, even when considered under the new standard.[115] The evidence the majority cited was a string of inferences that stated because the fryer was an innovation in the United States, one would expect it to have a patent, as any superior product would in such a market.[116] The fact that Pentalpha copied all but the cosmetic features of the fryer showed that they knew the technology was something special and therefore valuable. The Court also states that it was telling that Pentalpha not only chose to copy an overseas version of the fryer despite its intention to sell in the United States, but also did not tell their patent attorney that they had copied anything.[117] This evidence combined, the Court states, "was more than sufficient for a jury to find that Pentalpha subjectively believed there was a high probability that SEB's fryer was patented, [and] that Pentalpha took deliberate steps to avoid knowing that fact," therefore willfully blinding itself to the infringement.[118]

While the Court in *Global-Tech* upheld a finding of knowledge under a theory of willful blindness, the re-defining the Court did to the standard will most likely make it more difficult to prosecute using willful blindness in the future. This is because providing specific evidence that tangible steps were taken to avoid learning a given fact is a heavy burden. It will likely be very difficult to provide such evidence, especially in corporations where a lot of work is done behind closed doors. To extrapolate further, statutes containing a knowledge mens rea will become more difficult to prosecute. Unless knowledge is specifically defined in the language of the statute, it will include positive knowledge and willful blindness as an alternative. Because *Global-Tech* heightened the requirements necessary for willful blindness, a finding of knowledge mens rea will become more difficult to prove, ultimately frustrating prosecution strategies and court analyses.

IV. Applications of *Global-Tech*

The impact of *Global-Tech* and its alteration of the willful blindness standard is already reflected in many recent lower court decisions. Since *Global-Tech* was decided in 2011, nearly 130 cases have utilized the language of the opinion as a citing reference, applying and examining the new willful blindness standard, and grappling with the best way to follow the rigid elements and heightened standard, specifically prong two. While these cases span a variety of subject matters, encompassing both criminal and civil causes of action, many reflect the difficulty in providing the correct type of evidence now necessary for a finding of willful blindness based on the new language and standard. Some cases simply are unable to provide sufficient evidence of "deliberate steps,"

115. *Id.* at 2072.
116. *Id.* at 2071.
117. *Id.*
118. *Id.* at 2072.

others refuse to apply *Global-Tech* and differentiate it on a technicality, and others yet ignore the "deliberate steps" second prong requirement or restate the *Global-Tech* standard in a way to make the burden of proof easier to meet.

A number of these cases were simply unable to establish a finding of knowledge, due to the heightened requirements under *Global-Tech*. In *Bose Corp. v. SDI Technologies*, Bose commenced an action against SDI for allegedly infringing a patent involving interactive sound reproducing.[119] After citing the new *Global-Tech* standard, the court stated, "Arguably, this intent standard makes patent prosecutions more difficult."[120] SDI was not found as infringing as no knowledge could be established.[121] Instead, the facts were taken to construe that SDI did not have the requisite intent and the court concluded that, "Bose cannot prove the specific intent necessary to proceed to trial on contributory infringement or inducement" and that "Bose has not shown that SDI knew . . . ."[122] This difficulty can also be seen in *MONEC Holding v. Motorola*, where a patent owner brought an infringement action for a flat electronic device housing a processing system.[123] The court specifically stated that to state a claim for willful blindness, a complaint must identify affirmative actions taken by the defendant to "avoid gaining actual knowledge of the patent-in-suit . . . ."[124] The majority held that the plaintiffs did not provide sufficient evidence to establish knowledge or willful blindness, and that the "allegations are insufficient to establish 'active efforts by an inducer' to avoid knowledge . . . ."[125] Finally, in *Mikkelson Graphic,* the plaintiff was not even able to pass summary judgment on the case because "there [was] no evidence that [the defendant] deliberately shielded itself from clear evidence that the acts it induced constituted patent infringement."[126] Concrete behavior that "avoids knowledge" is thus a difficult fact to prove and establish in court.

Alternatively, some cases have simply refused to apply *Global-Tech* or extend its holding, ostensibly due to its difficult application, though the subject matter seems relevant. For example, in *Sovereign Military*, a Catholic order brought an action against a non-Catholic religious order for trademark infringement, false advertising, unfair competition, and deceptive trade practices.[127] Although the court cited the *Global-Tech*

119. Bose Corp. v. SDI Technologies Imation Corp., No. 09-11439-WGY, 2012 WL 2862057, at *1 (D. Mass. July 10, 2012).

120. *Id.* at *9.

121. *Id.* at *11.

122. *Id.*

123. MONEC Holding AG v. Motorola Mobility, Inc., 897 F. Supp. 2d 225, 228 (D. Del. 2012).

124. *Id.* at 230.

125. *Id.* at 234 (quoting Global Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2071 (2011)).

126. Mikkelson Graphic Engineering, Inc. v. Zund America, Inc., No. 07-C-0391, 2011 WL 6122377, at *7 n.3 (E.D. Wis. Dec. 8, 2011).

127. Sovereign Military Hospitaller v. Florida Priory, 702 F.3d 1279 (11th Cir. 2012).

standard, the majority refused to apply it, stating, "It was error to look to [*Global-Tech*] for the applicable standard to analyze a claim for fraud on the PTO" and cautioned against applying patent standards to a trademark case.[128] It held, "[t]o the extent the district court relied on the inapplicable 'willful blindness' standard to find the required intent to deceive the PTO, it erred."[129] Despite this case being in the realm of intellectual property rights, the court did not wish to allow a finding of willful blindness. Perhaps this is because the evidence required under that standard is too difficult to prove, illustrating another way the courts have had difficulties in applying *Global-Tech*.

Additionally, a third set of cases uses the *Global-Tech* standard, but states it in varying terms so as to make the required evidence easier to provide. This can be seen in *United States v. Jinwright*, where the defendants were convicted of conspiracy to defraud the United States, tax evasion, and other charges.[130] The district court issued a willful blindness jury instruction, which the defendant stated was in error as there was not sufficient evidence to warrant such an instruction.[131] While citing *Global-Tech*, the standard the court used was that knowledge could be proven by establishing that the defendant "deliberately shielded himself from clear evidence of critical facts that are strongly suggested by the circumstances."[132] The evidence must just support "an inference that a defendant was subjectively aware of a high probability" of the existence of the crime.[133] This varies from the *Global-Tech* standard, which held that there must be first, a subjective belief that there is a high probability that a fact exists, and second, that deliberate steps have been taken to avoid learning that fact. The court in *Jinwright* seems to just ignore this second component.

The second component was likely ignored because of the extreme confusion surrounding what type of evidence is even necessary to meet the standard. Following the exact wording of *Global-Tech*, the defendant "must take deliberate actions to avoid learning of that fact."[134] Such behavior would likely include deleting emails, shredding files, telling someone to destroy evidence, or destroying records. As the standard explicitly says "deliberate" this would most likely not cover omissions, which by definition is the neglect of a duty or the failure to carry out an act.[135] The law must impose a specific duty which a person ignores in order to qualify as an omission and create criminal liability. The FCPA imposes no such duty to investigate in its bribery provisions. As such, simply failing to investigate or failing to look into things further, even when there is a suspicion of wrongdoing, would not fulfill the second prong of the *Global-Tech* standard. Instead, it would only point to the

128. *Id.* at 1291.
129. *Id.* at 1292.
130. United States v. Jinwright, 683 F.3d 471 (4th Cir. 2012).
131. *Id.* at 478.
132. *Id.* at 478–79.
133. *Id.* at 479 (quoting United States v. Poole, 640 F.3d 114, 122 (4th Cir. 2011).
134. Global-Tech Appliances, Inc. v. SEB, 131 S. Ct. 2060, 2070 (2011).
135. BLACK'S LAW DICTIONARY 1086 (9th ed. 2009).

first prong that the defendant subjectively believes there is a high probability that a fact exists. It seems that only very rarely will such concrete evidence be available so as to prove the second prong under *Global-Tech*.

Accordingly, since the holding in *Global-Tech*, the lower courts have struggled with the best way to apply the new willful blindness standard, particularly the second prong requiring evidence of deliberate steps. Some courts face the issue head-on and the plaintiff is simply left without a case, as they are unable to provide sufficient evidence of discrete steps taken to avoid learning a fact. Others use questionable circumstantial evidence to meet the burden of proof. Other courts avoid *Global-Tech* altogether, declining to apply the standard in similar subject matter cases, and still others state the standard in a different way so as to avoid the harsh requirements. Each of these cases illustrates the difficulties courts have had in applying the willful blindness standard under *Global-Tech*, and these difficulties will likely increase as time goes on.

A. *Implications of* Global-Tech *on the FCPA*

These issues will plague the application and enforcement of the Foreign Corrupt Practices Act, a troublesome notion given the Act's importance in combating bribery and corporate crime. Since the inception of the Act, prosecutions have been proliferating, illustrating the inherent and pervasive nature of bribery. In particular, since 1978, there have been more than two hundred cases covering activity in eighty different countries raised by the Department of Justice against corporations and individuals on FCPA grounds.[136] Particularly, in the last few years, the focus on FCPA prosecutions by the government has increased dramatically, resulting in a skyrocketing increase of FCPA prosecutions.[137] Culminating in the most recent case currently being brought against Wal-Mart, these cases have cost corporations nearly half a billion dollars in internal investigations.[138] FCPA probes have resulted in a number of astounding government settlements with several different companies; for example, Siemens AG settled for nearly $800 million.[139] Combined across all sectors of industry, nearly $4.5 billion in penalties have been collected. While the United States is only one of a number of nations that bans bribery overseas, it is the country that has brought by far the most cases compared to anywhere else with more than 100 companies under investigation.[140] This strongly illustrates the inherent and pervasive nature of bribery and corruption in American corporations, particularly by the number of instances of bribery found across companies in all industries.

136. *Where the Bribes Are*, MINTZ GROUP, http://fcpamap.com/ (last updated July 11, 2013).

137. John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 Notre Dame J.L. Ethics & Pub. Pol'y 25, 26 (2012).

138. Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J., Oct. 2, 2012, at B1.

139. *Id.*

140. *Id.*

To estimate the impact of *Global-Tech*, it is useful to examine an FCPA willful blindness case decided before the new willful blindness standard was established and determine how it would turn out if the new standard were applied instead. In *United States v. Kozeny*, the defendant was convicted of conspiring to violate the FCPA by agreeing to make payments to Azeri officials to encourage privatization of SOCAR (State Oil Company of Azerbaijan Republic).[141] On appeal, defendant Bourke argued that the court erroneously allowed a conscious avoidance charge.[142] The court stated that a conscious avoidance (or deliberate ignorance) charge was proper when "a defendant asserts the lack of some specific aspect of knowledge required for conviction and the appropriate factual predicate for the charge exists."[143] A factual predicate exists when "the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." In this case, the evidence available included phone conversations where the defendant explicitly stated his fears that bribery may have been occurring. In particular, Bourke states:

> What happens if they break a law in . . . Kazakhstan, or they bribe somebody in Kazakhstan and we're at dinner and . . . one of the guys says, 'Well, you know, we paid some guy ten million bucks to get this now.' I don't know, you know, if somebody says that to you, I'm not part of it . . . I didn't endorse it. But let's say [ ] they tell you that. You got knowledge of it. What do you do with that? . . . I'm just saying to you in general . . . *do you think business is done at arm's length in this part of the world.*[144]

Even evidence where the defendant so obviously speaks of bribery would likely not meet the heightened *Global-Tech* willful blindness standard. The evidence above would likely fulfill the first prong, that the defendant subjectively believed that there was a high probability of wrongdoing. His statements illustrate that subjective belief, but they do not rise to the level of concrete, deliberate actions required for the second prong. It would be necessary that defendant Bourke not only commented on the potential for bribery, but also said that he was actively doing something like deleting files. Because he is only commenting on his belief that bribery may be happening, there are no deliberate actions. This case would therefore fail under the new *Global-Tech* two-pronged analysis for willful blindness. This is a frightening thought, given the apparentness of the wrongdoing in this case.

United States v. Kozeny and the non-FCPA willful blindness cases illustrate a number of issues. Firstly, the new *Global-Tech* standard requires specific evidence of deliberate steps taken to avoid learning of

141. United States v. Kozeny, 664 F.Supp.2d 369, 371 (S.D.N.Y. 2009).

142. *Id.* at 385.

143. *Id.* at 385–86 (quoting United States v. Kaplan, 490 F.3d 110, 127 (2d Cir. 2007)).

144. *Id.* at 387.

an illegal bribery situation. Such evidence will be more difficult to provide, meaning prosecutors will have a more difficult time bringing successful bribery convictions under the FCPA. In particular, while corporations are working to become more transparent, the task of collecting evidence of dealings occurring in massive companies with thousands of employees, where the deals are conducted over a long period of time, often in foreign countries, and behind closed doors with limited records, seems a nearly impossible task for prosecutors.

This, however, is assuming that the standard will even be followed literally. Based on the splintering of case law subsequent to *Global-Tech* in fields outside of the FCPA, it seems that generally lower courts will have great difficulty figuring out how to apply the standard at all. Some courts may ignore the changes altogether. Others may allow many sorts of circumstantial evidence to be sufficient to prove deliberate ignorance. This will make it so that, depending on where an FCPA case is brought, it will be extremely difficult to predict how a given case will go. Different courts may find differently depending on their application of the standard. This will create a total lack of uniformity for FCPA prosecutions as it is completely unclear what kind of evidence is necessary to even meet the second prong of the *Global-Tech* willful blindness standard. Additionally, the legislative intent behind the mens rea of the FCPA seems to be getting lost in the shuffle. In any of these situations, FCPA prosecutions will face great difficulties moving forward.

V. Recommendations & Conclusion

With all of the uncertainty surrounding the FCPA and its mens rea requirement, drastic action must be taken, otherwise in the face of mounting bribery investigations, the law will just continue to disintegrate and contradict itself. With Wal-Mart's FCPA case on the horizon, the FCPA case law on mens rea is a veritable mess, compounded by the recent decision in *Global-Tech*. It is almost impossible to predict how the case could turn out, as there is contradictory authority relating to what level of knowledge is necessary across all of the circuits. As such, Congress needs to step in and define exactly what is required for the knowledge element under the Foreign Corrupt Practices Act.

The historical process of statute creation is that Congress writes statutes and the courts attempt to follow the legislative intent of Congress when they wrote the statutes to correctly apply them. However, when courts interpret the statutes inconsistently or contrary to Congressional intent, Congress can amend the areas in the statute that are creating trouble. This can be seen in *United States v. Santos*, a Supreme Court case decided in 2008. In this case, defendant Santos ran an illegal lottery where runners took commissions from the bets they gathered, and some of the rest of the money was paid as salary to second defendant Diaz and other collectors, and to winning gamblers.[145] Based on these secondary payments, defendant Santos was convicted of

145. United States v. Santos, 553 U.S. 507, 509 (2008).

money laundering under 18 USC § 1956.[146] This statute prohibits the use of "proceeds" of criminal activities for various purposes, including transactions intended to promote the carrying on of unlawful activity. Despite defendant Santos pleading guilty to conspiracy to launder money, intervening circuit precedent created some confusion over what "proceeds" referred to exactly. The district court stated that under circuit precedent, "proceeds" referred only to transactions involving criminal profits, not criminal receipts.[147] Because there was no evidence that the transactions which Santos' convictions were based on involved lottery profits, the court vacated the convictions, which the Seventh Circuit affirmed.[148]

The Supreme Court reviewed the case and in a deeply divided decision affirmed the ruling of the lower courts.[149] Four Justices concluded that the term "proceeds" meant "profits" or net income and not "receipts" or gross income.[150] The plurality, written by Justice Scalia, came to this conclusion using the canons of statutory construction. First, they looked to the ordinary meaning of "proceeds" which they found to be contradictory. Then, using the rule of lenity, they interpreted the statute in favor of the defendants stating, "the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition."[151] Justice Stevens concurred in the judgment and Justice Alito wrote a dissenting opinion joined by three others. The dissent felt that the plurality ignored the context in which the term "proceeds" was used.[152] Justice Alito believed that by interpreting "proceeds" as profits, Congress's intent would be frustrated and the money laundering statute, an important tool used to fight corruption and crime would be "maim[ed]."[153]

The Court's ruling had a deep impact on the application of the federal money laundering statute. By restricting and narrowing the definition of proceeds to defendant-friendly profits, successful prosecutions for persons committing money laundering became more difficult and more varied. Since the Supreme Court's decision in *Santos*, "district courts have been all over the map in applying the 'profits' definition" with one court noting that *Santos* "raises as many issues as it resolves."[154] With an already more narrow definition, lower courts created further problems by debating what predicate offenses, other than gambling, the new definition should apply to.

In particular, since the Supreme Court's redefinition, decisions in the lower courts could be classified as narrow, moderate, or broad.

146. *Id.* at 509–10.
147. *Id.* at 510.
148. *Id.*
149. *Id.* at 524.
150. *Id.* at 523.
151. *Id.* at 514.
152. *Id.* at 531 (Alito, J., dissenting).
153. *Id.*
154. Rachel Zimarowski, Note, *Taking a Gamble: Money Laundering After* United States v. Santos, 112 W. VA. L. REV. 1139, 1142–43 (2010) (referencing United States v. Brown, 553 F.3d 768, 783 (5th Cir. 2008)).

Narrow decisions restricted the application of the "profits" definition to the predicate offense of operating an unlawful gambling business only; such decisions were present in the Fourth Circuit, Eleventh Circuit, and several district courts. While restricting the defendant-friendly definition to only one application would make prosecutions easier, one commentator contends this application of the profits definition "effectively chang[ed] the meaning of the statute based upon its application, a position that is in direct conflict with binding Supreme Court precedent."[155]

Alternatively, moderate decisions expanded the "profits" term to include some predicate offenses and not others; these decisions were present in the Third Circuit, Sixth Circuit, and the Ninth Circuit, and at least one district court. Under this purview, the courts applied the "profits" definition to some specified unlawful activities, but not others. As more offenses were included under the new profits definition, the prosecution's job became more difficult. Additionally, this created the problem of changing the definition of proceeds depending on the factual context of the predicate offense, which directly conflicted with core principles of statutory interpretation and created a host of uniformity issues.

Finally, broad decisions applied the "profits" definition to all predicate offenses under the money laundering statute. While such decisions were only in several district courts, this created the biggest hurdle for prosecutors. The *Santos* profit definition, interpreted under the rule of lenity to be the more defendant-friendly version, now applied to all predicate offenses under the Money Laundering Act, made it so that the whole Act was more defendant-friendly in general. Out of all post-*Santos* applications, this broad view was the most worrisome, as it greatly tied the hands of prosecutors—a trend that we are starting to see paralleled with the *Global-Tech* willful blindness doctrine.

Each of these applications of the *Santos* profits standard highlights the troubles the courts had and corresponds closely to the issues emerging from the *Global-Tech* decision. While there has not yet been sufficient case law to observe such a splintering as can be seen with the *Santos* decision, what case law is available establishes the confusion courts are already feeling in understanding the new willful blindness doctrine. Additionally, in the same way that the new *Santos* decision restricted profits to the defendant-friendly proceeds, the heightened evidentiary standard under *Global-Tech* makes the willful blindness doctrine more defendant-friendly as well. This is a cause for concern, as these statutes were meant to combat white-collar crime and corporate corruption, two issues increasing in prominence and severity.

Because of these application difficulties among the lower courts, one year after the Supreme Court's decision in *Santos*, Congress stepped in and amended the federal money laundering statute.[156] In

155. *Id.* at 1168.

156. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111–29, 123 Stat. 1617 (2009).

this amendment, Congress stated that "proceeds" meant "gross receipts", thus re-broadening the definition and overruling the Supreme Court. As stated in *United States v. Morris*, the 2009 amendment defined "proceeds" specifically as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, *including the gross receipts of such activity*."[157] The court in *Morris* states further that this definition was in direct response to the Supreme Court's holding in *Santos*, citing Senator Bayh who stated, "this bill would overturn the Supreme Court's narrow and confusing decision in *United States v. Santos* and clarify that, as used in the Money Laundering Control Act, the term 'proceeds' refers to the total receipts."[158] According to Senator Leahy, the *Santos* decision was contrary to "congressional intent and if left uncorrected, would have allowed those committing fraud to escape liability."[159] Thus, in the face of a confusing Supreme Court holding relating to an important white-collar statute, Congress stepped in and clarified their legislative intent, thus allowing prosecutions to continue unimpeded.[160]

From *Santos* comes the lesson that Congress can and should step in where Supreme Court decisions prove to have difficulties in application and are contrary to legislative intent. *Global-Tech* and its changes to the willful blindness standard represent such a failure, particularly in respect to criminal statutes such as the Foreign Corrupt Practices Act. The lower courts are already splintering; much in the way they did after the *Santos* decision. Some courts evade the new willful blindness standard, others misconstrue it, and others are left to grapple with the heightened level of proof required, an almost impossible burden to meet. As more cases involving the willful blindness standard of knowledge emerge, it will become clearer that the standard needs to be defined and set right by Congress. Otherwise, important statutes such as the FCPA, that have the option of a willful blindness mens rea, will start to fail in application as prosecutors are unable to reach the level of proof needed.

Congress, therefore, must pass a legislative amendment specifically defining willful blindness in the context of the Foreign Corrupt Practices Act. This definition should not require the second prong of "deliberate steps" that *Global-Tech* has imposed. The mens rea component of any crime is meant to encompass a subjective, mental state; it does not make sense that objective evidence should be required to show a subjective mindset. Instead, the original standard of *Jewell* of a high probability that the defendant knew of wrongdoing should be suffi-

157. United States v. Morris, No. 6:09-16-S-DCR, 2010 WL 1049936, at *2 (E.D. Ky. Mar. 19, 2010)

158. *Id.*

159. Brian Dickerson & Klodiana Basko, *Confusion in Defining "Proceeds" Under the Money-Laundering Statute: A Survey of Circuit Opinions*, 57 FED. LAW. 23 (2010).

160. For further discussion on the Fraud Enforcement and Recovery Act of 2009, see generally Leslie A. Dickinson, Note, *Revisiting the "Merger Problem" in Money Laundering Prosecutions Post-*Santos*, and the Fraud Enforcement and Recovery Act of 2009*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 579 (2014).

cient. More particularly, Congress should amend the FCPA to follow the MPC formulation, with one who is willfully blind defined as "one who acts with a high level of awareness of a particular fact."[161] This definition is in line with legislative intent for the FCPA and matches commentator opinions and pre-*Global-Tech* court decisions concerning the best formulation of willful blindness. In this way, there will be no grey area in FCPA cases, which otherwise causes splintering decisions among lower courts. Additionally, the unreasonable level of proof required will be eliminated making it so that employees of large corporations, where bribery continues to be a momentous issue, will not be able to turn a blind eye. Executives in corporations such as Wal-Mart, who are potentially spending millions of dollars on bribes in foreign countries, will not be allowed to simply say "I didn't know" and get away with it. Instead, the Foreign Corrupt Practices Act can reach its full potential and crack down on corruption, creating a fairer and safer marketplace, and bolstering public confidence in corporations, foreign officials, and business in general.

161. Marcus, *supra* note 77, at 2235.