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MEDI A COVERAGE
IN CRIMINAL
JUSTICE CASES
What Prosecutors and Defenders Can and Cannot Say
Andrew E. Taslitz, Editor

From Jodi Arias and Amanda Knox to Michael Jackson and Kobe Bryant, the media plays a role in many major criminal cases. But lawyers need not represent the rich and powerful to find themselves with a microphone thrust in their faces. Media coverage extends not just to salacious tales of child abuse, rape, and murder but also to white collar crimes, proven and merely alleged, particularly in light of the 2008 Great Recession.

Written by experts, this comprehensive and practical guide addresses the major media issues facing criminal lawyers, and will be an invaluable resource to practitioners, judges, legislators, ethics regulators, academics, students, and the general public on the impact of media coverage on citizens’ attitudes toward criminal defendants, victims, and prosecutors.
I am honored and humbled to serve as the chair of the Criminal Justice Section. The Section has a diverse and multidisciplinary membership of over 20,000 members. I look forward to working with those members and the Criminal Justice Section staff to advance current initiatives and address emerging legal issues in the field. The work of retiring chair William Shepherd, a former Florida prosecutor and now a partner with Holland & Knight LLP, is inspiring in both quantity and quality. I am eager to cultivate the Section’s efforts to increase the public’s knowledge and awareness of child abuse and exploitation with an emphasis on understanding how children, including those who are runaways, non-English speaking, or who have substance abuse problems, can become victims of human trafficking, with the goal of addressing this global crime and broadening the Section’s international presence.

In tribute to the incredible and strategic leadership of Jack Hanna, who was the Criminal Justice Section director for well over a decade, a theme of this year will be “New Beginnings.” While we all miss Jack, the Section has been left in the very capable hands of new Section director Jane Messmer. Jane has had a multifaceted professional career and is well acquainted with the Section, having worked closely with Jack for over a year-and-a-half as the senior staff attorney. Jane and the Section are supported by a professional, highly competent, and dedicated staff.

Part of new beginnings is looking to the future, and one focus for the upcoming year will be on law student and young lawyer recruitment to engage and invigorate the future of our Section. We will host various events throughout the year in order to recruit new members and match young lawyers with potential mentors.

The Section is concluding work on the “Achieving an Impartial Jury” project, which aims to produce a toolbox with practical materials that can help courts increase awareness of implicit bias and offer effective techniques to lessen the impact of such bias on the jury and its deliberations.

We will also build upon and strengthen the foundation of the Section. For the sixth year in a row, we are sponsoring the popular and successful CJS Fall Institute. This year, the institute will feature programming on sentencing, reentry, academics, and juvenile justice, as well as special discussions on military justice reform and overcriminalization. The Section’s Standards project continues to grow as well. We anticipate publications of the “Prosecutorial Investigations Standards” and the “Fair Trial, Public Discourse Standards” within the next year.

The strength of the Section comes not only from these projects, but also the participation and growth of our membership. I call upon existing members to help the Section in two ways. First, join one or more of our 40-plus committees. Second, help our Section grow by recruiting new members and informing them of the opportunities that exist within the Section.

Together we can address the new and complex criminal justice issues that are sure to surface within the coming year. Thank you for the opportunity to serve as your chair. I welcome your ideas and suggestions. Contact me through the Section office at crimjustice@americanbar.org.
Exporting US Antitrust Law: The DOJ’s Increasing Focus on Asia
By M. Brinkley Tappan and Stephen M. Byers
When illegal agreements in foreign jurisdictions hurt US consumers, the DOJ’s Antitrust Division extends its global reach to cooperate with its overseas counterparts and aggressively prosecute both corporate and individual wrongdoers.

The FCPA’s Internal Controls Provision: Is Oracle an Oracle for the Future of SEC Enforcement?
By William J. Stuckwisch and Matthew J. Alexander
In Oracle, the SEC appeared to broadly interpret the FCPA, holding the parent company responsible for having insufficient internal audit controls over distributors hired by its Indian subsidiary—even though no one was aware of the weakness at the time.

International Asset Tracing: The Struggle for Transparency Abroad
By Mara V.J. Senn and Giselle K. Fuentes
New legislation draws back the curtain on secret bank accounts that often enabled illegal activity such as tax fraud and terrorism. But not every account is held by someone with illicit intent. How do you create transparency while maintaining privacy rights?

Criminal Investigations Overseas
LEGAL AND POLICY ISSUES FOR AN INTERNATIONAL PROSECUTOR
By Mariana Pena
International tribunals appeared after the two world wars but gained momentum in the 1990s. Today international prosecutors step in when state governments lack the resources, security, or political will to pursue the most serious criminal actors.

Defending Attorneys Charged with Obstruction under the US Code
By Laina Lopez
Arguing that, under 18 U.S.C. § 1515(c), in-house counsel has a right to provide a client with “bone fide” legal advice, the author details when such advice is not obstruction, using as an example the case of an attorney for Blackwater Worldwide, Inc.

Access to Remedies for Transnational Public Bribery: A Governance Gap
By Delphia Lim, Maryum Jordan, Patrick Kibbe, David Donatti, Jose Vicente Santos De Mendonca, and Kwabena Acheampong
When big corporations bribe foreign officials, the negative impact is often most keenly felt by the inhabitants—especially in third-world countries. Shouldn’t there be a legal mechanism to ensure compensation reaches those most in need?

The UK Bribery Act: Britain’s New Legal Landscape
By Nick Kochan
A look at the British government’s attack on bribery and how it compares to the FCPA.
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   “NEW BEGINNINGS” THEME FOR 2013–2014

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More than 150 years after President Abraham Lincoln promised in the Emancipation Proclamation a nation free of slavery, his promise has yet to be fulfilled. Today, within our borders and across the world, the injustice of human trafficking continues to grow. This modern form of slavery is one of the most tragic and disgraceful criminal endeavors ever to exist.

Human trafficking affects large and small communities throughout the United States. Thousands of US citizens have been forced into sex or labor for the profit of their captors. Thousands more men, women, and children are illegally trafficked into our country each year.

Nearly 21 million people across the globe, predominantly women and children, are denied basic rights, such as sleep, food, compensation, or free interaction with others, while forced to work or engage in sexual acts under threat of violence, abuse, or death, according to the US State Department. Human trafficking is believed to be one of the fastest-growing criminal enterprises, generating an estimated $32 billion a year in illicit profits.

Dispelling the Myths
The American Bar Association (ABA) is mobilizing the legal profession to combat human trafficking in our nation. As I reflect on this journey, it is apparent that while more people are aware of the crisis of modern-day slavery, some myths about its existence in the United States need to be dispelled.

One myth is that trafficked people are only foreign nationals. This is false. Slavery flourishes in our own backyards—in urban, suburban, and rural America—and affects American citizens as well as immigrants.

Another myth is that persons who engage in illegal activities cannot be considered victims of trafficking. This is false. Trafficking victims often cannot seek out help because they fear abuse, they fear their loved ones will be harmed, or they fear law enforcement. At the same time, trafficking victims frequently are confronted by a criminal justice system that treats human trafficking victims as defendants, further complicating efforts to intervene and stop this heinous crime.

Prostitution vs. Sex Trafficking
I am often asked, “What is the difference between prostitution and sex trafficking?” Often, in individual cases, prostitution and sex trafficking coexist. And there is such a significant overlap between prostitution and sex trafficking that I now refer not to the “sex industry” but to the “sex trafficking industry.”

Researchers and law enforcement inform us that most people in prostitution enter this industry as minors, with the average age from 13 to 16. Children do not choose to become prostitutes. They are recruited, seduced, procured, or coerced for the economic gain and sexual gratification of adults exerting control over them, such as pimps or buyers. The federal Trafficking Victims Protection Act and state Safe Harbor laws consider commercially sexually exploited minors to be sex trafficking victims. Thus, an adult woman in prostitution who appears to be there voluntarily likely started out as a trafficked child.

In addition, a significant amount of prostitution—regardless of whether the victims are immigrants or American citizens—takes place under the control of sex trafficker pimps. Courtney Bryan, director of Midtown Community Court, which processes prostitution cases in Manhattan, estimates that 70 percent of people arrested for prostitution and arraigned in her court are victims of human trafficking. Pimps secure domination of their victims using tactics ranging from psychological manipulation—usually through protestations of love and promises of support—to threats and
physical violence. Pimps have learned that psychological manipulation is often more effective than physical abuse and subject their victims to a process called "seasoning," transforming their identities from autonomous individuals to owned objects. Pimps confiscate victims' identity documents, give victims a new look and new name, convince them that they owe the pimp money, and/or tattoo them with indicia signifying possession. As a result, I believe, along with many law enforcement providers and victim advocates, that pimps are traffickers and that a significant percentage of prostitution is controlled by pimps.

A recent interview by Rachel Lloyd, a survivor of commercial sexual exploitation in England and Germany who fell under the control of a brutal pimp at age 18, demonstrates the complexity of distinguishing sex trafficking from "sex work." Rachel led a US effort to ensure that commercially sexually exploited minors are treated under state law as child trafficking victims who need refuge and services—not as juvenile delinquents or adult criminals who deserve stigmatization and punishment. Rachel believes the links between prior sexual abuse and entry into the sex industry are well established. "Are there a handful of women for whom this looks different?" Rachel said. "Cool, great. Let's not argue with you. [But let's] talk about the systemic issues of poverty and racism and classism and sexual abuse and family abuse and all the things that make young people and adult women . . . vulnerable." (Julie Greicius, The Rumpus Interview with Rachel Lloyd, RUMPUS (Feb. 28, 2012), http://tinyurl.com/qd7um2c.)

Rachel points to an important fact. Many in the sex industry who are not currently under pimp control, and therefore who may not be viewed as trafficking victims, were under such control in the past and are now trapped in prostitution because of the economic and psychological harm they sustained. Others who entered prostitution voluntarily are actually in situations of commercial sexual exploitation as the result of experiences of abuse and deprivation that left them vulnerable to predatory sex industry entrepreneurs and buyers.

I do not suggest that prostitution and trafficking should be simplistically conflated. For there to be trafficking, there must be a trafficker—someone who, at minimum, abuses his or her power or exploits another's position of vulnerability to subject that victim to prostitution and/or to prey on the victim's exploitation in prostitution. Some individuals enter prostitution voluntarily and can leave voluntarily, although most experts estimate that these individuals represent a tiny percentage of those in the global sex industry.

**Identifying and Representing Trafficking Victims**

Recognizing the complex barriers to prosecuting traffickers and identifying victims, the ABA is committed to changing the way our legal system approaches human trafficking. The ABA Task Force on Human Trafficking has conducted training sessions across the country to help stakeholders learn to identify and treat victims as victims and to prosecute and punish perpetrators. These training sessions also shine a spotlight on the thousands of victims funneled through criminal justice systems as defendants.

So far, we have trained more than 500 lawyers and allied professionals. Training programs help those who come into contact with trafficking victims to understand the barriers victims encounter in accessing help and resources. For example, if someone being screened for services is, or has been, in prostitution, lawyers should presume that sex trafficking is likely. Lawyers should also be aware that because of fear and trauma, victims are often reluctant to disclose their victimization. Many are in conditions of "traumatic bonding," once called Stockholm syndrome, where they identify with their captors and cannot recognize their own victimization. If you learn that a pimp has been in the picture—a pimp who may take the form of an intimate partner or even a husband—you are almost certainly dealing with a victim of human trafficking.

And even if a woman or man is engaged in prostitution, lawyers should not assume that she or he does not need their assistance. Research demonstrates that people in prostitution experience staggeringly high levels of violence from sex industry buyers and are many times more likely to be murdered than others in dangerous industries—and that most want to get out. Lawyers can help them by developing a life-saving exit strategy.

Lawyers should also be aware that extensive time, patience, and heightened sensitivity are needed for victims to disclose their victimization. Rarely will such disclosure occur without the development of a relationship of trust between lawyer and victim. For help in identifying victims and building that relationship, please see Lawyer's Manual on Human Trafficking: Pursuing Justice for Victims, published by the New York State Judicial Committee on Women in the Courts and available online (http://tinyurl.com/oeztanq).

Traffickers harm their victims physically and psychologically. The psychological wounds, in particular, often run deep. Those wounds can get in the way of identifying victims, understanding their experiences, and building the relationship of trust necessary for effective advocacy. Lawyers should not try to solve the problems of victims alone. Reach out for help. Throughout the United States, trafficking victims’ services organizations can provide invaluable assistance with victim identification and support. Many groups, such as Breaking Free, the SAGE Project (Standing Against Global Exploitation), and Girls Educational and Mentoring Services (GEMS), are led by human trafficking survivors. The Polaris Project’s National Human Trafficking Resource Center provides a national toll-free hotline, available 24/7 in English and Spanish at 1-888-373-7888, which can assist in finding the organization best-suited to support lawyers and sex trafficking victims or potential victims.

**Conclusion**

Since undertaking this journey, I have been inspired by the numerous members of the legal profession who have joined me in our shared mission to eliminate modern-day slavery in our nation. Lawyers can give these victims a voice. We can commit ourselves to rectifying the injustice of modern-day slavery in our nation.
EXPORTING US ANTITRUST LAW

The DOJ’s Increasing Focus on Asia

By M. Brinkley Tappan and Stephen M. Byers
Over the last decade, the United States Department of Justice’s (DOJ’s) Antitrust Division has increased its focus on anticompetitive conduct abroad, out of concern that international cartels cause American consumers a great deal of economic harm. The division has worked to combat anticompetitive conduct abroad by advocating for the adoption of stricter antitrust laws in foreign jurisdictions, as well as by cultivating relationships with foreign governments that can be used to assist the division in investigating and prosecuting foreign conduct that affects US commerce. The Antitrust Division employs both formal and informal methods of cooperation with foreign governments to coordinate competition policy and criminal enforcement against international cartels. As a result of these efforts, the reach of US antitrust law is rapidly expanding.

In 2006, Scott Hammond, deputy assistant attorney general in charge of criminal antitrust prosecutions, stated: “Multinational cooperation has made a 180-degree turn. Now antitrust authorities have a ‘pick-up-the-phone’ attitude and are searching for ways to cooperate with each other. Antitrust enforcers around the world have taken a page from the cartel handbook by ‘harmonizing’ their efforts.” (Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., Dep’t of Justice, Address at the Twentieth Annual National Institute on White Collar Crime: Charting New Waters in International Cartel Prosecutions 6 (Mar. 2, 2006), http://tinyurl.com/lesx3nn.)

With respect to cartel enforcement, since 2006 the Antitrust Division has taken advantage of tools such as mutual legal assistance treaties (MLATs) and Interpol Red Notices. MLATs are bilateral agreements between nations that provide that each country will use its own criminal laws in foreign jurisdictions, as well as by cultivating relationships with foreign governments that can be used to assist the division in investigating and prosecuting foreign conduct that affects US commerce. The Antitrust Division employs both formal and informal methods of cooperation with foreign governments to coordinate competition policy and criminal enforcement against international cartels. As a result of these efforts, the reach of US antitrust law is rapidly expanding.

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With respect to cartel enforcement, since 2006 the Antitrust Division has taken advantage of tools such as mutual legal assistance treaties (MLATs) and Interpol Red Notices. MLATs are bilateral agreements between nations that provide that each country will use its own criminal investigative powers, including, where appropriate, subpoenas and search warrants, to obtain information for an investigation being conducted by the other party. Interpol Red Notices allow for detention of fugitives pending extradition. (See Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Div., Dep’t of Justice, Address Before the Section of International Law and Practice of the American Bar Association: Enhancing Market Access through Trade and Antitrust Law (Aug. 8, 1995), http://tinyurl.com/l3ajnilf.)

Increasingly, authorities across the globe coordinate investigations from the very beginning in order to preserve an element of surprise as dawn raids and search warrants are executed simultaneously in multiple jurisdictions. Authorities may also share information throughout the course of parallel investigations. Although the Federal Rules of Criminal Procedure generally prevent US authorities from sharing documents or specific interview content with foreign authorities, antitrust regulators cooperate in other ways; for example, by sharing general leads.

In addition to its focus on the anticompetitive conduct of foreign companies, the Antitrust Division has also sought increasingly to prosecute foreign individuals for antitrust crimes. From May 1999 to February 2010, the division put more than 40 foreign defendants in jail for antitrust crimes, and, according to Scott Hammond, “Division practice now is to insist on jail sentences for all defendants domestic and foreign.” (Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., Dep’t of Justice, Address at the Twenty-Fourth Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement over the Last Two Decades 7 (Feb. 25, 2010), http://tinyurl.com/lq3akv [hereinafter Evolution of Criminal Antitrust Enforcement].) The division has also pushed foreign governments to impose individual criminal sanctions, including jail time, in order to increase deterrence worldwide.

In the context of these general developments, the division has made particular efforts to further antitrust enforcement in Asia, as evidenced by recent policy work and investigative activity.

Antitrust Enforcement Cooperation in Asia
The Antitrust Division has long collaborated with the Japanese government in developing competition policy. In the past several years, the Antitrust Division has referred to the convergence between the division’s own leniency program—which encourages disclosure and cooperation by cartel participants in exchange for amnesty or more lenient treatment—and Japan’s, and has touted the success of Japan’s program in detecting and dismantling some of the world’s largest cartels.

The Antitrust Division and the Japan Fair Trade Commission (JFTC) are cochairs (along with a third member, the German Bundeskartellamt) of the Cartel Working Group of the International Competition Network (ICN), an organization formed for the purpose of facilitating the “adoption of superior standards and procedures in competition policy around the world.” (See INT’L COMPETITION NETWORK, http://tinyurl.com/mlr99bd [last visited July 5, 2013].) In that context, the US and Japanese

M. BRINKLEY TAPPAN is a counsel in the Antitrust Group at Crowell & Moring. STEPHEN M. BYERS is a partner with the firm’s White Collar and Regulator Enforcement Group and the E-discovery Information Management Group. Both are in the Washington, D.C., office.
Very recently, the division has made strides to increase collaboration with the People’s Republic of China (PRC). In July 2011, the assistant attorney general in charge of the Antitrust Division and the chairman of the US Federal Trade Commission traveled to Beijing to sign a Memorandum of Understanding on Antitrust and Antimonopoly Cooperation (MOU) between the two US competition agencies on the one hand, and China’s three competition agencies—the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce (SAIC)—on the other. The MOU expresses the countries’ interests in collaborating on policy and enforcement. Specifically, each agency recognized that, “when a U.S. antitrust and a PRC antimonopoly agency are investigating related matters, it may be in those agencies’ common interest to cooperate in appropriate cases, consistent with those agencies’ enforcement interests, legal constraints, and available resources.” (Memorandum of Understanding on Antitrust and Antimonopoly Cooperation, U.S.-China, July 27, 2011, available at http://tinyurl.com/ns9gqz0.) The MOU also contains a pledge to explore how the countries can facilitate the coordination of law enforcement activities, through the development of “detailed work plans.” The agencies have agreed to conduct high-level annual meetings to further the goals set forth in the MOU and to encourage regular dialogue among staff-level employees regarding day-to-day investigative issues.

In September 2012, the US and Chinese competition agencies held the first joint dialogue meetings on competition policy in Washington, D.C., where they discussed, among other things, “various aspects of civil and criminal enforcement.” (See Division Update Spring 2013, supra.) In addition to the joint dialogue, the MOU signatory agencies also participated in two workshops in China, and various other “formal and informal exchanges.”

In April 2013, Scott Hammond, speaking at the ABA’s Antitrust Spring Meeting, described the Antitrust Division’s efforts regarding international cartel enforcement. Hammond mentioned the division’s efforts in China as a significant feature of international enforcement. Specifically, he expressed a keen interest in working with China and other Asian countries to develop effective leniency programs to encourage reporting in those jurisdictions, as well as to expand the basis for collaboration across jurisdictions.

Recent Enforcement Efforts

The Antitrust Division’s increasing focus on Asia is also demonstrated by several recent investigations arising out of conduct that occurred in Asia. The division has extracted many of its largest fines—and most significant prison
From 2005 to 2011, the division investigated a global price-fixing cartel involving air cargo services. Although carriers based in Europe were also subjects of the investigation, a large number of Asian carriers were implicated and paid substantial fines. For example, Korean Airlines pleaded guilty in 2007 and paid a fine of $300 million, which remains one of the largest single fines in the history of the Antitrust Division. The following year, Japan Airlines pleaded guilty and paid a criminal fine of $110 million. In 2011, All Nippon Airways, based in Japan, entered a guilty plea and paid a $73 million fine. Cathay Pacific, Hong Kong, Asiana Airlines (Korea), Singapore Airlines (Singapore), Nippon Cargo Airlines (Japan), China Airlines (Taiwan), and Nippon Express (Japan) all pleaded guilty as well, and paid fines ranging from $40 to $60 million for participation in the same cartel. (See Sherman Act Violations Yielding a Corporate Fine of $1 Million or More, Dep’t of Justice (Dec. 21, 2012), http://tinyurl.com/kxqcecell [hereinafter Corporate Fine].) The Antitrust Division also indicted several Japanese executives—two from Nippon Cargo Airlines and one from Japan Airlines—although none has yet come to the United States to face the charges. (Press Release, Dep’t of Justice, Former Executives from Two Japanese Airlines Indicted in Conspiracy to Fix Rates on Air Cargo Shipments (Nov. 16, 2010), http://tinyurl.com/lzq6oif2.)

The JFTC investigated the same conduct, and levied its own fines against many of the same carriers, which suggests coordination between the US and Japanese antitrust authorities with respect to this investigation. (See Hisane Masaki, Japan Forwarders Fined for Price Cartel, J. Com. (Mar. 19, 2009), http://tinyurl.com/lpceevr.) The KFTC also conducted an investigation, and imposed liability on 26 carriers. It imposed aggregate fines of KRW 119.5 billion, and attributed the success of the investigation to “collaboration with foreign competition authorities, such [as] the US and the EU.” (See Korea Fair Trade Commission, 2011 Annual Report, at 94, http://eng.ftc.go.kr, “publications,” “annual reports,” “Annual Report 2011”.)

From 2009 to 2012, the division investigated a price-fixing cartel regarding liquid crystal display (LCD) screens manufactured by various competitors based in Asia. The conspirators in that cartel are headquartered throughout Asia, including in Taiwan, Japan, and Korea, and are said to have participated in “monthly meetings . . . secretly held in hotel conference rooms, karaoke bars and tea rooms around Taiwan.” (Press Release, Dep’t of Justice, AU Optronics Corporation Executive Sentenced for Role in LCD Price-Fixing Conspiracy (Apr. 29, 2013), http://tinyurl.com/c2t4lya.) This investigation yielded some of the largest corporate antitrust fines ever imposed. Sharp Corporation, based in Japan, pleaded guilty and paid a fine of $120 million. Chi Mei Optoelectronics Corporation of Taiwan pleaded guilty and paid a fine of $220 million, and LG Display Company of Korea paid a staggering $400 million following a guilty plea. (See Corporate Fine, supra.) Several of the same companies were also penalized in Japan, which suggests at least some level of cooperation between the US and Japanese authorities. (See Press Release, Japan Fair Trade Comm’n, Cease and Desist Order and Surcharge Payment Order against Manufacturers of TFT Liquid Crystal Display Module for “Nintendo DS” and “Nintendo DS Lite” (Dec. 18, 2008), http://tinyurl.com/kkhcmun.)

AU Optronics Corporation (AUO), based in Taiwan, was another target of the division’s LCD investigation. The company refused to accept a plea agreement, and instead took the case to trial. In September 2012, following an eight-week trial in the Northern District of California, AUO was found guilty and sentenced to pay $500 million, the largest fine ever imposed against a company for violating US antitrust laws. In addition to the corporate fine, two AUO executives were prosecuted individually and convicted. Hsuan Bin Chen, former president of AUO, and Hui Hsiung, former vice president, were each sentenced to serve three years in prison and to pay $200,000 in criminal fines. (Press Release, Dep’t of Justice, Taiwan-Based AU Optronics Corporation Sentenced to Pay $500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy (Sept. 20, 2012), http://tinyurl.com/9ujmd53.) These verdicts are now on appeal to the Ninth Circuit, where AUO and the executives have argued that the DOJ exceeded its jurisdiction under the Sherman Act by prosecuting conduct that involved “foreign defendants who allegedly met in a foreign country to fix prices for foreign-made components sold to foreign-based entities and shipped from one foreign jurisdiction to another.” (Brief for Defendants-Appellants Hui Hsiung and Hsuan Bin Chen, United States v. AU Optronics Corp., Nos. 12-10492, 12-10493, 12-10500, 12-10514 (9th Cir. May 13, 2013.).) The DOJ, on the other hand, has argued that a single overt act in the United States is sufficient to confer jurisdiction over a conspiracy that is otherwise foreign in all respects, particularly where the conduct was intended to produce, and did in fact produce, effects in the United States.

Apart from the convictions on appeal, a third AUO executive, Shiu Lung Leung, former manager of AUO’s desktop display business, was recently sentenced to two years in prison and a fine of $50,000. Leung initially avoided a conviction after a mistrial was declared. In November 2012, however, Leung was retried and found guilty. Regarding the outcome of the second trial, the new assistant attorney general for the Antitrust Division, Bill Baer, who is said to be keenly interested in international cooperation regarding antitrust enforcement, stated: “These international price-fixers caused consumers to pay inflated prices for their computer monitors, notebook computers, and televisions. . . . Prison sentences for culpable executives, combined with substantial fines against corporate wrongdoers, are the most effective deterrents for protecting consumers from this kind of illegal cartel behavior.” (See Press Release, Dep’t of Justice, AU Optronics Corporation Executive Sentenced for Role in LCD Price-Fixing Conspiracy (Apr. 29, 2013), http://tinyurl.com/c2t4lya.)

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Imagine the following scenario: You have guided your client, a publicly traded company, through the long and winding process that is a Foreign Corrupt Practices Act (FCPA) internal investigation. Afterward, or increasingly more often simultaneously, you then lead your client through presentation of the results of the investigation to the United States Department of Justice (DOJ) and Securities and Exchange Commission (SEC) (collectively, “government”). Ultimately, neither the internal investigation nor the government’s investigation finds any improper payment (or offers of payments) to any foreign official, or any other knowing misconduct. As a result, the government cannot pursue substantive FCPA antibribery charges against your client, and the DOJ cannot pursue any other FCPA-related criminal charges. Just when you begin to savor this significant success, you are ripped back to reality, as the SEC informs you that, nevertheless, your client faces civil enforcement under the FCPA’s internal controls provision and demands a significant penalty.

BY WILLIAM J. STUCKWISCH AND MATTHEW J. ALEXANDER
Unfortunately, this scenario is not a hypothetical for the FCPA Bar to deliberate at conferences and include as footnotes in memoranda addressing real-world client issues. Instead, it mirrors the facts publicly alleged in the SEC’s August 2012 enforcement action against Oracle Corporation, a case considered by many FCPA practitioners to be a stunning result. (SEC v. Oracle Corp., No. 3:12-cv-04310 (N.D. Cal. Aug. 13, 2012); Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Oracle Corporation With FCPA Violations Related to Secret Side Funds in India (Aug. 16, 2012), http://tinyurl.com/9e42byx.)

In Oracle, the SEC faulted the US parent corporation for not auditing local distributors hired by its Indian subsidiary, without alleging that the distributors (or anyone else) had made any improper payment to any foreign government official. Oracle is the latest example of the SEC’s expansive enforcement of the FCPA’s internal controls provision, and it potentially paints a bleak picture—one in which the provision is essentially enforced as a strict liability statute that means whatever the SEC says it means (after the fact). Oracle highlights the SEC’s ability to bring a (settled) enforcement action against virtually any public company investigated for potential FCPA improper payments by alleging that some aspect of the company’s internal controls was insufficient, regardless of whether anyone knew of the weakness at the time. Accordingly, Oracle invites many questions. Is the statute really that broad? How did we get here, should we have seen Oracle on the horizon, and just how harsh is this post-Oracle reality? What does Oracle tell us about the SEC’s views on necessary internal controls? Last, but most importantly, where can counsel and clients go from here?


Unfortunately, however, given the highly subjective nature of the internal controls provision, companies will continue to feel at the SEC’s mercy once it opens an FCPA investigation, even if no improper payments (or offers of payments) are ever found. Several proactive steps can help mitigate this feeling. First, companies should evaluate and enhance their internal controls (as appropriate) long before any investigation begins. Second, at the outset of any SEC FCPA investigation, counsel should devote significant attention to the state of their client’s internal controls, not just to whether the government can prove an antibribery charge. Finally, counsel should seek to demonstrate not only that the internal controls were sufficient, but also that the SEC should exercise its discretion to reward their client for genuine efforts to implement effective internal controls, even if SEC hindsight generates critique.

The Internal Controls Provision

In 1977, as part of the fallout from the Watergate scandal, the FCPA was enacted after more than 400 corporations reported making corrupt payments to foreign government officials, totaling over $300 million, while also filing inaccurate corporate financials to hide such payments. (Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78 et seq. (Supp. II 1979); see H.R. REP. No. 95-640; S. REP. No. 95-114; SEC. & EXCH. COMM’N, 94TH CONG., REP. ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 2–3 (Comm. Print 1976).) The core of the statute is its antibribery prohibitions, barring the bribery of foreign government officials to win or keep business. The
antibribery prohibitions are complemented by accounting provisions that include the internal controls provision as a second prong (with the books-and-records provision being the first). The FCPA received little attention in its early years; indeed, the SEC originally wanted no role in enforcing such a law. After amendments in 1988 and 1998, enforcement of the FCPA began in earnest in the mid-2000s; however, relatively little focus was given to its internal controls provision at the time. (Omnibus Foreign Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107; International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.)

Who Is Subject to the Internal Controls Provision?
Jurisdictional coverage of the FCPA's internal controls provision is narrower than that of its substantive anti-bribery counterparts, leaving many companies unaffected by the SEC's expansive enforcement practices. While it is colloquially understood to apply to publicly-traded companies, the internal controls provision actually applies more broadly to all “issuers,” a group not limited solely to US companies. For FCPA purposes, issuers are those entities with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that are required to file reports (periodic or otherwise) under section 15(d) of the same, a group that includes foreign entities with American depository receipts listed on a US exchange. (15 U.S.C. §§ 78l, 78o(d) (2011).)

Issuers are responsible not only for their own internal controls, but also for those of their subsidiaries around the world. It is this extended responsibility for far-flung conduct that is often the source for expansive interpretations like Oracle, where the conduct occurred at the company's Indian subsidiary. However, the FCPA does limit the obligations of parent companies with respect to the internal controls of subsidiaries and/or affiliates when the parent holds voting power of 50 percent or less. In these instances, all that is required are good faith efforts by the parent to ensure the sufficiency of the subsidiary's or affiliate's internal controls. Parent efforts vis-à-vis subsidiaries and affiliates that it does not control are judged on a case-by-case basis by weighing all facts presented, with the statute requiring consideration of parental ownership interests and “the laws and practices governing the business operations of the country in which such firm is located.” (15 U.S.C. § 78m(b)(6) (2011).)

What Does the Statute Require?
Though enacted as part of the FCPA and, at least in part, to deter foreign bribery, the internal controls provision’s reach extends beyond foreign bribery cases. Specifically, the provision requires that issuers:

- devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—
  - transactions are executed in accordance with management’s general or specific authorization;
  - transactions are recorded as necessary
    - (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and
    - (II) to maintain accountability for assets;
  - access to assets is permitted only in accordance with management’s general or specific authorization; and
  - the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences . . .

(15 U.S.C. § 78m(b)(2)(B).)

Thus, an internal accounting controls system does not have to be perfect; rather, it need only provide “reasonable assurances.” As with the parallel “reasonable detail” qualification to the books-and-records provision, “reasonable assurances” is further defined by the statute as “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.” (Id. § 78m(b)(7).) Coupled with the fuel of this highly subjective definition is the absence of any scienter requirement for civil liability—which serves as an accelerant for expansive SEC enforcement. In contrast, criminal liability under the internal controls provision attaches only when an entity “knowingly” circumvents or fails to implement sufficient controls. (Id. § 78m(b)(4)–(5).)

There is a dearth of case law on the meaning of the internal controls provision, as is true with respect to judicial consideration of the FCPA more generally. Indeed, the provision has yet to be judicially examined in a case involving alleged foreign bribery. Its most extended treatment appears in the SEC’s oft-overlooked 1983 action against World-Wide Coin Investments. (SEC v. World-Wide Coin Invs., Ltd., 567 F. Supp. 724 (N.D. Ga. 1983).) While otherwise unremarkable, World-Wide Coin succinctly highlighted the concepts of reasonableness and proportionality embodied within the internal controls provision:

“[R]easonable assurances . . . recognizes that the costs of internal controls should not exceed the benefits expected to be derived. It does not appear that either the SEC or Congress . . . intended that the statute should require that each affected issuer install a fail-safe accounting control system at all costs. It appears that Congress was fully cognizant of the cost-effective considerations which confront companies . . . and of the subjective elements which may lead reasonable individuals to arrive at different conclusions. Congress has demanded only that judgment be exercised in applying the standard of reasonableness. . . . It is also true that the internal accounting controls provisions contemplate the financial principle
of proportionality—what is material to a small company is not necessarily material to a large company. (Id. at 751.)

Despite this elucidation, the facts presented in *World-Wide Coin* did not provide meaningful opportunity to explore application of these nuanced contours in a manner useful for today's well-meaning companies. As with many early internal controls enforcement actions, *World-Wide Coin* was an easy case, given that it involved an environment essentially devoid of controls. Nevertheless, *World-Wide Coin* spotted the fundamental issue that ultimately has enabled the SEC to bring cases like *Oracle*: “The main problem with the internal accounting controls provision . . . is that there are no specific standards by which to evaluate the sufficiency of controls; any evaluation is inevitably a highly subjective process in which knowledgeable individuals can arrive at totally different conclusions.” (*World-Wide Coin*, 567 F. Supp. at 751.)

**What the Government Says the Provision Requires**

The SEC's settled enforcement actions have been an additional source of guidance (albeit somewhat limited) about its views on the meaning of the internal controls provision. For example, in numerous actions leading up to *Oracle*, the SEC has made clear its view that, even if it cannot assert an antibribery count, either because there is not sufficient evidence of foreign bribery or because there is no US jurisdiction, it can (and will) bring an internal controls charge. (See, e.g., Press Release, U.S. Sec. & Exch. Comm'n, SEC Files Settled Civil Action Charging NATCO Group Inc. with Violations of the Foreign Corrupt Practices Act (Jan. 11, 2010), http://tinyurl.com/mafgywgy.) The SEC has also staked out its position that disgorgement of profits, as well as civil penalties, are available remedies for internal controls violations, even in the absence of antibribery charges. (See, e.g., SEC v. Textron, Inc., No. 07-cv-1505 (D.D.C. Aug. 23, 2007).)

In some cases, counsel and their clients must draw inferences about the SEC's interpretation of the internal controls provision, as the SEC has simply asserted that, because improper payments occurred, the defendant company's internal controls were insufficient, without identifying a failure to implement or maintain any particular control. (See, e.g., Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges California Telecommunications Company with FCPA Violations (June 29, 2010), http://tinyurl.com/2v9f6q [hereinafter SEC Veraz Networks Press Release].) More commonly, however, SEC cases have found fault with the failure to implement or maintain specific internal controls, becoming expansively prescriptive in this approach. (See, e.g., SEC v. ENI, S.p.A., No. 4:10-cv-02414 (S.D. Tex. July 7, 2010) (citing lack of due diligence on agents); SEC v. Titan Corp., No. 05-0411 (D.D.C. Mar. 1, 2005) (citing lack of a formal FCPA policy or procedures).)

In November 2012, the government published its *FCPA Guide* in an effort to provide businesses with more information about its FCPA enforcement views and approach. In it, the government defines internal controls processes to include various components, such as: a control environment that covers the tone set by the organization regarding integrity and ethics; risk assessments; control activities that cover policies and procedures designed to ensure that management directives are carried out (e.g., approvals, authorizations, reconciliations, and segregation of duties); information and communication; and monitoring. (*FCPA Guide, supra*, at 40.)

Further, according to the government's *FCPA Guide*, “an effective compliance program is a critical component of a company's internal controls and is essential to detecting and preventing FCPA violations.” (*FCPA Guide, supra*, at 56.) Beginning in 2005, the DOJ has included a list of minimum elements of an anticorruption compliance program and internal controls system in its FCPA settlement documents, requiring the settling company to implement such controls as:

- Policies and procedures applicable not only to employees but also, where necessary and appropriate, outside parties acting on the company's behalf in foreign jurisdictions addressing enumerated risk areas such as gifts, entertainment, travel, political contributions, charitable donations, facilitation payments, and extortion;
- Periodic risk assessments addressing the company's particular foreign bribery risks;
- Periodic training of not only employees but also, where necessary and appropriate, agents and business partners;
- Appropriate due diligence and compliance requirements pertaining to the retention and oversight of agents and business partners; and
- Monitoring and testing mechanisms.

(See, e.g., Non-Prosecution Agreement Between U.S. Dep’t of Justice & Ralph Lauren Corp., Attachment B: Corporate Compliance Program (Apr. 22, 2013) [hereinafter Ralph Lauren Non-Prosecution Agreement], available at http://tinyurl.com/n75zmw5.)

Practically speaking, it becomes difficult to imagine business processes not encompassed within these government formulations of internal controls; yet, on the flip side, the government continues to recognize the FCPA's concepts of proportionality and reasonableness, concepts that give companies leeway to establish internal controls appropriate for their businesses: “The Act does not specify a particular set of controls that companies are required to implement. Rather, the internal controls provision gives...
companies the flexibility to develop and maintain a system of controls that is appropriate to their particular needs and circumstances.” (FCPA Guide, supra, at 40.) Further, the FCPA Guide concedes that this inherently remains a case-by-case endeavor:

Fundamentally, the design of a company’s internal controls must take into account the operational realities and risks attendant to the company’s business, such as: the nature of its products or services; how the products or services get to market; the nature of its work force; the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with a high risk of corruption. A company’s compliance program should be tailored to these differences. Businesses whose operations expose them to a high risk of corruption will necessarily devise and employ different internal controls than businesses that have a lesser exposure to corruption, just as a financial services company would be expected to devise and employ different internal controls than a manufacturer.

(Id.)

As noted in World-Wide Coin, tension will always arise in balancing these competing notions.

Separate and apart from this tension, serious questions also remain as to whether the SEC’s current (apparent) formulation of the internal controls provision—one that essentially conflates the provision’s requirements for sufficient “internal accounting controls” with the continually evolving elements of an “effective” compliance program (which, for purposes of securing credit during corporate sentencing, has been defined by the US Sentencing Commission Guidelines Manual)—is even a proper definition. (See U.S. SENTENCING GUIDELINES MANUAL § B2.1 (2012).) This article does not attempt to tackle this separate question; however, it is worth noting that even the FCPA Guide states that internal controls over financial reporting are limited to “the processes used by companies to provide reasonable assurances regarding the reliability of financial reporting and the preparation of financial statements,” suggesting that the SEC’s formulation may go too far. (FCPA Guide, supra, at 40.) Certainly issuers should have compliance programs, and those with international operations should make sure they address the FCPA (and other countries’ applicable anticorruption laws) for a whole host of reasons, but just what those programs include should be guided by individual, risk-based assessments, rather than preconceived definitions.

The Oracle Enforcement Action

Despite its subjective standards and the absence of any civil mens rea constraint, the internal controls provision seemed relatively navigable for companies and their counsel before Oracle. To be sure, the nature of SEC inquiries into the sufficiency of internal controls, conducted with the benefit of 20/20 hindsight after an often lengthy search for evidence of foreign bribery, left plenty of room for disagreement as to the appropriateness of any given enforcement action. But relative comfort could be (and was) derived from the fact that, when viewed against the informal authority existing in the form of settled enforcement actions, most internal controls cases involved relatively clear failures to implement fairly obvious internal controls. However, even the cases that appeared to expand the SEC’s formulation of the internal controls provision did not presage the leap to Oracle.

Oracle, like many companies in the software industry, sold its product to Indian government customers via local distributors. The Oracle enforcement action involved allegations that employees of Oracle’s wholly-owned Indian subsidiary structured sales to the Indian government so as to enable local distributors to “park” proceeds of the sales in unauthorized “side funds.” (Complaint, SEC v. Oracle Corp., No. 3:12-cv-04310 (N.D. Cal. Aug. 13, 2012) [hereinafter Oracle Complaint], available at http://tinyurl.com/l3wcb5.) The subsidiary’s employees then directed distributors to use these side funds to pay third parties for purported marketing and development expenses. The SEC’s complaint does not include any allegation that Oracle’s Indian subsidiary, or the subsidiary’s distributors made any improper payments to any government official from the side funds (or any other source); it alleged only that the side funds “created a risk that the funds potentially could be used for illicit means, such as bribery or embezzlement.” (Id. ¶ 13 (emphasis added).) While there were allegations of payments to “unauthorized third parties,” there were no allegations that those third parties either were government officials or used the unauthorized payments to reach government officials. Thus, the SEC did not charge—and on these alleged facts, could not have charged—Oracle with a substantive antibribery count.

Nevertheless, the SEC pursued books-and-records and internal controls violations and collected a $2 million civil penalty. It is widely recognized that, from an anticorruption perspective, India is a high-risk country in which to operate, and it is not surprising that the SEC would expect an issuer operating in India to have procedures and controls commensurate with that risk. (See, e.g., Corruption Perceptions Index 2012, TRANSPARENCY INT’L, http://tinyurl.com/bv849o6 (last visited July 26, 2013).) As is somewhat typical, the SEC’s complaint alleges few facts relating to Oracle’s existing internal controls. However, from the complaint’s recitation of Oracle’s subsequent remedial measures, it can be gleaned that the company’s preexisting internal controls included at least some level of due diligence on its partner transactions in India, as well as some anticorruption training for employees and partners. (Oracle Complaint, supra, ¶ 20.) Additionally, the parking of funds violated Oracle’s corporate policies. (Id. ¶ 15.)

In particular, the SEC alleged three internal controls “failures”: (1) Oracle lacked the proper controls to prevent its employees at Oracle India from creating and misusing...
the parked funds; (2) Oracle failed to audit and compare distributors’ margins against the end-user price to ensure excess margins were not being built into the pricing structure; and (3) Oracle failed to seek transparency in or audit third-party payments made by distributors on Oracle’s behalf. (Id. ¶¶ 17–18.) The only reason given in the complaint for why any of these “failures” violated the internal controls provision was that Oracle knew distributor discounts created a margin of cash from which distributors received payments for their services. The SEC did not allege that Oracle itself knew of the side funds. To the contrary, it alleged that employees of the Indian subsidiary concealed their existence from Oracle, and, as mentioned, that parking funds was a violation of Oracle’s internal corporate policies. (Id. ¶ 11.)

The DOJ has indicated as part of its settled enforcement actions that, depending on an assessment of corruption risks, it may be appropriate for companies to audit third-party business partners’ books to ensure that they have not made improper payments. (See Ralph Lauren Non-Prosecution Agreement, supra.) Oracle, however, raises troubling questions about whether the failure to do so is a per se violation of the FCPA’s internal controls provision: Does the SEC now expect every company that uses distributors around the world to audit distributors’ margins and their payments to third parties? Is this expectation limited only to companies whose distributors are compensated by retaining the difference between the end-user price and a distributor discount? From a cost-benefit perspective, would this make sense, even in risky countries such as India?

We do not read Oracle as an SEC statement that all companies must audit their distributors’ margins and distributors’ payments to third parties. Significantly, it does not appear that the remedial measures implemented by Oracle itself to address the risk that funds left with distributors could be put to improper uses—which are cited with approval in the SEC’s complaint—including auditing distributors’ payments on Oracle’s behalf. Oracle apparently devised other controls—focused on preventing the creation of side funds altogether—to address the corruption risks presented by its product distribution model in India.

In our view, the true lesson of Oracle is not that this particular type of internal control is required, but rather that the internal controls provision is so broad, and the statutory standard of reasonable assurances so subjective, that the SEC has an almost unfettered ability to insist on a settlement, including a civil penalty, at the conclusion of virtually any FCPA investigation. Companies may be willing to enter into such settlements—particularly because, in the absence of a parallel DOJ action, they need not make any factual admissions (due to the “neither admit nor deny” nature of SEC settlements in such circumstances), and the cost of a settlement is often lower than continuing investigative and representative costs. But such settlements can have severe, unintended consequences. Perhaps most significantly, these settlements can lead other companies to misdirect their scarce compliance resources. For example, when companies see the SEC pursue an enforcement action over a relatively small amount of improper gifts to employees of a state-controlled telecommunications company, including flowers for its CEO’s wife, some may perceive that gifts are such a high-risk area that compliance resources should be diverted to focus on gifts, rather than truly high-risk areas for each company. (See, e.g., SEC Veraz Networks Press Release, supra.) Regarding Oracle itself, even assuming that Oracle’s failure to audit distributors violated the internal controls provision, other companies still must conduct their own risk assessments and cost-benefit analyses before deciding to embark on a program of distributor auditing.

**Does the SEC now expect every company that uses distributors around the world to audit distributors’ margins and their payments to third parties?**

Where Do We Go from Here?
In the post-Oracle world, must it be a given that the SEC will pursue an enforcement action, regardless of whether it finds evidence that any foreign official was bribed? To date, seven FCPA enforcement matters including internal controls counts have been announced since Oracle and publication of the *FCPA Guide*. Notably, four of these were pursued by the SEC alone, a pattern that may indicate not only the different mens rea requirements for bringing a criminal case, but also genuine attempts by the DOJ to adhere to the principles of reasonableness and proportionality noted in the *FCPA Guide*. As has been noted elsewhere, divergence of opinion between the SEC and DOJ on FCPA enforcement is not unprecedented. (See, e.g., Laurence A. Urgenson, William J. Stuckwisch & Brigham Q. Cannon, *FCPA Anti-Bribery Liability for a Subsidiary’s Conduct: Recent Developments Suggest Apparent Split between DOJ and SEC*, BUS. CRIMES BULL. (Law Journal Newsletters), Jan. 2013.)

Where can companies look for real-world hints at how to escape an FCPA investigation without the SEC insisting on a settlement? While only one SEC “declination” has been acknowledged publicly, its details provide a few post-Oracle lessons. In April 2012, the SEC charged former Morgan Stanley managing director Garth Peterson (in a settled enforcement action) with violating the FCPA’s antibribery and internal controls provisions, as well as with investment advisor fraud. (SEC Morgan Stanley Press Release, supra.) At the same time, the
DOJ charged Peterson with conspiracy to evade Morgan Stanley’s internal controls, noting in its press release that Peterson had “conspired with others to circumvent Morgan Stanley’s internal controls in order to transfer a multi-million dollar ownership interest in a Shanghai building to himself and a Chinese public official with whom he had a personal friendship.” (Press Release, U.S. Dep’t of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), http://tinyurl.com/72jmypq [hereinafter DOJ Morgan Stanley Press Release].) In its press release, the SEC deemed Peterson a “rogue employee” and, in an extremely rare move, publicly announced that Morgan Stanley was not being charged.

The SEC’s complaint against Peterson included significant discussion of Morgan Stanley’s internal controls. Apart from providing extensive FCPA training, the company:

- had policies to conduct due diligence on its foreign business partners, conducted due diligence on [the bribed foreign official and his employer] before initially conducting business with them, and generally imposed an approval process for payments made in the course of its real estate investments. Both were meant to ensure, among other things, that transactions were conducted in accordance with management’s authorization and to prevent improper payments, including the transfer of things of value to officials of foreign governments. (Complaint at ¶ 23, SEC v. Peterson (Morgan Stanley), No. 1:12-cv-02033-JBW (E.D.N.Y. Apr. 25, 2012).)

Praise for Morgan Stanley was not limited to the SEC. In its press release, the DOJ also highlighted the company’s controls:

- According to court documents, Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley’s internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley’s compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners. (DOJ Morgan Stanley Press Release, supra.)

Reading these public documents, there can be no doubt that the government was trying to send a message that it will reward robust internal controls by declining to bring an enforcement action against a potential corporate defendant in the appropriate case, even when it is able to prove an antibribery charge, as it clearly could based on Garth Peterson’s conduct as a Morgan Stanley employee. And there can be no doubt that Morgan Stanley and its counsel gave the government plenty of internal-controls-specific evidence for use in sending this message. Even after discounting Morgan Stanley—on account of the notion that the SEC could sue in lieu of the company (which is not always true in FCPA matters)—useful takeaways for the post-Oracle era can still be gleaned from it.

**Takeaways**

**Recognize the government’s subject matter expertise.** First, clients and counsel should understand that the government, specifically the DOJ Criminal Division’s Fraud Section and SEC Enforcement Division’s FCPA Unit, are now fully invested in the compliance business. Day after day, week after week, these prosecutors and enforcement lawyers hear presentations from a wide array of lawyers and compliance professionals. In contrast, individual compliance officers are often buried in the (admittedly all-consuming) details of compliance program design, implementation, and update within their own companies. While, for most of the period of FCPA enforcement, the government was continually playing catch-up in its understanding of compliance practices, the tables have now turned. Companies are at risk of quickly appearing outdated, even when well-resourced and well-intentioned, as the government simply has higher visibility into the state-of-the-art than any counsel or compliance professional can achieve without concerted effort. Continual benchmarking is therefore a vital component of any developed system of internal controls. If the government has seen another company (competitor or not) implement a control that may have prevented the type of alleged conduct for which it is investigating your client, it will want to know (perhaps unfairly) whether your client considered implementing that step and, if not, why not.

**Tailor internal controls to company-specific risks.** While benchmarking is helpful to understand the state-of-the-art and find potentially effective ways to mitigate risk, each company’s internal controls still must be tailored to
its particular risks and circumstances. And while studying government enforcement actions can be helpful in understanding the government’s views, government allegations that one company’s internal controls were insufficient because they lacked a particular element does not mean that every company’s internal controls must also include that element to be effective. Embrace the government’s acknowledgment in the FCPA Guide that the internal controls provision gives companies flexibility to implement a system of internal controls that is appropriate to address their particular needs and circumstances. Tailor FCPA compliance programs to the specific risks presented by the way the business is run. Document the conscious, good-faith decisions that are made as part of the cost-benefit analysis that inevitably must inform the design of a system of internal controls in a world of limited compliance resources.

**Start now.** It may seem obvious, but whatever your plan of action, do not delay implementation. Change, even incremental change for those with well-established compliance programs, always takes longer than initially anticipated. Counsel and their clients never know when an FCPA matter will have them sitting across the table from the DOJ and SEC. Never was this truer than now, as the post-Oracle era coincides with the deployment of the SEC’s Office of the Whistleblower and offer of significant financial incentives to potential whistleblowers. (U.S. Sec. & Exch. Comm’n, Annual Report on the Dodd-Frank Whistleblower Program: Fiscal Year 2012 (2012), available at http://tinyurl.com/cu8mzjg.)

**In any investigation, develop the compliance story.** Just as counsel would marshal the facts and evidence to support any other argument, counsel should seek to demonstrate to the government that—notwithstanding alleged foreign bribery or other bad conduct—their client’s internal controls were designed to provide reasonable assurances that even employees and agents on the other side of the world would not engage in bribery. In Morgan Stanley, details such as the number of times Morgan Stanley employees and agents were trained clearly resonated with the government. Aspects of Morgan Stanley’s internal controls that seem removed from the illegal conduct in the case, such as policies and procedures related to giving of gifts, business entertainment, travel, lodging, meals, charitable contributions, and employment, apparently demonstrated to the government that Morgan Stanley took FCPA compliance seriously in designing its internal controls. By telling the story of their client’s system of internal controls as a whole, rather than focusing simply on how to defend the area in which there may have been a breakdown, counsel will be better positioned to argue that the internal controls were sufficient, if imperfect, and that the SEC should reward their client for having an effective preexisting system of controls.

**Conclusion**

The post-Oracle world of SEC FCPA internal controls provision enforcement is one of high stakes and uncertain boundaries. When representing a client in a parallel DOJ and SEC FCPA investigation, the SEC’s approach to the internal controls provision should not be overlooked, or relegated to an issue to address at the end of the criminal investigation. Rather, counsel should realize that they will face an uphill battle convincing the SEC to decline to bring any action at the end of the day, and plan for that battle now.
International Asset Tracing
The Struggle for Transparency Abroad

By Mara V.J. Senn and Giselle K. Fuentes
Show me the money!” As business transactions and asset holdings get more international, secret bank accounts act as a haven to avoid taxes, engage in fraudulent transactions, and illicitly transfer funds. Finding the money, much less showing the money, is becoming more difficult. Anti-corruption and kleptocracy initiatives are hitting the news, but a huge hole in this dragnet is the world of secret bank accounts. However, a number of initiatives are shedding light on these hidden, offshore accounts, which not only could decrease corruption and kleptocracy, but could also help trace terrorism funding and bring more transparency to many transactions around the world.

Some high-profile tax havens are being affected, such as the Cayman Islands, Jersey, Guernsey, and the Isle of Man. The governments of the United States, United Kingdom, and Cayman Islands have all proposed or passed legislation to make financial transactions more transparent. In addition, in April 2013, the Washington-based International Consortium of Investigative Journalists (ICIJ), in an effort to expose the secret world of offshore banking, reported the results of its 15-month joint investigation with international media companies into offshore secrecy. The investigation included a review of 2.5 million files revealing the names and financial information about hidden companies and private trusts in the British Virgin Islands, the Cook Islands, and other offshore hideaways in more than 170 countries. It is likely that this trend of increased transparency will continue.

Although overall transparency is a welcome development, especially in countries where assets are plundered by corrupt leaders, it could also adversely impact unwitting victims. Many offshore accounts are there for perfectly legitimate reasons, and certain new transparency initiatives may disrupt some of those accounts and related overseas transactions. For example, people may open offshore accounts to diversify their investments, to have easier access to money while living or working abroad, or to engage in international business transactions in jurisdictions where local accounts are necessary. New laws and regulations requiring financial entities to create systems to identify, track, and report account information to the government may prove to be a substantial burden, leading to increased fees and transaction costs for taxpayers legitimately using foreign accounts and assets for legal reasons. This would be in addition to having to file complicated tax forms and the fear of the serious consequences that may arise in failing to abide by the new laws and regulations. Some of these developments have already imposed burdens on foreign financial institutions.

**MARA V.J. SENN** is a partner in Arnold & Porter LLP’s Washington, D.C., office, with a focus on white collar criminal law and international arbitration. Contact her at mara_senn@apporter.com. **GISELLE K. FUENTES** is an associate in the Arnold & Porter’s Washington, D.C., office and a member of its global anticorruption, litigation, and international arbitration groups. Contact her at giselle.fuentes@apporter.com.

**Appeal of Offshore Accounts**

Offshore, untraceable accounts and corporations offer a number of advantages to those wishing to evade detection: They can help the account holder avoid paying higher taxes and can allow a bribe to be paid without being traceable. Ultimately, the main goal is to distance the assets from their actual owner, while allowing control over them. Offshore financial operatives can and do create very complicated and elaborate financial structures that span several countries in order to maintain the anonymity of their clients. Common locations for offshore accounts include Bermuda, British Virgin Islands, Cayman Islands, the Cook Islands in the South Pacific, the Channel Islands of Guernsey and Jersey, Ireland, Isle of Man, Panama, and Singapore.

Local agents, accountants, lawyers, banks, and other financial services providers—also called “gatekeepers”—who are familiar with the laws of offshore jurisdictions known to allow asset secrecy, can use the legal tools available in these jurisdictions to navigate and provide their clients with access to the local financial industries. These “clandestine” jurisdictions are appealing because they have promulgated financial secrecy laws in an effort to attract foreign investment. Moreover, they have no requirements for publicly registering any financial or account information. In addition to the financial secrecy they provide, these jurisdictions—commonly referred to as “tax havens”—impose little or no tax on income from sources outside their jurisdictions and allow individuals to hide assets from tax collectors in their countries of origin. In some cases, these tax haven jurisdictions do not recognize or enforce foreign judgments or subpoenas.

In practice, money is moved offshore through bank accounts in jurisdictions with very strong bank secrecy laws (such as, until recently, Switzerland), or through shell corporations established in jurisdictions that require no registration and no public disclosure of information. The shell corporations typically have no employees, operations, or physical assets and exist merely on paper. They use corporate directors or “nominees” who agree to their names being used on corporate documents to hide the identities of the real owners and their affiliation with the companies. Many of these nominees lend their names to thousands of companies. The ICIJ analysis alone identified 28 “sham directors” who served as the representatives on the corporate documents of more than 21,000 companies, with individual sham directors representing as many as 4,000 companies each. This system of using “stand-ins” to shield the real owners of companies that do not want their identities revealed makes it very difficult for investigators to track assets and identify the people who are in control of the offshore companies and accounts.

**Initiatives to Increase Transparency**

Several countries have recently taken action to address tax avoidance and asset-hiding involving offshore activity.

**United States Foreign Account Tax Compliance Act (FATCA)** The United States recently enacted FATCA in an effort to promote transparency and curtail tax evasion.
Following the 2009 UBS tax evasion case, in which US citizens hid billions of US dollars in Swiss bank accounts resulting in a $750 million fine, the United States passed FATCA in 2010 to combat the issues presented by offshore accounts. US citizens and residents generally are taxed in the United States on their worldwide income. Although it is legal for US citizens to open offshore accounts and to receive income from foreign sources, the law requires them to report these offshore accounts to the US Internal Revenue Service (IRS) or possibly be charged with tax evasion, fined with heavy penalties, and face jail time. Reasoning that the UBS case indicated that just requiring voluntary disclosure by taxpayers was not fully effective, FATCA requires foreign financial institutions (FFIs) to report to the IRS information about financial accounts held by US taxpayers. It also requires foreign entities to report substantial ownership interests held by US taxpayers. However, FATCA does not allow private parties looking for untraceable accounts access to the information.

FATCA requires not only banks to report this information directly to the IRS, but also other financial institutions, such as investment entities, brokers, and certain insurance companies.

**Withholding.** If an FFI does not enter into an agreement with the IRS, all relevant US-sourced payments, such as dividends and interest paid by US corporations, will be subject to a 30 percent withholding tax. The same 30 percent withholding tax will also apply to gross sale proceeds from the sale of relevant US property. (I.R.C. §§ 1471–74.)

**Compliance concerns.** According to the US Treasury Department, the United States has signed FATCA agreements with Denmark, Germany, Ireland, Japan, Mexico, Norway, Spain, Switzerland, and the United Kingdom. (FATCA Archive, U.S. DEP'T TREASURY, http://tinyurl.com/q6vg7nj (last updated June 11, 2013.) The United States is in talks with more than 50 other foreign jurisdictions to implement FATCA.

One concern for financial institutions is that compliance with the obligations imposed by FATCA will conflict with the local laws of the foreign jurisdictions. For instance, in Europe it would be difficult for foreign financial institutions to comply with FATCA without violating data protection laws and other legal restrictions. To address this issue, the US Treasury Department worked with several other countries to develop an intergovernmental approach to address the concerns expressed by foreign institutions around the world. Based on these discussions, it was agreed that financial institutions would instead report the information to their respective tax authorities, who would then provide the information to the United States under the legal framework provided by existing double taxation and tax information exchange agreements. The United Kingdom, United States, France, Germany, Italy, and Spain have already issued a joint statement agreeing to exchange tax information to enhance international compliance and facilitate enforcement to the benefit of all parties to the agreement.

It will be interesting to see how the FATCA agreements will be used in practice in gathering information to be reported to the United States. For example, the FATCA agreement between the United States and Switzerland makes reference to the 1996 Avoidance of Double Taxation with Respect to Taxes on Income treaty and its amending protocol of 2009, and states the parties’ desire to facilitate the implementation of FATCA. Per the terms of the FATCA agreement, the implementation of FATCA would be based on direct reporting by Swiss financial institutions to the IRS, supplemented by the exchange of information upon request pursuant to the tax treaty as amended.

Under the tax treaty, however, the parties are only permitted to exchange information in cases of suspected tax fraud and are not allowed to disclose information in cases of suspected tax evasion. In the event that this information is not provided to the IRS, whether it be because the local laws or the tax treaty do not allow for it and a waiver was not obtained from the respective account holder, FATCA requires that the financial institution close the account or be subjected to a 30 percent withholding tax on the US...
Last year, Facebook hid almost half-a-billion British pounds in a Cayman Islands tax haven to avoid paying taxes in Great Britain and its other main markets.

assets. However, the unilateral closure of certain bank accounts may also conflict with local laws, thereby creating another dilemma for financial institutions trying to implement and comply with FATCA.

In addition, the costs associated with FATCA will have serious implications for financial institutions abroad. For example, there will be costs related to creating and implementing databases and systems that help identify, track, and report the information required by FATCA. If the costs become unmanageable or burdensome, financial institutions may opt to turn away prospective US account holders or close the existing accounts of US entities and individuals. This would not only affect criminals, who have offshore accounts to evade taxes and commit other financial crimes, but regular, law-abiding US citizens, who live and work abroad and maintain these accounts for legitimate reasons. Another possibility is that the costs associated with the administrative burden of implementing FATCA placed on the financial industry will ultimately be passed down to the public.

Finally, laws like FATCA may discourage US investors from operating abroad, as they may not want to be subjected to stricter scrutiny as a result of their dealings abroad. This may also encourage US citizens who are living and working abroad to surrender their US citizenship so as to not be subject to the requirements and heavy penalties due to noncompliance imposed by FATCA.

Although the IRS estimates that initiatives such as FATCA will help in the recovery of billions of tax revenue from offshore accounts, this law is only one facet of the IRS’s efforts to put an end to offshore tax evasion. Another initiative implemented by the IRS is its offshore voluntary disclosure programs (OVDPs). The US Government Accountability Office (GAO) reported in March 2013 that this program, which began in 2003, has resulted in over 39,000 disclosures and the recoupment of more than $5.5 billion in back taxes, interest, and penalties. (U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-318, OFFSHORE TAX EVASION: IRS HAS COLLECTED BILLIONS OF DOLLARS, BUT MAY BE MISSING CONTINUED EVASION (2013).) Under this program, the IRS offers incentives to US taxpayers using undisclosed foreign accounts to avoid or evade taxes the opportunity to voluntarily report their offshore assets. The incentives include the opportunity to become compliant with US tax laws, a reduced risk of criminal prosecution, and lower penalties than if the unreported information was discovered by the IRS. The IRS has had OVDPs for 2003, 2009, 2011, and 2012, with each subsequent program including a higher standard offshore penalty rate. According to the GAO, one of the factors that has influenced participation in the 2012 OVDP, which is still open to the public, is FATCA. (Id. at 10, tbl. 1.) With FATCA being implemented, it will be more difficult for US taxpayers who choose not to disclose to keep their offshore assets and accounts under the radar.

**UK Initiatives**

The United Kingdom has also taken action to combat tax evasion and promote transparency by entering into agreements with Jersey, Guernsey, and the Isle of Man that would grant the United Kingdom’s tax collection agency, Her Majesty’s Revenue and Customs (HMRC), the authority to demand financial disclosures relating to UK residents without having to first present detailed prima facie evidence of evasion. (See Simon Bowers, Budget 2013: Tax Avoidance and Evasion Targeted by George Osborne, GUARDIAN (Mar. 20, 2013), http://tinyurl.com/cralxzf.) Financial disclosure talks have also been initiated between the United Kingdom and other British territories such as the Virgin Islands, Bermuda, the Cayman Islands, and Gibraltar. (See Mike Foster, No Hiding Place as Tax Noose Tightens, FIN. NEWS (Mar. 27, 2013), http://tinyurl.com/mn8xwme.)

**Cayman Islands Initiative**

Some tax havens are also taking steps themselves to increase transparency. For example, the Cayman Islands are known as a tax haven by many companies that attempt to avoid paying higher tax rates in other countries. Consistent with this reputation, in December 2012, it was reported that Facebook hid almost half a billion British pounds in a Cayman Islands tax haven last year in an effort to avoid paying taxes in Britain and its other main markets. (See Cayman Islands to Name Previously Hidden Companies, TELEGRAPH (Jan. 18, 2013), http://tinyurl.com/bcesyt.) Moreover, the Cayman Islands initiative as a tax haven made headlines last year after it was revealed that US presidential candidate Mitt Romney held millions of dollars in Bain Capital funds there. However, after increasing pressure from investors and governments on the Cayman Islands to reform their asset-sheltering regulations, it appears that the islands are taking steps to address this problem. In January, the Financial Times reported that it reviewed proposals sent by the Cayman Islands Monetary Authority, to Cayman-based hedge fund businesses outlining plans to create a database that would make public the names of thousands of previously hidden companies and their directors for the first time in the country’s history pending an ongoing consultation process. (Id.) The proposed reforms would be considered a break

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Criminal Investigations Overseas

Legal and Policy Issues for an International Prosecutor

By Mariana Pena
Although the first attempts to prosecute those responsible for mass atrocities date back to the aftermath of the First and Second World Wars, international criminal law started to clearly emerge as a field of law in the 1990s. International criminal tribunals were created in 1993 and 1994 respectively to bring to justice those responsible for mass crimes committed in the Balkans (International Criminal Tribunal for the former Yugoslavia—ICTY) and during the Rwandan genocide (International Criminal Tribunal for Rwanda—ICTR). Other “hybrid” (integrating international and domestic rules and personnel) tribunals were created thereafter (e.g., the Special Court for Sierra Leone—SCSL, the Extraordinary Chambers in the Courts of Cambodia—ECCC). All those tribunals have an ad hoc mandate, as they were created to address crimes committed during a limited period of time in a specific territory, and will be closed once their mandate has been completed.

The proliferation of international criminal tribunals paved the way for negotiations towards the creation of a permanent international criminal court. The statute of the International Criminal Court (ICC) was adopted during an international conference held in Rome in 1998. The statute, also known as the Rome Statute (Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]), reached the necessary number of ratifications in 2002, and the ICC became operational in July 2002. Although the United States took part in the Rome Conference and contributed to the drafting of the ICC Statute, it has not ratified the instrument. The United States has generally been very supportive of international criminal tribunals, and while it adopted a cautious approach toward the ICC when it first started operations, it has lately reviewed its laws and policies, taking steps to support the implementation of the ICC’s mandate.

Each international criminal tribunal has specific rules governing its functioning and operations. Their mandate is to adjudicate cases on the basis of individual criminal liability, and their jurisdiction covers primarily genocide, crimes against humanity, and war crimes. The specific context and political setting in which international criminal tribunals operate and international criminal investigations are set is unique. That context may include the involvement of the state apparatus or members of the government in the commission of the crimes, an armed conflict or a post-conflict setting, lack of stability and poor infrastructure in the national judicial system, and endemic corruption and malfunctioning domestic law enforcement agencies, among others. In addition, unlike national tribunals, international courts and international prosecutors cannot rely on any law enforcement capacity within their own system.

This article examines particular aspects regarding international criminal investigations. First, it presents in more detail the context of mass crime investigations. Second, it describes prominent practical, legal, and policy matters. Finally, it elaborates upon the importance of cooperation and related challenges. Given its permanent character, this article focuses primarily on investigations by the ICC, although relevant references to other tribunals will be made where appropriate.

Investigating Mass Crimes
International criminal tribunals are comprised of different components. The office of the prosecutor is an independent component in charge of investigations and prosecutions. Importantly, all the international tribunals, as well as some of the hybrid tribunals, have a seat in a country that is not the one where the crimes were committed. Investigations are conducted by the office of the prosecutor’s in-house investigators, who come from different countries and have diverse legal backgrounds and experience.

Some of the most relevant features of international criminal investigations include:

**Elements of an investigation into international crimes.** In order to look at the challenges involved in international criminal inquiries, it is relevant, first of all, to recall the elements of international crimes (whenever the term “international crimes” is used, it should be understood to refer to genocide, crimes against humanity, and war crimes, unless otherwise indicated).

The conflicts addressed by international criminal tribunals often involve a great number of criminal acts committed by a large number of perpetrators. International criminal tribunals do not have the structural and financial capacity to prosecute all perpetrators for all crimes. Therefore, these tribunals have generally focused on prosecuting those who bear the greatest responsibility for the crimes. At times, that requirement is provided for in the law of the relevant tribunal (e.g., the Statute of the SCSL). Even when not explicitly required by the law, that specific focus has been chosen as a matter of prosecutorial policy (e.g., at the ICC). (ICC OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY 5 (2006), http://tinyurl.com/nlf6wjk [hereinafter 2006 PROSECUTORIAL STRATEGY].) Those most responsible for the crimes are often those who planned, orchestrated, or were otherwise involved in directing the crimes or providing financial, military, or other type of support for executing the crimes. Although some of those persons may also have been personally and directly involved in the commission of criminal acts, most times they have not. As a consequence, international criminal investigations must address two very distinct aspects: (1) the individual criminal acts (a.k.a. “crime base”), and (2) the links between those acts and the person allegedly responsible for them (a.k.a. “linkage evidence”). The latter is one of the most complex aspects of investigations, as it generally involves,

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**MARIANA PENA,** a native of Argentina, was admitted to the Buenos Aires District Bar in 2002 and has worked in the field of international criminal justice since 2005. Currently she lives in The Hague, Netherlands, where she works as a consultant specializing in public international law and the law pertaining to international tribunals. Contact the author at marianacpena@yahoo.com.
inter alia, proving de jure or de facto control by the alleged suspect over troops, finding out the structure of an organization and chains of command, and uncovering secret orders.

In addition to crime base and causal links with the suspect, international criminal inquiries must be able to tie individual criminal acts to relevant contextual elements. For example, an investigation into the commission of war crimes will have to collect evidence about the existence of an armed conflict, which will involve inquiries into the nature of the confrontation among the relevant parties and their respective organizational structure.

Similarly, an investigation into crimes against humanity must gather sufficient elements to prove that the acts were committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (ICC Statute, supra, at art. 7), which will involve, inter alia, identifying an organizational policy and analyzing patterns in the commission of attacks. Finally, when investigating genocide, prosecutors will have to prove that the criminal acts were committed with the specific intent “to destroy, in whole or in part, a national, ethnic, racial or religious group, as such” (ICC Statute, supra, at art. 6).

Another important aspect is the selection of cases upon which investigations and prosecutions will focus. In this regard, it is relevant to note that the ICC prosecutor applies a different policy than the prosecutors of the ad hoc tribunals. The ICTY indictments, for example, include long lists of crimes in which the accused was allegedly involved. The ICTY and other tribunals have been criticized for the length of their proceedings. (See, e.g., Máximo Langer & Joseph W. Doherty, Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms, 36 YALE J. INT’L L. 241, 242 (2011).) In an effort to conduct shorter and cost-efficient investigations and trials, the ICC prosecutor adopted a policy of “focused investigations and prosecutions.” (2006 PROSECUTORIAL STRATEGY, supra, at 4.) “The policy . . . means that the Office [of the Prosecutor] selects a limited number of incidents . . . . This allows the Office to carry out short investigations and propose expeditious trials . . . .” (Id. at 5.) The ICC Office of the Prosecutor has explained that it intends to “represent the entire range of criminality” and thus aims “to provide a sample that is reflective of the gravest incidents and the main types of victimization.” (Id. at 5–6; see also ICC OFFICE OF THE PROSECUTOR, PROSECUTORIAL STRATEGY 2009–2012, ¶ 20 (2010), http://tinyurl.com/kjuuszj [hereinafter 2009 PROSECUTORIAL STRATEGY].)

The criterion applied for the selection of cases is gravity. According to the ICC prosecutor, “cases inside a situation are selected according to gravity, taking into account factors such as the scale, nature, manner of commission, and impact of the alleged crimes.” (2009 PROSECUTORIAL STRATEGY, supra, ¶ 20.)

The prosecutor will thus target those bearing the greatest level of responsibility for the most serious crimes. The investigation must therefore necessarily examine a much broader picture than what will ultimately be presented for prosecution. That broader picture will involve analyzing numerous incidents and perpetrators in order to identify lines of inquiry into the most serious acts and the most relevant suspects according to the gravity criteria.

Last but not least, an ICC investigation must look into what is known as the “complementarity” aspect. According to the ICC Statute (art. 17), cases before the court are inadmissible when they have been or are being investigated or prosecuted by a state and as long as the relevant state is not unwilling or unable to genuinely carry out such investigations or prosecutions. In practice, this means that ICC prosecutors must often make inquiries about the domestic legal and judicial system of the state (or states) that may have jurisdiction over the crimes. Such inquiries involve, inter alia, consideration of possible legislation that may bar domestic adjudication of the case at hand (e.g., amnesties, immunities, statutes of limitations); evaluation of means available for investigations and prosecutions; security conditions and adequate protection systems for witnesses, investigators, prosecutors, and judges; unfolding of proceedings and justification for relevant delays; and other evidence that may help establish whether the investigations or proceedings respect the conditions of independence or impartiality. (ICC OFFICE OF THE PROSECUTOR, DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS ¶¶ 58–65 (2010), http://tinyurl.com/k37da2.)

In sum, international criminal investigations involve inquiries into the crime base, linkage evidence, contextual elements according to the relevant legal characterization of the acts, a broader range of incidents and perpetrators for the purpose of selecting the most relevant ones according to the gravity criteria, and legal and judicial aspects of domestic investigations and prosecutions. All in all, international criminal investigations are complex and far-reaching.

Access to evidence and relevant sources. Most investigations of international crimes are conducted long after the crimes took place. The delay may be due to many factors (e.g., delay in triggering of jurisdiction, delays in the national investigations of the same crimes that block action by a supranational court, etc.), and it can vary from one situation to another. For example, in 2007 the ICC started an investigation into crimes committed in the Central African Republic between October 2002 and March 2003. However, the delay was much shorter in the case of the investigation regarding crimes committed in Côte d’Ivoire, which was opened in October 2011 and concerns events that took place between December 2010 and April 2011.

Delays in starting investigations create significant challenges, including the potential loss of evidence (risk of destruction of documents and loss of evidence due to fighting or looting; increased difficulties in tracking witnesses who may have moved, died, or been threatened, or whose memories could have distorted with the passing of time). The deferral in the start of the investigation also means that inquiries that can only be conducted shortly after the crimes were committed (e.g., certain medical
tests) may not be possible. As a consequence, international investigators will have to rely on whatever material was produced at the time of the events. (When it comes to medical evidence, for example, they may have to resort to existing medical records in hospitals or medical certificates that the victims may be able to display).

Although, in principle, it would be possible to envision a system where international prosecutors would be able to rely on inquiries undertaken by the domestic police and receive files from national prosecutors, this rarely happens in practice. Countries where international tribunals conduct investigations have often been ravaged by war or affected by some other type of conflict. Documentation of the facts by state actors is normally missing or inadequate. In general, these countries have a poor police and judicial infrastructure. In the case of the ICC, the court comes in precisely because the national judicial system lacks sufficient will or capacity to investigate itself (principle of complementarity). Often, materials that could be obtained from local police or judicial officers are unreliable, given that corruption is rampant. In some other cases, reliance on the local police is simply not possible because of allegations that members of the police were involved in the crimes (e.g., during the postelection violence in Kenya in 2007–2008, which the ICC is investigating).

To further complicate matters, in some cases investigators are not allowed access to the territory where the crimes were committed. For example, the ICC prosecutor has stated that the investigation into crimes committed in Darfur, Sudan, was conducted from outside the country. (See, e.g., ICC Office of the Prosecutor, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), at 2 (2006), http://tinyurl.com/kjr7rzzz.) The reasons why an international prosecutor may be unable to conduct investigations in the area are normally linked to security for both investigators and potential witnesses (i.e., the security assessment shows that it would be unsafe to operate in the area) and/or lack of physical access to the territory (e.g., the relevant state does not authorize deployment).

Given the difficulty of gathering certain types of evidence and conducting inquiries, other material acquires higher relevance. International prosecutors have relied, for example, on material gathered by the United Nations, either through a commission of inquiry specifically set up to look into acts under the jurisdiction of the relevant international tribunal, or through other programs. For example, the ICC prosecutor received materials collected by the United Nations Commission of Inquiry on Darfur. (Press Release, ICC, Prosecutor Receives List Prepared by Commission of Inquiry on Darfur (Apr. 5, 2005), http://tinyurl.com/mcyrmxk.) The ICC prosecutor also received a substantial number of documents from the United Nations peacekeeping operation in the Democratic Republic of Congo. (Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ¶ 19 (June 13, 2008), http://tinyurl.com/lbluc63.)

In addition to material gathered by intergovernmental organizations, documents collected by commissions of inquiry set up by the national government to specifically inquire into the relevant incidents may be of use. For example, following the 2007–2008 postelection violence in Kenya, the government established an international commission of inquiry (Commission of Inquiry into Post-Election Violence—CIPEV), composed of both Kenyan and non-Kenyan commissioners. (CIPEV Final Report 1 (2008), http://tinyurl.com/2dmsjcr.) The material gathered by CIPEV was later handed over to the ICC prosecutor. Similarly, in Côte d’Ivoire, the government established a national commission of inquiry to document the crimes committed during the postelection violence in that country in 2010–2011. The ICC prosecutor may seek access to documents produced by such type of commissions.

Often nongovernmental actors also gather documents and produce analyses that may be relied upon during an international inquiry. National and international human rights groups are frequently active in the collection of testimonies and other material during or immediately after serious crimes have been committed. Although credibility and reliability of such inquiries may vary according to the relevant group’s competence, expertise, and capacity to operate impartially, these materials may at the very least provide a basis for further inquiries. Civil society groups commonly have a level of access to the territory and the communities, including potential witnesses, which others (including international tribunal investigators) may not enjoy.

Relying on secondary evidence—evidence gathered by other sources—raises additional challenges. The ICC Office of the Prosecutor has repeatedly stated that it conducts its own independent investigations, meaning that it is not bound by the conclusions of other entities whose documents have been made available to the office. (See, e.g., ICC, Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005), at 2 (2005), http://tinyurl.com/lfu5dmu.) The prosecutor must gather evidence and conduct investigations firsthand. Secondary evidence, however, can play a significant role in the initial stages of the investigation, acting as leads to other material or witnesses, and identifying relevant lines of inquiry.

One of the main sources of information in firsthand investigations are witnesses. While some of the sources mentioned above, including secondary evidence, can be used to prove criminal acts and context, witness accounts are often needed to support and complement those findings. In particular, witnesses may provide evidence on linkage between the crimes and the suspect or accused. Given the nature of the crimes, orders and plans about attacks and the commission of atrocities against civilian populations are rarely documented. Even when some
information, such as the organizational structure to which the suspect belongs or support to a relevant group, can be extracted from documentary evidence, it will almost invariably need to be corroborated by other sources. Witnesses who were part of the suspects’ organization—insiders—are particularly useful, as they can share information that may not be obtained in any other way (e.g., participation of the suspect in meetings where major decisions about the attacks were made, his or her role in those meetings, etc.).

As indicated above, the ICC Office of the Prosecutor has a policy of “focused investigations and prosecutions.” The purpose of that policy is not only to avoid lengthy investigations and trials, but also to reduce the number of witnesses. The office has explained, “The policy also means that the Office selects a limited number of incidents and as few witnesses as possible are called to testify.” (2006 PROSECUTORIAL STRATEGY, supra, at 5.) This allows the office to limit the number of persons put at risk by reason of the investigation. (2009 PROSECUTORIAL STRATEGY, supra, ¶ 20.)

The ICC prosecutor has expressed interest in relying increasingly on other types of evidence, including “financial information to prove the role of those most responsible . . . as well as forensic evidence.” (Id. ¶ 34.) ICC judges have also spoken about the convenience of resorting to other types of evidence “thereby removing the need to call a substantial number of individual witnesses.” (Adrian Fulford, The Reflections of a Trial Judge, available at ¶ 12 (Dec. 6, 2010), http://tinyurl.com/ibrtte5.) However, given the complexity of the investigation, witnesses will continue to be needed.

Specific Legal, Policy, and Practical Issues in ICC Investigations

Following the creation of the newest and permanent international criminal tribunal, the ICC Office of the Prosecutor designed specific policies in relation to investigations. Given the particular context in which the ICC has operated so far (African countries, most of which are still in conflict or are only recently emerging from conflict), practical challenges led to the development of special practices. Some of the most relevant policy and practical features of such investigations will be examined below, in addition to specific ICC procedural rules that have an impact on the unfolding of investigations and related matters.

ICC policy of small investigation teams and use of intermediaries. Given the contextual challenges described above (limited access to territory, conflict or post-conflict setting, etc.), identifying and establishing an initial contact with witnesses may be challenging. At the ICC, this is further hampered by the fact that the ICC Office of the Prosecutor has taken a policy decision to establish small investigation teams (see Pascal Kambale, The ICC and Lubanga: Missed Opportunities, AFR. FUTURES (Mar. 16, 2012), http://tinyurl.com/km8sku8), who are not based in the countries where the crimes were committed (they are based in Europe and regularly fly into the countries) (HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT’S FIRST YEARS 54 (2008), http://tinyurl.com/lhj2lz6 [hereinafter HRW COURTING HISTORY]). This policy has been heavily criticized by civilian groups (see, e.g., INT’L FED’N FOR HUMAN RIGHTS, THE OFFICE OF THE PROSECUTOR OF THE ICC—9 YEARS ON 21–23 (2011), http://tinyurl.com/lba7vh7 [hereinafter FIDH 2011 REPORT]), who question the ICC prosecutor’s ability to conduct thorough inquiries with such a limited capacity, such vast territories over which crimes were committed, such difficult geographic access, and the need to acquire a comprehensive understanding of the relevant country’s history and traditions. Such background information is indeed often relevant to interpret witness accounts and other pieces of evidence.

This may have led the ICC Office of the Prosecutor to use “intermediaries”—persons who provide a link between the ICC investigators and potential witnesses or other evidentiary leads. The practice of using intermediaries, who are often local activists or other persons who had been performing work in the communities before the ICC’s arrival, has become widespread in investigations and other activities conducted by the ICC. (See, e.g., INT’L FEDN’ FOR HUMAN RIGHTS, ICC REVIEW CONFERENCE: RENEWING COMMITMENT TO ACCOUNTABILITY 10–11 (2010), http://tinyurl.com/12phyw6.) Intermediaries speak the local language, know the geography of the area as well as the culture of the country/region, and are known and trusted by the communities. They were often in the area before, during, and immediately after the crimes were committed, which puts them in a privileged position to identify potential witnesses or provide other information that may be of use to international investigators who are new to the country.

The use of intermediaries has been understandably questioned. Some have observed that this amounts to delegating core investigation tasks that ICC investigators should perform themselves. The use of intermediaries was very much at issue in the first ICC case, Prosecutor v. Lubanga Dyilo, in which the defense contested the practice and contended that witnesses had been inappropriately coached by intermediaries. In the final judgment (issued in March 2012), the trial chamber found that some intermediaries had indeed persuaded, encouraged, and assisted witnesses to give false evidence. This led to the striking of the relevant testimonies. While the trial chamber did not condemn the use of intermediaries as such, it considered that adequate oversight and appropriate verification should be conducted by the prosecution with regard to evidence obtained with the help of intermediaries. The trial chamber also stated that use of intermediaries should not result in delegation of investigative responsibilities. (Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶¶ 482–84 (Mar. 14, 2012), http://tinyurl.com/73dqmvc.) The adverse impact of the prosecution’s work with intermediaries in the first ICC investigation has been brought to the attention of the ICC’s appeals chamber in the defense appeal against the judgment. The case is currently pending before the appeals chamber.
Investigating exonerating circumstances and disclosure obligations. Another aspect that was discussed extensively in the first ICC case and is currently pending before the appeals chamber is the extent to which the ICC prosecutor investigated exonerating circumstances. According to article 54(1) of the ICC Statute, “[i]n order to establish the truth,” the prosecutor must investigate incriminating and exonerating circumstances equally. Defense attorneys have pointed out the contradictory nature of this obligation—given the prosecutor’s duty to prosecute cases and obtain convictions—as well as the extent to which the obligation has been discharged in practice.

In addition, in order to preserve the rights of the accused to adequately prepare his or her defense, the prosecutor must disclose in advance of the trial all incriminating evidence, as well as all potentially exonerating evidence in its possession. (ICC Statute, supra, at art. 67; ICC Rules of Procedure and Evidence, r. 76–84, ICC-ASP/1/3 (2002).) Given the access to secondary evidence described above, discharge of the disclosure obligation posed difficulties in the preparation of the first ICC case and almost led to its collapse. The ICC prosecutor had obtained a very significant amount of documents “on the condition of confidentiality and solely for the purpose of generating new evidence.” (ICC Statute, supra, at art. 54(3)(e).) It turned out that a large portion of those documents contained exonerating evidence that the ICC prosecutor was obliged to communicate to the defense.

While not compelling the prosecutor to communicate materials obtained on condition of confidentiality, the trial chamber made the following ruling: Should the prosecutor not obtain an agreement from the informant to lift the confidentiality requirement nor be in a position to disclose the material in another form—e.g., as a summary or with redactions—the prosecution would then be obliged to withdraw the relevant charges. (Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial (Nov. 9, 2007), http://tinyurl.com/m33vbfj; see also Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I (Oct. 21, 2008), http://tinyurl.com/mhtjsan5.)

Similar problems were encountered in the second ICC case. However, in subsequent cases, the ICC Office of the Prosecutor has modified its policy regarding acceptance of material under condition of confidentiality (see ICC Assembly of States Parties, Report of the Bureau on Cooperation, ICC-ASP/8/44, annex I ¶ 44 (Nov. 15, 2009), http://tinyurl.com/kza8dle), in order to ensure that it is in a position to disclose evidence to the defense whenever required.

Evidentiary thresholds and timing of investigations. A matter that has attracted considerable attention and has led to disputes in the proceedings is the timing of the investigations conducted by the ICC prosecutor. In general terms, the stages of ICC proceedings can be described as follows: (1) initiation of a case with the issuance of summons to appear or arrest warrant for the suspect(s); (2) confirmation of charges (a pretrial chamber evaluates whether the prosecutor has sufficient evidence to proceed to trial); and (3) trial. The evidentiary threshold that the prosecutor must reach increases as the proceedings progress (i.e., while proof beyond reasonable doubt is required for a conviction, less demanding thresholds apply for issuance of summons to appear/arrest warrants and for confirmation of charges). (ICC Statute, supra, at arts. 58(1), 61(5), 66(3).)

Investigations must be conducted prior to initiation of a case. In principle, nothing forecloses the prosecution to continue to investigate thereafter. The ICC prosecutor declared that, as a matter of policy, the Office of the Prosecutor would “request arrest warrants or summons to appear only when a case is nearly trial-ready in order to facilitate the expeditiousness of the judicial proceedings.” (2006 PROSECUTORIAL STRATEGY, supra, at 6; see also 2009 PROSECUTORIAL STRATEGY, supra, ¶ 21.) However, in the cases that have gone before the ICC, the prosecution appears to have conducted substantial investigations during subsequent stages (i.e., seeking evidence to reach the relevant evidentiary threshold at each stage and supplementing investigations as the case progresses and the need to attain higher thresholds materializes). (See, e.g., Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11, Dissenting Opinion by Judge Hans Peter Kaul in Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 42–52 (Jan. 23, 2012), http://tinyurl.com/knew95w.) In principle, from a legal standpoint, there would be no bar to conducting investigations at a later stage of the proceedings as long as that does not affect the accused’s rights “[t]o be informed promptly and in detail of the nature, cause and content of the charge” and “[t]o have adequate time . . . for the preparation of the defence.” (ICC Statute, supra, at art. 67.) In practice, however, the question becomes more nuanced, and the prosecutor’s capacity to investigate after the confirmation of charges has been a matter of contention in court.

The prosecutor’s capacity to investigate after the confirmation of charges has been a matter of contention in the court.
The ICC appeals chamber has ruled that most of the evidence must be collected before the confirmation of charges, and that only in exceptional circumstances should evidence be collected after. (Prosecutor v. Mbarushimana, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ¶¶ 117–23 (Apr. 26, 2013), http://tinyurl.com/kbeunhl.) While a judicious use of resources and other practical matters, such as witness security, may push the prosecutor to conduct investigations after the confirmation of charges, in practice that poses challenges.

A recent situation relating to the ICC prosecutor’s investigation in Kenya illustrates this point. The charges against one of the accused, Francis K. Muthaura, had been primarily based on the account of only one witness. Following confirmation, the credibility of that witness was brought into question, and his testimony was no longer reliable. The prosecutor argued that her team had not been able to gather other evidence and, as a consequence, the charges against Muthaura were withdrawn. (Prosecutor v. Muthaura & Kenyatta, Case No. ICC-01/09-02/11, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura (Mar. 11, 2013), http://tinyurl.com/n3bvfyk [hereinafter Withdrawal of Charges against Francis Kirimi Muthaura];) This situation exemplifies some of the challenges of delaying evidence gathering, including risk of loss of evidence with the passage of time, use of resources for administration of justice in relation to cases that may be inconclusive, and accusing a person before an international tribunal without sufficient evidence.

Obligation to Cooperate and Related Matters

A prominent feature of international criminal tribunals is the lack of law enforcement capabilities. In the case of the ICC, the court was created by states, through the adoption of an international treaty. Respect for state sovereignty was an important condition in the formation of the court. Granting the ICC law enforcement capabilities would have run counter to this idea. As we will see, however, this has a substantial impact on an international prosecutor’s capacity to investigate.

ICC lacks subpoena powers. Unlike at the ICTY and the ICTR, whose judges enjoyed subpoena powers, the ICC has no similar capacity to compel witnesses to testify. ICC chambers are not empowered to request states to enforce an order to appear before the court. There is, therefore, no obligation for witnesses to testify in ICC proceedings—the principle of voluntary appearance applies. So in addition to other challenges identified above, the ICC prosecutor cannot apply for a subpoena, and witness testimony is completely voluntary. It has been observed that, even if the subpoena power is not actually used, the mere existence of such power may have an important impact on witnesses’ decisions to testify. (Göran Sluiter, Appearance of Witnesses and Unavailability of Subpoena Powers for the Court, in International Criminal Justice 459 (Roberto Bellelli ed., 2010).) The lack of subpoena powers may frustrate the efforts to arrive at a determination of the truth. Trying to force an unwilling witness to cooperate with the court voluntarily not only affects the prosecution’s evidence-gathering capability but may also impact on the fairness of the proceedings—as, for example, when a witness holding exculpatory evidence refuses to testify. (Int’l Bar Ass’n, Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress (2011), http://tinyurl.com/lzydpdq.)

This matter has been a concern in ongoing cases before the ICC regarding the situation in Kenya, where witnesses have allegedly declined to give testimony. (Withdrawal of Charges against Muthaura, supra, ¶ 11.) A person may decide not to cooperate with the court due to personal considerations, but such a decision may also be taken out of fear for the person’s security or as the result of bribery or other forms of external influence. Allegations of witness tampering and witnesses being bribed have been made in relation to the Kenya cases before the ICC. (Prosecutor v. Muthaura & Kenyatta, Case No. ICC-01/09-02/11, Public Redacted Version of the 25 February 2013 Consolidated Prosecution Response, ¶ 17 (Feb. 25, 2013), http://tinyurl.com/k3zpaa.) In this regard, it is relevant to note that the ICC has jurisdiction to investigate offenses against the administration of justice in relation to proceedings before it, including “[c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence.” (ICC Statute, supra, at art. 70.) Investigations on such offenses are to be conducted by the ICC prosecutor.

Witness protection. Like national courts, international tribunals have a duty to protect those who come forward to testify. Given the seriousness of the crimes and potential consequences for the accused persons, the stakes are particularly high. In addition, the context in which most witnesses find themselves (conflict or immediate postconflict setting, low reliability of the local police and domestic judicial system, poor infrastructure, corruption, etc.) makes implementation of protection measures a significant challenge.

Protection is normally structured in different “layers.” (See, e.g., Silvana Arbia, The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits, 36 Commonwealth L. Bull. 519, 522 (2010).) The first layer of protection is the application of best practices (referred to as “good practices” in ICC documentation). Good practices are all measures aimed at preventing risks by minimizing the chances that the witness’s interaction with the tribunal will become known to those who could potentially harm him or her. (Id.) This implies restricting as much as possible the number of people who are privy to the person’s collaboration with the investigation. These measures include the use of cover stories and
interrogation in secure places where the witness will not be seen or identified, among other means. Good practices also aim at ensuring that the witness has direct communication with the investigators, so that potential incidents can be prevented.

The second level of protection is the application of judicial measures. These are aimed at concealing the witness’s identity from the general public and, on occasion, from other parties or participants in the proceedings. These measures are ordered by the judges and include the use of pseudonyms, face and voice distortion during broadcast testimony, and testimony in private sessions.

The third and more demanding level is the protection program, which normally entails some sort of temporary or permanent relocation that may be within the country where the person is located or internationally.

At the ICC, these three levels of protection are complemented by an emergency extraction system, which is activated in case of imminent risk. Other international criminal tribunals did not have such a system. While the setup of an “immediate response system” is certainly an improvement, it presents the disadvantage that it must rely on some sort of local structure in order to operate. (Markus Eikel, Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice, 23 CRIM. L. F. 97, 120–21 (2012).) Given the problems highlighted above (poor infrastructure as a result of conflict, corruption, etc.), this can be a challenge and reinforces the need for other protection measures.

Another significant difference between the ICC and other tribunals is the power of the Office of the Prosecutor when it comes to protection decisions. At the ICTY, the ICTR, and especially at the SCSL, the prosecutors had more leverage over decisions regarding who could be protected. Some of those offices had their own protection capability. (Chris Mahony, The Justice Sector Afterthought: Witness Protection in Africa 84 (Inst. for Sec. Studies 2010).) At the ICC, decisions on admission to the protection program are unilaterally taken by a separate independent unit within the Registry—the Victims and Witnesses Unit. The division of responsibilities between the Office of the Prosecutor and the Victims and Witnesses Unit led to disputes in the early years of the ICC. The chambers of the court have stated that, while all organs of the court must cooperate in matters related to protection, the ultimate decision regarding admission to the protection program lies with the Victims and Witnesses Unit, and any dispute is to be resolved by the court’s chambers. (Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Judgment on the Appeal of the Prosecutor against the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” of Pre-Trial Chamber I (Nov. 28, 2008), http://tinyurl.com/lb4zuaa.) The rationale behind these rulings seems to be that protective measures should not be perceived in practice as an incentive for witnesses to give evidence. (Eikel, supra, at 104.)

As in national investigations, witness protection is paramount, and international prosecutors have a keen interest in ensuring that no witness be harmed as a result of his or her collaboration with the tribunal. If one witness is attacked, other witnesses may be afraid of coming forward in future investigations (especially taking into account the principle of voluntary appearance before the ICC).

One aspect that has proven to be particularly challenging when it comes to witness protection is state cooperation. Such cooperation is needed for international tribunals to implement international protection measures, in particular relocation. All international criminal tribunals have experienced difficulties in concluding relocation agreements with states. (See, e.g., Mahony, supra, at 54, 73.) Other challenges related to witness protection—particularly relocation—include the expense and the difficulties inherent in relocating witnesses with a criminal past. (ICC, SUMMARY REPORT ON THE ROUND TABLE ON THE PROTECTION OF VICTIMS AND WITNESSES APPEARING BEFORE THE INTERNATIONAL CRIMINAL COURT 6, http://tinyurl.com/kpzbyys (last visited Aug. 14, 2013).)

Importance of state cooperation. International tribunals do not have their own police force; this makes cooperation by states (as well as other entities, including intergovernmental organizations) critical. In the case of the ad hoc tribunals created by a United Nations Security Council resolution, the obligation to cooperate was a result of the Security Council enforcement powers and states’ obligations under the United Nations Charter. When it comes to the ICC, part 9 of its Statute deals with international cooperation and judicial assistance. The first article of part 9, article 86, provides for a general obligation to cooperate: “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigations and prosecution of crimes within the jurisdiction of the Court.” In addition to states that are party to the ICC Statute, the court is also empowered to invite any other state to provide assistance. (ICC Statute, supra, at art. 86(5).) It may also ask intergovernmental organizations to provide information or documents, or other forms of cooperation and assistance agreed upon with such organizations. (Id. at art. 87(6).) The ICC has, for example, entered into such an agreement with the United Nations.

While the most prominent and well-known form of cooperation is the arrest and/or surrender of persons sought by a tribunal, there are many other forms of cooperation that prosecutors may require in the context of the investigation—for example, facilitating access to the territory of the state for the purpose of investigations, including to interrogate witnesses; delivering travel documents for witnesses to travel; transferring documents or records (including judicial documents and official records); and identifying, tracing, and freezing or seizure of proceeds, property, assets, and instrumentalities of crimes, among others. (Id. at art. 93.) Requests for cooperation and assistance are transmitted through diplomatic channels. (Id. at art. 87(1).) Once received, the request goes through a domestic procedure in accordance with the relevant state’s laws.
While some requests for cooperation may be addressed to various states, others can only be executed by the state on whose territory the crimes were committed. Given the specific setting in which international criminal investigations take place (see above), cooperation presents its own challenges. The ICC has indicated on several occasions that cooperation is not optimal. For example, in 2010, it was reported that the execution rate for requests addressed to states and intergovernmental organizations regarding investigative and prosecutorial activities was 70 percent. (See ICC Assembly of States Parties, Report of the Court on Cooperation, ICC-ASP/10/40, ¶ 10 (Nov. 18, 2011), http://tinyurl.com/klnmp5zp.) The ICC prosecutor has also reported that it has received deficient cooperation by some of the countries under investigation—in particular, Sudan (ICC, Seventh Report of the Prosecutor of the International Criminal Court to the Security Council Pursuant to UNSCR 1593 (2005), ¶¶ 30–31, http://tinyurl.com/mpdhdug), and Kenya (Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Public Redacted Version of the 8 May 2013 Prosecution Response (May 10, 2013), http://tinyurl.com/kjcag4n). Members of the governments of both countries have been indicted. Other states have been found to fail to arrest persons sought by the ICC when on their territories. (See, e.g., Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (Mar. 26, 2013), http://tinyurl.com/nh8e3qd.) Cooperation poses particular challenges when the state government has a political interest in the outcome of the investigations. During a conflict, for example, when crimes are committed by rebel groups as well as governmental forces, the government may be more inclined to share information about the other party’s crimes. Some wonder whether this is the reason why the ICC prosecutor only indicted rebel forces in some countries—such as in Uganda and the Democratic Republic of Congo—while governmental forces are also known to have committed atrocities. (FIDH 2011 REPORT, supra, at 18–19 (regarding cooperation with states and the practice of “self-referrals”); see also HRW COURTING HISTORY, supra, at 40–42.) Even in cases where the international prosecutor may have access to information on crimes committed by members of the armed forces, the question arises whether the prosecutor may choose not to prosecute such crimes for the sake of ensuring some level of continuing cooperation.

Within the context of a discussion on cooperation, it is worth considering the policy of the US government toward the ICC. Although the United States is not a state party to the ICC Statute, it can greatly assist the court in discharging its functions and accomplishing its mandate to put an end to impunity for the most serious crimes. Following the adoption of the Rome Statute and during the initial years of ICC operations, the United States adopted a very cautious approach toward the court, mainly out of concern that American nationals could be subject to politicized prosecutions by the ICC. Congress passed legislation that limited cooperation with the ICC, including any type of financial support. As the years have passed and the court has demonstrated that it upholds the highest standards of justice, the US government has gradually reviewed its policy. While most of the so-called “anti-ICC” legislation has been repealed, some provisions remain in force.

The United States has supported the ICC within the context of Security Council resolutions referring situations of allegations of mass atrocities to the ICC (Darfur and Sudan in 2005, and Libya in 2011). It has also expressed support for the ICC investigations in Uganda, the Democratic Republic of Congo, Darfur, and Kenya, among others. Specific measures of cooperation include the commitment to support protection of witnesses in the context of the Kenya investigation, and passing legislation offering a reward for intelligence that could lead to the arrest, transfer, or conviction of certain ICC indictees. (For more information on the relationship between the United States and the ICC, see www.amiec.org.) While the United States has taken relevant steps to approach and support the ICC in recent years, it could still reinforce its relationship and cooperation by repealing all “anti-ICC” legislation and considering ratification of the ICC Statute.

Conclusion

International tribunals were created by the international community, following its determination to fight impunity for the commission of the most serious crimes and recognizing that such crimes threaten the peace, security, and well-being of the world. These tribunals pursue cases that the individual state governments—despite having jurisdiction—are not in a position to prosecute. The same reasons that prevent the state governments from taking up the cases (deficient infrastructure, rampant insecurity, and absent political will) become challenges for an international prosecutor. International prosecutions are inherently complex and require appropriate strategies, adequate funding, and sufficient cooperation from various actors. State cooperation, in particular, is key for international prosecutors to succeed in the investigation and prosecution of mass atrocities. The United States has generally supported international tribunals, but it could take further steps to increase its support to the ICC.
Let’s say you are a general counsel to a government contractor that provides training and security services in Iraq and Afghanistan and other locations worldwide. On this particular day, you are confronted with a weapons compliance issue relevant to the company’s federal firearms license. You do some legal research and determine that some of the weapons possibly used on overseas contracts are not in compliance with a particular federal firearms regulation, and so you help your client to bring the weapons into compliance. Good news! You just helped your company minimize legal exposure for compliance violations. Uh oh. Bad news. A federal prosecutor learns of your actions and thinks you are obstructing an active federal investigation into the company’s weapons program. You are then indicted for obstruction of justice. Very bad news. Now what?

This scenario was precisely the predicament that the former general counsel of the company then known as Blackwater Worldwide Inc. found himself in three years ago, when he called upon my firm to represent him. This article tells the story of his indictment and of how our legal team was able to persuade a US district court to dismiss the three charges brought against him, primarily because, as a matter of law, our client had committed no crime.

The Indictment
In April 2010, a federal grand jury in the Eastern District of North Carolina returned an indictment against five former Blackwater employees, including our client, who served as Blackwater’s general counsel at all relevant times. The original indictment consisted of 15 counts.

All defendants were charged in Count One with conspiracy to violate various firearms laws in violation of 18 U.S.C. § 371.

Three of the defendants were charged variously with several unlawful schemes as follows. First, the indictment charged that some defendants participated in unlawful straw purchases of Romanian-manufactured AK-47 machine guns for the Camden County Sheriff’s Department. The indictment alleged that the AK-47 machine guns and other weapons were used not by the sheriff’s department, but by Blackwater to carry out training.

LAINA LOPEZ is a litigation attorney at Berliner, Corcoran & Rowe LLP. She may be reached at lcl@bcr-dc.com, or (202) 293-9096.
contracts for overseas government missions. Second, some defendants were charged with making false statements about certain firearms given as gifts to the King of Jordan in an alleged attempt to “gain favor with the Government of the Kingdom of Jordan” and hopefully to obtain Jordan’s business. (Indictment at 8, United States v. Jackson, No. 2:10-cr-00008-FL (E.D.N.C. Apr. 16, 2010), Dkt. No. 1.) Third, the indictment charged unlawful possession of unregistered “short-barrel” rifles. Allegedly, “defendants detached the short barrels from the receivers they had already been mated with before shipping them overseas” so the weapons could be reassembled easily abroad, and the defendants could avoid the unlawful export of regulated weapons. (Id. at 9.)

Our client was charged with three counts: one count of conspiracy to commit various weapons violations and two counts of obstruction of justice in violation of 18 U.S.C. §§ 1512 and 1519, respectively. The fifth defendant was also charged with conspiracy and obstruction of justice in violation of § 1512.

Approximately a year-and-a-half after the original indictment was filed, however, the government filed a motion to dismiss Count Thirteen, the count charging unlawful possession of unregistered short-barrel rifles. The court granted the government’s motion on November 22, 2011, thereby dismissing Count Thirteen and clarifying that Count One, the conspiracy count, no longer involved the allegedly unregistered short-barrel rifles that had been shipped overseas.

As for the obstruction of justice counts, Counts Fourteen and Fifteen, they charged that, in March 2009, our client instructed certain Blackwater employees to move a few short-barrel rifles from one location to another on Blackwater’s campus. Count Fourteen charged that our client, together with the fifth defendant, ordered the replacement of the short barrels with standard-length barrels to bring those weapons into compliance with the federal regulation that requires all weapons with barrels of less than 16 inches (which are considered more dangerous) to be registered with the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Count Fifteen charged that our client later attempted to cover up his conduct by sending an e-mail trying to create the impression that Blackwater’s then-president had instead ordered the barrel conversion.

As for conspiracy (Count One), the indictment charged that all five defendants conspired to “gain an advantage over competitors in the defense contracting field and thereby profit from obtaining and keeping Government contracts.” (Indictment, supra, at 7.) Our client specifically was alleged to have participated in the conspiracy by attempting to cover up the unlawful possession of the overseas short-barrel rifles charged in Count Thirteen.

When Legal Advice Is Not Obstruction

Importantly, none of our client’s conduct constituted a crime. Pursuant to 18 U.S.C. § 1515(c), the federal obstruction of justice statute “does not prohibit or punish the providing of lawful, bona fide legal advice to his client, and the indictment did not allege otherwise. Our client therefore lacked the specific intent necessary to commit a crime and, in our view, he should not have been indicted in the first place.

Although it may seem obvious that attorneys should not be indicted for providing bona fide legal advice, it plainly was not obvious to the prosecutors in the Blackwater case, and it was not obvious historically. Before § 1515(c) was enacted, prosecutors were, according to the Congressional Record, harassing defense attorneys for giving advice to their clients in situations that seemed to prosecutors to be obstruction of justice. (132 Cong. Rec. H11,291-01 (daily ed. Oct. 17, 1986).) To correct this problem, Congress added § 1515(c) to the obstruction statute in 1986, noting that “[v]igorously and zealously representing a client . . . is not a basis for charging an offense under the obstruction of justice chapter.” (Id.)

The statute has been invoked infrequently since its enactment. One of the most prominent decisions is United States v. Kloess, 251 F.3d 941 (11th Cir. 2001). In Kloess, the US Court of Appeals for the Eleventh Circuit held that § 1515(c) was a particular type of affirmative defense that had to be raised by the attorney-defendant, but the burden was on the government to disprove its application. In other words, under Kloess, when charging an attorney with obstruction of an official proceeding, the government does not have to plead in the indictment that the attorney was providing non-bona fide, unlawful legal representation services. Rather it was, according to Kloess, incumbent upon the attorney-defendant to raise that he or she was lawfully representing the client.

Essential Element vs. Affirmative Defense

Our legal team was convinced that Kloess had been wrongly decided and that, under Fourth Circuit precedent, our client never should have been prosecuted, given § 1515(c). The plain language of the statute, combined with Fourth Circuit case law and the legislative history of the provision, led us to conclude that § 1515(c) should be treated not as an affirmative defense, but as an “essential element” of any obstruction offense against an attorney. Indeed, under Fourth Circuit law, an essential element is “one whose specification . . . is necessary to establish the very illegality of the behavior.” (United States v. Hooker, 841 F.2d 1225, 1231 (4th Cir. 1988) (internal quotation marks omitted).) By contrast, an affirmative defense is one that “excuses punishment for a crime the elements of which have been established and admitted.” (United States v. Thompson, 554 F.3d 450, 452 n.2 (4th Cir. 2009) (internal quotation marks omitted).) For example, the insanity defense is a classic affirmative defense because a defendant admits to having committed the crime but asks that such behavior be excused and not punished due to insanity.

We therefore decided to challenge the Kloess decision and ask for dismissal of the obstruction counts as well as the conspiracy count. And so, in June 2012, we filed two
motions to dismiss before US District Court Judge Louise Flanagan in the Eastern District of North Carolina.

In the first motion, we joined with all other defendants to ask the court to dismiss Count One on the ground that the conspiracy charge was duplicitive. Specifically with regard to our client, we argued that his so-called obstructive conduct was not alleged to have been perpetrated as part of a common scheme or plan, but only to cover it up. We noted that his alleged alteration of certain rifles and the sending of an e-mail related thereto had nothing to do with the Camden County straw purchases or the guns at issue in the King of Jordan conspiracy. Under the doctrine of duplicity, two or more distinct and separate offenses cannot be joined in one count. (United States v. Burns, 990 F.2d 1426, 1438 (4th Cir. 1993).) Accordingly, we urged the court to dismiss the count against our client.

We knew that persuading the court to adopt our legal position would be an uphill battle. Motions to dismiss indictments are frequently made but rarely granted.

As to the motion to dismiss Counts Fourteen and Fifteen, we argued that obstruction of justice charges were fundamentally defective for failure to plead an essential element—the inapplicability of § 1515(c)—of an obstruction offense against an attorney. We further argued that, under binding Fourth Circuit law (e.g., United States v. Kingrea, 573 F.3d 186 (4th Cir. 2009), and Hooker, as distinguished from nonbinding Eleventh Circuit law (Kloess), the inapplicability of § 1515(c) had to be raised in the first instance by the government in the indictment submitted to the grand jury.

Further, under the Sixth and Fifth Amendments to the US Constitution, we noted, felony charges must be presented to a grand jury, and an accused criminal defendant must “be informed of the nature and cause of the accusation.” (U.S. Const. amend. VI; see also Russell v. United States, 369 U.S. 749, 760–61 (1962).) An indictment that does not allege all essential elements fails to give the grand jury the full context and fails to provide the defendant with adequate notice of the crimes allegedly committed. Indeed, in this case, the grand jury had been aware of § 1515(c) when it was considering whether the charged conduct was criminal, it very well might have decided not to indict.

We forcefully advocated our primary argument regarding § 1515(c) because, if we were correct that the government—and not the attorney-defendant—bore the burden to raise § 1515(c)’s inapplicability, then the indictment would have to be dismissed as constitutionally defective, potentially saving our client from having to endure a high-profile trial.

We knew, however, that persuading the court to adopt our legal position would be an uphill battle. Motions to dismiss indictments are frequently made but rarely granted. Furthermore, it is a lot to ask a district court to disagree with a circuit court decision (albeit a nonbinding

definition of affirmative defense includes “[a]ny defense which tends to negate an element of the crime charged” that when “sufficiently raised by the defendant, must be disproved by the government.” (United States v. Kloess, 251 F.3d 941, 947 (11th Cir. 2001) (emphasis omitted).) By contrast, under Fourth Circuit jurisprudence (such as Thompson and Hooker), an affirmative defense excuses punishment for a crime already established and admitted. Section 1515(c), the court held, did not seek to excuse punishment for a committed crime but mandated that providing bona fide, lawful legal representation services is not a crime in the first place. Hence, under Fourth Circuit law, it was an essential element of an obstruction offense alleged against an attorney.

The court analogized its treatment of § 1515(c) to the Fourth Circuit’s treatment of 21 U.S.C. §§ 841 and 822(b). As set forth in United States v. Daniel, 3 F.3d 775 (4th Cir. 1993), for example, § 841 prohibits any person from knowingly or intentionally distributing, dispensing, or possessing with intent to distribute or dispense a controlled substance, but § 822(b) permits doctors registered by the attorney general to prescribe and dispense controlled substances as far as authorized by their registration. Accordingly, an indictment must allege that “the attempted distributions or dispensations were not . . . for a legitimate medical purpose.” (Id. at 778 (internal quotation marks omitted).)

The court concluded that the Fourth Circuit “is directly in conflict with Eleventh Circuit law on its treatment of an analogous exception in a criminal statute, and this court is obligated to follow the approach of the Fourth Circuit, rather than the Eleventh Circuit as set forth in Kloess.” (Order, supra, at 38.) Thus, continued the court, the government must allege in any indictment charging an attorney

We knew that persuading the court to adopt our legal position would be an uphill battle. Motions to dismiss indictments are frequently made but rarely granted.

The Court’s Order

Specifically, the judge adopted the view that the inapplicability of § 1515(c) was an “essential element” of the offense of obstruction when charged against an attorney and those under an attorney’s control. She pointed out that the Eleventh Circuit defines an affirmative defense differently from the Fourth Circuit. The Eleventh Circuit’s
with obstruction of justice that he was not providing bona fide, lawful legal representation services at the time.

As part of her decision, Judge Flanagan also rejected the government’s argument that viewing § 1515(c) as an essential element of obstruction offenses would lead to absurd results because the government would have to negate that any defendant—not just attorneys—was providing bona fide legal services even when charging, for example, assault of a process server or threatening a juror. The court held “only attorneys are persons authorized to provide ‘legal representation services.’ Therefore the government need only plead the inapplicability of § 1515(c) in cases such as that here involving the alleged actions [of] attorneys, or those acting under their control.” (Order, supra, at 39.)

In this case, our client was acting as an attorney providing legal representation services at all relevant times. Specifically, after appropriate research and analysis of the law, he gave legal advice to his client (Blackwater) relating to the configuration of certain weapons in his client’s possession. The court found particularly significant the fact that the e-mail referenced in Count Fifteen was signed by our client as “General Counsel.” (Id.) Because the obstruction of justice charges did not allege that our client’s actions were anything other than bona fide, lawful legal representation services, the charges were defective and had to be dismissed.

As for the conspiracy charge, Count One, the court held that the count failed to allege that our client had joined the firearms conspiracy alleged against the other defendants. Instead, the indictment charged him only with attempting to cover up one facet of the conspiracy—possession of the overseas short-barrel rifles—which was no longer part of the case, due to the dismissal of Count Thirteen. The court noted that “acts of concealment done after these central objectives have been attained, for the purpose only of covering up the crime must be charged separately.” (Id. at 15 (citations omitted) (internal quotation marks omitted).) Because there was no commonality between the objectives of the alleged overarching conspiracy by other defendants and the alleged obstructive conduct, Count One improperly charged in a single count the underlying conspiracy of the other defendants as well as the acts of concealment. The court thus held (going even further than we had argued), “the flaw with the conspiracy count is not that it contains allegations of two equally viable conspiracies, but rather that it contains allegations of one overarching conspiracy in which [the attorney-defendant] played no role.” (Id. at 20.) Further, noted the court, the dismissal of Counts Fourteen and Fifteen, together with the dismissal of Count Thirteen “makes the connection between” the general counsel and “the overarching conspiracy to circumvent firearms laws all the more attenuated.” (Ibid. at 17.) Under various authorities, therefore, the conspiracy count against our client had to be dismissed.

Another Acquittal
Although Judge Flanagan dismissed the indictment without prejudice, the government elected not to file a superseding indictment, and our client is now free of all criminal charges. Ours is not the only case, however, in which the application of § 1515(c) resulted in the dismissal of all criminal charges against an attorney-defendant. In 2011, a former in-house counsel to GlaxoSmithKline raised the provision in a motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. The US District Court for the District of Maryland granted the motion, holding that § 1515(c) provided an “absolute bar” to the obstruction of justice charges because at all relevant times she had been providing “bona fide legal representation of a client.” (Transcript of Rule 29 Hearing at 5–6, United States v. Stevens, No. RWT-10-694 (D. Md. May 10, 2011).) The Stevens court held that § 1515(c) is “designed specifically to protect an attorney who is acting in accordance with the obligation that every lawyer has to zealously represent his or her client[.]” (Id. at 6.) Accordingly, the in-house counsel “should never have been prosecuted” and was acquitted. (Id. at 10.)

Conclusion
That two in-house attorneys to corporations with an international reach recently have been improperly indicted for providing legal advice and ultimately released of all charges based on § 1515(c) demonstrates the power of the provision. But, in our view, the provision is most faithfully adhered to if read and applied by prosecutors before they decide to indict.
ACCESS TO REMEDIES FOR TRANSNATIONAL PUBLIC BRIBERY

BY DELPHIA LIM, MARYUM JORDAN, PATRICK KIBBE, DAVID DONATTI, JOSE VICENTE SANTOS DE MENDONCA, AND KWABENA ACHEAMPONG

Transnational public bribery—bribery of foreign public officials by corporations—is a practice that victimizes the foreign country’s population. Its impacts are particularly adverse when the bribery occurs in developing countries. We believe that the home states of corporate bribe givers should provide access to remedies for public harm caused by transnational public bribery; however, US law does not currently provide for adequate legal avenues to recompense this harm. This article sets forth reasons for opening these legal avenues and explores a few proposals for doing so in the United States.

The Harmful Impact

The harm caused by transnational public bribery is especially significant in developing countries for at least three reasons. First, transnational public bribery buttresses the culture of corruption that exists in many developing countries and, in turn, undermines the legitimacy of and confidence in governments. (See Mary Hallward-Driemeier, Who Survives? The Impact of Corruption, Competition and Property Rights across Firms (World Bank Dev. Research Grp., Policy Research Working Paper No. 5084, 2009).) Second, it contributes to larger fiscal deficits,
undermining a government’s ability to exercise sound fiscal control. (Vito Tanzi, Corruption Around the World: Causes, Consequences, Scope, and Cures 26–27 (Int’l Monetary Fund, Working Paper No. 98/63, 1998).) Finally, public corruption of all types increases income inequality. (Id.) This means that the costs of corruption are ultimately borne by society, especially the poor.

Transnational public bribery’s role in public harm is seen more starkly in other cases. For instance, where the alleged payment of bribes secures the forced eviction of people from their homes and lands (Don Bauder, Did Sempra Bribe Mexicans?, SAN DIEGO READER, May 16, 2012, http://tinyurl.com/pfykwpw), or where bribes secure public procurement contracts without due regard for the quality of the goods or services delivered to consumers. Bribery in securing business property might even be used for violence by public security forces against private civilians. (John M. Miller, Strike at Freeport Settled, Even as Mine’s Scars Linger, WAGING NONVIOLENCE (Dec. 17, 2011), http://tinyurl.com/p8aszh6.)

**Why Provide Remedies to Foreign Plaintiffs?**

Recognizing that corruption is not a victimless crime, the United Nations Convention against Corruption (UNCAC) and the Council of Europe Civil Law Convention on Corruption (COECLCC) require state parties to ensure that victims of corruption have a right to compensation. As stated by the Council of Europe, victims of corruption should be enabled to safeguard their interests and obtain effective remedies where their rights and interests have been affected. (Civil Law Convention against Corruption explanatory report ¶ 12, Nov. 4, 1999, C.E.T.S. 174 [hereinafter COECLCC Explanatory Report], available at http://tinyurl.com/qhvxlnq.) This should apply with equal force to the public harm caused to developing countries by transnational public bribery. As observed by the United Nations Working Group on the Right to Development, equitable development demands recourse to remedies for those who bear the adverse consequences of development. (U.N. Comm’n on Human Rights, 60th Sess., Feb. 11–20, 2004, at 19–20, U.N. Doc. E/CN.4/2004/WG.18/2 (Feb. 17, 2004).) The harm caused by transnational public bribery, which often accompanies the influx of foreign investment needed for development, is one such adverse consequence that deserves remedy.

Providing recourse in the home states of corporate bribers, where most of their assets are, is efficacious if the enforcement of a successful claim can take place in the same jurisdiction. Further, avenues for recourse may be unavailable in the country where the harm occurred. Developing and transitional countries often have weak rule of law and institutional capacity because of high levels of corruption. (Cheryl W. Gray, Reforming Legal Systems in Developing and Transition Countries, FIN. & DEV., Sept.

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### Remedying Transnational Public Bribery

**The United Kingdom**

- In 2009, the bridge company, Mabey & Johnson, admitted to paying bribes to secure contracts for construction projects in Jamaica, Iraq, and Ghana. In connection with its prosecution settlement with the UK Serious Fraud Office, the company agreed to pay compensation to each of these three countries. (Rob Evans & David Leigh, Mabey and Johnson Admits Bribing Officials Abroad to Secure Contracts, THE GUARDIAN (Jul. 10, 2009), available at http://tinyurl.com/lbs4op.)

- In December 2010, the British aerospace and defense company, BAE Systems, which was found guilty of false accounting offenses in connection with the sale of radar equipment to Tanzania, reached an agreement with the UK Serious Fraud Office to pay £29.5 million to the Tanzanian people. (Press Release, U.K. Serious Fraud Office, BAE Fined in Tanzania Defence Contract Case (Dec. 21, 2010) available at http://tinyurl.com/l67st9c.) The UK Department for International Development and the Tanzanian government were involved in drawing up the plans for the use of the sum, which was eventually disbursed directly to the Tanzanian government to be used in support of education in Tanzania. (Press Release, U.K. Serious Fraud Office, BAE Systems Will Pay Towards Educating Children in Tanzania after Signing an Agreement Brokered by the Serious Fraud Office (Mar. 15, 2012) available at http://tinyurl.com/7amm6ye.)

**Switzerland**

- In late 2011, the Swiss Office of the Attorney General ordered Alstom Network Schweiz AG and its French parent company, Alstom SA, to pay compensation of 36.4 million and 1 million in Swiss francs respectively in relation to the bribery of foreign public officials in Latvia, Tunisia, and Malaysia. (Press Release, Office of the Attorney General of Switzerland, Criminal Proceedings Against Alstom Entities Are Brought to a Close (Nov. 22, 2011), available at http://tinyurl.com/mhqmdhr.) Alstom SA’s 1 million in reparations was transferred to the International Committee of the Red Cross, part of which was for use in its projects within these three nations. (Id.) Although the disbursement of the compensation from the Alstom case has not been transparent, it is clear that the Swiss courts recognized the public nature of the harm caused by transnational public bribery.
1997, at 14.) Political, economic, or legal considerations may present obstacles to those who wish to seek remedy for transnational bribery (id.), and judicial mechanisms often lack the capacity to provide effective remedies for victims of corporate abuse (Julius Court et al., The Judiciary and Governance in 16 Developing Countries (U.N. Univ. World Governance Survey Discussion Paper No. 9, 2003), available at http://tinyurl.com/n52cgyl).

Significantly, countries throughout the world increasingly recognize the importance of providing remedies for public harm caused by transnational public bribery. This recognition is manifested in payments to countries harmed, pursuant to official orders or as part of prosecution settlements. (See “Remedying Transnational Public Bribery.”)

The United States has, in prosecuting transnational public bribery, accorded similar recognition to the need for restitution for public harm. US courts have ordered restitution to foreign governments harmed by foreign public bribery that violates the US Foreign Corrupt Practices Act (FCPA). (5 U.S.C. §§ 78dd-l et seq.; see “Cases Resulting in Restitution to Foreign Governments for FCPA Violations.”) However, such restitution has rarely been ordered. See, “Cases Resulting in Restitution to Foreign Governments for FCPA Violations.”

While it is laudable that governments are taking responsibility for providing remedies for the extraterritorial harm caused by their corporations, whether remedies are provided is subject to the vagaries of negotiations between the corporate briber and the prosecutor. Given the public harm wrought by transnational public bribery, the provision of remedies should instead be a consistent practice.

With regard to the United States in particular, providing remedies for transnational public bribery as a consistent and sustained practice furthers US foreign policy goals underlying the FCPA. A US court of appeals has held that the FCPA was “designed to protect the integrity of American foreign policy.” (Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990).) As observed by a US Senate committee report regarding the enactment of the FCPA, foreign public bribery undermines “the image of American democracy abroad.” (S. Rep. No. 95-114, at 3 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4101.) Providing a forum for foreign victims to vindicate their rights and hold US-based corporations accountable would protect the integrity and safeguard the image of the United States.

Transnational access to remedies for transnational public bribery is therefore justified on principled and pragmatic grounds. However, legal frameworks internationally and in the United States have failed to adequately meet this need.

The International Governance Gap

International legal frameworks fail to adequately promote access to remedies for transnational public bribery. Of the six regional and international conventions on corruption—the Inter-American Convention against Corruption by the Organization of American States (1996), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Organization for Economic Cooperation and Development (1999), the Criminal Law Convention on Corruption adopted by the Council of Europe (1998), the COECLCC (1999), the Convention on Preventing and Combating Corruption adopted by the African Union (2003), and the UNCAC (2003)—only the COECLCC and UNCAC oblige state parties to provide for the right of victims of corruption to obtain damages in a private cause of action.

However, neither of these conventions obligates state parties to ensure that private rights of action cover transnational public bribery. Nor do they ensure that private rights of action are available to victims located outside their territory. The Council of Europe’s Multidisciplinary Group on Corruption has simply stated that “rules concerning jurisdiction need to be as flexible as possible. There might be difficulties in deciding which courts have jurisdiction in corruption cases. . . . [T]o that respect, the provisions of existing Conventions should be considered as a useful basis, when drafting future international legal instruments on the matter.” (Working Group on Civil Law, Multidisciplinary Group on Corruption, Feasibility Study on the Drawing Up of a Convention on

**Cases Resulting in Restitution to Foreign Governments for FCPA Violations**

- United States v. F.G. Mason Eng’g, Inc. and Francis G Mason, No. B-90-29 (D. Conn. 1990) (ordering defendant to make restitution to German government because of corrupt arrangement with West German military intelligence service official).

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CIVIL REMEDIES FOR COMPENSATION FOR DAMAGE RESULTING FROM ACTS OF CORRUPTION § 4.10 (1997) [hereinafter GMC FEASIBILITY STUDY], available at http://tinyurl.com/kq7rqjj.) The UNCAC’s preparatory works state:

While article 35 [i.e., the provision requiring state parties to provide for a private right of action for corruption] does not restrict the right of each State party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State party in doing so.


Accordingly, state parties have wide discretion in implementing the obligation to provide access to remedies for corruption.

Implementation of article 35 of the UNCAC appears inconsistent. A considerable number of state parties have not created a private right of action for victims of corruption. In implementation reports submitted to the UNCAC Implementation Review Group (available at http://tinyurl.com/ksjwe2t), Bolivia, Chile, Costa Rica, Cuba, Fiji, Finland, Haiti, Mexico, Mongolia, Peru, and Uruguay did not report on how they complied with article 35 of UNCAC. According to research by Transparency International, Burundi and Nigeria were not compliant with article 35 of the UNCAC. (Lillian Ekeanyanwu, Review of Legal and Political Challenges to the Domestication of the Anti-Corruption Conventions in Nigeria 24 (2006), available at http://tinyurl.com/m9a0ydy; Michel Masabo, Country Review of Legal and Practical Challenges to the Domestication of the Anti-Corruption Conventions in Burundi 18 (2006), available at http://tinyurl.com/kpykvs.)

Even where private rights of action are provided for in domestic laws, they are often not “corruption-specific.” Based on the implementation reports submitted by state parties to the UNCAC Implementation Review Group (supra), many state parties rely on laws relating to intentional and economic torts, negligence, and deceit, or laws providing for the initiation of civil proceedings for compensation upon conviction, to fulfill their obligation under article 35 of UNCAC. However, these laws may not cover all of the practices that are considered “corruption” under UNCAC.

Another important gap in international legal frameworks is how the harm caused by transnational public bribery is conceived. The typical causes of action available as civil remedies for corruption rely on narrow conceptions of victimhood, “harm,” and “causation” that do not sufficiently recognize the adverse impacts of transnational public bribery on the public at large. For example, the Council of Europe explained, in relation to instituting a right to compensation for corruption:

The damage . . . must be sufficiently characterised, particularly as regards the connection with the victim himself or herself. . . . An adequate causal link must exist between the act and the damage, in order for the latter to be compensated. The damage should be an ordinary and not an extraordinary consequence of corruption.

(COELCCLC Explanatory Report, supra, ¶¶ 43, 45.)

However, the public harm caused by transnational public bribery may not have a unique personal connection to any particular individual and hence would not meet these conventional requirements, despite broad effects on the community at large. For example, Wal-Mart has been accused of bribing Mexican officials to quickly obtain permits to open stores. (Steven Gandel, Not Just Wal-Mart: Dozens of U.S. Companies Face Bribery Suspicions, CNNMoney (Apr. 26, 2012), http://tinyurl.com/7ssj62c.) For this particular incident, it is difficult to determine which consumers actually suffered from these bribes and the extent of such harm.

The Governance Gap in the United States

Limitations of the FCPA. The FCPA specifically targets transnational public bribery. Originally passed in 1977, the FCPA is a federal statute that contains two major sets of provisions: the “antibribery” provisions and the “accounting” provisions. The antibribery provisions criminalize companies or individuals paying anything of value to foreign officials for the purposes of “obtaining or retaining business.” (15 U.S.C. §78dd-1 (1977).) The accounting provisions address practices that make it difficult to detect bribery violations (e.g., off-the-record slush funds for illegal payments and false entries that make payments look legitimate). (1 FOREIGN CORRUPT PRACTICES ACT REPORTER § 1:20 (2d ed. 2012).) This article focuses on the antibribery provisions.

Criminal and civil enforcement of the antibribery provisions are generally the responsibility of the Department of Justice (DOJ). The US Securities and Exchange Commission (SEC) is responsible for civil FCPA enforcement against issuers. (CRIMINAL DIV. OF THE U.S. DEP’T OF JUSTICE & ENFORCEMENT DIV. OF THE U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 4 (2012).) An “issuer” is any entity required to register or file reports with the SEC under sections 12 and 15 of the Securities Exchange Act. (Id. at 11.) Enforcement of the FCPA was initially slow, with an average of three prosecutions per year from 1978 to 2000, although enforcement has increased exponentially since 2000. (Eugene R. Erbstoesser et al., The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence, 2 CAP. MARKETS L.J. 381, 386 (2007).) Because of the FCPA’s potential...
The FCPA is the most suitable statutory foundation in the United States for establishing a civil right of action for foreign public bribery. However, it does not expressly permit any private right of action, despite this being a live issue throughout the course of its enactment. During its drafting, a proposed text of the FCPA included a private right of action “for any person who could establish actual damage to his business resulting from illegal payments made by a competitor.” (S. Rep. No. 94-1031 (1976).) This idea was regarded as having merit, but the proposed text was found to be too ambiguous. (Id.) A Senate committee requested that the text be revised, but it appears that no follow-up action was taken and the provision never became endorsed by the Senate. (S. Rep. No. 95-144 (1977).)

Another proposed private right of action under the FCPA was endorsed by the House of Representatives. That proposed text stated, “courts shall recognize a private cause of action . . . on behalf of persons who suffer injury as a result of prohibited corporate bribery.” (H.R. Rep. No. 95-640 (1977).) Notably, unlike the draft text proposed by the Senate, the House’s proposal did not limit its protection to businesses. It was reasoned that a private right of action would be instrumental in “enhanc[ing] the deterrent effect” of the FCPA and “provide a necessary supplement to the enforcement efforts” of the SEC and DOJ. (Id.) However, the matter was never addressed in the subsequent documented legislative history of the FCPA.

Subsequently, the Supreme Court and several lower courts have held that the FCPA provides no implied private right of action, on grounds that this was not the legislative intent and would be inconsistent with the legislative scheme. (See “Implied Private Right of Action in the FCPA Rejected by the Courts.”)

According to the US government after it ratified UNCAC, article 35 of the convention does not require a private right of action under the FCPA. A report issued by then-Secretary of State Condoleezza Rice after the ratification asserted that the “current laws and practices of the United States are in compliance with Article 35,” and significantly, that UNCAC should not be interpreted as “requiring the United States to create a private right of action under the [FCPA].” (Condoleezza Rice, Dep’t of State, Detailed Analysis of the Provisions of the United Nations Convention Against Corruption 10 (2005).) The report further expressed concern that a private right of action under the FCPA could lead to civil suits that were “unrelated or only tangentially related” to the United States and for “acts only marginally related to

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**Implied Private Right of Action in the FCPA Rejected by the Courts**

- **Lewis on Behalf of Nat. Semiconductor Corp. v. Sporck**, 612 F. Supp. 1316 (N.D. Cal. 1985): In a shareholder derivative action brought for alleged falsification of data in connection with sales and theft of trade secrets, the court held that no private right of action was implied in the accounting provisions of the FCPA. The court found that the legislative history showed there was no legislative intent to create a remedy, that a remedy would not be consistent with the legislative scheme, and that the acts alleged in the complaint are traditionally compensated under state law as breach of fiduciary obligations.

- **Lamb v. Phillip Morris, Inc.**, 915 F.2d 1024 (6th Cir. 1990), cert denied, 59 U.S.L.W. 3562 (Feb. 19, 1991): Domestic tobacco growers brought suit for FCPA and antitrust violations against tobacco importers for various agreements that were designed to keep the price of foreign tobacco low. The court held that domestic competitors were not the intended beneficiaries of the FCPA, and that a private right of action under the FCPA would not be consistent with its legislative history or legislative scheme.

- **Citicorp Int’l Trading Co., Inc. v. W. Oil & Ref. Co., Inc.**, 771 F. Supp. 600 (S.D.N.Y. 1991): Following Lamb, the court found no support for a private right of action from the legislative history or purpose, and further, that the plaintiff’s would have redress for their claim under tortious interference with contractual relations.
the act of corruption.” *Id.* The Senate Foreign Relations Committee concurred that article 35 of UNCAC did not require amending the FCPA. (STAFF S. COMM. ON FOREIGN RELATIONS, 109TH CONG., REP. ON U.N. CONVENTION AGAINST CORRUPTION (Comm. Print 2006).)

In 2011, Representative Ed Perlmutter (Colorado) introduced the Foreign Business Bribery Prohibition Act of 2011. Under this proposed bill, the FCPA would be altered to “authorize certain private rights of action . . . for violations by foreign concerns that damage domestic businesses.” (H.R. 3531, 112th Cong. (2011), available at http://tinyurl.com/q6wy4bx.) The proposed bill, however, never progressed past the consideration of two House subcommittees, and Representative Perlmutter did not renew the bill for the 113th Congress. (See Legislation Sponsored or Cosponsored by Ed Perlmutter, CONGRESS.GOV, http://tinyurl.com/oz43dzw (last visited Aug. 6, 2013).)

While future legislative action regarding an FCPA amendment remains unknown, the issue is still relevant. On June 14, 2013, George Terwilliger III prepared a statement for a House committee hearing on overcriminalization and overfederalization. (*See Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the H. Comm. on the Judiciary Over-Criminalization Task Force, 113th Cong. 10* (2013) (statement of Hon. George J. Terwilliger III, Partner, Morgan, Lewis & Bockius LLP.).) In his statement, Terwilliger recommended that Congress “consider long-overdue reforms to the FCPA,” in part, because of statutory ambiguities. *Id.*

Experts, academics, and commentators have argued for an FCPA amendment to include a private right of action. (*See, e.g.*, Richard L. Cassin, *The FCPA Is No Private Matter*, FCPA BLOG (Mar. 2, 2008), http://tinyurl.com/mx236fz.) For example, Gideon Mark argues that the bill proposed by Representative Perlmutter is overly restrictive, and plaintiffs should be permitted to sue US companies and individuals, as well. (Gideon Mark, *Private FCPA Enforcement, 49 AM. BUS. L.J. 419, 487* (2012).) Paul Carrington argues for amending the FCPA to allow private enforcement of its antibribery provisions by foreign citizens in US courts, on behalf of their governments whose officials were bribed. (Paul D. Carrington, *Enforcing International Corrupt Practices Law, 32 MICH. J. INT’L L. 129, 154* (2010).)

**Limitations of Other Private Rights of Action**

Other private rights of action exist that could be used to obtain civil remedies for activities that would violate the FCPA. In fact, more litigation related to the FCPA is brought by private parties than by the DOJ or SEC. (Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 464 (2009)). The existing possible avenues for bringing a private right of action for foreign public bribery are (1) claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), (2) causes of action based on tort law, (3) securities litigation by stockholders in the corporate briber, (4) antitrust claims, and (5) whistleblower suits. However, these avenues only remedy collateral harm, and are not viable substitutes for a private right of action under the FCPA (see Mark, * supra*, at 460), for the following reasons:

**RICO.** RICO permits “[a]ny person injured in his business or property by reason of a violation of [the Act]” to institute a civil action. (18 U.S.C. § 1964.) To prove a prohibited activity is to demonstrate (1) that the defendant committed two or more activities (2) that constituted a pattern (3) of racketeering. (Ann K. Wooster, *Annotation, Validity, Construction, and Application of Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961 et seq.—Supreme Court Cases, 171 A.L.R. FED. 1* (2001).) Racketeering includes repeated and systematic bribery (*id.*), and both businesses and not-for-profits can be held accountable under the statute. (*See Nat’l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 260 (1994).*

Private companies have successfully brought RICO actions against their business competitors for the bribery of foreign officials (W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int’l, 493 U.S. 400 (1990)), and employees have sued their employer corporations (Brown v. Cassens Transp. Co., 546 F.3d 347 (6th Cir. 2008)). Foreign plaintiffs have been permitted to bring suit under RICO, and suits may also be brought against foreign defendants. (Richard L. Cassin, *Bribery Allegations against Sojitz*, FCPA BLOG (Dec. 20, 2009), http://tinyurl.com/n543yzq.

Following are limitations of RICO relevant to remedying transnational public bribery:

- RICO does not cover all acts that would violate the FCPA’s antibribery provisions. The American Bar Association has noted that “situations do exist . . . where the conduct in question may be subject to criminal liability under the FCPA but not to civil liability under RICO.” (Vega, *Culture of Bribery, supra*, at 468.) Circuits are split as to whether a single bribery scheme can constitute a continuous, systematic pattern necessary for RICO liability. (See Amy Franklin et al., *Racketeer Influenced and Corrupt Organizations, 45 AM. CRIM. L. REV. 871, 878–79* (2008).)
- RICO applies a limited conception of injury. Only plaintiffs suffering injuries to “property or business” have a cause of action under RICO. (18 U.S.C. § 1964.)
- RICO’s extraterritorial reach is limited. Courts have held that private lawsuits regarding corrupt activity forming part of the impugned conduct must have occurred within the United States. (*See, e.g.*, Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010).)

**Tort-based causes of action.** Plaintiffs have, under common law and state statutory law, successfully pleaded
intentional tortious interference with economic relations (Rotec Indus., Inc. v. Mitsubishi Corp., 348 F.3d 1116 (9th Cir. 2003)), and retaliatory discharge (Dooley v. United Techs. Corp., 786 F. Supp. 65, 81 (D.D.C. 1992), abrogated on other grounds by FC Inv. Grp. LC v. IFX Mkts., Ltd., 529 F.3d 1087 (D.C. Cir. 2008)).

Following are limitations of tort claims relevant to remediing transnational public bribery:

• State law tort claims are a more cumbersome avenue for redress than the federal cause of action might be, due to the multiplicity of state laws, the complexity of choice of law provisions, and the limited powers of state courts to govern international behavior. (Vega, Culture of Bribery, supra, at 475.) Courts have refused to apply American tort law in cases predicated on FCPA violations and held that foreign law governs, whether or not it provides a legal remedy. (See, e.g., Integral Res. (PVT) Ltd. v. Istil Grp., Inc., 155 F. App’x 69, 74–75 (3d Cir. 2005).)

• Disparate enforcement between state jurisdictions could lead to inconsistent applications of the FCPA and might prove challenging for compliance with the statute. (Vega, Culture of Bribery, supra, at 475.)

Securities litigation. Government scrutiny of alleged corporate bribery under the FCPA, whether or not proven, can lead to shareholder suits. First, plaintiff shareholders institute a securities fraud claim under section 10(b) of the Securities Exchange Act and companion SEC Rule 10b-5 after a company discloses potential FCPA violations or settles with the government. Shareholders typically allege that, prior to these disclosures, the company had fraudulently failed to disclose or deliberately misled them regarding the company’s FCPA violations or the strength of its compliance controls. (See, e.g., In re Faro Techs. Sec. Litig., 534 F. Supp. 2d 1248, 1254–55 (M.D. Fla. 2007).) Most companies whose stock price reacted at a statistically significant level to news of FCPA action related to the company had resulting 10b-5 actions filed against them. (Raymund Wong & Patrick Conroy, FCPA Settlements: It’s A SMALL WORLD AFTER ALL 10–12 (NERA Econ. Consulting 2009), available at http://tinyurl.com/mzsnyz2.) Second, shareholders can also bring derivative lawsuits on behalf of the corporation against its officers for violating their duties to the corporation. (See, e.g., In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 35 (Del. 2006).) The settlements of derivative litigation could be much larger than the fines companies pay to the government. (See, e.g., SEC Obtains $500,000 Penalty against Syncor International Corporation for Violating the Anti-Bribery Provisions of the Foreign Corrupt Practices Act, Litigation Release No. 17,887 (Dec. 10, 2002), available at http://tinyurl.com/bxckewy.)

Following are limitations of securities actions relevant to remediing transnational public bribery:

• While securities actions have proliferated in the past decade, they only benefit a limited class of plaintiffs, namely, the corporation’s stockholders.

• The category of viable suits is relatively small. Shareholders bring securities actions if the company is harmed by the bribery, which only occurs if the conduct “backfires or the company gets caught by regulators.” (Vega, Culture of Bribery, supra, at 473.)

• Securities fraud requires misleading/false statements of fact, made with the intention to defraud, in connection with the plaintiff’s sale or purchase of securities that subsequently damaged the plaintiff. The cause of action is not based on the act of bribery, and is instead dependent on the nature of the fallout to the corporation and stock price accompanying an FCPA investigation. (In re Faro Techs. Sec. Litig., 534 F. Supp. 2d at 1258–59.)

Antitrust claims. The Supreme Court has held that section 2(e) of the Robinson-Patman Act, which was introduced in 1936 under the 1914 Clayton Antitrust Act, is a basis for actions involving commercial bribery in the context of antitrust injuries. (Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).) Following are limitations of antitrust claims relevant to remediing transnational public bribery:

• This cause of action covers only the narrow category of antitrust injuries.

• This cause of action may not apply to extraterritorial acts. (NewMarket Corp. v. Innospec, Inc., No. 3:10CV503-HEH, 2011 WL 1988073, at *4 (E.D. Va. May 20, 2011).)


This provision has recently been used by employees who claim they were wrongfully discharged in retaliation for reporting, either internally or to regulators, conduct that violated the FCPA. (George H. Brown et al., Strategies for Mitigating Civil Liability Consequences of FCPA Investigations & Enforcement Actions, SEC. Litig. Rep., Apr. 2012, at 4.)
Following is a limitation of whistleblower suits relevant to remediying transnational public bribery:

- The class of plaintiffs protected by the anti-retaliation private right of action is very limited; only employees who were whistleblowers are protected.

Limitations of Statutorily Mandated Restitution

Victims of foreign public bribery may have redress under the federal Crime Victims’ Rights Act (CVRA) and the Mandatory Victims Restitution Act (MVRA). The CVRA provides that a crime victim has the “right to full and timely restitution as provided in law,” and provides safeguards for ensuring the right is effective. (18 U.S.C. § 3771 (2006).) The MVRA allows the court to order “that the defendant make restitution to any victim of [the] offense,” defined as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.” (18 U.S.C. § 3663(a) (2006).) Such harm could include physical injury or pecuniary losses. In this regard, US courts have ordered restitution to foreign governments harmed by foreign public bribery that violates the FCPA, pursuant to the MVRA. (Transcript of Sentencing Hearing at 22–23, United States v. Diaz, No. 20346-CR-JEM (S.D. Fla. Aug. 5, 2009).) However, such restitution is contingent on a prosecution being brought in the first place. Moreover, despite mandatory restitution under these acts, orders for restitution in FCPA cases have been rare. (See Jordan Maglich, What Are Victim’s Rights under the FCPA?, W i a n d G u e r r a K i n g (May 17, 2011), http://tinyurl.com/mmfvev9.) This can be attributed to a number of factors. First, the vast majority of FCPA prosecutions are settled before trial, preventing victims from being eligible for restitution, even though the FCPA enforcement between 2002 and 2008 has resulted in over $1.2 billion in settlements and penalties. (W o n g & C o n r o y, supra.) Second, among the CVRA, restitution is only mandatory if the plea “specifically states” that the offense pleaded gives rise to it. (18 U.S.C. § 3663A(c)(2) (2012).) Hence, if a corporation settles without taking criminal responsibility, or takes responsibility for an offense other than one listed as requiring restitution, victims are not compensated. Also, during the settlement process, defendants may waive presentence procedures that might otherwise allow courts to order restitution. (See Richard L. Cassin, C o s t a R i c a n to intervene even if a lower court has awarded them restitution. (See Alan J. Bozer & Minryu Sarah Kim, Crime Victims’ Rights in Appellate Courts, D a i l y R e c ., Feb. 12, 2013, available at http://tinyurl.com/n5z4huF.)

Fourth, even in respect of the class of cases where restitution under the MVRA or CVRA might be awarded, restitution may not be ordered if (1) the number of identifiable victims is so large as to make restitution impracticable, or (2) “determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process” such that the need for restitution is “outweighed” by the burden on the sentencing process. (18 U.S.C. § 3663A(c)(3) (2012).) Restitution is sometimes impracticable where the defendant has insufficient financial means. For example, in an FCPA proceeding against a Morgan Stanley employee for FCPA violations, the judge found that Morgan Stanley would have been eligible for victim restitution. No restitution, however, was ordered because the defendant had limited funds. (M e m o r a n d u m on Proposed Settlement Agreement, United States v. Peterson, No. 12-CR-224 (E.D.N.Y. May 10, 2012).)

Furthermore, the availability of restitution through the MVRA or CVRA for harm caused by a breach of the FCPA’s antibribery provisions is minimal when compared to other corporate crimes.

Availability of restitution through the MVRA or CVRA for harm caused by a breach of FCPA antibribery provisions is minimal when compared to other corporate crimes.
Government Accountability Office found that, from 2002 through February 2010, 199 “Fair Fund” distributions had been ordered, with 73 of them established through SEC administrative proceedings and 126 by the courts. (Letter from A. Nicole Clowers, Gov’t Accountability Office, to Dennis Moore, Chairman, House Subcomm. on Oversight & Investigations (Apr. 22, 2010), available at http://tinyurl.com/lonrax7.) The disparity in restitution available for these two categories of corruption-related wrongdoing calls for reform.

Ideas for Reform

In view of the above limitations, reforms are needed to ensure access to remedies for public harm caused by transnational public bribery. The US government could consider either of the following two proposed reforms. The first involves introducing mechanisms for redistributing the FCPA penalties collected by the US Treasury to the foreign countries harmed by the bribery. The second entails creating a public interest-based right of action under the FCPA.

Reforming Distribution of FCPA Penalties

Compensation to victims of transnational public bribery under the FCPA can and should be more robust. Fines paid during and after FCPA investigations could be used to compensate victims. Between 2002 and 2008, FCPA enforcement resulted in over “$1.2 billion in settlements and penalties involving more than 30 countries.” (Matt A. Vega, Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery under the Alien Tort Statute, 31 Mich. J. Int’l L. 385, 387 (2010).) At least one foreign corporation claiming to have been harmed by conduct in violation of the FCPA has taken issue with the fact that current FCPA enforcement practice resembles the distribution of “illegal proceeds obtained from victims” to the US federal government. (Cassin, Costa Rican “Victim” Objects, supra.)

Rather than regarding FCPA fines as national revenue, an institutional mechanism could be established to channel the monies collected toward public purposes, pursuant to a broad conception of “remedy.” For example, the United States could distribute proceeds to a multilateral financing mechanism working directly with individuals in countries with weak rule of law in order to allow those individuals to pursue redress for damages caused by public corruption, thereby addressing the “root causes of corruption worldwide.” (Margaux Hall & Vivek Maru, From Bribery to Empowerment, Project Syndicate (Nov. 2, 2012), http://tinyurl.com/m74mb95.)

Alternatively, US authorities could distribute proceeds directly to injured foreign states or to public interest non-governmental organizations (NGOs) working within them, as was done by the Swiss and UK authorities, respectively, in the Alstom and BAE cases. (See “Remedying Transnational Public Bribery.”) Notably, this would also emulate current practices for enforcing environmental crimes in the United States. Associated with the settlement of Environmental Protection Agency (EPA) cases are the “Supplemental Environmental Projects” (SEPs), in which defendants may voluntarily agree to help fund projects that benefit the environment. (Andy Spalding, Wal-Mart’s Victims, Part XIII: Learning from Environmental Law, FCPA BLOG (June 6, 2013), http://tinyurl.com/l2ch6by.) The creation of SEPs did not arise from Congress or from judicial approval; they were created through voluntary agreements between enforcement agencies, defendants, and the recipient organization. (Id.) For example, after the BP oil spill in the Gulf of Mexico, a SEP was established to help compensate the communities and ecosystems that suffered the most as a consequence of the spill. (Id.) One academic has suggested that the settlement of FCPA cases could be similar to the settlement of EPA cases. (Id.) The DOJ could similarly form funding agreements with defendants for an FCPA violation. The voluntariness of this EPA practice is, however, a disadvantage if a more consistent practice of compensation is desired.

These proposals are admittedly not flawless. Direct repayment to the governments of harmed foreign states may in certain situations be akin to “paying the fox to guard the henhouse.” (Hall & Maru, supra.) Distributing funds to NGOs has its own problems, among them the difficulty of selecting the appropriate NGO, ensuring its accountability, and determining the project or projects to be financed. Research and monitoring of existing distribution practices is needed to refine these solutions.

Despite these potential implementation issues, the United States’ practice in relation to restitution of foreign governments and the DOJ’s Kleptocracy Asset Recovery Initiative show that reforming the distribution of FCPA penalties is feasible and within the realm of current legal practices. The Kleptocracy Asset Recovery Initiative recovers the proceeds of public bribery that have been laundered into or through the United States “for the benefit of the people of the country from which it was taken.” (Press Release, U.S. Dep’t of Justice, Department of Justice Seeks to Recover More Than $70.8 Million in Proceeds of Corruption from Government Minister of Equatorial Guinea (Oct. 25, 2011), available at http://tinyurl.com/3bu6j6c.) Since 2004, the United States has forfeited and returned over $168 million to victims abroad. (U.S. Dep’t of State, U.S. Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation 1 (2012), available at http://tinyurl.com/n64mbxc.)

One example of asset forfeiture related to bribery was the prosecution of James Giffen, who was accused of paying $84 million in bribes to the president and other foreign officials of Kazakhstan. (Richard L. Cassin, No Punishment for “Hero” Giffen, FCPA BLOG (Nov. 22, 2010), http://tinyurl.com/mlpwzwq.) In 2010, Giffen pleaded guilty to a misdemeanor tax charge related to the payment of bribes—roughly seven years after the prosecution first began. (Id.) Although Giffen did not face any jail time (id.), roughly $80 million in funds traceable to the bribes was forfeited to the United States and thereafter used to finance an NGO in Kazakhstan. (Andy Spalding, Wal-Mart’s Victims, Part XIV: We Did It Before, We Can Do It Again, FCPA BLOG...
Creating a Public Interest-Based Right of Action under the FCPA

Proposals to create a private right of action under the FCPA are, as mentioned, not new. However, many of these proposals have set forth plans intended to benefit US corporations harmed by transnational public bribery without accounting for the public harm caused by the bribery.

To remedy this public harm, a cause of action would need to be based on a public interest rationale, and contain a broad definition of harm or expanded provisions for defining who can bring a suit. The need for a public interest-based private right of action in relation to corruption has already been recognized. The Council of Europe’s Multidisciplinary Group on Corruption has acknowledged the possibility of “defending the public interest” as a justification for proceedings for civil damages for corruption. (GMC Feasibility Study, supra, § 4.1.)

The qui tam provision in the False Claims Act (FCA) can provide a framework for a public interest-based right of action. A qui tam suit allows a citizen, known as a “relator,” to commence and maintain a claim on behalf of the United States to secure compensation from persons such as government contractors who engage in corrupt practices. (Carrington, supra, at 150.) A relator can bring an FCA complaint along with supporting evidence to the DOJ, which then has 60 days to decide whether it wants to act. (31 U.S.C. § 3730(b)(2) (2000).) If the DOJ chooses to intervene, it takes primary responsibility for the suit, but the relator can remain a party to the suit with substantial rights. (Id. § 3730(c).) If the DOJ declines to intervene, the relator can continue the suit independently of the DOJ. (Id. § 3730(c)(3).)

The underlying rationale for a qui tam suit is that the plaintiff contributes to the “common good” of society. Thus, a plaintiff who brings a qui tam suit does not need to have directly suffered harm from the defendant’s conduct. This reasoning is transferable to the context of transnational public bribery. As proposed by Carrington, the FCPA could be amended to enable a citizen of another nation to take on the role of a relator and bring suit on behalf of his or her government in a US court against a company that allegedly bribed public officials in the relator’s country. (Carrington, supra, at 155.) A relator could also be a public interest organization that files a suit on behalf of the public in a developing country. The Council of Europe’s Multidisciplinary Group on Corruption has noted the possibility that public interest organizations could be entrusted with a status in civil suits for corruption.

Importantly, a qui tam-inspired private right of action for transnational public bribery would serve to remedy the public harm caused only if the relator distributes monies obtained to the people of the affected country.

Advantages

A public interest-based right of action for transnational public bribery has a number of advantages. First, it could provide beneficial judicial review and interpretation of the FCPA because many prosecutions result in a settlement. (Id.) This advantage would be especially helpful when considering statutory ambiguities. During a House of Representatives hearing on the FCPA, many FCPA experts, including the former Attorney General Michael Mukasey, provided testimony on the lack of sufficient statutory interpretation. Mukasey stated, “If the definitions of these fundamental statutory terms vary by circumstance and by case, . . . it becomes impossible for companies to figure out in advance what conduct may and may not provide a meaningful risk of violating the FCPA.” (Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary, 112th Cong. 2, 20 (2011) (testimony of Michael Mukasey, former Att’y Gen., Partner, Debevoise & Plimpton LLP.) Second, from an international law perspective, amending the FCPA would conform to various international treaties and conventions that mandate access to remedies for corruption such as UNCAC. (Mark, supra, at 422.)

The benefits of amending the FCPA to include a private right of action can also be realized through the advantages of civil suits in general. Civil suits can play a role in promoting greater enforcement of the law because government resources available for prosecution are limited. For example, the Supreme Court has noted that “implied private actions provide a more effective weapon in the enforcement of the securities laws.” (Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (internal quotation marks omitted).) With regard to the FCPA specifically, the DOJ and SEC have limited resources to regulate an ever-increasing number of multinational corporations. There were 24 DOJ FCPA enforcement actions between 2003 and 2007, and 16 in 2008. (Vega, Culture of Bribery, supra, at 441.) A further benefit is that civil suits can be more efficient because private citizens are faced with fewer bureaucracies and administrative procedures necessary for government regulation, which can create “dis-economies of scale.” (Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1298 (1982).)

A closely related advantage is that private rights of action can be of use to agencies charged with the enforcement of a particular statute. Private rights of action can ease the administrative and resource burdens that arise from prosecuting FCPA violations. (Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, 91 Va. L. Rev. 93, 111–12 (2005).) Further, civil FCPA actions can alert the DOJ and the SEC to potential misfeasance. For example, in a case between Aluminum Bahrain B.S.C. (Alba), a Bahraini corporation, and Alcoa, a Pennsylvania corporation, Alba alleged that Alcoa violated the FCPA. (Daniel Lovering, Justice Dept. Opens Alcoa Bribery Probe, USA Today, Mar. 21, 2008, http://tinyurl.com/
Federal prosecutors subsequently initiated criminal investigations into Alcoa. (Id.)

Challenges
Various challenges could affect the efficacy and the feasibility of a public interest-based private right of action under the FCPA. These challenges include (1) interference with government prosecutions, (2) foreign policy concerns, and (3) the viability of a private right of action for ordinary plaintiffs.

Interference with government prosecutions. One of the most salient issues with regard to constructing a public interest-based private right of action under the FCPA relates to the nature of possible interactions between plaintiffs exercising this right and government prosecutorial activity. A private right of action could compromise the DOJ’s prosecutorial discretion by putting undesirable pressure on the DOJ to enforce an FCPA violation or to not go forward with enforcement. Further, since the enactment of the FCPA, the DOJ has enjoyed much discretion in statutory interpretation. The rise of civil suits and judicial interpretation could narrow the scope of transnational bribery that is recognized under the FCPA and limit the DOJ’s negotiating power in reaching settlements. This would also consequently reduce the amount of funds that go to the United States Treasury. In this regard, between 2002 and 2008, FCPA enforcement resulted in over “$1.2 billion in settlements and penalties involving more than 30 countries.” (Wong & Conroy, supra, at 1); a majority of these funds have gone to the US government. (Luke Ballenly, Foreign Bribery Fines and Settlements: Who Should Get the Money?, Reuters (May 9, 2012), http://tinyurl.com/mjy3p64.)

Nevertheless, additional cases arising from civil suits might not infringe on current enforcement actions. First, the DOJ may seek the stay of civil proceedings where these are related to its investigations. In 2008, for instance, the DOJ asked a federal judge to halt the civil lawsuit between Alba and Alcoa. (See Lovering, supra.) The lawsuit had alleged that Alcoa had violated the FCPA by bribing Bahraini officials. (Id.) For qui tam proceedings in particular, the private right of action could be made contingent on consent from the DOJ. This would give the DOJ discretion to intervene and take primary responsibility for a suit. (See, e.g., 31 U.S.C. § 3730(c) (2006) (“Rights of the Parties to Qui Tam Actions” under the FCA).)

Foreign policy concerns. Creating a private right of action under the FCPA, including one based on an FCA qui tam model, may also have foreign policy implications as it may hinder US foreign relations. The very nature of the FCPA’s antibribery offense leads to many allegations that involve foreign public officials soliciting or accepting bribes. The adjudication of matters involving the conduct of foreign public officials has hence implicated the act of state doctrine. This doctrine “precludes American courts, both federal and state, from inquiring into the validity of the public acts which a recognized foreign sovereign power commits within its own territory,” and arguably reflects the United States’ policy goal of “a strong foreign relations position expressed in a singly-voiced foreign policy.” (Maurreen A. Dowd & Theodore B. Eichelberger, Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases?, 59 Notre Dame L. Rev. 455, 455, 457 (1984) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 389, 401 (1964); Underhill v. Hernandez, 168 U.S. 250, 252 (1897).)

Defendants in civil suits for bribery of foreign officials have, unsurprisingly, invoked the act of state doctrine to preclude plaintiffs from proving their claims. (See id.)

The Supreme Court’s decision in W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International, however, indicates that the act of state doctrine would not entirely prohibit a private right of action under the FCPA. (493 U.S. 400 (1990)). In this case, a civil RICO suit was brought as a follow-on from a successful FCPA prosecution. The Court held that the act of state doctrine only prevents the adjudication of a question that requires the determination of the validity of an official act of a foreign sovereign performed within its own territory. (Id. at 406.) Significantly, the Court declined to accept the point made by the solicitor general that the doctrine may need to be applied where an inquiry into the motives for actions of foreign public officials might embarrass a foreign sovereign or interfere with the conduct of US foreign policy. The Supreme Court’s ruling appears consistent with the opinion of an amicus curiae in the same case, which called for the doctrine to be founded on conflicts of laws considerations (as opposed to the possibility “embarrassment”) for purposes of greater predictability. (Peter D. Trooboff, Case Note on W.S. Kirkpatrick, 84 Am. J. Int’l L. 550 (1990).)

The prevailing narrow interpretation of the act of state doctrine gives ample scope for the introduction of a private right of action under the FCPA. Most, if not all, civil lawsuits for bribery of foreign officials would not require inquiry into the validity of a foreign government’s actions in the determination of causation of injury. The focus instead would be on the actor who provided the bribe. The position taken by the solicitor general in Kirkpatrick, however, evinces a concern to rein in the political implications of judicial pronouncements relating to the bribery of foreign public officials. The solicitor general’s position could also foreshadow resistance from the executive to such an enactment, at least on foreign policy grounds.

Viability of a private right of action for ordinary foreign plaintiffs. For foreign plaintiffs, and those in developing countries in particular, practical challenges related to expense and length of litigation would arise during an FCPA civil suit. While expense is a general problem associated with litigation in the United States, this issue would be aggravated in a transnational lawsuit. Additional costs could arise from translating and reviewing documents, traveling, hearing witnesses in different countries, and contracting specialized attorneys from both the United States and the country where the bribery occurred. Directly connected with expense is the length of litigation. Due to its complexity, it is likely that an FCPA-related lawsuit would last for
The government of the United Kingdom intended the Bribery Act to lead the way in pioneering a new global level of strict antibribery legislation. To some extent it has achieved this goal. For example, it has overtaken the Foreign Corrupt Practices Act (FCPA) by outlawing facilitation payments. The law has also created a strict liability offense of bribery, from which the sole defense is the application inside the corporate entity of “adequate procedures” aimed at excluding bribe giving. Companies that use this defense determine that bribe takers and givers are rogue employees, according to the new law. This is an innovative measure and possible model for other jurisdictions.

The issue for practitioners is whether the legislation’s bark is worse than its bite. For while the UK government has succeeded in putting an act on the statute book—it gained royal assent on April 8, 2010—it did not come into force until July 2011, and its authorities have so far failed to bring any significant cases using the act. The law’s lead prosecutorial agency, the United Kingdom’s Serious Fraud Office (SFO), says it is pursuing cases that rely on the act. (See Nick Kochan, Fraud Squad’s New Bruiser, INDEPENDENT, Nov. 7, 2012, http://tinyurl.com/cjywuj.) This may be true, but none has yet come to court, and this lack of tried cases is particularly problematic for lawyers and company executives who look for
a court to refine and detail what is meant in the legislation. Some indication of how the act may be used was given in August 2013, when the Serious Fraud Office charged three individuals connected to a company called Sustainable AgroEnergy with “offences of making and accepting a financial advantage” under the Bribery Act. This represented the organization’s first prosecution of individuals using the UK Bribery Act. (See Caroline Binham, SFO Brings First Bribery Act charges in bio fuels case, Financial Times, Aug. 14, 2013, http://tinyurl.com/pv99jdu.)

While the United Kingdom is seeking to take the lead in bribery legislation in some respects, in others it lags behind the United States, says Lord Peter Goldsmith, the former British senior law officer, or attorney general.

The FCPA depends on roots for jurisdiction; but if American citizens or residents are involved, they can be proceeded against, if they are complicit in payments. The FCPA is narrower because it is directed towards corruption of corrupt foreign public officials. There are ways of getting at private payments as well, but that is through books and records disclosures, accounting. We can do that much less easily in this [country]—namely the UK—as there is no requirement to disclose payments to agents. Accounting in the US is easier to prove, and companies find it easier to reach an agreed settlement. If you are convicted of bribery, you may find yourself prohibited from tendering for public contracts. The United Kingdom has false accounting in the Companies Act. This is not as refined an instrument because there is not the requirement to disclose particular payments.

We are moving towards tougher penalties and the argument is strong, that the cost to the public, to consumers of economic crime is enormous. It is a mistake to think that economic crime is victimless. It does, in fact, cost everyone money, and there is no reason why people who cheat the system should not receive a pretty tough penalty. If you are guilty of a blue-collar fraud you will often go to prison, but if you took 50 times that through white-collar crime, you wouldn’t go to prison. You can’t treat these things as less serious because they are done by someone of a different social class.

NICK KOCHAN is a commentator, author, and consultant on compliance, forensic, and regulatory issues. His work appears in international publications, including the Financial Times and the Economist. He is a public speaker and moderator for conferences on bribery and corruption law. He is based in London. His website is www.kochan.co.uk. The author would like to acknowledge the contribution of Robin Goodyear, coauthor (with Nick Kochan) of Corruption: The New Corporate Challenge, published by Palgrave Macmillan, 2011.

Background to the Bribery Act
British antibribery law has historically been based on the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. This medley of laws has been described as “inconsistent, anarchonistic and inadequate.” (David Aaronberg & Nichola Higgins, The Bribery Act 2010: All Bark and No Bite . . . ?, Archbold Rev., June 7, 2010.) The first move to update British bribery legislation occurred in 1972 when a political scandal triggered the establishment of a committee headed by a judge to examine UK bribery legislation. That committee recommended updating and codifying these statutes, but the government of the time took no action. Similar suggestions were made in the first report of the Committee on Standards in Public Life established by then-prime minister John Major in 1994.


The consultation paper and report coincided with mounting criticism from the Organisation for Economic Co-operation and Development (OECD), which felt that, despite the United Kingdom’s ratification of the OECD Anti-Bribery Convention, its bribery laws were inadequate. (Aisha Anwar & Gavin Deeprose, The Bribery Act 2010, SCOTS L. TIMES, 2010, issue 23, pages 123–128.) The OECD was particularly concerned in the aftermath of the Al-Yamamah bribery scandal where, at the instigation of the UK government led by then-prime minister Tony Blair, the SFO halted an investigation of trade terms between British Aerospace and the government of Saudi Arabia following allegations of bribery. (Nick Kochan & Robin Goodyear, Corruption: The New Corporate Challenge 67–69 (2011).)

A draft bribery bill was announced in the 2002 Queen’s Speech, but was rejected by the joint committee examining it. A second consultation paper was issued in 2005 examining the committee’s concerns, before the government announced in March of the same year that “there was broad support for reform of the current law, but there was no consensus as to how this could be achieved.” (Sheikh, supra, at 4.) Following a white paper in March 2009, the Bribery Bill, based on the Law Commission’s 2008 report Reforming Bribery (Editor, The Bribery Act 2010, 6 CRIM. L. REV. 439 (2010)) was announced in the Queen’s Speech and duly passed into law.

Main Offenses in the Bribery Act
The UK Bribery Act 2010 creates four main offenses. It criminalizes both demand-side (demanding, asking for,
or agreeing to accept a bribe) and supply-side (giving, promising to give, or offering a bribe) bribery. It creates a separate offense of bribery of a foreign public official, and a new corporate offense of failure to prevent bribery. This last offense criminalizes a corporation that fails to prevent bribe paying by those who perform services on its behalf. It is an absolute defense to this “failure to prevent” offense if the corporation can demonstrate that it had “adequate procedures” in place to prevent bribery.

Any enterprise that carries out business or part of its business in the United Kingdom can be prosecuted under the act. UK authorities have stated that it is likely the courts will take a broad interpretation of what constitutes part of a company’s business. Facilitation payments are not mentioned in the act, and there is no change to the extent to which they remain illegal. Overly lavish hospitality also remains illegal. A key feature of the act is its extraterritorial jurisdiction; it is a crime for a corporate entity that is subject to the act to pay a bribe anywhere in the world. The Bribery Act also marks a departure from the US FCPA because it applies to both private and public sectors. A guidance published by the directors of the SFO and Public Prosecutions notes that the Bribery Act’s scope is not limited to commercial bribery and may extend to attempts to influence decisions by public officials on matters such as planning consent, school admission procedures, or driving tests. (Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions (2011) [hereinafter Joint Prosecution Guidance], available at http://tinyurl.com/8ozw4he.)

The act raises the maximum prison sentence for bribery by an individual from seven to 10 years, and the corporate offense (section 7) carries the possibility of an unlimited fine. In some circumstances, senior directors can be held personally liable under the act.

The act is drafted in such a way that it includes cases in which an offer, promise, or request for a bribe can only be inferred from the circumstances. An interview held over an open bag of cash could be held to represent an implied offer without there being any evidence that a formal offer was made. The directors’ guidance also points out that there is no requirement that a transaction be completed, except where the allegation is that an advantage was given or received; the act focuses on conduct, not results. (Joint Prosecution Guidance, supra.)

Subsequent to the publication of the guidance, the SFO issued revised statements of policy on facilitation payments, business expenditure (hospitality and gifts), and self-reporting. (Revised Policies, Serious Fraud Off. (Oct. 9, 2012), http://tinyurl.com/8ozw4he.) This emphasized the SFO’s role as an investigator and prosecutor of serious or complex fraud and aimed to ensure consistency of approach with other prosecuting bodies and compliance with certain OECD recommendations.

With respect to facilitation payments, the SFO confirmed that facilitation payments were bribes and were illegal under the Bribery Act 2010 (irrespective of their size or frequency). The SFO said that business expenditure on genuine hospitality or promotional or other legitimate business expenditure was an established and important part of doing business; it noted that bribes could be disguised as legitimate business expenditure. With respect to self-reporting, the SFO noted that it would not automatically avert prosecution. Each case would be decided on its own facts, and even if the prosecutor did not prosecute for reported violations, it could prosecute for unreported violations of the law and provide information on them to other bodies (such as foreign police forces). Finally, the SFO said that it would prosecute a case where there was sufficient evidence and it was in the public interest to do so. Where appropriate, and as an alternative (or in addition) to prosecution, the SFO may use its asset recovery powers under the Proceeds of Crime Act 2002 in accordance with the attorney general’s guidance. (See Bribery Act: Revised SFO Policies on Facilitation Payments, Business Expenditure (Hospitality) and Corporate Self-Reporting, PRACTICAL L. (Oct. 9, 2012), http://tinyurl.com/5sf582t.)

The details and implications of the key offenses in the Bribery Act 2010 are addressed below:

Section 1: The offense of active bribery. Section 1 deals with supply-side bribery that relates to any function of a public nature that is connected with a business, performed in the course of a person’s employment, or performed on behalf of a company or another body of persons. As mentioned above, bribery in both the public and private sectors is covered. (MINISTRY OF JUSTICE, THE BRIbery Act 2010, at 10 (2011) [hereinafter MOJ GUIDANCE], available at http://tinyurl.com/5sf582t.) A person is guilty under this section if he or she offers, promises, or gives a financial or other advantage and intends the advantage to influence the official to improperly perform a relevant function or activity, or if the person believes that the acceptance of the advantage would itself amount to improper performance of a relevant function or activity. The test in determining a defendant’s guilt is subjective; the defendant’s knowledge and intentions at the time are key.

Improper performance is determined by a two-step test. The first step is to consider whether there was an expectation that the official was to perform the function impartially, in good faith, or from a position of trust. The second step is to determine whether the official failed to perform the relevant function or activity in breach of this expectation. The test gauges what a reasonable person in the United Kingdom would expect in relation to the performance of the relevant activity.

Offenses of bribing another person focus on conduct (offering, promising, or giving a financial or other advantage), and also require what the directors’ guidance calls a “wrongfulness element.” This wrongfulness element is committed where the advantage is intended to induce (or reward) improper performance of a relevant function or activity, or where a person knows or believes that the acceptance of the advantage that has been offered, promised, or given in itself constitutes the improper performance of a relevant function or activity. (Joint Prosecution Guidance, supra.) Prosecutors
will consider any evidence of actual intention or knowledge
or belief, or whether such intention or knowledge or belief
or belief can be inferred from the circumstances. The value of the
advantage will be crucial to this process.

An offense is committed if the bribery or omission was
committed in the United Kingdom or by an individual
with a close connection to the United Kingdom.

Section 2: The offense of receiving bribes. This section
of the act criminalizes taking, requesting, or agreeing to
receive a bribe with the intention that a relevant function
or activity be improperly performed as a result (the func-
tion does not actually have to be improperly performed).
The law also criminalizes the act of agreeing to receive
or requesting an advantage—financial or otherwise—
where this in itself constitutes the improper performance
of a relevant function or activity. It criminalizes taking a
bribe as a reward for the improper performance of a re-
levant function or activity by that person or another. It is
important to note that an official could be guilty of an
offense, despite not knowing that his or her performance
of a relevant function or activity was improper. One law
firm pointed out that a corporate entity can be held liable
for an offense under section 2 if it is incorporated in the
United Kingdom or the act or omission that forms part of
the offense takes place in the United Kingdom. However,
the “adequate procedures” defense will not be available to
offenses committed by a corporate entity under sections
1, 2, or 6. (Bond Pearce, Bribery and Anti-Corruption: Key
Issues on the Bribery Act 2010, DOCSTOC (Feb. 2, 2011),
http://tinyurl.com/kcdhvh2.)

Section 6: The offense of bribery of a foreign public official.
This provision reflects the OECD Convention on Combating
Bribery of Foreign Public Officials in International Business
Transactions. A foreign public official is defined in the Min-
istry of Justice (MOJ) guidance as including:

- officials, whether elected or appointed, who hold
  a legislative, administrative, or judicial position of
  any kind in a country or territory outside the United
  Kingdom;
- any person who performs public functions in any
  branch of the national, local, or municipal govern-
  ment of such a country or territory or who exercises
  a public function for any public agency or public
  enterprise of such a country or territory (for example
  professionals working for public health agencies and
  officers exercising public functions in state-owned
  enterprises); and
- officials or agents of a public international organi-
  zation, such as the United Nations or World Bank.

(MOJ GUIDANCE, supra, at 11.)

The offense requires the intention to influence the offi-
cial in his or her official capacity and intention to obtain
some advantage. There is a further requirement that
the person must directly or through a third party offer,
promise, or give an advantage to the foreign public official
or to another person at the official’s request or with
the official’s assent or acquiescence. No offense will be
committed where the local law explicitly permits an offer
or promise of a gift. However, absent local law, the UK
act applies. As with section 2, intention is the key here.
The specific wording of this offense means that inten-
tion to influence the official will be sufficient. There is no
requirement to show that the person offering or promis-
ing the bribe knew that the foreign public official would
be improperly performing his or her function.

With regard to tenders for publicly funded contracts,
it is important to repeat that any local written law that
permits or requires the foreign public official to be influ-
enced would supersede the Bribery Act. In the absence
of such local law, the Bribery Act applies. The MOJ pro-
vides an example:

[W]here local planning law permits community
investment or requires a foreign public official to mini-
mise the cost of public procurement administration
through cost sharing with contractors, a prospective
contractor’s offer of free training is very unlikely to
engage section 6. In circumstances where the addi-
tional investment would amount to an advantage to
a foreign public official and the local law is silent as
to whether the official is permitted or required to be
influenced by it, prosecutors will consider the public
interest in prosecuting. This will provide an appro-
priate backstop in circumstances where the evidence
suggests that the offer of additional investment is a
legitimate part of a tender exercise.

(MOJ GUIDANCE, supra, at 12.)

Section 7: The corporate offense of failing to prevent
bribery. This is a strict liability offense, based on the legal
discipline that imposes absolute legal responsibility for an
injury on the “wrongdoer” without proof of carelessness or
fault. A corporate entity is guilty under section 7 where an
associated individual or entity intends to obtain or retain
business for the commercial organization or to obtain or
retain an advantage in the conduct of business for the com-
mercial organization. Section 7 creates new legal exposure
for businesses, in that it only covers active bribery, meaning
that a person performing services for or on behalf of the
company must have committed an act or omission form-
ing part of the offenses covered by section 1 or 6 of the
act. However, this does not mean that a corporate entity
may avoid potential liability under section 1 or 6 if it has
adequate procedures in place.

The corporate offense under section 7 is a separate
offense. So for instance, there may be insufficient evidence
to prove a corporate entity is itself guilty of a section 1 or
6 offense, but if one of its employees commits an act that
would constitute an offense under section 1 or 6, the cor-
porate entity may be prosecuted under section 7 and would
then only avoid liability if it could show it had “adequate procedures” in place. The act clarifies that an “associated” person for the purposes of section 7 is a person who performs services on behalf of the commercial organization. Accordingly, this could be an employee, agent (including a contractor), or subsidiary of the commercial organization. (MOJ GUIDANCE, supra, at 16.)

Peter Goldsmith, the former attorney general, commented:

The single most important point of the new law is the corporate offense of failing to prevent bribery. That is a sea-change. Until the new act came in, as far as the company was concerned, the company could be guilty of bribery, but you had to demonstrate knowledge among “the controlling mind” of the company, and that means the most senior people. If it is a very small organization, then that is not a problem; it is the person who gets his hands dirty, but also the man who is ultimately in charge. It is not the case in larger corporations. So although you could prosecute individuals for bribery, it would be difficult to prosecute the company. The company would have the “hear no evil, see no evil, speak no evil” defense.

The new corporate offense completely changes it; it makes it an offense of strict liability. If somebody who is an “associate,” that is, someone for whom you are responsible, commits a relevant act of bribery, the company itself is liable for failing to prevent it unless it can demonstrate it had in place adequate procedures. The single most important message for the corporate manager is that you need to get in place your adequate procedures now. That is your defense against sales directors and others going “rogue” on you and landing the company in the dock. The company is at risk. If there is a relevant act of bribery, and there aren’t adequate procedures in place to prevent it, then the company will be liable.

(Interview with Peter Goldsmith, supra.)

Where the corporate offense is concerned, the directors’ guidance explains that a “relevant commercial organization” will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organization, but only if the associated person is or would be guilty of an offense under section 1 or 6. (Section 2 “passive bribery” is not relevant to a section 7 offense.)

Section 7 does not require a prosecution for the predicate offenses under section 1 or 6, but there needs to be sufficient evidence to prove the commission of such an offense to the normal criminal standard. For this purpose, it is not necessary for the associated person to have a close connection with the United Kingdom. (Bribery Act, 2010, c. 23, § 7(3)(b) (U.K.).)

The jurisdiction for this offense is wide. (See id. § 12.)

Provided that the commercial organization is incorporated or formed in the United Kingdom, or that the organization carries out its business or part of its business in the United Kingdom, courts in the United Kingdom will have jurisdiction, irrespective of where in the world the acts or omissions that form part of the offense may be committed.

The offense is not a substantive bribery offense. It does not involve vicarious liability, and it does not replace or remove direct corporate liability for bribery. If it can be proved that someone representing the corporate “directing mind” bribes or receives a bribe or encourages or assists someone else to do so, then it may be appropriate to charge the organization with a section 1 or 6 offense in the alternative or in addition to any offense under section 7 (or a section 2 offense if the offense relates to being bribed). (JOINT PROSECUTION GUIDANCE, supra.)

While debarment from European Union (EU) contracts is a discretionary outcome if convicted of a failure to prevent bribery, the then-secretary of state for justice explained that debarment was not inevitable. “The Government has also decided that a conviction of a commercial organization under section 7 of the act in respect of a failure to prevent bribery will attract discretionary rather than mandatory exclusion from public procurement under the United Kingdom’s implementation of the EU Procurement Directive (Directive 2004/18).” (Interview with Barry Vitou, Partner, Pinsent Masons, London (Feb. 16, 2011.) As it currently stands, the court itself will not issue a judgment stating that an organization is debarred. Instead, under the rules, it will simply find a corporate entity guilty of a section 7 offense. The authority offering a job for tender will then stipulate whether or not it will entertain tenders from corporates guilty of a section 7 failure to prevent an offense. One lawyer pointed out that “it remains to be seen how many public tender requests stipulate that they do NOT debar companies who have been convicted of this offense. The change may turn out to be of no consequence in practice.” (Id.)

**Section 12: Territorial application.** Section 12 provides that the courts will have jurisdiction over section 1, 2, or 6 offenses committed in the United Kingdom, but they will also have jurisdiction over offenses committed outside the United Kingdom “where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.” (MOJ GUIDANCE, supra, at 9.)

However with regard to section 7, a close connection with the United Kingdom is not required; a relevant commercial organization can be liable for conduct amounting to an offense under section 1 or 6 on the part of any person. Furthermore, section 7 applies anywhere in the world, so long as the relevant commercial organization carries on a business or part of a business in the United Kingdom. (Jane Croft & Elizabeth Rigby, Fraud Chief Vows Tough Stance on Bribery Act, FIN. TIMES, Mar. 30, 2011, http://tinyurl.com/mcwjn3y.)

With regard to the definition of carrying on a business or part of a business in any part of the United Kingdom,
the MOJ makes it clear that this is something for the courts to determine. Where the issue of whether an organization is “carrying on a business” in the United Kingdom is concerned, many factors will be considered, and it has been made clear in the official guidance that merely being listed on the London Stock Exchange or having a UK-incorporated subsidiary would not necessarily be sufficient. Monty Raphael, senior counsel to Peters & Peters, a UK-based law firm, pointed out that “[w]hat will worry anti-corruption campaigners and the OECD is the wiggle room unethical businesses will have to structure corporate activities to take themselves outside the ambit of the legislation and still maintain their right to raise money on the London capital markets.” (Monty Raphael Comments on the New Bribery Act 2010 Guidance Published 30 March 2011, Peters & Peters (Mar. 29, 2011), http://tinyurl.com/k8wwlwxx.)

Loophole for Corporate Entities?
Transparency International, the nongovernmental organization that focuses on bribery and corruption, has criticized what it sees as a possible loophole that companies can use to avoid prosecution for bribery: A non-UK parent company A with a large UK subsidiary B could pay bribes through subsidiary C based in a third country. If UK subsidiary B did not directly benefit from the bribes, the non-UK parent company A would not be caught by the Bribery Act—even if its other subsidiary C was competing unfairly with honest UK companies (Press Release, Transparency Int’l, Government Guidance Deplorable and Will Weaken the Bribery Act (Mar. 30, 2011).)

The extent of these criticisms is rejected by some in the legal profession, who point out that the formal guidance replaces the draft form that was of little practical use to companies. They also note that companies that are listed on the London Stock Exchange usually have other connections in the United Kingdom that are likely to satisfy the court’s requirement for carrying on a business. It is also important to note that historically the UK courts have indicated a very low threshold in the context of what constitutes carrying on business in the United Kingdom, and the SFO has indicated that, for example, an Internet retailer with operations outside the United Kingdom but with a web presence and which ships products to the United Kingdom may well be interpreted by the courts as carrying on business. Ultimately, it will be for the courts to decide what the act means in practice.

As noted above, it is an absolute defense for the corporate entity to demonstrate that it had adequate procedures in place to prevent bribery on its behalf. Companies should take note that the general public interest considerations for active bribery are also applicable to the failure to prevent an offense. In the absence of case law or prescriptive guidance for businesses of all sizes and sectors, it is impossible to state definitively what procedures will be deemed to be adequate by the courts.

Despite this fact, it should be noted that prosecutors must take account of the MOJ guidance that identifies six principles that are likely to underpin such antibribery procedures: proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training), and monitoring and review.

Conclusion
The Bribery Act 2010 carries important messages for prosecutors, legislators, and legal bodies. Many companies have taken these messages on board and implemented what they believe to be adequate procedures to cover themselves against allegations of bribery and possible prosecution. However, the viability of these messages will be best examined when the UK courts are asked to test the new law. Only then can interested parties be sure of the act’s true force and import.

ACCESS TO REMEDIES (CONTINUED FROM PAGE 45)

years. This problem, however, may be mitigated over time once precedents have been established for FCPA lawsuits.

For a public interest-based right of action, the burdens of litigation for ordinary foreign plaintiffs may be ameliorated with assistance from public interest organizations. A challenge regarding the legal standing of a public interest organization could, however, arise. In this regard, the Council of Europe’s Multidisciplinary Group on Corruption has raised the question of whether organizations “defending the public interest in the fight against corruption, as in the environmental field, could be entrusted with a status in proceedings.” (GMC FEASIBILITY STUDY, supra, § 4.1.) While the question was left unanswered, this evinces a view that the harm caused by corruption to a country’s public may deserve civil remedies under the law, and that public interest organizations can play a role in securing such remedies.

Conclusion
This article has sought to draw attention to the public harm caused by foreign public bribery, and the need for remedies for such harm. Recourse to such remedies is at present limited by gaps in legal frameworks and limited conceptions of harm and extraterritorial application. Rather than serving to facilitate social justice, the law instead has a limiting effect.

This article has highlighted two possible reforms in the United States that have the potential to address these gaps, namely, redistributing fines collected by the US Treasury for FCPA violations, and the creation of a private right of action based on a “common good” rationale. Implementing these reforms would entail challenges, but could have potentially far-reaching effects for global economic development and provide justice for individual plaintiffs harmed by transnational public bribery.
The Basics of Plea Negotiation: A Dual Perspective

BY MICHAEL D. DEAN AND RICK McKELVEY

For the Defense:
Two of the main factors that impact negotiations in a criminal case are (1) the quality of the case, and (2) the character of the defendant. The defense has the greatest leverage when the government’s case is weak and the defendant is a stellar citizen. The worst cases are “slam-dunks” for the government that involve a client with a criminal history a mile long. Therefore, before engaging in negotiations, it is important to assess both of these factors to understand your bargaining power.

Valuing the case. Understanding the strength of a case means understanding how likely it is that the defendant will succeed at trial. To know this, the attorney must develop a defensive “theory”—a concise statement of the evidence that explains why the defendant should be found “not guilty.” For example, this may be a problem with identity, or a reasonable dispute that the defendant was acting in self-defense. Once you have selected the strongest available theory, stick to it. The theory will guide all future stages of litigation including negotiation, discovery, trial examination, and argument.

After you identify a theory, you must objectively determine its strength. After all, a theory is worthless unless it is well supported by admissible evidence. Thus, after selecting a theory, the attorney should conduct a comprehensive review of all available discovery to identify facts that support or dispel your intended argument. All facts that support the theory should be noted and referenced in a manner that makes them easy to find during negotiations or when preparing for trial. Acknowledge the facts that frustrate your theory as well. You must be prepared to address these facts with a reasonable argument as to why they do not nullify your defense.

After the review, the attorney should have a feel for the theory’s potential for success and should attempt to “value” the case—determine the sentence the client would likely receive if he or she lost at trial and discount it fairly based upon an objective analysis of the weaknesses in the government’s case. The result should be your reasonable settlement goal.

Meeting with the client. Before discussing the client’s plea expectations, make sure that he or she understands the nature of the charge and the possible penalties. Knowing what the government must prove and the possible sentencing range brings the client down to earth and provides the initial framework for setting a reasonable goal.

Next, instruct the client as to your valuation of the case. Explain the process you followed in detail, the possible theories that have been identified, and how well supported those theories are based upon the facts. This shows the client that you have taken the time to carefully consider every angle of the case and your reasons for your opinions. Too often, attorneys merely advise their clients to plead without proper explanation. This “take my word for it” approach negatively affects client confidence. You will be respected and trusted much more by being transparent and laying out your reasoning clearly. If your reasoning is sound, the client will have little room to argue. You may even ask the client if he or she sees any issue with your analysis. By inviting debate, you should be able to extract any reservations the client has and put them to rest. It is important before settlement for you and your client to see eye-to-eye.

After clearly outlining the nature of the case, you should obtain all information about your client that may favorably impact sentencing. Your interview should be guided by your jurisdiction’s sentencing considerations, which are usually codified. It is also a prudent practice to provide the client a copy of your jurisdiction’s sentencing guidelines to read and consider during the interview. Doing so may cause your client to volunteer helpful information that you did not think to ask about and that would support a mitigating factor. During your interview, you may learn that documents and records exist that would substantiate a mitigation argument (e.g., certificate of completing a counseling program). Each potential witness and exhibit should be identified and recorded. At the end of the interview, it is good practice to give your client a “to-do” list, including gathering tangible mitigating exhibits, or providing contact information for any character witnesses. Follow this up with a letter to the client listing the items...
or information that he or she promised to obtain.

Unfortunately, sometimes we get bad cases and clients that have no persuasive mitigating traits. However, when this is discovered early, you may be able to engage in damage control. In these situations, there are still options available that help settle. For example, encourage your client to enroll in drug treatment; have your client do volunteer work; have the client start setting aside money to pay restitution; encourage therapy or counseling. In other words, it’s better late than never. Have your client start doing things immediately that will later provide ammunition for negotiation or, if necessary, a sentencing argument.

Meeting with the government. If possible, do not schedule a settlement meeting until you receive an initial offer. This prevents giving away your selling points before you know the government’s position. Your approach should be: “Here’s what you were offering before you considered X, Y, Z.”

Once you receive the initial offer, you should immediately communicate it to the client. Send a standard letter that explains the essential terms and makes it clear that by communicating the offer you are by no means making any recommendations at that time. It is your ethical obligation to communicate all offers—even the bad ones—shortly after they are received. This language should eliminate any belief you are pressuring the client to take the offer.

Provided the client does not accept the offer, schedule a settlement meeting. Before the meeting, anticipate the government’s rebuttals to your points and be prepared to respond firmly but respectfully. Your points should be reasonable, concise, and easy to understand. You may wish to avoid emotional appeal unless your client’s hardship is an extraordinary one (everybody has children and everybody has a sick relative—it doesn’t help). Also, be prepared to acknowledge indisputable strengths in the government’s case. This shows you are fair, that you have considered these points, but are also not bothered by them. Moreover, if you planned correctly, your theory has already taken their strengths into account.

Finally, remember there is a “negotiation trade-off.” The more you push for a better settlement, the more you are helping the government anticipate your defense and fill in any evidentiary gaps. There is no mechanical formula for how best to handle this. Common sense, good judgment, and experience must be applied on a case-by-case basis. Nevertheless, the young attorney should always be cautious of how much he or she is giving away and must believe the potential benefit outweighs the potential cost.

For the Government:

Prioritization. Most young prosecutors handle a significant caseload that runs the gamut from simple drug possession cases to the most violent offenses. The defendants’ actions may reflect youthful indiscretion or the habitual offenses of a lifelong criminal. The quality of evidence in these cases ranges from “slamdunk” to “how did this get indicted?”

To that end, valuing one’s case to determine its priority is one of the most important things a young prosecutor can do. Learn to measure the limitations of a case (e.g., the quality of a witness, or a problem with the search or seizure) against the seriousness of the offense and the extent of the defendant’s prior record. Then apply the law as it pertains to sentencing limits, mandates, and guidelines.

Next, know your priorities as they pertain to the possible sentence. Prosecutors must consider their own perception of fairness and justice, as well as that of the victim. Restitution or forfeiture of property may, in some cases, outweigh the importance of a custodial sentence. Intensive drug treatment is often clearly the answer for some defendants. Still, certain crimes and criminals absolutely require jail or prison sentences. Knowing early what your priorities are greatly helps the negotiation process.

Based on your prioritization, make a fair, just, and reasonable plea offer early. It is important to control—or at least not be controlled by—the dynamic of plea negotiations with defense counsel. To do so, one must have a firm grasp on the facts and the law guiding one’s case, and the time and effort it is worth to you personally, as well as to your office. If your priorities are not in order, defense counsel will shape them for you, and soon enough you will have spent too much valuable time on a more trivial matter, such as fines or a defendant’s driving license suspension, when you should be focused on a more complicated and consequential case.

Communication. Only once you have prioritized can you effectively communicate with defense counsel. Prosecutors should maintain control over the negotiations; we make the offer, we consider the counteroffer, and we recommend a sentence to the court.

This is easier said than done. Defense counsel comes to the table with his or her own priorities, which could very well be the opposite of yours. They also have to deal with difficult clients who, out of fear, obstruction, or animosity, engage in delay tactics and demand the filing of frivolous motions. Consequently, prosecutors should help their adversaries by making offers early, clearly, unequivocally, and with a firm expiration. Notwithstanding, there may be certain discovery a defendant and counsel absolutely need in order to make an informed decision. Prosecutors should be diligent and efficient in

(Continued on page 77)
Supreme Court Cases of Interest

BY CAROL GARFIEL FREEMAN

Most of the 2012 Term’s final decisions of interest to the criminal justice community involved technical issues. However, two were of special interest and generated vigorous dissents. In Salinas v. Texas, the Court declined to find a Fifth Amendment violation when the prosecutor commented on the defendant’s prearrest, pre-Miranda silence in respect to one question during an hour-long interview. Maryland v. King upheld a statute authorizing the taking of a DNA sample from persons arrested for, but not yet convicted of, certain violent offenses. Both are summarized below.

After hearing argument in Boyer v. Louisiana, the Court dismissed cert as improvidently granted. (133 S. Ct. 1702 (Apr. 29, 2013) (No. 11-9953).) Justice Alito, with whom Justices Scalia and Thomas joined, wrote explaining that the facts developed did not support Boyer’s claim that the delay in his trial was due primarily to the state’s failure to fund capital counsel. Justice Sotomayor, with whom Justices Ginsburg, Breyer, and Kagan joined, dissented from the dismissal, arguing that the Court should address the issue presented, that is, whether the state’s failure to fund counsel should weigh against the state in determining whether there was a speedy trial violation.

In Gallow v. Cooper, 133 S. Ct. 2730 (June 27, 2013) (No. 12-7516), the Court denied cert in a case in which state habeas counsel failed to put forth any evidence to support what appeared to be a substantial claim of ineffective assistance of trial counsel. Gallow had pleaded guilty during the trial on advice of his lawyer who later admitted that in Gallow’s case he had been unable effectively to cross-examine the victim because he had been suffering from panic attacks and—“more importantly”—was related to the victim; the lawyer was disbarred. Justice Breyer, with whom Justice Sotomayor joined, wrote that this would appear to excuse the procedural default and allow the circuit court to consider an affidavit in support of Gallow’s claim. The denial of cert, they noted, should not be considered a reflection on the merits of Gallow’s habeas claim, although no circuit has “clearly adopted a position that might give Gallow relief.”

In Nevada v. Jackson, 133 S. Ct. 1990 (June 3, 2013) (No. 12-694) (per curiam), the defendant had cross-examined the victim at length about prior incidents in which she had charged him with rape and assault; none of these complaints had been substantiated. However, the judge refused to allow the defendant to offer police reports and testimony to corroborate that these complaints had been unproven, because he had not complied with a state law requiring prior notice to the prosecution that the defense seeks to offer such evidence. The Court noted that it had never ruled that federal law precludes such a notice requirement, or that federal law requires admission of extrinsic evidence as an element of the right to present a defense. The state’s petition for cert was granted and the case remanded to the federal habeas court for further proceedings.

In another per curiam decision, the Court granted the state’s petition for cert and reversed a judgment of the Ninth Circuit that had declined to issue its mandate following the Supreme Court’s decision denying cert to a capital defendant. (Ryan v. Schad, 133 S. Ct. 2548 (June 24, 2013) (No. 12-1084) (per curiam).) The rules require issuance of a mandate “immediately” when an order of the Supreme Court denying cert is filed. In Schad’s case, there was no exceptional circumstance justifying delay in issuance of the mandate.

As of August 1, there were only 11 cases involving criminal justice issues on the October Term 2013 docket—the eight cases noted below, and Burt v. Titlow, 133 S. Ct. 1457 (Feb. 25, 2013) (No. 12-414), Kaley v. United States, 133 S. Ct. 1580 (Mar. 18, 2013) (No. 12-609), and Kansas v. Cheever, 133 S. Ct. 1460 (Feb. 25, 2013) (No. 12-609), the questions presented in which appear in the Summer 2013 issue of Criminal Justice. Burt v. Titlow, Kansas v. Cheever, and Kaley v. United States will be argued in October. Argument dates for cases to be argued later in the term will be posted on the Court’s website when the calendars are fixed.

CERTIORARI GRANTED
Note: Questions presented are quoted as drafted by the parties, or, in some instances, by the Court.

Capital Case
White v. Woodall, cert. granted, 133 S. Ct. 2886 (June 27, 2013) (No. 12-794), decision below at 685 F.3d 574 (6th Cir. 2012), reh’g denied, Oct. 3, 2012.
Robert Keith Woodall, amidst overwhelming evidence of his guilt, pled guilty to kidnapping, raping, and murdering a 16-year-old child, and thus pled guilty to all aggravating circumstances. At the penalty phase trial, the prosecutor elected to present evidence of guilt and the circumstances of the crimes. Woodall did not testify; and his request that the jury be instructed not to draw any adverse inference from his decision not to testify (a “no adverse inference instruction”) was denied. He was sentenced to death by a Kentucky jury. The Kentucky Supreme Court affirmed.

Even though this Court has never held that a defendant is entitled to a no adverse inference instruction at the sentencing phase of a trial where the defendant has pled guilty to the offense and all aggravating circumstances, the Sixth Circuit granted habeas relief to Woodall on the ground that the trial court’s failure to provide such an instruction violated his Fifth Amendment right against self-incrimination. The questions presented are:

1. Whether the Sixth Circuit, violated 28 U.S.C. § 2254(d)(1) by granting habeas relief on the trial court’s failure to provide a no adverse inference instruction even though this Court has not “clearly established” that such an instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to the crimes and aggravating circumstances.

2. Whether the Sixth Circuit violated the harmless error standard in Brecht v. Abrahamsson, 507 U.S. 619 (1993), in ruling that the absence of a no adverse inference instruction was not harmless in spite of overwhelming evidence of guilt and in the face of a guilty plea to the crimes and aggravators.

The questions presented are:

Do the Constitution’s structural limits on federal authority impose any constraints on the scope of Congress’ authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state prerogatives, and is concededly unnecessary to satisfy the government’s treaty obligations?

Can the provisions of the Chemical Weapons Convention Implementation Act, codified at 18 U.S.C. § 229, be interpreted not to reach ordinary poisoning cases, which have been adequately handled by state and local authorities since the Framing, in order to avoid the difficult constitutional questions involving the scope of and continuing vitality of this Court’s decision in Missouri v. Holland?

**Crimes and Offenses**

**Bond v. United States**, cert. granted, 133 S. Ct. 978 (Jan. 18, 2013) (No. 12-158), decision below at 681 F.3d 149 (3d Cir. 2012).

Two years ago, this Court held that petitioner had standing to challenge her criminal conviction as a violation of the Constitution’s structural limits on federal authority. See **Bond v. United States**, 131 S. Ct. 2355 (2011) [see 26:3 C.RIM. JUSt. at 44 (Fall 2011)]. The Court rejected the argument that Congress’ reliance on the treaty power somehow defeated petitioner’s standing. On remand, however, the court of appeals held that, while petitioner had standing, her constitutional challenge was a non-starter because the basic limits on the federal government’s power are not “applicable” to statutes purporting to implement a valid treaty. App. 36 n.21. Although it had grave misgivings about its decision, the Third Circuit viewed this startling result as compelled by dictum in Missouri v. Holland, which states that “if [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.” 252 U.S. 416, 432 (1920). The court thus broadly construed Holland as allowing the Senate and the President to expand the federal government’s constitutional authority by negotiating a valid treaty requiring implementing legislation otherwise in excess of Congress’ enumerated powers.

**Burrgage v. United States**, cert granted limited to Questions 1 and 2 presented by the petition, 133 S. Ct. 2049 (Apr. 29 2013) (No. 12-7515), decision below at 687 F.3d 1015 (8th Cir. 2012), reh’g denied, Sept. 13, 2012.

1. Whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime, without a foreseeability or proximate cause requirement.

2. Whether a person can be convicted for distribution of heroin causing death utilizing jury instructions which allow a conviction when the heroin that was distributed “contributed to,” death by “mixed drug intoxication,” but was not the sole cause of death of person.
Rosemond v. United States, cert. granted, 133 S. Ct. 2734 (May 28, 2013) (No. 12-895), decision below at 695 F.3d 1151 (10th Cir. 2012).

Whether the offense of aiding and abetting the use of a firearm during and in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2, requires proof of (i) intentional facilitation or encouragement of the use of the firearm, as held by the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, or (ii) simple knowledge that the principal used a firearm during a crime of violence or drug trafficking crime in which the defendant also participated, as held by the Sixth, Tenth, and District of Columbia Circuits.

United States v. Apel, cert. granted, 133 S. Ct. 2767 (June 3, 2013) (No. 12-1038), decision below at 676 F.3d 1202 (9th Cir. 2012), reh’g denied, Sept. 27, 2012.

Whether 18 U.S.C. 1382, which prohibits a person from reentering a military installation after a commanding officer has ordered him not to reenter, may be enforced on a portion of a military installation that is subject to a public roadway easement.

First Amendment
McCullen v. Coakley, cert. granted, 133 S. Ct. 2857 (June 24, 2013) (No. 12-1168), decision below at 708 F.3d 1 (1st Cir. 2013).

Massachusetts has made it a crime for speakers to “enter or remain on a public way or sidewalk” within 35 feet of an entrance, exit, or driveway of “a reproductive health care facility.” The law applies only at abortion clinics. The law also exempts, among others, clinic “employees or agents . . . acting within the scope of their employment.” In effect, the law restricts the speech of only those who wish to use public areas near abortion clinics to speak about abortion from a different point of view.

Petitioners are individuals who believe that women often have abortions because they feel pressured, alone, unloved, and out of options. Petitioners try to position themselves near clinics in an attempt to reach this unique audience, at a unique moment, to offer support, information, and practical assistance. They are peaceful, non-confrontational, and do not obstruct access. Yet, the State prohibits them from entering or standing on large portions of the public sidewalk to proffer leaflets or seek to begin conversations with willing listeners.

The questions presented are:

1. Whether the First Circuit erred in upholding Massachusetts’ selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.
2. If Hill v. Colorado, 530 U.S. 703 (2000), permits enforcement of this law, whether Hill should be limited or overruled.

Fourth Amendment

Proper interpretation of Georgia v. Randolph, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006), specifically whether a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search or whether a defendant’s previously-stated objection, while physically present, to a warrantless search is a continuing assertion of 4th Amendment rights which cannot be overridden by a co-tenant.

Sentencing
Paroline v. United States, cert. granted limited to the following question posed by the Court, 2013 WL 497856 (June 27, 2013) (No. 12-8561), decision below at 701 F.3d 749 (5th Cir. 2012).

What, if any, causal relationship or nexus between the defendant’s conduct and the victim’s harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259.

DECIDED CASES
Crimes and Offenses
United States v. Kebodeaux, 133 S. Ct. 2496 (June 24, 2013) (No. 12-418). While in the Air Force, Kebodeaux was convicted by a special court martial of a sex offense. After he served his sentence and was discharged, he moved to Texas where he registered under Texas law as a sex offender. When he failed to reregister after a move from one city to another, he was prosecuted under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901 et seq., a statute enacted after he had served his sentence. The Court held that Congress had power under the necessary and proper clause of the Constitution to apply SORNA to federal sex offenders such as Kebodeaux who had completed their sentences before its enactment. Because Kebodeaux was subject to federal criminal penalties if he failed to register under state law by virtue of an earlier law, the Wetterling Act, 108 Stat. 2038–42, he had not been
unconditionally discharged before the enactment of SORNA. Congress’s power to regulate the military and the necessary and proper clause provided authority for applying the Wetterling Act registration requirements and SORNA to Kebodeaux. SORNA made certain reasonable modifications to the prior registration requirements, and its application to Kebodeaux was constitutional. Opinion by Justice Breyer, in which Justices Kennedy, Ginsburg, Sotomayor, and Kagan joined. Chief Justice Roberts concurred in the judgment but objected to language discussing the public safety benefits of the registration requirement on the ground that it might suggest the existence of a federal police power. Justice Alito concurred in the judgment solely on the ground that it was within the power of Congress to make rules for the military, and that a military offender might “fall through the cracks of a state registration system.” Justice Thomas dissented, writing that SORNA, as applied to Kebodeaux, who had served his sentence and was no longer in the military, was not based on any of the enumerated powers vested in Congress but rather “usurps the general police power vested in the States.” Congress could not validly enact SORNA only to make the Wetterling Act more effective—SORNA itself must be based on one of the enumerated powers, and the power to enact rules for the military does not include the power to require a person to register when he is a civilian (unless it had been a condition of his sentence). Justice Scalia dissented, joining Justice Thomas’s dissent except the portion stating that “what is necessary and proper to enforce a statute validly enacted pursuant to an enumerated power is not itself necessary and proper to the execution of an enumerated power.”

Sekhar v. United States, 133 S. Ct. 2720 (June 26, 2013) (No. 12-357). Sekhar was convicted of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951(a), by threatening the general counsel of a state agency with disclosure of his extramarital affair if he did not recommend that the state invest in a fund administered by Sekhar’s employer. Reviewing the common law and the New York statute on which the Hobbs Act was based, the Court held that “property” under the Hobbs Act is something “transferable”—something that can be passed from one person to another. The “property” alleged to have been extorted in this case was the general counsel’s recommendation or his right to have his opinion given free from outside interference. This was not property that could be extorted. Rather, Sekhar exercised “coercion” on the general counsel, but the provision of the New York statute criminalizing coercion had not been included in the Hobbs Act. Opinion by Justice Scalia, in which Chief Justice Roberts and Justices Thomas, Ginsburg, Breyer, and Kagan joined. Justice Alito filed a concurring opinion in which Justices Kennedy and Sotomayor joined.

Fifth Amendment
Salinas v. Texas, 133 S. Ct. 2174 (June 17, 2013) (No. 12-246). Salinas voluntarily came to the police station for an interview in connection with a homicide. He was not advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). After he had answered many questions, he remained silent when asked whether shells found at the scene would match his shotgun, but clenched his fists, looked down at the floor, and “began to tighten up.” He then resumed answering other questions. At trial, the prosecutor argued that Salinas’s reaction to the question indicated consciousness of guilt. Cert was granted to consider whether the prosecution may use an assertion of the privilege against self-incrimination during a noncustodial interview as evidence of guilt. The Court did not resolve this question, however, although the plurality upheld the conviction. Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, concluded that Salinas could not claim that evidence of his silence violated his Fifth Amendment privilege because he had not claimed the privilege during the interview. This plurality opinion noted that the general rule is that the government is entitled to every person’s testimony. Many cases have held that a person who claims the privilege must assert it, to give the government the opportunity either to argue that the testimony would not be incriminating or to cure the problem by granting immunity. The Fifth Amendment is an exception to this general rule, and applies to the right of a defendant at trial not to testify and situations that are inherently coercive, such as a custodial interrogation (Miranda), or where answering the question itself is incriminating (e.g., reporting income from illegal activity). These justices declined to extend the Fifth Amendment exception to a situation where the person simply does not answer a question that the government suspects would result in incrimination. They noted that the Fifth Amendment does not specifically provide a “right to remain silent.” Justice Thomas, joined by Justice Scalia, joined the judgment but on the ground that use of a person’s silence during precustodial interrogation does not compel him to testify against himself, and thus the evidence would be admissible even had he claimed the privilege at the time of the interview. These justices believe that Griffin v. California, 380 U.S. 609 (1965), which held that neither a prosecutor nor a judge may comment on a defendant’s failure to testify, was wrongly decided and should not be extended. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented.

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The Fifth Amendment prohibits prosecutors from commenting on a defendant’s silence because that would result in the defendant becoming a “witness against himself.” *Miranda* emphasized the importance of the Fifth Amendment and specifically noted that the prosecution cannot use “the fact that [the defendant] stood mute or claimed the privilege in the face of accusation.” (*Miranda*, 380 U.S. at 468 n.37 (emphasis added by Justice Breyer).) The dissent distinguished the cases cited by the plurality, and noted that Salinas had been interrogated at the police station without counsel, had been told that he was a suspect, and that apparently the question about the shotgun changed the subject and was more directly aimed at getting incriminating evidence. Reasonably, therefore, his silence was based on a Fifth Amendment claim. The plurality’s insistence that the privilege be specifically claimed will lead to litigation as to what words lay people will need to utter to invoke the privilege. The dissent’s solution would be a rule that asks “Can one fairly infer from an individual’s silence and surrounding circumstances an exercise of the Fifth Amendment privilege?”

**Fourth Amendment**

*Maryland v. King*, 133 S. Ct. 1958 (June 3, 2013) (No. 12-207). King was arrested on April 10, 2009, and charged with two counts of felony assault. A Maryland statute authorizes law enforcement to take DNA samples from the cheek of a person arrested for a crime of violence or burglary or the attempt to commit either, by use of a cotton swab or filter paper (a “buccal swab”). The sample cannot be processed or placed in a database until after the arrestee has been arraigned and probable cause found for the arrest on the qualifying charge. If probable cause is not found (or the charges are dropped or the person is acquitted), the sample is to be destroyed. Otherwise, it is to be sent to a national database (CODIS) where it is checked against a database of DNA found at other crimes where no perpetrator has been identified. The portions of the chromosome that are used for DNA typing are portions that do not contain genetic material related to individual characteristics such as predisposition to disease, hair color, etc. Although these portions are known as “junk DNA,” they contain patterns that have been determined to be invaluable for purposes of identification. Samples taken pursuant to the Maryland statute cannot be used for any purpose other than identification.

Justice Kennedy, in an opinion in which Chief Justice Roberts and Justices Breyer, Thomas, and Alito joined, agreed that the taking of the DNA sample constituted a search under the Fourth Amendment. The majority held that the search was reasonable because it enabled proper identification of the person arrested, in the same way that fingerprints, photographs, tattoos, etc., are used to identify a person. Identification is important to determine the person’s prior record, both for the protection of persons with whom the person will come into contact and for the setting of bail conditions. The majority opinion assumed that months will go by before bail is set, months during which the DNA sample can be processed to determine whether the person has a prior record. Finally, the majority said, if the DNA sample is a match to DNA from another crime, a person who may have been convicted improperly of that crime could be freed. For all these reasons, the government has a strong interest in proper identification of the person arrested, an interest that outweighs the intrusion into the person’s privacy, and makes the taking of the DNA sample by a buccal swab as part of the booking process reasonable.

Justice Scalia, with whom Justices Ginsburg, Sotomayor, and Kagan joined, dissented on the ground that the real purpose of the DNA statute was not to aid identification of the person arrested but rather to investigate other crimes although there is no particular reason to suspect that individual has been involved. The Fourth Amendment requires that warrants be based on probable cause and particularly describe the place to be searched and the items or persons to be seized. Even when a warrant is not required, the Court has usually insisted that the prohibition of unreasonable searches requires “individualized suspicion.” Random drug tests of railroad employees and school lockers have been approved because of the special interest in safety and the guardianship of children. The search of King could not be justified as pursuant to his arrest, because such a search is only for weapons and evidence of the crime of arrest. The majority relies on the need for DNA to identify King, but the facts show that this was not its purpose. The DNA sample was taken on April 10. It was not processed then, because the Maryland statute prohibits testing before the arrestee is arraigned (when probable cause may be found and bail set), and arraignment did not occur until three days after his arrest. Moreover, several months went by thereafter before the sample ultimately was tested and placed in the CODIS database. It was not until July 13 that the results were entered into Maryland’s database with information identifying King as the person from whom the sample was taken. Thereafter, his sample, without identifying information, was sent to the FBI database for convicts and persons arrested. The FBI then checked a database for unsolved crimes (not crimes for which possibly innocent people are serving time), and on August 4, King’s sample was matched with DNA from the 2003 rape. The sample
was not checked with other samples in the database for convicts and person arrested (which the majority says it would do to further identify King), because the Maryland authorities already knew who King was. The purpose of sending the sample to CODIS was to see if he could be linked with an unsolved crime, that is, the taking of the buccal swab was a suspicionless search. Moreover, the Maryland statute itself, the governor, and the attorney general have described the statute as a crime fighting tool (to assist in solving previously open cases). Regulations implementing the statute provide that if a sample from a person arrested appears in the state database, there is no need to take a second sample—another reason why the statute is not designed to aid identification of the person arrested. Fingerprints are sufficient to identify a person arrested. Although this statute is limited to persons arrested for crimes of violence, the rationale would apply to persons arrested for any offense, including traffic offenses.

Habeas

Metrish v. Lancaster, 133 S. Ct. 1781 (May 20, 2013) (No. 12-547). The Court held, unanimously, that Lancaster was not entitled to federal habeas. Lancaster had first been tried for first degree murder and other offenses in 1993 and proffered a defense (rejected by the jury) that his diminished capacity prevented him from forming the required specific intent. After his conviction was reversed on other grounds, but before his retrial, the state supreme court held that diminished capacity was not a defense recognized by the state's insanity statute. Lancaster sought habeas on the ground that he was denied due process by the refusal to permit him to raise a diminished capacity defense at the retrial. In an opinion for the Court, Justice Ginsburg wrote that the application of the state supreme court decision denying the defense at Lancaster's retrial was not an unreasonable application of federal law (Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1)). The cases on which Lancaster relied, Bouie v. City of Columbia, 378 U.S. 347 (1964), and Rogers v. Tennessee, 532 U.S. 451 (2000), were distinguishable. Neither case involved a decision by a state supreme court that reasonably interpreted the language of a state statute, contrary to earlier lower court interpretations. Bouie, which involved sit-ins by protesters during the 1960s, concerned a new state court ruling that a statute that specifically criminalized entry into premises after notice not to enter also criminalized failure to leave those premises after lawful entry. The Court held that application of this interpretation of the statute violated due process because it had no support in either the statutory language or earlier state court decisions. In Lancaster's case, however, only intermediate state court decisions had accepted the diminished capacity defense before the state supreme court's rejection of it, and that court's interpretation of the statutory language was not unreasonable. Rogers involved rejection of the common law rule that a victim must die within a year and a day of the assault to justify a murder charge. This rule was described as a “relic,” had been rejected by modern courts and legislatures, and had only slight support in dicta in state court decisions. Thus, application of this new rule to Rogers did not deny due process. Although the diminished capacity defense is not outdated but has support in ABA Standards for Criminal Justice and in many states, the state supreme court decision in Lancaster's case disallowing the defense was a reasonable interpretation of a comprehensive statute and was not an unreasonable application of federal law.

McQuiggin v. Perkins, 133 S. Ct. 1924 (May 28, 2013) (No. 12-126). Perkins filed his federal habeas claim alleging ineffective assistance of counsel more than a year after his case became final and more than a year after he obtained various affidavits on which he based a claim of actual innocence. In a 5–4 decision, the Court held that he was not entitled to equitable tolling of AEDPA's one-year statute of limitations—28 U.S.C. § 2254(d)(1)(D)—but that unjustifiable delay in asserting the claim of actual innocence could be considered in determining whether a miscarriage of justice would result if the habeas claim were not considered, under the “demanding” standard of Schluh v. Delo, 513 U.S. 298 (1995). The district court had concluded that Perkins's petition did not meet the Schluh standard. The case was remanded for further proceedings in which the district court decision probably should be dispositive. Opinion for the Court by Justice Ginsburg, in which Justices Kennedy, Breyer, Sotomayor, and Kagan concurred. Justice Scalia filed a dissenting opinion pointing out that earlier cases in which procedural defaults had been excused involved judge-made rules, for example, if the prisoner showed cause and prejudice by failing to comply with a state procedural rule. This case, on the other hand, involves a federal statute of limitations. Congress had provided an escape clause for persons with a credible claim of innocence, giving them an additional year from discovery of the evidence of innocence in which to file the petition. Chief Justice Roberts and Justice Thomas joined Justice Scalia's dissent, and Justice Alito joined as to Parts I, II, and III.

Trevino v. Thaler, 133 S. Ct. 1911 (May 28, 2013) (No. 11-10189). Although Texas theoretically allows a defendant to raise a claim of ineffective assistance of trial counsel on direct appeal, in practice such a claim is almost impossible to raise adequately,
and the courts encourage such claims to be raised on collateral attack where the record can be fully developed. There is no right to counsel on collateral attack and therefore no right to constitutionally effective counsel in such a proceeding. Nevertheless, in Martinez v. Ryan, 566 U.S. 1 (2012), the Court held that a “substantial” claim of ineffective assistance of trial counsel is not procedurally defaulted if under state procedure such claims must be raised on collateral attack and there was either no counsel in the postconviction proceeding or counsel was ineffective. In the instant case, the Court held that the Martinez rule applies. Although Trevino had counsel on his state postconviction proceeding, counsel failed to raise a claim that trial counsel was constitutionally ineffective by failing to investigate and to present mitigating evidence in this capital case. The case was remanded for further proceedings to determine the merits of the ineffective assistance claim, whether that claim was “substantial,” and in addition whether state postconviction counsel was ineffective. Opinion by Justice Breyer, with whom Justices Kennedy, Ginsburg, Sotomayor, and Kagan concurred. Chief Justice Roberts filed a dissenting opinion in which Justice Alito joined. Justice Scalia filed a dissent in which Justice Thomas joined.

Immigration
Moncrief v. Holder, 133 S. Ct. 1678 (Apr. 23, 2013) (No. 11-702). Moncrieffe, a noncitizen legally present in the United States from the age of three, was found to have 1.3 grams of marijuana (equivalent to two or three cigarettes) and was convicted under a Georgia statute of possession of marijuana with intent to distribute. The immigration court concluded that he had been convicted of an “aggravated felony” under the Immigration and Nationality Act (INA), 8 U.S.C. § 1227(a)(2)(A)(iii), and thus was not eligible for discretionary relief. Under the federal Controlled Substances Act, distribution of marijuana is generally considered a felony, although distribution of a small amount of marijuana for no remuneration is punished as simple possession. (21 U.S.C. § 841(b)(1)(D), (4).) To determine whether a state conviction is analogous to one under the INA, the Court uses the categorical approach, which does not look at the facts on which a particular conviction is based, but rather considers whether the state conviction “necessarily” involved the minimum facts required to constitute the federal offense. A conviction under Georgia’s statute could be either a felony or a misdemeanor under federal law, and thus did not “necessarily” correspond to a federal felony. Moncrieffe, therefore, would not be considered to have committed an “aggravated felony,” although as a drug violator he remains deportable. He is, however, eligible to apply to the attorney general for discretionary relief. Opinion by Justice Sotomayor, with whom Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, Ginsburg, and Kagan concurred. Justices Thomas and Alito each filed dissenting opinions.

Procedure
United States v. Davila, 133 S. Ct. 2139 (June 13, 2013) (No. 12-167). Rule 11 of the Federal Rules of Criminal Procedure provides that the court must not enter into plea negotiations, but a variance from that prohibition is harmless error unless it affects substantial rights. (Fed. R. Crim. P. 11(c)(1), (h).) Rule 52(a) mandates that any trial court error “that does not affect substantial rights must be disregarded,” whereas Rule 52(b) authorizes an appellate court to consider “plain error that affects substantial rights” even if no objection was made below. In this case, a magistrate judge had held an in camera hearing and essentially advised Davila to plead guilty. Three months later, Davila entered a plea to one count of a 33-count indictment, in a proceeding in which no mention was made of the magistrate judge’s hearing or advice. The Court held that despite the magistrate judge’s violation of Rule 11(c)(1), the plea should not be vacated unless Davila had been prejudiced thereby. Earlier cases had held that Rule 52(b) covers errors in the conduct of the plea proceedings and that the defendant has the burden of showing that the error affected his or her substantial rights. Davila sought to distinguish cases involving errors at the plea hearing itself (such as failure to inform the defendant that he would have the right to counsel if he went to trial) from errors that occur prior to the decision to enter the plea (such as improper involvement of the judge), and argued that this required relief. The Court rejected this distinction, noting that automatic reversal is only required for “structural” errors that affect the basic fairness of the criminal proceeding, such as denial of counsel, denial of a jury trial, and failure to instruct on reasonable doubt. Because the court of appeals did not consider whether the magistrate judge’s advice affected substantial rights, the case was remanded for further proceedings. Opinion by Justice Ginsburg, with whom Chief Justice Roberts and Justices Kennedy, Breyer, Alito, Sotomayor, and Kagan joined. Justice Scalia, joined by Justice Thomas, filed an opinion concurring in part and in the judgment.

Sentencing
Peugh v. United States, 133 S. Ct. 2072 (June 10, 2013) (No. 12-62). Peugh was convicted on five counts of bank fraud that occurred in 1999 and 2000. At that time, the applicable sentencing guideline range was 30 to 37 months. When he was sentenced in 2000, however, the guidelines for his
offense had been increased so that the range was 70 to 87 months. He received a sentence of 70 months. The Court accepted his argument that application of the 2009 guidelines at his sentencing violated the ex post facto clause of the United States Constitution, Article 1, Section 9, Clause 3. The ex post facto clause prohibits a punishment that is greater than the penalty applied when the offense was committed. Reviewing the precedents, the Court noted that the issue is whether the change in the law “presents a ‘sufficient risk of increasing the measure of punishment,’” quoting Garner v. Jones, 529 U.S. 244, 250 (2000). In Miller v. Florida, 482 U.S. 423 (1987), the Florida guidelines system required a written explanation for sentences outside the guidelines. The guideline range applicable at Miller’s sentencing was higher than the range applicable at the time of his offense. Although the judge had discretion to sentence outside the guidelines, he would have been required to state reasons and the sentence would have been reviewable on appeal. The burdensomeness of this procedure increased the chance that the punishment would be higher and thus violated the ex post facto clause. Although there are differences between the advisory federal and Florida systems, there are many requirements that direct judges to sentence within the guidelines. Thus, there is a sufficient risk that application of postoffense guidelines will result in a higher sentence. This is consistent with the principles of fairness that underlie the ex post facto clause. The sentencing judge should begin with the guidelines applicable at the time of the offense, and may then use the current (increased) guidelines as a reason for deviating from the original guidelines. Opinion by Justice Sotomayor for the Court, except Part III-C; Justices Ginsburg, Breyer, and Kagan joined the opinion in full, and Justice Kennedy joined except for Part III-C (which discussed issues of fairness). Justice Thomas filed a dissent in which Chief Justice Roberts and Justices Scalia and Alito joined in part, arguing that the ex post facto clause should be limited to increases in the punishment attached to the crime. Justice Alito filed a dissent in which Justice Scalia joined.

Descamps v. United States, 133 S. Ct. 2276 (June 20, 2013) (No. 11-9540). In considering whether a state conviction for a “violent felony” such as “burglary” counts to increase a sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), a sentencing court uses the “categorical” approach, determining whether the elements of the state statute prohibit “generic burglary,” which is generally defined as unlawful entry—breaking and entering—with intent to commit a felony. If the statute’s elements are the same or narrower than those of generic burglary, then the conviction will count. However, if the state offense can be committed in multiple ways (such as entry into a building or a boat), then the court uses the “modified categorical approach” and can consult documents such as the indictment to determine whether the conviction was for an offense similar to generic burglary. In this case, the California statute was broader than generic burglary, not requiring a forced entry but merely entry with intent to commit a felony. Thus, the statute can be violated by a shoplifter who enters a store lawfully but with the intent to steal. The Court held that in such a circumstance, when the element of unlawful entry is not one of the elements of the state crime of burglary, it was wrong to consult documents related to the prior conviction to determine whether, in fact, Descamps had been convicted of acts constituting generic burglary. Opinion by Justice Kagan, in which Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor joined. Justice Kennedy filed a concurring opinion, observing, inter alia, the “troublesome” fact that statements made in connection with convictions under state law may go unchallenged because the parties do not consider the possible effect later on an ACCA sentence. Justice Thomas filed an opinion concurring in the judgment. Justice Alito filed a dissent.

Note that after the decision in Descamps, the Court granted cert in and remanded for further proceedings a case involving a conviction for simple assault under Pennsylvania state law. Justice Alito, joined by Justice Kennedy, dissented on the ground that the facts already developed clearly showed that the conviction qualified as a third conviction for purposes of federal sentencing. (Marrero v. United States, 133 S. Ct. 2732 (June 27, 2013) (No. 12-6355).)

Sixth Amendment
Alleyne v. United States, 133 S. Ct. 2151 (June 17, 2013) (No. 11-9335). Holding that a fact that increases a mandatory minimum must be found by the jury under Alleyne v. New Jersey, 530 U.S. 466 (2000), the Court overruled Harris v. United States, 536 U.S. 545 (2002). Alleyne held that the Sixth Amendment jury trial right required a jury finding of any element of an offense that would result in an increased maximum sentence. The Court in that case distinguished between “elements” of the offense, which must be found by the jury, and “sentencing factors” such as prior convictions, which can be invoked by the sentencing judge to impose a sentence within statutory limits. Harris had limited Alleyne to factors that led to increases in the maximum possible punishment, such as use of a firearm in connection with a crime of violence. In Alleyne’s case, the statutory minimum was five years, but if he

(Continued on page 78)
Virtual Currencies in the Crosshairs

BY GORDON GRIFFIN

On May 28, 2013, Liberty Reserve, a self-described virtual currency provider, was designated by the Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN) as a primary money laundering concern, and the Department of Justice simultaneously indicted several of its officers. The indictments and the FinCEN finding read like a movie script, complete with a shadowy network of hackers, drug dealers, and international criminals relocating to a nonextradition country to protect their money laundering operation. The government’s allegations describe an enterprise responsible for laundering billions of dollars over a period of years through the use of Liberty Reserve’s virtual currency—the “LR.”

So what is a virtual currency, and how does it lend itself to criminal activity? While there is no universally accepted definition, FinCEN describes a virtual currency as a medium of exchange that is not legal tender in any jurisdiction. This definition highlights one of the difficulties regulators face when addressing virtual currencies and one of the reasons that would-be money launderers might find a virtual currency attractive: the lack of a government issuer or regulator responsible for tracking and managing the currency. The story of Liberty Reserve provides insight into both how virtual currencies work, as well as how they can be exploited for criminal gain.

Digital Equivalent of a Cash Transaction

Liberty Reserve was arguably designed to provide its customers with anonymity. According to the indictment and FinCEN’s finding, Liberty Reserve provided accounts to its customers without requiring any sort of name verification. One account was listed under the name “Russia Hackers,” and an undercover government agent was able to obtain an account under the name “Joe Bogus.” This “no questions asked” policy made Liberty Reserve an attractive venue for money launderers and other criminals.

Money could not be deposited directly into Liberty Reserve accounts. Instead, a depositor would have to purchase LRs from an exchanger, some of which were owned by the owners of Liberty Reserve, and most of which were operated in countries with few Anti-money laundering (AML) controls. These exchangers would charge high fees, both to convert currency into LRs, and then to convert the LRs back into real currency. For its part, Liberty Reserve charged approximately 1 percent per transaction.

Once an individual had LRs in his or her account, he or she could transfer between accounts with only a transaction number linking the two accounts, and even these could be erased if you were willing to pay a small fee. Users had enough trust in the system that they were willing to accept LRs as payment for goods or services.

While there were almost certainly some legitimate business interests with accounts at Liberty Reserve, the indictments allege that the overwhelming majority of the account holders were involved in a criminal enterprise. Other virtual currencies appear to have more legitimate clienteles, but there are risks for legitimate businesses using virtual currencies. Next, we’ll explore how to examine and mitigate some of those risks for participants in virtual currency markets.

To Use or Not to Use Virtual Currencies?

First, examine your needs and activities involving virtual currencies. What type of transactions will you be conducting? For the purposes of AML responsibilities, the threshold question is whether or not you will be considered a money services business (MSB). FinCEN issued a guidance on March 18, 2013, applying its definition of MSBs under the Bank Secrecy Act (BSA) to virtual currency. This guidance describes three classes of participants in virtual currency arrangements and their respective obligations as MSBs.

As defined by FinCEN’s guidance, a user of virtual currency is just that, anyone who “obtains virtual currency to purchase goods or services.” (Fin. Crimes Enforcement Network, Dep’t of Treasury, Fin-2013-G001, Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies 2 (2013), available at http://tinyurl.com/lcmy3e7.) Users of virtual currency are not MSBs under FinCEN regulations. Accordingly, users are not subject to the registration, reporting, AML compliance program, and recordkeeping obligations that FinCEN maintains for MSBs.

The next two categories of virtual currency participants are administrators and exchangers. As per FinCEN’s guidance, an exchanger is “a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency,” while an administrator is “a person engaged as a business in issuing (putting into circulation) a virtual currency, and...
who has the authority to redeem (to withdraw from circulation) such virtual currency.” (Id.) An exchanger or an administrator that accepts and transmits a virtual currency or buys or sells virtual currency is a money transmitter under FinCEN regulations, and an MSB. It is important to note that, unlike other types of MSBs, money transmitters have no activity threshold to be subject to all of the regulations for MSBs; if you’re a money transmitter, you’re an MSB, regardless of the amount of money transmission activity.

MSBs are required to have effective AML programs that are reasonably designed to prevent the MSB from being used to facilitate money laundering and the financing of terrorist activities. The programs must adequately address the risks inherent in the business, and must (1) incorporate written policies, procedures, and internal controls reasonably designed to assure compliance with the BSA; (2) designate a compliance officer responsible for day-to-day compliance with the BSA; (3) provide education and/or training of appropriate personnel; and (4) provide for independent review to monitor and maintain an adequate program. (31 C.F.R. § 103.125.)

**Future of Virtual Currency and Decentralization**

The government has been able to target both the individuals involved with Liberty Reserve as well as the institution itself to prosecute AML violations precisely because of its centralized nature: Liberty Reserve had administrators, employees, and even a place of business. So what happens when you remove all of the centralized structure around a virtual currency? Bitcoin and other similar decentralized virtual currencies happen. Bitcoin is an open-source “peer-to-peer” digital currency that has no administrator. Rather, it uses an algorithm that constantly checks itself against other Bitcoin users to verify its amounts and locations.

The March 18, 2013, FinCEN guidance on virtual currencies acknowledged this difference. It described a decentralized virtual currency as one that has no administrator or central repository, and that persons may obtain through their own computing or manufacturing effort. Users of this type of virtual currency are not MSBs. This leaves only one category of persons open to FinCEN and law enforcement scrutiny: exchangers. Bitcoins can be purchased with “real” currencies, and several companies exist to serve just that purpose. This is the only point in the current Bitcoin model that lends itself to regulatory enforcement.

Bitcoin currently appears to be more attractive to speculators than to consumers and consumer businesses, due to the large fluctuations in its value. One notable exception is illicit websites. For example, in 2011, Senators Charles Schumer (D-NY) and Joe (D-WV) wrote a letter to Attorney General Eric Holder asking him to take action against the website Silk Road, where, according to the letter, one can purchase illegal drugs and weapons, and the only accepted currency is the Bitcoin. But as Bitcoin acceptance becomes more ubiquitous, and the fluctuations in value level out, the need for money exchangers will fall in line more with national currencies. This may very well lead to difficulties for regulators at FinCEN and the Department of Justice. It is not difficult to imagine a future in which a transfer of Bitcoins between two individuals valued at $100,000 could become commonplace. Bitcoin transactions are untraceable, they do not involve any financial institutions, and they effectively sidestep any regulatory enforcement mechanism currently in place.

While Bitcoin users may be seeking anonymity, it is clear that the global regulatory trend, spearheaded by groups like the Financial Action Task Force (FATF), is calling for greater transparency. FinCEN’s director noted in a recent speech that the agency is not looking to prohibit virtual currencies, but one would expect that, if virtual currencies are to gain ground among traditional merchants and consumers, they will have to submit to some minimum AML controls.

Technology and innovation may have outpaced the law, but it seems clear from the Liberty Reserve investigation that this is an area that law enforcement will be paying attention to in the future. Expect more to come from Treasury and FinCEN, as well as input from other government agencies, on the rules surrounding virtual currencies.
Supervisors, Subordinates, and Sanctions

BY PETER A. JOY AND KEVIN C. McMUNIGAL

Many complain about a lack of sanctions against prosecutors who violate disclosure obligations. Such violations frequently go undetected for a variety of reasons, such as the prevalence of guilty pleas and the difficulty inherent in learning what a prosecutor did not reveal. Even when detected, such violations often go unpunished by judges or bar disciplinary authorities. To fill this sanction gap, some have called for prosecutor offices to investigate and impose sanctions internally for disclosure violations.

The Department of Justice’s (DOJ’s) investigation of the prosecutors who handled the trial of US Senator Ted Stevens provides a rare opportunity to observe the operation of such an internal disciplinary process. The investigation generated disagreements about the level of culpability of various members of the prosecution team and about who should be sanctioned. The most recent development in this internal sanctions saga occurred on April 5, 2013, when Administrative Judge Benjamin Gutman reversed 40- and 15-day suspensions without pay for the only two Stevens trial prosecutors against whom the DOJ’s Office of Professional Responsibility (OPR) had sought sanctions.

In this column, we provide an overview of the investigation and the disagreements it produced. We also highlight some troubling issues the investigation revealed.

The Stevens Case

On October 27, 2008, a federal jury convicted Senator Ted Stevens, Republican from Alaska, for making false statements on Senate financial disclosure forms. The case focused on whether Senator Stevens had improperly failed to report gifts in the form of improvements to a vacation home. After the conviction, questions were raised about whether the prosecutors who had handled the trial had made adequate disclosures to the defense. The DOJ assigned a new team of prosecutors to the case, who determined that the trial team’s disclosures had been incomplete. The DOJ made a motion to set aside the conviction, which trial Judge Emmet Sullivan granted.

The Contempt Investigation

In April 2009, Judge Sullivan appointed Henry F. Schuelke as special prosecutor to investigate and, if warranted, prosecute contempt charges against six DOJ lawyers involved in the Stevens prosecution. The supervisory hierarchy of these six lawyers was as follows:

- William Welch, chief of the Public Integrity Section (PIN);
- Brenda Morris, chief deputy of PIN and lead trial counsel;
- Joseph Bottini, second chair trial counsel;
- Nicholas Marsh, third chair trial counsel;
- James Goeke, back office work; and
- Edward Sullivan, back office work.

The report noted that Matthew Friedrich, the head of the criminal division, and his principal deputy, Rita Glavin, also exercised supervisory roles and to a large degree displaced the supervisory role of William Welch. Morris, for example, directly reported to Glavin and Friedrich. Neither Friedrich nor Glavin, though, were subjects of the Schuelke contempt investigation.

Following an 18-month investigation, Schuelke on November 14, 2011, submitted a detailed and scathing report to Judge Sullivan finding numerous violations. The report found fault with all the prosecutors involved, stating that the prosecution was “permeated by the systematic concealment of significant exculpatory evidence.” In regard to the supervisory lawyers, it noted “the failures of effective supervision of the trial team” by the PIN leadership, which would include both Welch and Morris. It found that “Ms. Morris abdicated any meaningful supervisory role.” But the report found that neither Welch nor Morris had intentionally withheld Brady information. (Report to Hon. Emmet G. Sullivan, In re Special Proceedings, No. 1:09-mc-00198-EGS (D.D.C. Mar. 15, 2012), available at http://tinyurl.com/kknbxka.)

Schuelke reserved his harshest condemnations for two of the subordinate lawyers, Bottini and Goeke. Both were found to have intentionally withheld exculpatory information. The most junior member of the trial team, Sullivan, was spared a similarly
harsh assessment on the basis that “he deferred to the judgment of his seniors.”

Despite his unequivocal conclusion that there had been intentional prosecutorial wrongdoing by Bottini and Goeke, Schueller decided not to pursue contempt charges against any of the prosecutors. Judge Sullivan had been quite clear in telling the prosecutors that he expected them to make all required disclosures to the defense. But he never entered a written order to that effect, apparently because the prosecutors had assured him that they were making all required disclosures. Because of the lack of such a written order, Schueller concluded that a contempt charge could not be sustained. In effect, by erroneously telling the judge that they were fulfilling their disclosure obligations and convincing the judge a written order was unnecessary, the prosecutors insulated themselves from contempt charges.

DOJ Internal Disciplinary Review
The DOJ also investigated the conduct of the Stevens prosecutors. In August 2011, in contrast to the findings of the Schueller report, its OPR concluded that there had been no intentional professional misconduct by any of the prosecutors. It found “general responsibility” for the team as a whole. It found no professional misconduct on the parts of Morris or anyone higher in the chain of supervision. But OPR found two lawyers lower in the chain of command, Bottini and Goeke, guilty of reckless disregard of disclosure obligations as well as the exercise of poor judgment. (Office of Prof’l Responsibility, Dep’t of Justice, Report: Investigation of Allegations of Prosecutorial Misconduct in United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C. 2009) (EGS) (2011), available at http://tinyurl.com/l5gqxy3.)

In accord with its internal disciplinary procedures, the DOJ assigned Terrence Berg, a lawyer in its Professional Misconduct Review Unit (PMRU), to review the investigation and recommend appropriate sanctions. The PMRU is comprised of a career chief and two subordinate “line level” prosecutors, each of whom serves a two-year term. In a lengthy memorandum, Berg disagreed with the OPR report. He concluded that there had been no professional misconduct by Bottini and Goeke, only poor judgment. A DOJ lawyer can only be disciplined internally if there is a finding of professional misconduct, which can be intentional or reckless. A finding of poor judgment is insufficient. Accordingly, Berg concluded that there was no basis for imposing sanctions on either Bottini or Goeke. (Memorandum from Terrence Berg, Prof’l Misconduct Review Unit, to Joseph A. Bottini, Assistant U.S. Attorney, OPR Investigation of Joseph A. Bottini (August 15, 2011)).

Following the Berg memorandum, the DOJ reassigned the task of recommending appropriate sanctions to Kevin Ohlson, the chief of the PMRU and Berg’s supervisor. Ohlson disagreed with Berg and agreed with the OPR report’s earlier findings. He recommended 45-day and 15-day suspensions without pay respectively for Bottini and Goeke. On May 23, 2012, Associate Deputy Attorney General Scott Schools signed letters imposing suspensions on both. Schools largely agreed with the Ohlson recommendations, but reduced Bottini’s 45-day suspension to 40 days. (Letter from Scott N. Schools, Assoc. Deputy Attorney Gen., to Joseph W. Bottini, Assistant U.S. Attorney (May 23, 2012), available at http://tinyurl.com/m32h6ea; Letter from Scott N. Schools, Assoc. Deputy Attorney Gen., to James A. Goeke, Assistant U.S. Attorney (May 23, 2012), available at http://tinyurl.com/mmfvp7e.)

The two prosecutors appealed the sanctions to the Merit Systems Protection Board. On April 5, 2013, Administrative Judge Benjamin Gutman reversed the sanctions on the basis that the DOJ had failed to follow its own internal disciplinary procedure by reassigning the task of reviewing the OPR report and proposing sanctions from Berg to Ohlson. As noted earlier, the PMRU is comprised of one supervisor, its chief, Ohlson, and two “rank and file” attorneys, one of whom was Berg. Judge Gutman found that DOJ procedure required that one of the “rank and file” attorneys, in this case Berg, rather than the chief of the PMRU, perform the task of reviewing the OPR report and proposing sanctions. He noted that this requirement had been placed in the DOJ procedures because of the importance of having “similarly situated” peers “with actual experience” decide on sanctions in the first instance in order to promote a perception of fairness among those subject to internal discipline. (Goeke v. DOJ, Nos. SF-0752-12-0598-I-1, SF-0752-12-0600-I-1 (Merit Systems Protection Board Apr. 5, 2013), available at http://tinyurl.com/kklg6ot.) The DOJ has appealed Judge Gutman’s ruling.

In the rest of this column, we focus on a number of troubling issues raised by the investigations.

Culpability
A focal point throughout the investigations was each prosecutor’s culpability regarding the legal and ethics rules they violated. But should a prosecutor’s liability for sanctions turn on his or her culpability regarding the legal and ethical rules that govern the prosecutor’s behavior? If so, what sort of culpability should be sufficient?

The DOJ currently requires intent or recklessness regarding a violation in order to impose an internal sanction on a prosecutor. In doing so, it departs from what one finds in the contexts of both criminal law and lawyer discipline by the bar. In both
of these areas, proof of a mental state on the part of the alleged wrongdoer as to a statute or rule the person is charged with violating is not a prerequisite for liability.

Criminal law generally treats mental state about the existence of the law and whether one is violating the law as irrelevant in defining criminal offenses. Retributive concerns about ensuring adequate individual blameworthiness are seen as outweighed by utilitarian fears of encouraging ignorance of the law and also the pragmatic difficulties in proving awareness of the law. So the prosecution typically need not prove purpose, knowledge, recklessness, or even negligence on the part of an actor about the existence or meaning of the law the actor is charged with violating.

Similarly, in the context of professional discipline, the bar typically is not required to prove any level of culpability about the existence or meaning of the ethics rules at issue in order to prove a violation. Such culpability may, however, be considered in selecting a sanction.

In sharp contrast, the DOJ’s guidelines for internal discipline make proof of a prosecutor’s culpability about whether the prosecutor is violating an ethical obligation a prerequisite for establishing professional misconduct. Should prosecutors be treated under more generous standards than those that apply to other lawyers or to criminal defendants when it comes to awareness of the legal and ethical rules that govern their behavior? One can argue quite convincingly that the same pragmatic concerns that drive dispensing with proof of culpability regarding criminal statutes and legal ethics rules in the contexts of criminal law and lawyer discipline generally should also lead to dispensing with such proof in the context of internal discipline of prosecutors. In other words, if we conclusively presume all citizens to know the criminal law, and all lawyers to know the legal ethics rules that apply to them, doesn’t it also make sense to conclusively presume that prosecutors, whose job it is to enforce the law, know the constitutional and ethical rules that govern their conduct?

The DOJ’s requirement of culpability regarding the legal and ethical rules a prosecutor is charged with violating gives rise to the task of defining and distinguishing among various types of culpability, a task that has long troubled the criminal law. One thing that stands out in the various documents generated during the investigations of the Stevens prosecutors is the wide variation in assessments of culpability. The Schuelke report, for example, found that Bottini and Goeke engaged in intentional misconduct. OPR, Ohlson, and Schools found that these two were reckless. Berg, in contrast to all these assessments, found only negligence on the parts of Bottini and Goeke. One reason for this disparity in culpability assessments is that culpability concepts used internally by the DOJ for sanctions are not well or consistently defined.

The internal DOJ lawyer disciplinary process revolves around disciplinary offense definitions set forth in a document titled U.S. Department of Justice Office of Professional Responsibility: Analytical Framework (http://tinyurl.com/kdqq865). The framework recognizes two categories of bad behavior. The first is “professional misconduct,” which is subject to disciplinary sanction by the DOJ. The second category, often referred to simply as “poor judgment,” is not subject to discipline. Instead, instances of poor judgment are referred to the supervising United States attorney for possible disciplinary action.

The analytical framework further breaks professional misconduct down into two subcategories distinguished by culpability level: intentional professional misconduct and reckless professional misconduct. Although the document does not explicitly say so, intentional misconduct appears to be treated as a more serious offense than reckless misconduct.

In defining intentional and reckless misconduct, the framework’s drafters appear to have drawn on the Model Penal Code’s (MPC’s) culpability terms. But they did so clumsily. The categories they created are a confusing and inconsistent mix of MPC purpose, knowledge, recklessness, and negligence. The imprecision and confusion in these definitions are, in part, responsible for the disagreements within the DOJ about how to assess the culpability of the various prosecutors who worked on the Stevens trial.

The crux of the disagreements within the DOJ was how appropriately to classify the conduct of various prosecutors under the DOJ analytical framework. This classification—especially the distinction between professional misconduct and poor judgment—determined which prosecutors could be disciplined. All appeared to agree that there had been disclosure violations. But there was serious disagreement about who should be held responsible—in particular in regard to those such as Welch and Morris, who were higher in the supervisory chain of authority.

Failure to Sanction Supervisors
Both Schuelke and the investigating lawyers at the DOJ other than Berg failed to find any individual misconduct on the part of the supervisory lawyers involved in prosecuting the Stevens case. Although the failures to supervise and manage the case were harshly criticized, they were not seen by anyone other than Berg as amounting to misconduct. The investigators thus appear to have ignored Model Rule 5.1(b), which requires that “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other
lawyer conforms to the Rules of Professional Conduct.” It seems clear under both the Schuelke report and the OPR report that those higher in the supervisory chain violated this obligation.

**Singling Out Subordinates**
The central thrust of the Berg memorandum is his objection to singling out the lower level members of the trial team for sanctions while not pursuing sanctions against the supervising prosecutors. In other words, Berg’s primary concern was with a particular type of selective underenforcement. Selecting only some wrongdoers for punishment raises issues of fairness and equal treatment. Selecting only subordinate wrongdoers for punishment can also be objected to on the ground that supervisors may be viewed as both more dangerous and more blameworthy than subordinate lawyers because of the greater power entrusted to supervisors. Criticism of selective enforcement against subordinates may also be grounded in concern about scapegoating subordinates to deflect attention from others who are more powerful.

The DOJ analytical framework does not address this selective enforcement issue. It does not require that all culpable lawyers be disciplined or that supervisory lawyers be disciplined if subordinate lawyers are disciplined. Thus, the only practical way for Berg to give effect to his selective enforcement objection and block the imposition of sanctions on the subordinate prosecutors was to find that the subordinate lawyers lacked the level of culpability required by the DOJ framework—and this appears to be what he did. A disciplinary authority’s treatment after the fact of a supervisor in reviewing a possible violation has little if any relevance to the culpability level of a subordinate at the time of the violation. Berg’s memorandum strains to make this connection, and is not very convincing in its assessment of Bottini and Goeke’s culpability.

**Collective Responsibility?**
Everyone involved in investigating the Stevens prosecutors—Schuelke, OPR, Berg, Ohlson, and Schools—appears to have agreed that there was collective responsibility for the disclosure failures. What, if anything, though, are the practical consequences of a finding of collective responsibility? Is it possible to impose some sort of collective sanction following a finding of collective responsibility? One way of doing so might be through entity liability—the ethics equivalent of corporate governmental liability. Though some have argued for ethical entity liability for firms and other types of law offices, ethics rules do not currently recognize it. Currently only individual lawyers can be disciplined. Similarly, the DOJ analytical framework appears to envision only wrongdoing by and liability for individual lawyers. What are the implications of a finding of collective responsibility for individual liability? Is it a way of saying that no one is individually responsible? Or that all involved are individually responsible?

As pointed out above, Terrence Berg emphasized that the Stevens case was prosecuted by a team and that the team as a whole, and particularly the managers, should be held responsible. In essence, he took the position that collective responsibility should lead to individual liability for all the lawyers involved. But then he also adopted an interesting variation on this view—that collective responsibility means that all must be held responsible if any are to be held responsible. In other words, Bottini and Goeke should not be punished unless every member of the prosecution team is punished.

**Conclusion**
The Schuelke and DOJ investigations of the Stevens prosecutors were unusual in some respects. The amount of time and resources devoted to analyzing the conduct of the prosecutors was exceptional. Both the DOJ and Special Prosecutor Schuelke thoroughly investigated the allegations of misconduct, as evidenced by their lengthy and detailed reports running hundreds of pages. The investigations were also unusual in the amount of attention they drew from the profession, academic commentators, and the public. But the results—no contempt liability and, if Judge Gutman’s ruling stands, no internal sanctions on any of the prosecutors—are consistent with an all too familiar pattern of prosecutors evading punishment for misconduct. If the DOJ is serious about changing this pattern and a commitment to internal sanctions as a means of enforcing Brady disclosure obligations, a good start would be modifying and clarifying the culpability standards found in the DOJ analytical framework as well as addressing the issues of supervisory and collective responsibility.

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March 5–6 • Miami Beach, FL
Judicial Declaration of Expertise

BY PAUL C. GIANNELLI

After an expert witness has recited his or her credentials, the proponent often formally tenders the witness to the court as an “expert” for the purpose of having the judge declare the witness an expert—in front of the jury. Indeed, lawyers are advised to introduce their experts this way:

[Y]ou say to the judge something like, “Your Honor, I ask the court to declare Dr. Elko an expert in the field of physiology.” . . . And, of course, you’ve done it, so the judge says, “Yes.” How does the jury hear it? The jury hears it as the judge certifying that your expert is an expert. The judge’s authority begins to be associated with your expert’s authority. And since the judge is the ultimate figure in the courtroom, it’s a nice phenomenon to have working for you.


In 1994, Judge Richey wrote an article in which he argued against declaring a witness to be an expert in the presence of the jury. In his view, “trial courts [should] not inadvertently put their stamp of authority” on a witness’s opinion, and should protect against the jury's being “overwhelmed by the so-called ‘experts.’” He went on to explain: “Given the state of ‘expert’ testimony in our society today, it is a matter of fundamental fairness and, increasingly, the duty of the courts and counsel to neutralize the impact and possible prejudicial weight given to such opinions.” (Charles R. Richey, Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” under the Federal Rules of Evidence in Civil and Criminal Jury Trials, 154 F.R.D. 537, 559 (1994).)

Judicial Decisions

Subsequently, the Kentucky Supreme Court ruled that the trial judge should not declare the witness to be an expert in the presence of the jury:

Great care should be exercised by a trial judge when the determination has been made that a witness is an expert. If the jury is so informed such a conclusion obviously enhances the credibility of that witness in the eyes of the jury. All such rulings should be made outside the hearing of the jury and there should be no declaration that the witness is an expert.

(Luttrell v. Commonwealth, 952 S.W.2d 216, 218 (Ky. 1997).)

More recently, the Ninth Circuit reached the same conclusion:

To the extent that Defendants argue that the district court abused its discretion by failing to describe Meyer as an “expert” in front of the jury, we disagree. The determination that a witness is an expert is not an express imprimatur of special credence; rather, it is simply a decision that the witness may testify to matters concerning “scientific, technical, or other specialized knowledge.” Fed. R. Evid. 702.

(United States v. Laurienti, 611 F.3d 530, 547 (9th Cir. 2010).)

Other courts have expressed similar views:

• United States v. Gutierrez-Castro, 805 F. Supp. 2d 1218, 1235 (D.N.M. 2011) (“The Court will allow McNutt to testify, but it will not put its imprimatur on him as an expert witness in the jury’s presence. The Court will not allow the United States to offer him as an expert witness, the Court will not certify McNutt as an expert witness in the jury’s presence, and the jury instructions will not refer to him as an expert.”).

• Campbell v. Shelton, 727 N.E.2d 495, 500 (Ind. Ct. App. 2000) (“[W]e disapprove of the action undertaken by counsel here, i.e., asking the trial court to expressly accept a witness as an expert. A court should refrain from making comments such as the trial court made in the instant case.”).

ABA Policy

The position taken by these courts aligns with ABA policy. ABA Civil Trial Practice Standard 14 provides: “The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.” The accompanying comment observes: “The tactical purpose, from

(continued on page 79)
Someone Must Be Lying

BY STEPHEN A. SALTBURG

Is it permissible for prosecutors to argue in closing to a jury that in order to find a defendant not guilty, the jury would have to find that police officers lied? The answer is sometimes “yes” and sometimes “no.” The fact that there is no rule that governs all cases means that prosecutors must take care before arguing to the jury that someone must be lying. It also means that defense counsel must be prepared to object to improper argument.

The Easy Case

It is not difficult to imagine a case in which the prosecutor may argue that it is necessary to find that a police officer lied in order to find the defendant not guilty. Suppose, for instance, the defendant is charged with being a felon in possession of a firearm, the officer who arrested the defendant testifies to searching the defendant and finding a pistol in the defendant’s jacket, and the defendant testifies that the officer “planted” the pistol during the arrest. In this case, the only question is who is telling the truth. Either the officer or the defendant must be, and there is little, if any, possibility that the two simply had different, but equally honest, perceptions of how the gun came to be found on the defendant. In such a case, the prosecutor would be arguing that the jury should believe the officer; defense counsel would be arguing that the jury should believe the defendant; and the jury would understand that one of the two percipient witnesses was lying.

Other cases are not so straightforward. An example is United States v. Ruiz, 710 F.3d 1077 (9th Cir. 2013).

The Facts of Ruiz

Two sisters saw a man walking down the street in their residential neighborhood, holding a shotgun and mumbling. One called 911; five minutes later a police helicopter responded, and Officer Peck in the helicopter saw from 300 to 500 feet in the air a man run around the back of a house and throw a shoebox sized item over a fence into a vacant lot. Officer Porch arrived at the scene, searched the vacant lot, and found a shoe box with eight to 12 shotgun shells. Officer Verbanic arrived at the house as Raymond Ruiz Jr. was trying to enter through the back door. Officer Verbanic ordered Ruiz to get on the ground and noticed a shotgun about an arm’s length from Ruiz. The ammunition found in the shoebox matched the 12-gauge shotgun. The sisters both identified the man they had seen with the shotgun as Ruiz.

After Ruiz was arrested, Officer Ludikhuize took him to a squad car, where Ruiz waived his Miranda rights. Officer Ludikhuize testified at trial that Ruiz told him that the shotgun belonged to his father and that he had been trying to hide it when the police arrived. Ruiz testified at trial and denied making the statement. Ruiz was convicted of being a felon in possession of a firearm and ammunition.

The Prosecutor’s Closing Argument

The court of appeals described the prosecutor’s closing argument as follows:

To highlight parts of his closing argument, the prosecutor utilized a PowerPoint slide presentation consisting of pictures of the alleged crime scene, photographs of the witnesses who testified at trial, summaries of the testimony presented, and visual representations of the jury instructions, and of the government’s key arguments. Following a slide depicting the first element of the offense—“the defendant knowingly possessed the firearm or ammunition”—were three slides depicting alternative “way[s] to find defendant guilty.” The slides stated that the jurors could find Ruiz not guilty “only” if they found that Officers Peck and Ludikhuize “lied to you” and that the Fuentes sisters were mistaken. The court overruled Ruiz’s objection to the slides. (Id. at 1082 (alteration in original).)

The defense objection was directed to the argument that to find Ruiz not guilty the jury would have to conclude that Officers Peck and Ludikhuize lied. The court summed up the defense argument as follows:

At the heart of Ruiz’s argument is his contention that the prosecutor’s statements presented the jury with a false choice between his and the officers’ accounts, since the officers could have testified honestly, but nonetheless mistakenly perceived the events on the night in question.
This false choice, he asserts, improperly shifted the burden of proof to the defense.

(Id.)

**Fair Argument**

The court quoted from several prior cases to highlight when the argument about credibility of law enforcement officers is permissible:

As we have previously explained, “credibility is a matter to be decided by the jury.” *United States v. Sanchez*, 176 F.3d 1214, 1224 (9th Cir. 1999). To that end, “prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying.” *Id.* (citation and internal quotation marks omitted). “It is also true, however, that the prosecution must have reasonable latitude to fashion closing arguments. Inherent in this latitude is the freedom to argue reasonable inferences based on the evidence. In a case that essentially reduces to which of two conflicting stories is true, it may be reasonable to infer, and hence to argue, that one of the two sides is lying.” *United States v. Molna*, 934 F.2d 1440, 1445 (9th Cir. 1991) (citing *United States v. Laurins*, 857 F.2d 529, 539 (9th Cir. 1988) (holding that the prosecutor’s statement that defendant was a liar could be construed as a comment on the evidence) and *United States v. Birges*, 723 F.2d 666, 672 (9th Cir. 1984) (“It is neither unusual nor improper for a prosecutor to voice doubt about the veracity of a defendant . . . .”); see also *United States v. Wilkes*, 662 F.3d 524, 539–42 (9th Cir. 2011) (same); *United States v. Tucker*, 641 F.3d 1110, 1120–21 (9th Cir. 2011) (“Prosecutors can argue reasonable inferences based on the record, and have considerable leeway to strike hard blows based on the evidence and all reasonable inferences from the evidence. A prosecutor may express doubt about the veracity of a witness’s testimony [and] may even go so far as to label a defendant’s testimony a fabrication.” (alteration in original) (internal quotation marks and citations omitted)).

(Ruiz, 710 F.3d at 1082–83 (footnote omitted).)

**United States v. Wilkes**

The court cited *Wilkes* and explained why in that case it rejected the defendant’s argument that the prosecutor engaged in improper burden shifting in arguing that the defendant’s testimony was a “preposterous charade” and that “each [government witness], if you think about their testimony and what they told you, you either have to believe all of those people or you believe Brent Wilkes. That’s the choice before you. You can’t believe both.” (662 F.3d at 541 (alteration in original).)

The court explained that it rejected the defendant’s argument because the case came down to which of two conflicting stories was true and, therefore, the prosecutor’s argument was a permissible inference from the evidence. The court added that the prosecutor made his argument after explaining at length to the jury what the government was required to prove in order for the jury to find Wilkes guilty.

**United States v. Tucker**

The court also offered *Tucker* as an example of permissible argument. *Tucker*, however, addressed prosecutor argument concerning the improbability that a defense theory of the case was credible rather than a comparison of government and defense witnesses. The *Tucker* court summarized a portion of the prosecutor’s closing argument as follows:

The prosecutor, in her closing argument, also commented on what the jury would have to find or believe, in order to convict Tucker. The prosecutor said she wanted “to point out a couple of things that you as jurors are going to have to find to be true if you decide that the defendant is not guilty. Because for you to say that he's not guilty, these are the things that you have to believe. . . . The prosecutor went on to list various aspects of the defense theory of the case that the jury would “have to believe,” and stated “[y]ou will have to believe that and that is not logical. It’s not reasonable.”

(641 F.3d at 1115 (alteration in original).)

The court observed that after defense counsel unsuccessfully objected that the standard of proof was being shifted to the defense, the prosecutor made the following argument:

To find the defendant not guilty, remember, you have to have some kind of reasonable doubt. And the key word there is “reasonable” . . . . If you are gonna find him not guilty, you also have to believe that [lists various points of the defense argument]. . . . You will have to believe that. Because if you do not, that means that that [sic] the personal property in that master bedroom was the defendant’s. It means it was his bedroom. It means that it was his shotgun. It means that he is guilty. You would also have to believe that the defendant did not lie. And do you believe that? . . .
Again, if you’re going to have a doubt it must be reasonable; it must be based on reason. (*Id.* (alteration in original).)

The *Ruiz* opinion noted that the *Tucker* court found that the prosecutor’s argument was “inartful,” but that it was permissible because it simply communicated that the jury would have to believe implausible aspects of the defendant’s testimony in order to believe that the defense theory was credible. (*Ruiz*, 710 F.3d at 1083–84.)

**Back to Ruiz**

In *Ruiz*, the court concluded that “the prosecutor’s argument came very close to altering the burden of proof.” (*Id.* at 1084.) The court distinguished between comparing (1) Officer Ludikhuize’s testimony to that of the defendant, and (2) Officer Peck’s testimony to that of the defendant.

The court recognized that “Ruiz’s testimony was squarely at odds with Officer Ludikhuize’s testimony in one key respect—namely, Ruiz denied confessing to Ludikhuize that he was attempting to hide the shotgun when police arrived.” (*Id.*) Although the court did not say so explicitly, it appears that *Wilkes* would strongly support the conclusion that it would have been permissible for the prosecutor to argue that either the defendant or the officer must be lying about whether the defendant admitted that he was attempting to hide the shotgun. Not only is this a rational argument based on the evidence, but it also is an inevitable one. There is no other way to explain the difference in testimony.

The prosecutor’s suggestion that either Officer Peck or the defendant must be lying was neither inevitable nor correct, as the court explained:

[Ruiz’s] testimony vis-a-vis Officer Peck’s observation of an item thrown over the fence into the adjoining vacant lot was too equivocal. Ruiz testified that, upon observing Peck’s spotlight trained on his grandmother’s house, he attempted to hide because he was drinking beers with his father in violation of his parole. To this end, he ran around the side of the house, where he stated that he may have thrown his beer bottle into the backyard adjoining the fence and vacant lot, but could not recall with certainty how he disposed of the beer bottle. Although Ruiz also testified that he did not throw “anything” over the fence, including the “panel” or shoe box-sized item that Peck observed, Peck could have mistaken the size and shape of the item thrown from his vantage point nearly two football fields above the scene.

As the foregoing suggests, the prosecutor’s argument that either Peck or Ruiz must be lying could well be construed as arguing an inference unsupported by the evidence, and thereby altering the burden of proof. (*Id.*)

The point the court made was that it was possible for Ruiz and Officer Peck both to be telling the truth, which meant that the situation was very different from the comparison of Officer Ludikhuize’s and the defendant’s testimony.

**The Concern**

The concern that arises when prosecutors argue that someone must be lying is that the burden of persuasion is subtly shifted, and that courts must be careful to ensure that jurors are not misled as to what the government must prove. To be clear, when a prosecutor argues that for a defendant to be found not guilty the jury must believe that police officers lied, the jury may be misled into thinking that if it finds that the police officers were truthful then they must convict the defendant. This is misleading because honest police officers may be mistaken, and even honest police officers who are not mistaken may not have presented sufficient evidence to meet the beyond a reasonable doubt standard.

Similarly, when a prosecutor argues that either police officers or the defendant must be lying, the jury may be misled into believing that its task is simply to decide who is truthful and that this one decision will be case determinative. It may well be true in cases like *Wilkes*. It is certainly true that the jury in *Ruiz* inevitably had to decide whether to believe Officer Ludikhuize or Ruiz. If the jury believed the officer, it probably would not matter very much whether the jury also believed Officer Peck, since Officer Ludikhuize’s testimony established that Ruiz was in possession of a firearm. Whether or not he also possessed the ammunition that Officer Porch found in the shoe box would not have mattered, and thus Officer Peck’s testimony would also have been of little importance, even if discredited.

**The Decision**

The court of appeals ultimately did not decide whether the prosecutor committed error in the closing argument. Instead, it concluded that any error was harmless given the substantial evidence adduced by the government.

**Lessons**

1. The *Ruiz* court relied in part on the fact that before making the argument that someone must be lying, the prosecutor gave a lengthy explanation to (CONTINUED ON PAGE 79)
Shepherd Testifies on the Hill on Hot-Button Issues

BY KYO SUH

On June 14, the Over-Criminalization Task Force, House Judiciary Committee convened a hearing on overcriminalization and overfederalization at the Rayburn Building on Capitol Hill. Section Chair William N. Shepherd testified before the committee on these national hot-button issues.

Shepherd expressed the ABA’s position that the breadth and consequences of federal criminal law are excessive, costly, and counterproductive, and asked the bipartisan task force to conduct a comprehensive review of such laws because the sheer number of federal criminal laws “[make] it impossible for the lay person to understand what is criminal and what is not.” Shepherd warned that “[p]unishment . . . can lose its deterrent, educative, rehabilitative, and even retributive qualities, under the barrage of overly broad, superfluous statues.”

The ABA identifies overfederalization and overcriminalization as liabilities with significant financial and legal costs. An ABA study revealed in 1998 that more than 40 percent of the federal provisions enacted since the Civil War were enacted since 1970.

“While only a small fraction of our nation’s prosecutions are handled in federal court, the overwhelming number of regulations and statutes that carry criminal penalties are found on the federal side of the ledger,” Shepherd said. Overcriminalization is evidenced by the 6.98 million offenders under supervision in 2011 in the United States. “Nearly half of the prisoners in the United States have been incarcerated for nonviolent offenses,” Shepherd said. “Reducing over-criminalization saves taxpayer money and improves the lives of all citizens.” Shepherd’s complete testimony can be found at http://tinyurl.com/mdazdgc.

Annual Meeting Programs

The Criminal Justice Section’s programs during the ABA Annual Meeting in San Francisco, California, August 8–10, included:

- “International Double Jeopardy: What Practitioners Need to Know before Advising Clients about Criminal and Regulatory Liability for Acts Committed Abroad”;
- “Annual Survey of Supreme Court Decisions”;
- “Corporate Social Responsibility Is 2013’s Newest Business Imperative: Are You Prepared for the Regulatory Deluge”; and
- “Faster, Better Justice: Cutting Edge Apps for Lawyers Can Simplify Your Practice and Increase Your Efficiency in the Courtroom.”

Livingston Hall Juvenile Justice Award

Edwin “Ned” Chester was honored with the Livingston Hall Juvenile Justice Award at the CJS Spring Meeting in Boca Raton, Florida, on May 11, in recognition of his tireless dedication to juvenile
Justice issues. Ned led a collaborative group of juvenile defense attorneys, corrections officials, district attorneys, psychologists, judges, elected officials, and others who committed their time and attention over a 10-year period to move the juvenile detention facility in the state of Maine from a harsh, punitive jail to a positive, skills-building, rehabilitative institution.

New Section Books

- The Rights of the Accused under the Sixth Amendment: Trials, Presentation of Evidence, and Confrontation by David K. Duncan, Paul Marcus, Tommy Miller, and Joëlle Anne Moreno. This essential resource takes a close look at the Sixth Amendment to the United States Constitution and those key provisions that have a great impact on defendants in criminal prosecutions. The book was authored by four noted legal professionals, each from different backgrounds (private practice of law, former prosecutors, academics, jurists) and from different parts of the country.

- The State of Criminal Justice 2013 edited by Myrna S. Raeder. In this compelling annual edition, authors from across the criminal justice field provide essays on topics ranging from white collar crime to international law to juvenile justice. This publication also examines and reports on the major issues, trends, and significant changes in the criminal justice system. As one of the cornerstones of the Criminal Justice Section’s work, this publication serves as an invaluable resource for policy makers, academics, and students of the criminal justice system alike. The 2013 volume contains 26 chapters focusing on specific aspects of the criminal justice field, with summaries of all of the adopted official ABA policies passed in 2012–2013 that address criminal justice issues.

Hanna Retires, Messmer Named Section Director

On May 17, Criminal Justice Section Director Jack C. Hanna retired from the ABA after eight years of dedicated service to the Section and 16 years with the ABA. Jack directed a team of 11 staff members while leading a membership of more than 20,000+ prosecutors, defense attorneys, judges, law professors, academics, and other legal professionals. On May 15, the ABA and the Section hosted a spectacular celebration on the veranda of the former ABA Washington, D.C., office, where more than 100 colleagues and close friends gathered to honor his service.

The unflagging vision and charisma that Jack Hanna brought to the Criminal Justice Section over the past eight years will be sorely missed. He has continuously infused great energy and passion into the Section, working closely with its leadership to expand the reach of the Section’s sponsorships, partnerships, programs, international initiatives, special projects, publications, and membership. His efforts in executing a Long-Range and Strategic Communications Plan were indispensable to the widespread recognition of the Section as an undisputed leader addressing critical criminal justice issues throughout the nation.

With Jack’s retirement, the Section leadership selected Jane Messmer, senior staff attorney in the Criminal Justice Section since early 2012, as the new Section director. In her position as staff attorney, Jane assisted with policy and governance concerns and worked with members to plan the Section’s international conferences in London and Frankfurt in 2012. Jane is a former assistant...
Although the final outcome of the AUO investigation is not yet certain, the case demonstrates that the Antitrust Division is prepared to be aggressive with respect to the prosecution of international cartels, even where most of the conduct occurred outside of the United States.

Also during 2012, the Antitrust Division began an investigation of price-fixing in the auto parts industry. The investigation initially centered on an Asia-based cartel to fix the price of wire harness, and expanded to include other automobile parts. To date, the majority of the corporations that have pleaded guilty and paid fines have been based in Asia. In 2012, Yazaki, a Japanese manufacturer of various auto parts, agreed to plead guilty and pay a fine of $470 million, the second largest fine ever imposed for an antitrust violation. In conjunction with Yazaki’s corporate plea, four of its executives also agreed to plead guilty, and to serve prison sentences ranging from 15 months to two years. Two of these executives—Japanese nationals—were sentenced to two years in prison, which is the longest term of imprisonment ever imposed on foreign nationals voluntarily submitting to US jurisdiction for antitrust violations. (See Press Release, Dep’t of Justice, Acting Assistant Attorney General Sharis A. Pozner Speaks at the Briefing on Department’s Enforcement Action in Auto Parts Industry (Jan. 30, 2012), http://tinyurl.com/6lt6e2u.)

Around the same time, Furukawa Electric Company Ltd., a Japanese producer of wire harness and other related automotive products, agreed to pay a $200 million criminal fine, and three of its executives received individual prison sentences. (Id.) In addition, Denso, a Japanese manufacturer of various auto parts, agreed to pay a $73 million fine. (See Corporate Fine, supra.) Several other Asian companies, including Fujikura Ltd., Tokai Rika Co., G.S. Electech, and Nippon Seiki Co., have also pleaded guilty to anticompetitive conduct in the auto parts industry, and have paid fines ranging from $1 million to $20 million. (See Division Update Spring 2013, supra.)

In recent months, the JFTC has announced its own fines against various companies for fixing auto parts prices, as a result of its parallel investigation. (See Press Release, Japan Fair Trade Commission, The JFTC Issued Cease and Desist Order and Surcharge Payment Orders to Participants in Bid-Rigging Conspiracies for Automotive Parts (Nov. 22, 2012), http://tinyurl.com/l4yo66z.) Although neither government has divulged publicly the details of their collaboration, in a recent update, the Antitrust Division noted that it “continues to cooperate with its counterparts” in Japan and Korea, among other countries, on the auto parts investigation. (Division Update Spring 2013: Criminal Program, Dep’t of Justice, The JFTC Issued Cease and Desist Order and Surcharge Payment Orders to Participants in Bid-Rigging Conspiracies for Automotive Parts (Nov. 22, 2012), http://tinyurl.com/l4yo66z.)

Conclusion

It is clear that the DOJ views anticompetitive conduct as a worldwide problem, particularly in today’s global economy, where illegal agreements in foreign jurisdictions have the power to harm American consumers. To date, the Antitrust Division has addressed foreign anticompetitive conduct on two fronts: First, it has sought to advance antitrust policy in jurisdictions where enforcement regimes are still developing and to foster cooperation with its foreign counterparts. Second, it has been aggressive in its prosecution of foreign conduct—both corporate and individual—that affects US commerce. The two goals are intertwined. As antitrust policy in the United States and foreign jurisdictions converges, formal and informal cooperation increases, and enforcement becomes more effective.

The Antitrust Division’s recent enforcement efforts with respect to Asia are illustrative. The long history of cooperation with Japan and Korea, and the more recent overtures with China’s antitrust authorities, have led to increased harmonization of antitrust policy with respect to cartel conduct, and can be expected to provide the Division with additional tools to prosecute Asia-based conduct that affects US consumers. That in turn will allow the DOJ to maintain its aggressive stance toward combatting anticompetitive conduct overseas.
from decades of secrecy in the Cayman Islands that has serious implications for companies and hedge funds domiciled in this territory.

ICIJ Investigation

Finally, the transparency trend is being furthered by the efforts of the press. The ICIJ received leaked data about secret offshore accounts that is 160 times bigger than the State Department files leaked by Wikileaks. An analysis conducted by an international consortium of media organizations confirmed that “havens in the South Pacific and Caribbean in some cases have become sanctuaries for individuals seeking to conceal their activities from investigators and investors.” (Scott Higham et al., *Offshore Tax Havens Became Traps for Investors*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 7, 2013), http://tinyurl.com/qhewfk4.) The investigation was described as the “largest data leak in history,” concluding that “alongside perfectly legal transactions, the secrecy and lax oversight offered by the offshore world allows fraud, tax dodging and political corruption to thrive.” (Gerard Ryle et al., *Secret Files Expose Offshore’s Global Impact*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2013), http://tinyurl.com/d692qdz.)

The results of the investigation, which were reported in April 2013, included findings that shed some light on the purposes for which offshore accounts are used. For instance, the investigation analyzed documents that revealed the following:

- A prominent Canadian lawyer, husband to a liberal senator, moved $1.1 million to secretive financial havens while he was locked in battle with the Canada Revenue Agency over his taxes.
- A corporate mogul whose business empire has won building contracts worth billions of dollars amid Azerbaijani President Ilham Aliyev’s massive construction spree is tied to the president’s family through secretive offshore companies.
- Two major French banks, BNP Paribas and Crédit Agricole, oversaw the creation of a large number of totally opaque offshore companies in the British Virgin Islands, Samoa, and Singapore from the late 1990s until the end of the 2000s for clients in search of secrecy and lower tax rates.
- A half-billion-dollar Ponzi scheme in Venezuela shuffled investor money among a maze of offshore companies, hedge funds, and bank accounts stretching from the Cayman Islands to Switzerland and Panama, and smoothed the way by funneling bribes to officials in Venezuela.

(See Kimberley Porteous & Emily Menkes, *Highlights of Offshore Leaks So Far*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (June 14, 2013), http://tinyurl.com/cczchyd.)

As a result of this information and mounting international pressure, several countries, including Austria, Britain, France, Germany, Italy, Luxembourg, and Spain, are moving toward ending banking secrecy.

Conclusion

With the implementation of laws around the world that call for more transparency within the financial system, there are bound to be serious ramifications for those using hidden accounts to engage in improper activities. If more countries begin to require stricter reporting and record-keeping procedures to be put in place, this may expose the identities and monetary transactions of thousands of corporations and individuals around the world who have, for either legal or criminal reasons, decided that they wanted to remain anonymous. It may also lead to more effective investigations into tax evasion, corruption, money laundering, and other white collar crimes as investigators are allowed better access to suspicious money trails.

However, there is a fear that laws requiring more transparency abroad will have unintended consequences that may adversely affect persons who are not attempting to commit crimes. Companies and individuals that maintain accounts abroad should be aware of these recent actions and should take these laws into account when planning their financial structures.
fulfilling those obligations. However, once all the necessary information is provided, defendants have no right to play Hamlet week after week as to a fair and reasonable plea offer—at least not without some consequence.

Effective communication also calls for being candid and open with your adversary. The benefits of being up front and honest about your case in negotiations—efficiency, effectiveness, and trust—far exceed what you might gain through gamesmanship and secrecy. Therefore, try to be straightforward with opposing counsel about your priorities, concerns, and knowledge of the case. Prosecutors have obligations to statute, office policies, victims, and to the public at large. Therefore, when making it clear to counsel how “low” you are willing to go on a sentence, resist the urge to use Mom’s, “Because I said so.” Instead, explain your reasoning. This helps you maintain credibility while saving your time and opposing counsel’s breath.

Execution. Sometimes, no matter how well you know your case, or how effectively you communicate with defense counsel, things don’t go as planned. As firm as prosecutors should be generally, flexibility may be just as important. It is essential to know how to achieve an acceptable resolution when a defendant balks at a reasonable offer, a judge makes a surprisingly adverse evidentiary decision, or your own priorities have quickly changed.

Creativity is often the key. Knowing about alternative sentences that you and your office can live with (e.g., inpatient drug treatment, house arrest, or monitoring bracelets) and understanding the operable law—such as exceptions to sentencing minimums under statute, permissible downgrades, and discretionary jail credits—can help resolve a difficult case. When it comes down to it, your credibility with opposing counsel, bolstered by your knowledge of the case and effective, honest communication, will help to achieve a fair and effective resolution.

It’s no secret that obtaining pleas is an important goal of both sides. The vast majority of cases resolve this way. However, part of good negotiating also involves knowing when to stop negotiating and take a case to trial. Prosecutors should abide by the guiding law, office policies, and their own instincts. The only way defense counsel will know our plea offers mean anything is by standing behind them and taking cases to trial when necessary. By effectively navigating the plea negotiating process, prosecutors can establish their credibility, effectively resolve cases, and be assured that when the time for a trial comes, they are trying the right cases, for the right reasons.
CERT ALERT (CONTINUED FROM PAGE 61)

had “brandished” a firearm there was a mandatory minimum sentence of seven years. The jury verdict did not include a finding that he had “brandished” a weapon. Nevertheless, the trial judge sentenced him to the seven-year mandatory minimum, concluding that he had in fact brandished the weapon. In an opinion by Justice Thomas, which Justices Ginsburg, Sotomayor, and Kagan joined in full and Justice Breyer joined in part, the Court overruled Harris, concluding that the mandatory minimum increases the penalty for the offense and thus is an “element” that must be found by the jury. Justice Breyer concurred, noting his continued disagreement with Apprendi but agreeing that Harris should be overruled because there is no logical distinction between requiring a jury finding of facts that authorize the judge to impose a higher maximum sentence (Apprendi) and requiring a jury to find facts that mandate imposition of a higher minimum sentence (Harris and Alleyne). Justice Sotomayor filed a concurring opinion, addressing the question of stare decisis raised in Justice Alito’s dissent. Chief Justice Roberts filed a dissent in which Justices Scalia and Kennedy joined.

ARGUMENTS SCHEDULED

October 8, 2013:
Burt v. Titlow, cert. granted, 133 S. Ct. 1457 (June 25, 2012) (No. 12-414), Cert Alert, 28:2 CRIM. JUST. at 30 (Summer 2013) (issues involving claim that ineffective assistance of trial counsel prevented habeas petitioner from accepting a plea).

October 16, 2013:
Kansas v. Cheever, cert. granted, 133 S. Ct. 1460 (Feb. 25, 2013) (No. 12-609), Cert Alert, 28:2 CRIM. JUST. at 29 (Summer 2013) (is Fifth Amendment privilege violated when prosecution offers evidence of court-ordered mental exam to rebut affirmative evidence that defendant lacked necessary mental state for capital offense because of effects of methamphetamine use?).

Kaley v. United States, cert. granted, 133 S. Ct. 1580 (Mar. 18, 2013) (No. 12-464), Cert Alert, 28:2 CRIM. JUST. at 30 (Summer 2013) (constitutionality of postindictment ex parte order freezing defense assets that could be used to retain counsel of choice).
the proponent’s perspective, is to obtain a seeming judicial endorsement of the testimony to follow. It is inappropriate for counsel to place the court in that position.” (CIVIL TRIAL PRACTICE STANDARDS 14 cmt. (2007).) This policy was extended to criminal cases in 2012:

[T]he American Bar Association urges judges and lawyers to consider the following factors in determining the manner in which expert testimony should be presented to a jury and in instructing the jury in its evaluation of expert scientific testimony in criminal and delinquency proceedings:

6. Whether the court should prohibit the parties from tendering witnesses as experts and should refrain from declaring witnesses to be experts in the presence of the jury. (ABA HOUSE OF DELEGATES, RESOLUTION 101C (Feb. 6, 2102); see also Paul F. Kirgis, Curtailing the Judicial Certification of Expert Witnesses, 24 AM. J. TRIAL ADVOC. 347 (2000.).)

TRIAL TACTICS (CONTINUED FROM PAGE 71)

the jury of the elements that the government was required to prove and reminded the jury of the government’s burden of proof. Prosecutors may reduce the likelihood that an argument that crosses the line will be found prejudicial if they take pains to be clear to the jury what they must prove and the burden of proof they must meet.

2. It is important for prosecutors to consider before making an argument that either law enforcement officers or the defendant must be lying whether such an argument is applicable to all law enforcement officers involved in the case or only some. Ruiz highlights the importance of such consideration. An argument that either Officer Ludikhuize or Ruiz must be lying likely would have withstood a challenge, whereas an argument that either Officer Peck or Ruiz must be lying likely would not have.

3. Defense counsel have the burden of objecting when prosecutors improperly make the “somebody must be lying” argument. The objection takes on force when defense counsel is able to explain to the trial judge how the argument may impermissibly mislead the jury as to what it must believe to convict the defendant.
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