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REINING IN THE FOREIGN CORRUPT PRACTICES
ACT: THE SUPREME COURT IGNORES A PERFECT
OPPORTUNITY

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Reining in the Foreign Corrupt Practices Act: The Supreme Court Ignores a Perfect Opportunity

*J. Scott Ballenger, Douglas N. Greenburg, and Nathan H. Seltzer**

I. Introduction

Many companies and members of the Foreign Corrupt Practices Act (“FCPA”)¹ bar had hoped that the Supreme Court would grant certiorari and review the Fifth Circuit’s landmark decision in *United States v. Kay*,² which remains the only significant appellate decision to interpret the scope of the FCPA. The core dispute in *Kay* concerned whether the statute’s prohibition against paying bribes to foreign officials to “obtain[] or retain[] business”³ covers only payments made to foreign officials to secure particular business, or instead any improper payments that facilitate an American company’s general business activities or competitive position. The Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) have staked an increasingly aggressive prosecution campaign on the latter interpretation—prosecuting American executives and companies for, among other things, paying local customs agents to facilitate the movement of goods in and out of foreign ports.

The government’s interpretation greatly expands the number of interactions overseas that could produce enterprise-threatening FCPA liability—and hence greatly increases the already daunting investigative and other costs associated with FCPA compliance. Yet there is no

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¹Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g) to (h), 78dd-1, 78dd-2, 78dd-3, 78ff), amended by Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at §§ 78dd-1 to 78dd-3, 78ff), and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at §§ 78dd-1 to 78dd-3, 78ff).

²*U.S. v. Kay*, 513 F.3d 432 (5th Cir. 2007), cert. denied, 129 S. Ct. 42, 172 L. Ed. 2d 21 (2008).

³15 U.S.C. § 78dd-1(a)(1)(B).

clear indication, from the text or history, that Congress ever intended such a sweeping interpretation. By allowing the *Kay* decision to stand,⁴ the Court missed an important opportunity to rein in the government's enforcement program or, at the very least, to provide much needed clarification for businesses operating overseas. In the wake of *Kay*, the following question deserves consideration:

Should companies continue to settle FCPA investigations as a matter of course, or is it time for companies to (strategically) litigate with the government over the scope of the Act with the chance of obtaining a favorable court of appeals decision and ultimately Supreme Court review?

This article addresses this question by reviewing the issues in *Kay* and presenting some of the arguments that could be made by a company or individuals litigating an FCPA case against the government, where the allegations are outside the core FCPA purpose of preventing corrupt payments to retain or obtain business.

II. The Fcpa and Payments Not Made to Obtain or Retain Business

A. *United States v. Kay (& Murphy)*

David Kay and Douglas Murphy, former executives of American Rice, Inc., were charged with violating the FCPA for conduct that arose from American Rice's operations in Haiti during the 1990s, a period of rampant corruption and lawlessness in that country. In 1998 and 1999, Kay and Murphy authorized payments to Haitian customs officials to reduce the company's custom duties and sales taxes for rice shipments into Haiti, and to be able to bring ships into port unharassed. The district court initially found that bribery aimed at reducing customs duties is not a payment made "in order to assist . . . in obtaining or retaining business,"⁵ and dismissed the indictment.⁶

The government appealed the dismissal of the indictment, and the United States Court of Appeals for the Fifth Circuit reversed.⁷ The Fifth Circuit recognized that no other court had construed the FCPA to prohibit payments for the purpose of reducing taxes, and it held that the FCPA's text was "ambiguous as a matter of law" as to whether it

⁴*Kay v. U.S.*, 129 S. Ct. 42, 172 L. Ed. 2d 21 (2008) (mem.).

⁵15 U.S.C. § 78dd-1(a)(1).

⁶*U.S. v. Kay*, 200 F. Supp. 2d 681, 686–87 (S.D. Tex. 2002), rev'd and remanded, 359 F.3d 738, 6 A.L.R. Fed. 2d 711 (5th Cir. 2004).

⁷*U.S. v. Kay*, 359 F.3d 738, 6 A.L.R. Fed. 2d 711 (5th Cir. 2004).

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encompassed tax-related payments.⁸ Disregarding the traditional “rule of lenity,” under which all ambiguities in criminal statutes are supposed to be resolved in the defendant’s favor, the Fifth Circuit relied on dubious legislative history to conclude that the FCPA reaches payments directed at reducing tax obligations if the defendants intended for the tax savings to improve the company’s competitive position and thereby improve business generally.⁹ The Fifth Circuit’s decision in *Kay I* was the first case that extended the reach of the FCPA to cover these kinds of regulatory payments to foreign officials that were not directly connected to obtaining or retaining business with any person.

Kay and Murphy were then convicted at trial under the Fifth Circuit’s expansive interpretation of the statute. On appeal for the second time, the Fifth Circuit held that the FCPA gave Kay and Murphy “fair warning” that their conduct was unlawful, despite the court’s own prior holding that the statute is ambiguous.¹⁰ The Fifth Circuit also held that its first-impression interpretation of the statute could be applied retroactively to the defendants’ conduct, which occurred more than five years prior to the Fifth Circuit’s decision in *Kay I*.

Kay and Murphy then filed a petition for certiorari with the Supreme Court, which was supported by *amicus* briefs from the Chamber of Commerce of the United States of America, and the National Association of Criminal Defense Lawyers. Unfortunately, the Supreme Court denied review.¹¹

Since the Fifth Circuit’s decision was the only federal court decision interpreting the scope of the statute’s “obtaining or retaining business” language, there was no “circuit split” requiring Supreme Court. But there is good reason to believe that a conflict of authority in the federal courts of appeals may take a long time to develop, if it ever does. In the absence of other decisions, *Kay* has effectively become the law nationwide. And because of the enterprise-threatening risks associated with any criminal indictment of a business enterprise—as illustrated by the indictment of Arthur Andersen¹²—companies (as opposed to individual defendants) have been reluctant to litigate FCPA

⁸*Kay I*, 359 F.3d at 744–46 & n.21.

⁹*Kay I*, 359 F.3d at 759.

¹⁰*U.S. v. Kay*, 513 F.3d 432 (5th Cir. 2007), cert. denied, 129 S. Ct. 42, 172 L. Ed. 2d 21 (2008).

¹¹*Kay v. U.S.*, 129 S. Ct. 42, 172 L. Ed. 2d 21 (2008) (mem.).

¹²“When Anderson’s indictment was unsealed, the company essentially fell apart, losing its clients and the support of its creditors — both of which were likely scared off by the stigma of criminality and the potential penalties that a guilty verdict would bring to Anderson The lesson that prosecutors and corporations alike seemed to take from Anderson’s collapse was that corporate criminality, even just an indictment,

cases against the government, and the government is therefore able to force companies into burdensome settlements without exposing its basic legal theory to judicial scrutiny.

Of course the Supreme Court's decision not to review the case should not be interpreted as an endorsement of the Fifth Circuit's decision. The Supreme Court has always explained that "'[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" ¹³ But as a practical matter, the current lack of other FCPA cases in the pipeline that could lead to Supreme Court review means that companies are likely facing many more years of FCPA enforcement that arguably exceeds what Congress authorized in the statute—perhaps further emboldened by the government's victory in *Kay*.

B. The Scope of the FCPA

The proper interpretation of the FCPA's business nexus requirement concerns the fundamental scope of one of the most important American laws governing the conduct of business overseas, and presents an issue of national and international importance. As globalization increases, many businesses compete vigorously for business overseas and in emerging markets, and are governed by the FCPA. The Fifth Circuit's decision in *Kay* approved of the government's expansive interpretation and essentially broadens the FCPA's substantive coverage from interactions with foreign officials for the purpose of obtaining or retaining business, to essentially any interaction with a foreign official on any subject, however trivial, that may in some manner enhance a company's competitive advantage. It therefore greatly increases the investigative and compliance burden on U.S. businesses without any clear direction from Congress.

To avoid the risk of enterprise-threatening criminal liability, a U.S. company must be extremely vigilant about any interaction potentially subject to the FCPA. It may, for example, need to require multiple internal reviews and approvals, scrupulously document and retain the evidence of legitimate payments to "facilitat[e] or expedit[e] . . . routine governmental action," and devote substantial resources to vetting and monitoring third-party representatives (or refrain from delegating FCPA-covered interactions at all). And when it learns that conduct

can have ruinous repercussions on a corporation." Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell and End to Corporate Criminal Liability?*, 40 Colum. J.L. & Soc. Probs. 77, 97-98 (2006) (footnotes omitted).

¹³*Missouri v. Jenkins*, 515 U.S. 70, 85, 115 S. Ct. 2038, 132 L. Ed. 2d 63, 100 Ed. Law Rep. 506 (1995) (quoting *U.S. v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 67 L. Ed. 361, 1923 A.M.C. 47 (1923)).

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has occurred that may have violated the FCPA, a prudent U.S. company must ordinarily pursue an internal investigation and wrestle with the complex decision of whether to self report the issue to the government.

Internal investigations are often extraordinarily expensive because of their complexity and the need for U.S. lawyers and financial investigators to operate in unfamiliar countries and languages. Comprehensive internal investigations often range from \$1 million to \$20 million.¹⁴ As of November 2007, in the midst of a long running investigation, electronics company Siemens disclosed that it has already spent \$500 million on its internal investigation overseen by Debevoise & Plimpton.¹⁵ In mid-December 2008, Siemens ultimately settled that case with the DOJ and SEC for \$800 million in fines (plus approximately \$800 million more to German authorities)—almost twenty times higher than the largest previous penalty under the FCPA. Under the terms of that settlement, Siemens will be required to have an external compliance monitor for up to four years.¹⁶ Similarly, ABB, a Swiss-Swedish engineering group, settled a case with the government for \$16.4 million in fines and penalties, but the investigation and continued monitoring will cost more. ABB reported paying for 43,000 hours of lawyers' time, and, as part of the settlement with the SEC, must hire a compliance monitor to oversee its operations.¹⁷

Such costly “[c]ompliance monitors with three-year mandates have become a common feature of recent enforcement actions.”¹⁸ In fact, nearly “every settled case since the Fifth Circuit’s decision in *Kay* has included an agreement by the settling company to retain an independent consultant acceptable to the SEC and DOJ to evaluate the settling company’s compliance with the FCPA.”¹⁹ And those direct costs do not account for the disruptive costs to the business’s operations or other compliance priorities.

¹⁴See Steven Pearlstein, *Cashing In on Corruption*, Wash. Post, Apr. 25, 2008, at D1.

¹⁵See Jack Ewing, *Siemens Braces for a Slap from Uncle Sam*, Bus. Wk., Nov. 26, 2007, at 78.

¹⁶Mike Esterl & David Crawford, *Siemens to Pay Huge Fine in Bribery Inquiry*, Wall St. J. (Dec. 15, 2008).

¹⁷Tom Leander, *In China, You Better Watch Out*, CFO Asia (Mar. 20, 2006).

¹⁸Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, reprinted in *The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks* 93 (Lucinda A. Low et al., eds., 2007) (hereinafter *Heightened Enforcement Risks*).

¹⁹Claudius O. Sokenu, *FCPA Enforcement After United States v. Kay: SEC and DOJ Team Up to Increase Consequences of FCPA Violation*, reprinted in *Heightened Enforcement Risks*, supra note 18, at 132.

Safeguards and expenses like these are clearly within what Congress contemplated when a U.S. company is attempting to obtain or retain business from or directed by a foreign government. In such contexts, the core purposes of the FCPA are implicated and companies are on clear notice of the need for heightened vigilance. Before the *Kay* prosecution, however, the vast majority of federal criminal enforcement of the FCPA had been in the context of payments to obtain or renew contracts, which was consistent with the statutory prohibition on illicit payments “to assist such [business] in obtaining or retaining business for or with . . . any person.”²⁰ The Supreme Court’s denial of review puts companies on notice, at least for the present, to be extremely vigilant about *any* payments made to foreign officials, including those arguably not for obtaining or retaining business.

The Fifth Circuit’s reasoning in *Kay* will continue to increase the compliance burdens and costs on U.S. companies by greatly expanding the scope of the interactions potentially subject to criminal liability under U.S. law. The Fifth Circuit reasoned that “[a]voiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors.”²¹ Of course, the same can be said about virtually any contact with a foreign official that somehow—and no matter how indirectly—enables the company to take some action that reduces costs or otherwise benefits it. Thus, for example, even small illicit payments by a third-party customs agent somewhere become a potential criminal violation of U.S. law, with a host of potential consequences for the U.S. company retaining him or her that far exceed the significance of the offense in the jurisdiction where the conduct occurred.

Even prior to the Supreme Court’s denial of review, the Fifth Circuit’s substantive expansion of the FCPA has had a dramatic impact on U.S. enforcement activities. “Since the Fifth Circuit’s decision in February 2004, the SEC and DOJ have intensified their respective FCPA enforcement programs.”²² Although *Kay* at least required the government to prove at trial some connection between the illicit conduct and obtaining or retaining business, this standard in practice leads to costly investigations of *any* potential payment to government officials

²⁰15 U.S.C. § 78dd-2(a)(1). See also, e.g., *U.S. v. Liebo*, 923 F.2d 1308, 1311–12 (8th Cir. 1991); *U.S. v. Castle*, 925 F.2d 831, 832–33 (5th Cir. 1991) (per curiam); *U.S. v. Young & Rubicam, Inc.*, 741 F. Supp. 334, 344 (D. Conn. 1990).

²¹*U.S. v. Kay*, 359 F.3d 738, 749, 6 A.L.R. Fed. 2d 711 (5th Cir. 2004).

²²*Sokenu*, supra note 19, at 142; see also Low et al., supra note 18, at 67.

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no matter how attenuated the business nexus. Indeed, many of the post-Kay investigations and prosecutions have relied on the Kay reasoning to target allegedly illicit payments that have little if anything to do with obtaining or retaining business. As one commentator explained: “U.S. companies . . . face an ever-expanding interpretation of the FCPA by the enforcement agencies—the Justice Department on the criminal side and the Securities Exchange Commission at the civil end, both of which operate largely unconstrained by judicial precedent. Because staying in business is more important than setting precedent to most companies, targeted companies typically plead guilty or settle with the government rather than risk the potentially ruinous consequences of going to trial. The consequent dearth of case law and the widening intolerance of bribery can turn compliance into an international game of pin the tail on the donkey.”²³

One area on which the government has focused intensely since Kay—and which may be the most promising area to test the government’s interpretation of the statute—involves payments to reduce or avoid regulatory burdens. American businesses face substantial regulatory and operational burdens abroad. “The ability of a company to operate in a host country . . . and the success of those operations, often turns on discretionary government decisions, including foreign investment or trade approvals; the obtaining of concessions (as in the natural resources sector), franchises, permits, or licenses (as in the telecommunications sector in many countries or in other ‘sensitive’ sectors), tax or customs rulings, and other regulatory actions or benefits. As a condition to trade or investment transactions, the government may require the foreign investor to partner with a local firm, subcontract certain work to local firms, meet specified local employment standards, build infrastructure, or satisfy other performance conditions.”²⁴

While the FCPA contains an express safe harbor for so-called “facilitating payments” or “grease payments” necessary to induce a foreign official simply to do his or her job, the line between a legitimate facilitating payment and a forbidden bribe is often murky at best. Because “facilitation payments” often violate local law and are seen as potentially undermining a strong anti-corruption compliance program, many companies subject to the FCPA now ban them or curtail their use to very narrow circumstances. Nevertheless, U.S. businesses remain subject to a wide range of extortion-like demands from foreign nationals that blur the lines between a company seeking an unfair advantage and simply trying to get a fair shake in often

²³ John Gibeaut, *Battling Bribery Abroad*, A.B.A. J. 50 (Mar. 2007).

²⁴ Low et al., *supra* note 18, at 72.

byzantine and corrupt systems. Indeed, the payments to local officials or law enforcement that the DOJ and SEC can potentially target in the wake of *Kay* are often necessary to protect a company's property or construction equipment from theft, to permit a company's ships to enter port without harassment, or to obtain necessary permits, licenses, or zoning rules to even begin operations in a country. A U.S. company may ultimately be seeking nothing more than protection of private property and the rule of law, but there is always a risk that U.S. prosecutors will attempt to recharacterize such payments as an illicit effort to influence local regulatory or enforcement discretion in a manner that confers, under the Fifth Circuit's broad understanding, some business advantage.

In the wake of *Kay*, there have been numerous FCPA actions predicated in part or in whole on payments made to reduce or avoid regulatory burdens, and many additional cases remain under investigation. Among others, the DOJ and SEC have entered into resolutions with companies alleged to have paid bribes to obtain (1) government inspection reports and laboratory certifications;²⁵ (2) reductions in annual employment tax obligations;²⁶ (3) reductions in general tax obligations;²⁷ (4) refunds on previous tax payments;²⁸ (5) customs clearance for goods or equipment that were improperly or illegally imported;²⁹ (6) customs clearance for goods delayed due to the

²⁵See *SEC v. Delta & Pine Land Co.*, No. 07-cv-01352 (D.D.C. filed July 25, 2007); In the Matter of Delta & Pine Land Co., SEC Admin. Proceeding File No. 3-12712, Cease & Desist Order at 3 (July 26, 2007), available at <http://www.sec.gov/litigation/admin/2007/34-56138.pdf>.

²⁶In the Matter of Bristow Group Inc., SEC Admin. Proceeding File No. 3-12833, Cease & Desist Order at 3 (Sept. 26, 2007), available at <http://www.sec.gov/litigation/admin/2007/34-5633.pdf>; Press Release, SEC Institutes Settled Enforcement Action Against Bristow Group for Improper Payment to Nigerian Gov't Officials and Other Violations (Sept. 26, 2007), available at <http://www.sec.gov/news/press/2007/2007-201.htm>.

²⁷In the Matter of Baker Hughes Inc., SEC Admin. Proceeding File No. 3-10572, Cease & Desist Order (Sept. 12, 2001), available at <http://www.sec.gov/litigation/admin/34-44784.htm>; *SEC v. KPMG Siddharta Siddharta & Harsono*, No. H-01-3105 (S.D. Tex. filed Sept. 11, 2001); *SEC v. Mattson*, No. H-01-3106 (S.D. Tex. filed Sept. 11, 2001).

²⁸*SEC v. Triton Energy Corp.*, No. 97-cv-00401-RMU (D.D.C. filed Feb. 27, 1997).

²⁹In the Matter of BJ Servs. Co., SEC Admin. Proceeding File No. 3-11427, Cease & Desist Order (Mar. 10, 2004), available at <http://www.gov/litigation/admin/34-49390.htm>.

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failure to post bonds with sufficient funds to cover duties and tariffs;³⁰ (7) repeal or amendment of national regulations limiting foreign investments;³¹ (8) repeal of a government decree requiring an environmental impact study to be conducted;³² (9) expedite government registration certifications required by law to produce, warehouse, or market products in the country;³³ and (10) beneficial changes to laws and regulations relating to land development.³⁴ Additional ongoing investigations implicate payments to bribe tax, customs and administrative officials to obtain (1) reduced tax obligations; (2) importation of construction equipment in violation of customs regulations; (3) customs clearance for goods and equipment; (4) immigration and tax benefits; and (5) a beneficial tax audit.

Instead of devoting compliance resources to prevent bribes to government officials to obtain or retain business, the core purpose of the FCPA, companies are being forced to expend vast amounts of time and money policing nearly every interaction—no matter how insignificant—with foreign officials, employees of state run enterprises, and virtually anyone who might in some way have influence with a foreign government. U.S. businesses are also significantly hampered in their ability to rely on local agents, such as customs agents, whose services may as a practical matter be essential (or even required by local law) to navigating unfamiliar regulatory environments, but whose behavior cannot be completely controlled. These third party representatives are a huge source of potential liability because the FCPA explicitly makes businesses liable both for conduct they authorize and conduct as to which they are willfully blind or deliberately ignorant.³⁵ To avoid allegations of willful blindness, companies subject to the FCPA must devote considerable resources to vetting and monitoring

³⁰*United States v. Vetco Gray Controls Inc.*, No. 07-cr-004 (S.D. Tex. filed Jan. 5, 2007).

³¹*SEC v. BellSouth Corp.*, No. 02-cv-00113-ODE (N.D. Ga. filed Jan. 15, 2002). It is worth noting that the Senate originally proposed language that would have prohibited payments made for the purpose of “obtaining or retaining business . . . or directing business to, any person or influencing legislation or regulations of [the foreign] government.” S. 305, 95th Cong. § 103 (1977) (emphasis added). This language was ultimately rejected in favor of the current statute.

³²See News Release, Monsanto Announces Settlements With DOJ and SEC Related to Indonesia (Jan. 6, 2005), available at <http://Monsanto.mediaroom.com/index.php?s=43&item=278>.

³³See *SEC v. Dow Chem. Co.*, No. 07-cv-336 (D.D.C. filed Feb. 12, 2007).

³⁴*United States v. Halford*, No. 01-cr-00221-SOW-1 (W.D. Mo. filed Aug. 3, 2001); *United States v. Reitz*, No. 01-cr-00222-SOW-1 (W.D. Mo. filed Aug. 3, 2001); *United States v. King*, No. 01-cr-0190-DW (W.D. Mo. filed June 27, 2001).

³⁵15 U.S.C. § 78dd-1(f)(2).

third parties and documenting that they have done so. Again, while such compliance activity is appropriate in the sales agent context, *Kay* vastly expands the universe of third parties that must get this enhanced scrutiny far beyond the statutory purpose of preventing companies from buying business.

III. Will Companies Continue to Settle with the Government or Decide to Litigate?

When a potential FCPA violation falling within the interpretive “gray zone” is suspected internally or identified by the government, companies must consider whether taking on the government’s expansive interpretation of the FCPA may be more cost effective, in the long run, than settling. Should a company (or indicted executive) decide to litigate in a venue outside the Fifth Circuit, we believe the most promising argument is that payments to reduce taxes or general regulatory burdens are not clearly criminalized by the plain language of the statute, and the rule of lenity requires the court to “resolve any doubt in favor of the defendant.”³⁶

The rule of lenity requires that “when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”³⁷ As Chief Justice Marshall explained in *United States v. Wiltberger*: “The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”³⁸ The principle espoused by Marshall is that “before a man can be punished, his case must be plainly and unmistakably within the statute.”³⁹

In *Kay*, the Fifth Circuit repeatedly acknowledged that the FCPA’s “obtaining or retaining business” language is “‘amenable to more than one reasonable interpretation’ and therefore ‘ambiguous as a matter

³⁶*Ratzlaf v. U.S.*, 510 U.S. 135, 148, 114 S. Ct. 655, 126 L. Ed. 2d 615, 94-1 U.S. Tax Cas. (CCH) P 50015 (1994).

³⁷*McNally v. U.S.*, 483 U.S. 350, 359-60, 107 S. Ct. 2875, 97 L. Ed. 2d 292, R.I.C.O. Bus. Disp. Guide (CCH) P 6663 (1987).

³⁸*U.S. v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37, 1820 WL 2133 (1820).

³⁹*U.S. v. Lacher*, 134 U.S. 624, 628, 10 S. Ct. 625, 33 L. Ed. 1080 (1890); see also *U.S. v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (Sutton, J., dissenting) (“I am aware of no decision from our Court or from the United States Supreme Court that broadens the reach of a criminal statute on the basis of legislative history . . .”).

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of law' absent its legislative history."⁴⁰ The Fifth Circuit acknowledged that the direct legislative history—the Conference Report—“merely parrots the statutory language” and sheds no additional light.⁴¹ The court also recognized that Congress rejected more broadly drafted language from the House bill that would have eliminated any business nexus requirement (making it unlawful to bribe a foreign official “to use his or her influence to affect any act or decision”) in favor of the narrower Senate version ultimately enacted.⁴²

The court nonetheless resolved the acknowledged ambiguity in this criminal statute in *the government's* favor. Despite finding no support in the text, and acknowledging that Congress rejected the text that would have specifically covered the conduct in this case, the Fifth Circuit concluded (without citation) that the Senate was nevertheless “mindful of bribes that influence legislative or regulatory actions.”⁴³ It reasoned that “the concern of Congress with the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid.”⁴⁴ It thus declined to apply the rule of lenity and it relied on a Conference Report from the later 1988 amendments to the FCPA, declaring that “a payment to a foreign official for the purpose of obtaining more favorable tax treatment” was already covered by the Act.⁴⁵

The Fifth Circuit's fundamental error was in failing to appreciate that lenity applies whenever a statute remains ambiguous—i.e., reasonably susceptible to more than one interpretation—after resort to the conventional core tools of statutory construction. The Fifth Circuit characterized the rule of lenity as a “last resort of interpretation” that applies only where “after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended.”⁴⁶ But the Fifth Circuit relied on stray language from a Supreme Court decision *applying lenity* that was never intended to

⁴⁰*U.S. v. Kay*, 513 F.3d 432, 443 (5th Cir. 2007), cert. denied, 129 S. Ct. 42, 172 L. Ed. 2d 21 (2008) (footnote and citation omitted); see also *U.S. v. Kay*, 359 F.3d 738, 744, 6 A.L.R. Fed. 2d 711 (5th Cir. 2004) (“genuinely debatable and thus ambiguous”).

⁴¹*Kay I*, 359 F.3d at 747.

⁴²*Kay I*, 359 F.3d at 746.

⁴³*Kay I*, 359 F.3d at 748 (emphasis added).

⁴⁴*Kay I*, 359 F.3d at 749.

⁴⁵*Kay I*, 359 F.3d at 749–52.

⁴⁶*U.S. v. Kay*, 513 F.3d 432, 445 (5th Cir. 2007), cert. denied, 129 S. Ct. 42, 172 L. Ed. 2d 21 (2008) (quoting *Reno v. Koray*, 515 U.S. 50, 65, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995)).

permit a court to resolve statutory ambiguity *against* a criminal defendant whenever it could do so without resorting to sheer speculation. The test has always been that “where text, structure, and history fail to establish that the Government’s position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”⁴⁷

The Fifth Circuit forthrightly conceded that the FCPA’s business nexus requirement remains ambiguous even after mining all possible inferences from the text and structure of the statute. The court of appeals resolved that ambiguity in the government’s favor based on its intuition about Congress’s overall preferences, and several sources that might loosely be described as legislative history. It focused on a prior SEC report that the court believed provided some of the impetus for the FCPA’s passage, and a Conference Report from a subsequent Congress purporting to interpret what the earlier Congress meant when it enacted the FCPA.

The Supreme Court’s decisions have reflected different views about whether a statutory ambiguity in a criminal statute may ever be resolved in the government’s favor through resort to legislative history.⁴⁸ There is much to be said for a rule that, although all citizens are presumed to know the text of the law and relevant interpretive judicial decisions, they are not presumed or required to study congressional reports, floor statements by individual congressmen, or similar forms of legislative history.⁴⁹ Such statements are at best tangential to the legislative and interpretive process, and can frequently be found to express contradictory sentiments such that “[j]udicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal’s memorable phrase, an exercise in ‘looking over a crowd and picking out your friends.’”⁵⁰

Regardless, the materials the Fifth Circuit relied upon do not even

⁴⁷*U.S. v. Granderson*, 511 U.S. 39, 54, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994).

⁴⁸Compare, e.g., *Moskal v. U.S.*, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990) (applying lenity only to “situations in which a reasonable doubt persists about a statute’s intended scope even after resort to ‘the language and structure, legislative history, and motivating policies’ of the statute”) (citation omitted), with *Hughey v. U.S.*, 495 U.S. 411, 422, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990) (“[L]ongstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history.”).

⁴⁹E.g., *Laton*, 352 F.3d at 314 (Sutton, J., dissenting) (stating that a contrary rule “stretches the necessary legal fiction that every person knows the law to the breaking point”) (citation omitted).

⁵⁰*Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 567, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (citing Patricia M. Wald, *Some Observations on the*

genuinely merit the label of “legislative history.” The Fifth Circuit conceded that the actual legislative history of the FCPA’s business nexus provision is entirely uninformative. If anything, Congress’s rejection of the broader House version of the language counsels strongly *against* the government’s interpretation.⁵¹ The Fifth Circuit relied on an SEC report expressing that agency’s views *prior* to passage of the FCPA, but that document is not legislative history in any conventional sense. It may have been part of the background informing Congress about the need for some legislative action in this area, but it obviously sheds no light on why, for example, Congress ultimately chose the narrower Senate language rather than the broader House bill (which would have been more clearly consonant with the views previously expressed by the SEC). And the Fifth Circuit’s reliance on *subsequent legislative history* from a later Congress is illegitimate. The Fifth Circuit completely misunderstood the principle articulated by the Supreme Court in *Red Lion*—which gives great weight to subsequent interpretive *legislation*, not to subsequent legislative history.⁵² The Supreme Court continues to debate the general relevance of legislative history to statutory interpretation, but agrees unanimously that subsequent legislative history of the sort relied upon by the Fifth Circuit is essentially useless and should be wholly disregarded.

IV. Conclusion

Although the Supreme Court declined to review *Kay*, there are serious flaws in the Fifth Circuit’s decision and it may not be persuasive to other courts. Given the Supreme Court’s denial, in the short term, companies must continue to be vigilant in their compliance efforts, and must extend those efforts beyond traditional bribes and into areas of regulatory compliance overseas. But companies might also give serious consideration to whether the Fifth Circuit’s decision—which as a matter of jurisdiction applies only to Texas, Louisiana, and Mississippi—should be given *de facto* national (and international) force through acquiescence to the government’s interpretation of the statute or whether litigating some of the government’s more attenuated prosecutions makes more sense in the long run.

Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983).

⁵¹See, e.g., *Chickasaw Nation v. U.S.*, 2002-1 C.B. 718, 534 U.S. 84, 93, 122 S. Ct. 528, 151 L. Ed. 2d 474, 2001-2 U.S. Tax Cas. (CCH) P 50765, 2001-2 U.S. Tax Cas. (CCH) P 70172, 88 A.F.T.R.2d 2001-6967 (2001) (“We ordinarily will not assume that Congress intended ‘to enact statutory language that it has earlier discarded in favor of other language.’”) (citation omitted).

⁵²In *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 380–81, 89 S. Ct. 1794, 23 L. Ed. 2d 371, 1 Media L. Rep. (BNA) 2053, 79 Pub. Util. Rep. 3d (PUR) 1 (1969), the Court explained that “[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.”