

## THE FOREIGN CORRUPT PRACTICES ACT JURISPRUDENCE OF SHIRA SCHEINDLIN

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### INTRODUCTION

The Foreign Corrupt Practices Act (FCPA)<sup>1</sup> is a top priority federal statute of significant importance to all businesses and individuals engaged in international commerce.<sup>2</sup> Yet, despite its significance, few FCPA enforcement actions are subjected to judicial scrutiny and most federal court judges go their entire career without an FCPA case being placed on their docket. However, recently retired judge for the U.S. District Court for the Southern District of New York Shira Scheindlin is an exception and during her time on the bench she refereed more disputed

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1. 15 U.S.C. §§ 78dd-1–78dd-3 (2012).

2. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 930 (2012).

FCPA issues than any other federal judge in FCPA history. Judge Scheindlin's written FCPA decisions spanned both criminal and civil enforcement actions and touched upon topics ranging from prima facie FCPA elements, an FCPA affirmative defense, jurisdiction over foreign nationals, as well as related legal issues such as statute of limitations. Moreover, Judge Scheindlin interpreted the FCPA and related issues across the full spectrum of a contested proceeding from motions to dismiss, to motions in limine in advance of trial, to post-trial motions, and to sentencing a criminal defendant.

This Article analyzes the FCPA jurisprudence of Judge Scheindlin and provides rare insight—including through exclusive questioning of Judge Scheindlin—into the mind of the FCPA's most prominent jurist. The Article proceeds in four parts: Part I provides context for Judge Scheindlin's spot-on observation that there are “surprisingly few decisions throughout the country on the FCPA”;<sup>3</sup> Part II briefly highlights Judge Scheindlin's background and overall judicial career; Part III dissects Judge Scheindlin's many FCPA decisions; and Part IV extracts common themes from Judge Scheindlin's FCPA jurisprudence and concludes that Judge Scheindlin's views on the FCPA—a statute she frequently found ambiguous—were undeniably nuanced. The jurisprudence of the FCPA's most prominent jurist matters against the backdrop of some who insist that the FCPA is a clear statute and who view FCPA issues as black and white.

#### I. THERE ARE “SURPRISINGLY FEW DECISIONS THROUGHOUT THE COUNTRY ON THE FCPA”

The first notable aspect of Judge Scheindlin's FCPA jurisprudence is that she found herself on a judicial island and had to construe the FCPA largely against a blank slate. Indeed, in one of her earliest FCPA decisions, Judge Scheindlin candidly observed that there are “surprisingly few decisions throughout the country on the FCPA.”<sup>4</sup> That Judge Scheindlin made this observation in 2007, thirty years after the FCPA was enacted in 1977, is perhaps most remarkable and Part I of this Article takes a step back and explains the dynamics which have contributed to the paucity of FCPA jurisprudence.

For starters, growing pains associated with a new law (not to mention a pioneering law like the FCPA) were understandable in the late 1970s and early 1980s as both business organizations and enforcement agencies alike were absorbing the law and its new expectations and

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3. *United States v. Kozeny*, 493 F. Supp. 2d 693, 697 (S.D.N.Y. 2007).

4. *Id.*

challenges. For instance, two years into enforcing the FCPA, the Department of Justice (DOJ) Assistant Attorney General stated: “The interpretive questions arising under the [FCPA] depend on subtle judgments of fact and law. We’re dealing with a new Act, where no one has much enforcement experience. It is an Act that presents questions there has never been occasion to address in domestic bribery law . . . .”<sup>5</sup> Indeed, part of the reason for the general lack of early FCPA enforcement was that even the enforcement agencies viewed the FCPA as an imprecise and confusing statute. For instance, in 1981 the Security Exchange Commission’s (SEC) new Director of Enforcement stated that he “[p]ledged to enforce, with discretion, the FCPA, which he criticized as being ambiguous.”<sup>6</sup> In fact, nearly as soon as the FCPA was enacted in 1977 Congress sought to amend the law.<sup>7</sup> From a policy standpoint it is thus understandable that the FCPA enforcement agencies would exercise restraint enforcing a new law while legislative efforts were afoot to amend the law. These reform efforts moved at a glacial pace culminating in an amended FCPA statute in 1988.<sup>8</sup>

Further contributing to the paucity of FCPA jurisprudence is that unlike other provisions of the Securities Exchange Act, which expressly provide for a private right of action (i.e., civil cases brought by parties other than government enforcement agencies) or in which courts have inferred a private right of action, courts held relatively early in the FCPA’s history that the FCPA does not provide a private right of action.<sup>9</sup> In other words, only the DOJ or the SEC can bring an FCPA enforcement action thus limiting the number of enforcement actions and the potential for judicial scrutiny.<sup>10</sup>

As the FCPA was further amended in 1998 to capture additional potential defendants,<sup>11</sup> and as those subject to the FCPA increasingly

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5. MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA 36 (Edward Elgar Publ’g Ltd. 2014).

6. *Id.*

7. *See id.*

8. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(a), (c), 102 Stat. 1107, 1415, 1419 (codified as amended at 15 U.S.C. §§ 78dd-1–78dd-2 (2012)).

9. *See, e.g.,* Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990).

10. Generally speaking, the DOJ is the sole agency responsible for criminal enforcement of the FCPA—both the anti-bribery provisions and willful violations of the books and records and internal control provisions. The SEC, a civil law enforcement agency, generally has jurisdiction only as to “issuers” (a company, U.S. or foreign, that has a class of securities traded on a U.S. exchange or an entity that is otherwise required to file reports with the SEC) as well as “issuer” employees and agents. The SEC can bring civil charges for violations of the anti-bribery provisions and books and records and internal controls provisions.

11. *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306–09 (codified at 15 U.S.C. § 78dd-3 (2012)) (amending the

ventured into the global marketplace, FCPA enforcement increased.<sup>12</sup> With the increase in FCPA enforcement—and increasingly expansive enforcement theories that pushed the law’s boundaries—one would normally expect an increase in contested FCPA enforcement actions and thus judicial scrutiny.

However, in 2004 an important event occurred which further explains the paucity of FCPA jurisprudence. Up until this point in FCPA history, if the DOJ suspected a business organization had violated the FCPA it had two options: charge the organization with FCPA violations or not charge the organization.<sup>13</sup> However, in 2004 the DOJ introduced alternative resolution vehicles such as non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) to the FCPA enforcement landscape.<sup>14</sup> The common thread in these resolution vehicles is the absence of any meaningful judicial scrutiny.

An NPA is not filed with a court, but instead is a privately negotiated agreement (often made public) between the DOJ and a business organization. These agreements often take the form of letter agreements from the DOJ to the organization’s lawyer and generally include a brief, often [times] bare-bones, statement of facts replete with legal conclusions that the company acknowledges responsibility for as well as a host of compliance undertakings that the company agrees to implement. Because an NPA is not filed with a court, there is absolutely no judicial scrutiny of these agreements including the statement of facts and legal conclusions that serve as the foundation of the agreement. In other words, there is no independent review of the statement of facts to determine if evidence exists to support the essential elements of the “crime” not prosecuted or to determine whether valid and legitimate defenses are relevant to the alleged conduct.

A DPA, on the other hand, is filed with a court and thus has a look and feel much like a pleading, although the factual allegations are likewise often bare-bones and replete with legal conclusions. Like NPAs,

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FCPA to include, among other things, the dd-3 prong making anti-bribery provisions applicable to persons other than issuers or domestic concerns).

12. See *Foreign Corrupt Practices Act: An Overview*, U.S. DEP’T JUST., <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (last visited May 5, 2019); *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited May 5, 2019).

13. Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 499 (2015).

14. See, e.g., Non-Prosecution Agreement at 1, *In re InVision Techs., Inc. Sec. Litig.*, No. 04-CV-03181 (N.D. Cal. Dec. 3, 2004), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-03-04invisiontech-agree.pdf>.

DPAs are also the result of privately negotiated agreements between the DOJ and a business organization. In exchange for the DOJ agreeing to defer prosecution of the crime alleged (usually for a two- to four-year period), the company acknowledges responsibility for the conduct described in the allegations and agrees to implement a host of compliance undertakings.

Because a DPA is filed with a court, these agreements, at least in theory, could be subject to judicial scrutiny. However, a Governmental Accountability Office (GAO)—the investigative arm of Congress—report concluded that judicial scrutiny of DPAs was essentially nonexistent as well. “To assess what role the courts have played in the DPA process,” GAO “obtained written responses to structured interview questions from judges who had overseen DPAs in federal courts.” Based on these responses, GAO found that “judges reported that they were generally not involved” in the DPA process.

Thus, while DPAs could in theory be subjected to judicial scrutiny, the GAO report found that judges routinely “rubber-stamp” DPAs without inquiring into whether factual evidence exists to support the essential elements of the crime alleged or to determine whether valid and legitimate defenses are relevant to the alleged conduct.<sup>15</sup>

Subsequent case law, albeit outside the FCPA context, has further contributed to the lack of meaningful judicial scrutiny of DPAs.<sup>16</sup> For instance, *United States v. Fokker Services B.V.* involved criminal charges against the company for unlawfully exporting U.S. goods and services to Iran, Sudan, and Burma.<sup>17</sup> In resolving the case, the DOJ and Fokker

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15. KOEHLER, *supra* note 5, at 61–62 (internal footnote omitted) (quoting U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 8, 25–26 (2009)); *see, e.g.*, Deferred Prosecution Agreement at 1, *United States v. LATAM Airlines Grp. S.A.*, No. 16-CR-60195 (S.D. Fla. Jul. 25, 2016), <https://www.justice.gov/criminal-fraud/file/879136/download>; Non-Prosecution Agreement Letter from Andrew Weissman, Chief, Fraud Section, Criminal Div., U.S. Dep't of Justice, to Roger Witten, Wilmer Cutler Pickering Hale & Dorr LLP, Counsel to Parametric Tech. (Shanghai) Software Co. & Parametric Tech. Ltd. (Hong Kong) (Feb. 16, 2016), <https://www.justice.gov/criminal-fraud/file/825576/download>.

16. The DOJ uses DPAs to resolve other alleged substantive legal violations and not just FCPA violations. *See* Koehler, *supra* note 13, at 504–06, 512.

17. 79 F. Supp. 3d 160, 162 (D.D.C. 2015), *rev'd*, 818 F.3d 733 (D.C. Cir. 2016) (“The Information charges Fokker Services with violating U.S. export laws from 2005 until 2010 . . . .”); *see also* Press Release, U.S. Attorney’s Office D.C., U.S. Dep’t of Justice, Fokker Services B.V. Agrees to Forfeit \$10.5 Million for Illegal Transactions with Iranian, Sudanese, and Burmese Entities—Company Will Pay Additional \$10.5 Million in Parallel Civil Settlement—(June 5, 2014) [hereinafter Fokker Press Release], <https://www.justice.gov/usao-dc/pr/fokker-services-bv-agrees-forfeit-105-million-illegal-transactions-iranian-sudanese-and>.

Services agreed to an eighteen-month DPA in which the company agreed to forfeit \$10.5 million and to pay an additional \$10.5 million in a parallel civil settlement.<sup>18</sup> However, the federal trial court judge to which the case was assigned rejected the DPA.<sup>19</sup> In pertinent part, Judge Richard Leon of the U.S. District Court for the District of Columbia stated:

Both of the parties argue, not surprisingly, that the Court's role is extremely limited in these circumstances. They essentially request the Court to serve as a rubber stamp . . . . Unfortunately for the parties, the Court's role is not quite so restricted.

. . . .

One of the purposes of the Court's supervisory powers, of course, is to protect the integrity of the judicial process. . . .

. . . .

When, as here, the mechanism chosen by the parties to resolve charged criminal activity requires Court approval, it is the Court's duty to consider carefully whether that approval should be given. . . .

I do not undertake this review lightly. I am well aware, and agree completely, that our supervisory powers are to be exercised "sparingly," and I fully recognize that this is not a typical case for the use of such powers. The defendant has signed onto the DPA and is not seeking redress for any impropriety it has identified. But the Court must consider the public as well as the defendant. After all, the integrity of judicial proceedings would be compromised by giving the Court's stamp of approval to either overly-lenient prosecutorial action, or overly-zealous prosecutorial conduct.

. . . .

. . . [T]he Court concludes that this agreement does not constitute an appropriate exercise of prosecutorial discretion and I cannot approve it in its current form.<sup>20</sup>

Both the DOJ and Fokker Services appealed Judge Leon's denial of the DPA and on appeal the U.S. Court of Appeals for the District of Columbia concluded that federal trial court judges lack authority to reject

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18. Fokker Press Release, *supra* note 17.

19. *Fokker Servs.*, 79 F. Supp. 3d at 161.

20. *Id.* at 164–67 (quoting *United States v. Jones*, 433 F.2d 1176, 1181–82 (D.C. Cir. 1970)) (first citing Government's Supplemental Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 2–3, 10–15, *Fokker Servs.*, 79 F. Supp. 3d 160 (No. 14-CR-121); then citing Fokker Services B.V.'s Memorandum in Support of the Deferred Prosecution Agreement with the Government at 2–4, 12, *Fokker Servs.*, 79 F. Supp. 3d 160 (No. 14-CR-121); then citing *United States v. Payner*, 447 U.S. 727, 735 n.8 (D.D.C. 2015); and then citing *United States v. Johnson*, 221 F.3d 83, 96 (2d Cir. 2000)).

DOJ DPAs.<sup>21</sup> In pertinent part, the appellate court stated:

The order under review marks the first time a DPA negotiated by the government has been subjected to judicial scrutiny of the prosecution's basic exercise of charging discretion. DPAs have become an increasingly important tool in the government's efforts to hold defendants accountable. They afford prosecutors an intermediate alternative between, on one hand, allowing a defendant to evade responsibility altogether, and, on the other hand, seeking a conviction that the prosecution may believe would be difficult to obtain or would have undesirable collateral consequences for the defendant or innocent third parties. The agreements also give prosecutors the flexibility to structure arrangements that, in their view, best account for the defendant's culpability and yield the most desirable long-term outcomes.

By rejecting a central component of the resolution reached between a number of federal enforcement agencies and the defendant company, the district court's ruling "cannot but have enormous practical consequences for the government's ability to negotiate future settlements," and could have "potentially far-reaching consequences" for prosecutors' ability to pursue—and fashion the terms of—DPAs. The order thus amounts to "an unwarranted impairment of another branch in the performance of its constitutional duties."<sup>22</sup>

Based on this decision, federal trial court judges—while expressing concerns regarding certain DOJ corporate enforcement actions resolved through a DPA—have nevertheless felt powerless to act. For instance, in 2018 Transport Logistics International agreed to resolve an FCPA enforcement via a DPA in which it agreed to pay two million dollars in settlement (reduced from \$21.4 million based on inability to pay).<sup>23</sup> The DPA was placed on the docket of Judge Theodore Chuang of the U.S. District Court for the District of Maryland who observed that "[t]he Court's authority to take action other than approval of the DPA appears to be very limited."<sup>24</sup> Citing *Fokker Services*, Judge Chuang concluded

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21. *Fokker Servs.*, 818 F.3d at 738.

22. *Id.* at 750 (first quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1456 (D.C. Cir. 1995); then quoting *Kellogg Brown & Root Inc.*, 756 F.3d 754, 762 (D.C. Cir. 2014); and then quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 390 (2004)).

23. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Transport Logistics International Inc. Agrees to Pay \$2 Million Penalty to Resolve Foreign Bribery Case (Mar. 13, 2018), <https://www.justice.gov/opa/pr/transport-logistics-international-inc-agrees-pay-2-million-penalty-resolve-foreign-bribery>; *FCPA Appetite Still Strong*, ANTI-CORRUPTION DIGEST (Jul. 12, 2018), <https://anticorruptiondigest.com/anti-corruption-news/2018/07/12/fcpa-appetite-still-strong/#axzz5hyO0DUTA>.

24. Deferred Prosecution Agreement at 2, *United States v. Transp. Logistics Int'l, Inc.*, No. TDC-18-0011 (D. Md. Apr. 2, 2018), <https://www.scribd.com/document/378550758/U->

that “[t]he Court must approve the DPA.”<sup>25</sup>

Controversy aside, the salient point regarding DPAs relevant to this Article is that such resolution vehicles are not subjected to any meaningful judicial scrutiny and since being introduced to the FCPA context, NPAs and DPAs have become the dominant resolution vehicle used by the DOJ to resolve corporate FCPA enforcement actions.<sup>26</sup>

Furthermore, in recent years the chance of judicial scrutiny of FCPA enforcement theories has become even more remote as the DOJ introduced in 2016 yet another way to “enforce” the FCPA—a so-called “declination with disgorgement” letter agreement.<sup>27</sup> These informal letter agreements are even more bare-bones and replete with legal conclusions compared to NPAs and DPAs as the substantive allegations are often just one paragraph.<sup>28</sup> In exchange for the DOJ dropping its investigation of alleged FCPA violations, the resolving company agrees to disgorge money to the DOJ.<sup>29</sup> As with NPAs, there is absolutely no judicial scrutiny of these agreements including the statement of facts and legal conclusions that serve as the foundation of the agreement.

It is not just DOJ corporate FCPA resolution vehicles which largely bypass judicial scrutiny, but SEC corporate FCPA resolution vehicles as well. For instance, the SEC began using NPAs and DPAs in 2011.<sup>30</sup> Other dynamics relevant to SEC FCPA enforcement that also contribute to a paucity of FCPA jurisprudence include neither admit nor deny settlements and the increasing frequency of administrative actions.

The SEC’s neither admit nor deny settlement policy was adopted in 1972 and states:

The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting

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S-v-Transport-Logistics-Int-l-Order.

25. *Id.* at 3.

26. *See DOJ FCPA Enforcement—2017 Year in Review*, FCPA PROFESSOR (Jan. 16, 2018), <http://fcpaprofessor.com/doj-fcpa-enforcement-2017-year-review/>; *see also* Koehler, *supra* note 13, at 504.

27. *See, e.g.*, Letter from Lorinda Laryea, Trial Attorney, Criminal Division, U.S. Dep’t of Justice, to Steven A. Tyrrell, Esq., Weil, Gotshal, & Manges LLP (Sept. 29, 2016) (on file with U.S. Dep’t of Justice) [hereinafter Laryea Letter], <https://www.justice.gov/criminal-fraud/file/899116/download>.

28. *See, e.g.*, Laryea Letter, *supra* note 27.

29. *See, e.g., id.*

30. *See* Deferred Prosecution Agreement, U.S. Sec. & Exch. Comm’n v. Tenaris, S.A. (May 17, 2011), <https://www.sec.gov/news/press/2011/2011-112-dpa.pdf>; Non-Prosecution Agreement, U.S. Sec. & Exch. Comm’n v. Ralph Lauren Corp. (Apr. 18, 2013), <https://www.sec.gov/news/press/2013/2013-65-npa.pdf>.

to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings.<sup>31</sup>

In short, when an issuer is allowed to resolve an SEC enforcement action without admitting or denying the SEC's allegations or findings, there is little practical incentive to contest the SEC's theory of prosecution. Indeed, in a notable decision, albeit outside the FCPA context, the U.S. Court of Appeals for the Second Circuit concluded that the SEC does not need to establish "the truth" of the allegations against a settling party as a condition for approving consent decrees because, in the words of the Court, "[t]rials are primarily about truth" whereas "[c]onsent decrees are primarily about pragmatism."<sup>32</sup>

The increasing frequency of SEC administrative actions to resolve corporate FCPA enforcement actions further contributes to the paucity of FCPA jurisprudence. By way of background, SEC administrative actions in the FCPA context were rare prior to 2010 largely because the SEC could not impose monetary penalties in such proceedings absent certain exceptions not relevant to FCPA enforcement. However, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 granted the SEC authority to impose civil monetary penalties in administrative proceedings in which the SEC staff seeks a cease-and-desist order.<sup>33</sup> Since then, administrative orders—which bypass judicial scrutiny completely—have become the SEC's preferred method for resolving corporate FCPA enforcement actions.<sup>34</sup>

The above dynamics relevant to DOJ and SEC corporate FCPA enforcement are regrettable from a rule of law perspective in that there is little meaningful judicial scrutiny of a top priority law of significant importance to all businesses and individuals engaged in international commerce. For instance, Judge Rosemary Pooler of the Second Circuit stated in *United States v. HSBC Bank USA, N.A.*, (once again a case outside the FCPA context) that "it is time for Congress to revisit the issue of deferred and nonprosecution agreements (collectively, 'DPAs')."<sup>35</sup>

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31. 17 C.F.R. § 202.5(e) (2018).

32. *SEC v. Citigroup Global Mkts*, 752 F.3d 285, 295 (2d Cir. 2014).

33. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a)(1), 124 Stat. 1376, 1862 (2010) (codified at 15 U.S.C. § 77h-1 (2012)).

34. See *SEC FCPA Enforcement—2017 Year in Review*, FCPA PROFESSOR (Jan. 9, 2018), <http://fcpaprofessor.com/sec-fcpa-enforcement-2017-year-review/> (setting forth historical statistics).

35. 863 F.3d 125, 142 (2d Cir. 2017) (Pooler, J., concurring).

Judge Pooler observed:

[Corporations] enter into negotiated agreements with prosecutors that set forth the facts to which the corporation admits and a remedy that typically includes both a fine and an agreement for the corporation to make structural changes. The prosecution retains sole discretion to decide if the corporation adequately complied with the agreement, allowing the prosecution to act as prosecutor, jury, and judge. Prosecutors can enforce legal theories without such theories ever being tested in a court proceeding.

Using DPAs in this manner is neither improper nor undesirable. . . . As the law governing DPAs stands now, however, the prosecution exercises the core judicial functions of adjudicating guilt and imposing sentence with no meaningful oversight from the courts.

I respectfully suggest it is time for Congress to consider implementing legislation providing for such review.<sup>36</sup>

Echoing the above judicial critiques of alternative resolution vehicles, others have similarly stated:

[P]rosecutors' virtually unchecked powers under DPAs and NPAs threaten our constitutional framework. To be sure, prosecutors are acting upon duly enacted laws, but federal criminal provisions are often vague or ambiguous, and the fact that prosecutors and large corporations alike feel obliged to reach agreement, rather than follow an orderly regulatory process and litigate disagreements in court, denies the judiciary an opportunity to clarify the boundaries of such laws. Instead, the laws come to mean what the *prosecutors* say they mean—and companies do what the prosecutors say they must. Federal prosecutors are thus assuming the role of judge (interpreting the law) and of legislature (setting broad policy choices about industry conduct), substantially eroding the separation of powers.<sup>37</sup>

Regarding the SEC's penchant for using administrative orders to resolve corporate FCPA enforcement actions, Russell Ryan (former Assistant Director of the SEC's Enforcement Division) rightly noted that "a surge in administrative [SEC] prosecutions should alarm anyone who values jury trials, due process and the constitutional separation of powers. The SEC often prefers to avoid judicial oversight and exploit the convenience of punishing alleged lawbreakers by administrative means, but doing so is unconstitutional."<sup>38</sup>

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36. *Id.* at 143 (citing *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 30 n.9 (D.D.C. 2015)).

37. James R. Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, 14 CIV. JUST. REP. 1, 12 (2012) (internal footnote omitted).

38. Russell G. Ryan, *The SEC as Prosecutor and Judge*, WALL STREET J. (Aug. 4, 2014,

The irony of the SEC's increased use of resolution vehicles that bypass judicial scrutiny is that they have flourished during the same general time SEC leaders have extolled the virtues of trials and the adversarial system. For instance, in a speech titled *The Importance of Trials to the Law and Public Accountability*, then SEC Chair Mary Jo White stated that trials “put our system of justice . . . on display for all to see” and observed that “[t]he public airing of facts, literally in open court, creates accountability for both defendants and the government. How we resolve disputes and how we decide the guilt or innocence of an accused are the true measure of our democracy.”<sup>39</sup> In the speech, White further noted that trials are the “‘crown jewel’ of our system of justice” and stated that “[t]rials allow for more thoughtful and nuanced interpretations of the law in a way that settlements and summary judgments cannot.”<sup>40</sup> White further notes:

“The death of trials would . . . remove a source of disciplined information about matters of public significance. . . . It would mean the end of an irreplaceable public forum and would mean that more of the legal order would proceed behind closed doors. And it would deprive us, as American citizens, of an important source of knowledge about ourselves and key issues of public concern.”<sup>41</sup>

Yet, as highlighted above, this is precisely what has happened with corporate FCPA enforcement actions and puts into context Judge Scheindlin's spot-on observation that there are “surprisingly few decisions throughout the country on the FCPA.”<sup>42</sup> Given these now-common resolution vehicles used to resolve corporate FCPA enforcement actions, even fewer federal court judges are likely to have an FCPA case placed on their docket in the future. In short, another Judge Scheindlin in the FCPA context is unlikely to occur anytime soon.

The resolution vehicles highlighted above largely focused on corporate FCPA enforcement by the DOJ and SEC; however, both FCPA enforcement agencies also have enforcement authority over individuals. Yet here again, certain dynamics have resulted in a paucity of FCPA jurisprudence.

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7:36 PM), <http://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362>.

39. Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, 5th Annual Judge Thomas A. Flannery Lecture, Washington D.C.: *The Importance of Trials to the Law and Public Accountability* (Nov. 14, 2013), <http://www.sec.gov/News/Speech/Detail/Speech/1370540374908#.VPiytfnF-So>.

40. *Id.*

41. *Id.*

42. *United States v. Kozeny*, 493 F. Supp. 2d 693, 697 (S.D.N.Y. 2007).

Unlike business organizations, individuals can be put in jail and have their liberty, as well as their personal assets and reputation, at stake in an FCPA enforcement action. Thus, individuals are more likely to contest DOJ FCPA charges as well as even SEC civil charges and put the enforcement agencies to their burden of proof and subject enforcement theories to judicial scrutiny. In fact, all substantive FCPA judicial decisions (including all of Judge Scheindlin's FCPA decisions) involved individual FCPA defendants.

Even so, it is risky for an individual FCPA defendant to force the FCPA enforcement agencies to prove a case. Unlike the alternative resolution vehicles highlighted above relevant to corporate FCPA enforcement, the FCPA enforcement agencies have generally adhered to the traditional binary option of either charging or not charging an individual with FCPA violations. An individual criminally charged in an FCPA enforcement action thus confronts a stark choice: plead guilty or exercise their constitutional right to a jury trial and put the government to its burden of proof. However, it is risky for individuals to test their innocence in an FCPA enforcement action because, by testing one's innocence at trial, the individual defendant faces a significantly longer jail sentence under the federal sentencing guidelines if they lose than if they acknowledge responsibility and plead guilty.<sup>43</sup>

Consider an FCPA enforcement action against Joel Esquenazi and Carlos Rodriguez compared to an FCPA enforcement action against Albert Stanley and Jeffrey Tesler. Stanley and Tesler were criminally charged in connection with a massive, decade-long bribery scheme and were accused of paying over \$100 million in bribes to Nigerian "foreign officials" to obtain more than six billion dollars in contracts at Bonny Island, Nigeria.<sup>44</sup> Both individuals accepted responsibility, plead guilty, and cooperated.<sup>45</sup> Stanley was sentenced to thirty months in federal

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43. *See id.* at 220–22; Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHL.-KENT L. REV. 77, 87 (2010); Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL STREET J. (Sept. 23, 2012, 10:30 PM), <https://www.wsj.com/articles/SB10000872396390443589304577637610097206808>.

44. Indictment at 9–13, *United States v. Tesler*, No. 09-CR-098 (S.D. Tex. Feb. 17, 2009), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/tesler-indict.pdf>; Information at 6–8, 10, *United States v. Stanley*, No. 08-CR-597 (S.D. Tex. Aug. 29, 2008), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/19/08-29-08stanley-info.pdf>.

45. Plea Agreement at 1–2, *United States v. Tesler*, No. 09-CR-098 (S.D. Tex. Mar. 11, 2011), [https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/11/30/tesler\\_plea\\_agmt.pdf](https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/11/30/tesler_plea_agmt.pdf); Plea Agreement at 1–2, *United States v. Stanley*, No. 08-CR-597 (S.D. Tex. Sep. 3, 2008), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/19/09-03-08stanley-plea-agree.pdf>.

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prison and Tesler was sentenced to twenty-one months.<sup>46</sup> Esquenazi and Rodriguez were criminally charged for paying approximately \$890,000 to shell companies to be used for bribes to Haiti “foreign officials” to receive preferred telecommunication rates from an alleged state-owned telecommunications company.<sup>47</sup> In short, Esquenazi and Rodriguez’s conduct paled in comparison to Stanley and Tesler’s conduct. However, Esquenazi was sentenced to 180 months and Rodriguez was sentenced to eighty-four months—significantly harsher sentences merely because they tested their innocence at trial and subjected the government’s enforcement theories to judicial scrutiny.<sup>48</sup>

Regarding the risk of subjecting government enforcement theories to judicial scrutiny, it has been noted:

[O]ur existing legal system places the risk of going to trial, and in some cases even being charged with a crime, so high, that innocence and guilt no longer become the real considerations. . . .

. . . [Rather] maneuvering the system to receive the least onerous consequences may ensure the best result for the accused party, regardless of innocence.

. . . .

Innocence becomes irrelevant as the real question becomes whether it is worth the risk of testing an innocence claim.<sup>49</sup>

Given the prospect of missing out on a child’s life or growing old in jail, many white collar individual defendants choose the lesser of two evils, accept a plea, and play a game in which “innocence and guilt no longer become the real considerations.”<sup>50</sup> Indeed, data suggests that a “growing number of federal defendants [plead guilty], often to avoid the lengthy prison sentences that can come with losing at trial.”<sup>51</sup> Further, it

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46. Judgment at 2, *United States v. Tesler*, No. 09-CR-098 (S.D. Tex. Feb. 28, 2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/22/2012-02-28-teslerj-judgment.pdf>; Judgment at 2, *United States v. Stanley*, No. 08-CR-597 (S.D. Tex. Mar. 1, 2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/19/2012-03-01-stanleya-judgment.pdf>.

47. Indictment at 6–8, 27, *United States v. Esquenazi*, No. 09-CR-21010 (S.D. Fla. Dec. 4, 2009), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/05/31/12-08-09esquenazi-indict.pdf>.

48. Judgment at 3, *United States v. Esquenazi*, No. 09-CR-21010 (S.D. Fla. Oct. 26, 2011), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/05/31/10-26-11esquenazi-judgment.pdf>; Judgment at 3, *United States v. Rodriguez*, No. 09-CR-21010 (S.D. Fla. Oct. 26, 2011), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/05/31/10-26-11rodriguez-judgment.pdf>.

49. Podgor, *supra* note 43, at 77–78, 84.

50. *Id.* at 78.

51. Fields & Emshwiller, *supra* note 43.

has been noted:

Federal [sentencing] guidelines not only toughened punishments but also formalized a system to reward defendants who plead guilty by reducing sentences if they accept responsibility or cooperate with prosecutors, among other things. As part of plea deals, federal prosecutors often drop additional charges that could add years, or decades, to a sentence. Going to trial brings none of those benefits for the accused.<sup>52</sup>

The salient point here is not whether individual FCPA defendants are guilty or innocent, but rather the following: even though individual FCPA defendants are more likely than business organizations to subject FCPA enforcement theories to judicial scrutiny doing so is extremely risky for individuals and thus further contributes to a paucity of FCPA jurisprudence.

A final dynamic contributing to a paucity of FCPA jurisprudence is that in connection with most corporate FCPA enforcement actions there are no related individual enforcement actions. Specifically, since 2006: (i) approximately eighty percent of DOJ corporate enforcement actions have lacked any related DOJ FCPA charges against company employees, and (ii) approximately eighty percent of SEC corporate enforcement actions have lacked any related SEC FCPA charges against company employees.<sup>53</sup> What makes this statistic interesting is that business organizations can of course only be exposed to FCPA scrutiny because of the conduct of company employees.

Consider the following representative examples. Since first being used in a corporate FCPA enforcement action in 2002, the enforcement agencies have brought approximately twenty-five corporate enforcement actions against healthcare related companies based, in whole or in part, on the dubious enforcement theory that physicians, nurses, mid-wives, and lab personnel of various foreign health care systems are “foreign officials” under the FCPA and thus occupy the same status as prime ministers and presidents.<sup>54</sup> All of these corporate enforcement actions were resolved via an NPA or DPA, meaning there was no meaningful judicial scrutiny of this enforcement theory.<sup>55</sup> However, not *one* single

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52. *Id.*

53. *A Focus on DOJ Individual Actions*, FCPA PROFESSOR (Jan. 17, 2018), <http://fcpaprofessor.com/focus-doj-individual-actions-2/>; *A Focus on SEC Individual Actions*, FCPA PROFESSOR (Jan. 10, 2018), <http://fcpaprofessor.com/focus-sec-individual-actions-2/>.

54. *See* Koehler, *supra* note 13, at 551 (referencing “Table 2,” which highlights criminal DOJ FCPA enforcement actions against business organizations).

55. *Id.* at 552.

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individual has ever been charged in connection with these corporate enforcement actions. Similarly, since first being used in a corporate FCPA enforcement action in 2015, the enforcement agencies have brought approximately five corporate enforcement actions based, in whole or in part, on the dubious enforcement theory that providing internships (even unpaid) to family members of alleged “foreign officials” constitutes a violation of the FCPA.<sup>56</sup> All of these corporate enforcement actions were likewise resolved via an NPA or DPA, meaning there was no meaningful judicial scrutiny of this enforcement theory.<sup>57</sup> However, not *one* single individual has ever been charged in connection with these corporate enforcement actions.<sup>58</sup>

In short, perhaps the FCPA enforcement agencies are hesitant to expose certain dubious enforcement theories to judicial scrutiny in an individual enforcement action and risk losing the theory to extract lucrative corporate FCPA settlements. In fact, some view this (curious as it may be) as the proper role of the DOJ in enforcing the FCPA. For instance, Harvard Law School Professor Matthew Stephenson is leery of judicial scrutiny of FCPA enforcement and explained:

[O]ne possible drawback to dramatically ramping up enforcement of the Foreign Corrupt Practices Act against individuals . . . is that individual defendants are relatively more likely to litigate than are corporate defendants. This not only might entail a greater drain on the resources of the government enforcement agencies—a familiar and well-understood concern—but it could also lead to adverse appellate rulings on the meaning of key FCPA provisions . . . .<sup>59</sup>

The more the DOJ pushes ahead with prosecutions of individuals, the more of these cases are likely to be litigated to judgment and appeal, and the DOJ may well lose some of those cases in ways that have adverse collateral consequences for other cases (including cases against corporations).<sup>60</sup>

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56. *See Next Up—A \$77 Million Enforcement Action Against Credit Suisse*, FCPA PROFESSOR (July 5, 2018), <http://fcpaprofessor.com/next-77-million-enforcement-action-credit-suisse/>.

57. *See id.*

58. *See, e.g., id.*

59. Matthew Stephenson, *Private FCPA Enforcement: Some Troubling Trade-Offs*, GLOB. ANTICORRUPTION BLOG (Apr. 28, 2015), <https://globalanticorruptionblog.com/2015/04/28/private-fcpa-enforcement-some-troubling-trade-offs/>.

60. Matthew Stephenson, *Some Preliminary Thoughts on US v. Hoskins and its Implications for FCPA Enforcement*, GLOB. ANTICORRUPTION BLOG (Sept. 4, 2018), <https://globalanticorruptionblog.com/2018/09/04/some-preliminary-thoughts-on-us-v-hoskins-and-its-implications-for-fcpa-enforcement/>.

In any event, with a contextual understanding of Judge Scheindlin's spot-on observation that there are "surprisingly few decisions throughout the country on the FCPA," Part II of this Article briefly highlights Judge Scheindlin's background and overall judicial career.

## II. JUDGE SCHEINDLIN'S BACKGROUND

Prior to dissecting Judge Scheindlin's FCPA jurisprudence, it is useful to understand Judge Scheindlin the person and judge.

After graduating from Cornell Law School in 1975, Scheindlin had a variety of legal experiences: private practice, Assistant U.S. Attorney for the U.S. District Court for the Eastern District of New York, Magistrate Judge in the Eastern District of New York, and General Counsel for the New York City Department of Investigation.<sup>61</sup> Thereafter, in 1994 President Bill Clinton nominated Scheindlin to the federal bench in the Southern District of New York, a position she held for twenty-two years prior to stepping down in May 2016.<sup>62</sup>

During her time on the bench, Judge Scheindlin was termed a "maverick"<sup>63</sup> and "feisty"<sup>64</sup> judge who was not afraid to hold the government to high standards. Perhaps most notably, in *Floyd v. City of New York*—a series of cases brought by primarily African American and Latino plaintiffs challenging the New York City Police Department's alleged racial profiling practices and unconstitutional stop and frisks—Judge Scheindlin found the City liable for violating plaintiffs' Fourth and Fourteenth Amendment rights.<sup>65</sup> In the words of Judge Scheindlin:

The City acted with deliberate indifference toward the NYPD's practice of making unconstitutional stops and conducting unconstitutional frisks. Even if the City had not been deliberately indifferent, the NYPD's unconstitutional practices were sufficiently widespread as to have the force of law. In addition, the City adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data. This has resulted in the disproportionate and discriminatory stopping of blacks and Hispanics in violation of the

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61. *Shira A. Scheindlin of Counsel*, STROOCK, <https://www.stroock.com/people/SScheindlin> (last visited Apr. 15, 2019).

62. *Id.*

63. Jeffrey Toobin, *Rights and Wrongs: A Judge Takes on Stop-and-Frisk*, NEW YORKER (May 20, 2013), <https://www.newyorker.com/magazine/2013/05/27/rights-and-wrongs-2>.

64. Larry Neumeister, *Free to Speak, Stop-and-Frisk Judge Claims Some Victories*, ASSOCIATED PRESS (May 2, 2016), <https://apnews.com/553c22eca89c4c9797f365038f284d6a/free-speak-stop-and-frisk-judge-claims-some-victories>.

65. 959 F. Supp. 2d 540, 556, 667 (S.D.N.Y. 2013).

Equal Protection Clause.<sup>66</sup>

After her trial court ruling, the Second Circuit took the unusual step of removing Judge Scheindlin from the case concluding that she “ran afoul of the Code of Conduct for United States Judges, . . . and that the appearance of impartiality surrounding [the] litigation was compromised.”<sup>67</sup> In particular, the Second Circuit expressed concern about, among other things, Judge Scheindlin’s media interviews and public statements regarding the matter and underlying issues.<sup>68</sup>

Other notable decisions by Judge Scheindlin included:

- *United States v. Awadallah*, in which she dismissed a criminal indictment against an alleged terrorist concluding that the government had exceeded its authority under the material witness statute by unlawfully detaining him.<sup>69</sup>
- *General Media Communications, Inc. v. Perry*, in which she struck down as unconstitutional the Military Honor and Decency Act which prohibited the sale of pornography in military establishments.<sup>70</sup>
- *Zubulake v. UBS Warburg, LLC*, a series of decisions in a rather generic employment discrimination case, that become some of the leading, early decisions concerning electronic discovery.<sup>71</sup>

Reflecting on her judicial career, Judge Scheindlin commented:

Too many judges, especially because so many of our judges come out of [the Southern District U.S. Attorney’s Office], become government judges . . . I don’t think I’m the favorite of the U.S. Attorney’s Office for the Southern District. Because I’m independent. I believe in the Constitution. I believe in the Bill of Rights. These issues come up, and I take them quite seriously. I’m not afraid to rule against the government.<sup>72</sup>

According to reports, in her judicial chambers Judge Scheindlin

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66. *Id.* at 562.

67. *Ligon v. City of New York*, 538 F. App’x 101, 102 (2d Cir. 2013).

68. *Id.* at 102–03.

69. 202 F. Supp. 2d 55, 58, 61, 82 (S.D.N.Y. 2002), *rev’d*, 349 F.3d 42, 44 (2d Cir. 2003).

70. 952 F. Supp. 1072, 1084 (S.D.N.Y. 1997).

71. *See* 217 F.R.D. 309, 311, 324 (S.D.N.Y. 2003) (applying a three-step analysis to deciding disputes regarding the scope and cost of discovery of electronic data), *motion granted in part and denied in part*, 216 F.R.D. 280, 291 (S.D.N.Y. 2003) (further analyzing the costs associated with restoration of electronic data), *motion granted in part and denied in part*, 220 F.R.D. 212, 222 (S.D.N.Y. 2003) (analyzing costs and adverse inference charges), *motion granted*, 229 F.R.D. 422, 440–41 (S.D.N.Y. 2004) (addressing sanctions for electronic discovery matters).

72. Toobin, *supra* note 63.

framed an article she co-wrote regarding the Bill of Rights which stated: “If a judge decides that a defendant’s rights have been violated and the case is dismissed, a remarkable thing happens: the government bows to the rule of law.”<sup>73</sup> Others stated about Judge Scheindlin: “Nobody was a presumptive winner when you went before Judge Scheindlin. You had to make your case, and depending on how the facts and the law played out, that was how the ruling was going to play out.”<sup>74</sup>

Although none of Judge Scheindlin’s nationally notable decisions occurred in the FCPA context, this does not negate the fact that Judge Scheindlin is the most notable FCPA jurist in history and Part III of this Article goes in-depth into Judge Scheindlin’s FCPA decisions. As the below FCPA decisions highlight, Judge Scheindlin’s FCPA jurisprudence was consistent with her general judicial demeanor in that: she held the government to high standards; nobody was a presumptive winner before her; and success depended on how the facts and the law played out.

### III. JUDGE SCHEINDLIN’S FCPA DECISIONS

Between 2004 and 2013 Judge Scheindlin authored seven substantive FCPA decisions that spanned both criminal and civil enforcement actions and touched upon topics ranging from prima facie FCPA elements, an FCPA affirmative defense, jurisdiction over foreign nationals, as well as related legal issues such as statute of limitations. Moreover, Judge Scheindlin interpreted the FCPA and related issues across the full spectrum of a contested proceeding from motions to dismiss, to motions in limine in advance of trial, to post-trial motions, to sentencing a criminal defendant. The prevailing party in Judge Scheindlin’s FCPA decisions were nearly equally split between the government and the defendant.

Most of Judge Scheindlin’s FCPA decisions involved the same core set of facts regarding an alleged bribery scheme in Azerbaijan and relevant factual background for these decisions is first highlighted. Thereafter, this Part dissects the legal and policy issues Judge Scheindlin addressed in these decisions as well as the one case she decided outside the context of the Azeri bribery scheme.

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73. *Id.*

74. Keely McKee, *What Everyone Should Know about the Honorable Shira Scheindlin*, RELATIVITY (Jan. 11, 2018), <https://www.relativity.com/blog/what-everyone-should-know-about-shira-scheidlin/>.

*A. Azeri Bribery Scheme*

The Azeri bribery scheme concerned the privatization of the State Oil Company of the Azerbaijan Republic (SOCAR), a process administrated by Azerbaijan's State Property Committee (SPC).<sup>75</sup> The privatization program gave Heydar Aliyev, the President of Azerbaijan, discretionary authority as to whether and when to privatize SOCAR.<sup>76</sup> As summarized by Judge Scheindlin:

As part of the SOCAR privatization process, every Azerbaijani citizen received, at no cost, a booklet containing four voucher coupons. The vouchers were freely tradeable bearer instruments, and could be used to bid at auction on shares of privatized enterprises, including SOCAR. Foreigners who sought to participate in the auctions by using the vouchers were required to purchase, from the SPC, one "option" for every voucher held. The options were sold at an official government price.<sup>77</sup>

According to the U.S. government, several corporate entities were created "for the purpose of acquiring, at auction, a controlling interest in SOCAR."<sup>78</sup> Specifically, Oily Rock Group Ltd. ("Oily Rock"), a British Virgin Islands corporation with its principal place of business in Baku, Azerbaijan, entered into various investment agreements "to acquire and exercise at auction privatization vouchers and options, with the goal of obtaining a controlling interest in SOCAR."<sup>79</sup> Minaret Group Ltd. ("Minaret"), also a British Virgin Island corporation with its principal place of business in Baku, Azerbaijan and created at the same time as Oily Rock, was also a party to an investment agreement.<sup>80</sup> Oily Rock and Minaret were both created by Viktor Kozeny, a Czech national, Irish citizen and resident of the Bahamas, who served as president and chairman of the board of both entities and exercised effective control over both entities.<sup>81</sup> Omega Advisors, Inc., a Delaware corporation with its principal place of business in New York, also entered into investment agreements "through its subsidiaries and affiliates, with Oily Rock and Minaret" and "purchased \$126 million in privatization vouchers and options."<sup>82</sup> Pharos Capital Management L.P., a Delaware limited partnership, also entered into investment agreements with Oily Rock and

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75. United States v. Bodmer, 342 F. Supp. 2d 176, 178 (S.D.N.Y. 2004).

76. United States v. Kozeny, 643 F. Supp. 2d 415, 417 (S.D.N.Y. 2009).

77. *Bodmer*, 342 F. Supp. 2d at 178.

78. *Id.*

79. *Id.*

80. *Id.* at 178.

81. United States v. Kozeny, 493 F. Supp. 2d 693, 698 (S.D.N.Y. 2007).

82. *Bodmer*, 342 F. Supp. 2d at 178.

Minaret and “purchased \$25 million in privatization vouchers and options.”<sup>83</sup>

This relatively narrow set of facts gave rise to several criminal indictments against various individuals who all, at least initially, challenged the government’s theory of enforcement resulting in several FCPA decisions on a variety of issues.<sup>84</sup>

#### 1. *United States v. Bodmer (2004)*

The first Azeri bribery scheme case placed on Judge Scheindlin’s docket concerned Hans Bodmer, a Swiss national and lawyer, who represented Omega, Oily Rock, and Minaret.<sup>85</sup> As summarized by Judge Scheindlin:

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83. *Id.* at 178–79.

84. In 2007, the DOJ announced a non-prosecution agreement with Omega Advisors relating to Omega’s investment in a privatization program in Azerbaijan alongside Czech national Kozeny. Press Release, U.S. Attorney’s Office S. Dist. of N.Y., U.S. Dep’t of Justice, U.S. Announces Settlement with Hedge Fund Omega Advisors, Inc. in Connection with Omega’s Investment in Privatization Program in Azerbaijan (July 6, 2007). As noted in the DOJ’s release: “Omega acknowledged in the Agreement that Clayton Lewis, one of its former employees, had learned, prior to Omega’s investment, that Kozeny had entered into arrangements with some officials of the government of Azerbaijan that gave those officials a financial interest in the privatization of certain Azeri industries.” *Id.* Pursuant to the NPA, Omega agreed to civilly forfeit \$500,000. *Id.*

In 2004, Clayton Lewis pleaded guilty to a two-count criminal information charging him with conspiracy to violate the FCPA and a substantive FCPA violation. Amended Judgment at 1, *United States v. Lewis*, No. 03-CR-930 (S.D.N.Y. Apr. 12, 2013), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/22/2012-02-28-teslerj-judgment.pdf>. In 2013, Lewis was sentenced to time served based on the six days he previously spent in prison upon his arrest. *See id.*; *see also* David Glovin, *Ex-Omega Advisors Official Gets Time Served for Scheme*, BLOOMBERG (Apr. 4, 2013), <https://www.bloomberg.com/news/articles/2013-04-04/ex-omega-advisors-official-gets-time-served-for-scheme>.

In 2003, Thomas Farrell pleaded guilty to a two-count criminal information charging him with conspiracy to violate the FCPA and a substantive FCPA violation. *See* Plea Agreement at 1, *United States v. Farrell*, No. 03-CR-290 (S.D.N.Y. Mar. 7, 2003), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/07/03-07-03farrell-plea-agmt.pdf>. In 2013, Farrell was likewise sentenced to time served. *See* Amended Judgement at 1–2, *United States v. Farrell*, No. 03-CR-290 (S.D.N.Y. Apr. 26, 2013), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/07/04-26-13-judgment-thomas-farrell.pdf>.

As for Kozeny, he will likely live out his life in relative comfort in the Bahamas as that country has continually refused U.S. efforts to extradite Kozeny to the United States to face criminal charges. *See* Brian Whisler, *The Elusive Mr. Kozeny*, FCPA PROFESSOR (Apr. 2, 2012), <http://fcpaprofessor.com/the-elusive-mr-kozeny/>.

85. *Bodmer*, 342 F. Supp. 2d at 177–79.

According to the Government, beginning in August 1997, and continuing until 1999, Bodmer, in his capacity as an agent, paid bribes and authorized the payment of bribes, on behalf of various members of the investment consortium. The purpose of these payments was three-fold: “(a) to induce Azeri Officials to allow the investment consortium’s continued participation in privatization; (b) to privatize SOCAR; (c) and to permit the investment consortium to acquire a controlling interest in SOCAR.” The bribes were paid to Azerbaijani officials, including a senior government official, a senior SOCAR official, and two senior SPC officials, and were made in the form of cash, shares of profits from SOCAR’s privatization, vouchers and options, wire transfers, and stock, among other things.

In connection with the bribery scheme, Bodmer allegedly participated in numerous meetings with the officials who were bribed, and created off-shore shell companies to effectuate the bribes. Furthermore, he opened Swiss bank accounts and used his law firm’s client accounts at Hyposwiss Bank, where he sat on the board of directors, to launder money in furtherance of the scheme. Similarly, he wired funds through banks in Switzerland, the Netherlands, and the United Arab Emirates, and arranged for U.S. currency to be flown to Azerbaijan via private jets and charters; these funds were ultimately paid to the Azerbaijani government officials. Finally, Bodmer purportedly drafted various legal documents in connection with the payment of bribes, and arranged for the issuance of additional shares of Oily Rock, to be used as bribe payments.<sup>86</sup>

Bodmer moved to dismiss the criminal indictment and argued “that at the time of his alleged misconduct, he was not subject to the FCPA’s criminal provisions, and therefore cannot be criminally sanctioned for conspiring to violate the FCPA.”<sup>87</sup> Bodmer further argued that the indictment failed to allege essential elements of the crimes charged.<sup>88</sup>

From an FCPA standpoint, Judge Scheindlin’s first FCPA decision was unique in that it involved construing a prior version of the law that existed before Congress amended the FCPA in 1998.<sup>89</sup> As stated by Judge Scheindlin:

Bodmer has been charged pursuant to the FCPA of 1977, as it existed prior to the November 10, 1998 amendments (the “1998 amendments”). The 1998 amendments made clear that foreign nationals acting as

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86. *Id.* at 179 (quoting Indictment at 8, *United States v. Bodmer*, No. 03-CR-947-SAS, 2004 U.S. Dist. LEXIS 959, at \*1 (S.D.N.Y. Jan. 28, 2004)) (citing Indictment, *supra*, at 7–11, 14–19).

87. *Id.* at 181.

88. *Id.*

89. *See id.*

agents of domestic concerns are subject to the FCPA's criminal liability provisions. The question before me is whether prior to the 1998 amendments, foreign nationals who acted as agents of domestic concerns, and who were not residents of the United States, could be criminally prosecuted under the FCPA. The Government concedes that if the FCPA's criminal penalties did not apply to Bodmer, Count I must be dismissed . . . .

According to the Government, before the 1998 amendments, the FCPA's criminal penalties applied to non-resident foreign nationals who had "minimum contacts" with the United States. Bodmer contends that the statute's criminal penalties did not apply to non-resident foreign nationals who acted only as agents of a domestic concern. Alternatively, he argues that before the 1998 amendments, the scope of the FCPA's criminal penalties was ambiguous, but that at a minimum, the penalties applied only to non-resident foreign nationals whose status in the United States was similar to that of a citizen, national, or resident.<sup>90</sup>

Judge Scheindlin began by reviewing the then-existing language of the FCPA and concluded:

[I]t is not clear whether *agents* of domestic concerns who are neither United States citizens, nationals, nor residents, may be subject to the FCPA's criminal penalties. Pursuant to the language of the statute, such persons are subject to criminal penalty *only* if they are "otherwise subject to the jurisdiction of the United States."

The FCPA does not define "otherwise subject to the jurisdiction of the United States." Where no definition is provided, courts first "consider the ordinary, common-sense meaning of the words." But this canon of statutory construction provides little guidance here, because the phrase "otherwise subject to the jurisdiction of the United States" does not have an "ordinary common-sense meaning." Instead, it is a technical legal term, with varying meanings in different contexts.<sup>91</sup>

After summarizing the respective positions of Bodmer and the government, Judge Scheindlin concluded that the "language of the FCPA, and the canons of statutory construction, do not clarify whether the FCPA's criminal penalties apply to Bodmer."<sup>92</sup> Thus, Judge Scheindlin consulted the FCPA's legislative history and found that the enacting legislative history was not instructive as to the disputed issue and

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90. *Bodmer*, 342 F. Supp. 2d at 181–82 (first citing *Gebardi v. United States*, 287 U.S. 112 (1932); then citing *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991); and then citing Reply Memorandum in Support of Hans Bodmer's Motion to Dismiss the Indictment at 11–12, 16–17, *Bodmer*, No. 03-CR-947-SAS, 2004 U.S. Dist. LEXIS 959, at \*1).

91. *Id.* at 183 (first quoting 15 U.S.C. § 78dd-2(g)(2)(B) (1998); and then quoting *United States v. Dauray*, 215 F.3d 257, 260 (2d. Cir. 2000)).

92. *Id.* at 184.

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provided “no guidance regarding Congress’s original intent in applying the FCPA to non-resident foreign nationals who serve as agents of domestic concerns.”<sup>93</sup>

Judge Scheindlin next reviewed the 1998 amendments to the FCPA and concluded that “at the time of the 1998 amendments, Congress did not believe that the FCPA subjected non-resident foreign nationals who acted as agents of domestic concerns to criminal penalties.”<sup>94</sup> After reviewing the FCPA’s legislative history, Judge Scheindlin concluded:

In sum, the legislative history of the FCPA’s enactment sheds no light on whether Congress intended to include within the statute’s criminal penalties non-resident foreign nationals who act as agents of a domestic concern. The legislative history for the 1998 amendments, as well as the Department of Justice’s own pronouncements, suggest that until after the 1998 amendments, the criminal sanctions did not apply to foreign nationals who act as agents of domestic concerns, unless they were found in the United States. Such a conclusion is consistent with the precept that “Congress is primarily concerned with domestic conditions.”<sup>95</sup>

Having found both the statutory language and legislative history ambiguous, Judge Scheindlin next considered judicial interpretations of the FCPA.<sup>96</sup> However, as she would frequently find herself in subsequent FCPA decisions, Judge Scheindlin was on a judicial island. She observed:

No court has ever before considered whether prior to the 1998 amendments, non-resident foreign nationals who acted as agents of domestic concerns were subject to the FCPA’s criminal penalties. In fact, other than *Bodmer*, it appears that the Department of Justice has charged only one such person under the FCPA. In 1990, an [sic] information was filed against George Morton, a Canadian national, as a result of his role in a scheme to bribe Canadian officials. But Morton pled guilty without challenging the applicability of the FCPA, and therefore no court ever considered whether the FCPA’s criminal penalties applied to him.<sup>97</sup>

Indeed, Judge Scheindlin further noted that “[t]he Government’s charging decision, standing alone, does not establish the applicability of the statute.”<sup>98</sup> This 2004 observation would become more notable with

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93. *Id.* at 185.

94. *Id.*

95. *Bodmer*, 342 F. Supp. 2d at 186 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

96. *Id.*

97. *Id.* at 186–87.

98. *Id.* at 187 n.10.

the passage of time as so-called “prosecutorial common law” has come to dominate FCPA enforcement.<sup>99</sup>

Against this blank slate, Judge Scheindlin struggled to decide the disputed issue and stated:

After consideration of the statutory language, legislative history, and judicial interpretations of the FCPA, the jurisdictional scope of the statute’s criminal penalties is still unclear. The question remains: What does it mean for an agent of a domestic concern to be “otherwise subject to the jurisdiction of the United States”? This confusion likely results from the fact that the concept of “jurisdiction” does not generally arise in the criminal context. Instead, jurisdiction is reserved for civil cases—a *civil* defendant may avoid civil prosecution if the court lacks jurisdiction over her. As any first-year law student knows, the question of whether a court has jurisdiction over a civil defendant is governed by the forum state’s laws, but at the very least, due process requires that the defendant have “minimum contacts” with the state.

But the issue of “minimum contacts” does not arise in criminal cases. If a defendant appears in court to defend charges, the court may inquire into whether venue is proper. This is because the Constitution provides that “the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed,” and “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” If venue is proper, the court does not inquire into whether it has jurisdiction over the defendant, or the extent of the defendant’s contacts with the forum state. Jurisdiction is presumed by virtue of the defendant’s presence.

With this in mind, the criminal penalty provision of the FCPA of 1977 appears to implicate the concept of personal jurisdiction . . . I therefore conclude that in 1977, Congress likely intended that the FCPA’s criminal sanctions applied to non-resident foreign nationals who properly appeared in United States courts; personal jurisdiction over the defendant derived from the defendant’s (1) arrest in the United States, (2) voluntary appearance in court, or (3) lawful extradition.<sup>100</sup>

Applying this standard to the facts of the case, Judge Scheindlin concluded that “[a]lthough Bodmer purportedly appeared in this Court voluntarily, thereby triggering jurisdiction over him, the circumstances of

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99. See Michael Levy, *Prosecutorial Common Law*, FCPA PROFESSOR (Mar. 16, 2011), <http://fcpaprofessor.com/prosecutorial-common-law/>.

100. *Bodmer*, 342 F. Supp. 2d at 187–88; (first quoting U.S. Const. art. III, § 2, cl. 3; and then quoting U.S. Const. amend. VI) (first citing *Burger King Corp. v. Rudzewics*, 471 U.S. 462, 474 (1985); then citing *Kerr v. Illinois*, 119 U.S. 436, 440–43 (1886); and then citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)); see *supra* notes 20, 90, 95 and accompanying text.

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his extradition, as well as the rule of lenity, nonetheless require dismissal . . . .”<sup>101</sup> Specifically, she concluded:

The Indictment was filed under seal on August 5, 2003, while Bodmer was in Switzerland. Several days later, Bodmer traveled to South Korea on behalf of the International University Sports Federation. Thereafter, the Indictment was unsealed, and on August 19, 2003, Bodmer was arrested in South Korea. In the ensuing five months, Bodmer was incarcerated in a South Korean prison, and because of local prison rules, he was not permitted to meet with his United States counsel to discuss his case. He ultimately consented to extradition from South Korea to the United States, arriving here on January 16, 2004.

Given the circumstances of Bodmer’s arrest, incarceration in South Korea, and extradition to the United States, I have serious doubts regarding whether his extradition, and appearance in this Court, were truly consensual. Bodmer was in an untenable position in South Korea: he could remain in prison indefinitely, unable to meet with United States counsel, or he could consent to extradition. Though theoretically Bodmer could have contested extradition while incarcerated in South Korea, this alternative was illusory because of his lack of access to U.S. counsel. In sum, although Bodmer technically consented to extradition, I conclude that because of the circumstances surrounding his arrest and extradition, his appearance in this Court was, as a practical matter, involuntary.

Moreover, even if Bodmer consented to personal jurisdiction by appearing in court, he did not have fair notice that the FCPA’s criminal sanctions applied to him, or that his appearance in court triggered the statutory criminal penalty. . . . [T]he language contained in the penalty provisions of the FCPA is ambiguous, and there is no legislative history establishing that Congress intended to subject non-resident foreign nationals who act as agents of domestic concerns to criminal penalties. Neither the statute standing alone, nor any judicial interpretation, made it reasonably clear to Bodmer that his alleged conduct, or his voluntary appearance in a United States court, could result in a criminal penalty. In fact, it appears that as of 1998, even the Department of Justice did not believe the FCPA’s criminal penalties could be applied to a non-resident foreign nationals. Accordingly, the portion of the indictment charging Bodmer with conspiracy to violate the FCPA contravenes the constitutional fair notice requirement, and the rule of lenity demands its dismissal.<sup>102</sup>

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101. *Bodmer*, 342 F. Supp. 2d at 189.

102. *Id.* at 189 (internal footnotes omitted) (first citing *United States v. Bodmer*, No. 03-CR-947-SAS, 2004 U.S. Dist. LEXIS 959, at \*2 (S.D.N.Y. Jan. 28, 2004); then citing Defendant’s Memorandum in Support of Motion to Dismiss at 1 n.1, *Bodmer*, 342 F. Supp.

Notwithstanding dismissal of the FCPA criminal charge, Judge Scheindlin allowed the money laundering charge against Bodmer to proceed concluding:

Whether Bodmer violated the FCPA, and the fact that he cannot be criminally sanctioned for that conduct, is irrelevant to proving that he transported money in furtherance of FCPA violations. Thus, the Government is not circumventing the FCPA's limitation on penalizing non-resident foreign nationals by charging Bodmer with money laundering.<sup>103</sup>

Thereafter, Bodmer moved for reconsideration of Judge Scheindlin's decision denying the motion to dismiss the money laundering charge, but she denied the motion for reconsideration stating:

Bodmer points to no facts or law that the Court overlooked in reaching its conclusion, and instead simply reiterates the arguments that the Court already considered and rejected . . . . The rule of lenity applies only where a court finds that a criminal statute is ambiguous, or that a defendant lacked notice that his conduct was subject to criminal sanction. . . . [The money laundering charge] does not implicate the rule of lenity because there is no ambiguity in the money laundering statute, and Bodmer had sufficient notice that his purported conduct could give rise to criminal sanctions.<sup>104</sup>

Shortly thereafter, Bodmer pleaded guilty to conspiracy to commit money laundering and after testifying on behalf of the government in the Bourke trial discussed *infra*, Bodmer was sentenced to time served (based on his time incarcerated in South Korea), ordered to pay a \$500,000 fine,<sup>105</sup> and forfeited approximately \$130,000 (representing the amount of proceeds obtained by Bodmer as a result of the offense).<sup>106</sup>

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2d 176 (No. 03-CR-947-SAS); then citing Petition for Pretrial Release at 1–2, *Bodmer*, No. 03-CR-947-SAS, 2004 U.S. Dist. LEXIS 959, at \*1; and then citing *United States v. Lanier*, 520 U.S. 259, 267 (1997)).

103. *Id.* at 191.

104. Order at 3–4, *United States v. Bodmer*, No. 03-CR-947-SAS (S.D.N.Y. July 23, 2004), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/07/07-23-04bodmer-denyorder.pdf>.

105. Judgment at 4, *United States v. Bodmer*, No. 03-CR-947-SAS (S.D.N.Y. Mar. 7, 2013), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/07/03-07-13-judgment-hans-bodmer.pdf>.

106. Preliminary Order of Forfeiture/Money Judgement at 2, *United States v. Bodmer*, No. 03-CR-947-SAS (S.D.N.Y. Mar. 7, 2013), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/09/05/bodmer-preliminary-order-judgment.pdf>.

## 2. United States v. Bourke and Pinkerton (2007)

Judge Scheindlin next confronted the same alleged Azeri bribery scheme in a case concerning Frederic Bourke and David Pinkerton. Bourke, a U.S. citizen, invested in the Azeri privatization with Kozeny through Blueport International Ltd., an investment vehicle in which he was the principal shareholder.<sup>107</sup> Judge Scheindlin summarized the government's allegations against Bourke as follows:

In or about March and July 1998, Blueport invested a total of eight million dollars in Oily Rock, of which 5.3 million dollars were Bourke's personal funds. Bourke made these investments based in part on his understanding that Kozeny had paid and would pay bribes to Azeri officials to ensure SOCAR's privatization and the investment consortium's participation in the privatization. Bourke assisted Kozeny in arranging for medical treatment for two different Azeri Officials in New York on three separate occasions. The treatments were paid for by Oily Rock and Minaret.<sup>108</sup>

Pinkerton, a U.S. citizen, was the head of American International Group, Inc.'s (AIG) Global Investment Corporation.<sup>109</sup> Judge Scheindlin summarized the government's allegations against him as follows:

In late March 1998, Clayton Lewis, an investment manager at Omega, contacted Pinkerton to solicit AIG's participation in a deal involving privatization in Azerbaijan, which had been brought to Omega by Kozeny a few weeks earlier. AIG invested approximately \$15 million in June 1998 pursuant to a co-investment agreement with Oily Rock and Minaret pursuant to which the parties agreed to pursue a joint strategy to acquire and exercise vouchers and options to gain a controlling interest in SOCAR. AIG wired the funds from accounts in New York to accounts controlled by Kozeny in Switzerland. Pinkerton caused AIG to make this investment based in part on his understanding that Kozeny had paid and would pay bribes to the Azeri Officials to ensure the privatization of SOCAR and the investment consortium's participation in the privatization.<sup>110</sup>

Pinkerton and Bourke moved to dismiss various criminal charges as being time barred and for failure to adequately charge federal offenses.<sup>111</sup> Once again, Judge Scheindlin found herself on a judicial island and began her decision as follows:

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107. United States v. Kozeny, 493 F. Supp. 2d 693, 699 (S.D.N.Y. 2007).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 697.

These motions raise various issues of law that are of first impression in the Second Circuit. Not only is there a dearth of Second Circuit law on these issues, but there has been surprisingly few decisions throughout the country on the FCPA over the course of the last thirty years—especially with respect to the specific questions raised by these motions. Indeed, other than a single circuit court decision and a district court case citing thereto—neither of which analyzed the relevant subsection of the statute and neither of which binds this Court—no case has addressed the statute of limitations challenge raised herein. As a result, the Court was faced with the difficult task of addressing several first-impression issues of statutory interpretation.<sup>112</sup>

Finding no statute of limitations in the FCPA itself, Judge Scheindlin concluded, and the parties did not dispute, that 18 U.S.C. § 3282 governed which states:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.<sup>113</sup>

However, Judge Scheindlin also found 18 U.S.C. § 3292 (“Suspension of limitations to permit United States to obtain foreign evidence”) relevant based on the following factual background:

On October 29, 2002, the Department of Justice’s Office of International Affairs (the “OIA”) submitted an official request to the Netherlands seeking, *inter alia*, bank account records from certain Dutch banks that “received wire transfers for the benefit of third parties and on behalf of an Azeri government official.” On January 13, 2003, OIA submitted a separate official request to Switzerland seeking, *inter alia*, records of bank accounts held by Oily Rock, Minaret and certain Azeri officials, and requested that a search be conducted of a law firm in Switzerland that represented Kozeny in the Azeri investment.

On July 21, 2003, the government applied for an order suspending the running of the statute of limitations based on these two official requests. On July 22, 2003 . . . the Southern District of New York granted the application, finding that “[i]t reasonably appears, and reasonably appeared at the time the official requests were made, that . . . evidence is, or was” in the Netherlands and Switzerland (the “July 22, 2003 Order”). [The court] further found that at the time of the July 22, 2003 Order, no final action had been taken by either the Netherlands or Switzerland on those official requests. The July 22, 2003 Order specified that the period of suspension of the statute of limitations “shall

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112. *Kozeny*, 493 F. Supp. 2d at 697.

113. *Id.* at 701 (quoting 18 U.S.C. § 3282(a) (2012)).

begin on the dates on which the official requests were made” and end upon the earlier of final action by both the Netherlands and Switzerland, or three years. The Netherlands produced responsive documents on November 8, 2005. Switzerland produced documents on several occasions in partial execution of the request, the last of which was on September 10, 2004.<sup>114</sup>

After setting forth the relevant legal and factual background, Judge Scheindlin summarized the disputed legal issue as follows:

The majority of the conduct charged in the Indictment occurred between March and July 1998. Accordingly, the five-year statute of limitations for those offenses would have run sometime between March and July 2003. Because the Indictment was not returned until May 12, 2005, all of those offenses are time-barred unless the government can demonstrate that the statute of limitations was tolled. Here, the government attempts to utilize section 3292 to toll the statute of limitations based on the government’s official requests for foreign evidence from the Netherlands and Switzerland.<sup>115</sup>

Once again, Judge Scheindlin found a federal statute, this time § 3292, ambiguous and consulted the legislative history for guidance.<sup>116</sup> Upon doing so, Judge Scheindlin found that the legislative history “reinforces the principle that only court action will toll the statute of limitations.”<sup>117</sup> Judge Scheindlin concluded:

Reading the statute as a whole, as I must, I find that the structure of section 3292 strongly supports the interpretation that the court order itself—not the official request to the foreign government—tolls the statute of limitations and that the toll must be ordered before the statute of limitations expires.

As a result, the words of the statute itself, another subsection of the statute and the legislative history of the statute all confirm that section 3292 only permits a court to suspend the running of the statute of limitations when the government applies for and obtains a suspension order prior to the expiration of the limitations period. The Court’s reading is further supported by the policy of statutes of limitations and another canon of statutory construction, the doctrine of constitutional

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114. *Id.* at 699–700 (internal footnotes omitted) (first quoting Affidavit of FBI Special Agent George P. Choudras at 22(a), *Kozeny*, 493 F. Supp. 2d 693 (No. 05-CR-518-SAS); and then quoting July 22, 2003 Order, Declaration of Barry H. Berke, counsel for Pinkerton Ex. F., *Kozeny*, 493 F. Supp. 2d 693 (No. 05-CR-518-SAS)).

115. *Id.* at 706.

116. *Id.* at 707.

117. *Kozeny*, 493 F. Supp. 2d at 707.

avoidance.<sup>118</sup>

Accordingly, Judge Scheindlin found that all of the counts against Pinkerton and Bourke (except false statement counts) were time-barred and should be dismissed “because the government did not move to ‘suspend the running’ of the statute of limitations until after it had expired” and thus the government was not entitled to any tolling under § 3292.<sup>119</sup> In so holding, Judge Scheindlin chided the government for its lack of diligence in bringing the criminal charges:

It should be noted that in practice, this problem can easily be avoided—and easily could have been avoided in this case. The government waited almost nine full months after making the official request to the Netherlands before applying for a section 3292 suspension. Had the government applied to the court anytime [sic] before March 2003, the Indictment would have been timely . . . . But the mere fact that the government could have easily avoided this dismissal does not change the result here. Statutes of limitations must be enforced, even where it deprives society of its ability to prosecute otherwise viable criminal offenses; “that is the price we pay for repose.”<sup>120</sup>

Even though Judge Scheindlin’s statute of limitations findings disposed of the government’s claims (except false statements charges), in the interest of completeness Judge Scheindlin also addressed Pinkerton and Bourke’s FCPA specific arguments for dismissing the indictment.<sup>121</sup> Although dicta, Judge Scheindlin’s conclusions are nevertheless worthy of analysis.

Regarding Pinkerton’s argument that he lacked specific intent to conspire to violate the FCPA and that the indictment failed to allege his intent that a future bribe be paid, Judge Scheindlin opined that “this argument has no merit” and stated:

The Indictment alleges that the defendants, including Pinkerton, “agreed . . . to commit offenses against the United States; to wit, violations of (a) the FCPA . . . .” Moreover, the Indictment alleges that Pinkerton joined the conspiracy with the knowledge that bribes had been paid and would continue to be paid to Azeri officials in exchange for ensuring defendants’ participation in the privatization of SOCAR. Pinkerton’s intent to join the conspiracy and an overt act by any co-conspirator is sufficient to allege a conspiracy. Taken as a whole, the allegations in the Indictment are plainly sufficient to withstand a motion

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118. *Id.* at 707–08.

119. *Id.* at 709 (quoting 18 U.S.C. § 3292(a)(1) (2012)).

120. *Id.* (footnote omitted) (quoting *United States v. Meader*, 138 F.3d 986, 994 (5th Cir. 1998)).

121. *Id.* at 709–11.

to dismiss. Whether the evidence ultimately will be sufficient to support a conviction is a separate issue not before the Court.<sup>122</sup>

Separately, Pinkerton and Bourke also argued that the indictment should be dismissed because it failed to allege the mens rea element of an FCPA offense or conduct sufficient to meet the FCPA's obtain or retain business element.<sup>123</sup> However, Judge Scheindlin also found these arguments "without merit."<sup>124</sup> Noting that the FCPA's mens rea element relevant to individuals includes both "corruptly" and "willfully," and while acknowledging the government's concession "that there is no express allegation of willfulness in the substantive counts of the Indictment," Judge Scheindlin nevertheless concluded that this "technical defect" did not "prejudice defendants and is not fatal to those counts."<sup>125</sup> In sum, Judge Scheindlin wrote: "At trial, the jury will be instructed on the issue of willfulness and defendants will not be convicted of a criminal violation of the FCPA without a finding of willfulness. The absence of that word from the charging portion of the Indictment does not merit dismissal of those offenses."<sup>126</sup>

As to the FCPA's obtain or retain business element, Judge Scheindlin, largely relying on a rare appellate court decision construing this element, found "that the FCPA's business nexus element was intended to be construed broadly" and concluded:

Defendants argue that the Indictment does not adequately allege the business nexus element insofar as the alleged bribes were not made for the purpose of obtaining or retaining business as required by the FCPA. The Indictment alleges that the bribes were paid to the Azeri Officials in order to ensure not only the privatization, but defendants' participation in the privatization, which would permit defendants to obtain a large stake in a significant asset, SOCAR. These are not the type of "grease" payments that Congress intended to exclude from coverage by the FCPA. In light of the broad construction that Congress intended courts to apply to the business nexus element, I find that these alleged payments, made for the purpose of inducing foreign officials to make available a lucrative investment opportunity, fall within the ambit of the conduct Congress intended to prohibit under the FCPA. Accordingly, the Indictment adequately charges an FCPA offense.<sup>127</sup>

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122. *Kozeny*, 493 F. Supp. 2d at 711 (quoting Indictment at 29, *Kozeny*, 493 F. Supp. 2d 693 (No. 05-CR-518-SAS)) (citing Indictment, *supra*, at 11–12).

123. *Id.*

124. *Id.*

125. *Id.* at 704, 712.

126. *Id.* at 713.

127. *Kozeny*, 493 F. Supp. 2d at 713 (internal footnote omitted) (citing 15 U.S.C. § 78dd-

After Judge Scheindlin's ruling that all of the counts against Pinkerton and Bourke (except false statement counts) were time-barred and should therefore be dismissed,<sup>128</sup> the government moved for reconsideration arguing that three of the twenty-seven criminal charges "should not have been dismissed because even under the Court's reading of section 3292, each of the counts on its face alleges conduct that occurred within the limitations period . . . ."<sup>129</sup> Judge Scheindlin agreed and reinstated three counts: (i) one count charging both defendants with conspiracy to violate the FCPA and Travel Act for allegedly paying the medical expenses of an Azeri official; (ii) one count charging Bourke with a substantive FCPA offense for the same payment of medical expenses; and (iii) one count charging both defendants with money laundering conspiracy.<sup>130</sup>

Even though Judge Scheindlin reinstated a few criminal charges against Pinkerton and Bourke in granting the motion for reconsideration, the government appealed Judge Scheindlin's dismissal of the bulk of the criminal charges against the defendants.<sup>131</sup> Although the Second Circuit, unlike Judge Scheindlin, did not view the text of § 3292 as ambiguous, it nevertheless affirmed Judge Scheindlin's statute of limitations analysis by concluding "that the plain language of the provision, and the structure and content of the law by which it was enacted, require the government to apply for a suspension of the running of the statute of limitations before the limitations period expires."<sup>132</sup>

Pinkerton was initially an appellant in the above Second Circuit matter; however in a strange twist, while the appeal was pending, the government abandoned its case against Pinkerton.<sup>133</sup> As noted in Judge Scheindlin's order of nolle prosequi: "Based upon a review of the evidence and information pertaining to this defendant [(Pinkerton)] acquired since the filing of the Indictment, the Government has concluded that further prosecution of David Pinkerton in this case would not be in the interest of justice."<sup>134</sup>

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1(b) (2012)).

128. *Id.*

129. *United States v. Kozeny*, 493 F. Supp. 2d 693, 714 (S.D.N.Y. 2007) (mem.).

130. *Id.* at 714–15.

131. *See* Government's Notice of Appeal as to Frederic Bourke, Jr. & David Pinkerton, *United States v. Kozeny*, 541 F.3d 166 (2d Cir. 2008) (No. 07-CR-3107).

132. *Kozeny*, 541 F.3d at 168.

133. Nolle Prosequi at 3, *United States v. Pinkerton*, No. 05-CR-00518-SAS (S.D.N.Y. July 2, 2008), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/06/01/2008-07-02-kozenyv-pinkerton-nolle-prosequi.pdf>.

134. *Id.*

Pinkerton’s lawyer reacted to the order by saying, “We have always known that David Pinkerton is completely innocent of any wrongdoing and we are thrilled by his vindication.”<sup>135</sup>

The government did not however abandon its case against Bourke. Given that Bourke was an accomplished individual of substantial means<sup>136</sup> with his personal liberty on the line, not surprisingly he fought the government during all remaining phases of the case and provided Judge Scheindlin several additional opportunities to interpret the FCPA.

### 3. United States v. Bourke (2008)

With certain claims against Bourke reinstated, Judge Scheindlin once again was placed in the position of deciding an issue of first impression under the FCPA—specifically the meaning of the FCPA’s so-called “local law” affirmative defense which states that it shall be an affirmative defense to actions under the FCPA’s anti-bribery provisions if “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.”<sup>137</sup>

As summarized by Judge Scheindlin:

Bourke has requested that the Court make determinations as to the content of applicable law in Azerbaijan and instruct the jury on certain defenses that might be available under the law of Azerbaijan. The Government and Bourke were unable to agree on the contents or applicability of that law. . . .

. . . Bourke argues that the alleged payments were legal under Azeri law and thus under the FCPA . . . because they were the product of extortion. He also argues that pursuant to Azeri law, any criminality associated with the payments was excused when he reported them to the President of Azerbaijan.<sup>138</sup>

Bourke and the government submitted expert reports and Judge Scheindlin “held a hearing in which the experts testified as to their

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135. Dealbook, *Charges Against Ex-A.I.G. Executive Dropped*, N.Y. TIMES: DEALBOOK (July 3, 2008, 6:50 AM), <https://dealbook.nytimes.com/2008/07/03/charges-against-ex-aig-executive-dropped/>.

136. Among other things, Bourke is the founder of handbag company Dooney & Bourke. See *Our Heritage*, DOONEY & BOURKE, <https://www.dooney.com/our-heritage/about-us-heritage.html> (last visited Apr. 13, 2019).

137. 15 U.S.C. § 78dd-2(c)(1) (2012).

138. *United States v. Kozeny*, 582 F. Supp. 2d 535, 536–37 (S.D.N.Y. 2008) (internal footnotes omitted) (citing Supplemental Memorandum of Law in Support by Frederic Bourke, Jr. of Defendant’s Motion Regarding Azeri Law Issues at 4, *Kozeny*, 582 F. Supp. 2d 535 (No. 05-CR-518-SAS)).

interpretations of the relevant law.”<sup>139</sup> She summarized the relevant Azeri law—relevant to the FCPA’s affirmative defense—as follows:

During the relevant period, Article 170 of the Azerbaijan Criminal Code (“ACC”) provided that “[the] receiving by an official . . . of a bribe in any form whatsoever for the fulfillment or the failure to fulfill any action in the interest of the person giving the bribe which the official should have or might perform with the use of his employment position . . . shall be punished by deprivation of freedom . . .” Professor Stephan [(Bourke’s expert)] asserts that during the same period, Article 171 of the ACC provided that “[g]iving a bribe shall be punished by deprivation of freedom for a term of from three to eight years. . . . A person who has given a bribe shall be *free* from criminal responsibility if with respect to him there was extortion of the bribe or if that person after giving the bribe voluntarily made a report of the occurrence.” Professor Butler [(the government’s expert)] believes that a more accurate translation of the last clause is “[a] person who has given a bribe shall be *relieved* from criminal responsibility if extortion of the bribe occurred with respect to him or if this person after giving the bribe voluntarily stated what happened.”

The Supreme Court of the U.S.S.R. interpreted Article 171 in a Resolution published in 1990. The parties agree that the Resolution is relevant to the Azeri courts’ interpretation of the Article. It defines extortion as “a demand by an official for a bribe under the threat of carrying out actions that could do damage to the legal interests of the briber . . .” The Resolution further explains that “a voluntary declaration of having committed the crime absolves from criminal responsibility not only the bribe giver but his accomplices.” Finally, the Resolution provides that “[t]he absolution of a bribe-giver from criminal responsibility because of extortion of the bribe or the voluntary declaration of the giving of the bribe . . . does not signify an absence in the actions of such persons of the elements of an offense. For that reason, they cannot be considered victims and are not entitled to claim restitution of the items of value given as bribes.”<sup>140</sup>

After reviewing the relevant Azeri law, Judge Scheindlin disagreed with Bourke’s assertion that if an individual is relieved of criminal

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139. *Id.* at 537.

140. *Id.* at 538–39 (internal footnotes omitted) (first quoting Declaration of the Government’s Expert Professor William E. Butler at 10, *Kozeny*, 582 F. Supp. 2d 535 (No. 05-CR-518-SAS) [hereinafter Butler Declaration]; then quoting Declaration of Defendant’s Expert Professor Paul B. Stephan at 10, *Kozeny*, 582 F. Supp. 2d 535 (No. 05-CR-518-SAS) [hereinafter Stephan Declaration]; and then quoting *Resolution of the Plenum of the Supreme Court of the U.S.S.R. of March 30, 1990, No. 3*, “*On Court Practice in Bribery Cases*” at pt. 11, 19, 21 [hereinafter *Resolution*]) (first citing *Resolution, supra*; and then citing Stephan Declaration, *supra*, at 7).

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responsibility under Azeri law, his actions were thus “lawful” under the FCPA’s affirmative defense.<sup>141</sup> Judge Scheindlin concluded that “[f]or purposes of the FCPA’s affirmative defense, the focus is on the *payment*, not the payer.”<sup>142</sup> In a footnote, Judge Scheindlin continued:

The FCPA focuses on payments, not payers, throughout its structure. For example, it provides that there is no liability for “any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official . . .” The purpose of this subsection was to “acknowledge[] . . . that some payments that would be unethical or even illegal within the United States might not be perceived similarly in foreign countries, and those payments should not be criminalized.”<sup>143</sup>

She further elaborated:

A person cannot be guilty of violating the FCPA if the payment was *lawful* under foreign law. But there is no immunity from prosecution under the FCPA if a person could not have been prosecuted in the foreign country due to a technicality (e.g., time-barred) or because a provision in the foreign law “relieves” a person of criminal responsibility. An individual may be prosecuted under the FCPA for a payment that violates foreign law even if the individual is relieved of criminal responsibility for his actions by a provision of the foreign law.

As Professor Butler observes, the structure of the reporting exception to liability in Article 171 illustrates that the initial payment of a bribe was certainly not lawful. The ACC relieves the payer of a bribe from criminal liability if the bribe is properly reported not because such an action retroactively erases the stain of criminality, but because the state has a strong interest in prosecuting the government official who received the bribe. By waiving liability for reporting payers, the state increases the likelihood that it will learn of the bribery.

But at the moment that an individual pays a bribe, the individual has violated Article 171. At that time, the payment was clearly not “lawful under the written laws” of Azerbaijan. If the individual later reports the bribe, she can no longer be prosecuted for that payment. But it is inaccurate to suggest that the payment itself suddenly became “lawful”—on the contrary, the *payment* was unlawful, though the *payer* is relieved of responsibility for it. This is why the Resolution provides that the payer cannot receive restitution. Further, if the *payment* were retroactively lawful, the official who received the payment could not be

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141. *Id.* at 539.

142. *Id.*

143. *Kozeny*, 582 F. Supp. 2d at 539 n.25 (alteration in original) (first quoting 15 U.S.C. § 78dd-2(b); and then quoting *United States v. Castle*, 925 F.2d 831, 834 (5th Cir. 1991)).

prosecuted for receiving it. This cannot be correct because the purpose of the reporting exception is to enable the government to pursue the official. Thus, the relief from liability in Article 171 operates to excuse the payer, not the payment.

The exception for extortion contained in the same sentence must operate in the same manner. A payment to an Azeri official that is made under threat to the payer's legal interests is still an illegal payment, though the payer cannot be prosecuted for the payment.<sup>144</sup>

Notwithstanding the above conclusion, Judge Scheindlin emphasized that Bourke would not be precluded "from arguing that he cannot be guilty of violating the FCPA by making a payment to an official who extorted the payment because he lacked the requisite corrupt intent to make [the] bribe."<sup>145</sup> Judge Scheindlin explained:

The legislative history of the FCPA makes clear that "true extortion situations would not be covered by this provision." Thus, while the FCPA would apply to a situation in which a "payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract," it would not apply to one in which payment is made to an official "to keep an oil rig from being dynamited," an example of "true extortion." The reason is that in the former situation, the bribe payer cannot argue that he lacked the intent to bribe the official because he made the "conscious decision" to pay the official. In other words, in the first example, the payer could have turned his back and walked away—in the latter example, he could not.

If Bourke provides an evidentiary foundation for the claim that he was the victim of "true extortion," I will instruct the jury on what constitutes a situation of "true extortion" such that Bourke would not be found to have possessed the "corrupt" intent required for a violation under the FCPA. In any event, the jury will be instructed regarding the "corrupt" intent that the Government must prove he possessed beyond a reasonable doubt he possessed. Such instruction will define "corrupt" intent as "having an improper motive or purpose" and will explain that the payment must have been intended to "induce the recipient to misuse his official position" in discharging an official act. The charge will also emphasize that the proper focus is on Bourke's intent and that the Government is not required to show that "the official accepted the bribe," that the "official[] had the power or authority to perform the act[] sought" or that the "defendant intended to influence an official act

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144. *Id.* at 539–40 (internal footnotes omitted) (first citing Butler Declaration, *supra* note 140, at 46; and then citing Transcript of Proceedings as to Frederic Bourke, Jr. Held on 9/11/2008 at 37, 215–16, *Kozeny*, 582 F. Supp. 2d 535 (No. 05-CR-518-SAS) [hereinafter 9/11/08 Transcript]).

145. *Id.* at 540.

which was lawful.”<sup>146</sup>

#### 4. United States v. Bourke (2009)

With trial looming, the next disputed issue teed up for Judge Scheindlin was Bourke’s motion in limine to preclude the government from offering background evidence relating to corruption in Azerbaijan.<sup>147</sup> Judge Scheindlin summarized Bourke’s position:

Bourke moves to preclude the Government from presenting background evidence of corruption in Azerbaijan, which he believes will be central to the Government’s proof that Bourke acted with the requisite knowledge required by the FCPA. The FCPA states that “[w]hen knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is *aware of a high probability of the existence of such circumstance*, unless the person actually believes that such circumstance does not exist.” Bourke therefore notes that the Government will likely proceed on a “conscious avoidance” theory in an attempt to impute to Bourke knowledge of the alleged bribes.

Bourke makes two arguments in support of his contention that the Government should be precluded from presenting evidence of the prevalence of corrupt business practices in Azerbaijan. *First*, he argues that the conscious avoidance standard “is not a reasonable person standard; the Government cannot rely on evidence that [] Bourke should have known about the bribes to establish conscious avoidance . . . .” *Second*, he asserts that the Government should be permitted to introduce evidence regarding the knowledge of individuals other than the defendant “only if there is some other evidence in the record—concerning, for example, the nature of the fraud or the relationship of the parties—from which to conclude that the defendant would have the

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146. *Id.* at 540–41 (alterations in original) (internal footnotes omitted) (first quoting S. Rep. No. 95-114, at 10–11 (1977); then quoting *United States v. Alfisi*, 308 F.3d 144, 150 n.1 (2d Cir. 2002); and then quoting 1 L. SAND ET. AL., MODERN FEDERAL JURY INSTRUCTIONS at 16.01 (2008)). Thereafter, Bourke filed a motion for reconsideration, a motion Judge Scheindlin denied. *See United States v. Kozeny*, No. 05-CR-518-SAS, 2008 U.S. Dist. LEXIS 101803, at \*2, \*6 (S.D.N.Y. Dec. 12, 2008).

147. *United States v. Kozeny*, 643 F. Supp. 2d 415, 419 n.18 (S.D.N.Y. 2009) (citing Memorandum of Law in Support of Bourke’s Motion in Limine to Exclude Evidence Relating to Corruption in Azerbaijan at 1–2, *Kozeny*, 643 F. Supp. 2d 415 (No. 05-CR-518-SAS) [hereinafter Bourke Memorandum]). In advance of trial, a superseding indictment was filed against Bourke that dropped the substantive FCPA charge against him. *Id.* Yet, as Judge Scheindlin explained, the remaining conspiracy to violate the FCPA charge still required the government to “demonstrate Bourke’s knowledge of the conspiracy’s ‘unlawful purpose’—the bribing of Azeri officials in order to encourage the privatization of SOCAR.” *Id.* (quoting SAND ET. AL., *supra* note 146, at 19.01) (citing Second Superseding Indictment as to Frederic Bourke, Jr., *Kozeny*, 643 F. Supp. 2d 415 (No. 05-CR-518-SAS)).

same knowledge.”<sup>148</sup>

As to evidence showing Bourke’s awareness of corruption in Azerbaijan, Judge Scheindlin agreed with Bourke, on one level, that “the Government cannot present background evidence of corruption in Azerbaijan for the purpose of demonstrating that Bourke ‘should have known’ that Azeri officials would require bribes in order to facilitate the privatization of SOCAR.”<sup>149</sup> Nevertheless, Judge Scheindlin noted that the government intended to use such evidence “not to show that Bourke ‘should have known,’ but to show that Bourke was aware of the high probability that Azeri officials were being bribed,” and that “a person of Bourke’s means, who was considering making a large investment in a venture in Azerbaijan, would have at least been aware of the high probability that bribes were being paid.”<sup>150</sup> Accordingly, Judge Scheindlin concluded that such evidence was relevant and admissible and explained:

The Government informs the Court that it intends to present several items of evidence that—together—are relevant to such proof, including (1) that “Azerbaijan in the late 90s was one of the most corrupt nations in the world;” (2) it was “well-known that post-Communist privatization of state-owned assets was particularly plagued by corruption, not only in Azerbaijan, but in many other former Soviet states;” (3) “SOCAR was Azerbaijan’s most important economic and strategic asset: it was highly unlikely that the president of Azerbaijan would permit it to be privatized and acquired at an outrageously low price by a group of foreign investors, absent some corrupt arrangement with the Azeri leadership;” and (4) “Bourke invested because of his great faith in co-defendant Kozeny, whose notoriety as the ‘Pirate of Prague’ arose from his prior corrupt dealings in privatization in the Czech Republic. . . .”

That Azerbaijan was known to be a corrupt nation, that the post-Communist privatization processes in other countries have been tainted by corrupt practices, that SOCAR was a strategic asset of Azerbaijan, and that Kozeny was notorious as the “Pirate of Prague” makes it probable that Bourke was aware that Azeri officials were being bribed

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148. *Id.* at 418–19 (alterations in original) (internal footnotes omitted) (first quoting 15 U.S.C. § 78dd-2(h)(3)(B) (2012); and then quoting Bourke Memorandum, *supra* note 144, at 3, 5) (citing Bourke Memorandum, *supra* note 144, at 1–2).

149. *Id.* at 419 (citing *United States v. Nektalov*, 461 F.3d 309, 315 (2d Cir. 2006)).

150. *Kozeny*, 643 F. Supp. 2d at 419–20 (internal footnotes omitted) (quoting Government’s Opposition to the Defendant’s Motion in Limine to Exclude Evidence Relating to Corruption in Azerbaijan at 2–3, 6–7, *Kozeny*, 643 F. Supp. 2d 415 (No. 05-CR-518-SAS) [hereinafter Government’s Opposition]).

in order to ensure the privatization of SOCAR.<sup>151</sup>

Judge Scheindlin further concluded that “no prejudice will result from admitting such evidence because the Government had demonstrated that it will be able to establish a factual predicate for a conscious avoidance charge.”<sup>152</sup> She noted:

The Government notes that it has accumulated substantial evidence regarding Bourke’s awareness of corruption in Azerbaijan generally. For instance, the Government seeks to present evidence of conversations in which Bourke was warned by his counsel that Azerbaijan was the “Wild West” and that doing business in Azerbaijan was like the movie “Chinatown,” where there are “no rules.”

In addition, the Government will introduce a tape recording that it obtained from one of Bourke’s counsel, which records a conversation among Bourke, another investor, and their respective attorneys. In this recording, Bourke expresses his concern that Kozeny and his employees are paying bribes and violating the FCPA: “I mean, they’re talking about doing a deal in Iran. . . . Maybe they . . . bribed them, . . . with ten million bucks. I, I mean, I’m not saying that’s what they’re going to do, but suppose they do that.” Later in the conversation, Bourke says:

I don’t know how you conduct business in Kazakhstan or Georgia or Iran, or Azerbaijan, and if they’re bribing officials and that comes out . . . Let’s say . . . one of the guys at Minaret says to you, Dick, you know, we know we’re going to get this deal. We’ve taken care of this minister of finance, or this minister of this or that. What are you going to do with that information?

Still later in the conversation, Bourke again ponders:

What happens if they break a law in, uh, in uh, you know, Kazakhstan, or they bribe somebody in Kazakhstan and we’re at dinner and . . . one of the guys [says] “Well, you know, we paid some guy ten million bucks to get this now.” I don’t know, you know, if somebody says that to you, I’m not part of it, I didn’t endorse it. But let’s say, they tell you that. You got knowledge of it. What do you do with that? . . . I’m just saying to you in general . . . *do you think business is done at arm’s length in this part of the world.*”<sup>153</sup>

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151. *Id.* (internal footnotes omitted) (quoting Government’s Opposition, *supra* note 150, at 3).

152. *Id.* at 420.

153. *Id.* at 420–21 (alteration in original) (internal footnotes omitted) (quoting Government’s Opposition, *supra* note 150, at 4).

After summarizing the government's intended evidence, Judge Scheindlin concluded:

While these comments do not demonstrate conclusively that Bourke knew that bribes were being paid in Azerbaijan to further the privatization of SOCAR, they certainly suggest that he suspected that might be the case. Furthermore, statements such as “What are you going to do with that information?” and “You got knowledge of it. What do you do with that?” intimate that he was concerned about what he might discover. Thus, if Bourke did not actually know, this evidence is at least sufficient for a jury to conclude beyond a reasonable doubt that he knew of the high probability that bribes were being paid. In addition, his lack of actual knowledge would suggest that he decided not to learn more. Because this evidence is both relevant and probative to whether Bourke acted with conscious avoidance, Bourke's motion to preclude such evidence is denied.<sup>154</sup>

As to the knowledge of third parties, Bourke argued that “the Government should not be permitted to introduce evidence of third parties' knowledge of the bribes unless the Government also presents ‘evidence from which to conclude that [Bourke] would have the same knowledge.’”<sup>155</sup> After reviewing analogous decisions on the issue, Judge Scheindlin observed:

In this case, the Government has responded that there is “ample” evidence that the knowledge of others was likely communicated to Bourke and that Bourke was exposed to the same sources from which others had derived their knowledge of the fraud. For instance, Bourke traveled by private jet through the former Soviet Union with Viktor Kozeny, the alleged mastermind behind the SOCAR investment. The Government intends to show that Kozeny knew about the corruption in Azerbaijan and thereafter undertook to establish a relationship with a high-ranking Azeri official.

Moreover, the Government will present evidence that Bourke became friendly with others in Kozeny's “inner circle,” including Clayton Lewis, a former employee of Omega Advisors, which was a co-investor in the venture, and Thomas Farrell, who was employed by Kozeny to facilitate the scheme. The Government has informed the Court that Farrell will testify about the significant amount of time he spent in Azerbaijan and elsewhere in the Soviet Union and his awareness of the corruption in that part of the world. This evidence, the Government argues, will make clear that Bourke likely possessed the same

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154. *Id.* at 421 (internal footnote omitted).

155. *Kozeny*, 643 F. Supp. 2d at 422 (alteration in original) (footnote omitted) (quoting Bourke Memorandum, *supra* note 147, at 2).

knowledge.

I am satisfied that there will be sufficient testimony from Government witnesses regarding the close business relationships between Bourke, Kozeny, and Lewis, and the participation of others like Farrell. Based on these relationships the jury has a fair basis to infer that the knowledge of these individuals can be imputed to Bourke.<sup>156</sup>

#### 5. United States v. Bourke (2009)

In the summer of 2009, Bourke's criminal trial began on criminal charges that he conspired to violate the FCPA's anti-bribery provisions and the Travel Act, money laundering conspiracy, and making a false statement to the FBI.<sup>157</sup> At the time, and still today, FCPA trials are rare and thus Bourke's trial generated substantial media attention and provided Judge Scheindlin another unique opportunity of overseeing an actual FCPA trial.<sup>158</sup> After the government's case-in-chief, Bourke moved for a judgment of acquittal.<sup>159</sup> Given the "very heavy burden" a criminal defendant has in succeeding on such a motion (i.e., a judgment of acquittal can be entered "only if the evidence that the defendant committed the crime is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt") it is not surprising that Judge Scheindlin denied the motion.<sup>160</sup>

As to the FCPA conspiracy charge, Judge Scheindlin concluded that there was "ample evidence to suggest that the purpose of many of the payments was to obtain assistance from the Azeri officials in the privatization venture."<sup>161</sup> Judge Scheindlin wrote:

Farrell testified that bribes had been paid to the officials for the purpose of "help[ing] us purchase and obtain vouchers and options to [use in the] privatization auction." There is also testimony connecting specific bribes to the privatization venture. For instance, Farrell testified that at the meeting in which Kozeny agreed to give the officials a two-thirds

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156. *Id.* at 422–23 (internal footnotes omitted) (citing Government's Opposition, *supra* note 150, at 6).

157. Chad Bray & Dionne Searcey, *Bourke Trial Gets Under Way*, WALL ST. J. (June 3, 2009, 12:01 AM), <https://www.wsj.com/articles/SB124399659754180207>.

158. *See, e.g., id.*; Andrew Longstreth, *Prosecutor Gives Closing Argument in Frederic Bourke FCPA Trial*, AM. LAW. (July 6, 2009), <https://www.law.com/americanlawyer/almID/1202432024751/?id=1202432024751>; Andrew Longstreth, *U.S. Envoy George Mitchell Defends Frederic Bourke at FCPA Trial*, AM. LAW. (June 20, 2009), <https://www.law.com/americanlawyer/almID/1202431627434/?id=1202431627434>.

159. *United States v. Kozeny*, 638 F. Supp. 2d 348, 349 (S.D.N.Y. 2009).

160. *Id.* at 350 (quoting *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999)).

161. *Id.* at 355.

share of the vouchers, he had also agreed to pay an “entry fee” of eight to twelve million dollars to President Aliyev in order to participate in the privatization of SOCAR, which was subsequently transferred in cash and by wire. A reasonable jury could properly conclude that any bribes made after July 22, 1998 were also made for the purpose of encouraging privatization . . . .

Bourke’s argument is also unpersuasive for another reason. As noted, there is sufficient evidence from which a reasonable jury could infer that Bourke knew of payments being made to Azeri officials by February 1998 and that he intended for similar payments to be made as of April 1998. In addition, there is evidence that he was involved in referring Nuriyev to a doctor in the United States and obtaining a visa for him to travel to the United States in August 1998. . . . It would therefore be plausible for a jury to infer that the purpose of the bribes—including some that were made after July 22, 1998—was to encourage the privatization of SOCAR, in which Bourke participated . . . .<sup>162</sup>

On July 10, 2009, Bourke was found guilty for conspiring to violate the FCPA and Travel Act and for making false statements to the FBI, yet acquitted of money laundering conspiracy.<sup>163</sup> As stated in the DOJ’s release:

Evidence presented at trial established that Bourke was a knowing participant in a scheme to bribe senior government officials in Azerbaijan with several hundred million dollars in shares of stock, cash, and other gifts. According to evidence presented at court, the bribes were meant to ensure that those officials would privatize the State Oil Company of the Azerbaijan Republic (SOCAR) in a rigged auction that only Bourke, fugitive Czech investor Viktor Kozeny and members of their investment consortium could win, to their massive profit. According to evidence presented at trial, the scheme involved the purchase of vouchers and options that could be used to bid for shares in SOCAR. The vouchers and options were largely purchased with millions of dollars of cash flown into Azerbaijan on private planes. The vouchers and options were intended to be exercised by Oily Rock Ltd., a company Kozeny allegedly controlled, according to evidence presented at trial. Bourke, a friend and neighbor of Kozeny’s in Aspen, Colo., invested approximately \$8 million in Oily Rock, on behalf of

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162. *Id.* at 355–56 (alterations in original) (internal footnotes omitted) (quoting 9/11/08 Transcript, *supra* note 147, at 353) (citing 9/11/08 Transcript, *supra* note 147, at 436–37, 574–75, 1177–78). Judge Scheindlin also denied Bourke’s motion for a judgment of acquittal on the money laundering conspiracy and false statement charge. *Id.* at 354–57.

163. Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Connecticut Investor Found Guilty in Massive Scheme to Bribe Senior Government Officials in the Republic of Azerbaijan (July 10, 2009), <https://www.justice.gov/opa/pr/connecticut-investor-found-guilty-massive-scheme-bribe-senior-government-officials-republic>.

himself and family members and friends. Evidence also showed that Bourke obtained directorships, salary and stock options with related companies that Kozeny allegedly set up and funded.

... [E]vidence presented at trial showed that Bourke and others conspired to pay or cause to be paid millions of dollars worth of bribes to Azeri government officials to ensure that their investment consortium would gain, in secret partnership with the Azeri officials, a controlling interest in SOCAR and its substantial oil reserves. For example, evidence presented at trial showed that . . . Kozeny allegedly agreed to transfer to corrupt Azeri officials two-thirds of the vouchers and options Oily Rock purchased, and to give them two-thirds of all of the profits arising from his investment consortium's participation in SOCAR's privatization. In addition, evidence presented at trial showed that . . . Bourke knew that Kozeny arranged for Oily Rock to increase its authorized share capital from \$150 million to \$450 million so that the additional \$300 million worth of Oily Rock shares could be transferred to one or more of the Azeri officials as a further bribe payment. Bourke also arranged for two of the corrupt officials to travel to New York City on different occasions in 1998 to receive medical treatment, for which Oily Rock paid. Thereafter, in interviews with the FBI in April and May of 2002, Bourke falsely stated that he was not aware that Kozeny had made the alleged payments to the Azeri Officials.<sup>164</sup>

#### 6. United States v. Bourke (2009)

Upon conviction, Bourke again moved post-trial for a judgment of acquittal or, alternatively, a new trial.<sup>165</sup> However, once again Judge Scheindlin denied the motion and reasoned:

Bourke argues that the Government presented insufficient evidence to establish beyond a reasonable doubt that he had actual knowledge of the bribery. However, Bourke misconstrues the knowledge that a jury must find he had in order to be convicted of the crime of conspiracy. The Government must prove that Bourke had knowledge of the *object of the conspiracy*, which was to violate the FCPA, not that bribes had, in fact, been paid. Indeed, a defendant can be convicted of conspiracy even if the object of the conspiracy—in this case, the making of corrupt payments in return for the privatization of SOCAR—is never fully consummated.

There was ample circumstantial evidence that Bourke had actual knowledge of the object of the conspiracy. For instance, Amir Farman-Farma, who was employed by Minaret and became familiar with Bourke during the course of the privatization venture, testified that he

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164. *Id.*

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

had asked Bourke in a December 1998 conversation how Kozeny had justified the dilution of Oily Rock shares as a result of the capital share increase. Bourke had replied that he had been told by Kozeny that the dilution was “a necessary cost of doing business” and that “he had issued or sold shares to new partners who would maximize the chances of the deal going through, the privatization being a success.” Robert Evans, another investor in the venture, also testified that Kozeny had told him and Bourke during a trip to Azerbaijan that they would not be receiving the “full value” of their investments because of a “split with local interests.” It can be inferred from both of these conversations that Bourke was aware that “new partners” or “local interests” were receiving shares of the venture without consideration and in exchange for assistance in encouraging the Azeri Government to privatize SOCAR.

In addition, the Government introduced a tape recording of a May 1998 teleconference in which Bourke and Richard Friedman, another investor in Oily Rock, discussed with their attorneys how to limit any liability that may result from their participation on the boards of Kozeny’s companies. During this call, Bourke indicated strongly that he knew Kozeny and others were engaged in bribing state officials.

Despite this knowledge, Bourke and Friedman proposed the formation of companies affiliated with Oily Rock and Minaret that would shield them from liability and limit their knowledge of the affairs of Kozeny’s Oily Rock and Minaret. Bourke joined the board of directors of Oily Rock U.S. Advisors and Minaret U.S. Advisors on July 1, 1998. He made an additional investment in the privatization scheme after his appointments to these positions.

There is also substantial direct evidence of Bourke’s knowledge. Hans Bodmer, co-defendant and attorney to Kozeny during the period of the scheme, testified that he had a conversation with Bourke in February 1998 regarding the bribery of Azeri officials. Bodmer testified that on February 5, 1998 during a trip to Azerbaijan, Bourke asked him, “what is the arrangement, what are the Azeri interests.” After obtaining Kozeny’s approval to speak to Bourke about the specifics of the “arrangement,” Bodmer then met with Bourke the following day, February 6. He testified that he then told Bourke that two-thirds of the vouchers had been issued to the Azeri officials under credit facility agreements at no risk to them. He also identified the Azeri officials who received these vouchers as Barat Nuriyev, Nadir Nasibov, and their families.

In addition to Hans Bodmer, the Government also called Thomas Farrell, co-defendant and one of Kozeny’s employees. Farrell testified that some time [sic] after Bourke had invested in Oily Rock, Bourke requested that Farrell leave his office with him so that they might have

a conversation. During that conversation, Bourke asked about the status of the privatization venture and whether President Aliyev or Barat Nuriyev had given any indications to Farrell about possible approval. Farrell testified that at one point in the conversation, Bourke had asked: “Has Viktor given them enough money?”

Farrell testified that Bourke raised the subject with him a second time during a trip to celebrate the opening of the Minaret offices in Baku, Azerbaijan in April 1998. Farrell testified that Bourke asked him about the prospects of privatization and whether Farrell had heard anything from the officials in charge, such as Nuriyev. After Farrell gave Bourke a short status report, Bourke asked: “Well are—is Viktor giving enough to them?”

. . . .

. . . Viewed in the light most *favorable* to the Government, the testimony shows that far from being ignorant of the corrupt arrangements, Bourke not only knew about them but supported them.<sup>166</sup>

Accordingly, Judge Scheindlin concluded that “the Government presented sufficient evidence to demonstrate beyond a reasonable doubt that Bourke possessed actual knowledge of the object of the conspiracy” and thus denied his post-trial motion seeking a judgment of acquittal or, alternatively, a new trial.<sup>167</sup>

Post-trial, Bourke also challenged Judge Scheindlin’s rulings on a number of motions in limine during the proceedings including alleged jury instruction errors.<sup>168</sup> As to conscious avoidance, Judge Scheindlin summarized Bourke’s argument and the relevant legal framework as follows:

Bourke argues that the Court erroneously charged the jury that it could find him guilty of the conspiracy offense on a theory of conscious avoidance despite the fact that “(1) the Government expressly disclaimed reliance on such a theory at trial; and (2) the Government’s evidence, at best, could establish only negligence, which under

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166. *Id.* at 374–77 (internal footnotes omitted) (quoting *United States v. Wexler*, 522 F.3d 194, 214 (2d Cir. 2008)) (first citing Memorandum of Law in Support of Defendant Frederic Bourke, Jr.’s Post-Trial Motion for Entry of a Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29 or for a New Trial Pursuant to Fed. R. Crim. P. 33 at 29, *Kozeny*, 638 F. Supp. 2d 348 (No. 05-CR-518-SAS) [hereinafter Bourke Acquittal Motion]; then citing 9/11/08 Transcript, *supra* note 144, at 1455, 2623; then citing Government Exhibit 4A-T-2 at 2, *Kozeny*, 582 F. Supp. 2d 535 (No. 05-CR-518-SAS); then citing Government Exhibit 217, *Kozeny*, 582 F. Supp. 2d 535 (No. 05-CR-518-SAS); and then citing 9/11/08 Transcript, *supra* note 144, at 518–20, 535–36, 354, 1065–70).

167. *Id.* at 377. Judge Scheindlin also denied Bourke’s motion with respect to the false statements charge. *Id.* at 378.

168. *See id.* at 380–85.

controlling Second Circuit precedent cannot support criminal liability.” He contends that because the Government’s evidence of actual knowledge was thin, there was a “strong possibility” that the conscious avoidance charge misled the jury into improperly believing that it could convict him on the basis that he had “not tried hard enough to learn the truth.”

“The conscious avoidance doctrine provides that a defendant’s knowledge of a fact required to prove the defendant’s guilt may be found when the jury is persuaded that the defendant consciously avoided learning that fact while aware of a high probability of its existence.” With respect to conspiracy, the Second Circuit has held that conscious avoidance may satisfy the knowledge component of the intent to participate in the conspiracy, even though there must be further proof that the defendant joined the conspiracy with the intent to further its criminal purpose.

A conscious avoidance charge is proper “(i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction and (ii) the appropriate factual predicate for the charge exists.” A factual predicate exists when “the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.”<sup>169</sup>

However, Judge Scheindlin concluded that a factual predicate existed for the conscious avoidance charge and stated:

There is no dispute with respect to the first requirement—Bourke’s key defense was that he never knew of any corrupt arrangements. I also find that the appropriate factual predicate exists for such a charge. There was ample evidence that Bourke was aware of a high probability that the payments were illegal and deliberately avoided confirming this fact. *First*, there was testimony at trial from a number of witnesses that Bourke knew that corruption was rampant in Azerbaijan. For instance, Farman-Farma testified that he and Bourke were aware that “Azerbaijan . . . was rated as one of the most corrupt countries in the world.” One of Bourke’s attorneys, Arnold Levine, also testified that he had once compared Azerbaijan to the “wild west” in a conversation with Bourke.

*Second*, there was also testimony that Bourke was aware of Kozeny’s exploits and misdeeds in Czechoslovakia. David Hempstead, another of Bourke’s attorneys, testified that Bourke was familiar with Kozeny’s

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169. *Kozeny*, 664 F. Supp. 2d at 385–86 (internal footnotes omitted) (first quoting Bourke Acquittal Motion, *supra* note 166, at 7; then quoting *United States v. Svoboda*, 347 F.3d 471, 477 (2d Cir. 2003); and then quoting *United States v. Kaplan*, 490 F.3d 110, 127 (2d Cir. 2007)).

past and had told Hempstead on one occasion that Kozeny was replicating in Azerbaijan the same scheme that he had staged during Czechoslovakia's privatization period, which consisted of amassing vouchers in order to later control companies. Senator Mitchell also testified that he had approached Bourke to express his concerns after reading a number of negative news articles about Kozeny's Czechoslovakia ventures and that Bourke had already been "aware" of them.

Perhaps the strongest evidence that Bourke was aware of the high probability that corrupt payments were being made to Azeri officials is a May 18, 1989 tape recording of a phone conference among Bourke, Friedman, and their attorneys during which they discuss whether Bourke and Friedman will join the board of Oily Rock. During this conversation, Bourke expressed his concern that Kozeny and his employees were paying bribes and violating the FCPA: "I mean, they're talking about doing a deal in Iran . . . Maybe they . . . bribed them, . . . with . . . ten million bucks. I, I mean, I'm not saying that's what they're going to do, but suppose they do that." Later in the conversation, Bourke says:

I don't know how you conduct business in Kazakhstan or Georgia or Iran, or Azerbaijan, and if they're bribing officials and that comes out. . . Let's say . . . one of the guys at Minaret says to you, Dick, you know, we know we're going to get this deal. We've taken care of this minister of finance, or this minister of this or that. What are you going to do with that information?

Still later in the conversation, Bourke again ponders:

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

These comments certainly suggest that Bourke suspected bribes were being paid to encourage the privatization of SOCAR. Furthermore, statements such as "What are you going to do with that information?" and "You got knowledge of it. What do you do with that?" indicate that he feared what he might discover.

There is also a factual predicate for the conclusion that Bourke took steps to avoid learning that the bribes were illegal. At the end of the recording, Bourke and Friedman decided that instead of joining the Oily Rock board directly, they would join the boards of newly-established

but separate companies that were affiliated with Minaret and Oily Rock. According to their conversation, the purpose of forming these companies was to enable them to participate in the venture without having direct access to knowledge about Oily Rock's transactions and without the possibility of being held civilly or criminally accountable should any of their suspicions about Kozeny turn out to be true. Thus, if Bourke did not actually know, this evidence is at least sufficient for a reasonable juror to conclude beyond a reasonable doubt that he knew of the high probability that bribes were being paid and that he took steps to ensure that he did not acquire knowledge of that fact. A factual predicate therefore existed for this instruction.<sup>170</sup>

Bourke also attacked his conviction on the ground that the government "merely presented evidence of [his] negligence."<sup>171</sup> However, Judge Scheindlin likewise found this argument unavailing and stated:

[T]here is plenty of evidence that Bourke—rather than merely failing to conduct due diligence—had serious concerns that Kozeny was engaging in questionable practices but nevertheless took steps to avoid learning about those practices by declining to join the board of Oily Rock. His remarks on the tape evidencing his concern that he would discover Kozeny's engagement in corrupt practices and the subsequent formation of companies affiliated with Oily Rock in which he could participate without being held accountable for Kozeny's actions demonstrate that he was not merely negligent, but was deliberately attempting to shield himself from actual knowledge.

....

And there is no reason to believe that the jury improperly returned a guilty verdict on the basis of Bourke's negligence. The jury was specifically instructed that Bourke could not be convicted if it found him to be negligent. The jury was instructed—with respect to conscious avoidance—that Bourke's

knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge. On the other hand, knowledge is not established in this manner if the person merely failed to learn the fact through negligence or if the person

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170. *Id.* at 386–88 (alteration in original) (quoting Government Exhibit 4A-T-2, *supra* note 166, at 2–3) (first citing 9/11/08 Transcript, *supra* note 144, at 123, 1496, 1571, 1632, 1924–25; and then citing Government Exhibit 4A-T-2, *supra* note 166, at 7–8).

171. *Id.* at 388.

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actually believed that the transaction was legal.<sup>172</sup>

Having denied Bourke's post-trial motions, next up for Judge Scheindlin was sentencing Bourke and the sentence she imposed, as well as the comments she made at the sentencing hearing, further demonstrate her nuanced views regarding the FCPA and its enforcement. On the one hand, Judge Scheindlin observed:

Those who participated in efforts to corrupt foreign officials so that they may make a handsome profit on their investment, have violated the law and deserve to be punished. Had this scheme succeeded, a number of American investors would have made hundredfold returns on their investments. Officials in Azerbaijan would have become even richer, while the people of Azerbaijan would have been deprived of the benefit of the value of their greatest natural resource. Such conduct cannot be tolerated and must be punished. This is also the main reason that I concluded that jail sentence is required and rejected [Bourke's] request for probation.

. . . .

. . . Those who invest in foreign countries must recognize that bribery of foreign officials is outlawed by the Foreign Corrupt Practices Act and cannot be undertaken with impunity. Such bribery must, and will, result in a jail sentence.<sup>173</sup>

On the other hand, Judge Scheindlin observed:

[Bourke] was in no way the originator of this scheme. There is no doubt in my mind that his involvement began as an investor hoping to make a good deal of money. However, I also find, as did the jury, that over the course of time in which he was an investor, he learned that in order for this investment to pay off the wheels would need to be greased by bribing the decision makers in Azerbaijan. He went along with that plan and furthered its goals.

On the other hand, there is slim proof as to whether the bribes were paid, and if so how much was paid, and if so, who got the money. In the end, the intended privatization never occurred, and this defendant and many others lost the full value of their investment. Bourke never made a dollar on this scheme, and it has cost him many years of stress and anxiety in

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172. *Id.* at 388–89 (footnote omitted) (quoting 9/11/08 Transcript, *supra* note 144, at 3366–67). In the decision, Judge Scheindlin also rejected Bourke's arguments in connection with, among other things, a mens rea instruction, the failure to include a good faith jury instruction, and issues relevant to the FCPA's local law affirmative defense, an issue Judge Scheindlin previously addressed. *Id.* at 389–96; see *United States v. Kozeny*, 582 F. Supp. 2d 535, 539 (S.D.N.Y. 2008).

173. Transcript of Sentencing Hearing at 30–31, *United States v. Bourke*, No. 05-CR-518-SAS (S.D.N.Y. Nov. 11, 2009), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/06/01/11-10-09bourke-trans-hearing.pdf>.

several ways.

. . . .

. . . [F]ar worse for Mr. Bourke, has been the years spent fighting this case. A case he believes is misguided. He deeply believes that the government has not treated him fairly. He has raised many challenges to his conviction . . . . Suffice it to say, for now, that there may yet be merit to many of his charges. In any event, there is enough uncertainty here to warrant the imposition of a non-guidelines sentence.<sup>174</sup>

In the end, Judge Scheindlin rejected the government's ten-year sentencing recommendation and instead sentenced Bourke to 366 days in federal prison and also ordered him to pay a one million dollar fine and serve three years of supervised release following the prison term.<sup>175</sup> Even though Judge Scheindlin denied Bourke's post-trial motions and sentenced him to prison, she did comment at sentencing that "[a]fter years of supervising this case, it is still not entirely clear to [her] whether Mr. Bourke was a victim, or a crook, or a little bit of both."<sup>176</sup>

From there, Bourke appealed to the Second Circuit and the primary issue on appeal was Bourke's knowledge of the alleged bribery scheme.<sup>177</sup> Once again, the Second Circuit agreed with Judge Scheindlin and affirmed Bourke's conviction for conspiring to violate the FCPA, among other charges.<sup>178</sup> In pertinent part, the court held that Bourke enabled himself to participate in a bribery scheme without acquiring actual knowledge of the specific conduct at issue and that such conscious avoidance, even if supported primarily by circumstantial evidence, was sufficient to warrant an FCPA-related charge.<sup>179</sup> Specifically, the Second Circuit concluded:

While the government's primary theory at trial was that he had actual knowledge of the bribery scheme, there is ample evidence to support a conviction based on the alternate theory of conscious avoidance. The testimony at trial demonstrated that Bourke was aware of how pervasive corruption was in Azerbaijan generally. Bourke knew of Kozeny's reputation as the "Pirate of Prague." Bourke created the American advisory companies to shield himself and other American investors from potential liability from payments made in violation of FCPA, and joined the boards of the American companies instead of joining the Oily Rock board. In so doing, Bourke enabled himself to participate in the

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174. *Id.* at 33–34.

175. *Id.* at 13, 28.

176. *Id.* at 34.

177. *United States v. Kozeny*, 667 F.3d 122, 130 (2d Cir. 2011).

178. *Id.* at 140.

179. *Id.* at 133–35.

investment without acquiring actual knowledge of Oily Rock's undertakings.

The strongest evidence demonstrating that Bourke willfully avoided learning whether corrupt payments were made came from tape recordings of a May 18, 1999 phone conference with Bourke, fellow investor Friedman and their attorneys, during which Bourke voiced concerns about whether Kozeny and company were paying bribes . . . .

. . . .

Finally, Bourke's attorney testified that he advised Bourke that if Bourke thought there might be bribes paid, Bourke could not just look the other way. Taken together, a rational juror could conclude that Bourke deliberately avoided confirming his suspicions that Kozeny and his cohorts may be paying bribes.<sup>180</sup>

All of the above Azeri bribery matters decided by Judge Scheindlin were criminal FCPA enforcement actions brought by the DOJ. However, Judge Scheindlin's last FCPA decision occurred in the context of a civil enforcement action brought by the SEC.

#### B. SEC v. Sharaf

In 2008, Siemens AG (a German company with shares listed on a U.S. exchange and thus subject to the FCPA) resolved parallel DOJ and SEC enforcement actions by agreeing to pay a then-FCPA record \$800 million in combined settlement amounts.<sup>181</sup> The DOJ stated that "for much of its operations across the globe, bribery was nothing less than standard operating procedure for Siemens" and the SEC likewise stated that the "pattern of bribery by Siemens was unprecedented in scale and geographic reach."<sup>182</sup> A component of the Siemens enforcement action involved alleged improper conduct in Argentina in connection with a national identity card project and in 2011 the SEC used this prong of the corporate enforcement action to bring individual charges against seven individuals associated with Siemens including Herbert Steffen, a seventy-four-year-old German citizen who previously served, among other positions, as the CEO of Siemens S.A. Argentina, a wholly-owned

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180. *Id.* at 133 (first citing 9/11/08 Transcript, *supra* note 144, at 1496, 1571, 1666–67; and then citing Government Exhibit 41-T4, *Kozeny*, 582 F. Supp. 2d 535 (No. 05-CR-518-SAS)).

181. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html>.

182. *Id.*; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), <https://www.sec.gov/news/press/2008/2008-294.htm>.

subsidiary of Siemens.<sup>183</sup> Judge Scheindlin summarized the SEC's alleged bribery scheme as follows:

The Complaint alleges that between 1996 and 2007 the defendants orchestrated a bribery scheme which paid millions of dollars in bribes to top government officials in Argentina. Over the course of the bribery scheme, Siemens paid an estimated \$100 million in bribes, approximately \$31.3 million of which were paid after March 12, 2001, when Siemens became subject to U.S. securities laws. In the course of paying these bribes Siemens made false certifications pursuant to the Sarbanes-Oxley Act representing the truthfulness of its quarterly and annual certifications.

In 1998, Siemens and its Argentine affiliate were awarded the contract for a one billion dollar project to create national identity cards. The Complaint alleges that throughout the bid process, and the life of the contract, the Argentine government sought bribes, which were paid by Siemens. In August 1999, the contract was suspended due to political turmoil, and Siemens was notified that it would not be renewed unless the terms were renegotiated with the new government. Beginning in December 2000, Steffen and [Uriel] Sharef, a Siemens Managing Board Member, began renegotiating with the Argentine government, including the newly elected President. The government demanded that Siemens pay it bribes in order to reinstate the contract. As a result, Siemens, via its operating group Siemens Business Services ("SBS"), began to pay \$27 million in bribes to obtain the reauthorization of the contract. SBS signed a \$27 million sham consulting agreement with Mfast Consulting AG ("Mfast"), a front company. The purpose of this transaction was to provide a cover for the bribes funneled to the Argentine government. Despite these efforts the contract was canceled.

In May 2002, Siemens initiated an arbitration proceeding with the World Bank's International Centre for Settlement of Investment Disputes ("ICSID") to recover lost profits and costs resulting from the cancellation of the contract. Because evidence of corruption in the initial award of the contract would have provided Argentina with a defense to Siemens' ICSID claim, Siemens worked to conceal its bribery. As part of this effort, Steffen and the other defendants continuously urged Siemens management to funnel more money to Argentine officials to ensure that the earlier bribes were not disclosed. In 2007, Siemens was awarded \$217 million in the arbitration proceeding. The SEC alleges that the award was issued because Siemens paid additional bribes to suppress evidence that the contract

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183. SEC v. Sharef, 924 F. Supp. 2d 539, 541 (S.D.N.Y. 2013); Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Seven Former Siemens Executives with Bribing Leaders in Argentina (Dec. 13, 2011), <https://www.sec.gov/news/press/2011/2011-263.htm>.

itself was awarded to Siemens as a result of bribes it paid to the government.

Between 2002 and 2006, defendant Bernd Regendantz, Chief Financial Officer of SBS, signed quarterly and annual certifications under the Sarbanes-Oxley Act in which he represented that SBS's financial statements were not false or misleading. The SEC alleges, that in light of the bribery scheme, these certifications were fraudulent.<sup>184</sup>

As to Steffen's alleged role in the bribery scheme, Judge Scheindlin observed:

The Complaint alleges that Sharef recruited Steffen "to facilitate the payment of bribes" to officials in Argentina because of his longstanding connections in Argentina, which he acquired during his tenure at Siemens Argentina. Following the cancellation of the contract, beginning in December 2000, Steffen and Sharef began renegotiating with the Argentine government, including the newly elected President, which demanded that Siemens pay it bribes in order to reinstate the contract.

In order to facilitate payment of bribes to the Argentine officials, Steffen met several times with Regendantz, who became the Chief Financial Officer of SBS in February 2002, and "pressured" Regendantz to authorize bribes from SBS to Argentine officials. In April 2002, Steffen told Regendantz that SBS had a "moral duty" to make at least an "advance payment" of ten million dollars to the individuals who had previously handled the bribes because he and other individuals were being threatened as a result of the unpaid bribes.

Once Regendantz authorized the bribes, the allegations against Steffen are limited to participation in a phone call initiated by Sharef from the United States in connection with the bribery scheme, and that in the first half of 2003, defendants including Steffen "urged Sharef to meet the demands [of Argentine officials] and make the additional payments."<sup>185</sup>

Steffen moved to dismiss the complaint charging FCPA anti-bribery violations as well as FCPA books and records and internal controls violations by arguing that the court lacked personal jurisdiction against him and that the complaint was untimely.<sup>186</sup> While Steffen's motion occurred in the context of an FCPA enforcement action, Judge Scheindlin's decision concerned general personal jurisdiction issues relevant in civil securities actions—namely that the relevant securities

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184. *Sharef*, 924 F. Supp. 2d at 541–42 (citing Complaint at ¶¶ 1, 25–30, 33, 35, 37, 59–60, *Sharef*, 924 F. Supp. 2d 539 (No. 11-CV-9073-SAS)).

185. *Id.* at 542 (alteration in original) (quoting Complaint, *supra* note 184, at ¶ 51) (citing Complaint, *supra* note 184, at ¶¶ 12, 27–28, 39–40).

186. *Id.* at 540–41.

law “permits the exercise of personal jurisdiction to the limit of the Due Process Clause of the Fifth Amendment.”<sup>187</sup> As stated by Judge Scheindlin, this “analysis consists of two components: the minimum-contact analysis and a reasonableness inquiry.”<sup>188</sup>

As to minimum contacts, Judge Scheindlin explained:

A nonresident defendant sued under the Exchange Act need not have minimum contacts with the state seeking to exercise personal jurisdiction; rather the only contacts required are with the United States as a whole, as [relevant law] provides for nationwide service of process. To establish the minimum contacts necessary to satisfy due process, the plaintiff must show that his “claim arises out of, or relates to, the defendant’s contacts with the forum . . . [and that] the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there.” The SEC alleges specific jurisdiction over Steffen, which requires that a defendant has “purposefully directed his activities towards the forum and the litigation arises out of or is related to the defendant’s contact with the forum.”

It is well-established that a court may exercise personal jurisdiction over a foreign defendant who causes an effect in the forum by an act committed elsewhere. However, “this is a principle that must be applied with caution, particularly in an international context.” “[F]oreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.” Rather defendants must have “followed a course of conduct directed at . . . the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.” The effects in the United States must “occur [] as a direct and foreseeable result of the conduct outside the territory” and defendant “must know, or have good reason to know, that his conduct will have effects in the [forum] seeking to assert jurisdiction over him.”<sup>189</sup>

As to reasonableness, Judge Scheindlin explained:

If the defendant’s contacts with the forum state rise to this minimum

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187. *Id.* at 544 (quoting *SEC v. Unifund Sal*, 910 F.2d 1028, 1033 (2d Cir. 1990)).

188. *Id.* (citing *King County v. IKB Deutsche Industriebank AG*, 712 F Supp. 2d 104, 111 (S.D.N.Y. 2010)).

189. *Sharef*, 924 F. Supp. 2d at 544–45 (alterations in original) (internal footnotes omitted) (first quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir. 2007); then quoting *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972); then quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 295 (1980); and then quoting *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011)) (first citing Memorandum of Law in Opposition of Defendant’s Motion to Dismiss the Complaint at 10–11, *Sharef*, 924 F. Supp. 2d 539 (No. 11-CV-9073-SAS); then citing *In re Magnetic Audiotape Antitrust Litig.*, 334 F. 3d 204, 207 (2d Cir. 2003); and then citing *Eskofot A/S v. E.I. Du Pont de Nemours & Co.*, 872 F. Supp. 81, 87 (S.D.N.Y. 1995)).

level, the defendant may defeat jurisdiction only by presenting “a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” Courts must weigh several factors in evaluating this “reasonableness” requirement of due process, including: “the burden on the defendant; the interests of the forum State and the plaintiff’s interest in obtaining relief[;] ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.’”<sup>190</sup>

Based on the above legal standards, Judge Scheindlin granted Steffen’s motion to dismiss for lack of personal jurisdiction by concluding that the SEC did not establish minimum contacts and that the exercise of jurisdiction over Steffen was not otherwise reasonable.<sup>191</sup>

As to minimum contacts, Judge Scheindlin concluded:

The SEC’s allegations are premised on Steffen’s role in encouraging Regendantz to authorize bribes to Argentine officials that ultimately resulted in falsified SEC filings. While Steffen’s actions may have been a proximate cause of the false filings—and even that is a matter of some doubt—Steffen’s actions are far too attenuated from the resulting harm to establish minimum contacts. Steffen was brought into the alleged scheme based solely on his connections with Argentine officials. In furtherance of his negotiations with those officials, Steffen “urged” and “pressured” Regendantz to make certain bribes. However, Regendantz did not agree to make the bribes until he communicated with several “higher ups” whose responses he perceived to be instructions to make the bribes. Once Regendantz agreed to make the bribes—following receipt of instructions from Siemens’ management rather than Steffen—Steffen’s alleged role was tangential at best. Steffen did not actually authorize the bribes. The SEC does not allege that he directed, ordered or even had awareness of the cover ups that occurred at SBS much less that he had any involvement in the falsification of SEC filings in furtherance of those cover ups. Nor is it alleged that his position as Group President of Siemens Transportation Systems would have made him aware of, let alone involved in falsification of these filings.

To be sure, there is ample (and growing) support in case law for the exercise of jurisdiction over individuals who played a role in falsifying or manipulating financial statements relied upon by U.S. investors in order to cover up illegal actions directed entirely at a foreign

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190. *Id.* at 546 (alteration in original) (internal footnotes omitted) (first quoting *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 477 (1985); and then quoting *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 113–14 (1987)).

191. *Id.* at 546, 548. Because Judge Scheindlin found jurisdiction lacking, she did not consider Steffen’s other argument that the SEC complaint was untimely.

jurisdiction. In a recent decision, *SEC v. Elek Straub*, a court in this district exercised jurisdiction over individuals who orchestrated a bribery scheme aimed at the Macedonian government, *and* as part of the bribery scheme signed off on misleading management representations to the company's auditors and signed false SEC filings.

As the SEC points out, the lynchpin of these decisions is that jurisdiction exists where "an executive of a foreign securities issuer, wherever located, participates in a fraud *directed* to deceiving United States shareholders." It is by now well-established that signing or directly manipulating financial statements to cover up illegal foreign action, with knowledge that those statements will be relied upon by United States investors satisfies this test. However, the exercise of jurisdiction over foreign defendants based on the effect of their conduct on SEC filings is in need of a limiting principle. If this Court were to hold that Steffen's support for the bribery scheme satisfied the minimum contacts analysis, even though he neither authorized the bribe, nor directed the cover up, much less played any role in the falsified filings, minimum contacts would be boundless. Illegal corporate action almost always requires cover ups, which to be successful must be reflected in financial statements. Thus, under the SEC's theory, every participant in illegal action taken by a foreign company subject to U.S. securities laws would be subject to the jurisdiction of U.S. courts no matter how attenuated their connection with the falsified financial statements. This would be akin to a tort-like foreseeability requirement, which has long been held to be insufficient.

The allegations against Steffen fall far short of the requirement that he "follow[] a course of conduct directed at . . . the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct." Absent any alleged role in the cover ups themselves, let alone any role in preparing false financial statements the exercise of jurisdiction here exceeds the limits of due process, as articulated by the Supreme Court and the Second Circuit.<sup>192</sup>

As to reasonableness, Judge Scheindlin concluded:

The decision not to exercise jurisdiction in this case is bolstered by my conclusion that requiring Steffen to defend this case in the United States would be unreasonable. If minimum contacts are present the defendant may defeat jurisdiction only by presenting, "a compelling case that the presence of some other considerations would render jurisdiction

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192. *Id.* at 546–48 (alteration in original) (internal footnotes omitted) (first quoting SEC's Reply in Support of Its Notice of Supplemental Authority at 2, *Sharef*, 924 F. Supp. 2d 539 (No. 11-CV-9073-SAS); and then quoting *McIntyre*, 564 U.S. at 884) (first citing Complaint, *supra* note 184, at ¶¶ 47, 59; then citing *SEC v. Stanard*, No. 06-CV-7736 (S.D.N.Y. May 16, 2007); then citing 921 F. Supp. 2d 244, 248, 251 (S.D.N.Y. 2013); then citing *World-Wide Volkwagon*, 444 U.S. at 292; and then citing *Leasco*, 468 F.2d at 1341 n.11)).

unreasonable.” The reasonableness analysis has been characterized as “largely academic” in cases brought under a federal law which provides for nationwide service of due process. However, when a defendant, is not located in the United States, “[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international context.”

Steffen’s lack of geographic ties to the United States, his age, his poor proficiency in English, and the forum’s diminished interest in adjudicating the matter, all weigh against personal jurisdiction. Geographic ties alone do not dictate the extent of the reasonableness inquiry. However, it would be a heavy burden on this seventy-four year old defendant to journey to the United States to defend against this suit. Further, the SEC and the Department of Justice have already obtained comprehensive remedies against Siemens and Germany has resolved an action against Steffen individually. The SEC’s interest in ensuring that this type of conduct does not go unpunished will not be furthered by continuing the suit against Steffen, in light of his age, the burden on him to defend this suit, and the previous adjudications.<sup>193</sup>

As the above in-depth analysis has highlighted, Judge Scheindlin’s written FCPA decisions spanned both criminal and civil enforcement actions and touched upon topics ranging from prima facie FCPA elements, an FCPA affirmative defense, jurisdiction over foreign nationals, as well as related legal issues such as statute of limitations. Moreover, Judge Scheindlin interpreted the FCPA and related issues across the full spectrum of a contested proceeding from motions to dismiss, to motions in limine in advance of trial, to post-trial motions, to sentencing a criminal defendant. The final part of this Article extracts themes from Judge Scheindlin’s FCPA jurisprudence and discusses the broader importance of her undeniably nuanced FCPA views.

#### IV. THEMES FROM JUDGE SCHEINDLIN’S FCPA JURISPRUDENCE

Regarding Judge Scheindlin’s general judicial approach, it was noted in Part II that “[n]obody was a presumptive winner when you went before Judge Scheindlin. You had to make your case, and depending on how the facts and the law played out, that was how the ruling was going

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193. *Id.* at 548–49 (internal footnotes omitted) (first quoting *Burger King*, 471 U.S. at 477; and then quoting *Asahi*, 480 U.S. at 115) (first citing *SEC v. Softpoint, Inc.*, No. 95-C-2951, 2001 U.S. Dist. LEXIS 286, at \*1 (S.D.N.Y. Jan. 18, 2001); then citing *In re LDK Solar Secs. Litig.*, No. C 07-05182 WHA, 2008 U.S. Dist. LEXIS 80717, at \*7 (N.D. Cal. Sept. 24, 2008); then citing Complaint, *supra* note 184, at ¶ 19; and then citing Reply Memorandum of Law in Support of Defendant Herbert Steffen’s Motion to Dismiss the Complaint at 15, *Sharef*, 924 F. Supp. 2d 539 (No. 11-CV-9073-SAS)).

to play out.”<sup>194</sup> Judge Scheindlin’s FCPA jurisprudence also fits this mold as her FCPA views were undeniably nuanced. Judge Scheindlin’s nuanced views regarding what she termed the “ambiguous” FCPA matters and represents a clear rejection of the simplistic narrative of some that the FCPA is a clear statute and that FCPA issues are black and white.

*A. Nuanced Views of FCPA Enforcement*

From her first FCPA decision granting Bodmer’s motion to dismiss criminal FCPA charges, to her last decision granting Steffen’s motion to dismiss civil FCPA charges, Judge Scheindlin’s FCPA views were undeniably nuanced. To her credit, Judge Scheindlin seemingly rejected the simplistic narrative that because the FCPA deals with bribery, and because bribery is bad, all FCPA enforcement actions must therefore be inherently good. Indeed, commenting on this general dynamic Judge Scheindlin observed that “the criminal law in isolation sounds good,” but questioned whether “it is being applied in a fair way that accomplishes the goals that it is set out to accomplish?”<sup>195</sup>

For instance, in *Bodmer* Judge Scheindlin concluded that the foreign national criminal defendant “did not have fair notice that the FCPA’s criminal sanctions applied to him,” and that “the constitutional fair notice requirement, and the rule of lenity” demanded dismissal of the charges.<sup>196</sup> Moreover, Judge Scheindlin expressed serious concerns regarding the circumstances surrounding Bodmer’s arrest and extradition.<sup>197</sup> Likewise, in *Sharef* Judge Scheindlin concluded that jurisdiction was lacking over the foreign national civil defendant because Steffen’s alleged actions were “far too attenuated . . . to establish minimum contacts” in the United States and that requiring Steffen to defend himself would be “unreasonable.”<sup>198</sup> As to the former, Judge Scheindlin found the government’s theory of prosecution “in need of a limiting principle” and as to the latter she found that Steffen’s “lack of geographic ties to the United States, his age, his poor proficiency in English, and the [United States’] diminished interest in adjudicating the matter, all weigh against personal jurisdiction.”<sup>199</sup>

Judge Scheindlin’s concerns about expansive FCPA enforcement

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194. McKee, *supra* note 74.

195. *FCPA Flash—A Conversation with Judge Shira Scheindlin*, FCPA PROFESSOR, (Sept. 25, 2018), <http://fcpaprofessor.com/fcpa-flash-conversation-judge-shira-scheindlin-fcpas-prominent-jurist/>.

196. *United States v. Bodmer*, 342 F. Supp. 2d 176, 189 (S.D.N.Y. 2004).

197. *Id.*

198. 924 F. Supp. 2d at 546, 548.

199. *Id.* at 547–48.

against foreign national defendants and the United States’ “diminished interest” in prosecuting such cases remain relevant. In recent years, much of the largeness of FCPA enforcement (both in terms of the number of actions brought and settlement amounts secured) has resulted from enforcement actions against foreign companies domiciled in countries that, like the United States, are members of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>200</sup> These peer countries, such as the United Kingdom, Sweden, and the Netherlands, all have mature FCPA-like laws governing the conduct of their companies coupled with reputable legal systems to prosecute such offenses.<sup>201</sup> However, the United States has continued to bring such lucrative enforcement actions often premised on sparse jurisdictional allegations, yet none of these enforcement actions were subjected to any meaningful judicial scrutiny for the reasons highlighted in Part II.<sup>202</sup> If they were, would Judge Scheindlin or another federal court judge have questioned “what legitimate U.S. law enforcement interested are implicated when for example:

- A U.K. company interacts with alleged officials in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola and Iraq;
- A Swedish company interacts with Uzebekistan officials; or
- A Dutch company interacts with alleged officials in Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq?”<sup>203</sup>

Given that each of these examples also involved law enforcement actions in the home country of the companies, would Judge Scheindlin or another federal court judge have concluded—as Judge Scheindlin did in *Sharef*—that “comprehensive remedies” against the companies in their home countries warrant the United States backing away from such enforcement actions?

Regarding Judge Scheindlin’s demonstrated concerns about expansive FCPA enforcement against foreign national defendants, it is worth highlighting that the Second Circuit—which affirmed Judge

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200. *FCPA Enforcement Actions Against Foreign Companies from OECD Convention Peer Countries*, FCPA PROFESSOR, (Jan. 23, 2018), <http://fcpaprofessor.com/fcpa-enforcement-actions-foreign-companies-oecd-convention-peer-countries-2/> [hereinafter *FCPA Enforcement*].

201. *Id.*

202. *Id.*; see discussion *supra* Part II.

203. *FCPA Enforcement*, *supra* note 200.

Scheidlin's FCPA rulings twice—recently expressed similar concerns in *United States v. Hoskins* and twice cited *Bodmer*.<sup>204</sup> In the criminal prosecution of a foreign national defendant, a unanimous panel rejected the government's expansive theory of prosecution and framed the issue as follows:

The central question of the appeal is whether Hoskins, a foreign national who never set foot in the United States or worked for an American company during the alleged scheme, may be held liable, under a conspiracy or complicity theory, for violating FCPA provisions targeting American persons and companies and their agents, officers, directors, employees, and shareholders, and persons physically present within the United States. In other words, can a person be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal?<sup>205</sup>

Consistent with Judge Scheindlin's FCPA jurisprudence, the Second Circuit also found limiting principles embodied in the FCPA and specifically stated:

[T]he carefully tailored text of the [FCPA], read against the backdrop of a well-established principle that U.S. law does not apply extraterritorially without express congressional authorization and a legislative history reflecting that Congress drew lines in the FCPA out of specific concern about the scope of extraterritorial application of the statute, persuades us that Congress did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability.

. . . .

. . . [T]he structure of the FCPA—confirms that Congress's omission of the class of persons under discussion was not accidental, but instead was a limitation created with surgical precision to limit its jurisdictional reach.<sup>206</sup>

Further consistent with Judge Scheindlin's FCPA jurisprudence, the Second Circuit also relied extensively on the FCPA's legislative history in reaching its conclusion. As stated by the Court:

The strands of the legislative history demonstrate, in several ways, the affirmative policy described above: a desire to leave foreign nationals outside the FCPA when they do not act as agents, employees, directors, officers, or shareholders of an American issuer or domestic concern, and when they operate outside United States territory.

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204. See 902 F.3d 69, 84, 89 n.8 (2d Cir. 2018) (citing 342 F. Supp. 2d at 188).

205. *Id.* at 71–72, 76.

206. *Id.* at 83–84.

. . . .

. . . [L]imitations on liability for foreign nationals based on conspiracy and complicity theories were sensible given congressional concerns and aspirations in enacting the FCPA. In passing the statute, Congress was largely concerned with ensuring the SEC's ability to supervise and police companies as well as the negative perception that bribery could create for American companies, its effect on the marketplace, and the foreign policy implications of the conduct. But Congress also desired that the statute not overreach in its prohibitions against foreign persons. Protection of foreign nationals who may not be learned in American law is consistent with the central motivations for passing the legislation, particularly foreign policy and the public perception of the United States.<sup>207</sup>

The above diversion away from Judge Scheindlin's FCPA jurisprudence demonstrates that her concerns about expansive FCPA enforcement against foreign nationals endures and remains one of the most pressing modern FCPA enforcement issues.

While the bookends of Judge Scheindlin's FCPA jurisprudence were clear government defeats, as Part II highlighted, Judge Scheindlin's FCPA views were undeniably nuanced as she ruled in favor of the government on several disputed issues against Bourke.<sup>208</sup> For instance, in an issue of first impression and still the only judicial decision construing the FCPA's local law affirmative defense, Judge Scheindlin narrowly construed the defense.<sup>209</sup> As the case proceeded to trial, Judge Scheindlin denied several of Bourke's evidentiary objections and allowed the government to broadly introduce evidence to show that "Bourke was aware of the high probability that Azeri officials were being bribed" and that "a person of Bourke's means, who was considering making a large investment in a venture in Azerbaijan, would have at least been aware of the high probability that bribes were being paid."<sup>210</sup> Furthermore, both after the government's case-in-chief at trial and after the jury verdict, Judge Scheindlin denied Bourke's motion for acquittal reasoning that the government provided "ample" evidence to demonstrate beyond a reasonable doubt that Bourke conspired to violate the FCPA.<sup>211</sup> Notably,

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207. *Id.* at 93–94 (first citing S. Rep. No. 95-114, at 2 (1977); and then citing H.R. Rep. No. 95-640, at 4–6 (1977)).

208. *See* discussion *supra* Part II.

209. *See* *United States v. Kozeny*, 582 F. Supp. 2d 535, 539 (S.D.N.Y. 2008).

210. *United States v. Kozeny*, 643 F. Supp. 2d 415, 419–20 (S.D.N.Y. 2009).

211. *United States v. Kozeny*, 638 F. Supp. 2d 348, 355 (S.D.N.Y. 2009); *United States v. Kozeny*, 664 F. Supp. 2d 369, 373–74 (S.D.N.Y. 2009).

the Second Circuit affirmed Bourke's conviction.<sup>212</sup>

Even though Judge Scheindlin ruled in the government's favor at nearly every turn in the *Bourke* case, her views even in this case were also undeniably nuanced. As highlighted in Part II, in sentencing Bourke to 366 days in prison and rejecting the government's ten-year sentencing recommendation, Judge Scheindlin stated: "after years of supervising this case, it is still not entirely clear to me whether Mr. Bourke was a victim, or a crook, or a little bit of both."<sup>213</sup>

### *B. The Broader Context of Judge Scheindlin's FCPA Jurisprudence*

Judge Scheindlin's nuanced FCPA views were likely a direct result of her struggles to interpret the FCPA and the final portion of this Article provides a broader context to view her FCPA jurisprudence and how her decisions clearly rejected the simplistic narrative that the FCPA is a clear statute and that FCPA issues are black and white.

According to some FCPA commentators, a top "misconception about the FCPA" is that the "FCPA is a vague statute."<sup>214</sup> Other FCPA commentators have long warned others not to believe FCPA lawyers who say that the FCPA is "complicated, technically challenging, obscure, poorly drafted and badly organized" because "[t]here's no evidence in the record that judges or juries have any trouble understanding the FCPA."<sup>215</sup> These statements, penned after the bulk of Judge Scheindlin's FCPA decisions highlighted above, were misinformed and Judge Scheindlin's FCPA jurisprudence represents a wholesale and convincing rejection of these simplistic narratives.<sup>216</sup>

Judge Scheindlin clearly struggled to interpret the FCPA. However, her struggles were not the result of any deficiencies on her part, but rather the deficiencies of the actual FCPA statute enacted by Congress. As highlighted in Part II, on a number of occasions Judge Scheindlin found the FCPA statute, as well as the FCPA's legislative history,

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212. *United States v. Kozeny*, 667 F.3d 122, 140 (2d Cir. 2011).

213. Transcript of Sentencing Hearing, *supra* note 173, at 34.

214. *The FCPA As an Ambiguous Statute and The Importance of Legislative History*, FCPA PROFESSOR (Feb. 3, 2013), <http://fcpaprofessor.com/the-fcpa-as-an-ambiguous-statute-and-the-importance-of-legislative-history/>.

215. Richard L. Cassin, *Is the FCPA Unclear? Clearly Not*, FCPA BLOG (May 19, 2011, 1:08 PM), <http://www.fcpublog.com/blog/2011/5/19/is-the-fcpa-unclear-clearly-not.html>; Richard L. Cassin, *We Get It*, FCPA BLOG (Sept. 17, 2009, 8:28 PM), <http://www.fcpublog.com/blog/2009/9/18/we-get-it.html>.

216. *See The Importance Of The FCPA's Legislative History*, FCPA PROFESSOR (Aug. 25, 2015), <http://fcpaprofessor.com/the-importance-of-the-fcpas-legislative-history/> (highlighting other sporadic instances of judicial scrutiny of FCPA enforcement in which judges have likewise found portions of the FCPA vague or ambiguous).

ambiguous.<sup>217</sup> Reflecting on her FCPA decisions after retiring from the federal bench, Judge Scheindlin still believes that there are a number of inherent ambiguities in the FCPA and thinks that “Congress could have done a better job to clarify a number of the terms that [she] think[s] are vague [in the FCPA].”<sup>218</sup>

Judge Scheindlin’s struggles in interpreting the FCPA were also the result of being on a judicial island and largely interpreting the FCPA against a blank slate. As stated in one of her first FCPA decisions, there were “surprisingly few decisions throughout the country on the FCPA,” and further reflecting on this dynamic Judge Scheindlin was “certainly surprised to find so little precedent.”<sup>219</sup> Comparing the FCPA to other bodies of law that are “very well established,” Judge Scheindlin observed:

The difference with the Foreign Corrupt Practices Act enforcement cases is that there has been so few and so there is very little for a judge to look to when he or she gets their first case. Most judges who come on the bench have never heard of the Foreign Corrupt Practices Act, have never been involved in a case either as a prosecutor or defense lawyer . . . I dare say that 99.8 percent of federal judges never came across such a case during their practice, so they are novices and they just get this case and an issue is raised and they have to look at the statute or beyond the statute to figure out what it means and there is almost no judicial guidance to make that determination.<sup>220</sup>

From a public policy standpoint, Judge Scheindlin’s spot-on observations are problematic as the FCPA is a top priority federal statute of significant importance to all businesses and individuals engaged in international commerce. This is particularly true in criminal FCPA enforcement actions against individuals in which their personal liberty is at stake. Further problematic are the dynamics highlighted in Part II which contribute to the paucity of FCPA jurisprudence and how the FCPA enforcement agencies seem hesitant to expose certain dubious enforcement theories to judicial scrutiny in an individual enforcement action and perhaps risk losing the theory to extract lucrative corporate FCPA settlements. Commenting generally on judicial scrutiny and how it is a hallmark of the rule of law, Judge Scheindlin observed:

While the rule of law says judicial interpretation develops the law, from the executive branch perspective, the regulatory perspective, it

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217. See discussion *supra* Part II.

218. *FCPA Flash—A Conversation with Judge Shira Scheindlin*, *supra* note 198.

219. *Id.*

220. *Id.*

[settlements that bypass judicial scrutiny] may be a tactic that you want to avoid court to avoid an adverse ruling.<sup>221</sup>

Yet, it is this aspect of FCPA enforcement that persists as so-called “prosecutorial common law”—and not actual legal authority—largely frame the contours of the FCPA.<sup>222</sup> A commentator described “prosecutorial common laws” as follows:

Prosecutors don’t set out deliberately to interpret criminal statutes in ways that convict hundreds of people on the basis of a standard that not a single Supreme Court Justice finds supportable, but it has happened already and may well happen again in the context of the Foreign Corrupt Practices Act because of a phenomenon I’ve referred to for a number of years as “prosecutorial common law.”

There are no law school classes or scholarly papers on prosecutorial common law, yet it governs, as a practical matter, an enormous amount of the daily life of the criminal justice system in white collar cases. Prosecutorial common law can be thought of as the “common law of settlement.” In areas, such as complex white collar crime, in which prospective defendants either are highly unlikely to challenge the government in court (e.g., corporations) or highly unlikely to have both the fortitude and the personal wealth or strong support of another entity advancing fees to be able to challenge the government thoroughly and completely (e.g., most individuals), almost all cases are settled.

But settling cases creates very different incentives for the two sides. The government has a long-term interest in developing the law because it is charged with enforcing that law not just against the settling party, but also against other parties in the future. Thus, the government has a strong institutional interest in pushing ever more aggressive interpretations of the governing criminal statute. On the other hand, the defendant, whether a corporation or an individual, is not particularly concerned about the scope of the statute as it might be applied to others in the future. The defendant wants the least possible punishment, right now.

So, in many white-collar cases, the government pushes hard for the defendant to plead guilty pursuant to expansive interpretations of a statute’s jurisdiction and/or scope of liability, and defendants readily accept those interpretations in exchange for what they perceive to be the lowest available penalty.

But what happens next?

In the absence of much decided case law in the area—because so many defendants strike plea agreements rather than litigating their cases—

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221. *Id.*

222. *See Levy, supra* note 102.

prosecutors start to believe that the law means whatever they have been able to get defendants to agree to in earlier plea agreements. After all, they reason (ignoring the parties' different interests in settlements), "Why would Global MegaCorp have agreed to plead guilty on this very same theory of liability if it didn't believe that (1) we had jurisdiction and (2) the conduct clearly violated the criminal statute?"

And when the next case comes around, the government stretches the theory of liability or jurisdiction a little bit further. Again, nobody sets out to develop a statutory interpretation that goes beyond what any Supreme Court Justice would conclude was intended by Congress, but that is consistently what winds up happening because prosecutors (rather than judges) and settlements (rather than well-reasoned judicial opinions) wind up creating the "common law" that prosecutors use to interpret these statutes.<sup>223</sup>

Notwithstanding the prominence of "prosecutorial common law" and how the government often relies upon it in advancing its FCPA enforcement positions, Judge Scheindlin rebuked it in *Bodmer* when she stated, "The government's charging decision, standing alone, does not establish the applicability of the statute."<sup>224</sup> This single sentence alone speaks volumes and Judge Scheindlin's FCPA jurisprudence is a refreshing reminder that the applicability of a statute is determined by the actual statute, Congressional intent in enacting the statute, and judicial decisions interpreting the statute. Yet, as this Article has highlighted through the lens of the FCPA's most prominent judge, there are often unclear answers regarding the FCPA's proper meaning.

In terms of the future and how FCPA jurisprudence can be improved, Judge Scheindlin noted:

[J]udges who draw these cases need to have a better . . . background education in this statute, and the history of the statute, and the purpose of the statute, and maybe the government in its civil and criminal cases should essentially think about almost a tutorial . . . to bring judges up to speed because the assumption that judges are going to be able to figure out some of these difficult terms . . . [ambiguous terms] to figure that out with so little precedent to help them is difficult.<sup>225</sup>

In certain respects, the FCPA Guidance jointly issued by the DOJ and SEC in 2012 was intended to be such a tutorial that Judge Scheindlin envisions.<sup>226</sup> However, there were many deficiencies in the non-binding

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223. *Id.*

224. 342 F. Supp. 2d 176, 187 n.10 (S.D.N.Y. 2004).

225. *FCPA Flash—A Conversation with Judge Shira Scheindlin*, *supra* note 195.

226. *See* CRIM. DIV. OF THE U.S. DEPT. OF JUST. & ENF'T DIV. OF THE U.S. SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 1 (2012)

FCPA Guidance—written by individuals who have long left government service—and it was generally viewed as an advocacy piece and not a well-balanced portrayal of the FCPA. As stated by the former chief of DOJ’s Fraud Section during a period of FCPA enforcement escalation, the FCPA Guidance is “more of a scrapbook of past DOJ and SEC successes than a guide book for companies who care about playing by the rules.”<sup>227</sup> Substantively, the FCPA Guidance was filled with selective information, half-truths, and information that was demonstratively false.<sup>228</sup> Moreover, the passage of time would demonstrate that certain enforcement positions were rejected by courts. For instance, the FCPA Guidance states:

Individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA—i.e., for *agreeing* to commit an FCPA violation—even if they are not, or could not be, independently charged with a substantive FCPA violation.<sup>229</sup>

Yet, as the above *Hoskins* case demonstrates, the Second Circuit unanimously disagreed with this Guidance position.<sup>230</sup> However, even if the government would provide a well-balanced, accurate portrayal of the FCPA as Judge Scheindlin envisions, the more fundamental problem as highlighted in Part II is that because of how the government has chosen to enforce the FCPA, federal court judges are rarely put in a position to interpret the FCPA.<sup>231</sup>

This is what made Judge Scheindlin a unique federal court judge and she will continue to be unique so long as the dynamics highlighted in this article persist. Nevertheless, those who value the rule of law should be grateful that a Judge Scheindlin did exist because her FCPA jurisprudence and nuanced views serve as an important reminder that just

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[hereinafter FCPA GUIDANCE], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

227. Joe Palazzolo & Christopher M. Matthews, *U.S. Attempts to Clarify Antibribery Law*, WALL ST. J. (Nov. 14, 2012, 6:59 PM), <http://online.wsj.com/article/SB10001424127887324735104578118850181434228.html>.

228. Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance*, WHITE COLLAR CRIME REPORT 7, 961 (2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2189072](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189072).

229. FCPA GUIDANCE, *supra* note 226, at 34.

230. *See United States v. Hoskins*, 902 F. 3d 69, 74, 94–95 (2d Cir. 2018). Likewise, the FCPA Guidance states: “The five-year limitations period applies to SEC actions seeking civil penalties, but it does not prevent SEC from seeking equitable remedies, such as an injunction or the disgorgement of ill-gotten gains, for conduct pre-dating the five-year period.” FCPA GUIDANCE, *supra* note 226, at 35. However, in 2017 the Supreme Court unanimously disagreed with this position in *Kokesh v. SEC*. 137 S. Ct. 1635, 1639 (2017).

231. *See* discussion *supra* Part II.

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because the FCPA deals with bribery, and just because bribery is bad, does not necessarily mean that all FCPA enforcement actions are therefore inherently good.