WILL THE REAL FOREIGN OFFICIAL PLEASE STAND UP: DETERMINING WHO IS A FOREIGN OFFICIAL AFTER *UNITED STATES V. ESQUENAZI*, 752 F.3D 912 (11TH CIR. 2014)[*]

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I. INTRODUCTION

In the years following the investigation into the Watergate Scandal, Congress discovered widespread instances of bribe payments being made to foreign government officials, by many United States corporations in their dealings overseas.[1] Specifically, Congress discovered a long recurring systematic scheme of U.S. corporations bribing numerous high-ranking foreign government officials and political parties throughout the world.[2] Those bribed included the likes of the President of the Republic of Korea, Italian political parties, the Japanese Prime Minister, the President of Honduras, and the President of Gabon, amongst others.[3]

This discovery profoundly disturbed Congress, and it believed the bribery of foreign officials was the single greatest threat that the 95th Congress faced.[4] Congress believed that U.S. national interests and foreign policy were at stake if this new discovery was left unchecked.[5] In the end, the result of was the passage of the Foreign Corrupt Practices Act (FCPA), which made it illegal for any corporation or individual to give "anything of value" to a "foreign official" for the purposes of "obtaining or retaining business."[6]

More recently, in 2009, a grand jury indicted Joel Esquenazi and Carlos Rodriguez on numerous charges including substantive violations of

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1. MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES IN A NEW ERA 3 (2014).
2. *Id.* at 4.
3. *Id.*
4. *Unlawful Corporate Payments Act: Hearing Before the Subcomm. on Consumer Prot. And Fin. of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 171 (1977) (statement of Rep. Solarz).
5. *Id.* at 173.
6. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(a)(1)(A)-(B) (2012).

the FCPA.[7] The main issue the defendants argued on appeal of their convictions was what "instrumentality" meant in relation to the definition of "foreign official."[8] This issue required judicial review, as the FCPA does not define "instrumentality."[9] Of even more importance was the fact that no court in the country, including the United States Court of Appeals for the 11th Circuit, had ever addressed this issue.[10] On appeal, the court ruled that an "instrumentality" is "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."[11] However, this ruling was incorrect because it contravenes legislative intent and greatly expands the meaning of the FCPA.

This Note will argue that the court was wrong in its statutory interpretation of the meaning of "instrumentality" in the context of the FCPA, and that its ruling is in direct contravention of congressional intent for the overall purpose of the FCPA. Section II will discuss the statutory language and legislative history of the original enactment of the FCPA and the proceeding amendments, and the effect of Non-Prosecutorial Agreements (NPAs) and Deferred Prosecution Agreements (DPAs) on FCPA interpretation. Section III will provide an overview of the facts and procedural history of the case, and a review of the court's holding. Section IV will analyze the proper interpretation of the FCPA's language and legislative history. Finally, a review of the court's holding will show that the court's analysis is unworkable when considered in light of the real-world challenges of doing business in international markets.

II. LEGAL BACKGROUND

In this section, first the statutory language of the FCPA will be covered, including the definitions of "foreign official," and the statutory exceptions that Congress placed within the FCPA. Second, the legislative history following the original enactment of the FCPA in 1977 and proceeding amendments in 1988 and 1998 is discussed. This legislative history, from both the original enactment and subsequent amendments, will show that Congress was explicit in its purpose in enacting the FCPA. Finally, the discussion ends on the use of NPAs and DPAs and their influence on the interpretation of the FCPA, arguing that these agreements have skewed the interpretation of the FCPA from the original meaning that

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7. United States v. Esquenazi, 752 F.3d 912, 917 (11th Cir. 2014).
8. *Id.* at 920 (explaining that "foreign official" within the context of FCPA is defined as any employee of a government department, agency, or instrumentality with no statutory definition being supplied for the meaning of instrumentality).
9. *Id.*
10. *Id.*
11. *Id.* at 925.

Congress intended and in favor of how the Department of Justice (DOJ) intends it to be understood.

A. Statutory Language of the FCPA

The FCPA's statutory language prohibits "anything of value" being given, by a U.S. corporation or business, to a "foreign official" of a foreign government.[12] The FCPA then defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof."[13] However, as mentioned above, it is this definition that is of main concern in *United States v. Esquenazi*, and of main dispute between the parties, as neither courts nor Congress has ever defined the term "instrumentality."[14]

While the statutory language is does not define "instrumentality," there are clear indications in the statutory language that Congress intended the FCPA to be limited in scope. In particular, Congress made the distinction between payments made to influence a "foreign official's" decisions, and payments made to "foreign officials" to speed along certain government processes.[15] The FCPA provides that such payments may be made for the purpose of "facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official."[16]

Routine government action is defined as any "action[,] which is ordinarily and commonly performed by a foreign official."[17] Specific examples mentioned within the Act as routine government action include "obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country."[18] The inclusion of this exemption illustrates that Congress saw the reality of how business operated in most parts of the world and included this exemption to allow bribery to occur.[19]

Furthermore, this "facilitating payment" exemption has been in place in the FCPA since its inception in 1977.[20] At first the FCPA language did not expressly contain the "facilitating payment" exemption; the statute merely stated that the payments made by corporations must not be made

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12. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(a)(1) (2012).
13. *Id.* at § 78dd-2(h)(2)(A).
14. *Esquenazi*, 752 F.3d at 920.
15. H.R. REP. NO. 95-640, at 8 (1977).
16. *Id.*
17. 15 U.S.C. § 78dd-2(h)(4)(A).
18. *Id.* § 78dd-2(h)(4)(A)(i).
19. Beverley Earle & Anita Cava, *When is a Bribe not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT'L & COMP. L. REV. 111, 115–16 (2013).
20. *See* S.E.C. v. Jackson, 908 F. Supp. 2d 834, 857 (S.D. Tex. 2012).

corruptly.[21] While the statute did not expressly contain the "facilitating payment" exemption, the legislative history shows that this was meant to limit the situations where the FCPA could be applied.[22] However, to better clarify its stance on the issue Congress expressly added the "facilitating payments" exemption in 1988 to expressly limit the FCPA to apply only to a limited number of situations.[23]

B. Legislative History and the Formation of the FCPA

Because the statutory language of the FCPA is unclear on the meaning of "instrumentality," it is necessary to examine the legislative history surrounding the Act. Legislative history surrounding original enactment and any proceeding amendments is the first source of legal background a court must look to when there are ambiguous or vague terms in statutory language.[24] Moreover, the legislative history surrounding the FCPA is more important than in most other statutes, as the FCPA is rarely, if at all, subject to judicial scrutiny.[25] This lack of judicial scrutiny leaves a large gap in legal background that can only be filled with the legislative history. Thus, the legislative history that must be addressed is the history following the original enactment of the FCPA in 1977 and following the amendments in 1988[26] and 1998.[27]

1. FCPA's Original Enactment

As stated above, the FCPA arose out of the investigations that followed the Watergate scandal, and from these investigations, Congress decided that legislative action was needed.[28] After much debate and investigation, Congress ultimately decided on an approach to outlaw bribes with criminal sanctions.[29] Congress chose criminal sanctions, as it believed they would be the most effective choice while putting smallest burden on U.S. companies doing business in foreign markets.[30] Moreover, using the

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21. *Id.*
22. *Id.*; *see also* H.R. REP. NO. 95-640, at 4 (1977).
23. U.S. v. Kay, 359 F.3d 738, 750 (5th Cir. 2004).
24. Blum v. Stenson, 465 U.S. 886, 896 (1984); *see also* Tolbb v. Radloff, 501 U.S. 157, 162 (1991), for a discussion that the Supreme Court has with frequency stated that when statutory language is unclear a court must look to legislative history.
25. KOEHLER, *supra* note 1, at 1.
26. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107 (effective Aug. 23, 1988).
27. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 2, 112 Stat. 3302 (effective Nov. 10, 1998).
28. KOEHLER, *supra* note 1, at 19.
29. H.R. REP. NO. 95-640, at 6 (1977).
30. *Id.*

approach least burdensome to U.S. companies was one of the primary concerns of Congress when enacting the FCPA.[31] Congress' goal of creating the least burden demonstrates the purpose of including the "facilitating payment" exemption directly into the language of the FCPA.[32]

Congress not only wanted to limit the burden on corporations, but it also wanted to limit the scope of the FCPA.[33] Congress had a strict intention and was mindful of limiting the reach of the FCPA to only the most major payments made to legitimate foreign officials.[34] Congress made this distinction between types of payments because its intention was to have the FCPA prohibit illegal payments only in settings that affected U.S. foreign policy.[35] More specifically, "a 1976 SEC report to a Senate committee that spurred development of the FCPA distinguished the two types of payments, noting a difference between 'recipients [who are] government officials' and 'recipients of commercial bribery.'"[36]

It is clear from the legislative history that Congress made a distinction between these two kinds of payments, and chose only to criminalize payments that are made to foreign officials.[37] Congress was primarily worried that bribes paid to "foreign officials" would create "'diplomatic problems,' a tarnished image of America aboard, and damage to 'the legal, political, and economic order of friendly host governments.'"[38] It is clear from Congress' deliberation that it intended the FCPA to be a limited statute, narrowly construed to pertain to only a select few instances of bribery in foreign countries.[39]

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31. *See id.*
32. H.R. REP. NO. 95-640, at 8 (1977).
33. *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 930, 1003 (2012).
34. *See* S. REP. NO. 95-114, at 10 (1977).
35. Koehler, *supra* note 33.

    > Congress narrowed the range of actionable payments to those involving a narrow category of foreign recipients and those involving foreign government procurement or to influence foreign government legislation or regulations. Congress's intent on these issues would seem directly linked to the primary foreign policy motivations it had in investigating the foreign corporate payments as well as recognition of the difficult and complex business conditions encountered in many foreign markets.

    Id.
36. Stephen Hagenbuch, *Taming "Instrumentality": The FCPA's Legislative History Requires Proof of Governmental Control*, 2012 U. CHI. LEGAL F. 351, 354–55 (2012) (quoting *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices to the Senate Banking, Housing and Urban Affairs Committee*, 94th Cong. 25 (1976)).
37. *Id.*
38. *Id.* at 355 (quoting *Unlawful Corporate Payments Act of 1977, Hearings before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce,* 95th Cong. 1st Sess. 28–31 (1977) (statement of Dr. Gordon Adams)).
39. KOEHLER, *supra* note 1, at 31.

2. FCPA's Subsequent Amendments

However, the FCPA today is not the same as when it was originally enacted in 1977.[40] It was first amended in 1988[41] and then again ten years later in 1998.[42] The 1988 amendment included several changes, including a requirement of knowledge in third-party actions, allowing for affirmative defenses, and facilitating payment exceptions.[43] The 1998 amendment, which is more relevant to this analysis, aimed to implement the requirements of the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) signed by the United States and thirty-three other countries in 1997.[44]

The OECD Convention was an international treaty that focused on the prevalent use of bribery in business transactions across the world.[45] The OECD Convention sought to combat bribery in an "effective and co-ordinated [sic] manner" between member countries.[46] In 1998, Congress made changes to recognize the legal effect of this international treaty, which "included: (i) the creation of a new statutory provision applicable to certain foreign companies and foreign nationals; and (ii) expanded nationality jurisdiction as to U.S. companies and citizens."[47]

It is unmistakable from the legislative history that Congress, in its investigations, learned of widespread corruption and illegal payments in foreign countries by U.S. businesses. However, instead of enacting a law that would cover all of these illicit payments, Congress choose to limit the FCPA to payments involving "foreign officials," and provided for an exemption that allowed payments to be made to "foreign officials" in certain situations.

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40. *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213.
41. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107 (effective Aug. 23, 1988).
42. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 2, 112 Stat. 3302 (effective Nov. 10, 1998).
43. KOEHLER, *supra* note 1, at 42 (discussing the amendment changes including "(i) amending the original 'reason to know' standard applicable to third party liability; (ii) amending the FCPA to include certain affirmative defenses based on foreign law and reasonable and bona fide expenditures; and (iii) amending the FCPA to include an express facilitating payment exception.").
44. *See generally International Anti-Bribery Act of 1998: Hearing on S. 2375 Before the S. Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. 277 (1998) [hereinafter *International Bribery Act Hearings*].
45. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS 6 (2011).
46. *Id.*
47. KOEHLER, *supra* note 1, at 42; International Anti-Bribery and Fair Competition Act of 1998 §2.

C. NPAs, DPAs, and Prosecutorial Common Law

As mentioned above, there has been little judicial review of the FCPA's statutory language and definitional terms, including "instrumentality."[48] This lack of judicial review is due to the fact that there is no private right of action, and the United States Department of Justice (DOJ) is the only entity capable of bringing criminal charges against companies and individuals.[49] This lack of review is furthered by the fact that the DOJ resolves most FCPA enforcement actions through the extensive use of NPAs and DPAs.[50] These NPAs and DPAs are essentially agreements between the corporations and the DOJ. Fundamentally, the DOJ will resolve an enforcement action with a corporation through these agreements by agreeing not to bring formal charges, and the corporation will follow certain requirements put forth by the DOJ for a certain number of years.[51]

DOJ attorneys are capable of using these agreements in criminal cases, as the agreements are authorized by both federal statute and the United States Attorneys' Manual for use in criminal cases.[52] The process for the use of NPAs and DPAs starts after a prosecutor has received an indictment, but the prosecutor defers prosecution because the defendant agrees to reform.[53] Once the agreement is in place and the defendant meets whatever requirements were set forth, the indictment is dismissed.[54] Then, the defendant is free to continue on with life "without [a] conviction which triggers debilitating collateral consequences."[55] These types of agreements between prosecution and defendants were conceived decades ago as a

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48. KOEHLER, *supra* note 1, at 60.
49. Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1030 (6th Cir. 1980).
50. KOEHLER, *supra* note 1, at 60–61.
51. CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE AND ENFORCEMENT DIVISION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 74 (2012).
52. Leonard Orland, *New Models for Securities Law Enforcement Outsourcing, Compelled Cooperation, and Gatekeepers Article*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 57 (2006); *see* 18 U.S.C. §§ 3152–3154 (2000) (establishing pretrial services and allowing attorneys to make recommendations for sentencing to district court judges and to form contracts with the purpose of enforcing these recommendations upon defendants); U.S.A.M. 9-22.010 (1997) (discussing eligibility criteria and procedures for U.S. attorneys to use in using alternative measures to criminal trials).
53. Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866 (2005).
54. *Id.*
55. *Id.* (discussing that in corporate settings NPAs and DPAs have been used frequently to avoid aftermath similar to the indictment and collapse of Arthur Andersen which caused the loss of 28,000 jobs to innocent bystanders).

means for individuals to receive punishment, but not to be branded with a criminal record for the rest of his or her life.[56]

While the terms NPA and DPA may be used interchangeably, there are slight differences. NPAs are negotiated in private, behind closed doors, and do not have to be filed with any court.[57] Because NPAs are not filed with a court, there is no judicial scrutiny of the agreements, and in essence, they are contracts between the DOJ and a business organization.[58] Therefore, NPAs have been described as "contractual in nature, and therefore interpreted in accordance with general principles of contract law."[59] It has also been a long-held principle of the law that contracts are only binding upon the parties that contain obligations within the contract.[60]

On the other hand, DPAs must be filed with a court and resemble an official court document.[61] However, while they are technically subjected to scrutiny by the court, in a recent study, most federal judges stated they are not greatly involved in the process of DPA negotiations and formation.[62] DPAs permit the DOJ to defer prosecution for a set number of years, in exchange for which the corporations will acknowledge their actions and implement any compliance policies the DOJ sees fit.[63]

These NPAs and DPAs were first used in actions against corporations after the indictment and collapse of Arthur Andersen for its role in the Enron scandal.[64] The DOJ has stated in the Principles of Federal Prosecution that NPAs and DPAs are an important middle ground that give prosecutors a third option other than simply choosing to prosecute or not to prosecute.[65] However, the first time an NPA or DPA was used in a FCPA

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56. *Id.*
57. KOEHLER, *supra* note 1, at 61; *see generally* Ralph Lauren Corporation, Non-Prosecution Agreement, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/ralph-lauren/Ralph-Lauren.-NPA-Executed.pdf.
58. KOEHLER, *supra* note 1, at 61, 63.
59. United States v. Castaneda, 162 F.3d 832, 835 (5th Cir. 1998); *see also* United States v. Quintanilla, No. C-05-260, 2007 WL 2461900 (S.D. Tex. 2007) (applying ruling from *Castaneda* court concluded that both defendant and prosecution are bound by the agreement based upon contract principals).
60. Von Hoffman v. City of Quincy, 71 U.S. 535, 538 (1866).
61. KOEHLER, *supra* note 1, at 62; *see* Deferred Prosecution Agreement, United States v. Bilfinger SE, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/bilfinger/bilfinger-dpa.pdf.
62. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (2009) (explaining that in general judges simply rubber stamp these agreements between parties and have no further review of their contents).
63. KOEHLER, *supra* note 1, at 62
64. Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 165–66 (2008) (Arthur Andersen would not agree to plead guilty or admit guilt, and the indictment put the corporation out of business and left tens of thousands of people out of a job; DOJ realized that they would have to be sensitive in its enforcement of fraud against these mega-corporations).
65. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-28.000 (2008).

setting was in 2004 in an enforcement action against InVision Technologies, and since then NPAs and DPAs have resolved eighty-five percent of DOJ FCPA enforcement actions.[66]

The issue with the increasing use of NPAs and DPAs in resolving FCPA enforcement actions is that they give too much power to the DOJ. Former Attorney General Alberto Gonzalez acknowledged this when he stated that the FCPA gives tremendous discretion to the DOJ to define the statute's scope.[67] He also said that corporations do not like to be investigated by the DOJ and often settle and jump on the chance to receive an NPA or DPA.[68] The use of NPAs and DPAs does not allow the courts to properly rule on the prosecution's arguments, and there are no boundaries for the law in general.[69] Effectively, the law is whatever the prosecution says it is, because the NPAs and DPAs will never see the light of judicial scrutiny.[70]

The use of NPAs and DPAs are of great concern in the context of the FCPA, as almost all enforcement actions brought by the DOJ concerning the FCPA are resolved through NPAs or DPAs. Therefore, to understand the FCPA, one must understand the use and importance of the agreements discussed above and the effect these types of agreements have on the enforcement of the FCPA.

III. EXPOSITION

United States v. Esquenazi is the first time in the history of the FCPA that a court has ruled on the meanings of "foreign official" and "instrumentality."[71] This section will first describe the facts and circumstances that led to the case being before the court. Next, this section covers the procedural facts of the case, including the sentencing of the defendants. Finally, this section discusses the court's analysis, including its statutory interpretation of the FCPA and its holding defining "instrumentality" within the context of the FCPA.

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66. KOEHLER, *supra* note 1, at 60-61.
67. Mike Koehler, *Add Gonzalez To the List Of Former High-Ranking DOJ Officials Who Support an FCPA Compliance Defense*, FCPA PROFESSOR: A FORUM DEVOTED TO THE FOREIGN CORRUPT PRACTICES ACT (Sept. 11, 2012), http://www.fcpaprofessor.com/add-alberto-gonzalez-to-the-list-of-former-high-ranking-doj-officials-who-support-an-fcpa-compliance-defense.
68. *Id.*
69. James R. Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, 14 CIV. JUST. REP. 1, 12 (2012).
70. *Id.*
71. United States v. Esquenazi, 752 F.3d 912, 920 (11th Cir. 2014).

A. Facts of the Case

The defendants, Joel Esquenazi and Carlos Rodriquez, owned Terra Telecommunications Corp. (Terra) together.[72] Terra was a Florida-based company that purchased minutes for phone use from foreign companies and then resold them to users within the United States.[73] Joel Esquenazi was Terra's majority shareholder and served as the CEO,[74] while Carlos Rodriquez was a minority shareholder and served as Executive Vice President of Operations.[75] Telecommunications D'Haiti, S.A.M. (Teleco), a corporation based in Haiti, was one of the main foreign companies that Terra did business with.[76] At the time of the incident in question, Patrick Joseph, Teleco's Director General, and Robert Antoine, its Director of International Relations, were the main individuals the defendants were in contact with.[77]

The relationship between Terra and Teleco began in 2001 when Terra entered into a contract to buy minutes from Teleco.[78] By October 2001, Terra owed Teleco over $400,000, and defendant Esquenazi sent an agent to meet with Antoine to work out a deal to reduce Terra's debt.[79] The resulting deal involved Antoine agreeing to shave minutes from Terra's bills in exchange for payments from Terra that equaled fifty percent of everything Terra saved from his efforts.[80] In November 2001, Terra made its first payments to Antoine, using sham corporations in an effort to hide the payments.[81]

Terra set up this deception by drafting a "consulting agreement" with a company called J.D. Locator, which was owned by a friend of Antoine.[82] The defendants then sent payments to this company, which were subsequently paid to Antoine.[83] Antoine received approximately $822,000 in total from Terra for his efforts in reducing its debt by over $2 million.[84]

In April 2003, Antoine was removed from office and replaced by Alphonse Inevil who, soon after replacing Antoine, moved up to become

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72. *Id.* at 917.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 918.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* *See generally* B.B.B., Annotation, *Disregarding Corporate Existence*, 34 A.L.R. 597 (1925) (discussing that sham corporations are merely created as a way to provide some legitimacy to actions carried out for a variety of reasons when in fact the corporation merely exists on paper and provides no services or actual function other than to hide the actions it was intended to hide).
82. *Esquenazi*, 752 F.3d at 918.
83. *Id.* at 918–19.
84. *Id.* at 919.

the Director General of Teleco.[85] Once again behind on Terra's payments, the defendants helped the new Director General, Inevil, form a shell company known as Telecom Consulting Services Corporation.[86] It was through this shell company that defendants again starting making side payments, but this time to Inevil, to reduce Terra's debt.[87] The total amount paid to Inevil through this shell company totaled $60,000.[88]

B. Procedural Posture

In December 2009, a grand jury indicted the defendants on a total of twenty-one counts.[89] However, the primary charges of interest on appeal were the substantive violations of the Anti-Bribery Provision of the FCPA.[90] At sentencing, defendant Esquenazi faced a sentencing range of 292 to 365 months.[91] The judge instead sentenced Esquenazi to 180 months in prison.[92] Defendant Rodriquez was eligible for a sentence ranging from 151 to 188 months.[93] Ultimately, however, the judge sentence Rodriquez to eighty-four months of imprisonment.[94] Furthermore, both defendants were held responsible for $3,093,818.50, and the court entered a forfeiture order against them in this amount.[95]

The defendants appealed their convictions, and the main issue on appeal was whether the employees of Teleco were "foreign officials."[96]

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85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 917 (discussing that the charges filed against the defendants included "conspiracy to violate the [FCPA] and commit wire fraud, all in violation of 18 U.S.C. § 371 (Count 1); and conspiracy to launder money, in violation of 18 U.S.C. § 1956 (Count 9). Counts 2 through 8 charged substantive violations of the FCPA, 15 U.S.C. § 78dd-2, and Counts 10 through 21 charged acts of concealment of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i)").
90. *Id.* at 918 (discussing that counts 2 through 8 were the substantive violations, which where the direct payment of money to foreign officials to influence their judgment, which was in direct violation of 15 U.S.C. §78dd-2(a)).
91. *Id.* at 920 ("The presentence investigation report prepared in advance of Mr. Esquenazi's sentencing calculated a base offense level of 12, under United States Sentencing Commission, *Guidelines Manual*, (USSG) § 2C1.1(a)(2); a 2–level enhancement under because the offense involved more than one bribe, under USSG § 2C1.1(b)(1); a 16–level enhancement based on Terra's receipt of $2.2 million from the bribery scheme, under USSG § 2B1.1(b)(1)(I); a 4–level enhancement for Esquenazi's leadership role in the offense, under USSG § 3B1.1(a); and a 2–level obstruction-of-justice enhancement, under USSG § 3C1.1. With a criminal history category I, Mr. Esquenazi's guideline range was 292 to 365 months imprisonment.").
92. *Id.*; *see* Judgment in a Criminal Case, United States v. Esquenazi, No. 1:09-21010-CR-Martinez-1 (S.D. Fl. 2011) (discussing the sentence for the defendants but it is unclear why the Judge in this present case choose to depart from the Sentencing Commission Guideline Range).
93. *Esquenazi*, 752 F.3d at 920.
94. *Id.*
95. *Id.*
96. *Id.*

Under the FCPA, a "foreign official" is any officer or employee of a foreign government or a "department, agency, or *instrumentality* thereof."[97] Both the prosecution and defendants disputed the meaning of "instrumentality" and whether Teleco qualified as one.[98] The DOJ argued that an "instrumentality" is any entity that performs any function for a government.[99] The defendants, on the other hand, argued that "instrumentality" should be construed to only include entities that are directly created and controlled by the government as "instrumentalities of the State."[100]

C. Opinion of the Court

The analysis by the court interpreted the FCPA and defined "instrumentality" in relation to the definition of "foreign official."[101] It was from this analysis that the court developed a test to determine who is a "foreign official" under the FCPA.[102]

1. Statutory Interpretation

The court started its analysis, as it always does when conducting statutory interpretation, with determining the plain meaning of "instrumentality."[103] The court concluded that according to both *Black's Law Dictionary* and *Webster's Third New International Dictionary,* an "instrumentality" is a group or agency through which actions of the controlling entity are performed.[104] The court concluded that while the dictionary definitions established that an "instrumentality" is an entity that must perform some government function, it is still receptive to multiple meanings.[105] The court then applied the canon of construction known as *noscitur a sociis*, which translates to "a word is known by the company it

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97. *Id.* (quoting 15 U.S.C. §§ 78dd-2(A)(1), (3)) (*emphasis added*).
98. *Id.*
99. Brief of Plaintiff-Appellee at 28-9, United States v. Esquenazi, No. 11-15331-C (11th Cir. Aug. 21, 2012).
100. Brief of Defendants-Appellants at 39-43, United States v. Esquenazi, No. 11-115331-C (11th Cir. May 9, 2012).
101. *Id.*
102. *Id.* at 926–27.
103. *Id.* at 920; *see* Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000) (explaining that courts should always begin and end statutory interpretation with the actual words of the statute in question).
104. *Esquenazi*, 752 F.3d at 920–21 ("Black's law dictionary states an instrumentality is '[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body' . . . Webster's Third New International Dictionary says the word means 'something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body.'").
105. *Id.* at 921 (quoting Edison v. Douberly, 604 F.3d 1307, 1309 (11th Cir. 2010)).

keeps."[106] In the FCPA, "instrumentality" is paired with "agency" and "department," which are "both entities through which the government performs its functions."[107] Thus, the court concluded that to qualify as an "instrumentality" within the FCPA, an entity must be under the control of the government and also perform a function of the government.[108]

The next question that needed to be addressed was exactly what constitutes a government function.[109] To answer this question, the court looked to the "broader statutory context in which the word is used" especially to the "facilitating payment" exemption.[110] As mentioned above, this provision allows for payments to be made to foreign officials as long as they are for the purpose of expediting the performance of a *routine governmental action* by a foreign official.[111] The FCPA defines routine governmental action, in this context, as "'an action . . . ordinarily and commonly performed by a foreign official in,' among other things, 'providing phone service.'"[112] Therefore, under the definition of routine governmental action, Teleco was performing a routine governmental action by providing phone service.[113] However, the court further concluded that this does not automatically indicate that Teleco was performing a governmental function, only that it was possible.[114]

Then the court turned to the 1998 amendment to the FCPA in which Congress made changes to the FCPA to coincide with the ratification of the OECD Convention.[115] Under this agreement, the United States agreed to "take such measures as may be necessary to establish that it is a criminal offence under [United States] law for any person intentionally to offer, promise or give . . . directly or through intermediaries, to a *foreign public official*."[116] Under this agreement "foreign public official" is defined to include "any person exercising a public function for a foreign country, including for a . . . public enterprise."[117] A public enterprise defined as

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106. *Id.* (quoting United States v. Williams, 553 U.S. 285, 294 (2008)) (explaining that when construing statutory language that includes a series of words, all the words should be construed to have a similar meaning—one that they all have in common).
107. *Id.* at 922.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* (quoting 15 U.S.C. § 78dd-2(b)).
112. *Id.* (quoting 15 U.S.C. § 78dd-2(f)(4)(A)).
113. *Id.*
114. *Id.* at 922–23.
115. *Id.* at 923.
116. *Id.* (quoting OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, art. 1.1(2001) (emphasis added).
117. *Id.* (quoting OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, art. 1.4(a) (2001)).

"any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence."[118]

To adopt this agreement, Congress amended the FCPA, but the only change Congress made to the definition of "foreign official" was to add "public international organization" to department, agency, or instrumentality.[119] The decision by Congress not to further amend the FCPA led the court to conclude that "foreign official" already covered an official of a public entity that was controlled by the government.[120]

Furthermore, the court decided this was the only possible outcome, as otherwise it would mean that its interpretation of the FCPA would be in direct conflict with a treaty ratified by Congress.[121] The court stated "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements."[122]

2. *Court's Holding*

The court concluded that to determine whether an entity is an instrumentality of a foreign government one must look at whether the government itself considers the entity to be performing a governmental function.[123] The most objective way to decide this is to see whether the government treats the actions of the entity as its own.[124] Therefore, the court ruled that an instrumentality under the FCPA is "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own," which is a fact-specific question that each court must determine on its own.[125]

To implement this test, the court established several factors for the fact finder to consider for both governmental control[126] and whether the

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118. *Id.* (quoting OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, art. 1.4, cmt. 14 (2001) (discussing that a public enterprise is essentially a company that is performing and operating as what would normally be considered a private company and in the context of the OECD Convention it is deemed part of a foreign government when a foreign government controls it the otherwise private corporation.).
119. *Id.* (quoting 15 U.SC. § 78dd-2(h)(2)(A)).
120. *Id.*
121. *Id.* at 924.
122. *Id.* (quoting Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539 (1995) (discussing that Supreme Court has ruled that when interpreting U.S. laws one must attempt to find an interpretation that does not go against international treaties and laws of other countries).
123. *Id.* at 924–25.
124. *Id.* at 925.
125. *Id.*
126. *Id.* (discussing factors that court interpreted from the commentary of the OCED Convention including the formal designation of the entity; whether the government has a majority interest;

government treats the actions of the entity as its own.[127] Applying this new rule and the facts of the case to the factors, the court concluded that Teleco was indeed an instrumentality of the Haitian government.[128] Teleco was clearly controlled by the Haitian government, as the executives were hired and fired by the Haitian Prime Minister, and Haiti's national bank owned ninety-seven percent of Teleco.[129] Teleco also clearly was performing a government function, as it had a complete monopoly on telecommunications service within Haiti, and an expert testified that the "government, officials, [and] everyone consider Teleco as a public administration."[130]

IV. ANALYSIS

The court in *United States v. Esquenazi* was incorrect in its ruling, because the court's holding contravenes Congressional intent and greatly expands the scope of the FCPA. Specifically, this new ruling expands the scope of the FCPA to include employees of state-owned enterprises as foreign officials. This section will first discuss the correct statutory interpretation of the FCPA and the definition of "foreign official," including the correct meaning of the term "instrumentality." Next, this section will argue that the court's test is completely unworkable given the real-world difficulties of doing business in the international market.

A. Proper Statutory Interpretation

Proper statutory interpretation is a multistep process that involves analyzing several aspects of the statute and the history surrounding its enactment. First, the language of the FCPA itself must be analyzed for the plain meaning of the term in question. If the statutory language and plain meaning are still ambiguous, statutory interpretation continues, and includes legislative history and other sources outside the statutory language.[131]

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ability of the government to hire and fire; whether the government controls the profits; and the length in which these factors have been present between the government and the entity).

127. *Id.* at 926 (discussing factors that court interpreted from the commentary of the OECD Convention including whether there is a monopoly; existence of subsidies; services provided to the public at large; and if the public and government see the entity performing a government function).
128. *Id.* at 925.
129. *Id.* at 928–29.
130. *Id.*
131. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985) (arguing that when statutory language is ambiguous a court may infer its meaning from a variety of sources including statutory structure, relevant legislative history, congressional purposes).

1. Statutory Language

The first step in any analysis of a statute should always be the statutory language itself, as it is the most persuasive evidence.[132] Therefore, in the current case, one must look first to the statutory language and definition of "foreign official" to determine its true meaning. To determine the true meaning can involve several steps, including applying one of many canons of construction.

a. Definitional meaning

The FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof."[133] This language indicates that a "foreign official," within the context of the FCPA, may be an individual within a variety of settings. Particularly, the term includes any officer or employee of a government "department, agency, or instrumentality." However, the term "instrumentality" is not defined within the FCPA. Thus, when interpreting statutory language where no definition is provided within the statute, the ordinary or plain meaning of the words must be applied.[134]

However, when determining the ordinary or plain meaning of a term within a statute, the meaning must be the same as when the statute was enacted.[135] Fundamentally, as the FCPA was enacted in 1977, the term instrumentality must be understood in the context as it was meant then, and one cannot simply pull any dictionary off the shelf to look up a definition for the term. The court made this mistake, when it applied a definition of "instrumentality" that was taken from *Black's Law Dictionary*, which was published in 2009, and *Webster's Third New International Dictionary* that was published in 1993.[136]

To help courts select the correct dictionary to use in statutory interpretation, Justice Antonin Scalia has provided an authoritative list of

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132. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940).

133. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(h)(2)(A) (2012) (emphasis added).

134. Smith v. United States, 508 U.S. 223, 228 (1993).

135. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012); Sandifer v. U.S. Steel Corp., 134 S. Ct. 870 (2014) (court used dictionary from 1950s to determine the meaning of an undefined term contained within a statute).

136. United States v. Esquenazi, 752 F.3d 912, 920–21 (11th Cir. 2014).

> According to Black's Law Dictionary, an instrumentality is '[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body.' Webster's Third New International Dictionary says the word means 'something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body.

Id. (citations omitted)).

dictionaries for the English language that should be used in determining the meanings of words from years past.[137] The dictionary closest to the enactment of the FCPA is the *American Heritage Dictionary of the English Language* published in 1978,[138] which defines "instrumentality" as simply "agency."[139] This definition is not entirely specific and would seem to be rather broad.

Yet, due to this rather broad meaning there is a logical conclusion that may be made. The logical conclusion for the placement of this broad non-specific word is that Congress had the intention for "instrumentality" to be a catchall term for all government agencies. The idea would be that the other words contained in the series were rather specific and that Congress simply wanted to include a term that would cover all explicit government entities. Nevertheless, as the term "instrumentality" is broad and has no limitations, it needs to be narrowed in its meaning, and to do that it is best to use the cannon of construction known as *ejusdem generis*.

b. Canons of Construction

Canons of construction in general are often useful in interpretation statutory language that is lacking in clarity or overly vague.[140] However, in the present case *ejusdem generis* is of more use, because it aims to limit an overly broad general word that follows specific words in statutory language.[141] Specifically, *ejusdem generis* seeks to limit a broad general word to by applying a common theme that is present through the proceeding specific enumerated words contained in the statutory language.[142] Thus, to apply this canon to the statutory language of the FCPA we must find the common thread that is present in both "agency" and "department," which then may be applied to "instrumentality."

To find this common thread, the first step is to ascertain the common and ordinary meaning of the words, which is always necessary in statutory

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137. SCALIA & GARNER, *supra* note 135, at 419–24 (providing lists of dictionaries for both legal terms and the English language and dividing them by eras starting from 16th century all the way to the current era).

138. *Id.* at 423 (showing that the American Heritage Dictionary of the English Language is the only listed dictionary of the English language that was published the closest to the enactment of the original FCPA and will have the closest correct meaning of the term "instrumentality").

139. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 681 (2d ed. 1978).

140. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001).

141. Wash. State Dept. of Soc. and Health Services v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003); *see also* Yates v. United States, 135 S.Ct. 1074, 1086 (2015).

142. SCALIA & GARNER, *supra* note 135, at 199 (Justice Scalia provides an insightful example "[i]f one speaks of 'Mickey Mantle, Rocky Marciano, Michael Jordan, and other great competitors,' the last noun does not reasonably refer to Sam Walton (a great competitor in the marketplace) or Napoleon Bonaparte (a great competitor on the battlefield). It refers to other great *athletes*.").

interpretation.[143] However, just as it was necessary to take the definition of "instrumentality" from a dictionary published from the same time as the FCPA was enacted, it is necessary to do the same for the words that precede it. Thus, the first word in the series, "agency," is defined as a "service authorized to act for another,"[144] and the second word, "department," is defined as "distinct division of a large organization, such as a government."[145]

From these definitions it appears that both an "agency" and a "department" are understood to be acting for a larger entity, such as a government. However, more telling is the fact that the definitions use language such as authorized and distinct. The use of these words appears to show that these definitions convey that the entities are explicitly or noticeably acting expressly as part of a larger entity.

Applying this now established thread to "instrumentality," it is clear that a private corporation with little to no governmental involvement could never be deemed an "instrumentality." It is unmistakable that Congress intended "instrumentality" to act as a catchall phrase for any group or entity that is acting expressly for the government. More precisely, Congress' intention was that "instrumentality" would apply to any entities that may not have been easily grouped under agency or department. The legislative history also supports this construction of the FCPA's language, which will be discussed in further detail in the following section, as Congress specifically intended for the FCPA to be narrowly construed to only apply to a small number of situations.[146]

Furthermore, the present court wrongly interpreted the FCPA's language when it applied the canon of construction known as *noscitur a sociis*.[147] The court concluded that "agency" and "department" were defined as "entities through which the government performs its functions and that are controlled by the government."[148] Within the context and definitions the court used, this might appear to be a logical determination. However, as noted above, the court was incorrect in its analysis because it applied the wrong definitions to the term "instrumentality."

Additionally, the court gives no citations or definitions for "agency" and "department." The court simply states, as a matter of a fact, that "agency" and "department" are "entities through which the government

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143. Smith v. United States, 508 U.S. 223, 228 (1993).
144. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 24 (2d ed. 1978).
145. *Id.* at 354.
146. *See* S. REP. NO. 95-114, at 10 (1977).
147. United States v. Esquenazi, 752 F.3d 912, 921-22 (11th Cir. 2014) (quoting Edison v. Douberly, 604 F.3d 1307, 1309 (11th Cir. 2010) (explaining that *noscitur a sociis* is defined as "a word is known by the company it keeps.")).
148. *Id.* at 922.

performs its functions and that are controlled by the government."[149] This begs the question of where the court got these definitions, and this question is not addressed within the court's opinion.

The definition of "instrumentality" is extremely broad and ambiguous at its very core. Even applying canons of construction, such as *ejusdem generis*, to help define "instrumentality," the term is still broad. Accordingly, when the statutory language is unclear, one must consider the legislative history of the statute.[150]

2. Legislative History

When attempting to correctly interpret a statute enacted by Congress, the legislative history is the most important source of information aside from the statutory language itself.[151] Furthermore, when there is a lack of clarity and vagueness in a statute, a further analysis using legislative history is necessary to determine the proper meaning of the statutory language.[152] When looking to the legislative history of the FCPA, it is clear that Congress intended to construe the FCPA to pertain only to improper payments made to a select few express entities acting for and within a foreign government.

a. FCPA's Original Enactment

The beginning of the legislative history for the FCPA indicates that when Congress first discovered bribe payments being made by U.S. corporations in foreign markets, the bribes were widespread and took place in many different circumstances.[153] Specifically, Congress learned of bribery in both government and commercial settings, but Congress enacted a law that would only prohibit bribery in specific government settings.[154] This decision by Congress clearly shows that it intended to limit the scope of the FCPA, and that all of provisions of the FCPA should be narrowly construed.

Furthermore, congressional intent for the FCPA to be narrowly construed is evident from examining the inclusion of an exemption, by Congress, that allows bribery to occur even in governmental settings. As discussed above, the FCPA includes the "facilitating and expediting" payment exemption. This exemption allows bribery to occur as long as it is

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149. *Id.*
150. Lindley v. Fed. Dep. Ins. Corp., 733 F.3d 1043, 1055 (11th Cir. 2013).
151. Flora v. United States, 362 U.S. 145, 150 (1960).
152. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001).
153. *See* S. REP. NO. 95-114, at 10 (1977).
154. Hagenbuch, *supra* note 36.

for the purpose of "facilitating or expediting" performance of a routine government action.[155]

Moreover, this exemption, though not expressly laid out in the original statutory language, has been in place since the enactment of the FCPA.[156] While this exemption does not apply directly to the issue of determining the meaning of "instrumentality," it is still important because it provides strong evidence that Congress intended from the outset for the FCPA to be a limited statute. Congress intended that the FCPA should always be narrowly construed to pertain only to illegal payments being made to high-ranking government officials, and not to those in lower positions performing "routine government functions."

Additionally, Congress' primary purpose in enacting the FCPA in 1977 was to protect U.S. foreign policy interests.[157] As discussed above, Congress was keenly aware of commercial bribery that was taking place with U.S. corporations overseas, and yet it did not incorporate these types of payments into the FCPA.[158] The payments that concerned Congress were those paid to high-ranking foreign government officials and that had the ability to influence foreign governments, which would in turn have an effect on U.S. foreign policy.[159] This conclusion is only strengthened by the fact that, since the beginning of the FCPA, Congress indirectly and directly included the "facilitating and expediting" exemption discussed above. In the end, the full legislative history of the FCPA clearly indicates that Congress has always considered the FCPA to be a narrow statute that should only apply in a very few select situations.

The court in *Esquenazi* failed to apply the correct legislative history to interpret the FCPA. The court relied primarily upon the legislative history stemming from the amendment to the FCPA that occurred in 1998.[160] This amendment and relevant legislative history dealt almost exclusively with bringing the FCPA into compliance with U.S. treaty obligations involving the OECD Convention.[161] As discussed above, the court noted that in the 1998 amendment Congress' only change to the language defining "foreign official" was to add "public international organization."[162]

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155. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(b) (2012).
156. *See* S.E.C. v. Jackson, 908 F. Supp. 2d 834, 857 (S.D. Tex. 2012).
157. Koehler, *supra* note 33.
158. Hagenbuch, *supra* note 36.
159. *See* KOEHLER, *supra* note 1, at 4.
160. United States v. Esquenazi, 752 F.3d 912, 923 (11th Cir. 2014); *See generally* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (November 10, 1998).
161. *See generally International Bribery Act Hearings*, *supra* note 44.
162. *Esquenazi*, 752 F.3d at 923–24 ("The only change to the definition of 'foreign official' in the FCPA that Congress thought necessary was the addition of 'public international organization.' This seems to demonstrate that Congress considered its preexisting definition *already to cover* a

The court then found that the OECD Convention states that member countries should make it illegal to make payments to "foreign public officials," which includes employees of public enterprises.[163] Thus, because Congress only added "public international organization" it must have believed that "foreign official" already covered the requirements laid out by the OECD Convention.[164] This analysis by the court was wrong for several reasons.

b. Application of Silent Subsequent Congress

First, the legislative history that the court relied upon is from a subsequent Congress, which did not originally enact the FCPA. It is a well-held standard of statutory interpretation that a court may not rely upon subsequent legislative history, because an "interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."[165] Accordingly, because Congress did not directly amend the term "instrumentality" in the 1998 amendment, nothing it did or did not do provides a valid basis to determine the meaning of that term. Only the legislative history from the Congress that did pass the FCPA and deals directly with the term "instrumentality" is valid legislative history that the court may address. Moreover, the court primarily relies upon the fact that Congress was silent on the matter of the definition of "instrumentality."[166]

Specifically, the court relies on the fact that that Congress did not change anything other than adding "public international organization" to the definition of "foreign official." This reliance is hazardous in interpreting a statute, because "where [statutory] language is unambiguous, silence in the legislative history cannot be controlling."[167] It is clear from the previous analysis that the original enactment of the FCPA was meant to only pertain to a select limited number of situations.[168]

Therefore, because the legislative history, combined with the statutory language, shows clear congressional intent, there is no need for an application of congressional silence. Hence, this court's application of legislative history was incorrect because it chose history subsequent to the original enactment of the FCPA and because congressional silence on the

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'foreign public official' of an 'enterprise . . . over which a government . . . exercise[s] a dominant influence' that performs a 'public function[.]'").

163. *Id.* at 924.

164. *Id.*

165. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 185 (1994).

166. *Esquenazi*, 752 F.3d at 922–23.

167. Dewsnup v. Timm, 502 U.S. 410, 419–20 (1992) (discussing that only when there is true ambiguity on the intent of Congress may congressional intent be determined from its silence).

168. See *supra* Part IV.A.2.a.

matter cannot be applied where congressional intent is already clear. Even if the legislative history from the 1998 amendment was valid, the court misinterpreted its meaning.

c. Misinterpretation of OECD Convention

Specifically, the court misread the language of the OECD Convention where it reasoned in its analysis that, under the OECD Convention, any individual working for a business under the control of a foreign government would be a "foreign official."[169] While this may be technically true, the court took it one step further, which proved fatal to its reasoning. The court argued that if it failed to rule that employees of state-owned enterprises are foreign officials, it would place United States law in direct contradiction of a ratified treaty.[170]

While this may be the truth, the court ignored a key piece of evidence when determining that the U.S. was required to follow the guidelines put forth in the OECD Convention. The language of the OECD Convention does state that a foreign official is anyone who works for a foreign government "including for a public agency or public enterprise," which would include private companies.[171]

However, the court ignored the commentary to this treaty language, which goes on to state "[a] Party may use various approaches to fulfil [sic] its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph."[172] Thus, the court bases almost its entire argument on the claim that its ruling is the only one permissible because any other ruling would place the United States in violation of an international treaty.[173] However, the Court completely ignored the fact that the OECD Convention allows for countries to use

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169. *Esquenazi*, 752 F.3d at 923.

170. *Id.*

> Indeed, since the beginning of the republic, the Supreme Court has explained that construing federal statutes in such a way to ensure the United States is in compliance with the international obligations it voluntarily has undertaken is of paramount importance. 'If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.

Id.

171. Organization for Economic Cooperation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, art 1.4(a) (2001).

172. *Id.* at art 1.4(a), cmt. 1.3.

173. *Esquenazi*, 752 F.3d at 924.

whatever methods they deem fit to combat bribery in international business, as long as it is no *more* than the OECD Convention allows for.

Specifically, looking at the language of the OECD Convention, it says that member nations may go about implementing new laws and rules, as long as their new rules do "not require proof of elements *beyond* those which would be required to be proved if the offence were defined as in this paragraph."[174] Therefore, member nations may take any measures they deem necessary, so long as it does not go *beyond* what is required in the OECD Convention. The logical presumption would be then that a member nation is free to regulate less than prescribed by the OECD Convention. Thus, the Court's ruling that congressional action had to be deemed to be in direct compliance with the OECD Convention completely misses this point: that it was completely within Congress' prerogative to regulate *less* than OECD Convention required.

In analyzing the FCPA's legislative history, the court made several grave mistakes. It ignored the central focus the original enacting Congress had for the FCPA. The court then wrongly applied the views of a subsequent legislative body, and held wrongly that this subsequent Congress' silence was controlling. Even if the court was correct in applying the legislative history following the 1998 amendment to the FCPA, it wrongly misinterpreted this history. While it is clear that the present court was incorrect in its ruling defining the term "instrumentality," a further analysis is needed to demonstrate how the court's ruling is unworkable in the real world of doing business internationally.

B. Court's Ruling is Unworkable and Gives More Powers to the DOJ

As discussed above, the court ruled that an instrumentality "is an entity controlled by the government of a foreign country that performs a function that the controlling government treats as its own."[175] To apply this holding, the court crafted a two-part test to determine whether a privately held company is controlled by a foreign government and its employees should be deemed "foreign officials" within the scope of the FCPA.[176] This test requires that one must first determine whether the government controls the entity in question, and second, whether the entity performs a function the government treats as its own.[177] To answer these two factual questions, the court listed several factors to consider when deciding whether the

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174. Organization for Economic Cooperation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, art 1.4(a) cmt. 1.3 (2001) (emphasis added).

175. *Esquenazi*, 752 F.3d at 925.

176. *Id.*

177. *Id.*

government controls the entity,[178] and whether the entity performs a government function.[179]

1. Court's Two Part Test is not Practical in Reality

While at first it might appear that the court developed a logical test that may be implemented in a wide variety of settings, this is far from the truth. Instead, the court provided a completely unworkable test that is impossible for those in the business world to actually implement as a proactive matter to prevent future situations in which they could be subjected to enforcement actions.

Furthermore, the court reasoned that using this two-part test would also help the district courts in determining whether a privately held company should qualify as an "instrumentality."[180] However, again, this test will not be implemented in most cases by the judicial system. In reality, it will be the DOJ that will apply this test in its enforcement actions, which, in the end, will never see the light of judicial scrutiny, as this court intended it to be. Each of these realities will be addressed in the following discussion.

First, the reality of this test is that the corporations who are doing business in foreign markets will attempt to employ this "test," which will create substantial burden and a conscious effort by the corporation to be risk averse. While the court envisioned this test as a benefit to those corporations, in truth it will only make the job of complying with the FCPA harder. This test requires a corporation to conduct extensive investigations to determine whether it is dealing with an actual privately held company or a company that is under even the smallest government control. This amount of investigation will take substantial amounts of time, money, and man-hours.

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178. *Id.* (discussing several factors taken from the OECD Convention to consider for determining whether the government controls the entity:

> [1] the foreign government's formal designation of that entity;" [2] "whether the government has a majority interest in the entity; [3] the government's ability to hire and fire the entity's principals; [4] the extent to which the entity's profits, if any, go directly into the governmental fisc[;] . . . [5] the extent to which the government funds the entity if it fails to break even; and [6] the length of time these indicia have existed.

Id.)

179. *Id.* at 926 (discussing factors taken from the OECD Convention to consider whether the entity is performing a function the government treats as its own:

> [1] whether the entity has a monopoly over the function it exists to carry out; [2] whether the government subsidizes the costs associated with the entity providing services; [3] whether the entity provides services to the public at large in the foreign country; and [4] whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.

Id.).

180. *Id.* at 925.

Ultimately, a corporation will have to make the decision of whether it is even worth doing business in a foreign market when it effectively already has one hand tied behind its back. Therefore, this requirement that is now forced upon U.S. corporations seeking to do business in foreign markets will likely only lead to those businesses being risk averse. This risk aversion will simply lead to more businesses avoiding those foreign markets that would subject them to possible legal troubles under this new, greatly expanded view of the FCPA.

a. Real World Scenarios of the Court's Test in Practice

Furthermore, this test is not as easily implemented as the court believes it to be. To demonstrate this difficulty, consider the following hypothetical in which a prospective U.S. corporation is seeking to conduct business in South Korea. In this hypothetical, the U.S. company is a pharmaceutical corporation seeking to sell its products to Seoul National University Hospital (SNUH). Before the U.S. corporation can begin to conduct business with SNUH, it must first determine whether SNUH is under the control of the South Korean government, per the test put forth by the *Esquenazi* court. The difficulty in the present case is determining how much control is enough control under the *Esquenazi* court's factors to consider for government control.[181]

In the current hypothetical, the South Korean government does have some control over SNUH in that it appoints some directors and receives reports on SNUH's annual budget.[182] However, on the opposite end of the spectrum, the South Korean Supreme Court has explicitly designated SNUH employees as "not public officials for the purposes of Korea's anti-public bribery laws."[183] Clearly this would be confusing for a U.S. business attempting to determine whether SNUH is an instrumentality. The *Esquenazi* court was not explicit in how the balance of its factors should play out in the real world. In this hypothetical, a U.S. corporation contemplating doing business with SNUH would have absolutely no idea how the facts should be applied to the factors of the test provided.

Additionally, the greater reality is that in real-world situations, U.S. businesses need access to foreign government records to be able to determine whether the *Esquenazi* factors are present, which is easier said than done in most situations. In the previous example, South Korea is

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181. *Id.*
182. Samantha Dreilinger, *Esquenazi In Korea: Identifying Instrumentalities Abroad*, LAW 360 (Sept. 12, 2014), http://www.law360.com/articles/576519/esquenazi-in-korea-identifying-instrumentalities-abroad.
183. *Id.*

generally perceived as being an open source of public records.[184] Therefore, in the prior example it would have been relatively easily to obtain the necessary records and search out the information needed to apply the *Esquenazi* factors. Yet it still is difficult to reach an overall conclusion, as there was little guidance from the court. In most other circumstances the information needed will not be as easily obtained.

Consider another hypothetical where a U.S. corporation is seeking to conduct business in China instead of South Korea, as in the prior example. China has been and currently is near the "top of many corporate strategies" for conducting business in the recent era.[185] However, China has always been an FCPA compliance sore spot due to the prevalence of businesses in which the Chinese government has some or total control.[186] Therefore, in this example a U.S. corporation seeking to do business in China will have to perform its due diligence to determine whether the *Esquenazi* factors are present in the Chinese businesses it is seeking to interact with.

Yet the reality is that a U.S. corporation will never be able to obtain the necessary information to determine whether a Chinese business is an instrumentality. This necessary information will not be obtainable because, in recent years, the Chinese government has begun to crack down on the ability of corporations to conduct due diligence investigations on Chinese business.[187] Specifically, there is limited to no access to documents pertaining to "company registration files, annual returns and some limited but useful personal data."[188] In most circumstances, U.S. corporations will not have access to the necessary information to put the factors given by *Esquenazi* to use.

Furthermore, while this test is meant to give corporations the ability to pre-screen potential clients for any possible government influence, in many situations this is pointless. For instance, again consider the hypothetical of a United States corporation attempting to do business in China. In this situation, many companies seeking to conduct business within China will be required and forced to enter into a joint venture with a Chinese

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184. *See* TRANSPARENCY INTERNATIONAL: THE GLOBAL COALITION AGAINST CORRUPTION, http://www.transparency.org/country/#KOR (showing that South Korea's corruption perceptions index ranks it 46 out of 177 countries worldwide, while it also has a score of 71 on its open budget index, which indicates it they provides the public with "significant information").

185. *See* Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT'L L.J. 397, 398 (2007).

186. *Id.* at 416.

187. Mark Jenkins et al., *FCPA Compliance in China* (Mar. 2014), http://www.fraud-magazine.com/article.aspx?id=4294982094.

188. Peter Humphrey, *The Fraud Examiner: How Fraud Investigation Just Got Harder In China* (May 2013), http://www.acfe.com/fraud-examiner.aspx?id=4294978054.

company.[189] Therefore, in China, which is one of the largest areas for foreign investment by United States companies, this test is basically useless.

A United States company may apply the *Esquenazi* test, and it may even determine that its prospective client in China has potential risk of violating the test. However, per Chinese law, the United States company will still be forced to conduct business and interact with the Chinese company. So where is the value of the court's test in real world? The truth is that there is no value, and in reality, even if a company is capable of determining whether a potential client satisfies the factors from *Esquenazi*, it will more than likely still be forced to conduct business with the potential client.

The central focus of these two hypotheticals is that, due to this expansive view of "instrumentality," U.S. corporations will now be forced to spend enormous amounts of time and resources investigating ownership of potential foreign companies.[190] These investigations will involve lawyers, accounting firms and other outside counsel at a great cost to the U.S. corporations.[191] In many circumstances, this will be a futile effort because the necessary information will be unobtainable.[192] All of this will be done for the sole purpose of determining whether the corporation can treat this potential customer the same way it would treat any other potential business client.[193] And in the end the corporation may have put all this effort and resources into this task only to find out that it may still be forced to do business with the very same entity it has been investigating.

2. *New Test Only Gives Greater Authority to the DOJ*

Additionally, this new "test" will allow the DOJ to twist and manipulate this ruling to suit its needs, as it is unlikely that any judicial scrutiny will be given to this test anytime soon. This lack of judicial scrutiny for this new test will be due to the fact that the DOJ ends almost all enforcement actions within the context of the FCPA with NPAs and DPAs, which are not subjected to any judicial scrutiny at all. Essentially, due to this lack of judicial scrutiny, this new test will be whatever the DOJ deems

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189. *See generally* UNITED STATES CHAMBER OF COMMERCE, *China's Approval Process for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment and Transparency, available at* https://www.uschamber.com/sites/default/files/legacy/international/asia/china/files/1210_Chinainbound_inside.pdf (last visited March 31, 2015) (discussing the requirement that, in many industries and types of business, United States businesses seeking to conduct business in China are required to work through a Chinese company).

190. KOEHLER, *supra* note 1, at 334.

191. *Id.*

192. Humphrey, *supra* note 188.

193. *Id.*

it to be. The reality of the situation is that the DOJ will use this test the way it wants to continue to expand the scope of the FCPA, and to force more corporations and businesses to settle through these agreements.

For example, consider the following, the FCPA strictly applies to instances in which illegal bribe payments are made to "foreign officials" for the purpose of "obtaining or retaining business."[194] Congressional intent, on this issue, was that the illegal payments must have been made for the purpose of influencing foreign officials to act in a way that would assist a company in "obtaining, retaining, or directing business," such as a government contract.[195]

However, recently through the use of NPAs and DPAs the DOJ has begun to expand this original meaning, "obtaining or retaining business," to include evading taxes or penalties, obtaining exceptions to regulations, and circumventing the rules for importation of products.[196] The DOJ argues that "obtaining or retaining business" is to be interpreted as gaining a business advantage.[197] This is in direct contravention of both the statutory language and legislative history. However, DOJ has continued to use this expansive theory of "obtaining or retaining business," and it will do the same with this new test for "foreign official." This new test simply gives the DOJ the opening it needs to expand the FCPA as it sees fit when it comes to the meaning of "foreign official" and "instrumentality."

Ultimately, the court's intent was for this new "test" to be used by the district courts to determine whether a private company should be deemed an "instrumentality" within the meaning of the FCPA. However, while the intent was for courts to apply this test, it will be the DOJ that instead uses it to its advantage. The DOJ will manipulate and transform the test into a tool that it may use to further force U.S. corporations into settlement agreements using NPAs and DPAs.

V. CONCLUSION

In conclusion, the Court of Appeals for the Eleventh Circuit was incorrect in its ruling, and it greatly expanded the original intent and scope of the FCPA that Congress intended. First, the statutory interpretation conducted by the court was incorrect. The court incorrectly relied upon definitions derived from dictionaries that were published decades after the FCPA was enacted. This was incorrect in that it is established that the correct definition can only be taken from a dictionary that was published around the same time as the enactment of the statute in question.

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194. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(a)(1) (2012).
195. H.R. REP. No. 95-831, at 11–2 (1977).
196. CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE, *supra* note 51, at 13.
197. *Id.*

If the correct definition were used, the court would have seen that "instrumentality" was intended to be a catchall term for a variety of explicit government entities. Second, the court's ruling contravenes the intent and original purpose of the FCPA. The expansion of "foreign officials" by the court to include employees of privately held companies flies directly in the face of what Congress intended to do in limiting the FCPA to only select situations. Furthermore, the legislative history that the court relied upon was taken from a subsequent Congress that was completely silent on the matter of "instrumentality." This goes against binding precedent, as a court may not rely upon subsequent congressional intent. Additionally, the court's reliance upon Congress' silence on the matter of "instrumentality" was incorrect, as there was ample evidence available to persuade it of the proper interpretation.

Finally, the court's ruling is unworkable in the real world, as it requires U.S. corporations to conduct extensive research and investigations before ever setting foot in a foreign country. Moreover, the test handed down by the court will not be used by the judicial system in a non-biased way, but instead will be manipulated and transformed into what the DOJ wishes it to be through the use of NPAs and DPAs. The sad truth is that no matter how incorrect this ruling was, it is here to stay. It took 37 years for the first judicial ruling on the term "instrumentality," and the Supreme Court has recently denied *certiorari* on this case.[198] Hence, if this ruling is ever to be corrected it is going to take a couple of decades for the judicial system to have another opportunity to get it right.

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198. *See* United States v. Esquenazi, 752 F.3d 912, 920 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 293 (Oct. 6, 2014) (No. 14-189).