

The Story of the Foreign Corrupt Practices Act

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In the mid-1970s, Congress journeyed into uncharted territory. After more than two years of investigation, deliberation, and consideration, what emerged in 1977 was the Foreign Corrupt Practices Act (FCPA), a pioneering statute and the first law in the world governing domestic business conduct with foreign government officials in foreign markets. This Article weaves together information and events scattered in the FCPA's voluminous legislative record to tell the FCPA's story through original voices of actual participants who shaped the law. As the FCPA approaches thirty-five years old, and as enforcement enters a new era, the FCPA's story remains important and relevant to government agencies charged with enforcing the law, those subject to the law, and policy makers contemplating reform.

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I. INTRODUCTION

In the mid-1970s, Congress journeyed into uncharted territory. After more than two years of investigation, deliberation and consideration, what emerged in 1977 was the Foreign Corrupt Practices Act (FCPA). The FCPA was a pioneering statute and the first law in the world governing domestic business conduct with *foreign* government officials in *foreign* market. As with most new laws, the FCPA did not appear out of thin air. Rather, real events and real policy reasons motivated Congress to act, and this Article tells the story of the FCPA.

In telling the FCPA's story, this Article weaves together information and events scattered in the voluminous legislative record. To a large extent, the story is told through original voices of actual participants who shaped the FCPA.¹

¹Between 1975 and 1977, Congress held numerous hearings as to the so-called foreign corporate payments problem. Testimony at these hearings was given by, among others, representatives from the Department of State, Department of Defense, Department of Justice, Department of Commerce, Department of the Treasury, and the Securities and Exchange Commission. Testimony was also given by, among others, lawyers, law professors, the American Bar Association, other bar association committees, industry

Part II discusses how the foreign corporate payments problem was discovered, specific events that prompted congressional concern, and the policy ramifications of those events—most notably foreign policy—which motivated Congress to act. Among other things, this Part highlights that even though the payments unearthed in the mid-1970s were extensive and significant, efforts were made to place the conduct in the proper context, and there was certain resentment that U.S. companies were being unjustly pilloried for a worldwide problem.

Part III highlights that upon discovery of the foreign corporate payments problem, Congress's first task was to determine if the payments were adequately captured by existing law. Among other things, this Part discusses the divergent views on this issue and highlights that while certain existing laws did indirectly deal with various aspects of the problem, the prevailing view was that existing laws were deficient and that a new and direct legislative remedy was needed.

Part IV chronicles how seeking new legislative remedies to the foreign corporate payments problem was far from a consensus view of the U.S. government and details the divergent views as to a solution. Among other things, this Part highlights that the problem was not the simple and safe issue it appeared to be, and that Congress encountered many difficult and complex issues including the foreign business conditions in which certain payments were made, whether unilateral action would put U.S. companies at a competitive disadvantage, and the basic issue of defining bribery.

Part V discusses how Congress sought to address the foreign corporate payments problem from a variety of angles and the resulting two main competing legislative responses to the problem—a disclosure approach as to a broad category of payments and a criminalization approach as to a narrow category of payments. Among other things, this Part highlights that despite significant minority concern, the FCPA adopted a criminalization approach as it was viewed as more effective in deterring improper payments and less burdensome on business.

Part VI presents the FCPA as a limited statute. Even though Congress learned of a variety of foreign corporate payments to a variety of recipients and for a variety of reasons, it intended and accepted in passing the FCPA to capture only a narrow category of such payments. Among other things, this Part highlights how Congress limited the FCPA's payment provisions to a narrow category of foreign recipients, further narrowed the range of actionable payments to those involving foreign government procurement or influencing foreign government legislation or regulations, and how Congress chose not to capture so-called facilitation payments given the difficult and complex business conditions encountered in many foreign markets.

groups, and public interest groups, all of whom also submitted material found in the legislative record.

Understanding the past is critical to informing the present and addressing the future. As the FCPA approaches thirty-five years old, and as enforcement enters a new era, the story of the FCPA's enactment remains important and relevant to government agencies charged with enforcing the law, those subject to the law, and policy makers contemplating reform. This Article seeks to tell the FCPA's story in the hopes of informing public debate on the FCPA at this critical point in its history.

II. THE FOREIGN CORPORATE PAYMENTS PROBLEM

As with most new laws, the FCPA did not appear out of thin air. Rather, real events and policy reasons motivated Congress to enact the FCPA. This Part discusses how the foreign corporate payments problem (the problem) was discovered, specific events that prompted congressional concern, and the policy ramifications of those events which motivated Congress to act.

A. *Discovery of the Problem*

Discovery of the foreign corporate payments problem in the mid-1970s resulted from a combination of work by the Office of the Watergate Special Prosecutor, including related follow-up work and investigations by the Securities and Exchange Commission (SEC) and Senator Frank Church's Subcommittee on Multinational Corporations (Church Committee).

The Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices (SEC Report) stated as follows:

In 1973, as a result of the work of the Office of the [Watergate] Special Prosecutor, several corporations and executive officers were charged with using corporate funds for illegal domestic political contributions. The Commission recognized that these activities involved matters of possible significance to public investors, the nondisclosure of which might entail violations of the federal securities laws. . . .

The Commission's inquiry into the circumstances surrounding alleged illegal political campaign contributions revealed that violations of the federal securities laws had indeed occurred. The staff discovered falsifications of corporate financial records, designed to disguise or conceal the source and application of corporate funds misused for illegal purposes, as well as the existence of secret "slush funds" disbursed outside the normal financial accountability system. These secret funds were used for a number of purposes, including in some instances, questionable or illegal foreign payments. These practices cast doubt on the integrity and reliability of the corporate books and records which are the very foundation of the disclosure system established by the federal securities laws.²

²U.S. SEC. & EXCH. COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES

As evident from the SEC Report, the SEC's focus was not whether the discovered domestic and foreign payments were or should be per se illegal under U.S. law, but rather whether such payments were and should be disclosed to investors.

Along with the SEC's work, the Church Committee also helped shine a light on questionable foreign corporate payments.³ In May 1975, the Church Committee held the first of several hearings generally dealing with U.S. corporate political contributions to foreign governments. Senator Church opened the hearings as follows:

In the course of the Watergate Committee hearings and the investigation by the Special Prosecutor, it became apparent that major American corporations had made illegal political contributions in the United States. More recently, the [SEC] has revealed that several multinational corporations had failed to report to their shareholders millions of dollars of offshore payments in violation of the Securities laws of the United States. . . .

The [SEC] is understandably concerned that the disclosure requirements of U.S. laws are complied with. This subcommittee is concerned with the foreign policy consequences of these payments by U.S.-based multinational corporations.

This is not a pleasant or easy subject for the corporations involved or U.S. Government officials to discuss in a public forum. This subcommittee deliberated long and hard as to whether it should pursue this matter, and, if so, in what fashion. It decided by a unanimous vote to initiate this investigation and to do so in open public hearings. For what we are concerned with is not a question of private or public morality. What concerns us here is a major issue of foreign policy for the United States.⁴

The Church Committee sought answers to the following questions regarding the questionable payments:

In what country were they made? Were they illegal in the country in which they were made? If the corporation was reluctant, did it bring the matter to the attention of the U.S. Embassy? If not, why not? Does the United States have a

(1976), reprinted in *Special Supplement*, Sec. Reg. & L. Rep. (BNA) No. 353, at 2 (May 19, 1976) [hereinafter SEC REPORT].

³Chaired by Senator Church, the Subcommittee on Multinational Corporations of the Senate Foreign Relations Committee was established in 1972, and among other things, this subcommittee investigated relationships between U.S. oil companies and Middle East producing nations, corporate plans to influence elections in Chile, and complicity between U.S. companies and other foreign countries. See generally RALPH W. HANSEN & DEBORAH J. ROBERTS, *THE FRANK CHURCH PAPERS: A SUMMARY GUIDE* (Boise State Univ. ed., 1988), available at <http://libraries.boisestate.edu/special/church/church.shtml>.

⁴*Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations*, 94th Cong. 1 (1975) [hereinafter *Multinational Corporations*] (statement of Sen. Frank Church, Chairman, Subcomm. on Multinational Corps., S. Comm. on Foreign Relations).

foreign assistance program in the country in which the payment was made? Was the company's investment in the country guaranteed, in whole or in part, by our Government's Overseas Private Investment Corporation? Was the U.S. Embassy aware of such payments? If not, why not?⁵

In concluding his opening remarks, Senator Church stated as follows: "In short, we cannot close our eyes to this problem. It is no longer sufficient to simply sigh and say that is the way business is done. It is time to treat the issue for what it is: a serious foreign policy problem."⁶

B. Specific Events Which Prompted Congressional Concern

Over the course of four months in 1975, the Church Committee held separate hearings regarding Gulf Oil, Northrop, Mobil Oil, and Lockheed. Each of these corporations were the subject of allegations, or had already made admissions, concerning questionable payments made directly or indirectly to foreign government officials or foreign political parties in connection with a business purpose. For instance, Gulf Oil principally involved contributions to the political campaign of the President of the Republic of Korea.⁷ Northrop principally involved payments to a Saudi Arabian general.⁸ Exxon principally involved contributions to Italian political parties.⁹ Mobil Oil also principally involved contributions to Italian political parties.¹⁰ Lockheed principally involved payments to Japanese Prime Minister Tanaka, Prince Bernhard (the Inspector General of the Dutch Armed Forces and the husband of Queen Juliana of the Netherlands), and Italian political parties.¹¹ In addition, although not the focus of separate Church Committee hearings, foreign payments by United Brands and Ashland Oil also concerned Congress. United Brands principally involved payments to Oswaldo Lopez Arellano, the President of Honduras.¹²

⁵ *Id.* at 2 (statement of Sen. Frank Church, Chairman, Subcomm. on Multinational Corps., S. Comm. on Foreign Relations).

⁶ *Id.*

⁷ See, e.g., *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 2 (1975) [hereinafter *American Multinational Corporations Abroad*] (statement of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

⁸ See *id.*

⁹ See *Multinational Corporations*, *supra* note 4, at 239 (statement of Sen. Frank Church, Chairman, Subcomm. on Multinational Corps., S. Comm. on Foreign Relations).

¹⁰ See *id.* at 315 (statement of Everett Checket, Exec. Vice President, Int'l Div., Mobil Oil Corp).

¹¹ See *Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 2 (1976) [hereinafter *Foreign Payments Disclosure*] (statement of Rep. John M. Murphy, Chairman, Subcomm. on Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce).

¹² See *American Multinational Corporations Abroad*, *supra* note 7, at 2 (statement of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

Ashland Oil principally involved payments to Albert Bernard Bongo, the President of Gabon.¹³

The Lockheed scandal, in particular, prompted significant congressional concern given that during the time period the payments were made Lockheed was the recipient of a \$250 million federal loan guarantee intended to keep the company out of bankruptcy. A *Washington Post* editorial included in the legislative record noted as follows:

It would have been unfortunate enough to have any American corporation involved in this kind of transaction. But Lockheed is not considered, in other countries, to be just another American company. It is the largest U.S. defense contractor, and it owes its existence to federally guaranteed loans. It is seen abroad as almost an arm of the U.S. government. Its misdeeds, thus, have done proportionately great damage to this country and its reputation.¹⁴

Moreover, the *New York Times* reported on a possible link between the Central Intelligence Agency (CIA) and Yoshio Kodama, Lockheed's principal conduit in Japan. Senator William Proxmire stated as follows:

According to the New York Times, Kodama was the recipient of CIA funds for covert projects on several occasions. The Times also reports that the CIA was aware of Kodama's relationship with Lockheed from the late 1950's on. And it's well known that Lockheed has had a relationship with the CIA over the years.¹⁵

In Senate testimony, SEC Chairman Roderick Hills described the types of corporate payments discovered as follows:

The practices uncovered in the course of these investigations revealed problems of a serious magnitude:

- (1) [b]onuses to selected corporate employees which were rebated for use in making illegal domestic political contributions by such corporations;
- (2) [u]se of an offshore corporate subsidiary as "cover" for a revolving cash fund for distributing diverted corporate funds for both domestic and foreign political activities, all of which were illegal in the place where paid;
- (3) [a]nonymous foreign bearer stock corporations, used as depositories for secret illegal "kickbacks" on purchase or sales contracts;
- (4) [p]ayments, to foreign consultants which were diverted to management and used for illegal domestic political contributions and commercial bribery;

¹³ *Id.*

¹⁴ 122 CONG. REC. 30,336 (1976) (daily ed. Sept. 14, 1976) (citing *Mr. Tanaka and Lockheed*, WASH. POST, Aug. 21, 1976, at A10).

¹⁵ *Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Hous., and Urban Affairs*, 94th Cong. 46 (1976) [hereinafter *Foreign and Corporate Bribes*] (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

(5) [d]irect, corporate payments to foreign government officials in return for favorable business concessions; and

(6) [p]ayments, aggregating tens of millions of dollars, to consultants or commission agents, made with accounting procedures, controls and records which, if existent at all, were insufficient to document whether any services were even rendered by such consultants or agents, or whether such services were commensurate with the amounts paid. In some cases the parties involved have stated that the payments were used to bribe foreign government officials in order to procure business. No foreign official has, however, yet confirmed the receipt of such monies for such purposes, and there still are large amounts of such payments for which no accounting has been made.¹⁶

As discussed in more detail in Part IV, the above statement from Chairman Hills makes clear, as does other material found in the legislative record, that during its multi-year investigation, Congress learned of problematic domestic and foreign corporate payments and, as to the foreign payments, payments to a variety of recipients and for a variety of reasons.

The Association of the Bar of the City of New York (New York City Bar) summarized the magnitude and significance of what Congress learned in the mid-1970s in a report included in the legislative record as follows:

No single issue of corporate behavior has engendered in recent times as much discussion in the United States—both in the private and public arenas—and as much administrative and legislative activity, as payments made abroad by corporations. In part, this interest derives from the important issue of integrity in public life. In part, it derives from the impact of the political and social controversies which eddy about corporate enterprise and the free enterprise system—Are multinational corporations good or bad? Should the center of gravity of corporate governance be under state or federal control? Are the concepts of private management and initiative consistent with notions of corporate ethics?¹⁷

Even though the problematic corporate payments unearthed in the mid-1970s were extensive and significant, efforts were made to place the conduct in the proper context. For instance, Gerald Parks, Assistant Secretary for International Affairs, Department of the Treasury, stated during a 1976 House hearing as follows:

Although I do not wish to minimize the seriousness of the problem, the situation can be put in the proper light by noting that the approximately 200

¹⁶ *Abuses of Corporate Power: Hearings Before the Subcomm. on Priorities and Econ. in Gov't of the Joint Econ. Comm.*, 94th Cong. 13 (1976) [hereinafter *Abuses of Corporate Power*] (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm'n).

¹⁷ *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. of Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 63 (1977) [hereinafter *Unlawful Corporate Payments Act of 1977*] (report of the Ass'n of the Bar of the City of N.Y.).

firms [the subject of questionable payment inquiries] come from a total of more than 9,000 that regularly file with the Commission. . . .

Only a relatively few firms appear to have engaged in making questionable payments abroad. The vast bulk of our firms conduct their businesses ethically and completely in accord with the laws of the United States. We should not let the activities of a minority of U.S. firms operating abroad cast doubts on the nature or conduct of U.S. business generally.¹⁸

Even as to the companies implicated in the questionable conduct, the SEC Report noted that “[t]he conduct reported varies significantly, and the companies included can by no means universally be characterized as wrongdoers.”¹⁹ In a June 1975 speech included in the legislative record, SEC Chairman Raymond Garrett stated as follows:

All improper foreign payments, of course, are not big bribes. Many of them are small and in the foreign community where made possibly not really regarded as improper at all. If the local plant manager in a foreign country has to slip a weekly mordita of modest amount to the postman in order to get regular mail deliveries, or to the customs inspector, the fire inspector or the tax collector, is that something for us to get excited about? In our public statements, individual members of the Commission have said no, at least where these payments conform to custom and usage. Similar payments, at the local level, anyway, are not unknown in the United States. That is certainly my current view, even though there is some difficulty in formulating the rationale for the distinctions implied.²⁰

Likewise, SEC Chairman Hills stated during a House hearing as follows:

It is, of course, important . . . to make distinctions among these companies. It is quite true that in some cases the payments were cynically and arrogantly made by top corporate officials who knew they were acting contrary to existing laws and regulations and without the authority of their board of directors. Indeed, many went to great lengths to conceal their conduct from the outside auditors, outside directors, and of course, the shareholders.

But it is equally true that in a very large number of cases, the sums of money that have been involved are relatively small and were made by persons at a much lower level of management who went to great pains to conceal their own activities from their superiors [sic]. Unfortunately, the distinctions

¹⁸ *Foreign Payments Disclosure*, *supra* note 11, at 84–85 (1976) (statement of Gerald Parsky, Assistant Sec’y of Int’l Affairs, U.S. Dep’t of the Treasury).

¹⁹ SEC REPORT, *supra* note 2, at 9.

²⁰ *American Multinational Corporations Abroad*, *supra* note 7, at 61 (statement of Raymond Garrett, Chairman, U.S. Sec. & Exch. Comm’n).

between these different types of corporate misconduct have not been made sufficiently clear to the public.²¹

Indeed, some resented that U.S. companies were being unjustly pilloried for a worldwide problem. Senator Abraham Ribicoff was the most passionate in his views. During a 1975 Senate hearing in the early stage of Congress's investigation of the problem, he described a recent trip to world capitals to discuss various trade issues and stated as follows:

What disturbed me as I traveled around the world was the realization that American business was being internationally blamed for activities which are very obvious to me were a very common practice throughout the entire world. Not only the countries of the West—Western Europe, Japan, and the United States—but certainly through Africa, the Middle East, and Asia. . . .

. . . .
. . . And I sort of resented American companies being pilloried for what was a common practice throughout the world. . . .

. . . .
American corporations have been pilloried on the front pages and the television of not only the United States but throughout the entire world. And the world and the American people have been given to believe that American corporations are the only malefactors of this practice. And, yet, anybody who knows what is going on worldwide knows this is a worldwide phenomenon; that business houses and business corporations in every nation of the world are paying under the table and are guilty of bribes but none of them paint them this way.²²

C. Policy Ramifications Which Motivated Congress to Act

As highlighted above by Senator Church's opening statement during hearings devoted to U.S. corporate political contributions to foreign governments, foreign policy was the primary policy concern from the discovered foreign corporate payments which motivated Congress to act. However, foreign policy was not the sole reason motivating Congress. The legislative record also evidences that congressional motivation was sparked by a post-Watergate morality, economic perceptions, and global leadership.

²¹ *Foreign Payments Disclosure*, *supra* note 11, at 17 (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm'n).

²² *Protecting the Ability of the United States to Trade Abroad: Hearing Before the Subcomm. on Int'l Trade of the S. Comm. on Fin.*, 94th Cong. 1-2, 19 (1975) [hereinafter *Protecting U.S. Trade Abroad*] (statement of Sen. Abraham Ribicoff, Chairman, Subcomm. on Int'l Trade, S. Comm. on Fin.).

1. *Foreign Policy*

Representative Robert Nix, who chaired a series of House hearings in 1975 as to the foreign corporate payments, stated as follows:

There has been a negative impact on our foreign policy already because of these revelations. Peru has expropriated property of the Gulf Corp. in that country. Costa Rica is considering expropriation legislation and other countries in Latin America may be considering such steps. The interference in democratic elections with corporate gifts undermines everything we are trying to do as a leader of the free world. . . .

. . . [I]n Italy the Communist party is using the fact of multinational bribery in Italy against the political friends of the United States.²³

Representative Stephen Solarz and Mark Feldman, Deputy Legal Advisor, Department of State, also expressed similar concerns during the hearing. Representative Solarz stated as follows:

Failure to take prompt and effective action can only encourage the continuation of these practices and, thereby, continue to create serious problems in our international economic and political relations throughout the world. One government has already been toppled and political parties in several other countries have been seriously compromised.²⁴

Deputy Legal Advisor Feldman stated as follows:

Let me give a few examples of events related to the disclosure of the last weeks which have impacted our foreign relations:

The head of a friendly government has been removed from office and other friendly leaders have come under political attack.

Both multinational enterprises and U.S. Government agencies have been accused of attempting to subvert foreign governments.

A firm linked with payments in one country has had property in another country expropriated, not because of any alleged improprieties in that country, but simply on the grounds that it was an undesirable firm.

Several governments have presented firms suspected of making payments with ultimatums of economic retaliation or criminal prosecution.²⁵

²³ *American Multinational Corporations Abroad*, *supra* note 7, at 1–2 (statement of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

²⁴ *Id.* at 4 (statement of Rep. Stephen J. Solarz, Member, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

²⁵ *Id.* at 22–23 (statement of Mark B. Feldman, Deputy Legal Advisor, U.S. Dep't. of State).

In chairing another 1975 Senate hearing regarding the foreign payments, Senator Church again expressed that foreign policy was his chief concern. He stated as follows:

There is also little doubt that widespread corruption serves to undermine those moderate democratic and pro-free-enterprise governments which the United States has traditionally sought to foster and support. Several oil companies testified before the subcommittee that they had made huge political contributions in Italy and Korea, for example. They claimed to be supporting the democratic forces who are friendly to foreign capital in those countries, but in fact, they were subverting the basic democratic processes of those two countries by making illegal contributions and were, at the same time, providing the radical left with its strongest election issue. The large and steady gains made by the Italian Communist Party in recent elections are due in no small part to the fact that it is believed to be the only non-corrupt political force in the country, while the other parties are seen as the handmaidens of foreign and domestic financial interests. So that while bribes and kickbacks may bolster sales in the short run, the open participation of American firms in such practices can, in the long run, only serve to discredit them and the United States. Ultimately, they create the conditions which bring to power political forces that are no friends of ours, whether a Quaddafi in Libya, or the Communists in Italy.

I have focused on the foreign policy aspects of this issue because that is the chief concern of my subcommittee.²⁶

Likewise, Senator Church stated as follows on the Senate floor:

[T]hese very practices have extremely serious consequences both for the conduct of U.S. foreign policy and the reception U.S. business receives abroad.

U.S.-based corporations should not be allowed to weaken a friendly government through bribery and corruption while the United States is relying on that government as a stable sure friend in supporting our policies. U.S.-based corporations should not be supporting political factions antithetical to those supported by the U.S. Government. Nor do we want, as was revealed in Multinational Subcommittee hearings, the defense priorities of our allies distorted by corporate bribery.

Further, when these payments become known, and they will and do, whether it be through revelations by Senate subcommittees or through the common knowledge that leads to revolution and the downfall of such governments as the Idris regime in Libya, the repercussions are often international and the foreign policy implications for the United States severe. Payments by Lockheed alone may very well advance the communists in Italy. In Japan, a mainstay of our foreign policy in the Far East, the government is reeling as a consequence of payments by Lockheed. Inquiries have begun in

²⁶ *Protecting U.S. Trade Abroad*, *supra* note 22, at 9 (statement of Sen. Frank Church, Member, Subcomm. on Int'l Trade, S. Comm. on Fin.).

many other countries. The Communist bloc chortles with glee at the sight of corrupt capitalism.²⁷

Deputy Secretary of the Department of State Robert Ingersoll, in early congressional hearings, stated as follows:

We have seen dramatic evidence in recent weeks of the potential consequences of disclosure in the United States of events which affect the vital interests of foreign governments. Preliminary results have included serious political crises in friendly countries, possible cancellation of major overseas orders for U.S. industries and the risk of general cooling toward U.S. firms abroad. Many foreign commentators and opinion makers have expressed concern about the effects of U.S. processes in their countries and suggested that the United States has a responsibility to take into account the interests of its allies when it is cleaning up its own house.

I wish to state for the record that grievous damage has been done to the foreign relations of the United States by recent disclosures of unsubstantiated allegations against foreign officials. As I said, we do not condone, nor does the U.S. Government condone, bribery by American corporations overseas. On the other hand, it is a fact that public discussion in this country of the alleged misdeeds of officials of foreign governments cannot fail to damage our relations with these governments.²⁸

Representatives John Murphy, John Moss, and Michael Harrington also expressed concern about the foreign policy ramifications of the foreign corporate payments during various congressional hearings. Representative Murphy stated as follows:

The foreign policy implications for the United States are staggering and in some cases, perhaps irreversible. Payments by Lockheed alone may well have advanced the Communist cause in Italy. In Japan, a mainstay of our foreign policy in the Far East, the government is reeling as a consequence of such payments. On August 16[, 1976], former Prime Minister Tanaka was indicted on charges of accepting \$1.7 million from Lockheed. And most recently, the monarchy in the Netherlands has been rocked by the Lockheed scandal.

All of this lends substantial credence to the suspicions by extremists that U.S. businesses operating in their country have a corrupting influence on their political systems.²⁹

²⁷ 122 CONG. REC. S6515–16 (1976) (daily ed. May 5, 1976).

²⁸ *Abuses of Corporate Power*, *supra* note 16, at 154 (statement of Robert Ingersoll, Deputy U.S. Sec’y of State).

²⁹ *Foreign Payments Disclosure*, *supra* note 11, at 2 (statement of Rep. John M. Murphy, Chairman, Subcomm. on Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce).

Representative Moss stated as follows:

Business practices of these corporations abroad often impact directly on U.S. foreign policy. Disclosures have shown that United Brands dealings with the Honduran Government and Lockheed's relationship with the Dutch Crown, Italian political parties, and former key leaders of the ruling Japanese party had an impact as great as the Department of State might have had.

Surely the public expects more than to have foreign policy made in the board rooms of United Brands or Lockheed. Not only is a publicly owned corporation unaccountable to the public when it uses its assets to bribe foreign governmental officials, but also it is unaccountable to its shareholders, the ones to whom the assets belong.³⁰

Representative Harrington stated as follows:

[I]t is obvious that the foreign policy repercussions of such payments can be severe. In their support of one foreign political party over another, American corporate activities can undermine official U.S. policy. Both Chilean President Allende and Venezuelan President Perez broke off talks with U.S. officials on compensation for nationalized property when they learned of corporate payments. . . . Numerous other examples could be cited but the point is clear. U.S. business contributions to foreign political parties can severely impair official policy. The U.S. Government, not private business, should conduct U.S. foreign policy.³¹

Representative Solarz, who emerged as a leader in the House as to the problem, stated as follows during a House hearing:

[W]hat is at stake is much more than the individual interests of corporations which are competing for a share of foreign markets. What is in fact at stake is the foreign policy and national interest of the Untied [sic] States. It is clearly in our interest to put a stop to these pernicious practices. Leaving aside the question of whether bribery is necessary to win contracts—and there is much evidence that it is not—there is much more involved than a few dollars. We simply cannot permit activity which so damages U.S. foreign policy.³²

A Senate Report stated as follows:

Bribery of foreign officials by U.S. corporations also creates severe foreign policy problems. The revelations of improper payments invariably

³⁰ *Id.* at 152 (statement of Rep. John Moss, Member, Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce).

³¹ *Unlawful Corporate Payments Act of 1977*, *supra* note 17, at 169 (statement of Rep. Michael Harrington, Member, Subcomm. on Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce).

³² *Id.* at 173 (statement of Rep. Stephen J. Solarz, Member, Subcomm. on Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce).

tends to embarrass friendly regimes and lowers the esteem for the United States among the foreign public. It lends credence to the worse suspicions sown by extreme nationalists or Marxists that American businesses operating in their country have a corrupting influence on their political systems. It increases the likelihood that when an angry citizenry demands reform, the target will be not only the corrupt local officials, but also the United States and U.S. owned business.

Bribery by U.S. companies also undermines the foreign policy objective of the United States to promote democratically accountable governments and professionalized civil services in developing countries.³³

Even though foreign policy was the primary policy concern from the discovered foreign corporate payments, it was not the sole concern motivating Congress to act. Congressional motivation was also sparked by a post-Watergate morality,³⁴ economic perceptions including a sense that prohibiting foreign corporate payments would give U.S. companies a competitive advantage and actually help companies resist foreign payment demands, as well as global leadership.

2. Post-Watergate Morality

Representative Solarz stated during a 1975 House hearing as follows:

Simple business ethics would seem to dictate the standards on which firms would conduct their affairs, and it is truly a sad commentary that the excuse put forward by most of the corporations is that other nations engage in bribery and massive political contributions as well.

The conduct of commercial operations by foreign nations in a morally shabby manner is no excuse for American citizens to engage in such scandalous activities as well. To the extent that international bribery is characteristic of business dealings in other parts of the world, the participation of American firms in it warrants prompt and effective elimination.

...
... [W]hat is at stake here is really, in a number of significant respects, the reputation of our own country, and I think that we have an obligation to set a standard of honesty and integrity in our business dealings not only at home but

³³ S. REP. NO. 94-1031, at 3–4 (1976).

³⁴ Former Vice President Spiro Agnew, who resigned as a result of Watergate, used the term “post-Watergate morality” in his farewell address. “By this he meant that the things he had done had been . . . normal and generally tolerated . . . until Watergate came along.” Philip Wagner, *Cleaning It Up*, NEWS & COURIER, Nov. 15, 1973, at 18-A (Editor’s Note: In 1991, the *News and Courier* became the *Post and Courier*. See <http://www.postandcourier.com/section/pcboutus>. The original *News and Courier* article cited here is on file with the author.).

also abroad which will be a beacon for the light of integrity for the rest of the world.³⁵

The following exchange between Representative Solarz and Michael Butler, Vice President and General Counsel, Overseas Private Investment Corporation, during the House hearing best captures the moral dimension of the foreign corporate payments:

MR. SOLARZ. . . .

. . . What do you think an American corporation ought to do if, in the course of its business activities in a foreign country, it is approached by responsible officials of the government of the country in which they are doing business and, in effect, are told that if they don't make what is clearly an illegal payment, they may suffer economically as a result, leaving aside whether the penalty would be expropriation or an increase in local taxes, as was the problem with the United Brands situation? What do you think that their response ought to be if the failure to meet the demand might indeed cost them substantially more than the price that was being asked in order to avoid the penalty in the first place?

MR. BUTLER. My advice would be to not pay it. That is always cheap advice since it is not my investment that is at risk, but I think my feeling would be that, once you start down that road, it gets worse and worse.

MR. SOLARZ. . . . It is nice to hear some responsible official of the U.S. Government standing up for some old-fashioned principles of morality even if the price of morality may be loss of one's company.³⁶

Nevertheless, there was concern that enacting a law governing business interactions with foreign government officials in foreign lands would be viewed as the U.S. legislating morality and that such a law might be resented abroad. The following exchange between Representative Solarz and Deputy Legal Advisor Feldman best captures this issue:

MR. SOLARZ. Assuming, just for the purposes of discussion, that in most countries of the world bribery is illegal, why would those countries in any way resent it if we enacted legislation making the bribery of foreign officials by our own citizens illegal as well?

MR. FELDMAN. . . . I think it is not hard to understand that countries feel they have the right not only to enact the laws in their country but to enforce the laws in their country. We have reason to believe that there would be resentment and that we could not really quarrel with that if the U.S. Government, as a function of its sovereign power, undertook to insure, in

³⁵ *American Multinational Corporations Abroad*, *supra* note 7, at 3–5 (statement of Rep. Stephen J. Solarz, Member, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

³⁶ *Id.* at 15–16 (statements of Rep. Stephen J. Solarz, Member, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations; and Michael Butler, Vice President and Gen. Counsel, Overseas Private Inv. Corp.).

effect, that foreign officials lived up to the statutes which have been enacted in their countries.

MR. SOLARZ. What I am talking about is legislation which would make American citizens live up to the statutes of the United States. For example, would our government in any way resent it if a foreign government passed legislation in its own country prohibiting their nationals from bribing American officials?

It would seem to me that that would be no basis for any feeling of resentment on our part that they wouldn't infringe on our sovereignty. They would be regulating the conduct of their citizens. If they choose to make something illegal which is already illegal here in the sense it would apply to their citizens, why should we in any way be concerned about that? It seems to me that we might welcome that as an additional form of insurance against such activities taking place.³⁷

Representative Solarz was particularly troubled by the argument that a U.S. law governing business interactions with foreign government officials would be viewed as the U.S. exporting morality. He further stated as follows:

The problem with this argument . . . is that it is fundamentally unrelated to reality. While it has a seeming intellectual attractiveness, it is ultimately, I think, a facile argument. . . .

. . . [W]e would not be imposing our standards on others because I think research would indicate that virtually every country in the world already makes such payments illegal.³⁸

As to legislating morality and the potential for foreign government resentment, a Senate Report stated as follows:

The argument has also been made that some foreign countries might resent American attempts to export our morality and impose American standards on transactions taking place in their countries. The fact is that virtually every country has its own laws against bribery, although some are not vigorously enforced. Given world-wide outcry against the corrupting influencing of some United States-based multinationals on foreign governments, the Committee believes that most countries would welcome a greater effort by the United States to discourage offensive conduct by U.S. companies, wherever their activities may take place.

The Attorney General of the African Republic of Botswana, Mr. M.D. Mokama, has observed:

Certainly, no self-respecting African nation would consider U.S. legislation aimed at curbing corrupt practices of American transnational enterprises in their foreign host states to be "presumptuous" or in any way

³⁷ *Id.* at 26–27 (statements of Rep. Stephen J. Solarz, Member, S. Comm. on Banking, Hous., and Urban Affairs; and Mark B. Feldman, Deputy Legal Advisor, Dep't of State).

³⁸ *Foreign Payments Disclosure*, *supra* note 11, at 139 (statement of Rep. Stephen J. Solarz, Member, Subcomm. on Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce).

“an interference.” On the contrary, most Third World nations would appreciate such legislation. You see, developing countries have difficulties in discovering offenses committed by U.S. corporations in so far as their bribing and corrupting of local government officials. . . . Why do you think all of these disclosures are coming out of Washington and not out of the host countries? On this particular issue, most Third World countries would want to cooperate to the fullest extent possible, with the U.S. and other home countries to make sure that the offending transactional enterprise is punished. Another result of the U.S. adopting such legislation is that the Third World will acquire a healthier respect for the United States and its transnational enterprises.³⁹

Even though many of the foreign corporate payments presented a moral quandary, not all participants in the legislative debate were prepared to offer a firm response. For instance, during a Senate hearing in 1975 focused on the Lockheed scandal, Senator John Tower stated as follows: “A central question is raised here and that is, is it morally right for an American company to operate within the mores and folkways of the society in which they are trying to do business? I’m not prepared to give a snap answer to that myself.”⁴⁰

Senator Tower’s statement hints at the many difficult and complex issues Congress would encounter in addressing the foreign corporate payments problem.

3. *Economic Perceptions*

During a hearing on the Lockheed scandal, Senator Proxmire offered the following:

Consider the argument against corporate bribery as a policy. The payoff may cost a lot of money and still not work. You are paying off people who are dishonorable or they won’t accept the payoff. You may be doublecrossed. The payoffs, while deferring the pressure for a time, may cause bigger problems later on for obvious reasons because of the illegality involved.

. . . .
[I]t is not a matter of being a Sunday School advocate of morality, although that is important, but it is a matter of having hard, practical sense. Once you go down the road of bribery, you are likely to be in serious trouble. It is bad economics as well as bad morality.⁴¹

Likewise, Senator Tower noted on the Senate floor as follows:

³⁹ S. REP. NO. 94-1031, at 4–5 (1976).

⁴⁰ *Lockheed Bribery: Hearings Before the S. Comm on Banking, Hous., and Urban Affairs*, 94th Cong. 12 (1975) [hereinafter *Protecting U.S. Trade Abroad*] (statement of Sen. John Tower, Member, S. Comm. on Banking, Hous., and Urban Affairs).

⁴¹ *Id.* at 23–24 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

[I]mproper payments to foreign government officials or their intermediaries is indeed a serious problem and one which is not taken lightly by responsible governments. It is also a problem more akin to a disease which deeply trouble proponents of our free enterprise system. We have built an economy in the United States based on vigorous, honest competition where price, quality, and service commingle with demand and supply to regulate economic transactions. Bribery poisons this system by destroying the organisms of mutual trust and voluntary cooperation so essential to the free flow of commerce. This ethical decay must be stopped.⁴²

A Senate Report stated as follows: “There is a broad consensus that the payment of bribes to influence business decisions corrodes the free-enterprise system. Bribery short-circuits the marketplace. Where bribes are paid, business is directed not to the most efficient producer, but to the most corrupt. This misallocates resources and reduces economic efficiency.”⁴³

The view was also expressed that prohibiting payments to foreign government officials could give U.S. companies a competitive advantage and actually help companies resist foreign payment demands. Robert Dorsey, Chairman of the Board of Gulf Corporation, stated as follows during a Senate hearing:

You can help us and many other multinational companies which are confronted with this problem by enacting legislation which would outlaw any foreign contributions by an American company. Such a statute on our books would make it easier to resist the very intense pressures which are placed upon us from time to time.⁴⁴

Dorsey’s observation was repeated often by congressional leaders who favored a direct payment prohibition. Senator Proxmire stated as follows during a Senate hearing:

I just conclude by pointing out how widespread the desire in the business community is for this kind of legislation. Mr. Dorsey, whom as you know is connected with Gulf Oil and was dismissed from Gulf Oil, indicated how helpful this kind of a law would have been for him. He said, such a statute on our books would make it easier to resist the very intense pressures which are placed on corporate officials from time to time. If they could cite our law which says we just may not do it, they would be in a better position to resist these pressures and refuse these requests.⁴⁵

⁴² 122 CONG. REC. S15791 (1976) (daily ed. Sept. 14, 1976).

⁴³ S. REP. NO. 94-1031, at 3 (1976).

⁴⁴ *Protecting U.S. Trade Abroad*, *supra* note 22, at 9 (statement of Sen. Frank Church, Member, Subcomm. on Int’l Trade, S. Comm. on Fin. (quoting statement of Robert Dorsey, Chairman of the Bd., Gulf Corp.)).

⁴⁵ *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing Before the S. Comm on Banking, Hous., and Urban Affairs*, 95th Cong. 98–99

Likewise, Representative Bob Eckhardt stated as follows during a House hearing:

[M]any U.S. corporations would welcome a strong anti-bribery statute because it would make it easier to resist pressures from foreign officials. Former Gulf Oil Company Chairman Bob Dorsey testified that such a law would have put Gulf in a better position to resist and refuse demands by the South Korean Government for political contributions.⁴⁶

Likewise, Senator Church stated as follows during a Senate hearing:

[A] number of the corporate executives who have appeared before this Subcommittee . . . asked for the enactment of such laws, because they find themselves under great pressure from time to time. They felt that if our law prohibited the practice, they then could stand up to that pressure and say, "Look, we cannot do it, because regardless of whether or not we will be penalized in Korea for doing it, we would be violating American law, and we would be subject to the penalties that are prescribed under American law for this action."

I think such a law would give these corporate executives a measure of protection in dealing with the pressures of extortion in foreign countries.⁴⁷

The perception that a direct payment prohibition could actually help U.S. companies resist foreign payment demands was also shared by others who testified during congressional hearings. For instance, SEC Commissioner Philip Loomis stated as follows:

I think that, if you could devise a workable mechanism for making these payments illegal, you could then give the American executive a degree of bargaining power. He could say: "No. I would like to do it, but I can't because it is illegal," so that I would be disposed to think that might be a good idea.⁴⁸

Likewise, James Weldon, Acting Director, Bureau of Enforcement, the Civil Aeronautics Board, stated as follows:

[L]egislation prohibiting payments to foreign governmental officials should be considered. U.S. corporations may have more success in resisting requests for

(1977) [hereinafter *Investment Disclosure*] (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

⁴⁶ *Unlawful Corporate Payments Act of 1977*, *supra* note 17, at 2 (statement of Rep. Bob Eckhart, Chairman, Subcomm. on Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce).

⁴⁷ *Protecting U.S. Trade Abroad*, *supra* note 22, at 15 (statement of Sen. Frank Church, Member, Subcomm. on Int'l Trade, S. Comm. on Fin.).

⁴⁸ *American Multinational Corporations Abroad*, *supra* note 7, at 75 (statement of Philip Loomis, Comm'r, U.S. Sec. & Exch. Comm'n).

such payments if such payments are unlawful under U.S. law and if there exists some reasonable likelihood of detention and prosecution in the United States.⁴⁹

Notably, a Senate Report stated as follows: “A strong anti-bribery law would help U.S. multinational companies resist corrupt demands, and would enhance the reputation of U.S. business abroad.”⁵⁰

4. *Global Leadership*

As highlighted by Senator Ribicoff’s above statement, it was widely recognized that U.S. companies were part of a worldwide problem and not the only companies making questionable payments. Thus, a final factor evidenced in the legislative record motivating Congress to act was global leadership and the hope that other countries would soon follow the United States in enacting laws governing business conduct with foreign government officials in foreign markets.

For instance, Senator Proxmire stated as follows:

I think the advantage the United States of America, if it’s recognized and if it’s a fact that we do effectively prevent and prohibit bribery—there’s no country in which the sovereign of that country, whether it’s the Shah or the people, benefit from the bribery. They lose. They lose because what it means is that they are getting inferior products at a higher cost because of the bribery. So it’s to the great interest of every country that the people who sell to them don’t bribe. Now if we have a reputation of being the one country that enforces the law and everything that we sell is sold on the basis of merit and competition and not on the basis of bribery, it seems to me that’s an enormous advantage that shouldn’t be overlooked. I would think unilateral action wouldn’t isolate us. It would give us a great advantage and other countries would per force be constrained to follow.⁵¹

Likewise, Senator Williams stated as follows: “[a]n affirmative action by our Government will facilitate, what I believe is generally agreed is necessary, an international solution. Once the bill becomes law our Government will be in a position to argue forcefully, with integrity and credibility, for bilateral and multilateral agreements.”⁵²

⁴⁹ *Id.* at 84 (statement of James L. Weldon, Acting Dir., Bureau of Enforcement, Civil Aeronautics Bd.).

⁵⁰ S. REP. NO. 94-1031, at 4 (1976).

⁵¹ *Foreign and Corporate Bribes*, *supra* note 15, at 63 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

⁵² *Investment Disclosure*, *supra* note 45, at 2 (statement of Sen. Harrison Williams, Jr., Member, S. Comm. on Banking, Hous., and Urban Affairs).

III. DEFICIENCIES IN EXISTING LAW

Upon discovery of the foreign corporate payments problem, Congress's first task was to determine if the payments were adequately captured by existing law. This Part discusses the divergent views on this issue. While certain existing laws did indirectly deal with various aspects of the problem, the prevailing view was that existing laws were deficient and that a new and direct legislative remedy was needed.

In 1975, the House held a series of hearings largely focused on whether the discovered payments were a violation of U.S. law.⁵³ In opening the hearing, Representative Nix, Chairman of the Subcommittee, stated as follows:

Such payments to foreign officials are not a violation of American law at present, although they are very often a violation of foreign law. However, it is a requirement of the United States Code that American corporations make full disclosure of their assets and liabilities to the Securities and Exchange Commission, the Civil Aeronautics Board, and the Internal Revenue Service. It is also true that if the purpose of the payments was anticompetitive in intent, the Antitrust Division of the Department of Justice would have a basis to begin legal proceedings.

... We may need improvements in our law. There is always room for improvement. . . .

Our hearing will continue until we can answer positively whether our present legal system can meet the challenge of foreign slush funds maintained by the foreign operations of American-based companies.

Of course, that does not confine the operations of this subcommittee; it seeks to explore, to examine and to suggest legislation that will meet the needs of the problem that we face.⁵⁴

Likewise, in opening a 1976 hearing, Senator Proxmire stated as follows:

By now, close to 100 publicly held corporations have made disclosures to the [SEC] under the SEC's so-called voluntary program, of literally hundreds of millions of dollars paid over the years as bribes to foreign officials and political parties. This bloodletting, unfortunately, is continuing. It is the disgrace of our free enterprise system.

In turn, the practice of bribing foreign officials has corrupted those paying the bribes, and has corrupted the free market system, under which the most efficient producers with the best products are supposed to prevail.

There was a time when defenders of corporate bribery argued that you had to make under-the-table payments in order to compete in certain parts of the world. By now, I think, no responsible person would make that claim. . . .

⁵³ See generally *American Multinational Corporations Abroad*, *supra* note 7.

⁵⁴ *American Multinational Corporations Abroad*, *supra* note 7, at 1, 79 (statements of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

...
... Yet, I fear, even though the issue is settled in theory, that many companies will continue paying bribes if they can get away with it, because the potential rewards are so great and the risks are minimal. Nobody has gone to jail. Only three corporations have fired their chief executive officers. At most, there has been some unfortunate publicity. Even Lockheed is reporting increased profits.

And so we come to the need for a remedy.

In my view, U.S. corporations should be prohibited from paying bribes anywhere in the world. They are already prohibited from paying bribes at home.⁵⁵

During the hearing, Senator Proxmire further stated as follows:

What we are concerned about is the kind of payment that Lockheed, for example, engaged in and admits where a payment is made to a foreign official indirectly for the purpose of selling what that corporation has to sell to that country. It is a bribe.

Now that kind of payment is not outlawed at the present time in our law and while it is outlawed in many foreign countries . . . it's very hard for those countries to prosecute because they don't have the facts. We may have the facts but we don't prosecute because it's not against the law. We are trying to bridge that situation and provide a provision in the law that would make this illegal so we have the basis for action.⁵⁶

As suggested by Senator Proxmire's above statement, the primary focus of Congress's investigation was whether the existing securities laws, tax laws, and/or antitrust laws adequately addressed the foreign corporate payments problem.

A. *Securities Laws*

Early in Congress's investigation of the problem, SEC Chairman Garrett highlighted the potential deficiencies of the securities laws as a comprehensive solution to the problem. In a speech included in the legislative record he stated as follows:

[T]he significance of this illegality and immorality is far from clear in all instances. Are we saying that every improper expenditure must be disclosed, as such, giving details, because it is improper regardless of other considerations? We are not saying that. At least we have not said it so far, and I, at least, do not propose that we should ever say it. . . .

⁵⁵ *Foreign and Corporate Bribes*, *supra* note 15, at 1–2 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

⁵⁶ *Id.* at 9 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

... [W]e are not concerned with corporate morality as such—just disclosure of material facts. . . .

... [W]e do not regard ourselves as having a mandate to enforce, even indirectly, through compulsory disclosure, all of the world's laws and all of its perceptions of morality and right conduct. Some forbearance not only seems implicit in our governing statutes, but also may be essential to enable us to continue to do a competent job of investor protection.

As you can see, if we require disclosure of all violations of laws against bribery or political contributions on the ground that illegal payments are material *per se*, we may be hard pressed to explain that other illegal corporate acts are not equally material for the same reason. . . .

... [I]f improper foreign expenditures are not to be regarded as material simply because they are improper, without more, what principles govern the separation of those that are material and those that are not? Is it the method by which payments are made, the size of the payments, the purpose for which they are made, or the hazards to the business for exposure of the payments? It is, I believe, all of these, in different proportions in different situations.⁵⁷

During testimony before a House hearing, SEC Commissioner Loomis, with the Division of Enforcement, indicated that “the mere fact that a foreign payment has been made, particularly in a relatively small amount, is not necessarily a material fact to investors,”⁵⁸ and “[t]here is a significant question as to the extent to which information about foreign payments, even if illegal under foreign law or our law, or regarded as being improper, is material to an investor in appraising investment in a very large corporation.”⁵⁹

SEC Commissioner Loomis further stated as follows:

While it is true that we have and have exercised authority to deal with the problem of companies that have maintained false books and records, there is no explicit requirement under the Federal securities laws dealing with that problem or, more to the point, requiring that corporations establish and maintain adequate systems of internal controls.⁶⁰

Regarding the key concept of materiality under the securities laws, SEC Commissioner Loomis stated as follows:

[T]he problem is that the payment has to be disclosed only if it is material for purposes of our disclosure requirements.

⁵⁷ *American Multinational Corporations Abroad*, *supra* note 7, at 59–60 (statement of Raymond Garrett, Chairman, U.S. Sec. & Exch. Comm'n).

⁵⁸ *Id.* at 64 (statement of Philip Loomis, Comm'r, U.S. Sec. & Exch. Comm'n).

⁵⁹ *Id.* at 191 (statement of Philip Loomis, Comm'r, U.S. Sec. & Exch. Comm'n).

⁶⁰ *Prohibiting Bribes to Foreign Officials: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 94th Cong. 19 (1976) [hereinafter *Prohibiting Bribes*] (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm'n).

A company that is doing business abroad makes payments of numerous amounts for numerous purposes. They don't have to itemize each one of them in their disclosure documents with us, so that the mere fact that they made a payment would not necessarily have to be disclosed under our existing requirements.⁶¹

Senator Proxmire, in particular, was unconvinced that the existing securities law requirement of material disclosures, applicable only to publicly held companies, was an effective remedy to the problem. Noting the SEC's position "that disclosure of the identity of a recipient of a bribe is probably unnecessary because it may be of little significance to the investor,"⁶² Senator Proxmire stated as follows:

That is precisely the problem with tying it to materiality. It may indeed be immaterial to the investor. There is nonetheless a very good justification for a public policy requiring disclosure of the recipient of a bribe. The purpose is simply to inhibit the bribe in the first place. But by tying it to materiality in every case it becomes necessary to disclose a different defense which is really not material to our purpose here.⁶³

Senator Proxmire further stated: "[t]here might be a very substantial bribe involved which could be construed as not material. . . . That's one of the reasons why we think [new] legislation is essential."⁶⁴

Senator Proxmire further stated as follows:

The SEC's voluntary disclosure program depends on the premise that foreign bribes are information material to investors which must be disclosed under existing law. The SEC has made the most of this approach, but the enforcement program would be much more effective if bribes were directly prohibited and there were systematic disclosure of all foreign consultants' fees.

. . . .
Wouldn't it be more effective if the SEC didn't have to argue materiality? Shouldn't the law simply require that all foreign payments to so-called sales consultants be disclosed and then prohibit bribes?⁶⁵

⁶¹ *American Multinational Corporations Abroad*, *supra* note 7, at 69 (statement of Philip Loomis, Comm'r, U.S. Sec. & Exch. Comm'n).

⁶² *Prohibiting Bribes*, *supra* note 60, at 8 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

⁶³ *Id.*

⁶⁴ *Foreign and Corporate Bribes*, *supra* note 15, at 71 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

⁶⁵ *Id.* at 3, 10 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

A Senate Report stated as follows:

[W]hile the Committee recognizes that the [SEC] has diligently sought to enforce the securities laws provisions requiring corporate reports to disclose “material” payments, the concerns raised by the disclosure of corrupt foreign payments require a national policy against corporate bribery that transcends the narrower objective of adequately disclosing material information to investors.⁶⁶

Not only was the securities laws materiality threshold viewed as deficient in requiring disclosure of all corporate payments to foreign government officials, but congressional leaders were also surprised to learn that existing corporate record-keeping and internal control provisions were deficient as well. The following exchange between Senator Proxmire, SEC Chairman Hills and Stanley Sporkin, Director of Enforcement for the SEC, is instructive:

CHAIRMAN PROXMIRE. . . . [Y]ou stress the fact that in all nine of the SEC cases the corporate abuses were accompanied by false or inadequate corporate books and records and that most of the cases involved illegal or improper domestic and foreign payments. Does such falsification of corporate books and records constitute a violation of SEC’s laws or regulations and do they constitute criminal violations?

MR. HILLS. I can’t say in all cases.

MR. SPORKIN. There is no provision that prohibits just what you stated. . . .

MR. SPORKIN. There is no provision that provides, with respect to the kinds of companies we are talking about, that that could be a violation of law.

CHAIRMAN PROXMIRE. Well, then, it would seem to me that maybe we ought to consider, as the legislative body for our Government, making it a violation of the law.⁶⁷

B. *Tax Laws*

Singleton Wolfe, Assistant Commissioner of Compliance for the Internal Revenue Service, stated as follows during a House hearing as to whether existing tax laws adequately captured the discovered foreign corporate payments:

Section 162(c) [of the Internal Revenue Code] . . . provides that no deduction shall be allowed for any payment made directly or indirectly to an official or employee of any government, of any agency or instrumentality of

⁶⁶ S. REP. NO. 94-1031, at 5 (1976).

⁶⁷ *Abuses of Corporate Power*, *supra* note 16, at 33 (statements of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs; Roderick Hills, Chairman, U.S. Sec. & Exch. Comm’n; and Stanley Sporkin, Dir. of Enforcement, U.S. Sec. & Exch. Comm’n).

any government, if the payment constitutes an illegal bribe or kickback, or, if the payment is to an official or employee of a foreign government, the payment would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee.

In plain language, the Internal Revenue Code prohibits the allowance of any deduction for moneys paid to a foreign official if a similar payment would have been unlawful under the Federal statutes of the United States, whether or not the payment is lawful under the laws of the particular country employing the foreign official who receives the payment or the benefit of the payment.⁶⁸

Thus, under section 162(c), the violation is not in making the payment, but rather deducting the payment for tax purposes. Donald Alexander, a Commissioner for the Internal Revenue Service, stated as follows during the House hearing:

We become involved in the process only if two things occur in a bribe situation. One, the bribe is made, and, two, the bribe is improperly treated for tax purposes, deducted by the briber or the bribee, if also subject to U.S. tax, fails to report it.

... I am sure that many bribes to foreign officials have no tax consequences ... because it was solely a foreign transaction which at best might have a deferred consequence for U.S. tax purposes.⁶⁹

C. Antitrust Laws

Donald Baker, Deputy Assistant Attorney General, Antitrust Division, Department of Justice (DOJ), stated as follows during a House hearing as to the antitrust laws:

When bribery is used to further conspiracies that restrain the domestic or foreign trade of the United States or conduct that monopolizes or attempts to monopolize such trade, it is a matter of direct concern to the Antitrust Division of the Department of Justice. . . .

... [T]he Sherman Act does not need to and does not in fact declare illegal any specific business practice such as bribery. Rather, it focuses on the purpose and effect of conspiratorial behavior which restrains trade or individual or joint conduct leading to monopolization.

To the extent techniques such as the payment of bribes further such purposes and/or have such effects, the entire pattern of anticompetitive behavior may be subject to prosecution. While bribery has not been explicitly at issue up to now in cases involving international trade, some private inducements to foreign governments to engage in anticompetitive activity have been the subject of litigation. There is no logical reason why bribery of foreign

⁶⁸ *American Multinational Corporations Abroad*, *supra* note 7, at 42–43 (statement of Singleton Wolfe, Assistant Comm’r of Compliance, Internal Revenue Serv.).

⁶⁹ *Id.* at 48 (statement of Donald Alexander, Comm’r, Internal Revenue Serv.).

officials may not be involved in future international activities which are the subject of antitrust litigation.

... What makes international antitrust a complex subject in analyzing situations such as those under consideration by this committee are the collateral considerations which must be taken into account in determining whether or not subject matter jurisdiction may properly be exercised. Four of these constraints are worth particular notice. Their relevance must be analyzed in virtually every international antitrust problem. These are:

One. The doctrine of sovereign immunity.

Two. The doctrine of act of state.

Three. The doctrine of foreign governmental compulsion, and

Four. Considerations of comity.

Very succinctly, the doctrine of sovereign immunity is that, in general, official agencies of foreign sovereigns are entitled to immunity from the process of U.S. courts with respect to their sovereign diplomatic and political activities even if these activities have anticompetitive consequences. The act of state doctrine holds that U.S. courts may not review the political acts of a sovereign within its sovereign territory, even where such acts would, but for the applicability of the doctrine, be Sherman Act violations.

The doctrine of foreign governmental compulsion is that a private firm should not be held liable for certain violations of law which it may commit because it is compelled—I stress compelled—to do so under risk of penalty by a foreign sovereign.

Issues of comity involve situations in which two states have concurrent jurisdiction and are likely to prescribe and enforce rules of law requiring inconsistent conduct upon the same person. They represent considerations which the agencies and courts of each state are required by international law to consider, in good faith, in deciding whether to exercise or refrain from the exercise of jurisdiction. . . .

... In recapitulation, payments to foreign governmental officials, could be the subject of antitrust suit where they were part of a scheme to restrain or monopolize U.S. imports or exports, if a suit was not otherwise constrained by these four and other related considerations.⁷⁰

Deputy Assistant Baker then proceeded to set forth various different “hypothetical situations involving payments to foreign officials which might raise problems.”⁷¹ He stated as follows:

Perhaps the most common form of bribery is one which “greases the wheel,” payments for “future considerations” without immediate prospect of advantage, offered in the hope that it will smooth future access to or cooperation from government officials. This kind of bribe, about which we

⁷⁰ *Id.* at 87–89 (statement of Donald Baker, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice).

⁷¹ *Id.* at 90 (statement of Donald Baker, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice).

have been reading a good deal recently, would most certainly not be, in itself, an antitrust violation. The reason is that such bribes are unlikely to have any direct and identifiable effect on U.S. foreign commerce. The bribe is not intended to harm a U.S. competitor's export opportunities. In sum, neither payment nor the withholding of payment can be directly related to the flow of imports into or exports from U.S. markets.

.....
A second situation is one in which a U.S. firm, say, sells its product directly to a foreign government for its own use, bribing the responsible foreign procurement official to choose its product over that of a particular competitor. If the bribe is paid for the purpose of excluding the product of a non-U.S. competitor, there is no likely violation of U.S. law since there is no anticompetitive effect on U.S. foreign commerce. Of course, this may well be a violation under foreign antitrust law, most likely, if at all, that of the country whose government is making the purchase.

If, however, to change the facts, a Delaware corporation is paying a bribe specifically to insure that a foreign procurement officer buys its product to the exclusion of its principal competitor, a New Jersey corporation, there would then be an impact on U.S. foreign commerce. It is not necessarily, however, a violation of U.S. antitrust law. Whether or not there is such a violation of the Sherman Act might well depend, for example, on whether the procurement officer was acting in his official capacity on behalf of his government in accepting the payment or whether he was acting outside the scope of his authority. If the former, actual execution of the purchase might well be an act of state. The act of state doctrine thus might insulate the Delaware corporation from antitrust liability since holding it liable would imply a judgment about the conduct of the foreign government officer, within his or her own territory, and this is just what the act of state doctrine seeks to avoid.

.....
A third type of payment, depending upon how you look at it, is probably not a "bribe." Rather, it is a "contribution," "assessment," "license fee" or whatever which private firms or private nonnational firms are required to make to a foreign government as a condition of doing or continuing to do business in a foreign country. . . . Where the payment is to the government, the principle of sovereign immunity would, in most situations preclude U.S. antitrust enforcement against the foreign government.⁷²

Deputy Assistant Baker concluded his testimony as follows:

I am not sure I feel fully qualified to comment on the whole question of whether we ought to have a specific foreign bribery law. . . .

. . . [I]f the Congress feels—and I hear you very clearly as saying that this is an important problem we have got to do something about, then I think you had better look to a criminal law dealing specifically with the international

⁷² *Id.* at 90–92 (statement of Donald Baker, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice) (footnote omitted).

bribery situation or expanding the scope of it and not look to the antitrust laws as the way of dealing with it in a general way.⁷³

Secretary of Commerce Elliot Richardson observed the deficiencies of existing laws as follows in a letter included in the legislative record:

With respect to taxation and antitrust, both systems are theoretically applicable to all U.S. corporations doing business abroad but only to the extent that the making of a questionable payment *also* results in a violation of certain statutory prohibitions.

The tax laws only reach those transactions in which a questionable payment is deducted as a business expense. . . .

The antitrust laws are generally inapplicable to an improper payment unless it can be shown that there is an anticompetitive effect on U.S. foreign commerce, for example, where a bribe is paid to exclude the product of a U.S. competitor or to monopolize a foreign market.⁷⁴

Likewise, Leonard Meeker, Center for Law and Social Policy, noted similar deficiencies in testimony before a House Committee:

References have been made to statutes, laws, already on the books. There indeed are some. They are scattered. Some of them are criminal. Some are statutes providing civil remedies. They tend to deal, each one, with a small segment of the problem. It might be a tax aspect. It might be an antitrust aspect. There is no existing Federal law which deals with this problem in general.⁷⁵

However, the view that existing law was deficient in capturing the discovered foreign corporate payments was not universal as demonstrated by the following dialogue between Representative Bill Stuckey and Representative Harrington during a House hearing:

MR. STUCKEY. . . .

. . . Do you feel that there is probably enough legislation already on the books now to handle the problem, if the various departments and independent agencies will just address themselves to the problem and further if the Congress will exercise whatever responsibilities it is charged with, and that includes the oversight, functions of Congress?

. . . .

⁷³ *American Multinational Corporations Abroad*, *supra* note 7, at 87 (statement of Donald Baker, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice).

⁷⁴ *Prohibiting Bribes*, *supra* note 60, at 51-52 (letter from Elliot Richardson, Sec'y of Commerce to Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

⁷⁵ *Foreign Payments Disclosure*, *supra* note 11, at 197 (statement of Leonard Meeker, Ctr. for Law & Soc. Policy).

MR. HARRINGTON. I feel very strongly that the existing legislation is adequate. . . .⁷⁶

Likewise, William Kennedy testified at a House hearing on behalf of the Special Committee on Foreign Payments of the New York City Bar and stated as follows:

There was never a lack of law applicable to the situation. What there was, was a lack of law enforcement. And I think this is the first point that the subcommittee should address itself to in its deliberations; namely, to look at the need for new law in the context of what is now on the books and what is now available.⁷⁷

Similarly, the U.S. Chamber of Commerce stated as follows in substantively identical statements to Senate and House Committees seeking to address the problem:

The Chamber condemns the payment, solicitation or extortion of bribes, payoffs or kickbacks, and supports the disclosure of such acts and the prosecution of violations of national laws. The Chamber has long endorsed the highest standards of professional conduct of American business people operating in the United States or overseas. The overwhelming majority of U.S. firms operating abroad conduct their activities in accordance with the legal requirements of host countries and refrain from unlawful intervention in the domestic affairs of host countries. . . .

The Chamber believes that disclosure has proved to be an effective deterrent against the offering or solicitation of various forms of questionable payments. U.S. securities law already requires public disclosure of material payments. This reporting requirement, embodied in the [SEC's] "Voluntary Disclosure Program," has prompted voluntary disclosures by many corporations over the last two years. This voluntary disclosure approach, taken with existing SEC rule-making authority and the SEC's recommended stock exchange listing requirements, should adequately respond to public, corporate and investor-related concerns. It is important to note, as well, that misrepresentations to the Internal Revenue Service of certain payments may constitute violations of the Internal Revenue Code.

*The Chamber, therefore, is not convinced that new legislation is needed to confront the problems caused by questionable overseas business payments.*⁷⁸

⁷⁶ *Id.* at 147 (statements of Rep. Bill Stuckey and Rep. Michael Harrington, Members, Subcomm. on Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce).

⁷⁷ *Id.* at 178 (statement of William Kennedy, Co-chairman, Special Comm. on Foreign Payments, Ass'n of the Bar of the City of N.Y.).

⁷⁸ *Investment Disclosure*, *supra* note 45, at 185–86 (statement of J. Jefferson Staats, Staff Assoc., U.S. Chamber of Commerce); *see also Unlawful Corporate Payments Act of 1977*, *supra* note 17, at 234–35 (statement of J. Jefferson Staats, Staff Assoc., U.S. Chamber of Commerce).

The Chamber of Commerce was not the only business group to express an opinion as to the sufficiency of existing law to capture the discovered foreign corporate payments. In a statement to a Senate Committee, the National Association of Manufacturers stated as follows:

An effective solution to the problem of improper foreign payments does not require the passage of new laws. Substantial legal sanctions are already in existence which are applicable to foreign bribery: in the Internal Revenue Code, the Clayton Act, the Sherman Act, the Federal Trade Commission Act, and the Securities and Exchange Act; in transactions involving AID or arms exports; and in shareholder derivative suits based on state and federal law. The reported cases of improper foreign payments indicate not a lack of law, but of enforcement, both from within and outside the company.⁷⁹

In the end however, the prevailing view was that existing laws were deficient and that a new and direct legislative remedy was needed to capture all of the discovered foreign corporate payments. As Representative Solarz stated during a House hearing, “[c]urrent statutes have failed to provide sufficient protection and more positive action is clearly needed.”⁸⁰ The following statement by D.J. Haughton, Chairman of the Board, Lockheed Aircraft Corporation, during a Senate hearing seemed to prove this point:

So it is true that we knew about the practice of payments on some occasions to foreign officials. But so did everyone else who was at all knowledgeable about foreign sales. There were no U.S. rules or laws which banned the practice or made it illegal.

....
No effort was made to condone such payments except to say . . . that it was thought that it appeared to be necessary to make such payments in order to compete successfully in many parts of the world. . . .

....
. . . If Congress passes laws dealing with commissions and direct or indirect payments to foreign officials in other countries, Lockheed, of course, will fully comply with them.⁸¹

⁷⁹ *Investment Disclosure*, *supra* note 45, at 208–09 (letter from the Nat’l Ass’n of Mfrs.).

⁸⁰ *American Multinational Corporations Abroad*, *supra* note 7, at 5 (statement of Rep. Stephen J. Solarz, Member, Subcomm. on Int’l Econ. Policy and Trade, H. Comm. on Int’l Relations).

⁸¹ *Lockheed Bribery*, *supra* note 40, at 27–28 (statement of D.J. Haughton, Chairman of the Bd., Lockheed Aircraft Corp.).

IV. DIVERGENT VIEWS WITHIN THE GOVERNMENT AS TO A SOLUTION AND THE DIFFICULT AND COMPLEX ISSUES ENCOUNTERED

Seeking new legislative remedies to the foreign corporate payments problem was far from a consensus view of the government. This Part details the divergent views within the government as to a solution as well as the many difficult and complex issues Congress encountered. As Representative Eckhardt succinctly stated, “[d]espite the clear consensus at our hearings that foreign bribery is a reprehensible activity and effective remedial legislation is required, there were some differences in approach to this problem.”⁸²

A. Divergent Views Within the Government

Numerous government departments or agencies participated in congressional hearings regarding the problem and all expressed universal condemnation of the discovered payments. However, beyond such unsurprising statements were deep divisions within the government as to the solution. Moreover, certain segments of the government were viewed by congressional leaders as being participants in, or at least enablers of, the very problem Congress was seeking to address. This section highlights the views of the SEC, the Department of State, and the Department of Defense.

1. SEC

The SEC played the most prominent and trusted role during Congress’s multi-year investigation, deliberation, and consideration of the problem. Yet, the SEC’s role was also the most curious as the Commission was a reluctant actor in Congress’s quest for a new and direct legislative remedy to the problem. It is clear from the legislative record that the SEC wanted no part in policing the morality of American business or in determining what is an improper foreign corporate payment. Rather, the SEC, true to its mission, was focused on ensuring disclosure of material foreign corporate payments to investors by companies subject to its jurisdiction.

During a House hearing, SEC Commissioner Loomis stated as follows:

[D]isclosure really is our business in this area. Our concern by statute is with disclosure. As a matter of policy, whether there should be a Federal statute making such payments illegal or otherwise dealing with them, seems to me a

⁸² *Corporate Business Practices and United States Foreign Policy: Hearing Before the Subcomm. on Int’l Econ. Policy and Trade of the H. Comm. on Int’l Relations*, 95th Cong. 9 (1977) [hereinafter *Corporate Business Practices*] (statement of Rep. Bob Eckhardt, Member, Subcomm. on Int’l Econ. Policy and Trade, H. Comm. on Int’l Relations).

general question within the province of the Congress primarily, rather than our disclosure statutes.⁸³

Likewise, SEC Commissioner Loomis stated as follows:

We have no mandate from the Congress to act, at least directly, as the guardians of corporate morality. . . .

. . . .
. . . [O]ur basic mandate in this matter is one of full disclosure rather than of passing judgment on corporate morality or of imposing our own views as to what is "proper" or "improper."

. . . .
. . . [O]ur purpose and mission is not to eliminate sin, but to enforce the statutes entrusted to us, which, in general, require disclosure of facts material to investors. Companies with foreign payments present some questions in turn in that connection.

. . . .
. . . [O]ur obligation . . . is to obtain disclosure of information which is material to investors in the buying and selling of securities in the company. We are not here to police the morality of American industry as such, but the responsibilities of disclosures to investors.⁸⁴

SEC Chairman Hills stated as follows:

We don't have the skill to say should we, can we, enforce the laws of the rest of the world? I'm sure the West Digest that reports these decisions would be full of cases trying to decide whether a given payment is or is not legal. The legal profession has enough business without going to all the countries of the world to try to establish whether a given transaction is right or wrong. We are concerned with the materiality of these practices.⁸⁵

[Congress] has asked for our views as to the adequacy and effectiveness of the present laws and regulations and any recommendations we may have for improving them. As [Congress] knows, a primary purpose of the Federal securities law and the Commission's regulations is to protect investors by requiring issuers of securities to make full and fair disclosure of material facts. In my opinion, these statutes provide the Commission adequate authority to require appropriate disclosure about the matters I have been discussing in order to protect stockholders.⁸⁶

⁸³ *American Multinational Corporations Abroad*, *supra* note 7, at 72 (statement of Philip Loomis, Comm'r, U.S. Sec. & Exch. Comm'n).

⁸⁴ *Id.* at 36, 39, 58, 189 (statement of Philip Loomis, Comm'r, U.S. Sec. & Exch. Comm'n).

⁸⁵ *Prohibiting Bribes*, *supra* note 60, at 15 (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm'n).

⁸⁶ *Abuses of Corporate Power*, *supra* note 16, at 11 (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm'n).

The Commission does not oppose direct prohibitions against these payments, but we have previously stated that, as a matter of principle, we would prefer not to be involved even in the civil enforcement of such prohibitions. As a matter of long experience, it is our collective judgment that disclosure is a sufficient deterrent to the improper activities with which we are concerned. . . .

. . . [A]s a matter of longstanding tradition and practice, the [SEC] has been a disclosure agency. Causing questionable conduct to be revealed to the public has a deterrent effect. Consistent with our past tradition, we would rather not get into the business, however, we think get involved [sic] in prohibiting particular payments. It is a different thing entirely to try to prohibit something, to try to make a decision as to whether it is legal or illegal, or proper or improper. Under present law, if it is material, we cause its disclosure, and we need not get into the finer points of whether it is or is not legal.⁸⁷

. . . [The SEC] would prefer not to be involved in civil enforcement of such prohibitions since they embody separate and distinct policies from those underlying the federal securities laws. The securities laws are designed primarily to insure disclosure to investors of all of the relevant facts concerning corporations which seek to raise their capital from the public at large. The [criminal payment provisions of proposed legislation], on the other hand, would impose substantive regulation on a particular aspect of corporate behavior.

The Commission recognizes the congressional interest in enacting these prohibitions, but the enforcement of such provisions does not easily fit within the Commission's mandate.⁸⁸

The SEC Report stated as follows:

The Commission believes that the question whether there should be a general statutory prohibition against the making of certain kinds of foreign payments presents a broad issue of national policy with important implications for international trade and commerce, the appropriateness of application of United States law to transactions by United States citizens in foreign countries, and the possible impact of such legislation upon the foreign relations of the United States. In this context the purposes of the federal securities laws, while important, are not the only or even the overriding consideration, and we believe that the issue should be considered separately from the federal securities laws.⁸⁹

Despite being a reluctant actor, the SEC's role in helping uncover the problem and the expertise it gained in doing so was highly valued by congressional leaders, particularly Senator Proxmire who stated that the SEC

⁸⁷ *Foreign Payments Disclosure*, *supra* note 11, at 20, 25 (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm'n).

⁸⁸ *Investment Disclosure*, *supra* note 45, at 124-25 (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm'n).

⁸⁹ SEC REPORT, *supra* note 2, at 13.

was “the only agency in the Government that hasn’t gone to sleep on this issue, and [that it did] a good job under the circumstances.”⁹⁰ That the SEC was also an independent agency, unlike the DOJ, was also highly valued by Senator Proxmire as indicated by the following statement:

If we learned anything in the Watergate affair, we learned that the Department of Justice is not a department we can always rely on, especially when you have top influential corporate officials that are involved. They have a good record in some areas. They prosecute the hoodlums. They haven’t got such a good record on white-collar crime.⁹¹

The following statement by Senator Proxmire to SEC Chairman Hills best captures the SEC’s reluctant role in seeking a new and direct legislative remedy to the problem:

[Y]ou were responsible for about the only action we have taken with respect to foreign bribery and your agreements, your work, with various corporations to persuade them to cleanse their operation have been a fine example of how an agency can work to get this job done even without legislation.

Because of that, you see, we would like to have you involved at least on the investigative disclosure basis. And perhaps we can work something out that would protect you from not pushing you into something you think you wouldn’t want to do.⁹²

2. State Department

As detailed below, while the State Department condemned the discovered foreign corporate payments, it opposed unilateral U.S. legislation governing the conduct of U.S. citizens abroad in their relations with foreign government officials.

Deputy Legal Advisor Feldman stated during a House hearing as follows:

I want to make clear that the Department of State cannot and does not condone illegal activities by American firms operating in other countries. We condemn such actions in the strongest terms. Illicit contributions and their disclosure can adversely affect government, unfairly tarnish the reputation of responsible American businessmen, and make it more difficult for the U.S. Government to

⁹⁰ *Prohibiting Bribes*, *supra* note 60, at 30 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

⁹¹ *Foreign and Corporate Bribes*, *supra* note 15, at 15 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

⁹² *Investment Disclosure*, *supra* note 45, at 144 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

assist U.S. firms in the lawful pursuit of their legitimate business interests abroad.⁹³

During a House hearing, Deputy Legal Advisor Feldman also stated as follows:

The State Department is, of course, deeply concerned about the problem of illicit payments by U.S. companies abroad. We know that illicit payments are ethically wrong and that they unfairly distort trade. We also know that revelations of such payments do great harm to the companies and the countries involved, that they complicate and encumber our relations with other countries, and that they tarnish both the reputation of U.S. businessmen and the image of the private enterprise system in general.⁹⁴

Deputy Secretary of State Robert Ingersoll likewise stated as follows during a congressional hearing:

[T]he Department of State condemns in the strongest terms any and all corrupt practices involving corporations, whether United States or foreign. . . .

They are ethically wrong; their disclosure can unfairly tarnish the reputations of responsible American businessmen; they make it more difficult for the U.S. Government to assist U.S. firms in the lawful pursuit of their legitimate business interests abroad; they encumber our relations with friendly foreign governments; they are, in the long run, bad business, as firms involved in such practices risk loss of contracts, sales and even property; and they contribute to a deterioration of the general investment climate.⁹⁵

Despite the State Department's condemnation of the discovered foreign corporate payments, it opposed unilateral U.S. legislation to address the problem. Rather, the State Department believed that foreign corporate payments could best be remedied through enforcement of foreign law along with multilateral efforts to prevent such payments.

During a House hearing, Deputy Legal Advisor Feldman stated as follows.

What, then, should be done? . . .

. . . .

. . . [W]e need to move carefully. Some have suggested that we should enact legislation making it a criminal act for U.S. companies to engage abroad in what we regard as improper activities here at home, such as corporate political contributions.

⁹³ *Id.* at 22 (statement of Mark B. Feldman, Deputy Legal Advisor, U.S. Dep't of State).

⁹⁴ *Foreign Payments Disclosure*, *supra* note 11, at 90 (statement of Mark B. Feldman, Deputy Legal Advisor, U.S. Dep't of State).

⁹⁵ *Abuses of Corporate Power*, *supra* note 16, at 152 (statement of Robert Ingersoll, Deputy U.S. Sec'y of State).

Although investors operating in foreign lands would be wise to avoid even the appearance of impropriety in those countries, we believe it would not be advisable for the United States to try to legislate the limits of permissible conduct by our firms abroad.

It would be not only presumptuous but counterproductive to seek to impose our specific standards in countries with differing histories and cultures. Moreover, enforcement of such legislation—and I think this is the most important point—would involve surveillance of the activities of foreign officials as well as U.S. businessmen and would be widely resented abroad.

Extraterritorial application of U.S. law—which is what such legislation would entail—has often been viewed by other governments as a sign of U.S. arrogance or even as interference in their internal affairs. U.S. penal laws are normally based on territorial jurisdiction and, with rare exceptions, we believe that is sound policy.

...
... Corruption of friendly foreign governments can undermine the most important objectives of our foreign policy. But experience shows the United States cannot police the internal affairs of foreign states. In the final analysis the only solution to corruption lies in the societies concerned.⁹⁶

The following exchange between Representative Solarz and Deputy Legal Advisor Feldman during the hearing best captures the State Department's views.

MR. SOLARZ. . . . Do I understand your position to be that you would be opposed to any prohibition against the bribery of foreign officials by American corporations on the grounds, first, that that would be resented by the governments of other countries as an unwarranted intrusion in their affairs and, second, you would be opposed to it on the grounds that it is, by definition, unenforceable since we would be unable, in cases where such allegations had been made, to obtain the testimony of foreign officials for the judicial proceedings that would have to ensue? Would that be a fair statement of your position?

MR. FELDMAN. It is a generally correct statement of our position, and I would like to give our reasons with more precision. I think that we would be opposed to any legislation that would be directed to the conduct of U.S. citizens abroad in their relations with foreign officials which is based on a general proposition that U.S. citizens should behave well abroad.

...
That kind of legislation we would oppose, not because we differ with the moral imperatives involved but we feel that the enforcement of such legislation would involve us in the surveillance of activities taking place in foreign countries, including the behavior of foreign officials, and would fundamentally

⁹⁶*American Multinational Corporations Abroad*, *supra* note 7, at 23–24 (statement of Mark B. Feldman, Deputy Legal Advisor, U.S. Dep't of State).

intrude our moral views into foreign societies which may have different conditions.⁹⁷

Deputy Legal Advisor Feldman likewise stated as follows during a House hearing:

We believe that the main responsibility for enacting and enforcing criminal laws rests with the State whose officials are involved, and we believe that there is an important role for cooperation in law enforcement on the part of the home countries of companies, or of exporting countries such as the United States.⁹⁸

In terms of a remedy to the problem, Deputy Secretary of State Ingersoll likewise stated as follows:

What should be done? Obviously, the principal responsibility for dealing with criminal acts in foreign countries is that of the governments directly concerned. But we too have a responsibility to make sure that U.S. laws regulating corporate behavior are vigorously enforced, and that official U.S. programs in foreign countries are effectively managed to guard against these practices. . . .

But this is an international problem and significant progress will come only on a broad scale. It is tempting to try to deal with the situation unilaterally, but there are serious risks for the United States in such an approach. There is widespread recognition in the Congress that such unilateral action would put U.S. companies at a serious disadvantage in the export trade. . . .

We think there are many advantages to a multilateral approach which is based on international agreement both as to the basic standards to be applied in international trade and investment, and the procedures to curtail corrupt practices. A coordinated action by exporting and importing countries would be the only effective way to inhibit improper activities of this kind internationally. An international agreement would also help insure that action would be taken against those who solicit or accept payments, as well as those who offer or make them.⁹⁹

Congressional leaders, however, had little patience for what was expected to be a multi-year international initiative to address foreign corporate payments.

⁹⁷ *Id.* at 30–31 (statements of Rep. Stephen J. Solarz, Member, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations; and Mark B. Feldman, Deputy Legal Advisor, U.S. Dep't of State).

⁹⁸ *Foreign Payments Disclosure*, *supra* note 11, at 108 (statement of Mark B. Feldman, Deputy Legal Advisor, U.S. Dep't of State).

⁹⁹ *Abuses of Corporate Power*, *supra* note 16, at 153–55 (statement of Robert Ingersoll, Deputy U.S. Sec'y of State).

Senator Proxmire stated “this is something that may take years. Meanwhile we do have this very, very serious corruption problem.”¹⁰⁰

Congressional leaders were also troubled that the State Department was perhaps a participant in, or at least enabler of, the very problem Congress was seeking to address. The following exchange between Senator Jesse Helms and Lockheed’s Chairman Houghton during a Senate hearing highlights this issue:

SENATOR HELMS. . . .

Do you feel that these bribes or whatever name may be applied to them came as any surprise to the Government of the United States, specifically of the State Department?

. . . .

MR. HAUGHTON. I don’t believe they came as any surprise to the State Department or to other branches of the U.S. Government.¹⁰¹

Senator Helms directed the following statement to Deputy Secretary of State Ingersoll during a Joint Committee hearing:

I certainly don’t want to even have the appearance of badgering you, and I don’t want to belabor the point, but I am somewhat mystified in the light of all the reports that have come to me, sir, that apparently at the State Department during all of these years when these things were alleged to have occurred, that there was a complete “hear no evil and see no evil.”

Now, just tell me this one more time. Nobody at the State Department ever dreamed anything of this sort was going on at any time?¹⁰²

During a Senate hearing, Senator Helms further noted that Secretary of State Henry Kissinger declined opportunities to testify regarding the foreign corporate payment problem and Senator Helms offered the following conclusion: “I’m not all that certain that our Government has leveled with the American people about the Government’s own involvement with respect to these activities.”¹⁰³

On the Senate floor, Senator Church made the following statement regarding the State Department’s perceived role in the problem:

In all the months that we have investigated the practices of multi-million-dollar bribes and payoffs all over the world, we have yet to find any evidence of State Department concern or State Department initiative taken at any time to deal

¹⁰⁰ *Id.* at 185 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

¹⁰¹ *Lockheed Bribery*, *supra* note 40, at 55 (statements of Sen. Jesse Helms, Member, S. Comm on Banking, Hous., and Urban Affairs; and D.J. Houghton, Chairman of the Bd., Lockheed Aircraft Corp.).

¹⁰² *Abuses of Corporate Power*, *supra* note 16, at 167 (statement of Sen. Jesse Helms, Member, Subcomm. on Priorities and Econ. in Gov’t of the Joint Econ. Comm.).

¹⁰³ *Foreign and Corporate Bribes*, *supra* note 15, at 12 (statement of Sen. Jesse Helms, Member, S. Comm on Banking, Hous., and Urban Affairs).

with the problem. When these bribes were finally exposed, they delayed for months even taking token action.

So I really do not think the State Department wants any legislation in this field. I believe their attitude fairly could be characterized as one of indifference or perhaps benign neglect.¹⁰⁴

3. Defense Department

Like the State Department, the Defense Department was also viewed by congressional leaders as being a participant in, or at least enabler of, the very problem Congress was seeking to address.

Certain of the discovered foreign corporate payments involved defense contractor use of foreign agents in connection with foreign government business, and among the series of House hearings in 1975 was one focused on the role of agents in foreign military sales. In opening the hearing, Representative Nix stated as follows:

The specific issue we are considering today is the part played in military sales contracts by foreign sales agents and the fees paid to them. . . .

. . . .
The Defense Department has at its disposal immense amounts of information on this very issue. No interest has been shown by the Department in this issue, in that its mission appears to be the promotion of arms sales.¹⁰⁵

As to the Defense Department's role in the problem, Representative Solarz stated as follows: "[t]here were some recent revelations to the effect that the Defense Department had advised American arms people doing business to the effect that payoffs were a traditional way in that part of the world of facilitating the kind of transactions which they were interested in."¹⁰⁶

Likewise, Senator Proxmire stated as follows during a Senate hearing:

One of the most disturbing aspects of this is the role the Defense Department has played, especially with respect to defense contractors who sold abroad. We have a document which indicates that at one point a top official in the Defense Department had counseled defense contractors on paying bribes and urged them to do so under circumstances where it was necessary.¹⁰⁷

¹⁰⁴ 122 CONG. REC. S15857 (1976) (daily ed. Sept. 15, 1976).

¹⁰⁵ *American Multinational Corporations Abroad*, *supra* note 7, at 99–100 (statement of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

¹⁰⁶ *Id.* at 29 (statement of Rep. Stephen J. Solarz, Member, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

¹⁰⁷ *Foreign and Corporate Bribes*, *supra* note 15, at 110 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

The document Senator Proxmire referred to was a memorandum entered into the hearing record titled "Agent Fees in the Middle East," an eight page paper described "as being approved by the Department of Defense and circulated to American aerospace, electronic, and other industry by the Defense Security Assistance Agency."¹⁰⁸ The memorandum contained a specific section titled "Influence" and the opening paragraph stated as follows:

The term "influence" is used here rather loosely. To be more specific, it can range from normal friendships or family ties between local agent and procuring officer to the payment of substantial sums of money to individuals in high government positions with somewhat lesser amounts paid to lower echelon government officials. One local agent had admitted to the writer that he has three members of the National Assembly (Parliament) of the country on retainer fees for the purpose of obtaining inner circle intelligence and to promote the sales potential of his principal's products.¹⁰⁹

Congressional leaders tried to learn more information about many of the foreign agent fees referenced in Defense Department documents, but were unsuccessful in their efforts as demonstrated by the following exchange during a House hearing between Representative Charles Whalen and General Howard Fish, Director, Defense Security Assistance Agency.

MR. WHALEN. The Department of Defense has marked as confidential the fees which agents throughout the world have received in connection with contracts. What is the purpose of this?

GENERAL FISH. . . . We classified the details that were on the report, which was requested by the Church committee, and also requested by this committee. The report contains much more detail than just the amount of the fee.

It includes weapons provided to governments. It provides dates and the sale amounts. These are, in my view, properly determined as confidential because of the governments' desire to have information on their purchases kept confidential.

MR. WHALEN. Whom are we protecting by this: DOD, the purchasing governments, the contractor, or the agent?

GENERAL FISH. I think that we are protecting the sanctity of government-to-government communications, which is the reason for the classification.¹¹⁰

The following exchange between Representative Edward Biester and General Fish best captures the Defense Department's views on potential legislative remedies to the problem.

¹⁰⁸ *American Multinational Corporations Abroad*, *supra* note 7, at 100 (statement of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

¹⁰⁹ *Id.* at 101.

¹¹⁰ *Id.* at 111 (statements of Rep. Charles Whalen, Member, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations; and Gen. Howard Fish, Dir., Def. Sec. Assistance Agency).

MR. BIESTER. What would be your thought or your position on legislation which would order this kind of information [foreign agent fees in connection with military sales to foreign governments] to be made public?

GENERAL FISH. I think it is important that any legislation protect the rights of all concerned. You have to make sure that you protect the competitive position of the U.S. firms and the workingman, who is working in these industries.

I think there should be ways of using public disclosure. I think there are ways of making sure that there is full and open disclosure, much as the SEC does, which does not necessarily go into the public realm but still gets plenty of visibility.¹¹¹

Senator Frank Church succinctly summarized on the Senate floor the clear divisions within the government concerning the problem as well as a lack of concern by certain segments of the government as follows:

[O]ur Government has initiated no real concern with this problem. Rather, aside from some statements of a cosmetic nature, it prefers to stick its head in the sand and hear no evil, see no evil, and pretend there is no problem. But there is a problem, a problem of cancerous dimensions which is eating away at the vitals of democratic society. So there is a need for action, and action now.¹¹²

Despite Senator Church's call for action, many difficult and complex issues emerged as Congress considered solutions to the problem.

B. Difficult and Complex Issues Encountered

The foreign corporate payments discovered were not the simple and safe issue they appeared to be at first blush. Congress encountered many difficult and complex issues as it considered solutions including the foreign business conditions in which certain of the payments were made, whether unilateral U.S. action would put companies at a competitive disadvantage, and the basic issue of defining bribery.

The following exchange between Senator Proxmire and Secretary of Commerce Richardson best captures this dynamic, as well as Senator Proxmire's frustration as to the pace of crafting solutions. Senator Proxmire stated as follows during a Senate hearing.

For more than a year now the [SEC] and the Senate Multinationals Subcommittee have been generating reams of evidence on foreign bribery. I have some of that evidence right here. The staff member who carried this up

¹¹¹ *Id.* at 124 (statements of Rep. Edward Biester, Member, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations; and Gen. Howard Fish, Dir., Def. Sec. Assistance Agency).

¹¹² 94 CONG. REC. S6516 (1976) (statement of Sen. Frank Church).

from downstairs is lucky if he doesn't have to report to the hospital with a hernia because there's so much of it.

Nearly 100 corporations have been the subject of investigations. . . . Yet it seems as if some, who rhetorically condemn bribery as roundly as the rest, want Congress to delay a remedy until the entire Fortune 500 have been investigated.

I recall the story of an agency in the bureaucracy that was short on bureaucrats. They hired a talking parrot. And they made him a GS-15. They taught him to say only one phrase: "Very complex, very complex." Sometimes I get the feeling that the parrot, that very complex parrot, is in charge of the Federal Government's groping, grasping policy on bribery.

Certainly, there are subtleties and complexities in the foreign bribery issue, but we should be able to agree after more than a year of investigation the time has come to provide a remedy for an act as simple and outrageous as bribery.¹¹³

In response, Secretary of Commerce Richardson stated as follows:

Even a parrot must occasionally be right. . . .

. . . .

What I am saying, Mr. Chairman, is that in the bribery area we are moving into uncharted national and international waters in which legislative remedies may be capable of achieving only part of the objectives we seek. As part of the process of considering specific legislative remedies, we should be certain that we have a clear understanding of the scope and magnitude of the problems to be addressed, a thorough assessment of the costs and benefits of the legislative remedies being advanced, and a reasonably precise plan for moving from where we are now to where we wish to be.¹¹⁴

1. *Foreign Business Conditions*

As to the foreign business conditions giving rise to many of the discovered foreign corporate payments, SEC Commissioner Loomis stated during a House hearing as follows:

These questionable payments by American corporations in foreign countries present a number of difficult problems for us, and for you in your deliberations.

For one thing, the exact purpose of such payments is often difficult to determine. It is normal and understandable that American corporations seeking to do business abroad will employ or retain sales agents, business consultants and others who are on the scene and familiar with local ways of doing business. Payments made to such intermediaries are often entirely proper, but may not always be so. Once the money is in the hands of a foreign agent, it

¹¹³ *Foreign and Corporate Bribes*, *supra* note 15, at 75–76 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

¹¹⁴ *Id.* at 80 (statement of Elliot L. Richardson, U.S. Sec'y of Commerce).

may be difficult to determine exactly what he does with it. Of course, suspicions are always raised where large sums are paid for unexplained services and it is hard to determine exactly what the company is receiving for its money.

We are told that in many countries it is almost customary to distribute various gratuities to persons in strategic positions in order to obtain favorable treatment. Indeed, such practices are not wholly unknown in the United States. These payments may or may not violate the laws of the country involved, and in countries having entirely different legal systems from the United States, local law on the subject may be quite obscure.

But, even where a payment does not violate the laws of the country involved, it is to be expected that foreign officials and governments would be sensitive to publicity about such payments and, therefore, such publicity may jeopardize the position of a company in foreign countries. Thus, while I am sure we can all agree that American companies should not, as a matter of principle, make payments to officials of foreign governments in return for favored treatment, it is often difficult to determine whether or not this has occurred.

Moreover, we are not insensitive either to the difficulties American companies experience in doing business abroad, or to the fact that our lawsuits might create an impression in some minds of United States interference in the affairs of foreign countries.¹¹⁵

During the hearing, Representative Solarz and SEC Commissioner Loomis had the following exchange:

MR. SOLARZ. . . . I want to pursue one other matter here. I suppose it is related to this. You make the point that your disclosure requirements are designed to protect the interest of the stockholders of these corporations.

Isn't it conceivable you can have situations abroad where the executive officers of an American corporation in effect are put in a position by the officials of a foreign government where the interests of the corporation, and thereby the interests of the stockholders, become perhaps dependent upon the willingness of the officials of that corporation to engage in what we would know and term as bribery?

. . . .

MR. LOOMIS. That is a very good point.

MR. SOLARZ. . . . For instance, what do you think the officials of an American corporation should do if they are doing business abroad and an individual in a position of authority in that country says to them in effect: "Unless you are prepared to pay me such-and-such, your installations will be nationalized or they will be taxed excessively," or what-have-you, and where the officer of the American corporation comes to a reasonable conclusion that in the absence of his willingness to make such a payment that his corporation will suffer from significant and substantial financial losses?

I don't know that that is inconceivable.

¹¹⁵ *American Multinational Corporations Abroad*, *supra* note 7, at 38 (statement of Philip Loomis, Comm'r, U.S. Sec. & Exch. Comm'n).

MR. LOOMIS. It is certainly not inconceivable.

MR. SOLARZ. It has probably happened. Now, we are concerned about the interests of American stockholders, and one way to secure that interest is through disclosure. Is there another way to secure their interest through paying these bribes, or do you think that regardless of those considerations there are countervailing considerations which militate against it?

MR. LOOMIS. It is because of that kind of problem which you very carefully described and which we have been wrestling with that this is a difficult area for us.

In that type of situation, do you say to the company that they have got to disclose that they made this payment, when, if they do disclose it, that may cause all these adverse consequences to occur?

It is not easy.

MR. SOLARZ. Sort of defensive bribery.

MR. LOOMIS. Yes. Extortion, we call it.¹¹⁶

Highlighting many of these same issues, William Kennedy testified at a House hearing on behalf of the Special Committee on Foreign Payments of the New York City Bar and stated as follows:

[W]ithout in any way excusing the failures of U.S. business that have been exposed over the last 2 years—and I don't think they can be excused—the problem goes beyond those failures. It is not really addressing the whole problem to say that we need only look at the failure of U.S. business and not look at the context in which those failures occurred.

We know from the evidence that has been exposed so far that in many cases the bribes were solicited, not volunteered. We know that there were cases of extortion. We know that there are laws on the books in these foreign countries applicable to these practices and that, as in the case of the United States, these laws were not enforced and they are now being enforced, of course, in some cases very vigorously.

We know, beyond that, from some of the filings with the SEC and from other sources, that it wasn't just U.S. business that was involved, and we certainly have reason to say that perhaps these practices in other countries were tolerated there.¹¹⁷

Yet just because foreign business conditions presented difficult issues for U.S. companies, all were not persuaded that this made the payments any less problematic. For instance, Senator Church stated as follows during a Senate hearing:

¹¹⁶ *American Multinational Corporations Abroad*, *supra* note 7, at 74 (statements of Philip Loomis, Comm'r, U.S. Sec. & Exch. Comm'n; and Rep. Stephen Solarz, Member, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

¹¹⁷ *Foreign Payments Disclosure*, *supra* note 11, at 178 (statement of Sen. William Kennedy, Co-chairman, Special Comm. on Foreign Payments, Ass'n of the Bar of the City of N.Y.).

[W]hile such methods may be common practice abroad, I am skeptical of the argument that it is perfectly all right because everyone does it. I know of no country where bribes and kickbacks are either legal or publicly accepted. And the fact that the corporations, by their own admission, go to such lengths to disguise these practices, through the use of double bookkeeping, numbered Swiss bank accounts, and a system of code names that would do credit to the CIA, puts the lie to the argument that it is accepted practice.¹¹⁸

2. *Competitive Disadvantage*

In addition to the issues Congress encountered regarding foreign business conditions, there was also concern that U.S. companies might be placed in a competitive disadvantage if Congress passed a unilateral law governing domestic business interaction with foreign government officials. Yet, as explained above in more detail, such concern was countered by those who suggested that such a statute could be a source of competitive advantage for U.S. companies. Moreover, as discussed in more detail in Part IV below, one of Congress's first acts upon learning of the foreign corporate payments problem was to pass a resolution calling for multilateral solutions to the problem.

Despite competitive advantage concerns, a certain degree of competitive disadvantage was accepted by Congress in seeking solutions to the problem. For instance, Representative Moss stated as follows during a House hearing:

[T]o think that no loss of business would occur in every instance would be unrealistic. Can we allow this to occur? Yes, if that is the small price we must pay to return morality to corporate practice. Yes, if that is the small price we pay to show that U.S. firms compete in terms of price, quality, and service and not in terms of the size of a bribe. Real competition works. The vast majority of American companies have operated successfully in foreign countries without the need to resort to bribery.¹¹⁹

Likewise, Treasury Secretary Michael Blumenthal stated during the same hearing as follows: "To the very, very small extent a particular company may lose a particular contract because it refuses to engage in this practice, I would be willing to say, all right, we will be at a slight competitive disadvantage and we will all sleep the better for it."¹²⁰

Foreign business conditions and competitive disadvantage issues aside, Congress also encountered the basic issue of defining bribery.

¹¹⁸ *Protecting U.S. Trade Abroad*, *supra* note 22, at 8 (statement of Sen. Frank Church, Member, Subcomm. on Int'l Trade, S. Comm. on Fin.).

¹¹⁹ *Unlawful Corporate Payments Act of 1977*, *supra* note 17, at 164 (statement of Rep. John Moss, Member, H. Comm. on Interstate and Foreign Commerce).

¹²⁰ *Id.* at 187–88 (statement of W. Michael Blumenthal, U.S. Sec'y of the Treasury).

3. *Defining Bribery*

Treasury Secretary William Simon stated as follows during a Senate Hearing:

You know that trying to define exactly what bribery is is a real problem. You and I would have no trouble saying what is a bribe and what isn't. However, having said that, it's very difficult to put it down on paper in statutory language that would not be damaging to some legitimate things that happen on the periphery, such as payments of commissions. It's almost like the Justice who said that he can't define pornography, but he knows what it is when he sees it. In certain instances, we have a gray area when it comes to this bribery question. Outright payment to secure a particular contract to an official of a foreign government, fine, we have no trouble with defining that as a bribe. Payment of commissions to agents, which is an accepted practice throughout the world, is another matter.¹²¹

Striking a similar theme, Michael Butler, Vice President and General Counsel, Overseas Private Investment Corporation, stated as follows during a Senate hearing:

A payment of a large sum of money directly to a foreign government official is undoubtedly illegal in any country under any circumstances. But such matters as tips, commissions, consulting fees, campaign contributions, contributions for charitable projects favored by important foreign officials, and the like, may be normal and accepted practices in one situation and illegal acts in another.¹²²

As to the difficulty of defining bribery, Treasury Secretary Blumenthal also stated as follows during a Senate hearing:

The definition of a bribe does differ from country to country. What a government official is allowed to do differs from country to country.

In some countries, for example, it is proper and acceptable, as it clearly would not be in our country, for a government official also to be engaged in some business enterprise. However, what might be considered a legal transaction with that official in his country could be construed as a bribe, an illegal payment here. That's why the question of how we define it is so important. In that country a transaction may be perfectly proper, but then the moment an American is accused here of paying a bribe to such an individual under our definition, an aspersion is cast immediately on him.¹²³

¹²¹ *Foreign and Corporate Bribes*, *supra* note 15, at 107 (statement of William Simon, U.S. Sec'y of the Treasury).

¹²² *American Multinational Corporations Abroad*, *supra* note 7, at 6 (statement of Michael F. Butler, Vice President and Gen. Counsel, Overseas Private Inv. Corp.).

¹²³ *Investment Disclosure*, *supra* note 45, at 97-98 (statement of W. Michael Blumenthal, U.S. Sec'y of the Treasury).

Articles published in the *New York Times Magazine* and *Foreign Affairs*, and included in the legislative record, best capture the many difficult and complex issues Congress encountered in seeking solutions to the problem.

An October 1975 article in the *New York Times Magazine* by Milton Gwartzman observed that “[t]his has not been an easy year for American business” and that “[s]ome of the country’s flagship corporations—Exxon, Lockheed, Northrop, Gulf, United Brands—have admitted funneling massive amounts of cash to officials of foreign governments and hiding the transactions from their shareholders and directors.”¹²⁴ Gwartzman observed that the revelations brought to light business practices that have “existed at least since the 1600s, when the British East India Company won duty-free treatment for its exports by giving Mogul rulers ‘rare treasures,’ including paintings, carvings and ‘costly objects made of copper, brass and stone.’”¹²⁵

Yet as Gwartzman observed, “in the United States, this traditional way of doing business abroad has become food for scandal because of the new climate of openness and honesty that former Vice President Agnew ruefully but accurately called in his resignation speech the ‘post-Watergate morality.’”¹²⁶ Gwartzman further observed as follows:

All of this presents the American businessman operating abroad with a seemingly cruel dilemma. If he keeps paying foreign officials, he runs afoul of the post-Watergate morality in all its fury. If he is prevented from making these payments, either by law or by the chilling effect of disclosure, he risks the loss of important sales and investment opportunities to foreign competitors, who can apparently continue to pass bribes without embarrassment. . . .

.....

If corporate bribery abroad has offended the post-Watergate morality, the companies implicated have nevertheless taken a greater share of the blame than they deserve. Bribery abroad is not exactly the corruption of innocents. Several of the incidents spotlighted by the Senate hearings smack more of protection and extortion than of simple bribery. In the most outrageous case, the chairman of the ruling party in South Korea threatened to close the \$300-million operation of Gulf Oil in that country unless the company made a donation of \$10-million to his party’s presidential campaign. Gulf’s chairman, Bob Dorsey, was able to shave the demand down from \$10-million, which he considered ‘not in the interests of the company’ to \$3-million, which he said was.

The reasons multinationals must do business amid a profusion of outstretched hands go deep into the history and structure of the lands in which they operate. In much of Asia and Africa, the market economy as we know it, in which the sale of goods and services is governed by price and quality competition, never has existed. What has developed in its stead are intricate tribal and oligarchic arrangements of social connections, family relations and

¹²⁴ Milton S. Gwartzman, *Is Bribery Defensible?*, N.Y. TIMES MAG., Oct. 5, 1975, at 19, reprinted in *Protecting U.S. Trade Abroad*, supra note 22, at 60.

¹²⁵ *Id.*

¹²⁶ *Id.*

reciprocal obligations, lubricated by name forms of tribute, including currency

In most developing countries, civil-service salaries are deliberately low—the average Indian bureaucrat makes \$1,650 a year—on the assumption that people will supplement their salaries by taking money where they can find it. Where political instability is the rule, the tenure of high officials is always uncertain and often short. Bribes provide a form of retirement fund. It is considered far more patriotic to take money from rich foreign corporations than out of one's own country.

. . . .

The responsibility for present practices must also be shared by our Government, which not only encouraged investment in countries whose ethical standards differ from ours, but also in many respects set the pattern for the graft under censure today. American intelligence agencies have regularly dealt in bribery and payoffs wherever they seemed to be useful tools in strengthening American influence abroad and frustrating the designs of Communist nations. Bribes have been used not just to acquire useful information, but to restore the Shah to power in Iran, to purchase votes in international organizations against Cuba, and to “destabilize” the Allende Government in Chile. We shall probably never know how many of the electoral campaigns of pro-West political parties were financed by secret contributions from the [CIA]. The important thing here is that these have been accepted tactics for more than a generation.

The rapid acceleration of American private investment in foreign lands, which began in the mid-nineteen-sixties, was seen by our foreign-policy makers as a welcome opportunity. If U.S. firms could build a nation's infrastructure, supply its consumer goods and hire a portion of its workers, the greater the likelihood the nation would be bound to ours by the safest and strongest of ties, economic self-interest. As a result, our Government wrote the foreign investment laws of several developing countries and urged our multinationals to make use of them. New programs were established to insure foreign investment against the risks of war and expropriation. Embassy personnel were ordered to scout out export possibilities for American firms, which were published in *Commerce Business Daily*, the Government's daily list of business opportunities.¹²⁷

Gwartzman further observed as follows:

For all these reasons, it would be unwise, as well as unfair, simply to write off bribery abroad to corporate lust. It is a symbol of far deeper issues that really involve America's role in the world. . . .

Since our multinational companies, like Government agencies, are important instruments of our nation's global power, it is argued they should not be hobbled by home-bred notions of business morality. After all, if such firms were [g]overnment-owned, as many of their foreign competitors are, their managers would be servants of the state and presumably have the same license as intelligence agents to pass bribes for the good of the country. And is there

¹²⁷ *Id.*, reprinted in *Protecting U.S. Trade Abroad*, *supra* note 22, at 61–63.

really a distinction in this regard between state-owned companies and firms like Northrop and Lockheed, whose customers are governments and whose products give our policies their clout?¹²⁸

An article published in *Foreign Affairs* by Theodore Sorensen in July 1976 also captures the many difficult and complex issues Congress encountered in investigating the foreign corporate payments.¹²⁹ Sorensen observed that “[l]ike motherhood and apple pie (zero population growth? food additives?), corporate bribery abroad is not the simple, safe issue it seems at first blush.”¹³⁰ Sorensen observed as follows:

The practice of exporters and investors offering special inducements to host country officials is at least as old as Marco Polo. But in the United States a post-Watergate climate of pitiless exposure for all suspect practices connected with government has intensified both the investigations of these payments and the oversimplified publicity given to them. . . .

As a result, U.S. corporate officials have engaged in the most painful rush to public “voluntary” confession since China’s Cultural Revolution. . . . Debates between businessmen asserting that only they live in the “real world” (“Of course, I’m against bribery, but . . .”) and bureaucrats asserting that only they are without sin (“no payment of any kind or size for any reason should escape . . .”) have thus far produced more heat than light.

It is to be hoped that a calmer, more long-range perspective can soon prevail. . . .

. . . .
 . . . [The issue of how to remedy foreign payments] has been further distorted by an outpouring of self-serving, self-righteous hypocrisy on both sides. Among the biggest hypocrites have been the following:

- those foreign governments which since time immemorial have closed their eyes and held out their hands, but which now denounce the United States for introducing corruption to their shores;
- those U.S. politicians who professed ignorance of the illegality of the corporate campaign contributions they received (or knew others received) in cash in sealed envelopes behind a barn or men’s room door, but who now insist that various company executives be prosecuted because they should have known of their subordinates’ improper activities abroad;
- those agencies of the U.S. government which long knew of and even approved of barely concealed payoffs by companies engaged in favored overseas sales and investments, but which now wring their hands at the unbelievable shame of it all; and
- those U.S. and foreign newspaper commentators who long winked at free junkets and passes for newsmen, even a little extra income doing

¹²⁸ *Id.*, reprinted in *Protecting U.S. Trade Abroad*, *supra* note 22, at 64.

¹²⁹ See *Foreign Payment Disclosure*, *supra* note 11, at 120 (citing Theodore C. Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 FOREIGN AFFAIRS 719, 719 (1976)).

¹³⁰ *Id.* (citing Theodore C. Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 FOREIGN AFFAIRS 719, 719 (1976)).

public relations for the organizations they were covering, but who now condemn the ethical standards of the business community.¹³¹

As to the basic issue of defining bribery, Sorensen observed as follows:

[T]here will be countless situations in which a fair-minded investigator or judge will be hard-put to determine whether a particular payment or practice is a legitimate and permissible business activity or a means of improper influence. . . .

. . . .
Reasonable men and even angels will differ on the answers to these and similar questions. At the very least such distinctions should make us less sweeping in our judgments and less confident of our solutions.¹³²

V. LEGISLATIVE PROPOSALS LEADING TO ENACTMENT OF THE FCPA

Notwithstanding the many difficult and complex issues Congress encountered, it proceeded to seek legislative remedies to the foreign corporate payments problem. This Part discusses how Congress sought to address the problem from a variety of angles and the resulting two main competing legislative responses: a disclosure approach as to a broad category of payments and a criminalization approach as to a narrow category of payments. Among other things, this Part highlights that despite significant minority concern, the FCPA adopted a criminalization approach as it was viewed as more effective in deterring improper payments and less burdensome on business.

A. *The Problem Was Addressed from a Variety of Angles*

Between June 1975 and September 1977, approximately twenty bills were introduced in the Senate or the House during the 94th or 95th Congresses to address the foreign corporate payments problem.¹³³

H.R. 7539, introduced by Representative Solarz in June 1975 during the middle of the Church Committee hearings, was the first bill to address the problem and it sought “[t]o give the Secretary of State responsibility for monitoring the overseas business activities of American companies in order to detect any violations of [f]ederal law and to make it unlawful for an American company to bribe any foreign official.”¹³⁴

¹³¹ *Id.* at 120–22 (citing Theodore C. Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 FOREIGN AFFAIRS 719, 719–22 (1976)).

¹³² *Id.* at 124–25 (citing Theodore C. Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 FOREIGN AFFAIRS 719, 723–24 (1976)).

¹³³ Declaration of Prof. Michael J. Koehler in Support of Defendants’ Motion to Dismiss Counts One Through Ten of the Indictment at 9, *United States v. Carson*, No. SACR 09-0007-JVS (C.D. Cal. Sept. 20, 2011).

¹³⁴ H.R. 7539, 94th Cong. (1975).

As to the prohibition, the bill sought to amend the criminal code by adding a new section titled “Bribery of foreign officials” and stated as follows:

Any American company or any official or employee of an American company who, with the intent to influence any official act affecting such company, gives or attempts, offers, promises, or conspires to give any thing of value to any foreign government, any foreign official, or any foreign political organization, shall be fined not more than \$10,000 or imprisoned not more than one year, or both.¹³⁵

Bills that followed sought to address the problem from a variety of angles.

For instance in March 1976 Senator Harry Byrd introduced S. 3150 “[t]o amend the Internal Revenue Code . . . to deny certain benefits to taxpayers who make bribes or illegal payments to foreign government agents or officials.”¹³⁶ Likewise in June 1976 Representative Herbert Harris introduced a similar bill in the House.¹³⁷

In July 1976 Representative Solarz introduced H.R. 14681 which provided for Overseas Private Investment Corporation (OPIC) termination of insurance for any investor found to have engaged in bribery of foreign officials.¹³⁸ As stated in the House Report:

The underlying principle behind H.R. 14681 is that the [OPIC] . . . should not continue to provide insurance coverage for an investor who gives or offers to give gifts or payments to foreign officials, in order to induce the officials to use their influence to affect a decision in relation to the project.¹³⁹

Speaking on the House floor prior to passage of the bill by the House, Representative Solarz stated as follows:

[T]his legislation is based on a very fundamental and important assumption which is that agencies of the U.S. Government should not insure corporations which are engaged in paying bribes to foreign officials. It seems to me that we have a moral obligation, as well as a political interest, in prohibiting practices which are both corrupt and counterproductive.¹⁴⁰

Congress also targeted foreign agent fees given the prominent use of agents in many of the foreign corporate payments uncovered including those involving

¹³⁵ *Id.* § 225. One of the many side debates during the FCPA’s legislative history was whether the criminal code or the securities laws was the proper place for the legislation. The FCPA was ultimately incorporated into the securities laws, not the criminal code, for the reasons identified in Part III above.

¹³⁶ S. 3150, 94th Cong. (1976).

¹³⁷ *See* H.R. 14358, 94th Cong. (1976).

¹³⁸ *See* H.R. 14681, 94th Cong. (1976).

¹³⁹ H.R. REP. NO. 94-1416, at 2 (1976).

¹⁴⁰ 122 CONG. REC. 27,491 (daily ed. Aug. 24, 1976) (statement of Rep. Stephen Solarz).

Lockheed and Northrop.¹⁴¹ In August 1975 the Department of State published a notice in the Federal Register of proposed regulations to amend the International Traffic in Arms Regulations “to require disclosure of contingent fees in material amounts which are to be paid in connection with transactions involving the export” of various items.¹⁴² Thomas Stern (Deputy Director of the Bureau of Politico-Military Affairs, Department of State) noted during a House hearing that “[b]y requiring disclosure of such payments . . . we intend to minimize the risk that they will be used as a conduit for efforts to influence improperly the decisions of purchasing governments.”¹⁴³

In addition to the various unilateral legislative responses discussed above that sought to address the problem from a variety of angles, the Senate also sought, as one of its first steps in the investigative process, to encourage the President to seek multilateral solutions to the problem pursuant to authority under U.S. trade law. In November 1975 Senate Resolution 265, sponsored by Senator Ribicoff, passed 93-0. In pertinent part, the resolution resolved as follows:

That the President’s Special Representative for Trade Negotiations and appropriate officials of the Departments of State, Commerce, Treasury, and Justice, in consultation with the chairman of the Committee on Finance and the congressional delegates for trade agreements, initiate at once negotiations within the framework of the current multilateral trade negotiations in Geneva, and in other negotiations of trade agreements pursuant to the Trade Act of 1974, with the intent of developing an appropriate code of conduct and specific trading obligations among governments, together with suitable procedures for dispute settlement, which would result in elimination of such practices on an international, multilateral basis, including suitable sanctions to cope with problems posed by nonparticipating nations, such codes and written obligations to become part of the international system of rules and obligations within the framework of the General Agreement on Tariffs and Trade, and other appropriate international trade agreements pursuant to the provisions and intent of the Trade Act of 1974.¹⁴⁴

Although a multilateral solution to the problem was viewed by many as ultimately desirable, congressional leaders were not persuaded that calls for a multilateral solution alone was a sufficient response to the problem. A 1976 Senate Report stated as follows:

While some sentiment has been expressed in favor of reliance on multilateral remedies, the Committee recognizes that pending multilateral

¹⁴¹ *American Multinational Corporations Abroad*, *supra* note 7, at 278 (proposed rules).

¹⁴² *Id.*

¹⁴³ *Id.* at 155 (statement of Thomas Stern, Deputy Dir., Bureau of Politico-Military Affairs, U.S. Dep’t. of State).

¹⁴⁴ S. Res. 265, 94th Cong. (1975).

measures are largely hortatory in nature and do not include reliable enforcement machinery or sanctions for violators. . . .

. . . .

In order to facilitate enforcement of the proposed anti-bribery statute, the Committee does expect the State Department to continue efforts to negotiate treaties and bi-lateral agreements providing specific cooperative law enforcement arrangements, including exchange of information and records, and extradition of fugitives. Binding bilateral enforcement agreements will produce more results than voluntary codes.

The Committee firmly believes, nonetheless, that an American anti-bribery policy must not await the perfection of international agreements however desirable such arrangements may be.¹⁴⁵

Moreover, despite unanimous passage of Senate Resolution 265, the Ford administration opposed introducing the complex payments problem into already difficult trade negotiations. Travis Reed (Assistant Secretary of Commerce for Domestic and International Business) stated as follows during a 1975 Senate hearing:

The trade negotiations . . . involve a very large number of countries not all of which necessarily share our interest in a code of conduct concerning unethical payments. Consequently, if this problem were introduced only into the MTN [multilateral trade negotiations], it might not receive the degree of support and attention necessary to reach an effective agreement. In that forum, the industrialized exporting countries in which most multinational corporations are based and with which we could realistically expect to reach an effective agreement constitute a relatively small portion of the total participants.

In addition, the MTN agenda already includes a large number of complex and difficult negotiating objectives in the tariff and non-tariff barrier areas, and it may not be in our best interest to add yet another major problem to that agenda.

. . . .

To sum up, an international agreement governing payments practices, as suggested in Senate Resolution 265, would seem to be the most promising means of dealing with the problem of unethical payments. However, I would urge that careful consideration be given to finding the most appropriate organization from the standpoint of reaching an agreement that will effectively eliminate unethical payments practices among the competing multinational enterprises of industrialized countries.¹⁴⁶

Reed suggested that the Organization for Economic Cooperation and Development (OECD)—a group consisting of the major industrialized nations—would provide a “proper vehicle . . . to attempt to get some unanimity of thought in regard to how this universal code of conduct would be accepted

¹⁴⁵ S. REP. NO. 94-103, at 6 (1976).

¹⁴⁶ *Protecting U.S. Trade Abroad*, *supra* note 22, at 31–32 (statement of Travis Reed, Assistant U.S. Sec’y of Commerce, Domestic and Int’l Bus. Admin.).

and could then be introduced into GATT [General Agreement on Tariffs and Trade] or any other appropriate body."¹⁴⁷ Likewise, Julius L. Katz, Acting Assistant Secretary for Economic and Business Affairs, Department of State, stated as follows in a letter included in a 1975 Senate hearing record:

With regard to tactics, I would suggest that we undertake, as a first step, the promotion of a consensus among developed countries, whose firms are most affected, that unethical practices shall not be followed. Once there is an understanding that we have a common interest in developing guidelines which will help protect our firms from the type of pressures which have led to the granting of bribes, we might together adopt measures to the effect that foreign investors should neither make nor be solicited to make payments to government officials or contributions to political parties or candidates.¹⁴⁸

B. Two Main Competing Legislative Responses Emerged to Address the Problem

Although Congress sought to address the foreign corporate payments problem from a variety of angles, two main competing legislative responses soon emerged. As described in more detail below in a general chronology, the Ford administration favored a disclosure approach as to a broad category of payments. However, key congressional leaders, as well as the Carter administration, which took office in January 1977, favored a criminalization approach as a narrow category of payments. Despite significant minority concern, the FCPA adopted a criminalization approach as it was viewed as more effective in deterring improper payments and less burdensome on business.

By the spring of 1976, Congress had already spent approximately one year on the problem and the difficult and complex issues presented. Legislative efforts to address the problem intensified and in March 1976 Senator Proxmire introduced S. 3133 which contained two provisions: a criminal payment provision and a disclosure provision requiring issuers to file with the SEC periodic reports.¹⁴⁹ The reports were to contain information relating to the following:

[A]ny payment of money or furnishing anything of value in an amount in excess of \$1,000 paid or furnished or agreed to be paid or furnished by the issuer . . . (i) to any person or entity employed by, affiliated with, or

¹⁴⁷ *Id.* at 35 (statement of Travis Reed, Assistant U.S. Sec'y of Commerce, Domestic and Int'l Bus. Admin.).

¹⁴⁸ *Id.* at 71 (citing letter from Julius Katz, Acting Assistant Sec'y for Econ. and Bus. Affairs, Dep't of State, to Sen. Ribicoff, Chairman, Subcomm. on Int'l Trade, S. Comm. on Fin. (Oct. 16, 1975)).

¹⁴⁹ *See* S. 3133, 94th Cong. (1976). Companion bills adopting S. 3133's disclosure provisions were also introduced in May 1976 in the House of Representatives. *See* 122 CONG. REC. 15,097 (1977) (Rep. James Pickle introduced H.R. 13953); 122 CONG. REC. 14,325-26 (1977) (Rep. John Moss introduced H.R. 13870).

representing directly or indirectly, a foreign government or instrumentality thereof; (ii) to any foreign political party or candidate for foreign political office; or (iii) to any person retained to advise or represent the issuer in connection with obtaining or maintaining business with a foreign government or instrumentality thereof or with influencing the legislation or regulations of a foreign government.¹⁵⁰

Speaking on the Senate floor, Senator Proxmire stated as follows:

The legislation before the committee . . . would end corporate bribery, first by requiring a systematic program of disclosure to the SEC of all overseas consultant payments and second, by flatly prohibiting such payments to foreign public officials.

Disclosure is the heart of this legislation. The disclosures that the SEC is currently receiving are in part predicated on the idea that such payments are material to investors, and must be disclosed under existing law. S. 3133 would require systematic disclosure of all such payments, per se, whether or not materiality were asserted.¹⁵¹

Compared to bills that would follow, S. 3133 was unique in that it contained both criminal payment and disclosure provisions. For instance, in May 1976 Senator Church introduced S. 3379¹⁵² and in June 1976 Representative Solarz introduced H.R. 14340.¹⁵³ Rather than seeking a criminal prohibition as to a narrow category of payments concerning business with foreign governments, both bills sought disclosure of a broader category of foreign payments. In pertinent part, the bills provided that a company subject to the SEC's jurisdiction shall in its annual report disclose the following:

- (A) direct and indirect political contributions to foreign governments;
- (B) direct and indirect payments and gifts to employees of foreign governments which are intended to influence the decisions of such employees and which are made either with or without the consent of their sovereign; and
- (C) direct and indirect payments and gifts to employees of foreign, nongovernmental purchasers and sellers which are intended to influence normal commercial decisions of their employer and which are made without the employer's knowledge or consent.¹⁵⁴

While much of the focus of legislative responses to the problem was on the payments directly (regardless of whether such payments should be prohibited or merely disclosed), the legislative record also evidences the SEC's insistence that any legislation be supplemented by books and records and internal control provisions. The May 1976 SEC Report stated as follows:

¹⁵⁰ S. 3133, 94th Cong. § 2(g) (1976).

¹⁵¹ 122 CONG. REC. 12,099 (1976) (statement of Sen. William Proxmire).

¹⁵² See S. 3379, 94th Cong. (1976).

¹⁵³ See H.R. 14340, 94th Cong. (1976).

¹⁵⁴ *Id.* § 4.

[W]e believe that any legislation in this area should embody a prohibition against the falsification of corporate accounting records. The most devastating disclosure that we have uncovered in our recent experience with illegal or questionable payments has been the fact that, and the extent to which, some companies have falsified entries in their own books and records. A fundamental tenet of the recordkeeping system of American companies is the notion of corporate accountability. It seems clear that investors are entitled to rely on the implicit representations that corporations will account for their funds properly and will not “launder” or otherwise channel funds out of or omit to include such funds in the accounting systems so that there are no checks possible on how much of the corporation’s funds are being expended or whether in fact those funds are expended in the manner management later claims.

Concomitantly, we believe that any legislation in this area should also contain a prohibition against the making of false and misleading statements by corporate officials or agents to those persons conducting audits of the company’s books and records and financial operations.

Finally, we believe that any legislation should require management to establish and maintain its own system of internal accounting controls designed to provide reasonable assurances that corporate transactions are executed in accordance with management’s general or specific authorization; and that such transactions as are authorized are properly reflected on the corporation’s books and records in such a manner as to permit the preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements.¹⁵⁵

The SEC Report proposed legislation which embodied the following four goals:

(1) [r]equire issuers to make and keep accurate books and records[;] (2) [r]equire issuers to devise and maintain a system of internal accounting controls meeting the objectives already articulated by the American Institute of Certified Public Accountants[;] (3) [p]rohibit the falsification of corporate accounting records[;] [and] (4) [p]rohibit the making of false, misleading, or incomplete statements to an accountant in connection with an examination or audit.¹⁵⁶

The goal of the books and records and internal control provisions were to make explicit what was merely implicit in the existing securities laws and one such bill, of many that followed, that sought to do that was S. 3418 introduced by Senator Proxmire in May 1976. A Senate Report stated as follows: “While the Committee believes that the requirement that issuers maintain books, records, and accounts that accurately and fairly reflect the transactions and

¹⁵⁵ SEC REPORT, *supra* note 2, at 13.

¹⁵⁶ *Investment Disclosure*, *supra* note 45, at 121–22 (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm’n).

dispositions of the assets of the issuer is implicit in the existing securities laws, the Committee believes that such a basic requirement should be explicit.”¹⁵⁷

Another Senate Report stated as follows:

The committee recognizes that the SEC has broad authority to promulgate accounting standards for companies subject to jurisdiction under its existing authority. Nevertheless, the committee believes the Commission’s current program for accurate accounting should be supplemented by an explicit statement of statutory policy. The accounting standards . . . are intended to operate in tandem with the criminalization provisions of the bill to deter corporate bribery . . . [and express] a public policy which encompasses a unified approach to the matter of corporate bribery.

This legislation imposes affirmative requirements on issuers to maintain books and records which accurately and fairly reflect the transactions of the corporation and to design an adequate system of internal controls to assure, among other things, that the assets of the issuer are used for proper corporate purpose[s]. The committee believes that the imposition of these affirmative duties under our securities laws coupled with attendant civil liability and criminal penalties for failure to comply with the statutory standard will go a long way to prevent the use of corporate assets for corrupt purposes. Public confidence in the securities markets will be enhanced by assurance that corporate recordkeeping is honest.¹⁵⁸

Similarly, SEC Chairman Hills stated as follows during Senate testimony:

Given the nature of the problem and the past practices we have discovered, we have determined to seek a specific statutory requirement rather than leave open to question whether we could achieve this goal indirectly through exercise of our rulemaking authority. . . .

. . . .
I admit that it makes for dull reading, but these proposals will provide the teeth to assure that problems of this nature are brought to appropriate levels of corporate management and recorded in a manner that makes it far easier for us to discover them.¹⁵⁹

Indeed, Senator Proxmire viewed such books and records and internal control provisions as “strengthen[ing] the Commission’s ability to combat payment of bribes by American corporations overseas.”¹⁶⁰ A Senate Report likewise stated as follows:

The Committee expects that the requirement to maintain accurate books[,] records, and management controls and the prohibition against falsifying such

¹⁵⁷ S. REP. NO. 94-1031, at 11 (1976).

¹⁵⁸ S. REP. NO. 93-114, at 7 (1977).

¹⁵⁹ *Prohibiting Bribes*, *supra* note 60, at 19 (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm’n).

¹⁶⁰ 122 CONG. REC. 13,574 (1976).

records or deceiving an auditor, will go a long way towards eliminating improper payments, which—almost by definition—require concealment. Taken in combination with the criminal prohibition against bribery, the accounting provisions should be adequate to the task of deterring corrupt payments even where transgressors take steps to evade the intent of the law.¹⁶¹

1. *The Ford Administration Favored a Disclosure Approach*

With legislative activity intensifying and after being viewed as exhibiting indifference to Congress's nearly year-long investigation of the foreign corporate payments problem, in March 1976 President Gerald Ford issued a memorandum to various federal agencies establishing a "Task Force on Questionable Corporate Payments Abroad" (the Task Force).¹⁶² The memorandum stated in full as follows:

This is to advise you of my decision to appoint you to a Cabinet-level Task Force which I am establishing to examine the policy aspects of recent disclosures of questionable payments to foreign agents and officials by U.S. companies in conjunction with their overseas business operations. The Task Force will be chaired by Secretary Richardson and will report to me through the Economic Policy Board and National Security Council. Status reports on the efforts of the Task Force should be presented to me from time to time, and a final report is due prior to the close of the current calendar year.

Although the Federal Government is currently taking a number of international and domestic steps in an attempt to deal with this problem, I believe that a coordinated program to review these efforts and to explore additional avenues should be undertaken in the interest of ethical conduct in the international marketplace and the continued vitality of our free enterprise system.

The full dimensions of this problem are not yet known but it is clear that a substantial number of U.S. corporations have been involved in questionable payments to foreign officials, political organizations or business agents. The possibility exists that more can be done by our government. There would also appear to be some interest in [guidance] as to what standards should be applied to the foreign sales activities of the overwhelming majority of American businessmen who are deeply concerned about the propriety of their business operations.

The Task Force should explore all aspects of this problem and seek to obtain the views of the broadest base of interested groups and individuals. While the problems are complex and do not lend themselves to simple solutions, I am confident that your labors will contribute to a better

¹⁶¹ S. REP. NO. 94-103, at 8 (1976).

¹⁶² Gerald R. Ford, *Memorandum Establishing the Task Force on Questionable Corporate Payments Abroad*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=5772> (last visited Nov. 5, 2012) (memorandum from Mar. 31, 1976).

international and domestic climate in which American business continues to play a vital and respected role.¹⁶³

In April 1976 Senate testimony, Secretary of Commerce Richardson described the Task Force as follows:

The task force has been directed by the [P]resident to conduct a sweeping policy review of the subject of improper or questionable corporate payments and to formulate a coherent national policy to deal with the problems posed by such payments. The task force has been directed to obtain the views of the broadest base of interest groups and individuals to aid in formulation of a clear and effective policy. Such a policy should enable American business to continue to play a vital and respect role in international markets.¹⁶⁴

Senator Proxmire, however, took a dim view regarding the emergence of the Task Force. He stated as follows:

[I]n view of the seriousness of the problem, how long it has taken the administration to establish a task force to study foreign bribery, I think it will be clearly a stall unless we get information up and down on this legislation by the first of June [1976]. Despite the excellence of the men appointed to the task force, it will be a stall.¹⁶⁵

In a June 1976 letter from Secretary of Commerce Richardson to Senator Proxmire included in the legislative record, Secretary Richardson set forth the views of the Task Force on “proposed legislation concerning questionable corporate payments abroad.”¹⁶⁶ The letter stated as follows:

There are two principal competing general legislative approaches—a disclosure approach or a criminal approach. While it is possible to design legislation—as indeed is the case with S. 3133—which requires disclosure of foreign payments *and* makes certain payments criminal under U.S. law, the Task Force has unanimously rejected this approach. The disclosure-plus-criminalization scheme would, by its very ambition, be ineffective. The existence of criminal penalties for certain questionable payments would deter their disclosure and thus the positive value of the disclosure provisions would be reduced. In our opinion the two approaches cannot be compatibly joined.

The Task Force has given considerable scrutiny to the option of “criminalizing” under U.S. law improper payments made to foreign officials by

¹⁶³ *Id.*

¹⁶⁴ *Foreign and Corporate Bribes*, *supra* note 15, at 77 (statement of Elliot Richardson, U.S. Sec’y of Commerce).

¹⁶⁵ *Id.* at 119 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

¹⁶⁶ *Prohibiting Bribes*, *supra* note 60, at 39 (letter from Elliot Richardson, U.S. Sec’y of Commerce to Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

U.S. corporations. Such legislation would represent the most forceful possible rhetorical assertion by the President and the Congress of our abhorrence of such conduct. It would place business executives on clear and unequivocal notice that such practices should stop. It would make it easier for some corporations to resist pressures to make questionable payments.

The Task Force has concluded, however, that the criminalization approach would represent little more than a policy assertion, for the enforcement of such a law would be very difficult if not impossible. Successful prosecution of offenses would typically depend upon witnesses and information beyond the reach of U.S. judicial process. Other nations, rather than assisting in such prosecutions, might resist cooperation because of considerations of national preference or sovereignty. Other nations might be especially offended if we sought to apply criminal sanctions to foreign-incorporated and/or foreign-managed subsidiaries of American corporations. The Task Force has concluded that unless reasonably enforceable criminal sanctions were devised, the criminal approach would represent poor public policy.

.....
The Task Force has similarly analyzed the desirability of new legislation to require more systematic and informative reporting and disclosure than is provided by current law. The Task Force recognized that additional disclosure requirements could expand the paperwork burden of American businesses (depending upon the specific drafting) and that they might, in some cases, result in foreign relations problems—to the extent the systematic reporting and disclosure failed to deter questionable payments and their publication provided embarrassing to friendly governments.

At the same time the Task Force perceived several very positive attributes of systematic disclosure. First, it deemed such disclosure necessary to supplement current SEC disclosure, which as noted already covers only issuers of securities making “material” payments, and does not normally include the name of the payee. Such disclosure would provide protection for U.S. businessmen from extortion and other improper pressures, since would-be extorters would have to be willing to risk the pressures which would result from disclosure of their actions to the U.S. public and to their own governments. It would avoid the difficult problems of defining and proving “bribery.” It would offer a means to give public reassurance of the essential accountability of multinational corporations.

.....
... [T]he President has decided to recommend that the Congress enact legislation providing for full and systematic reporting and disclosure of payments made by American businesses with the intent of influencing, directly or indirectly, the conduct of foreign governmental officials. At the same time, the President has decided to oppose, as essentially unenforceable, legislation which would seek broad criminal proscription of improper payments made in foreign jurisdictions.

.....
... [T]he President has decided to endorse the legislative approach to improved private sector internal reporting and accountability first proposed to your committee by Chairman Hills in [the SEC Report] and recommended by the Task Force. That approach would:

- prohibit falsification of corporate accounting records;
- prohibit the making of false and misleading statements by corporate officials or agents to persons conducting audits of the company's books and records and financial operations;
- require corporate management to establish and maintain its own system of internal accounting controls designed to provide reasonable assurances that corporate transactions are executed in accordance with management's general or specific authorization, and that such transactions are properly reflected on the corporation's books.¹⁶⁷

Later, in June 1976, President Ford announced “three new initiatives” based on the findings of the Task Force.¹⁶⁸ In the announcement, President Ford stated as follows:

First, as a deterrent to bribery by American-controlled industries, I am directing the task force to prepare legislation that would require corporate disclosure of all payments made with the intention of influencing foreign government officials. Failure to comply with the new disclosure laws would lead to civil and [criminal] penalties.

Second, I am announcing my support of pending legislation to strengthen the law requiring corporations to keep their shareholders fully and honestly informed about their foreign [behavior].

Finally, I am asking our major trading partners to work with us in reaching agreement on a new code to govern international corporate activities.¹⁶⁹

In early August 1976, President Ford issued a message urging enactment of the proposed legislation.¹⁷⁰ President Ford stated as follows:

... I am transmitting to the Congress my specific proposal for a Foreign Payments Disclosure Act. This proposal will contribute significantly to the

¹⁶⁷ *Id.* at 61–65 (letter from Elliot Richardson, U.S. Sec’y of Commerce to Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs). “The Task Force did give serious consideration to one criminalization scheme, whereby the standards of U.S. law against official bribery would be applied to improper payments made abroad, provided the country in which such payments were made had entered a mutual enforcement assistance agreement with the United States and had enacted its own criminal prohibitions against official bribery.” *Id.* at 62 (letter from Elliot Richardson, Sec’y of Commerce, to Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

¹⁶⁸ Gerald R. Ford, *Remarks Announcing New Initiatives for the Task Force on Questionable Corporate Payments Abroad*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=6124> (last visited Nov. 5, 2012) (memorandum from June 14, 1976).

¹⁶⁹ *Id.*

¹⁷⁰ See Gerald R. Ford, *Special Message to the Congress Transmitting Proposed Foreign Payments Disclosure Legislation*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=6254#axzz1zCuS3JqO> (last visited Nov. 5, 2012) (message from Aug. 3, 1976).

deterrence of future improper practices and to the restoration of confidence in American business standards.

This legislation represents a measured but effective approach to the problem of questionable corporate payments abroad:

—It will help deter improper payments in international commerce by American corporations and their officers.

—It will help reverse the trend toward allegations or assumptions of guilt-by-association impugning the integrity of American business generally.

—It will help deter would-be foreign extorters from seeking improper payments from American businessmen.

—It will allow the United States to set a forceful example to our trading partners and competitors regarding the imperative need to end improper business practices.

—It does not attempt to [apply] directly United States criminal statutes in foreign states and thus does not promise more than can be enforced.

—Finally, it will help restore the confidence of the American people and our trading partners in the ethical standards of the American business community.¹⁷¹

Bills based on the Task Force's recommendations were soon introduced in both the Senate and House. In August 1976, Senator Warren Magnuson introduced S. 3741 and it provided that "a person" shall report to the Secretary of Commerce "payments hereafter made on behalf of the person or the person's foreign affiliate to any other individual or entity in connection with an official action, or sale to or contract with a foreign government, for the commercial benefit of the person or his foreign affiliate."¹⁷² Also, in August 1976, Representative Harley Stagger introduced identical legislation in the House.¹⁷³

In Congressional hearings that soon followed, J.T. Smith, General Counsel, Department of Commerce, stated as follows in advocating the Ford administration position:

[T]he existence of the criminal prosecution would be of some value to an American businessman in resisting improper requests for payments abroad. I don't believe, however, that it would have as much value as the disclosure requirements, for the following reasons. A would-be foreign extorter who asks for \$50,000 to do something of importance to the American company, on the one hand would be told, "I can't give you that money because if I do I might have to go to jail," and the extorter says, "That is your problem, bud, but there is no way, your law can reach me." If you have a disclosure provision and the American businessman says, "If I give you that money, I am going to have to report the payment to the Department of Commerce, possibly to the SEC, and

¹⁷¹ *Id.* As noted in President Ford's message, unlike many legislative responses that sought to address the problem by focusing solely on publicly traded companies, President Ford proposed legislation to capture all U.S. participants in foreign commerce—not just firms subject to SEC regulatory requirements. *See id.*

¹⁷² S. 3741, 94th Cong. (1976).

¹⁷³ *See* H.R. 15149, 94th Cong. (1976).

it will therefore be in the public record, and your name will be in the public record.” If we are right that every other country in the world, virtually every other country, has laws against public bribery and extortion, then it is our guess that the extorter will be substantially deterred.¹⁷⁴

We believe that a combination of sunlight and encouragement of other nations to enforce their own laws represents a much more effective way to end corrupt payments than does direct, unilateral criminalization by this country of actions taking place in foreign jurisdictions.¹⁷⁵

We urge the Congress not to substitute tokenism for real action to deal with the questionable payments problem. The danger in such tokenism is that it will create complacency. Congress will wash its hands of an important problem without having taken meaningful, enforceable action.¹⁷⁶

However, many were not convinced that the Task Force-inspired disclosure legislation was an adequate response to the problem. In a passionate statement which speaks to the political context of Congress’s deliberations, Theodore Sorenson stated as follows during a September 1976 House hearing:

The principal policy issue raised . . . of course, is whether [the bill] should prohibit the bribery of foreign officials at all. The Ford administration . . . prefers to rely solely upon the offending corporation notifying the Department of Commerce of its misdeed, with the Department not making that fact known until as much as a year later, and then only if our national interest would not be adversely affected.

What a pitifully pallid response to a major moral crisis. Have we learned nothing from the attempted coverup of Watergate? Have we no shame, no decent respect for the opinions of mankind? How could this country continue to preach abroad the virtues of the free competitive market system and continue to call for economic justice and political integrity, how could we hope to avoid unreasonable restrictions and attacks on American corporations abroad, if we are unwilling to specially and directly prohibit and penalize this wasteful, corrosive, shabby practice? Do we really wish to align ourselves around the world with the cynical and the corrupt, with those who profit from bribery or wink at it as customary and unavoidable, or should we not instead align ourselves with those business and government officials who have stoutly resisted all pressures and temptations, and who would be vastly relieved today if a U.S. criminal statute said loudly and clearly that all U.S.-based enterprises continuing to engage in such practices did so at their own peril.¹⁷⁷

The Task Force-inspired disclosure legislation did not gain traction in Congress, but S. 3664 introduced by Senator Proxmire in July 1976, which

¹⁷⁴ *Foreign Payments Disclosure*, *supra* note 11, at 109 (statement of J.T. Smith, Gen. Counsel, U.S. Dep’t of Commerce).

¹⁷⁵ *Id.* at 34 (statement of J.T. Smith, Gen. Counsel, U.S. Dep’t of Commerce).

¹⁷⁶ *Id.* at 33 (statement of J.T. Smith, Gen. Counsel, U.S. Dep’t of Commerce).

¹⁷⁷ *Id.* at 115–16 (statement of Theodore Sorenson).

sought to directly criminalize payments to foreign officials, did gain traction.¹⁷⁸ S. 3664 was soon reported to the Senate and the Senate Report stated as follows:

The Committee considered two approaches for curbing the kind of bribery payments to foreign officials. . . . One approach would be to require that these bribes be publicly disclosed. The other approach would be to prohibit them by law with criminal penalties for those who violate the law.

The disclosure approach was . . . recommended by the Cabinet Task Force chaired by Secretary Richardson. The Task Force report to the Committee argued that disclosure would constitute an effective deterrant [sic] whereas an outright criminal prohibition would be difficult to enforce.

The Committee carefully weighed these arguments and decided that a direct criminal prohibition is the better approach. As the Richardson Task Force itself pointed out, a direct criminal prohibition of foreign bribes “would represent the most forceful possible rhetorical assertion by the President and the Congress to our abhorrence of such conduct. It would place business executives on clear and unequivocal notice that such practices should stop. It would make it easier for some corporations to resist pressures to make questionable payments.” On the other hand, merely requiring the disclosure of bribes would leave ambiguous whether such payments might be acceptable. Indeed, it would imply that bribery can be condoned as long as it is disclosed.

The Committee considered whether a criminal prohibition might be more difficult to enforce than a disclosure requirement. The Committee concluded that an outright prohibition would be at least as feasible to enforce as any meaningful disclosure requirement.

Under the disclosure approach recommended by Secretary Richardson, all payments made to foreign officials for the purpose of “obtaining or maintaining business with or influencing the conduct of a foreign government” would have to be disclosed. Clearly, in order to enforce such a disclosure requirement and apply sanctions for failure to file reports, it would be necessary to prove that an undisclosed payment was actually made, and that it was made with an improper purpose. Thus, the same evidence necessary to prove a violation of a direct prohibition would have to be marshalled in order to enforce a disclosure statute. Beyond that, there would be the additional burden of proving that an issuer willfully failed to file a report describing the bribe.

Accordingly, the Committee concluded that a disclosure approach has at least the same enforcement problems inherent in the direct prohibition approach and none of its advantages. The bill, as reported, therefore, provides a direct criminal prohibition.¹⁷⁹

In September 1976 the Senate considered S. 3664. During deliberations Senator Church offered an amendment to the bill that sought to add disclosure

¹⁷⁸ See 122 CONG. REC. 30,426 (1976).

¹⁷⁹ S. REP. NO. 94-103, at 8 (1976).

provisions.¹⁸⁰ However, Senator Church's amendment was rejected and S. 3664 passed the Senate unanimously 86-0 and was referred to the House.¹⁸¹

Yet the realities of the political calendar leading up to the 1976 elections soon stalled the legislation and the House did not complete work on a companion bill prior to adjourning in October 1976.¹⁸² The legislative record evidences Congress at a crossroads. On the one hand, Congressional leaders sought to capitalize on the momentum of the many recent corporate disclosures regarding foreign payments. Yet, on the other hand, many in Congress were concerned about a rush to pass legislation concerning a difficult and complex issue in the waning days of a session.

As to the momentum Congress had built since it began investigating the problem in mid-1975, Senator Proxmire stated that the "momentum we have now, because of the recent disclosures, is like so many other things that happen in Washington and the country, is likely to die down as time goes on and we are likely to accept this."¹⁸³ On the other hand, Senator Jake Garn stated as follows concerning the rush to pass legislation:

I'm just not sure that any bill . . . isn't premature until we have more facts on the extent and nature of the bribery, who's been involved, and who hasn't, and only when I think we have the full facts are we able to come up with a bill that will solve the problem.

. . . .
. . . I want to come up with some good legislation that will hopefully accomplish what all of us seem to want to accomplish, and I think we are rushing too rapidly to try and develop a piece of legislation to show that, "Aha, Congress knows this is going on. We're going to stop it. We're going to be big heroes." Well, I want this to take place but in a meaningful way.¹⁸⁴

Senator Charles Percy, likewise, thought it "would be foolhardy for us to rush ahead and feel that we've got all the answers on this highly complex problem,"¹⁸⁵ and Representative Eckhardt stated as follows: "I am not altogether convinced that legislation which is so related to motherhood, home, and fireside is therefore necessarily legislation which should be hurriedly passed. There are many bad pieces of legislation that have passed in the waning days of a session on that very basis."¹⁸⁶

¹⁸⁰ See 122 CONG. REC. 30,333 (1976).

¹⁸¹ See 122 CONG. REC. 30,424 (1976).

¹⁸² S. REP. NO. 93-114, at 2 (1977).

¹⁸³ *Foreign and Corporate Bribes*, *supra* note 15, at 10 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

¹⁸⁴ *Id.* at 38, 106 (statement of Sen. Jake Garn, Member, S. Comm. on Banking, Hous., and Urban Affairs).

¹⁸⁵ *Id.* at 38 (statement of Sen. Charles Percy).

¹⁸⁶ *Foreign Payments Disclosure*, *supra* note 11, at 142 (statement of Rep. Bob Eckhardt, Member, Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce).

Congressional efforts to address the problem did indeed pause for the 1976 elections in which the Democratic candidate Jimmy Carter defeated Republican President Ford. During the campaign, Carter “derided the [Ford] administration’s . . . ‘proposal to allow corporations to engage in bribery so long as they report such illegal transactions to the Department of Commerce.’”¹⁸⁷ As Representative Michael Harrington stated after Carter took office, “we now have an administration whose prime foreign policy concern to date has been to restore morality and ethical principles to all of our international relations.”¹⁸⁸

2. The Newly Elected Carter Administration as well as Congressional Leaders Favored a Criminalization Approach

When the 95th Congress opened after the 1976 elections, legislative efforts to address the foreign corporate payments problem soon renewed and focused on bills with criminal payment provisions. With President Ford out of office, the Task Force-inspired disclosure legislation fell by the wayside as the only bill introduced in the 95th Congress adopting such an approach, H.R. 7543 introduced by Representative Frederick Rooney in June 1977, never made it out of committee. In January 1977 Senator Proxmire introduced S. 305 and he stated as follows:

Last year this bill passed the Senate by a unanimous vote, 86 to nothing. Let’s not kid ourselves. This bill is not home free. It was stopped last year in the House by the opposition of those objecting to the provisions of the bill. It will take strong support from the administration and those of us in Congress who believe in it to get the bill passed.¹⁸⁹

As suggested by Senator Proxmire’s statement, S. 305 was substantively identical to S. 3664 that passed the Senate in September 1976. In February 1977, Representative Eckhardt introduced H.R. 3815, which in compromise with S. 305, ultimately became the FCPA.¹⁹⁰

In May 1977, S. 305 was reported to the Senate and the Senate Report is substantively similar to the above described Senate Report as to S. 3664. Like the previous Senate Report, the May 1977 Senate Report stated as follows:

¹⁸⁷ 122 CONG. REC. 30,337 (1976) (daily ed. Sept. 14, 1976) (citing *Mr. Tanaka and Lockheed*, WASH. POST, Aug. 21, 1976, at A10).

¹⁸⁸ *Unlawful Corporate Payments Act of 1977*, *supra* note 17, at 170 (statement of Rep. Michael Harrington, Member, Subcomm. of Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce).

¹⁸⁹ *Investment Disclosure*, *supra* note 45, at 2 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

¹⁹⁰ See H.R. 3815, 95th Cong. (1977).

The committee . . . concluded that the criminalization approach was preferred over a disclosure approach. Direct criminalization entails no reporting burden on corporations and less of an enforcement burden on the Government. The criminalization of foreign corporate bribery will to a significant extent act as a self-enforcing, preventative mechanism.¹⁹¹

Soon thereafter, S. 305 passed the Senate in May 1977,¹⁹² and in September 1977 H.R. 3815 was reported to the House.¹⁹³ The House Report stated as follows:

The committee considered two possible approaches for curbing the type of bribery payments defined [in the bill]. One approach is to require that these payments be publicly disclosed and criminal penalties imposed for failure to disclose. The other approach, which the committee adopted in H.R. 3815, is to outlaw the payoffs with criminal sanctions.

The Subcommittee on Consumer Protection and Finance received extensive testimony on both approaches during the 94th and 95th Congresses. There emerged a clear consensus that foreign bribery is a reprehensible activity and that action must be taken to proscribe it. After carefully considering all the testimony adduced, the committee concluded that it should be outlawed rather than legalized through disclosure. The committee believes the criminalization approach to be the most effective deterrent, the least burdensome on business, and no more difficult to enforce than disclosure.

The committee determined that disclosure can never be an effective deterrent because the anticipated benefit of making a bribe, such as winning a multimillion dollar contract, generally exceeds the adverse effect, if any, of disclosing 1 year later a lump sum figure without names, amounts or even countries. Criminalization, on the other hand, has proven an effective deterrent. Although a vast number of questionable corporate payments have been disclosed, subsequent management changes have been attendant only to disclosures of domestic bribery. The reason is obvious: domestic bribes are clearly illegal whereas foreign bribes are not.

The committee also found that criminalization is no more difficult to enforce than disclosure. Both approaches involve proving beyond a reasonable doubt the same factual and legal elements. Most importantly, though, criminalization is far less burdensome on business. Most disclosure proposals would require U.S. corporations doing business abroad to report all foreign payments including perfectly legal payments such as for promotional purposes and for sales commissions. A disclosure scheme, unlike outright prohibition, would require U.S. corporations to contend not only with an additional bureaucratic overlay but also with massive paperwork requirements.¹⁹⁴

¹⁹¹ S. REP. NO. 93-114, at 10 (1977).

¹⁹² 123 CONG. REC. 13,818 (1977).

¹⁹³ 123 CONG. REC. 31,404 (1977).

¹⁹⁴ H.R. REP. NO. 95-640, at 6 (1977).

Further to the belief that a criminal prohibition of a narrow category of payments would be less burdensome on business than a broader disclosure provision, Representative Eckhardt stated as follows:

[D]isclosure legislation must embrace a wide range of activities, many of which appear perfectly legal and even ethical. And of course, if they must all be disclosed, along with that which is illegal, one may assume that the acts most readily disclosed will be those which are innocent acts. We therefore put the major burden on the corporation which is engaged in absolutely proper activities; and, in some instances, by requiring extensive disclosure of acts which are legal in their nature, we may place that corporation at a disadvantage with respect to the corporation which wishes to act *ultra vires*. The *ultra vires* corporation will know what its opponent is doing; the honest corporation will not know what its offending and violating opponent is engaged in.

A significant difference between the two approaches, often overlooked, is that criminalization is far less burdensome on business. Disclosure would require U.S. corporations doing business abroad to report all foreign payments including legal promotional payments and legitimate commissions to sales agents.¹⁹⁵

In November 1977, the House passed H.R. 3815 and all that remained was for Congressional conferees to iron out certain differences between it and S. 305 which previously passed the Senate.¹⁹⁶

C. Despite Significant Minority Concern, the FCPA Adopted the Criminalization Approach

The prevailing view was that the criminalization approach embodied in S. 305 and H.R. 3815, along with supplemental books and records and internal control provisions that were agreed to in conference, represented the best legislative response to the foreign corporate payments problem. However, significant minority concern still existed as to whether this approach was the most effective.

The November 1977 House Report as to H.R. 3815 included “minority views” and stated as follows:

This legislation would prohibit U.S. corporations from making payments or promises of payments to foreign political or governmental officials. Payments falling within the scope of the bill must be made or offered with the purpose of corruptly influencing an act or decision of the foreign official or inducing that official to use his influence to affect a decision of a foreign

¹⁹⁵ *Corporate Business Practices*, *supra* note 82, at 10 (statement of Rep. Bob Eckhardt, Member, Subcomm. on Int'l Econ. Policy and Trade, H. Comm. on Int'l Relations).

¹⁹⁶ For instance, H.R. 3815 did not contain books and records and internal control provisions and, as discussed in Part VI below, H.R. 3815 also did not contain a business purpose test as to the prohibited payments.

government. We support, without reservation, the goal of H.R. 3815, which is the elimination of foreign bribery. Certainly, any legislation which will restore public confidence in American business and will prevent a continuation of the practices which recently have been disclosed is desirable and should be enacted. We are concerned, however, that the approach adopted by H.R. 3815 is not the most effective to eliminate questionable foreign payments.

In general terms the bill makes certain payments unlawful and imposes criminal sanctions on the making of payments described in the bill. The criminalization approach is contrasted with the approach recommended by Former Secretary of Commerce Elliot Richardson which would have required disclosure of improper payments. We believe that adoption of the disclosure approach would, in no way, imply that payoffs will be condoned as long as they are disclosed. Rather, we believe that this approach would prove ultimately to be a much more effective deterrent than would the provisions of H.R. 3815. This is because the legislation will be extremely difficult, if not impossible, to enforce. Payments falling within the scope of the legislation would include payments made on foreign soil to foreign officials and most probably made by persons who are not U.S. citizens. Investigations of such payments certainly require the active cooperation of foreign individuals and governments. Without such cooperation, the difficulties of obtaining witnesses and evidence to successfully investigate and prosecute the case would be insurmountable.

The difficulties of the criminalization approach to dealing with the problems of questionable foreign payments were reiterated by Secretary of the Treasury Blumenthal when he testified before the Consumer Protection and Finance Subcommittee. At that time he stated:

I have always felt a criminal statute such as this one will not be easy to enforce, particularly because it does involve acts that take place in other countries, the whole question of extra territoriality gets you into questions of the availability of witnesses, gets you into the question of acts taken in other jurisdictions in which the laws are different . . . we must not underestimate the difficulties of enforcement that in any case will result from this kind of legislation.

Former Secretary of Commerce Richardson expressed similar fears which are highlighted in the report of the President's Task Force on Questionable Payments Abroad:

The Task Force has concluded, however, that the criminalization approach would represent little more than a policy assertion, for the enforcement of such a law would be very difficult if not impossible. . . . The Task Force has concluded that unless reasonably enforceable criminal sanctions were devised, the criminal approach would represent poor public policy.

We believe that legislation that cannot be effectively enforced will do little to deter payoffs. On the other hand, disclosure could be a very effective deterrent especially in combination with the other sanctions against such

payments which exist in present securities, antitrust, tax and criminal law. We are concerned that the committee may have constructed a paper tiger which in the long run will do little to discourage conduct which we all believe has no place in the American business community.

We note that in this regard that the disclosure concept in the political area was finally utilized in the Federal Election Campaign Act of 1971. Its effect has been dramatic when compared to the nearly 50 years of benign neglect given unlawful political contributions prior to that time. Hopefully, H.R. 3815 will not be a law shielding corruption for 50 years before the effective deterrent to foreign bribery—full disclosure—is required.¹⁹⁷

Representative James Broyhill likewise stated as follows on the House floor:

[U]nfortunately, I cannot agree . . . that this bill will do much to deter improper payoffs to foreign officials. Although I subscribed 100 percent to the policy underlying the bill—that is, that payment of bribes to foreign officials is conduct which cannot be condoned under any circumstances—I am concerned that the legislation, because of enforcement difficulties inherent in the bill will do little to effectively solve the problem. Enforcement difficulties arise because the payments could involve those made in foreign countries by non-U.S. citizens to other non-U.S. citizens. This is why the previous administration chose to recommend legislation which would require disclosure of these kinds of payments. I do believe that disclosure in combination with the other sanctions against such payments which exist in present securities, antitrust, tax, and criminal law would provide more effective deterrence against such payments.¹⁹⁸

As suggested above, one of the key concerns regarding the criminalization approach was whether it would be, in many instances, enforceable and whether its prohibitions were fair to potential criminal defendants. Richard Darman, Assistant Secretary for Policy, U.S. Department of Commerce, stated as follows during a House hearing:

The basic question, it seems to us, which one must address in considering the foreign payments direct criminalization provision is this: What reason is there to enact a provision of law which an overwhelming majority of responsible legal scholars, law enforcement officials, and serious analysts of this issue, view to be essentially unenforceable. It cannot be said to be for reasons of practical moral leadership, for this would be potentially hypocritical. The answer must depend upon either a conception of the value of enforceable law as a force for change, through the power of declaratory policy alone; or it must depend upon a conception of the value of unenforceable law as a stabilizing force, through the periodic purgatorial effects of ritualistic collective expressions of outrage.

¹⁹⁷ H.R. REP NO. 95-640, at 19–20 (1977).

¹⁹⁸ 123 CONG. REC. 36,305 (1976) (statement of Rep. James Broyhill).

With respect to the latter explanation, we take the problem to be too serious to settle for what might be a passing symbolic gesture. As to the former . . . we believe it to be shortsighted. Whatever leadership value may be associated with essentially unenforceable law is surely to be counterbalanced by the ultimate corrosive effects of its exposure as fundamentally false.¹⁹⁹

Some of the most pointed criticism of the criminalization approach came from representatives of the New York City Bar who participated in various congressional hearings. Robert Von Mehren, Chairperson of the Ad Hoc Committee on Foreign Payments, New York City Bar, stated as follows during a House hearing:

We oppose criminalization for a number of reasons:

(a) As a general principle, states have been reluctant to extend the reach of their criminal law to acts done abroad. This reluctance arises from considerations of comity and from the potential foreign relations impact of extending domestic criminal laws to acts which have their center of gravity abroad and which, therefore, in most cases concern the foreign state more than the legislating state.

(b) It is difficult to investigate and prosecute acts done abroad. The writs of our grand juries and courts do not run as to non-United States citizens outside our boundaries. Thus cooperation of foreign individuals or governments would usually be required to investigate and prosecute a crime based on acts done abroad.

(c) Extraterritorial application of criminal laws also raises serious questions of fairness and due process. The prosecution may be able to obtain cooperation from a foreign government through diplomatic channels; no such possibility is open to the defendant. Certainly the accused would not enjoy the right to have compulsory process for obtaining witnesses in his favor. Moreover, the accused is placed in a position where he might be tried and acquitted in the foreign state and then tried and convicted in the United States, perhaps because the witnesses for the defense who had been available to the defendant in the foreign trial were not available to him in the trial here.

All of these considerations militate against the choice of a criminalization approach to the foreign payments problem.²⁰⁰

Likewise, William Kennedy, Co-Chairman, Special Committee on Foreign Payments, New York City Bar, stated as follows:

What is the situation of the accused? In order to show that he has not violated a law, he may have to bring in evidence in the form of both testimony from foreign persons and documents from foreign entities which may simply be

¹⁹⁹ *Foreign Payments Disclosure*, *supra* note 11, at 82 (statement of Richard Darman, Assistant Sec'y for Policy, U.S. Dep't of Commerce).

²⁰⁰ *Unlawful Corporate Payments Act of 1977*, *supra* note 17, at 55 (statement of Robert Von Mehren, Chairperson, Ad Hoc Comm. on Foreign Payments, Ass'n of the Bar of the City of N.Y.).

beyond the compulsory process of our courts. And I think to enact a law which raises questions as to whether a person can fairly and effectively defend himself when he is accused of violation of that law is something you should consider very carefully in your subcommittee.²⁰¹

Despite vocal minority opposition to a direct criminal payment provision, S. 305 and H.R. 3815 both adopted a criminalization approach.

After more than two years of investigation, deliberation and consideration of the foreign corporate payments problem and the policy ramifications of such payments, and despite divergent views as to the problem and the difficult and complex issues presented, Congress completed its pioneering journey and passed the first law in the world governing domestic business conduct with *foreign* government officials in *foreign* markets. Speaking on the House floor on December 7, 1977, Representative Eckhardt summed up the journey and stated that the FCPA was “one of the more important pieces of legislation to be considered by the Congress this year.”²⁰²

In December 1977, the FCPA became law. President Carter’s signing statement states in full as follows.

I am pleased to sign into law S. 305, the Foreign Corrupt Practices Act of 1977 and the Domestic and Foreign Investment Improved Disclosure Act of 1977.

During my campaign for the Presidency, I repeatedly stressed the need for tough legislation to prohibit corporate bribery. S. 305 provides that necessary sanction.

I share Congress [sic] belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.

This law makes corrupt payments to foreign officials illegal under United States law. It requires publicly held corporations to keep accurate books and records and establish accounting controls to prevent the use of “off-the-books” devices, which have been used to disguise corporate bribes in the past. The law also requires more extensive disclosure of ownership of stocks registered with the [SEC].

These efforts, however, can only be fully successful in combating bribery and extortion if other countries and business itself take comparable action. Therefore, I hope progress will continue in the United Nations toward the negotiation of a treaty on illicit payments. I am also encouraged by the

²⁰¹ *Foreign Payments Disclosure*, *supra* note 11, at 179 (statement of Sen. William Kennedy, Co-chairman, Special Comm. on Foreign Payments, Ass’n of the Bar of the City of New York).

²⁰² 123 CONG. REC. 38,778 (1977) (statement of Rep. Bob Eckhardt).

International Chamber of Commerce's new Code of Ethical Business Practices.²⁰³

VI. THE FCPA AS A LIMITED STATUTE

The FCPA was a pioneering statute. Yet at the same time, the FCPA was intended to be a limited statute. This Part discusses that even though Congress was aware of a wide range of foreign corporate payments to a variety of recipients for a variety of reasons, it intended, and accepted in passing the FCPA, to capture only a narrow category of such payments. Among other things, Congress limited the FCPA's payment provisions to a narrow category of foreign recipients and further narrowed the range of actionable payments to those involving foreign government procurement or to influence foreign government legislation or regulations. In addition, Congress chose not to capture so-called facilitation payments given the difficult and complex business conditions encountered in many foreign markets.

A. *The Wide Range of Payments Discovered*

During Congress's multi-year investigation of the foreign corporate payments problem, it learned of a wide range of foreign corporate payments to a variety of recipients for a variety of reasons.

The SEC Report, which Congress placed great reliance on during its deliberation and consideration of the problem, contains an entire section titled "Recipients of the Payments" and stated, in pertinent part, as follows:

The nature of the recipient often has been an important factor in determining that a corporate payment was a disclosable event. Various classes of recipients have presented these considerations, including but not limited to government officials, commission agents and consultants of the paying company, and recipients of commercial bribery.

Government Officials: Typically, a corporation would not, in the ordinary course of business, make payments to government officials in their individual capacities. Such payments, therefore, are usually a form of bribery that, where material, would give rise to a disclosable event.

The Commission has observed payments to government officials for four principal purposes. First, corporate payments have been made in an effort to procure special and unjustified favors or advantages in the enactment or administration of the tax or other laws of the country in question. . . .

Second, corporate payments may be made with the intent to assist the company in obtaining or retaining government contracts. It may be possible to distinguish payments intended to secure the favorable exercise of judgment or discretion on behalf of the governmental body from situations where the

²⁰³ *Presidential Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill*, 13 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1909 (Dec. 20, 1977).

official, under applicable laws, regulations or customs, appears to have been permitted to act for suppliers in connection with government contracts and to be paid for such services. . . .

A third purpose for payments is to persuade low-level governmental officials to perform functions or services which they are obliged to perform as part of their governmental responsibilities, but which they may refuse or delay unless compensated. . . .

Another type of payment is the political contribution. Where these contributions are illegal under local law, they can be assimilated to bribery. . . .

Commercial Agents and Consultants: The Commission recognizes that corporations doing business abroad often engage the services of non-official nationals possessing specialized information with regard to business opportunities or relationships which are of assistance in securing or maintaining business. . . .

A variety of considerations, some legitimate and some questionable, may prompt the use of agents or consultants. . . .

. . . .
Commission or consultant payments substantially in excess of the going rate for such services may give rise to a disclosable event, depending upon the significance of the business involved. In many instances, this may suggest that a portion of the commission was, in fact, intended to be passed through to government officials or their designees to influence government action. . . .

Commercial Bribery: The Commission also has observed payments made to improperly influence a non-governmental customer's use of a company's product or services.²⁰⁴

The SEC Report was not the only categorization of foreign corporate payments presented to Congress during its investigation. In connection with a 1977 House hearing, Dr. Gordon Adams (Council on Economic Priorities) (CEP) discussed a review of approximately 175 company disclosures filed with the SEC as of November 1, 1976 regarding foreign corporate payments and he stated as follows:

Our investigation revealed several categories of payments, some of which are not covered by the legislation pending before this subcommittee. . . .

The first such category, and the most clearly illegal in the jurisdictions where paid, are those made to foreign government officials, from the most senior to the lowest administrative level. . . .

. . . .
The second major category covers payments to politicians and political parties, often during election campaigns. . . .

. . . .
The third category of payment is even more difficult to classify, since it covers a variety of questionable commercial practices by U.S. firms abroad [such as payments] . . . involv[ing] gifts and payments to employees of foreign customers, to obtain business or to celebrate a successful commercial relationship. . . .

²⁰⁴ SEC REPORT, *supra* note 2, at 7.

....
Still another questionable commercial practice concerns overbilling and illegal rebating to foreign customers. . . .

....
... The bill's language deals with the most prominent cases of questionable payments: Bribes paid to government officials to influence them in the performance of their duties. It also deals, though in looser language, with the problem of political contributions. . . .

....
Perhaps appropriately, the bill also does not deal with overseas business practices: payments, kickbacks, rebates involving private foreign customers and businesses. CEP found this practice to be equally common, and conceivably equally injurious to the reputation of American business abroad. This legislation may not be the appropriate context for handling this problem, but I mention it as an issue with which this subcommittee, the Congress and the Executive ought to be concerned.²⁰⁵

Congress could have legislated as to the wide range of foreign corporate payments discovered. Indeed, as discussed in Part IV above, certain of the bills introduced during the legislative process captured a wide range of foreign corporate payments. Yet in passing the FCPA, Congress intended to capture only a narrow range of foreign corporate payments.

B. The Narrow Range of Payments Captured by the FCPA

In passing the FCPA's payment provisions, 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 motivation it had in investigating the foreign corporate payments as well as recognition of the difficult and complex business conditions encountered in many foreign markets.

Senators Church and Proxmire, who lead congressional efforts on the problem, were clear as to the scope of the law they envisioned. Senator Church stated as follows during a 1975 hearing:

[L]et us be clear that we are not just talking about a little 'baksheesh' to grease the palm of some petty clerk in order to speed needed documents on their way through the bureaucratic labyrinth. What we are talking about is a concerted effort by the petroleum industry to buy favorable tax and energy legislation in a European country in which one U.S. company alone made over \$50 million in contributions to the government parties and members of the cabinet over a 9-year period.

²⁰⁵ *Unlawful Corporate Payments Act of 1977*, *supra* note 17, at 29–30, 36 (statement of Dr. Gordon Adams, Dir. of Military Research, Council on Econ. Priorities).

What we are talking about is an arms industry campaign to flood the Middle East with weapons, in which a U.S. aircraft company paid over \$100 million in agents' fees in one country to sell an airplane which has no competitor. A large part of that \$100 million is known to have ended up in the Swiss bank accounts of high military and civilian defense officials of the purchasing country.

I could go on with other examples, but it suffices to say that what is at issue here is a massive and widespread perversion of the free enterprise system.²⁰⁶

Reacting to the SEC Report, Senator Proxmire stated as follows:

On the one hand, the Commission provides in its report some loose guidelines on what kind of questionable foreign payments must be disclosed under existing law, based on the materiality doctrine. On the other hand, the guidelines are very elastic. They remind me of the comment attributed to a Supreme Court justice about pornography—I can't define it, but I know it when I see it. The SEC seems to be saying that they can't quite define what sort of bribe is material under existing law, but they know it when they see it.

I would submit that, unlike pornography, a bribe is fairly easy to define. In S. 3133, we define it as a payment to an official of a foreign government for the purpose of inducing him to use his influence to secure business for the issuer or influence legislation or regulations of his government.²⁰⁷

Senator Proxmire further stated as follows during a Senate hearing:

I recognize it is hard [to define a bribe], but we are not concerned so much about the low level grease payments. What we are talking about is the payment, as I say, to make a sale.

.....
What we are concerned about, as I say, and trying to get at . . . is bribery for the purpose of making sales abroad.²⁰⁸

Representatives Murphy and Eckhardt likewise stated as follows during a House hearing:

- “[T]his bill is not concerned with so-called grease or facilitating payments, such as may be necessary to some petty clerk to speed documents through a bureaucracy.”²⁰⁹

²⁰⁶ *Protecting U.S. Trade Abroad*, *supra* note 22, at 7 (statement of Sen. Frank Church, Member, Subcomm. on Int'l Trade, S. Comm. on Fin.).

²⁰⁷ *Prohibiting Bribes*, *supra* note 60, at 1–2 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

²⁰⁸ *Foreign and Corporate Bribes*, *supra* note 15, at 9, 12 (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

²⁰⁹ *Foreign Payments Disclosure*, *supra* note 11, at 2 (statement of Rep. John Murphy, Member, H. Comm. on Interstate and Foreign Commerce).

- “The bill does not address itself to ‘grease’ or ‘facilitating’ payments made to low-level clerical or ministerial government officials.”²¹⁰

Senate and House Reports evidence the limited nature of what would become the FCPA and that it would not capture all foreign corporate payments Congress learned of during its multi-year investigation.

The Senate Report as to S. 3664 that passed in 1976 and served as the basis for S. 305 stated as follows:

In drafting the bill . . . the Committee deliberately cast the language narrowly, in order to differentiate between such payments [to a foreign official corruptly intended to induce the recipient to use his influence to secure business, influence legislation or regulations] and low-level facilitating payments sometimes called “grease payments.”

Thus, [the bill] would not reach a small gratuity paid to expedite a shipment through Customs or the placement of a trans-Atlantic telephone call, to secure required permits, or to ensure that a corporation’s warehouses were not put to the torch. In other words, payments made to expedite the proper performance of duties may be reprehensible, but it does not appear feasible for the United States to attempt unilaterally to eradicate all such payments. However, where the payment is made to influence the placement of government contracts or to influence the formulation of legislation or regulations, such payment is prohibited.

. . . .
The Committee fully recognizes that the proposed law will not reach all corrupt payments overseas.²¹¹

The Senate Report as to S. 305, likewise stated as follows:

The statute covers payments made to foreign officials for the purpose of obtaining business or influencing legislation or regulations. The statute does not, therefore, cover so-called “grease payments” such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.

. . . .
The committee has recognized that the bill would not reach all corrupt overseas payments. . . .

. . . .
The scope . . . is limited by the requirement that the offer, promise, authorization, payment, or gift must have as a purpose inducing the recipient to use influence with the foreign government or instrumentality, or to refrain from performing any official responsibilities, so as to direct business to any person,

²¹⁰ *Unlawful Corporate Payments Act of 1977*, *supra* note 17, at 2 (statement of Rep. Bob Eckhardt, Chairman, Subcomm. on Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce).

²¹¹ S. REP. NO. 94-1031, at 6–7 (1976).

maintain an established business opportunity with any person, divert any business opportunity from any person or influence the enactment or promulgation of legislation or regulations of that government or instrumentality.²¹²

The House Report as to H.R. 3815 likewise stated as follows:

The bill's coverage does not extend to so-called grease or facilitating payments.

.....
The language of the bill is deliberately cast in terms which differentiate between such payments and facilitating payments, sometimes called "grease payments". In using the word "corruptly", the committee intends to distinguish between payments which cause an official to exercise other than his free will in acting or deciding or influencing an act or decision and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action. In defining "foreign official", the committee emphasizes this crucial distinction by excluding from the definition of "foreign official" government employees whose duties are essentially ministerial or clerical.

For example, a gratuity paid to a customs official to speed the processing of a customs document would not be reached by the bill. Nor would it reach payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event.

While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments. As a result, the committee has not attempted to reach such payments. However, where the payment is made to influence the passage of law, regulations, the placement of government contracts, the formulation of policy or other discretionary governmental functions, such payments would be prohibited.

The committee fully recognizes that the proposed law will not reach all corrupt payments overseas.²¹³

The following exchange between Representatives Broyhill and Eckhardt on the House floor during final passage of H.R. 3815 speaks to the scope of the legislation.

MR. BROYHILL. . . . One concern has been brought to my attention, which is that the bill does proscribe payments to foreign officials. It defines foreign officials, but in the definition it excludes ministerial and clerical employees. I wonder if the gentlemen from Texas could give us a little bit better idea of what this actually means.

²¹² S. REP. NO. 95-114, at 10-11, 17 (1977).

²¹³ H.R. REP. NO. 95-640, at 4-8 (1977).

.....
MR. ECKHARDT. The section is contained in the definition of the term "foreign official" which says:

Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.

I think the key language there is essentially ministerial or clerical.

MR. BROYHILL. What the gentlemen is saying is that it may be permissible to make a facilitating payment to a clerk for the purpose of getting goods off a dock, as long as the payment is to a person who spends most of his time performing so-called ministerial functions?

MR. ECKHARDT. That is right. And I think the gentleman should note that the exclusion is as to the person involved, rather than as to the act. So if a person's duties are essentially ministerial and clerical, the payment to him to do something like move goods off the dock, which he was probably under a ministerial duty to do anyway, would not constitute a bribe, because that person has no authority to do other essentially ministerial and clerical duties. It may be that he has chosen not to do them, and in that sense his activity is by his volition. But the test is whether or not what he should do, that is, the duties assigned to him, are essentially ministerial and clerical.

Payments to him, for instance, to complete a form that ought, in equity, to be completed, to give everybody equal treatment, to move the good off the dock which he will not move without a tip, a mordida, I think, as they call it in the Spanish language, a facilitating payment, or a grease payment, would not constitute a foreign bribe.

MR. BROYHILL. The gentlemen is talking about a payment that may have to be given to assure that his case or his document or his request is going to be considered, rather than be left at the bottom of the pile?

MR. ECKHARDT. Precisely.

MR. BROYHILL. This would not, in that case, be a payment that would be made for a "corrupt purpose"?

MR. ECKHARDT. That is correct, I think it is excluded in two ways. The payment is not made for a corrupt purpose, and it is not made to the classification of persons to whom payments made may constitute foreign bribes.

MR. BROYHILL. But, of course, we are talking about action that in this country we would not agree with. But everybody thought that this kind of activity is fairly common in other countries.

MR. ECKHARDT. I think, from what I have heard, that is correct. And that is the reason we have been careful to draft a bill around those practices which may be common but which are not of the nature of bribing an official to perform a discretionary duty which he would not otherwise have done but for the bribe.²¹⁴

As evident from the legislative activity discussed above, despite learning of a wide range of foreign corporate payments, Congress limited the FCPA's payment provisions to a narrow category of foreign recipients and further

²¹⁴ 123 CONG. REC. 36,306 (1977).

narrowed the range of actionable payments to those involving foreign government procurement or to influence foreign government legislation or regulations. Congressional intent on these issues is further evidenced by the recipient categories in the FCPA and the law's business purpose test as to prohibited payments.

1. *Recipient Category*

The FCPA defined "foreign official" to mean

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency or instrumentality. *Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.*²¹⁵

The FCPA's definition of "foreign official" thus did not include many payment recipient categories Congress learned of during its investigation. For instance, and as stated above, Congress learned of a number of questionable foreign commercial payments, including those made to induce a non-government customer's purchasing decisions. However, Congress chose not to capture payments to such recipients in its definition of "foreign official" or otherwise in the FCPA.

Moreover, Congress further narrowed the term "foreign official" by capturing only traditional foreign government officials performing official or public functions (except officials whose duties were essentially ministerial or clerical as stated above).²¹⁶ The legislative record evidences that Congress was aware of the existence of so-called state-owned or state-controlled enterprises ("SOEs") and that some of the questionable payments uncovered or disclosed may have involved such entities.

For instance during a House Hearing, Donald Baker, Deputy Assistant Attorney General, Antitrust Division, DOJ, stated as follows:

Foreign governments are becoming increasingly involved in the production, distribution and acquisition of goods and services, especially

²¹⁵ See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 102, 91 Stat. 1494, 1496, *amended by* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, tit. V, subtit. A, pt. 1, 102 Stat. 1415 *and by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended in scattered sections of 15 U.S.C.) (emphasis added).

²¹⁶ For more on the legislative history concerning "foreign official," see Declaration of Professor Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One Through Ten of the Indictment, *United States v. Carson*, No. SACR 09-0007-JVS (C.D. Cal. Feb. 21, 2011), *available at* <http://www.scribd.com/doc/49310598/U-S-v-Stuart-Carson-el-al-Declaration-of-Professor-Michael-Koehler>.

primary commodities, such as oil, bauxite, and coffee. This involvement increases the opportunities and incentives to induce governmental conduct (by bribery and other techniques) in the service of private anticompetitive practices. It also increases the opportunities and incentives for particular foreign governmental officials—both in their official and personal capacities—to extract payments from private firms as a condition for access to products or markets influenced by such governments.²¹⁷

In Senate testimony, Ian MacGregor, Chairman, AMAX Inc., informed Senator Joseph Biden as follows:

[A] big problem [his company faces is] interface with something that is a phenomenon outside of the United States, increasingly Government-controlled businesses run in many cases by officials whose compensation is generally regarded as inadequate by the people in other parts of the world, and it does offer a temptation.

The biggest area of problem is in the interface between our business organizations and these Government and quasi-Government industrial establishments.²¹⁸

In certain of the bills introduced during the legislative process to address the foreign corporate payments problem, the definition of “foreign government” expressly included SOEs. These bills were introduced in both the Senate and the House during both the 94th and 95th Congresses. For instance, in 1976 S. 3741 was introduced in the Senate and H.R. 15149 was introduced in the House.²¹⁹ Both bills defined “foreign government” to include, among other things, “a corporation or other legal entity established or owned by, and subject to control by, a foreign government.”²²⁰ Similarly, in June 1977, H.R. 7543 was introduced in the House and defined “foreign government” to include “a corporation or other legal entity established, owned, or subject to managerial control by a foreign government.”²²¹ As to S. 3741 and H.R. 15149, an American Bar Association (ABA) committee informed the Chair of the House subcommittee holding hearings on these bills in a letter included in the legislative record that the definition of “foreign government” in these bills, specifically the portion of the definition referring to “a corporation or other legal entity established or owned by, and subject to control by, a foreign government” was “somewhat ambiguous” given that, among other things, “all entities operating within a jurisdiction are in some sense ‘subject to control by’

²¹⁷ *American Multinational Corporations Abroad*, *supra* note 7, at 87 (statement of Donald Baker, Deputy Assistant. Att’y Gen., Antitrust Div., U.S. Dep’t of Justice).

²¹⁸ *Foreign and Corporate Bribes*, *supra* note 15, at 63 (statement of Ian MacGregor, Chairman, AMAX Inc.).

²¹⁹ *See* S. 3741, 94th Cong. (1976); H.R. 15149, 94th Cong. (1976).

²²⁰ *Id.*

²²¹ H.R. 7543, 95th Cong. (1977).

the government within whose boundaries they exist”²²² The ABA committee suggested a “more precise definition of this aspect of the definition of ‘foreign government’” and proposed the following language: “a legal entity which a foreign government owns or controls as though an owner.”²²³

Despite being aware of SOEs, exhibiting a capability for drafting a definition that expressly included SOEs in other bills, and being provided a more precise way to describe SOEs, Congress chose however not to include such definitions or concepts in the FCPA.

Congressional intent and acceptance of the FCPA’s limitations discussed above would again seem directly linked to the primary foreign policy motivation it had in investigating the foreign corporate payments as well as recognition of the difficult and complex business conditions encountered in many foreign markets.

2. *Business Purpose*

The FCPA’s payment provisions also contained a limiting “business purpose” test. The December 1977 Conference Report stated as follows:

The scope of the prohibition [in the Senate bill] was limited by the requirement that the offer, promise, authorization, payment, or gift must have as a purpose inducing the recipient to use his influence with the foreign government or instrumentality, influencing the enactment or promulgation of legislation or regulations of that government or instrumentality or refraining from performing any official responsibilities, so as to direct business to any person, maintain an established business opportunity with any person or divert a business opportunity from any person.

The House amendment was similar to the Senate bill; however, the scope of the House amendment was not limited by the “business purpose” test. . . .

. . . .
. . . [T]he conferees clarified the scope of the prohibition by requiring that the purpose of the payment must be to influence any act or decision of a foreign official (including a decision not to act) or to induce such official to use his influence to affect a government act or decision so as to assist an issuer in obtaining, retaining or directing business to any person.²²⁴

²²² See *Foreign Payments Disclosure*, *supra* note 11, at 216 (citing letter from the American Bar Ass’n, Fed. Reg. of Sec. Comm., Section of Corp. Banking and Bus. Law to Rep. John Murphy, Member, H. Comm. on Interstate and Foreign Commerce).

²²³ *Id.*

²²⁴ H.R. REP. NO. 95-831, at 11–12 (1977) (Conf. Rep.). The House Bill prohibited payments to a “foreign official” for purposes of “influencing any act or decision of such foreign official in his official capacity” or “inducing such official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.” 123 CONG. REC. 36,303 (1976). In other words, the House Bill did not include the additional condition that the payment be “in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person”

In short, despite learning of a wide range of foreign corporate payments to a variety of recipients and for a variety of reasons, Congress intended, and accepted in passing the FCPA, to capture only a narrow range of such payments.

VII. CONCLUSION

The FCPA did not appear out of thin air. Rather real events and real policy reasons motivated Congress to act upon learning of the foreign corporate payments problem. Knowledge and understanding of specific events that prompted congressional concern, what about those events motivated Congress to act, the divergent views within the government as to how to act, the difficult and complex issues Congress encountered, and the various legislative responses which led to enactment of the FCPA is critical to informing the present and addressing the future. So too is the limited nature of the law that Congress passed. As the FCPA approaches thirty-five years old and as enforcement enters a new era, the story of the FCPA's enactment remains important and relevant to government agencies charged with enforcing the FCPA, those subject to the FCPA, and policy makers contemplating FCPA reform. This Article has sought to tell the FCPA's story through original voices of actual participants who shaped the law in the hopes of informing public debate on the FCPA at this critical point in its history.

as did the Senate Bill. *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, *amended by* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, tit. V, subtit. A, pt. 1, 102 Stat. 1415 *and by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended in scattered sections of 15 U.S.C.); H.R. REP. NO. 95-831, at 11-12 (1977) (Conf. Rep.).