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The Dark World of Interpreting the Foreign Corrupt Practices Act: Arguments, Cases and Critiques Illuminating Whether Employees of State Owned Enterprises are "Foreign Officials"

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THE DARK WORLD OF INTERPRETING THE FOREIGN CORRUPT PRACTICES ACT:

ARGUMENTS, CASES AND CRITIQUES ILLUMINATING WHETHER EMPLOYEES OF STATE OWNED ENTERPRISES ARE "FOREIGN OFFICIALS"

Christopher Hoffmann[*]

I. INTRODUCTION

Forged in the post-Watergate era's furor to remove corruption, the Foreign Corrupt Practices Act ("FCPA" or the "Act") stands as Congress' response to a 1976 Securities and Exchange Commission ("SEC") report wherein more than four hundred corporations admitted to bribing foreign officials.[1] When Congress passed the FCPA the following year, President Carter's signing statement indicated he shared Congress' belief that bribery is "ethically repugnant and competitively unnecessary."[2]

Judicial scrutiny of the FCPA remains elusive.[3] In many cases, the government is left to determine the FCPA's meaning through its prosecution theories.[4] The government has theorized that the term "instrumentality" within the definition of "foreign official" encompasses state owned enterprises ("SOEs").[5] This notion expands FCPA liability beyond the bribery of traditional government officials.

Recently, some FCPA defendants have questioned this prosecution theory by challenging the government's interpretation of "foreign official." The reason is clear: if the Act did not apply to the bribery of SOE employees, the government could not prosecute this type of bribery under the FCPA. Consequently, a defendant's success on this issue would limit prosecutable conduct under the FCPA.

This note is meant to encourage FCPA defendants to raise "foreign official" challenges. Thoroughly examining the sparse case law on this issue can assist future FCPA defendants to improve their arguments, avoid prior pitfalls, and increase the potential for success on this debatable issue.

Section II provides background information on FCPA ambiguity and enforcement trends. Section III examines the general legal arguments made in support and against

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[1] Jennifer Dawn Taylor, Comment, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption*, 61 LA. L. REV. 861, 862 (2001).

[2] Jimmy Carter, Foreign Corrupt Practices and Investment Disclosure Bill; Statement on Signing § 305 into Law, 2 PUB. PAPERS 2157 (Dec. 20, 1977) available at http://www.presidency.ucsb.edu/ws/?pid=7036.

[3] Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 909 (2010).

[4] *Id.*

[5] Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006) (amended 1998).

"instrumentality" encompassing SOEs. Differences in approaches and responses in the cases are noted. Section IV explores the pertinent individual cases and court decisions. Section V consists of observations and suggestions for future FCPA defendants to present stronger arguments on this matter.

II. BACKGROUND

The FCPA's anti-bribery provisions prohibit "corruptly" paying, offering to pay, promising to pay, or authorizing the payment of money, a gift, or "anything of value" to a "foreign official" in order to "obtain or retain business."[6] The FCPA applies to United States ("U.S.") companies, U.S. citizens, foreign companies filing with the SEC, or any person within U.S. territory.[7]

Ambiguity is the legislation's major flaw.[8] Key terms such as "corruptly," "anything of value," and "obtain or retain business" remain undefined. Even where a term is defined, the value is minimal. The FCPA defines the term "foreign official" as:

> [A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[9]

Ambiguity exists in the term "foreign official" because the term "instrumentality" within the definition remains undefined. Without judicial guidance, the government bases its prosecution theories on its own interpretation of the term "foreign official."

Initially, opportunities for judicial interpretation of the FCPA arose infrequently. For the first twenty-five years the FCPA existed the government barely enforced the law.[10] The SEC and Department of Justice ("DOJ") pursued approximately two cases per year.[11] Internationally, the U.S. received little anti-bribery support until the Organization for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") in 1997.[12]

Since 2004, FCPA enforcement by both the DOJ and the SEC has increased dramatically. In 2009 alone, the amount of the DOJ's FCPA cases was thirteen times its 2003 level.[13] This increase is no accident. In 2010, Former Assistant Attorney General Lanny A.

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[6] Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006) (amended 1998).

[7] *Id.*

[8] *See* Taylor, *supra* note 1, at 861 ("[T]he legislation ambiguously defines prohibited conduct and its provisions lack an adequate standard by which to determine the nature of contemplated activity.").

[9] Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-2(h)(2)(A) (2006) (amended 1998).

[10] Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act — 1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 103 (2010).

[11] *Id.*

[12] James D. Painter, *The New U.K. Bribery Act — What U.S. Lawyers Need to Know*, 82 PA. B.A. Q. 172, 172 (2011).

[13] Bixby, *supra* note 10, at 105.

Breuer remarked that the country is in a "new era of FCPA enforcement" and that "[the DOJ's] FCPA enforcement is stronger than it's ever been – and getting stronger."[14]

In 2009, defendants in *United States v. Nguyen* (the "*Nguyen* defendants") brought the first motion to dismiss the alleged FCPA violations against them based on the argument that SOE employees were not "foreign officials" under the Act. A year later, defendants in *United States v. Esquenazi* (the "*Esquenazi* defendants") brought a similar motion. Subsequently, similar motions by defendants in *Aguilar v. United States* (the "Lindsey defendants"), *Carson v. United States* (the "*Carson* defendants"), and *O'Shea v. United States* (the "*O'Shea* defendant") followed. With these recent cases, courts have begun unraveling ambiguity in the term "foreign official" and deciding whether the FCPA applies when bribery targets SOE employees.

III. GENERAL LEGAL ARGUMENTS

A. Defendants' Arguments and the Government's Responses

i. Ordinary Meaning

In the absence of a definition, courts construe a statutory term in accordance with its ordinary meaning.[15] The term "instrumentality" within the definition of "foreign official" remains undefined. Dictionaries may help courts ascertain a term's ordinary meaning.[16] *Black's Law Dictionary* defines "instrumentality" as "[a] thing used to achieve an end or purpose" or "[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body."[17] *Webster's II New College Dictionary* defines "instrumentality" as "[t]he quality or state of being instrumental."[18] In turn, "instrumental" is defined as "serving as a means or agency: implemental" or "of, relating to, or done with an instrument or tool."[19] The *Carson* court understood these definitions to mean that the term

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[14] Lanny A. Breuer, Assistant Attorney General, Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), available at http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html. Mr. Breuer departed from the office of Assistant Attorney General on March 1st, 2013. Press Release, Dep't of Justice, Assistant Attorney General Lanny A. Breuer Announces Departure from Department of Justice (Jan. 30, 2013), *available at* http://www.justice.gov/opa/pr/2013/January/13-ag-128.html.

[15] *See, e.g.*, Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (citing Burns v. Alcala, 420 U.S. 575, 580-581 (1975))); Johnson v. United States, 130 S.Ct. 1265, 1270-71 (2010) (construing "physical force" in the Armed Career Criminal Act's definition of "violent felony" as meaning "violent force." (citing Bailey v. United States, 516 U.S. 137, 144-145 (1995))); Smith v. United States, 508 U. S. 223, 228 (1993) (construing firearm "use" as trading firearms for drugs).

[16] *See, e.g.*, FCC v. AT & T Inc., 131 S.Ct. 1177, 1182 (2011) (consulting dictionaries to construe "personal" as not applying to artificial "persons" like corporations).

[17] BLACK'S LAW DICTIONARY 870 (9th ed. 2009).

[18] WEBSTER'S II NEW COLLEGE DICTIONARY 589 (3rd ed. 2005). In the *Aguilar* case, the Lindsey defendants offered and the court adopted this definition of "instrumentality."

[19] *Id.*

"generally refers to something that is used to achieve an end—an intermediary or means through which something is accomplished."[20]

Although they all attempt to resolve the ordinary meaning of "instrumentality," most FCPA defendants avoid or castigate its dictionary definition.[21] The *Nguyen* and *Esquenazi* defendants avoided dictionary consultation in favor of examining the FCPA's overall purpose.[22] The *O'Shea* defendant called dictionary definitions of "instrumentality" unhelpful.[23] The *Carson* defendants dismissed dictionary usage as unavailing and, if applied, would "largely beg the question."[24] Instead, the *Carson* defendants stated that "instrumentality," as used plainly in the statute, does not encompass SOEs.[25] Only the Lindsey defendants offered dictionary definitions of "instrumentality," which the court readily adopted.[26] This stands in stark contrast to the DOJ's dictionary usage, which states that "instrumentality" unambiguously refers to an entity achieving a government end or purpose.[27]

ii. Structure and Purpose

Courts are also aware that the structure and purpose of the statute requires interpretation.[28] In the context of the FCPA, the purpose of the statute undoubtedly concerns bribery. The issue lies in the extent of the bribery prohibited.

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[20] United States v. Carson, No. 09-CR-077-JVS, 2011 WL 5101701, *4 (C. D. Cal. 2011).

[21] Defendants' Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 5-6, United States v. Nguyen, No. 08-CR-522-TJS, (E. D. Pa. 2009) [hereinafter *Nguyen* Defendants' Motion]; Defendants' Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 4-5, United States v. Esquenazi, No. 09-CR-21010-JEM, (S. D. Fl. 2010) [hereinafter *Esquenazi* Defendants' Motion]; Defendants' Notice of Motion and Motion to Dismiss Counts One Through Ten of the Indictment; Memorandum of Points and Authorities in Support Thereof at 11-12, United States v. Carson, No. 09-CR-077-JVS, (C. D. Cal. 2011) [hereinafter *Carson* Defendants' Motion]; Defendants' Notice of Motion and Motion to Dismiss the First Superseding Indictment; Memorandum of Points and Authorities; [Proposed] Order (Filed Under Separate Cover) at 6-8, United States v. Aguilar, 783 F.Supp.2d 1108 (C.D. Cal. 2011) (No. 10-CR-1031) [hereinafter Lindsey Defendants' Motion]; Defendant O'Shea's Opposed Motion to Dismiss Counts One Through Seventeen of the Indictment at 3, United States v. O'Shea, No. 09-CR-629, (S. D. Tex. 2011)[hereinafter *O'Shea* Defendant's Motion].

[22] *Nguyen* Defendants' Motion, *supra* note 21, at 6; *Esquenazi* Defendants' Motion, *supra* note 21, at 5.

[23] *O'Shea* Defendant's Motion, *supra* note 21.

[24] *Carson* Defendants' Motion, *supra* note 21, at 12.

[25] *Id.*

[26] United States v. Aguilar, 783 F.Supp.2d 1108, 1113 (C.D. Cal. 2011).

[27] Government's Opposition to Defendants' Amended Motion to Dismiss Counts One Through Ten of the Indictment; Memorandum of Points and Authorities at 16, United States v. Carson, No. SA CR 09-00077-JVS, (C. D. Cal. 2011) [hereinafter Government's *Carson* Opposition Brief]; Opposition to Defendants' Motion to Dismiss the First Superseding Indictment; Memorandum of Points and Authorities; Exhibits at 11, United States v. Aguilar, 783 F.Supp.2d 1108 (C.D. Cal. 2011) (No. 10-CR-1031) [hereinafter Government's Lindsey Opposition Brief]; Response of the United States to Defendant's Motion to Dismiss Indictment at 4-5, United States v. O'Shea, No. H-09-CR-629 (S. D. Tex. 2011) [hereinafter Government's *O'Shea* Opposition Brief].

[28] CompuCredit Corp. v. Greenwood, 132 S.Ct. 665, 675 (2012) ("[P]roof of Congress' intent may also be discovered in the history or purpose of the statute in question.")(Sotomayor, J., concurring)(citation omitted); King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) ("[A] statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context.")(citations omitted).

Initially, FCPA defendants used Congressional purpose minimally. The *Nguyen* and *Esquenazi* defendants asserted that the purpose of the FCPA was to criminalize improper payments to officials performing a public function.[29] The defendants applied canons of construction to show Congress' intent involved government function, not control.[30]

The Lindsey and *Carson* defendants expanded usage of arguments involving structure and purpose. Three aspects of the FCPA are shown to support the idea that the FCPA's target was the bribery of foreign public officials. First, the FCPA's "foreign official" definition suggests concern with public officials because employees of "public international organizations," politicians, and candidates are explicitly included.[31] Second, the FCPA's routine governmental action exception only applies to governmental action.[32] Third, the FCPA's affirmative defense for bona fide expenditures related to contracts with a foreign government or agency does not mention instrumentalities.[33] This suggests Congress believed the terms "agency" and "instrumentality" covered comparable subject matter.[34]

The most powerful response the government makes related to the FCPA's structure and purpose involves the routine governmental action exception. Essentially, the surplusage canon shows that the exception requires "instrumentality" to include SOEs.[35] Since SOEs undertake many of the enumerated governmental actions listed in the exception, it would be illogical for SOEs to be excluded from the FCPA's grasp.

iii. *Noscitur a sociis, Ejusdem generis,* and the Canon Against Surplusage

Courts may also consult the canons of statutory interpretation in resolving ambiguities in the definition of "foreign official."[36] The *noscitur a sociis* canon, the *ejusdem generis* canon, and the canon against surplusage have all been noticeable features of these challenges.[37] Those canons are particularly relevant because "instrumentality" exists within a list that includes the terms "department" and "agency."

FCPA defendants have applied the *noscitur a sociis* and *ejusdem generis* canons.[38] Applying the *noscitur a sociis* canon, "words grouped in a list should be given related

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[29] *Nguyen* Defendants' Motion, *supra* note 21, at 7; *Esquenazi* Defendants' Motion, *supra* note 21, at 6.

[30] *Nguyen* Defendants' Motion, *supra* note 21, at 2; *Esquenazi* Defendants' Motion, *supra* note 21, at 2.

[31] *Carson* Defendants' Motion, *supra* note 21, at 16-17; Lindsey Defendants' Motion, *supra* note 21, at 9.

[32] *Carson* Defendants' Motion, *supra* note 21, at 17; Lindsey Defendants' Motion, *supra* note 21, at 10.

[33] *Carson* Defendants' Motion, *supra* note 21, at 18.

[34] *Id.*

[35] Government's *Carson* Opposition Brief, *supra* note 27, at 20-23; Government's Lindsey Opposition Brief, *supra* note 27, at 12-14; Government's *O'Shea* Opposition Brief, *supra* note 27.

[36] *See, e.g.*, Hassett v. Welch, 303 U.S. 303, 313 (1938) ("Resort is had to canons of constructions as an aid in ascertaining the intent of the Legislature.").

[37] *Nguyen* Defendants' Motion, *supra* note 21, at 14-15; *Esquenazi* Defendants' Motion, *supra* note 21, at 13; *Carson* Defendants' Motion, *supra* note 21, at 12-15; Lindsey Defendants' Motion, *supra* note 21, at 8-9; *O'Shea* Defendant's Motion, *supra* note 21, at 3-4; Government's *Carson* Opposition Brief, *supra* note 26, at 20-23; Government's Lindsey Opposition Brief, *supra* note 26, at 12-14; Government's *O'Shea* Opposition Brief, *supra* note 26.

[38] *Nguyen* Defendants' Motion, *supra* note 21, at 14-15; *Esquenazi* Defendants' Motion, *supra* note 21, at 13; *Carson* Defendants' Motion, *supra* note 21, at 12-15; Lindsey Defendants' Motion, *supra* note 21, at 8-9; *O'Shea* Defendant's Motion, *supra* note 21, at 3-4.

meaning."[39] With the *ejusdem generis* canon, general words following specific words in a list are construed to be similar in nature to the specific words.[40] As the Lindsey defendants noted, "department" and "agency" limit the scope of "instrumentality" to entities only existing in government, at the government's pleasure, funded by government, oriented to policies and/or public policy with defined powers uniform within each state.[41] Most likely, the term "instrumentality" would apply to entities such as government branches, ministries, bureaus, boards, administrations, commissions, and militaries, among others.[42] SOEs, however, are created for countless reasons and share no necessarily identifiable characteristics between departments and agencies.[43] Thus, SOEs must be excluded from the meaning of "instrumentality."

FCPA defendants do not uniformly apply both canons. The *Nguyen*, *Esquenazi* and Lindsey defendants applied the *ejusdem generis* canon.[44] The *Carson* and *O'Shea* defendants only claim to apply the *nosictur a sociis* canon. This marks a departure from prior cases, showing a lack of consensus on applying the *ejusdem generis* canon.

In response to the FCPA defendants' use of the *noscitur a sociis* and *ejusdem generis* canons, the government applies the canon against surplusage.[45] This principle states that courts should interpret all of a statute's portions to have independent meaning.[46] The DOJ has argued that parts of the "routine governmental action" exception are rendered meaningless if SOEs are not "instrumentalities." This exception exempts payments made to "foreign officials" to facilitate the performance of "routine governmental action" from the FCPA's purview. "Routine governmental action" is further defined as applying to such activity as mail pick-up, providing phone service, power, and water supply.[47] Since foreign SOEs can and do provide these services, "instrumentality" must include SOEs for the "routine governmental action" exception to have full meaning.

The limited responses from the FCPA's defendants about the canon against surplusage use in the context of the "routine governmental action" exception have varied.[48]

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[39] Dole v. United Steelworkers of America, 494 U.S. 26, 36 (1990) (quoting Massachusetts v. Morash, 490 U.S. 107, 114-115 (1989)).

[40] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001).

[41] Lindsey Defendants' Motion, *supra* note 21, at 8.

[42] *Id.*

[43] Reply to Government's Opposition to Defendants' Motion to Dismiss the First Superseding Indictment at 4, United States v. Aguilar, 783 F.Supp.2d 1108 (C.D. Cal. 2011) (No. CR 10-CR-1031(A)-AHM) [hereinafter Lindsey Defendants' Reply Brief].

[44] *Nguyen* Defendants' Motion, *supra* note 21, at 14-15; *Esquenazi* Defendants' Motion, *supra* note 21, at 13; Lindsey Defendants' Motion, *supra* note 21, at 8-9.

[45] Government's *Carson* Opposition Brief, *supra* note 27, at 20-23; Government's Lindsey Opposition Brief, *supra* note 27, at 12-14; Government's *O'Shea* Opposition Brief, *supra* note 27.

[46] *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used." (citing United States v. Menasche, 348 U.S. 528, 538-539 (1955))).

[47] 15 U.S.C. § 78dd-2(h)(4)(A).

[48] Defendant's Reply in Support of Amended Motion to Dismiss Counts One Through Ten of the Indictment at 12-13, United States v. Carson (C. D. Cal. 2011) (No. 09-CR-077-JVS)[hereinafter *Carson* Defendants' Reply Brief]; Lindsey Defendants' Reply Brief, *supra* note 43, at 5-6; Defendant O'Shea's Reply to the Response of the United States to Defendant's Motion to Dismiss Counts One Through Seventeen of the Indictment at 8-9, United States v. O'Shea (S. D. Tex.)(No. 09-CR-629)[hereinafter *O'Shea* Defendant's Reply Brief];

The Lindsey and *O'Shea* defendants emphasized that a "foreign official" is determined by the nature of the entity, not the nature of the service, in question.[49] The *Carson* defendants asserted that Congress was concerned only with corruption payments to governmental officials.[50]

iv. The Absurdity Doctrine

Another consideration for courts is the applicability of the absurdity doctrine. Under this venerable maxim, courts should not construe statutes in manners that create absurd results.[51] All the FCPA defendants have argued that if the meaning "instrumentality" includes SOEs it would lead to absurd results.[52] The most common example of absurdity cited is the extent of people that would qualify as a "foreign official." Essentially, under the government's interpretation of the term, American employees of a foreign SOE, living and working within the U.S., would be considered "foreign officials," regardless of the circumstances surrounding the SOE's existence.[53]

In articulating this argument, the *Nguyen* defendants stated, and the *Esquenazi* defendants repeated, that "mere control of an entity by a foreign government no more makes that entity's employees 'foreign officials' than control of General Motors by the U.S. Department of the Treasury makes all GM employees U.S. officials."[54] The Lindsey defendants saw absurdity in American citizens working within the U.S. ever being considered "foreign officials."[55] Additional considerations such as the suddenness, temporariness, or crisis surrounding a foreign state's nationalization of a private company would be irrelevant under the government's analysis.[56] The government's argument implicates that a private company's reliance on a foreign state alone renders its employees "foreign officials" under the FCPA.

Government's *Carson* Opposition Brief, *supra* note 27, at 16; Government's Lindsey Opposition Brief, *supra* note 27, at 11; Government's *O'Shea* Opposition Brief, supra note 27.

[49] Lindsey Defendants' Reply Brief, *supra* note 43, at 6; *O'Shea* Defendants' Reply Brief, *supra* note 48, at 8.

[50] *Carson* Defendants' Reply Brief, *supra* note 48, at 13.

[51] *See* Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 454 (1989) ("When the literal reading of a statutory term would compel 'an odd result,' this Court searches beyond the bare text for other evidence of congressional intent."); *see also* United States v. Kirby, 74 U.S. 482, 483 (1868)("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence, and it will always be presumed that the legislature intended exceptions to its language which would avoid results of this character.").

[52] *Nguyen* Defendants' Motion, *supra* note 21, at 9; *Esquenazi* Defendants' Motion, *supra* note 21, at 7; *Carson* Defendants' Motion, *supra* note 21, at 19-21; Lindsey Defendants' Motion, *supra* note 21, at 12-13; *O'Shea* Defendant's Motion, *supra* note 21, at 6-7.

[53] *Nguyen* Defendants' Motion, *supra* note 21, at 2; *Esquenazi* Defendants' Motion, *supra* note 21, at 2; *Carson* Defendants' Motion, *supra* note 21, at 19-21; Lindsey Defendants' Motion, *supra* note 21, at 13.

[54] *Nguyen* Defendants' Motion, *supra* note 21, at 2; *Esquenazi* Defendants' Motion, *supra* note 21, at 2.

[55] Lindsey Defendants' Motion, *supra* note 21, at 13.

[56] *Id.*

Courts are reluctant, however, to decide issues of law based on hypothetical examples.[57] A hypothetical example, by its very nature, is a theoretical situation. It is not the actual situation before the court. Also, given the limitations of language it would be a rare occurrence that a hypothetical absurdity does not exist in a statute.[58] This reluctance to construe statutes based upon hypothetical absurdity serves as the government's counter to the absurdity doctrine's applicability.[59]

v. Congress Knows How to State...

Another relevant canon of statutory construction in determining whether the term "instrumentality" includes SOEs, lies in the adage that "Congress knows how to say" when a particular word is to be given a broad or narrow meaning.[60] Although FCPA defendants have disagreed in formulation, this requires comparing the FCPA with other federal statutes using the term "instrumentality."[61]

Examining other statutes, Congress has defined "instrumentality" to explicitly include SOEs. Two prime examples exist for this broad definition of "instrumentality" in the Foreign Sovereign Immunities Act ("FSIA") and the Economic Espionage Act ("EEA").[62] The FSIA defines "instrumentality" to include "any entity...which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."[63] In the EEA, the term "foreign instrumentality" explicitly includes business organizations, corporations, firms and other entities "substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government."[64] These examples tend to show that "instrumentality" has a narrower meaning that only includes SOEs when Congress explicitly defines "instrumentality" to include them.

Also showing Congressional understanding of the term's narrowness is when statutes use additional language to include SOEs. One significant example is in §1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Dodd-Frank states that the term "foreign government" means a "foreign government, a department,

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[57] *See, e.g.*, Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 584 (1998) ("[W]e are reluctant...to invalidate legislation on the basis of [the absurdity doctrine's] hypothetical application to situations not before the Court." (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978))).

[58] *See* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (noting the limitations of language may cause hypothetical absurdity).

[59] Government's *Carson* Opposition Brief, supra note 27, at 39-42; Government's Lindsey Opposition Brief, supra note 27, at 25-26; Government's *O'Shea* Opposition Brief, supra note 27, at 13.

[60] *See* YULE KIM, CONGRESSIONAL RESEARCH SERV., STATUARY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 19 (2008) (detailing the nature and use of the "Congress knows how to say" canon of construction).

[61] The *Nguyen* and *Esquenazi* defendants purport to apply the *in pari materia* canon, but examine non-bribery related statutes in a manner similar to the other FCPA defendants. The Lindsey defendants state Congress was aware it could include SOEs within the meaning of "instrumentality," but chose not to do so. Only the *Carson* and *O'Shea* defendants use this explicit terminology. Despite differing verbiage, the arguments are analogous.

[62] Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 (b) (2006); Economic Espionage Act, 18 U.S.C. § 1839 (1) (2006).

[63] Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 (b) (2006).

[64] Economic Espionage Act, 18 U.S.C. § 1839 (1) (2006).

agency, or instrumentality of a foreign government, or a company owned by a foreign government."[65] If "instrumentality" already included SOEs, it would render meaningless the language about "a company owned by a foreign government." The SEC reinforced this demarcation with §1504's final rules, which clarified a "company owned by a foreign government" was a "company… majority-owned by a foreign government."[66] With this rule, if Congress used "instrumentality" to included SOEs it would render the clarification entirely unnecessary.

Initial usage of this argument was made by the *Nguyen* defendants. The *Nguyen* defendants analyzed two statutes, the FSIA and the Employee Retirement Income Security Act ("ERISA"). The *Nguyen* defendants' showed that courts and the Internal Revenue Service have construed "instrumentality" within ERISA as involving entities performing governmental functions, not private interests.[67] Other than the *Esquenazi* defendants' parroting of the *Nguyen* defendants arguments, FSIA and ERISA have not been used equally by later defendants. Defendants in every "foreign official" challenge have used FSIA.[68] ERISA has not been used outside the *Nguyen* and *Esquenazi* motions. The reason for this may lay in the particular emphasis on government control versus government function highlighted by the *Nguyen* defendants.

Interestingly, the *Nguyen* defendants claim to apply the *in pari materia* canon in this analysis of the FSIA and ERISA. Under the *in pari materia* canon, courts should construe the same term in similar statutes to have equivalent meaning.[69] The *in pari materia* canon is only applicable when statutes share the same subject.[70] The statutes analyzed by the *Nguyen* defendants are plainly not anti-bribery statutes. While this may appear inconsequential, the government nonetheless continuously recycles the *in pari materia* canon in its arguments.[71] Since the *in pari materia* canon is highly flawed in the FCPA's context due to the lack of comparable anti-bribery statutes, both FCPA defendants and the government should avoid its erroneous application.

Compared to the original examination of federal statutes in *Nguyen* and *Esquenazi*, more recent FCPA defendants have analyzed the EEA and Dodd-Frank. Despite this

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[65] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, §1504, 124 Stat. 1376 (codified in scattered sections of 5, 12, 15, and 42 U.S.C.).

[66] Payments By Resource Extraction Issuers, 77 Fed. Reg. 56365, 56368 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249).

[67] *Nguyen* Defendants' Motion, *supra* note 21, at 9.

[68] *Nguyen* Defendants' Motion, *supra* note 21, at 9; *Esquenazi* Defendants' Motion, *supra* note 21, at 8; *Carson* Defendants' Motion, *supra* note 21, at 30-31; Lindsey Defendants' Motion, *supra* note 21, at 12; *O'Shea* Defendant's Motion, *supra* note 21, at 4.

[69] *See* Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (plurality opinion) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." (quoting Northcross v. Bd of Ed. of Memphis City Schools, 412 U.S. 427, 428 (1973) (per curium))).

[70] Kokoszka v. Belford, 417 U.S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (*or statutes on the same subject*) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature…" (quoting Brown v. Duchesne, 19 How. 183, 194 (1857))) (emphasis added).

[71] Government's *Carson* Opposition Brief, *supra* note 27, at 24-26; Government's Lindsey Opposition Brief, *supra* note 27, at 21-23; Government's *O'Shea* Opposition Brief, *supra* note 27, at 10-12. The government also habitually points out that more explicit definitions place greater limits on terms, rather than less.

similarity, the defendants diverged in their usage of Dodd-Frank. The *Carson* and *O'Shea* defendants analyze Dodd-Frank like the FSIA or EEA.[72] The Lindsey defendants used Dodd-Frank in a footnote as an example of the use of the *noscitur a sociis* and *ejusdem generis* canons of construction to limit the meaning of the term "instrumentality."[73] As these cases predate the promulgation of §1504's final rules, FCPA defendants' arguments have not addressed them thus far.

vi. The Rule of Lenity and Unconstitutional Vagueness

The rule of lenity holds that if ambiguity exists despite application of the tools of statutory interpretation, the court must resolve the uncertainty in the defendant's favor.[74] A statute is unconstitutionally vague if its language does not give fair warning about the prohibited conduct.[75] If a court examining "foreign official" exhausts the tools of statutory construction and ambiguity remains, then it should grant the FCPA defendants' motion.[76]

The rule of lenity and unconstitutional vagueness arguments are typically the final arguments offered by FCPA defendants. The essence of these arguments is that the FCPA, as it applies to SOEs, remains ambiguous despite the government's interpretation.[77] At the very minimum, this ambiguity requires a decision in the defendants' favor. Alternatively, an ordinary person could not determine whether their conduct was criminalized under the FCPA.[78] These arguments repeat the defendants' theme of portraying the statute's ambiguity as rendering it inapplicable.

The government weakens both these arguments by emphasizing the high threshold necessary for their application.[79] The rule of lenity requires severe uncertainty as to Congress' intent with the language of the statute.[80] Also, statutes declared unconstitutionally vague by

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[72] *Carson* Defendants' Motion, *supra* note 21, at 32; *O'Shea* Defendant's Reply Brief, *supra* note 49, at 7.

[73] Lindsey Defendants' Motion, *supra* note 21, at 9 n. 8.

[74] *See* United States v. Granderson, 511 U.S. 39, 54 (1994) ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.").

[75] *See* McBoyle v. United States, 283 U.S. 25, 27 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.").

[76] *Nguyen* Defendants' Motion, *supra* note 21, at 15-17; *Esquenazi* Defendants' Motion, *supra* note 21, at 14-15; *Carson* Defendants' Motion, *supra* note 21, at 35-39; Lindsey Defendants' Motion, *supra* note 21, at 21; *O'Shea* Defendant's Motion, *supra* note 21, at 7.

[77] *Carson* Defendants' Motion, *supra* note 21, at 35-39; Lindsey Defendants' Motion, *supra* note 21, at 21; *O'Shea* Defendant's Motion, *supra* note 21, at 7.

[78] *Nguyen* Defendants' Motion, *supra* note 21, at 17-18; *Esquenazi* Defendants' Motion, *supra* note 21, at 16-17; *Carson* Defendants' Motion, *supra* note 21, at 39-48; Lindsey Defendants' Motion, *supra* note 21, at 23-24; *O'Shea* Defendant's Motion, *supra* note 21, at 6-7.

[79] Government's Response in Opposition to Defendant Esquenazi's Corrected and Amended Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 9, 10 n 5, United States v. Esquenazi, No. 09-CR-21010-JEM, (S .D. Fl. 2010) [hereinafter Government's *Esquenazi* Opposition Brief]; Government's *Carson* Opposition Brief, *supra* note 26, at 42, 45; Government's Lindsey Opposition Brief, *supra* note 26, at 35, 38-39.

[80] Barber v. Thomas, 130 S. Ct. 2499, 2508-9 (2010) ("[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute,' such that

facial challenges typically implicate the First Amendment.[81] Other statutes are typically viewed under an "as-applied challenge."[82] As-applied challenges fail when the statute is reasonably clear and the defendant's conduct was criminal, which necessitates a factual based inquiry.[83] Thus, if whether an SOE is an "instrumentality" is a question of fact, the defendants' motions would fail.

vii. Legislative History

Courts generally use legislative history to resolve ambiguities when other tools of statutory construction prove unavailing.[84] Usage of legislative history, however, is not without controversy.[85] The Supreme Court has stated Congress' "authoritative statement is the statutory text, not the legislative history."[86] The government has criticized FCPA defendants' emphasis on the legislative history instead of the actual text of the statute.[87] Nevertheless, the FCPA's legislative history is relevant to defendants for three general reasons.

First, Congress rejected proposed bills explicitly addressing SOEs before and during the FCPA's enactment. In the year before the FCPA's enactment, legislators in both the House and Senate considered anti-bribery bills that included foreign state owned corporations.[88] A year later, the House considered an analogous bill that would have plainly applied to SOEs.[89] During the FCPA's enactment, the Senate bill vaguely defined foreign officials.[90] The House's more precise definition of "foreign official" became the definition enacted.[91] Unlike its predecessors, H.R. 3815 did not explicitly include SOEs in its definition

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the Court must simply 'guess as to what Congress intended.'" (quoting Muscarello v. United States, 524 U.S. 125, 139 (1998))).

[81] United States v. Mazurie, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." (quoting United States v. National Dairy Products Corp., 372 U.S. 29 (1963))).

[82] *See* United States v. Lanier, 520 U.S. 259, 267 (1997).

[83] *Id.* ("[T]he touchstone [before criminal liability may be imposed] is whether the statute, either standing alone or as construed by the courts, made it reasonably clear at the time of the charged conduct that the conduct was criminal.").

[84] Children's Hosp. and Health Center v. Belshe, 188 F.3d 1090, 1096 (1999) ("If ambiguity exists, we may use legislative history as an aid to interpretation.").

[85] *See* Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998) (noting the general arguments made in support of and against the use of legislative history in statutory construction).

[86] Chamber of Commerce of U.S. v. Whiting, 131 S.Ct. 1968, 1980 (2011) (quoting Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005)).

[87] Government's *Carson* Opposition Brief, *supra* note 27, at 14; Government's Lindsey Opposition Brief, *supra* note 27, at 10.

[88] *See* Declaration of Professor Michael J. Koehler in Support of Defendants' Motion To Dismiss Counts One Through Ten of the Indictment at ¶ 16 (d), United States v. Carson, No. 09-CR-077-JVS, 2011 WL 5101701 (C.D. Cal. 2011) [hereinafter Koehler Declaration] (observing the proposed definitions for "foreign official" in S. 3741, H.R. 15149, and H.R. 7543 would have explicitly included SOEs).

[89] *Id.*

[90] S. 305, 95th Cong. (1977).

[91] H.R. 3815, 95th Cong. § 30A(e)(2) (1977).

of "foreign official."[92] This suggests Congressional awareness that SOEs could be part of the definition of "foreign official," but ultimately the bargained definition did not include them.

Second, Congress focused on routine governmental action during the 1988 amendment process. In 1988, Congress altered the language of the term "foreign official."[93] Congress removed the exclusion of employees doing ministerial or clerical work from the definition of "foreign official," and carved out a separate "routine governmental action" exception.[94] Congress' concern for governmental action indicates a narrower focus on bribery involving traditional government functions.

Third, the FCPA's 1998 amendments to implement the OECD Convention show that Congress chose to narrowly alter "foreign official" despite the Convention's broader equivalent. The OECD Convention definition of "foreign public officials" explicitly mentions "public enterprises."[95] The 1998 amendments altered "foreign official" to include officials at "public international organizations," but not "public enterprises."[96] This exclusion evidences Congressional unwillingness to include SOEs in the FCPA.[97]

Initial use of legislative history by FCPA defendants was rather subdued. The *Nguyen* defendants did not analyze the FCPA's legislative history beyond a committee report statement that Congress intended the 1998 FCPA amendments to implement the OECD Convention, and citing what became the implementing legislation itself.[98] The *Esquenazi* defendants then redrafted the *Nguyen* defendants' cursory legislative history analysis.[99]

Despite perfunctory treatment in early "foreign official" challenges, legislative history has become the cornerstone of FCPA defendants' arguments. Comprehensive analysis of the FCPA legislative history began in *Carson* with the Declaration of Professor Michael J. Koehler ("Koehler Declaration" or "the Declaration"). The 143 page Koehler Declaration extensively analyzes the FCPA's legislative history. The Declaration examines FCPA predecessors, the FCPA's enactment and amendments, and recent legislative developments.[100] Demonstrating its significance, both the Lindsey and *O'Shea* defendants have cited to the Koehler Declaration.[101] On appeal, the *Esquenazi* defendants also cited the Koehler Declaration.[102]

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[92] *Id.*

[93] Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1415 (1988) (amended 1998).

[94] *See* Koehler Declaration, *supra* note 87, at ¶¶ 281-383 (discussing the legislative history relevant to the creation of the express "routine governmental action" exception).

[95] Organization for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, arts. 1, 4(a), Dec. 17, 1997.

[96] The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, sec. 2 §§a(1)(A), a(2)(A), 112 Stat. 3302 (1998).

[97] *Carson* Defendants' Motion, *supra* note 21, at 28-29; Lindsey Defendant's Motion, *supra* note 21, at 20.

[98] *Nguyen* Defendants' Motion, *supra* note 21, at 14.

[99] *Esquenazi* Defendants' Motion, *supra* note 21, at 12-13.

[100] *See* Koehler Declaration, *supra* note 88, at ¶ 19.

[101] Lindsey Defendants' Motion, *supra* note 21, at 15-17; *O'Shea* Defendant's Motion, supra note 21, at 5.

[102] Corrected Initial Brief of Appellant at 37-39, United States v. Rodriguez (11th Cir. 2012) (No. 11 15331-C) [hereinafter Rodriguez Appeal]; Brief of Appellant at 36-37, United States v. Esquenazi (11th Cir. 2012) (No. 11-15331-C) [hereinafter Esquenazi Appeal].

Nevertheless, differences do exist. The degree of arguments made about the FCPA's legislative history is a distinguishable feature between the *Aguilar* and *Carson* motions.[103] By comparison, the Lindsey defendants provided a truncated legislative history in a different structural form than the *Carson* defendants. Despite stylistic differences, some key distinctions exist among the motions. First, the *Carson* defendants admit "there is nothing in the FCPA's legislative history addressing the 'any department, agency, or instrumentality' portion of the 'foreign official' definition."[104] Second, the *Carson* defendants analyze Congressional purpose along with legislative history whereas the Lindsey defendants apply Congressional purpose in asserting the plain meaning of "foreign official."[105] Third, the *Carson* defendants note Congress used the terms "foreign government official," "foreign public official," and "foreign official" interchangeably.[106]

FCPA defendants' use of legislative history is not flawless, and the government's response highlights its deficiencies. The government finds it compelling that Congress chose a broad word like "instrumentality" in the definition of "foreign official" rather than specific enumerated lists found in prior bills.[107]

In making this point in *Carson*, *Aguilar,* and *O'Shea*, the government has relied on a lone Seventh Circuit opinion.[108] In *National-Standard Co. v. Adamkus*, the court found it significant that Congress "chose [a] broad, general term" over an enumerated list.[109] This broadness was demonstrated in the legislative history. Citing a specific and remarkably unambiguous reference in the Hazardous and Solid Waste Amendments of 1984's ("HSWA") legislative history, the court justified the conclusion that Congress intended "hazardous waste" to apply to all waste meeting the statutory definition of "hazardous waste."[110]

Continued reliance on *Adamkus* may be undeserved. In *Adamkus*, a congressional report explicitly referred to Congressional intent for a broad term. The FCPA's legislative history does not show unequivocal support for a broad definition of "foreign official" in any report.[111] Nothing in the FCPA's initial legislative history, or the prior anti-bribery bills, nears unequivocal support for a broad reading of "foreign official" akin to the HSWA report. Despite this, no FCPA defendant has concerned itself with the government's citation of *Adamkus*.

The government has made other arguments involving the FCPA's legislative history. With the "routine governmental action" exception, the government has asserted that the exception necessarily requires the FCPA to apply to SOEs. They argue that certain "routine governmental action," such as electricity and telecommunications, are administered

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[103] *Compare Carson* Defendants' Motion, *supra* note 20, at 22, 25-26, *with* Lindsey Defendants' Motion, *supra* note 21, at 10-12. The *O'Shea* defendant's legislative history analysis relies heavily on the *Carson* defendants' reasoning.

[104] *Carson* Defendants' Motion, *supra* note 20, at 22.

[105] *Carson* Defendants' Motion, *supra* note 20, at 25; Lindsey Defendants' Motion, *supra* note 21, at 10-12.

[106] *Carson* Defendants' Motion, *supra* note 20, at 26.

[107] Government's *Carson* Opposition Brief, *supra* note 27, at 36-38; Government's Lindsey Opposition Brief, *supra* note 27, at 32-34; Government's *O'Shea* Opposition Brief, *supra* note 27, at 17.

[108] Government's *Carson* Opposition Brief, *supra* note 27, at 37; Government's Lindsey Opposition Brief, *supra* note 27, at 32-33; Government's *O'Shea* Opposition Brief, *supra* note 27, at 17.

[109] National-Standard Co. v. Adamkus, 881 F.2d 352, 360 (1989).

[110] *Id.*

[111] Koehler Declaration, *supra* note 88.

and controlled by foreign SOEs.[112] The government's arguments about the 1998 amendments tend to tie into arguments made about the *Charming Betsy* doctrines application. The argument is that Congress did not need to include "public enterprises" in the definition of "foreign official." "Instrumentality" was broad enough to bring the U.S. into full compliance with the OECD Convention once "public international organizations" was added to the definition.[113] These arguments attempt to show that the legislative history is clear, or at least unambiguous, as to whether "instrumentality" includes SOEs.

A recent development to the government's legislative history argument has been to directly attack the Koehler Declaration. In the *Esquenazi* appeal, the DOJ urged the appellate court to not even consider the Koehler Declaration.[114] In an effort to discredit the Declaration, the government claimed it was a selective analysis of the legislative history, was not reviewed as a scholarly article, and that Koehler was not a "disinterested expert."[115] It remains to be seen whether this attack on the Koehler Declaration's veracity will become part of the government's future general arguments.

B. The Government's Arguments and Defendants' Responses

i. A Premature Motion to Dismiss

In every "foreign official" challenge, the government has argued that the defendants are prematurely requesting a ruling on the sufficiency of the government's evidence.[116] The government asserts that the indictment states that the crime charged is in accordance with Rule 7(c)(1) of the Federal Rules of Criminal Procedure.[117] This rule requires indictments contain "a plain, concise and definite written statement of the essential facts constituting the offense charged."[118]

The Supreme Court established a two-prong test in *Hagner v. United States* to determine an indictment's sufficiency under Rule 7(c)(1). The *Hagner* test requires that an indictment (1) states the elements of the crime charged and (2) "sufficiently apprise[s] the defendant of what he must be prepared to meet."[119] Applying *Hagner*, the government insists

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[112] *See* Government's *Carson* Opposition Brief, *supra* note 27, at 21-23; Government's Lindsey Opposition Brief, *supra* note 27, at 14; Government's *O'Shea* Opposition Brief, *supra* note 27, at 6-7.

[113] *See* Government's *Carson* Opposition, *supra* note 27, at 30; Government's Lindsey Opposition, *supra* note 27, at 21; Government's *O'Shea* Opposition Brief, *supra* note 27, at 9.

[114] Brief for the United States at 42 n. 13, United States v. Esquenazi (11th Cir. 2012) (No. 11-15331-C).

[115] *Id.*

[116] *See* Government's Response in Opposition to Defendants' Second Motion to at 2, United States v. Nguyen, No. 08-CR-522-TJS, (E. D. Pa. 2009) [hereinafter Government's *Nguyen* Opposition Brief]; Government's *Esquenazi* Opposition Brief, *supra* note 80, at 1; Government's *Carson* Opposition Brief, supra note 27, at 4-9; Government's Lindsey Opposition Brief, *supra* note 27, at 7-15; Government's *O'Shea* Opposition Brief, *supra* note 27, at 2-4.

[117] *See* Government's *Nguyen* Opposition Brief, *supra* note 116, at 5; Government's *Esquenazi* Opposition Brief, *supra* note 80, at 6; Government's *Carson* Opposition Brief, *supra* note 27, at 9; Government's Lindsey Opposition Brief, *supra* note 27, at 8; Government's *O'Shea* Opposition Brief, *supra* note 27, at 2.

[118] FED R. CRIM. P. 7(c)(1).

[119] Hagner v. United States, 285 U.S. 427, 431 (1932) ("The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in

the indictment sufficiently states the elements of the offense and allows the defendant a basis to claim double jeopardy.[120] By the government's reasoning, the motion to dismiss is premature because SOE employees are properly alleged "foreign officials" in the indictment.[121] If true, the indictment's factual burden is met. Whether an SOE is an "instrumentality" would be a question of fact, not law, to be decided through trial evidence.

Only the Lindsey and *Carson* defendants have explicitly challenged the government's prematurity argument.[122] The Lindsey defendants insisted their motion raised a purely legal argument that a FCPA indictment is inappropriate for cases involving SOEs.[123] The *Carson* defendants responded that *Hagner* was unavailing.[124] The *Hagner* test cannot prevent an indictment's pretrial dismissal if the charge does not state a federal offense.[125] If the FCPA does not restrict bribery of SOE employees, as the defendants assert, then the government's indictment would fail to state an offense.[126]

ii. Interpreting the "Any" Modifier

The use of the modifier "any" may also illuminate the meaning of "foreign official." By its very nature, the term "any" suggests broadness.[127] In the FCPA, three important observations can be made about the "any" modifier. First, the "foreign official" definition uses the phrase "any department, agency, or instrumentality."[128] Second, the "foreign official" definition uses the "any" modifier five times.[129] Third, the FCPA as a whole uses the "any" modifier a total of twenty-seven times.[130] The government has repeatedly used these observations about the "any" modifier's ample use to support the notion that Congress intended for a broad construction of the FCPA.[131]

Nonetheless, the "any" modifier does not exist in a vacuum. The extent of the "any" modifier can only be known in relation to the term it modifies. It is imprudent to give

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case any other proceedings are taken against him for similar offenses, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.").

[120] *See* Government's *Nguyen* Opposition Brief, *supra* note 116, at 5; Government's *Esquenazi* Opposition Brief, *supra* note 80, at 7; Government's *Carson* Opposition Brief, *supra* note 27, at 11; Government's Lindsey Opposition Brief, *supra* note 27, at 8; Government's *O'Shea* Opposition Brief, *supra* note 27, at 2.

[121] Government's *Nguyen* Opposition Brief, *supra* note 115, at 5; Government's *Esquenazi* Opposition Brief, *supra* note 79, at 7; Government's *Carson* Opposition Brief, *supra* note 27, at 11; Government's Lindsey Opposition Brief, *supra* note 27, at 8; Government's *O'Shea* Opposition Brief, *supra* note 27, at 2.

[122] *See Carson* Defendants' Reply Brief, *supra* note 48, at 2-4; Lindsey Defendants' Reply Brief, *supra* note 43, at 1-2.

[123] Lindsey Defendants' Reply Brief, *supra* note 43, at 2.

[124] *Carson* Defendants' Reply Brief, *supra* note 48, at 2-4.

[125] *Id.* at 4.

[126] *Id.*

[127] *See, e.g.*, United States v. Gonzales, 520 U.S. 1, 5 (1996) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of what-ever kind.'") (quoting Webster's Third New International Dictionary, 97 (1976)).

[128] Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-2(h)(2)(A) (2006).

[129] *Id.*

[130] Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1-3.

[131] Government's *Carson* Opposition Brief, *supra* note 27, at 19-20; Government's Lindsey Opposition Brief, *supra* note 27, at 19-21; Government's *O'Shea* Opposition Brief, *supra* note 27, at 10.

credence to the modifier without knowing the limitations of the attached term. This linguistic argument is the FCPA defendants' general response to the government's use of the "any" modifier argument.[132] This approach is based less on the law and more on the common usage of the term.

iii. The *Charming Betsy* Doctrine

The *Charming Betsy* doctrine states "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[133] In the context of the FCPA, the government argues that courts should interpret the statute to comport with the OECD Convention.[134] Signed by the U.S. in 1997 as an international effort to combat bribery, Congress amended the FCPA in 1998 to implement the OECD Convention by adding "public international organizations" to the definition of "foreign official."[135] Examining the OECD Convention's definition of "foreign public official," the government asserts that the term was meant to apply to SOEs.[136]

The *Charming Betsy* doctrine is only applicable, however, if the potentially harmonious construction violates neither the statute nor the treaty.[137] This concept comes from the case *Whitney v. Robertson*, and its progeny, as the counter-canon to the *Charming Betsy* doctrine.[138] In essence, treaties and statutes are on equal footing.[139] A conflict between a treaty and a statute is resolved in favor of Congress' last enactment.[140] This is relevant to the OECD Convention as the treaty was non-self executing, requiring Congressional enactment. Therefore, the FCPA's 1998 amendments supersede the OECD Convention. FCPA defendants have argued Congress did not entirely implement the OECD Convention with the FCPA's 1998 amendments, thus making the *Charming Betsy* doctrine inapplicable.[141]

This general argument by FCPA defendants has stayed remarkably consistent through the cases. Both the *Nguyen* and *Esquenazi* defendants raised the issue that Congress did not implement the OECD Convention with the 1998 amendments to the FCPA in their

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[132] *Carson* Defendants' Reply Brief, *supra* note 48, at 12; Lindsey Defendants' Reply Brief, *supra* note 43, at 5; *O'Shea* Defendant's Reply Brief, *supra* note 48, at 11.

[133] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118-19 (1804).

[134] Government's *Carson* Opposition Brief, *supra* note 27, at 30; Government's Lindsey Opposition Brief, *supra* note 27, at 15; Government's *O'Shea* Opposition Brief, *supra* note 27, at 8.

[135] Government's *Carson* Opposition Brief, *supra* note 27, at 30; Government's Lindsey Opposition Brief, *supra* note 27, at 16; Government's *O'Shea* Opposition Brief, *supra* note 27, at 8.

[136] Government's *Carson* Opposition Brief, *supra* note 27, at 28-33; Government's Lindsey Opposition Brief, *supra* note 27, at 14-19; Government's *O'Shea* Opposition Brief, *supra* note 27, at 7-9.

[137] Whitney v. Robertson, 124 U.S. 190, 194 (1888) (explaining by the Constitution of the United States, a treaty and a statute are placed on the same footing, and if the two are inconsistent, the one last in date will control, provided the stipulation of the treaty on the subject is self-executing).

[138] *See* Michael Franck, Note, *The Future of Judicial Internationalism: Charming Betsy, Medellin v. Dretke, and the Consular Rights Dispute*, 86 B.U.L. REV. 515, 531-532, 540-545 (2006) (describing Whitney and its progeny as the antithesis of the Charming Betsy doctrine and supporting the *Charming Betsy* doctrine over the *Whitney* standard).

[139] Whitney, 124 U.S. at 194.

[140] *Id.*

[141] *Carson* Defendants' Motion, *supra* note 21, at 15; Lindsey Defendants' Motion, *supra* note 21, at 9; *O'Shea* Defendant's Motion, *supra* note 21, at 9.

Motions to Dismiss.[142] The Lindsey, *Carson*, and *O'Shea* defendants continued this argument in their reply briefs.[143] The more recent FCPA defendants have articulated this general argument far beyond the initial remarks made by the *Nguyen* and *Esquenazi* defendants. For example, these newer defendants have analyzed the OECD Convention's commentary and noted that other signatories have not applied their resulting anti-bribery statutes to SOEs.[144] Overall, the FCPA defendants' argument challenges the government's reliance on Congressional silence in a plausible and sensible way. This could be the reason for the defendants' consistency on this point.

iv. Persuasive Precedent

The fact that no court has granted any FCPA defendant's motion on this issue supports the interpretation that "foreign official" includes employees of SOEs. In *Esquenazi*, the government referred to the denied motion in *Nguyen*.[145] Similarly, in *Carson*, *Aguilar*, and *O'Shea* the government mentioned prior denials of similar "foreign official" challenges.[146]

Additionally, courts have accepted more than thirty five guilty pleas in FCPA prosecutions involving SOEs.[147] This is significant, as Rule 11 of the Federal Rules of Criminal Procedure requires district courts to have a factual basis that the crime was committed before accepting a guilty plea.[148] If the FCPA did not apply to the bribery of employees of SOEs, the government suggests that acceptance of these guilty pleas would be in error.

FCPA defendants have sought to distinguish their cases from prior cases, especially *Nguyen* and *Esquenazi*. The *O'Shea* defendant noted that these prior cases gave little or no substantive analysis of the FCPA, and did not examine the legislative history.[149] Both the Lindsey and *Carson* defendants distinguish *Nguyen* and *Esquenazi* on the grounds that they raise a factual issue about the term "foreign official."[150] In *Nguyen* and *Esquenazi*, the defendants argued that the term "instrumentality" only applied to business entities performing government functions. The courts dismissed the defendants' arguments as factually based and premature.[151] Distinguishing their case from *Nguyen* and *Esquenazi*, the Lindsey defendants

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[142] *Nguyen* Defendants' Motion, *supra* note 21, at 13-14; *Esquenazi* Defendants' Motion, *supra* note 21, at 12-13.

[143] *Carson* Defendants' Reply Brief, *supra* note 48, at 14-17; Lindsey Defendants' Reply Brief, *supra* note 43, at 7-12; *O'Shea* Defendant's Reply Brief, *supra* note 48, at 9-11.

[144] *Carson* Defendants' Reply Brief, *supra* note 48, at 16; Lindsey Defendants' Reply Brief, *supra* note 43, at 10-12; *O'Shea* Defendant's Reply Brief, *supra* note 48, at 10.

[145] Government's *Esquenazi* Opposition Brief, *supra* note 79, at 9 n. 2.

[146] Government's *Carson* Opposition Brief, *supra* note 27, at 17-19; Government's Lindsey Opposition Brief, *supra* note 27, at 27; Government's *O'Shea* Opposition Brief, *supra* note 27, at 14.

[147] Government's *Carson* Opposition Brief, *supra* note 27, at 18-19; Government's Lindsey Opposition Brief, *supra* note 27, at 27-28; Government's *O'Shea* Opposition Brief, *supra* note 27, at 14.

[148] FED R. CRIM. P. 11(b)(3).

[149] *O'Shea* Defendant's Motion, *supra* note 21, at 2-3.

[150] Lindsey Defendants' Motion, *supra* note 21, at 3-4 n. 4; *Carson* Defendants' Motion, *supra* note 21, at 11.

[151] Government's Lindsey Opposition Brief, *supra* note 27, at 3-4 n. 5.

argued that their dismissal motion was based on the notion that the term "instrumentality" excludes SOEs as a matter of law.[152]

Although both the *Carson* and the Lindsey defendants distinguish *Nguyen* and *Esquenazi* as representing a premature factually based issue, the *Carson* argument is more detailed, but less explicit.[153] Whereas the Lindsey defendants initially distinguish *Nguyen* and *Esquenazi* in a footnote and reiterate the distinction in their reply brief, the *Carson* defendants discuss the cases at length in their initial brief. The *Carson* defendants point out the similarities between the briefs in those cases, as well as the serial filing of motions in *Esquenazi*, which may have "colored the court's view."[154] Instead of emphasizing the flaws of the arguments, the Lindsey defendants pointed out the distinctiveness of their own argument. The Lindsey defendants articulated their arguments, unlike the arguments made about "instrumentality" in *Nguyen* and *Esquenazi*, as not factual in nature, and not based on the concept of governmental control. Despite a considerable discussion, the importance of this point is lost in the more detailed *Carson* motion and is shown in the *Carson* court's decision, which appears to assume both prior cases were on point.[155]

Later FCPA defendants have also distinguished the *Aguilar* case. The *Carson* defendants perceive the *Aguilar* decision as distinguishable because the entity involved was considered a "public entity" and not an SOE.[156] The *O'Shea* defendant identified the *Aguilar* decision as different because that court believed a factual dispute existed as to whether the SOE in question was performing a "government function."[157]

As for guilty pleas in FCPA prosecutions involving SOEs, FCPA defendants note that pleas are insignificant in determining the limits of what constitutes a "foreign official."[158] The FCPA defendants tend to offer general observations about plea agreements and Rule 11. The *O'Shea* defendant noted that plea agreements do not convert the government's interpretation into the law.[159] Similarly, the *Carson* defendants state that a court's acceptance of a guilty plea does not require statutory interpretation.[160] The Lindsey defendants go beyond these general observations and into Rule 11's legislative history.[161] They note that, during the drafting of the 1966 amendments to Rule 11, Congress clearly rejected a requirement that courts evaluate the prosecution's legal conclusions before accepting a guilty plea.[162]

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[152] Lindsey Defendants' Motion, *supra* note 21, at 3.

[153] *Carson* Defendants' Motion, *supra* note 21, at 11; Lindsey Defendants' Motion, *supra* note 21, at 3.

[154] *Carson* Defendants' Motion, *supra* note 21, at 11.

[155] *See* United States v. Carson, No. 09-CR-077-JVS, 2011 WL 5101701, *8-9 (C. D. Cal. 2011).

[156] *Carson* Defendants' Reply Brief, *supra* note 48, at 11.

[157] *O'Shea* Defendant's Reply Brief, *supra* note 48, at 3.

[158] Lindsey Defendants' Reply Brief, *supra* note 43, at 18; *Carson* Defendants' Reply Brief, *supra* note 48, at 11; *O'Shea* Defendant's Reply Brief, *supra* note 48, at 1.

[159] *Id.* at 1-2.

[160] *Carson* Defendants' Reply Brief, *supra* note 48, at 11.

[161] Lindsey Defendants' Reply Brief, *supra* note 43, at 18.

[162] *Id.*

IV. Specific Cases, Decisions, and Comparisons

A. Nguyen

In their motion to dismiss, the *Nguyen* defendants focused on the particular language of the indictment's allegation that the targeted employees' companies were "controlled" by a government agency, department, or instrumentality. [163] The defendants argued that government function, not control, was the defining characteristic of the term "instrumentality." [164] Applying this interpretation of "instrumentality," the bribes' targets would not be considered "foreign officials" as government control of an SOE was not tantamount to the performance of government function.[165]

In supporting this interpretation of "instrumentality," the *Nguyen* defendants gave cursory treatment to many of the FCPA defendants' general legal arguments. For example, the motion briefly mentions the applicability of the *ejusdem generis* canon of statutory construction.[166] In approximately half a page, the defendants argue an "instrumentality" must perform a governmental function akin to functions performed by governmental agencies and departments.[167] No further elaboration was provided beyond that statement.

The *Nguyen* Court passed ruling on the substantive claims made by the defendants. The motion was denied without opinion shortly after the Court received the government's response.[168] The Court appeared persuaded by the government's argument that the motion was really "a premature request for a ruling on the sufficiency of the government's evidence before any of that evidence has been presented."[169] Thus, the Court avoided a substantive determination on the "foreign official" element and allowed the government to present its case.[170]

B. Esquenazi

In the year following *Nguyen*, the *Esquenazi* defendants challenged the notion that SOE employees were "foreign officials" under the FCPA. The *Esquenazi* defendants' arguments parallel, and do not elaborate upon, the arguments offered in *Nguyen.* Aside from the facts, the precise wording of the *Esquenazi* motion appears virtually identical to the *Nguyen* motion. Even the cases cited are the same, despite different applicable Circuit Court precedent. The government highlighted the striking similarities between the *Nguyen* and *Esquenazi* motions in its response.[171]

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[163] *Nguyen* Defendants' Motion, *supra* note 21, at 1.

[164] *Id.* at 6.

[165] *Id.*

[166] *Id.* at 9-10.

[167] *Id.* at 14-15.

[168] Order Denying Motion to Dismiss, United States v. Nguyen, No. 08-CR-522-TJS, (E. D. Pa. 2009).

[169] Government's *Nguyen* Opposition Brief, *supra* note 117, at 1.

[170] *Id.*

[171] Government's *Esquenazi* Opposition Brief, *supra* note 80, at 9 n. 2.

Despite the similarities to the arguments made in *Nguyen*, the *Esquenazi* Court actually issued a perfunctory three-page written opinion.[172] Without addressing the defendants' substantive arguments, the Court held that the indictment allegations were sufficient to withstand the Motion to Dismiss.[173] The Court did, however, disagree that the definition of "foreign official" was unconstitutionally vague because "persons of common intelligence would have a fair notice of this statute's prohibitions."[174]

The subsequent conviction of the *Esquenazi* defendants is currently being appealed. One criticism of the *Esquenazi* defendants' "foreign official" challenge was that it was a "greenhorn" effort.[175] With new counsel, the *Esquenazi* defendants presented arguments that more fully addressed matters such as the FCPA's legislative history.[176] The outcome of these appeals is currently pending.

C. Aguilar

After *Esquenazi,* the next court ruling on whether employees of SOEs were "foreign officials" under the FCPA occurred in *Aguilar*. As occurred in *Nguyen* and *Esquenazi*, the *Aguilar* Court denied the defendants' motion.[177] Unlike the preceding case, however, the *Aguilar* Court issued an opinion addressing the defendant's substantive arguments.

Central to the decision was the government's use of the surplusage canon.[178] The *Aguilar* Court characterized the idea of excluding SOEs from the meaning of "instrumentality" as an "all or nothing" approach, because SOEs do not always share the same characteristics as "departments" or "agencies."[179] According to the Court, the defendants' logic "implicitly concedes some state-owned corporations can and do share the characteristics of departments and agencies."[180] The Court also found, in *dicta*, that the *Charming Betsy* doctrine was persuasive and the legislative history was ultimately inconclusive.[181] The *Aguilar* Court also avoided applying *Nguyen* and *Esquenazi* as persuasive precedent to the case at hand.[182]

While denying the motion, the *Aguilar* Court set forth non-exclusive characteristics an "instrumentality" could share with a "department" or "agency" for FCPA purposes. These characteristics include whether (1) the entity provides a public service; (2) the foreign

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[172] *See* Order Denying Defendant Joe Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness, United States v. Esquenazi, No. 09-CR-21010-JEM (S. D. Fl. 2010) [hereinafter *Esquenazi* Decision] (denying the *Esquenazi* defendants' motion).

[173] *Id.* at 2-3.

[174] *Id.* at 3.

[175] Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. Tol. L. Rev. 99, 117 (2011).

[176] Rodriguez Appeal, *supra* note 103; Esquenazi Appeal, *supra* note 103.

[177] United States v. Aguilar, 783 F.Supp.2d 1108, 1120 (C.D. Cal. 2011).

[178] *Id.* at 1114.

[179] *Id.* at 1115.

[180] *Id.*

[181] *Id.* at 1117, 1119.

[182] Although in its addendum denying the government's request for judicial notice that the SOE involved in the case was a "decentralized public entity" and not a "corporation," the court does mention the government used prior cases in its arguments.

government appoints key officers and directors of the entity; (3) the foreign government finances the entity; (4) the foreign government vests exclusive or controlling power in the entity; and (5) the public perceives the entity to be performing official government functions.[183] The Court is, however, indefinite on when the existence of these characteristics would make an SOE an "instrumentality." While attempting to clarify, it leaves the importance of the factors unresolved and invites judicial formulation of other considerations.[184]

D. Carson

As in all of the preceding cases, the Court denied the *Carson* defendants' motion.[185] Like *Aguilar*, this decision addressed the merits of the defendants' "foreign official" argument. Ultimately, the Court determined that whether a SOE is an "instrumentality" within the meaning of "foreign official" is a question of fact.[186]

Similar to the *Aguilar* Court, the *Carson* Court also listed several non-exhaustive factors that may help resolve whether an SOE is an "instrumentality." The enumerated factors are (1) the foreign state's characterization of the entity and its employees; (2) the foreign state's degree of control over the entity; (3) the purpose of the entity's activities; (4) the entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions; (5) the circumstances surrounding the entity's creation; and (6) the foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).[187]

Despite both providing factorial considerations, noticeable differences exist in the reasoning of the *Aguilar* and *Carson* decisions. One difference involves the rejection of the defendant's *noscitur a sociis* argument. Guided by the purpose of the statute, the *Carson* Court found the *noscitur a sociis* canon inapplicable, as its application would work an "impressible narrowing of a statute intended to mount a broad attack on government corruption."[188] Another difference is that the *Carson* Court did not examine the FCPA's legislative history.[189] Instead, the Court found the FCPA's language clear, its statutory scheme coherent and consistent, and resort to the legislative history unnecessary.[190] The *Carson* Court also did not analyze the *Charming Betsy* doctrine that the *Aguilar* Court found persuasive.[191]

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[183] United States v. Aguilar, 783 F.Supp.2d 1108, 1115 (C.D. Cal. 2011).

[184] *See* Dominique T. Fasano, Note, *United States v. Aguilar: District Court Attempts Clarification of the Foreign Corrupt Practices Act By Further Defining "Foreign Official"*, 20 B.U. L. REV.. 489, 498 (2012) ("This [decision] begs the question as to what other characteristics would qualify a state-owned corporation as an instrumentality of a foreign government, and if one had the characteristics provided by the court in the noted case, when it would actually be an instrumentality of a foreign government.").

[185] United States v. Carson, No. 09-CR-077-JVS, 2011 WL 5101701, *3 (C. D. Cal. 2011).

[186] *See id.*

[187] *Id.* at 3-4.

[188] *Id.* at 5.

[189] *See id.* at 8.

[190] *See id.*

[191] *See id.* at 9 n. 14.

Some key observations can be made about the differences between the defendants' motions in *Aguilar* and *Carson*, and how the latter Court treated them. For example, despite the *Carson* defendants' rejection of dictionary usage, the Court nevertheless cites dictionaries for a definition of "instrumentality."[192] Also, the *Carson* Court frames the issues in *Carson*, *Esquenazi*, and *Nguyen* as the same, despite the *Carson* defendants' lengthy attempt to distinguish its case from these prior decisions.[193]

One interesting aspect of the *Carson* decision is how the Court wrestles with the use of "instrumentality" in other federal statutes. The *Carson* decision is the first time a court addressed this argument. In the *Carson* decision, the Court states, "the defendants attempt to apply the well known canon of statutory construction *expressio unius est exclusio alterius* or similar variation to the FCPA, but these canons apply only within the same statute."[194] In reality, the defendants attempted to apply the canon that, "Congress knows how to state" the limits of specific wording. Application of the *expressio unius* canon is erroneous. Neither the defendants nor the government mentions its applicability, nor would they, as both sides utilize "instrumentality" in different federal statutes to support their arguments. It cannot be determined whether this was an intentional or inadvertent mistake. The Court's misapplication does, however, bolster its total rejection of the *Carson* defendants' arguments.[195]

E. O'Shea

When weighed against the lengthy Motions to Dismiss in *Aguilar* and *Carson*, the motions in *O'Shea* offered considerably less analysis of the term "foreign official."[196] All the general arguments are stated in the defendants' motion, but without in depth analysis. Instead, the *O'Shea* defendant relied heavily on the Court to examine the *Carson* defendants' motion, citing that motion twelve times in nine pages. The DOJ's response in *O'Shea* is equally devoid of new arguments. The government repeated many of the arguments made in *Aguilar*, recycling sentences from the DOJ's brief in that case.

The *O'Shea* Court denied the motion without opinion.[197] This may be a significant blow to early FCPA defendants' challenging of the reaches of the term "instrumentality," as it will go toward persuasive precedent on the subject. Since *Nguyen*, no court has dismissed a defendant's challenge to the definition of "foreign official" without writing an opinion.[198] Even in *Esquenazi*, where the defendants simply rewrote the legal arguments made in *Nguyen*, the Court issued a written opinion.[199] The lack of even a brief written opinion in

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[192] *See id.* at 4.

[193] *See id.* at 8.

[194] *Id.* at 7.

[195] This could also explain why the *Carson* decision addresses some the defendants' arguments and not others. The unexamined arguments, like the legislative history, may have been too burdensome to explain away at length.

[196] *See generally O'Shea* Defendant's Motion, *supra* note 21; Government's *O'Shea* Opposition Brief, *supra* note 27.

[197] *See* Mike Koehler, *O'Shea "Foreign Official" Challenge Denied*, FCPA PROFESSOR (Jan. 6, 2012), http://www.fcpaprofessor.com/friday-roundup-21 (discussing the *O'Shea* decision).

[198] *Id.*

[199] *See generally Esquenazi* Decision, *supra* note 172.

O'Shea might indicate underlying judicial aversion to grappling with the language of a historically non-litigated statute. The government's argument that the issue was premature, and the failure of the *O'Shea* defendant to respond to that argument, gave the court a means to avoid the task of addressing the merits of the defendant's claim.[200]

V. Observations

From these five judicial decisions, some important observations present themselves. FCPA defendants' efforts appear to matter considerably. The *Carson* and Lindsey defendants' motions were significantly longer and provided more detailed analysis than any other motion. In those cases, the judges issued written opinions addressing their legal argument. In contrast, the *O'Shea* motion urged the court to look at the *Carson* brief numerous times to make the defendant's argument. The motion was denied without opinion.

The *O'Shea* opinion further demonstrates the importance of adequately responding to the government's prematurity argument. The *O'Shea* defendant neither addressed the prematurity argument, nor the applicability of *Hagner*. Leaving this argument unaddressed provides courts room to entirely side step the tough task of statutory construction. If anything, *O'Shea* should serve as a harbinger to FCPA defendants choosing not to address the government's procedural arguments.

Another salient observation is that potential FCPA defendants should not place the lynchpin of their arguments squarely on the FCPA's legislative history. While the legislative history is indeed a valuable and developed source of material for FCPA defendants, judges have given it little credence. Only the *Aguilar* court analyzed the FCPA's legislative history in *dicta*, ultimately declaring the legislative history ambiguous.[201] The *Carson* Court simply avoided analyzing the legislative history altogether.[202]

Instead of exploring the FCPA's legislative history in greater depth, FCPA defendants should focus more attention on articulating the *noscitur a sociis* and *ejusdem generis* canons. The judicial decisions appear to emphasis the defendants' use of these canons.[203] One way FCPA defendants could bolster their position is by addressing the government's arguments against these canons at the outset. It is foreseeable that the government will respond to these canons by applying the canon against surplusage.[204] FCPA defendants could use their initial motions to placate concerns that their view of the FCPA would not devoid the term "instrumentality" of meaning. This provides defendants the opportunity to reemphasize, rather than initially address, this point in their reply briefs.

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[200] The *O'Shea* court might have nevertheless been influenced by the "foreign official" challenge. Although denying the motion, the *O'Shea* court went on to grant the defendant's motion for acquittal after the DOJ closed its case. It has been posited the "foreign official" challenge may have been relevant to the court's ultimate decision from analysis of subsequent hearing transcripts. *See* Mike Koehler, *Did "Foreign Official" Impact The O'Shea Acquittal?*, FCPA PROFESSOR (July 11, 2012), http://www.fcpaprofessor.com/did-foreign-official-impact-the-oshea-acquittal.

[201] *See* United States v. Aguilar, 783 F.Supp.2d 1108, 1117 (C.D. Cal. 2011).

[202] *See* United States v. Carson, No. 09-CR-077-JVS, 2011 WL 5101701, *8 (C. D. Cal. 2011) (stating a review of the FCPA's legislative history is unnecessary).

[203] *See* Aguilar, 783 F.Supp.2d at 1115; *see* Carson, 2011 WL 5101701 at *5.

[204] *See* Government's *Carson* Opposition Brief, *supra* note 26, at 20-23; *see also* Government's Lindsey Opposition Brief, *supra* note 27, at 12-14; *see also* Government's *O'Shea* Opposition Brief, *supra* note 27.

Furthermore, there are some things future "foreign official" challengers should keep in mind. The *in pari materia* canon should be avoided, as no other federal statute examined in this matter has involved anti-bribery. *Adamkus* should also be distinguished as it will most likely appear in future government briefs. Future FCPA defendants should note that extensive effort to distinguish their case from prior cases may not be effective, as occurred in *Carson*.[205] Likewise, arguing against applying dictionary definitions to "instrumentality" may not be persuasive. Lastly, it is important to keep in mind that a "foreign official" challenge may leave a positive impression on the court by casting doubt on the merits of the government's case, even if the court denies the motion.

VI. CONCLUSION

As the judicial decisions on this matter currently stand, the government's position is favored. However, this should not discourage FCPA defendants. Only two courts have provided substantive analysis. This note's primary theme has been to show that FCPA defendants' arguments provide courts ample grounds to decide in their favor.

Barring Congressional clarification on the meaning of "foreign official," future FCPA defendants should continue challenging the government's prosecution theories involving SOEs. Judicial decisions on whether "foreign official" includes employees of SOEs are simply too few to stop defendants from seeking the potential panacea this argument can provide. Learning from these prior cases should help FCPA defendants in that pursuit.

[205] *See* Carson, 2011 WL 5101701 at *8-9.