"Taming" Instrumentality: The FCPA's Legislative History Requires Proof of Government Control

Stephen Hagenbuch
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INTRODUCTION

In 1977, the Foreign Corrupt Practices Act (FCPA)1 was enacted primarily to prevent US companies from bribing foreign government officials in order to obtain or maintain business with the foreign government.2 The FCPA applies to businesses that issue stock in US markets, are based in the US, or commit an act in furtherance of an FCPA violation while in the US.3 Five elements relevant to this Comment comprise the FCPA antibribery provisions: 1) “corruptly” 2) paying or attempting to pay 3) “anything of value” 4) to a “foreign official” 5) in order to assist the company in retaining or obtaining business.4

This Comment challenges how some courts have interpreted the term “foreign official.” The FCPA defines a foreign official as “any 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 [entity].”5

Legislative hearings leading to the passage of the FCPA noted a number of “questionable” business practices abroad, including bribery of officials employed by foreign governments, donations to political parties, and bribery of employees of private cor-

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2 See note 27 and accompanying text. The FCPA also contains a books-and-records provision.

3 See 15 USC §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The statute uses the term “domestic concerns” to refer to US businesses. See 15 USC § 78dd-2(h)(1)(B).

4 15 USC § 78dd-2(a)(1).

5 15 USC § 78dd-2(h)(2)(A) (emphasis added).
though legislators knew companies were bribing employees of private corporations, the FCPA's drafters did not outlaw such payments; instead, they decided to criminalize payments only when the recipient has some connection to the public sector. As enacted, the FCPA therefore only criminalizes bribes to "any foreign official"; "any foreign political party or official thereof or any candidate for foreign political office"; or to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly" to the previously listed entities.

Prosecutors have advanced problematic interpretations of "instrumentality" when they allege that employees of corporations similar to a governmental agency or department are "foreign officials" under the FCPA. The Department of Justice (DOJ) has prosecuted cases of bribery of officials of foreign government-owned and foreign government-sponsored corporations (hereinafter "government-influenced corporations"). Yet courts have not developed a coherent framework to determine when government-influenced corporations should fall under the FCPA's prohibition on bribery of a foreign government "instrumentality," primarily because most lawsuits end in settlements, not litigation. Indeed, the uncertainty has spawned efforts for congressional clarification of the law; because many FCPA suits are settled out of court, critics argue that the term "instrumentality" lets the federal government enforce the FCPA broadly and punish payments to entities that fall far outside of the usual understanding of a government employee. One commentator has argued that this
vague definition has harmed US competitiveness: "Because of the prevailing view that the FCPA’s antibribery provisions are too vague and ambiguous, American companies have foregone legitimate business opportunities abroad rather than risk violating the Act."\(^{13}\)

Despite one court’s assertion that the definition of “instrumentality” is “clear,”\(^{14}\) the FCPA’s use of the word “instrumentality” is ambiguous because it lacks sufficient guidance for its application, especially compared to the statute’s use of “department, agency, or ... public international organization.”\(^{15}\) This Comment will lay out why the term is ambiguous and explain how the legislative history provides a principled distinction between government-influenced entities and fully privatized companies—one that narrows the expansive interpretation adopted by the DOJ and the Securities and Exchange Commission (SEC).\(^{16}\)

In Part I of this Comment, I examine the legislative history of key FCPA provisions and the current controversy over the government’s assertion that certain entities fall within the FCPA’s purview. In Part II, I argue that legislative history is key to defining “instrumentality” and that Congress’s failure to outlaw private bribery is instructive to defining the term. In Part III, I argue that courts should use a “control analysis” centering on the degree of government control over the “instrumentality.” I also argue that courts and commentators have in part relied on mistaken factors in determining whether entities fall under the FCPA’s purview.

I. BACKGROUND

In this Part, I use legislative history to explain the FCPA’s distinction between a foreign official and a private corporation official. I also use this history to explore the distinction between a “grease payment,” used to speed up foreign governmental action, and a “corrupt” bribe. I then examine how courts have recently defined “instrumentality.”


\(^{15}\) 15 USC § 78dd-2(h)(2)(A).

\(^{16}\) See Weissmann and Smith, *Restoring Balance* at 24–27 (cited in note 9).
A. The FCPA's Purpose

1. By permitting private corporation bribery, the FCPA targets improper influence on a foreign government.

When the FCPA was drafted, Congress was quite aware that US companies made payments to foreign private corporations in order to secure business. Congress held hearings following revelations of improper bribes that domestic corporations had made abroad in the mid-1970s. Legislators heard testimony, for example, that Honeywell paid $800,000 from 1971 to 1975 to employees of "private customers." Other practices included overbilling and rebating to foreign private corporations and making payments to senior employees in a corporation in order to secure contracts.

Testimony at these congressional hearings noted explicitly that the proposed legislation would not cover such payments. During one hearing, a witness from a public interest research organization stated:

[The bill also does not deal with overseas business practices: payments, kickbacks, rebates involving private foreign customers and businesses. [The Council on Economic Priorities] found this practice to be equally common, and conceivably equally injurious to the reputation of American business abroad.]

In addition, a 1976 SEC report to a Senate committee that spurred development of the FCPA distinguished the two types of payments, noting a difference between "recipients . . . [who are] government officials" and "recipients of commercial bribery." In both the House and Senate, therefore, the FCPA’s supporters

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17 See 1977 Consumer Protection Hearings, 95th Cong, 1st Sess at 30 (cited in note 6) ("Another type of questionable commercial payment involves gifts and payments to employees of foreign customers, to obtain business or to celebrate a successful commercial relationship.").
18 See id at 1 (statement of Congressman Eckhardt).
19 Id at 30 (statement of Dr. Gordon Adams).
20 See id.
22 Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices to the Senate Banking, Housing and Urban Affairs Committee, 94th Cong, 2d Sess 25 (1976). See also id at 29 ("The Commission also has observed payments made to improperly influence a non-governmental customer["].)
were aware that companies had also given bribes to private institutions and, crucially, that these bribes could also harm America’s reputation abroad. But the drafters did not outlaw these bribes in the FCPA.23

By permitting bribery of private officials, Congress signaled that the FCPA’s primary goal is eliminating improper influence on foreign governments. Congressman Bob Eckhardt, a key proponent of the FCPA’s House version, said during a House hearing that bribes to foreign officials were unethical and “bad business” because they distorted the free market by allocating business to those who could not compete on price and quality alone.24 But this concern exists for bribes to private corporations as well, so an intent to target unethical “bad business” does not explain the difference in payments to foreign officials and private officials. Congressman Eckhardt, though, did note that “[b]ribery to foreign officials . . . creates severe foreign policy problems” for America,25 including “diplomatic problems,” a tarnished image of America abroad, and damage to “the legal, political, and economic order of friendly host governments.”26 This second set of concerns can explain the FCPA’s focus on public, not private, bribery—outlawing public bribery addresses the effect on the foreign government vastly more than outlawing private bribery. The public/private bribery distinction appears primarily intended, therefore, to further the goal of eliminating improper influence on the operation of the foreign government itself.27

2. The “grease payment” exception targets improper influence on a foreign government.

Although the FCPA bans most payments to foreign officials, it permits “grease payments,” also known as facilitating pay-

\[23\] See Part IIB. Congress did not address private corporation bribery in the two subsequent revisions of the law in 1988 and 1998.


\[25\] Id.

\[26\] Id (quotation marks omitted). See also Report on the Unlawful Corporate Payments Act of 1977, HR Rep No 95-640, 95th Cong, 1st Sess 5 (1977) (discussing how improper payments “lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations”).

\[27\] See Lamb v Phillip Morris, Inc, 915 F2d 1024, 1029 (6th Cir 1990) (“[T]he FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets.”) (emphasis added).
ments.\textsuperscript{28} The FCPA as enacted in 1977 also permitted payments to employees whose duties were solely “ministerial or clerical.”\textsuperscript{29} However, Congress amended this ministerial/clerical provision in 1988 to outlaw payments to foreign officials that did not fall within certain stated exceptions, including the new grease payment exception.\textsuperscript{30} The sponsors of the 1988 amendment clarified that the distinction should not be about who received the payment, but about “the purpose of the payment.”\textsuperscript{31} The 1988 grease payments exception was meant to reinforce the 1977 congressional intent concerning ministerial/clerical employee payments.\textsuperscript{32} Therefore, the legislative history from 1977 remains useful in understanding the grease payments exception.\textsuperscript{33}

Legislative history indicates the ministerial/clerical exception applied to payments that “merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.”\textsuperscript{34} The exception was meant for actions “ordinarily and commonly performed by a foreign official” including, but not limited to, obtaining business licenses, governmental papers, police protection, mail, inspections, phone service, power, water, and protection of physical goods.\textsuperscript{35} Congressman Eckhardt’s statements at a 1977 congressional hearing further illuminate the congressional intent behind this exception. He envi-

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\textsuperscript{28} The exception reads: “[The FCPA] shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.” 15 USC § 78dd-2(b). However, the FCPA does apply to bribery in relation to any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party.


\textsuperscript{32} See id.

\textsuperscript{33} See, for example, United States v Kay, 359 F3d 738, 747 nn 31 & 32 (5th Cir 2004) (looking to the legislative history of the 1977 FCPA enactment to explain the meaning of the grease payment exception as it exists now).

\textsuperscript{34} HR Rep No 95-640 at 8 (cited in note 26).

\textsuperscript{35} 15 USC § 78dd-2(b)(4)(A).
sioned a hypothetical businessman giving a “tip” to a low-level bureaucrat in order to “spur up” the official’s transmission of a bid application to higher-level officials.\textsuperscript{36} Congressman Eckhardt stated that this action would not be “giving a thing of value for the purpose of getting an official to influence his government.”\textsuperscript{37}

Such giving of a “tip” would be permitted under the House bill because the bill required proof of “corrupt intent,” defined as “something more than merely [actions] to put into effect the normal channels of operation or to open the sluices of bureaucracy.”\textsuperscript{38} The House committee report on the FCPA stated that the FCPA was meant to outlaw “payments which cause an official to exercise other than his free will in acting or deciding or influencing an act or decision.”\textsuperscript{39} The FCPA was intended to apply to payments “made to influence the passage of law, regulations, the placement of government contracts, the formulation of policy or other discretionary governmental functions.”\textsuperscript{40} And the report further clarified that “payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action” would remain legal.\textsuperscript{41}

The 1988 amendment reinforced this focus on discretionary government action. The 1988 House committee report stated that when a court determined whether a payment should fall within the grease payment exception,

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it may determine that a payment which is unusually large in relation to the “governmental action” performed may not fall within this [grease payment] defense. It may also consider whether the foreign official receiving the payment is in a position to influence substantially the question of whether, or on what terms, to award new business to or continue business . . . or to influence legislative, judicial, regulatory, or other action.\textsuperscript{42}
\end{quote}

The 1988 amendment, then, outlawed payments to clerical employees who were senior enough to influence an official with

\begin{footnotes}
\item[36] 1977 Consumer Protection Hearings, 95th Cong, 1st Sess at 51 (cited in note 6).
\item[37] Id (emphasis added).
\item[38] Id at 52.
\item[39] HR Rep No 95-640 at 8 (cited in note 26).
\item[40] Id (emphasis added).
\item[41] Id.
\item[42] HR Rep No 100-40 Pt 2 at 77 (cited in note 31) (emphasis added).
\end{footnotes}
discretionary power. This change reinforced the FCPA’s functional approach, which was to target bribes meant to influence discretionary governmental activities.

While judicial commentary on the grease payment exception is sparse, in United States v Kay the Fifth Circuit explored the exception in a case involving bribes to Haitian customs officials to lower a company’s taxes and customs duties. The court held that such payments did not fall under the grease payment exception and interpreted the exception as meaning that “Congress sought to prohibit the type of bribery that (1) prompts officials to misuse their discretionary authority and (2) disrupts market efficiency and United States foreign relations, at the same time recognizing that smaller payments intended to expedite ministerial actions should remain outside of the scope of the statute.”

The Kay court interpreted the 1977 legislative history as intending to outlaw “payments that are intended to influence non-trivial official foreign action in an effort to aid in obtaining or retaining business for some person.” The court also noted that Congress’s intent was to target “bribery that . . . prompts officials to misuse their discretionary authority.”

The Kay court’s interpretation of the legislative history of the grease payment exception supports the conclusion that a payment is not illegal if it influences only a low-level paper-pusher. The payment must instead influence an official who wields discretionary power, and that power must be part of a governmental institution.

B. Courts Confront the Definition of “Instrumentality”

Although the Fifth Circuit in Kay used legislative history in its analysis of the grease payment exception, district courts have been reluctant to do the same in interpreting the word “instrumentality.” Most have relied on what they consider a plain meaning of the statutory text.

43 See id.
44 A recent search on WestlawNext indicates that fewer than fifteen cases have cited to the “grease payments” portion of the FCPA.
45 359 F3d 738 (5th Cir 2004).
46 See id at 740.
47 Id at 747 (emphasis added).
48 Id at 749–50 (emphasis added).
49 Kay, 359 F3d at 747.
50 See, for example, United States v Esquenazi, 2010 US Dist LEXIS 143572, *4–5
One district court has advanced a broad test for whether an entity fits under the term “instrumentality.” *United States v Aguilar*\(^{51}\) held that employees of the Comision Federal deElectricidad (CFE) in Mexico are employees of an FCPA “instrumentality.” The CFE was created in 1975 and is defined under Mexican law as a “decentralized public entity with legal personality and its own patrimony.”\(^{52}\) The DOJ argued that the CFE was a “state-owned” utility, entity, and enterprise, and a “government instrumentality.”\(^{53}\) The DOJ also stated that the Mexican Constitution provides that the supply of electricity is solely a government function.\(^{54}\)

The court held that the CFE had a number of characteristics that were similar to the *sine qua non* of agencies and departments. The court cautioned that its list was “non-exclusive,” but the factors it noted meant that the CFE was considered an instrumentality.\(^{55}\) The factors the court listed were the following: 1) the CFE provides a service to citizens, and often all inhabitants, of an area; 2) the government appoints key officers and directors; 3) the CFE is financed largely through government appropriations or government-required taxes or fees; 4) the CFE has exclusive power to administer its functions; and 5) the CFE is “widely perceived and understood to be performing official (i.e., governmental) functions.”\(^{56}\)

The court canvassed the relationship of the FCPA to the Organisation for Economic Co-Operation and Development (OECD) anticorruption treaty ratified in 1998, as well as the legislative history of the FCPA, but found both inconclusive concerning the meaning of instrumentality.\(^{57}\) It then concluded that, based on a hypothetical similar to the underlying facts, “members of Congress would not deem such a prosecution to be beyond the purview of the FCPA” simply because the entity was a “corporation.”\(^{58}\)
The court rejected the defendant’s argument that “instrumentality” meant such things as branches of government and that no corporation could fall into the definition of a government instrumentality. The defendants argued that only corporations with the characteristics that were the “sine qua non of both agencies and departments” could qualify as instrumentalities.

The government argued instead that government-influenced corporations share “various qualities” with government entities, “such as existing at the pleasure of the government and being oriented to public policy.” The government argued that the term “instrumentality” could not have precisely the same characteristics as either departments or agencies, or else the word “instrumentality” in the statute would make it surplusage. Ultimately, the Court agreed with the government.

Two other district courts that have interpreted “instrumentality” have held that the term was unambiguous and thus did not warrant an examination of the legislative history. In United States v Esquenazi, the court rejected a motion to dismiss based on the FCPA’s “instrumentality” clause. The court held, succinctly, that “[t]he plain language of this statute and the plain meaning of this term” show that a state-owned company, Haiti Teleco, could be an instrumentality under the FCPA. The court also held that the definition of “foreign official” was not unconstitutionally vague, as individuals of common intelligence would have fair notice of what the statute prohibited.

The fullest discussion of “instrumentality,” and the one closest to what this Comment argues is the correct interpretation, appears in United States v Carson. Carson held that the term should be given its “ordinary meaning” and cited dictionary definitions of the term. The court concluded that the FCPA’s language was “clear,” that the statute’s scheme was “coherent and

59 Aguilar, 783 F Supp 2d at 1113 (“[T]he dispositive question [defendants] pose is purely legal: whether any entity’s status as a state-owned corporation—of any kind, with any characteristics—disqualifies it as an entity properly addressed by an FCPA indictment.”) (quotation marks and citation omitted) (emphasis in original).
60 Id.
61 Id at 1114.
62 Id.
63 2010 US Dist LEXIS 143572 (SD Fla).
64 Id at *4-5.
65 Id at *5.
66 2011 WL 5101701 (CD Cal).
67 Id at *4.
consistent,” and that the legislative history was therefore irrelevant.\textsuperscript{68}

The court in \textit{Carson} based its analysis of the term on dictionary definitions of “instrumentality,” and formulated the rule that “instrumentality” means “something that is used to achieve an end—an intermediary or means through which something is accomplished.”\textsuperscript{69} It relied on definitions of instrumentality that included “a condition of serving as an intermediary,” “something by which an end is achieved,” and “the fact or function of serving or being used for the accomplishment of some purpose or end.”\textsuperscript{70} It also noted that the word instrumentality was used in statutes such as the Foreign Sovereign Immunities Act (FSIA)\textsuperscript{71} to include state-owned companies, and it concluded that the term “was intended to capture entities that are not ‘departments’ or ‘agencies’ of a foreign government, but nevertheless carry out governmental functions or objectives.”\textsuperscript{72} Nonetheless, the court explained that a government’s monetary investment in a company could make that entity an “instrumentality” if such investment was “combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives.”\textsuperscript{73}

The court in \textit{Carson} reasoned that the following six factors should be relevant to determining whether a corporation would be considered an instrumentality, although no factor should be dispositive: 1) the nation’s “characterization of the entity and its employees”; 2) the nation’s “degree of control over the entity”; 3) the “purpose of the entity’s activities”; 4) its “obligations and privileges,” such as whether it has exclusive power to administer its designated functions; 5) the circumstances of its creation; and 6) the nation’s “extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).”\textsuperscript{74} In its discussion of the sixth factor, the \textit{Carson} court noted that the “extent” of government ownership was a relevant factor and stated that government investment by itself might not suffice to fulfill the instrumentality characteriza-

\textsuperscript{68} Id at *8.
\textsuperscript{69} Id at *4 (citations omitted).
\textsuperscript{70} \textit{Carson}, 2011 WL 5101701 at *4 (citations omitted).
\textsuperscript{71} The FSIA is codified at 28 USC §§ 1602–11.
\textsuperscript{72} \textit{Carson}, 2011 WL 5101701 at *5.
\textsuperscript{73} Id.
\textsuperscript{74} Id at *3–4.
tion. But, the court explained, "when a monetary investment is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives," that entity is an instrumentality. The court concluded that "instrumentality" only referred to entities that "carry out governmental functions or objectives."77

Carson did not apply this test to the facts of the case, which involved payments to state-owned companies in countries including China. Rather, it held that whether an entity was an instrumentality depended on the facts and could not be decided as a matter of law; therefore, the district court could not decide this question on a motion to dismiss the indictment.78 Likewise, the court in Esquenazi held that the defendants could bring up their contentions at trial; the court could not determine whether the entity was an "instrumentality" as a matter of law.79

II. THE "INSTRUMENTALITY" AMBIGUITY INVITES INTERPRETING COURTS TO CONSIDER LEGISLATIVE HISTORY

In contrast to what district courts have stated, this Comment argues that "instrumentality" as used in the FCPA is ambiguous, both compared to the use of other terms in the FCPA and to how "instrumentality" is defined in other statutes. This Part lays out Supreme Court precedent for the use of legislative history and argues that legislative history on the private/public official distinction provides meaningful guidance for interpreting the FCPA term "instrumentality."

A. The Ambiguity of "Instrumentality" in the FCPA

The FCPA applies to payments given to employees of three other types of entities, the definitions of which are significantly less ambiguous than "instrumentality." The FCPA outlaws bribes to an official of a foreign governmental "department" and "agency." Both terms have straightforward definitions as administrative divisions of a foreign government’s power.80 The FCPA outlaws bribes to members of a "public international organiza-

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75 Id at *5.
76 Carson, 2011 WL 5101701 at *5.
77 Id.
78 Id at *3.
tion." While not clear on its face, the term is defined as an entity that the president has declared to be a public international organization. But the FCPA contains no further definition of "instrumentality." The Carson court's holding that "instrumentality" means "something that is used to achieve an end—an intermediary or means through which something is accomplished" is plausible, but as this Comment shows, this interpretation fails to focus on the discretionary government power that the FCPA emphasizes.

The FCPA's language also appears ambiguous when compared to FSIA, which more clearly lays out when an entity is considered an "instrumentality" of a state. The FSIA is like the FCPA in that the application of a US law depends in large part on the legal relationship that a foreign entity has to a foreign nation's government. However, the FSIA states that "agency or instrumentality" refers only to an "organ" of a foreign state or an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." The FSIA thus lays out a relatively clear test for when it would apply to a foreign "instrumentality."

1. Legislative history can be used to interpret ambiguous phrases such as "instrumentality."

The Supreme Court has held that "[w]hen the words of a statute are unambiguous, . . . judicial inquiry is complete." Statutory text is the most important source for courts to consult when interpreting a statute. However, "[]legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity." A court may refuse to consult legislative history, but this generally occurs when statutes provide more guidance than the

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82 Carson, 2011 WL 5101701 at *4 (citations omitted).
83 28 USC § 1603(b)(2).
85 See Hartford Underwritings Insurance Company v Union Planters Bank, NA, 530 US 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."). (quotation marks and citations omitted).
“instrumentality” reference in the FCPA. For instance, in *Burlington Northern Railroad Company v Oklahoma Tax Commission*, the respondents attempted to show that a statute’s reference to “true market value” should be interpreted as meaning “state determined market value.” Although the statute placed the burden of proof on the state to show true market value, the respondents contended that the issue could not be litigated in federal court at all. The Court held that it would be illogical for a statute to place the burden of proof on one party when that very party had the power to determine that issue. Therefore, the Court found the language to be unambiguous and cited to numerous provisions of the statute that buttressed its conclusion.

In other cases, the Court has employed legislative history when an examination of a statute’s text provides only modest support for an interpretation. For instance, the Court looked to legislative history in *Gustafson v Alloyd Company* when interpreting a provision of the federal securities laws. The Court held that the statutory language at issue only applied to primary transactions, not private, secondary transactions. The Court’s holding relied on a number of statutory construction doctrines. The Court noted that, in coming to its holding, legislative history proved “[o]f equal importance,” and it cited to a Senate report on the legislation that grouped primary and secondary transactions together. The Court’s reliance on legislative history appeared justified because the statute itself did not directly address whether its provisions applied only to primary purchasers or to primary and secondary purchasers.

2. These precedents indicate that legislative history is appropriate for interpreting the FCPA.

Given this case law, the FCPA lacks sufficient textual guidance to determine clearly the meaning of “instrumentality.” The FCPA does not, for instance, contain any provisions concerning the burden of proof (or any other aspects) of the instrumentality

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88 Id at 455.
89 Id at 462.
90 Id at 461–62.
92 These included interpreting a provision in light of the entire act; giving the same meaning to the same word in an entire act; and the doctrine of *noscitur a sociis*. Id at 570, 572–73.
93 Id at 577.
issue that a court could use to extrapolate its meaning, as the Court did in *Burlington Northern*. The FCPA's legislative history directly addresses the question of what sorts of entities it covers—and because it addresses the question head-on and frequently, a court would be likely to use that legislative history in statutory interpretation. As in *Gustafson*, the FCPA does not explicitly state what entities would fall under the definition of a government instrumentality, and this omission calls for the use of legislative history.

Therefore, in contrast to the holding of *Carson*, the term "instrumentality" is not "clear," nor is "the statutory scheme . . . coherent and consistent." Such an argument fails, given the definitions of other terms within the FCPA and the definition of "instrumentality" in the FSIA. Further, a court should not rely on the FSIA's definition of instrumentality as a placeholder for the FCPA's missing definition of instrumentality, since the two statutes were not drafted together and deal with separate issues.

The most useful legislative history sources for courts are "documents prepared by Congress when deliberating." The Court has relied on statements made in congressional hearings by proponents of the legislation, and it has even cited to the views of witnesses who are not members of Congress but who helped draft the legislation and testified in favor of the legislation at congressional hearings. Indeed, the Court once called a congressional witness's testimony "[t]he most relevant exposition of the provision," deemed his description "significant," and used his testimony to help divine "the intent" of Congress. Courts, then, can use testimony from congressional witnesses, including congressmen, to illuminate the intended meaning of statutory

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94 See *Chamber of Commerce v Whiting*, 131 S Ct 1968, 1980 (2011) (noting that the argument against using legislative history was "particularly compelling" where only one legislative document discussed the clause at issue, despite the existence of four House reports, a Senate report, and a conference committee report on the legislation).

95 *Carson*, 2011 WL 5101701 at *8.

96 See *Russello v United States*, 464 US 16, 25 (1983) ("Language in one statute usually sheds little light upon the meaning of different language in another statute, even when the two are enacted at or about the same time.").

97 *Gustafson*, 513 US at 580. The *Gustafson* opinion cited to a House committee report.

98 See, for example, *Ernst & Ernst v Hochfelder*, 425 US 185, 202–03 (1976), citing *Hearings on HR 7852 and HR 8720 before the House Committee on Interstate and Foreign Commerce*, 73d Cong, 2d Sess 115 (1934) (testimony of Thomas G. Corcoran, counsel with the Reconstruction Finance Corporation).

language that is not clear on its face, including the types of sources on which this Comment relies.100

B. The Legislative History of Private Bribery Reinforces Congress's Emphasis on Discretionary Government Power

A court could use the legislative history concerning private bribery as proof that Congress did not outlaw such practices in the FCPA.101 Because Congress did not outlaw foreign bribery in totality, it has indicated that the level of government influence on the entity is pivotal to the “instrumentality” inquiry.

In the FCPA realm, Congress's decision not to outlaw bribery of private corporations is vital to understanding the FCPA's purpose. Judicial precedents indicate that Congress's failure to outlaw one practice in a statute that eventually passes can provide guidance in statutory interpretation. For instance, an agency's interpretation of a regulation can receive implicit congressional approval when multiple legislative proposals to alter it have failed, Congress has passed other alterations to the statute, and Congress has held “[e]xhaustive hearings” on the interpretation.102 The failure to legislate over an interpretation may indicate to a court that Congress approved of such interpretation when “Congress—and in this setting, any Member of Congress—was . . . abundantly aware of what was going on.”103

In addition, a failure to legislate can codify the existing legal regime at issue. In FDA v Brown & Williamson Tobacco,104 the Court held that the FDA did not have congressional authorization to regulate tobacco products.105 Congress had enacted a number of bills concerning “tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco,”

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100 See id at 203 (taking a congressional witness’s description of a statutory section as a “catchall . . . to deal with new manipulative (or cunning) devices” as support for the Court’s holding that Congress did not intend to criminalize negligence).
101 See Part IA.
103 Id at 600–01. See also Solid Waste Agency of Northern Cook County v US Army Corps of Engineers, 531 US 159, 169 n 5 (2001) (finding that Congress's failure to overrule an agency interpretation implies congressional ratification of an interpretation that goes against the “plain text and original understanding” only when there is “overwhelming evidence of acquiescence,” such as when the agency interpretation is correct, all members of Congress knew about the interpretation, and many bills had been introduced and had failed on the subject).
105 See id at 156.
with actual knowledge of the dangers of tobacco. The FDA had consistently stated it lacked authority to regulate tobacco and Congress had acted to “preclude a meaningful role for any administrative agency” in policymaking on the subject. The Court held that the failure to grant specific jurisdiction to the FDA to regulate tobacco meant that Congress affirmatively intended the FDA to lack such authority.

However, the Court has cautioned that “unsuccessful attempts at legislation are not the best of guides to legislative intent.” For instance, a failure to pass a bill outlawing an agency interpretation of the law does not imply Congress’s “acquiescence” to that interpretation, in part because “[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others.”

The failure to outlaw private bribery in the FCPA, though, accords with the Court’s holding in Brown & Williamson Tobacco, because the reason for not outlawing private bribery was clear. The FCPA hearings consistently noted the existence of private bribery, that many legislators and experts in the field disapproved of it, and—crucially—the fact that the FCPA would not outlaw it. This is not a case where a standalone bill to outlaw an agency interpretation fails and a litigant claims that its failure implies congressional approval of that interpretation. Instead, Congress specifically desired to keep such payments out of the FCPA’s purview. As in Brown & Williamson Tobacco, courts could interpret the failure to do so as an indication of legislative intent.

III. SOLVING THE “INSTRUMENTALITY” PROBLEM WITH A CONTROL ANALYSIS

In this Part, I first argue that other commentators’ conclusions about the term “instrumentality” lack justification because they fail to use legislative history sufficiently. I next argue that a “control analysis,” which would focus on the effect of a bribe on its recipient, is the ideal method to interpret the phrase given

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106 Id at 155.
107 Id at 156 (emphasis in original). Such considerations may be less important for criminal laws, as there can be no prosecution in the absence of positive law criminalizing conduct.
108 Brown & Williamson Tobacco, 529 US at 156.
the FCPA's legislative history. In the past, courts have employed some irrelevant factors in decisions concerning the “instrumentality” definition.

A. Other Commentators’ Responses Fail to Provide a Principled Guide to Interpreting the FCPA

The definition of “instrumentality” has been the subject of academic debate, with some commentators arguing that the FCPA needs legislative revision in order to clarify what entities fall under the definition of instrumentality. Such a solution, however, leaves unanswered the question of what entities fall under the FCPA's current definition.

The authors of an article in The Business Lawyer urged the DOJ and SEC to define instrumentality synonymously with the OECD’s definition of “public enterprise” in the Anti-Bribery Convention, which went into effect in 1999. The OECD defines a public enterprise as one “over which a government may exercise a dominant influence directly or indirectly” or one “in which the government holds a majority stake.” The authors of The Business Lawyer article argued that only employees of a foreign company “who perform a public function” should be considered foreign officials. The article's authors also argued that employees of a company that is “substantially equivalent to that of a private enterprise” should not be considered foreign officials. Finally, the authors suggested that if a control test is used, the entity should only be considered an instrumentality if the foreign government exercises a “dominant influence” over the entity.

111 See, for example, Jacqueline L. Bonneau, Note, Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement, 49 Colum J Transnatl L 365, 399 (2011). Because of the high rate of settlements, there has been relatively little judicial commentary on the meaning of “instrumentality.” See note 10 and accompanying text.

112 Cohen, Holland, and Wolf, 63 Bus Law at 1270, 1259 (cited in note 10). See also Eric J. Smith, Comment, Resolving Ambiguity in the FCPA Through Compliance with the OECD Convention on Bribery of Foreign Public Officials, 27 Md J Intl L 377 (2012). The OECD includes thirty-four member nations, including the US. For a list of all OECD members, see http://www.oecd.org/about/membersandpartners (visited Sept 10, 2012).


114 Cohen, Holland, and Wolf, 63 Bus Law at 1270 (cited in note 10) (quotation marks and citation omitted).

115 Id. This suggestion would seem to violate the text of the FCPA, however, foreign governments may run entities that in the US would be privately held, such as telephone companies.

116 Id at 1271.
While their proposal coincides in part with this Comment’s conclusion, the authors drew the “public function” language from the OECD definition.\textsuperscript{117} Because the OECD convention went into effect in 1999, it is illogical to argue that Congress intended to codify such a definition in the FCPA, which was enacted in 1977. The authors reasoned that adopting OECD definitions would harmonize US law with other nations’ anticorruption laws and would help businesses conduct due diligence and alter their behavior to be more certain that they would avoid government prosecutions.\textsuperscript{118} Though harmonization may be desirable, it is not an excuse for failing to examine the intentions of the statute’s drafters. The authors do not justify their suggestions by examining legislative history in depth; instead, they rely mainly on DOJ and SEC opinions.\textsuperscript{119} While executive branch opinions may be persuasive given the low level of judicial commentary in the field, they may be a biased source from which to draw conclusions about statutory interpretation.\textsuperscript{120}

One commentator, Agnieszka Klich, has argued that a control analysis should determine whether an entity is an instrumentality under the FCPA.\textsuperscript{121} An “ownership” analysis determines that an entity is an instrumentality by analyzing the percentage of government ownership, while a “control” analysis considers the degree of control that the government exercises over the entity. Klich analyzed former Soviet bloc economies that were transitioning from state ownership to private control, and she suggested that one way to determine if an entity is an instrumentality is to analyze the percentage of government equity ownership of the entity. Klich relied on an April 1993 DOJ release concerning post-Communist economies that suggested an entity was an instrumentality if the government either “operate[d]” the enterprise or owned over half of the shares of the corporation and all the shares were voting.\textsuperscript{122} As previously dis-

\textsuperscript{117} See id at 1260.
\textsuperscript{118} Cohen, Holland, and Wolf, 63 Bus Law at 1269–70 (cited in note 10).
\textsuperscript{120} For instance, the Supreme Court has recognized, “We need accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.” Morrison v National Australia Bank Ltd, 130 S Ct 2869, 2887 (2010) (citation and quotation marks omitted).
\textsuperscript{122} Id at 136.
cussed, the FSIA relies on an ownership analysis to determine if an entity is an instrumentality.

Klich suggested that a "control" analysis more accurately reflects the purpose of the FCPA than an "ownership" analysis.\textsuperscript{123} She argued that the purpose of outlawing public institution bribery was "the implicit belief" that it "undermines the legitimacy of the state"; legitimacy can only be affected if the state exercises control, not if it simply owns a portion of the entity on paper.\textsuperscript{124} However, Klich relied on only one statement from Dr. Gordon Adams, a witness at a congressional hearing, in an attempt to determine the purpose of the FCPA.\textsuperscript{125} Instead, she relied extensively on post-enactment sources,\textsuperscript{126} which a court would be unlikely to give much weight.\textsuperscript{127}

B. Government Control Should Be the Defining Characteristic of an FCPA Instrumentality

1. The legislative history suggests that some government-influenced corporations are "instrumentalities" under the FCPA.

The foregoing discussion makes clear that members of Congress intended the FCPA to encompass bribes to a wide range of entities. The FCPA carves out exceptions to this broad statute—explicitly, through the grease payment exception, and implicitly, by not outlawing bribery to purely private corporations. A comprehensive "instrumentality" definition, therefore, must include some government-influenced corporations. The text of the statute does not exempt bribes of government-influenced corporations. As a result, the fact that an entity is merely deemed a "corporation" by foreign law cannot by itself preclude it from being a government instrumentality, agency, or department.

\textsuperscript{123} Id at 138.
\textsuperscript{124} Id.
\textsuperscript{125} Klich, Note, 32 Stan J Intl L at 135 nn 74, 75 (cited in note 121). The discussion of Dr. Adams' testimony only comprises two paragraphs of the Klich Note. Other citations to legislative sources concern the details of the FCPA's prohibitions; Klich did not use them to try to divine legislative intent. See id at 125 n 26 (discussing the grease payment exception); id at 139 nn 92, 93 (discussing the "corrupt" requirement).
\textsuperscript{126} See, for example, id at 138 n 88 (looking to a DOJ release from 1993).
\textsuperscript{127} The Supreme Court has indicated that even post-enactment legislative history is disfavored; post-enactment opinions of the executive branch are less illuminating concerning the FCPA drafters' intentions. See \textit{Hagen v Utah}, 510 US 399, 420 (1994) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (citations and quotation marks omitted).
2. Government control is the only way to harmonize the 
FCPA's prohibitions with the legality of private bribery.

Courts should adopt an inquiry that focuses on the degree of 
control that the government exercises over the entity, not simply 
an analysis of the percentage of the company's equity owned by 
the government. This "control analysis" is the correct interpreta-
tion because the FCPA's legislative history emphasizes the pos-
sibility of corruption of senior-level government officials, not low-
level functionaries. A control analysis is a logical corollary to 
the grease payment exception, which derived from the original 
allowance for bribery of low-level government officials. By con-
sulting legislative history, we can understand the legislative in-
tent behind the grease payment exception: the FCPA only in-
tended to target bribes when those bribes could affect a govern-
ment official's discretionary functions. The FCPA was designed 
to target the misuse of an official's discretionary power. If a gov-
ernment does not control an institution, a government official 
cannot misuse discretionary power when a member of the insti-
tution receives a bribe.

This "control analysis" would require a fact-finder to deter-
mine if the entity was more independent of the government than 
not and whether a bribe to that entity was more likely than not 
to have repercussions on a government official's wielding discre-
 tionary power. Given the FCPA's legislative history, this inquiry 
is the most logical interpretation of "instrumentality." Yet courts 
have so far been reluctant to articulate such a test in FCPA cases 
concerning the instrumentality definition. This failure is under-
standable given their reluctance to consult legislative history.

3. Judicial interpretations of "instrumentality" have in part 
relied on mistaken factors in their analyses.

The Carson court comes the closest to embracing the "control 
analysis," although it did not consult legislative history in its 
opinion. The legislative history that this Comment has exp-
lored shows that the test laid out in Carson would, as least in 
part, help courts interpret the FCPA as Congress had originally 
tended. In particular, Carson's focus on the nation's "degree of 
control over the entity"; the entity's "obligations and privileges".

128 See note 39 and accompanying text. See also Part IA.
129 See, for example, Aguilar, 783 F Supp 2d at 1119.
how the entity was created; and the extent of the government’s ownership of the entity are all relevant to determining the level of control that the government retains over the entity.\footnote{See id at *3.} These factors would help courts determine the potential for corruption of high-level government officials with discretionary power.\footnote{See note 74 and accompanying text.} These factors deal with the power that the government exercises over the entity, as well as the direct benefits that the government receives from the entity’s work. As these factors tilt toward government control, the risk that a bribe to the entity could influence a government official with discretionary power increases.

However, two Carson factors are irrelevant. First, the court noted that how the nation characterizes the entity could be relevant.\footnote{See Carson, 2011 WL 5101701 at *3.} Yet a nation could characterize an entity as a private corporation and still wield exclusive power over its activities. Certainly, the legislative history does not indicate that a government-owned entity that could be influenced by US-based bribery would be immune from that influence because the government calls it a private corporation. Second, the court stated that the entity’s purpose could be relevant.\footnote{See id.} However, the text of the legislation does not include any mention of the purpose of a government agency, department, instrumentality, or public international organization. Indeed, an entity’s purpose does not bear on the corrupting effect bribes would have on foreign officials.

Carson’s reliance on “purpose” factors into its statement that an entity can be an instrumentality if a government invests in it and there are “additional factors that objectively indicate the entity is being used . . . to carry out governmental objectives.”\footnote{Id at *5.} A government’s goal to achieve a particular policy should not matter in an FCPA instrumentality analysis. To illustrate, a government could wish to see its citizens purchase homes. Yet a government’s support of mortgage lenders (through subsidies, say) is irrelevant to the question of whether bribery of the officials of the mortgage lender would have a corrupting influence on those with discretionary governmental power.\footnote{It is conceivable that the government could be influenced by bribes to a mortgage lender; the lender could funnel those bribes to the government official who wields the purse strings, for instance. But the purpose of the entity, to lend to individuals, is irrele-}
court stated that, because of the US’s “long history of using corporations to carry out governmental objectives,” equivalent foreign entities could be instrumentalities under the FCPA.137 The key factor in Carson’s analogy, however, should be that the government “use[s]” the entity, not that the entity shares “objectives” with the government.138 Indeed, if a court determines that a government uses an entity, it would likely be straightforward to determine if the government also controls that entity.

For example, one can imagine an entity that promotes a government objective, is controlled by the government, and should therefore fall under the FCPA’s purview—for instance, if the state created the entity and controlled its board of directors. But the fact that the entity’s purpose overlaps with a government’s policy objective seriously muddles the control analysis. Carson thus enters dangerous territory when it delves into the purposes of a particular entity instead of focusing on objective factors indicating government control.

IV. CONCLUSION

The legislative history of the FCPA indicates that it was passed with the clear purpose of reducing bribes to foreign government-affiliated individuals. This purpose, evident in legislative hearings and revisions of provisions such as the grease payment exception, risks being undermined if courts read the FCPA too broadly. An entity may seem to fall under the FCPA if it carries out a function that Americans view as belonging to the government. But if the entity is not controlled by a foreign government, any purpose it has is irrelevant to the effect of the bribery on the foreign government. The FCPA’s purpose, clearly stated in the legislative history, is to target the misuse of a foreign official’s government-provided discretionary power. Courts should, therefore, determine if an entity is an instrumentality under the FCPA by examining the control that a foreign government has over that entity.

138 See id.