

RJ Zayed: Welcome back everybody and now we're entering our third and final phase here. What we have for you is a presentation of the Fire Side Chat. Many times, you know, in practice before the supreme courts, appellate courts or district courts, you're always asking what did the founding fathers think about this Constitution or this Amendment. Here we are absolutely fortunate and elated to have the founding father of the FCPA to talk to us about the background. Judge Stanley Sporkin has an illustrious career beginning at University of Pennsylvania, Yale Law School, the SEC Enforcements, head of SEC Enforcement, General Counsel for the CIA, the list goes on and on of his accomplishments. Currently I think he's also serving as Ombudsman and that's an interesting perspective to add to our mix today. Joining him is a renowned expert of the FPCA, law professor Michael Kohler, he's joining us from Southern Illinois University. He's testified before Congress. He writes extensively in this area and his expertise is second to none. To lead us in this discussion are my two partners, Jay Jackson and Tom Gorman. Tom worked with Judge Sporkin many years ago and has been at the forefront of SEC enforcement in DOJ investigations ever since. Jay Jackson has been at it for a long, long time in terms of securities as long as all of us with stuff. He brings extensive experience and expertise in the area.

Jay Jackson: He's telling you that I'm old.

RJ Zayed: There's only a few years difference, a few years difference between us. But I think the one point is you heard in the beginning the tools that we need, the compliance programs that you have. You heard about cooperation. You heard about things. But it's very important to go back to the beginning and say, what caused this? And what was it intended to solve and how we achieved it.

The idea of a compliance program is broader than FCPA, broader than UK. Those, the reason we focus on those is because the jurisdictional reaches of those are phenomenal. The FCPA can literally, if money passed through the United States, there's jurisdiction, even through a wire, through a bank or whatever. Arguably could say, you could make the same thing if the email passed through the U.S. or stuff like that for terms of jurisdiction. Persons, issuers have broad meanings. Same with the UK Bribery Act. If you have a foot in the UK, arguably the UK covers you as well 'cause there's acts of bribery, passive bribery and failing to stop a bribery. The UK's broader and that doesn't require a public official.

So the thing is, what is the impetus of this? Where did this begin? And what was the look ahead, what you were trying to do because that informs the decisions of your compliance programs. That informs the decisions of your cooperation and informs your decisions of disclosure because under the FCPA there's an underlining principle of not only being true to the letter of the law but to its spirit. And so it's a great honor that I turn it

over to my two partners and to Judge Sporkin and the FCPA Professor Kohler.

Jay Jackson:

Well thank you for sticking around and being here on what I'm really excited about. And welcome Tom and welcome Judge Sporkin and Professor Kohler. I'm going to begin just with a few comments and then we're going to try and get the interaction going but before I get into my comments, just imagine that there's a fireplace behind us and there's a blazing fire and we're all at the lodge learning from the master, if I can put it that way.

What we've emphasized today and I think what everybody in the audience already knows is that the Foreign Corrupt Practices Act and its, and its, and those statutes that have mimicked it in the various countries around the globe have significant impact on the way that people do business and on how you interact in the market place, particularly if you are in the international market place. It has a significant impact on your bottom line, not just from the point of view if you are unfortunate enough to have to dive into an investigation, but just in building the compliance programs that some of the panelists talked about today, in the commitment of the resources to it, and in the understanding of the interaction of the law with the way your company does business.

Let me take you back then to, 1972. In 1972, as you well know was an election year. In that particular year there was a break-in at the Democratic headquarters in the Watergate Hotel, a name that has of course taken on significance beyond what everyone could possibly imagine. It brought down eventually a president and a number of those senior officers that advised him. But in the course of the aftermath of the Watergate breakdown, there were significant congressional hearings because Congress wanted to understand what brought about this event and then of course Congress wants to see if there's a way to legislate to address it.

In the course of the congressional hearings there was testimony by the corporate officers and senior members of public companies as to contributions that they had made in political financing, contributions they had made to political candidates and that became a part of the investigation was looking into political contributions. It eventually expanded into contributions beyond just political, all as a part of the Watergate hearings. And I am going to introduce Judge Sporkin by saying, at the time, Judge Sporkin was the Director of Enforcement for the Securities and Exchange Commission and a person in that capacity who had an inquisitive mind and when he heard these slivers of testimony from the corporate officers about their contributions and their illegal contributions to political candidates and other illegal contributions. They first came to his mind as an enforcement officer of the SEC. How are they recording this on their books and records? What were they disclosing?

What had they revealed to their auditors? And in studying for this presentation, one of my favorite phrases that I take from Judge Sporkin is this concept that senior managers of corporations in Judge Sporkin's mind were stewards of that work. They were stewards of the money of the shareholders and they as a steward owed a responsibility to those shareholders to accurately and openly disclose the information and then to have internal controls within that organization to properly manage it. And Tom, why don't you take over here and then why don't we get Judge Sporkin and Professor Kohler involved.

Tom Gorman: I think Jay's adequately set the stage for the way this took place. And you have to go back, and this is about 1974. Recall that the Watergate hearings really were a broad array of hearings really involving the committee to reelect the President and all sorts of things in the cover up that took place after that and what was going on. And this was really a very small piece. But what, what we want to do is, as RJ talked to you about the reach of the UK statute, the reach of the statutes today. But if you want to understand these statutes, you have got to go back and take a look at, not the reach, let's take a look at the focus. What's the point of the statutes, and Stan, maybe you could talk to us a little bit about when you watched these hearings and you heard these little pieces of testimony, what did you think? What got you going and which lead to all of the cases that you and the enforcement division brought?

Judge Sporkin: Well you have adequately set the table. You know, I sometimes use the expression, "only in America could something like this happen". There I was sitting at my desk and, and at night while these Watergate hearings were going on I would go home and they'd be replayed and I would hear these heads of these companies testify. This fellow Dorsey from Gulf Oil. I hope he's no relationship but, and, and it was interesting that somebody would call Gulf Oil and they would say we need \$50,000 for the campaign. Now everybody, I knew that corporations couldn't give money to political campaigns and so, and the funny part is, they were able to get it. I came into the office the next day and I was not one of these elaborative investigations where you have 50 people. I called in a guy named Bob Ryan and I said, Bob, go to Gulf Oil. A little bit more about my background -- before I got to law school -- because I didn't know whether I was going to ever have the money to until I became a CPA. I found out greatly that being a lawyer is better than being a CPA. But being as it may, I don't want to offend too many CPAs here but what occurred to me was, how do you book a, a bribe, how do you book a payment to the, to Nixon's campaign? And the interesting thing was it took about a day when the information came back and it said what happened was that Gulf Oil had set up two corporations; one called the ANEX, one called the ANEY, capitalized it with the \$5 million each; took the money back to New York, put it into Dorsey's safe at the head of Gulf Oil and there he had a slush fund, a corporate slush fund of \$10 million.

And you wonder why they do it this way? What impressed me was they knew exactly what they were doing. They knew they were doing something that was wrong because the reason they set up this way, for those accountants in the audience, is because they didn't want to expense the money so they capitalized it. Why did they want to expense the money? Because they were afraid, not of the SEC, but of the IRS. So, right from the beginning, it showed me that there was something afool here. I said okay; let's see what we're going to do and we followed the leads. I came up with the idea that we are going to sue Gulf Oil and then I had to come up with what were we going to charge them with? The point was that we came up with the idea that a corporation that is taking shareholder money has a duty to disclose that some of the money they are using is to do illicit activities and that if they get caught it could have a dramatic effect on the corporation.

So that was the premise that we would go in under standard SEC disclosure laws. If you are going to violate the law go and tell the shareholders that you are violating the law. It had nothing else to do with anything else. We weren't trying to in any way trying to, in effect, change conduct or anything like that. That was not our purpose. Our purpose was public corporations that disclose. And we took it, I alone couldn't bring the case, I had to go to a five-member commission and we had some very interesting discussions. Before the commission, is \$10 million material to Gulf Oil, which had, even in those days had billions of dollars. We had to deal with the materiality concept that it wasn't a quantitative, but rather maybe a qualitative, but in order to be able to meet a question as to quantitative, we came up with the idea that you have to look when you're looking at these monies being paid, what is the income stream that is brought about from the money? What is the income stream with respect to this illegal activity? Let me go back a minute.

When we got into Gulf Oil, we found the slush fund. So the next thing we did was see what other payments were made out of slush fund. That's what took us into the foreign area. We not only did with Gulf Oil, but we did it with all the other companies. So we just followed lead, after lead, after lead and this stuff just sort of just burst out and it was hard to contain. As a matter of fact, I was just reading an article last night in preparation, 400 companies were, in those early days, were disclosed as getting involved with these illicit payments. So the thing that did occur to me was the question of how do you book something that's illegal? When we looked into the booking of these payments, we found that at no point do they show there were bribes. So that told me that the concept of having the accountants do their job was being defeated, was being undermined. It occurred to me at an early stage that we needed a provision in the law that required corporations to keep honest and accurate books and records. That thing set with me throughout the whole years that we, the early years, as we started to look into this conduct.

Tom Gorman: Stanley.

Judge Sporkin: Yes, they culminated...

Tom Gorman: Stanley, let me jump in here, Stan, for one second and ask you something. Gulf Oil had millions of dollars but you had cases, the first one I think was American Ship and George Steinbrother.

Judge Sporkin: Yeah. Right.

Tom Gorman: And there was only, like, maybe a half a million dollars there. How does the SEC say to a company like American Ship that a half a million dollars, that's about five bucks in my pocket, you know? So, how do you say that they've got to book this? What's the story?

Judge Sporkin: I don't remember the facts of the ship building case as much as Gulf Oil. The only thing that I would say was -- again we went on a two track, eight basis. The first track was the fact that the, of the qualitative. On the quantitative, what we looked to see was what was the money spent, what was received for that money, and if those monies no longer came in, would that be material to the company? But we were hopeful that we could win on one rather than we didn't have to prove both. On the qualitative, that the shareholders should know that the company was engaged in illegal activity. It's interesting that, when you look back to see, it was epidemic, that nobody had ever looked at this and realizing what these companies were doing. Actually, what we did was an autopsy on this type of stuff and found out what was really going on. Again what happens later is that Proxmire picks this up and calls me and says Stan, what do we need to do here? I told him, that I was ready for him, because I knew we needed a books and records provision.

We had a chief accountant that said you need internal controls and that became the books and records part of the statute, the first two parts of it. It was Proxmire who put in the anti-bribery provision. I was against it because I thought it would get us too mired down in proving corruption overseas and that it wouldn't be the best use of our resources to be doing that. I thought the books and records would be enough because that would then enlist the aid of the accountants. We would have the ability to do these cases; we didn't need a lot of resources. And that's what happened. But Proxmire said, no, I want an anti-bribery provision and also he wanted it to apply to private corporations. So those two provisions got added and that became the law. But the books and records were, I believe, the really hard core part of the statute.

Tom Gorman: Well, before we do the actual statute, let's go back to Gulf Oil in the early cases. You sort of referenced the volunteer program, which I want to come back to, but the early cases, the Gulf Oil and the other cases in the

beginning, when you brought these cases and the commission decided it had authority to bring them, how did you sell them? What kind of remedies did you try to put in there? Everybody needs to remember -- today you talk about the disgorgement, you talk about penalties, and that sort of thing, in those days the SEC wasn't getting disgorgement in these cases. In those days, the SEC had no penalty authority at all. How did you settle these things, Stan? How did you fix them?

Judge Sporkin:

The self-investigation thing came about because one of the questions that the commission asked me. They said we only have enough resources to do what we're supposed to do every day. We don't have enough to be going out on these fields, on these adventures that you want to go out on. I had to beat that argument and the way I met that argument was saying, I'll get the companies to self-investigate -- that's exactly what we did. Now with Gulf Oil, they had two of the finest lawyers you'll ever find. They had the John J. McCoy, the former head of Germany after the war, and a fellow named Jackson who was the son of the Justice Jackson. I actually brought them in, even though they did would be disqualified from doing it today because they were the lawyers for Gulf Oil and I had nobody else to look to. I said well look, we are going to get tremendous criticism, but I trust you these individuals and I know they would do a good job and if not then we all are going down. I knew John J. McCoy had a better reputation than I did and I didn't think he wanted to lose his reputation. So we went along with them doing their own investigation and it was a splendid investigation. He gave us everything we wanted and, in fact, I had some of the best lawyers in the country working for the Enforcement Division. It was tremendous.

That began the next one, and the next one, and the next one. We had a bar and I assume, we still have it now, but of some of the finest lawyers in the country. People that understood their duties and responsibilities and we were able to commandeer them and become SEC enforcement people. The thing worked because, I think we had about 650 volunteer investigations. Now we didn't give them amnesty, but we made it clear that if they did a good job, we weren't going to sue them. Our role there wasn't as it is today, which bothers me a little bit. We didn't look for statistics. What we were looking for is regging, the ability to regulate the community, to make sure things went well. So and you're right Tom, we didn't have any of this great authority, but we also knew that courts have equity jurisdiction. They had great powers under the courts' equity and that's what we used. We never asked for any of these things that the commission now has, where they spell out bars for offices, a director. I was able to get an officer directive bar in my day just by going to a court and barring the person from being an officer director because of acts that he had done in another company. But we were able to do it through the equitable powers of the court and that's disgorgement through the equitable power. Now it's also in Sarbanes Oxley. But, we did a lot. We

didn't whine a lot. We didn't go and cry to Congress and say we need more people; we need more of this and more budget. You tell me what the budget was and we were able to do it. If we had to use the private sector, we used the private sector, but we would get the job done.

Jay Jackson:

So Judge, this is Jay Jackson. I know that in 1974 you started bringing enforcement proceedings and I know that the ship building case, *SEC vs. American Ship Building* was the first, but it progressed from that, as you suggested, to a voluntary program. And as I recall, the history somewhere near 400 corporations participated in the voluntary program and came forward and self-reported on this type of activity. How did you get so many corporations to participate?

Judge Sporkin:

Well, because they trusted us. In other words, they realized that we weren't going to do something that would defeat what we wanted to accomplish and it became something that was done. The company said look, we've got a problem here. What would you do if we went to your lawyers and said we got a problem? The SEC said, look if we go look at the problem, investigate it, and disclose it, that's going to be enough for them. I think that's really what happened. But as I say again, the bar was only too ready to come in and be of help, and they knew that if they screwed up or they did something they shouldn't have done that they could ruin it for everybody. I don't think we had one case where we believed that people are fudging something. The other thing that's interesting is the dynamics and how we would guess how one thing lead to another. That was the most amazing thing. Now you say 400, but I think it was 675. I know Justice documented 400. But we would get calls. I remember -- I got a call one day and it would be a whisper on the phone; look at ABC. I'm using ABC just as an example. Look at ABC Corporation. What I would do is -- I'd call and I say that we received information that you might be engaged in this illicit payment -- we used to call it, activity; go and do an investigation. They did an investigation and then came back and it said nothing there, and then I would get a call from my informant the second time and he would say, "When are you ever going to take action against the ABC Corporation?" I told him that they didn't find anything. And his response was, "well go back again."

What happened was, it was the wrong ABC Corporation. So we had to go back to another one and of course we found it. But in the meantime, the first company came back and says, you know we looked a second time and you're right, we do have a problem. So I got the two cases. These are stories, but things just went like wildfire; it was just absolutely incredible. What it did show, was that if you trace what happened, that not only was this money being used in farm bribery, but we found that it was being used in domestic illegal payments. I think we sued Playboy. I didn't have trouble manning that case. But we found they were expensing their sheets or something like that and not disclosing it. I don't know how big a case

that was, but I do think we brought one there. I think Pitney Bowes had domestic issues. The thing went from foreign to domestic, to a lot of other kinds of things that companies were doing and the amazing thing was that they were building slush funds. Now the serious thing was that some of the information I would get was that some of this money may have been used in the Olympic, where the Israelis were killed. Though, I was never able to investigate that to my satisfaction. But I was told that some of the money went to pay the terrorists in that case. You can see that this money was used for all kinds of activities. Didn't we Tom? We took down governments. I think Lockheed took down the whole Japanese government to my recollection. The reason I know that is because every five years when there's an anniversary of Tanaka's government failing, I receive calls from the Japanese press wanting to get another statement from me. I think we took down Prince Bernhard in the Netherlands. I think he was caught doing some bribery. But it was an epidemic.

Tom Gorman: Also in Italy, Stan.

Judge Sporkin: What's that?

Tom Gorman: If you recall in Italy, in Japan the Prime Minister actually got indicted. In the Netherlands, the government toppled. In Italy, there was a serious scandal from all of these cases. The repercussions from the cases that you were bringing were -- not just in the United States -- they were around the world. Because as you said, the money was going everywhere, just everywhere.

Jay Jackson: You know given the success of the voluntary program and I think the success of the consent decrees with the injunctive relief you were getting. Was new legislation necessary? Maybe Professor Kohler, you can address that.

Professor Kohler: Yeah, I'd like to inject a number of points, specifically as to that question, yeah, legislation was needed because obviously, Judge Sporkin is focused on the books and records and internal control provisions but, you know, at the end of the day those only apply to issuers and there are more issuers, or excuse me, there are more non-issuers out there that are subject to the FCPA than issuers. Because one of the first things that Congress asked itself was, okay, are there deficiencies in existing laws? And Judge Sporkin mentioned the existing securities laws and those were all tied to materiality and the various congressional leaders wanted a more comprehensive statute that just didn't apply to the issuers but also applied to other forms of business organization.

Just in terms of a brief high-level overview, I think it's great that at an event like this you are actually talking about the legislative history. Because it's very important for a couple of reasons. One is just the basic

premise that, under our system, Congress passes laws and the DOJ and SEC are only tasked with enforcing laws that Congress actually passed. So understanding the legislative history is hugely important as a matter of policy. Also the legislative history is important as a matter of law. As you probably know, there is very little jurisprudence concerning the FCPA. But there is some -- it's nearly all in individual cases -- and a common theme in nearly every instance of judicial scrutiny, is a court declaring various portions of the FCPA ambiguous and thus resorting to the legislative history. So, not only is the legislative history important as a matter of policy, as a matter of understanding what Congress' motivations were, but it's also relevant as a matter of law. I question whether the existing enforcement agencies even know about the legislative history because much of what they're doing in the current enforcement context is inconsistent with congressional intent in enacting this in the first place.

And one point I want to make, and Judge Sporkin talked about some of the major cases that brought this to Congress' attention. The first point is, as Judge Sporkin alluded to, these 400 companies, it's probably one of the most mis-cited statistics in the FCPA legislative history. These were payments as Judge Sporkin alluded to across the wide spectrum. These were not 400 FCPA-like as we think of 'em, type payments. And what motivated Congress to act here were the major cases concerned traditional, bonafied foreign government officials, like presidents and prime ministers and princes. Congress' main motivation, and this is crystal clear from the legislative history and I've read it not once, but twice, was foreign policy. Foreign policy being the White House, the State Department. Congress did not want foreign government leaders being accountable to the corporations because of the improper payments but wanted foreign governments being accountable to the U.S. Government.

Given Congress' foreign policy motivation, you know, query whether so much of the existing enforcement activity concerning physicians and lab personnel and customs officials and other ministerial and clerical officials, Congress was not seeking to capture payments to those types of people. The FCPA that Congress passed was a limited statute.

Tom Gorman:

Mike, let me take you back for just a second to the sort of beginning of this and then we can go back out to this. And by the way, cited in the materials is a really excellent article I'm going to do a commercial for you, Mike, is a really excellent article written by Mike on the history of the FCPA. It walks you through it, hearing by hearing and bill by bill. And it's really good. I really commend you to take a look at it. But we go back to the beginning, Judge Sporkin talked about Senator Proxmire who was one of the original sponsors in the Senate, of some of the legislation; I think there was like 20 bills at the beginning. As you said, the State Department came in, they had some views. The Defense Department had a little bit different view. The commission had a different view. Could

you sort of walk us through a couple of those just so people get a sense of what was going on and what the congressmen were hearing and then we can take it out from there?

Professor Kohler: There were, as you allude to, divergent views in the Government about what to do about these so called foreign payment problems. The State Department was against it. The Defense Department was against it. As Stanley mentioned, the SEC was against what would become the anti-bribery provisions. Which is sort of interesting...

Tom Gorman: How could pieces of the Government be against us letting our companies go bribe people? How can the Government get up and testify in Congress and say, no that's okay with us?

Professor Kohler: Well the main takeaway point from the legislative history is it was soon discovered that bribery, whatever we call it, is not the simple safe solution it appeared to be at first blush. The State Department did not want a unilateral approach. The Defense Department didn't want this because they were viewed by Congress and with justification as participants in and enablers of the very bribery that was being addressed.

At the time of the made, most of the bills, President Ford was in office. President Ford was against a prohibition as to these types of payments. President Ford was in favor of disclosure. However, the main congressional leader, Senator Proxmire, Senator Church and then obviously when Jimmy Carter got elected, he was in favor of the prohibition on the view that disclosure was too weak of a policy of response and quite frankly, on the view that disclosure was going to be too burdensome on companies. All companies doing business in global markets at that time of course were engaging agents, of course were making perfectly legitimate payments. That it would -- disclosing literally everything -- was being viewed as too burdensome on companies, whereas, if you just have the prohibition, it's not going to be as burdensome on companies.

But this whole notion that there was a consensus view of the Government, it's not true; there were divergent views within the Government as to what to do about this problem.

Jay Jackson: Wasn't there also a point of view that the criminal provisions would be too difficult to enforce and those that argued against incorporating that portion into the statute emphasize that?

Professor Kohler: Yeah, there was wide concern that this was going to be too difficult. And I think this is very important, because it goes back to Congress' mind in the first point. How are we going to prove that a company gave a payment to a traditional foreign government official? A president, a prime

minister? How are we going to get that evidence? We're going to get into some sovereign immunity issues. Now at the time, when the FCPA originally passed, it did not have extra territorial jurisdiction which it does today. In terms of how are we going to prove these type things? A lot of that was alleviated in 1998 when the alternative nationality jurisdiction prong came in. But again, I just think it's so very important to understand why Congress passed this law in the first place.

When I look at literally every instance, probably not every instance, but most instances of FCPA scrutiny I think two questions can be asked. The first question and no doubt the question on the minds of most of the people in the audience is, is the type of conduct at issue the type of conduct on which the DOJ and the SEC have brought enforcement actions on in the past? That question is usually answered, yes. From a rule of law perspective though, the more important question is, is the conduct at issue the type of conduct that Congress sought to capture when passing the FCPA? And in many, many cases in this new era of enforcement, that is very much a debatable point. And let's not forget, more often than not when the DOJ and the SEC are actually put to their burden of proof in FCPA cases, they lose.

Judge Sporkin:

Let me just add something here that is troublesome to me. I lived through this era. And this was really Senator Proxmire. I didn't talk to all these other folks. And the proof of it is, without any question, the books and records provision, that didn't come -- Congress didn't come up and say -- hey we need a books and record provision. We told the Congress that that's what you needed here. But, yeah, they weren't trying to use the books and records provision to be able to deal with all this other conduct. We were using it because we believe that companies got to have honest books and records if they're going to have honest statements. The statements come from the books and records. That was the concept here and Proxmire, unlike any other senator I have ever seen, had tremendous authority, tremendous power and he pushed it through on his own. I don't know where else he was able to do it. The books and records provision was to make sure that we are getting honest statements from companies. The books and records had to be honest, therefore the statements, because the accountants would follow the records. That was the whole concept -- so there would be proper disclosure so that the shareholders would be able to see what these companies were doing.

Now the fact is, that it had other unintended consequences, was not something that clearly, we at the, at the SEC were interested in. Because you're right, the Professor's right, the SEC wasn't very warm to this. This is something that I was dealing with Senator Proxmire. The SEC would not have gone, I don't think, with such a recommendation.

Professor Kohler:

Well I don't know, Judge Sporkin...

Judge Sporkin: And now that the statute of limitations is over, I had dealt with Proxmire -- the commission, it wasn't going for it. Then the, our accountant, the interesting thing here is, you've got a provision of internal controls. That provision came from Sandy Burden to back up my position on the books and records. Interestingly, you saw in the past years a tremendous criticism or interest in Congress against the internal controls provision of the new law, of I guess it was Sarbanes Oxley. Yet nobody realizes it's in the law already. It's right there in the books and records. The other thing that's interesting here, as the Professor points out, is the fact that the only people that we were interested in at the SEC were those people that were required to make findings, filings -- I'm sorry -- with the SEC. If you look at one of the big problems with the FCPA at this point is that a company can get out of our jurisdiction by D-listing its securities. That was something that was never contemplated. But that's where we are and I don't think it's anything. It's very simple. There was again a books and records provision to get the companies to make honest statements to the shareholders.

Professor Kohler: Judge Sporkin, we're agreeing I think on most everything. Obviously given your position at the SEC and what your jurisdiction was and what your focus was at the time, yes, obviously you were focused on books and records and internal controls. But Congress was more comprehensively interested in the anti-bribery provisions recognizing that books and records and internal controls were not going to address the entire landscape.

Judge Sporkin: You're right. Absolutely on that, because as I told you, I didn't like it just as others didn't like the idea of having to go and prove bribery in foreign lands. I don't know how many cases they had, the SEC has, professor, in which they were able to be able to successfully prove a bribe and most of them were all by consensus.

Tom Gorman: Stan, at one point though, Proxmire put in his bill the anti-bribery provisions, and by the way, if you don't know who Stanley Burton was, he was chief accountant at the SEC at the time, later Dean of the Graduate School of Business at Columbia. You talked with Senator Proxmire. Proxmire's bill eventually, essentially -- not quite -- but essentially became the FCPA and it had the anti-bribery provisions in it. Could you give us a flavor of the conversations you had with the Senator about that?

Judge Sporkin: Well he had seen the cases that were brought and a lot of them had the bribery aspect to it. We didn't have a lot of long conversations about it other than the fact that he says, "Stan, what about an anti-bribery provision?" I was the one that said, "Well Senator I don't think it makes sense." Now obviously, I don't know, he might have had discussions with Church and others that were trying to push that through. I was not part of that discussion. He just asked me what I thought about it and I told him it

wasn't such a good idea. My idea was strictly on the books and records provision and internal controls. So the Professor's right on that. There might have been a lot of undercurrent on this other stuff, but I did not see it or was part of it, that discussion.

Jay Jackson: In the anti-bribery portion of it, why criminalize it? Why not have some other remedy for, as a deterrent to anti-bribery?

Professor Kohler: Well criminalizing something sends the most strong policy assertion as possible was Congress' viewpoint. The alternative bills provided, in many cases for a disclosure regime, but Congress soon learned that if you're going to require a company to disclose a certain category of payment, you're still going to have proof problems, definitional problems as to that certain category of payment. So why not criminalize it, because you're getting the same thing but it was viewed as less burdensome on business. Because if there was a disclosure regime, literally in 1977, every company doing business in the international marketplace was essentially going to have new disclosure obligations imposed upon them. It's really no different than the resource extraction provisions of Dodd Frank which provide for a disclosure regime as to perfectly acceptable and legal payments. And that's one of the reasons why I think Congress in that case lost sight of the fact that they already had that internal debate back in the '70s and opted against the disclosure regime.

Tom Gorman: Well Professor, the disclosure question under Dodd Frank though, you're talking about disclosing, as you said, legal conduct. The conduct we're talking about here, isn't it quite different because bribing people is illegal? And some of these cases, as I said before, the Prime Minister of Japan was indicted and went to prison for this. The Italian government almost toppled from this. Gulf Oil, when it came out that they had bribed some people, the Peruvian government expropriated the large, what was then the largest gas well in the world, in the northern part of the company and they lost that, they lost that asset and that problem didn't get solved until the early 1990s. So aren't we talking about two really different kinds of things and stuff Stan and the SEC were investigating was really wrongful conduct versus, are you using this or not, which is just a disclosure issue and not criminal conduct.

Judge Sporkin: Let me mention something to you now while I recall the reason the bribery. It was unusual for the SEC to be given authority under substantive types of offenses. While we were a disclosure agency and I think that goes to the point I was making was why I didn't want to get involved with our prosecuting people that are bribing people that really have nothing to do with the SEC's, the way it operates. Our concept was to get the information to the shareholders and let the shareholders make decisions on what they wanted to do. So that goes back to that. But again, I think the Professor's right about the undercurrent that was taking place

and I think Church had failed several times in trying to breathe some law, or enact some statutes. But, this other thing seemed to work. The business of, the disclosure, the beauty of disclosure, it is almost like an antibiotic. It has such tremendous power. Sure, the fact is when the people disclose in the United States, bribery is illegal in every place in the world. You don't think that if we disclose in the United States that the premiere of Japan is getting bribe money that Japan isn't gonna take action, or the Netherlands isn't gonna take action, or all these countries. Sure they did. That was obviously something that, whether it was contemplated was not, was certainly realized that somebody would have to do something here. And as a matter of fact, I think you can see why there was a worldwide effort to deal with worldwide bribery when this thing just sort of gushed right out and nobody could then ignore what was happening. Just think of what these companies were doing and what was going on in the world back in the '70s and nobody had an idea, any concept of what was happening.

We do know that certain governments condone this like the German government permitted you to take a tax deduction for a bribe payment and so we do know that. But when I look back and see what was going on and whether the 400 companies were all bribing or they were doing something else -- that's why we called it illicit payments, but it's incredible in what they were doing. The slush funds and everything else, how corporate money was being spent without it going through the regime that it was supposed to go through and that it was just being improperly spent and dishonestly spent and doing things that they shouldn't have been doing.

Professor Kohler: One thing I'd like to interject, Tom, and it's very much relevant to the legislative history is how often do we hear the "B" word -- bribery -- tossed about at conferences like this and other conferences? There's a presumption that we all know what we're talking about because bribery somehow has this universal meaning. Well, what Congress learned very early on, is that, this term bribery, it almost defies an explanation in many cases. How do you put down on paper what bribery means without negatively affecting so many other policy and competing interests? So, I don't know if you can see my hands here but Congress learned, during the legislative history of conduct this wide in scope. It's sought to address in the FCPA this type of conduct. Now if the DOJ and the SEC want a statute that applies to this type of conduct, there is a way to get that statute. Go back to Congress and get it. But I just think it's very dangerous for the DOJ and the SEC to attack conduct that Congress did not intend for them to enforce. And I think that's very much what we have in this new era of FCPA enforcement as declared four years ago.

Jay Jackson: So can you give us an example, Professor, of the types of prosecutions that you see or the proceedings you see that go beyond what you think the statute was intended to address?

Professor Kohler: Well, as some of the members in the audience may know, there's a current case before the 11th Circuit concerning state-owned or state-controlled enterprises based in part of my so-called foreign official declaration that's been used in many of these cases.

When Congress was looking at the foreign corporate payments problem, there were specific bills that specifically listed state-owned or state-controlled companies. You don't see that in the final FCPA. Congress was not seeking to address payments to so-called ministerial or clerical foreign officials. The FCPA originally had an indirect facilitation payments exception imbedded in the definition of foreign official. In 1998, the standalone facilitation payments exception came in.

The legislative history is clear, that Congress was not seeking to address payments concerning license, permits, certifications, etc. Where is most of the enforcement activity? SOEs, licensed certification type issues. Again, I completely understand why people in the audience are nervous about this conduct. It gets back to my two questions. Of course, if I was an in-house counsel, of course if I was a compliance officer, I would pay attention to the current enforcement theories. But what I am able to add to the conversation taking a step back is what is the big picture here? What did Congress intend? And under our legal system, legislative history matters. Under the rule of law, what Congress intended to capture matters. It's a very dangerous situation if we just exclude all of that and allow the DOJ and the SEC to address anything that they don't like. The EDM enforcement action from December involved allegations that the corrupt Ukrainian government was not giving something that EDM was entitled to, namely it's VAT refunds. Show me how corrupt intent, show me how the obtainer, retained business element would be satisfied in cases like that. And you could go on and on.

Tom Gorman: Well isn't the problem though that you're pointing out Professor; there still is a facilitations provision in the statutes, at least in theory. I don't know if you think it's there in practice, but, in theory it's there. And I agree with you that the statute's focused on certain narrow kinds of payments, but isn't one of the problems here that, none of these cases are getting litigated. So, if you settle them, you can settle them on the Government's terms or not on the Government's terms.

Professor Kohler: You are absolutely, positively right and one other article I've written is the façade of FCPA enforcement. As strange as it may sound, legal elements, legal principles only matter in the context of an adversary proceeding. And we don't have adversary proceedings given the resolution vehicles the DOJ and now the SEC have come up with.

I don't think people understand well enough that MPAs and DPAs insulate enforcement agency theories from judicial scrutiny, in all but the rarest of instances.

Judge Sporkin:

Correct.

Tom Gorman:

One of the things though, maybe I can get both of you to comment on this, back when Stan was running the volunteer program, these companies did these huge internal investigations and realized at the time -- doing internal investigation wasn't like today. Today companies do an internal investigation to find out how to get the parking lot to go home. Then these were relatively rare. Stan was putting in outside directors. Again, relatively rare. There weren't audit committees. In fact, during the time period the SEC asked the Exchange to put that into the listing requirement, so it was a different time period. But yet you were able to get people to effectively investigate. They effectively put in remedies and revamped their corporate procedures, Mr. Dorsey, sorry to say, I don't think he's connected to us. He got fired. A lot of other people got fired or got let out of their jobs quietly. But you reformed all of this, Stan. The Justice Department, and maybe Mike you can comment on this, seems to be doing this. But what's the difference? Isn't the volunteer program something similar to what's going on today or is it not?

Judge Sporkin:

Well look, if I were doing the thing now, you wouldn't see a lot of this stuff. I think the Professor's right. You know you have use common sense. Not only does the private sector have to use common sense, but the Government has to use common sense. And I agree there are a number of things that are getting involved here, that they shouldn't be involved with. Why you might ask, for example, is the Department of Justice -- when we were doing these things -- the Department of Justice wasn't involved in many of those instances. They didn't get themselves involved until much later. This piling on business, you know, you don't have to make it every time the SEC brings a case -- it doesn't have to be a criminal case that follows on. Or every time the Justice Department brings a case, it doesn't have to be a civil case following. I think there's got to be a lot of this, but I think people have got to get more confidence in their judgment and realize that if the SEC's role should be to try to regulate the Government, the prosecutor should be prosecuting those people which will be needed to make sure that you get the really bad people out of the system and help the SEC in this, its goal to regulate business, to regulate disclosure, to regulate what has to be done. But there has to be some more conforming of the two agencies together. And I think that's got to be done. How it can be done I don't know. But it should be done.

In other words, I always try to look at how to create something for the overall good; to create something with a purpose. The purpose was, if we could get all companies to have honest books and records and whatnot that

would be a good purpose. But to have to just go through this and every time bring a case, to have two parties bringing cases; I don't know if it makes sense. Then we have all these things have come on to defer prosecution, to defer this, to defer that, deferred prosecution with enrolled, without it being enrolled. It just doesn't make much sense. So the Government's got to reform itself I believe, and to get one Government type of talking here.

Professor Kohler: I could not agree more with what Stan says. And when a person like him is saying these things I think we ought to listen. The DOJ and the SEC have become tone deaf on FCPA reform-type issues. They don't want to lose their leverage. Politically it's not popular. But let me go back to a statement from prior FCPA reform hearings in the 1980s. Just because this topic is talking about a delicate, sensitive subject does not mean that you can't have a good faith, issue-based discussion about how we can do things better. And I agree with Stan. It's ridiculous that you have two agencies basically double-dipping and taking their own pot of money from corporations. Don't corporations have due process rights as well? Last time I checked, they're legal persons and entitled to due process rights.

This motion that NPAs and DPAs -- how many former DOJ officials do we need to come out and say these agreements are no good? How many more cases do we need for the Department of Justice and the SEC to realize that *ad hoc* enforcement is not the best positive incentive to send to companies?

Stan, many years ago myself, many other former DOJ's and SEC officials are in favor of a compliance defense. I think the compliance defense is in the DOJ and SEC's best interests. But they can't get to that point because it may mean less cases; it may mean less leverage; it may mean less enforcement statistics. But I think we've come to a moment in time where we need to have some of these discussions removed from the clichés and the banter of, "oh we're just trying to make it easier for companies to engage in bribery." That's just foolish!

Jay Jackson: Let me try to direct a question that might be more near and dear to the audience because I don't know if we're all going to run out and write to our congressman to ask them to reconsider this statute. But if you're in a compliance position at a company today or if you're in-house counsel that has responsibility for overseeing Foreign Corrupt Practices Act or similar statutes in other countries, but focusing on the Foreign Corrupt Practices Act, what do you do with what you've argued? What do you do with the argument that, that the Department of Justice or the SEC is reading the statute too broadly? Where do you take that?

Professor Kohler: Well it's a very difficult question and I acknowledge, because at the end of the day a company is going to be risk adverse. And at the end of the day,

if there is an actual criminal indictment or even a SEC complaint, the hit on the company's market capitalization is going to be bigger than anything the SEC or DOJ could ever throw at them.

But let me just say this, what may seem on a company-by-company basis as a specific risk adverse decision, the cumulative effect of all these companies making these specific risk adverse decisions is this current era of enforcement we find ourselves in. It's a fallacy that companies cannot defend themselves in this area. The Arthur Anderson effect is a myth. It's been proven to be a myth. PNG Energy was just criminally indicted earlier in April, in California. As far as I can tell, their stock is trading today, higher than it was early in April. If companies can do this in some of these other areas, why can't they do it in FCPA context? I know most boards and audit committees are risk adverse, but again, the cumulative effect of all of these separate, unique risk adverse decisions are what we have today.

Tom Gorman: Well, what I was going to say Jeff was...

Judge Sporkin: I think it's very difficult to defend one of these cases, as you know of course. But on the compliance end of it, I believe if there's a good faith effort in doing it and you go in when you find something and you take it to the FCC and possibly the Department, I think if they show that you caught it or you were able to, well at least you got the information, I think you're going to be alright. I doubt very much whether they want to hang you on that. But yeah, but I think you can help your clients by setting up a very meaningful, compliance program.

The problem I see in compliance is that they are not really putting in the kinds of effort and resources that's necessary here. And I really think that you've got to get your compliance department, your internal audit department working together; in too many instances, you find that they're working separately. And you've got to determine, I mean when you go into a courtroom with one of your clients, they are exposed to many different laws; environmental laws, and OSHA laws and what not, including the FCPA. And what you've got to do is give them an audit to determine how they are addressing these various concerns. And they've got to have real programs. And if you go back to the Caremark case -- you've got to have a program and you've got to enforce that compliance program. I find that too many clients are not. You go into a company and they say they have one person that's dealing with the FCPA and they're doing business in China in whatnot. It's a joke. So yeah, if the companies are putting in the effort and the resources, they'll be alright.

Professor Kohler: You know everyone's experience is specific to themselves and antidotal. I still advise companies on FCPA risk assessment and compliance and was an FCPA practitioner for 10 years. And you know, I never once felt that a

company was just having this cliché like paper program. Let's go back to the law here. The internal control provisions do not require perfection. It's reasonable, internal controls to provide sufficient assurances. This is a direct quote from the legislative history. Thousands of dollars should not be spent to conserve one dollar. Given the paranoid state that many companies find themselves in, thousands of dollars are being spent to conserve \$10. That's just not a wise and efficient use of shareholder money. The DOJ and the SEC make policy statements saying companies should efficiently allocate their compliance resources, but what do they then do? They bring enforcement actions that concern flowers and cigarettes and karaoke bars. I mean that's forcing companies to act completely inconsistent with the common sense advice that the DOJ and the SEC often give.

Tom Gorman:

Professor, I certainly agree with you and I think that the real takeaway point that Jay started to say between you and the judge is that, you need to go back to the statutes, you need to go back when you're doing your compliance program, you need to think about what the Judge said about what he was trying to do here. About what the Professor said about when he studied the legislative history and all of his writing, what's going on here? And when you're asking yourself, "what do you want to do here?" Commissioner Evans said in 1976 as this was unwinding he said, I'm concerned that people are playing around the edges. I'm concerned that people are worrying too much about not getting a DOJ, or an SEC enforcement action. That's not the point. And if you get something from this, think back to where these two points come together and think about as you do your compliance and if you have a problem and if you're gonna go in and push back on the Government, and I think you can push back on the Government. I agree with Mike about the trends. I also agree with the Judge about this. Give me two seconds to tell you about a short story and this will tell you where to go.

When these cases were being settled, you had to see how this worked. What happened was -- teams of corporate lawyers would come in to the SEC which was then at 500 North Capitol Street -- a really terrible building as you recall, Stan. And they'd come into Stan's office, and this is what it looked like. Over here on the left was Stan's desk; a huge desk with all kinds of stuff on it. Over here on the right was a huge couch, and Stan was usually sitting in the couch and this was a couch that -- sorry Stan -- they probably wouldn't give it to the Salvation Army. And over in this corner was a big table and that had a lot of stuff on it.

So Stan's sitting there on the couch, the SEC staff, which is all the people who've investigated the case and know all kinds of stuff about the case, they're sitting there on the couch, they're sitting on the chairs and they're all debating all this stuff. In walks this entourage of lawyers representing the company and they scatter about the room and the staff and the lawyers

start to argue. Well this is, it's immaterial, it's in a foreign country. It's this. It's that. Nobody cares about this. You guys are off the railroad. This was a very controversial time period and all of these arguments would go back and forth, back and forth and back and forth. Stan would sit there, looking a lot like he does right there, and so he would lean back and he closes his eyes, and staff had seen this trick before so they're not paying attention, although nobody's doing anything. The corporate lawyers are looking at this and they thinking, "Do you think he's asleep?" The staff's going -- we don't know -- don't worry about it.

So the argument goes on. And it just goes on for a while. And then eventually Stan gets up. He walks over to the desk and he picks up a pad and he goes, ladies, gentleman, we need to do the right thing here. This is the shareholder's money. You are the stewards. Securities laws aren't meant to trace square corners around, it's a code of ethics. So let's do the right thing. And then he would start writing on the pad and he'd sketch out the settlement and the case was over. When you do the compliance, think about what Stan's going say when he gets up after listening to you about how you want to do your compliance. And if you think about that, I think you'll get to the right answer.

Professor Kohler: But Tom, if I may, the problem with that is there's so many double standards here. Because what you can do with one category of customer, the DOJ is calling with another category of customer, bribery.

Tom Gorman: I absolutely agree with you, Mike, and you've got the Sat.com case, you've got the Diego case. You've got the cases that you've cited. They all have those problems. But I think if you really come in to them with a really effective, well put-together compliance program, if something goes wrong, something goes wrong. The SEC said a million times, even DOJ says, if stuff goes wrong it doesn't mean it's bad. I think companies need to put this stuff together right and put themselves in the position to do what Stan says, and if you're in that position, they can say whatever they want. But you have a very solid position to push back on and maybe if you have to, maybe in some cases you're right. Maybe you'll have to litigate this or maybe you'll have to get a court ruling but I think eventually it's going to push back on them. The problem with a lot of these cases and when you look at them is, there's very little said about the compliance programs and that's because there's very little about the compliance programs that's real. They're not really there. They're not tied into the internal controls the way Stan said. They're not having the internal audits. Go back and look at some of the literature Stan put out in what he calls an inoculation program. If you do that, it would be very hard, I believe, for the SEC or the DOJ to bring a case. And while companies are risk adverse and I think Mike's exactly right about that, so is the Government. They don't want to lose.

Judge Sporkin: Let me tell you something that's concerning, and that is, the current state of affairs of the corporate community. We have all got to be shocked when you see a General Motors and a Toyota. I mean, because lives are at stake here. Where corporations are not making the kinds of disclosures or taking the kinds of actions they should take. You still have that tension, and you have that tension with the government trying to enforce. You still have the tension where corporations are trying to get by with less than what they should be getting by with.

So that's a real problem and if we were able to get better corporate governance and better corporate performance, then I think we could have a better case to go to the Government and say look, we need your help. I don't think we have that situation today. I don't know how we get it there but next time, I'll talk about the ombudsman's role because that will come in and you'll see that it has a lot of impact. But we are not going to get into that today.

Tom Gorman: Alright, I'd like to thank Judge Sporkin for appearing today. I'd like to thank the Professor too. Obviously, Judge Sporkin has lived through this, as he said. He has a really unique point of view as does the professor. And by the way, I'll do another commercial for you, Mike. Mike is now running what he calls the FCPA Professor Institute, that's a two-day program on the statutes. Take a look at his website. I've looked at it. It's very good. I would commend that to you if you want to study the statutes, but thank you very much.

RJ Zayed: Yeah, thank you so much. Nice work. That concludes our program today. We have a couple of administrative matters and I'll turn it to Jay. Doing the right thing is the way to go. Because it may be hard, it may be difficult. The Government may not buy it but at the end of the day, doing the right thing, if Jay and I have to stand in front of the jury, that goes a long way. And so that is it. Thank you. Do the right thing no matter what. That's my take away on this. Jay.

Tom Gorman: Well just the administrative things. Thank you so much for your participation, your attendance, your attention was terrific. You will be getting an email from the firm sometime in the next few days asking you if you'd fill out an anonymous evaluation of the program. We take the responses we get very seriously. It not only helps us to improve what we're doing but it helps us to plan for future programs. So if you do have a few minutes and you get that email, go to the website. We won't know who you are unless you disclose who you are. So please do that. And again, thank you so much for coming.

RJ Zayed: Thank you.