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LIGHTING UP THE FOREIGN CORRUPT PRACTICES ACT: A CASE STUDY OF U.S. TOBACCO INDUSTRY POLITICAL INFLUENCE BUYING IN JAPAN

Mark Levin†

"If we admit that smoking is harmful to heavy smokers, do we not admit that BAT [British American Tobacco]¹ has killed a lot of people each year for a very long time? Moreover, if the evidence we have today is not significantly different from the evidence we had five years ago, might it not be argued that we have been 'willfully' killing our customers for this long period?"²

"There is gold for you. Sell me your good report."³

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³ William Shakespeare, Cymbeline act 2, sc. 3.
I. Introduction

On November 26, 1974, Kakuei Tanaka resigned as prime minister of Japan due to a recent exposure of political corruption. Now commonly known as “Japan’s Watergate,” the event originated from massive bribes provided by the Lockheed Corporation to obtain Tanaka’s influence in the Japanese military’s purchase of Lockheed aircraft. As the most notorious...
in Japan's long post-war history of political scandals,\(^7\) the events shook both Japan's political arena and its economic markets with the energy of a major earthquake.

Although influence peddling surely was not new to the world at the time,\(^8\) the United States Congress was dismayed to have the government of a key ally in Cold War geopolitics fall into political turmoil, especially when the agencies of American business produced that turmoil. Consequently, in the midst of political reforms that emerged from the Watergate scandal in the United States, Congress enacted far-reaching legislation, the Foreign Corrupt Practices Act (FCPA).\(^9\) This act aimed to prevent American commercial enterprises, or their agents, from participating in high-level corruption abroad that might be harmful to American diplomatic or geopolitical interests.

Nonetheless, ten years after the Watergate and Lockheed scandals, and just five years after the enactment of the FCPA, the senior-most executives of the Brown & Williamson Tobacco Corporation (B&W) developed a plan to provide cash and other benefits to one of Japan's most powerful political insiders and a close confidant of then Prime Minister Yasuhiro Nakasone. These plans appeared explicitly in confidential documents that became public through civil litigation discovery in the late 1990s.\(^10\) The documents show that B&W's executives, including its chairman and its director of marketing research services, participated in the

\(^7\) See, e.g., Gerald L. Curtis, The Japanese Way of Politics 163 (1988) (noting how "The Lockheed scandal . . . rocked Japan's political world as had no previous scandal.").

\(^8\) As to Western traditions, see, e.g., Bribery-The Tradition, http://law.jrank.org/pages/572/Bribery-tradition.html.


\(^10\) These documents were first revealed by Dr. Mary Assunta Kolandai in her outstanding doctoral dissertation, Mary Assunta Kolandai, The Tobacco Industry in Japan and its Influence on Tobacco Control 127-29 (Aug. 2007) (unpublished Ph.D. dissertation, The University of Sydney) (on file with author), available at http://tobacco.health.usyd.edu.au/site/supersite/resources/pdfs/AssuntaPhD.pdf. Dr. Assunta's massive work draws from interviews, tobacco industry documents and other materials and presents a comprehensive picture of Japanese tobacco control policy, the Japanese tobacco industry, and foreign tobacco multinational business in Japan through 2006. Dr. Assunta, a researcher at the University of Sydney, appropriately presented this story as an example of unethical and corrupt industry activity in Japan. This paper layers on top of her discovery the additional element of that activity's apparent illegality under U.S. law. *Id.*
plan to be effectuated in a highly secret face-to-face meeting with a key Japanese politician at the Regency Hotel in New York City in August 1983. Although the precise details of what transpired at that meeting remain hidden and key individuals have passed away, the documents alone reveal a telling story.

Lockheed’s run of global corruption was unethical but not yet illegal under U.S. law in the 1970s. But, by 1983, when B&W was planning the August meeting, Congress had codified the illegality of payoffs to influential government officials. Thus, B&W officials should have been well aware that the activities described in the plans, if carried out, would have been illegal under U.S. law. Had these industry documents emerged in a timely fashion, B&W’s chairman and senior-most executives should have been investigated for serious crimes with penalties, including up to five years of imprisonment for the individuals involved.

Whatever the B&W officials did, it seems as though they got away with it. The five-year statute of limitations has run, and most of the individuals involved have passed away.

This Article begins by presenting the historical record of B&W’s contemplated political influence buying in Japan as demonstrated by the tobacco industry documents in Part II.
While Japan was still reeling from its Lockheed scandal, the "same old thing" was happening again at the highest levels between the chairman of B&W and a very close associate of the Japanese Prime Minister, aiming to influence the Prime Minister's actions and the actions of what was then a public corporation, the Japan Tobacco and Salt Public Corporation (JTS). Next, Part III of this article analyzes those facts under the terms of the FCPA in effect at the time and concludes that the documents reveal a plan that, if carried out, constituted a felony.

Admittedly, it is impossible to determine whether the activities of B&W were unique or represent only the tip of the iceberg of how tobacco industry executives have operated to secure high-level political influence throughout the world. Other corrupt engagements are suggested in published reports regarding Malaysia and the Czech Republic. Moreover, a 2000 World Health Organization (WHO) report carefully documented the tobacco industry's corrupt efforts to influence WHO's policies.

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Library is available at the following website: http://legacy.library.ucsf.edu/ (last visited Feb. 5, 2009). The collection includes documents exposed by tobacco industry whistleblowers and civil litigation discovery in the United States and United Kingdom. Legacy Tobacco Documents Library, http://legacy.library.ucsf.edu/about/collectons.jsp (last visited Feb. 5, 2009).

19 See infra text accompanying notes 48-58. Japan Tobacco and Salt Public Corporation (JTS) is the antecessor to Japan Tobacco, Inc. (JTI), which emerged from JTS's so-called privatization in 1985. For an extensive history of Japan's tobacco monopoly and its privatization, see Mark A. Levin, Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan, 8 STAN. L. & POL'Y REV. 99, 101-02 (1997).


22 COMM. OF EXPERTS ON TOBACCO INDUS. DOC., WORLD HEALTH ORGANIZATION, TOBACCO COMPANY STRATEGIES TO UNDERMINE TOBACCO CONTROL ACTIVITIES AT THE WORLD HEALTH ORGANIZATION (July 2000), available at http://www.who.int/tobacco /media/en/who_inquiry.pdf. Here too, the FCPA might have been implicated except that at the time of the reported WHO interference, the FCPA did not apply to bribery of officials of public international organizations. This was put into the law in the 1998
These circumstances bolster the implications of the potential illegality portrayed in B&W’s story. Therefore, in Part IV, this article proposes a number of specific actions beginning with a comprehensive investigation by the United States Department of Justice and Congress into the U.S. tobacco industry’s political actions abroad. Appropriate measures with regard to U.S. tobacco industry political activities abroad must be integrated into the pending legislation for regulation of tobacco products by the U.S. Food and Drug Administration in a manner that goes far beyond the currently proposed approach. Furthermore, just as international measures under the WHO Framework Convention for Tobacco Control (FCTC) must play a role in the future directions of U.S. policy, the FCTC’s Conference of the Parties should also take immediate action to address this issue.23

Part V concludes this Article with a broader contemplation of the criminality of the tobacco industry’s handiwork. The business advantage potentially obtained by B&W through its corrupt connection to Japanese politicians would have resulted in Japanese citizens’ deaths.24 And so perhaps the individuals involved did not just get away with violations of the Foreign Corrupt Practices Act. It might be considered whether the individuals involved got away with murder.

II. N and Y’s Excellent Adventure25

A. B&W’s March 1983 Tokyo Visit

In mid-March of 1983, a New York-based business consultant named Marvin Stein, working as a special consultant for B&W, traveled to Tokyo with Dr. George E. Stungis, B&W’s director of marketing research services.26 They met high-level officials at JTS, other senior Japanese government officials, a representative from the press, and Mike Mansfield, the United States’

23 See discussion infra Part IV.
24 See discussion infra Part V.
25 Cf. BILL AND TED'S EXCELLENT ADVENTURE (Orion Pictures 1989) (describing a different kind of trip back through time).
ambassador to Japan at the time.\footnote{27} Upon his return, Stein prepared a detailed memo for B&W Chairman I.W. Hughes, to be delivered via Stungis.\footnote{28}

This memo, dated March 25, 1983, lays out the framework that Stein, Stungis, and B&W’s lead staffer in Japan, Joel Silverstein,\footnote{29} had put into place during the trip. The memo carefully details the company’s strategy to buy top-level influence in the Japanese government in two regards: shaping the Prime Minister’s trade policy on foreign tobacco imports and effectuating a new licensing arrangement for B&W with JTS that would outperform B&W’s existing import partner’s results.\footnote{30} The linchpin in enabling these changes was Stein’s personal friendships with an influential Japanese businessman, Kazuyuki Yokoyama, and more importantly, with a senior elected official, Mr. Eiichi Nakao, “a key backer of Prime Minister Nakasone Yasuhiro [and] one of the most influential members of the 150-man agricultural bloc in the Diet (Parliament).”\footnote{31} At the time, the agricultural bloc was among the most significant, if not the most significant, in Japanese domestic political affairs.\footnote{32} In this regard, Nakao was an

\footnote{28 Id.}
\footnote{29 Id. This memo does not explicitly mention Stungis as Stein’s travel partner in Tokyo. However, Stungis’ involvement is documented in at least two letters that Stungis sent after the trip to senior officials in Tokyo with whom he and Stein had met together. Letter from G.E. Stungis, Dir. of Mkt. and Research Services, Brown & Williamson Tobacco, to The Honorable Watanabe Hideo, Parliamentary Vice Minister of Int’l Trade and Indus., Japan (May 23, 1983), Bates No. 501024819, http://legacy.library.ucsf.edu/tid/wpi23f00/pdf; Letter from G. E. Stungis, Dir. of Mkt. and Research Services, Brown & Williamson Tobacco, to Akio Takita, Dir., Overseas Div., Japan Tobacco & Salt Pub. Corp., (May 23, 1983), Bates No. 501024818, http://legacy.library.ucsf.edu/tid/vpi23f00/pdf. In his letter to Akio Takita, Stungis mentions “Mr. Silverstein” as having joined the meetings. \textit{Id.} “Mr. Silverstein” was presumably Joel Silverstein, who is mentioned in the memo and identified in contemporaneous media reports as B&W’s area manager in Japan. Louis Kraar, \textit{Japan Blows Smoke About U.S. Cigarettes}, FORTUNE, Feb. 21, 1983, at 99, 103. Silverstein later became “regional VP-general manager of B&W (Japan).” David Kilburn, \textit{Silverstein’s Book Offers Close-up View of Japan}, ADVERTISING AGE, Jan. 2, 1989, at 20.}
\footnote{30 Stein, Summary Report, supra note 27, at -2711. B&W aimed to address both a declining market trend for Kent in Japan and a frustrating working relationship with JTS on its brands. See T.E. Whitehair, Jr., Visit Report–Japan (Oct. 14-21, 1981), Oct. 23, 1981, http://legacy.library.ucsf.edu/tid/ewo89e00/pdf at -300-02 (noting that JTS “is only reluctantly going to cooperate” and describing JTS’s obstinate position on Viceroy brand test marketing) and at -304 (discussing “the declining trend of K[ent] in Japan”).}
\footnote{31 Stein, Summary Report, supra note 27, at -2711.}
\footnote{32 See discussion \textit{infra} note 33.}
extremely influential political figure.\textsuperscript{33}

Pursuant to B&W's strategy, Nakao, at first gratis, and later for a fee,\textsuperscript{34} was to provide a variety of elements of access and influence for B&W in Japan. First and most importantly, Nakao was a close confidant of Prime Minister Yasuhiro Nakasone and he was to use his influence with the Prime Minister to gain B&W access to Japan's multi-billion dollar tobacco market.\textsuperscript{35} Nakao was also to provide B&W influence with JTS officials for the company's dealings with JTS, affect other parliamentarians within the crucial bloc of agricultural policy specialists in opening the tobacco market, and provide a valuable introduction to the leaders of the unified Japanese agricultural cooperatives vis-à-vis a possible joint venture in distributing B&W products through the cooperatives.\textsuperscript{36}

The covert nature of Nakao's engagement was clear from the start. Stein notes: "Needless to say, the public independent image of Mr. N[akao] (hereinafter, Mr. N) as totally separate and apart from business involvement must be maintained and protected at all costs."\textsuperscript{37} A huge payoff "if the Y-N duo succeed" would go to Yokoyama, who "would expect to receive about one-half of the royalties on Kent to be licensed by JTS."\textsuperscript{38} But "Mr. Y will be our liason [sic] with N in order to insulate N from the commercial aspects."\textsuperscript{39}

\textsuperscript{33} Professor Gerald Curtis's well-known 1988 book provides a careful assessment of rural voters' sizeable power among various domestic political forces, describing the rural sector as a contributing factor maintaining the Liberal Democratic Party's durable electoral strength. \textit{Curtis, supra} note 7, at 51. This phenomenon derives from the party's early roots in rural districts, with that effect first maintained through districting and then through a strictly-followed seniority system: "The party was almost entirely rural-based in its early years. Thus, its most powerful politicians... are almost all from districts that have strong agricultural lobbies." \textit{Id.} at 237.

\textsuperscript{34} \textit{See infra} text accompanying note 52.

\textsuperscript{35} \textit{Id.} Opening Japan's closed market was a crucial target for the U.S. tobacco industry at the time. \textit{See, e.g., Kraar, supra} note 29, at 99 (describing Japan as "potentially the largest overseas customer for U.S. cigarettes" and "the equivalent of $1.5 billion annually in U.S. exports"). B&W's senior leadership understood this goal, having identified Japan as "the BWI [Brown & Williamson International] market with greatest growth potential" in an internal report dated November 30, 1982. Presentation by Pat Sheehy, Brown & Williamson Tobacco (Nov. 30, 1982), Agenda, Bates No. 670124380, -423, http://legacy.library.ucsf.edu/tid/iqfl4f00/pdf.

\textsuperscript{36} Stein, Summary Report, \textit{supra} note 27 passim.

\textsuperscript{37} \textit{Id.} at -712.

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.} This remark is hazy regarding whether Nakao was to get a portion of the royalty payoff. But since he and Yokoyama were working clearly as a team, with Nakao having the more significant role, it certainly seems plausible that Nakao would also have
To ensure the B&W Chairman appreciated Nakao’s extraordinary clout, Stein credited Nakao with “ha[ving] a previous head of JTS fired for refusing to meet with Congressman James Jones when he visited Japan.”

Facts such as that JTS was a vast public enterprise with thirty-six factories, approximately 40,000 employees, and worth an estimated $24 billion, further indicate Nakao’s potent political influence.

Stein’s memo suggested a degree of pride in Nakao’s significant influence during B&W’s March 1983 Tokyo visit.

Stein credited Nakao with having arranged meetings with three of the most powerful people in the executive branch of the Japanese government: the Parliamentary Vice Minister of International Trade and Industry (the number two official in the Ministry), the “senior Japanese agricultural official responsible for U.S.-Japanese agricultural talks,” and one of the North America Bureau chiefs at the Ministry of Foreign Affairs. Stein similarly credits Nakao’s influence for making the meetings at JTS proceed smoothly, specifically noting: “Mention of our having had a previous meeting that day with Mr. N[akao] was also instrumental in insuring [sic] their cooperation.”

B. Planning the Secret August 1983 Meeting

The March memo anticipates that the arrangement would be further developed in a follow-up meeting in New York City with Hughes, Nakao, and Yokoyama attending. Their discussions were to be built upon an anticipated visit to Japan that spring by Thomas E. Sandefur, Jr., the company’s Senior Vice President for International Marketing, and then later, a personal visit to Japan by Chairman Hughes. Most importantly, the plans for this August

shared in the proceeds. See also infra notes 144-145.

40 Stein, Summary Report, supra note 27, at -712.
41 H. YOKOTA, PHILLIP MORRIS, Cigarette Industry in Japan (June 1987), Bates No. 2504004022/4047, -034, http://legacy.library.ucsf.edu/tid/aux32e00/pdf (listing factory and employee counts); Levin, supra note 19, at 100 n.64 (discussing company valuation).
42 Stein, Summary Report, supra note 27.
43 Id. at -712.
44 Id. at -713.
45 This meeting between Chairman Hughes, Mr. Nakao, and Mr. Yokoyama was so covert that it was hidden even from Nakao’s official handlers at the Japanese embassies and consulates. See infra text accompanying note 55.
46 In light of the fact that the documents do not reveal any further information
meeting laid out specifics regarding the questionable payments and other benefits to be given to Yokoyama and Nakao for B&W to secure their further engagement and support.\textsuperscript{47}

The first document contains a set of briefing notes marked "PRIVATE AND CONFIDENTIAL–SENSITIVE," produced by Stein for B&W Chairman Hughes dated August 3, 1983.\textsuperscript{48} The notes indicate that the purpose of the August meeting was "to develop a relationship between [Hughes and Nakao]."\textsuperscript{49} Stein explains that Nakao and Yokoyama "will be discreetly collaborating in enabling [B&W] to improve its overall marketing position with . . . [JTS]."\textsuperscript{50} But while other documents are more obtuse, this document specifically describes a corrupt payment scheme: "[B&W] provides a subsidy ($62,500)\textsuperscript{51} to Y's company: part of these funds are passed to N for his political maneuvering with the PM [Prime Minister] and key Diet members; the remainder is used by Y in cultivating JTS officials."\textsuperscript{52} For this, "N will exert influence on the PM to pressure the JTS into acceding to our marketing strategy."\textsuperscript{53} The larger payoff to Yokoyama, via a subsequent share in the increased revenues of B&W products in Japan and becoming B&W's Japanese agent is also referenced.\textsuperscript{54}

Again, Stein stressed the need for secrecy regarding Nakao:

about Sandefur's proposed visit, it seems likely that the visit was ultimately postponed or cancelled. Similarly, nothing in the documents reveal whether Hughes' Japan visit was carried out and so it seems unlikely that it was. Stein, Summary Report, \textit{supra} note 27, at -711.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} Memorandum from Marvin H. Stein, Special Consultant, Brown & Williamson Tobacco, to George E. Stungis, Dir. of Mkt. and Research Services, Brown & Williamson Tobacco (Aug. 3, 1983), Bates No. 501024808/4810, http://legacy.library.ucsf.edu/tid/uu23f00/pdf [hereinafter Stein, Briefing Notes].

\textsuperscript{49} \textit{Id.} at -808. Absent corrupt payments, there would presumably be no illegality in Hughes' lobbying or otherwise developing a personal relationship with Nakao. No other activities appear in the memorandum. \textit{Id.}

\textsuperscript{50} \textit{Id.}


\textsuperscript{52} Stein, Briefing Notes, \textit{supra} note 48, at -808 to -09. Because JTS was a public corporation, if Yokoyama was providing payments to JTS officials, his actions would also have violated the Foreign Corrupt Practices Act. \textit{See infra} note 119 and accompanying text.

\textsuperscript{53} Stein, Briefing Notes, \textit{supra} note 48, at 809.

\textsuperscript{54} \textit{Id.} Again, Nakao is not mentioned here and it is unclear whether he was to receive a portion of this money, but it seems most likely that he would have. \textit{See supra} note 39.
N wants his meetings with [B&W] to be completely unpublicized. Since he is the PM’s [Prime Minister’s] personal representative, he is constrained to stick to the official state-to-state mission and his schedule is being controlled by the Foreign Office and his movements are monitored by its overseas embassies and consulates.\textsuperscript{55}

Stein sent a confidential follow-up memo dated August 8, 1983, with a biographic summary of Nakao for Dr. Hughes as a reminder of Nakao’s extraordinary level of influence.\textsuperscript{56} Stein emphatically specifies that Mr. Nakao had been “(a) Vice Minister of Agriculture, (b) LDP Councillor on Agricultural Policy, (c) Chairman of the LDP Standing Committee on Agriculture, [and] (d) Chairman of the Lower House Committee on Liberalization of Agricultural Imports, since 1982 (June), a post he now holds.”\textsuperscript{57} As Hughes would certainly have understood, these posts evidence an extraordinary level of political clout.\textsuperscript{58}

On August 16, 1983, just days before the meeting, Stein sent an additional memo to Stungis, recommending that Hughes focus on trade liberalization in his discussions with Nakao. Stein also suggested that Hughes or Stungis provide a new benefit to Nakao, by helping his son study in the United States: “Either IWH [Hughes] or you should offer to help N’s [college-age] son (who will be traveling with him) study English in the US.”\textsuperscript{59} Again, secrecy was critical: “I [Stein] should probably be the one to handle it since [B&W] should have no known connection, in order to insulate N.”\textsuperscript{60} Adjacent handwriting in Stungis’ script notes “Very important,” and this note is linked to further notes below:

\textsuperscript{55} Stein, Briefing Notes, \textit{supra} note 48, at 809.

\textsuperscript{56} Memorandum from Marvin H. Stein, Special Consultant, Brown & Williamson Tobacco, to GES (Aug. 8, 1983), Bates No. 501024813, \url{http://legacy.library.ucsf.edu/tid/ffu24f00/pdf} \textit{[hereinafter Stein, Biographic Summary]}. “GES” is George E. Stungis, B&W’s director of marketing research services. \textit{See infra note} 26.

\textsuperscript{57} Stein, Biographic Summary, \textit{supra} note 56. \textit{See also} Stein, Summary Report, \textit{supra} note 27, at -712 (noting how Nakao had been able to cause a JTS chief to lose his job).

\textsuperscript{58} \textit{See, e.g.}, \textit{CURTIS, supra} note 7, at 88-98. It is also worth noting that Nakao’s support of B&W’s interests essentially betrayed the domestic constituencies and parliamentary colleagues for whom he publicly presented himself as an advocate.

\textsuperscript{59} Memorandum from Marvin H. Stein, Special Consultant, Brown & Williamson Tobacco, to GES, Bates No. 501024680 (Aug. 16, 1983), \url{http://legacy.library.ucsf.edu/tid/cfu24f00/pdf} \textit{[hereinafter Stein, Japan Update]}. “GES” is George E. Stungis, B&W’s director of marketing research services. \textit{See infra note} 26.

\textsuperscript{60} \textit{Id.} (emphasis in original).
"Non-open \( \underbrace{\text{NO direct company connection}} \) and "\( N \) would be very beholding [sic].""  

C. The Secret August 1983 Meeting and Its Aftermath

It is unclear precisely what transpired at the August 1983 meeting, as no written records are available. Evidence in the documentation suggests that Hughes and Nakao established an ongoing working relationship of some kind, but the paper trail is extremely limited. A February 17, 1984 letter from Yokoyama to Stungis purports to convey a copy of a letter that was sent by Nakao to Hughes on the previous day. However, Nakao's letter is missing from Stungis' files; more intriguingly, the letter does not appear anywhere else in B&W's document files, such as with Dr. Hughes' materials, as would ordinarily be expected. Presumably, the letter was destroyed.

Ultimately, it seems that B&W's work with Nakao ended in the spring of 1984 when Japan announced the liberalization of its cigarette market. It seems likely that the February letter from Nakao to Dr. Hughes pertained to Nakao's role in the Japanese government's decision, but what was conveyed in that letter is unclear.

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61 Id.
62 According to Stungis' handwritten notes on the back of the August 16 memo, Chairman Hughes received a one-hour briefing (from Stein and an unknown "AJ") on the morning of August 20. Id. at -681; Handwritten notes, George E. Stungis, Dir. of Mkt. and Research Services, Brown & Williamson Tobacco, Bates No. 501024681, http://legacy.library.ucsf.edu/tid/dfu24f00/pdf [hereinafter Stungis, Notes]. However, Hughes and Nakao's actual meeting appears to have been even more private. Stungis wrote: "May want to leave AJ and Y downstairs." Id.
64 Interestingly, Yokoyama's letter seems to have been secreted in Stungis' files, archived in his "Spain" file, rather than the East Asia files. Given the hush that was being put on Hughes' connections to Nakao and that the copies of Nakao's letter have disappeared, it seems very plausible that there was an intentional effort to bury the letter where it might not easily emerge during civil litigation discovery. See the metadata available at http://legacy.library.ucsf.edu/tid/ryu24f00 (listing the File Number as "Spain Ital GES 840200").
65 Stein provided one final memo to Chairman Hughes via Stungis at the time of the March 1984 public announcement by the Japanese government. Memorandum from Marvin H. Stein, Special Consultant, Brown & Williamson Tobacco, to Dr. I.W. Hughes, Chairman, Brown & Williamson Tobacco (Mar. 28, 1984), Bates No. 501009241, http://legacy.library.ucsf.edu/tid/lwi23f0/pdf. Stein notes that Stungis had not received Yokoyama's telephone call. However, once again pages may have disappeared or been destroyed. Only a single page appears in the documents. It is unclear whether the memo was just one page or whether pages behind the first page were removed. Stein's signature does not appear at the bottom, as it had on most of his earlier memoranda.
remains unknown. In light of the complete opening of the tobacco market, B&W's need for a contemplated licensing arrangement with JTS ended since it could instead compete openly. Thus, B&W opted to search for an independent venture partner to build its Japanese market. The company first announced a joint venture with Meiji Seika, a major producer of sweets and candies, but this arrangement fell through when tobacco control advocates in Japan protested the engagement of a candy manufacturer as a toxic cigarette distributor. A few weeks later, the company announced a joint venture with Sumitomo Corporation, the giant global trading company, as its partner in the soon-to-be-open market. Thereafter, B&W quickly built its Japanese market, becoming "the number two foreign cigarette company in the country, thanks primarily to its Kent Mild brand" by 1999.

This limited documentation may be all that remains to historicize these events. Three of the individuals directly involved, Hughes, Sandefur, and Stungis, have all passed away. Media reports in 2004 indicated Nakao to be in poor health, since that was the basis for his avoiding prison time for an unrelated bribery conviction. The trail completely disappears vis-à-vis both Stein and Yokoyama after the February 1984 letter. So perhaps only Joel Silverstein remains available to discuss these matters, if he were willing.

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66 See supra notes 63-64 and accompanying text.
67 See Whitehair, Visit Report, supra note 30 and accompanying text discussing B&W's declining market share in Japan and need for aid from JTS.
68 B and W to Launch Tobacco Sales in Japan in Tie-Up with Meiji Seika, JII PRESS TICKER SERV., Sept. 13, 1984, available at LEXIS.
69 Meiji Seika Scraps Plan to Set Up Tobacco Sales Agent With U.S. Maker, JII PRESS TICKER SERV., Oct. 19, 1984, available at LEXIS (noting that this was "mainly because of opposition from anti-smoking groups"). This is all the more interesting because Japan's tobacco control movement had only recently emerged at the time, and one would not anticipate the activists' voices yet being influential. See, e.g., Eric A. Feldman, The Limits of Tolerance: Cigarettes, Politics, and Society in Japan, in UNFILTERED: CONFLICTS OVER TOBACCO POLICY AND PUBLIC HEALTH 38, 59 (Eric A. Feldman & Ronald Bayer eds., 2004) (noting that most tobacco control organizations in Japan were formed after 1978).
70 Sumitomo to Sell B and W Cigarettes, JII PRESS TICKER SERV., Nov. 16, 1984, available at LEXIS.
71 Kilburn, Silverstein's Book, supra note 29, at 20.
72 See infra notes 75-76 and note 79.
73 See infra note 89.
74 Such willingness seems unlikely. In a recent magazine interview, Silverstein essentially covered up the fact that he had worked for a tobacco company. Maki
Chairman Hughes' subsequent tenure as chairman of the company was brief, as he passed away of an undisclosed illness in March 1985. Dr. Stungis appeared to have retired from B&W to become CEO of a medical equipment company in Florida and just recently passed away. Joel Silverstein remained as general manager of B&W Japan at least until 1990, when he shifted to a career in marketing other products, primarily Western fast foods, as Vice President of Kentucky Fried Chicken in Japan, Vice Chairman for DirectTV in Japan, and managing director for Outback Steakhouse in Japan. He most recently moved to Hong Kong to become manager of a chain of restaurants.

Sandefur became B&W's chairman in 1993. He was among the six tobacco industry company chairmen who famously testified before a House subcommittee unanimously denying that nicotine is addictive. While Sandefur was never charged with perjury, Committee Chair Henry Waxman accused Sandefur of having "knowingly deceived" Congress. Stronger allegations were raised by Dr. Jeffrey Wigand, who had worked directly with Sandefur at B&W, on the CBS program 60 Minutes: "I believe he [Sandefur] perjured himself because I watched those testimonies..."
very carefully."\textsuperscript{82}

Nakao continued his rise to power and influence in the Japanese government, taking on the posts of Director of Japan's Economic Planning Administration in the Takeshita cabinet,\textsuperscript{83} Minister of International Trade and Industry in the Kaifu administration,\textsuperscript{84} and Minister of Construction in the Hashimoto administration.\textsuperscript{85} As Minister of Construction, however, things did not bode well for Nakao. He was found to have accepted approximately $600,000 in bribes from a construction company while serving as cabinet minister.\textsuperscript{86} A major political scandal at the time, Nakao was arrested on June 30, 2000, for receiving the bribes, convicted in October 2002, and sentenced to pay $600,000 in fines and serve two years in prison.\textsuperscript{87} On November 21, 2003, the Tokyo High Court upheld Nakao's conviction but modestly reduced his sentence to acknowledge the former minister's showing of "profound remorse."\textsuperscript{88} On November 3, 2004, after the Supreme Court had dismissed Nakao's appeal two months earlier, the Tokyo High Public Prosecutors Office suspended Nakao's sentence owing to an undisclosed illness, restoring the seventy-four year old disgraced politician's liberty.\textsuperscript{89}
B&W has also exited the stage. In October 2003, British-American Tobacco sold B&W to its former competitor, R.J. Reynolds Tobacco, for $2.6 billion. Nonetheless, B&W’s brands, including Kent, are still being smoked by millions.

III. Catch Me If You Can

A. An Explanation of the Foreign Corrupt Practices Act

Because countless pages have already been written on the Foreign Corrupt Practices Act (FCPA), this article provides only a brief historical introduction and explanation of the law. The history of the Act is the most significant matter here since B&W’s plans evidenced in the documents are especially interesting when one considers that the contemplated activity seems to be precisely what the law was intended to prevent.

As noted above, the origins of the FCPA lay in the prosecutorial and congressional investigations following the Watergate scandal during the Nixon administration. These investigations and the convictions which resulted revealed such substantial illegal political contributions to the 1972 Nixon reelection campaign by American corporations that the U.S. Securities and Exchange Commission (SEC) began an investigation into all possible misuses of corporate funds and

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91 Kent cigarettes represent an infamous legacy given to Herbert A. Kent upon his retirement from the presidency of Lorillard Tobacco Company in March 1952. It was also the product that put asbestos, “a pure, dust-free, completely harmless material” into cigarette filters for what was advertised as “The Greatest Health Protection in Cigarette History”. RICHARD KLUGER, ASHES TO ASHES: AMERICA’S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 151 (1996).


93 CATCH ME IF YOU CAN (DreamWorks, 2002).


95 GREANIAS & WINDSOR, supra note 94, at 17.
concealment of improper payments.\textsuperscript{96} By December 31, 1976, the SEC reported seventy-seven firms that were suspected of questionable or clearly illegal foreign political and commercial payments, "ranging from $13,349 (Smith International) to $56,771,000 (Exxon).\textsuperscript{97} Congress leapt into action with regard to these issues, but it was not until the Carter administration replaced the Ford administration in January 1977 that legislation could be enacted and signed. During the Ford years, there seemed to be a consensus that some measures were necessary, but debate in Congress raged over the most appropriate approach—whether it should be a disclosure approach or a criminalized approach—but eventually, criminal penalties were included.\textsuperscript{98}

Nonetheless, by the time the law was enacted, the government had made clear that national foreign policy interests were at stake in preventing corrupt activities by American companies abroad. W. Michael Blumenthal, President Carter’s Treasury Secretary, explicitly made this point in his testimony before Congress:

We agree that the United States should impose criminal penalties on American businesses and their officials who bribe foreign public officials . . . . Apart from the moral repugnance and the inefficiency of the system, bribery is contrary to the foreign policy interests of the United States. There is ample evidence to support the statement that overseas bribery creates strains in our relations with friendly foreign countries and causes the international investment climate to deteriorate.\textsuperscript{99}

As to the law’s substance, for purposes of analysis, the multi-layered and complex language of the FCPA’s anti-bribery provisions can be conveniently broken down into seven key elements:\textsuperscript{100}

A violation of the Act’s anti-bribery provisions occurs if:

\textsuperscript{96} Id. at 19.
\textsuperscript{97} Id. at 22. Three of the nine leading companies in the U.S. tobacco industry reported questionable payments. Id. at 24, table 2-3.
\textsuperscript{98} Id. at 49-68.
\textsuperscript{99} Id. at 71 (quoting W. Michael Blumenthal’s remarks at the hearing on H.R. 3815). Greanias and Windsor further note that “the final debates on the floors of the Senate and House underscored again the foreign-policy implications of the act.” Id.
(1) an issuer or domestic concern;
(2) corruptly;
(3) uses the mails or any other means or instrumentality of Interstate commerce, in furtherance of;
(4) a payment, offer, promise to pay, or authorization of a payment, promise or offer of money or anything of value;
(5) to (a) any foreign official, (b) any foreign political party or party official, (c) candidate for foreign political office, or (d) any person while "knowing or having reason to know" that the payment or promise to pay will be passed on to one of the above;
(6) for the purposes of (a) influencing an official act or decision of that person or, (b) inducing that person to use his influence with the government or instrumentality to affect or influence any act or decision;
(7) to obtain or retain business, or direct business to any person.¹⁰¹

These elements enable us to clarify the contours of FCPA violations evidenced by the Brown and Williamson documents.

¹⁰¹ Id. The relevant statutory language as enacted is as follows:
It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--
(1) any foreign official for purposes of--
(A) influencing any act or decision of such foreign official in his official capacity . . . ; or
(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; . . .
(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official. . . , for purposes of--
(A) influencing any act or decision of such foreign official, political party, or candidate in his or its official capacity . . . ; or
(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

B. The Illegality of B&W’s Purported Payments to Nakao and Yokoyama

This section draws upon the documentary record in reviewing the intended gifts and payments to Yokoyama and Nakao. Through this analysis, it becomes immanently clear that B&W’s planned program for working with Yokoyama and Nakao, if it was carried out, represented illegal conduct by B&W, Hughes, Stungis, and Stein \(^{102}\) in several regards.

1. Nakao and Yokoyama’s Assistance Presumed Legal

First, since it was provided gratis and with no apparent quid pro quo, Nakao’s and Yokoyama’s assistance during the March 1983 trip was presumably legal. As noted above, Stein’s March 1983 memo specifically detailed several ways that Nakao exercised his political influence to assist B&W officials during their Tokyo trip.\(^{103}\) This influence included Nakao’s making possible meetings with some of the most powerful bureaucrats in the Japanese government as well as being a factor in senior JTS officials’ cooperative manner with the B&W visitors.\(^{104}\)

While Nakao’s efforts may well have been intended as an inducement to lure B&W’s willingness to provide payments later, the Stein memo makes clear that there was no “offer, payment, promise to pay, or authorization of the payment of any money... or value”\(^{105}\) to either Nakao or Yokoyama at that time.\(^{106}\) Stein notes as to Nakao: “Mr. N later told Mr. Y that he made these arrangements strictly as a favor to me in light of our long-standing

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\(^{102}\) Yokoyama’s terms of engagement and actions while in the territory of the United States would indicate a basis for his FCPA liability under the current version of the FCPA. But because the law’s application to non-U.S. affiliated persons only came into effect with the 1998 revisions, Yokoyama could not have been cited under the FCPA in effect in 1983. See International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. § 78dd-3 (1998) (governing persons other than issuers or domestic concerns). His engagement may well have been illegal under Japanese law, but that is a separate matter.

\(^{103}\) Stein, Summary Report, supra note 27.

\(^{104}\) Id. at 713.


\(^{106}\) Stein, Summary Report, supra note 27.
friendship.” Stein notes as to Yokoyama: “His invaluable advice and assistance to date has been rendered free of charge because of our long-standing personal relationship.” Accordingly, this memo sets the framework for the plans that followed but does not document or suggest any FCPA violations during the March trip.

2. The $62,500 Subsidy Violated the FCPA

The contemplated $62,500 “subsidy” to Yokoyama, if paid as suggested by the documents, would likely have represented at least two separate FCPA violations by B&W, as well as by Hughes, Stungis, and Stein as individuals – first as to Nakao’s exercise of influence and second as to Yokoyama’s “cultivating . . . favor” with JTS officials.

The following analysis draws upon the seven-item list of the FCPA’s anti-bribery provisions, as set forth in Section III of this article.

(1) An issuer or domestic concern;

FCPA § 78dd-2’s restrictions apply to “any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or any officer, director, employee, or agent of such domestic concern.”

The FCPA defines a “domestic concern” as:

(A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

In 1983, B&W was a wholly-owned subsidiary of BATCO, the

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107 Id. at 712.
108 Id. Later in another document, Stein provides more detail: “NAKAO and YOKOYAMA are long-time, close friends dating back to NAKAO’s student days at Waseda University, plus their mutual involvement in student and youth affairs. This writer (Marvin Stein) has known both for more than 25 years and also knew Mr. YOKOYAMA’s father before that.” Stein, Briefing Notes, supra note 48, at -808 (all caps in original).
U.S.-operating entity for British American Tobacco, with its principal place of business in Louisville, Kentucky. Accordingly, B&W was a "domestic concern" for FCPA § 78dd-2 purposes. Since Hughes was one of its officers (and presumably a director), Stungis was an employee, and Stein was an agent of the concern, the FCPA's restrictions also applied to Hughes, Stungis, and Stein individually.

(2) corruptly;

The statute itself does not define the notion of "corruptly," but a clear statement is given in the legislative history, which Duncan has pointed out, implies moral connotations:

The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payer or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrongfully influence the recipient.

Stein's memos repeatedly and emphatically convey to all involved parties the sensitivity associated with Nakao's engagement. Such sensitivity implicates in the circumstances a wrongful use of Nakao's influence, power, and authority, which, if publicly exposed, would have been castigated or punished. For example, Stein makes clear that Nakao's "independent image... as totally separate and apart from business involvement must be maintained and protected at all costs." Nakao wanted "his meetings with [B&W] to be completely unpublicized" and did not want his Japanese government handlers to know of the August

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111 In fact, Hughes was himself a former BAT executive sent over from the U.K. for his B&W posting. *Ivor Wallace Hughes Dies, supra* note 75.


113 Duncan, *supra* note 100, at 31-32 (arguing that the statute fails in part owing to the variations in how morality is assessed in different cultures).


115 Secrecy of an activity should not per se indicate corruption. But in the context of activity that is arguably unethical, such as payments to a public official, secrecy strongly suggests a misuse of an official position. Transparency will generally be welcome for proper payments.

meeting.\textsuperscript{117} And, as noted above, Nakao’s support of B&W in liberalizing Japan’s tobacco market was directly opposed to his public and pre-eminent political representation as a defender of Japanese agricultural interests.\textsuperscript{118}

The corrupt nature of Yokoyama’s use of funds “in cultivating JTS officials”\textsuperscript{119} is arguably less evident. One would certainly wish to inquire how the funds were to be used to cultivate the officials’ favor, but given the amount of money involved, it seems most likely that personal payments and gifts of value were intended means for bringing JTS officials into B&W’s good favor. Since these would have involved the JTS public officials’ illicit acceptance of private personal benefits, the corrupt element of the intent is strongly suggested by the planned allocation of funds.\textsuperscript{120}

(3) \textit{uses the mails or any other means or instrumentality of interstate commerce, in furtherance of;}

B&W and the involved individuals all used the mails and other means or instrumentality of interstate commerce in furtherance of the plan.

“Interstate commerce” is defined in the FCPA as: “trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality.”\textsuperscript{121}

This element seems quite obviously established. At the very least, all of the individuals involved except Stein traveled via some interstate instrumentality from Louisville and Tokyo to New York for the meeting in August.\textsuperscript{122} Moreover, all of Stein’s memos presumably moved interstate from his office in New York City to

\textsuperscript{117} Stein, Briefing Notes, \textit{supra} note 48, at -808-09. This manner is also dramatically illustrated by Stungis’ handwritten notes on the August 16, 1983 memo, indicating: “\textit{Non-open} \textit{NO direct company connection}”. Stein, Japan Update, \textit{supra} note 59, at 680.

\textsuperscript{118} See Stein, Briefing Notes, \textit{supra} note 48; Stein, Summary Report, \textit{supra} note 27.

\textsuperscript{119} Stein, Briefing Notes, \textit{supra} note 48, at 809.

\textsuperscript{120} For a related discussion regarding “knowing,” see also \textit{infra} notes 125-127.


\textsuperscript{122} See Stein, Briefing Notes, \textit{supra} note 48; Stein, Biographic Summary, \textit{supra} note 57; Stein, Japan Update, \textit{supra} note 59. Of course, Stein traveled interstate in going from New York to Tokyo in March. See Stein, Summary Report, \textit{supra} note 27.
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B&W headquarters in Louisville, Kentucky by postal mail. All of these actions were in furtherance of the planned political bribery.

(4) a payment, offer, promise to pay, or authorization of payment, promise or offer of money or anything of value;

This element also seems quite obviously established as the plan unmistakably contemplated a payment, promise to pay, an authorization of a payment, promise, or offer of money or something of value.

Stein’s August 3, 1983 memo expressly contemplates a cash payment of an unspecified amount to Nakao, from the $62,500 cash paid to Yokoyama. Similarly, as noted above, the plan apparently contemplates payments of money or other value to JTS officials, although these payments are not precisely detailed.

(5) to (a) any foreign official, (b) any foreign political party or party official, (c) candidate for foreign political office, or (d) any person while “knowing or having reason to know” that the payment or promise to pay will be passed on to one of the above;

The intended payments were both to a foreign official, as barred by subsection (a), and to a person “knowing or having reason to know” that the payment would be passed to a foreign official, as barred by subsection (d).

The FCPA defines a “foreign official” as:

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

Office “fax” machines were becoming common in Japan in 1983, but they did not become ubiquitous in the United States until three or four years later. Marian Beise, Lead Markets: Country-Specific Drivers of the Global Diffusion of Innovations, 33 RES. POL’Y 997, 997 (2004). Moreover, none of the documents have any indicator markings such as fax transmission headers or footers, which are visible in many tobacco industry documents beginning from the late 1980s.

Stein, Briefing Notes, supra note 48, at 808-09.

As to Nakao, no complicated analysis is needed; he was, without a doubt, a foreign official. He was a powerful elected legislator who had already served as a cabinet vice-minister of the pertinent executive agency.\textsuperscript{126} His work was in no regard ministerial or clerical.

As to Yokoyama’s involvement with JTS officials, the indirect payment brings the more complicated “knowing or reason to know” language into purview. It has already been acknowledged that the documentation is ambiguous whether cash payments or other value would be passed to JTS officials. Assuming arguendo that element was met, Stein’s documentation read by B&W officials is utterly clear that this would go to foreign officials at JTS, at least sufficient for the “knowing” requirement, and if not, then with a “reason to know.”\textsuperscript{127}

In a recent commentary, Justin Marceau provides a helpful approach for considering “complicated arrangements with consultants”:

The line separating legal and legitimate consulting agreements from mere conduits of bribery can be sketched out using details of the Justice Department’s own aggressive pursuit of FCPA prosecutions, as well as elements of emerging and increasingly complex consulting agreements. Certain factors, such as the reputation of the agent, the agent’s compensation, and any suspicious accommodation requests, are relevant when determining whether a domestic company’s decision to hire a particular agent will trigger FCPA liability. If the consultants hired have a reputation for bribing officials, or other corrupt

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\textsuperscript{126} Stein, Biographic Summary, \textit{supra} note 57, at 813.

\textsuperscript{127} The “reason to know” language was removed from the FCPA in the 1988 amendments. Foreign Corrupt Practices Act Amendments of 1988, 102 Stat. 1107, 1416 (1988). However, interpretations of the “knowing” term have been broad enough to approach the former “reason to know” standard such that B&W officials seemed to have been in the red zone even under a the requirement for the scienter of “knowingly.” See Julia Christine Bliss & Gregory J. Spak, \textit{The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?}, 20 \textit{L. & POL’Y INT’L BUS.} 441, 458-63 (1988) “As for the deliberate ignorance or ‘head in the sand’ problem, the conferees adopted the reasoning of the federal courts in a number of cases involving possession of narcotics or the receipt of stolen property which concluded that the term ‘knowingly’ already encompasses the problem of deliberate ignorance.” \textit{Id.} at 463.
behavior, a presumption of knowing impropriety exists.\textsuperscript{128}

Following from this reasoning, even if B&W officials might not have known precisely how Yokoyama would be spending the money on JTS officials, his unquestionably corrupt engagement with Nakao reveals a "reputation" for bribing officials that would have been understood by B&W executives or representatives. Thus, even while further investigation would be warranted to understand better the planned interactions with JTS officials, the knowing element could be presumed from the documented circumstances.

Also for FCPA purposes, it is inconsequential that JTS was essentially a commercial enterprise: "The FCPA does not distinguish between government officials acting in a sovereign capacity and a government agency acting in a commercial capacity. Accordingly, 'virtually any transaction between a person subject to the FCPA and the employees of a state-owned entity . . . can raise FCPA issues.'\textsuperscript{129} As noted above,\textsuperscript{130} JTS was a wholly-owned state enterprise in 1983 and so its officials were clearly "government officials" under 15 U.S.C. § 78d(2).

(6) for the purposes of (a) influencing an official act or decision of that person or, (b) inducing that person to use his influence with the government or instrumentality to affect or influence any act or decision;

The described payments were clearly for the purpose of influencing official acts and decisions and inducing persons to use their influence. B&W was aiming for two key targets in Japanese governmental policy—liberalization of the tobacco market for foreign manufacturers,\textsuperscript{131} and, in the interim, an inside deal with

\textsuperscript{128} Justin F. Marceau, A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act, 12 FORDHAM J. CORP. & FIN. L. 285, 306 (citing DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 47-48 (1999)) (emphasis added). Marceau adds: "[W]hen the "consultant" is in a corrupt relationship with the foreign official, . . . a company . . . will be well served by an early guilty plea." Id. at 307.

\textsuperscript{129} Id. at 306 n.91 (citing Foreign Corrupt Practices Act v. 1, 106.003 (2005)). Perhaps the most famous early cases in this regard were the so-called Pemex cases involving Petróleos Mexicanos (Pemex), a national oil company owned by the Republic of Mexico. For a concise synopsis of the four cases in this series, see Robert S. Levy, The Antibribery Provisions of the FCPA of 1977: Are they Really as Valuable as We Think They Are?, 10 DEL. J. CORP. L. 71, 91-92 (1985).

\textsuperscript{130} Levin, supra note 19.

\textsuperscript{131} See, e.g., Kraar, supra note 29; Presentation by Pat Sheehy, supra note 35; see also Alan Murray, Smoke in the Eyes of JTS: U.S. Cigarette Makers Join Forces to Open
JTS regarding distribution of B&W’s Kent brand cigarettes.132

There is nothing subtle in the Stein memoranda about Nakao and Yokoyama’s roles. Their roles involved inducing Japanese government officials, including the Prime Minister and the senior officials at JTS, to take official actions and make official decisions in B&W’s interest, and to have Nakao exercise his own political authority as a leading and powerful politician in B&W’s commercial interest.

For example:

As Nakao’s access to the Prime Minister: “N will exert influence on the PM to pressure the JTS into acceding to our marketing strategy.”133

As to Nakao’s access to other politicians: “NAKAO [is] . . . one of the most influential members of the 150-man agricultural bloc in the Diet (Parliament)”134 “Part of these funds are passed to N for his political maneuvering with the PM and key Diet members.”135

As to Nakao’s own acts and decisions: “Mr. N has been . . . Chairman of the Lower House Committee on Liberalization of Agricultural Imports, since 1982 (June), a post he now holds.”136

As to the overall JTS scheme: “This duo is capable of influencing the JTS to accept a licensing and marketing formula strongly favored by [B&W]/Japan . . . .”137

And as to Yokoyama’s inducing JTS officials decisions favoring B&W: “the remainder [of the $62,500 “subsidy”] is used by Y in cultivating JTS officials.”138

(7) to obtain or retain business, or direct business to any person.


132 Stein, Summary Report, supra note 27; see also Whitehair Report, Oct. 23, 1981, supra note 30 (indicating B&W’s frustration with JTS that it was trying to alleviate and Kent market share concerns).
133 Stein, Briefing Notes, supra note 48, at -809.
134 Stein, Summary Report, supra note 27, at -711.
135 Stein, Briefing Notes, supra note 48, at -808-09.
136 Stein, Biographic Summary, supra note 57, at -813.
137 Stein, Summary Report, supra note 27, at -711.
138 Stein, Briefing Notes, supra note 48, at -809.
This element is entirely self-evident as to the effort to obtain a licensing agreement with JTS for the Kent brand, since the payments were precisely in order to obtain a favorable government contract with JTS. Or as Stein’s March memo makes clear from the start, the purposes of the scheme is for “substantial [sic] enhancing B&W revenues in Japan.”

B&W’s efforts towards opening the Japanese cigarette market were also generally for the purpose of obtaining business in Japan, in that expanded market access would indirectly (but hugely) advance B&W’s unmistakable commercial goal of selling cigarettes in Japan.140

3. Yokoyama’s Licensing Royalty Possibly Violated the FCPA

The contemplated licensing royalty to Yokoyama may also have been a violation of the FCPA. However, for the royalty to constitute a violation, prosecutors would have to prove that those individuals involved in making the arrangement had actual knowledge or reason to know that all or a portion of such royalty would be offered, given, or promised, directly or indirectly, to Nakao for his engaging his political influence. Such knowledge seems very plausible but is only conjectural.

(1) An issuer, domestic concern, or any person other than an issuer or domestic concern;

B&W was a “domestic concern.” Hughes was one of its officers (and presumably a director), Stungis was an employee, and Stein was an agent of the concern.141

(2) corruptly;

The corrupt nature of any portion of the royalty payments provided to Nakao for his engaging his political influence would be evident for the reasons discussed above.142

(3) uses the mails or any other means or instrumentality of interstate commerce, in furtherance of;

139 Stein, Summary Report, supra note 27, at -711.
140 Cf. U.S. v. Kay, 359 F.3d 738, 748 (2004) (upholding a broad interpretation of the FCPA’s phrasing “obtaining or retaining business” “beyond the narrow band of payments sufficient only to ‘obtain or retain government contracts’” to include bribes intended to affect a foreign Haitian tax policy).
141 See supra notes 109-112 and accompanying text.
142 See supra notes 113-120 and accompanying text.
Again, B&W and the involved individuals all used the mails and other means or instrumentalities of interstate commerce in furtherance of the plan.\footnote{See supra notes 121-123 and accompanying text.}

(4) a payment, offer, promise to pay, or authorization of a payment, promise or offer of money or anything of value;

This element constitutes the crux of the issue regarding the proposed royalty payments. While the proposed royalty payments would likely have been several magnitudes more valuable than the $62,500 "subsidy,"\footnote{Keep in mind, however, that Stein's March 25 memo proposed a fifty percent share of the Kent royalties to Yokoyama. Stein, Summary Report, supra note 27, at -712. Given the size of the anticipated Kent market in Japan, this promise would have been worth millions or perhaps billions of dollars.} the documents do not expressly indicate that any portion of the royalty payments were to be provided to Nakao. But this conclusion seems fairly implied from the circumstances. The documents indicated the royalties paid to Yokoyama would be for the success of "the Y-N duo."\footnote{"If the Y-N duo succeed in the BWT strategy with JTS, Y would expect to receive about one-half of the royalties on Kent to be licensed by JTS." Id.} Moreover, as noted above,\footnote{Id. See also supra text accompanying note 39.} the value of Nakao's service in the arrangement was far greater than Yokoyama's. Thus, it seems highly likely that Nakao should have shared in this far larger payoff. Had the documents emerged in a more timely fashion, the payments would have been a key area for further exploration by investigators.

Also, as noted above, it seems that the proposed JTS/Kent licensing scheme was never concluded, since B&W was able to sell its products directly in Japan without partnering with JTS after the liberalization of Japan's cigarette market. However, this does not necessarily eliminate B&W's FCPA liability exposure regarding the royalty scheme. The statute is entirely clear that the conclusion of an illicit arrangement is not prerequisite to liability.\footnote{See FCPA, 15 U.S.C. § 78dd-2 (1983).} Rather, the law is violated even when a domestic concern makes an offer, promise to pay, or authorizes a promise or offer. Thus, if B&W officials\footnote{It also seems possible that Stein submitted the royalty offer to Yokoyama (knowing that a portion would go to Nakao) on behalf of B&W, in advance of the August 20, 1983 meeting. Such action would have been illegal, but this possibility poses yet another level of complexity regarding B&W, Hughes, or Stungis with regards to whether they knew Stein would have done so.} offered the royalty scheme to
Yokoyama, knowing a portion was reserved for Nakao's reward, the ultimate cancellation of the scheme would not provide them with a legal defense.

The paper trail should have provided a foundation for further inquiry regarding any August 20, 1983 discussion of Kent licensing royalties to Yokoyama. Prosecutors might well have obtained testimony regarding the arrangements conveyed in the August 20, 1983 meeting sufficient to establish an offer or promise to reward Nakao from the royalties or to pay Yokoyama knowing that he was to be passing money from the royalties on to Nakao. But with the protagonists essentially no longer available, the paper case seems insufficient regarding the royalty scheme. Nakao's name is not explicitly linked to the proposed royalties in any documents discovered to date and the connection remains very plausible but still only conjectural.

(5) to (a) any foreign official, (b) any foreign political party or party official, (c) candidate for foreign political office, or (d) any person while "knowing or having reason to know" that the payment or promise to pay will be passed on to one of the above;

Again, Nakao was a foreign official. Thus, if the August meeting included an offer to Nakao regarding the royalties under (a), or an offer to Yokoyama knowing a portion would go to Nakao under (d), there would have been an FCPA violation, regardless of whether the plan contemplated the royalty payments being channeled through Yokoyama.

(6) for the purposes of (a) influencing an official act or decision of that person or, (b) inducing that person to use his influence with the government or instrumentality to affect or influence any act or decision;

The analysis and result here are the same as above with regards to the $62,500 "subsidy."149

(7) to obtain or retain business, or direct business to any person.

The analysis and result here are the same as above with regards to the $62,500 "subsidy."150

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149 See supra notes 131-138 and accompanying text.
150 See supra notes 139-140 and accompanying text.
4. Educational Assistance for Nakao's Son May Have Violated the FCPA

Finally, the contemplated educational assistance for Nakao's college-age son, if provided as suggested by the documents, may have also represented FCPA violations by B&W, Hughes, Stungis, and Stein, though the possibility of violation substantially depends on the type of assistance contemplated.

(1) An issuer, domestic concern, or any person other than an issuer or domestic concern;

B&W was a "domestic concern," Hughes was one of its officers (and presumably a director), Stungis was an employee, and Stein was an agent of the concern. 151

(2) corruptly;

The corrupt nature of a benefit provided to Nakao's son to purchase Nakao's political influence would be evident for the same reasons as discussed above. 152 The fact that the proposed assistance was so obviously personal adds emphasis to such a conclusion. Similarly, Stein's suggestion that he "should probably be the one to handle it since B&W should have no known connection, in order to insulate N" and the adjacent handwriting in Stungis' script noting "Very important" and "Non-open > NO direct company connection" and "N would be very beholding [sic]" provide further support towards reaching the same conclusion. 153

(3) uses the mails or any other means or instrumentality of interstate commerce, in furtherance of;

B&W and the involved individuals all used the mails and other means or instrumentalities of interstate commerce in furtherance of the plan.

(4) a payment, offer, promise to pay, or authorization of a payment, promise or offer of money or anything of value;

B&W's contemplated offer to help Nakao's college-age son study in the United States could be viewed within the FCPA as "anything of value." The weakness in this argument lies in the uncertainty as to the nature of any contemplated or offered assistance. The pre-1987 FCPA had no de minimus exception, but

151 See supra notes 109-112 and accompanying text.
152 See supra notes 113-120 and accompanying text.
153 Stein, Japan Update, supra note 59, at -680.
if the contemplated assistance was merely a courteous welcome or simple gesture of hospitality, B&W’s offer would not have warranted FCPA prosecution.\textsuperscript{154} If the contemplated assistance was genuinely “of value,” such as helping Nakao’s son gain admission to a competitive program, providing a scholarship, or helping with the young man’s living expenses, then such an offer would surely have been illegal.

Thus, the paper trail should have provided a foundation for further inquiry regarding any August 20, 1983 discussion of assistance to Nakao’s college-age son traveling with him. Prosecutors may have been able to obtain testimony regarding the arrangements conveyed in the August 20, 1983 meeting sufficient to establish the existence of an offer of assistance that was “of value” to Nakao. But with the protagonists essentially no longer available, the paper case is ambiguous at best.

Regarding the royalty scheme, the statute is clear that the conclusion of an illicit arrangement is not prerequisite to liability.\textsuperscript{155} Rather, the law is violated when a domestic concern merely makes an offer, promise to pay, or authorizes a promise or offer.\textsuperscript{156} Thus, if B&W officials offered to assist Nakao’s son in a manner that was valuable at the August 20, 1983 meeting, it is irrelevant whether the assistance was actually provided.

\textbf{(5) to (a) any foreign official, (b) any foreign political party or party official, (c) candidate for foreign political office, or (d) any person while “knowing or having reason to know” that the payment or promise to pay will be passed on to one of the above;}

Nakao was a foreign official, and this contemplated offer was to be transmitted directly to him.\textsuperscript{157}

\textbf{(6) for the purposes of (a) influencing an official act or decision of that person or, (b) inducing that person to use his influence with the government or instrumentality to affect or influence any act or decision;}

The analysis and result here are the same as above with

\textsuperscript{154} Nonetheless, the obviously private nature of the benefit being considered for Nakao’s son adds support to characterizing the other components and the entirety of the proposed scheme as “corrupt.”


\textsuperscript{156} \textit{Id.}

\textsuperscript{157} See supra text accompanying note 125.
regards to the $62,000 "subsidy."\textsuperscript{158}

(7) to obtain or retain business, or direct business to any person.

The analysis and result here are the same as above with regards to the $62,500 "subsidy."\textsuperscript{159}

Thus, analysis based upon the FCPA in effect at the time strongly suggests the illegality of B&W's planned program. Though these historic events can no longer serve as the basis for criminal liability, the next section of this article evidences how this recent story nonetheless identifies compelling and urgent considerations for policy makers today.

IV. Live and Let Die\textsuperscript{160}

The limited set of available documents reveals a picture of carefully drafted plans for commerce and corrupt political influence. Again, it is presently impossible to determine whether the planned offers were in fact made, whether the contemplated $62,500 payment was given to Yokoyama, or what support, if any, Nakao's son received from B&W (via Stein) for college study in the United States. Also, it appears that the grand ideas Stein developed for a JTS/Kent licensing scheme that would deliver sizable rewards to its facilitator or possible facilitators never came to pass.

At the very least, it seems that B&W's officials and agents, including the company Chairman himself, quite knowingly and intentionally waded into murky waters, holding hands with corrupt Japanese players. Perhaps they decided not to dive in and swim out to deeper water together, but if offers were made, or cash or other value conveyed to tap into Nakao's substantial influence with Japan's Prime Minister Nakasone, with other members of parliament, into its ministries, or with the public officials who ran the Japanese government's tobacco monopoly, then under the FCPA, B&W and the individuals involved committed crimes under U.S. law even without taking the plunge.

The documented circumstances offer a glimpse of events that

\textsuperscript{158} See supra text accompanying notes 117-123.

\textsuperscript{159} See supra text accompanying notes 124-125.

\textsuperscript{160} \textit{LIVE AND LET DIE} (United Artists 1973).
warrant further attention and exposure.

A. A Call for A Proper Investigation into U.S. Tobacco Industry Dirty Dealings and Appropriate Legislative or Regulatory Action.

At the time of this writing, the U.S. Congress is considering a major enactment that would grant explicit regulatory authority to the U.S. Food and Drug Administration (F.D.A.) over tobacco products. The bill has already passed in the House of Representatives. It has garnered the public support of many, perhaps most, of the major U.S. public health organizations. Nonetheless, it remains deeply controversial within the U.S. (and global) tobacco control community.

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162 Many, including Justice Breyer and three other justices of the U.S. Supreme Court, believed that Congress granted the FDA authority over tobacco products in the original establishment of the agency. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161-92 (2000) (Breyer, J., dissenting). But a majority of the Court disagreed and the Court’s rejection of that authority established the impetus for the present initiative to enact an explicit delegation. Id. (majority opinion). See also KESSLER, supra note 2 (personal report by the then-FDA Commissioner of the investigatory and regulatory processes which formed the rationale for FDA authority).
The bill has two elements concerning tobacco product exports from the United States:

First, in a powerful recognition, Congress' findings explicitly acknowledge a link between tobacco and illegal activities abroad: "(35) Tobacco products have been used to facilitate and finance criminal activities both domestically and internationally. Illicit trade of tobacco products has been linked to organized crime and terrorist groups." Acting on this link, the bill mandates determined efforts under a strong title, "Prevention of Illicit Trade in Tobacco Products," with labeling, recordkeeping, and records inspections.

Second, the bill mandates an annual report from the Secretary of Health and Human Services regarding:

(A) the nature, extent, and destination of United States tobacco product exports that do not conform to tobacco product standards established pursuant to this Act;

(B) the public health implications of such exports, including any evidence of a negative public health impact; and

(C) recommendations or assessments of policy alternatives available to Congress and the Executive Branch to reduce any negative public health impact caused by such exports.

These provisions, the only items in the draft legislation that address the U.S. tobacco industry's commercial activities abroad, beg the question of what should be done with the more

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166 Note the particular use of passive voice. Congress states that "tobacco products have been used" in association with criminal activities. Family Smoking Prevention and Tobacco Control Act, S. 625, 110th Cong. § 2(35) (2007); H.R. 1108, 110th Cong. § 2(35) (2007) (as passed by House, July 30, 2008) (emphasis added). This passive voice leaves unanswered the crucial question of who used tobacco products in this manner. Was it the tobacco industry? Enquiring minds would wish to know.

167 Id. (emphasis added). For background information on this issue, see Campaign for Tobacco Free Kids, Illicit Trade/Smuggling: Facts and Resources (2008), http://tobaccofreecenter.org/resources/illicit_trade_smuggling/fact_sheets (last visited Feb. 8, 2009); see also The Framework Convention Alliance for Tobacco Control, http://www.fctc.org/index.php?item=illicit-trade (last visited Feb. 8, 2009) (discussing issues related and illicit tobacco trade and promoting greater control over tobacco trade). Smuggling has been described as one of British American Tobacco's "key market entry strategies" in the former Soviet region. Gilmore et al., supra note 21, at 2002.

168 S. 625 and H.R. 1108, §§ 301-02. Title II of H.R. 1108 also addresses the problem of cross-border advertising ("from the United States to another country") by mandating an empirical study of cross-border advertising and the provision of policy recommendations as to how it can be prevented or eliminated. H.R. 1108 § 302.

169 H.R. 1108 § 103(l)(3). The provision also enables the Secretary to "establish appropriate information disclosure requirements to carry out this subsection." Id.

170 These items appear to be the only relevant text drawn from the four instances of
consequential matter—the enormous trade in manufactured tobacco products by U.S.-based tobacco enterprises around the world.\textsuperscript{171} While this article sets aside the general debate regarding the merits of the draft legislation, it is important to point out the profoundly limited scale of action in the pending bill with regard to U.S. tobacco business abroad.\textsuperscript{172}

As tobacco executives and lobbyists maneuver their way through the halls of Congress, it is essential that elected decision-makers and the public realize that these individuals are not representatives of fine upstanding corporate citizenship and social responsibility. The companies they represent have already been found liable for a massive fifty-year fraud on the American public in the United States’ RICO litigation against the industry.\textsuperscript{173} Judge Gladys Kessler’s 992 page decision, with its vast encyclopedic fact findings, carefully documents multiple mechanisms of fraud and deception.\textsuperscript{174}

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\textsuperscript{171} This is especially true considering the § 103 reporting and disclosure requirements only apply to products that do not conform to future U.S. tobacco product standards. The non-illicit export of conforming products will remain entirely unregulated. \textit{Id.} § 103(l)(3)(1)(A).


\textsuperscript{174} \textit{Philip Morris}, 449 F. Supp. 2d at 1.
In a scathing introduction to her decision, which concludes that the tobacco industry defendants carried out "a pattern of racketeering activity"\(^{175}\) in violation of 18 U.S.C. § 1962(c),\(^ {176}\) Judge Kessler writes with the unmistakable voice of outrage:

[This case] is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community. Moreover, in order to sustain the economic viability of their companies, Defendants have denied that they marketed and advertised their products to children under the age of eighteen and to young people between the ages of eighteen and twenty-one in order to ensure an adequate supply of "replacement smokers," as older ones fall by the wayside through death, illness, or cessation of smoking. In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.\(^ {177}\)

\(^{175}\) *Id.* at 851.

\(^{176}\) 18 U.S.C. § 1962(c).

\(^{177}\) *Philip Morris*, 449 F. Supp. 2d at 28 (emphasis added). Judge Kessler continues to voice her outrage throughout the text of the opinion:

The purpose of the scheme was to obtain, from smokers and potential smokers, money, i.e., the cost of cigarettes, to fill the coffers of the corporate Defendants. Put more colloquially, and less legalistically, over the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal—to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.

*Id.* at 852 (emphasis added).
FCPA violations are not included in the Kessler decision, but these warrant particular consideration by decision makers in Washington D.C. These violations are important because the industry’s global activities outside the United States now represent the principal share of the industry’s overall commerce. If, as the B&W story reported here suggests, U.S. tobacco executives have engaged in illegal and corrupt business practices abroad or, as contemplated in Part V of this article, manslaughter or murder, then American policymakers should take suitable measures to address the industry’s global activities while they deliberate on how to regulate domestic tobacco commerce. American policymakers should address these global activities for precisely the same reason Congress first enacted the FCPA—to foster the United States’ moral reputation abroad. After all, since U.S. brands are the leaders among the world’s best selling cigarettes,

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181 Led by Marlboro, the world’s number one selling brand and L&M, “the fourth most popular brand,” Philip Morris International alone produces seven of the top fifteen most popular brands. Philip Morris International, http://www.philipmorrisoninternational.com (follow “About Us” hyperlink; then follow “Our Brands” hyperlink)
how can the millions of future deaths from these products possibly benefit the United States' reputation abroad?\textsuperscript{182}

Appropriate policy measures would include: (1) carrying out a thorough investigation following from the circumstances revealed in the industry documents\textsuperscript{183} (2) compelled disclosure and internal controls by the tobacco industry as to their political activities abroad, and (3) strict regulation of the industry's international business practices.\textsuperscript{184}

1. Investigation

The B&W story generates many questions that need to be asked and deserve to be answered. Considering that B&W executives brazenly aimed towards violating the Foreign Corrupt Practices Act,\textsuperscript{185} it seems entirely appropriate for the U.S. Department of Justice and the U.S. Congress to investigate whether B&W executives engaged in similar plans in other nations, or whether other tobacco companies' executives carried on business in this manner.\textsuperscript{186} Most importantly, given Judge Kessler's findings of the tobacco industry defendants as a rogue recidivist enterprise,\textsuperscript{187} the American public ought to know, by virtue of a proper investigation, whether this kind of corrupt

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{182} Aside from pragmatic concerns about national reputation, powerful moral reasons are certainly present as well. See, e.g., Bloom supra note 172 ("The role played by U.S. interests in creating this global health problem increases the moral obligation to help address it."). Id.
\item \textsuperscript{183} See discussion supra Part II.
\item \textsuperscript{184} Weissman and Hammond also recommend the Doggett Amendment (applicable to U.S. government agencies) be broadened, strengthened, and made permanent. Weissman & Hammond, supra note 172, at 2-3. See also Bloom supra note 162, Executive Summary ("Other important proposals would ... provide tax incentives for U.S. tobacco firms that observe minimum public health standards in their overseas operations; assess a fee on tobacco companies to support international tobacco control efforts; and require tobacco companies to develop company-wide programs to ensure compliance with public health and anti-smuggling laws in the U.S. and abroad.").
\item \textsuperscript{185} If the arrangements with Nakao and Yokoyama did not pan out, this does not seem to be from a lack of interest. See supra text accompanying notes 22-41. One does not find any B&W documents from Hughes or Stungis suggesting reluctance or questioning the propriety of the proposed scheme. See supra notes 24, 26, 28, 33, 49, 54, 59, 62 and accompanying text.
\item \textsuperscript{186} Noting the other indicia of corrupt tobacco industry policy interference documented in the reports described earlier. See supra notes 21-22.
\end{enumerate}
\end{footnotesize}
international activity is presently occurring.\textsuperscript{188} Thus, while the Congress is considering the future of tobacco regulation in the United States with hearings and related activities, these global issues should also be in Congress' careful purview.

2. **Disclosure and Internal Controls**

The accounting provisions of the FCPA already mandate disclosure of corrupt payments by issuers,\textsuperscript{189} but these restrictions do not, for example, extend as far as the requisite disclosures of internal domestic documents nor in the same comprehensive manner as the 1998 Multistate Settlement Agreement (MSA).\textsuperscript{190} If corrupt practices are evidenced in the investigation proposed above, this would provide an appropriate rationale for extending the reach of statutorily mandated disclosure obligations on any aspect of political activity anywhere overseas by tobacco industry entities under U.S. jurisdiction.\textsuperscript{191} These obligations should substantively combine the FCPA’s accounting provisions and the type of MSA disclosures regarding lobbying activities applicable domestically.\textsuperscript{192}

Similarly, the internal accounting controls provisions of the FCPA mandate issuers to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance” of compliance with the FCPA’s accounting and anti-


\textsuperscript{189} FCPA, 15 U.S.C. § 78m(b)(2)(A) (1983) (specifically mandating the fair and accurate disclosure of all transactions of the issuer). \textit{See} DEMING, supra note 94, at Ch. 3 (discussing the FCPA accounting and record keeping provisions).


\textsuperscript{192} Bloom, \textit{supra} note 172, at sec. 5.
bribery provisions. Similar measures for international tobacco control, i.e., mandating "company-wide programs to ensure compliance with public health and anti-smuggling laws in the U.S. and abroad" deserve Congressional consideration.


Aside from disclosure requirements, Congress, regulators (if duly empowered by the Congress), and the courts should not only consider regulating the U.S. tobacco industry's domestic business practices but also the entirety of its overseas operations.

At one time, U.S. tobacco control regulations were among the most advanced in the world and perhaps could have served as an adequate model for export. This is no longer the case as far stricter regulatory regimes have become widespread, including complete and comprehensive bans on advertising and product sponsorship, graphic warnings with shocking imagery on product packaging, nationally mandated comprehensive smoke-

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194 Bloom, supra note 172, at 1.

195 Compare the constrained approach in the pending FDA draft legislation, as explained supra notes 151-62 and accompanying text.

196 For early presentations along these lines, see Weissman & Hammond, supra note 172, at 3, and Bloom, supra note 172, at sec. 5.

197 See generally Tobacco Export Reform Act of 1989, H.R. 1249, 101st Cong. (1st Sess. 1989) (unenacted bill proposing that U.S. tobacco companies be required to observe U.S. labeling and advertising laws in overseas sales activities); 135 Cong. Rec. E627 (1989) (statement of Rep. Levine introducing the proposed law). Of course, the U.S. is not the only nation that has demonstrated political leadership and programmatic ingenuity in tobacco control.


199 As of June 5, 2008, seventeen nations required graphic picture warnings. PHYSICIANS FOR A SMOKE-FREE CANADA, PICTURE-BASED CIGARETTE WARNINGS (2008),
free workplaces laws, and negotiations for an emerging protocol regarding illicit tobacco trade, in which the United States is not participating. The overseas operations of the U.S. tobacco industry is already subject to a mandate by Judge Kessler to end deceptive product labeling and branding with terms such as "light" and "mild." While this court order is a start, it is hardly sufficient to accomplish the necessary tasks.

At a minimum, the U.S. tobacco industry should be statutorily barred from carrying out nefarious business practices abroad that are prohibited at home. But as to standards where domestically the United States is behind emerging global best practices, it would be inversely hypocritical to allow the industry a freer hand at home than it plays by abroad. Accordingly, the U.S. Senate

http://www.smoke-free.ca/warnings/countries%20and%20laws.htm (providing pictures of or links to pictures of warnings on packages already in use around the world). See also ROB CUNNINGHAM, CANADIAN CANCER SOCIETY, PACKAGE WARNINGS: OVERVIEW OF INTERNATIONAL DEVELOPMENTS 2, 4 (2007) (comparing size and placement of package warnings).


203 See Weissman & Hammond, supra note 172, at 3 and Bloom, supra note 172. These authors also suggested U.S. policy prohibits the inclusion of tobacco in any new bilateral trade agreements. Id.
should quickly ratify the Framework Convention on Tobacco Control (FCTC)\textsuperscript{204} and join the other 160 nations\textsuperscript{205} around the world who have agreed to work together for tobacco control, establishing minimum policy standards by both mandates and guidelines.\textsuperscript{206} The United States should then aim to reassume its leadership status in global tobacco control by meeting, exceeding, or developing new best practices among FCTC nations.\textsuperscript{207}

\textbf{C. The Tobacco Industry’s Dirty Dealings Should Be Considered by the FCTC’s Conference of the Parties in Developing Strong Guidelines Concerning the Framework Convention on Tobacco Control’s Article 5.3.}

As mentioned above, the FCTC has become an international standard. Of 195 eligible parties, 160 or eighty-two percent have joined in rapid succession since 2003.\textsuperscript{208} Only thirty-five nations remain on the sidelines, and of these, only three—the United States, Indonesia, and Ethiopia—are among the twenty-five most populous nations, ranking numbers three, four, and seventeen, respectively.\textsuperscript{209} Accordingly, 85.3\% of the world’s population

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205 WHO, FULL LIST OF SIGNATORIES AND PARTIES TO THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL (2008), http://www.who.int/fctc/signatories_parties/en/print.html (providing list of signatories and parties as of September 2008). In the meantime, the United States’ dramatic outlier status vis-à-vis this treaty regime is graphically apparent in a GIS map. Id. (follow “See Map” hyperlink; the green represents contracting parties). See also infra notes 208-210 and accompanying text.

206 This presumes the United States will be a constructive team player in tobacco control initiatives. U.S. participation is not desirable if our government will use its status as an FCTC party to impede global tobacco control policy progress. See generally Weissman & Hammond, supra note 172, at 2 (describing how U.S. government involvement in previous international trade agreements undermined attempts at global tobacco control).

207 Another means by which the United States can re-establish a leadership position is with generous funding of FCTC-driven international operations under the auspices of the World Health Organization’s Tobacco Free Initiative. Weissman & Hammond, supra note 172, at 3 and Bloom, supra note 172. This would build upon the work already underway by the private Bloomberg and Gates Foundations. See Donald G. McNeil Jr., Pledging $500 Million, Bloomberg And Gates Take Aim at Smoking, N.Y. TIMES, July 24, 2008, at B1; Editorial, Big Tobacco, Meet Big Philanthropy, N.Y. TIMES, July 29, 2008, at A18.

208 It has been said that the 160 countries’ adoption of the FCTC represents the fastest global adoption of any international treaty sponsored by the United Nations, but the author has found no means to verify this claim. For FCTC ratifications by month and year see WHO, supra note 205.

209 See WHO.int, WHO Member States that are Not Parties to the WHO Framework Convention on Tobacco Control, http://www.who.int/fctc/non_parties/en/index.html (last
lives in countries that are parties to the treaty.\textsuperscript{210}

In light of the history carefully documented by a WHO special research committee,\textsuperscript{211} tobacco industry interference with tobacco control policy was a specific concern that the World Health Assembly conveyed to the FCTC drafters in a plenary resolution at its meeting in Geneva in May 2001.\textsuperscript{212}

The resolution provided:

\textit{The Fifty-fourth World Health Assembly}

\textit{Noting with great concern the findings of the Committee of Experts on Tobacco Industry Documents, namely, that the tobacco industry has operated for years with the express intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic;}

\textit{Understanding that public confidence would be enhanced by transparency of affiliation between delegates to the Health Assembly and other meetings of WHO and the tobacco industry,}

1. \textbf{URGES Member States to be aware of affiliations between the tobacco industry and members of their delegations;}

2. \textbf{URGES WHO and Member States to be alert to any efforts by the tobacco industry to continue its subversive practice and to assure the integrity of health policy development in any WHO meeting and in national governments;}

3. \textbf{CALLS ON WHO to continue to inform Member States of activities of the tobacco industry that have a negative impact on tobacco control efforts.}\textsuperscript{213}


\textsuperscript{211} See generally WHO Report, supra note 22 (outlining the instances of interference). See supra note 21 for other indicia of corrupt tobacco industry policy interference.

\textsuperscript{212} W.H.A. Res. 54.18, 5, WHO Doc. A54/52 (May 22, 2001), available at \url{http://www.who.int/tobacco/framework/whaEb/ea5452%5bl%5d.pdf}.

\textsuperscript{213} Id. See generally WHO.int, A History of the WHO Framework Convention on Tobacco Control, \url{http://www.who.int/fctc/history/en/index.html} (last visited Feb. 5, 2009) for a full collection of archived documents relating to the negotiations and drafting of the treaty.
Accordingly, this key issue was explicitly addressed in the FCTC’s Article 5.3, unanimously adopted by the World Health Assembly on May 21, 2003: "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law."\(^\text{214}\)

Article 5.3’s implementation is presently under active development. The crucial nature of Article 5.3 was elaborated at the Second Conference of FCTC Parties (COP) in Bangkok, Thailand from June 30 to July 6, 2007, which established a working group for the elaboration of guidelines on Article 5.3 and sought “a progress report, if possible draft guidelines” to the Third COP in November 2008 in Durban, South Africa.\(^\text{215}\)

In the lead-up to the Durban session, a nine-month intensive international process led by Key Facilitators, Brazil, Ecuador, the Netherlands, Palau, and Thailand, resulted in a fifteen-page set of draft guidelines (Draft Guidelines) and resources for implementation of Article 5.3 delivered in advance to the gathering of nations in Durban.\(^\text{216}\)

The Draft Guidelines include eight specific recommended actions “deemed vital for dealing with tobacco industry interference in public health policies:"

1) Raise awareness about the addictive and harmful nature of tobacco products and about tobacco industry interference with Parties’ tobacco control policies.

2) Establish measures to limit interactions with the

\(^{214}\) FCTC, supra note 204, at art. 5.3. This provision has come to be understood as being most significant with regards to process. The FCTC’s other provisions already aim to ensure that domestic tobacco control policies prevail over tobacco industry benefits. Telephone Interview between Jonathan Liberman, Pol’y Dir., Framework Convention Alliance, and author (Aug. 22, 2008).


tobacco industry and ensure the transparency of those interactions that occur.

3) Reject partnerships and non-binding or non-enforceable agreements and partnerships with the tobacco industry.

4) Avoid conflicts of interest for government officials and employees.

5) Require that information collected from the tobacco industry be transparent and accurate.

6) Denormalize and regulate activities described as "corporate social responsibility" by the tobacco industry.

7) Do not give privileged treatment to tobacco companies.

8) Treat State-owned tobacco companies in the same way as any other tobacco industry.\(^{217}\)

The Draft Guidelines quickly drew responses from the Framework Convention Alliance (FCA), a NGO body of more than 350 organizations from over 100 nations,\(^{218}\) urging a number of revisions to the Draft Guidelines to "provide strong, clear guidance to Parties in implementing this critical Article."\(^{219}\) As succinctly stated previously by the FCA's Policy Director:

The biggest obstacle to effective FCTC implementation is the tobacco industry. The tobacco industry is different from other industries. Its interests are in direct conflict with those of public health and the objective of the FCTC. It does, and always has done, everything to weaken, delay and undermine tobacco control. Parties to the FCTC have a legal obligation under Article 5.3 to protect their public health policies with respect to tobacco control from commercial and other vested interests of the tobacco

\(^{217}\) Id. ¶ 14. Moreover, "[p]arties are encouraged to implement measures beyond those provided for by these guidelines, and nothing in these guidelines shall prevent a Party from imposing stricter requirements that are consistent with these recommendations." Id.

\(^{218}\) See FCTC.org, What is the Framework Convention Alliance?, http://www.fctc.org/index.php?option=com_content&view=article&id=2&Itemid=9 (last visited Feb. 5, 2009). The author of this article is an FCA individual member and serves on its Policy Committee.

\(^{219}\) FRAMEWORK CONVENTION ALLIANCE, COP-3 POLICY BRIEFING ARTICLE 5.3 INTERFERENCE 1 (2008), available at http://www.fctc.org/dmdocuments/COP3_Article_5_3_%20briefing.pdf.
Working with a similar approach in the Draft Guidelines, the FCA has called for Article 5.3 to be implemented by the FCTC’s parties with four Guiding Principles underlying all tobacco control policies:

Principle 1: There is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy.

Principle 2: Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent.

Principle 3: Parties should require the tobacco industry and those working to further its interests to operate and act in a manner that is accountable and transparent.

Principle 4: Because their products are lethal, tobacco industry entities should not be granted incentives to establish or run their businesses.²²¹

In short, the story revealed by the B&W documents in this article and the apparent illegality of the activity revealed therein highlight the need for FCTC parties to adopt strong, clear, and effective Guidelines for Article 5.3 in Durban in accordance with the Guiding Principles presented above.²²²

V. The Untouchables: Criminal Liability and Tobacco.²²³

If only there were evil people somewhere insidiously committing evil deeds, and it were necessary only to separate them from the rest of us and destroy them. But the line dividing good and evil cuts through the heart of every human being. And who is

²²⁰ E-mail from Jonathan Liberman, Pol’y Dir., Framework Convention Alliance, to author (May 9, 2008) (on file with author).

²²¹ FRAMEWORK CONVENTION ALLIANCE, supra note 219, at 7.

²²² Postscript note: The Durban conference took place in November 2008 while this article was in editorial production. Delegates adopted strong and comprehensive Article 5.3 Guidelines, substantially meeting the FCA’s aspirations. See WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, THIRD SESSION OF THE CONFERENCE OF THE PARTIES (COP3), http://www.who.int/fctc/cop/cop3_in_brief_EN.pdf, at 2; FRAMEWORK CONVENTION ALLIANCE, Thank You, South Africa!, 85 BULLETIN 1 (2008), available at http://www.fctc.org/dmdocuments/Issue%2085%20saturday.pdf. An overview report about this article and a link to a pre-publication draft were distributed to over 600 Durban delegates by the Framework Convention Alliance on the first day of the gathering helping to evidence the vital need for action. http://www.fctc.org/index.php?option=com_docman&task=doc_download&gid=291&Itemid=21.

²²³ THE UNTOUCHABLES (Paramount Pictures 1987).
willing to destroy a piece of his own heart?\textsuperscript{224}

This is a story about violent crime. Unlike many other dealings in dirty politics, if the tobacco industry succeeds with political corruption, there is a terrible impact: people die. People die if the industry's corrupt influence will have government leaders opening their markets for powerful tobacco transnationals, increasing their business and thus its deadly toll.\textsuperscript{225} People die when tobacco control policies that might have been implemented at the national or international level are corruptly blocked or defeated.\textsuperscript{226} People die when tobacco industry executives "over the course of more than 50 years, . . . lie[], misrepresent[], and deceive[] the American public, . . . suppress[] research, destroy[] documents, . . . and . . . abuse[] the legal system in order . . . to make money."\textsuperscript{227}

What is the correct term for acts that leave our global society with millions of dead and dying? Smoking has caused over one hundred million deaths in the twentieth century, and by current estimates, manufactured tobacco products are expected to cause one billion deaths in the twenty-first century.\textsuperscript{228} Can we just call

\begin{footnotesize}
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\item This is suggested by the B&W story reported here. See supra Part II. Regarding the adverse impact of market-opening measures on tobacco consumption and disease in Japan and Asia, see generally Kaori Honjo & Ichiro Kawachi, Effects of Market Liberalization on Smoking in Japan, 9 TOBACCO CONTROL 193 (2000) and Frank J. Chaloupka & Adit Laizuthai, U.S. Trade Policy and Cigarette Smoking in Asia (Nat'l Bureau of Econ. Research, Working Paper No. 5542, 1996) (documenting increased smoking prevalence in Japan Taiwan, South Korea, and Thailand).
\item See generally WHO Report, supra note 22 (noting tobacco companies' efforts to undercut scientific research on the dangers of smoking and thereby downplay the need for control policies).
\end{enumerate}
\end{footnotesize}
this business?  

Ordinarily, a defendant’s intentional act with a malicious state of mind that legally causes the death of a living human being is known as murder. 230 Homicides that are “not bad enough to be murder but which are too bad to be no crime whatsoever” are described as manslaughter. 231 There is also “the other extreme, justifiable or excusable homicide, which is not criminal at all.” 232

Since the United States’ legislature and judiciary has not yet deemed the marketing and sale of manufactured tobacco products to be murder or manslaughter, 233 the marketing and sale must represent justifiable or excusable homicide. People are dying by intentional acts of individuals who know the products they sell lead to death. And yet there is no crime?

While something seems terribly amiss, perhaps the lack of legislative or judicial action is simply because too many people are complicit in this industry. From the growers, manufacturers, employees, shareholders, lawyers, lobbyists, advertising executives, and public relations consultants, to the retail network’s owner of the corner grocery and the cashier at the local drug store, a staggering number of people are involved with the deadly tobacco trade. Ultimately, we are probably all connected in through our families, friends, and acquaintances. 234

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229 Robert F. Kennedy Jr.’s incisive observation that “Killing one man is murder; killing millions is a statistic” comes to mind. I DREAM THINGS THAT NEVER WERE ... AND SAY WHY NOT: QUOTATIONS OF ROBERT F. KENNEDY 36 (Jane Wilkie & Rod McKuen eds., 1970).


231 Id. at 775.

232 Id.

233 The primary exceptions are B&W’s own in-house legal counsel’s candid observations quoted at the start of this paper and Jonathan Liberman, supra note 1, at 9. See Ernest Pepples, supra note 1 and accompanying text. Other notable presentations include Nagoya Japan attorney Shizuo Itoh’s unsuccessful cases which he filed seeking an inquest of prosecution against Japan Tobacco executives (first for murder, then for attempted murder), and a moot court debate by law students at Monash and Melbourne Universities in Australia. See Levin, supra note 19, at 120 n.154; Jonathan Liberman & Ron Borland, Australia: Lawyers Ponder Tobacco Firms' Criminal Liability, 10 TOBACCO CONTROL 205, 205 (2001).

234 Coleman is far less forgiving and far more pragmatic in his assessment of “Why Justice Fails.” Denying that white collar crime is any less harmful than street crime, he points to the personal advantages of privilege, the advantages of corporate organization,
And so, it remains profoundly difficult to end this 100-year old man-made commercial and industrial disaster having millions of persons entwined in the killing and the dying.\(^{235}\) After all, "[\textit{W}]ho is willing to destroy a piece of his own heart?"\(^ {236}\)