corporations and individuals alike, and one proven theory of FCPA prosecution is that an executive "stuck his head in the sand" in deliberately failing to discover the illegal acts of subordinates.[2]

The FCPA model, which has strong parallels to the military command responsibility question, clearly demonstrates that the doctrine works. As evidenced by a recent sea change in corporate compliance efforts resulting from a spate of increased FCPA enforcements,[3] holding leaders accountable is highly effective in incentivizing compliance and deterring future misconduct.

As the war in Afghanistan continues to evolve, President Obama's commitment of additional troops portends a continuing increase in violence and casualties. Future American war crimes in that conflict are not unforeseeable, as the current system has demonstrably failed to properly motivate commanders to develop a command climate of zero tolerance for violations. Against this backdrop, the issue of command responsibility has never been more urgent. The American military justice system should adopt a standard of command responsibility toward its own officers. The practicality of such a system has been established by the corporate-law example of the FCPA, which has proven workable and highly effective in holding corporate executives criminally accountable for subordinate misconduct. Surely it is no less reasonable to hold military officers to answer for certain crimes of those under their effective command and control.

2. The mens rea standard of culpability for FCPA violations is actual knowledge or conscious avoidance of knowledge as to the misconduct. 15 U.S.C. §§ 78dd-1(a)[((()-4(1(rd)--2(o12(t)-1327 0.5)4(1(rd)5)4(1(3)1(1(rd) (202(t)10). By co)(t)n)(t)tr)-4(a)5(st, th)
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3. *2010 Mid-Year FCPA Update*, GIBSON

II. AN AMERICAN DOCTRINE OF COMMAND RESPONSIBILITY WOULD PROMOTE MISSION ACCOMPLISHMENT AND STRENGTHEN THE MILITARY

The case for an American doctrine of command responsibility is often made with appeals to lofty values and promises of abstract benefits, such as adhering to international law, upholding human rights norms, and achieving legitimacy on the global stage. To be sure, these aims are both laudable and in America's interest, and they would be furthered by adoption of a command responsibility doctrine. But a more pragmatic approach highlights the concrete benefits that the United States and its military would yield from an effective command responsibility doctrine.

Apart from moral and ethical considerations, law of war violations are contrary to our national interest. In today's asymmetrical wars, a delicate, diffi

breakdown in unit cohesion. And in the long term, violations of the law of war endanger current and future American servicemembers, as our failure to recognize, prevent, and punish war crimes by our own forces detracts from our ability to object to similarly inhumane treatment by current and future enemies.[6]

A command responsibility doctrine that is embraced and enforced by the military would send a clear message throughout the military that law of war violations are contrary to our interests and are not tolerated. It would also provide commanders with a strong incentive to ensure that their troops comply with the law of war, an incentive that the American military justice system currently lacks.

III. T

mens rea on the part of the commander is required.[10]

In an effort to understand the fundamental aspects of the current system and how it can be strengthened, a brief examination of the historical development of the command responsibility doctrine is useful.

A. Early American Developments

Although domestic U.S. military law does not currently incorporate a doctrine of command responsibility applicable to its own servicemembers, this has not always been so.[11] Various early American military codes, including several versions of the Articles of War during the first 100 years after the American Revolution, incorporated provisions of command responsibility.[12] In one illustrative early American example, the Massachusetts Articles of War, adopted in 1775, expressly provides that a commanding officer "who shall refuse or omit" to ensure that those under his command are punished for their crimes shall be punished "in such manner as if he himself had committed the crime or disorders complained of."[13]

B. The Yamashita Case

The doctrine of command responsibility developed more fully in the years following World War II. The best known of the post-World War II tribunals relating to command responsibility was the prosecution of Japanese General Tomoyuki Yamashita by U.S. military commission in 1945. General Yamashita, the highest ranking general in the Japanese Imperial Army's air force, was charged with violations of the law of war by having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of members of his command, permitting them to commit brutal atrocities and other high crimes against

For the United States To Adopt a Standard of Command Responsibility Toward Its Own, 42 GONZ. L. REV. 335, 348 (2007).

10. The requisite level of mens rea is the subject of continuing debate, and the standard has continued to evolve over time.

11. Hansen, *supra* note 9, at 349–51.

12. *Id.*

13. *Id.*; *see also* The Massachusetts Articles of War (Apr. 5, 1775), *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 948_949 (William S. Hein & Co 1979) (1896).

people of the United States and of its allies and dependencies."[14] It was not disputed that Japanese troops under General Yamashita's command had committed widespread atrocities; however, there was no direct evidence that General Yamashita had ordered these acts or even had knowledge of them.

In its written evidentiary findings, the commission held that "the crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused."[15] The commission then summarized its view of command responsibility as follows:

Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful attacks are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending on their nature and the circumstances surrounding them.[16]

Based on the evidentiary findings and this formulation of the command responsibility doctrine, the commission concluded that the charged atrocities had been committed by forces under General Yamashita's command; that these crimes were not sporadic and were in many cases methodically supervised by officers and noncommissioned officers; and that General Yamashita failed to provide effective control of his troops as was required by the circumstances.[17]

There is some scholarly dispute as to the true mens rea requirement for command responsibility advanced in the d been s[(requirem)8(ea

support such a theory.[18] Other scholars contend, more plausibly, that the commission applied a negligence standard—that he "knew or should have known."[19]

C. My Lai and Captain Medina

Two decades later, for the first time since the inception of the Uniform Code of Military Justice (hereinafter "UCMJ")[20], a U.S. tribunal was called upon to adjudicate the liability of an American commander for the criminal acts of his subordinates. In March of 1968, U.S. soldiers opened fire in the Vietnamese village of My Lai, killing an estimated 500 noncombatants—many of them women, children, and elderly.[21] At trial, Lieutenant William Calley, the platoon leader on the scene, testified that he participated in the unlawful killings of noncombatants pursuant to the order of his company commander, Captain Ernest Medina.[22] That same year, Captain Medina was tried by court-martial in connection with the actions of his subordinates at My Lai.[23] Because the UCMJ lacked a clear mechanism of command responsibility, Captain Medina was charged as a principle in the

18. *Id.* Noted commentator W. Hays Parks observes that A. Frank Reel, one of General Yamashita's defense counsel, subsequently published a book asserting that the conviction was based on a theory of strict liability rather than any evidence of guilt. W. Hays Parks, *A Few Tools in the Prosecution of War Crimes*, 149 MIL. L. REV. 73, 74 n. 4 (1995). Professor Parks refuted this argument with a thorough examination of the Yamashita record of trial, which he concluded was inconsistent both with Reel's theory as to the application of strict liability and with Reel's own factual representations. *Id.*; *see also* W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L.

My Lai crimes.[24] Accordingly, the military judge instructed the court-martial members that a guilty verdict must be predicated by a finding of actual knowledge coupled with a culpably negligent failure to act.[25] After the Medina case, the United States continued to embrace, in theory, a doctrine of command responsibility with a negligence standard.[26]

D. The International Criminal Tribunal for the Former Yugoslavia

Fifty years after the Tokyo and Nuremberg war crimes tribunals following World War II, the international community again assumed responsibility for adjudicating criminal cases on the basis of customary international law. The statute for the

24. Maj. Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 195 (2000). Medina was eventually acquitted by a court-martial.

25. *Id*. at 193–94.

26. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 501 (July 1956) [hereinafter

International Criminal Tribunal for the former Yugoslavia (ICTY) includes a provision for holding military commanders[27] criminally

F. The Military Commissions Act

The Military Commissions Act of 2006 authorized trial by military commission for violations of the laws of war. The Act adopted a negligence standard fo

doctrine would be most credibly accomplished by an amendment to the UCMJ. This amendment should take the form of a new UCMJ article, analogous to the articles establishing the doctrines of accomplice liability[47] and accessory liability[48] that would apply the doctrine of command responsibility to all relevant punitive articles.[49]

The following two case studies illustrate the problems that can arise absent a clear doctrine of command responsibility.

V. TWO RECENT CASE STUDIES

The military's own investigations into the allegations of unprovoked killings of civilians at Haditha and systematic detainee abuse at Abu Ghraib produced strong evidence indicating that American commanders in each case either knew about these crimes or should have known about them.[50] In the case of Haditha, the evidence suggests that those commanders were not merely negligent in not knowing; rather, they either knew about the offenses or were willfully blind to them, and failed to report and investigate the violations and to punish the perpetrators.[51] Thus, these officers could have been prosecuted under a theory of command responsibility with a conscious-avoidance standard.

In the case of Abu Ghraib, the evidence indicates that at least three officers either knew or should have known of the abuses but failed to prevent the offenses or punish the perpetrators. However,

47. Article 77, 10 U.S.C. § 877 (2005).

48. Article 78, 10 U.S.C. § 878 (2005).

49. For one example of such an article, see the proposal by Victor Hansen, *supra* note 11, at 412–13.

50. Having not been subject to the court-martial process on a command-responsibility theory, these officers are entitled to the presumption of innocence (as are the servicemembers under their command who have not been convicted of the underlying offenses). This article argues that the military's investigative findings would have supported a referral of charges on a command-responsibility theory.

51. This article does not posit that immediate commanders of the Marine unit operating in Haditha could reasonably be liable for failing to prevent the commission of violations at Haditha; rather, the evidence suggests that they were aware of apparent violations after the fact and failed to report, investigate, and punish the perpetrators. While the existing offense of dereliction of duty ostensibly covers these actions, incorporating these offenses under a doctrine of command responsibility (which would carry a wider sentencing range, as well as a more tailored deterrent and stigma) would provide a more appropriate fit for such cases. *See* 10 U.S.C.§ 892 (2007).

blast, and that Marines from 3/1 had shot nine insurgents in an ensuing gun battle.[56] The false initial report that the victims were killed by a roadside bomb was blatantly contradicted by the physical evidence—including official and unofficial photographs of the dead victims depicting their apparent manner and place of death—as well as by the Marine Corps' own death reports.[57] One's curiosity regarding the clear incongruities between the evidence as observed and the facts as reported might have been further piqued by the fact that fifteen civilian deaths is an unusually high number of casualties from a roadside bomb, and a casualty count invoking an immediate official reporting requirement to the highest levels of command in Iraq.[58] Nonetheless, neither the battalion commander nor any other military official in the chain of command undertook an investigation at that time.[59] And, in violation of the official reporting requirement triggered by the "significant civilian casualties," no accurate report was made.[60]

Several months after the Haditha incident, *Time* magazine reported that the official U.S. account was inaccurate, and that all of the dead Iraqis, including the civilians, had been killed by United States Marines.[61] Prior to publication of the story, the *Time* reporter, Tim McGurk, contacted the Marine Corps with his allegations.[62] Upon receiving this information at 3/1 headquarters,

56. *Id*. at 2.

57. *Id*. at 1 n.3. The *Bargewell Report* concluded that the official report that fifteen Iraqi civilians were killed by a roadside bomb blast was "clearly inaccurate" in light of the facts understood at that time, and further notes that the omission of information that might have suggested Marine responsibility for civilian deaths made the release of that clearly inaccurate report "suspect." *Id*. at 47.

58. The *Bargewell Report* specifically found that the death of fifteen Iraqi civilians, standing alone, met the criteria for three independent reporting requirements that mandated immediate reporting at every level of command throughout Multinational Force–Iraq. These three criteria were: 1) an event resulting in significant civilian casualties; 2) an event likely to generate media interest; and 3) possible alleged, or suspected violation of the law of armed conflict. *Id*. at 61.

59. *Id*. at 50.

60. *Id*. at 45–48. "[L]ittle or no action that can be described as appropriate, including anything meaningful in the form of further inquiry into the circumstances surrounding the killings, was taken or directed by [the division, the Regimental Combat Team, or the battalion]." *Id*. at 48.

61. McGurk, *supra* note 54.

62. *Bargewell Report*, *supra* note 53, at 53.

the battalion executive officer and the battalion intelligence officer reportedly went together to the battalion commander and recommended that he commence an investigation.[63] Apparently ignoring yet another red flag that an investigation was warranted, the battalion commander reportedly stated words to the effect that, "my men are not murderers," and dismissed the subordinate officers without further action.[64]

When the *Time* story was published, the military assigned Unites States Army Major General Eldon Bargewell to conduct an investigation into the Haditha incident, including the possibility of a command cover-up.[65] The ensuing report, known as the *Bargewell Report*, made a number of factual findings supporting its ultimate conclusion that multiple officers throughout the chain of command ignored numerous red flags and were, at a minimum, willfully blind to the significant probability that the incident involved violations of the law of war by 3/1 Marines.[66]

The *Bargewell Report* found that multiple officers, including the company commander, aTJ0.0bilr3l y8u994 TwTc 0.04471 Tw 13.695capt th,(isitdism)

photographs of the victims at the scene,[70] both for official and unofficial purposes.[71] At least one set of these photographs, taken by an intelligence specialist in the course of his official duties, was reviewed by the company commander.[72] These photographs were subsequently deleted from the intelligence specialist's camera.[73] A number of 3/1 staff officers with information about the incident and the discrepancies in reporting—including the executive officer, the battalion staff judge advocate, the intelligence officer,[74] and the Civil Affairs Group team leader—later stated that they assumed that an investigation would be directed by the battalion commander or higher headquarters.[75]

The *Bargewell Report* further found that the fact that Marines from Kilo Company 3/1 had killed women and children was generally known throughout the company, including by the company commander and other company leadership.[76] This issue apparently so affected morale that the company commander r found that thref num7p

the Marine Corps chain of command, concluding that the command had ignored "obvious" signs of "serious misconduct."[82] It concluded that the initial reports of Marines and officers to their superiors as to the civilian deaths were "untimely, inaccurate and incomplete,"[83] and that the Marine Corps leadership at the company, battalion, regimental, and division levels "failed to take any follow on action that could be called appropriate or adequate."[84] It further stated: "Despite many indications that inquiry was warranted and opportunities to conduct further inquiry, no individual accepted the responsibility to investigate the potentially unlawful killing of noncombatants."[85]

The report specifically attributed these failures to "inattention and negligence, in certain cases willful negligence."[86] Moreover, "[l]eaders from the platoon through the 2d Marine Division level, particularly at the Company and Battalion level, exhibited a determination to ignore indications of serious misconduct, perhaps to avoid conducting an inquiry that could prove adverse to themselves or their Marines."[87] It further concluded, in unusually explicit terms, that these initial failures were compounded by the fact that the chain of comm

Marines."[89]

The *Bargewell Report* specifically found that:

[A] case for willful dereliction of duty could be made out against some of these individuals. This is not to suggest that any individual willfully covered up misconduct, but that they may have willfully failed to inquire more closely because they were afraid of the truth which might be harmful to their unit, their career, or to their personal standing.[90]

Additionally, the report went a pace further, specifically noting and identifying "some unusual and suggestive circumstances" with regard to some actions on the part of the command.[91]

When the *Time* story was published, approximately four months after the incident, it sparked intense and widespread interest, and the Marine Corps commenced a criminal investigation.[92] Along with several enlisted Marines and staff officers, two Marine officers in positions of command were subsequently charged with violations of the UCMJ stemming from the Haditha affair. The company commander, Captain Lucas McConnell, was charged with a single count of dereliction of duty for failing to investigate.[93] This charge carried a maximum prison sentence of six months.[94] The government dismissed the sole charge against Captain McConnell in September 2007 after granting him immunity to secure his cooperation with the remaining prosecutions.[95] The battalion commander, Lieutenant Colonel Jeffrey Chessani, was charged with two counts of

89. *Id*. at 54.

90. *Id*. at 63.

91. *Id*.

92. Josh White & Thomas E. Ricks, *Investigators of Haditha Shootings Look to Exhume Bodies*, WASH. POST (June 2, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/01/AR2006060100343.html.

93. *Napan Among Eight Charged By Marine Corps for Haditha Incident, Aftermath*, NAPA VALLEY REG. (Dec. 21, 2006), http://napavalleyregister.com/news/local/image_f76b1c13-f7c3-52ec-b7e6-cd68ec06df25.html.

94. 10 U.S.C. § 892 (2010).

95. *Charges Dropped Against Company Commander in Haditha Killings*, CNN.COM (Sept. 18, 2007), http://edition.cnn.com/2007/WORLD/meast/09/18/iraq.haditha. *See also* Adam Tanner, *U.S. Officer Charges Dismissed in Haditha Killings*, REUTERS.COM (Sept. 18, 2007), http://www.reuters.com/article/idUSN1845602020070918;

B. Abu Ghraib

In April of 2004, the American news media broadcast the first of many photographs graphically depicting physical abuses against Iraqi detainees at the hands of American soldiers at the Abu Ghraib prison in Baghdad during 2003 and early 2004. The now-familiar images showed a hooded man standing on a box, arms outstretched, with wires attached; a naked man wearing a dog leash and collar and led by a smiling female soldier; and American soldiers looking on as naked men were forced to simulate sexual acts, among many others. Since that time, evidence has surfaced that the abuses at Abu Ghraib during that time period extended to the rape and sexual abuse of women and minors.[100]

The detainee-abuse scandal spawned various official investigations within the U.S. Department of Defense, including independent criminal investigations into the conduct of individual soldiers involved. As a result of these criminal investigations, several junior enlisted soldiers faced courts-martial for their direct involvement in the abuses.

In addition to those charged with

alleged that he had failed to obtain approval to use military working dogs in interrogations.[104] He was fined $8,000, given a written reprimand, and relieved of his command.[105]

Only one officer faced court-martial in connection with the Abu Ghraib affair. Lieutenant Colonel Steven Jordan, the deputy

After prior instances of detainee abuse by soldiers in the 800th MP Brigade (several weeks before she assumed command) had come to light, she failed to institute corrective training to ensure that these unlawful acts by soldiers in the same command were not repeated.[109] She further failed to ensure that the soldiers under her command and control knew, understood, and followed the requirements of the Geneva Conventions and other applicable laws regarding the treatment of detainees.[110]

She failed to ensure that the military police soldiers under her command and control had appropriate standard operating procedures (SOPs) relating to treatment of detainees.[111] Indeed, there were virtually no detailed SOPs in effect at any of the detention facilities under her command and control.[112] Those few SOPs that did exist were not understood or followed by those soldiers charged with the difficult mission of detention operations.[113]

Despite her awareness that the soldiers under her command and control were inadequately trained for their mission, were not proficient in their basic job skills relating to detainee operations, and were almost uniformly unfamiliar with the applicable Army Regulation and Field Manual provisions relating to treatment of detainees and other elements of detainee operations, she failed to request or provide any additional training for her soldiers.[114]

She failed to adequately supervise the soldiers under her command and control, including a failure to make regular visits to her subordinate commands at the prison.[115]

She failed to enforce the most basic military discipline standards (i.e., saluting of officers, uniform regulations, weapons protocols, non-fraternization policy) throughout her command.[116]

109. Major General Antonio M. Taguba, AR 15-6 Investigation of the 800th Military Police Brigade, DEPARTMENT OF THE ARMY, at 7, 16, 43, 44 (June 4, 2004), http://www.dod.gov/pubs/foi/detainees/taguba/TAGUBA_REPORT_CERTIFICATIONS.pdf [hereinafter *Taguba Report*].

110. *Id*. at 43, 44.

111. *Id*. at 44.

112. *Id.* at 31.

113. *Id*. at 43.

114. *Id*. at 11, 19–20, 37, 44.

115. *Id.* at 43–44.

116. *Id*. at 38, 41, 44.

to take appropriate action to investigate and confirm or refute the ICRC's findings.

by post-graduate business schools as well as by corporate boards.[132] A leading business magazine has likened the U.S. Marine officer training course to a highly effective MBA program, and has declared that "there is no better preparation for the rigors of running a business than the intense training of the U.S. Marine Corps."[133] And some top-tier MBA programs sponsor mock boot camp sessions at military installations to take advantage of military-style leadership training.[134]

In March 2010, *Fortune* magazine ran a cover feature entitled "The New Warrior Elite" that chronicled how the past decade of war has spawned "a new generation of business leaders."[135] Perhaps due to these parallels between military and executive leadership, successful military officers often later become successful CEOs. According to one study, American military officers are overrepresented among the ranks of CEOs, and there is a positive correlation between service as a military officer and strong executive performance.[136]

The military and corporations alike recognize that discipline and compliance within the organization follows the command climate set from the top. The current corporate buzzword for command climate is "tone at the top," but the basic definition—namely, the ethical atmosphere created in the workplace by an

132. *See, e.g.*, Diana Middleton, *Business Schools Tap Veterans*, THE WALL STREET JOURNAL (Feb. 18, 2010), http://online.wsj.com/article/SB10001424052748703444804575071231319849408.html.

133. David H. Freedman, *Corps Values*, INC. MAGAZINE (Apr. 1, 1998), http://www.inc.com/magazine/19980401/906.html.

134. *See*

organization's leadership[137]—mirrors that of command climate precisely.[138] Like a civilian executive, a military commander ensures good order and discipline in the organization and is in a unique position to dictate, by and large, the behavior of his or her troops. In the military context, command climate sets the tone for what is and what is not permissible behavior in an organization that prizes discipline and adherence to rules above most other virtues. While isolated incidents may still occur even in a strong command climate, systemic violations will not.[139]

Corporations have come to recognize that a proper command climate, or tone at the top, is essential to the success of a compliance program.[140] This is because line employees who are in

137. *See, e.g.*, Mark S. Schwartz, Thomas W. Dunfee, and Michael J. Kline, *Tone at the Top: An Ethics Code For Directors?*, 58 J. BUS. ETHICS 79 (2005), *available at* http://lgst.wharton.upenn.edu/dunfeet/Documents/Articles/Tone%20At%20the%20TopJBE.pdf; *see also* Association of Certified Fraud Examiners, *Tone at the Top: How Management Can Prevent Fraud in the Workplace*, ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, http://www.acfe.com/documents/tone-at-the-top-research.pdf (last visited October 8, 2010).

138. *See, e.g.*, MIR BAHMANYAR, SHADOW WARRIORS: A HISTORY OF THE U.S. ARMY RANGERS 255 (Osprey Publishing 2005) ("In practice, since the Army is not a democracy, a great deal depends on the tone set from the top– or, what is known as the 'Command Climate.'").

139. With rare exceptions, violations of the law of war are command failures. The argument that such violations are often effectuated by "a few bad apples" among the lower ranks was surely eviscerated with the revelation that the precise tactics employed at Abu Ghraib were actually devised years earlier and expressly approved by the then-Secretary of Defense for use in interrogations at Guantanamo Bay. *See, e.g.*, Josh White, *Abu Ghraib Tactics Were First Used At Guantanamo*, WASH. POST (July 14, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/13/AR2005071302380.html.

140. *See, e.g.*, Melissa Klein Aguilar, *Building an Integrity Culture at Siemens*, COMPLIANCE WEEK (Mar. 11, 2008), http://www.complianceweek.com/article/3969/building-an-integrity-culture-at-siemens (quoting Siemens Chief Compliance Officer Andreas Pohlmann: "The most important issue for Siemens is to change the culture of the company going forward and to drive the tone from the top into the organization."); *see also* Larry D. Thompson, *Tone At the Top*, ETHISPHERE, http://members.ethisphere.com/?tone_at_the_top (last visited October 8, 2010) (remarks by Pepsico Senior Vice President of Government Affairs: "we all know that having the right tone at the top is critical"); *Corruption Crackdown: How The FCPA Is Changing The Way The World Does Business*, PRICEWATERHOUSECOOPERS, at 39, http://graphics8.nytimes.com/packages/pdf/world/PwC_Corruption_whitepaper.pdf (last visited Aug. 18, 2010) (quoting Walter Ricciardi, former deputy director of SEC Division of Enforcement: "If you set the right tone at the top of

When an American servicemember uses electric shocks on a detainee,

have dramatically expanded actions against both companies and individuals over the

statutes—of a knowledge standard to defendants who consciously chose to avoid actual knowledge of a circumstance despite a high probability of the existence of that circumstance.[159]

In a recent high-visibility case, federal prosecutors successfully invoked the conscious-avoidance doctrine to secure the criminal conviction of Frederic Bourke on charges of conspiring to violate the FCPA.[160] Bourke was not charged with personally engaging in bribery. Rather, the government's charges rested on an allegation that Bourke had invested in an entity that he knew—or at least had every reason to know—was involved in bribing government officials in Azerbaijan in order to induce the privatization of SOCAR, the Azeri state-owned oil company.[161] At closing argument, the government told the jury that Bourke "had enough understanding to know that something . . . was occurring," yet he kept his "head in the sand."[162]

The judge in the *Bourke* case instructed the jury on the knowledge element as follows:

> When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be

much of the government's evidence pointed only to general knowledge and did not purport to conclusively establish that Bourke himself was aware of these facts.[170]

While the *Bourke* case presents the first FCPA conviction in which the government invoked the conscious avoidance doctrine to support an argument that the defendant must have known about corrupt activities, this theory is not novel. Indeed, several similar cases have ended with negotiated resolutions. In one such case, an executive for a defense contractor entered into a marketing agreement authorizing payments to a relative of a foreign official, despite the fact that he was not aware of any actual services provided by the payee and that he believed there was a high probability that the payments were made in exchange for obtaining government contracts.[171] In that case, the defendant admitted that he had deliberately avoided knowledge about the true purpose of the payments and pled guilty to violating the FCPA.[172] In another case, an oil-and-gas software company resolved criminal charges with the DOJ on the understanding that the company had retained a consultant recommended by a foreign government official, failed to conduct any due diligence into the consultant, failed to enter a written agreement with the consultant for the services, and paid a commission to the consultant without verifying that any services were actually provided.[173] Pursuant to its agreement with the DOJ, the company acknowledged this conduct and agreed to a $1 million penalty along with various other requirements.[174]

The lesson from these conscious avoidance cases in the FCPA context is that if a defendant suspects that a circumstance may exist, if there is a high probability that the circumstance does exist, and if the defendant elects not to find out whether the circumstance exists, knowledge by the defendant may thereby be established. This principle of superior responsibility should be exported to the

170. *Id*.

171. Press Release, Department of Justice, 08-394, Former Pacific Consolidated Industries Executive Pleads Guilty (May 8, 2008), *available at* http://www.justice.gov/opa/pr/2008/May/08-crm-394.html.

172. *Id*.

173. Press Release, Department of Justice, 07-751, Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), *available at* http://www.justice.gov/opa/pr/2007/September/07_crm_751.html

174. *Id.*

lower incidence of violations.[180]

Over the last three years, FCPA prosecutions against individuals have more than doubled.[181] The recent increase in individual FCPA prosecutions is part of a deliberate strategy by the U.S. government to deter future violations and to incentivize compliance with the law. In the words of the government's top FCPA enforcer:

The number of individual prosecutions has risen—and that's not an accident. This has been quite intentional on the part of the department. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.