Conversations With...

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The Honorable Dick Thornburgh
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Homer E. Moyer, Jr.

The Issue: U.S. & International Anti-Corruption Efforts

This edition of Washington Legal Foundation's CONVERSATIONS WITH examines international corruption in the context of business activity, with a focus on the Foreign Corrupt Practices Act and anti-corruption efforts at international organizations. Former Attorney General of the United States Dick Thornburgh leads an informative discussion with Homer E. Moyer, Jr., a Member of the law firm Miller & Chevalier; and former Chairman of the Federal Reserve Paul A. Volcker, who is Chairman of the Independent Inquiry Committee created to investigate the corruption in the United Nation's "Oil-for-Food Programme." The participants discuss the corrosive effect public corruption has on free enterprise and the world community, as well as the laws, treaties, and independent investigative efforts that governments and organizations such as the UN and the World Bank are increasingly pursuing to hold businesses and public officials accountable for bribery and unlawful influence.

Governor Thornburgh: Our conversation will focus on what the United States and other nations are doing to address official or public corruption. In order to best understand the possible remedies, however, we must first discuss the problem. What types of activities are we talking about here and who generally engages in them?

Homer Moyer: Grand corruption -- corruption at senior levels of government in connection with large economic transactions -- is in some ways analogous to the "tone at the top" of multinational corporations. Grand corruption can not only shelter petty corruption throughout a society, but it also imposes heavy costs on citizens in conjunction with large government procurements -- telecom systems, airports, highways, computer systems, defense articles -- or the sale of government-owned public assets -- state-owned companies, licenses to operate media outlets, mining concessions, oil exploration rights. Not surprisingly, grand corruption tends to be found in large transactions involving large sums of money or lucrative entitlements.

Governor Thornburgh: Why should the average citizen be concerned with these types of activities? What are the costs of official corruption?

Dick Thornburgh
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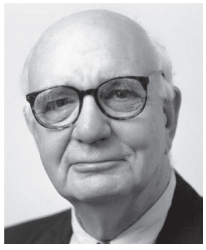

Paul A. Volcker
Former Chairman
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Homer E. Moyer, Jr.
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"Official corruption has emerged as perhaps the greatest threat to the rule of law."

Homer Moyer

Mr. Moyer: In terms of the rule of law, official corruption has emerged as perhaps the greatest threat to the rule of law and most corrosive influence in the transitional countries of the former Soviet Union. Many of these countries have re-written their constitutions, adopted new laws, and begun to build new legal institutions; however, widespread official corruption threatens to erode the impressive progress many countries have made in seeking to establish societies based on the rule of law. This problem, which is by no means limited to former communist countries, is especially deleterious when corruption infects the judiciary, since it is the courts to which citizens can turn for both protection of newly endowed rights and a check against arbitrary or unlawful government action.

Governor Thornburgh: When did U.S. policy makers first begin to understand the impact of corruption, and what was their response?

Mr. Moyer: The issue of bribery of foreign officials by U.S. companies was catapulted to public attention as a result of the Watergate investigations in the mid-1970s. The revelation that many U.S. corporations had off-book slush funds out of which they made political contributions led to the discovery that similar funds were used to bribe foreign government officials to obtain business. In the voluntary disclosure program of the SEC that ensued, more than 400 American corporations confirmed that they had made "questionable payments" to foreign officials.

The response of U.S. policy makers was the enactment of the Foreign Corrupt Practices Act (FCPA) in 1977. In 1988, Congress urged the Executive branch to negotiate multi-lateral anti-corruption agreements, and in the late 1990s, the Organization of American States (OAS), the Organization for Economic Cooperation and Development (OECD), and Council of Europe conventions were successfully concluded. More recently, the Independent Investigating Committee chaired by Mr. Volcker revealed widespread corruption in the United Nations' Oil-for-Food Programme; the World Bank has aggressively begun to address corruption in bank-funded projects; and this past December, the ambitious United Nations Convention Against Corruption entered into force.

Governor Thornburgh: Let's talk a bit about these multi-lateral organizations' efforts. Please explain the basic principles they try to advance. Are there common elements and approaches they follow? Are their differences reflective of each organization's members and institutional focuses?

Mr. Moyer: The conventions share the common principle of requiring signatories to criminalize bribery of foreign government officials. They define bribery to include not just paying cash bribes, but also providing any economic benefit to a foreign official for the illicit purpose of getting business or gaining some commercial advantage. They all prohibit bribes paid indirectly to government officials through intermediate third parties, as well as direct payments. Each also contains accounting provisions, and all include provisions for multilateral cooperation and mutual assistance among national enforcement officials.

At the same time, the conventions differ among themselves in many respects. Among the features found in some, but not all, conventions are the following. The OECD convention provided for an elaborate process of peer group review to monitor implementation and enforcement by signatories, and the Council of Europe convention followed suit. Both the Council of Europe and U.N. conventions reach bribery of domestic public officials as well as foreign officials and both prohibit the acceptance, as well as the payment, of bribes. These two conventions also extend to commercial bribery, as well as bribery of public officials. The OAS convention uniquely allows signatories to criminalize "illicit enrichment" to punish public officials who realize, but cannot reasonably explain, a significant increase in their personal assets during public service. And the U.N. convention contains a private right of action provision through which those harmed by acts of corruption may recover damages. Unlike the FCPA, none of the conventions covers bribery of political parties or party officials, and none contains an express exception for small "facilitating" payments.

Governor Thornburgh: Do these institutions work together to advance their individual standards or agreements? Are there any instances where the overlap in missions has hindered anti-corruption agendas?

Mr. Moyer: The recent proliferation of conventions has prompted the observation that we are now seeing "convention congestion," and multiple conventions could theoretically lead to prosecutions in more than one jurisdiction for the same bribe. To date, however, conflicting or duplicative prosecutions of official bribery have not emerged as a significant practical problem, notwithstanding the existence of overlapping conventions. Rather, the conventions have tended to reinforce one another, and they have plainly facilitated international cooperation among enforcement officials. To date, the OECD has led the way in monitoring implementation by signatories, and U.S. enforcement officials have set the high-water mark for enforcement and prosecutions.

Governor Thornburgh: How have private enterprises integrated the standards enunciated by these multi-lateral agreements into their business practices?

Mr. Moyer: The conventions themselves generally do not prescribe compliance standards or requirements. However, parallel with increased enforcement of the FCPA, there has emerged a vibrant new FCPA compliance industry in the United States. U.S. government enforcement officials have actively promoted compliance programs by requiring them as a condition of settling cases and through soft incentives set forth in the Sentencing Guidelines and in enforcement policies and guidelines. As a result, many U.S. corporations have adopted aggressive compliance programs, extended them to their foreign affiliates and overseas joint ventures, and created thereby a growing body of compliance "best practices."

Governor Thornburgh: As the world's largest international organization, the United Nations can play a major role in

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Paul Volcker

opposing corruption. The recent scandal relating to Iraq's Oil-For-Food Programme certainly has called into question its ability to do so. Paul Volcker, the reports that your Independent Inquiry Committee compiled documented corruption of astonishing cost and breadth. What was the Oil-for-Food Programme, and what were you and your investigators asked to do regarding it?

Paul Volcker: As a result of Iraq's invasion of Kuwait in 1990, the UN imposed comprehensive sanctions on Iraq, prohibiting most financial transactions and trade with that country. Over time, these sanctions created hardships for the people of Iraq. To alleviate the effects of these sanctions on the people of Iraq, following extensive negotiations with Saddam Hussein, the Oil-for-Food Programme started in late 1996 and operated until 2003, ending with the outbreak of the war in Iraq. Originally enacted as a temporary United Nations program to provide urgently needed humanitarian relief to Iraq, the program lasted for seven years and more than $100 billion in transactions with over $64 billion in oil sales and almost $37 billion for food, medicines and equipment. In simple terms, the program allowed for the sale of an agreed upon amount of oil by Iraq with UN approval and surveillance. The proceeds of the oil sales were deposited into a UN controlled escrow bank account at Banque Nationale de Paris S.A. ("BNP") and those funds were then used for the purchase of humanitarian assistance for the people of Iraq, again under UN surveillance.

When the program concluded, there were an increasing number of complaints and allegations of corruption and maladministration related to the program. This led the Secretary-General - with the support of the Security Council - to appoint the three member Independent Inquiry Committee (with me as Chair, and members: Richard Goldstone and Mark Pieth) supported by an international staff of over 75 investigators, lawyers, forensic accountants and support personnel.

Consistent with the Committee's mandate, we were asked to address the following central issues:

1. Whether there was mismanagement and maladministration in the execution of the Programme by the United Nations, its personnel, and agents;

2. Whether any United Nations officials, personnel, or agents engaged in any illicit or corrupt activities in connection with the Programme; and

3. Whether contractors of the United Nations, purchasers of oil, or providers of humanitarian aid engaged in any illicit or corrupt activities in connection with the Programme.

Governor Thornburgh: What were some of the Committee's key findings?

Mr. Volcker: During the 18 months of the Committee's investigation, we produced over 2,000 pages of reports and briefing papers, all of which can be accessed on the Committee website (www.iic-offp.org). Many of the Committee's key findings focused upon the management of the Programme:

* Failures by the Security Council, its

"661 Committee," and the Secretariat to appropriately design, administer and oversee the largest humanitarian effort ever undertaken by the United Nations;

* A virtual vacuum with respect to appropriate auditing and controls functions devoted to the monitoring of the Programme;

* Failures by the United Nations to follow its own procurement procedures when selecting the companies to monitor the oil sales and humanitarian deliveries in Iraq, and the bank to hold the UN escrow account;

* Benon Sevan, the Executive Director of the Office of the Iraq Programme (OIP) corruptly and with others derived a personal financial benefit from the Programme through the receipt of cash proceeds from sales of oil allocated by Iraq in the name of Mr. Sevan and sold by the African Middle East Petroleum Company ("AMEP").

The Committee also found that by mid-1999, the Government of Iraq had imposed corrupt practices related to the sale of its oil and the purchase of humanitarian goods:

* On the humanitarian side, a "kickback" policy was imposed in mid-1999 on those supplying humanitarian goods initially charging for "inland transportation fees" and then by mid-2000 a broader policy was instituted to impose an additional ten-percent "after sales service fee" requirement on all humanitarian contractors. More than 2,200 companies worldwide paid approximately $1.5 billion in these charges for non-existent services to the Government of Iraq;

* A government imposed scheme for the collection of surcharges (from those purchasing oil) on every barrel of oil sold under the Programme for a two year period beginning in the fall of 2000. During this time 139 companies paid approximately $229 million in illegal surcharges to the Government of Iraq.

In both of these areas, the Security Council and the Secretariat simply did not follow up on reports that the program was being twisted and corrupted.

Governor Thornburgh: Were you surprised by how widespread and institutionalized the corruption was in the Oil-for-Food Programme?

Mr. Volcker: We need to make a distinction here between the corruption the Committee uncovered within the United Nations, and that which occurred through Saddam Hussein's manipulation of the Programme with the complicity of companies and individuals willing to pay kickbacks and surcharges to the regime in return for the receipt of lucrative oil and humanitarian contracts.

Within the United Nations, most significantly the Committee found that the Executive Director of the Programme, Benon Sevan, corruptly benefited from the very program that he was relied upon to administer. He had an irreconcilable conflict of interest while administering this significant Programme. Purchasing practices were also tainted and the Committee ran across evidence of corruption in that area beyond the Oil-for-Food Programme. That is currently a matter of another investigation. However, I don't think it fair to say that the Committee found institutionalized corruption within

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the United Nations and its agencies tasked with implementing this very large and complicated humanitarian program.

The corruption of the Programme by Saddam Hussein was indeed substantial and pervasive. By the year 2000, Saddam's manipulation of the Programme amounted to institutionalized corruption. The regime required the payments of surcharges and kickbacks in return for contracts. That could be accomplished only with the complicity of thousands of companies, other entities and individuals. As a result close to $2 billion was siphoned off illicitly into the coffers of the former Iraq regime at the expense of the suffering Iraqi population. This corrupt activity by the buyers of oil and sellers of humanitarian goods reinforces the Committee's central conclusion of serious failures of UN oversight and management and the need for better controls within the organization.

Governor Thornburgh: How did the UN itself contribute to the problems? What institutional faults existed that created the right environment for corruption?

Mr. Volcker: There is shared responsibility amongst the "gatekeepers" for what went wrong with the Programme. Responsibility rests not only with the Secretariat but also with the members of the Security Council and its 661 Committee in providing uneven and wavering direction in the implementation of the Programme. This Programme was unusual for the United Nations in that the 661 Committee, on behalf of the Security Council itself, retained a central role in the review and approval of transactions that occurred under the Programme. That political body was simply not equipped to do the job.

The Security Council failed to clearly define the broad parameters, policies and administrative responsibilities for the Programme. Compounding this was the fact that the Iraqi regime had been permitted during the Programme negotiations process to exercise too much initiative in the Programme design and its implementation.

Within the Secretariat, generally there was a lack of effective oversight of the Office of Iraq Program's ("OIP") administration of the $100 billion Programme, and a failure to provide oversight of its Executive Director, Benon Sevan. Problems within the Secretariat arose from the outset. As our reports document, both the Secretary-General and the Deputy Secretary-General failed to exert administrative discipline. Important information of potential Programme violations was not brought before the Security Council and 661 Committee. Efforts to address sanctions violations with Iraqi officials were ineffective or simply not undertaken. As discussed in some detail in our reports, the absence of an independent auditing and control capacity -- and little or no desire by Benon Sevan to develop such capacities -- was a critical problem for the Programme.

Finally, the UN agencies responsible for distributing humanitarian goods in northern Iraq were called upon to perform well beyond their core functions and competencies and this exacerbated the problems.

Governor Thornburgh: Did any state

actors or state-owned enterprises, other than Saddam Hussein's Iraq, participate in or advance the scheme?

Mr. Volcker: Yes. The Committee's final Report: *Manipulation of the Oil-for-Food Programme by the Iraqi Regime* (October 27, 2005), discusses the distributions of oil to various countries that had state-owned oil companies, such as Russia. Those governments apparently had some knowledge of the illicit payments. Also, there were preferential oil allocations to various political figures from France, Russia and several other countries. In many of these transactions, surcharge payments were made to the Government of Iraq.

Governor Thornburgh: What recommendations did the Committee make to the UN to improve its self-policing of corruption and eliminate incentives for corruption? Have any of them been adopted?

Mr. Volcker: While the Oil-for-Food Programme was certainly a unique and unprecedented undertaking for the United Nations, many of the problems identified by the Committee relating to the creation and implementation of the Programme were generally indicative of institutional problems within the organization. For that reason, the Committee's management findings and consequent recommendations are relevant to the United Nations organization, beyond this one Programme.

The Committee's major recommendations for the United Nations included:

* Create the position of Chief Operating Officer ("COO") with the authority over all aspects of UN administration. While subordinate to the Secretary-General on road policy, the COO would be appointed by the General Assembly at the initiative of the Security Council. He or she would thus have a certain authority over, and responsibility for, administrative matters, with clear accountability to the General Assembly;

* Strengthen the independence of UN oversight and auditing through the establishment of an Independent Oversight Board ("IOB") with functional responsibility for all audit, investigation and evaluation activities, both internal and external, across the United Nations Secretariat and in some circumstances its agencies. The independent members and Chairman would be named by the General Assembly and funded by the United Nations;

* Improve the coordination and oversight framework for cross-agency programs, particularly regarding common principles, planning, transparent financials, and resources;

* Reform and improve management performance through a strengthening of the quality of management and management practices;

* Expand conflict-of-interest and financial disclosure requirements;

* Cost recovery of up to $50 million from agencies involved in the Programme that received excess compensation as a result of work performed under Security Council Resolution 1483.

Since the completion of the Committee's reports, a new Under Secretary for Administration has undertaken efforts to improve administrative policies and procedures, including financial reporting, disclosure of conflicts of interest, and strong ethical standards. Generally, these efforts are consistent with the recommendations

of the Committee and its staff. And I would point out that these recommendations also parallel the recommendations of other commissions that have examined some of these same issues.

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The most substantial reform progress can be seen in those areas subject to the control of the Secretary-General: the creation of a UN Office of Ethics; the implementation of a whistleblower protection policy; and a more comprehensive financial disclosure policy for UN staff. In addition, procurement irregularities are being investigated by a newly created Procurement Task Force and the adequacy of controls are under review. The Organization has also authorized much needed additional inspection and auditing positions. However, the success of these measures will be largely dependent upon the United Nations' commitment to consistently implement them with transparency and integrity.

Unfortunately, recent events have shown that the General Assembly has not embraced recommended reforms requiring that body's approval. For example, a series of proposals that would enhance the administrative authority of the Secretary-General, and additional funding to bolster the Organization's independent auditing and oversight functions have not been implemented. The fear is that the General Assembly, as the governing body of the United Nations, will stall the reform effort through the resistance of some member states and its own unwieldy bureaucracy.

The lessons of the UN Oil-for-Food Programme demonstrate nothing less than the urgent need for UN reform. My hope is that providing strong leadership in the reform effort will be a priority for the new General Assembly.

Governor Thornburgh: I understand that the Committee itself was not granted enforcement powers. How have your investigators worked with nations to help them pursue offending enterprises or government actors?

Mr. Volcker: At the beginning of our investigation questions were raised regarding how the Committee would have the ability to gather evidence in the absence of subpoena powers and other law enforcement capabilities. However, subpoena powers, while obviously useful, are also limited, typically extending no further than the borders of the issuing jurisdiction. Because the Committee had the support of the Security Council and many of the UN's member states, our investigators were able to obtain evidence and information from many different countries both formally and informally, in accordance with each country's laws and regulations. As a result of the substantial information we acquired documenting the payments of surcharges and kickbacks to the Iraq regime, since the issuance of its final report in October the Committee has received requests for assistance from law enforcement and regulatory authorities from some 62 jurisdictions in 25 countries.

The Committee and its staff have met with representatives from these jurisdictions and assisted them with obtaining relevant non-confidential and un-restricted information and documents acquired by the Committee during its investigation. So, it has been gratifying to see that the Committee's reports have been reviewed and scrutinized by national authorities of some UN member states and subsequent

investigations and actions may be undertaken by them, using subpoena powers as appropriate.

Governor Thornburgh: Have law enforcement actions been brought?

Mr. Volcker: Recently, Tongsun Park was prosecuted by the United States Attorney's Office for the Southern District of New York for his activities related to the Programme. In addition several individuals, amongst them Oscar Wyatt and David Chalmers, and their related companies involved in the Programme's oil sales, have been indicted by that same office and the trial is expected to proceed this fall.

I am also aware that three national independent inquiries have been convened in Australia, India and South Africa to examine the involvement of national companies and individuals in illicit activities during the Programme. The Indian Commission's report (Justice R.S. Pathak's Inquiry Authority) was placed in Parliament in early August. The report concluded that K. Natwar Singh, the former Foreign Minister of India had influenced and facilitated the procurement of certain oil contracts, although he did not derive a financial or personal benefit. They further found that there was no evidence that the Congress Party of India was involved in the two contracts under investigation.

Governor Thornburgh: The Committee's reports note that some private enterprises may have been unaware that payments they were making were kickbacks. Homer, for purposes of U.S. domestic or other nation's laws, is that lack of knowledge relevant?

Mr. Moyer: It is possible that secondary buyers of petroleum on international markets could be unaware, or misinformed, about whether oil they were buying was smuggled or illicitly purchased Iraqi oil. For the traders or buyers who purchased directly, or collaborated with those who did, however, lack of knowledge about the source would obviously be difficult to maintain.

More importantly, those involved in purchases of oil or sales of humanitarian goods would have had first-hand knowledge of the price manipulations that were occurring. Neither surcharges on oil purchases nor kickbacks on the sale of humanitarian goods were authorized by the U.N. Nor were they transparent. And both obviously distorted the actual transaction prices. Paying fees for services in the absence of receiving services, for example, is not something that would slip unnoticed by sophisticated international businesses.

Under the U.S. Foreign Corrupt Practices Act, the knowledge standard is very broad and approaches a "reason to know" test. This standard could likely be met in almost all cases. However, kickback schemes would not necessarily violate the FCPA unless funds were used to bribe or enrich individual officials, which may well have happened.

In any event, buying and selling Iraqi oil during the UN embargo through other than the Oil-for-Food Programme would have been in violation of the U.N. embargo and the national laws of U.N. members.

Messrs. Volcker, Goldstone, Pieth, and their able staff did a quite remarkable job of laying out chapter and verse of widespread corruption in the program. The issue now becomes one of national will in

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terms of whether countries with jurisdiction over those who participated in the kickback schemes will prosecute them. Because Iraq generally preferred not to do business with American companies, this is an issue that primarily faces Iraq's favored trading partners, including Russia, France, and others.

Governor Thornburgh: Paul, can the UN credibly advance its anti-corruption convention after the oil-for-food scandal?

Mr. Volcker: I continue to believe that the United Nations serves a uniquely important role in the international community. This is particularly so today as the world is ever increasingly challenged by new threats to its security. The world would be a poorer and more dangerous place without an effective United Nations. However, the urgent need for stronger executive leadership, thoroughgoing administrative reforms, and more reliable controls and auditing has been highlighted in the Committee's reports.

To more credibly advance its anti-corruption convention, the United Nations will need to demonstrate its commitment to reform within its own organization. These internal reform efforts cannot be accomplished through the efforts of any one country. Instead, committed and influential member states should consider forming a 'coalition of the willing' to take on the reform efforts and advance them through the complex political landscape of the United Nations. Work to combat corruption has been emphasized by the OECD as well. The World Bank is also undertaking fresh initiatives.

Governor Thornburgh: The international anti-corruption regimes we've been discussing are certainly important to private enterprises here in the U.S., but their main focus of concern remains the Foreign Corrupt Practices Act. Homer, you deal with this law on a daily basis. What are its main requirements?

Mr. Moyer: The FCPA prohibits the payment of bribes to foreign officials. Bribes include not only payments of cash, but other means of transferring economic benefit, such as extravagant gifts or entertainment, lavish hosting, similar favors to family members, club memberships, "sweetheart deals," debt forgiveness, or any other means of transferring economic value. "Foreign officials" include not just ministers and those who work for them, but also legislators, judges, political parties, party officials, officials of international organizations, and all of the officers and employees of any company that is owned or controlled by a government (national airlines, oil companies, telecom countries, etc.)

The FCPA also has accounting provisions that require companies to keep accurate books and records and to maintain effective internal controls to prevent abuses of the sort that were present in the off-book corporate slush funds of the 1970s. Violations of the books and records provisions of the FCPA are often easier to prove than violations of the anti-bribery provisions, and the accounting provisions hold U.S. corporations strictly liable for failures of their foreign subsidiaries to comply with FCPA standards. As a result, there are some cases in which the SEC (the primary enforcer of the FCPA's accounting

provisions) successfully prosecutes a U.S. company even though the Department of Justice (the primary enforcer of the FCPA's anti-bribery provisions) may lack jurisdiction over, or be unable to prove, anti-bribery violations. In addition, the Sarbanes-Oxley legislation has had the effect of increasing the number of voluntary disclosures of violations.

The most important new force on the anti-corruption front may well prove to be the World Bank, which, with limited public notice, may now have imposed more sanctions for foreign bribery than most of the countries that are signatories to the international conventions.

Governor Thornburgh: For some time after its passage, some U.S. businesses felt the FCPA put them at a competitive disadvantage in foreign markets. Has that perception changed over the past three decades?

Mr. Moyer: That perception persists, but for different reasons than before. From 1977 well into the 1990s the United States was the only country to have a foreign bribery statute. With the recent advent of the OAS, OECD, and other international conventions, more than 60 countries now have laws similar to the FCPA. So the FCPA is no longer a lone, unilateral law.

The issue now is one of enforcement. Prosecutions under the new international conventions have thus far been meager. OECD officials indicate that many cases are in the pipeline, but until enforcement of anti-bribery laws in other major countries begins in earnest, U.S. businesses will continue to feel, justifiably, that the international playing field is not yet level.

Governor Thornburgh: How has the FCPA and its enforcement changed as more multi-lateral agreements and principles come into existence?

Mr. Moyer: One significant change is the increase in international cooperation and in the number of cross-border investigations. Prosecutors in different countries now talk with one another much more than before. And investigations in one country can now lead to investigations in other countries. For example, the Elf trial in France led to additional investigations, both in Europe and the United States. Prosecutions in Brazil, Switzerland, and Africa have, in turn, spawned investigations in the United States. With some countries still apparently loathe to prosecute their own corporations (Japan and the U.K. are leading examples), U.S. enforcement agencies continue to shoulder a disproportionate load and increasingly find themselves stretched thin and facing growing backlogs.

Governor Thornburgh: How has FCPA enforcement evolved over the years at the SEC and DOJ?

Mr. Moyer: In the 1970s, when the SEC's highly publicized disclosure program directly led to the enactment of the FCPA, the SEC was where the action was. In the years that followed, Justice stepped into the spotlight and led the enforcement effort, including some high visibility cases in the 1990s. In the last several years, aided by the voluntary disclosure pressures created by the Sarbanes-Oxley legislation and strengthened by additions to its enforcement staff, the SEC has re-appeared as a central player. More

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importantly, the two agencies are communicating more closely now than in years past.

For a company that has an FCPA issue, prudent advice is that if you receive a call from one agency, you should expect a call from the other. Or if one invites you in for a meeting, don't be surprised to find the other there as well.

Governor Thornburgh: What are some key enforcement trends that the regulated community has had to address lately?

Mr. Moyer: One of the most important is the increase in the number of vicarious liability cases, that is, prosecutions of companies for improper payments made by third parties working on their behalf, such as consultants, sales representatives, agents, accountants, and lawyers. Also, enforcement officials are plainly focused on non-cash "bribes," from free travel to subsidized shopping sprees to scholarships or trips to Disney World for family members. Cases have cited first class travel, excessive per diem, gifts of club memberships, and pedicures. Multiple small bribes, as well as big ones, are also under investigation.

Even more dramatic are new sanctions and enforcement tools that enforcement officials have begun to use. Not only have the statutory penalties been increased, but recent cases have also shown new responses from the government. From the world of drug enforcement, prosecutors have imported the concept of "deferred prosecution agreements," which allow a company to avoid a guilty plea but impose both a penalty and, effectively, a period of probation. In one recent case, an improper payment led to a count for violating tax laws, as well as FCPA charges. And in most recent cases against corporations, companies have been required as a condition of settlement to retain an independent "compliance monitor" acceptable to the government. The monitor's responsibilities are to evaluate the company's compliance program, make binding recommendations for improvements, and monitor implementation, all at the company's expense. Monitors can serve a constructive role and be a less unwelcome alternative to continuing oversight by the government, but they are given free rein within the company, broad authority, and few limits on costs.

Governor Thornburgh: How can the FCPA be improved?

Mr. Moyer: In 1988, the Congress invited the Department of Justice to issue public guidelines, much like the implementing regulations that regulatory agencies routinely promulgate, but Justice declined to do so. Because significant ambiguities in the statute persist to this day, guidelines are still a good idea, and Justice and the SEC, notwithstanding their heavy caseloads, should consider drafting guidelines and subjecting them to public notice and comment.

The Justice Department does issue "Opinions" on particular factual situations in response to requests submitted from the private sector. However, the procedure is used sparingly, primarily because companies find it to be of limited utility. The published opinions are of little value because the Department states its conclusions but not its rationale and

because the Department expressly cautions the public that only the requester may rely on the opinion. This process could be made more informative and more valuable to corporations seeking to comply with the statute.

Because U.S. law authorizes denial of export privileges, suspension or debarment, and other sanctions prior to conviction, the low likelihood that FCPA issues will be subject to judicial review is even further reduced. These aggressive, pre-conviction sanctions (about which there may be constitutional issues) should rarely be invoked. In any event, the development of some jurisprudence on this important law would be salutary.

A contentious current issue is that many companies perceive that the benefits they may obtain for making a voluntary disclosure are uncertain, and thus a dubious incentive to disclose. A defined, predictable program could increase the number of voluntary disclosures by companies that are dedicated to full compliance but that are leery of the supposed advantages of disclosure and fearful of the protracted time period it may take to resolve their issues. Certainty of the type provided by the Antitrust Division or the World Bank's Voluntary Disclosure Program might both improve compliance and reduce anxiety.

Governor Thornburgh: Paul, did you draw at all from the U.S. experience in pursuing corruption in the course of the Committee's investigation?

Mr. Volcker: This was an international investigation with staff from 28 countries. One of the first orders of business when we were hiring staff and establishing our procedures was the creation of the Committee's Investigation Guidelines which were drawn in large part from existing international standards for the conduct of international administrative inquiries. The investigation was guided by and conducted in accordance with these Guidelines that were posted on our website. Because many of our staff came from a law enforcement background, they brought to the investigation their considerable expertise in the gathering of documents and information and the conduct of interviews. Thus our practices were based not only on the U.S. experience but also the experiences of the staff from the many other countries represented on our investigative teams.

Governor Thornburgh: Generally speaking, where do the biggest challenges lie for anti-corruption officials for the rest of this decade?

Mr. Volcker: The press reminds us almost every day of the pervasiveness of corruption in political and economic life around the world, including even the United States. However, I believe corruption is a particularly grave threat to newly independent countries, to transitional economies, and to those mired in insecurity, all without strong traditions of the rule of law. It presents a particular challenge, but also an opportunity, for those institutions that purport to provide assistance, whether in the form of economic aid, crisis response, military security, or legal and institutional reform.

That assistance can be helpful and sustained only with a mixture of oversight, evaluation and controls, assessing and

guarding against corruption of intended programs. In societies where corruption is rife and principles of governance are weak, the needed oversight and controls will be difficult to design and enforce. But the fact is egregious waste or corrupt subversion of assistance programs will undercut both program success and the credibility of the assisting agencies.

Achieving the right balance between providing and withholding funding will not be easy. But it seems clear that agencies providing assistance will need strong and independent auditing and investigatory functions if potential and actual corruption is to be exposed and limited.

Washington Legal Foundation's (WLF) seventh and newest publication format, CONVERSATIONS WITH, provides an occasional forum for leading experts from business, government, academia, and the legal profession to discuss current legal policy issues. In spontaneous and informal question-and-answer conversations, our participants give frank thoughts on a wide range of important contemporary subjects.

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The Honorable Dick Thornburgh is a former Attorney General of the United States, Governor of Pennsylvania, and Under-Secretary-General of the United Nations. He is currently Of Counsel to the law firm *Kirkpatrick & Lockhart Nicholson Graham LLP*, and Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

Paul A. Volcker was asked in April 2004, by United Nations Secretary-General Kofi Annan to chair the Independent Inquiry into the United Nations Oil-for-Food Programme. In the course of his career, Mr. Volcker worked in the Federal Government for almost 30 years, culminating in two terms as Chairman of the Board of Governors of the Federal Reserve System from 1979-1987. He divided the earlier stages of his career between the Federal Reserve Bank of New York, the Treasury Department, and the Chase Manhattan Bank. Mr. Volcker retired as Chairman of Wolfensohn & Co. upon the merger of that firm with Bankers Trust.

Homer E. Moyer, Jr. is a Member in the Washington, D.C. office of the law firm *Miller & Chevalier, Chartered*. The founder of the firm's International Department and past member of the firm's Executive Committee, he has a diverse international and litigation practice. Mr. Moyer has represented dozens of clients in Foreign Corrupt Practices Act matters and investigations, chaired more than 15 conferences on the FCPA and international anti-corruption conventions, and served as the SEC-approved Independent Compliance Consultant in the largest FCPA case to date. In export controls and international sanctions, Mr. Moyer's experience dates from when he was General Counsel of the U.S. Department of Commerce.