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Willful Blindness: The Hazards of an Evolving Standard of Knowledge

Alex Robert Daniel

WILLFUL BLINDNESS: THE HAZARDS OF AN EVOLVING STANDARD OF KNOWLEDGE

Alex Daniel*

I. INTRODUCTION

Many clever first year law students, suffering from the rigors and strains of their first class on criminal law, will instinctively turn to their *Black's Law Dictionary* for guidance when asked what it means to have knowledge. While such students might, on a fundamental level, be correct when they respond that knowledge is "[a]n awareness or understanding of a fact or circumstance,"[1] following the Supreme Court's decision in *Global-Tech Appliances v. SEB S.A.*,[2] a more appropriate definition would include the caveat "except where the defendant was willfully blind." In *Global-Tech*, the Supreme Court found cause to redefine the requirements of knowledge mens rea for all federal courts by extending the doctrine of willful blindness from the criminal sphere into the realm of civil law.[3] In *Global-Tech*, a civil patent law case, the Supreme Court held in an eight-to-one ruling that a defendant could be found liable for knowingly inducing the infringement of a patent where it could be shown that the defendant was "willfully blind" as to the existence of a preexisting patent.[4] In the course of its decision, the Supreme Court rejected the position of the Federal Court of Appeals that "deliberate indifference" towards

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[1] BLACK'S LAW DICTIONARY THIRD POCKET EDITION 403 (3d ed. 1996). This was the resource I first turned to when asked to define knowledge. The result, while seemingly satisfactory at the time, has proven to be anything but.

[2] Global-Tech Appliances v. SEB S.A., 131 S. Ct. 2060 (2011).

[3] *Id.*

[4] *Id.* at 2072.

the existence of a patent was sufficient to impute knowledge to the defendant and instead imported the concept of "willful blindness" from criminal law into the case.[5]

According to the majority, the lower court's application of the deliberate-indifference standard fell short of the requirements of knowledge because it required merely that there be a "known risk" that the defendant was "deliberately indifferent towards," and did not require the defendant to have taken some additional effort to avoid confirming that risk.[6] Nevertheless, the Supreme Court found that the defendant was still liable because it was possible for the jury to conclude that the defendant had willfully blinded itself to the existence of a rival's patent when the defendant marketed and sold a knock-off product.[7] In crafting its holding, the majority observed that nearly every circuit court had some form of a "willful blindness" standard incorporated into its criminal law rulings.[8] The majority further found that the lower courts typically required a showing that the defendant was (1) subjectively aware of a high probability of the existence of a fact and (2) took some deliberate action in avoiding confirming that fact before knowledge could be imputed through the willful blindness standard.[9] In his lone dissent, Justice Kennedy warned of the dangers of the majority's ruling insofar as it drastically expanded the scope of knowledge in all federal criminal cases by means of a civil patent holding.[10] Implicit to this was Justice Kennedy's fear that by injecting the criminal law concept of "willful blindness" into civil law the term was redefined, thus changing the scope of knowledge mens rea not only in civil law, but also in federal criminal law. In particular, Justice Kennedy questioned the wisdom of this expansion by means of a civil patent case without hearing a single brief from

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[5] *Id.* at 2068–69.
[6] *Id.* at 2071.
[7] *Id.* at 2071–72.
[8] Global-Tech, 131 S. Ct. at 2070.
[9] *Id.* at 2070.
[10] *Id.* at 2073–74 (Kennedy, J., dissenting).

the criminal bar.[11] Furthermore, Kennedy expressed concern that the majority bolstered its decision with very little justification beyond a citation to a centuries-old case, which, at best, provided ambiguous support for the majority's ruling[12].

Although *Global-Tech* may appear on its face to have clarified many of the issues underlying the standard of willful blindness, the Court's failure to adequately define its requirement of "deliberate action" will likely prove problematic to lower courts as they apply the case to their rulings. In a recent article, Timothy P. O'Toole noted that although nearly every court applying willful blindness has a requirement that the defendant possess an awareness of the high probability of the existence of a fact, there was confusion between the various lower courts prior to *Global-Tech* as to whether anything more was required.[13] In particular, O'Toole noted that "few if any courts required a separate showing of 'deliberate actions to avoid knowledge.'"[14] Although O'Toole praised the Court's decision for providing much needed clarity to the realm of willful blindness, his optimism may be premature in light of the scant definition of "deliberate action" provided by the Supreme Court in *Global-Tech.* A review of the model jury instructions for various circuit courts makes apparent that many courts simply do not require the sort of "deliberate action" described in *Global-Tech.*[15] While lower courts have had decades to develop definitions for the element requiring "awareness of a high probability of the existence of a fact," their inexperience with the "deliberate action" element and the confusing precedents and facts underlying *Global-Tech* will likely lead to various splits as to the definition of "deliberate action."

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[11] *Id.* at 2073.
[12] *Id.* at 2073.
[13] Timothy P. O'Toole, *Patently Unusual: How a Recent Supreme Court Patent Decision Alters the Landscape for Proving Criminal Knowledge,* 18 No. 10 WESTLAW JOURNAL OF INTELLECTUAL PROPERTY 1, 3 (2011).
[14] *Id.*
[15] *Id.* at 4.

As a result, the Supreme Court will likely need to use future cases to further define the deliberate action requirement, especially as the consequences of *Global-Tech* expand from the limited realm of cases regarding inducement of patent infringement into the area of federal criminal law. There are many potential definitions for "deliberate action" which can be gleaned from the Supreme Court's findings in *Global-Tech*. On one extreme, courts could find that a failure to investigate a suspicion of wrongdoing only results in deliberate action where the defendant has a legally cognizable duty to investigate. At the other extreme, lower courts interpreting *Global-Tech* could reasonably conclude that the bare failure to investigate a suspicion of wrongdoing is sufficient to find deliberate action. Regardless of the interpretation, the efficacy of and need for the willful blindness charges is quite clear. As Judge Browning indicated in his opinion in *United State v. Jewell,* criminal enterprises, such as the drug trade, which are predicated upon making many participants as ignorant of the facts as possible, would greatly benefit from a definition of knowledge that rewards defendants for shielding themselves from information by failing to investigate suspicions of illegality. [16] In short, criminals engaged in valuable and illegal enterprises are legally savvy, and will exploit ambiguities in the law to shield their illicit activities. Nevertheless, an extremely lax standard for deliberate action would no doubt invite prosecutors to adopt willful blindness charges en masse, encouraging overzealous prosecutions. The ideal test of deliberate action would be one that is both flexible in its application in order to retain the viability of the willful blindness doctrine, but narrow in the circumstances in which it applies in order to limit overzealous prosecution

In further defining the deliberate action requirement, the Supreme Court will need to balance its desire to protect defendants from overzealous prosecution against the likelihood that smart criminals will exploit gaps in its definition. In light of this, the Court should define

[16] 532 F.2d 697, 703 (9th Cir. 1976).

deliberate action to include a conscious decision by a defendant not to investigate. Furthermore, the Court should be wary of requiring the prosecution to show that a defendant erected actual obstacles to obtaining knowledge. Such a requirement would reward criminals who knew enough to know how to avoid information without actually "putting on blinders." As a result, the ideal interpretation of deliberate action would adopt a holistic approach and would apply a totality of the circumstances test. Under such a test, courts would be invited to review the entirety of the circumstances surrounding the case, including such factors as the burden on the defendant of investigating suspicions of wrongdoing, the defendant's conduct in creating the risk, the defendant's ability to avoid the risk and whether the defendant was bound by a duty that was not followed.

This Comment will set aside the consequences of *Global-Tech* for future patent law decisions and instead focus on the potential effects that its holding may have on the future of knowledge mens rea in criminal convictions premised on willful blindness. In particular, this Comment will describe the potential interpretations that courts may have for the "deliberate action" element and the likely effects that these interpretations may have in criminal prosecutions. Part II will provide a brief history of the willful blindness doctrine and its development in the courts. Part III will break down the facts, reasoning, and prior precedent underlying the Court's decision in *Global-Tech*, including the opinion of the Federal Appellate Court, the majority opinion in *Global-Tech*, and Justice Kennedy's dissent. Part IV will compare many potential interpretations of the "deliberate action" element and argue instead that in future cases the Supreme Court should adopt a totality of the circumstances test in determining whether a defendant's conduct rises to the level of deliberate action. Part IV will compare each potential interpretation of the deliberate action requirement against a model fact pattern and statute in

order to demonstrate the weaknesses and ambiguities inherent in each and conclude by demonstrating the efficacy of a totality of the circumstances test. Part V will conclude that the Supreme Court's failure to provide a clear definition for the "deliberate action" requirement of the *Global-Tech* willful blindness standard will likely lead to confusion between circuit courts, and will suggest that future courts implement the more flexible totality of the circumstances test.

II. THE HISTORY OF WILLFUL BLINDNESS

Willful blindness developed as a theory in English case law in a series of cases pertaining to the application of criminal statutes where it was essential to prove to the jury that a defendant had culpability sufficient to demonstrate knowledge.[17] In *Regina v. Sleep*,[18] the court ruled that a defendant could not be found guilty of the possession of "naval stores" unless the defendant knew "that the goods were government stores or *willfully shut his eyes to that fact*."[19] Subsequent rulings by English courts suggested that actual knowledge was unnecessary where it could be shown that a defendant purposefully abstained from ascertaining facts that would support a finding of knowledge.[20] However, confusion arose amongst English courts as to the degree of conduct necessary to prove that a defendant was willfully blind.[21] Some courts posited that it was simply necessary for a defendant to fail to investigate a suspicion of wrongdoing, whereas other courts hinted that it was necessary for the prosecution to show that the wrongdoing was so obvious that the defendant's claims of ignorance could be assumed to be little more than a façade designed to confound prosecutions.[22] This discrepancy between the English courts allowed for various conceptualizations of willful blindness to emerge. In one

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[17] Jonathon L. Marcus, *Model Penal Code Section 2.02 (7) and Willful Blindness*. 102 YALE L.J. 2231, 2233 (1993).
[18] Regina v. Sleep,169 Eng. Rep. 1296 (Cr. Cas. Res. 1861).
[19] Marcus, *supra* note 17, at 2333–34 (emphasis added) (discussing the development of willful blindness doctrine in the English courts).
[20] *Id.; see* Bosley v. Davies, 1 Q.B. 84 (1875); Redgate v. Haynes, 1 Q.B. 89 (1876).
[21] Marcus, *supra* note 17, at 2334.
[22] *Id.*

form, an actors willfully blinded themselves if they "closed their eyes to the truth."[23] Yet other English court required that the defendant "connived" to avoid discovering knowledge of the existence of wrongdoing.[24] To this extent, these English courts required that the prosecution show that the defendant's ignorance was little more than an act put on by the defendant to avoid criminal sanction.[25]

Despite the ambiguities in the English courts, according to Jonathan L. Marcus, the Supreme Court first approved the use of the willful blindness doctrine in *Spurr v. United States.*[26] According to Marcus:

> The defendant, Spurr, was charged with knowingly certifying certain checks drawn on a bank account that had insufficient funds. The Court noted that an 'evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not. The rationale behind this presumption [was that] the defendant had a *duty* to know the amount of money in a customer's account.[27]

Nevertheless, in addition to cases in which defendants owed, by statute, a duty of care to others, following *Spurr*, lower courts began to decide cases using willful blindness as a substitute for knowledge in situations in which the defendant owed no legally cognizable duty to know or become aware.[28] In particular, courts have invoked the willful blindness doctrine heavily since its conception in cases involving narcotics convictions; such cases are, by their nature, "prohibitory and involve no legal duty to know."[29] According to Robin Charlow, an express or implied duty to know places the burden on the defendant to search out additional information when there is a suspicion of wrong doing or a danger of abuse, such that it can be said that the

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[23] Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1362–63 (1992).
[24] Charlow, *supra* note 23, at 1363–64.
[25] *Id.*
[26] 19 S.Ct. 812 (1899).
[27] Marcus, *supra* note 17, at 2334 (emphasis added).
[28] *Id.*
[29] *Id.*

willing failure to discover positive knowledge carries with it the stigma of an "evil intent."[30] However, where no such duty exists it is more controversial to say that a defendant is required to search out additional information any time the defendant suspects criminal acts because the scope of potential liability increases dramatically without the requisite increase in the moral opprobrium surrounding the failure to investigate.[31]

The drafters of the Model Penal Code ("MPC") sought to address the controversial question of willful blindness in their formation of the various levels of culpability.[32] In particular, the drafters wanted to address situations where the defendant is "aware of the probable existence of a material fact but does not determine whether it exists or does not exist."[33] According to the text of the MPC, an actor "knowingly" acts in regards to an element of a crime

> [i]f the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.[34]

However, in addition to this, the drafters stated that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."[35] According to Marcus, this rule was justified on the basis that:

> the actor who commits an act even though he knows it is highly probable that a crucial fact exists is just as culpable as the actor who has virtually certain knowledge. The actor who is aware of a high probability of a fact's existence has

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[30] Charlow, *supra* 23, at 1407–78 (discussing the policy rationales and invocations of morality which underlie convictions based on the "willful blindness" doctrine).
[31] *Id.* at 1409.
[32] Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 36 (1994).
[33] *Id.*
[34] MODEL PENAL CODE § 2.02 (b).
[35] MODEL PENAL CODE § 2.07.

> been 'put on notice;' that is, he has the opportunity, if he cares, to investigate and eliminate any doubt before acting or, in any event, to refrain from acting.[36]

For Marcus, an actor's indifference towards the existence of criminality is itself the best justification for a willful blindness charge.[37] When such an actor chooses to act despite his awareness that his actions are likely criminal, the actor has manifested a complete disregard for the values of society.[38] For Marcus, such disregard is as offensive to the law as acting with the knowledge that one is engaged in criminality.[39] To this extent, the drafters of the MPC regarded individuals who possessed a high awareness of material elements of a crime, but chose not to pursue those facts any further and acted despite their awareness, to be just as morally culpable as those who acted with full awareness of their conduct, the surrounding circumstances, and the likely results thereof.[40]

Although other cases in United States courts were responsible for opening the door for willful blindness convictions, in particular *Leary v. United States*[41] and *Turner v. United States*.[42] willful blindness, as applied in a modern sense, first appeared in the criminal case of *United*

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[36] Marcus, *supra* note 17, at 2235–36. *See also* David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 961–65 (1999) ("The drafters of the Model Penal Code simply abandoned the doctrine that willful blindness can substitute for knowledge. In its place, they proposed that awareness of the high probability of a fact is tantamount to knowledge of that fact. In this way, they preserved the root intuition that criminal guilt requires some guilty mental state. Here, the guilty mental state is awareness of the high probability of a fact, presumably whatever fact the willfully blind person is arranging not to know.").

[37] Marcus, *supra* note 17, at 2235–36.

[38] *Id.*

[39] *Id.* at 2236.

[40] Luban, *supra* note 36, at 961–65.

[41] Leary v. U.S., 395 U.S. 6, 46 n.93 (1968). In *Leary*, the Supreme Court first adopted the MPC's definition of knowledge, which provides that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." As a result of this holding, the Court relaxed the requirement of actual knowledge and opened the door to lesser showings of knowledge.

[42] Turner v. United States, 396 U.S. 398, 415–17 (1969) (upholding the defendant's conviction for trafficking heroin on the grounds that the defendant was likely aware that little if any heroin is actually manufactured in the United States and, as a result, must be smuggled from foreign countries in order to meet the demand for the drug in American markets. On this basis, the Court concluded that the defendant was likely aware of the high likelihood that the heroin he possessed was foreign manufactured and that a conviction for trafficking based on such a finding would be consistent with the MPC's definition of knowledge).

States v. Jewell.[43] In *Jewell*, the Court ruled that where a person is aware of facts demonstrating a high risk of criminal wrongdoing and deliberately chooses not to further investigate the surrounding circumstances, knowledge of the critical facts can be imputed to that person.[44] In *Jewell*, the defendant crossed the border into Mexico and a stranger offered the defendant a chance to purchase narcotics.[45] The defendant turned down the offer, but subsequently agreed to drive a car for the stranger across the border for $100.[46] The police stopped the car, searched it and found it contained over 100 pounds of marijuana in a secret compartment that was visible to the driver as a large void in the side of the vehicle.[47] The defendant was subsequently charged and convicted of knowingly possessing illegal narcotics.[48] The defendant testified that he did not know that the drugs were in the car, but that he did believe at the start of the trip that there was likely something illegal and questionable about the whole affair.[49] Despite that suspicion, he admittedly did not engage in any further investigation beyond a short inspection of the trunk and glove compartment of the car.[50]

The Court found that such circumstances were sufficient to justify a conviction on the basis of willful blindness as the defendant was aware of a high probability that the vehicle contained illegal drugs and consciously chose not to investigate the contents of the secret compartment in the car in order to avoid learning the truth.[51] According to two commentators, the purpose of the *Jewell* holding was to convict a defendant who clearly lacked the mental state

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[43] O'Toole, *supra* note 13, at 1; United States v. Jewel, 532 F.2d 697 (9th Cir. 1976).
[44] United States v. Jewel, 532 F.2d 697, 700 (9th Cir. 1976).
[45] *Id.* at 699 n.1.
[46] *Id.* at 699 n.2.
[47] *Id.*
[48] *Id.* at 698.
[49] *Id.* at 699 n.2.
[50] Jewel, 532 F.2d at 699 n.2.
[51] *Id.* at 698.

of actual knowledge of the facts essential to conviction.[52] As a result, two rationales could potentially underlie and support willful blindness as applied to a fact pattern similar to *Jewell*. Under one rationale, the mental state described by "willful blindness," which the authors refer to as "willful ignorance," is nothing more than a kind of knowledge separate from, but still equivalent to, actual knowledge.[53] Under the other potential rationale, willful blindness would not be construed as another form of knowledge, but rather as the moral equivalent to knowledge insofar as it raises similar moral objections.[54] Regardless of the rationale supporting the court's use of willful blindness in criminal convictions requiring knowledge culpability, it is obvious that, since *Jewell*, the application of willful blindness in criminal courts generally—and in drug convictions specifically—has increased significantly.[55] Prior to *Global-Tech* almost all of the circuits had some variant of the willful blindness doctrine embedded in their mens rea jurisprudence.[56] Nearly all the circuits shared the requirement that the defendant be shown to have had an awareness of the high probability of the existence of a fact to justify a finding of willful blindness.[57] However, with the Supreme Court's addition of the "deliberate action" requirement in *Global-Tech*, lower courts are faced with the task of deciding just what level of activity qualifies as "deliberate action." Unfortunately, the Supreme Court gave little guidance for courts to follow. According to O'Toole "*Global-Tech* makes clear that securing an attorney opinion about existing patents while intentionally withholding critical facts and copying a product whose markings will not provide proof of knowledge of that patent qualify as "active

[52] Husak, *supra* note 32, at 35–36.
[53] *Id.* at 36.
[54] *Id.* at 36–37.
[55] O'Toole, *supra* note 13, at 1–2. "After *Jewell*, the use of the doctrine expanded rapidly, becoming commonplace in drug prosecutions. By 1982, the 9th Circuit had described willful blindness as an integral part of the drug trade. And this made some sense: In inherently illegal industries such as the drug, gambling or counterfeit trades, strong incentives exist for individuals to avoid gaining knowledge to protect them in an easily foreseeable criminal prosecution."
[56] *Id.* at 3.
[57] *Id.*

efforts" to avoid knowledge of patent infringement. But the opinion contains little additional guidance about how this requirement will play out in other contexts."[58] Because of this, lower courts will struggle to give definition to "deliberate action," with numerous circuit splits likely as a result.

III. ANALYSIS OF *GLOBAL-TECH*

A. Federal Circuit Court of Appeals Decision in *Global-Tech v. SEB S.A.*

Global-Tech arose out a claim for inducement of patent infringement against the company Global-Tech Appliances ("Global-Tech") by the manufacturer SEB S.A. ("SEB").[59] In the 1980s, SEB developed a revolutionary deep fryer for home use that was cool to the touch and used an innovative and inexpensive design to overcome the costs associated with using heat resistant plastics; for this, it received a U.S. Patent in 1991.[60] In 1997, Sunbeam Products, Inc. ("Sunbeam") approached defendant Pentalpha Enterprises ("Pentalpha"), a subsidiary of Global-Tech, with a request that Pentalpha supply Sunbeam with a deep fryer that met certain specifications.[61] For the sake of simplicity, Global-Tech and Pentalpha will be referred to collectively as "Pentalpha" for the remainder of this section, unless otherwise specified. Pentalpha thereafter acquired a version of the SEB deep fryer that was marketed in Hong Kong.[62] Because it was a foreign-marketed product, this deep fryer did not display any U.S. patent markings that would otherwise show it to be protected by SEB's patent.[63] Pentalpha reverse engineered and copied the internal workings of the foreign-marketed deep fryer, including the cool-touch technology, crafted its own exterior and aesthetic design, and began marketing it to

[58] O'Toole, *supra* note 13, at 5.
[59] Global-Tech Appliances, Inc. v. SEB S.A. 131 S. Ct. 2060 (2011).
[60] SEB S.A. v. Montgomery Ward & Co., 594 F.3d 1360, 1365–66 (2010).
[61] Global-Tech, 131 S. Ct. at 2064.
[62] *Id.*
[63] *Id.*

third parties, including Sunbeam.[64] Prior to agreeing to sell its copied deep fryer to third parties, Pentalpha acquired a "right-to-use study" from an attorney.[65] In all, the attorney examined twenty-six individual patents and concluded that "none of the claims in those patents read on [defendant's] deep fryer."[66] Global-Tech, however, had neglected to inform the attorney performing the right-to-use study that it had previously copied its design from a foreign-marketed version of the SEB deep fryer.[67] Because Sunbeam was able to buy its product from Pentalpha at a cheaper price, it was able to undercut SEB in sales in the United States.[68]

Sunbeam began selling the deep fryer that it acquired from Pentalpha in the United States under its own trademarks, and subsequently SEB sued for patent infringement in March of 1998 in the District Court for the District of New Jersey.[69] Sunbeam informed Pentalpha in April of 1998 that it was the subject of a law suit for patent infringement.[70] This suit ultimately ended in a settlement with Sunbeam in which Sunbeam agreed to pay SEB the sum of $2 million.[71] Despite being warned of the patent infringement law suit, Pentalpha continued to sell the deep fryer to other distributors, including Fingerhut Corp. and Montgomery Ward.[72] In 1999, SEB filed for and received a preliminary injunction barring Global-Tech from continuing these sales. By 2001, discovery had closed, and by 2006, the district court began its trial against Pentalpha for inducement of patent infringement.[73] Following the close of evidence, Pentalpha moved for a judgment as a matter of law on the grounds that there was insufficient evidence showing that

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[64] *Id.*
[65] SEB S.A., 594 F.3d at 1366.
[66] *Id.*
[67] Global-Tech Appliances, Inc. v. SEB S.A. 131 S. Ct. 2060, 2064 (2011)
[68] *Id.*
[69] SEB S.A, 594 F.3d at 1366.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 1367. *See* 35 U.S.C. § 271 (2010) ("(a) Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefore, infringes the patent. (b) Whoever actively induces infringement of a patent shall be liable as an infringer.").

Pentalpha had any knowledge of the existence of SEB's patent at the time of the alleged inducement of patent infringement.[74] Although the trial court noted that there was no evidence that the defendant actually knew of the existence of SEB's patent, it found that there was evidence to support SEB's theory of inducement.[75] At trial, SEB argued that a jury could conclude that Pentalpha had knowledge of the existence of the patent from the fact that Pentalpha failed to disclose to the attorney performing the right-to-use study the fact that it had reverse engineered a foreign-marketed version of the SEB deep fryer.[76] SEB argued that Pentalpha engaged in this conduct knowing that the right-to-use study was doomed to fail and was calculated so as not to discover the existence of the SEB patent.[77] While the trial court found that the defendant did not have actual knowledge of the existence of the SEB patent, the jury could conclude that the defendant was aware he was "likely violating a patent . . . ."[78] As a result, the case went to the jury, which concluded that Global-Tech, through its subsidiary Pentalpha, had infringed and induced others to infringe on SEB's patent.[79] The defendants responded to this decision by appealing and challenging the trial court's findings as to SEB's theory of infringement.[80]

The Appellate Court of the Federal Circuit affirmed the trial court's opinion in regards to the inducement of patent infringement under 35 U.S.C. 271(b).[81] The panel concluded that 35 U.S.C. § 271(b) requires a showing of specific intent by the defendant to induce others to

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[74] SEB S.A, 594 F.3d at 1367.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 1367–68.
[80] SEB S.A., 594 F.3d at 1368.
[81] *Id.* at 1365.

infringe on the plaintiff's patent in accordance with the court's prior precedent.[82] Citing the concept of "deliberate indifference," the panel held that where a defendant has (1) actual knowledge of a known risk and (2) disregards that risk, knowledge is imputed to the defendant in civil patent litigation.[83] The Federal Circuit found that in many cases, other courts deciding a similar issue had concluded that deliberate indifference is not a substitute for actual knowledge, but rather that it is just another form of actual knowledge.[84] To that extent, in order to defeat a showing that the defendant was deliberately indifferent towards a known risk, the defendant would need to merely prove that he did not have actual knowledge of that risk.[85]

Applying the deliberate indifference standard to the facts of *Global-Tech*, the Federal Circuit concluded that there was sufficient evidence to show that Pentalpha was aware of a known risk of the existence of SEB's patent and that it chose to wrongly disregard that risk when it manufactured, marketed, and sold its knock-off deep fryer to distributors.[86] According to the court, the jury heard evidence that the defendant purchased a version of SEB's deep fryer—which was marketed in Hong Kong—and copied it in all aspects, save for its aesthetics and cosmetic design.[87] Additionally, there was evidence showing that although the defendant obtained a right-to-use study, it chose not to inform the attorney performing the study that the defendant had copied the design from a version of the SEB deep-fryer which was free from U.S. patent markings.[88] For the Federal Circuit, evidence that the defendant, a company savvy in

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[82] *Id.* at 1376 ("This court has made clear, however, that inducement requires a showing of 'specific intent to encourage another's infringement.'"). *See also* Broadcom Corp. v. Qualcomm Inc., 543 F.3d 683, 699 (Fed. Cir. 2008) (quoting *DSU Medical Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (2011)) ("As other courts have observed, 'specific intent' in the civil context is not so narrow as to allow an accused wrongdoer to actively disregard a known risk that an element of the offense exists.").
[83] SEB S.A, 594 F.3d at 1376–78.
[84] *Id.*
[85] *Id.* at 1378.
[86] *Id.*
[87] *Id.* at 1377.
[88] *Id.*

patent law and manufacturing, failed to inform counsel of such copying clearly supported a finding that the defendant was deliberately indifferent towards the existence of SEB's protective patent.[89] According to the court, Pentalpha could have defeated a finding that it had been deliberately indifferent towards the existence of SEB's patent by providing evidence that it actually believed that SEB's patent did not exist.[90] Nevertheless, Pentalpha failed to argue at trial that, as a result of the lack of patent marking on the copied deep fryer, it actually believed that no rival patent existed.[91]

B. Majority Holding and Reasoning in *Global-Tech Appliances, Inc. v. SEB S.A.*

Although the Supreme Court ultimately affirmed the result of the trial and the Federal Circuit's decision to impute knowledge to Pentalpha, it rejected the Federal Circuit's use of the deliberate indifference standard.[92] Although the Supreme Court agreed with the Federal Circuit's ruling that 35 U.S.C. 271(b) requires knowledge of the existence of a preexisting patent before civil sanction can attach, it rejected the sufficiency of the deliberate indifference standard to demonstrate knowledge scienter.[93] Instead, the Court ruled that Pentalpha knowingly induced patent infringement through its sales of the copied deep-fryer under the doctrine of willful blindness.[94] The majority found willful blindness to be the appropriate standard on the grounds that it prevents defendants from escaping liability for charges requiring knowledge where the defendant has deliberately shielded himself from "clear evidence of critical facts that are strongly suggested by the circumstances."[95] The majority opined that the rationale traditionally cited in justification of the willful blindness doctrine was that defendants who knew enough to shield

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[89] SEB S.A, 594 F.3d at 1378.
[90] *Id.*
[91] *Id.*
[92] Global Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2071–72 (2011).
[93] *Id.* at 2068.
[94] *Id.*
[95] *Id.* at 2068–69.

themselves from knowing more were just as culpable as those defendants who had actual knowledge.[96]

In formulating its definition of willful blindness, the majority concluded that "a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts."[97] According to the Court, the deliberate indifference standard adopted by the Court of Appeals did not rise to the level necessary to impute knowledge to the defendant because it did not distinguish itself from recklessness and negligence clearly.[98] To this extent, the Court found that the two chief elements of a willful blindness charge are (1) that the defendant was aware of a high probability of the existence of a fact, and (2) that the defendant took deliberate actions in order to avoid confirming the existence of that fact.[99] The majority stated that this formulation of willful blindness was superior to others on the grounds that it clearly distinguished itself from both negligence and recklessness to the effect that where the defendant's action did not rise above reckless, no willful blindness culpability could attach.[100] In particular, the majority compared willful blindness to recklessness and negligence on the grounds that a willfully blind defendant can "almost be said to know" of wrongdoing, whereas "[b]y contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing . . . and a negligent defendant is one who should have known of a similar risk but, in fact, did not . . . ."[101] In this regard, the majority rejected deliberate indifference on the ground that deliberate indifference merely requires a showing that the defendant was aware of a known risk and was "deliberately

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[96] *Id.*
[97] *Id.* at 2070–71.
[98] Global-Tech, 131 S. Ct. at 2070.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 2070–71 (quoting the MPC's definitions of recklessness and negligence under MODEL PENAL CODE § 2.02(2)(C)-(d)).

indifferent" towards it; the majority did not agree that it also requires the defendant to have engaged in some active effort to avoid ascertaining knowledge of the risk.[102]

The majority supported its holdings by citing the prior decisions describing willful blindness and the findings of the drafters of the MPC with regards to their conceptualization of knowledge mens rea.[103] In particular, the majority cited *Spurr v. United States*[104] and *United States v. Jewell*[105] to support its definition of and decision to import willful blindness into patent law.[106] The Court cited *Spurr* on the grounds that the centuries-old case endorsed a concept very similar to willful blindness.[107] In *Spurr*, the Court held that a bank officer could be found to have violated a statute that made it a crime to willfully certify a check drawn against sufficient funds "if the [bank] officer purposely [kept] himself in ignorance of whether the drawer [had] money in the bank."[108] Furthermore, the majority cited *Jewell* in support of the notion that defendants who blind themselves to "direct proof of critical facts in effect have actual knowledge of those facts."[109] Finally, the majority noted that the MPC, which had often been used by the Court as a guide in analyzing statutory culpability requirements, made room for the willful blindness doctrine insofar as it defined "'knowledge of the existence of a particular fact' to include a situation in which 'a person is aware of the high probability of [the fact's] existence, unless he actually believes it does not exist.'"[110]

Applying its standard for willful blindness to the facts of *Global-Tech*, the majority concluded that the defendant had willfully blinded itself as to the existence of SEB's protective

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[102] *Id.* at 2071.
[103] *Id.* at 2069.
[104] Spurr v. United States, 174 U.S. 728 (1899).
[105] United States v. Jewell, 532 F.2d 697 (1976).
[106] Global-Tech, 131 S. Ct. at 2069.
[107] *Id.* at 2069.
[108] *Id.* at 2069 (quoting Spurr, 174 U.S. at 735).
[109] *Id.* at 2069 (citing Jewell, 532 F.3d at 700).
[110] *Id.* at 2069 (quoting MODEL PENAL CODE § 2.02(7)).

patent.[111] According to the majority, Pentalpha was aware of the revolutionary nature and superior design of SEB's patent when it decided to reverse engineer the design.[112] The testimony of the CEO and President of Pentalpha, John Sham, who stated that in developing the deep fryer for Sunbeam, Pentalpha had performed thorough market research, demonstrated this awareness.[113] Furthermore, the fact that Pentalpha copied all but the cosmetic features of the SEB product showed Pentalpha's awareness that the SEB design "embodied advanced technology that would be valuable in the U.S. market . . . ."[114] The Court found particularly salient the fact that Pentalpha had chosen to copy a foreign-marketed version of the plaintiff's patented deep fryer and failed to inform the attorney it hired to perform the right-to-use study of this fact.[115] Sham himself was an inventor on many U.S. patents and would have known that foreign-marketed products would not contain any reference to potential U.S. patents.[116] As a result, the majority opined that defendant's failure to provide an explanation for his decision not to tell the attorney was all-the-more telling of his true purpose in initiating the right-to-use study—to manufacture a claim of plausible deniability should Pentalpha be accused of inducing patent infringement.[117] When asked whether or not informing the attorney that the design had been copied would have increased the likelihood that he would have found a U.S. patent during his right-to-use study, Sham stated that a patent search was not an "easy job," which is why he had lawyers perform them for him.[118] The majority concluded in light of these facts that the defendant could be found liable with regards to inducement of patent infringement to the extent that it had willfully blinded itself from knowledge as to the existence of SEB's preexisting U.S.

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[111] *Id.* at 2072.
[112] *Id.* at 2071 (internal citations omitted).
[113] Global-Tech, 131 S. Ct. at 2071(internal citations omitted).
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*

patent. In effect, the defendant willfully blinded itself to the existence of a prior U.S. patent by commissioning a right-to-use study without informing the investigating attorney that it had copied its design for its product from a foreign-marketed version of a competitor's patented product.

C. Kennedy's Dissent

As the lone dissenting justice, Justice Kennedy challenged the majority's decision to import the concept of willful blindness from criminal law into the field of civil patent law, arguing that its reasoning supporting its adoption of the standard in this context was flawed at best.[119] According to Kennedy, the majority adopted willful blindness in an effort to draw in defendants who otherwise could not be found to have knowledge under the inducement of patent infringement statute: "[o]ne can believe that there is a 'high probability' that acts might infringe a patent but nonetheless conclude they do not infringe . . . the alleged inducer who believes a device is noninfringing cannot be said to know otherwise."[120] For Kennedy, the majority's decision to import willful blindness into patent law drained the doctrine of any and all legitimacy with regards to justifications that depend on finding that willful blindness is either the same thing as knowledge or that it can be properly punished because it triggers the same degree of moral opprobrium as knowingly acting in defiance of the law.[121] In particular, Justice Kennedy assailed the majority's finding that a defendant who avoided confirmation of a fact is just as morally culpable as one who has actual knowledge of the fact.[122] Although Kennedy seems to acknowledge the appeal of this argument in the realm of criminal prosecutions, Kennedy argued that the retributive purpose of criminal prosecutions to punish moral wrongs through a system of

[119] Global-Tech, 131 S. Ct. at 2072 (Kennedy, J., dissenting).
[120] *Id.*
[121] *Id.*
[122] *Id.* at 2072–23.

laws does not attach in the area of patent law, which is utilitarian in nature.[123] Because of the utilitarian nature of patent law, retributivist justifications for the willful blindness doctrine lose much of their strength when taken out of the context of criminal cases.[124]

Furthermore, Kennedy challenged the majority's interpretation of *Spurr*,[125] which it cited in support of its holding.[126] According to Kennedy, the real question underlying *Spurr* was whether or not the "defendant's admitted violation was willful."[127] To this extent, Kennedy concluded that *Spurr* stood merely for the proposition that wrongful intent could be inferred from the attendant circumstances surrounding a case and that it did stand not for the majority's position that willful blindness was equivalent to knowledge.[128] The risk of confused precedent is even more apparent when *Jewell* and *Spurr*—two cases cited favorably by the majority despite having strongly opposed reasoning—are read alongside one another. According to Justice Kennedy, the decision to import willful blindness into patent law, and thus redefine all scienter requirements for knowledge in all federal courts in all criminal cases requiring knowledge, was made without so much as a single brief from the criminal bar.[129] Under such circumstances, Kennedy concluded that it was hugely inappropriate to incorporate a criminal-law concept into civil patent law. Kennedy argued that a jury could have reasonably inferred that the defendant did have knowledge of SEB's patent based on circumstantial evidence surrounding the defendant's conduct in avoiding potential confirmation of the patent's existence.[130] For Kennedy the majority seemed to justify importing willful blindness on the unstated grounds that knowledge otherwise requires certainty, despite the fact that law often allows "probabilistic

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[123] *Id.* at 2073.
[124] *Id.*
[125] 174 U.S. 728 (1899).
[126] Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2069 (2011).
[127] *Id.* at 2073.
[128] *Id.*
[129] *Id.*
[130] *Id.*

judgments to count as knowledge."[131] To this end, Kennedy rejected the Court's decision to invoke the willful blindness doctrine and thereby redefine all scienter requirements in all criminal cases in federal court.

IV. HOW MUCH ACTION IS DELIBERATE ACTION?

According to the Supreme Court's holding in *Global-Tech* to prove a defendant was willfully blind, the prosecution must show that the defendant had an awareness of a high probability of the existence of a material fact and that the defendant took deliberate action in order to avoid confirming the existence of that fact such that the defendant can almost be said to have actually known the fact.[132] The Supreme regarded these requirements to be nearly universally shared among all the circuit courts, yet O'Toole argued in his recent article in the Westlaw Journal of Intellectual Property that, in actuality, the circuits are not nearly so uniform in their definitions.[133] Although prior to *Global-Tech,* nearly all the circuit courts universally required a showing that the defendant was subjectively aware that there was a high probability that a fact existed, many courts did not require a showing of deliberate action to avoid knowledge, and many others fail to exclude recklessness from a finding of willful blindness.[134] A model jury instruction from the Eighth Circuit is indicative of this problem. According to the jury instruction:

> You may find that the defendant [(name)] acted knowingly if you find beyond a reasonable doubt that the defendant [(name)] was aware of a high probability that (state fact as to which knowledge is in question (e.g., that 'drugs were contained in his suitcase')) and that [he] [she] deliberately avoided learning the truth. The element of knowledge may be inferred if the defendant [(name)] deliberately closed [his] [her] eyes to what would otherwise have been obvious to [him] [her]. [You may not find the defendant acted 'knowingly' if you find he/she was merely

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[131] *Id.*
[132] Global-Tech, 131 S. Ct. at 2070–71.
[133] O'Toole, *supra* note 13, at 4.
[134] *Id.*

> negligent, careless or mistaken as to (state fact as to which knowledge is in question (e.g., that "drugs were contained in his suitcase")).][135]

The Eighth Circuit's model jury instruction fails to require a showing that the defendant deliberately acted to avoid ascertaining the facts to which they claim to have no knowledge, using merely the passive language that the defendant need only to have "deliberately avoided learning the truth."[136] Additionally, while the instruction does give an example of what might constitute an act that willfully blinded the defendant (i.e. closing one's eyes to what would otherwise be obvious), it does not exclude from its reach reckless behavior, which might come in under a close reading of the instruction.

Circuit courts will have an opportunity to review their requirements for willful blindness and will need to construct definitions for the deliberate-action standard to comport with the Supreme Court's ruling in *Global-Tech.* Recently, in *United States v. Vasquez*, the Fifth Circuit Court of Appeals affirmed the conviction of a defendant who had been charged with possession with intent to distribute cocaine, importing cocaine into the United States, and conspiring to possess with intent to distribute cocaine on the grounds that the defendant had been deliberately ignorant. [137] In making its decision, the Fifth Circuit cited to *Global-Tech* in passing without giving much attention to the question of *Global-Tech*'s deliberate-action requirement, but stated that at a minimum the defendant must make a conscious decision to avoid confirmation of a fact or avoid information.[138] In *United States v. Butler*, the Eighth Circuit affirmed a lower court's decision to grant a willful blindness charge to the prosecution on the grounds that a "defendant's willful blindness may serve as the basis for knowledge if, in light of certain obvious facts,

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[135] Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions*: Criminal § 17.09 (5th ed. 2000).
[136] *Id.*
[137] U.S. v. Vasquez, No. 10-41270, 2012 U.S. App. 2012 WL 1216515 at *1 (5th Cir. Jan. 13, 2012) (The count stated that deliberate ignorance in its prior precedent shared contours with willful blindness, a concept it considered analogous to deliberate ignorance).
[138] *Id.* at *14.

reasonable inferences support a finding that a defendant's failure to investigate is equivalent to burying one's head in the sand."[139] In *Butler*, the defendant was convicted of bank fraud and had his sentence mandatorily increased because of the aggravating circumstance of having managed or coordinated actors who *knowingly* participated in the scheme.[140] The court found that while the other actors in the scheme may not have had direct knowledge that they were participating in bank fraud, their failure to investigate further was sufficient to impute knowledge where they actors were aware of facts that put them on notice of criminal activity.[141]

As evidenced by the reasoning of the circuit courts, the deliberate-action requirement is more as ambiguous than a cursory reading of *Global-Tech* may suggest. While both circuits ultimately upheld the convictions, the Fifth Circuit found that at a minimum the defendant must take deliberate steps to prevent him or herself from confirming wrongdoing,[142] whereas the Eighth Circuit was willing to uphold a conviction where there was a simple failure to investigate further with the intent to remain ignorant.[143] The simple fact of the matter is that that the vast majority of pre-*Global-Tech* willful blindness cases have gone forward without being reviewed for deliberate action on the part of the defendant.[144] Additionally, upon close inspection majority's holding in *Global-Tech* that the court gave scant definition to the deliberate action require apart from citations to prior cases that seem to have conflicting results as pertains to willful blindness. As a result, courts developing future willful blindness charges, in light of these doctrinal contradictions, will likely arrive at varying definitions of what actually constitutes deliberate action. This section will explore the plausible interpretations of the deliberate action requirement in light of majority's opinion in *Global-Tech.*

[139] U.S. v. Butler, 646 F.3d 1038, 1042 (2011).
[140] *Id.* at 1041.
[141] *Id.*
[142] Vasquez, 2012 WL 1216515, at *6–7.
[143] Butler, 646 F.3d at 1041.
[144] O'Toole, *supra* note 13, at 5.

A. Deliberate Action: A Duty to Investigate v. Failure to Investigate

The Supreme Court cited two significant cases in support of its proposition that willful blindness had long been accepted and endorsed in federal criminal law.[145] In particular, the majority cited *Spurr v. United States* and *United States v. Jewel* to support its conclusion that it was a long-recognized principle that where a defendant is aware of the highly probable existence of a material element and deliberately avoids discovering that element, knowledge can be permissibly imputed to the defendant.[146] However, these cases justify this outcome on two distinct and opposing bases.

In *Spurr*, a bank officer was charged with violating a federal statute that made it a crime to willfully certify a check despite the account of the drawer not having funds sufficient to clear the check.[147] Before the Supreme Court, the defendant argued that he could not have knowingly certified a check from an overdrawn account because he was not aware of the amount of money within the account as he had not inspected the account before certification.[148] The Court ruled, in language that the majority in *Global-Tech* quoted, that "[i]f an officer certifies a check with the intent that the drawer shall obtain so much money out of the bank, when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed . . . evil design may be presumed if the officer *purposely keeps himself in ignorance* of whether the drawer has money in the bank or not, or is *grossly indifferent to his duty in respect to the ascertainment of that fact*."[149]

For the *Spurr* court, it was sufficient proof of willful intent to show that a defendant with an affirmative duty to investigate chose not to act upon that duty despite the obvious risks

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[145] Global-Tech Appliances v. SEB S.A., 131 S. Ct. 2060, 2068–89 (2011).
[146] *Id.*
[147] Spurr v. U.S., 174 U.S. 728, 733–34 (1899) (emphasis added).
[148] *Id.* at 735.
[149] *Id.*

posed.[150] Furthermore, the court indicated that where the defendant has no duty to investigate, willful intent (knowledge) could only be premised upon a showing that the defendant purposefully kept himself "in ignorance" with respect to a critical fact.[151] However, when applying this standard to the facts of the case, the Court found that while the defendant did owe a duty to investigate the amount of money in the drawer's account and failed to fulfill that duty, evidence showing that the defendant reasonably relied in good faith on the assertions of a subordinate as to the amount of money in the drawer's account could be sufficient to exculpate the defendant.[152]

As a result, courts following the *Spurr* line of reasoning will find deliberate action on the part of the defendant in two limited circumstances. Read alone, the result of the *Spurr* holding is that for a defendant to be willfully blind as to a fact in absence of evidence showing of actual knowledge, it is sufficient to show that the defendant had a duty of affirmative investigation which the defendant consciously ignored.[153] As a result, one potential interpretation of deliberate action is that where a defendant is found to have an affirmative duty to investigate, the conscious decision not to investigate is sufficient to show deliberate action. Alternatively, if a defendant did not owe such a duty, the *Spurr* Court implied that it would be necessary for the prosecution to show that the defendant purposefully made himself ignorant of the material element of the crime by shielding himself from facts.[154] As a result, in cases where the defendant owes no duty to investigate, the defendant's failure to investigate alone is insufficient to prove willful blindness. This standard recognizes "[t]he decision to avoid knowledge typically involves an *omission*; the purpose is formed in the actor's mind and will rarely be manifested by

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[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Spurr, 174 U.S. at 735.
[154] *Id.*

any kind of unequivocal act or deliberate undertaking."[155] As a result, the duty requirement ensures that the defendant's failure to investigate is not simply a negligent omission, but rather is the result of a conscious choice.[156] This conforms to the position of the Model Penal Code that states that unless a law specifically defining an offense holds omissions sufficient, omissions will not create criminal liability unless "a duty to perform the omitted act is otherwise imposed by law."[157] According to Robin Charlow, "in a case such as *Spurr*, when one has a specific statutory duty to investigate and to obtain knowledge of a fact in order lawfully to perform some act, one cannot deliberately fail to investigate, remain ignorant, and thereby escape liability for the act."[158] As a result of this reading of *Spurr*, a court attempting to interpret the Supreme Court's deliberate-action requirement in *Global-Tech* may conclude that (1) if the defendant can be found to owe a duty to investigate, his/her failure to investigate constitutes deliberate action; and (2) that in the absence of such a duty, the failure to investigate does not constitute deliberate action, and the defendant must be shown to have purposefully avoided or erected barriers to prevent him from ascertaining a fact which otherwise would have been obvious to the defendant before deliberate action can be found.

However, there is some tension between this interpretation and the Court's holding in *Global*-Tech, specifically the absence of a finding that Pentalpha was under a duty to investigate. The majority found that Pentalpha's CEO and president, John Sham, was a highly knowledgeable inventor who himself was the named inventor on several U.S. patents.[159] Sham had testified that Pentalpha engaged in thorough market research prior in designing its deep-

[155] Marcus, *supra* note 17, at 2252.
[156] Marcus, *supra* note 17, at 2234.
[157] Model Penal Code § 2.01 (3)
[158] Charlow, *supra* note 23, at 1405.
[159] Global-Tech Appliances v. SEB S.A., 131 S. Ct. 2071 (2011).

fryer.[160] Furthermore, as an inventor, Sham was well aware that foreign-marketed products usually do not have U.S. patent markings, yet he chose not to inform the attorney assigned to do the right-to-use study that the Pentalpha deep-fryer was copied from a knockoff.[161] Yet absent from the Court's opinion is any statement to the effect that either Pentalpha or Sham were under a duty to investigate at the time they engaged in the right-to-use study. However, like the bank clerk in *Spurr* who on account of his duty understood the risks of failing investigate the amount of money in a drawer's account, Sham was effectively on notice that a preexisting U.S. patent might have existed, yet he chose not to reveal these facts to his investigating attorney. While it cannot be necessarily said that he had a duty to investigate, Sham's status as a sophisticated inventor strengthens the conclusion that his failure to inform the investigating attorney was not a negligent omission, but rather a conscious choice.

Yet, this interpretation is not without drawbacks. According to O'Toole, "In inherently illegal industries such as the drug, gambling or counterfeit trades, strong incentives exist for individuals to avoid gaining knowledge to protect them in an easily foreseeable criminal prosecution."[162] Ultimately, the result of an interpretation predicated upon the defendant having a preexisting duty to investigate would be to make it very difficult to use the willful blindness doctrine to convict defendants participating in the transport of illegal narcotics who can legitimately say that they merely failed to investigate for drugs. It can hardly be said that "drug mules" are obligated by any duty to investigate the narcotics they are required to smuggle across the border. Furthermore, as demonstrated clearly in *Jewell*, drug mules often cite as a defense the fact that they did not actually know they were carrying drugs with them and that they merely

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[160] *Id.*
[161] *Id.*
[162] O'Toole, *supra* note 13, at 1.

failed to investigate suspicions of illegality.[163] If courts predicate successful convictions using the willful blindness doctrine on a showing that the defendant owed a duty to investigate, defendants who, like the one in *Jewell*, claim that they just did not look hard enough will likely be rewarded with acquittal.

B. Deliberate Action—The Failure to Investigate

In bolstering its position in *Global Tech*, the majority also cited the case of *United States v. Jewell* for the proposition that willful blindness constituted just another form of knowledge.[164] In *Jewell*, the defendant was convicted of knowingly possessing a controlled substance for trying to drive an automobile containing over 100 pounds marijuana across the border between the United States and Mexico.[165] The defendant argued that he did not know the vehicle contained a controlled substance.[166] Prior to driving the vehicle, the defendant had been approached by a man named "Ray" who had tried to sell the defendant marijuana.[167] Although the defendant turned down the offer to purchase drugs from Ray, he immediately agreed to drive a car across the border in exchange for $100.[168] Enforcement officers stopped the defendant's car, searched it and discovered a secret compartment containing over 100 pounds of marijuana.[169] The drug enforcement officer testified that the defendant told the drug enforcement officer that he was suspicious of the vehicle and performed a brief inspection of the glove box and trunk before driving.[170] At trial the defendant testified that while he had seen the opening of the secret compartment, he did not know what it was and did not bother to examine it or its contents to the effect that he did not know that the vehicle he was driving contained any controlled

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[163] United States v. Jewell, 532 F.2d. 697, 698-99 (1976).
[164] Global-Tech Appliances v. SEB S.A., 131 S. Ct. 2069(2011).
[165] United States v. Jewell, 532 F.2d. 697, 699 n.1 (1976).
[166] *Id.* at 698–99.
[167] *Id.* at 699 n. 1.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 699 n. 2.

substances.[171] The Ninth Circuit, sitting en banc, held that the defendant could willfully blinded himself to the existence of the marijuana insofar as the defendant was virtually aware of the secret compartment, yet deliberately "refrained from acquiring positive knowledge" of existence of the marijuana in it.[172] According to the Ninth Circuit, a defendant is willfully blind if the defendant's ignorance was "entirely a result of [the defendant] having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth."[173]

The court justified its holding that willful blindness was an adequate substitute for actual knowledge to the extent that willful blindness was as equally culpable as actual knowledge.[174] The court stated that willful blindness was effectively just another form of knowledge to the extent that the defendant is sufficiently aware of the probable existence of a fact to know how to avoid confirming it.[175] The concept behind this justification is that if a defendant knows enough to understand that knowing more would make him criminally liable, he can almost be said to have actual knowledge of a material element of a crime. To the extent that actual knowledge does not require positive knowledge of the existence of a fact, willful blindness allows courts to convict defendants who have avoided gathering any more information than absolutely necessary in order to remain ignorant.[176]

As a result a court could conclude based on the language of the *Jewell* holding that deliberate action can be found any time a defendant fails to investigate a suspicion of wrongdoing or criminality. Under this interpretation, where a defendant is aware of a high probability of wrongdoing and consciously chooses not to investigate that suspicion of

[171] *Jewell*, 532 F.2d at 699 n.2.
[172] *Id.*
[173] *Id.* at 700.
[174] *Id.*
[175] *Id.*
[176] *Id.*

wrongdoing in order to avoid confirming wrongdoing, they are willfully blind. At a minimum, to demonstrate deliberate action sufficient to prove willful blindness, a prosecutor need only prove that the defendant consciously chose not to gain positive knowledge of the existence of a fact. Rather than having to prove that the defendant proactively erected barriers to prevent himself from learning criminally culpable information, the prosecution need only show that the defendant had an opportunity to investigate and that he chose not to act.[177]

While the appeal of such a standard to prosecutors seeking easy convictions is clear, the specter of overzealous prosecutions and unfair convictions is equally apparent. The dangers imposed by such a standard are best explained by means of an example. Consider the following facts. A woman meets her mother and borrows a relative's car in order to drive her mother across the border. The woman notices that her mother is acting suspiciously as they approach the border and notes a strong perfume smell in the vehicle. The woman asks her mother to explain the smell, but the mother claims that she spilled fabric softener in the car the day before. The woman is incredulous and suspects something is wrong, but continues to drive towards the border. Border patrol agents stop the car and notice the strong perfume smell. Upon inspection they discover over one hundred pounds of narcotics in the back of the vehicle, and immediately arrest the driver. She is subsequently convicted of possession on a willful blindness charge. If this fact pattern seems preposterous, it is the exact fact pattern that the Ninth Circuit felt supported a willful blindness charge in *United States v. Heredia.*[178] In *Heredia*, the Ninth Circuit concluded that the woman's failure to investigate the contents of her vehicle despite her

[177] *But see* U.S. v. Vasquez, No. 10-41270, 2012 U.S. App. 2012 WL 1216515 at *15 (5th Cir. Jan. 13, 2012) (citing U.S. v. Newell, 315 F.3d 510, 528 (5th Cir. 2002)) (stating that the essence of deliberate ignorance is "Don't tell me, I don't want to know").
[178] 483 F.3d 913, 917 (2007).

suspicion of criminal activity was sufficient to support a willful blindness charge.[179] If nothing else, this case demonstrates the potential scope of a broad willful blindness charge and serves as a cautionary tale to those who fear unfair or excessive prosecution.

This is a particular worry to the extent that a broad definition of willful blindness may not clearly distinguish itself from recklessness mens rea. As defined by the MPC:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[180]

However, where the failure to investigate a suspicion of wrongdoing (an omission to act) is sufficient to meet the definition of deliberate action, there is little to distinguish the omission to investigate from the act of recklessly disregarding a risk. While under the *Spurr* duty-standard, the existence of a defendant's duty to act ensures that an omission to investigate is more than a simple lapse of judgment or negligent omission, broadly categorizing all failures to investigate as "deliberate action" affords no such reassurance. Absent a requirement that omission to investigate will create liability only where the actor owes a duty, it appears on the surface that there is little to distinguish willful blindness from recklessness. However according to Marcus, recklessness under the Model Penal Code requires the jury to make a determination as to the social utility of the defendant's conduct, to the extent that where a jury concludes that the conduct was of little social utility, the defendant's awareness of the risks need only be low.[181] This language of social utility is completely absent from the definition of willful blindness

[179] *Id.* at 924.
[180] MODEL PENAL CODE § 2.02 (c).
[181] Marcus, *supra* note 17, at 2239–40.

offered by the Court in *Global-Tech*.[182] Under *Global-Tech*, juries must still find that the defendant had a subjective awareness of a high probability of the existence of wrongdoing, which distinguishes willful blindness from recklessness by requiring much high awareness on the part of the defendant. Nevertheless where the government's only assertion is that a defendant failed to investigate a suspicion, willful blindness charges may result in convictions with little to no evidence of actual knowledge and for conduct that is likely merely reckless.

C. Deliberate Action—Avoidance for the Purpose of Escaping Sanction

In its discussion of the elements of willful blindness, the majority noted in *Global-Tech* that "a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing *and who can almost be said to have actually known the critical facts.*"[183] Towards the close of its opinion in *Global-Tech*, the Supreme Court noted that Pentalpha provided little explanation as to why it chose not to disclose to the attorney performing the right-to-use study the fact that it had copied its design from a foreign-marketed version of SEB's patented product.[184] The Court stated: "On the facts of this case, we cannot fathom what motive [Pentalpha] could have had for withholding this information other than to manufacture a claim of plausible deniability in the event that [the] company was later accused of patent infringement."[185]

Read in conjunction with the Court's statement that a willfully blind defendant "can almost be said to have actually known the critical facts,"[186] a plausible interpretation of deliberate action would require that the defendant avoided learning a critical fact with the specific purpose of escaping civil or criminal sanction. As noted by O'Toole, some courts prior

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[182] Global-Tech Appliances v. SEB S.A., 131 S. Ct. 2060, 2070 (2011).
[183] *Id.* (emphasis added).
[184] *Id.* at 2071.
[185] *Id.*
[186] *Id.* at 2070.

to *Global-Tech* held that the defendant's desire to escape criminal sanction was an essential element to a willful blindness charge, and the reference to Pentalpha's motivation to create "plausible deniability" seems to support such a requirement.[187] This interpretation would require prosecutors seeking to invoke willful blindness to prove that the defendant's alleged ignorance was actually a contrivance designed to hinder legal action against the defendant. Similarly, some early English courts required the prosecution show that the defendant ignorance was a charade.[188] In effect, willful blindness would only attach in situations that the wrongdoing and illegality were so plainly evident to the defendant that his or her claimed ignorance was an act self-servingly designed to exonerate the defendant.

The result of this interpretation would be to place a considerable evidentiary obstacle in front of any prosecutor seeking to invoke the willful blindness standard and would likely render it a useless doctrine. For instance, in a case such as *Heredia*[189] where the chief witnesses for the prosecution are arresting officers and drug enforcement agents, it would be virtually impossible for a prosecution to elicit testimony from a defendant that he acted for the purpose of creating a defense in case of future litigation. Few if any criminals would be so brazen as to make such an admission. Furthermore, this standard would draw an arbitrary distinction between defendants who were legally savvy and those who were ignorant of the law, rewarding the latter with a potential defense. To the extent that a defendant is ignorant of the law, they cannot be said to have acted for the purpose of evading or escaping criminal sanction. As a result, unsophisticated criminals have a much stronger defense when charged with willful blindness. Judge Browning warned in *Jewell* that criminal enterprises like the drug trade are predicated upon as many

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[187] O'Toole, *supra* note 13, at 1. *See also* U.S. v. Puche, 350 F.3d 1137, 1149 (11th Cir. 2003); U.S. v. Willis, 277 F.3d 1026, 1032 (8th Cir. 2002); U.S. v. Delreal-Ordones, 213 F.3d 1263, 1268-69 (10th Cir. 2000).
[188] *See* Somerset v. Hart, 12 Q.B.D. 360 (1884) (Lord Coleridge, C.J.).
[189] 483 F.3d 913 (2007).

participants as possible being as ignorant as possible of the facts surrounding the trade.[190] If deliberate action applies only to criminals who act for the purpose of escaping criminal sanction, then *Global-Tech* stands for the proposition that ignorant drugs mules, who often possess little to no understanding of the legal system, will be able to defeat willful blindness charges based on their own ignorance. Whether the Supreme Court intended to make such a glaring distinction between savvy criminals and ignorant henchmen is unclear.

D. The Appropriate Interpretation of Deliberate Action

As a result of the ambiguities inherent to the Supreme Court's ruling, lower courts interpreting the holding of *Global-Tech* will likely develop wildly divergent definitions of conduct sufficient to prove deliberate action in willful blindness cases. To this extent, the Supreme Court will likely need to step in at some future time in order to provide lower courts with guidance on how to appropriately construe the requirements for willful blindness. The Supreme Court will need to balance the importance of such charges against the likelihood that their abuse will create undesirable legal consequences. Willful blindness instructions have become an invaluable tool to prosecutors seeking to hold defendants liable where the defendants took great efforts to defeat a finding of actual knowledge through contrived ignorance.[191] In *Jewell*, the court noted that by requiring a demonstration of actual knowledge on the part of defendants and disallowing willful blindness charges, courts would reward otherwise criminal actors with acquittal for deliberately making themselves ignorant as to certain facts.[192] Entire criminal enterprises such as the drug trade are predicated on the fact that participants will try to inoculate themselves from future prosecution by limiting their knowledge of the business. While it is critical that participants in such illegal activities not be allowed to protect themselves by

[190] 532 F.2d 697, 703 (9th Cir. 1976).
[191] O'Toole, *supra* note 10, at 1 (discussing the application of willful blindness charges to criminal prosecutions).
[192] United States v. Jewell, 532 F.2d. 697, 703 (1976).

skirting the definition of actual knowledge, it is equally important that the scope of willful blindness does not exceed this use. As stated by the Supreme Court in *Global-Tech*, an overly broad interpretation of willful blindness would allow criminal convictions of defendants who were at most severely reckless or negligent in their behavior.[193] While each of the aforementioned interpretations of the deliberate action standard may be plausible given a particular reading of *Global-Tech*, none seem to provide the flexibility required by courts in applying such a useful and potentially onerous doctrine as willful blindness.

As a result, in future cases the Supreme Court should adopt a totality of the circumstances test to determine whether or not a defendant's conduct in avoiding knowledge rose to the level of deliberate action sufficient to prove willful blindness. Under this model, the court would decide the degree of conduct necessary to prove deliberate action based on the totality of the circumstances surrounding the case. While this method would not provide a bright-line rule, it decreases the likelihood of wrongful conviction without making willful blindness extraordinarily difficult to demonstrate. The Court would weigh such factors as: (1) whether the defendant actually shielded himself from the facts as opposed to simply ignoring a risk; (2) whether the defendant had some advanced warning as to wrongdoing; (3) whether there is evidence that the defendant contrived his claims of ignorance in order to escape criminal or civil sanction; (4) whether evidence exists demonstrating that the defendant actually did not know of the material fact; (5) whether the degree of effort necessary to discern the facts or investigate the risk of wrong doing was extraordinary or not; (6) whether the defendant had some duty, implied or express, to investigate risks; (7) whether the defendant's conduct under the circumstances can be attributed to carelessness as opposed to design; (8) whether through their conduct the defendant exacerbated or invited the risk; and, finally, (9) the nature of the underlying charge, such as

[193] Global-Tech, 131 S. Ct. at 2070–71.

whether it is for a drug possession crime as opposed to a white-collar crime. The advantage of a totality of the circumstances test is that it would reduce the risk of unjust convictions by granting judges the ability to weigh certain facts on appeal, while simultaneously leaving willful blindness as a viable option to plaintiffs and prosecutors in situations in which evidence of a defendant's actual knowledge is not forthcoming.

The utility of a totality of the circumstances test is best demonstrated by its application to a model fact pattern and model statute. Consider the following hypothetical situation: a federal statute makes it "unlawful to purposefully or knowingly sell a firearm to an individual who intends to use it in commission of a crime insofar as the firearm substantially affects interstate commerce." Defendant Robert owns a firearms store that exclusively sells firearms that are purchased from out of state sources. Robert placed a large sign in front of his store that advertised "Bob's Guns—No Questions Asked!" On January 17, 2012, Andrew walked into Robert's firearms store shouting loudly. Defendant Robert heard Andrew murmur that Andrew hated his boss for firing Andrew and that he would never forgive his boss. Andrew asked to purchase a pistol from Robert and inspected several different pistols before making his final selection. Robert suspected that Andrew was capable of violence towards his boss; however, he did not question Andrew about his motivations for purchasing a pistol or about Andrew's feelings towards his boss. Robert sold the pistol to Andrew and the next day learned that Andrew had used the pistol that night to rob his boss. Andrew entered into a plea agreement with the government and agreed to testify that the pistol he used to rob his boss was the same firearm that Robert sold to him. When questioned by police, Robert admitted that he remembered Andrew and remembered hearing Andrew express distaste for his boss, but that he did not investigate any further. Robert is charged under the federal statute with knowingly

selling a firearm to an individual who intended to use it in the commission of a crime. At trial, the prosecution seeks a willful blindness charge against Robert with regards to whether he knew Andrew intended to use the firearm in the commission of a crime.

Depending on the circuit's interpretation of the deliberate-action requirement in the willful blindness charge, different results will likely follow. For instance, if the court found that a failure to investigate suspicions of wrongdoing will result in a successful willful blindness claim only in cases where the defendant owes a duty to investigate,[194] defendant Robert would likely be acquitted of the charge if he owes no legally cognizable duty to investigate. Robert did not take steps to prevent Andrew from divulging his plan. Rather Robert sat in silence and chose not to investigate at all. Had Andrew began to tell Robert of his plans for the pistol and Robert prevented him from completing his story, Robert could be convicted under a willful blindness charge to the extent that Robert actively prevented Andrew from revealing to him his intent to use the weapon in the commission of a crime.

If the court adopted a bright-line rule that any failure to investigate a suspicion of wrongdoing was sufficient to demonstrate deliberate action for the purposes of willful blindness,[195] Robert would almost certainly be subject to a willful blindness charge. Under the fact pattern, regardless of how seriously Robert took the actual threat posed by Andrew, he would be subject to a willful blindness charge because he did not stop and question Andrew about his intended use of the firearm. If Robert's failure to investigate Andrew's intended use for the firearm satisfies the deliberate action requirement, then ultimate question is whether or not Robert was aware of a high probability of wrongdoing on the part of Andrew. To the extent that Robert heard Andrew angrily enter the store and describe his disdain for his boss, it is

[194] *See Supra* Part IV. A.
[195] *See Supra* Part IV. B

unlikely Robert can argue that he was unaware of a high probability that Andrew intended to use the firearm against his boss.

The shortcomings of the previous interpretations highlight the significant advantages of applying a totality of the circumstances test to the question of what constitutes deliberate action in a willful blindness charge. As stated above, juries and judges would be able to consider such factors as whether or not the defendant actively shielded his or herself from information as opposed to choosing not to investigate further, whether the defendant had advanced warning of the wrongdoing or whether the defendant exacerbated the situation through his or her conduct. In this fact pattern, the jury would be allowed to consider the fact that Robert had advertised his store as "No questions asked!" and whether or not Robert had a pecuniary interest in selling a firearm to a man who was clearly agitated. The jury would be allowed to consider Robert's relationship with Andrew and whether or not Robert had an interest in not probing in Andrew's intended use of the firearm.

But most importantly, a totality of the circumstances test would not pigeonhole a jury into deciding the case based on a single fact. Under each of the other potential interpretations of deliberate action, a single factor could decide an entire case regardless of the defendant's conduct. Clever defendants could avoid criminal sanction by simply choosing not to investigate, whereas unfortunate defendants who were simply acting out of fear could doom themselves to conviction. However, like the *Jewell* standard, the totality of the circumstances test does suffer from the fact that it does not clearly distinguish itself from recklessness mens rea. The duty-standard under the *Spurr* regime creates a clear distinction between willful blindness and recklessness by ensuring that the defendant's failure to investigate creates criminal liability only

where the defendant was under an affirmative duty to act.[196] This ensures that the defendant's omission was the product of a conscious choice and was not simply the result of negligent or even reckless disregard for risks.

In contrast, a totality of the circumstances test trades this clear distinction between willful blindness and recklessness for greater flexibility in application. As a consequence the totality of the circumstances test creates greater uncertainty in application, as the boundary between willful blindness and recklessness breaks down. However, it is still possible to distinguish recklessness from willful blindness to the extent that the former still requires a jury to determine the social utility of a reckless defendant's conduct.[197] This requirement is wholly absent from the Court's definition of willful blindness in *Global-Tech*, which specified that "a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and *who can almost be said to have actually known the critical facts.*"[198] To the extent that willful blindness requires a jury to make a subjective inquiry into whether the defendant was aware of a high probability of wrongdoing and to determine that the defendant can almost be said to have actually known of the wrongdoing, it is distinguishable from recklessness. However, it is still unclear if a totality of the circumstances test in application would not lead to uncertain results. Nevertheless, the advantages of a more flexible approach to the deliberate action requirement under the totality of the circumstances test outweigh the narrow and rigid requirements of any of the previously described interpretations. Ultimately, uncertainty is the cost paid for creating a standard that blurs the line between knowledge and recklessness. Regardless, a totality of the circumstances test would allow juries and judges the flexibility necessary to properly apply the

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[196] *See Supra* Part IV. A.
[197] Marcus, *supra* note 17, at 2239–40.
[198] Global-Tech Appliances v. SEB S.A., 131 S. Ct. 2071 (2011) (emphasis added).

willful blindness standard without giving prosecutors a cudgel with which to prosecute truly ignorant defendants.

V. CONCLUSION

In *Global-Tech*, the Supreme Court developed a uniform definition of willful blindness for all lower federal courts to the extent that it defined a willfully blind defendant as "one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts."[199] Although the Court's requirement that a defendant be found to have an awareness of a high probability of wrongdoing is relatively non-controversial given the history of the willful blindness doctrine in the various circuit courts, evidence that the deliberate action requirement is relatively alien to most lower courts' definition of willful blindness casts doubt on the clarity of the Supreme Court's holding.[200] While the Supreme Court's definition of willful blindness appears clear on its face, it is apparent from a close reading of the facts of the case and the precedent cited that the Court must clarify what it means by "deliberate action in avoiding discovery of material facts." The cases which the Supreme Court cites in defense of its use of the willful blindness doctrine are hugely conflicting to the extent that contradictory interpretations of the deliberate action can result. Depending on the line of cases followed, a lower court interpreting deliberate action could conclude that it requires showings ranging from consciously ignoring a suspicion of wrongdoing to requiring that prosecutors demonstrate that the defendant "put on blinders" and actively prevented himself from gathering actual knowledge of wrongdoing for the purpose of manufacturing a defense in future litigation.

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[199] *Id. at* 2070–71 (2011).
[200] O'Toole, *supra* note 10, at 3.

As a result of these ambiguities, it is clear that the Supreme Court will need to provide future guidance to lower courts on how best to interpret the deliberate action requirement. Although each of the above mentioned interpretations of the deliberate action requirement are plausible given the right reading of *Global-Tech*, none appears to adequately balance the interests of prosecutors and defendants in criminal trials. Although willful blindness instructions have greatly aided prosecutors in convicting defendants who have sought to circumvent justice through manufacturing their own ignorance, an excessively broad reading of the deliberate action requirement risks unjust criminal convictions. As a result, the Supreme Court should move away from these potential interpretations in future rulings and instead adopt a totality of the circumstances test. Under such a test, lower courts would decide the degree of conduct necessary to demonstrate deliberate action based on all the attendant circumstances surrounding the case. While such an interpretation would not afford courts a bright-line rule, it would grant them the flexibility necessary to protect the interests of defendants while also allowing them to defeat the machinations of crafty criminals. Regardless of whatever interpretation the Supreme Court may mandate in the future, it is clear from the ambiguities and lack of clarity in the Court's decision in *Global-Tech* that future guidance will be necessary if lower courts are to have any hope of providing uniform and consistent rulings in willful blindness prosecutions.