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The Supreme Court's Willful Blindness Doctrine Opens the Door to More Wrongful Criminal Convictions

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> *Willful blindness is not knowledge; and judges should not broaden a legislative proscription by analogy.*
>
> —Justice Anthony Kennedy,
> May 31, 2011[1]

A recent decision of the Supreme Court of the United States in a patent lawsuit may, somewhat surprisingly, have a major and destructive impact on federal criminal law. In *Global-Tech Appliances v. SEB*, the high court held that the "willful blindness" doctrine, which relieves a plaintiff of proving that the defendant actually knew that its actions were infringing, applies to certain patent infringement claims. The Court also implied that the doctrine properly applies in federal criminal cases, which would undermine traditional criminal-intent, or *mens rea*, protections against unjust criminal punishment. The result may be that more innocent Americans will face criminal conviction.

Global-Tech Appliances v. SEB. The case before the Supreme Court focused on SEB's claim that Global-Tech and one of its subsidiaries induced U.S. distributors of the subsidiary's knockoff kitchen product to infringe SEB's patent. The Court held that the patent law requires a defendant to "know" that the third party's conduct constitutes patent infringement but that a plaintiff need not prove that the defendant had any actual knowledge of the infringement. Therefore, it was sufficient that the subsidiary "willfully blinded itself to the infringing nature of the sales it encouraged [a distributor] to make."[2]

Civil liability often turns on whether a defendant acted recklessly or negligently, such as by disregarding information that he or she "should have known." The Court's discussion of the willful blindness doctrine drew from academic publications, historical materials, lower-court opinions, and an 1899 opinion of its own in a case upholding a check-fraud prosecution. However, its conclusion seems to extend the application of the doctrine far beyond any of those sources or the case before it. The Court recognized that, while it had never placed its imprimatur on general application of the doctrine, to varying degrees nearly all of the federal courts of appeal had done so.[3] Therefore, the Court reasoned, given "its wide acceptance in the Federal Judiciary," there was "no reason" that the doctrine should not apply broadly, including in civil lawsuits for patent infringement.[4]

A Shortcut to Conviction. The Court's rationale suggests that the impact of its decision will be felt most strongly not in patent suits but in criminal prosecutions—a result fraught with troubling consequences. In a patent suit, the plaintiff is seeking monetary damages and an injunction curtailing the infringing party's conduct. A criminal prosecution,

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by contrast, is a far more serious legal contest. The dangers to criminal defendants of not requiring proof of actual knowledge include a felony conviction, loss of personal liberty (i.e., prison), and the great moral and societal stigma that goes with being labeled a criminal.

While everyone knows that murder, battery, theft, and embezzlement are crimes, the same cannot be said of most of the thousands of criminal offenses now on the books. Thus, as Georgetown University law professor Julie O'Sullivan has noted, what a person accused of a crime did and did not know "is often both central to the case and hotly contested."[5]

Government prosecutors "frequently seek to ease their burden of proving *knowledge*,"[6] often by arguing for a conviction on the basis of what they think the accused person should have known given the facts and circumstances of which he was aware.[7] Prosecutors ask courts (and juries) to impose on the accused a duty to research or inquire—a duty that is not imposed by the statutory language of the criminal offense the accused is charged with violating. When courts buy this argument, honest, hard-working Americans who had no idea they were violating one of tens of thousands of federal criminal prohibitions can end up serving years in prison.

The willful blindness shortcut is common in the lower federal courts, but in his dissent to the majority's decision, Justice Anthony Kennedy emphasized that this is the first time the Supreme Court has approved of using the willful blindness doctrine to satisfy a statute that requires proof of the defendant's knowledge. As one federal court of appeals has pointed out, courts "often are wary of giving a willful blindness instruction" because they recognize the danger of its "allowing the jury to convict based on an *ex post facto* 'he should have been more careful' theory or to convict on mere negligence."[8]

Unfortunately, however, use of the instruction is widespread[9] and was increasing even before the *Global-Tech* decision. Indeed, some federal circuits have concluded that "conscious avoidance," a related doctrine, may be used to satisfy even the burden of proving specific intent, such as the intent to engage in a conspiracy.[10]

Courts have extended willful blindness and its related doctrines to impose criminal punishment when juries were instructed to decide whether the accused acted with "reckless disregard," often "reckless disregard for the truth."[11] The civil-law standards of recklessness and negligence are adequate bases for imposing civil penalties such as injunctions and monetary damages. Civil liability is justified when a defendant made a mistake or caused an accident because of his failure to exercise the care that would have been exercised by an (idealized) reasonable person in the same circumstances, but these are insufficient justifications for criminal punishment.

1. Global-Tech Appliances v. SEB S.A., 131 S. Ct. 2060, 2072 (2011) (Kennedy, J., dissenting).
2. *Id*. at 2071.
3. *But cf*. United States v. Alston-Graves, 435 F.3d 331, 337–41 (D.C. Cir. 2006) (Randolph, J.) (calling into question the willful blindness doctrine and citing cases illustrating the wide range of criminal offenses, rationales, and jury instructions that federal courts have relied on as a proper basis for the doctrine's use).
4. *Id*. at 2069.
5. Julie R. O'Sullivan, Federal White Collar Crime 114 (2d ed. 2003).
6. *Id.*
7. *See Alston-Graves*, 435 F.3d at 340 ("One problem with the various formulations of this instruction is that the jury might convict a defendant for acting recklessly or even for acting negligently.").
8. United States v. Mancuso, 42 F.3d 836, 846 (4th Cir. 1994).
9. *Global-Tech*, 131 S. Ct. at 2069; O'Sullivan, *supra* note 5, at 114.
10. *See* United States v. Gabriel, 125 F.3d 89, 98 (2d Cir. 1997); United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1195–96 (2d Cir. 1989).
11. *See* United States v. Prince, 214 F.3d 740, 759–63 (6th Cir. 2000); United States v. Thomas, 484 F.2d 909, 912–14 (6th Cir. 1973).

While the majority in *Global-Tech* attempted to formulate the doctrine narrowly and in a manner that requires more than mere recklessness and negligence, the lower federal courts' widespread misuse of the doctrine demonstrates its inherent flaws. Thus, the majority's decision in *Global-Tech* could have highly negative ramifications for Americans accused of any federal crime that—at least until this week's decision—required the government to prove actual knowledge. The majority, Justice Kennedy wrote, "appears to endorse the willful blindness doctrine here for all federal criminal cases involving [a defendant's] knowledge."[12]

The Heart of the Matter. In his *Global-Tech* dissent, Justice Kennedy explained that the Supreme Court "has never before held that willful blindness can substitute for a statutory requirement of knowledge."[13] He also objected that willful blindness simply is not the same as knowledge, as well as to the idea of extending the scope of criminal responsibility by an analogy based on (supposedly) equal culpability.[14]

Justice Kennedy's passion on this issue is heartening because, as a judge on the U.S. Court of Appeals for the Ninth Circuit, he had already authored an important dissent disapproving of the use of the willful blindness doctrine in criminal cases. Unfortunately, an *en banc* panel of the Ninth Circuit adopted the doctrine in *United States v. Jewell*.[15] Referring to the English-law doctrine of willful blindness, but correctly anticipating the widespread and improper use of the doctrine in the federal courts, then-Judge Kennedy and the three appeals court judges who joined his dissent noted that some courts had come to consider willful blindness "a state of mind distinct from, but equally culpable as, 'actual' knowledge."[16] He put the problem plainly:

> When a statute specifically requires knowledge as an element of a crime, however, the substitution of some other state of mind cannot be justified even if the court deems that both are equally blameworthy.[17]

Kennedy's criticism strikes at the heart of the matter. Courts, legal commentators, and other proponents of broad criminalization typically justify the willful blindness doctrine on precisely such grounds: that those who are "willfully blind" are equally as culpable as those with actual knowledge. But as then-Judge Kennedy pointed out, the doctrine is unnecessary because knowledge is often proved using circumstantial evidence, and the law does not require proof to an absolute certainty.[18] The willful blindness doctrine invites a jury to infer, after the fact, that an accused "should have known" and to conclude that the government has carried its burden even though the statute requires "knowledge."

Together with his dissent in *Jewell*, Justice Kennedy's dissent in *Global-Tech* holds promise. In an appropriate case down the road, Kennedy could lead the Court to reconsider how the "willful blindness" doctrine erodes the criminal-intent safeguards in federal law.[19]

Criminal Intent: An Essential Protection. No person should be punished as a criminal unless government prosecutors prove that he intentionally engaged in inherently wrongful conduct (such as murder, rape, robbery, theft, or embezzlement) or knew that what he was doing was unlawful. Punishing as criminals those whom prosecutors

12. *Global-Tech*, 131 S. Ct. at 2073 (Kennedy, J., dissenting).
13. *Id.*
14. *Id.*; *see also* Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis*, 1994 Wisc. L. Rev. 29, 30 (1994) ("Analogical reasoning in the enforcement of the criminal law is clearly incompatible with the principle of legality.").
15. 532 F.2d 697 (9th Cir. 1976).
16. *Id.* at 706.
17. *Id.*
18. *Id.* at 706 n.6, 708.
19. *See generally* Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (2010), *available at http://report.heritage.org/sr0077*.

decide—after the fact—"should have known" that their conduct was unlawful is a misuse of criminal law. This is true even if courts and prosecutors do so relying on a doctrine whose name makes the defendant sound guilty. Hopefully, Justice Kennedy will open other justices' eyes to the dangers and injustices of the "willful blindness" doctrine.

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