UNITED STATES v. HOSKINS

902 F.3d 69 (2d Cir. 2018)

Synopsis

Defendant, a nonresident foreign national who allegedly participated in bribery scheme, was charged with violation of the Foreign Corrupt Practices Act (FCPA). The United States District Court for the District of Connecticut, Janet Bond Atherton, J., granted in part defendant's motion to dismiss. Government appealed.

POOLER, Circuit Judge:

In this case, we are asked to decide whether the government may employ theories of conspiracy or complicity to charge a defendant with violating the Foreign Corrupt Practices Act ("FCPA"), even if he is not in the category of persons directly covered by the statute.[1] We determine that the FCPA defined precisely the categories of persons who may be charged for violating its provisions. The statute also stated clearly the extent of its extraterritorial application.

The FCPA establishes three clear categories of persons who are covered by its provisions: (1) Issuers of securities registered pursuant to 15 U.S.C. § 78l or required to file reports under Section 78o(d), or any officer, director, employee, or agent of such issuer, or any stockholder acting on behalf of the issuer, using interstate commerce in connection with the payment of bribes, 15 U.S.C. § 78dd-1; (2) American companies and American persons using interstate commerce in connection with the payment of bribes, 15 U.S.C. § 78dd-2; and (3) foreign persons or businesses taking acts to further certain corrupt schemes, including ones causing the payment of bribes, *while present in the United States*, 15 U.S.C. § 78dd–3.

Because we agree with the district court that the FCPA's carefully-drawn limitations do not comport with the government's use of the complicity or conspiracy statutes in this case, we AFFIRM the district court's ruling barring the government from bringing the charge in question. We REVERSE the district court's holding on the Second Object of the Conspiracy, because the government's intention to prove that Hoskins was an agent of a domestic concern places him squarely within the terms of the statute and takes that provision outside our analysis on the other counts.

BACKGROUND

I. The Allegations

The government alleges that several defendants, including Hoskins, were part of a scheme to bribe officials in Indonesia so that their company could secure a $118 million contract from the Indonesian government. Hoskins worked for Alstom S.A. ("Alstom"), a global company headquartered in France that provides power and transportation services During the relevant time, which was from 2002 to 2009,

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[1] Because the question before us is whether conspiracy and complicity charges can be used to extend liability beyond the categories delineated in the statute, we assume that Hoskins is not an agent of Alstom U.S. only for the sake of arguments advanced on appeal and express no views on the scope of agency under the FCPA.

Hoskins was employed by Alstom's UK subsidiary, but was assigned to work with another subsidiary called Alstom Resources Management, which is in France.

The alleged bribery scheme centers on Alstom's American subsidiary, Alstom Power, Inc. ("Alstom U.S."), headquartered in Connecticut. The allegations are that Alstom U.S. and various individuals associated with Alstom S.A. retained two consultants to bribe Indonesian officials who could help secure the $118 million power contract for the company and its associates. Hoskins never worked for Alstom U.S. in a direct capacity. But the government alleges that Hoskins, while working from France for Alstom Resources Management, was "one of the people responsible for approving the selection of, and authorizing payments to, [the consultants], knowing that a portion of the payments to [the consultants] was intended for Indonesian officials in exchange for their influence and assistance in awarding the [contract.]" Third Superseding Indictment (hereinafter "Indictment").

The government alleges that several parts of the scheme occurred within the United States. The indictment alleges that one of the consultants kept a bank account in Maryland. In some cases, funds for bribes allegedly were paid from bank accounts held by Alstom and its business partners in the United States, and deposited in the consultant's account in Maryland, for the purpose of bribing Indonesian officials. The indictment also states that several executives of Alstom U.S. held meetings within the United States regarding the bribery scheme and discussed the project by phone and email while present on American soil.

The government concedes that, although Hoskins "repeatedly e-mailed and called ... U.S.-based coconspirators" regarding the scheme "while they were in the United States," Hoskins "did not travel here" while the bribery scheme was ongoing.

II. The Indictment

The Third Superseding Indictment, the operative one in the case, brings twelve counts against Hoskins. This appeal concerns the first seven counts of the indictment.

Count one charges Hoskins with conspiring to violate the FCPA. It alleges that Hoskins is liable because he was an agent of Alstom U.S., an American company, and, in that capacity, committed acts that violated the statute. It also alleges that, independently of his agency relationship with an American company, Hoskins conspired with the company and its employees, as well as foreign persons, to violate the FCPA, and also aided and abetted their violations. The Count focuses on two objects of the conspiracy, which correspond to two provisions of the FCPA that Hoskins supposedly violated as an accomplice and also conspired to violate. The first of the two FCPA provisions prohibits American companies and American persons, as well as their agents, from using interstate commerce in connection with the payment of bribes. 15 U.S.C. § 78dd-2. The second prohibits foreign persons or businesses from taking acts to further certain corrupt schemes, including ones causing the payment of bribes, while present in the United States. 15 U.S.C. § 78dd–3.

Counts two through seven charge substantive violations of the FCPA, focusing on particular wire transfers from Alstom U.S.'s bank account to the consultants' accounts. These counts all charge Hoskins with violations of 15 U.S.C. § 78dd-2. The counts allege that Hoskins violated this provision as "an agent" of an American company or person, and also "by aiding and abetting" such a company or person.3

III. Proceedings Below

Before the district court Hoskins moved for dismissal of the first count of the indictment. He noted that the FCPA prescribes liability only for narrowly-circumscribed groups of people—American companies and citizens, and their agents, employees, officers, directors, and shareholders, as well as foreign persons acting on American soil. Hoskins argued that the government could not circumvent those limitations by charging him with conspiring to violate the FCPA, or aiding and abetting a violation of it, if he did not fit into one of the statute's categories of defendants. He thus moved for dismissal of Count One, as it charged that he was liable even if he did not fit into one of the statute's categories.

The government filed a closely-related motion in limine regarding Counts Two through Seven. The motion sought to preclude Hoskins from arguing at trial that he could only be convicted of violating the statute under a conspiracy or aiding-and-abetting theory if the government first proved that he fell within one of the FCPA's enumerated categories of defendants.

The district court granted Hoskins's motion in part and denied the government's motion. The court explained that, under Gebardi v. United States, 287 U.S. 112 (1932), "where Congress chooses to exclude a class of individuals from liability under a statute, the Executive may not override the Congressional intent not to prosecute that party by charging it with conspiring to violate a statute that it could not directly violate." Upon a thorough consideration of the text, structure, and legislative history of the FCPA, the district court concluded that "Congress did not intend to impose accomplice liability on non-resident foreign nationals who were not subject to direct liability" under one of the statute's provisions.

The court thus dismissed Count One of the indictment to the extent that it sought to charge Hoskins with conspiring to violate Section 78dd-2 of the FCPA without demonstrating that Hoskins fell into one of the FCPA's enumerated categories. The court also dismissed Count One to the extent it alleged that Hoskins conspired to violate Section 78dd-3, which prohibits acts "while in the territory of the United States," because Hoskins had never entered the United States during the relevant period. The district court denied Hoskins's motion in part, however, because the indictment charged him with conspiring to violate the FCPA, or aiding and abetting a violation, as an agent of an American company, a category covered by Section 78dd-2. The court also denied the government's motion in limine.

The government appeals all of the district court's rulings.

DISCUSSION

II. The FCPA and the First Object of the Conspiracy

The central question of the appeal is whether Hoskins, a foreign national who never set foot in the United States or worked for an American company during the alleged scheme, may be held liable, under a conspiracy or complicity theory, for violating FCPA provisions targeting American persons and companies and their agents, officers, directors, employees, and shareholders, and persons physically present within the United States. In other words, can a person be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal?

A. Conspiracy Liability

For purposes of this appeal, we assume that Hoskins was neither an employee nor an agent of a domestic concern and therefore does not fall within the terms of the statute. But accomplice and conspiracy liability are generally not so limited. A get-away driver for a bank robbery team can still be prosecuted even though he has not "by force and violence ... take[n] ... from the person or presence of another ... any property ... belonging to ... any bank." 18 U.S.C. § 2113(a). As the common law has long recognized, persons who intentionally direct or facilitate the crimes physically executed by others must be held accountable for their actions. This recognition was effectuated by developing the doctrines of conspiracy and complicity, principles that are now codified in statutes. Under 18 U.S.C. § 2(a), a person who does not personally commit the acts constituting an offense is liable as a principal if he or she "aids, abets, counsels, commands, induces or produces" the commission of those acts by another. In addition, 18 U.S.C. § 371 punishes anyone who "conspire[s]" with another to commit the offense. Thus, by the plain language of the general statutes regarding conspiracy and accessorial liability—which nothing in the language of the FCPA purports to overrule or limit—if Hoskins did what the indictment charges, he would appear to be guilty of conspiracy to violate the FCPA and (as an accomplice) of substantive violations of that statute.

Conspiracy and complicity statutes do not cease to apply simply because a statute specifies particular classes of people who can violate the law. It is well established in federal criminal law that "[a] person ... may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas v. United States*, 522 U.S. 52, 64 (1997). That principle was already deeply ingrained when the Supreme Court unanimously ruled in 1915 that persons not themselves bankrupt could be guilty of conspiring with someone who had declared bankruptcy to hide assets of the bankrupt's estate from the bankruptcy trustee, even if a non-bankrupt party could not be convicted of the principal offense. *United States v. Rabinowich*, 238 U.S. 78, 86 (1915). With respect to complicity, the same principal was so clearly entrenched as a matter of the common law of crimes that the Supreme Court saw no need to cite a particular precedent when it unanimously recognized in 1833 that someone who "procure[d], advise[d] and assist[ed]" a postmaster to remove from the mail and destroy a letter was guilty of violating, as an accomplice, a statute prohibiting postal employees from taking mail entrusted to them for delivery. *United States v. Mills*, 32 U.S. (7 Pet.) 138, 141 (1833).

Thus the firm baseline rule with respect to both conspiracy and complicity is that where the crime is so defined that only certain categories of persons, such as employees of a particular sort of entity, may commit the crime through their own acts, persons not within those categories can be guilty of conspiring to commit the crime or of the substantive crime itself as an accomplice. Longstanding principle and precedent thus reinforces what the plain language of the conspiracy and aiding and abetting statutes command.

B. The Affirmative-Legislative-Policy Exception

There is a narrowly circumscribed exception to this common-law principle. In certain cases it is clear from the structure of a legislative scheme that the lawmaker must have intended that accomplice liability not extend to certain persons whose conduct might otherwise fall within the general common-law or statutory definition of complicity. A classic illustration is statutory rape, which makes it a crime to have sexual relations with a person who is under a statutorily defined age of consent. Applying the literal definitions of accomplice liability, a youthful participant who voluntarily consents to the act would be guilty of rape as well, because he or she intentionally aided or solicited the commission of the criminal act. But the legislature, in criminalizing the conduct of the adult participant and not that of the juvenile, obviously conceptualized the under-age party as the victim of the crime, and not a co-participant. Despite the common-law recognition of conspiracy and accomplice liability, and of the general principle that one could be guilty as a conspirator or accomplice even if the statute were defined in such a way that one was not capable of committing it as a principal, the common-law courts had no difficulty in recognizing an exception in those circumstances.

Here the government concedes that the common-law principle of conspiracy liability admits of exceptions but argues that the FCPA falls outside those exceptions. Hoskins, by contrast, contends that the FCPA demonstrates "an affirmative Congressional intent to exclude certain persons from liability" under the statute. The parties' dispute focuses on two cases, *Gebardi v. United States*, 287 U.S. 112, 53 S.Ct. 35, 77 L.Ed. 206 (1932), and *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987), and it is thus profitable to consider both in some detail.

1. Gebardi

In *Gebardi*, the Supreme Court considered a conviction under the Mann Act, a statute that imposes a penalty upon

> any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.

The Mann Act criminalizes such transportation "with or without [the woman's] consent." The government convicted both a man and woman for conspiracy to violate the Mann Act, on the theory that the woman conspired to transport a person—herself—merely by consenting to the man's transportation of her.

The Supreme Court reversed the convictions. The Court first noted that the Mann Act plainly covered cases where "the woman consents to her own transportation," rather than just cases where her transportation was forced, "[y]et it does not specifically impose any penalty upon her, although it deals in detail with the person by whom she is transported." Because it would be obvious that women would participate in many violations of the statute, but the statute discussed no punishment for the women, the Court concluded that Congress intended for the women not to be liable for at least some class of violations of the Act. In particular, the Court determined it could not "infer that the mere acquiescence of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter." "The penalties of the statute are too clearly directed against the acts of the transporter" to support the view that Congress intended the woman always to be liable.

Having decided that Congress intended to leave the woman unpunished when she merely acquiesced in her own illegal transportation, the Court next considered whether she could be convicted of conspiring to violate the statute in such circumstances. The Court concluded that she could not. The Court emphasized, again, that "Congress set out in the Mann Act to deal with cases which frequently, if not normally, involve consent and agreement on the part of the woman to the forbidden transportation," but that "this acquiescence ... was not made a crime under the Mann Act itself." Consequently, the Court "perceive[d] in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished." The Court explained that it was

> a necessary implication of that policy that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter. It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers.

Because the defendant in *Gebardi* had merely consented to her transportation, the Court ruled that her conviction for conspiracy could not stand; and because she had not conspired to violate the Mann Act, her companion had no one with whom to conspire. Id. Both of their convictions for conspiracy were reversed.

In determining that the woman in *Gebardi* was not liable as a conspirator because of Congress's "affirmative legislative policy" to leave her unpunished, the *Gebardi* Court distinguished its reasoning from an older common-law limitation on conspiracy liability—a rule widely known as *Wharton*'s Rule. Wharton's Rule states that "[a]n agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission," such as dueling.

The Court in *Gebardi* alluded to *Wharton*'s Rule. But the Court stated that Wharton's Rule did not apply, because the Rule requires voluntary consent while "criminal transportation under the Mann Act may be effected without the woman's consent as in cases of intimidation or force." Consequently, the Court "d[id] not rest [the] decision upon [Wharton's Rule], nor upon the related one that the attempt is to prosecute as conspiracy acts identical with the substantive offense." Instead, the Court explicitly situated its ruling "upon the ground that we perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished."

3. Identifying an Affirmative Legislative Policy

Accepting *Gebardi*'s teaching that conspiracy and complicity liability will not lie when Congress demonstrates an affirmative legislative policy to leave some type of participant in a criminal transaction unpunished, the question becomes how to identify such a policy. As the common-law principle outlined above indicates, we cannot identify such a policy whenever a statute focuses on certain categories of persons at the exclusion of others. *Gebardi* confirms this, emphasizing that its reasoning was "concerned with something more than an agreement between two persons for one of them to commit an offense which the other cannot commit." In *Gebardi* that "something more" was a recognition that because a woman's participation was "an inseparable incident of all cases in which the woman is a voluntary agent" capable of entering into a conspiracy, Congress's silence as to the women's liability was a conferral of immunity. Similarly, in *Amen* the Court saw that the continuing criminal enterprise provision "was designed to reach the top brass in the drug rings, not the lieutenants and foot soldiers" and broadening the scope of liability with the conspiracy statute would subvert that purpose. In both instances the courts looked to the text of the statute and the purpose that Congress was trying to achieve, thereby honoring their "over-arching obligation to give effect to congressional intent" when interpreting statutes. In keeping with traditional principles of statutory interpretation, as well as the analysis employed in *Gebardi* and its progeny, an affirmative legislative policy can be discerned by looking to the statute's text, structure, and legislative history.

4. Government's Arguments for a Narrower Principle

The government argues for a much narrower reading of *Gebardi* that would effectively circumscribe the ability of the courts to ascertain congressional intent in enacting criminal statutes. The government argues that *Gebardi* forecloses liability for conspiracy or complicity only when (1) "the defendant's consent or acquiescence is inherent in the [substantive] offense," or (2) "the defendant's participation in the crime is frequently, if not normally a feature of the [substantive] criminal conduct."

A number of problems arise with either of these narrow readings of *Gebardi*. The government's first reading of *Gebardi* is foreclosed because, at least in the conspiracy context, it is the same as *Wharton*'s Rule. As noted, where a substantive offense requires persons to agree in order to commit it, *Wharton*'s Rule disallows liability for conspiracy based on the same agreement required for the substantive crime. Here, the government suggests that we should read the *Gebardi* principle to mean the same thing: that liability for conspiracy is barred when "the defendant's consent or acquiescence is inherent in the [substantive] offense." The opinion in *Gebardi* explicitly stated that its reasoning was not based on *Wharton*'s Rule; thus that cannot be the basis for the exception.

The government's argument that the exception is limited to situations where the defendant's conduct is inherent in the substantive offense is also inconsistent with *Amen*. Our holding in *Amen*, which considered an individual who was not an employee of the criminal enterprise, did not turn on the fact that the defendant was essential to the existence of the criminal transaction under consideration. Although a "criminal enterprise" with a "kingpin" must have employees, and such employees are thus essential to the statute's application, the enterprise need not work with non-employee third parties. *Amen* held that the "kingpin" statute did not apply to third parties, and did so based on the intentions of Congress rather than because third parties were required for a criminal enterprise to exist.

Second, we do not share the government's view that *Gebardi* asks whether a certain type of defendant's conduct is "frequently, if not normally" involved in an offense. With respect to the statute giving rise to *Gebardi*—the Mann Act—there was no question that a woman's participation in the crime was "frequently, if not normally" a feature of a violation. Indeed, a woman's participation, either willing or unwilling, was required in every violation. But the Court did not merely ask whether her involvement was "frequently, if not normally" a feature of a violation; instead, the Court discerned the legislative policy of the Mann Act, and provided immunity only to the extent it comported with the Act's policy.

Finally, the government relies on *Ocasio v. United States*, 136 S.Ct. 1423, 194 (2016), a recent decision that it believes to have drawn narrowly the exception exemplified by *Gebardi*. The opinion in *Ocasio* considered an incident of bribery charged under the Hobbs Act, and a charge of conspiracy to violate the Hobbs Act by paying the same bribe. Although the language of the Hobbs Act prohibits "extortion" committed by "the obtaining of property from another, with his consent ... under color of official right," 18 U.S.C. § 1951(b)(2), the Supreme Court has held that this tortured language is best understood as the "rough equivalent of what we would now describe as 'taking a bribe,' " In other words, the Hobbs Act's text speaks as though a bribe-payer is being "extorted," when, in reality, the bribe may be a consensual one paid to secure some advantage.

The defendant in *Ocasio* contended, using the language of the Hobbs Act, that he could not be convicted of conspiracy. He noted that the Hobbs Act criminalized "*obtaining of property from another*," 18 U.S.C. § 1951(b)(2) (emphasis added). He then contended that a conspiracy charge was not appropriate, because "the conspirators," who were the officials taking the bribe and the persons paying it, "had not agreed to obtain money from ["another"—that is, from] a person who was not a member of the conspiracy." The Court rejected this argument, explaining that it did not matter that the defendants who paid the bribes "did not have the objective of obtaining money 'from another' because the money in question was their own." The Court simply reasoned that it was sufficient for the defendants to conspire with others who would take money "from another," even if that "[ ]other" person happened to be the conspirator himself.

The opinion in *Ocasio* emphasized that the crime in question, Hobbs Act extortion, bears a meaning not readily discernible from its text. Because, as noted, the statute essentially criminalizes "taking a bribe," the Court was unwilling to indulge the defendant's argument that the text indicated an affirmative legislative policy to leave the "extorted" party unpunished, or a desire to punish only the party taking property "from another."

Although *Ocasio* arose in a setting where a statute's language arguably suggested that certain persons are spared from liability, the unique features of Hobbs Act extortion limit *Ocasio*'s helpfulness to the government. Because the Supreme Court did not agree that the Hobbs Act manifested the "something more" present in *Gebardi*, namely any intention to limit liability for the payer of a bribe, the Court rejected the argument that conspiracy liability should be circumscribed based on any such limitation. Consequently, the case does not demonstrate a narrowing of the affirmative-legislative-policy exception, but simply a situation where there was no affirmative legislative policy to leave the bribe payers unpunished. Moreover, *Ocasio*'s independent ruling that incapacity to commit a substantive offense does not, without more, preclude conspiracy or complicity charges, is merely a reaffirmation of the common-law principle addressed above, not an abdication of the affirmative-legislative-policy exception.

C. The Affirmative Legislative Policy Regarding the FCPA's Coverage

Applying the teachings of *Gebardi* and *Amen* to the FCPA, we find the "something more" that evinces an affirmative legislative policy to leave the category of defendants omitted from the statutory framework unpunished. In particular, the carefully tailored text of the statute, read against the backdrop of a well-established principle that U.S. law does not apply extraterritorially without express congressional authorization and a legislative history reflecting that Congress drew lines in the FCPA out of specific concern about the scope of extraterritorial application of the statute, persuades us that Congress did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability. Our conclusion is consistent with the reasoning of other courts that have addressed this question. See United States v. Castle, 925 F.2d 831 (5th Cir. 1991); United States v. Bodmer, 342 F.Supp.2d 176 (S.D.N.Y. 2004).

1. Text of the FCPA

We begin with the text of the statute. Like the Mann Act, which "[did] not specifically impose any penalty upon" a woman for assisting in her own transportation across state lines, "although it deal[t] in detail with" other persons, the FCPA contains no provision assigning liability to persons in the defendant's position—nonresident foreign nationals, acting outside American territory, who lack an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies. See 15 U.S.C. §§ 78dd-1; 78dd-2; 78dd-3.

Moreover, in *Gebardi*, the statute under consideration was less clear as to Congress's intent to exclude the defendant from liability, compared to the FCPA's utter silence regarding the class of defendants involved in this case. As noted, the Mann Act placed a penalty upon "any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for ... any woman or girl for ... any ... immoral purpose." The Supreme Court explained that, for a woman to be liable under the Mann Act, her role must "be more active than mere agreement on her part to the transportation and its immoral purpose." But the Court stated in *Gebardi* that the Mann Act would cover the woman to the extent she were to " 'aid or assist' some one else in transporting or in procuring transportation" for her. Thus, the statute created at least some potential for liability where a woman did more than exhibiting "mere agreement ... to the transportation." In the present case, by contrast, there is no text that creates any liability whatsoever for the class of persons in question.

2. Structure of the FCPA

A second piece of evidence—the structure of the FCPA—confirms that Congress's omission of the class of persons under discussion was not accidental, but instead was a limitation created with surgical precision to limit its jurisdictional reach. The statute includes specific provisions covering every other possible combination of nationality, location, and agency relation, leaving excluded only nonresident foreign nationals outside American territory without an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies.

The FCPA explicitly lays out several different categories of persons over whom the government may exercise jurisdiction. First, the statute prohibits a company issuing securities regulated by federal law (an "issuer") from using interstate commerce in connection with certain types of corrupt payments to foreign officials. 15 U.S.C. § 78dd–1(a). The same prohibitions apply to any "domestic concern." 15 U.S.C. § 78dd–2(a). "Domestic concern" is a broad term that covers "any individual who is a citizen, national, or resident of the United States," 15 U.S.C. § 78dd–2(h)(1)(A), wherever such a person happens to be in the world. It also covers most businesses—including partnerships, sole proprietorships, and unincorporated organizations—that are organized under state or federal law or have principal places of business in the United States. 15 U.S.C. § 78dd–2(h)(1)(B).

Importantly, the prohibitions on issuers and domestic concerns also apply to "any officer, director, employee, or agent of" the entity, "or any stockholder thereof acting on behalf of" the entity. 15 U.S.C. §§ 78dd–1(a), 78dd–2(a). The statute's prohibitions thus apply not only (for example) to partnerships organized under state law, but also to their executives, janitors, and travel agents. And, although a person must be a citizen, national, or resident of the United States to be charged as a domestic concern, no similar requirement limits the liability of officers, employees, or agents of domestic concerns and issuers.

Second, the statute prohibits "any person other than an issuer ... or a domestic concern" from using interstate commerce in furtherance of corrupt payments to foreign officials, but only while the person is "in the territory of the United States." 15 U.S.C. § 78dd-3(a). A "person" is "any natural person other than a national of the United States," as well as any business organized under foreign law. 15 U.S.C. § 78dd-3(f)(1).

In sum, these provisions provide jurisdiction over the following persons, in the following scenarios:

> (1) American citizens, nationals, and residents, regardless of whether they violate the FCPA domestically or abroad;
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> (2) most American companies, regardless of whether they violate the FCPA domestically or abroad;
>
> (3) agents, employees, officers, directors, and shareholders of most American companies, when they act on the company's behalf, regardless of whether they violate the FCPA domestically or abroad;
>
> (4) foreign persons (including foreign nationals and most foreign companies) not within any of the aforementioned categories who violate the FCPA while present in the United States.

The single, obvious omission is jurisdiction over a foreign national who acts outside the United States, but not on behalf of an American person or company as an officer, director, employee, agent, or stockholder.

3. Legislative History

The question thus becomes whether there is "something more," a policy basis for Congress to exclude Hoskins's category of defendants from criminal liability—something akin to the Mann Act's decision not to punish the woman who is frequently, if not normally involved in the offense or 21 U.S.C. § 848's gradation of punishment based on leadership in a criminal enterprise. We think there is. "It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world." Courts will therefore not apply a U.S. law extraterritorially unless "the affirmative intention of the Congress [is] clearly expressed." *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). This principle stems from the risk of "unintended clashes between our laws and those of other nations which could result in international discord." Id. The legislative history of the FCPA makes it clear that Congress was attuned to these risks and carefully delimited the statute accordingly.

a. The Foreign Corrupt Practices Act of 1977

When President Carter took office in 1977, sponsors of the 1976 precursor to the FCPA exhorted the administration to take an active approach in promoting an anti-bribery statute comparable to the 1976 bill that passed the Senate but failed to pass the House. The Carter Administration indicated its support for such a statute, and, in particular, suggested that "specific criminal penalties" for acts of bribery were the correct approach to solving the problem.

i. The Administration and the Senate Bill

Although it hoped to pass aggressive anti-bribery legislation, the Administration recognized that a statute focusing on criminalization, rather than disclosure, required a delicate touch where extraterritorial conduct and foreign nationals were concerned. The Secretary of the Treasury, W. Michael Blumenthal, noted as much at a hearing before the Senate Committee on Banking, Housing, and Urban Affairs on March 16, 1977:

> [T]he Administration recognizes that great care must be taken with an approach which makes certain types of extraterritorial conduct subject to our country's criminal laws. Moreover, a law which provides criminal penalties must describe the persons and acts covered with a high degree of specificity in order to be enforceable, to provide fair warning to American businessmen.

Secretary Blumenthal emphasized, in particular, the Administration's concerns regarding the protection of foreign nationals:

There is a problem of extraterritoriality which needs to be carefully addressed. There is also a question of insuring fairness and due process, not only for American citizens but also for those foreign citizens and foreign countries who may in some way become involved and whose reputations become involved in particular allegations. We have to deal with the question of how we can write the bill in such a way that it includes protections in this regard.

In the initial draft of the FCPA, individual liability for bribery was chargeable largely through the conspiracy and complicity statutes. In the initial draft, as in the current version of the FCPA, there were three categories of legal rules:

> • first, obligations to create "books, records, and accounts, which accurately and fairly reflect the transactions" of the company, S. 305, 95th Cong., § 102(2)(A) (as introduced Jan. 18, 1977) (hereinafter "S. 305 as Introduced"),;
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> • second, obligations to "devise and maintain an adequate system of internal accounting controls sufficient to provide reasonable assurances" that transactions are properly authorized and recorded, id. at §§ 102(2)(B); and
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> • third, provisions prohibiting the payment of bribes to foreign officials, id. at §§ 103-104.

Individual liability was discussed for the first two classes of rules—the "books and records" and "internal accounting controls" provisions. But the anti-bribery provision, spread over Sections 103 and 104, covered only bribery by an "issuer" or a "domestic concern." Conspicuously absent was any provision creating liability for the employees of an "issuer," which meant that there would be no liability under a substantive provision of the statute for an employee of a publicly-traded company who approved a bribe. Although the draft prohibited "domestic concerns, other than an issuer" from offering, paying, promising to pay, or "authoriz[ing] the payment of" bribes, and the draft included among "domestic concerns" both "an individual who is a citizen or national of the United States," as well as most American companies, the provision did not clarify that an individual employee of a non-issuer company would be liable for the company's payment of bribes. The result was draft legislation that clearly did not create direct individual liability for employees of publicly-traded companies, and only arguably created it for employees of other companies. As explained below, the Senate's intention in this draft was to create individual liability using the conspiracy and complicity statutes rather than by enumerating particular individuals who could be liable within the statute's text.

On April 6, 1977, less than a month after Secretary Blumenthal's testimony before a Senate committee, his concerns regarding individual liability under the nascent FCPA were specifically addressed in a markup session held by the same committee. During the session, the Committee on Banking, Housing and Urban Affairs discussed the version of S. 305 that had been introduced to the Senate. The Committee adopted two amendments that significantly clarified the classes of persons liable under the statute, and did so by reducing the bill's reliance on conspiracy and complicity theories:

> Amendment number 3, on page 4, line 5 after the word "title" insert the words "or any officer, director, employee or stockholder thereof acting on behalf of such issuer."
>
> On page 6, line 1 after "1934" insert the words: "or any officer, director, employee or stockholder thereof acting on behalf of such domestic concern."

These amendments clarified that particular individuals would be liable for certain violations of the statute. These amendments were explained in the markup hearing as a change to the Senate's earlier plan to cover individuals using theories of complicity and conspiracy instead of defining specifically the persons who could be liable under the statute:

> [T]his amendment also reflects the Administration's position in recommending that individuals be covered. Indeed, I believe that the committee last year intended to cover individuals; however, it wasn't specifically stated. They were intended to be covered as aiders, abettors and conspirators and so on and so forth, and this makes clear that they are covered directly and also it makes it clear that they are covered in their capacity in acting on behalf of the company.

The markup session provides powerful evidence of two points relevant to this case. First, before the Carter Administration's concerns and the markup hearing detailed above, the Senate had planned to adopt a bill that largely omitted references to individual liability, and that instead relied on theories of conspiracy and complicity to tie individual action to corporate misdeeds. In response to administration concerns—particularly concerns regarding the clarity of liability and its application to foreign persons—the Senate rejected its prior approach. Instead, it opted for a version of the bill that was not reliant on conspiracy or complicity theories. Rather, it defined, with great precision, who would be liable.

ii. The House Bill and Final Legislation

In the House, Representative Bob Eckhardt initially proposed a bill, the Unlawful Corporate Payments Act of 1977, with broader coverage than the Senate's initial legislation. The bill created liability not only for officers, directors, and employees of issuers and domestic concerns, but also for "agents" who "knowingly and willfully carried out" bribes. The sections covering individuals—which covered "agents" who "carried out" bribes—appeared to apply regardless of nationality or location.

Several leading authorities suggested to Representative Eckhardt and other Congressmen on the Committee on Interstate and Foreign Commerce that these provisions went too far. In a hearing discussing the bill, the SEC stated as follows:

> At a minimum, I think the language of subsection (c)(2), applying to any agent, might create some jurisdictional problems if the agent is wholly situated overseas and has not been in this country. While I think there are jurisdictional ties that could be asserted, the problems you express in this case might be even worse in terms of prosecution. But, I think you could so something along the lines you are suggesting either by amending this subsection or by report language that would clarify burdens of proof, obligations, and the involvement of agents, to provide a fair opportunity for an agent to present his defense. That does seem to be a very serious concern.

Following these hearings, the Committee on Interstate and Foreign Commerce reported an amended bill to the House. The revised version allowed liability for agents and employees of issuers and domestic concerns only if the company for which they worked was also found to be liable—a change that essentially increased the U.S. nexus required for an offense to be covered.

The final version of the FCPA, agreed to in conference, demonstrated a compromise between the House and Senate versions. Like the Senate's revised bill—and the House's original bill—it named particular categories of individuals who would be liable under the FCPA rather than relying on the use of conspiracy and complicity principles to create such liability. It did allow liability for agents, but restricted the liability to an agent who was "a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States," and also required a finding that the employer had been liable. The bill also rejected liability for foreign affiliates of American companies.

The Conference Report emphasized that the statute drew deliberate lines regarding the liability of foreign persons, both corporate and natural:

> [T]he conferees recognized the inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill. However, the conferees intend to make clear that any issuer or domestic concern which engages in bribery of foreign officials indirectly through any other person or entity would itself be liable under the bill. The conferees recognized that such jurisdictional enforcement, and diplomatic difficulties may not be present in the case of individuals who are U.S. citizens, nationals, or residents. Therefore, individuals other than those specifically covered by the bill (e.g., officers, directors, employees, agents, or stockholders acting on behalf of an issuer or domestic concern) will be liable when they act in relation to the affairs of any foreign subsidiary of an issuer or domestic concern if they are citizens, nationals, or residents of the United States. In addition, the conferees determined that foreign nationals or residents otherwise under the jurisdiction of the United States would be covered by the bill in circumstances where an issuer or domestic concern engaged in conduct proscribed by the bill.

This discussion, much like the discussion in the earlier hearings on the Senate's 1976 legislation, largely resolves the problem of liability against foreign persons by noting that an American company will be liable if it acts through unreachable foreign affiliates. Its mention of situations where "foreign nationals or residents otherwise under the jurisdiction of the United States" would be liable because "an issuer or domestic concern engaged in conduct proscribed by the bill" clearly refers to the statute's liability for agents, which permits jurisdiction over foreign nationals. Id. The Conference Report made no mention of conspiracy or aiding-and-abetting theories of liability.

b. The 1998 Revisions

In 1998, Congress amended the FCPA. The Committee Report from the Senate Committee on Banking, Housing, and Urban Affairs noted that "[s]ince the passage of the FCPA, American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty," because their countries' laws did not include comparable prohibitions on bribery. In response to this problem, "[i]n 1988, Congress directed the Executive Branch actively to seek to level the playing field by encouraging ... trading partners to enact legislation similar to the FCPA." "These efforts eventually culminated in the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the 'OECD Convention')," which asked signatory nations to enact anti-bribery laws containing certain minimum requirements.

The difficulty with the government's position, however, is that this provision covers the content of substantive law—the particular acts prohibited by it—not the law's jurisdictional aspects. A separate part of the Convention addresses jurisdictional questions. Moreover, adopting the government's view that the jurisdictional reach of the FCPA must be coterminous with that of bribery of American officials would transform the FCPA into a law that purports to rule the world. The defendant notes, for example, that bribery statutes covering American officials prohibit not only crimes with foreign national conspirators acting overseas, therefore, under the government's theory, these statutes likely cover situations in which the entire offense occurred overseas—that is, where there is no U.S. nexus at all except that the official to be bribed is stateside. The government does not dispute this point. Consequently, if read as the government proposes, the above-quoted provision of the Convention would cover conspiracies to bribe foreign officials consisting entirely of actions taken abroad. That is obviously not consistent with the legislation Congress wrote, and it cannot be what the OECD Convention requires.

c. The Legislative History's Demonstration of an Affirmative Legislative Policy

The strands of the legislative history demonstrate, in several ways, the affirmative policy described above: a desire to leave foreign nationals outside the FCPA when they do not act as agents, employees, directors, officers, or shareholders of an American issuer or domestic concern, and when they operate outside United States territory.

First, it is clear that the FCPA's enumeration of the particular individuals who may be held liable under the Act demonstrated a conscious choice by Congress to avoid creating individual liability through use of the conspiracy and complicity statutes. As discussed above, the statute's initial approach was to place liability for bribery largely upon companies, and then to allow prosecution of individuals for conspiring with companies or aiding and abetting their violations of the law. But the Carter Administration objected to that approach, voicing concerns for due process protections and clarity of rules for foreign persons. The statute was amended; the amended version narrowly tailored the liability for foreign individuals, and did not contemplate a reversal of that narrow tailoring by means of conspiracy and complicity theories. These changes were principally discussed in the Senate. But the House bill, and the final legislation, were structured similarly to the Senate's revised bill. At the same time that the Senate made these changes, the House was revising its own legislation to cut back on liability placed upon foreign agents, again because of specific concerns expressed by executive-branch officials regarding overreach.

The 1998 amendments surely extended the statute's jurisdictional reach. But in doing so, Congress delineated as specifically as possible the persons who would be liable, and under what circumstances liability would lie. None of the changes included liability for the class of individuals involved in this case. And despite the government's urging to the contrary, nothing in the OECD Convention required Congress to create such liability.

Congress also repeatedly emphasized that out-of-reach foreign entities should not create concern because American companies would be liable for violating the Act even if they did so indirectly through such persons.

Finally, limitations on liability for foreign nationals based on conspiracy and complicity theories were sensible given congressional concerns and aspirations in enacting the FCPA. In passing the statute, Congress was largely concerned with ensuring the SEC's ability to supervise and police companies, as well as the negative perception that bribery could create for American companies, its effect on the marketplace, and the foreign policy implications of the conduct. But Congress also desired that the statute not overreach in its prohibitions against foreign persons. Protection of foreign nationals who may not be learned in American law is consistent with the central motivations for passing the legislation, particularly foreign policy and the public perception of the United States. And the desire to protect such persons is pressing when considering the conspiracy and complicity statutes: these provisions are among the broadest and most shapeless of American law, and may ensnare persons with only a tenuous connection to a bribery scheme.

In short, the legislative history of the FCPA further demonstrates Congress's affirmative decision to exclude from liability the class of persons considered in this case and we thus hold that the government may not override that policy using the conspiracy and complicity rules.

Consequently, the presumption against extraterritoriality bars the government from using the conspiracy and complicity statutes to charge Hoskins with any offense that is not punishable under the FCPA itself because of the statute's territorial limitations. That includes both charges that are the subject of this motion—conspiracy to violate Sections 78dd-2 and 78dd-3 of the FCPA, and liability as an accomplice for doing so—because the FCPA clearly dictates that foreign nationals may only violate the statute outside the United States if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern. To hold Hoskins liable, the government must demonstrate that he falls within one of those categories or acted illegally on American soil.