NO CONSPIRACY OR COMPLICITY LIABILITY WHEN A STATUTE DRAWS SPECIFIC LINES AS TO ITS EXTRATERRITORIAL APPLICATION

U.S. v. Hoskins, 902 F. 3d 69 (2nd Cir. 2018).

By Megan Moody Barcak[1]

The United States Court of Appeals for the Second Circuit addressed whether a nonresident foreign national may be liable based on conspiracy or complicity under the Foreign Corrupt Practices Act ("FCPA").[2] The court focused on the FCPA's text, its structure, and Congress' intent when enacting the Act. The court held that the FCPA should be interpreted as it facially states, which contains no express provision assigning liability to nonresident foreign nationals "who lack an agency relationship with a U.S. person."[3] Additionally, the court reasoned that, from the process that the Senate and House went through while drafting the bill, Congress demonstrated an affirmative legislative policy in the FCPA in order to restrict criminal liability to certain types of defendants.[4]

The FCPA statute: (1) "prohibits American companies and American persons, as well as their agents, from using interstate commerce in connection with the payments of bribes"[5] and (2) "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."[6]

The Appellant in this case had neither worked for a United States subsidiary directly nor been present in the United States. The Government charged the Appellant with conspiracy because he was responsible for approving and authorizing payments to consultants who were hired to bribe foreign officials. The Government argued that conspiracy and complicity of the FCPA can be charged even though the Appellant could not be charged as the principal under the FCPA. The Court acknowledged the precedent that states conspiracy still applies even though the person charged with conspiracy could not have been charged as the principal.[7] The Court distinguished the Government's referenced precedent from this particular case based on the Act's structure. The Government's argument suggested that the FCPA applies to nonresident foreign nationals with no direct connection to an American business.[8] The Court relied on the fact that the Government's theory came up while Congress was discussing the bill, and Congress decided to enact the bill in a reasonable way with no connection of complicity or conspiracy liability for foreign nationals.[9] The Government's view of the FCPA tends to structure the Act in a way that it would allow the Government to extend jurisdiction outside of the United States and rule the world.[10] Appellant argued that the Government's view would allow the FCPA to impose criminal sanctions even when the whole offense occurred overseas, eliminating the need for a connection with the United States.[11] The Court found that this view did not adhere to Congress' intent when enacting the Act.

Next, the Government argued that, under the OECD Convention, if any part of the offense occurs in the United States then the United States must exercise jurisdiction.[12] The Court stated that the "requirement that a nation establish its jurisdiction over the bribery of a foreign public official does not say that it must create jurisdiction over persons in foreign lands with only distant connections to the offense."[13]

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[2] U.S. v. Hoskins, 902 F. 3d 69 (2nd Cir. 2018).
[3] *Id*. at 83–4.
[4] *Id.* at 94
[5] *Id.* at 71 (citing 15 U.S.C. §78dd-2)
[6] *Id.* (citing 15 U.S.C. §78dd-3)
[7] *Id.* at 77-78
[8] *Id.* at 92
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 93
[13] *Id.*

The Court looked at the FCPA's text, structure, and legislative history in order to determine whether Congress intended to eliminate liability for co-conspirators under this statute as it did in *Gebardi* and *Amen*.[14] The Court reasoned that Congress carefully drafted FCPA statute shows the concern for the extraterritorial application of the FCPA.[15] The Court mentioned the well-established principal that extraterritorial application of a United States law only happens with express congressional authorization.[16] The Court held that it was not Congress' intent to have persons outside of the statute be subject to conspiracy or complicit liability.[17] The Court reasoned that the structure and precision of the FCPA statute when compiling its provisions showed that Congress intended to omit the class in an effort to limit the jurisdictional reach.[18] The Court further stated that courts will "not apply a U.S. law extraterritorially unless the affirmative intention of the Congress is clearly expressed" (internal quotes and brackets omitted).[19] For the United States to subject extraterritorial conduct to the U.S. criminal laws, the provisions of the statute need to be "covered with a high degree of specificity in order to be enforceable, to provide fair warning to American businessmen."[20]

Since the FCPA strategically lists everyone who can fall under and violate the statute, the Government cannot use conspiracy to work around Congress. The Court made a strong statement when it held that "the legislative history of the FCPA further demonstrates Congress' 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."[21] The Court refused to enforce the FCPA "on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern—unless that person commits a crime within the territory of the United States."[22] The Court further stated, even if the court did not decide this way, the burden still falls on the Government to establish that Congress clearly expressed an intent to allow conspiracy and complicity liability, thus expanding the extraterritorial jurisdiction of the statute.[23]

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[14] *Id.* at 81; *see* Gebardi v. U.S., 287 U.S. 112 (1932); *also see* U.S. v. Amen, 831 F.2d 373 (2nd Cir. 1987).
[15] *Hoskins*, 2018 U.S. App. LEXIS 23963 at *37
[16] *Id*. at 84
[17] *Id.*
[18] *Id.* at 85
[19] *Id*. at 86
[20] *Id.*
[21] *Id.* at 95
[22] *Id.* at 96
[23] *Id.* at 95