EXTRATERRITORIAL ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT: ASSERTING U.S. INTEREST OR FOREIGN INTRUSION?

EVAN FORBES*

INTRODUCTION

United States enforcement of the Foreign Corrupt Practice Act's ("FCPA") anti-bribery statutes has been scrutinized since Jimmy Carter signed it into law in 1977. The FCPA has an extraterritorial jurisdictional reach, meaning its provisions can apply to individuals outside of the United States. But how far did Congress intend to expand the FCPA's jurisdiction? How far should we extend extraterritorial jurisdiction of our anti-bribery statutes? What is the proper boundary between enforcing American law and respecting foreign sovereignty?

This Article examines these questions through the lens of *United States v. Hoskins*, a recent Second Circuit case. Part I will provide background: Section I.A will discuss the circumstances that compelled Congress to pass the original FCPA, the FCPA's subsequent amendments, and the controversy surrounding U.S. enforcement of the FCPA. Section I.B will provide a basic background of accomplice liability, the *Gebardi* principle, and subsequent interpretations of the *Gebardi* principle. Section I.C will briefly explain the presumption against extraterritoriality. Section I.D will provide a synopsis of *Hoskins*.

Part II will argue that, as a matter of statutory interpretation and policy, the government should be allowed to prosecute accomplices to FCPA violations, even when they are beyond the extraterritorial reach of the

*. Senior Editor, *Southern California Law Review*, Volume 93; J.D. Candidate 2020, University of Southern California Gould School of Law; B.M. Vocal Performance, Indiana University. Thank you to my parents, Pat and Susan, for all their encouragement and support, and thank you to the Southern California Law Review editors for their excellent work.

FCPA's principal liability. Section II.A will argue that the *Hoskins* Court misapplied the *Gebardi* principle and the presumption against extraterritoriality and that, as a matter of statutory interpretation, accomplice liability's extraterritorial reach extends beyond those who can substantively violate the FCPA. Section II.B will argue that principles of international law allow the U.S. government to prosecute Hoskins. Section II.C will argue that expanded accomplice liability is necessary as a matter of policy. The conclusion will recommend that the Supreme Court take action and hold that accomplice liability is extended to foreign nationals that conspire with principal offenders of the FCPA, even if they cannot be held liable as principal offenders. It will also recommend that, in the absence of a Supreme Court decision, Congress should explicitly expand accomplice liability's extraterritorial reach beyond the FCPA's principal liability.

I. LEGAL BACKGROUND

A. THE FOREIGN CORRUPT PRACTICES ACT: HISTORY, CONTENT, AND AMENDMENTS

1. Origins of the Foreign Corrupt Practices Act

The United States began to acknowledge the problem of foreign bribery after Watergate.[1] As part of the Watergate investigation, the Special Prosecutor's office investigated illegal domestic election payments made by corporations.[2] In doing so, they discovered that many corporations used slush funds outside of their normal financial accountability systems to bribe foreign government officials.[3] This prompted the SEC to investigate the scope of foreign bribery, which resulted in over 400 companies disclosing that they had spent over $300 million bribing foreign officials.[4] Congress expanded on the SEC's work through the "Church Committee," a select committee formed in part to investigate the foreign bribery problem.[5] After months of hearings, the Committee concluded that foreign bribery was a serious and complex problem that administrative agencies lacked the power to address.[6]

At this time, many in Congress called for a ban on foreign bribery.[7]

1. *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 932 (2012).
2. *Id*. at 932, 934–35.
3. *Id.*
4. H.R. REP. NO. 95-640, at 4 (1977).
5. Koehler, *supra* note 1, at 932.
6. *Id.* at 971–80.
7. *See, e.g.*, *id.* at 949 (quoting S. REP. NO. 94-1031, at 4 (1976)).

Their policy justifications varied. Some argued that foreign bribery had profound consequences on U.S. foreign policy and foreign reception of U.S. enterprise.[8] Others argued that foreign bribery created a risk of corroding the free-enterprise system itself.[9] And still others argued that an anti-bribery bill would "set a standard of honesty and integrity in our business dealings not only at home but also abroad."[10] But many in Congress remained skeptical. They argued that foreign bribery was a worldwide problem, and unilaterally prohibiting it would disadvantage American corporations in their dealings abroad.[11] But the voices calling for a foreign bribery prohibition prevailed, and Congress passed the Foreign Corrupt Practices Act, which President Carter signed into law in 1977.[12] At the time, it was the "first law in the world governing domestic business conduct with foreign government officials in foreign market[s]."[13]

2. The FCPA of 1977

The FCPA's anti-bribery statute prohibited (1) corruptly paying, offering to pay, promising to pay, or authorizing the payment of money, a gift, or anything of value; (2) to a foreign official; (3) in order to obtain or retain business.[14] Compared to today's FCPA, the 1977 version contained a narrow jurisdictional reach. Under the original framework, Congress limited the FCPA's jurisdiction to two groups: (1) "issuers," a foreign or domestic company that is publicly listed on U.S. stock exchanges or that is required to register with the SEC pursuant to other provisions of the Securities Exchange Act of 1934;[15] and (2) individuals and corporations that were a "domestic concern,"[16] which was limited to citizens and U.S. nationals and corporations owned by U.S. citizens or nationals that had a principal place of business in the U.S. or its territories.[17]

8. *Id.* at 938–43
9. *Id.* at 947.
10. *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 5 (1975) (statement of Rep. Stephen J. Solarz, Member, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).
11. Koehler, *supra* note 1, at 975.
12. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, secs. 102–04, §§ 13(b), 30A, 32(a), 32(c), 91 Stat. 1494, 1494–98 (codified as amended at 15 U.S.C. §§ 78m(b), 78dd-1 to 78dd-3 (2018)).
13. Koehler, *supra* note 1, at 930 (emphasis omitted).
14. 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2, 78dd-3 (2018).
15. *Id.* § 78dd-1.
16. *Id.* § 78dd-2.
17. S. REP. NO. 95-114, at 17 (1977).

3. The OECD Anti-Bribery Convention

Although the enactment of the FCPA was a historic step in anti-bribery legislation, politicians and corporations continued to criticize the FCPA for placing U.S. firms at a competitive disadvantage internationally.[18] As the only country in the world with a foreign bribery ban, American entities played on a "lopsided playing field," competing for government contracts with foreign companies not bound by anti-bribery laws.[19]

To solve this problem, in 1988 Congress asked the President to pursue an international anti-corruption agreement with member nations of the Organization of Economic Cooperation and Economic Development ("OECD").[20] After seven years of investigation, the OECD member countries concluded that "it [was] necessary to criminalise the bribery of foreign public officials in an effective and co-ordinated manner."[21] That year, the OECD Committee on International Investment and Multinational Enterprises ("CIME") created a report with recommended provisions to combat bribery.[22] After some technical amendments, the OECD agreed to the recommendations, and on December 18, 1997, the OECD members adopted the recommendations as the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Anti-Bribery Convention").[23]

The Anti-Bribery Convention signatories agreed to enact legislation that would make bribery of foreign officials a criminal offense and take measures to ban bribery of foreign public officials to gain an "improper advantage in the conduct of international business."[24] Regarding jurisdiction, the Anti-Bribery Convention called upon signatories to "establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory."[25] It also called on countries to

18. *See, e.g.*, *Impact of Foreign Corrupt Practices Act on U.S. Business*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶ 82,841 (1981).

19. Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 255 (1997).

20. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5003(d), 102 Stat. 1107, 1424.

21. Organization of Economic Cooperation and Economic Development [OECD], *Review of the 1994 Recommendation on Bribery in International Business Transactions, Including Proposals to Facilitate the Criminalization of Bribery of Foreign Officials*, at 6, OCDE/GD(97)131 (1997).

22. *Organization of Economic Cooperation and Economic Development, Council Revised Recommendation on Combating Bribery in International Business Transactions*, 36 I.L.M. 1016, 1018–19 (1997).

23. *Argentina-Brazil-Bulgaria-Chile-Slovak Republic-Organization for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 37 I.L.M. 1, 4 (1998) [hereinafter *Convention*].

24. *Id.* at 4.

25. *Id.* at 5.

"[interpret jurisdiction] broadly so that an extensive physical connection to the bribery act is not required."[26] Further, when two signatories had jurisdiction over the same wrongful act, the Convention called on the signatories to "consult with a view to determining the most appropriate jurisdiction for prosecution."[27] The Clinton Administration hailed the Anti-Bribery Convention as a "victory for good government, fair competition and open trade,"[28] and the Senate unanimously approved the Anti-Bribery Convention on July 31, 1998.[29]

4. 1998 Amendments to The FCPA

Although much of the Anti-Bribery Convention was modeled after the FCPA,[30] Congress had to modify the FCPA to comply with the Anti-Bribery Convention. Particularly, Congress had to expand the FCPA's jurisdictional reach. To meet the Anti-Bribery Convention's guidelines, Congress expanded criminal liability to two groups: first, to foreign nationals who used "any means or instrumentality of interstate commerce" or acted in furtherance of an FCPA violation;[31] second, to U.S. nationals who violated the FCPA while outside of the United States.[32] In doing so, "Congress abandoned its previous reticence and instead broadly asserted U.S. jurisdiction over foreign nationals, even those who may not have been physically present in the United States."[33] However, despite these changes, Congress reaffirmed that the government should assert jurisdiction only "when consistent with national legal and constitutional principles."[34]

26. *Id.* at 10.
27. *Id.* at 5.
28. Press Release, Dep't of State, Statement of Secretary of State Madeline K. Albright at the Organization for Economic Cooperation and Development Signing Ceremony of the Anti-Bribery and Corruption Convention (Dec. 17, 1997), https://1997-2001.state.gov/statements/971217b.html [https://perma.cc/LM7Q-DGPR].
29. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (resolution of advice and consent to ratification agreed to in Senate July 31, 1998).
30. *See* Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 486 (2000) ("An important component of the Convention is its emulation of the corporate accountability approach of the Foreign Corrupt Practices Act (FCPA) to detect corrupt payments." (footnote omitted)).
31. 15 U.S.C. § 78dd-3(a) (2018).
32. *Id.* §§ 78dd-1(g)(1), 78dd-2(i)(1).
33. H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 292 (2001).
34. S. REP. NO. 105-277, at 3 (1988).

5. Current FCPA Enforcement

Today, U.S. enforcement of the FCPA is controversial. Some commentators fear that U.S. prosecutors interpret the FCPA's extraterritorial reach too liberally.[35] And because prosecutors resolve almost all FCPA charges without the courts (via settlements and plea agreements), they are free to interpret the FCPA largely unchecked.[36] Critics worry that by expanding extraterritorial reach and arresting too many foreign nationals, the international community may perceive the FCPA "as a culturally arrogant encroachment on their ability to govern activities exclusively within their own borders, in accordance with international law principles on territorial sovereignty."[37]

B. ACCOMPLICE LIABILITY AND THE *GEBARDI* PRINCIPLE

Critics argue that the DOJ prosecuted the defendant in *Hoskins* by expanding FCPA jurisdiction with an overly liberal theory of liability.[38] To understand the government's theory of liability, we must first understand accomplice liability and its exceptions.

1. Accomplice Liability: The Basics

Accomplice liability is a fundamental principle in criminal law. Under 18 U.S.C. § 2, a person who "aids, abets, counsels, commands, induces or procures" the commission of a crime is punishable to the same extent as the person who committed the crime (the "principal").[39] Accomplice liability applies to "all federal criminal offenses,"[40] which means that the government can hold a person liable for any crime if (1) they committed the crime or

35. *See What the SEC and DOJ Resource Guide to the FCPA Means for Multi-National Companies*, AM. BAR ASS'N (July 31, 2013), https://www.americanbar.org/groups/business_law/publications/blt/2013/07/02_murphy [https://perma.cc/RX29-3XNH] (arguing that the DOJ's FCPA guide "confirms that the DOJ and SEC read the FCPA broadly"); *see also District Court Rules FCPA Jurisdiction Has Limits*, JONES DAY (Mar. 2013), https://www.jonesday.com/District_Court_Rules [https://perma.cc/7DWT-6Q3P] ("[T]he boundaries of [FCPA jurisdiction] have seemed to move farther and farther outward with each successive case.").

36. For a discussion of this phenomena, *see generally* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010).

37. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 447 (1999) (quoting Kenneth U. Surjadinata, Comment, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1026 (1998)).

38. See, e.g., Jodi Avergun & Joseph Moreno, The Implications of the Second Circuit's Ruling in Hoskins, GlobAL Investigations Rev. (Aug. 30, 2018), https://globalinvestigationsreview.com/article/jac/1173589/the-implications-of-the-second-circuit%E2%80%99s-ruling-in-hoskins [https://perma.cc/87BW-X26L] (arguing that the DOJ used its theory of liability to "effectively circumvent the jurisdictional language of the Foreign Corrupt Practices Act").

39. 18 U.S.C. § 2 (2018).

40. Cent. Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 181 (1994) (citation omitted).

(2) they served as an accomplice to the crime. For the purposes of criminal liability, the federal government treats both equally.[41] Accomplice liability is a powerful tool because prosecutors can charge a person as an accomplice even if they are "incapable of committing the substantive offense."[42]

2. The *Gebardi* Principle

Although the accomplice liability statute applies to all criminal offenses, there are a few narrow exceptions to blanket accomplice liability. One such exception is a rule of statutory construction known as the "*Gebardi* principle." The *Gebardi* principle seeks to shield individuals from accomplice liability when Congress, through statutory language, shows an affirmative intent to shelter them from criminal liability.[43] The principle originates from *Gebardi v. United States*, a 1932 Supreme Court case in which two defendants, a man and woman, were charged with violating the Mann Act.[44] The Mann Act proscribed knowingly transporting "any woman or girl" in interstate commerce "for the purpose of prostitution, debauchery, or for any other immoral purpose."[45] In *Gebardi*, a female voluntarily followed a male across state lines to engage in adultery with him.[46] Both were arrested.[47] The male defendant was charged with violating the Mann Act by transporting the female across state lines for an immoral purpose (adultery).[48] The woman, however, could not be charged as a principal under the Mann Act, because she had not transported a woman or girl. To circumvent this problem, the government charged her by using accomplice liability, arguing that she had aided the man in transporting *herself* across state lines by voluntarily going.[49] Both were convicted, and the female defendant appealed.[50]

The Supreme Court reversed the female defendant's conviction and articulated a rule of statutory construction that serves as an exception to blanket accomplice liability.[51] The Court held that when a statute proscribes

41. *See, e.g.*, United States Court of Appeals for the Third Circuit, Model Criminal Jury Instructions § 7.02, http://www.ca3.uscourts.gov/sites/ca3/files/Chap%207%20July%202014%20Rev.pdf [https://perma.cc/YXJ2-M3TX] ("A person may be guilty of an offense(s) because (he) (she) personally committed the offense(s) (himself) (herself) or because (he) (she) aided and abetted another person in committing the offense.").

42. *See, e.g.*, Salinas v. United States, 522 U.S. 52, 64 (1997).

43. Gebardi v. United States, 287 U.S. 112, 123 (1932).

44. *Id.* at 115–16.

45. White-Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2018)).

46. *Gebardi*, 287 U.S. at 115–16.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 123.

a criminal conspiracy that must involve two classes of individuals, and the statute does not assign principle liability to one of those classes, the government cannot punish the other class via accomplice liability.[52] For example, every "Mann Act conspiracy" involves two classes of individuals: (1) the woman being transported and (2) the person transporting her. By assigning principal liability to one class of individual (the person transporting the woman) and not the other (the woman being transported), Congress showed an affirmative intent *not to punish* the woman being transported; using accomplice liability to punish her would frustrate congressional intent.[53]

Some circuit courts have broadened the *Gebardi* principle.[54] Whereas the *Gebardi* principle initially operated as a rule of statutory construction (meaning the statute's construction itself had to show a legislative intent), some courts now delve into legislative history and congressional records to intuit a policy for or against prosecutorial immunity from accomplice liability.[55] The Second Circuit case *United States v. Amen* provides an example of this broadened interpretation.[56] In *Amen*, the court faced a *Gebardi* question regarding "drug kingpin statutes," special statutes that give heavy penalties to organizers, supervisors, or managers of a continuing criminal enterprise engaged in a series of felony narcotics violations when they are conducted with five or more persons.[57] One of the defendants assisted a kingpin in communicating with his subordinates and performed tasks for the kingpin.[58] Prosecutors sought to charge him with aiding and abetting the kingpin.[59] The Second Circuit, however, held that the man could not be charged with accomplice liability.[60] But instead of relying strictly on the statute's text to infer Congress's intent, the Second Circuit relied on legislative history to conclude that Congress did not intend to hold "lower level individuals" criminally liable under the drug kingpin statutes.[61]

52. *Id.*
53. *Id*.
54. For a discussion about different applications of the *Gebardi* principle, *see generally* Shu-en Wee, Note, *The Gebardi "Principles"*, 117 COLUM. L. REV. 115 (2017).
55. *Id.* at 131.
56. United States v. Amen, 831 F.2d 373, 382 (2d Cir. 1986).
57. *See id.* at 380–82.
58. *Id.* at 376–77.
59. *Id.* at 381.
60. *Id.* at 382.
61. *See id.* ("[The legislative history] makes it clear that the purpose of making [the drug kingpin statute] a new offense rather than leaving it as sentence enhancement was not to catch in the [drug kingpin statute] net those who aided and abetted the supervisors' activities . . . .").

C. PRESUMPTION AGAINST EXTRATERRITORIALITY

Understanding *Hoskins* also requires an understanding of the presumption against extraterritoriality. Although Congress has the authority to apply its law outside of the United States, courts have long presumed that U.S. laws apply only to U.S. states and territories unless Congress clearly indicates otherwise.[62] In the past twenty years, the most famous assertion of the principle comes from *Morrison v. National Australia Bank*, which states that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[63] However, in the past, courts have generally ruled that when a statute has an extraterritorial reach, accomplice liability can cover extraterritorial conduct even when that conduct would not fall under the statue's principal liability.[64]

D. *UNITED STATES V. HOSKINS*

The FCPA, the *Gebardi* principle, and the presumption against extraterritoriality came together in *Hoskins*.[65] *Hoskins* centered around Alstom S.A. ("Alstom"), a multinational company headquartered in France with subsidiaries across the world.[66] The defendant, Lawrence Hoskins, was employed by Alstom's United Kingdom subsidiary and was working in France at the time of the events at issue.[67] The Department of Justice ("DOJ") alleged that, while working in France, Hoskins selected two consultants in the Alstom U.S. subsidiary and authorized them to bribe Indonesian officials.[68] Hoskins himself never worked for Alstom's U.S. subsidiary in a direct capacity,[69] and although Hoskins emailed and called the U.S.-based consultants, he did not travel to the U.S. during the scheme.[70] Because of this, he could not be charged with principally violating the FCPA.[71] So the DOJ turned to accomplice liability and charged him with aiding and abetting

62. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L LAW 85, 85 (1998).

63. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255(2010).

64. *See* Ford v. United States, 273 U.S. 593 (1927); United States v. Inco Bank & Tr. Corp., 845 F.2d 919 (11th Cir. 1988); United States v. Winter, 509 F.2d 975 (5th Cir. 1975); United States v. Lawson, 507 F.2d 433 (7th Cir. 1974); Rivard v. United States, 375 F.2d 882 (5th Cir. 1967).

65. United States v. Hoskins, 902 F.3d 69 (2d Cir. 2018).

66. *Id.* at 72.

67. *Id.*

68. *Id.*

69. *Id*.

70. *Id.*

71. Section 78dd-3 liability is limited to American companies and citizens, and their agents, employees, officers, directors, and shareholders, as well as foreign persons acting on American soil. 15 U.S.C. § 78dd-3 (2018).

the U.S. consultants' FCPA violations.[72] Hoskins sought dismissal of this charge,[73] and the Second Circuit agreed, rejecting the DOJ's use of accomplice liability and holding that, for the purposes of the FCPA, accomplice liability's extraterritorial reach cannot extend beyond the extraterritorial reach of principal FCPA offenses.[74] The court provided multiple justifications for this holding.

First, it relied on the *Gebardi* principle. The court argued that Congress, through text, structure, and legislative history of the FCPA, affirmatively intended not to extend accomplice liability beyond the parties included within the FCPA's principal liability.[75] It argued that because Congress assigned principal liability under the FCPA with "surgical precision," under the backdrop of the presumption against extraterritoriality, Congress intended to limit the extraterritorial application of accomplice liability to the same extent that it limited principal liability.[76] To support this reading of the FCPA, the court pointed to legislative history that suggested that Congress wanted to limit the extraterritorial application of the FCPA.[77]

The court also held that, even if Congress did not show an affirmative intent to exclude foreigners such as Hoskins under the *Gebardi* principle, the presumption against extraterritoriality barred prosecuting Hoskins.[78] It argued that because the FCPA limited the extraterritorial application of substantive liability to a select group, and the presumption against extraterritoriality operates to limit the provisions to their terms, accomplice liability's extraterritorial reach was limited to FCPA's principal liability.[79]

II. ARGUMENT

A. THE FCPA ALLOWS FOR JURISDICTION OVER HOSKINS

1. The Text and Legislative History Do Not Show an Affirmative Intent to Immunize Foreign Nationals from Accomplice Liability

To show an affirmative congressional intent to limit accomplice liability, the court argued that Congress listed the parties it intended to hold liable with "surgical precision."[80] This "surgical precision," when "read

72. *Id.* at 73.
73. *Id*. (citing United States v. Hoskins, 123 F. Supp. 3d 316 (D. Conn. 2015)).
74. *Hoskins*, 902 F.3d at 97.
75. *Id.* at 83–95.
76. *Id.* at 83–85.
77. *See id.* at 85–95.
78. *See id.* at 96.
79. *Id.* at 96–97.
80. *Id.* at 84.

against the backdrop" of the presumption against extraterritoriality, "persuade[d] [the court] that Congress did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability."[81] But this analysis ignores the generally accepted principles that (1) even if an individual cannot be held liable as a principal offender, he or she can still be held criminally liable under accomplice liability,[82] and (2) in a statute with an extraterritorial reach, the extraterritorial reach of accomplice liability extends beyond the statute's principal liability.[83] Congress knew these principles when it wrote the FCPA, and it knew they would apply to the FCPA. Thus, Congress's choice to limit principal liability does not show that it affirmatively intended to limit accomplice liability. The court implicitly admitted this, but found that the FCPA's legislative history showed an affirmative intent to limit accomplice liability.[84]

In its analysis of the legislative history, the court emphasized a major shift in the FCPA during drafting. In the Senate's first draft, individual liability for bribery was chargeable only through accomplice liability statutes.[85] But in March 1977, the Carter Administration expressed concern that relying solely on accomplice liability to charge individuals would create confusion as to who could be held liable.[86] In response, the Senate wrote a bill that carefully delimited individual principal liability.[87] The court argued that this decision to clearly define principal liability showed an affirmative intent by Congress to limit accomplice liability to those who can be charged as principals under the FCPA.[88]

But the legislative history of the House bill reveals a more complicated story. In September 1977, several months after the Carter Administration requested a bill with carefully delimited individual liability, the House completed an amended version of its bill. The bill included carefully

81. *Id.* at 83–84.

82. United States v. Applins, 637 F.3d 59, 76 (2d Cir. 2011) (citing United States v. Viola, 35 F.3d 37, 43 (2d Cir. 1994)); United States v. Weisscredit Banca Commerciale E D'Investimenti, 325 F. Supp. 1384, 1396 (S.D.N.Y. 1971) ("A person may be convicted of conspiracy to commit an offense which he lacks the capacity to commit himself.").

83. *See supra* Section I.C.

84. Compare *Hoskins*, 902 F.3d at 85 (noting, immediately after its discussion of text and structure, that "[t]he question thus becomes whether there is 'something more,' a policy basis for Congress to exclude Hoskins's category of defendants from criminal liability"), *with id.* at 93 ("The strands of the legislative history demonstrate, in several ways, the affirmative policy described above . . . .").

85. *Id.* at 86

86. *Id.*

87. *Id.*

88. *See id.* at 87–88.

delimited individual liability,[89] as the Carter Administration requested, but specifically noted that "*[t]he concepts of aiding and abetting and joint participation would apply to a violation under this bill in the same manner in which those concepts have always applied* in both SEC civil actions and in implied private actions brought under the securities laws generally."[90] Given that extending accomplice liability beyond those who can be charged for as principal offender is a well-established principle, the House clearly expected accomplice liability to extend beyond potential principal offenders of the FCPA, even in a bill that included carefully delimited individual liability. The court pointed out that this was not the final bill,[91] but it failed to show any legislative history for the final bill that even discusses accomplice liability.[92] As such, there is no reason to believe that Congress changed its mind about accomplice liability between the House bill and the final bill, which means Congress did not show an affirmative intent to change the well-established principle that accomplice liability could expand beyond those charged as a principal.

But even if Congress did not want the original FCPA's accomplice liability to extend beyond principal liability, the 1998 Amendments show that Congress wanted accomplice liability to extend beyond principal liability. The legislative history says that:

> Although this section limits jurisdiction over foreign nationals and companies to instances in which the foreign national or company takes some action while physically present within the territory of the United States, Congress does not thereby intend to place a similar limit on the exercise of U.S. criminal jurisdiction over foreign nationals and companies *under any other statute or regulation*.[93]

Given the context of the quote (a discussion about jurisdiction), and that accomplice liability is covered in another statute,[94] Congress was clearly expressing that accomplice liability should not be limited to the extraterritorial reach of the FCPA's principal offenders. Thus, Congress certainly did not affirmatively intend to limit accomplice liability, meaning that the *Gebardi* exception does not apply here.

89. H.R. REP NO. 95-640, at 4 (1977) ("Section 2 also applies to any officer, director, employee, or agent . . . .").

90. *Id*. at 8 (emphasis added).

91. *See Hoskins*, 902 F.3d at 89 ("The final version of the FCPA, agreed to in conference, demonstrated a compromise between the House and Senate versions.").

92. *Id*. at 90 ("The Conference Report made no mention of conspiracy or aiding-and-abetting theories of liability).

93. S. REP. NO. 105-277, at 6 (1988) (emphasis added).

94. *See supra* Section I.B.1.

2. The Presumption Against Extraterritoriality Does Not Limit Accomplice Liability in This Situation

The court concluded that because the FCPA limits the extraterritorial reach of principal liability, it also limits the extraterritorial reach of accomplice liability. But this is incompatible with general principles of accomplice liability. Many cases have held that when Congress writes a statute with extraterritorial reach, accomplice liability can expand beyond the extraterritorial reach of the statute's principal liability.[95] The court argued that the FCPA differs from these cases because those cases "considered statutes prohibiting illegal importation of various items—statutes that certainly contemplated the punishment of extraterritorial action of precisely the kind that the defendants in the cases were convicted."[96]

But this argument has no textual support. Nothing in the "drug importation" statutes upon which these cases were based suggest that Congress contemplated expanding extraterritorial liability for accomplice liability.[97] For example, in *United States v. MacAllister*, a Canadian man bought cocaine over the phone (while in Canada) from an undercover DEA agent.[98] He was arrested for conspiring to violate 21 U.S.C. § 953, which proscribes "export[ing] [narcotics] from the United States."[99] The text of the statute includes a territorial limit: one must export narcotics "from the United States" to be charged under the statute. However, because the statute had an extraterritorial reach, the court allowed the prosecution even though the defendant had *no* territorial or citizenship-based connections to the U.S.[100] Given this principle, it is clear that the presumption against extraterritoriality does not limit the FCPA prosecutions of individuals and foreign individuals like Hoskins, who conspired with Americans to violate the FCPA.

95. *See, e.g.*, Ford v. United States, 273 U.S. 593 (1927); United States v. Inco Bank & Tr. Corp., 845 F.2d 919 (11th Cir. 1988); United States v. Winter, 509 F.2d 975 (5th Cir. 1975); United States v. Lawson, 507 F.2d 433 (7th Cir. 1974); Rivard v. United States, 375 F.2d 882 (5th Cir. 1967); United States v. MacAllister, 160 F.3d 1304 (11th Cir. 1998).

96. *Hoskins*, 902 F.3d at 97.

97. *See* 21 U.S.C. § 952.

98. *MacAllister*, 160 F.3d at 1305–06.

99. 21 U.S.C. § 953 (2018).

100. *MacAllister*, 160 F.3d at 1307–08; *see also Winter*, 509 F.2d at 982 n.24 ("A different question might be presented had these foreign nationals been charged with the substantive offense of unlawful importation or attempt to import. In that event, the Court, in the absence of a showing of agency, aider or abettor, etc., would likely have to determine whether Congress intended the statute in issue to have an extraterritorial effect.").

B. INTERNATIONAL LAWS AND NORMS SUPPORT SUCH PROSECUTIONS

1. The Effects Doctrine Supports Prosecution

Because the court ruled that the FCPA does not allow the government to prosecute Hoskins, it did not continue its analysis. However, as we now know, the FCPA does not limit the extraterritorial application of accomplice liability. This means that the government can prosecute Hoskins if the federal courts have jurisdiction over him. "Principles of international law and United States precedent counsel, however, that . . . jurisdiction only be invoked when U.S. interests are directly involved and when the assertion of U.S. jurisdiction is a reasonable exercise of U.S. sovereignty" under international law and norms.[101] To determine whether jurisdiction is reasonable, U.S. courts have created a test known as the "effects doctrine,"[102] which asks the court to determine whether the defendant's conduct directly and substantially harmed U.S. interests.[103]

In this case, the effects doctrine emphatically supports jurisdiction over Hoskins. Given that only issuers, domestic concerns, and those who use means or instrumentalities of American interstate commerce to bribe an official can principally violate the FCPA's anti-bribery statutes, people who aid principal violators of the FCPA directly and substantially harm American interests. For example, by ordering U.S. citizens to violate the FCPA within U.S. borders, Hoskins directly harmed the American interest in preventing foreign bribery.[104] Courts have ruled that such acts fall under the effects doctrine many times.[105] Therefore, jurisdiction is not an issue here, as charging defendants such as Hoskins would not violate international law or norms.

2. The OECD Anti-Bribery Convention and the Charming Betsy Doctrine do Not Oppose This Type of Prosecution

The prosecution would also need to survive the Charming Betsy Doctrine. The Charming Betsy Doctrine is a canon of statutory construction which states that, when courts interpret American law, they should presume

101. Brown, *supra* note 33, at 320.
102. *Id.* at 328–35.
103. Tamari v. Bache & Co. S.A.L., 730 F.2d 1103, 1108 (7th Cir. 1984).
104. *Hoskins*, 902 F.3d at 103.
105. The courts have often recognized the effects doctrine as justifying jurisdiction over extraterritorial conspiracies. These often involve conspiracies to violate the contraband laws of the United States. *See* United States v. Orozco-Prada, 732 F.2d 1076, 1087–88 (2d Cir. 1984); Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984); United States v. Arra, 630 F.2d 836, 840 (1st Cir. 1980); United States v. Ricardo, 619 F.2d 1124, 1128–29 (5th Cir. 1980).

that Congress did not intend to violate international norms.[106] However, since prosecution of international corruption is a fairly new endeavor, international norms regarding prosecution of corruption are also limited.[107] Accordingly, this Section will look to treaties to determine international corruption norms.

This Section specifically turns to jurisdiction limitations in the OECD Anti-Bribery Convention. Yet, the Convention does not provide jurisdictional limits; rather, it asks states to create anti-bribery laws that cover (1) when the offense is committed in whole or in part in a country's territory and (2) when the country has established through its own laws jurisdiction to prosecute its own nationals abroad.[108] Further, the Convention notes that when two countries' laws assert jurisdiction over the same individual, those countries will consult to determine the proper jurisdiction.[109]

Given that Hoskins can be prosecuted under U.S. jurisdictional principles (the effects doctrine), the Anti-Bribery Convention allows for this extraterritorial prosecution. Further, the consultation requirement in Article Four of the Anti-Bribery Convention implies that the Anti-Bribery Convention allows the DOJ to prosecute Hoskins because it shows that the Anti-Bribery Convention clearly planned for jurisdictional overlaps. Thus, it seems clear that the OECD Convention, at the very least, permits holding foreigners liable under conspiratorial liability. As such, extending accomplice liability to Hoskins faces no Charming Betsy problems.

C. EXPANDING CONSPIRATORIAL LIABILITY AS A MATTER OF POLICY.

Although outside the court's purview, this Section discusses policy issues related to expanding accomplice liability if a congressional solution is needed. Accomplices like Hoskins deliberately undermine American law. So why, as a matter of policy, do some feel that the United States should not prosecute him? Most critics point to one issue: international hostility.[110] They fear that when the United States expands the FCPA's extraterritorial reach, it engages in moral and economic imperialism that will anger the international community.[111] And indeed, extraterritorial application of laws

106. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

107. Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 333 (2009) (noting that although corruption is frowned upon, a norm against corruption is not recognized as jus cogens).

108. *Convention*, *supra* note 23, at 5.

109. See *supra* Section I.A.3.

110. *See generally* Salbu, *supra* note 37 (arguing that extraterritorial enforcement of the FCPA threatens global harmony).

111. *See id.* at 430 (noting that countries with differing cultural standards will make "[d]rawing

can create international hostility; foreign countries have criticized the United States for the extraterritorial reach of its antitrust laws.[112] Indeed, most critics of FCPA enforcement rely on international hostility toward antitrust laws to justify their skepticism toward extraterritorial application of the FCPA.[113]

But analogizing anti-bribery enforcement to antitrust enforcement is misleading: unlike antitrust enforcement, expanding the extraterritorial application of the FCPA does not create a major risk of international hostility. In the last twenty years, "not one meaningful diplomatic rift can be attributed to the enforcement of [the FCPA]" and "no empirical evidence supports the conclusion that anti-bribery laws seriously offend host countries."[114] There are several reasons for this. Unlike antitrust law, in which international attitudes vary widely,[115] every country in the world has condemned and criminalized bribery.[116] As a result, unlike antitrust laws, the U.S. *cannot* engage in moral imperialism regarding the general concept of anti-bribery

lines distinguishing acceptable and unacceptable behavior . . . precarious and may even threaten unjust results at the cut-off point").

112. See Gary E. Dyal, Comment, *The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes*, 6 NW. J. INT'L L. & BUS. 1065, 1065 (1984–1985) ("The extraterritorial enforcement of United States antitrust law against Canadian businesses has been a source of continual conflict between the two nations.").

113. Most empirical studies of American law and foreign relations law focus on antitrust law. Many of these papers attempt to conflate antitrust law and anti-bribery law. *See* Penny Zagalis, Note, *Hartford Fire Insurance Company v. California: Reassessing the Application of the McCarran-Ferguson Act to Foreign Reinsurers*, 27 CORNELL INT'L L.J. 241, 267 n.192 (1994) (discussing British legislation blocking U.S. antitrust laws); *see also* Barry E. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 237–39 (1982) (discussing reactions to extraterritorial application of U.S. antitrust laws); Douglas Michael Ely, Note, *The Noerr-Pennington Doctrine and the Petitioning of Foreign Governments*, 84 COLUM. L. REV. 1343, 1357 & nn.71–72 (1984) (discussing reaction of foreign governments to being involved in U.S. antitrust litigation); Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1318 n.58 (1983) (discussing blocking legislation aimed at extraterritorial application of U.S. antitrust law). Indeed, scholar Philip M. Nichols notes Salbu's article is "[t]he most extensive argument to date claiming that anti-bribery laws constitute an extraterritorial intrusion that will be resented by host countries." Phillip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 647 (2000) (referencing Salbu, *supra* note 37). And while Salbu's article cites thirteen sources, none of them discuss anti-bribery laws directly. Further, while it cites ten scholarly works, nearly all of them deal with extraterritorial application of antitrust laws. *See generally* Salbu, *supra* note 37.

114. Nichols, *supra* note 113, at 645–46.

115. For differences between U.S. and foreign antitrust laws, see generally Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247 (1982); *Antitrust Laws Around the World*, GLOBAL COMPLIANCE NEWS, https://globalcompliancenews.com/antitrust-and-competition/antitrust-laws-around-the-world [https://perma.cc/T34W-AN4B] (providing map that shows many countries in the world have no antitrust or competition laws).

116. Fritz F. Heimann, *Combatting International Corruption: The Role of the Business Community*, *in* CORRUPTION AND THE GLOBAL ECONOMY 147, 149 (1997) ("[S]o-called respect for cultural diversity is usually an excuse for continuing corruption [and] there is no country in the world where bribery is legally or morally acceptable.").

enforcement because the entire world agrees that it is wrong.

Additionally, expanding accomplice liability under the FCPA would cause less international backlash because expanded accomplice liability under the FCPA would not reach nearly as far as antitrust laws. American antitrust law extends principal liability to anyone whose conduct meets the effects doctrine.[117] This allows antitrust legislation to reach conspiracies in which none of the principal offenders of U.S. law have a territorial or nationality-based connection to the United States.[118] Expanding extraterritorial application of accomplice liability under the FCPA would not have the same result. Accomplices could be charged only if they act in concert with a principal offender. Given that principal offenders of the FCPA must be connected to the United States through citizenship or territoriality,[119] accomplice liability would naturally limit itself to accomplices who take part in conspiracies that either directly involve U.S. citizens or take place on U.S. territory. Thus, expanding extraterritorial application of accomplice liability under the FCPA would not create a risk of runaway jurisdiction and would not trigger international hostility.

CONCLUSION

The *Hoskins* decision creates an incoherent FCPA enforcement scheme. After the *Hoskins* decision, the U.S. government can charge foreigners who act as a mere agent to a U.S. criminal conspiracy from outside of the United States, but cannot charge foreigners who *organize and lead* a U.S. criminal conspiracy from outside of the United States.[120] This obviously incoherent scheme leaves U.S. officials unable to police corporations' upper management. And this hole in enforcement is important. According to the OECD, two-thirds of foreign bribery conspiracies involve "top corporation officials," and virtually all foreign bribery conspiracies involve corporation management.[121] Limiting extraterritorial application of accomplice liability

117. *See* Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 6–16 (1992) (discussing liability under the Sherman Act and the Clayton Act, and the evolution of the effects doctrine to determine the limit of extraterritorial liability under these acts).

118. For example, in the famous *Amax Potash Ltd. v. Saskatchewan* case from the Supreme Court of Canada, United States regulators sought an injunction against Saskatchewan residents who were price fixing a deposit of potash in their region. This type of principle liability based on vague effects on the United States, without a territorial or nationality basis the action, received condemnation from Saskatchewan officials. Robert Trumbull, *Canadians Score U.S. Tie of Saskatchewan to Potash Price Fixing*, N.Y. TIMES, Aug. 31, 1976, at 37.

119. *See* 15 U.S.C. §§ 78dd-1 to 78dd-3 (2018).

120. *See* United States v. Hoskins, 902 F.3d 69, 102 (2d Cir. 2018) (Lynch, J., concurring).

121. ORG. FOR ECON. CO-OPERATION AND DEV., OECD BUSINESS AND FINANCE OUTLOOK 2017 101 (2017).

will leave prosecutors unable to police the group that creates and facilitates most foreign bribery.

To avoid this problem, this Note proposes two solutions. First, Congress should pass a law to expand the extraterritorial reach of accomplice liability under the FCPA to the limits of U.S. courts' jurisdiction under the effects test. Unfortunately, this kind of legislation is unlikely for the time being, given that President Trump does not support the FCPA or statutes fighting foreign bribery.[122] However, given the Democratic Party's recent focus on anti-corruption,[123] a change in party power might make such a bill possible.

Second, the Supreme Court could hold that the extraterritorial reach of accomplice liability is not limited to the extraterritorial reach of the FCPA's principal liability. This would probably require the DOJ to force a circuit split, which would be easy to accomplish. The Seventh Circuit currently takes a much narrower interpretation of the *Gebardi* principle that would likely not apply to the FCPA.[124] However, this issue would take years to work its way through the courts, meaning that for the time being, the DOJ's ability to combat foreign corruption will remain weakened and damaged by its inability to enforce the FCPA against those who seek to undermine it.

122. Jim Zarroli, *Trump Used to Disparage an Anti-Bribery Law; Will He Enforce It Now?*, NAT'L PUB. RADIO (Nov. 8, 2017), https://www.npr.org/2017/11/08/561059555/trump-used-to-disparage-an-anti-bribery-law-will-he-enforce-it-now [https://perma.cc/3TXH-SG67] (noting that President Donald Trump has called the FCPA "ridiculous" and "a horrible law").

123. Catie Edmondson, *House Democrats Will Vote on Sweeping Anti-Corruption Legislation. Here's What's in It.*, N.Y. TIMES (Mar. 7, 2019), https://www.nytimes.com/2019/03/07/us/politics/house-democrats-anti-corruption-bill.html [https://perma.cc/7N8F-UCJ4] (noting that Democrats have made anti-corruption legislation a high priority in their party platform).

124. For a discussion on the Seventh Circuit's interpretation of the Gebardi principal, s*ee* Wee, *supra* note 54, at 125–29.