United States v. Hoskins: An Originalist Approach to the Foreign Corrupt Practices Act

I. OVERVIEW

Lawrence Hoskins, a resident of the United Kingdom, allegedly participated in a scheme to bribe Indonesian officials in order to secure a $118 million contract, making him a potential target for liability under the Foreign Corrupt Practices Act (FCPA).[1] However, as a foreigner who had not entered the United States during the period in question, it was not immediately clear whether Hoskins would face liability under the FCPA.[2] At the time Hoskins allegedly participated in the bribery scheme, he worked for the United Kingdom subsidiary of Alstom S.A., a company headquartered in France that provided transportation and power services around the world.[3] The government alleged that the United States subsidiary, along with Alstom S.A., hired consultants to bribe Indonesian officials to win a large business contract.[4] The United States Government contended that Hoskins was directly involved in the scheme because he was "one of the people responsible for approving the selection of, and authorizing payments to, [the consultants]."[5] The government asserted that parts of the scheme occurred in the United States because Alstom kept funds in American banks and deposited them directly to the consultants, and executives of the American subsidiary had telephone and email conversations in the United States concerning the bribery.[6] While the government argued that several events occurred on United States soil, it

1. United States v. Hoskins, 902 F.3d 69, 72 (2d Cir. 2018).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* (quoting the third overarching indictment).
6. *Id.*

also conceded that Hoskins never traveled to the United States in connection with the bribery scheme.[7]

The government brought twelve counts against Hoskins for which this appeal addressed the first seven.[8] In Hoskins' motion for dismissal of Count One, he argued that the FCPA enumerated very specific categories of defendants that could be charged under the statute and further asserted that he did not fit into any of them.[9] The government's motion in limine, which concerned the subsequent counts, sought to prevent Hoskins from arguing that the government had to prove that he fit within one of the categories of the FCPA *before* it could charge him with conspiracy or aiding and abetting.[10] The court below dismissed Count One because Hoskins did not fit within any of the enumerated categories of the FCPA; however, the court denied dismissal of the other counts because he could still be convicted of conspiracy or aiding and abetting as an agent of the United States subsidiary.[11] The government appealed these rulings, and the Second Circuit addressed whether a foreign individual could be convicted of violating the FCPA, or in the alternative, conspiring or aiding and abetting a violation of the FCPA.[12] The United States Court of Appeals for the Second Circuit *held* that the government may not charge a foreign individual with violating the FCPA if that individual has not committed a crime within the United States, but it may attempt to prove the foreign individual is an agent of domestic concern for Second Object of the Conspiracy liability. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

II. BACKGROUND

A. Beginnings of the FCPA

The FCPA came to fruition in the 1970s, and commentators have described it as a "pioneering statute" because it paved the way for regulating business interactions in foreign markets and with foreign nations.[13] During the time of the statute's inception, Congress learned that American companies routinely participated in illegal payments to foreign

7. *Id.*
8. *Id.*
9. *Id.* at 73.
10. *Id.*
11. *Id.* at 74.
12. *Id.*
13. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 930, 1003 (2012).

governments and companies.[14] Following the Watergate scandal, some members of Congress took a staunch position against bribery, and in particular, Representative Stephen Solarz acknowledged that the mere fact that many other countries participated in this conduct "[was] no excuse for American citizens to engage in such scandalous activities as well."[15] Many in Congress worried that these changes in foreign relational policy would lead other countries to resent the United States for imposing stricter business standards upon them.[16] However, Representative Solarz argued that most countries already had laws against bribery, so the United States would not be imposing its laws on those countries.[17] However, many still felt uneasy about strictly enforcing the FCPA, and in particular, Congress struggled with how far to extend the FCPA because it did not want to "police the internal affairs of foreign states."[18] Those rallying against strict application of the FCPA believed imposing stringent standards on foreign governments would undermine "the most important objectives of [the United States'] foreign policy."[19] Others worried the FCPA would leave the United States disadvantaged in the global market, but those supporting the Act agreed a slight disadvantage in business interactions would be a small trade-off to promote ethical business dealings in the global market.[20]

In its struggle to find an adequate compromise, Congress amended the FCPA twenty times over the course of two years, and it purposely limited its scope to a "narrow category of foreign recipients" and a narrow range of "actionable payments."[21] The first category over which FCPA liability extended included securities issuers that made corrupt payments to foreign officials using interstate commerce.[22] The next category included American companies and citizens who used interstate commerce to pay bribes to foreign officials.[23] The last category covered anyone using interstate commerce to make corrupt payments to foreign officials "while in the territory of the United States."[24] Congress added the last category in its 1998 amendment, and throughout the amendment process, Congress sought only to clarify the Act's vague language rather than to change its

14. *Id.* at 932-33.
15. *Id.* at 943.
16. *Id.* at 945.
17. *Id.*
18. *Id.* at 966.
19. *Id.*
20. *Id.* at 975.
21. *Id.* at 980, 1003.
22. 15 U.S.C. § 78dd-1 (1998).
23. *Id.* at § 78dd-2.
24. *Id.* at § 78dd-3.

original meaning.[25] Congress felt compelled to amend the FCPA in 1998 because, as some had previously feared, American businesses faced disadvantages in global business, so the amendment focused on encouraging trade partners to create legislation like the FCPA in order to give American businesses equal opportunities.[26]

B. Conspiracy Liability

Like the FCPA, criminal statutes in America underwent many changes, and the establishment of statutes relating to crimes such as aiding and abetting and conspiracy solidified conspiracy liability in criminal jurisprudence.[27] In 1833, the Supreme Court in *United States v. Mills* recognized that a person who assists another in committing a crime should also face punishment as if they had committed the crime themselves.[28] With conspiracy liability, subsequent courts were able to assign liability to those who did not commit the substantive violation but who nonetheless committed an act in furtherance of a crime.[29] However, exceptions to the general rule of conspiracy liability emerged in situations where one party could not have committed the crime as the principal actor.[30] In *Gebardi v. United States*, the Supreme Court analyzed the Mann Act, which penalized individuals who knowingly transported or aided in transporting a woman across state lines for immoral purposes.[31] The Supreme Court in *Gebardi* refused to hold a woman liable for violating the Mann Act because the Act did not specifically criminalize a woman's acquiescence to the crime, and because it did not contemplate punishing a woman for transporting herself.[32] Accordingly, the Court also reversed the man's conviction because he could not have conspired with the woman to violate the Mann Act since she could not have committed the crime.[33]

The Second Circuit followed in the Supreme Court's footsteps of using an originalist interpretation by determining that Congress intended to limit the scope of liability to only "ringleaders of large-scale narcotics

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25. Robin Miller, Annotation, *Construction and Application of Foreign Corrupt Practices Act of 1977*, 6 A.L.R. Fed. 2d. 351, § 2 (2005).
26. S. REP. NO. 104-277 (1998).
27. *See* 18 U.S.C. § 2 (1998); *id.* § 371 (1998).
28. United States v. Mills, 32 U.S. 138, 141 (1833).
29. *See* Salinas v. United States, 522 U.S. 52, 66 (1997); United States v. Rabinowich, 238 U.S. 78, 86 (1915).
30. Gebardi v. United States, 287 U.S. 112, 123 (1932).
31. *Id.* at 118.
32. *Id.* at 118-19.
33. *Id.* at 123.

operations" under the Comprehensive Drug Abuse Prevention and Control Act of 1970.[34] The Supreme Court described the continuing criminal enterprise statute as "aimed at a special problem" and "designated to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers."[35] Because of the Second Circuit's narrow interpretation of the statute, one of the defendants in *United States v. Amen* escaped liability because the court interpreted the statute to mean that Congress intended to convict those in charge rather than minor actors in the criminal enterprise.[36] Accordingly, the Second Circuit has affirmatively adopted the practice of employing originalism in analyzing criminal statutes, which continues to allow those individuals not specifically enumerated in a statute to avoid liability as a principal offender.[37]

C. Originalism in American Jurisprudence

A court has several choices when determining which method to employ to interpret a statute, and many courts and judges have used originalism, which determines what a legislative body may have intended the statute to mean at the time of drafting.[38] Initially, originalism employed the use of "original intent," which is described as the "subjective intention of the drafters or ratifiers of an authoritative text."[39] However, many who initially relied on the subjective intent of the drafters have shifted to a more objective test that interprets the original "meaning" rather than the original "intent."[40] By employing the use of originalism, courts effectively curtail judicial activism because originalism "requires a basis in historical evidence for the constitutional text's original meaning, and thus ultimately yields a foundation for constitutional adjudication that is objective and reliable (not subjective and variable)."[41] Commentators have deemed some methods of determining original meaning more reliable than others.[42] Courts rely on legislative history to determine the

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34. United States v. Amen, 831 F.2d 373, 381 (2d Cir. 1987).
35. *Id.*; Garrett v. United States, 471 U.S. 773, 781 (1985).
36. *Amen*, 831 F.2d at 382.
37. *Id.*
38. Emily C. Cumberland, *Originalism in a Nutshell*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 52, 52 (2010).
39. *Original Intent*, BLACK'S LAW DICTIONARY (10th ed. 2014).
40. Cumberland, *supra* note 38.
41. *Id.* at 54; *see also* Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 1 (2007).
42. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641 (1990); *see also* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1130 (1983).

"history and progress" of a bill, and this helps to better show the conditions and intentions surrounding the document.[43] However, some have argued that hearings and floor debates in Congress offer too unreliable a view of legislative history to show true "external context."[44] In particular, determining the intent of an entire legislative group poses difficulty, as some members of the group most likely did not share their opinions outwardly.[45] However, even with the difficulty of assuring that legislative history provides an accurate picture of the beginnings of a statute, it serves a useful purpose of providing "reassurance" in more difficult cases and can be useful to "support, but not to overturn, meaning-in-context."[46]

III. COURT'S DECISION

In the noted case, the Second Circuit found that Hoskins could not be convicted for violating the FCPA because the statute did not specifically reference foreign individuals acting outside of the United States; however, the court left open the possibility that if the government could prove Hoskins was an agent of the United States subsidiary, it could also prove that he committed the Second Object of the Conspiracy.[47] In its opinion, the court noted that its inquiry into the proper interpretation of the FCPA would focus on identifying an "affirmative legislative policy," which could be achieved by analyzing the "statute's text, structure, and legislative history."[48]

The court first provided background by introducing the concept of conspiracy liability by citing cases and statutes that expanded the meaning of conspiracy and complicity within common law understanding.[49] The court asserted the general rules for conspiracy and accomplice liability, which Congress has codified in statutes.[50] Along with the general rules, the court acknowledged the Affirmative Legislative Policy Exception, for which Congress intended that certain individuals could avoid accomplice liability, such as in a situation where a consenting participant in statutory rape would not be charged with the crime but would rather be treated as a

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43. R.E.H., *Resort to Constitutional or Legislative Debates, Committee Reports, Journals, etc., as Aid in Construction of Constitution or Statute*, 70 A.L.R. 5 (1931).

44. Eskridge, *supra* note 42, at 641; Dickerson, *supra* note 42, at 1131-32.

45. Eskridge, *supra* note 42, at 642.

46. Dickerson, *supra* note 42, at 1135.

47. United States v. Hoskins, 902 F.3d 69, 97-98 (2d Cir. 2018).

48. *Id.* at 81.

49. *Id.* at 76-80.

50. *See* 18 U.S.C. § 371 (1998); *id.* § 2(a); *see also* MODEL PENAL CODE AND COMMENTARIES § 2.06, at 296 (AM. LAW. INST. 1985).

victim of the crime under law.[51] The court determined that the exception would only apply when Congress affirmatively intended to leave a category of individuals unpunished.[52] Using the test from *Gebardi*, the court determined that in order to qualify for the exception, there had to be "something more" than a mere agreement by the actors of a crime that one of them could not be punished.[53] To determine whether there was "something more" the court sought to undertake its "over-arching obligation to give effect to congressional intent" with full consideration first given to the actual text of the statute.[54]

In analyzing the FCPA's scope, the court rejected the government's contention that the holding in *Gebardi* hindered the court from analyzing Congress' intent in finding conspiracy liability.[55] The government argued that *Gebardi* only diminished liability for conspiracy when (1) "the defendant's consent or acquiescence is inherent in the [substantive] offense," or (2) "the defendant's participating in the crime is frequently, if not normally a feature of the [substantive] criminal conduct."[56] The court rejected the government's first argument because of its reliance on Wharton's Rule, which the Supreme Court in *Gebardi* specifically distinguished from by stating that it did not rest its conclusion on the theories of cases governed by Wharton's Rule.[57] The government's second argument focused on whether the defendant's participation was "frequently, if not normally" a feature of the crime, which the court dismissed simply because in certain situations, an individual's participation is always required—like under the Mann Act where a woman's participation is required in every instance.[58]

In a last ditch effort to find against an exception, the government attempted to analogize the holding of *Ocasio v. United States* to the current case to no avail.[59] In *Ocasio*, the Supreme Court held that a person's inability to commit the substantive crime did not preclude them from conspiracy charges, even if petitioners could not obtain money "from

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51. *Hoskins*, 902 F.3d at 78.
52. *Id.* at 80.
53. *Id.*; Gebardi v. United States, 287 U.S. 112, 121 (1932).
54. United States v. Bonanno Organized Crime Fam. of La Cosa Nostra, 879 F.2d 20, 21 (2d Cir. 1989); *see also* Blackfeet Tribe of Indians v. State of Mont., 729 F.2d 1192, 1205 (9th Cir. 1984); *see also* Neth. Shipmortgage Corp. v. Madias, 717 F.2d 731, 733 (2d Cir. 1983).
55. *Hoskins*, 902 F.3d at 81.
56. *Id.* (quoting the appellants opening brief).
57. *Id.*; *Gebardi*, 287 U.S. at 122; *see* United States v. Dietrich, 126 F. 664, 667 (D. Neb. 1904) (describing Wharton's Rule).
58. *Hoskins*, 902 F.3d at 82.
59. *Id.* at 82-83.

another" because the money was their own, and the Hobbs Act did not specifically address this activity.[60] The government in the noted case attempted to describe the holding in *Ocasio* as a "narrowing of the affirmative-legislative-policy exception"; however, the court determined that it was merely a "reaffirmation of [a] common-law principle."[61]

After refuting the government's many arguments against finding an exception in this case, the court found the "something more" test from *Gebardi* and *Amen* was met because of the following: (1) the text of the FCPA explicitly laid out who could be convicted under it, (2) a "well-established principle" suggests that a statute may not be applied extraterritorially without Congress' express intent, and (3) legislative history shows that Congress specifically intended to narrow the scope of the FCPA.[62]

The court next sought to substantiate the arguments it had made by conducting an in-depth analysis of the text and structure of the FCPA.[63] Comparing the noted case once again to *Gebardi*, the court concluded that even more so in this case, the FCPA's text clearly indicates no liability for Hoskins because of its "utter silence regarding the class of defendants involved in this case."[64] Put simply, the court acknowledged that the FCPA has "no text that creates any liability whatsoever for the class of persons in question."[65] The structure of the FCPA also did not leave room for liability for anyone besides the enumerated groups because Congress meticulously included every combination of person or entity that could be liable except for foreign individuals not present in the United States.[66] Because of Congress' explicit inclusion of multiple combinations of persons under the FCPA, the court viewed its exclusion of foreign nationals acting outside the United States as an "obvious omission."[67]

Lastly, the court sought to analyze the legislative history of the FCPA.[68] In doing so, the court quoted language from *E.E.O.C. v. Arabian American Oil Co.*, in which the Supreme Court concluded that courts do not apply American law extraterritorially unless "the affirmative intention

60. Ocasio v. United States, 136 S. Ct. 1423, 1433-34 (2016).
61. *Hoskins*, 902 F.3d at 83.
62. *Id.* at 83-84; United States v. Bodmer, 342 F. Supp. 2d 176, 188-89 (S.D.N.Y. 2004) (holding that the FCPA's language is not ambiguous).
63. *Hoskins*, 902 F.3d at 84-85.
64. *Id.* at 84.
65. *Id.*
66. *Id.*
67. *Id.* at 85.
68. *Id.*

of the Congress [is] clearly expressed."[69] Thus, the court asserted that Congress was aware of this issue when drafting the FCPA because of the United States' reasonable practice of avoiding unnecessary conflict with other countries.[70] In its analysis of legislative history, the court acknowledged the struggle that went into creating an appropriate anti-bribery bill that would balance criminalizing unlawful conduct while also protecting foreign persons from unnecessary liability.[71] In analyzing extraterritoriality issues, the court used the framework from *RJR Nabisco, Inc. v. European Community*, which determined (1) "whether the presumption against extraterritoriality ha[d] been rebutted" and (2) "whether the case involve[d] a domestic application of the statute."[72] After analyzing these factors, the Second Circuit concluded that the statute had clear territorial limitations, which demanded the court find that Hoskins did not fit within any of the enumerated categories of the FCPA.[73]

IV. ANALYSIS

In analyzing the history of the FCPA, the Second Circuit transformed a seemingly difficult case of conspiracy liability into a simple one by asking: what does the statute actually say and mean?[74] Prior to this case, only a few cases had encountered the question of which groups of persons fit within the limits of the FCPA, and this case upheld prior rulings that the FCPA explicitly allocated specific groups of people to face liability.[75] However, along with a straightforward interpretation of the statute, the court placed emphasis on congressional hearings and floor debates, which some commentators have criticized for being unreliable for determining the "external context" of a statute.[76] One could potentially argue the court placed too much importance on the subjective intent of Congress; however, because the court used legislative history as a means of support for its textual and structural claims rather than its entire argument, it is unlikely a critic would deem the court's decision as too speculative.[77]

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69. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).
70. *Hoskins*, 902 F.3d at 85.
71. *Id.* at 86.
72. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016).
73. *Hoskins*, 902 F.3d at 98.
74. *Id.* at 81.
75. *See* United States v. Castle, 925 F.2d 831, 836 (5th Cir. 1991); United States v. Bodmer, 342 F. Supp. 2d 176, 185 (S.D.N.Y. 2004).
76. Eskridge, *supra* note 42, at 641; Dickerson, *supra* note 42, at 1131-33.
77. Dickerson, *supra* note 42, at 1135.

The court acknowledged that its most important and compelling inquiry in this case was into the language of the statute itself.[78] While recognizing it would place the most emphasis on the "statutory scheme as a whole," the court determined that if their analysis failed to produce a clear picture of the language of the statute, it could resort to legislative history to help explain conflicting understandings.[79] In its undertaking, the court analyzed the words of the statute meticulously and determined that the FCPA's "utter silence" regarding defendants like Hoskins meant that Congress did not contemplate liability for foreign individuals outside the United States.[80] Before directly turning to legislative history, the court turned to the structure of the FCPA as its second inquiry, which produced compelling evidence in favor of Hoskins.[81] Because Congress did not explicitly exclude foreign individuals living and working outside the United States from liability, an analysis of the groups Congress specifically included led the court to determine that liability for individuals like Hoskins was not contemplated.[82]

Following the court's in-depth analysis of the FCPA's text and structure, commentators against using unnecessary legislative history might have suggested that the court could find for Hoskins without having to delve into Congress' intent.[83] However, because the court had determined Hoskins did not fit within a class of defendants under the FCPA during its textual and structural analysis, its examination of legislative history was used to bolster what it had already determined as true.[84] Past cases have held that policy considerations may be addressed, but only after interpreting a statute's "plain meaning."[85] It is clear that the court's main argument focused on the textual and structural interpretation of the statute, and its discussion of legislative history and foreign policy considerations merely acted to bolster an otherwise convincing argument.[86]

78. Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978).
79. Raila v. United States, 355 F.3d 118, 120 (2d Cir. 2004); United States v. Gayle, 342 F.3d 89, 92-94 (2d Cir. 2003).
80. United States v. Hoskins, 902 F.3d 69, 84 (2d Cir. 2018).
81. *Id.* at 84-85.
82. *Id.*
83. Eskridge, *supra* note 42, at 642; Dickerson, *supra* note 42, at 1130.
84. *See Hoskins*, 902 F.3d at 84-95.
85. Hofkin v. Provident Life & Acc. Ins. Co., 81 F.3d 365, 370-31 (3d Cir. 1996).
86. *See Hoskins*, 902 F.3d at 84-95.

V. CONCLUSION

The Second Circuit in this case used the text, structure, and legislative history of the FCPA in order to effectively analyze its meaning and apply it to foreign defendant, Lawrence Hoskins. In analyzing whether Hoskins could face liability under the FCPA, the court employed a plethora of techniques to substantiate its holding, and none were more persuasive than a simple, straightforward reading of the actual text of the statute. The court's decision to survey the FCPA's legislative history further reinforced the court's credibility by providing background on Congress' actual intent in drafting the text of the Act. Policy considerations weighed heavily in favor of finding Hoskins not liable under the FCPA, especially in light of Congress' apprehension when drafting the Act because of its potential for upsetting foreign business relations. Coupled with the court's deep analysis of the text and structure of the Act, the foreign policy considerations acted to reinforce the court's holding—despite some commentators' concerns that testimony of this type proves unreliable in determining true congressional intent. Ultimately, the court upheld a traditional originalist approach by examining the meaning and structure of the words as intended by Congress to determine that Lawrence Hoskins could not face direct liability under the FCPA.

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