Washington and Lee Law Review Online

Volume 74 | Issue 1 Article 13

11-29-2017

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Michael F. Dearington
Arent Fox LLP

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Abstract

Last year, the United States Supreme Court decided a Hobbs Act conspiracy case that could significantly expand the bounds of the general federal conspiracy statute. In Ocasio v. United States*, 136 S. Ct. 1423 (2016), the Court held that, under "age-old principles of conspiracy law," a police officer could conspire with shop owners to extort those very same shop owners in violation of the Hobbs Act. The corollary is that a shop owner can, in theory, conspire to extort himself. If a shop owner can conspire to extort himself as a matter of law, why can't a bribe-taking foreign official conspire to bribe himself in violation of the Foreign Corrupt Practices Act ("FCPA")? This Article posits that, under* Ocasio*'s flawed holding, and contrary to the oft-cited Fifth Circuit decision,* United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) (per curiam), he probably can.*

* Michael F. Dearington is an attorney at the Washington, D.C., office of Arent Fox LLP, where he focuses his practice on complex civil litigation and government investigations. He previously clerked for the Honorable José A. Cabranes of the United States Court of Appeals for the Second Circuit, and is a graduate of Vanderbilt University Law School and Trinity College. The views expressed herein are his alone, and the information provided by the author is not intended to be legal advice, nor does it create an attorney-client relationship.

Table of Contents

I. Introduction

Just last year, the United States Supreme Court decided a Hobbs Act conspiracy case that could significantly expand the bounds of the general federal conspiracy statute.[1] Few have taken notice. In *Ocasio v. United States*,[2] the Court held that, under "age-old principles of conspiracy law," a police officer could conspire with shop owners to extort those very same shop owners in violation of the Hobbs Act.[3] The corollary is that a shop owner can, in theory, conspire to extort himself.[4] If a shop owner can conspire to extort himself as a matter of law, why can't a bribe-taking foreign official conspire to bribe himself? This Article posits that, under *Ocasio*'s flawed holding, and contrary to the

1. 18 U.S.C. § 371 (2012).

2. 136 S. Ct. 1423 (2016).

3. *See id.* at 1427 (rejecting the argument that a police officer "cannot be convicted of conspiring with . . . shop-owners to obtain money from them under the color of official right . . . . because it is contrary to age-old principles of conspiracy law").

4. *See id.*

oft-cited Fifth Circuit decision *United States v. Castle*,[5] he probably can.

This Article first analyzes the *Ocasio* decision and argues that the Supreme Court misapplied two early conspiracy-law decisions, *United States v. Holte*[6] and *Gebardi v. United States*,[7] in reaching its anomalous holding in *Ocasio*.[8] The Article then turns its focus to a logical extension of *Ocasio*'s holding: Although the Fifth Circuit's longstanding *Castle* decision previously precluded federal prosecutors from charging bribe-taking foreign officials with conspiracy to violate the Foreign Corrupt Practices Act ("FCPA")—leaving them to pursue other, more creative charges—*Ocasio*'s holding casts doubt on *Castle* and could enable prosecutors to charge bribe-taking foreign officials with FCPA conspiracy.[9]

II. Ocasio v. United States*: The Supreme Court's Questionable Distillation of "Longstanding Principles of Conspiracy Law"*

In *Ocasio*, the Supreme Court held that "[u]nder longstanding principles of conspiracy law, a defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he entered into a conspiracy that had as its objective the obtaining of property from another conspirator with his consent and under color of official right."[10] In other words, a police officer can conspire *with* a shop owner to extort the shop owner; and a shop owner can theoretically conspire to extort himself.[11] As

5. *See* United States v. Castle, 925 F.2d 831, 835–36 (5th Cir. 1991) (per curiam) (declining to "extend the reach of the FCPA through the application of the conspiracy statute" to bribe-taking foreign officials).

6. 236 U.S. 140 (1915).

7. 287 U.S. 112 (1932).

8. *Infra* Part II.

9. *Infra* Part III.

10. United States v. Ocasio, 136 S. Ct. 1423, 1429 (2016).

11. *See id.*; Kate Stith, *No Entrenchment: Thomas on the Hobbs Act, the*

explained in this section, however, the Court based its curious holding on two Mann Act cases that turned on the Mann Act's particular legislative history—and that cannot be neatly grafted onto a Hobbs Act conspiracy case.

A. The Ocasio *Decision*

The facts of *Ocasio* are straightforward. Various Baltimore police officers participated in a kickback scheme whereby they would persuade vehicle owners who were involved in traffic accidents to take their damaged vehicles to a particular auto-repair shop, and in return the shop owners would pay the officers kickbacks for each vehicle they consequently repaired.[12] The petitioner, a former police officer who had been convicted of conspiracy to violate the Hobbs Act, argued that as a matter of law he could not have conspired with the shop owners to obtain money from them under color of official right—essentially because the shop owners could not conspire with the officer to extort themselves.[13]

Despite the argument's logical appeal, a divided Supreme Court, with Justice Alito writing for the majority, upheld the officer's conspiracy conviction.[14] The Court began by examining black-letter law interpreting the general federal conspiracy statute: "The government does not have to prove that [a] defendant intended to commit the underlying offense himself/herself," the Court explained.[15] "Instead, '[i]f conspirators have a plan which calls for some conspirators to perpetrate the

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Ocasio Mess, and the Vagueness Doctrine, 127 YALE L.J. FORUM 233, 236 (2017) ("To be clear, as strange as it sounds, *Ocasio* held that a Hobbs Act 'victim' can 'conspire' in his own extortion.").

12. *See Ocasio*, 136 S. Ct. at 1427–28.

13. *See id.* at 1427 (describing the petitioner's argument that "as a matter of law, he cannot be convicted of conspiring with the shop owners to obtain money from them under color of official right").

14. *See id.* at 1436 (upholding the petitioner's conspiracy conviction).

15. *Id.* at 1429.

crime and others to provide support, the supporters are as guilty as the perpetrators.'"[16] For instance,

> [A] person may conspire to commit burglary without agreeing to set foot inside the targeted home. It is enough if the conspirator agrees to help the person who will actually enter the dwelling, perhaps by serving as a lookout or driving the getaway car. Likewise, "[a] specific intent to distribute drugs oneself is not required to secure a conviction for participating in a drug-trafficking conspiracy."[17]

Thus, under *Ocasio*, a shop owner need not commit a substantive Hobbs Act offense as a predicate to a conspiracy charge, so long as he conspired with another who would do so.[18] This principle did not resolve the ultimate question, though, because the shop owner was not even *capable* of obtaining money from himself under color of official right; so how could he conspire to do so? The Court had an answer to that question, too.

The Court explained that a person may be convicted of conspiracy even if the person is *incapable* of committing the substantive offense himself.[19] The Court waded into murkier waters to illustrate this point, however, examining two early Mann Act cases: *United States v. Holte*[20] and *Gebardi v. United States*.[21] Section 2 of the Mann Act essentially provided that it was illegal to knowingly cause to be transported a woman or girl across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose."[22] In *Holte* and *Gebardi*, the

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16. *Id.* at 1429–30 (quoting Salinas v. United States, 522 U.S. 52, 64 (1997)).

17. *Id.* at 1430 (quoting United States v. Piper, 35 F.3d 611, 614 (1st Cir. 1994)).

18. *Id.*

19. *See id.* at 1430 (commenting that a conspirator may be convicted even though he is incapable of committing the substantive offense himself).

20. 236 U.S. 140 (1915).

21. 287 U.S. 112 (1932).

22. White-Slave Traffic Act of 1910 (the "Mann Act"), 61 Cong. Ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421(a) (2012)).

Supreme Court addressed whether and when a woman or girl could be charged with conspiracy to transport *herself* across state lines for an immoral purpose.[23] In both decisions, the Court reasoned that "an agreement to commit an offense may be criminal, though its purpose is to do what some of the conspirators may be free to do alone,"[24] and he may also conspire to commit a crime that he is incapable of committing himself.[25] The Court in *Holte* and in *Gebardi* also noted that the Mann Act did not implicate an exception to conspiracy liability that has come to be known as Wharton's Rule[26]—where "concurrence [is]

23. *See Gebardi*, 287 U.S. at 118–119; *Holte*, 236 U.S. at 144.

24. *Gebardi*, 287 U.S. at 120; *see also Holte*, 236 U.S. at 144 ("[A] conspiracy to accomplish what an individual is free to do may be a crime, and even more plainly a person may conspire for the commission of a crime by a third person." (citations omitted)). The Court in *Holte* relied on Drew v. Thaw, 235 U.S. 432 (1914), where the Supreme Court denied habeas relief to a defendant charged with conspiring with others to secure his escape from a mental-health facility, even though the defendant, according to the defense, could not be charged with the escape itself. *Id.* at 440. Whether a defendant can be charged with conspiracy, the *Drew* Court explained, "depends on the statute. It is perfectly possible and even may be rational to enact that a conspiracy to accomplish what an individual is free to do shall be a crime." *Id.* at 438.

25. *Holte,* 236 U.S. at 144; *see Gebardi*, 287 U.S. at 120–21 ("Incapacity of one to commit the substantive offense does not necessarily imply that he may with impunity conspire with others who are able to commit it."). For instance, "a conspiracy with an officer or employee of the government or any other for an offense that only he could commit has been held for many years to fall within the conspiracy section," and "a woman may conspire to procure an abortion upon herself when under the law she could not commit the substantive crime and therefore, it has been held, could not be an accomplice," even though "there may be a degree of cooperation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor was not a crime in the purchaser although it was in the seller." *Holte*, 236 U.S. at 144–45.

26. *See, e.g.*, Iannelli v. United States, 420 U.S. 770, 782–83 (1975) ("The classic Wharton's Rule offenses—adultery, incest, bigamy, dueling—are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. . . . and the immediate consequences of the crime rest on the parties themselves rather than on society at large."). In *Iannelli*, the Supreme Court noted that its "most complete description of the [Wharton's Rule] appears in" *Gebardi*. *See id.* at 774 n.8. But the Court noted that "Wharton's Rule owes its name to Francis Wharton, whose treatise on criminal law identified the doctrine and its fundamental rationale." *Id.* at 773. The Court in *Iannelli* added that a third-party exception to the classic Wharton's Rule

necessary to effect [the] crime"[27]—because a woman could be transported for an immoral purpose without her consent or complicity.[28] *Holte* and *Gebardi* require further explication to understand their relevance to the facts in *Ocasio*.

In *Holte*, in a concise opinion penned by Justice Holmes, the Court applied the foregoing principles in holding that a woman can in some circumstances be charged with conspiring with a man to transport herself across state lines for an immoral purpose in violation of the Mann Act.[29] The Court first reasoned that a woman could in some circumstances commit a substantive violation of the Mann Act—"for instance, [where] a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York."[30]

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generally is thought to apply when a third party "ha[s] conspired with the principals to encourage commission of the substantive offense." *Id.* at 781 n.15. "The rationale supporting this exception," the Court reasoned, "appears to be that the addition of a third party enhances the dangers presented by the crime . . . [and] the legislature would not have intended to preclude punishment for a combination of greater dimension than that required to commit the substantive offense." *Id.*

27. *Holte*, 236 U.S. at 145.

28. *See Gebardi*, 287 U.S. at 121–22 (describing how "criminal transportation under the Mann Act may be effected without the woman's consent").

29. *Holte*, 236 U.S. at 145. Justice Lamar, joined by Justice Day, argued in dissent that the transported woman should be exempt from a conspiracy prosecution in all cases based on the legislative intent behind the Mann Act, which "treats the woman who is transported for use in the business of prostitution as a victim—often a willing victim, but nevertheless a victim . . . . [S]he cannot therefore be punished for being enslaved nor for consenting and agreeing to be transported by [the man] for purposes of such business. To hold otherwise, would make the law of conspiracy a sword with which to punish those whom the [Mann Act] was intended to protect." *Id.* at 147–48 (Lamar, J., dissenting). The dissent added that, "if . . . Congress had intended that they should be subject to indictment for conspiracy, it would have so declared by extending the penal consequences of the prohibited act to all persons aiding, counseling, or encouraging the principal offender." *Id.* at 150 (Lamar, J., dissenting) (internal quotation marks omitted).

30. *Id.* at 145.

The Court therefore saw no reason why a woman could not also be charged with conspiracy to violate the Act based on the preliminary agreement.[31] To simplify, if the woman can in some circumstances be charged with a substantive Mann Act violation, why can't she also be charged with conspiracy to violate the Act? The Court thus upheld the indictment, but did not opine about what facts would be required to support a conviction.[32]

In *Gebardi*, the Court held, with Justice Stone writing for the majority, that although a woman *can* conspire to violate the Mann Act in some circumstances, as the Court held in *Holte*, evidence that a woman merely consented to being transported for the immoral purpose—and therefore did not commit a substantive violation—was insufficient to support a conspiracy conviction.[33]

Critically, the *Gebardi* Court based its decision on congressional intent, which the Court divined from the text and legislative history of the Mann Act. The Court observed 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,"[34] and yet "this acquiescence, though an incident of a type of transportation specifically dealt with by the statute, was not made a crime under the Mann Act itself."[35] The Court thus perceived 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."[36] The Court noted that it was "concerned with something more than an agreement between two persons for one of them to commit an offense which the other

31. *Id.*
32. *Id.* (upholding the indictment).
33. *See Gebardi*, 287 U.S. at 123.
34. *Id.* at 121.
35. *Id.*
36. *Id.* at 123 (emphasis added).

cannot commit"[37]—the situation in *Ocasio*. Indeed, the Court was concerned with "the added element that the offense planned, the criminal object of the conspiracy, involve[d] the agreement of the woman to her transportation by the man, which is the very conspiracy charged,"[38] and which Congress contemplated would "frequently, if not normally" be the case, but chose not to criminalize.[39] The Court rejected the view that "the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers" upon a woman who merely consents to her illicit travel.[40] The Court's holdings in *Holte* and *Gebardi*, therefore, turned on congressional intent in enacting the Mann Act evidenced by the text and legislative history of the statute.[41]

The Court in *Ocasio* sought to distill the teachings in these decisions, declaring:

> *Holte* and *Gebardi* make perfectly clear that a person may be convicted of conspiring to commit a substantive offense that he or she cannot personally commit. They also show that when that person's consent or acquiescence is inherent in the underlying substantive offense, something more than bare consent or acquiescence may be needed to prove that the person was a conspirator.[42]

The Court did not say, however, what that "something more" could be. In the Mann Act context, facts sufficient to support the conviction would have presumably involved the woman or girl playing an active role in bringing about her illegal transportation—rather than merely consenting to being transported—which could also support a substantive Mann Act

37. *Id.* at 121; *see also* United States v. Holte, 236 U.S. 140, 144 (1915).

38. *Gebardi*, 287 U.S. at 121 (1932).

39. *Id.*; *see Holte*, 236 U.S. at 144.

40. *Gebardi*, 287 U.S. at 123.

41. *See id.* at 121 (discussing what Congress "set out" to do in enacting the Mann Act); *Holte*, 236 U.S. at 144 (addressing the text of the Mann Act).

42. Ocasio v. United States, 136 S. Ct. 1423, 1432 (2016).

conviction. But the Court was silent as to what facts were required to support a Hobbs Act conviction in these circumstances. Trumpeting the principles in *Holte* and *Gebardi* as "longstanding principles of conspiracy law,"[43] "age-old principles of conspiracy law,"[44] and "basic principles of conspiracy law,"[45] the Court concluded that "[t]hese basic principles of conspiracy law resolve this case."[46]

Based on *Holte* and *Gebardi*, the *Ocasio* Court held that, "[a]lthough [the shop owners] were incapable of committing the underlying substantive offense as principals, they could, under the reasoning of *Holte* and *Gebardi*, nevertheless conspire to commit Hobbs Act extortion by agreeing to help petitioner and other officers commit the substantive offense" of extorting themselves.[47] The Court explained that,

> [i]n order to establish the existence of a conspiracy to violate the Hobbs Act, the Government has no obligation to demonstrate that each conspirator agreed personally to commit—or was even capable of committing—the substantive offense of Hobbs Act extortion. It is sufficient to prove that the conspirators agreed that the underlying crime *be committed* by a member of the conspiracy who was capable of committing it. In other words, each conspirator must have specifically intended that *some conspirator* commit each element of the substantive offense.[48]

Based on the foregoing analysis, and without analyzing the Hobbs Act's legislative intent or purpose—or whether Congress contemplated that the shop owners would "frequently, if not

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43. *Id.* at 1429.
44. *Id.* at 1427.
45. *Id.* at 1432.
46. *Id.*
47. *Id.* (footnote omitted).
48. *Id.*

normally"[49] agree to be extorted in typical cases—the Court upheld the police officer's conspiracy conviction.[50]

As noted above, the curious corollary of the Court's holding is that a shop owner can conspire with a police officer to extort himself.[51] This result requires further scrutiny.

B. Did Ocasio *Improperly Extend* Holte *and* Gebardi*?*

The Court in *Ocasio* arguably misinterpreted *Holte* and *Gebardi* by extracting from those cases "basic principles of conspiracy law" that were in fact tethered to Congress's intent in enacting the Mann Act.[52] As a result, the Court extended a holding specific to Mann Act conspiracy cases to a case involving conspiracy to violate the Hobbs Act—a statute with different text, history, and legislative intent—thereby reaching the curious holding that a police officer can conspire with a shop owner to extort the shop owner.[53] A more-careful application of *Gebardi* and its test, however, may have yielded a different result.

At the outset, the Court in *Ocasio* may have mischaracterized the *Holte* and *Gebardi* decisions by suggesting that those cases involved defendants who were incapable of violating the Mann Act.[54] In *Holte* and *Gebardi*, the Court made clear that a woman or girl could in some circumstances be charged with a substantive violation of the Mann Act for illegally transporting herself; thus, the cases did *not* turn on the principle that a "a conspiracy with an officer or employee of the

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49. Gebardi v. United States, 287 U.S. 112, 121 (1932).

50. *See Ocasio*, 136 S. Ct. at 1436 (upholding the petitioner's conviction).

51. *See supra* notes 4–6 and accompanying text (addressing this result of the Court's decision).

52. *See supra* note 41 and accompanying text (discussing the Court's use of intent- and text-based interpretation in *Gebardi* and *Holte*).

53. *See Ocasio*, 136 S. Ct. at 1431–32 (discussing *Gebardi*'s application to the facts of the case).

54. *See id.* at 1432 ("*Holte* and *Gebardi* make perfectly clear that a person may be convicted of conspiring to commit a substantive offense that he or she cannot personally commit.").

government or any other for an offense that only he could commit . . . fall[s] within the conspiracy section," even though the Court in both cases noted this principle.[55] Indeed, the Court in *Holte* explained that if the woman were the driving force in carrying out the Mann Act scheme—for example where she was a "professional prostitute, as well able to look out for herself as was the man," and she suggested and carried out the journey "in the hope of black-mailing the man," including by buying railroad tickets for the illicit travel—the Court "s[aw] no reason why" the woman could not violate the Mann Act as a principal.[56] Nevertheless, the Court in *Ocasio* seemed to suggest that the *Holte* and *Gebardi* Courts "applied" the principle that a person incapable of committing the substantive offense can still be a conspirator.[57] To the contrary, a careful reading of *Holte* and *Gebardi* reveals otherwise, even if the woman in *Gebardi* was incapable of committing the substantive offense based on the particular facts proven at trial.[58]

Even more critically, the Court in *Ocasio* arguably misapplied the central principle of conspiracy law established by *Gebardi* when it ignored the Hobbs Act's legislative intent in reaching its decision. In *Gebardi*, the Court looked to the text and

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55. United States v. Holte, 236 U.S. 140, 145 (1915); *see also* Gebardi v. United States, 287 U.S. 112, 120 (1932) ("Incapacity of one to commit the substantive offense does not necessarily imply that he may with impunity conspire with others who are able to commit it.").

56. *Holte*, 236 U.S. at 145.

57. *See Ocasio*, 136 S. Ct. at 1430 ("The Court applied these principles in two cases involving the Mann Act."). The Court explained:

Holte and *Gebardi* make perfectly clear that a person may be convicted of conspiring to commit a substantive offense that he or she cannot personally commit. They also show that *when that person's* consent or acquiescence is inherent in the underlying substantive offense, something more than bare consent or acquiescence may be needed to prove that the person was a conspirator.

Id. at 1432 (emphasis added).

58. *See supra* note 56 and accompanying text (discussing hypothetical from *Holte* where a woman could be found to have committed a substantive Mann Act offense).

legislative history of the Mann Act to decide whether Congress intended that a woman who merely consented to the illicit transport—and thus did not violate the substantive provisions of the Mann Act—could be convicted of conspiracy to violate the Mann Act.[59] As noted above, the Court explained:

> 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. In every case in which she is not intimidated or forced into the transportation, the statute necessarily contemplates her acquiescence. Yet this acquiescence, though an incident of a type of transportation specifically dealt with by the statute, was not made a crime under the Mann Act itself . . . . We [rest our decision] rather 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. We think it 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.[60]

In other words, the *Gebardi* principle holds that, when Congress enacts a criminal statute that "frequently, if not normally, involve[s] consent and agreement on the part of" a particular party, but does not punish that conduct, Congress does not intend to punish that same conduct under the general federal

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59. *See Gebardi*, 287 U.S. at 121–23 (discussing Congress's intent in enacting the Mann Act).

60. *Id.*

conspiracy statute.[61] In *Gebardi*, that meant that because Congress, in enacting the Mann Act, contemplated that the woman would frequently consent to the illicit travel, but did not elect to punish that conduct without more, Congress also did not intend to punish that conduct under the conspiracy statute.[62] Yet if the woman in *Gebardi* had done more than merely consented to the travel and had, for instance, "aid[ed] or assist[ed]" in causing her illicit transportation, the woman would have violated the substantive provision of the Mann Act and could also have conspired to violate the Mann Act.[63] Thus, the *Gebardi* Court required more than "mere consent" to convict the woman of conspiracy, presumably requiring conduct that would constitute a substantive Mann Act offense and that Congress therefore intended to punish under the Act.[64]

The *Gebardi* principle, then, is perhaps best understood to mean that when the conduct of a particular class of actors (i.e., the transported woman) is "frequently, if not normally," part of the conduct that a substantive criminal statute aims to punish, but the substantive statute leaves that class of actors' conduct unpunished, then that same conduct should not give rise to conspiracy liability, because that was not Congress's intent.[65] In this way, the *Gebardi* principle, like Wharton's Rule,[66] is a rule of

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61. *See id.*

62. *See id.* ("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.").

63. *See id.* at 118–19 (noting that the Mann Act does not punish the woman for transporting herself).

64. *See id.* at 123 (concluding that Congress did not intend to punish mere acquiescence to the transportation).

65. *See id.* at 121–23 (discussing how the substantive offense under the Mann Act differs from conspiracy acts).

66. *See* Iannelli v. United States, 420 U.S. 770, 785–86 (1975). The Court in *Iannelli* explained:)

> Wharton's Rule applies only to offenses that require concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because both require collective criminal activity. The

statutory construction intended to aid in determining legislative intent when defining the contours of conspiracy liability.[67] The *Ocasio* Court's interpretation of the general federal conspiracy statute, detached from the text and legislative intent of the predicate substantive offense, by contrast, can lead to a holding that frustrates congressional intent.[68] To be sure, the general federal conspiracy statute aims to punish a separate offense than the charged predicate offense; but *Gebardi* suggests that in some cases courts should nevertheless consider whether Congress's intent to leave unpunished certain conduct under a substantive criminal statute means that Congress *also* meant to leave that conduct unpunished under the conspiracy statute.

The *Ocasio* Court thus misapplied the *Gebardi* principle when it extended the Mann Act–specific holding from *Gebardi* to the Hobbs Act, instead of focusing on whether Congress aimed to punish the extorted shop owners under the conspiracy statute when it passed the Hobbs Act.[69] As Justice Sotomayor observed in her dissent, joined by Chief Justice Roberts, the majority in *Ocasio* "stretches this Mann Act case beyond its tethers," and

> substantive offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter. Thus, absent legislative intent to the contrary, the Rule supports a presumption that the two merge when the substantive offense is proved . . . . [A]s the Rule is essentially an aid to the determination of legislative intent, it must defer to a discernible legislative judgment.

67. *See Gebardi*, 287 U.S. at 123 (finding an affirmative legislative intent in the Mann Act to leave the woman's mere acquiescence to the illicit transport unpunished).

68. *See supra* notes 47–50 and accompanying text (noting that the Supreme Court resolved *Ocasio* on general principles of conspiracy law).

69. *See Ocasio*, 136 S. Ct. at 1431 n.4 (describing the *Gebardi* reasoning and conclusion). The Court in *Ocasio* downplayed the significance of the Mann Act's text in the *Gebardi* decision, reducing *Gebardi*'s discussion of the Mann Act's "affirmative legislative policy" to a footnote, and characterizing it as merely part of the "path of reasoning by which the *Gebardi* Court reached [its] conclusions." *Id.*

most of the "so-called" "age-old principles of conspiracy law" relied upon by the majority "are derived from decisions that turn on interpreting the *text* of another federal statute—the Mann Act."[70]

For the *Ocasio* Court to have properly applied the principle in *Gebardi*, then—and putting aside the distinction that the shop owner, unlike the woman in *Gebardi*, could not commit the substantive Hobbs Act offense in *Ocasio*—the Court would have needed to determine: (1) whether Congress, in enacting 18 U.S.C. § 1951(a) and (b)(2) of the Hobbs Act, set out to deal with cases that "frequently, if not normally, involve[d] consent and agreement on the part of" an extorted party[71] (here, a party from whom someone has obtained property "with his consent . . . under color of official right."[72]); and, if so, (2) whether those sections of the Hobbs Act punish the extorted party's conduct.[73] If Congress enacted the Hobbs Act provision to deal with situations that frequently, if not normally, involve parties who are extorted with consent under color of official right, but did not punish the extorted party's conduct, then the Court should have perceived in Congress's "failure to condemn" the shop owner for his conduct "an affirmative legislative policy to leave [the shop owner] unpunished" for both the extortion and his agreement to being extorted.[74] But if Congress elected to punish that conduct as a substantive offense, then the Court should sustain a conspiracy charge predicated on that conduct.[75]

If the Court had undertaken this analysis, it may have concluded that the Hobbs Act provisions at issue—which

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70. *Id.* at 1443 (Sotomayor, J., dissenting). Justice Thomas also dissented, but on the distinct ground that the Court should have overruled an earlier decision relied upon by the majority, *Evans v. United States*, 504 U.S. 255 (1992), which equated Hobbs Act extortion with bribery. *Id.* at 1437 (Thomas, J., dissenting); *see also* Stith, *supra* note 11, at 237–39.

71. *Gebardi*, 287 U.S. at 121.

72. 18 U.S.C. § 1951(b)(2) (2012).

73. *See Gebardi*, 287 U.S. at 123.

74. *Id.*

75. *See id.*

proscribe extortion involving "the obtaining of property from another, with his consent . . . under color of official right"—contemplated that frequently the extorted persons will not only have consented but also agreed to the scheme.[76] If the Court reached this conclusion, *Gebardi* would require the Court to hold that the shop owner could not conspire to extort himself because the Hobbs Act meant to leave unpunished his agreement to being extorted.[77] This principle would *not* leave unpunished, however, an agreement by a third party incapable of committing the substantive Hobbs Act violation but whose consent is not frequently or normally involved, such as someone who identified the shop owner as an extortion target for the police officers or otherwise facilitated the scheme.

Having highlighted the arguable weaknesses in the Supreme Court's *Ocasio* decision, and its arguable misapplication of *Holte* and *Gebardi*, this Article now turns to the question of how *Ocasio*'s holding and interpretation of *Holte* and *Gebardi* could expand the reach of the general federal conspiracy statute to include bribe-taking foreign officials within its scope, despite the Fifth Circuit's oft-cited holding to the contrary in *United States v. Castle*.[78]

III. Corrupt Foreign Officials, Beware: Ocasio*'s Potential Impact on* United States v. Castle *and the Scope of FCPA Conspiracy Liability*

Setting aside the *Ocasio* decision's arguable infirmities, this Article considers the *Ocasio* decision's potential impact on a

76. *See* 18 U.S.C. § 1951(b)(2) (defining extortion to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear or under color of official right").

77. *See Gebardi*, 287 U.S. at 123 (holding that the woman's consent did not support her Mann Act conspiracy conviction).

78. 925 F.2d 831 (5th Cir. 1991) (per curiam).

specific area of conspiracy law long thought to have been settled: foreign-official conspiracy liability under the FCPA.[79]

A. United States v. Castle

In 1991, the Fifth Circuit decided the seminal case of *United States v. Castle*,[80] holding that the Government cannot charge bribe-taking foreign officials—who cannot as principals violate the substantive provisions of the FCPA, which targets bribe-*payers*—with conspiracy to violate the FCPA's anti-bribery provisions.[81] The Court in *Castle* concluded that, in enacting the FCPA, "Congress affirmatively chose to exempt this small class of persons from prosecution," extending the Supreme Court's holding in *Gebardi v. United States*.[82]

In *Castle*, federal prosecutors in Texas charged Canadian "foreign officials" Donald Castle and Darrell W.T. Lowry with conspiracy to violate the FCPA.[83] According to the indictment, John Blondek and Vernon Tull, two U.S. citizens and employees of Eagle Bus Company, a U.S. concern, paid Castle and Lowry a bribe of $50,000 to secure a contract to provide buses to the Saskatchewan provincial government.[84] The Canadian officials moved to dismiss the indictment, which the district court granted, relying on *Gebardi*.[85]

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79. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, *et seq.* (2012).

80. 925 F.2d 831 (5th Cir. 1991) (per curiam).

81. *See id.* at 836 (noting an affirmative legislative policy to leave this group unpunished).

82. *Id.*

83. *See id.* at 832 (noting that Castle and Lowry moved to dismiss the indictment on the grounds that, as foreign officials, they could not be convicted of the offense).

84. *See id.* (describing the allegations in the indictment).

85. *See* United States v. Blondek, 741 F. Supp. 116 (N.D. Tex. 1990), *aff'd sub nom. Castle*, 925 F.2d at 832 (holding that bribe-taking foreign officials could not be charged with conspiracy to violate the FCPA in accordance with *Gebardi*).

On appeal, the Fifth Circuit affirmed, adopting the opinion of the district court nearly in its entirety. At the outset, the Fifth Circuit observed that:

> There is no question that the payment of the bribe by Defendants Blondek and Tull is illegal under the FCPA and that they may be prosecuted for conspiring to violate the Act. Nor is it disputed that Defendants Castle and Lowry could not be charged with violating the FCPA itself, since the Act does not criminalize the receipt of a bribe by a foreign official.[86]

The Court continued: "[t]he issue here is whether the Government may prosecute [Canadian foreign officials] Castle and Lowry under the general conspiracy statute, 18 U.S.C. § 371, for conspiring to violate the FCPA."[87] It cannot, the Fifth Circuit held.[88]

In reaching this conclusion, the Fifth Circuit extended *Gebardi*'s rationale to foreign officials charged with conspiracy to violate the FCPA. The Court explained:

> The principle enunciated by the Supreme Court in *Gebardi* squarely applies to the case before this Court. Congress intended in both the FCPA and the Mann Act to deter and punish certain activities which necessarily involved the agreement of at least two people, but Congress chose in both statutes to punish only one party to the agreement. In *Gebardi* the Supreme Court refused to disregard Congress' intention to exempt one party by allowing the Executive to prosecute that party under the general conspiracy statute for precisely the same conduct. Congress made the same choice in drafting the FCPA, and by the same analysis, this Court may not allow the Executive to override the Congressional intent not to prosecute foreign officials for their participation in the prohibited acts.[89]

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86. *Castle*, 925 F.2d at 832.

87. *Id.*

88. *See id.* at 836.

89. *Id.* at 833.

The Court highlighted what it viewed as "overwhelming evidence of a Congressional intent to exempt foreign officials from prosecution for receiving bribes, especially since Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power."[90] The Court added, "[a]s in *Gebardi*, it would be absurd to take away with the earlier and more general conspiracy statute the exemption from prosecution granted to foreign officials by the later and more specific FCPA."[91] Thus, the Court properly focused on legislative intent behind the FCPA's anti-bribery provisions.

The Fifth Circuit's decision in *Castle* is not beyond reproach. For example, the Court's characterization of the Mann Act and the FCPA as prohibiting "activities which necessarily involved the *agreement* of at least two people"[92] was doubly incorrect. In *Gebardi*, the Supreme Court made clear that "criminal transportation under the Mann Act may be effected *without the woman's consent* as in cases of intimidation or force," such that the principle known as Wharton's Rule did not apply.[93] Similarly, a principal can violate the FCPA's anti-bribery provisions *without* the agreement of a foreign official, for instance when a principal *offers* a foreign official a bribe but the official declines to accept it.[94]

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90. *Id.*

91. *Id.* at 836.

92. *Id.* at 833 (emphasis added).

93. Gebardi v. United States, 287 U.S. 112, 122 (1932) (emphasis added); *see supra* notes 26 & 66 and accompanying text (discussing Wharton's Rule and the *Gebardi* Court's explanation of the same).

94. *See* 15 U.S.C. §§ 78dd-1–3 (prohibiting issuers, domestic concerns, and other persons from using bribery to influence foreign officials, foreign political parties, and foreign candidates in order to obtain or retain business). The Fifth Circuit may have meant that a violation of both the Mann Act and the FCPA required the involvement of two parties—not the *agreement* or concurrence of two parties. *See, e.g.*, *Castle*, 925 F.2d at 833 n.1 ("In the Mann Act the two necessary parties were the transporter and the transported woman, and in the FCPA the necessary parties were the U.S. company paying the bribe and the foreign official accepting it."). The mere involvement of two parties in a violation of the statute, moreover, would not trigger Wharton's Rule absent the required element that they entered into the agreement. *See supra* notes 26 & 66 and

Nevertheless, the Fifth Circuit's application of *Gebardi* in *Castle* was probably correct. Congress enacted the anti-bribery provisions of the FCPA knowing that the proscribed conduct frequently if not normally involved acceptance of bribes by corrupt foreign officials, but did not condemn the foreign official's conduct under the statute. Thus, Congress probably did not intend to create conspiracy liability for those foreign officials when enacting the FCPA. That said, the Fifth Circuit may have overstated the strength of this argument when it noted that "evidence of a Congressional intent to exempt foreign officials from prosecution for receiving bribes" was "overwhelming."[95] Indeed, the Government highlighted in its appellate brief in *Castle* that the House Report relating to the FCPA's passage stated 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 implied private actions brought under the securities laws generally."[96] Small wonder, then, that the Government thought the Fifth Circuit's decision in *Castle* was "patently incorrect."[97] On the other hand, the House Report may not have had in mind bribe-taking foreign officials, as opposed to bribe-payers who conspire with each other to pay bribes to those officials.[98]

Castle's holding has had a widespread impact. Indeed, *Castle* is the only appellate decision to have decided the question of

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accompanying text (discussing Wharton's Rule).

95. *See Castle*, 925 F.2d at 833 (arguing that there was intent to exempt foreign officials from the FCPA "since Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power").

96. *See* Brief for the United States at *21, United States v. Castle, 925 F.2d 831 (5th Cir. 1991) (No. 90-1455), 1990 WL 10085129 (citing H.R. REP. NO. 95-640, at 8 (1977) (analyzing Section 2 of the Unlawful Corporate Payments Act of 1977)) (emphasis added).

97. *See id.* at *13 (arguing that the lower court misread and misapplied *Gebardi*).

98. For a comprehensive and fascinating look at the enactment of the FCPA, see Michael Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L. J. 929 (2012).

whether a bribe-taking foreign official can conspire to violate the FCPA, and the Government has fully accepted its holding. In the decades since *Castle*, the Government has not prosecuted any alleged bribe-taking foreign officials for conspiracy to violate the FCPA's anti-bribery provisions. And the Department of Justice itself has explained, in its FCPA Guidance released in 2012, that bribe-taking foreign officials are not liable under the general federal conspiracy statute for conspiracy to violate the FCPA.[99]

But the *Ocasio*[100] decision calls all that into question.

B. Is Castle *still good law?*

The *Ocasio* decision seems to undermine the *Castle* decision and suggest that the Government *can* charge bribe-taking foreign officials with conspiracy to violate the FCPA's anti-bribery provisions, so long as the bribe-taking foreign officials do more than merely *consent* to the bribery scheme.

Ocasio makes clear that, "[n]ot only is it unnecessary for each member of a conspiracy to agree to commit each element of the substantive offense, but also a conspirator may be convicted even though he was incapable of committing the substantive offense himself."[101] The Court in *Ocasio* further held that, based on *Holte* and *Gebardi*, "when that person's consent or acquiescence is inherent in the underlying substantive offense, something more than bare consent or acquiescence may be needed to prove that the person was a conspirator."[102] Based on these principles, the Court in *Ocasio* concluded that "[a]lthough [the shop owners]

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99. *See* U.S. DEP'T OF JUSTICE & SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 48–49 (2012) (citing *Castle* and stating that, "although foreign officials cannot be prosecuted for FCPA violations," certain foreign officials have been prosecuted for money laundering).

100. *See* Ocasio v. United States, 136 S. Ct. 1423 (2016) (upholding conviction of a police officer for extortion and conspiracy to commit extortion under the Hobbs Act).

101. *Id.* at 1430 (internal quotation marks omitted).

102. *Id.* at 1432.

were incapable of committing the underlying substantive offense as principals, they could, under the reasoning of *Holte* and *Gebardi*, conspire to commit Hobbs Act extortion by agreeing to help petitioner and other officers commit the substantive offense."[103]

Applying the foregoing reasoning in the FCPA context, a foreign official arguably can be charged with conspiring to violate the FCPA—at least where the bribe-taking foreign official has done more than merely consented or acquiesced to accepting the illicit bribe.

First, although a bribe-taking foreign official cannot violate the FCPA as a *principal*—because the FCPA generally proscribes the payment or offering of payment of bribes *to* foreign officials in order to obtain or retain business—that prohibition does not mean that a bribe-taking foreign official cannot *conspire* with a principal to violate the FCPA.[104] The *Holte-Gebardi-Ocasio* trio of cases make clear that incapacity to commit the object of the conspiracy, as a principal, does not bar a conspiracy count, which charges a distinct offense.[105]

Second—although discussed only in *Holte* and *Gebardi*, and not in *Ocasio*—Wharton's Rule likely does not preclude charges against a bribe-taking foreign official for conspiracy to violate the FCPA. Just like under the Mann Act, where the Supreme Court in *Holte* and *Gebardi* pointed out that the Act could be violated by a principal without the consent or acquiescence of a woman, warranting no Wharton's Rule exception, a principal can violate the FCPA without the consent or acquiescence of a foreign official. For instance, a principal can violate the FCPA by using the mails or instrumentalities of interstate commerce corruptly to offer to pay a bribe to a foreign official in order to retain or obtain

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103. *Id.* (footnote omitted).

104. *See* 15 U.S.C. §§ 78dd-1–3 (prohibiting issuers, domestic concerns, and other persons from using bribery to influence foreign officials, foreign political parties, and foreign candidates in order to obtain or retain business).

105. *See Ocasio*, 136 S. Ct. at 1430; Gebardi v. United States, 287 U.S. 112, 120–21 (1932); United States v. Holte, 236 U.S. 140, 145 (1915).

business, where the official declines to accept the bribe.[106] Or a foreign official could hypothetically ask a principal to offer him a bribe in violation of the FCPA, only to later decline to accept the bribe due to a change of heart, or because he has selected a more lucrative or otherwise-attractive offer from another bribe-payer instead. Accordingly, Wharton's Rule's narrow application "to offenses that require concerted criminal activity, a plurality of criminal agents,"[107] should not apply in the FCPA context.[108]

Finally, the Supreme Court's key conclusion in *Ocasio* that when the "consent or acquiescence" of a person incapable of acting as a principal "is inherent in the underlying substantive

106. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

107. *See* Iannelli v. United States, 420 U.S. 770, 785 (1975) (limiting Wharton's Rule's application to only those offenses).

108. Moreover, a conspiracy to violate the FCPA entered into by a principal and a bribe-taking foreign official raises concerns not found in the narrow subset of cases to which Wharton's Rule has traditionally applied. The Supreme Court explained in *Iannelli* that "[t]he classic Wharton's Rule offenses—adultery, incest, bigamy, dueling—are crimes that are characterized by the general congruence of the agreement and the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large." *Id.* at 782–83 (emphasis added). Also, the conspiratorial agreement in Wharton's Rule cases tends to be unlikely "to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert," for instance where "an agreement to commit an offense . . . will produce agreements to engage in a more general pattern of criminal conduct." *Id.* at 783; *see also* Pinkerton v. United States, 328 U.S. 640, 644 (1946) (explaining that conspiracy is "an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crimes," involving "deliberate plotting to subvert the laws, educating and preparing the conspiracies for further and habitual criminal practices," and "characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered" (quoting United States v. Rabinowich, 238 U.S. 78, 88 (1915))). A conspiracy to violate the FCPA between a bribe-paying principal and a foreign official, in contrast, results in harm to those beyond "the parties themselves," *Iannelli*, 420 U.S. at 782–83, due to the misappropriation of public funds or corruption of the foreign official's decision. *Cf.* United States v. McNair, 605 F.3d 1152, 1215 (8th Cir. 2010) (noting that Wharton's Rule's does not apply to a conviction for conspiracy to commit bribery under 18 U.S.C. § 201 and under § 666 in part because "bribery is not limited to the bribe-payor and recipient, as the crime involves public corruption, which harms society at as a whole").

offense, something more than bare consent or acquiescence may be needed to prove that the person was a conspirator," seems to support the view that a bribe-taking foreign official can *in some circumstances* be charged with conspiracy to violate the FCPA.[109] The *Ocasio* Court did not, as one of the dissents pointed out, indicate *when* mere consent tips over into a conspiracy.[110] But several circumstances would likely suffice in the FCPA context.

Consider, for example, a scenario in which a senior official at a foreign state-owned entity ("SOE") in charge of contracting informs a business executive that the official will be drafting a request for proposal ("RFP") for a lucrative contract. The foreign official demands a bribe from the business executive, and promises that in exchange for the bribe, the foreign official will draft the RFP in a way that will guarantee that the SOE awards the contract to the business executive's company. The foreign official threatens, however, that if the business executive does *not* pay the bribe, his company will not win the contract and will also be frozen out of all future RFPs issued by the SOE. The business executive is at first reluctant to pay the bribe due to ethical and legal concerns and his fear of being detected by the company's compliance department or, worse yet, by law-enforcement officials. But after further prodding and pressure by the foreign official, the business executive worries that he will jeopardize his company's ability to work with the SOE in the future if he does not pay the bribe and may even lose his job. As a result, the business executive pays the foreign official the demanded bribe, and his company wins the contract. Consistent with *Ocasio*, has the foreign official conspired to violate the FCPA?

In the foregoing example, the bribe-taking foreign official has not merely consented to or acquiesced to the illegal bribe. Rather, the foreign official is a "but for" cause of the principal's ultimate decision to violate the FCPA. If federal prosecutors were to charge the foreign official in this scenario, they would have a

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109. *Ocasio*, 136 S. Ct. at 1432.

110. *See id.* at 1445 (Sotomayor, J., dissenting) (noting the ambiguity in the *Ocasio* majority opinion about when "mere 'consent' tip[s] over into conspiracy").

colorable argument that the charges are consistent with the "basic principles of conspiracy law" summarized in *Ocasio* and articulated in *Holte* and *Gebardi*.[111]

The possibility that the Government could charge bribe-taking foreign officials with conspiracy to violate the FCPA is not merely academic. Since 2009, the Department of Justice's charging decisions in cases involving foreign bribery have evinced a steadfast commitment to prosecuting bribe-taking foreign officials, who compose the "demand side" of the foreign-bribery equation and are thought by some to be a root cause of foreign bribery.[112] At the time this Article went to press, beginning with the indictment of "foreign officials" Juthamas and Jittisopa Siriwan on substantive and conspiracy money-laundering charges, federal prosecutors have charged at least eleven "foreign officials" with violations relating to various bribery schemes, despite the Government's view that these officials cannot be charged with FCPA conspiracy in light of *Castle*.[113] In particular,

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111. Justice Sotomayor's dissent in *Ocasio* suggests certain factors that could be relevant in determining when consent has tipped over into conspiracy:

> When does mere 'consent' tip over into conspiracy? Does it depend on whose idea it was? Whether the bribe was floated as an 'official demand' or a suggestion? How happy the citizen is to pay off the public official? How much money is involved? Whether the citizen gained a benefit (a liquor license) or avoided a loss (closing the restaurant)? How many times the citizen paid the bribes? Whether he ever resisted paying or called the police?

Id.

112. *See, e.g.*, Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME. L. REV. 781, 795–800 (2011) (describing the nature and frequency of bribe demands by foreign officials). *See generally* Lucinda Low, *The "Demand Side" of Transnational Bribery & Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 FORDHAM L. REV. 563 (2015); Lindsay B. Arrieta, *Attacking Bribery at Its Core: Shifting Focus to the Demand Side of the Bribery Equation*, 45 PUB. CONT. L. J. 587 (2016).

113. *See* Indictment, United States v. Siriwan, 2009 WL 10667404 (C.D. Cal. Jan. 28, 2009) (Juthamas and Jittisopa Siriwan); Judgment and Probation/Commitment Order for Defendant Gerald Green, United States v. Green, No. 2:08-cr-00059-GW (C.D. Cal. Sept. 10, 2010), ECF No. 385 (Gerald Green); Judgment and Probation/Commitment Order for Defendant Patricia Toledo Green, United States v. Green, No. 2:08-cr-00059-GW (C.D. Cal. Aug. 12,

2010), ECF No. 387 (Patricia Green); *Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts*, DEP'T OF JUSTICE (Sept. 14, 2009), https://www.justice.gov/opa/pr/film-executive-and-spouse-found-guilty-paying-bribes-senior-thai-tourism-official-obtain (last visited Nov. 1, 2017) (on file with the Washington and Lee Law Review*); Two Florida Executives, One Florida Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme*, DEP'T OF JUSTICE (Dec. 7, 2009), https://www.justice.gov/opa/pr/two-florida-executives-one-florida-intermediary-and-two-former-haitian-government-officials (last visited Nov. 1, 2017) (reporting on Robert Antoine and Jean Rene Duperval) (on file with the Washington and Lee Law Review); *Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti*, DEP'T OF JUSTICE (Oct. 25, 2011), https://www.justice.gov/opa/pr/executive-sentenced-15-years-prison-scheme-bribe-officials-state-owned-telecommunications (last visited Nov. 1, 2017) (mentioning Patrick Joseph in allegations of a scheme to commit bribery) (on file with the Washington and Lee Law Review); *High-Ranking Bank Official at Venezuelan State Development Bank Pleads Guilty to Participating in Bribery Scheme*, DEP'T OF JUSTICE (Nov. 18, 2013), https://www.justice.gov/opa/pr/high-ranking-bank-official-venezuelan-state-development-bank-pleads-guilty-participating (last visited Nov. 1, 2017) (discussing Maria de los Angeles Gonzalez de Hernandez, former bank official of Venezuela's economic development bank) (on file with the Washington and Lee Law Review); *Nuclear Energy Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act*, DEP'T OF JUSTICE (Aug. 31, 2015), https://www.justice.gov/opa/pr/russian-nuclear-energy-official-pleads-guilty-money-laundering-conspiracy-involving (last visited Nov. 1, 2017) (reporting on Vadim Mikerin) (on file with the Washington and Lee Law Review); *Miami Businessman Pleads Guilty to Foreign Bribery and Fraud Charges in Connection with Venezuela Bribery Scheme*, DEP'T OF JUSTICE (Mar. 23, 2016), https://www.justice.gov/opa/pr/miami-businessman-pleads-guilty-foreign-bribery-and-fraud-charges-connection-venezuela (last visited Nov. 1, 2017) (discussing Jose Luis Ramos Castillo, Christian Javier Maldonado Barillas, and Alfonzo Eliezer Gravina Munoz) (on file with the Washington and Lee Law Review); Former Guinean Minister of Mines Convicted of Receiving and Laundering $8.5 Million in Bribes from China International Fund and China Sonangol (May 4, 2017), https://www.justice.gov/opa/pr/former-guinean-minister-mines-convicted-receiving-and-laundering-85-million-bribes-china (last visited Nov. 1, 2017) (discussing Mahmoud Thiam, a former minister of the Republic of Guinea) (on file with the Washington and Lee Law Review). *See also Director of South Korea's Earthquake Research Center Convicted of Money Laundering in Million Dollar Bribe Scheme*, DEP'T OF JUSTICE (July 18, 2017), https://www.justice.gov/opa/pr/director-south-koreas-earthquake-research-center-convicted-money-laundering-million-dollar (last visited Nov. 1, 2017) ("For the second time in recent months, the Criminal Division has convicted a foreign official, [Heon-Cheol Chi], who solicited bribes and then laundered the

federal prosecutors have successfully used the money-laundering statute and the Travel Act, often in conjunction with the general federal conspiracy statute, to prosecute bribe-taking foreign officials in cases that involve FCPA charges against the bribe-payers. These prosecutions, spanning 2009 to present, appear to be part of the Government's broader strategy of targeting the "demand side" of foreign bribery.[114]

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illicit proceeds in the United States. We will continue to hold such individuals responsible and accountable.") (on file with the Washington and Lee Law Review). For further reading on this subject, see Michael Dearington, *The Challenges of Pursuing Foreign Bribe-Takers*, FCPA PROFESSOR (Nov. 25, 2014), http://fcpaprofessor.com/the-challenges-of-pursuing-foreign-bribe-takers/ (last visited Oct. 24, 2017) (on file with the Washington and Lee Law review); Michael Dearington, *From Siriwan to Gonzalez: Why the DOJ Altered The Way it Charges Alleged Corrupt Foreign Officials*, FCPA PROFESSOR (Aug. 26, 2013), http://fcpaprofessor.com/from-siriwan-to-gonzalez-why-the-doj-altered-the-way-it-charges-alleged-corrupt-foreign-officials/ (last visited Oct. 24, 2017) (on file with the Washington and Lee Law review).

114. The indictments brought in the Haiti Teleco case roughly coincided with the Department of Justice's launch of the Kleptocracy Asset Recovery Initiative, in July 2010, which Attorney General Holder indicated was "aimed at combating large-scale foreign official corruption and recovering public funds for their intended—and proper—use: for the people of our nations." *Attorney General Holder at the African Union Summit*, DEP'T OF JUSTICE (July 25, 2010), https://www.justice.gov/opa/speech/attorney-general-holder-african-union-summit (last visited Nov. 1, 2017) (on file with the Washington and Lee Law Review). Attorney General Holder indicated that the Department of Justice is "assembling a team of prosecutors who will focus exclusively on this work and build upon efforts already underway to deter corruption, hold offenders accountable, and protect public resources." *Id.* Assistant Attorney General for the Criminal Division Leslie Caldwell echoed this sentiment, remarking in November 2014, "now we also are prosecuting the bribe takers, using our money laundering and other laws . . . . Our efforts to hold bribe takers as well as bribe payors accountable for their criminal conduct are greatly aided by out foreign partners." *Assistant Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act*, DEP'T OF JUSTICE (Nov. 19, 2014), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st (last visited Nov. 1, 2017) (on file with the Washington and Lee Law Review). Congress has joined in the effort to deter and punish bribe-taking foreign officials, suggesting broad-based support for an expansive enforcement approach. For instance, Congress recently enacted the "Global Magnitsky Human Rights Accountability Act," § 3 of which permits the President to impose sanctions on any foreign person who, inter alia, "is a

If the Government decides to challenge *Castle*, it will likely wait for a test case involving facts similar to the example above—where a zealous and aggressive foreign official was a "but for" cause of the bribery scheme, and did not merely consent to the scheme by accepting the bribes.[115] In the meantime, however, the Government will likely continue to prosecute bribe-taking foreign officials, where appropriate, under the Money Laundering Control Act or the Travel Act. And courts will continue to grapple

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government official, or a senior associate of such an official, that is responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption, including the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of the proceeds of corruption to foreign jurisdictions . . . ." Pub. L. No. 114–328, § 1263(a)(3), 130 Stat. 1999, 2534 (2016). For a detailed personal narrative of the events that led to passage of the Act, see BILL BROWDER, RED NOTICE: A TRUE STORY OF HIGH FINANCE, MURDER, AND ONE MAN'S FIGHT FOR JUSTICE (Simon & Schuster 2015).

115. A case involving the question of whether a nonresident foreign national can be charged with conspiracy to violate the FCPA was pending before the U.S. Court of Appeals for the Second Circuit when this Article went to press. In *United States v. Hoskins*, just months before the Supreme Court handed down the Ocasio decision, a federal district court in the District of Connecticut held that defendant Lawrence Hoskins—a nonresident foreign national charged with conspiracy to violate the FCPA, substantive violations of the FCPA and aiding and abetting the same, and money laundering and aiding and abetting the same, all in connection with the Alstom bribery case—could not be held criminally liable for conspiring to violate or aiding and abetting an FCPA violation. No. 3:12-cr-238 (JBA), 2016 WL 1069645, at *3–4 (D. Conn. Mar. 16, 2016) (providing the District Court's discussion and analysis of the legal issue). The District Court observed, based on the text, structure, and legislative history of the FCPA, that Congress had intended to exclude nonresident foreign nationals from liability under Sections 78dd-3 and 78dd-2 of the FCPA unless they acted while in the United States or acted as an agent of a domestic concern, respectively. *See id.* at *2 (explaining the District Court's prevailing interpretation of the statute). Extending the *Gebardi* principle, the District Court therefore concluded that a nonresident foreign national can only be charged with conspiring to violate or aiding and abetting a violation of Section 78dd-2, at issue in the case, if he was conspiring or aiding and abetting as an agent of a domestic concern. *See id.* at *6 (rejecting the Government's alternative interpretation of the FCPA). Although not squarely on point, this case could present an opportunity for the Second Circuit to examine *Ocasio*'s impact in the context of a different but related FCPA conspiracy case.

with how to interpret the scope of the general federal conspiracy statute, whose bounds remain unclear.