

## “TAKE ME OUT TO THE BALLGAME?” ASKED THE INSPECTOR: SAYING “YES” MAY NOW BE A FEDERAL CRIME

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### White Collar Crime/ Criminal Defense Alert

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Imagine this hypothetical: A local fire marshal says to Mary Jones, who runs the residence halls at a major university, "It must be nice having seats at the Saturday football games." Mary gets the message and thinks that if she agrees to offer the fire marshal tickets, he will be less likely to "nitpick" during his inspections of the residence halls. Could the government claim that this is a bribe by Mary within the meaning of the Hobbs Act's proscription against "extortion" by public officials? Maybe. On May 2, in *Ocasio v. United States*, the U.S. Supreme Court broadened the reach of federal corruption law to cover private individuals who are involved in extortion conspiracies with government officials and held that anyone — even the bribe payor — who has conspired to engage in extortion can be charged for violation of the Hobbs Act, the federal statute that federal prosecutors use to indict state officials who solicit and take bribes, and can be convicted of conspiracy. In doing so, the Supreme Court has given federal prosecutors a new, and potent, weapon.

The Hobbs Act makes it unlawful for a public official to extort a bribe "from another, with his [or her] consent," or to engage in a conspiracy to extort such bribes. Prior to *Ocasio*, at least one circuit court of appeal had found that the language "from another" meant that a Hobbs Act conspiracy required that the property that was extorted come from someone outside of the conspiracy, not from a participant in it. In *Ocasio*, the Supreme Court rejected that limitation and held that the payor and payee of a bribe can conspire to violate the Hobbs Act even if the payor of the bribe cannot commit the underlying crime of extortion (because she cannot not extort anything from herself). Thus, *Ocasio* held that a conspiracy charge was valid so long as there is proof that the bribe payor "reached an agreement with the owner of the property in question to obtain that property under the color of official right." 578 U.S. \_\_\_ (2016), slip op. at 18. It did not matter that the bribe payor could not extort herself because in a conspiracy case, the government has no obligation to prove "that each conspirator . . . was even capable of committing" the underlying offense of taking a bribe. *Id.* at 10. Federal prosecutors need only to prove that "the conspirators agreed that the underlying crime be committed by some member of the conspiracy who was capable of committing it." *Id.* Since the bribe payees committed that offense, the bribe payors could be convicted of conspiracy to extort.

### THE BACKGROUND

The petitioner, Samuel Ocasio, is a former police officer. *Id.* at 1. In 2009, while still a police officer, he joined an ongoing kickback scheme formed by other department police officers and the owners of a local auto repair shop. *Id.* at 2. The scheme was that, upon reporting to the scene of an auto accident, *Ocasio* would persuade the

owners of the damaged cars to have their vehicles towed to a certain repair shop; in exchange for this referral, those shop owners paid *Ocasio* between \$150 and \$300 per referral. *Id.* at 1–2.

In 2011, federal prosecutors charged *Ocasio* with violating the Hobbs Act, 18 U.S.C. § 1951, for extorting money from the shop owners with their consent "under the color of official right" — i.e., the "rough equivalent of . . . taking a bribe." *Id.* at 2–3 (citing *Evans v. United States*, 504 U.S. 255, 260 (1992)). *Ocasio* was also charged with violating the general federal conspiracy statute, 18 U.S.C. § 371, for reaching an *agreement* with the scheme participants to conduct the plot in violation of the Hobbs Act. *Id.* at 3.

At his trial, *Ocasio* moved for a judgment of acquittal on the conspiracy count, arguing that any conspiracy to violate the Hobbs Act, as a matter of law, necessarily requires that the alleged conspirators formed an agreement to obtain money or property from someone *who was not a member of the conspiracy*. *Id.* at 3–4. *Ocasio* argued that because the bribe-paying repair shop owners participated in the kickback scheme, there was no agreement to violate the Hobbs Act, as the scheme sought to obtain money from persons who *themselves* were co-conspirators. *Id.* The district court denied *Ocasio's* motion. *Id.* at 4. Subsequently, the jury found *Ocasio* guilty on both the conspiracy count and the three counts of Hobbs Act extortion. *Id.* On appeal, the Fourth Circuit affirmed the conviction, rejecting *Ocasio's* argument that his conspiracy conviction was fatally flawed because the conspirators had not agreed to obtain money from a person who was not a member of the conspiracy. *Id.*

## THE SUPREME COURT'S DECISION

In a 5–3 decision written by Justice Samuel Alito, the Supreme Court also affirmed *Ocasio's* conviction. The majority first reviewed the "longstanding principles of conspiracy law," highlighting the Court's past rulings that "[n]ot only is it unnecessary for each member of a conspiracy to agree to commit each element of the substantive offense," it is also "perfectly clear that a person may be convicted of conspiring to commit a substantive offense that he or she cannot *personally* commit." *Id.* at 5, 10 (emphasis added). In support of this principle, the Court cited its own Mann Act precedent, in which the Court refused to rule out the possibility that a woman could conspire to cause herself to be transported across state lines for an immoral purpose. *Id.* at 7–10.

For Justice Alito, these holdings and the basic principles of conspiracy law were enough to resolve *Ocasio's* case. The majority found that *Ocasio* and the shop owners shared a common purpose — namely, that *Ocasio* "would commit every element of the substantive extortion offense." *Id.* at 10. Thus, although the shop owners themselves were incapable of committing the extortion — i.e., they couldn't extort *themselves* — they could, along with the police officers, "conspire to commit Hobbs Act extortion by agreeing to help [*Ocasio*] and the other officers commit the substantive offense." *Id.* at 11. The objective of the conspiracy, the Court reasoned, was not that each conspirator, including the shop owners, would obtain money from "another" third party, but rather that *Ocasio* and the other Baltimore officers would do so. *Id.* at 13. Thus, the Court found that under well-established rules of conspiracy law, *Ocasio* was properly charged with and convicted of conspiring with the shop owners, who together with the officers agreed on a criminal objective that *Ocasio* would commit substantive violations of the Hobbs Act. *Id.* at 13.

Finally, the Court noted that its decision did not, as *Ocasio* claimed, dissolve the distinction between extortion and conspiracy to commit extortion. *Id.* at 15. Instead, the Court argued that there are plenty of instances in which the "consent" required under a Hobbs Act bribery scheme will not be enough to constitute the sort of agreement

needed under the law of conspiracy. *Id.* As examples, the Court noted that a store owner who "grudging[ly] consents" to pay neighborhood gang members out of fear that they will otherwise trash her store does not enter into a conspiratorial agreement, as there is no shared criminal objective between the store owner and the gang members. *Id.* at 16. Likewise, the Court found that a restaurant owner who "reluctantly pays" a health inspector who demands a bribe under the threat of shutting down the restaurant "lacks the *mens rea* necessary for a conspiracy," as this "mere acquiescence in the demand does not form a conspiracy" between the crooked health inspector and the acquiescing restaurant owner. *Id.*

## IMPLICATIONS OF OCASIO

The Hobbs Act, along with the wire and mail fraud statutes, has long been a favored tool by the Department of Justice to prosecute public corruption cases. In *Ocasio*, the Supreme Court upheld federal prosecutors' use of the Hobbs Act to prosecute kickback conspiracies involving individuals who pay bribes to corrupt state or local officials. This holding represents further expansion of federal prosecution of potential criminal activity that is essentially local in nature.[1] As a consequence, activity that may at first glance appear to be "local" may well be within the expanding reach of federal criminal statutes and investigated and potentially charged by the Department of Justice. There is much that has been and will be written about this case, but here we note three points about the implications of *Ocasio*.

First, bribe payors will face increased criminal liability for participating in alleged conspiracies, making it harder for them to establish that they are actually victims of the scheme, not perpetrators in it.

Second, and related, if *Ocasio* does allow the person who reluctantly agrees to pay a bribe to be charged as a co-conspirator, then this expansion of liability for individual bribe payors will also mean increased risk of vicarious criminal liability for companies based on the actions of their employees.

Third, it is of note that the doctrine of lenity — that ambiguous criminal statutes be interpreted against a finding of criminal liability — was brushed aside, almost as an afterthought.

### Liability for Bribe Payors

The Court's decision allows federal prosecutors to charge — under the conspiracy statute — those who pay bribes to corrupt public officials. Though these "bribe payors" cannot be charged for substantive Hobbs Act violations (as they are not public officials), they can be charged for conspiring to violate the act through their willingness to form an agreement with the corrupt public officials to enact a bribery scheme. Determining where on the culpability spectrum a "pressured victim" or a "co-conspirator" falls will continue to be a subject of factual debate and likely of prosecutorial discretion. In its "store owner" and "restaurant owner" examples, the majority in *Ocasio* attempted to sharpen what may otherwise be the blurry line between victim and conspirator. But as Justice Breyer noted in his concurrence, even these seemingly straightforward examples will require "courts (and juries) . . . to draw the difficult distinction between the somewhat involuntary behavior of the bribe payor and the voluntary behavior of the same bribe payor, which may determine whether there is or is not a conspiracy." 578 U. S. \_\_\_\_\_, (Breyer, J., concurring) slip concurring op. at 1. Seldom are the facts of a case as simple and clean as the examples suggested by the Court.

While the Court admits that any consent is not enough to form a criminal conspiracy, it provides little guidance on where to draw the line. In the absence of a bright-line rule, we can expect that prosecutors may well use their discretion to broadly find conspiracies, even where they cannot charge a defendant with the underlying substantive crime. In the latter case, *Ocasio* makes clear that a bribe-paying witness can be indicted and, practically speaking, forced to cooperate under threat of conviction, which the government may find preferable.

## **Risk to Companies Facing DOJ Scrutiny**

In permitting federal prosecutions of bribe payors, *Ocasio* likely increases the risk of criminal prosecution against companies whose employees are charged with conspiracy to violate the Hobbs Act. Where an employee bribes a public official within the scope of his or her employment and in order to benefit the company, the company can be charged for conspiracy to violate the Hobbs Act and, thus, be itself subject to criminal prosecution.

In this context, the corporate defendant must take note of the increased federal interest in what appears to be local activity. Therefore, an employer should never assume that its employees' actions are not of interest to federal authorities, either because the facts are too localized in nature or the amount of money at issue is too small. The Justice Department may well investigate and, where it can, charge individual *and* corporate parties. This drives home the importance of corporate compliance programs. As a part of any investigation into a corporate defendant, the government will consider the compliance policies the company had in place to prevent the employee conduct as issue, as we explained here.

## **No Lenity to the Petitioner**

Finally, it is also of note that the Court's ruling granted no lenity to *Ocasio*, who argued that the Hobbs Act element "property obtained from another" was not met. Lenity is an important concept criminal defense and refers to the judicial doctrine that requires those ambiguities in a criminal statute relating to prohibition and penalties to be resolved in favor of the defendant if it is not contrary to legislative intent. This defense has been raised increasingly in this era of complex criminal statutes and increased criminalization of what is often perceived as legitimate business activity.[2] Instead of accepting *Ocasio*'s argument that the Hobbs Act's language was ambiguous, the Court noted, in a footnote, that "that rule applies only when a criminal statute contains a 'grievous ambiguity or uncertainty'" and "only if, after seizing everything from which aid can be derived," a court "can make no more than a guess as to what Congress intended." 578 U. S. \_\_\_\_, slip op. at 13, n.8.

## **CONCLUSION**

*Ocasio* is yet another warning flare for corporate defendants — the government has a myriad of ways of prosecuting you and your employees if it chooses to do so. Corporate defendants thus should ensure their compliance programs are well-designed and rigorously enforced well before an issue pops up that raises the specter of a federal criminal prosecution.

*K&L Gates white-collar practice members defend individuals and companies in a wide variety of criminal cases in the United States and around the world. Its lawyers, many of whom are former prosecutors, have handled several Hobbs Act cases.*

## NOTES:

[1] This is also the rationale we see for federal prosecution of drug and gun crimes.

[2] See *United States v. Radley*, 632 F.3d 177 (5th Cir. 2011), where the court upheld the dismissal charges of conspiring to manipulate the U.S. propane market. The defendants prevailed in part because of the ambiguities in the statutes at issue.

## KEY CONTACTS



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