1 GERARD E. LYNCH, Circuit Judge, *concurring*:

2 I join in Judge POOLER's thorough opinion for the Court, and write only to
3 state why I regard this as a close and difficult case.

4 I

5 The operative indictment in this case charges, among other things, that
6 Lawrence Hoskins, a senior vice president of a foreign corporation based abroad,
7 (1) conspired with others, among them named employees of a Connecticut power
8 company that is a subsidiary of the foreign corporation for which Hoskins
9 worked, to commit offenses against the United States, including to violate the
10 Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2, by bribing
11 Indonesian public officials, and (2) committed substantive violations of that
12 statute in that he aided and abetted those American individuals who engaged in
13 the charged bribery.

14 For purposes of this appeal, we assume that Hoskins was neither an
15 employee nor an agent of a domestic concern.[1] He therefore does not fall within
16 the terms of the statute, any more than the get-away driver for a bank robbery

1 [1] See Court Op. 4 n.1. The district court dismissed the indictment only insofar as
2 it relies on the conspiracy and aiding and abetting theories, and left the charges
3 against Hoskins intact insofar as he is charged as an "agent" of an American
4 entity.

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1 team has personally "by force and violence . . . take[n] . . . from the person or
2 presence of another . . . any property . . . belonging to . . . any bank." 18 U.S.C.
3 § 2113(a). He did not, by his own actions, commit the acts prohibited by the
4 FCPA, nor is he within the class of individuals who *could* commit the prohibited
5 acts.

6 The problem for Hoskins, however, as for the get-away driver, is that 18
7 U.S.C. § 2 punishes "as a principal" anyone who, although he or she does not
8 personally commit the acts constituting the offense, "aids, abets, counsels,
9 commands, induces or procures" the commission of those acts by another; in
10 addition, 18 U.S.C. § 371 punishes anyone who "conspire[s]" with another to
11 commit the offense. The indictment in this case expressly charges that someone
12 (specifically the alleged co-conspirator Pomponi, who *was* an employee or agent
13 of a domestic concern) *did* engage in substantive violations of the FCPA, and that
14 Hoskins conspired with, and aided and directed, that person in the commission
15 of the offense.

16 As the opinion for the Court expressly recognizes, were we to rely solely
17 on "the plain language of the general statutes regarding conspiracy and
18 accessorial liability — which nothing in the text of the FCPA purports to override

1 or limit – if Hoskins did what the indictment charges, he would appear to be
2 guilty of conspiracy to violate the FCPA and (as an accomplice) of substantive
3 violations of that statute," Court Op. 19–20, just as the wheelman for the bank
4 robbery team is guilty of conspiracy and of substantive violations of the bank
5 robbery statute. That is precisely the result that the conspiracy and complicity
6 statutes, and the common-law doctrines that long preceded such statutes and
7 which the statutes codify, are designed to effect.

8 Moreover, as the Court also recognizes, the fact that the FCPA specifies
9 that only particular classes of people can violate the law by bribing foreign
10 officials does not in itself restrict the reach of conspiratorial or aiding and
11 abetting liability to those same classes of people. Many offenses are defined such
12 that they may be committed only by the actions of particular types of people. But
13 as the Court's opinion ably documents, "the firm baseline rule with respect to
14 both conspiracy and complicity is that where the crime is so defined that only
15 certain categories of persons . . . may commit the crime through their own acts,
16 persons not within those categories can be guilty of conspiring to commit the
17 crime or of the substantive crime itself as accomplices." Court Op. 21. That is not
18 only the rule established by federal precedent; as the Court notes, that position is

1 "universally held" in the states and in other Anglo-American jurisdictions. *Id*.
2 n.4, quoting the American Law Institute, Model Penal Code and Commentaries,
3 § 2.06 at 323 (1985).[2]

4 That baseline principle, like most principles, admits of exceptions, some of
5 which have longstanding common-law roots. One such exception, as the Court's
6 opinion notes, is exemplified by the Supreme Court's opinion in *Gebardi v. United*
7 *States*, 287 U.S. 112 (1932). Sometimes we can infer from the apparent purpose of
8 the statute that the legislature cannot have intended to extend accessorial liability
9 to a class of persons who might better be thought of as victims of the crime (such
10 as a willing underage participant in a sex act defined as rape because of the
11 underage party's incapacity to consent, even where the minor intentionally
12 facilitates the act and is old enough to have the capacity to commit a crime), or

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[2] For example, 18 U.S.C. § 656 makes it a crime for an "officer, director, agent or employee of" certain banking institutions to "embezzle[ ] . . . or misappl[y]" the bank's funds. But it would be quite peculiar if the language of the law defining the kinds of persons who could be the *principals* of an embezzlement scheme precluded from liability, by that very definition, those who aid or induce a bank officer to engage in acts of embezzlement. Thus, if a bank officer persuades a friend with computer expertise to write code that could be insinuated into the bank's computers to divert funds into the officer's account, in exchange for a share of the proceeds of the crime, the computer-savvy friend would of course be punishable for knowingly joining and assisting the criminal plan.

1 where a legislative sentencing scheme distinguishes levels of culpability among
2 various participants, and treating the less culpable party as an accomplice of the
3 more culpable one would undermine that scheme (as in the case of narcotics
4 transactions, where possessors of illegal drugs for their own use are punished
5 less severely than distributors; the purchaser is not treated as the accomplice of
6 the seller even though he or she intentionally facilitates the sale).[3]

7 This exception, however, must be construed narrowly. Discerning when
8 the legislature "must have" intended to exempt a particular class of persons from
9 the plain text of its statutes is a tricky business. What, after all, in the language or
10 structure of the statute distinguishes one statute that limits the category of
11 principal offenders from another, such that some few should be singled out as
12 clearly intending to preclude some persons outside that category from liability,
13 and distinguished from the general run of statutes where no such intention can

1 [3] The latter aspect of the exception largely accounts for *United States v. Amen*, 831
2 F.2d 373 (2d Cir. 1987). The "continuing criminal enterprise" or "kingpin" statute,
3 21 U.S.C. § 848, is essentially a sentence-enhancing statute that identifies some
4 drug dealers as worthy of increased punishment because of the extent and
5 magnitude of their criminal acts. To apply accessorial liability as a way of
6 bumping the kingpin's henchmen up to the same level of punishment because
7 they help him in his enterprise would disrupt the legislature's intention to
8 impose graduated punishments according to various conspirators' different
9 levels of involvement in the narcotics trade.

1 be discerned? Nothing, or at least not much, in the statutes at issue tells us to
2 exclude some or all persons not within the designated category from accomplice
3 liability.

4 In my view, it is helpful in most cases to look to the traditional principles
5 derived from the common law, and embodied in the legislation and judicial
6 decisions of the fifty states, which have the primary responsibility for enforcing
7 criminal law in this country. That is not an idiosyncratic position of my own; it
8 was the view expressed by Justice Jackson, writing for a unanimous Supreme
9 Court in *Morissette v. United States*, 342 U.S. 246 (1952). The *Morissette* Court
10 looked to the common law and the rulings of "[s]tate courts of last resort, on
11 whom fall the heaviest burden of interpreting criminal law in this country," to
12 interpret a federal statute (the prohibition on theft of federal property, now
13 codified at 18 U.S.C. § 641) that lacked "any express prescription of criminal
14 intent." *Id*. at 260–61. Justice Jackson concluded that, since Congress acted against
15 the backdrop of "an unbroken course of judicial decision in all constituent states
16 of the Union," its silence about *mens rea* reflected the adoption of common-law
17 principles, rather than their rejection. *Id*. at 261–62.

18 As our principal opinion today correctly points out, the Supreme Court in

1 *Gebardi* seems to have considered its ruling, rejecting conspiratorial liability
2 under the Mann Act for women who agreed to be transported across state lines,
3 as a slight extension of the traditional common-law rules. Court Op. 26–27. But
4 this fact alone would not persuade me that *Gebardi* opens a broad door to finding
5 "legislative policy" exceptions to the general principle that persons outside
6 defined legislative categories of principal liability may still be guilty of
7 conspiracy and complicity. In codifying the general consensus of common-law
8 complicity principles, the Model Penal Code confined the exceptions to two
9 closely related situations, proposing to exclude from accomplice liability only
10 "victim[s] of [the] offense," MPC § 2.06(6)(a), and those whose "conduct is
11 inevitably incident to its commission" in light of the definition of the offense, *id.*
12 § 2.06(6)(b). The Commentary to these proposals, which extensively discusses the
13 many decisions classifying persons as accomplices or not across a variety of
14 crimes, treats *Gebardi* as an example of the latter exception. *See* American Law
15 Institute, Model Penal Code and Commentaries, § 2.06 at 323–25 & nn.74, 82.[4]

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[4] Indeed, the language of the second exception is closely derived from that of Justice Stone in *Gebardi*, who wrote:

> 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

1 The Fifth Circuit's decision in *United States v. Castle*, 925 F.2d 831 (5th Cir.
2 1991), illustrates a classic application of the *Gebardi* principle to the FCPA. There,
3 the government attempted to prosecute the foreign official who received a bribe
4 from representatives of a domestic concern for conspiracy to violate the FCPA.
5 Such a prosecution runs directly in the face of *Gebardi* and its common-law
6 predecessors. As the Fifth Circuit ruled, "Congress intended in both the FCPA
7 and the Mann Act to deter and punish certain activities which necessarily
8 involved the agreement of at least two people, but Congress chose in both
9 statutes to punish only one party to the agreement." *Id*. at 833. Thus, "the very
10 individuals whose participation was required in every case — the foreign
11 officials accepting the bribe — were excluded from prosecution for the
12 substantive offense." *Id*. at 835. In such a case, it makes sense to conclude that
13 Congress must have intended to impose liability only on the American bribe

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> 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.

267 U.S. at 123 (emphasis added).

1 giver, and not on the foreign official who receives the bribe, even though the
2 latter plainly facilitates the criminal conduct of the bribe giver. The legislative
3 history cited in the Court's opinion corroborates that intuition. If anything is clear
4 from that history, it is that Congress was concerned about intruding into foreign
5 sovereignty by attempting to punish under American law foreign officials taking
6 bribes from Americans on their own soil.

7 It is not at all clear to me, however, that Hoskins benefits from the *Gebardi*
8 principle. Although every bribe given by an American company to a foreign
9 government official in return for favorable official treatment inherently involves
10 such a foreign official (the foreign official's receipt of the bribe is an "inseparable
11 incident," in Justice Stone's phrase, of the American bribe-giver's violation of the
12 FCPA), not every such bribe involves the direction of the American company's
13 action, or the provision of expert advice on how to execute the scheme, by an
14 executive of a foreign parent of the American company. Thus, while Congress
15 could not help but be aware that every bribe given abroad by an affiliate of an
16 American entity involved by definition a foreign official who received the bribe,
17 there is no particular reason to think that the conceivable (but somewhat arcane)
18 case of a foreign parent company's executives who directed, supervised, or

1 assisted an American company to pay a bribe was necessarily present to the
2 minds of the members of Congress who voted to adopt the FCPA.

3 II

4 If this case involved an ordinary criminal statute with purely domestic
5 applications, then, I would likely reach a different conclusion here. But as Justice
6 Jackson also explained in *Morissette*, while in many cases Congress can best be
7 understood to have created federal criminal law against the backdrop of
8 traditional common-law principles of criminal liability, in some instances
9 Congress faces novel situations not anticipated by the common law of crimes,
10 and legislates "to call into existence new duties and crimes." 342 U.S. at 253. In
11 doing so, Congress may have to deal with issues that are unique to federal law.

12 The FCPA, for example, is not an ordinary domestic criminal law, but a
13 novel expansion of criminal liability to impose duties on American businesses to
14 conform to domestic ethical standards even when they operate beyond our
15 borders, in lands with different cultures, laws, and traditions. I agree with my
16 colleagues that the extraterritorial effects of the FCPA require us to exercise
17 particular caution before extending its reach even farther than that expressly
18 declared by the statutory text. Although the FCPA explicitly and by design

1 applies extraterritorially, the same concerns that generate a presumption against
2 implying extraterritorial application of United States law, *see Morrison v. National*
3 *Australia Bank, Ltd.*, 561 U.S. 247 (2010) warrant special caution in applying
4 normal principles of accessorial liability when Congress has delineated the
5 particular circumstances in which the statute applies abroad.

6 In adopting the FCPA, Congress sought to criminalize wrongful conduct
7 by Americans and those who in various ways work with Americans, while
8 avoiding unnecessary imposition on the sovereignty of other countries whose
9 traditions and laws may differ from our own. The legislative history described in
10 the Court's opinion demonstrates that, in confronting the delicate line-drawing
11 exercises involved in balancing these concerns, Congress intended to limit the
12 overseas applications of the statute to those that it explicitly defined. The
13 particular situation of someone like Hoskins, who is alleged to have participated
14 in directing or assisting Americans to violate the FCPA, was not explicitly
15 discussed by Congress, and such a case might well never have occurred to those
16 drafting the law. The extraterritorial application that *primarily* concerned
17 Congress was the potential intrusion into the sovereignty of the nations whose
18 officials were bribed. But we do not sit to decide how Congress might have

1 written the law if it had specifically considered this case. We can only apply the
2 law that Congress *did* write, which limits the extraterritorial application of the
3 FCPA to specific cases that do not include Hoskins's situation.

4 I therefore think that a combination of the presumption against
5 extraterritorial application of United States law generally discussed in Part II D of
6 the majority opinion, and the legislative history, discussed in Part II C 3
7 demonstrating that Congress drew lines in the FCPA out of specific concern
8 about the scope of extraterritorial application of the statute, warrant affirmance of
9 the district court's partial dismissal of the indictment in this case.

10 III

11 I would be remiss, finally, not to note that Congress might want to revisit
12 the statute with this case in mind, as the result we reach today seems to me
13 questionable as a matter of policy. The FCPA represents an effort by the United
14 States to keep its own nationals free of corruption when dealing in foreign
15 countries where corruption is endemic. Such corruption undermines the ethical
16 foundations of American businesses, and risks accustoming American
17 businesspeople and corporations to corrupt practices that they encounter abroad,
18 with the attendant possibility of importing back to the United States practices

1 they become familiar with in countries with less developed principles of the rule
2 of law and the transparency and impartiality of government regulation.
3 Moreover, by embroiling American companies in the corrupt activities of foreign
4 officials, such bribery tends to perpetuate the corruption of developing nations,
5 to the long-run disadvantage of the United States both in foreign policy (by
6 associating the United States and its citizens and businesses with unpopular
7 corrupt regimes) and in commerce (by perpetuating the corruption "tax" levied
8 on all those who do business with such regimes). *See* Court Op. 50–51 & n.7
9 (discussing purposes of the FCPA).

10 As noted above, these important purposes must be balanced against a
11 concern about intruding into foreign sovereignty. It is thus not surprising that
12 Congress chose to stop American businesses from engaging in the corrupt
13 cultures of countries where they may do business, but did not attempt to reform
14 those countries themselves by punishing their public officers.

15 If the charges in the indictment are proved true, however, the prosecution
16 of Hoskins does not implicate that concern. Hoskins was not an official of a
17 corrupt foreign government, operating in a legal and business culture distinct
18 from that of the United States and other Western democracies. He was, rather, a

1 citizen of the United Kingdom, employed by a British subsidiary of the French
2 parent company of the American entity that allegedly paid bribes to Indonesian
3 legislators to secure business for the American company, working in France from
4 the offices of a French subsidiary of the same French parent. Both his country of
5 citizenship (the United Kingdom) and the country where he worked and where
6 the company whose interests he was ultimately advancing was incorporated
7 (France) are signatories of the Organisation for Economic Co-operation and
8 Development ("OECD") Convention on Combating Bribery of Foreign Public
9 Officials in International Business Transactions, and are thus committed, as is the
10 United States, to enacting legislation along the lines of the FCPA.[5] Although any
11 prosecution of a foreign national for actions taken on foreign soil raises some
12 concern about possible friction with other countries, the prosecution of someone
13 in Hoskins's position does not threaten a foreign country's sovereign power to
14 select, retain, and police the officials of its own government, nor does it conflict
15 with the policies of the countries involved.

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[5] As the Court's opinion describes, the OECD Convention was a diplomatic initiative of the United States to encourage its principal trading partners and competitors in international commerce to enact anti-corruption laws similar to those of the FCPA. The 1998 FCPA amendments were adopted in part to conform American law to the Convention's requirements. *See* Court Op. 55–63.

1 Nor were the effects of Hoskins's alleged actions felt only in his own
2 countries of citizenship and employment. Hoskins is alleged to have been part of
3 the team that reached into the United States to counsel and procure the
4 commission of an American crime by an American company, and to assist that
5 company in executing bribes in violation of American law. A prosecution on
6 these facts does not evince an effort by the United States to "rule the world," *RJR*
7 *Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016), but rather an effort to
8 enforce American law against those who deliberately seek to undermine it.
9 Moreover, the FCPA explicitly contemplates the prosecution of at least
10 some foreign nationals who operate entirely abroad, in that it penalizes foreign
11 nationals who act as the *agents* of American companies in paying bribes abroad.
12 Thus, for example, if Alstom U.S. had channeled its bribes to Indonesian officials
13 through Indonesian citizens who were low-level Alstom employees in Indonesia,
14 the FCPA would appear to penalize those employees. Indeed, our decision today
15 leaves intact the possibility that Hoskins himself may be convicted under this
16 indictment for violating the FCPA, if the government establishes that he
17 functioned as the *agent* of the American company, rather than as one who
18 directed the actions of the American company in the interests of its French parent

1 company. That seems to me a perverse result, and one that is unlikely to have
2 been specifically anticipated or intended by Congress. It makes little sense to
3 permit the prosecution of foreign affiliates of United States entities who are
4 minor cogs in the crime, while immunizing foreign affiliates who control or
5 induce such violations from a high perch in a foreign parent company. That is the
6 equivalent of punishing the get-away driver who is paid a small sum to facilitate
7 the bank robber's escape, but exempting the mastermind who plans the heist.

8 It is for Congress to decide whether there are sound policy reasons for
9 limiting the punishment of foreign nationals abroad to those who are agents of
10 American companies, rather than to those who make American companies their
11 agents. Our only task is to enforce the laws as Congress has written them. While I
12 see no reason to believe that Congress specifically contemplated a case quite like
13 this one, I agree that the lines drawn in the FCPA, which were crafted specifically
14 to define when extraterritorial prosecutions would be permitted, do not
15 encompass the present case. I therefore concur in the opinion and judgment of
the Court.