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Accomplices, Aiding and Abetting, and the Like: An Abbreviated Overview of 18 U.S.C. § 2

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Summary

Virtually every federal criminal statute has a hidden feature; primary offenders and even their most casual accomplices face equal punishment. This is the work of 18 U.S.C. § 2, which visits the same consequences on anyone who orders or intentionally assists in the commission of a federal crime.

Aiding and abetting means assisting in the commission of someone else's crime. Section 2(a) demands that the defendant embrace the crime of another and consciously do something to contribute to its success. An accomplice must know the offense is afoot if he is to intentionally contribute to its success. While a completed offense is a prerequisite to conviction for aiding and abetting, the hands-on offender need be neither named nor convicted.

On occasion, an accomplice will escape liability, either by judicial construction or administrative grace. This happens most often when there is a perceived culpability gap between accomplice and primary offender. Such accomplices are usually victims, customers, or subordinates of a primary offender. On other occasions, an accomplice will be charged as a co-conspirator because the facts that will support accomplice liability will ordinarily support conspirator liability and conspiracy is a separate offense.

Section 2(b) (willfully causing a crime) applies to defendants who work through either witting or unwitting intermediaries, through the guilty or the innocent. Section 2(b) applies even if the intermediary is unaware of the nature of his conduct. Section 2(a) requires two guilty parties, a primary offender and an accomplice. Section 2(b) permits prosecution when there is only one guilty party, a "causing" individual and an innocent agent. Both subsections, however, require a completed offense.

Federal courts sometimes mention, but rarely apply, a withdrawal defense comparable to one available in conspiracy cases. Defendants are more likely to succeed by attacking the elements for liability, that is, arguing that they did not knowingly intend to commit the underlying offense or that no underlying offense ever occurred.

There is no general civil aiding and abetting statute. Aiding and abetting a violation of a federal criminal law does not trigger civil liability unless Congress has said so in so many words.

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Introduction

Virtually every federal criminal statute has a hidden feature; helpers and hands-on offenders face the same punishment.[1] This is the work of 18 U.S.C. § 2, which treats hands-on offenders and their accomplices (aiders and abettors) alike. This accomplice liability is much like that which accompanies conspiracy, and the rationale is the same for both: society fears the crimes of several more than the crimes of one. Aiding and abetting, unlike conspiracy, is not a separate crime; instead it serves as an alternative means of incurring criminal liability for the underlying offense.

Background

At English common law, felonies were punishable by death in most instances. An individual might be guilty of a felony as a leal in the first degree, a principal in the second degree, an accessory before the fact, or an accessory after the fact. A principal in the first degree was he who by his own hand committed the crime. A principal in the second degree was "he who [was] present, aiding, and abetting the fact to be done." An accessory before the fact was "one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime." An accessory after the fact was one who, "knowing a felony to have been committed, receive[d], relieve[d], comfort[ed], or assist[ed] the felon." The common law erected several procedural barriers for the benefit of accessories in felony cases, apparently to shield them from the death penalty.

When the first Congress convened, it outlawed as capital offenses piracy and related murders and robberies. At the same time, it merged the concepts of principal in the second degree (those who aided and abetted) and accessory before the fact (those who commanded and counseled) in piracy cases, condemning to death anyone who "knowingly and wittingly aid[ed] and assist[ed], procure[d], commanded[ed], counsel[ed] or advise[d] any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon the seas."

The Revised Statutes, the first official codification of federal law, carried the piracy provision forward with slight modifications. It remained for the 1909 codification of federal criminal law to extend coverage beyond a few individual offenses like piracy to the general coverage now found in 18 U.S.C. § 2(a). The commission, established in 1897 to recommend a proposed United States Penal Code, urged from the beginning the elimination of the common law distinctions between principals and accessories before the fact. Congress acted on its recommendation in 1909.

Congress carried the 1909 provision forward in its 1948 recodification. It added Section 2(b), however, to ensure criminal liability of the offender worked who remotely to commit the offense entirely by commanding or duping others.

Section 2(a): Aiding and Abetting

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Conviction under Section 2(a) requires that a defendant embrace the crime of another and consciously do something to contribute to its success. Although its elements are variously

[1] This report is an abridged version of longer CRS Report R43769, *Accomplices, Aiding and Abetting, and the Like: An Overview of 18 U.S.C. § 2*, by Charles Doyle, without the footnotes, attributions, and citations to authority found in the longer version.

described, it is often said that, "[i]n order to aid and abet another to commit a crime it is necessary [1] that a defendant in some sort associate himself with the venture, [2] that he participate in it as in something that he wishes to bring about, [3] that he seek by his action to make it succeed," and [4] that someone commits the offense. Satisfying only one of these elements is not enough. Thus, presence at the commission of a crime or close association with the perpetrator does not constitute aiding and abetting, without more. Yet, a defendant's level of participation may be relatively minimal and need not advance every element of the crime. As for seeking to make it succeed, the defendant must intend the commission of the underlying offense, and that intent requires that he be aware beforehand of the scope of the offense in order to permit him to disassociate himself. Thus, the defendant must know that the offense is afoot before it occurs if he is to be convicted of aiding and abetting. A completed offense is a prerequisite to conviction for aiding and abetting, but the hands-on offender need be neither named nor convicted.

As a general rule, the defendant's aiding and abetting must come before or at the time of the offense. The general rule, however, does not always apply when the defendant's assistance straddles elements of the offense. At common law, robbery consisted of forceful taking the personal property of another from his person *and* carrying it away. The federal bank robbery statute carries forward this notion when it outlaws "taking and carrying away" a bank's money. Thus in a sense aiding another to escape, that is to "carry away" the proceeds of a robbery, might be considered aiding and abetting before the crime is over. A number of courts have concluded that one who assists a bank robber to escape may be charged with aiding and abetting.

Elsewhere, assistance given after the crime has occurred is ordinarily treated as a separate, less severely punished, offense – acting as an accessory after the fact. Conviction requires the government to "demonstrate (1) the commission of an underlying offense against the United States; (2) the defendant's knowledge of that offense; and (3) assistance by the defendant in order to prevent the apprehension, trial, or punishment for the offender." A defendant cannot be convicted as an accessory before the fact and an accessory after the fact.

Exceptions

Whether by prosecutorial discretion or judicial pronouncement, accomplices sometimes void the application of federal principles of secondary criminal liability which usually govern conspiracy and aiding and abetting cases. It happens most often when there is a substantial culpability gap between the accomplice or co-conspirator and the primary offender. The cases frequently involve one of three types of accomplices or co-conspirators: victims, customers, or subordinates.

"Victims" include "persons who pay extortion, blackmail, or ransom monies." Not every victim qualifies for the exception. Some do. Some do not. Culpability makes a difference. For instance, the Hobbs Act outlaws extortion by public officials. Victims at the mercy of a corrupt public official might not be charged. Yet, the erstwhile victim who is the moving party or a willing participant in a scheme to corrupt a public official is likely to be convicted and sentenced either for bribery or as an accomplice to extortion.

"Customers" who have escaped conviction as co-conspirators or accomplices include drinkers, bettors, johns, and drug addicts. Examples from the Supreme Court include *United States v. Farrar* and *Rewis v. United States*. In *Farrar*, the Court held a speakeasy's customers could not be prosecuted as aiders and abettors of the establishment's unlawful sale of liquor. In *Rewis*, it reached the same conclusion for the customers of a gambling den. Rewis had been convicted of interstate travel in aid of unlawful gambling, following a jury charge that included an aiding and abetting instruction. The Court concluded that Congress had not intended mere bettors to be covered. It later indicated that the same could be said of the federal gambling business statute, 18

U.S.C. § 1955, when it observed that "§1955 proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor." Comparable logic may cover a prostitute's customer also.

The Federal Controlled Substances Act (CSA) reinforces the preexisting view that a drug trafficker's customers cannot be prosecuted co-conspirators or aiders and abettors in his trafficking. Prior to the Act, federal law punished the trafficker but not his customer. Since enactment of the CSA, federal law punishes the trafficker severely for possession with intent to distribute, but it punishes the customer for simply possession, ordinarily as a misdemeanor.

"Subordinates" have more difficulty avoiding secondary liability. Nevertheless, in *Gebardi*, the Supreme Court held that a woman who agreed to be transported in interstate commerce for immoral purposes could not be charged with conspiracy to violate the Mann Act, which outlawed interstate transportation of a woman for immoral purposes. Later lower federal courts continued to honor the *Gebardi* construction of the Mann Act, but limited it to cases in which the prostitute did no more than acquiesce in her interstate transportation. Moreover, Occupational Safety and Health Act's (OSHA) provisions do not allow employees of an OSHA offender to be prosecuted as aiders and abettors. On the other hand, no such benefit accrues to subordinates supervised by offenders of the federal gambling business statute, which condemns those who own or supervise an unlawful gambling enterprise which involves direction of five or more individuals. There is no consensus over how subordinates of a drug kingpin may be treated.

Section 2(b): Causing the Offense

> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The words "commands, induces or procures" in Section 2(a) would seem to capture crimes committed through an intermediary. Congress enacted Section 2(b), however, to makes it clear that the section applies to defendants who work through either culpable or innocent intermediaries. And the courts have construed Section 2(b) to apply whether a defendant works through culpable or innocent intermediaries. When the intermediary is an innocent party, no one but the "causing" individual need be charged the underlying offense. Yet there must be an underlying crime. Section 2(b) imposes no liability unless the actions of the defendant and his intermediary, taken together, constitute an offense.

Congress gave little indication of its purpose when it changed "causes" to "willfully causes," in 1951. The amendment originated in Senate Judiciary Committee, after the House had passed its version of the bill. The Committee Report explained why it changed "is a principal" to "is punishable as a principal," but said nothing about why it added the word "willfully." There has been some speculation that the word "willfully" was added to address an observation by Judge Learned Hand. Judge Hand had observed that Section 2(a) had a mental element ("knowing"), but that Section 2(b) had no comparable element. In any event, it appears that the courts understand "willfully" to be part of dual form of required intent. The individual must purposefully cause another to commit a necessary element of the offense and the individual must do so with the intent necessary for commission of the underlying offense. An individual may incur liability under Section 2(b) even if he is unaware that the underlying conduct is in fact a crime, unless the underlying offenses requires guilty knowledge.

Withdrawal Defense

Federal courts sometimes mention an aid-and-abetting withdrawal defense comparable to one available in conspiracy cases. In conspiracy, withdrawal is not a defense for conspiracy itself, but it may be a defense for liability for co-conspirator offenses committed in foreseeable furtherance of the scheme after the defendant's withdrawal. To establish withdrawal from a conspiracy, the defendant has the burden to show "that he took affirmative action by reporting to the authorities or by communicating his intentions to the co-conspirators."

In aiding and abetting, the withdrawal defense in federal cases is at most less well established that its conspiracy counterpart. "[I]t is unsettled if a defendant can withdraw from aiding and abetting a crime. Other courts have reached varying results when considering the applicability of the withdrawal defense to the federal accomplice liability statute."

An aiding and abetting defense is more likely to take the form of an attack on one of the elements for liability. For example, an individual charged with an uncompleted offense has a perfect defense, because aiding and abetting liability requires a completed offense. By the same token, an individual who unwittingly assists the commission of the crime of another faces no liability under Section 2, because an accomplice incurs liability only if he knowingly embraces the crime of another as something he wishes to succeed. As for seeking to make it succeed, the defendant must intend the commission of the underlying offense, and that intent requires that he be aware beforehand of the scope of the offense in order to permit him to disassociate himself. Thus, the defendant must know that the offense is afoot before it occurs if he is to be convicted of aiding and abetting.

Civil Liability

"Congress has not enacted a general civil aiding and abetting statute. . . . Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." With this in mind, the courts have concluded, for example, that aiders and abettors incur no civil liability as a consequence of their violations of the Anti-Terrorism Act; the Electronic Communications Privacy Act; the Stored Communications Act; RICO; or the Trafficking Victims Protection Act.

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