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Aiding, 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 results from 18 U.S.C. 2, which visits the same consequences on anyone who orders or 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.

Section 2(b) (willfully causing a crime) applies to defendants who work through either witting or unwitting intermediaries, through the guilty or the innocent. Whether the intermediary is a subordinate or an undercover government agent, he may be well aware that his conduct constitutes an element of the underlying offense. On the other hand, whether the intermediary is a dupe or a facilitating governmental official, §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. Proponents of a general withdrawal defense in §2 cases may find support in recent Supreme Court dicta. In *Rosemond*, the Court explained that an accomplice must know of the pending substantive offense in order to be shown to have embraced its commission. It did so in a manner suggesting that an accomplice might be able to withdraw and escape liability prior to the commission of the substantive offense, even if he had contributed to the crime's ultimate success.

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.

This report is an abridged version of CRS Report R43769, *Aiding, Abetting, and the Like: An Overview of 18 U.S.C. 2*, by (name redacted) without the footnotes, attribution for quotations, and citations to authority found there.

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Introduction

Virtually every federal crime comes with a hidden feature. Helpers and hands-on offenders face the same punishment. The result is the work of 18 U.S.C. 2, which visits the same consequences on anyone who orders the commission of a federal crime. This secondary 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.

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.

Section 2(a), the aiding and abetting subsection, is more frequently prosecuted than §2(b), the causes subsection. Although its elements are variously described, it is often said that, “[i]n order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, [and] that he seek by his action to make it succeed.”

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. That means that the defendant must know that the offense is afoot before it occurs if he is to be convicted of aiding and abetting.

That does not mean that the defendant must aid in every aspect of the substantive offense. At common law: “where several acts constitute[d] together one crime, if each [was] separately performed by a different individual[,] ... all [were] principals as to the whole.... Indeed, ... a person’s involvement in the crime could be not merely partial but minimal too: [t]he quantity [of assistance was] immaterial, so long as the accomplice did something to aid the crime.... That principal continues to govern aiding and abetting law under §2.” Yet, neither knowledge without assistance nor assistance without intent is enough.

Moreover, §2(a) requires that someone else commit a federal offense, because “[a]iding and abetting is not itself a federal offense, but merely describes the way in which a defendant’s conduct resulted in the violation of a particular law.” In *Standefer*, the Supreme Court rejected the petitioner’s contention that “he could not be convicted of aiding and abetting a principal, Niederberger, when that principal had been acquitted of the charged offense.” That view still prevails. 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. Assistance given after the crime has occurred is a separate, less severely punished, offense—acting as 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 as well as 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 ordinarily involve one of three types of accomplices or co-conspirators: victims, customers, and 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. 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 speak-easy’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 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.” The same logic may cover a prostitute’s customer.

The federal Controlled Substances Act (CSA) reenforces the preexisting view that a drug trafficker’s customers cannot be prosecuted coconspirators 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, the Occupational Safety and Health Act’s (OSHA’s) 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.

Although the words “commands, induces or procures” in §2(a) would seem to capture crimes committed through an agent, as the 1948 report explained the language of §2(b) leaves no doubt. Section 2(b) applies to defendants who work through either witting or unwitting intermediaries, through the guilty or the innocent. Whether the intermediary is a subordinate or an undercover government agent, he may be well aware that his conduct constitutes an element of the underlying offense. On the other hand, whether the intermediary is a dupe or a facilitating governmental official, §2(b) also applies even if he is unaware of the nature of his conduct.

When the intermediary is an innocent party, no one but the “causing” individual need commit 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 the 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 §2(a) had a mental element (“knowing”), but that §2(b) had no comparable element. In any event and although it seems far from certain, it appears that the courts understand “willfully” to mean a dual form of “intentionally.” They believe that an individual “willfully” causes an offense when he intends the commission of conduct that constitutes a crime and then intentionally uses someone else to commit it. An individual may incur liability under §2(b) even if he is unaware that the underlying conduct is in fact a crime.

Withdrawal Defense

Federal courts sometimes mention a withdrawal defense comparable to one available in conspiracy cases. In conspiracy, withdrawal is not a defense for conspiracy itself but only for the crimes committed in foreseeable furtherance of the scheme after the defendant’s withdrawal. “To establish withdrawal from a conspiracy, the defendant has the burden to demonstrate that he took affirmative action by making a clean breast to the authorities or by communicating his withdrawal in a manner reasonably calculated to reach his coconspirators.”

In aiding and abetting, the withdrawal defense in federal cases may be more limited. Certainly, an individual faces no liability under §2(a) if the underlying offense goes uncommitted as a consequence of the withdrawal of his necessary assistance. Aiding and abetting needs a completed offense. The question is more difficult in cases where the crime blooms in spite of an abettor’s abandonment. “[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.”

Proponents of a general withdrawal defense may claim support from recent dicta in *Rosemond*. *Rosemond* had been convicted of two crimes, distributing marijuana (21 U.S.C. 841) and discharging a firearm during a drug trafficking offense (18 U.S.C. 924(c)). The Tenth Circuit had upheld an alternative aiding and abetting instruction concerning the firearm charge. The Supreme Court explained that an accomplice must know of the substantive offense beforehand in order to be shown to have embraced its commission. It did so in a manner suggesting an accomplice might be able to withdraw and escape liability prior to the commission of the substantive offense, even if he had contributed to the crime’s ultimate success.

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; or RICO.

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