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COMMENT *UNITED STATES V. KOZENY*-SHOULD OVERT ACTS BE ELEMENTS OF THE FEDERAL CONSPIRACY STATUTE?

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Comment *United States v. Kozeny*—Should Overt Acts be Elements of the Federal Conspiracy Statute?

*Benjamin E. Rosenberg**

Title 18 of the United States Code, section 371, the federal conspiracy statute, has been in force since 1948, and it is perhaps the most-often invoked statute in federal indictments. It is not complicated. It is thus somewhat surprising that there is a healthy debate about what its elements are — that is, what must the government prove beyond a reasonable doubt to establish a violation of section 371. In the debate, which was most recently addressed by the Second Circuit Court of Appeals in *United States v. Kozeny*,[1] the circuits are almost evenly divided on the question of whether overt acts are elements of the crime of conspiracy as defined in section 371. As it may be anticipated that there will be further cases addressing this issue, it is important to summarize and evaluate the arguments on both sides of the debate. Doing so demonstrates that, notwithstanding *Kozeny* and the cases on which it relied, the better answer is that overt acts should be recognized as elements of the federal conspiracy statute.

I. 18 U.S.C.A. § 371: The Text, the Question, and the Obvious Answer

We begin with what should be uncontested ground. First, all federal criminal laws are creatures of statute; there are no federal common law crimes.[2] Second, each federal statute is comprised of *elements*, which, by definition, are what the government must prove beyond a reasonable doubt.[3] Juries are instructed in each criminal case that they must find each element of the crime, unanimously, beyond a

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[1] *U.S. v. Kozeny*, 667 F.3d 122 (2d Cir. 2011).

[2] See, e.g., *U.S. v. Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971); *U.S. v. Hudson*, 11 U.S. 32, 3 L. Ed. 259, 1812 WL 1524 (1812).

[3] See, e.g., *Richardson v. U.S.*, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999); *Schad v. Arizona*, 501 U.S. 624, 641–42, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality opinion); *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

reasonable doubt.[4] If they do so, then, leaving aside affirmative defenses, they must find the defendant guilty.[5] Third, to determine what the elements of a crime are, the court must look to the statute itself, for Congress defines crimes, and Congress therefore determines the elements that comprise each crime.[6]

Elements of a crime are best understood by contrasting them with the *means* by which a crime may be committed. The Supreme Court clearly stated the distinction in *Richardson v. United States*:

> Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement — a disagreement about means — would not matter as long as 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.[7]

With these givens in mind, consider title 18, United States Code, section 371, the federal conspiracy statute:

> If [1] two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . and [2] one or more of such persons do any act to effect the object of the conspiracy, each [has committed a crime].

On its face, there are two elements to the crime of conspiracy as defined in § 371: [1] An agreement (the two persons must *conspire*) and [2] an act in furtherance of the agreement (*any act to effect the object of the conspiracy*). The latter element is referred to as the "overt act" element,[8] and courts have emphasized that the overt act

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[4]See, e.g., *U.S. v. Edmonds*, 52 F.3d 1236, 1241 (3d Cir. 1995), reh'g en banc granted, opinion vacated on other grounds, (93-1890) (June 29, 1995) and on reh'g en banc, 80 F.3d 810 (3d Cir. 1996).

[5]See, e.g., *U.S. v. Birbal*, 62 F.3d 456, 462–63, 42 Fed. R. Evid. Serv. 1256 (2d Cir. 1995).

[6]See, e.g., *U.S. v. Booker*, 543 U.S. 220, 330, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (Breyer, J., dissenting); *United States v. Edmonds*, 80 F.3d at 817 n.7.

[7]*Richardson*, 526 U.S. at 817. This passage is quoted in full in *Kozeny*, see 667 F.3d at 132, and the page of the Richardson opinion on which it appears is cited by *U.S. v. Griggs*, 569 F.3d 341, 343 (7th Cir. 2009). See also *Schad*, 501 U.S. at 631–32 (plurality opinion).

[8]See, e.g., *U.S. v. Hall*, 349 F.3d 1320, 1323 (11th Cir. 2003), aff'd, sub nom., *Whitfield v. U.S.*, 543 U.S. 209, 125 S. Ct. 687, 160 L. Ed. 2d 611 (2005); *U.S. v. Stone*, 323 F. Supp. 2d 886, 888, 94 A.F.T.R.2d 2004-5203 (E.D. Tenn. 2004).

referred to in the statute need not be significant. Any act in furtherance of the aims of the conspiracy will do.[9]

Based on the text of the statute and the rudimentary bedrock principles described above, it would seem fairly clear — indeed inescapable — that overt acts are elements of the federal conspiracy statute, and that, because they are elements, the government must prove them beyond a reasonable doubt, and a jury must find them unanimously. The conclusion is only reinforced when one recognizes that other federal conspiracy statutes, most significantly the federal narcotics conspiracy statute, 21 U.S.C.A. § 846, does not refer to overt acts, and the Supreme Court has relied upon the omission of such a reference in that statute in finding that there is no overt act requirement in that statute.[10] The contrast between 18 U.S.C.A. § 371 and 21 U.S.C.A. § 846, is clear — one expressly refers to overt acts and the other does not — and so is the conclusion — one has an element the performance of an overt act, and the other does not.

Most standard jury instructions also identified overt acts as elements of the crime of conspiracy under section 371.[11]

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[9]See, e.g., *U.S. v. Alvarez*, 610 F.2d 1250, 1255 n.5 (5th Cir. 1980), on reh'g, 625 F.2d 1196 (5th Cir. 1980) ("The overt act need not, however, be criminal in nature or create any danger to the victim or society; it suffices if, however innocent, the act furthers the criminal venture."); *U.S. v. Tucker*, 376 F.3d 236, 239 (4th Cir. 2004) (mailing a letter); *U.S. v. Hersh*, 297 F.3d 1233, 1248, 186 A.L.R. Fed. 713 (11th Cir. 2002) (taking a trip); *U.S. v. Morales*, 445 F.3d 1081, 1084 (8th Cir. 2006) (attending a meeting); *U.S. v. Valencia*, 226 F. Supp. 2d 503, 507 (S.D. N.Y. 2002), judgment aff'd, 100 Fed. Appx. 17 (2d Cir. 2004) (phone call).

[10]See *U.S. v. Shabani*, 513 U.S. 10, 13–15, 115 S. Ct. 382, 130 L. Ed. 2d 225 (1994). Similarly, the federal statute outlawing money laundering conspiracies, 18 U.S.C.A. § 1956(h), has no overt act requirement.

[11]See, e.g., Pattern Criminal Jury Instructions for the District Courts of the First Circuit § 4.18.371(1) (2012) ("An overt act is any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy. Only one overt act has to be proven. The government is not required to prove that [defendant] personally committed or knew about the overt act. It is sufficient if one conspirator committed one overt act at some time during the period of the conspiracy."); Third Circuit Criminal Jury Instructions § 6.18.371F (2010) ("With regard to the fourth element of conspiracy — overt acts — the government must prove beyond a reasonable doubt that during the existence of the conspiracy at least one member of the conspiracy performed at least one of the overt acts described in the indictment, for the purpose of furthering or helping to achieve the objective(s) of the conspiracy."); Fifth Circuit Criminal Jury Instructions § 2.20 (2001) ("For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt . . . *Third*: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy."); Sixth Circuit Criminal Pattern Jury Instructions § 3.04

II. *United States v. Kozeny* and the Wrong Answer

Even though the answer to the question, "Is the commission of an overt act an element of the federal conspiracy statute, 18 U.S.C.A. § 371?," would appear, as discussed above, to be "yes," there are very few cases addressing the issue. Perhaps because the overt act requirement is so limited — remember it can be *any* act in furtherance of the conspiracy; an act as simple as crossing the street, or making a phone call[12] — there are few cases addressing the question. The paucity of cases is surprising in light of the frequency with which the statute is invoked in indictments. *United States v. Kozeny* addresses the question head-on, and it is therefore an important case in the development of the law of criminal conspiracy.

A. Kozeny's Analysis

Kozeny arose out of an investment by a defendant in Azerbaijan. The indictment alleged, among other things, that the defendant had engaged in a conspiracy to violate the Foreign Corrupt Practices Act (FCPA)[13] in violation of the general federal conspiracy law, 18 U.S.C.A. § 371. The jury convicted the defendant on that count (acquitting him

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(2011) ("The third element that the government must prove is that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy. The indictment lists overt acts. The government does not have to prove that all these acts were committed, or that any of these acts were themselves illegal. But the government must prove that at least one of these acts was committed by a member of the conspiracy, and that it was committed for the purpose of advancing or helping the conspiracy. This is essential."); Ninth Circuit Manual of Model Criminal Jury Instructions § 8.21 (2010) ("In order for the defendant to be found guilty of [18 U.S.C.A. § 371, the government must prove each of the following elements beyond a reasonable doubt . . . Third, one of the members of the conspiracy performed at least one overt act [on or after [*date*]] for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed . . .. An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts."); Tenth Circuit Criminal Pattern Jury Instructions § 2.19 (2011) ("To find the defendant guilty of [18 U.S.C.A. § 371], you must be convinced that the government has proved each of the following beyond a reasonable doubt . . .. *Second*: one of the conspirators engaged in at least one overt act furthering the conspiracy's objective."); Eleventh Circuit Pattern Jury Instructions (Criminal Cases) § 13.1 (2010) ("The Defendant can be found guilty of [18 U.S.C.A. § 371] only if all the following facts are proved beyond a reasonable doubt . . .. during the conspiracy, one of the conspirators knowingly engaged in at least one overt act as described in the indictment; and the overt act was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy."). See generally Sand, Federal Jury Instructions: Criminal, Instructions 19-3, 13S, 19-7, and 19-8.

[12] See supra note 9 (collecting authority).

[13] 15 U.S.C.A. §§ 78dd-1 et seq.

on others), and the defendant appealed. One of the arguments on his appeal was that the district court had refused to instruct the jury that "it needed to agree unanimously on a single overt act committed in furtherance of the conspiracy."

Because the law is clear that the jury must unanimously agree on each element of the crime charged, the defendant's argument was, in effect, that overt acts were an element of the crime of conspiracy. And, for the reasons set forth above, that argument would appear to have solid support in the language of the conspiracy statute. Thus, the defendant's position that the jury must unanimously agree on which overt acts were committed was well-founded.

The Second Circuit, however, found that the jury was not required to agree unanimously on which overt acts had been committed. The court began its analysis by noting that there was a split of authority on the question. The defendant pointed to two cases, from the Eighth[14] and Ninth Circuits,[15] that required jury unanimity on a specific overt act; and the *Kozeny* court identified two other cases, from the Fifth[16] and Seventh[17] Circuits that reached the opposite conclusion. The *Kozeny* court did not dwell on any of these cases. As to the cases from the Eighth and Ninth circuits, *Kozeny* noted that they both approved jury instructions that required unanimity, but did not consider the question of whether such instructions were required. The court said "[a] fair reading of *Haskell* and *Jones* suggests that the Eighth and Ninth Circuits were simply approving the jury instructions, rather than undertaking an analysis of whether jurors are, as a rule, required to agree on a particular overt act."[18] As to the Fifth and Seventh Circuit cases, the *Kozeny* court quoted those circuits' conclusions, but did not consider their reasoning or analyses. The *Kozeny* court's discussion of all of these cases was cursory,[19] with the evident purpose not of endorsing any of these cases' analyses, but merely of establishing that the *Kozeny* court had some precedent favoring its conclusion.

After noting that the issue was open in the Second Circuit, the *Kozeny* court then quoted the passage from Richardson that is quoted above, with the obvious (though unstated) implication being that overt

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[14] *U.S. v. Haskell*, 468 F.3d 1064 (8th Cir. 2006).

[15] *U.S. v. Jones*, 712 F.2d 1316, Fed. Sec. L. Rep. (CCH) P 99447 (9th Cir. 1983).

[16] *U.S. v. Sutherland*, 656 F.2d 1181, 9 Fed. R. Evid. Serv. 278 (5th Cir. 1981).

[17] *U.S. v. Griggs*, 569 F.3d 341 (7th Cir. 2009).

[18] *Kozeny*, 667 F.3d at 130–31.

[19] As discussed below, *Sutherland* itself was quite cursory, whereas *Griggs* is the most sustained judicial analysis of the overt act issue.

acts were simply means of carrying out a crime, not elements of the crime, and thus no unanimity was required. The court then stated its conclusion that "the jury need not agree on a single overt act to sustain a conspiracy conviction."[20] The court explained that "the overt act taken in furtherance of the conspiracy need not be a crime,"[21] and that "'[a]n indictment need not specify which overt act, among several named, was the *means* by which a crime was committed.' "[22] And, the court continued, "The government may plead one set of overt acts in the indictment and prove a different set of overt acts at trial without prejudice to the defendant."[23] The court then concluded that

> although proof of at least one overt act is necessary to prove an element of the crime, which overt act among multiple such acts supports proof of a conspiracy conviction is a brute fact and not itself element of the crime. The jury need not reach unanimous agreement on which particular overt act was committed in furtherance of the conspiracy.[24]

Summarizing *Kozeny*'s analysis, then, the reasons that the court gave for finding that overt acts were not an element of the crime of conspiracy were: (a) overt acts are merely a means of committing the crime of conspiracy, (b) overt acts need not be criminal acts in and of themselves, and (c) the indictment may plead one overt act, but the government can prove another, without there being a fatal variance between indictment and proof.

B. The Precedent Cited by Kozeny

Although *Kozeny* gave short shrift to the other circuits' decisions on the question whether overt acts are elements of a § 371 conspiracy, at least one of them, *Griggs*, deserves some attention. For completeness, I will review each of them briefly.

In *Haskell*, the defendant claimed that the district court judge had not instructed the jury that it was required to agree unanimously on an overt act, but the court found that the jury had been so instructed.[25] The *Haskell* court did not consider whether it would have been error if

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[20] *Kozeny*, 667 F.3d at 131–32.

[21] *Kozeny*, 667 F.3d at 132 (citing *Braverman v. U.S.*, 1942-2 C.B. 319, 317 U.S. 49, 63 S. Ct. 99, 87 L. Ed. 23, 42-2 U.S. Tax Cas. (CCH) P 9731, 29 A.F.T.R. (P-H) P 1195 (1942)).

[22] *Kozeny*, 667 F.3d at 132 (quoting *Schad*, 501 U.S. at 631) (emphasis added by the author, not the court).

[23] *Kozeny*, 667 F.3d at 132 (citing *U.S. v. Kaplan*, 490 F.3d 110, 129, 73 Fed. R. Evid. Serv. 152 (2d Cir. 2007)).

[24] *Kozeny*, 667 F.3d at 132.

[25] *Haskell*, 468 F.3d at 1074–75.

the district court had not so instructed the jury.[26] Similarly, in *Jones*, the court upheld a challenge to the jury instructions, finding that taken together, they "required that the jury decide unanimously on the overt act committed."[27]

Kozeny read these cases as finding that the jury instructions required unanimity, and thus concluded that the cases were of slight precedential value because they did not address the question whether such a unanimity instruction was required. The reading is accurate, but the cases also support the proposition for which the defendant in *Kozeny* had cited them, that these circuits determined, at least *sub silentio*, that unanimity as to overt acts was required. Otherwise, there would have been no need to examine the jury instructions as given, for the argument could have been dismissed on other grounds.

Sutherland's discussion of the issue was quite summary. In rejecting the defendant's argument that the jury needed to be unanimous as to what overt act was committed, the Fifth Circuit noted that the overt acts alleged "were not distinguished in any significant respect and the evidence as to each is remarkably similar. Therefore this series of alleged acts compromises one 'conceptual group' and the jury need not have unanimously agreed as to which was proven."[28]

Kozeny did not dwell on *Sutherland*'s analysis, and the analysis is not very convincing. That the alleged overt acts were "not distinguished in any significant respect" and were supported by similar evidence does not answer the question of whether the jury needed to agree unanimously on which overt act(s) were committed. That question is a question of law, not fact. The *Sutherland* court's conclusion that the overt acts comprised a "'conceptual group' '' is simply unclear, as indicated by the court's use of quotations around the phrase. It is not clear what concept the overt acts are part of, or what relevance it would have for the question of unanimity.

Griggs is a far more analytical opinion, and unlike any of the other three, it addresses several of the key issues relating to the question of unanimity. It begins its analysis by referring to the familiar distinction between elements of a crime — which a jury must find unanimously and the government must prove beyond a reasonable doubt — and means by which a crime may be committed — as to which the jury need not be unanimous, and which need not be proven beyond a

[26] See generally *Haskell*, 468 F.3d at 1074–75.

[27] *Jones*, 712 F.2d at 1322.

[28] *Sutherland*, 656 F.2d at 1202 (quoted in *Kozeny*, 667 F.3d at 131).

reasonable doubt.[29] It then stated that "[i]f the jurors in our case disagreed about which of the overt acts charged were committed, that was less momentous than failing to agree on what crime the defendant had committed."[30] Continuing its analysis, the *Griggs* court stated that failure to of the jurors to agree on an overt act would be "inconsequential, especially because they didn't have to find that the step was itself a crime, or even base conviction on an overt act charged in the indictment."[31]

Further to its argument that overt acts are means rather than elements under § 371, *Griggs* states that "[t]he requirement of proving an overt act is a statutory afterthought,"[32] noting that conspiracy was a crime at common law without overt acts, and that statutes other than § 371 that criminalize conspiracy do so without reference to overt acts.[33] *Griggs* concludes that

> [f]ailing to agree on the overt act that the defendant committed is not like failing to agree on the object of the conspiracy, or on which statement is the basis of a perjury conviction, or on which offenses constitute the predicate of a continuing criminal enterprise conviction. All those are cases in which the jury fails to agree on the crime that the defendant committed.[34]

Let us summarize *Griggs*'s arguments as we did those of *Kozeny*. According to *Griggs*, overt acts are means, not elements, of § 371 because (a) failure to agree on what overt act was committed is not "momentous;" (b) overt acts are a mere "statutory afterthought," because the common law crime of conspiracy did not require overt acts; and (c) failure to agree on what overt act a defendant committed is not "like" failing to agree on elements of other crimes.

C. Analysis of Kozeny and Its Precedents

None of the arguments proffered by *Kozeny* or *Griggs* for the proposition that overt acts are not elements of the crime of conspiracy as defined in section 371 is convincing, either separately or together.

First, *Kozeny*'s assertion that overt acts are a means of committing the crime of conspiracy rather than an element,[35] is not an argument at all, but merely a statement of the conclusion. *If* the overt acts are a means, rather than an element, then there need not be unanimity, but

[29] *Griggs*, 569 F.3d at 343 (citations omitted).

[30] *Griggs*, 569 F.3d at 343.

[31] *Griggs*, 569 F.3d at 344 (citations omitted).

[32] *Griggs*, 569 F.3d at 344.

[33] *Griggs*, 569 F.3d at 344.

[34] *Griggs*, 569 F.3d at 344 (citations omitted).

[35] *Kozeny*, 667 F.3d at 131–32.

Kozeny does not provide any reason for its position that overt acts are means, rather than overt acts. That the overt acts are expressly referred to in the statute certainly indicates the opposite, and *Kozeny* provides no reason for contradicting the obvious conclusion.

Second, *Kozeny* notes that overt acts need not be criminal acts in and of themselves.[36] The point is true, but it certainly does not distinguish overt acts from any number of other elements of criminal statutes. The Federal criminal bank robbery statute requires that the victim banks be federally insured[37] — surely not a criminal or wrongful act in and of itself; wire and mail fraud statutes require wires or mails to pass through or affect interstate or foreign commerce[38] — again, such wires are not criminal acts in and of themselves. Even felon-in-possession statutes include elements that are not in and of themselves wrongful. For example, knowingly possessing a handgun is an element of 18 U.S.C.A. § 922(g) — but that element is not wrongful or criminal in and of itself, but becomes so only when the person possessing the handgun is a convicted felon.

More generally, there is an element of circularity about this part of the *Kozeny* argument. No element is criminal *in and of itself*. Rather every element of a crime is precisely what its name implies, a necessary but not sufficient piece of a crime, and the crime itself is defined by a statute. Thus, it is almost nonsensical to say that an overt act is not an element because it is not a criminal act in and of itself, because *no* element is a criminal act in and of itself.

Read most sympathetically, what *Kozeny* is saying is that overt acts need not be wrongful or harmful in and of themselves — they are not, that is, *malum in se*. They might even be trivial. As stated above, however, that does not distinguish them from numerous other overt acts in federal statutes, which are not themselves harmful or *malum in se*.

This analysis addresses two of the points asserted by *Griggs* — that failure to agree on what overt act was committed is not "momentous;" and that it is not "like" failing to agree on elements of other crimes.[39] Whether failure to agree on an overt act is "momentous" depends on whether it is an overt act or not. If it is an overt act, then failure to agree is indeed momentous, because it is the difference between conviction and acquittal.

The idea that seems to be animating *Griggs* is that overt acts might

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[36] *Kozeny*, 667 F.3d at 132.

[37] See 18 U.S.C.A. § 2113(f) to (g).

[38] See 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire fraud)

[39] *Griggs*, 569 F.3d at 343–44.

be so slight and trivial that failure to agree on them should not be momentous. Perhaps so, but, as we have just seen, there are numerous elements of numerous federal criminal statutes that are not *malum in se* or otherwise significant in and of themselves, but become so only when joined with the other elements of a statutorily-defined federal crime.

Third, *Griggs* notes that overt acts are a mere "statutory afterthought," because the common law crime of conspiracy did not require overt acts. From this observation, *Griggs* argues, deeming overt acts to be elements would be to give them too much significance.[40]

One problem with this answer, of course, is that it requires one to ignore the plain language of the statute. Section 371 plainly requires overt acts — there is no other plausible reading of the requirement that "one or more of such persons do any act to effect the object of the conspiracy" — and thus any analysis of whether overt acts were a congressional "afterthought" is irrelevant because it runs afoul of the well-settled rule that when the words of a statute are clear and unambiguous investigation into congressional intent is inappropriate.[41] The principle of statutory construction applies to any statute, but is especially important in construing criminal statutes, where strict construction is mandated by principles of due process.[42]

Furthermore, even if inquiry into congressional intent were appropri-

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[40]*Griggs*, 569 F.3d at 344. See also *Whitfield v. U.S.*, 543 U.S. 209, 213–14, 125 S. Ct. 687, 160 L. Ed. 2d 611 (2005) (noting and citing authority for the proposition that common law conspiracy did not include an overt act requirement).

[41]See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning . . . "); *Lamie v. U.S. Trustee*, 540 U.S. 526, 539, 124 S. Ct. 1023, 157 L. Ed. 2d 1024, 42 Bankr. Ct. Dec. (CRR) 122, 50 Collier Bankr. Cas. 2d (MB) 1299, Bankr. L. Rep. (CCH) P 80038 (2004) (unnecessary to refer to legislative history when a statute's meaning is plain); *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989) (where the "statute's language is plain, "the sole function of the courts is to enforce it according to its terms"); *U.S. v. Locke*, 471 U.S. 84, 95, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) (courts must accept the plain meaning of a statute in "recognition that Congressmen typically vote on the language of a bill"); *Rubin v. U. S.*, 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633, Fed. Sec. L. Rep. (CCH) P 97818 (1981) ("judicial inquiry is complete" when the words of a statute are unambiguous); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) P 74457A (1992) (same).

[42]See, e.g., *U.S. v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ("due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope").

ate, the evidence that overt acts were a statutory "afterthought" is not compelling. The conspiracy statute has been in its current form since 1867. An amendment in 1909 was simply a recodification with no substantive change to the language.[43] An amendment in 1948 added the "or any agency thereof" language.[44] The only amendment to the statute since 1948 has been to increase the maximum penalty.[45] There appears to be no legislative history related to any of these amendments.

The 1909 version of the statute amended a version that had been enacted in 1867. That version, too, is quite similar to the statute in its current form. Most importantly for present purposes, it, too, includes an overt act requirement that is almost *verbatim* of the current statute, with the only changes being to update the language. The 1867 statute provides:

> If [1] two or more persons conspire either to commit any offense against the laws of the United States, or to defraud the United States . . . and [2] one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed [to have committed a crime].[46]

Nowhere in any of the legislative histories of the conspiracy statutes is there any indication that the overt act requirement was analyzed or carefully considered. The absence of relevant legislative history hardly makes the overt act requirement a statutory "afterthought." It would equally accurate to say that Congress had reconsidered the statute several times over a century and, in each instance, kept the overt act requirement, the fair inference being that Congress intended to keep the requirement. That inference is especially strong given that, as *Griggs* pointed out, at common law the crime of conspiracy did not have an overt act requirement.[47] Thus, Congress deliberately added such a requirement, and kept that addition through several iterations of the statute.

Fourth, *Kozeny* notes that the indictment may plead one overt act, but the government can prove another, without there being a fatal

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[43] See Act of March 4, 1909, ch. 321, § 37, 35 Stat. 1096.

[44] See Act of June 25, 1948, ch. 645, § 371, 62 Stat. 701 (codified as amended at 18 U.S.C.A. § 371).

[45] See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 330016(L), 108 Stat. 2146 (codified in scattered sections of 18 U.S.C., 21 U.S.C. and 42 U.S.C.).

[46] See Act of March 2, 1867, ch. 169, § 30, 14 Stat. 484.

[47] *Griggs*, 569 F.3d at 344.

variance between indictment and proof.[48] There is no other element of a crime of which such pleading is true, for it is a well-settled rule that because a crime is defined by its elements, it is a necessary condition for conviction that each of the elements of a (statutorily-defined) crime be set forth in the indictment.[49] Thus, *Kozeny* reasons, overt acts must not be elements of the crime of conspiracy.

The problem with the argument is that it turns a pleading rule — what must an indictment say? — into a substantive rule regarding the interpretation of a statute. But such reasoning is backwards. Whether something — an overt act, the use of a gun in connection with a bank robbery, the fact that a financial institution is federally insured — is an element of a crime is simply a question of statutory interpretation.[50] That is, *if* overt acts are elements of a crime — a question of statutory interpretation — *then* they must be pled properly in any indictment, and failure to do so may be a fatal variance. The converse does not hold, however: Those cases holding that the government may prove overt acts not pled in the indictment do not establish that overt acts are not elements.

D. Two Problems in Implementing Kozeny

For the reasons set forth above, *Kozeny*'s reasoning is deeply flawed, and it is contrary to established principles of statutory construction. In addition, it leaves two significant practical questions.

The first practical question is how the decision affects questions related to venue. The case law is clear that a conspiracy may be prosecuted in any district in which an overt act is committed.[51] If a jury does not have to agree on a single overt act, then how can it agree on venue? A similar issue is presented by the calculation of the statute of limitations on a conspiracy prosecution. The limitations period for a conspiracy prosecution runs from the final overt act in furtherance of

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[48] *Kozeny*, 667 F.3d at 132. See generally *U.S. v. Kaplan*, 490 F.3d 110, 129–30, 73 Fed. R. Evid. Serv. 152 (2d Cir. 2007).

[49] See, e.g., *Hamling v. U.S.*, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590, 1 Media L. Rep. (BNA) 1479 (1974); *U.S. v. LaSpina*, 299 F.3d 165, 177, 90 A.F.T. R.2d 2002-5508 (2d Cir. 2002).

[50] See, e.g., *U.S. v. Harris*, 243 F.3d 806, 808 (4th Cir. 2001), judgment aff'd, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002); *U.S. v. Meyer*, 864 F.2d 214, 221 (1st Cir. 1988).

[51] See, e.g., *U.S. v. Svoboda*, 347 F.3d 471, 482–83, 12 A.L.R. Fed. 2d 895 (2d Cir. 2003); *U.S. v. Smith*, 198 F.3d 377, 382 (2d Cir. 1999). For an excellent discussion of problems relating to venue in federal criminal conspiracy cases, see Robert L. Ullmann, One Hundred Years After *Hyde*: Time to Expand Venue Safeguards in Federal Conspiracy Cases?, 52 Santa Clara L. Rev. 101 (2012).

the conspiracy.[52] Once again, if the jury does not have to agree unanimously on which overt act was committed, then how will it determine if the prosecution is timely?

III. Why Kozeny?

The argument to this point has been that established principles of statutory interpretation support the proposition, which was also supported by the standard jury instructions, that an overt act was an element of the crime defined by section 371, and that the arguments against such an interpretation are not convincing. I have also argued that the *Kozeny* decision leads to practical problems involving both venue and the statute of limitations for charges arising under section 371.

Then why was *Kozeny* decided as it was? Part of the answer may be desuetude. Overt acts can be so minimal[53] that they are rarely difficult to identify. There is some sense in reading *Kozeny*, and even more so in *Griggs*, that overt acts are almost too trivial to be deemed as elements of a crime. The line of cases that permits the government to prove overt acts that are not identified in the indictment,[54] may also derive from the sense that overt acts are mere technicalities.

While desuetude may explain the *Kozeny* decision, it cannot justify it. The courts' treatment of overt acts is not appropriate, and it is evidence of a fundamental failure to observe the distinctive roles of courts and congress. The decision whether overt acts are suitable elements of the crime of conspiracy defined in section 371 is a decision left to Congress, not the courts.

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[52]See, e.g., *Grunewald v. U.S.*, 353 U.S. 391, 396, 77 S. Ct. 963, 1 L. Ed. 2d 931, 57-1 U.S. Tax Cas. (CCH) P 9693, 51 A.F.T.R. (P-H) P 20, 62 A.L.R.2d 1344 (1957) (addressing a three-year limitations period and concluding the government must prove that conspiracy was still in existence at beginning of limitations period and that at least one overt act was performed after that date); *U.S. v. Dolan*, 120 F.3d 856, 864, 47 Fed. R. Evid. Serv. 656 (8th Cir. 1997) ("In a conspiracy charge, the limitations period begins to run from the occurrence of the last overt act committed in furtherance of the conspiracy that is set forth in the indictment."); *U.S. v. United Medical and Surgical Supply Corp.*, 989 F.2d 1390, 1398, Fed. Sec. L. Rep. (CCH) P 97402, 38 Fed. R. Evid. Serv. 462 (4th Cir. 1993) ("A prosecution for conspiracy is timely if, during some portion of the limitations period, (1) the agreement between the conspirators was in existence; and (2) at least one overt act in furtherance of that conspiratorial agreement occurred."); *U.S. v. Lash*, 937 F.2d 1077, 1081, 33 Fed. R. Evid. Serv. 473 (6th Cir. 1991); *U.S. v. Dynalectric Co.*, 859 F.2d 1559, 1564 n.6, 1988-2 Trade Cas. (CCH) ¶ 68347, 27 Fed. R. Evid. Serv. 1057, 109 A.L.R. Fed. 575 (11th Cir. 1988) (stating if an overt act is necessary for the commission of the conspiracy, then "the indictment must charge and the evidence at trial must show that an overt act in furtherance of the conspiracy was made within the limitations period").

[53]See supra note 9 (giving examples).

[54]See supra note 23.

Kozeny goes in exactly the wrong direction. Instead of holding that overt acts are not elements of the crime of conspiracy a defined in section 371, courts should clearly hold — what jury instructions already acknowledge — that overt acts are elements like any other, and that juries must unanimously find beyond a reasonable doubt on which overt act(s) were committed. Courts should also revisit their decisions holding that defendants may be convicted even if none of the overt acts set forth in the indictment are proven beyond a reasonable doubt so long as some other overt act is proven beyond a reasonable doubt. Conviction should be permitted upon proof beyond a reasonable doubt of an overt act alleged in the indictment.