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LIMITING PUBLIC CORRUPTION PROSECUTIONS UNDER
THE HOBBS ACT: WILL *UNITED STATES v. EVANS*
BE THE NEXT *McNALLY*?

DAN K. WEBB, STEVEN F. MOLO, AND JAMES F. HURST*

I. INTRODUCTION

Over the last twenty years the two weapons used most frequently by federal prosecutors in their war against local public corruption, in the Seventh Circuit and elsewhere, have been the mail fraud statute¹ and the Hobbs Act.² The courts have allowed these two statutes to be stretched and molded to extend federal jurisdiction over what historically had been considered purely state and local crimes. In its 1987 decision in *McNally v. United States*,³ the Supreme Court, following a strict interpretive approach, held that prosecutors and the lower courts had gone too far in applying the mail fraud statute and limited the statute's jurisdictional reach.⁴ In granting a writ of certiorari in the case of *United States v. Evans*,⁵ the Court appears poised to limit the Hobbs Act similarly.

The Hobbs Act prohibits interference with interstate commerce by means of "extortion" and "robbery;" it does not refer to bribery. Under the Act, extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force,

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1. 18 U.S.C. § 1341 (1988).

2. 18 U.S.C. § 1951 (1988); see generally Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1172 (1977); James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 815 (1988) [hereinafter "Lindgren"]; Herbert J. Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: the Unnecessary Distinction Between Bribery and Extortion*, 3 SETON HALL L. REV. 1 (1971) [hereinafter "Stern"].

3. 483 U.S. 350 (1987); see also *infra* notes 117-24 and accompanying text.

4. *Id.* at 358-61.

5. 910 F.2d 790 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 2256 (1991). According to the petitioner's brief, the question presented in *Evans* is "whether . . . an affirmative act of inducement by a public official such as a demand has to be shown by the government in an extortion case under color of official right?" Brief for Petitioner at 4, *Evans v. United States*, (No. 90-6015). *Evans* involves a federal prosecution in connection with a government sting operation in Atlanta, Georgia. 910 F.2d at 792-94. The defendant was a member of the Board of Commissioners in DeKalb County accused of accepting payments from an FBI agent for assistance in zoning matters. *Id.*

violence or fear, or under color of official right.”⁶ To extend the Hobbs Act’s reach to bribery, then, the question is when does bribery constitute extortion under this definition? According to eight of the ten courts of appeals to address the question, the answer is always; extortion “under color of official right” fully embraces bribery.⁷ In other words, bribery is extortion whether or not the payment has been induced by the defendant.

Although widely accepted, this view is inconsistent with the legislative history of the Hobbs Act and the prevailing judicial definition of extortion at the time of enactment. A review of the Act’s legislative history and early twentieth century American case law reveals that Congress did not intend that the Hobbs Act proscribe classic bribery—the passive acceptance of a corrupt payment. The courts created the Hobbs Act prohibition against bribery. The Supreme Court should correct the courts’ flawed interpretation of the Act when it resolves this issue in *Evans*.

This article is divided into six sections. Section II traces the evolution of the Hobbs Act from its inception in 1946 through today, focusing on the expansion of the Act’s reach from traditional extortion to the passive receipt of bribes.⁸ Section III outlines the interpretation of the Hobbs Act advanced by the majority of the Courts of Appeals including the Seventh Circuit,⁹ and Section IV outlines the alternate interpretation advanced by the Second and Ninth Circuits.¹⁰ Section V, divided into three subsections, explains why the Second and Ninth Circuit view is correct. First, contrary to the view of some courts, the language of the Hobbs Act does not settle the issue because it is ambiguous.¹¹ Second, while the legislative history of the Hobbs Act does not specifically address the issue, the Act mandates that official extortion be defined according to its meaning in 1946—not its meaning under ancient English

6. 18 U.S.C. § 1951(b)(2).

7. *United States v. Kelly*, 722 F.2d 873, 875 (1st Cir. 1983), *cert. denied*, 465 U.S. 1070 (1984); *United States v. Jannotti*, 673 F.2d 578, 594-96 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982); *United States v. Price*, 507 F.2d 1349 (4th Cir. 1974); *United States v. Williams*, 621 F.2d 123, 123-24 (5th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); *United States v. Butler*, 618 F.2d 411, 417-18 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980); *United States v. Garner*, 837 F.2d 1404, 1421-22 (7th Cir. 1987), *cert. denied*, 486 U.S. 1035 (1988); *United States v. French*, 628 F.2d 1069, 1074-75 (8th Cir.), *cert. denied*, 449 U.S. 956 (1980); *United States v. Hall*, 536 F.2d 313, 320-21 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976); *Evans*, 910 F.2d at 796-97. *Contra*, *United States v. O’Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc); *United States v. Agnon*, 851 F.2d 1158 (9th Cir. 1988) (en banc); discussed at *infra* notes 23-30 and accompanying text.

8. See *infra* notes 16-22 and accompanying text.

9. See *infra* notes 23-30 and accompanying text.

10. See *infra* notes 31-39 and accompanying text.

11. See *infra* notes 40-43 and accompanying text.

common law.¹² Third, according to the prevailing definition of official extortion in 1946, the passive receipt of a bribe by a public official did not constitute extortion. Consequently, applying that definition to the Hobbs Act, the Act plainly does not proscribe passive bribery.¹³ Section VI criticizes the incomplete and misleading review of the 1946 case law performed by those advocating an expansive view of the Hobbs Act.¹⁴ Finally, comparing this issue to the issue faced by the Supreme Court in *McNally*, Section VII concludes that the Rule of Lenity ultimately controls the question. Thus, if the case law existing in 1946 is not enough, the Rule of Lenity conclusively mandates that the Hobbs Act not be read to proscribe the passive receipt of bribes.¹⁵

II. EVOLUTION OF THE HOBBS ACT

Congress enacted the Hobbs Act in its present form in 1946,¹⁶ and the corrupt practice of bribing state and local officials existed well before that. But no federal court held that the Hobbs Act proscribed passive bribery until 1972.¹⁷ During the 24 years from 1946 to 1972, the few courts that considered the question relied on the traditional distinction between extortion and bribery to reject the Act's application to bribery.¹⁸ This changed, however, in 1972 with the Third Circuit's decision in *United States v. Kenny*.¹⁹ In affirming the Hobbs Act conviction of several local and county officials in New Jersey, the court construed the Act's extortion definition broadly, stating: "[t]he 'under color of official right' language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress."²⁰

12. See *infra* notes 44-69 and accompanying text.

13. See *infra* notes 70-104 and accompanying text.

14. See *infra* notes 105-16 and accompanying text.

15. See *infra* notes 117-24 and accompanying text.

16. 18 U.S.C. § 1951 (1948).

17. See *infra* notes 19-22 and accompanying text.

18. *United States v. Hyde*, 448 F.2d 815, 833 (5th Cir. 1971) ("The distinction from bribery is therefore . . . the fear and lack of voluntariness on the part of the victim"), *cert. denied*, 404 U.S. 1058 (1972); *United States v. Addonizio*, 451 F.2d 49, 72 (3d Cir. 1971) ("while the essence of bribery is voluntariness, the essence of extortion is duress"), *cert. denied*, 405 U.S. 936 (1972); *United States v. Kubacki*, 237 F. Supp. 638, 641 (E.D. Pa. 1965) (same).

19. 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972).

20. *Id.* at 1229. The court then cited four post-Hobbs Act cases in support of the notion that under common law there was no requirement of duress or coercion for official extortion: *United States v. Nardello*, 393 U.S. 286, 289 (1969); *United States v. Sutter*, 160 F.2d 754, 756 (7th Cir. 1947); *State v. Begyn*, 34 N.J. 35, 167 A.2d 161 (1961), *overruled on other grounds*, *State v. Savoie*, 67 N.J. 439, 341 A.2d 598 (1975); *State v. Weleck*, 10 N.J. 355, 371, 91 A.2d 751, 759-60 (1952), *overruled on other grounds*, *State v. Savoie*, 67 N.J. 439, 341 A.2d 598 (1975).

With no more stated analysis than that, a significant expansion of federal jurisdiction had begun. Although not quite explicitly, the *Kenny* court held in effect that the mere passive acceptance of a bribe could constitute "extortion" under the Hobbs Act. *Kenny* thus provided the springboard for a significant expansion of federal jurisdiction to a matter traditionally left to the states—the acceptance of bribes by state and local officials. In just four years, six other circuits substantially adopted the *Kenny* view, and the Hobbs Act became a potent weapon in the federal government's war against local public corruption.²¹ Recently, two courts of appeals rejected the broad application of the Act to bribery,²² but the *Kenny* view remains the majority.

III. THE SEVENTH CIRCUIT VIEW

Two years after *Kenny*, in 1974, the Seventh Circuit became the first court to follow *Kenny's* lead in *United States v. Braasch*.²³ *Braasch* concerned the prosecution of several Chicago police officers for shaking down liquor store and tavern owners for payments to ensure police "protection."²⁴ Affirming the convictions, the Seventh Circuit stated in *dicta*:

[i]t matters not whether the public official induces payments to perform his duties or not to perform his duties So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.²⁵

Despite commentator criticism of this view, and the contrary view of two other Courts of Appeals considering the question *en banc*,²⁶ the Seventh Circuit has held firm over the past two decades.

The court has reiterated many times that "[e]xtortion under 'color of official right' equals the knowing receipt of bribes; they need not be solicited" or induced in any manner by the public official.²⁷ In *United*

21. See *United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); *United States v. Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Price*, 507 F.2d 1349, 1350 (4th Cir. 1974); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. Brown*, 540 F.2d 364, 371-72 (8th Cir. 1976); *United States v. Hall*, 536 F.2d 313, 320-21 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976).

22. See *United States v. O'Grady*, 742 F.2d 682 (2d Cir. 1984) (*en banc*); *United States v. Aguon*, 851 F.2d 1158 (9th Cir. 1988) (*en banc*); discussed *infra* at notes 31-39 and accompanying text.

23. 505 F.2d at 139. One of the authors, Mr. Webb, served as lead prosecutor for the government in the *Braasch* prosecution. Mr. Webb also served as the United States Attorney for the Northern District of Illinois from 1981 to 1984.

24. *Id.* at 142.

25. *Id.* at 151.

26. See *infra* notes 18-22 and accompanying text.

27. *United States v. Garner*, 837 F.2d at 1404, 1421-22 (7th Cir. 1987), *cert. denied*, 486 U.S.

States v. Holzer,²⁸ the court explained fully that “[i]n this circuit it is extortion if the official knows that the bribe, gift, or other favor is motivated by a hope that it will influence him in the exercise of his office and if, knowing this, he accepts the bribe.”²⁹

The Seventh Circuit has acknowledged that other circuits differ on this question, but has never explained its disagreement with those circuits. Perhaps it has not yet confronted the issue squarely. As Judge Posner stated in *Holzer*, “[t]here is an air of the academic about this intercircuit conflict because, as a matter of fact, in none of the cases in which the issue has been pressed was the official passive”³⁰ Apparently no Seventh Circuit case since *Holzer* has made the issue any less academic in the court’s eyes.

IV. THE SECOND AND NINTH CIRCUIT VIEW

The Second and Ninth Circuits, each sitting *en banc*, have definitively rejected the Seventh Circuit’s approach. The leading Second Circuit case is *United States v. O’Grady*;³¹ the leading Ninth Circuit case is *United States v. Aguon*.³² In *O’Grady*, the Second Circuit reversed a conviction because the jury was instructed that “[t]he Government need not show that the defendant in words or otherwise, induced, requested, demanded, or solicited the benefits”³³ The court explained:

[t]he conduct proscribed by the Hobbs Act is the wrongful use of public office, not merely acceptance of benefits. Although receipt of benefits by a public official is a necessary element of the crime, there must also be proof that the public official did something, under color of his public office, to cause the giving of benefits.³⁴

Thus, the court concluded:

[t]o prove the crime of extortion under color of public office the government must show that the public official *induced* the benefits received. The fact of public office supplies the potential threat or force necessary, but it is the wrongful use of that office to induce benefits that constitutes the crime. . . .³⁵ [E]xtortion under color of official right

1035 (1988) (quoting *United States v. Holzer*, 816 F.2d 304, 311 (7th Cir.), *vacated and remanded on other grounds*, 484 U.S. 807 (1987)); *see also* *United States v. Murphy*, 768 F.2d 1518, 1530 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); *United States v. Blackwood*, 768 F.2d 131, 134 (7th Cir.), *cert. denied*, 474 U.S. 1020 (1985); *United States v. Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *United States v. Price*, 617 F.2d 455, 457 (7th Cir. 1979).

28. 816 F.2d at 304.

29. *Id.* at 311.

30. *Id.*

31. 742 F.2d 682 (2d Cir. 1984) (*en banc*).

32. 851 F.2d 1158 (9th Cir. 1988) (*en banc*).

33. *O’Grady*, 742 F.2d at 686 (quoting trial transcript).

34. *Id.* at 687.

35. *Id.* at 688 (footnote omitted) (*emphasis in original*).

begins with the public official, not with the gratuitous actions of another.³⁶

The Ninth Circuit reached the same result in *Aguon*. There, the district court instructed the jury that extortion under color of official right “does not require proof of any specific acts on the part of the public official demonstrating force, threats, use of fear or inducement.”³⁷ Reversing a conviction, the Ninth Circuit explained that Congress “intended to require inducement as an element for conviction under the Hobbs Act”³⁸ and did not intend to ensnare those who had no “more than an inert role in the transaction” at issue.³⁹

V. THE LOGIC OF THE INDUCEMENT REQUIREMENT

The Second and Ninth Circuit view is the better-supported approach; it is consistent with the language of the Hobbs Act and mandated by the Act’s legislative history and the predominant judicial understanding of extortion in 1946. Consequently, this view should prevail in the intercircuit conflict about the meaning of extortion.

A. *Language of the Hobbs Act’s Extortion Definition*

Every issue of statutory interpretation begins with the language of the statute, which the courts must construe according to its plain meaning.⁴⁰ Here, though, it is clear that there is no *plain* meaning of the Hobbs Act extortion definition. In an attempt to divine such a meaning, many commentators and courts have engaged in a fruitless wrangle over proper grammatical construction, resorting to an analysis of the often subtle rules of coordinating conjunctions and parallel prepositions.⁴¹ The commentators and courts incorrectly presume that Congress followed such rules when drafting the Hobbs Act. Without evidence, that presumption is little more than a baseless fiction. While helpful in some cases to discern the “plain meaning” of a statute and congressional intent, reference to standard rules of English does not help here—not when so many courts and commentators have disagreed on the proper

36. *Id.* at 691.

37. *Aguon*, 851 F.2d at 1161 (emphasis removed).

38. *Id.* at 1165.

39. *Id.* at 1163.

40. *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917).

41. See, e.g., *Aguon*, 851 F.2d at 1162-63; *United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.), *cert. denied*, 424 U.S. 819 (1976); *United States v. McClelland*, 731 F.2d 1438, 1439-40 (9th Cir. 1984), *cert. denied*, 472 U.S. 1010 (1985), *rev’d*, 941 F.2d 999 (1991); *United States v. Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972); James P. Fleissner, Comment, *Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right*, 52 U. CHI. L. REV. 1066, 1078-79 (1985); Stern, *supra* note 2, at 14.

construction.⁴²

Instead, such heated debate over construction of the Hobbs Act leads to one inescapable conclusion: the Act's language is ambiguous. It can reasonably be read one of two ways: either (1) "the obtaining of property from another, with his consent, . . . under color of official right;" or (2) "the obtaining of property from another, with his consent, *induced* . . . under color of official right."⁴³ The correct construction—with or without the word "induced"—is not at all clear from the face of the Act. Depending on the words emphasized when reading the Hobbs Act, either definition appears correct.

B. Legislative History/Congressional Intent

1. The Text of the Debates

When a plain reading of the statute does not resolve an ambiguity, the next step is to review the statute's legislative history. Unfortunately, the legislative history of the Hobbs Act does not offer definitive guidance. Congress passed the Act in 1946 primarily in response to the Supreme Court's decision in *United States v. Local 807, International Brotherhood of Teamsters*.⁴⁴ In *Local 807*, the Court ruled that the extortion prohibition of the Anti-Racketeering Act of 1934 did not proscribe traditional acts of extortion committed by labor union members who claimed they were seeking "wages."⁴⁵ As the legislative history to the Hobbs Act makes plain, Congress' primary concern was to overturn the rule established by *Local 807* and to criminalize robbery and extortion by labor unions.⁴⁶ Thus, the congressional debate dealt almost exclusively with the "threatened force, violence or fear" branch of the Hobbs Act and its potential effect on the labor movement. The debate included little discus-

42. See, e.g., *Aguon*, 851 F.2d at 1162-63 ("induced" modifies "under color of official right"); *Hathaway*, 534 F.2d at 393 ("induced" does not modify "under color of official right"); *McClelland*, 731 F.2d at 1440 (does not modify); *Kenny*, 462 F.2d at 1229 (does not modify); Comment, *supra* note 41, at 1078-79 (modifies); Stern, *supra* note 2, at 14 (does not modify).

43. 18 U.S.C. § 1951(b)(2) (emphasis supplied).

44. 315 U.S. 521 (1942).

45. The respondents, New York labor union members, had waited regularly for trucks operated by out-of-state drivers coming into New York from New Jersey and then "forced their way onto the trucks, and by beating or threats of beating the drivers procured payments to themselves . . . [in amounts] equivalent [to] the union wage scale for a day's work." *Id.* at 539 (Stone, C.J., dissenting); see also *id.* at 525-27. Sometimes the respondents would then drive the truck to its destination, unload the truck, reload the truck with merchandise for the return trip, and then return it to the out-of-state driver. *Id.* at 526. Other times the respondents did not do any work for the money that was paid. *Id.* The Court found that this did not constitute extortion due to the exception under the 1934 Act for "wages paid . . . to a bona fide employee." *Id.* at 531-35. The Court reasoned that the teamsters were seeking wages. *Id.*

46. See generally 91 CONG. REC. 11,839-47, 11,900-22 (1945).

sion of the "under color of official right" branch of the Act and no meaningful attempt to define the term.⁴⁷

Congress offered some guidance, however, when it expressed its intent to rely on the judicial definition of extortion generally understood in the various states. In an exchange between Congressmen Springer and Robsion, Robsion asked, "[c]annot the gentleman state that the definition of robbery and extortion put in this bill is that followed by the codes and statutes generally throughout the Nation, in all the jurisdictions of the various States?"⁴⁸ Springer replied, "[t]he gentleman is precisely correct. It is practically the same as the statutes in the different States of the Union."⁴⁹ Congressman Russell concurred: "[w]herever jurisprudence has had its sway robbery and extortion have been defined. There is no use defining those terms because they are so well defined that their definition now is a matter of common knowledge."⁵⁰ Congressman Hobbs added that extortion and robbery "have been construed a thousand times by the courts. Everybody knows what they mean."⁵¹

On the other hand, some congressmen indicated that the language of the extortion definition was taken directly from New York's criminal

47. However, Congressmen Hobbs and Sumners made at least some attempt by defining the crime as something in the nature of false pretenses. Congressman Hobbs explained that "[c]olor of official right" means absence of right but pretended assertion of right" and applied to situations such as: "you pretend to be a police officer, you pretend to be deputy sheriff, but you are not." 89 CONG. REC. 3,229 (1943). He later confirmed that "[i]t could not possibly apply if there was any bona fide right; it applies only to pretended right." *Id.* Congressman Sumners concurred, stating that a careful review of the language revealed that it "means money acquired by somebody claiming to be a public officer." *Id.*

Every commentator and court that has focused on this discussion has brushed it aside as the muddled rambling of two congressmen ignorant of the law. Congressmen Hobbs and Sumners' explanation could not be correct, they say, because extortion "under color of official right" has never been defined as they suggest. See Stern, *supra* note 2, at 12-15; Lindgren, *supra* note 2, at 890-91; *United States v. French*, 628 F.2d 1069, 1073 (8th Cir.), *cert. denied*, 449 U.S. 956 (1980) ("The brief debate that occurred in 1943, however, was not clear enough to be determinative of the scope of the 'color of official right' language, especially in light of the confusing reference to false pretense type crimes, which would seem out of place in an extortion statute."). But giving such short shrift to the explanations of these two Congressmen during the legislative debate is like ignoring an abstract expressionist's explanation of his canvas with a black stripe painted down one side and a white stripe down the other. It is simply contrary to the recognized rules of statutory construction. After all, it is the intent of Congress that is paramount, not what later commentators and courts believe would be a more accurate interpretation of the law. Indeed, it is hard to understand how the Congressmen could have been wrong about the law when they were in fact creating the law. Further, it appears that their understanding is corroborated by the text of the Act: "under color of official right." Nevertheless, at this late stage, it may be too much to hope that the Supreme Court would rely on Hobbs and Sumners when the congressmen have been wholly ignored for so long and by so many.

48. 91 CONG. REC. 11,910 (1945).

49. *Id.*; see also *id.* (Rep. Springer) ("Robbery is defined by every State in the Union by the State Legislature.").

50. *Id.* at 11,914.

51. *Id.* at 11,912.

statute, the Penal Code of 1909.⁵² For instance, Congressman Hobbs stated later: "there is nothing clearer than the definitions of robbery and extortion in this bill. They have been construed by the courts not once, but a thousand times. The definitions in this bill are copied from the New York Code substantially."⁵³ Congressman Robsion also explained, "[t]he definitions of robbery and extortion set out in the bill are the same definitions set out in the New York State code of laws and are defined in substantially the same way by the laws of every State in the Union."⁵⁴ Apparently relying on these statements and ignoring the statements of Congressmen Russell and Springer, a number of courts and commentators have concluded that Congress intended to look specifically to New York law for the meaning of extortion. This conclusion is unfounded. Whether or not the Hobbs Act drafters used the *language* of the New York extortion definition, no congressman asserted an intent to rely specifically on New York decisional law.⁵⁵

Moreover, notwithstanding the assertions of Congressmen Hobbs and Robsion, whether the Hobbs Act extortion definition was in fact taken from the New York statute is questionable. Although similar, the Hobbs Act definition is not identical to the definition in the New York Penal Code of 1909.⁵⁶ The definition more closely parallels the extortion definition contained in the FIELD CODE—the proposed New York criminal code of 1865—which was the model 19th century American criminal code.⁵⁷ While the FIELD CODE eventually served as the basis of New York's criminal statute, some states actually adopted it before New York.⁵⁸ By the time Congress enacted the Hobbs Act in 1946, many states had already adopted the FIELD CODE extortion definition. Most

52. See *infra* note 56.

53. *Supra* note 48, at 11,900; see also *id.* (Rep. Hancock) ("bill contains definitions of robbery and extortion which follow the definitions contained in the laws of the State of New York. * * * The courts of the States of this country have tried thousands of cases of robbery and extortion. They know what those crimes are.").

54. *Id.* at 11,906.

55. See *United States v. Harding*, 563 F.2d 299, 304 (6th Cir. 1977) (concluding that Congress did not intend to rely specifically upon New York decisional law), *cert. denied*, 434 U.S. 1062 (1978); Lindgren, *supra* note 2, at 900 ("nothing in the Congressional debates indicates an intent to enact New York case law"); Stern, *supra* note 2, at 3 (same conclusion).

56. The Penal Code of 1909 provided: "Extortion is the obtaining of property from another, or the obtaining of property of a corporation from an officer, agent or employer thereof, with [his] consent, induced by a wrongful use of force or fear, or under color of official right." N.Y. PENAL LAW OF 1909 § 850, *as amended*, LAWS OF 1917, ch. 518.

57. COMMISSIONERS OF THE CODE, [PROPOSED] PENAL CODE OF THE STATE OF NEW YORK § 613 (1865) (generally referred to as the "FIELD CODE") ("Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."); see also Lindgren, *supra* note 2, at 892.

58. See, e.g., CAL. PENAL CODE §§ 518-24 (West 1988) (enacted in 1872).

states actually followed the definition more faithfully than New York.⁵⁹

Additionally, one commentator notes that references during the congressional debates to the similarity of the New York statute do not indicate that Congress looked specifically to New York law for guidance.⁶⁰ Instead, the references were probably intended only to quiet the fears of certain congressmen from New York considered "the leaders of the fight against [the] Act."⁶¹ The commentator explains that "[i]t was not surprising, . . . that [the Act's] advocates, in explaining the Act's provisions, compared it to the existing law of New York, in an attempt to show [the opposition leaders from New York] that nothing revolutionary was proposed."⁶²

Thus, considering the unequivocal statements by Congressmen Russell and Springer, it is clear that Congress did not intend to look *solely* to New York law for guidance. Rather, as it declared expressly, Congress intended to rely on the meaning of extortion "under color of official right" generally understood in the various states.

2. The Erroneous Consideration of English Common Law

Those courts and commentators advocating an expansive view of the Hobbs Act argue that, unlike all other varieties of extortion, extortion under color of official right does not require a showing of any kind of duress, coercion, or inducement. For this conclusion, they rely on English common law where, as Blackstone defined it, extortion was "an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due."⁶³ Under a broad interpretation of this definition, bribery would fall within the scope of extortion. Indeed, one expansionist, Professor James Lindgren, has compiled a significant number of primarily English cases from the 1200s to 1800s suggesting that, during that period, classic bribery was often

59. See, e.g., MINN. STAT. § 621.14 (1949); CAL. PENAL CODE §§ 518-24 (West 1988); OKLA. STAT. ch. 23, § 2682 (1910); see also Lindgren, *supra* note 2, at 892 (discussing this subject).

60. Stern, *supra* note 2, at 3; see also 91 CONG. REC. 11,900 (1945) (Rep. Hobbs) ("The definitions in this bill are copied from the New York Code substantially. So there cannot be any serious question . . . by the gentlemen from New York who are the leaders of the fight against the bill.")

61. Stern, *supra* note 2, at 3.

62. *Id.*

63. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 141 (1769). However, bribery does not fit quite so neatly in the definition of official extortion advanced by other leading authorities of the time. Hawkins states that "extortion signifies, in a large sense, any *oppression* under colour of right; but, that in a strict sense, it signifies the taking of money by any officer, by colour of his office, either when none at all is due, or not so much is due, or where it is not yet due." WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 316 (6th ed. 1788) (emphasis added).

prosecuted as extortion under color of office.⁶⁴

This analysis, however, is beside the point. As indicated above,⁶⁵ Congress never expressed an intent to rely on a definition of extortion developed in ancient English common law. Congress enacted the Hobbs Act in 1946, asserting in the clearest terms that the Act included the contemporary meaning of extortion. Several times during the debates, various Congressmen stated, in essence, that "the definition of robbery and extortion put in this bill is that followed by the codes and statutes generally throughout the Nation,"⁶⁶ and that those definitions were consistent with the "laws of every State in the Union."⁶⁷ Consequently, the English common-law meaning of official extortion must be rejected in favor of the understanding of the crime prevailing in the United States in 1946.⁶⁸ Under these circumstances, Congress presumably was knowledgeable about existing case law as it related to that understanding.⁶⁹

64. Lindgren, *supra* note 2, at 837-89. However, the issue does not appear to be as clear as Professor Lindgren suggests. See JOHN THOMAS NOONAN, BRIBES 584-91 (1984) (arriving at contrary conclusion). None of the cases upon which he relies directly confronts the issue of whether coercion, duress, demand, or inducement is an element of official extortion. *But see* Mayor of Lynn's Case, 1 Leonard 295, 74 Eng. Rep. 269 (1586). The very few cases from that era that do appear to make reference to the issue, indicate that if a victim pays voluntarily, the crime is not extortion. Professor Lindgren dismisses these cases primarily as misstatements of the law influenced by the incorrect lay impression of extortion. Lindgren, *supra* note 2, at 884. In Floyd and Cannon's Case, 78 Eng. Rep. 257 (Star Ch. 1628), the court states that "in every oppression there ought to be a threatening [*sic*] of the party, for the voluntary payment of a greater sum where a lesser is due cannot be said extortion." See also *The King v. Ayers*, 2 Keble 100, 84 Eng. Rep. 63 (1666); *Rex v. Burdett*, 1 Ld. Raym. 148, 91 Eng. Rep. 996 (1696); Lindgren, *supra* note 2, at 884-85 (citing and discussing foregoing cases).

65. See *supra* notes 44-62 and accompanying text.

66. 91 CONG. REC. 11,906 (1945) (statement of Rep. Robsion).

67. *Id.* at 11,910 (statement of Rep. Springer); see also *id.* at 11,914 (statement of Rep. Russell) (referring to extortion and robbery, "their definition *now* is a matter of common knowledge") (emphasis added); *id.* at 11,900 (statement of Rep. Hancock) ("The courts of the States of this country have tried thousands of cases of robbery and extortion. They know what those crimes are.")

68. Even at times when Congress was silent about whether it was relying on the contemporary or common-law meaning of a term, the Supreme Court has often rejected the common-law definition. See *Taylor v. United States*, 495 U.S. 575, 594 (1990) (court applies modern definition of burglary where there was no evidence that Congress relied on "ancient English law" definition and where that definition was "ill-suited" to statute's purpose); *Perrin v. United States*, 444 U.S. 37, 45 (1979) (court applies contemporary definition of bribery where the "common understanding and meaning of 'bribery' had extended beyond its early common-law definitions"); *United States v. Nardello*, 393 U.S. 286, 292-94 (1969) (court applies modern definition of extortion where definition of extortion had expanded in many states beyond the common-law meaning and where common-law meaning would conflict with Act's purpose); see also *Bell v. United States*, 462 U.S. 356, 362 (1983) (rejecting common law for modern definition); *United States v. Turley*, 352 U.S. 407, 416-17 (1957) (same). Here, of course, Congress was not silent; it expressly declared its reliance on the contemporary meaning of extortion.

69. See, e.g., *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979); *Director, Office of Workers' Compensation Programs v. Perini North River Assoc.*, 459 U.S. 297, 319-20 (1983); *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973); *Air Trans. Assoc. v. Professional Air Traffic Controllers Org.*, 667 F.2d 316, 321 (2d Cir. 1981); *Shapiro v. United States*, 335 U.S. 1, 16 (1948). While it may be a fiction to presume that

C. *The Contemporaneous Judicial Definition of Extortion*

What was the prevailing definition of extortion "under color of official right" when Congress passed the Hobbs Act in 1946? From the late 1800s to 1946, numerous courts distinguished official extortion from bribery by the existence of an element of coercion, duress, or inducement. The courts did not view the simple passive acceptance of bribes as extortion. A good example is the 1890 decision of the Supreme Court of North Carolina in *State v. Pritchard*,⁷⁰ a case concerning a charge of extortion "under color of office" against a justice of the peace. The court explained that "[t]he words under 'color of his office' imply that the officer has taken advantage of his position and corruptly used the relation that he sustains to the government to drive others to submit to his exactions."⁷¹ Further, it stated that the "distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in demanding a fee or present by color of office."⁷²

That same year, in *United States v. Harned*,⁷³ the District Court of Washington granted a motion for a directed verdict acquitting a defendant charged with "extortion under color of his office." The court reasoned that the evidence showed only that the defendant had taken a bribe, not that he had committed extortion.⁷⁴ It explained that "[t]he word 'extortion' implies that the money paid was extorted on the part of the one who received it, and was paid unwillingly by the party paying the same"⁷⁵

The California Appellate Court in *People v. Powell*⁷⁶ recognized the same distinction in 1920 when discussing Section 518 of the California Code. Similar to the Hobbs Act, Section 518 defined extortion as "the obtaining of property from another with his consent, induced by fear or force, or under color of official right."⁷⁷ Comparing extortion under this definition to bribery, the court stated:

[t]hat extortion and bribery are two separate and distinct offenses, we think, beyond dispute. . . . Where property is obtained by extortion, the consent of the person who parts with the property is not free and vol-

Congress is aware of court decisions construing some relevant law, and indeed may even be a far-fetched fiction, it is also a long-standing and unquestioned one.

70. 107 N.C. 921, 12 S.E. 50 (1890).

71. *Id.* at 51.

72. *Id.* at 52.

73. 43 F. 376 (D. Wash. 1890).

74. *Id.* at 377.

75. *Id.*

76. 50 Cal. App. 436, 195 P. 456 (1920).

77. *Powell*, 195 P. at 458.

untary, but is, in a measure, coerced, i.e., induced by the wrongful use of force or fear or under color of official right. Where a bribe is actually received, the property or money given by the briber is not obtained from him through any coercion of his will. It is given and received upon agreement or understanding the official conduct of the person receiving it shall be influenced thereby. From this it follows that a defendant, if he is guilty of receiving a bribe, cannot as a result of the same transaction, likewise be guilty of the offense of extortion.⁷⁸

The court further distinguished the crimes by noting that extortion “involves an element of coercion by one of the parties” and the victim consequently “cannot be an accomplice,” but bribery “necessarily involves a willing co-operation by both” parties to the transaction.⁷⁹

The Ninth Circuit ruled consistently in 1927 in *Daniels v. United States*.⁸⁰ Daniels was convicted of bribing a government prohibition agent in an attempt to avoid an investigation.⁸¹ On appeal, claiming he was actually the *victim* of extortion, not a briber, Daniels asserted that the government agent was guilty of extortion.⁸² Citing *Harned* and *Pritchard*, the court rejected this claim explaining that, unlike bribery, “[e]xtortion is the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction, . . . and the term implies that the money paid was extorted on the part of the one who received it, and paid unwillingly by the one who paid it.”⁸³ The court then noted that “Daniels took the initiative, and was the active proponent of all that was done. All that [the agent] did was to assent ostensibly to Daniels’ offer, and receive the money.”⁸⁴

The Supreme Court of Florida recognized essentially the same distinction between extortion and bribery in *Callaway v. State*⁸⁵ in 1933. In *Callaway*, where three criminal statutes proscribed very similar conduct—the unlawful collection of compensation by public officials for the performance or nonperformance of a duty—the court found that the mis-

78. *Id.* (emphasis removed). The court reiterated this view in another portion of the opinion stating that the crime would constitute bribery if “the money or property is given and received upon an agreement or understanding that the official conduct of the person receiving it shall be influenced thereby,” but would constitute extortion if it “is obtained through a consent induced by the wrongful use of force or fear or under color of official right.” *Id.* at 459. Although the distinction drawn by the court between extortion “under color of official right” and bribery is technically dictum because the defendant police officer was charged with extortion by fear, the case is important because of the court’s unequivocal interpretation of Section 518—before the adoption of virtually identical language by Congress when it enacted the Hobbs Act.

79. *Id.*

80. 17 F.2d 339 (9th Cir.), *cert. denied*, 274 U.S. 744 (1927).

81. *Id.* at 340.

82. *Id.* at 342.

83. *Id.*

84. *Id.*

85. 112 Fla. 599, 152 So. 429 (1933).

demeanor statute prohibited bribery and the felony statutes prohibited extortion.⁸⁶ The court explained fully:

[t]he sections denouncing the offense as a felony . . . introduce the element of extortion which differentiates it from the offense of bribery and makes it more odious. The offense consists in the oppressive misuse of the exceptional power with which the law invests the incumbent of an office

In the transaction denounced as a misdemeanor the sheriff or deputy is a complaisant tool in the hands of the person offering the reward, a passive agent in the scheme of the bribe giver, but in the transaction denounced as a felony the officer appears as one exacting a compensation or reward over that which the law prescribes, from a person toward whom the officer is required by law or rule to take some official action; an extortion practiced by demanding the sum required, or by means of insidious suggestions or veiled threats of the arbitrary exercise of official power, induces another to offer a reward for the nonperformance or violation of law.⁸⁷

The decisions in *People v. Feld*⁸⁸ and *Hornstein v. Paramount Pictures, Inc.*,⁸⁹ indicate that the New York Supreme Court also adhered to this view of extortion at the relevant time. Unlike the cases discussed above, *Feld* and *Hornstein* did not address extortion under color of official right or involve specifically the prosecution of a government official. But neither case limited its discussion to a particular variety of extortion.⁹⁰ In *Feld*, decided in 1941, the court reversed the conviction of a

86. *Id.* at 603, 152 So. at 430.

87. *Id.*

88. 262 A.D. 909, 28 N.Y.S.2d 796 (1941).

89. 22 Misc. 2d 996, 37 N.Y.S.2d 404 (N.Y. Sup. Ct. 1942) *aff'd*, 292 N.Y. 468, 55 N.E.2d 740 (1944).

90. Along these lines, the expansionists often point to § 855 of the New York Penal Code, which, prior to 1909, was entitled "[e]xtortion committed under color of official right." That section provided that a public officer commits extortion if he "asks, or receives, or agrees to receive, a fee or other compensation for his official service" in excess of the "fee or compensation" permitted by law or where no "fee or compensation" is permitted by law. Highlighting the words "receives, or agrees to receive," expansionists argue that this statute conclusively proves that, under New York law, the passive receipt of a bribe constituted official extortion. Lindgren, *supra* note 2, at 897-99; United States v. Aguon, 851 F.2d 1158, 1180 (9th Cir. 1988) (en banc). This conclusion is not warranted.

The words the expansionists should highlight from § 855 are the words "fee or other compensation for . . . official service." At a time when public officials often were paid through the collection of fees for their services, rather than through a salary, many jurisdictions enacted fee statutes similar to New York. See *State v. Begyn*, 34 N.J. 35, 167 A.2d 161, 166 (1960); Lindgren, *supra* note 2, at 866-75 (discussing fee statutes). Typically, the only crime proscribed by these statutes was the collection of a fee under the pretense that it was officially due. The crime was called extortion because the victim's consent is coerced in the sense that the request for a fee is backed by the pretense of the force of law. See *United States v. Cerilli*, 603 F.2d 415, 435-46 (3d Cir. 1979) (Aldisert, J., dissenting). Fee statutes did not purport to embrace bribery, which can hardly be described as a "fee or other compensation for . . . official service." See *Dunlap v. Curtis*, 10 Mass. Rep. 210, 211 (1813) (referring to Massachusetts' fee statute, extortion by "color of . . . office supposes a right to demand fees of the person who pays them. . . . But fees demanded of a person not liable, or voluntarily paid by a person not liable, although improperly and unjustly taken and accepted by the officer, and

labor union official for extortion of an “employer by threatening to foment a strike among its employees.”⁹¹ The court found that the union official was entitled to an instruction, which he did not receive, that “if the employer were guilty of bribery, the [union official] could not be guilty of extortion.”⁹² The court explained that the “two crimes are mutually exclusive”⁹³ and that a claim of bribery was a defense to extortion.⁹⁴

A year later in *Hornstein*, the New York Supreme Court stated that “the essence of bribery is the *voluntary* giving of something of value to influence the performance of *official duty*” whereas the essence of extortion is coercion or duress of some nature.⁹⁵ In support, the court cited 11 C.J.S. *Bribery* § 1 (1938),⁹⁶ which states:

[e]xtortion is the unlawful act of an officer in exacting money or property from another *under color of official right* by the wrongful use of force or fear; bribery on the other hand, involves a voluntary rather than coerced payment and may consist of either the offering or receiving of property to influence official conduct.⁹⁷

The New York Court of Appeals decision in *People v. Dioguardi*,⁹⁸ although decided after 1946, is instructive for its interpretation of *Feld* and *Hornstein*. Relying solely on those cases, the court held that bribery and extortion were “mutually exclusive crimes” and that bribery was an effective defense to a charge of extortion.⁹⁹ The court reasoned that bribery “makes the payor equally as guilty as the payee, which could *never* be the case with extortion” where the payee is innocent if the payor is

although, in certain cases, he may be punishable for the cheat or fraud, yet this is not extortion, as the fees, if excessive, are not obtained by color of office.”); *Runnells v. Fletcher*, 15 Mass. 525 (1819) (“it must be proved that the sum, alleged to have been extorted, was demanded as a fee for some official duty”); *State v. Oden*, 10 Ind. App. 136, 37 N.E. 731, 732 (1894) (to commit extortion under Indiana’s fee statute, “the sum demanded or received must at least be claimed as due the officer for services in his official capacity”); *Hirshfield v. Fort Worth Nat’l Bank*, 18 S.W. 743, 745-46 (1892) (same interpretation of Texas fee statute); see also *Hanley v. State*, 125 Wis. 296, 104 N.W. 57, 59 (1905) (discussing distinction between extortion under a fee statute and common-law extortion).

Thus, particularly without support from New York case law, the conclusion that § 855 of the New York Penal Code embraces bribery is not at all warranted. Indeed, in 1909, well before the Hobbs Act was passed, the title of § 855 was changed from “[e]xtortion committed under color of official right” to “[p]ublic officer taking illegal fees commits extortion.”

91. *Feld*, 28 N.Y.S.2d at 797.

92. *Id.* The dissenting judge agreed, stating that “[i]t must be admitted that the crimes of bribery and extortion are mutually exclusive” *Id.* at 798 (Johnston, J., dissenting).

93. *Id.*

94. *Id.* at 797-98.

95. *Hornstein*, 37 N.Y.S.2d at 412-13 (emphasis in original).

96. *Id.*

97. 11 C.J.S. *Bribery* § 1 (1938) (emphasis added), see also 35 C.J.S. *Extortion* § 1 (1960) (with respect to extortion under color of official right, “the person paying must have been yielding to official authority, and not acting voluntarily . . .”).

98. 8 N.Y.2d 260, 203 N.Y.S.2d 870, 168 N.E.2d 683 (1960).

99. *Id.* at 273-74, 203 N.Y.S.2d at 881-82, 168 N.E.2d at 692.

guilty.¹⁰⁰

The official commentary to the FIELD CODE provides further support for the proposition that official extortion does not fully embrace bribery. For interpretive guidance, the official comment to the extortion definition refers to the larceny comment.¹⁰¹ Comparing extortion to robbery, the larceny comment contemplates that the consent of an official extortion victim is coerced or "induced," stating:

[i]n robbery . . . there is a taking of property from another against his consent In extortion there is again a taking. Now it is *with* the consent of the party injured; but this is a consent induced by threats, or *under color of some official right* Thus extortion partakes in an inferior degree of the nature of robbery.¹⁰²

Professor W. Burdick, a leading commentator in 1946, held the same view. Describing official extortion, he explained that "the officer takes advantage of his official position, and uses it to exact unlawful gain."¹⁰³ He further explained:

[t]o constitute extortion under color of office, all money or things received must have been claimed or accepted in right of office, *and* the person paying *must have been yielding to official authority*. The offense consists in the *oppressive misuse* of the power with which the law invests the incumbent of an office¹⁰⁴

100. *Id.* at 273, 203 N.Y.S.2d at 881, 168 N.E.2d at 692. (emphasis added). Even further support in the case law is provided by cases that appear to recognize the distinction between official extortion and bribery by implication. In such cases, although the defendant-public officials were not charged with official extortion, the courts find that the acceptance of a bribe does not constitute extortion of some other variety. The courts do not suggest that defendants would be guilty of official extortion. *See, e.g.,* *People v. McLaughlin*, 2 A.D. 419, 37 N.Y.S. 1005, 1020 ("[A] threat by the defendant to do a lawful act as captain of the police force, unless money was paid to him, would not constitute extortion. The failure to perform a legal duty, in consideration of the receipt of money would be bribery."), *rev'd on other grounds*, 150 N.Y. 365, 44 N.E. 1017 (1896); *State v. Pierce*, 76 Iowa 189, 40 N.W. 715 (1888) (constable who accepts bribe is not guilty of extortion); *see also* *State v. Browning*, 153 Iowa 37, 133 N.W. 330, 336 (1911) ("[t]hat there is a distinction between these offenses [bribery and extortion] is manifest, and proof of one will not support the other.").

101. FIELD CODE § 613 (official comment).

102. *Id.* at § 584 (official comment) (latter emphasis added); *cf. Dive v. Maningham*, 1 Plowd. 60, 68, 75 Eng. Rep. 96, 108 (C.B. 1550) (concluding that extortion done *colore officii sue* is "more odious than robbery" because it carries the "Mask of Virtue" and is often difficult to prosecute). The Field Code's comment to the extortion definition also refers to *People v. Whaley*, 6 Cow. 661 (N.Y. Sup. Ct. 1827). This case, however, does not address the present issue. Whaley, a justice of the peace, entered a money judgment against a civil defendant without the knowledge of the plaintiff. Pursuant to that judgment, Whaley "received and demanded" payment from the defendant. Whaley did not give the money to the plaintiff. *Id.* at 664. Although confirming Whaley's conviction for extortion under color of office, the court does not determine whether coercion or inducement of some nature is a required element of the offense. *Id.* Indeed, Whaley's "demand" for the payment was backed by the pretense of the force of law, so the matter was not in issue.

103. 1 W. BURDICK, LAW ON CRIME § 275 (1946).

104. *Id.* at 395 n.91 (citations omitted and emphasis added). Professors Odgers and Odgers agreed, defining extortion as follows: "[i]f any public officer, in the pretended exercise of the duties of his office, illegally and from some improper motive takes from any person *against his will* any money

Consequently, the overwhelming weight of authority in 1946—the case law, the treatises, the official commentary of the FIELD CODE, and scholarly commentary—distinguished official extortion from bribery by the existence an element of coercion, duress, or inducement. It was this understanding of official extortion that Congress enacted into law through the Hobbs Act in 1946. Consequently, the Hobbs Act does not proscribe the passive receipt of bribes.

VI. THE EXPANSIONISTS' RESPONSE

The strength of the cases and authority cited in the previous section is highlighted by the expansionists' weak response. Professor Lindgren states:

[w]hile in the early 1800s the scope of official extortion at common law was well settled, in the late 1800s the consensus on what had been the scope of extortion at common law began to break down. Some cases still stated the law more or less correctly, while other cases began to misstate the traditional scope of common law extortion.¹⁰⁵

But at some point, a growing body of case law cannot be so lightly dismissed as a misstatement of the law. It must be recognized for what it is: the controlling law. As detailed in the previous section,¹⁰⁶ by 1946 many jurisdictions made substantially the same distinction between official extortion and bribery—an element of coercion, duress, or inducement of some nature.

Professor Lindgren maintains, however, that the cases from those jurisdictions are merely a “side channel” of a split in the case law that occurred in the late 1800s.¹⁰⁷ The “main flow of the river,” he contends, is represented by those cases that “still stated the law more or less correctly.”¹⁰⁸ He offers very little support for this contention. Indeed, despite exhaustive research reaching back to the 1200s, he cites only two twentieth century cases.¹⁰⁹ The Pennsylvania Superior Court decided both cases near the turn of the century. Admittedly, both cases—*Commonwealth v. Wilson*,¹¹⁰ decided in 1906, and *Commonwealth v.*

or valuable thing which is not then due from that person, he is guilty of extortion.” W. L. ODGERS & W. B. ODGERS, *THE COMMON LAW OF ENGLAND 187-88* (1920) (emphasis added).

105. Lindgren, *supra* note 2, at 886. Most expansionists do not even address the state of the law after the turn of the century and instead rely solely on arguments about ancient English common law. See, e.g., Stern, *supra* note 2, at 14-17; *United States v. Aguon*, 851 F.2d 1158, 1176-90 (9th Cir. 1988) (en banc) (Wallace, J., dissenting).

106. See *supra* notes 70-100 and accompanying text.

107. Lindgren, *supra* note 2, at 886-87.

108. *Id.*

109. *Id.* at 886 n.446.

110. 30 Pa. Super. 26, 30-31 (1906).

Brown,¹¹¹ decided in 1903—used the English common-law definition of official extortion, even quoting Blackstone, and recognized that official extortion was a crime distinct from other kinds of coercive extortion. Neither court, however, expressly held that a public officer can be convicted of extortion for the passive receipt of a bribe.

In fact, the *Wilson* court recognized that, to be convicted of extortion, a public official must have taken some affirmative step to induce the bribe payment. Discussing whether sufficient evidence existed to submit the case to the jury, the court stated:

[i]t is true, the evidence in the present case does not show that the defendant made a specific demand for the payment of money, or made any threat as to what he would do if it was not paid. But the evidence taken as a connected whole fully warranted the court in submitting to the jury the questions, whether the defendant's conduct was intended, and had the effect, to induce [the victim] to believe, and to act on that belief, that she must give him money, or reward him in some way, in order to obtain the permission she requested.¹¹²

Professor Lindgren's reliance on *Brown* and *Wilson* is particularly dubious in light of the same court's 1963 decision in *Commonwealth v. Francis*.¹¹³ The court in *Francis* explicitly relied upon *Brown* and *Wilson*, among other cases, to hold that inducement was an element of official extortion. The court stated:

[w]e have held many times that the extraction of money or other things of value under a threat of using the power of one's office may constitute extortion. Such provision of the statute is the same as it is under the common law crime. However, in all of these cases, as well as many others examined by us, when there has been extortion of money by "color of office" there has always been some threat, veiled or expressed, incident to it. We must therefore conclude that under the statutory definition of extortion, when the offence is "by color of his

111. 23 Pa. Super. 470, 490-91 (1903).

112. *Wilson*, 30 Pa. Super. at 29-30. The precise jury instruction that the court affirmed was even more clear on this point:

[t]hat where a person desiring to commit an illegal act or enter into an unlawful business voluntarily offers a police officer a sum of money to be permitted to do an illegal act or enter into such illegal business, even if the officer accepts such sum of money, his offense in such case is not extortion; and if the jury believed the facts to be as stated in this point, defendant cannot be convicted. . . . This is true if the facts are just as stated in this point. But if the offer of money is not voluntary, but is induced by the fact that the person is given to understand that money or something of value must be given to secure the noninterference of the defendant, the case is entirely different and you may find extortion. There is no evidence here that this man demanded in terms money from this woman. But if you find that his conduct meant that—that he gave her to understand that—that she must give him money or in some way do a favor to him before he would assent to her request, then you may find him guilty as indicted.

Id. at 27.

113. 201 Pa. Super. 313, 191 A.2d 884 (1963).

office", some threat to perform the duty of or to exercise the rights or power of that office must be established.

Although we have recognized that the crimes of common law extortion and bribery may coincide at times, . . . it is generally held that they are mutually exclusive crimes.¹¹⁴

Many other official extortion cases from 1900 to 1946 suffered from the same infirmity as *Brown* and *Wilson*. They did not squarely confront the issue at hand. While some of the cases contained inconclusive dictum, none decided whether a showing of coercion, duress, or inducement is an element of official extortion.¹¹⁵ Without *any* discussion of this issue, these cases certainly were not "the main flow of the river." Instead, the numerous cases cited in the previous section that directly confronted and resolved the issue in fact represented the "main flow of the river" in 1946.¹¹⁶ Thus, consistent with these cases recognizing that official extortion does not fully embrace bribery, and as with all other varieties of extortion, a showing of some form of coercion, duress or inducement is necessary to prove official extortion under the Hobbs Act.

This is not to say, however, that no distinction exists between extortion induced "under color of official right" and extortion induced by the use of "force, violence or fear." A public official occupies a unique position of power, and often has the discretion to wield that power over others. Similar to "force, violence or fear," officials can use the power that comes with public office to coerce or induce a person to part with money or property. This inducement may take many forms, but in all cases, the courts must focus on the actions and intent of the public official. The official must affirmatively take some step to induce the payor to part with the money or property. The passive receipt of a corrupt payment voluntarily offered by the payor is not extortion.

VII. McNALLY AND THE RULE OF LENITY

The question facing the Supreme Court in *United States v. Evans*¹¹⁷ regarding the jurisdictional reach of the Hobbs Act is very similar to the

114. *Id.* at 322-23, 191 A.2d at 889 (citations omitted).

115. *See, e.g.*, *State v. Barts*, 132 N.J.L. 74, 38 A.2d 838, *aff'd*, 132 N.J. 420, 40 A.2d 639 (1944) (police officer threatens to arrest and jail victim if payment is not made), *overruled on other grounds*, *State v. Savoie*, 67 N.J. 439, 341 A.2d 598 (1975); *La Tour v. Stone*, 139 Fla. 681, 190 So. 704, 709 (1939) (quoted formulation of official extortion, indicates demand necessary) (quoting *Commonwealth v. Mitchell*, 3 Bush 25, 96 Am. Dec. 192, 193-94 (1867)); *Cox v. State*, 33 Okla. Crim. 436, 244 P. 206 (1926) (defendant threatens victim with prosecution); *Hanley v. State*, 125 Wis. 396, 104 N.W. 57, 79 (1905) (court's formulation of official extortion, indicates demand is necessary).

116. *See supra* notes 70-100 and accompanying text.

117. 910 F.2d 790 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991).

question it faced in 1987 in *McNally v. United States*,¹¹⁸ which dealt with the jurisdictional reach of the mail fraud statute. Since the early 1970s, the Government had used the mail fraud statute in the Seventh Circuit and elsewhere to prosecute public officials for depriving citizens of their right to honest and faithful services.¹¹⁹ In relevant part, that statute prohibits the use of the United States mails for the purposes of executing "any scheme or artifice to defraud, or for any obtaining of money or property by means of false or fraudulent pretenses, representations, or promises"¹²⁰ The Court addressed the question of whether that statute prohibited schemes to deprive "individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly."¹²¹

Every Court of Appeals addressing the issue prior to 1987 held that the mail fraud statute did in fact protect "intangible rights."¹²² Even the Supreme Court recognized that "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the later phrase does not limit schemes to defraud to those aimed as causing deprivation of money or property."¹²³ Nevertheless, the Court held that the statute must be interpreted strictly, prohibiting only schemes aimed at depriving money or property. In language that may be repeated in *Evans*, the *McNally* Court stated:

[t]he Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. As the Court said in a mail fraud case years ago: "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go

118. 483 U.S. 350 (1987).

119. Like the Third Circuit was to the Hobbs Act in *United States v. Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972) (see *supra* notes 19-22 and accompanying text), the Seventh Circuit was instrumental in expanding the jurisdictional reach of the mail fraud statute through the development of the "intangible rights" rationale. See *United States v. Bush*, 522 F.2d 641, 646-48 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1975); *United States v. Keane*, 522 F.2d 534, 546-50 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976); *United States v. Isaacs*, 493 F.2d 1124, 1149-50 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *United States v. George*, 477 F.2d 508, 512 (7th Cir. 1973), *cert. denied*, 414 U.S. 827 (1974).

120. 18 U.S.C. § 1341.

121. *McNally*, 483 U.S. at 358.

122. See *id.*

123. *Id.*

further, it must speak more clearly than it has.¹²⁴

VIII. CONCLUSION

If any doubt remains that the prevailing view of extortion "under color of official right" in 1946 mandates a stricter reading of the Hobbs Act than advocated by the Seventh Circuit, *McNally* and the time-honored Rule of Lenity should settle the matter conclusively. Because Congress did not proscribe the passive receipt of bribes in "clear and definitive language" when it drafted the Hobbs Act, the Supreme Court should choose the less harsh reading of the Act. Thus, the Court should construe the Act as follows: "the obtaining of property from another, with his consent, *induced* . . . under color of official right." The Court should hold that a showing of inducement is a requirement in all Hobbs Act prosecutions, and that extortion under color of official right does not fully embrace bribery.

This does not mean that the Government necessarily should be precluded from prosecuting the passive receipt of bribes by state and local officials. It should do so, however, only under a statute that clearly authorizes such prosecutions upon a proper jurisdictional basis. After *McNally*, Congress passed 18 U.S.C. § 1346, which expressly authorizes prosecutions that *McNally* found beyond the jurisdictional reach of the mail fraud statute. The newly added § 1346 provides, "the term 'scheme or artifice to defraud' [in the mail fraud statute] includes a scheme or artifice to deprive another of the intangible right of honest services."¹²⁵ Assuming a jurisdictional basis exists, Congress could act similarly regarding extortion by passing a statute outlawing the passive acceptance of bribes by state and local officials. Currently, no such statute exists.

124. *Id.* at 359-60 (citations omitted). In *United States v. Bass*, 404 U.S. 336 (1971), the Court also emphasized the need for a clear congressional statement before a criminal statute would be construed to expand federal jurisdiction into a matter traditionally left to the states:

[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. As this Court emphasized only last term in *Rewis v. United States*, [401 U.S. 808 (1971)], we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relations between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 347.

125. 18 U.S.C. § 1346.

IX. POSTSCRIPT

After this article was written, the Supreme Court decided *Evans*, affirming the defendant's Hobbs Act conviction by a vote of 6 to 3.¹²⁶ Thus, the answer to the question posed by the article's title is "no;" *Evans* will not be the next *McNally*. Somewhat disturbingly, the majority never discussed *McNally* and the Rule of Lenity in reaching its result. Moreover, as the dissent points out,¹²⁷ the majority mistakenly relied on English common law to define extortion under color of official right, rather than American common law at the time the Hobbs Act was enacted.

Given the widespread criticism of the expansion of federal criminal jurisdiction and the Court's recent trend toward limiting that expansion, it is difficult to comprehend why the Court failed to adopt a stricter reading of the Hobbs Act and its legislative history. While policy reasons may support federal prosecution of local public corruption, even stronger policy reasons support adherence to the Rule of Lenity and the interests it promotes.

Justice Thomas' dissent, which discusses American official extortion cases contemporaneous to the Hobbs Act's enactment and undertakes a Rule of Lenity analysis, provides a better reasoned approach to the issue addressed in *Evans*.¹²⁸ Unfortunately, it is only a dissent.

126. *Evans v. United States*, 60 U.S.L.W 4411, 1992 U.S. LEXIS 3122 (May 26, 1992) (LEXIS, Genfed library, U.S. file).

127. *Evans*, 1992 U.S. LEXIS 3122, at *38 (Thomas, J., dissenting).

128. *Id.* at *51 (Thomas, J., dissenting).