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# FEDERAL JURISDICTION AND THE HOBBS ACT: *UNITED STATES V. STILLO* AND THE DEPLETION OF ASSETS THEORY

FRANCIS N. MACDONALD\*

## INTRODUCTION

On June 9, 1995, the Court of Appeals for the Seventh Circuit upheld the conviction of Judge Adam Stillo, Sr., and his nephew, attorney Joseph Stillo, for conspiracy to commit extortion under color of official right.<sup>1</sup> The Stillos had been charged with violations of the Hobbs Act, a federal statute that broadly prohibits extortion or robberies, or attempts or conspiracies to commit such acts, that interfere with interstate commerce.<sup>2</sup>

Federal prosecutors established jurisdiction in the case by demonstrating that the Stillos' extortive scheme would have reduced the funds available to the victim, a local attorney, to buy office supplies that had traveled in interstate commerce.<sup>3</sup> Such diminished purchasing power has long been held sufficient under the Act to invoke federal protection.<sup>4</sup>

Over the past fifty years there has been a gradual reduction in the effect on interstate commerce necessary to permit federal intervention under the Hobbs Act.<sup>5</sup> During the period immediately following its

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1. See *United States v. Stillo*, 57 F.3d 553, 555-57 (7th Cir. 1995). Judge Stillo was also convicted of racketeering under 18 U.S.C. §§ 2 and 1962(c) (1994). These charges stemmed in part from a series of bribes he accepted over the decade ending in or about April 1987. See discussion *infra* notes 89-102. See also *United States v. Stillo*, No. 91 CR 795-1-2, Oct. 3, 1991, at 10 ("Indictment"); *Stillo*, 57 F.3d at 555-57. Federal racketeering charges were predicated on violations of Illinois law prohibiting official misconduct, conspiracy, and bribery. See 38 ILL. COMP. STAT. 8/2 (West 1996); 38 ILL. COMP. STAT. 33/1, 3 (West 1996).

2. See 18 U.S.C. § 1951 (1994); see also *infra* note 16 and accompanying text.

3. See *Stillo*, 57 F.3d at 558-59.

4. See, e.g., *United States v. Harty*, 930 F.2d 1257, 1261 (7th Cir. 1991); *United States v. Addonizio*, 451 F.2d 49, 60 (3d Cir. 1972); *United States v. Auguello*, 451 F.2d 1167, 1170 (2d Cir. 1971); *United States v. Esperti*, 406 F.2d 148, 150 (5th Cir. 1969); see also *infra* notes 41-69 and accompanying text.

5. See, e.g., *United States v. Boulahanis*, 677 F.2d 586 (7th Cir. 1982) (stating \$68 depletion of the coffee-purchase fund of a local social club sufficed); *United States v. Staszczuk*, 517 F.2d 53, 59 (7th Cir. 1975) ("[A] threatened effect on interstate commerce is sufficient."); *United States v. Provenzano*, 334 F.2d 678, 683 (3d Cir. 1964) (stating extortion by local Teamster official of

passage in 1946, jurisdiction was generally linked to some direct and substantial effect on interstate commerce. The use or threat of force or violence would halt work, and therefore the flow of goods traveling in interstate commerce necessary to complete the work, unless the victim complied with the extortive demand. Beginning in the mid-1960s, prosecutors began instead to consider the victim's payment as a means to sustain jurisdiction. Compliance with the demand threatened interstate commerce indirectly by reducing the victim's ability to make future purchases of goods. Courts presented with this "depletion of assets" theory have neither imposed nor implied a monetary floor below which an effect on interstate commerce would be considered insufficient to permit federal intervention. Indeed, the legislative history and categorical language of the statute—"[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce"<sup>6</sup>—suggest a full exercise of power under the Commerce Clause.<sup>7</sup> It is thus unlikely that such a lower limit would exist as the statute is now written, unless that limit is required by the Constitution.

Legislative intention "to use all the constitutional power Congress has to punish interference with interstate commerce" has permitted an expansion of jurisdiction largely unforeseen in 1946.<sup>8</sup> Arguably, this expansion has simply tracked the growth of a unified national economy during this century. Using the holding in *United States v. Stillo*, however, I will attempt to demonstrate that the courts themselves have actively, if not eagerly, contributed to the Act's jurisdictional breadth.<sup>9</sup> While the Court of Appeals for the Seventh Cir-

\$17,000 from trucking company to prevent labor slowdowns and disruptions sufficed). *See also infra* notes 24, 40–88 and accompanying text.

6. 18 U.S.C. § 1951 (1994). *See also infra* note 14-17 and accompanying text.

7. U.S. CONST. art. I, § 8, cl. 3.

8. *Stirone v. United States*, 361 U.S. 212, 215 (1960).

9. *See, e.g., United States v. Villareal*, 764 F.2d 1048, 1049-50 (5th Cir. 1985) (involving conspiracy to extort protection money from massage parlors); *Boulanhanis*, 677 F.2d at 589-90; *United States v. Arena*, 984 F. Supp. 580, 584-85 (N.D.N.Y. 1995) (upholding federal jurisdiction where anti-abortion activist engaged in attacks on a Planned Parenthood clinic, thereby depleting the assets used to purchase goods traveling in interstate commerce); *see also United States v. Farmer*, 73 F.3d 836, 843 (8th Cir. 1996) (stating that the Hobbs Act in no way precludes prosecutions for "garden-variety," isolated or local robberies provided prosecutors also satisfy the provision that interstate commerce be affected in some way); *United States v. Jones*, 30 F.3d 276, 284-85 (2d Cir. 1994) (holding that robbery during illegal drug sale affected interstate commerce because the assets available to the victim drug dealer would be depleted, thereby affecting his ability to purchase additional cocaine that had traveled in interstate commerce); *United States v. Fernandez*, No. 93 Cr. 386 (SWK), 1993 WL 362392 (S.D.N.Y. Sept. 14, 1993) (upholding jurisdiction where defendants conspired to rob furniture store owner who had brought the store proceeds home for safe keeping).

cuit, far more frequently than other federal courts of appeals, has evinced a willingness to uphold federal jurisdiction based on truly de minimis effects on interstate commerce,<sup>10</sup> *United States v. Stillo* is, for the most part, representative of cases in all circuits analyzed under a depletion of assets theory. Nevertheless, language and reasoning in the opinion suggest the means by which the jurisdictional element has gradually been relaxed.

There are strong arguments both for and against the “federalization” of criminal law, as the *Stillo* decision and the investigation of which it was a part suggest.<sup>11</sup> While consideration of the wisdom of an expanded federal role in criminal law is beyond the scope of this Comment, it is beyond argument that a corrupt judiciary goes far towards undermining the foundation of an ordered society. Federal intervention seems particularly appropriate where corruption is pervasive and local officials lack the will or the resources to restore the integrity of local institutions.<sup>12</sup> Such action is not without cost, however: paradoxically, the nation’s federal structure may be undermined by intervention intended to preserve democratic institutions. One may likewise legitimately speculate that an expansionist federal policy hinders, rather than fosters, local solutions to such problems.

Part II of this Comment will present an overview of the Act’s legislative history. The section will specifically trace the evolution of the de minimis effects and the depletion of assets theories, the adoption of which have largely shaped modern Hobbs Act prosecutions. In Part III, I will set out the facts of *Stillo* and the defendants’ jurisdictional challenges. I will then examine the court’s reasoning and the case law upon which it rests. Finally, I will review the court’s assessment of *United States v. Lopez*<sup>13</sup> and its effect on the ability of federal prosecutors to sustain jurisdiction based on de minimis effects on interstate commerce.

10. Compare sources cited *infra* note 60, with sources cited *infra* notes 130, 158.

11. For discussions on the expansion of federal criminal law in general, see, for example, ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.10, at 413–16 (2d ed. 1986 & Supp. 1995); Symposium: *Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System*, 46 HASTINGS L.J. 967 (1995); Stephen Chippendale, *More Harm than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 463–66, 468–71 (1994); Tracy W. Resch, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 LAW FORUM 805, 820–23; Robert L. Stern, *The CCL Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973); 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]; see also *infra* note 138.

12. See *infra* note 138.

13. 514 U.S. 549 (1995).

The court's handling of the jurisdictional question in *Stillo* is not entirely satisfying. Whether or not this lack of rigor is—or should be—sufficient in our bifurcated political structure to permit federal intervention, the treatment of the jurisdictional element is representative of the level of analysis demonstrated by most courts. I conclude that the expansion of federal jurisdiction is likely to continue until the judiciary itself is willing to recognize principled limitations on its ability to reach criminal conduct, even where it appears that there may be compelling reasons to permit such intervention.

## II. AN OVERVIEW OF THE JURISDICTIONAL ELEMENT OF THE HOBBS ACT

The Hobbs Act was enacted in 1946 as an amendment to the Anti-Racketeering Act of June 18, 1934.<sup>14</sup> The language of the new amendment was broadly written and has been consistently interpreted as a full exercise of congressional power under the Commerce Clause.<sup>15</sup> The Act provides in part:

14. The Hobbs Act was passed in 1946. Minor revisions of no substantive import were made in 1948, and the act has remained unchanged since that time. See *infra* notes 15–22 and accompanying text. The Anti-Racketeering Act, which preceded the Hobbs Act, provided in pertinent part:

Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee, or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate (sub) sections (a) or (d). . . .

The Anti-Racketeering Act, ch. 569, § 420(a), § 2, 48 Stat. 979 (repealed 1946). For discussions of the Anti-Racketeering Act of 1934, see *United States v. Local 807*, 315 U.S. 521, 528–31 (1942); Comment: *Prosecutions under the Hobbs Act and the Expansion of Federal Criminal Jurisdiction*, 66 J. CRIM. L. & CRIMINOLOGY 306, 308–12 (1975) [hereinafter *Expansion*]; *A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws*, 1 LAW & CONTEMP. PROBS. 445, 446–47 & n.5 (1934).

15. See, e.g., *United States v. Culbert*, 435 U.S. 371, 373 (1978) (“[T]he statutory language sweeps within it all persons who have ‘in any way or degree affect[ed] commerce . . . by robbery or extortion.’ These words do not lend themselves to restrictive interpretation. . . .”) (alteration in original) (citation omitted); *Stirone v. United States*, 361 U.S. 212, 215 (stating that the Act manifests a purpose “to use all the constitutional power Congress has to punish interference with interstate commerce.”); *United States v. DiGregorio*, 605 F.2d 1184, 1190 (1st Cir. 1979); *United States v. DeMet*, 486 F.2d 816, 821 (7th Cir. 1973). In *Battaglia v. United States*, 383 F.2d 303, 305 (9th Cir. 1967), the court traced congressional power to protect interstate commerce, citing *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963); *Stirone v. United States*, 361 U.S. 212 (1960); *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937); and *Gibbons v. Ogden*, 22 U.S. 1 (1824).

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.<sup>16</sup>

An effect on interstate commerce attributable to the proscribed conduct is thus an express element of the statute.

Congress intended the Hobbs Act to address shortcomings in the Anti-Racketeering Act that had been highlighted by the Supreme Court's decision in *United States v. Local 807*.<sup>17</sup> Congressman Sam Hobbs of Alabama, the major sponsor of the legislation, acknowledged that the terms "extortion" and "robbery" were familiar common law terms in every legislator's lexicon.<sup>18</sup> Nonetheless, added another Congressman, the language in the Anti-Racketeering Act "is

16. 18 U.S.C. § 1951(a) (1994). The Hobbs Act also defines certain key terms:

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1951 (1996). For discussions of the legislative history of the Hobbs Act, see *Culbert*, 435 U.S. at 374-78; *Callanan v. United States*, 364 U.S. 587, 590-93 (1961); *United States v. Varlack*, 225 F.2d 665, 671-72 (2d Cir. 1955); *United States v. Kemble*, 198 F.2d 889, 891-92 (3d Cir. 1952); *Expansion*, *supra* note 14, at 308-12. See also *United States v. Green*, 358 U.S. 415, 418-20 & n.5 (1956).

17. 315 U.S. 521 (1942); see 89 CONG. REC. 3210 (1943) (remarks of Congressman Hancock). Out-of-state truckers arriving at the outskirts of Manhattan in 1941 were being halted and threatened at barricades set up by members of Teamsters' Local 807. See *Local 807*, 315 U.S. at 525-31. Local Teamsters were demanding from non-local, non-member drivers that they pay fees that corresponded to a day's wage, at union rates, for the right to proceed. See *id.*; see also 89 CONG. REC. at 3210, 3214-15. At issue in the subsequent litigation was a specific provision in the Anti-Racketeering Act exempting lawful activities undertaken to secure "the payment of wages by a bona-fide employer to a bona-fide employee," enacted to shield lawful union strike activity. *Local 807*, 315 U.S. at 529 (quoting 18 U.S.C. § 420(a)2(A)). The Supreme Court recognized in the Act two firm congressional directives: "[F]irst, the elimination of terroristic activities by professional gangsters was the aim of the statute, and second, [sic] no interference with union activities was intended." *Id.* at 530. Given the apparent clarity of congressional purpose, the Court interpreted the Anti-Racketeering Act so as to shield those members of the union who had been prosecuted. See *id.* at 531, 535-36.

18. These terms "have been construed a thousand times by the courts. Everybody knows what they mean." 91 CONG. REC. 11,912 (1945) (comments of S. Rep. Hobbs).

too general, and we thought it better to make this bill explicit, and leave nothing to the imagination of the Court."<sup>19</sup> Following the passage of the Hobbs Act, prosecutors generally used the statute as a tool to attack the sort of disruptive activities that the drafters of both the Anti-Racketeering Act and the Hobbs Act had decried at length during the legislative debates.<sup>20</sup> This included "typical racketeering activities [such as] price fixing and extortion directed by professional gangsters,"<sup>21</sup> and illegal labor practices.<sup>22</sup>

For example, in *Hulahan v. United States*<sup>23</sup> the Court of Appeals for the Eighth Circuit upheld the conviction of a corrupt union representative charged with conspiracy and attempting to extort \$50,000 to ensure labor peace during the construction of a housing development.<sup>24</sup> Defendant Hulahan emphasized the local nature of his con-

19. 91 CONG. REC. 11,904 (1945) (remarks of Rep. Hancock) (quoted in *Culbert*, 435 U.S. at 378); see also *id.* at 11,912 (remarks of Rep. Hobbs).

20. See, e.g., *United States v. Provenzano*, 334 F.2d 678 (3d Cir. 1964) (involving extortion by local Teamster official to prevent labor slowdowns and disruptions); *United States v. Kennedy*, 291 F.2d 457 (2d Cir. 1962) (involving conspiracy to obstruct interstate trucking shipments); *United States v. Persico*, 305 F.2d 534 (2d Cir. 1962) (finding conviction for hijacking a truckload of goods moving in interstate commerce and conspiring to do so); *United States v. Floyd*, 228 F.2d 913 (7th Cir. 1956) (involving threats of labor disruption leveled against a local company engaged in the construction of an interstate crude oil pipeline); *United States v. Varlack*, 225 F.2d 665 (7th Cir. 1955) (finding labor union representatives allegedly orchestrating strikes threatened additional unrest "unless we are taken care of" by interstate shipper); *Callanan v. United States*, 223 F.2d 171 (8th Cir. 1955) (involving extortion of \$28,000 from construction company to prevent labor slowdowns and disruptions during the construction of an interstate pipeline); *Kemble*, 198 F.2d at 890 (finding non-union truck driver attempting to deliver freight that had been hauled interstate was met by union representative using threats and violence to prevent the driver from unloading the shipment); see also Stern, *supra* note 11, at 3-9, 14 n.59; 31A AM. JUR., *Extortion* §§ 74-110 (1989); NORMAN ABRAMS, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 32-40 (1986).

21. Letter from the Attorney General to the House Committee on the Judiciary of May 18, 1934, quoted in *Local 807*, 315 U.S. at 529. Senator Copeland commented that the Act was intended to "close gaps in existing Federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types." *Local 807*, 315 U.S. at 528-30. Though the Copeland Committee did not define the term "racket," they "found that the term . . . had 'for some time been used loosely to designate every conceivable sort of practice or activity which was either questionable, unmoral, fraudulent, or even disliked, whether criminal or not.'" *Culbert*, 435 U.S. 371, 375 (1978) (quoting S. Rep. No. 1189 (1937)).

22. See 91 CONG. REC. 11,899-912 (1945); see also Randy J. Curato et al, Note, *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption*, 58 NOTRE DAME L. REV. 1027, 1049-50 (1983).

23. 214 F.2d 441 (8th Cir. 1954).

24. See *id.* at 443-44. Similarly, in *Floyd*, 228 F.2d at 915-16, the Court of Appeals for the Seventh Circuit upheld the conviction of an Illinois Teamsters' Union business agent who had extorted \$2,650 from contractors engaged in the construction of a \$52,000,000 interstate oil pipeline. The defendant threatened disruptive labor activity unless he was paid \$25.00 per mile as the line passed through his one hundred six mile union jurisdiction. See *id.*; see also *United States v. Dale*, 223 F.2d 181, 182-83 (7th Cir. 1955) (involving conspiracy and attempt to extort \$1,030,000 from contractors engaged in the construction of a power plant to furnish interstate electrical power); *Bianchi v. United States*, 219 F.2d 182, 185-86 (8th Cir. 1955) (involving extor-

duct.<sup>25</sup> The government countered that the lumber, bath tubs and other fixtures used on the project were being shipped from outside the state to the construction site on an as-needed basis.<sup>26</sup> The court agreed that these shipments adequately tied local activities to interstate commerce, and concluded that “the exaction of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment, and supplies” fell within the scope of conduct the Hobbs Act was enacted to prevent.<sup>27</sup>

Because the Act proscribes the wrongful use of “threatened force, violence, or fear,” the Court of Appeals concluded that no actual effect on interstate commerce was required.<sup>28</sup> The court noted that Congress had intended to prevent both actual disruptions of interstate commerce as well as potential disruptions caused by the threat of illegal strikes, slowdowns or violence.<sup>29</sup> The *Hulahan* court relied on *Nick v. United States*,<sup>30</sup> an earlier Eighth Circuit case in which the court determined that the Anti-Racketeering Act “evinces an intention of the Congress to cover the entire constitutional range of interstate commerce in its prohibition of racketeering. . . . All that is necessary is that the conspiracy shall be to do something, the natural

tion of \$15,312 from contractors engaged in interstate pipeline projects where defendants threatened violence and the continuation of a labor strike).

25. See *Hulahan*, 214 F.2d at 443, 445.

26. See *id.* at 443.

27. *Id.* at 445. In so holding, the court approved of a jury instruction that stated:

I charge you, as a matter of law, that if you believe the testimony of the Government witnesses with reference to the bringing of various materials, commodities, and equipment, from out of state to the job sites in question in this federal judicial district, then you are instructed that defendant's activities as shown by the Government's testimony, if you believe the same, did delay, obstruct and affect interstate commerce as that language is used in the statutes under which these charges are brought. That is to say, if you find the facts to be as testified to by the Government's witnesses, the Court has determined as a matter of law that there has been a substantial effect in interstate commerce shown here by the United States and that question is not for your determination.

*Id.* (citing *Nick v. United States*, 122 F.2d 660, 673 (8th Cir. 1941), for that court's approval of a “similar instruction”).

28. *Id.* at 444-45 (citing 18 U.S.C. § 1951(b)(2) (1992)); see *supra* note 14. It has been suggested that limiting prosecution to those who actually carry out their threats might serve to “reward” those who could create a level of fear in their victims sufficiently high so as to make payment of the extortive demands a virtual certainty. See *Expansion*, *supra* note 14, at 312.

29. See *Hulahan*, 214 F.2d at 444 (“We have no doubt that Congress has the power to deal with extortion or attempted extortion actually or potentially affecting interstate commerce, just as it has the power to deal with unfair labor practices so affecting interstate commerce.”). In support for its position, the court cited *NLRB v. Fainblatt*, 306 U.S. 601 (1939), a civil labor relations case brought under the National Labor Relations Act. The *Fainblatt* Court observed that “the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate.” 306 U.S. at 605; see also *id.* at n.1.

30. 122 F.2d 660 (8th Cir. 1941).



effect of which will be to affect interstate commerce.”<sup>31</sup> The Court of Appeals for the Second Circuit likewise quoted the *Nick* holding, commenting in *United States v. Varlack*<sup>32</sup> that nothing in the legislative history of the Hobbs Act indicated an intent to restrict or otherwise diminish the reach of the original Anti-Racketeering Act.<sup>33</sup>

In 1960 the Supreme Court confirmed this expansive interpretation.<sup>34</sup> *Stirone v. United States*<sup>35</sup> involved a union official indicted for

31. *Id.* at 668, 673; *see also* *United States v. Compagna*, 146 F.2d 524, 526, 528–29 (2d Cir. 1944). *Nick* involved an extortive labor scheme advanced by a St. Louis union official who controlled a local motion picture operators’ union. *See Nick*, 122 F.2d at 664–65. The defendant threatened to call for strikes and shutdowns unless he received a \$10,000 fee, subsequently reduced to \$6,500. *See id.* at 667. The appellate court, relying on *Fainblatt*, noted:

There the effect was upon the origination of interstate commerce. The situation before us affects the termination or purpose of interstate commerce and is just as effective in preventing such commerce. . . . If exhibitors are prevented or seriously obstructed in exhibiting the films they will not buy them. If exhibitors will not buy the films they will not be shipped in interstate commerce. . . . [I]n either case, the films will not be shipped because of the obstruction.

*Id.* at 668.

Hobbs Act defenses based on the “stream of commerce” theory—the goods affected by a defendant’s extortive conduct have already left the stream of interstate commerce, thereby barring federal intervention—have generally been unsuccessful. *See, e.g., United States v. Crowley*, 504 F.2d 992, 997 (7th Cir. 1974) (citing *Burke v. Ford*, 389 U.S. 320, 321 (1967)); *United States v. Braasch*, 505 F.2d 139, 147 (7th Cir. 1974); *United States v. Irali*, 503 F.2d 1295, 1298 (7th Cir. 1974); *United States v. Gill*, 490 F.2d 233, 236 (7th Cir. 1973) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253–58 (1964); *Wickard v. Filburn*, 317 U.S. 111, 118–29 (1942)); *see also infra* notes 36 and 63. *But see United States v. Waters*, 850 F. Supp. 1550, 1561–62 (N.D. Ala. 1994) (“A run-over pedestrian undoubtedly might constitute a greater interference with traffic than anything reflected in the evidence in this case. This court agrees with *United States v. Blair*, . . . in which that court . . . note[d] that the one-time simple purchase of an item which had already ‘come to rest’ inside a state would not automatically provide an effect on interstate commerce.”); *United States v. Blair*, 762 F. Supp. 1384, 1393 n.10 (N.D. Cal. 1991) (“It appears that this neutral purchase of an item ‘come to rest’ in-state would not have any effect on interstate commerce.”).

32. 225 F.2d 665 (2d Cir. 1955).

33. *See id.* at 668–70, 672. Quoting the “natural effect” jury instruction approved in *Nick*, the *Varlack* court noted, “We have no doubt that the same is true under the statute in its present form and, in this regard, we appear to be in agreement with the Court of Appeals for the Eighth Circuit . . .” *Id.* at 672.

34. The Supreme Court declined to rule on the constitutionality of the Hobbs Act until 1956, in *United States v. Green*, 350 U.S. 415 (1956). The district court found no Hobbs Act violations where union members attempted to obtain jobs and wages through the use of threats and violence. *See United States v. Green*, 135 F. Supp. 162, 163 (S.D. Ill. 1955). The lower court had suggested that the defendant might be operating within his legal rights and responsibilities in attempting to induce an employer to engage the services of union labor, even if the services were unwanted. *See id.* The Supreme Court disagreed, remarking pointedly that the legislative history of the Hobbs Act made it clear that “attempts to get personal property through threats of force or violence” were not legitimate labor activities because “[t]he Hobbs Act was meant to stop just such conduct.” *Green*, 350 U.S. at 421. The Court likewise observed that since the legislation was intended for the “protection of interstate commerce against injury from extortion, . . . racketeering affecting interstate commerce was within federal legislative control.” *Id.* at 420–21; *see also United States v. Sweeney*, 262 F.2d 272 (3d Cir. 1959); *Bianchi v. United States*, 219 F.2d 182, 190–91 (8th Cir. 1955).

35. 361 U.S. 212, 213–14 (1960).

allegedly threatening labor disruption during the construction of a proposed steel mill. The sand used to produce the concrete had been shipped into Pennsylvania from out of state.<sup>36</sup> The Supreme Court agreed with the lower courts that such interstate shipments entitled the victim to federal protection. The Court remarked, “[T]hat Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence. The Act outlaws interference ‘in any way or degree.’”<sup>37</sup> The Court articulated some cautionary observations, however:

[T]here are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government’s jurisdiction of this crime rests only on that interference.<sup>38</sup>

It was unclear whether Stirone’s conviction had been upheld in part on the basis of the potential effect on interstate commerce of the mill’s delayed steel shipments, a factor unmentioned in the original indictment. It was likewise unclear “whether the grand jury would have concluded in its indictment a charge that commerce in steel from a nonexistent steel mill might have been interfered with.”<sup>39</sup> The Court therefore reversed.

While the expansive Stirone passage has been cited or quoted in the vast majority of subsequent Hobbs Act cases, the cautionary pas-

36. See *United States v. Stirone*, 262 F.2d 571, 572 (3d Cir. 1958), *aff’d* 168 F. Supp. 490, 495–96 (W.D. Penn. 1957). The defendant had argued unsuccessfully that interstate commerce had ended with the delivery into Pennsylvania of the sand, and its subsequent transformation into concrete at the victim’s plant. See *Stirone*, 168 F. Supp. at 495–96. The district court replied:

[T]he power of Congress to regulate commerce is plenary and the power to regulate includes the power to protect commerce ‘no matter what the source of the dangers which threaten it.’ . . . [T]he only criteria which this court may properly employ to determine whether the act is applicable are whether the channels of interstate commerce have been used and whether the free passage of articles therein has been threatened.

*Id.* at 496 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

37. *Stirone*, 361 U.S. at 215 (quoting 18 U.S.C. § 1951).

38. *Id.* at 218. The Court’s decision hinged on the insufficiency of the defendant’s indictment. Over the objections of Stirone’s attorney, the trial court had permitted jury consideration of the possibility that interstate commerce could be affected by disruption of steel shipments from the plant yet to be built. The indictment charged only that Stirone had burdened interstate commerce by his threats to disrupt the sand shipments into Pennsylvania. See *id.* at 214–15.

39. *Id.* at 219. The Court noted, “[w]hether prospective steel shipments from the new steel mills would be enough, alone, to bring this transaction under the Act is a more difficult question,” one the Court could not, and did not, address. *Id.* at 215. Compare *id.*, with *United States v. Staszczuk*, 517 F.2d 53 (7th Cir. 1975) (*en banc*) and *infra* text accompanying notes 74–86. Cf. *United States v. Leichtnam*, 948 F.2d 370, 378–79, 385–86 (7th Cir. 1991) (stating that *Stirone* is the “classic case of an impermissible broadening of the charges”).

sage, far closer to the core of the Court's holding, has largely gone unnoticed.

### A. *Evolution of the Depletion of Assets Theory*

For the first two decades following the passage of the Hobbs Act, prosecutors generally used the statute to combat the extortion of relatively valuable property or large sums of money, as well as attempts or conspiracies to engage in such extortion.<sup>40</sup> Nevertheless, an early district court decision, *United States v. Malinsky*,<sup>41</sup> set forth in sweeping terms the proposition that the Act might also apply to activities of little or no economic consequence:

The statute provides that effect "in any way or degree" is sufficient. Congress itself has concluded that any effect upon interstate commerce in any degree caused by extortion or conspiracy contemplating extortion is in itself substantial. The substantiality of the effect is not left to judicial determination. The only question is whether the prohibited activity is within the reach of Congress.<sup>42</sup>

*Malinsky*, which has been widely cited,<sup>43</sup> helped to prepare the way for several decisions that drastically reduced the effect on interstate commerce necessary to support jurisdiction under the Act.

In contrast to this relatively early suggestion that even a de

40. See, e.g., *United States v. Pranno*, 385 F.2d 387, 390 (7th Cir. 1967) (extorting \$16,000 for the issuance of a building permit); *United States v. Provenzano*, 334 F.2d 678, 683 (3d Cir. 1964) (extorting \$17,000 over a period of seven years to avoid labor disruptions); *United States v. Postma*, 242 F.2d 488, 491-92 (3d Cir. 1957) (extorting \$10,000 to end a union strike); *United States v. Dale*, 223 F.2d 181, 182 (7th Cir. 1955) (involving attempted extortion of a total of \$1,037,500 on a construction project); *Callanan v. United States*, 223 F.2d 171, 173 (8th Cir. 1955) (extorting \$28,000 for labor peace during the construction of an interstate pipeline); *United States v. Varlack*, 225 F.2d 665, 667-69 (2d Cir. 1955) (involving approximately \$11,000 and an initial demand that the victims "give each of us \$2,500 and . . . a Chevrolet car, and that you place each of us on the payroll at \$50 a week"); see also *supra* notes 20, 24 and accompanying text.

41. 19 F.R.D. 426 (S.D.N.Y. 1956).

42. *Id.* at 428 (citing *United States v. Darby*, 312 U.S. 100, 120 (1941)) (applying the Fair Labor Standards Act of 1938 and interpreting congressional power to reach and regulate admittedly local activities under the Commerce Clause)). It is arguable that determining the "substantiality of the effect" has been left to the judiciary. The belief that Congress has exercised its full power under the Commerce Clause leaves unanswered the questions of the full extent of that power and who is to determine its measure. Moreover, the Court's recent decision in *United States v. Lopez*, 514 U.S. 549 (1995) suggests an increased role for the judiciary in determining the "substantiality of the effect" on interstate commerce necessary to sustain jurisdiction under the Commerce Clause. *Malinsky*, 19 F.R.D. at 428. See *Lopez*, 514 U.S. at 603-615 (Souter, J., dissenting); *Expansion*, *supra* note 14, at 318-19; see *infra* notes 222-58 and accompanying text.

43. See, e.g., *United States v. Boston*, 718 F.2d 1511, 1515 (10th Cir. 1983); *United States v. Hyde*, 448 F.2d 815, 837 (5th Cir. 1971); *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969); *United States v. Amabile*, 395 F.2d 47, 49 (7th Cir. 1968); *Carbo v. United States*, 314 F.2d 718, 732 (9th Cir. 1963); *United States v. Barna*, 442 F. Supp. 1232, 1235 (W.D. Pa. 1978); see also *infra* notes 52, 111.

minimis effect on commerce might warrant federal intervention, it was not until eighteen years after the passage of the Act that it occurred to anyone that federal jurisdiction might be sustained by focusing on the victim's impaired ability to make future purchases. In 1964, the Court of Appeals for the Third Circuit affirmed the conviction of Teamster official Anthony Provenzano for extorting monthly payoffs from a trucking firm directly engaged in interstate commerce.<sup>44</sup> In its charge to the jury, the trial court twice explained that the depletion of the firm's assets by the defendant's extortive conduct permitted the reasonable inference that business operations might be obstructed, delayed, or affected.<sup>45</sup> One of the court's instructions read:

If you find from the evidence that money was obtained from [the victim trucking company] by way of extortion . . . you may infer from that fact that payments of money made did in some way or degree obstruct or delay or affect the business in which [the victim] was engaged. Where the resources of a business are depleted or diminished in any manner or degree by payments of money obtained by extortion the capacity to efficiently conduct such business is to the extent of the drain on its resources likely to be impaired.<sup>46</sup>

The jury convicted him. On appeal, Provenzano argued that "the mere payment of money" did not constitute obstruction of interstate commerce under the statute.<sup>47</sup> The appellate court, assessing the jury instruction in light of the expansive language in *Stirone v. United States*,<sup>48</sup> disagreed:

We can perceive no reason why extortive payments, in substantial amounts, paid as here from the treasury of a company engaged in interstate commerce in order to avoid obstruction of the company's interstate business should not be deemed to affect commerce and therefore to lie within the proscription of the Hobbs Act. This was the substance of the court's charge. We hold it to have been a correct one in light of all the circumstances.<sup>49</sup>

*United States v. Provenzano* is apparently the first instance in which a court held that the effect on interstate commerce necessary to support federal jurisdiction could be supported by a depletion of a firm's assets.<sup>50</sup> When the Court of Appeals for the Seventh Circuit

44. See *United States v. Provenzano*, 334 F.2d 678, 683 (3d Cir. 1964). The case involved a series of monthly sums paid by the trucking firm to an attorney for fictitious legal services. See *id.* at 687.

45. See *id.* at 693.

46. *Id.* at 692.

47. *Id.* at 693.

48. 361 U.S. 212, 215 (1960); see also *supra* notes 35–39 and accompanying text.

49. *Provenzano*, 334 F.2d at 693.

50. For holdings which tend to corroborate this statement, see *United States v. Inigo*, 925 F.2d 641, 649 (3d Cir. 1991); *United States v. Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979); *United*

applied the theory four years later in *United States v. Amabile*,<sup>51</sup> the court quoted from the *Provenzano* trial court's emphatic jury instruction rather than the appellate court's opinion.<sup>52</sup> The language in *Amabile* was thus considerably less provisional than *Provenzano*. The Court of Appeals for the Third Circuit subsequently adopted the stronger formulation.<sup>53</sup>

In so doing, however, the court emphasized that in *United States v. Addonizio* the victimized construction firms, pressured to pay a total of nearly one million dollars in illegal payoffs, were also interstate companies directly involved in interstate projects or projects benefiting other interstate companies.<sup>54</sup>

In 1971, the Court of Appeals for the Second Circuit linked the depletion of assets theory to the expansive language of the Hobbs Act in *United States v. Auguello*.<sup>55</sup> Auguello's conviction was based in part on three \$100 cash payments made by the victim, the owner of a restaurant. One of the payments had been taken directly from the restaurant's cash register.<sup>56</sup> The government's indictment sought to establish the link to interstate commerce by arguing that the restaurant's meat products had been purchased from out of state. The defendant countered that the victim was a private party who had paid with personal funds,<sup>57</sup> thus the link to interstate commerce was simply non-existent. The court was unpersuaded. The Court of Appeals ex-

*States v. Addonizio*, 451 F.2d 49, 60 (3d Cir. 1972); *United States v. Auguello*, 451 F.2d 1167, 1170 (2d Cir. 1971); *United States v. Esperti*, 406 F.2d 148, 150 (5th Cir. 1969). See also *Expansion*, *supra* note 14, at 314.

51. 395 F.2d 47 (7th Cir. 1968) (extorting of \$48,500 from a management company engaged in the construction of an apartment complex).

52. See *id.* at 49. The *Amabile* court quoted *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964), and *Hulahan v. United States*, 214 F.2d 441, 445 (8th Cir. 1955). See 395 F.2d at 49. The court also noted that "[i]t is unnecessary that the extortion have as substantial an effect on interstate commerce as a combination in restraint of trade." *Id.* (citing *United States v. Malinsky*, 19 F.R.D. 426, 428 (S.D.N.Y. 1956)); see also *United States v. Battaglia*, 394 F.2d 304, 312 (7th Cir. 1968).

53. See *Addonizio*, 451 F.2d at 76-77 (citing *Stirone v. United States*, 361 U.S. 212, 215 (1960); *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969); *Amabile*, 395 F.2d at 49; *United States v. Varlack*, 225 F.2d 665, 672 (2d Cir. 1955); *Hulahan*, 214 F.2d at 445; *Nick v. United States*, 122 F.2d 660, 673 (8th Cir. 1941)).

54. See 451 F.2d at 54-57, 60.

55. 451 F.2d 1167 (2d Cir. 1971).

56. See *id.* at 1068-69. The first payment had come from the victim's own pocket, and the third was made with money supplied by law enforcement officials. See *id.* The defendant had also demanded \$250 per month for the victim "to be with" the defendant and fifty percent of the proceeds if the restaurant were ever sold. *Id.* The *Auguello* court relied on an earlier Second Circuit decision, *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969), in which the court had emphasized that "interference or attempted interference with interstate commerce 'in any way or degree' is prohibited. Stated differently, extortion or threats of violence need affect interstate commerce only in a minimal degree to constitute a violation."

57. *Auguello*, 451 F.2d at 1169.

plained that the “providential fact” that the victim contacted the police before his business was demonstrably affected by the extortive demands did not remove the case from the reach of federal protection:

Given the sweeping power of Congress under the Commerce Clause . . . , it is enough that the extortion ‘in any way or degree’ affects commerce, though its effects be merely potential or subtle. Here, depletion of Happy-Burger’s resources, which by itself may impair the efficient conduct of its business sufficiently to affect commerce, was shown at the very least by the September 5, 1968 payment taken directly from Happy-Burger’s cash register.<sup>58</sup>

The defendant’s demand for monthly protection payments and a fifty percent share of the profits upon the sale of the restaurant was no doubt considered by the court in reaching its decision. Nevertheless, the language of the holding permitted—even encouraged—the inference that the single \$100 payment made from the restaurant’s cash register was sufficient to trigger application of the Hobbs Act.<sup>59</sup> Though the Court of Appeals relied on familiar language from widely-cited cases, the *Auguello* holding indicated the court’s willingness to sustain jurisdiction based on a de minimis indirect effect on interstate commerce.

The Court of Appeals for the Seventh Circuit quickly adopted and vigorously applied the notion that a de minimis depletion of a firm’s assets through extortive payments was sufficient to permit federal intervention. The Court of Appeals reviewed numerous cases prosecuted under this theory during 1973 and 1974.<sup>60</sup> In the first,

58. *Id.* at 1169–70 (citing *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964); *Stirone v. United States*, 361 U.S. 212, 215 (1960); *Tropiano*, 418 F.2d at 1076–77; *United States v. Provenzano*, 334 F.2d 678, 692 (3d Cir. 1964); *Hulahan*, 214 F.2d at 445)). *Compare id.* (finding that the “providential fact” that police intervened before an effect on interstate commerce became substantial does not defeat federal jurisdiction), *with United States v. Staszuk*, 517 F.2d 53, 60 (7th Cir. 1975) (en banc) (finding that the “fortuitous circumstance” that a change in plans following the extortive payment made an effect on interstate commerce impossible did not defeat federal jurisdiction).

59. *See, e.g.*, *United States v. Zeigler*, 19 F.3d 486, 492 (10th Cir. 1994) (quoting *Auguello* for the proposition that “\$100 taken directly from restaurant’s cash register to pay extortionist showed depletion of assets, ‘which by itself may impair the efficient conduct of [restaurant’s] business sufficiently to affect commerce’”); *United States v. Flores*, 855 F. Supp. 638, 640 (S.D.N.Y. 1994) (citing *Auguello* for the proposition that the jurisdictional element was satisfied where the victim met the extortive demand “with \$100 from the restaurant cash register”).

60. *See United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974) (involving shakedowns for protection of 53 taverns and nightclubs by members of the vice squad at \$150 per month per establishment); *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974) (involving six monthly payments of \$100 made by bowling alley operators to police for protection from local violence); *United States v. Irali*, 503 F.2d 1295 (7th Cir. 1974) (involving \$150 payment by the mother of a tavern owner to a clerk in city hall in order to secure a liquor license); *United States v. Devitt*, 499 F.2d 135 (7th Cir. 1974) (involving payments in unnamed amounts made by four tavern

*United States v. DeMet*,<sup>61</sup> the court explained:

The effect on interstate commerce would exist, though small by most standards, and only indirectly caused by defendant's acts. . . . [G]iven the existence of an impact on interstate commerce, the question is whether the Hobbs Act must be construed as stopping some margin short of full application of the commerce power.<sup>62</sup>

The *DeMet* court differentiated between statutes that "regulate activities 'in commerce'" and those that "regulate matters 'affecting' interstate commerce," reasoning that the former category represented only a partial exercise of federal power.<sup>63</sup> The court concluded that the Hobbs Act constituted a full exercise of Congress' power under the Commerce Clause, therefore "extortionate conduct having an arguably de minimis effect on commerce may nevertheless be punished."<sup>64</sup> The holding was not unqualified, however, since the court determined that the victim must "customarily" purchase goods or inventory coming from outside the state before a depletion of assets warranted federal protection.<sup>65</sup> No court, before *DeMet* or since, has articulated a threshold level below which an effect on interstate commerce will be dismissed as inconsequential. This is understandable: the language of the statute is broad and its legislative history indicates that protection

owners to police for protection); *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973) (involving \$300 payment to police by tavern owner to prevent the loss of his liquor license for sale to a minor); *United States v. DeMet*, 486 F.2d 816 (7th Cir. 1973) (involving payment by a tavern owner to police of two monthly \$50 sums and a case of liquor worth approximately \$300 to avoid enforcement of a local late-night parking ban); *United States v. Pacente*, 503 F.2d 543 (7th Cir. 1974) (en banc), *rev'g* 490 F.2d 661 (7th Cir. 1973) (involving \$200 payment to police by liquor store owner to avoid arrest for allegedly selling to a minor).

61. 486 F.2d 816 (7th Cir. 1973).

62. *Id.* at 821.

63. *Id.* at 821; *see also id.* at 821 n.4; *Russell v. United States*, 471 U.S. 858, 859 & n.4 (1985) ("The reference to . . . any activity affecting interstate or foreign commerce expresses an intent by Congress to exercise its full power under the Commerce Clause."); *Scarborough v. United States*, 431 U.S. 563, 571-72 (1977) ("Congress is aware of the 'distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.'"). The *DeMet* court quoted *Walling v. Goldblatt Bros.*, 128 F.2d 778, 781 (7th Cir. 1942), a civil case addressing the Fair Labor Standards Act of 1938 and the stream of commerce argument. The court also quoted *Stirone v. United States*, 361 U.S. 212, 215 (1960), and cited *Perez v. United States*, 402 U.S. 146, 150 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); and *Wickard v. Filburn*, 317 U.S. 111 (1942). *See DeMet*, 486 F.2d at 821-22; *see also id.* at 821 n.4.

64. *DeMet*, 486 F.2d at 822 (citing *United States v. Auguello*, 451 F.2d 1167 (2d Cir. 1971); *Battaglia v. United States*, 383 F.2d 303, 305 (9th Cir. 1967)). The court felt neither compelled nor authorized to formulate a test under which an impact on interstate commerce would be dismissed as de minimis. *See id.* at 822 n.5.

65. *See id.* at 822; *see also United States v. Flores*, 855 F. Supp. 638, 642 (S.D.N.Y. 1994) ("[I]t is the victim's purchase of items in interstate commerce that . . . must be ongoing, not the criminal conduct that impairs the ability to purchase.").

of interstate commerce was the goal of the Act's sponsors.<sup>66</sup> The Supreme Court's explications in *Stirone v. United States*<sup>67</sup> and *United States v. Culbert*<sup>68</sup> further encourage expansive interpretation. Currently, the de minimis threshold for a Hobbs Act prosecution appears to lie somewhere between sixty-eight dollars and "eighty cents and a near-empty pouch of chewing tobacco."<sup>69</sup>

### B. *The Devolution from "Affects Commerce" to "Realistic Probability"*

The Hobbs Act prohibits conspiracies and attempts to rob or extort that would affect interstate commerce if successfully completed. The courts have never insisted that a conspiracy be carried out, an attempt be successful, or a threat to use force or violence actually be executed to secure a criminal conviction.<sup>70</sup> In *United States v. Jannotti*,<sup>71</sup> the Court of Appeals for the Third Circuit explained the rationale: "The ultimate failure of the conspiracy may diminish, but does not eliminate, the threat it poses to social order; therefore, the illegality of the agreement does not depend on the achievement of its ends."<sup>72</sup> Similarly, where a defendant has been charged with conspiracy or attempted extortion, the courts have consistently sustained fed-

66. See, e.g., 91 CONG. REC. 11903-06, 11910-13 (1945); see also H.R. REP. NO. 80-238 (1947). No doubt the chiding given the Supreme Court by members of the legislature for what they regarded as a misjudgment of congressional intent has helped to clarify the Court's understanding of the goals of the statute's framers. See, e.g., 91 CONG. REC. 11905, 11907 (comments of Congressman Robinson and Representative Fellows); see also *supra* notes 14-22 and accompanying text.

67. 361 U.S. 212, 215 (1960) ("That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce. The Act outlaws interference 'in any way or degree.'" (quoting 18 U.S.C. § 1951(a)).

68. 435 U.S. 371, 373 (1978) ("[T]he statutory language sweeps within it all persons who have 'in any way or degree affect[ed] commerce . . . by robbery or extortion.' These words do not lend themselves to restrictive interpretation . . .") (alteration in original) (citation omitted). The Court also noted, "Congress intended to make criminal all conduct within the reach of the statutory language." *Id.* at 379-80.

69. *United States v. Quigley*, 53 F.3d 909, 910-11 (8th Cir. 1995). Prosecutors argued that "the robbery affected commerce by preventing [the victims] from reaching the store to make their purchase of beer, an item that had traveled in interstate commerce." *Id.* at 911. The court declined to extend jurisdiction. See *id.*, *infra* notes 167-70 and accompanying text.

70. See *Callanan v. United States*, 364 U.S. 587, 593-96 (1960) (discussing the difference between conspiracy and the substantive offense); see also *United States v. DiCarlantonio*, 870 F.2d 1058, 1061-62 (6th Cir. 1989); *United States v. Brantley*, 777 F.2d 159, 163 (4th Cir. 1985); *United States v. Jarabek*, 726 F.2d 889, 901 (1st Cir. 1985); *United States v. Jannotti*, 673 F.2d 578, 592 (3d Cir. 1982) (en banc); *United States v. Rindone*, 631 F.2d 491, 493-94 (7th Cir. 1980); *United States v. Kuta*, 518 F.2d 947, 951 (7th Cir. 1975); *United States v. Crowley*, 504 F.2d 992, 998 (7th Cir. 1974); *United States v. Varlack*, 225 F.2d 665, 672 (2d Cir. 1955); *Nick v. United States*, 122 F.2d 660, 673 (8th Cir. 1941).

71. 673 F.2d 578.

72. *Id.* at 591.



eral jurisdiction based on some anticipated effect on commerce.<sup>73</sup>

In 1975, the Court of Appeals for the Seventh Circuit upheld the conviction of a defendant charged only with extortion where the district court found no actual effect on interstate commerce. The jurisdictional predicate was satisfied solely on the "realistic probability" of some future effect on interstate commerce.<sup>74</sup> The defendant in *United States v. Staszuk*,<sup>75</sup> an alderman charged with three counts of extortion, had accepted payments to permit zoning changes necessary for the construction of a veterinary clinic. The payments were made and the zoning changes were implemented, but for unspecified reasons the veterinarian abandoned the project.<sup>76</sup> The developer subsequently erected buildings that would have been permissible even absent the zoning change.<sup>77</sup> A panel of the appellate court conceded that the effect of the extortive act on interstate commerce need not be simultaneous with the act of extortion, but rejected the government's "frivolous" contention that "any potential effect on commerce satisfies the Hobbs Act."<sup>78</sup> Citing *United States v. DeMet*,<sup>79</sup> the court concluded that if the charge of extortion as opposed to attempted extortion or conspiracy, were to be upheld, some actual effect on interstate commerce was necessary: "If the extortion is successful and there is still no effect on commerce, the extortioner has not violated the Hobbs Act."<sup>80</sup>

Rehearing the case en banc, the Court of Appeals rejected the panel's reasoning and upheld the conviction.<sup>81</sup> Judge Stevens, writing for the court, explained that the congressional intent in enacting the

73. See, e.g., *United States v. Scacchetti*, 668 F.2d 643, 648-49 (2d Cir. 1982) (approving jury instruction based on the *Nick* language quoted *supra* at note 27); *United States v. Pearson*, 508 F.2d 595, 597 (5th Cir. 1975) (upholding federal jurisdiction where defendants conspired to rob the safety deposit boxes of a hotel that entertained large numbers of guests from out of state); *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969) ("Interstate commerce was involved and attempted interference, if not actual interference, was clearly established."); *United States v. Pranno*, 385 F.2d 387, 389 (7th Cir. 1967) (stating all that must be proved is that the "natural effect" of the executed threat would be an effect on interstate commerce); *Varlack*, 225 F.2d at 672 (same); *Hulahan v. United States*, 214 F.2d 441, 445 (8th Cir. 1954) (upholding federal jurisdiction where union official threatened labor disruptions if his extortive demand were not met); *Nick*, 122 F.2d at 673; see also *Expansion*, *supra* note 14, at 316-17.

74. *United States v. Staszuk*, 517 F.2d 53, 60 (7th Cir. 1975) (en banc).

75. 502 F.2d 875 (7th Cir. 1974), *aff'd in part on reh'g, rev'd in part on reh'g*, 517 F.2d 53 (7th Cir. 1975). Staszuk was indicted on three counts of extortion under color of official right. See *id.* at 877. The court's holding on the third count was the subject of the rehearing en banc. See *id.*

76. See *id.* at 877-78.

77. See *id.* at 879.

78. *Id.* at 879; see *id.* n.10.

79. 486 F.2d 816 (7th Cir. 1973).

80. *Staszuk*, 502 F.2d at 878-79 & n.10.

81. See *United States v. Staszuk*, 517 F.2d 53, 56 (7th Cir. 1975) (en banc).

statute “parallels the central purpose” of the Commerce Clause itself: “to secure freedom of trade.”<sup>82</sup> Because the Hobbs Act proscribes extortion based on mere threats, without requiring that the threats be executed,<sup>83</sup> the court concluded that jurisdiction could be sustained based on the anticipated effect on commerce measured at the time of the extortive agreement, whether or not the effect ever materialized.<sup>84</sup>

The *Staszczuk* holding is frequently cited in Hobbs Act prosecutions.<sup>85</sup> Where this holding has been joined with the de minimis effects and depletion of assets theories, there have understandably been very few successful jurisdictional challenges.<sup>86</sup>

Establishing jurisdiction under the Act presents few difficulties in modern prosecutions: the government can use the statute to bring charges of extortion, robbery, or attempts or conspiracies to commit such acts, then tailor its indictments to best fit the facts of its investiga-

82. *Id.* at 58.

83. *See Id.* at 57 & n.9, 59–60 & n.14.

84. The language of the Act states that “whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce” by extortive conduct or robbery is subject to the Act. 18 U.S.C. § 1951(a) (1994). The *Staszczuk* court paraphrased the jurisdictional element and stated that the Act requires only that “the prosecutor [must] prove some connection with interstate commerce in every case.” *Staszczuk*, 517 F.2d at 59. The two positions are not synonymous. The court conceded that if no effect on interstate commerce had been foreseeable on the date of the extortive transaction, federal jurisdiction could not be supported. *See id.* at 59 n.19. This seems unlikely, however, given the courts’ expansive interpretation of the Act’s “affects commerce” provision.

85. *See, e.g.*, *United States v. Peete*, 919 F.2d 1168, 1174 (6th Cir. 1990); *United States v. Hathaway*, 534 F.2d 386, 396 (1st Cir. 1976); *United States v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976); *United States v. Mazzei*, 521 F.2d 639, 642–43 (3d Cir. 1975); *see also infra* note 86 and cases cited therein.

86. *See, e.g.*, *United States v. Stillo*, 57 F.3d 553 (7th Cir. 1995); *United States v. Zeigler*, 19 F.3d 486 (10th Cir. 1994); *United States v. Shields*, 999 F.2d 1090 (7th Cir. 1993); *United States v. Harty*, 930 F.2d 1257 (7th Cir. 1991); *United States v. McKenna*, 889 F.2d 1168 (1st Cir. 1989); *United States v. Rivera-Medina*, 845 F.2d 12 (1st Cir. 1988); *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986); *United States v. Tuchow*, 768 F.2d 855 (7th Cir. 1985); *United States v. Jarabek*, 726 F.2d 889 (1st Cir. 1984); *United States v. Boston*, 718 F.2d 1511 (10th Cir. 1983); *United States v. Glynn*, 627 F.2d 39 (7th Cir. 1980); *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979); *United States v. Blakey*, 607 F.2d 779 (7th Cir. 1979); *United States v. Richardson*, 596 F.2d 157 (6th Cir. 1979); *United States v. Phillips*, 577 F.2d 495 (9th Cir. 1978); *United States v. Harding*, 563 F.2d 299 (6th Cir. 1977); *Hathaway*, 534 F.2d at 402; *United States v. DiCaro*, No. 88 Cr. 923, 1989 WL 18340 (N.D. Ill. Feb. 24, 1989). *But see* *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994) (finding effect on interstate commerce insufficiently drawn where the victim was a private party whose work patterns were disrupted by the proscribed conduct); *United States v. Buffey*, 899 F.2d 1402 (4th Cir. 1990) (involving private party whose personal indiscretions were unrelated to interstate commerce); *United States v. Mattson*, 671 F.2d 1020 (7th Cir. 1982) (finding that extortion victim’s only relation to interstate commerce was that he was employed by a company doing business in interstate commerce); *United States v. Elders*, 569 F.2d 1020 (7th Cir. 1978) (finding that extortion victims were in the process of liquidating their assets and going out of business and were therefore not positioned to affect interstate commerce); *United States v. Blair*, 762 F. Supp. 1384, 1393 (N.D. Cal. 1991) (finding that withdrawal of personal funds from private bank account was insufficient to affect interstate commerce).

tions without affecting the stringency of the sanction.<sup>87</sup> Similarly, the government presumably maintains a high degree of control over the development of its investigations, has available a wide variety of overlapping statutes proscribing related conduct,<sup>88</sup> and brings to trial only those cases in which the odds of prevailing are in its favor. Consequently, when the government charged Judge Adam Stillo, Sr., and his nephew Joseph with conspiracy to extort under color of official right, all that was necessary to sustain federal intervention under the Hobbs Act was a realistic probability that their victim's extortive payment would affect his ability to purchase goods traveling in interstate commerce: a reduction in the victim's office supply funds would be sufficient.

### III. *UNITED STATES V. STILLO*

#### A. *Factual Background*

On November 5, 1986, Cook County Circuit Court Judge Adam Stillo, Sr., considered the case of Illinois motorist James Hess.<sup>89</sup> A state trooper had pulled Hess over for speeding and making an illegal lane change. After discovering open beer cans and marijuana in the car, the trooper arrested Hess.<sup>90</sup> The defendant's attorney, Robert Cooley, filed a motion to suppress evidence, but Judge Stillo denied the motion and sentenced Hess to six months supervision.<sup>91</sup>

That afternoon, Cooley visited Judge Stillo's nephew, attorney Joseph Stillo, at Joseph's law offices.<sup>92</sup> Cooley thought he had "fixed" the case through Joseph Stillo to ensure suppression of the marijuana and sought some explanation for the morning's events.<sup>93</sup> Stillo re-

87. Defendants convicted under the Hobbs Act face imprisonment for up to twenty years and fines of up to \$10,000. See 18 U.S.C. § 1951 (1994).

88. See, e.g., 18 U.S.C. § 2 (1994) (stating that one who aids and abets may be treated as a principal); 18 U.S.C. §§ 201-25 (1994) (describing bribery and graft involving federal officials); 18 U.S.C. § 371 (1994) (involving conspiracy to commit offenses); 18 U.S.C. §§ 891-94 (1994) (involving extortionate credit practices); 18 U.S.C. § 1951 (1996) (involving extortion and robbery); 18 U.S.C. § 1952 (1996) (involving interstate travel in aid of racketeering enterprise); 18 U.S.C. § 1962 (1996) (finding federal racketeering charges predicated in part on state law bribery and extortion).

89. See *People v. James D. Hess*, 03-5324571-75 (cited in *United States v. Stillo*, No. 91 CR 795-1-2, 1992 WL 297388 at \*1 (N.D. Ill. Oct. 7, 1992)).

90. See *Stillo*, 57 F.3d at 555-56; Charles Nicodemus, *Ex-Judge's Trial Begins Today: Stillo Accused of Conspiring To Fix Case, Taking Bribes*, CHI. SUN-TIMES, July 6, 1993, at 12, available in 1993 WL 6537284 [hereinafter *Taking Bribes*].

91. See *Stillo*, 57 F.3d at 556.

92. See *id.*

93. See *id.* at 555-56. This was not the first illegal encounter between Cooley and Judge Stillo. Between 1977 and 1983, Cooley had allegedly bribed the judge in several other cases, but ceased when word surfaced of an ongoing federal investigation into local corruption. See *id.*;

sponded that his uncle had convicted Hess because the defendant “look[ed] like an FBI agent.”<sup>94</sup> Two days later, Cooley spoke with the Judge about the case. Judge Stillo informed Cooley that his client “didn’t sound right. . . . He sounded like a plant. I just started having bad vibes out there.”<sup>95</sup> On December 16, Cooley again spoke with Joseph Stillo, who advised Cooley to persevere in his efforts on the Hess case because his uncle would eventually be willing to expunge the conviction from Hess’ record.<sup>96</sup>

Unfortunately for the Stillos, Cooley had been wearing a hidden microphone throughout this period; Hess was an F.B.I. “plant;” and the charges against him were fictional, filed by the United States Attorney’s Office and the FBI as part of an ongoing federal investigation into corruption in Cook County.<sup>97</sup> On October 2, 1991, Judge Stillo was charged with racketeering, conspiracy to extort and attempted extortion.<sup>98</sup> Count I, section 4, charged in part:

Beginning in or about August 1986, and continuing to in or about April 1987, defendant Adam Stillo, Sr. did conspire with Joseph T. Stillo to commit extortion, in that defendant Adam Stillo, Sr. agreed with Joseph T. Stillo to obtain money from Robert J. Cooley, in order to corruptly provide a favorable resolution to the client of Robert J. Cooley in the case of *People of the State of Illi-*

Matt O’Connor, *Stillo Found Guilty of Corruption*, CHI. TRIB., July 30, 1993, at A1, available in 1993 WL 11089377. The Hess trial was originally set to come before Judge Stillo on October 21, 1986, but at the last minute, the trial was postponed. See *Stillo*, 57 F.3d at 556. *People v. Hess* went to trial a day after the Illinois election in which Judge Lawrence A. Passarella was defeated in his bid for judicial retention. Eight months earlier, Judge Passarella had acquitted a local bodybuilder accused in a 1984 beating of a Chicago policewoman. See *id.* The acquittal resulted in widespread popular outrage. Charles Nicodemus, ‘86 *Colella Case Cited In Trial of Judge Stillo*, July 14, 1993, CHI. SUN-TIMES, at 22, available in 1993 WL 6538534. A separate federal investigation into alleged political corruption in the First Ward turned up allegations that the Colella trial had been fixed by the late Pat Marcy, First Ward Democratic Organization secretary: Robert Cooley had been Colella’s lawyer. See *id.*

94. Matt O’Connor, *Judge’s Sixth Sense Recounted at Bribe Trial*, CHI. TRIB., July 9, 1993, at A1, available in 1993 WL 11082705; *Stillo*, 57 F.3d at 556; see also Appellate Brief for Joseph Stillo, *Stillo* 57 F.3d 553 (No. 94-2679) [hereinafter J. Stillo Br.]. As attorneys for Joseph Stillo recounted the story:

Later that day, Cooley went to Joe Stillo’s office. Cooley told Joe that he thought the state trooper “tried to bang me. I think he manufactured a story.” Joe interjected, “That’s not why he did it,” and explained that the judge thought Cooley’s client looked like an FBI agent. Cooley and [Joseph] Stillo discussed what FBI agents looked like, with Joe noting that an “agent looks different to everyone depending on their level of paranoia at any given moment.”

*Id.* at 13 (citations omitted).

95. *Stillo*, 57 F.3d at 556.

96. See *id.*

97. See *id.* at 555; Nicodemus, *Taking Bribes*, *supra* note 90, at 12; Charles Nicodemus, *Stillo Convicted In Bribery Case: Retired Judge’s Nephew Also Found Guilty*, in CHI. SUN-TIMES, July 30, 1993, at 3, available in 1993 WL 6541261.

98. See *Stillo*, 57 F.3d at 556–57. Judge Stillo was also charged with violations of Illinois law prohibiting official misconduct, conspiracy, and bribery. See *supra* note 1.

*nois v. James D. Hess*, 03-5324571-75; in violation of Title 18, United States Code, Section 1951.<sup>99</sup>

Count II charged Judge Stillo and his nephew with conspiracy to extort, "in that they agreed among themselves to obtain an amount of money from Robert J. Cooley, with his consent, said consent being induced under color of official right . . . . It was further a part of the conspiracy . . . to obtain a favorable resolution of the case against Cooley's client . . . ." <sup>100</sup>

On July 29, 1993, a jury found Judge Stillo guilty of racketeering and conspiracy to commit extortion. He was subsequently sentenced to four years' imprisonment.<sup>101</sup> Joseph Stillo was found guilty of conspiracy to commit extortion, and was sentenced to two years' imprisonment and a \$10,000 fine.<sup>102</sup>

### *B. Upholding Federal Jurisdiction in United States v. Stillo*

On appeal, the Stillos attacked the jurisdictional link between the extortive transaction and the purchase of goods traveling in interstate commerce.<sup>103</sup> They argued that the government had failed to show that Cooley's specific contributions were used to purchase such goods.<sup>104</sup> They also argued that Cooley's comment—that Hess himself would be paying Judge Stillo's bribe—demonstrated that Cooley's assets were not implicated in the scheme.<sup>105</sup> Similarly, they asserted that the government's depletion of assets theory was inapposite because the bribery money was supplied by the FBI rather than by Cooley's firm. Thus, there could be no effect on interstate commerce that was not attributable to the undercover operation.<sup>106</sup> Finally, the Stillos questioned the sufficiency of the interstate nexus in light of the Supreme Court's recent holding in *United States v. Lopez*.<sup>107</sup>

To establish the connection between the Stillos' extortive scheme and interstate commerce, the government presented "numerous"

99. Indictment, *supra* note 1, at Count I, ¶ 2(d)(4).

100. *Id.* at Count II, ¶¶ 2, 7.

101. See *Stillo*, 57 F.3d at 556; Matt O'Connor, *Judge Stillo Gets 4 Years for Fixing String of Cases*, CHI. TRIB., July 12, 1994, at A3, available in 1994 WL 6505720. The government sought a ten-year sentence and argued that the elder Stillo was in "excellent shape." *Id.* The trial judge replied, "I'm dealing with a 77-year old man," and sentenced Judge Stillo to four years' imprisonment. *Id.*

102. See *Stillo*, 57 F.3d at 556.

103. See *id.* at 558.

104. See *id.* at 559.

105. See *id.* at 558-59.

106. See *id.* at 559. This argument was apparently first addressed in the Seventh Circuit in *United States v. Glynn*, 627 F.2d 39 (7th Cir. 1980).

107. 514 U.S. 549 (1995); see *infra* notes 127-29, 218-20, 222-58 and accompanying text.

items purchased by Cooley's law firm that had traveled in interstate commerce, such as will covers and "an \$11.75 Texas Instruments mini-desk calculator" shipped from Texas.<sup>108</sup> An office employee engaged by Cooley's firm also testified that Cooley made "weekly contributions" to the common office account, out of which such goods were regularly purchased.<sup>109</sup> The government built its case on a number of settled propositions: (1) no actual effect on interstate commerce need be found if the "natural effect" of the scheme, upon execution, were to obstruct commerce;<sup>110</sup> (2) an effect on interstate commerce need only be de minimis;<sup>111</sup> (3) a reduction, however temporary, of the victim's ability to purchase goods that have traveled in interstate commerce is sufficient to establish federal jurisdiction;<sup>112</sup> and (4) the assets depleted must be those of an enterprise or organization regularly engaged in activities with an interstate nexus.<sup>113</sup>

The Court of Appeals concluded that "the general set-up was sufficient to support the jury's finding" that the payment of a bribe by Cooley could potentially deplete his firm's assets.<sup>114</sup> In particular, the *Stillo* court relied on three prior Seventh Circuit decisions: *United States v. Murphy*,<sup>115</sup> *United States v. Lewis*,<sup>116</sup> and *United States v.*

108. J. Stillo Br., *supra* note 94, at 16; *see also Stillo*, 57 F.3d at 558. On appeal, Joseph Stillo noted:

As part of the interstate commerce evidence, the government offered a series of bills. One such bill showed that [the firm of] Lemke & Cooley ordered an \$11.75 Texas Instruments mini-desk calculator from Quill corporation [sic]. On August 28, 1986, Quill shipped the calculator form Texas to Chicago. [An employee] testified that this calculator was ordered by a person named Donna, and [the employee] did not know who the calculator was for. . . .

The next bill was for a [sic] \$188.40 worth of will covers and will envelopes provided by Histacount, a New York corporation. The will materials were paid for on November 24, 1986. . . .

J. Stillo Br., *supra* note 94, at 16-17. The government also introduced Illinois Bell telephone bills, "most" of which were for intrastate calls; and "long distance telephone bills for which payments were made in September, October, and November 1986." *Id.* at 17; *see also* Appellate Brief for Adam Stillo, at 9 n.2, *Stillo*, 57 F.3d 553 (No. 94-2678) [hereinafter A. Stillo Br.]

109. *Stillo*, 57 F.3d at 558.

110. *See, e.g., United States v. Staszczuk*, 517 F.2d 53, 56 n.6, 60 (7th Cir. 1975) (en banc); *Nick v. United States*, 122 F.2d 660, 673 (8th Cir. 1941).

111. *See, e.g., United States v. Blakey*, 607 F.2d 779, 784 (7th Cir. 1979); *United States v. Auguello*, 451 F.2d 1167, 1169-70 (2d Cir. 1971); *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969); *United States v. Malinsky*, 19 F.R.D. 426, 428 (S.D.N.Y. 1956).

112. *See, e.g., United States v. Shields*, 999 F.2d 1090, 1098 (7th Cir. 1993); *United States v. Boston*, 718 F.2d 1511, 1515 (10th Cir. 1983); *United States v. DeMet*, 486 F.2d 816, 822 (7th Cir. 1973); *United States v. Amabile*, 395 F.2d 47 (7th Cir. 1968); *United States v. Provenzano*, 334 F.2d 678, 693 (3d Cir. 1964).

113. *See, e.g., United States v. Buffey*, 899 F.2d 1402, 1404-07 (4th Cir. 1990); *United States v. Mattson*, 671 F.2d 1020, 1024-25 (7th Cir. 1982); *United States v. Rabbitt*, 583 F.2d 1014, 1024 (8th Cir. 1978); *United States v. Merolla*, 523 F.2d 51 (2d Cir. 1975).

114. *Stillo*, 57 F.3d at 558.

115. 768 F.2d 1518 (7th Cir. 1985).

*Shields*.<sup>117</sup> Two of the cases, *Murphy* and *Shields*, involved prosecutions in which the "victims" had been attorneys working with the FBI to ferret out corrupt judges.<sup>118</sup> The *Stillo* court thus expressed no hesitation in sustaining jurisdiction based on the de minimis depletion of an attorney's office supply funds.<sup>119</sup>

The court likewise dismissed the *Stillos'* claim that the use of FBI funds in the operation negated any possible effect on interstate commerce.<sup>120</sup> The *Stillo* court referred to *Shields*,<sup>121</sup> a holding which in turn had relied on *United States v. Hocking*,<sup>122</sup> in which the court concluded that the offense of attempted extortion "is complete at the time the attempt to extract payment is made, even before any money changes hands."<sup>123</sup> Because the *Stillos* were charged as conspirators, and because the intended victim was attorney Cooley ("in his profes-

116. 797 F.2d 358 (7th Cir. 1986).

117. 999 F.2d 1090 (7th Cir. 1993).

118. *United States v. Murphy* involved two attorneys who had bribed a Cook County Circuit Court judge for favorable rulings. See 768 F.2d at 1526, 1530. One, an undercover FBI agent posing as a corrupt attorney, had regularly purchased stationery from New York. See *id.* The other, who had agreed to cooperate with the government in the investigation, purchased law books from outside Illinois. See *id.* The confidential informant in *United States v. Shields* was Robert Cooley. See 999 F.2d at 1093.

119. See *Stillo*, 57 F.3d at 558.

120. See *id.*; see also *United States v. Blakey*, 607 F.2d 779, 783 (7th Cir. 1979). But see *United States v. Brantley*, 777 F.2d 159, 163 (4th Cir. 1985) (concluding that interstate movement of FBI gambling equipment and undercover personnel did not satisfy the interstate commerce element of extortion under the Hobbs Act: "We do not think the commercial predicate for federal jurisdiction can be found in such pretense on the part of federal agents."). See *infra* notes 171-97 and accompanying text.

121. 999 F.3d at 1097-99.

122. 860 F.2d 769 (7th Cir. 1988).

123. *Id.* at 777; see also *United States v. Santoni*, 585 F.2d 667, 671 (4th Cir. 1978) (involving extortive scheme to insure award of city contracts based on a fee of 10% of all future contracts and a \$3,000 "initiation fee"). *Santoni* involved an FBI shell-corporation established for the "specific purpose" of obtaining evidence of corruption in the awarding of city contracts. *Id.* at 670. The Court of Appeals for the Fourth Circuit emphasized that the FBI-sponsored company was a functional business engaged in ongoing operations. See *id.*; see also *United States v. Brooklier*, 459 F. Supp. 476, 479 (C.D. Cal. 1978) ("Legal impossibility is said to exist whenever the intended acts, even if successfully completed by a defendant, would not constitute a crime. . . . Factual impossibility . . . refers to those situations in which a circumstance unknown to the defendant renders the consummation of the intended criminal conduct physically impossible. [W]hile legal impossibility is a defense to a charge of attempt, factual impossibility is not."); *United States v. Bellomini*, 454 F. Supp. 44, 47 (E.D. Pa. 1978) ("The fact that the business enterprise was frustrated at a later time through failure of finances does not constitute a defense to a charge of attempt to extort money in violation of the Hobbs Act."); cf. *Blakey*, 607 F.2d at 782-84. *Blakey* raised the question of whether the Hobbs Act would extend to extortion of illegal businesses. See *id.* at 783. In that case, the extortion victim had used a tire store as a cover for the sale of heroin. The court cited *Santoni* for the proposition that an F.B.I. "dummy" corporation could be used successfully to ferret out official corruption. See *id.* The *Blakey* court determined "[o]n the basis of these authorities" that the Hobbs Act's coverage extended to "mixed legal-illegal business ventures like [that run by the victim]." *Id.*

sional capacity”),<sup>124</sup> the crime was complete before the source of Cooley’s payment money—motorist Hess or the FBI—became an issue.<sup>125</sup> The *Stillo* court thus upheld jurisdiction based on the probable effect on interstate commerce at the time of the proscribed agreement.<sup>126</sup>

Finally, the court dismissed the Stillos’ reliance on *United States v. Lopez* as misplaced, noting that unlike the Gun-Free School Zones Act of 1990, which the *Lopez* Court ruled unconstitutional,<sup>127</sup> the Hobbs Act contained both an express jurisdictional provision and was directed at a “type of economic activity.”<sup>128</sup> The *Stillo* court concluded that *Lopez* had done “nothing to undermine this [c]ourt’s precedents that minimal potential effect on commerce is all that need be proven to support a conviction.”<sup>129</sup>

### C. Analysis of the Court’s Holding in *United States v. Stillo*

#### 1. De Minimis Depletion of the Victim’s Assets

Each circuit has developed its own body of Hobbs Act case law but all rely on common principles, including the de minimis effects<sup>130</sup>

124. *Stillo*, 57 F.3d at 560; see also Indictment *supra* note 1, at 8 (“Defendant Adam Stillo, Sr., would corruptly rule in a manner favorable to the client of Robert J. Cooley.”).

125. *Stillo*, 57 F.3d at 558–59.

126. The *Stillo* court continued, “[L]ater developments which negate or lower the potential effect on interstate commerce do not undermine the jurisdictional element.” *Id.* at 558 (citing *United States v. Staszczuk*, 517 F.2d 53, 60 (7th Cir. 1975) (en banc)). See also *United States v. Glynn*, 627 F.2d 39 (7th Cir. 1980) (concerning FBI funding of an undercover operation involving payoffs to city electrical inspectors). In a vigorous dissent, Circuit Judge Swygert argued:

[A]ny attempt to affect commerce was an impossibility when the monies offered and delivered to the defendant were Government funds rather than assets of the contractors. Conceptually, the transactions were illusory insofar as their having any possibility, let alone probability, of an effect on commerce. There was no possible risk that the contractors’ assets might be depleted.

. . . Here an effect, actual or potential, on interstate commerce (a necessary jurisdictional element of a Hobbs Act prosecution) did not exist nor could it have come into existence.

. . . The statute does not cover “attempts” to affect commerce; it speaks only of attempts to rob or extort.

*Id.* at 44. The court in *United States v. Rindone*, 631 F.2d 491, 495–96 (7th Cir. 1980), which three days later handed down a decision in accord with the *Glynn* decision, found Judge Swygert’s argument persuasive. Indeed, Judge Swygert eventually capitulated to the “the law of the circuit” in *United States v. DeMet*, 486 F.2d 816, 823 (7th Cir. 1973) (Swygert, J., concurring).

127. Pub. L. No. 101-647, § 1702(a), 104 Stat. 4789, 4844-45 (codified as amended at 18 U.S.C. §§ 921, 924 (1994)). See *infra* notes 217–20, 222–58 and accompanying text.

128. *Stillo*, 57 F.3d at 558 n.2; see also *United States v. Lopez*, 514 U.S. 549, 557–560 (1995).

129. *Stillo*, 57 F.3d at 558 n.2.

130. See, e.g., *United States v. Capo*, 791 F.2d 1054, 1067 (2d Cir. 1986) (holding no more than a minimal effect on commerce need be shown where defendants engaged in extortive scheme to sell job opportunities at \$500–\$1000 per job); *United States v. Mazzei*, 521 F.2d 639, 642–43 (3d Cir. 1975) (holding de minimis effect on interstate commerce sufficient where senator extorted payments totaling \$20,000 from victim); *United States v. Shackelford*, 494 F.2d 67, 75 (9th Cir. 1974) (noting that the effect on interstate commerce need only be minimal where defendant attempted to extort \$270,000 from an airline); *United States v. Bryson*, 418 F. Supp. 818,



and depletion of assets theories,<sup>131</sup> as well as the requirement that the government need demonstrate only a reasonable probability that the proscribed conduct will affect interstate commerce.<sup>132</sup> The Act has been broadly read in all circuits;<sup>133</sup> prosecutions in the Seventh Circuit, however, far more frequently than elsewhere, have been upheld based on truly de minimis depletions of assets.<sup>134</sup> Many of the Seventh Circuit cases employing this analysis—including *United States v. Murphy*,<sup>135</sup> *United States v. Shields*,<sup>136</sup> and *United States v. Stillo*<sup>137</sup>—are the result of widespread investigations into patterns of official corruption.<sup>138</sup> Thus, a defendant convicted on a single count representing a \$100 transaction may nevertheless have been charged with (and brought to trial on) multiple counts alleging a long series of corrupt or extortive activity.

Following their convictions, the Stillos filed post-trial motions challenging the sufficiency of the interstate nexus between Cooley, his

825 (W.D. Okla. 1975) (holding extortion of \$10,000 and attempted extortion of \$8000 was sufficient to affect interstate commerce where effect need only be de minimis by most standards); see also *infra* note 158 and cases cited therein.

131. See *infra* notes 201–04 and accompanying text.

132. When traced back in each jurisdiction, courts generally cite *United States v. Staszczuk*, 517 F.2d 53 (7th Cir. 1975) (en banc) as the source for this proposition. See, e.g., *University v. Harding*, 563 F.2d 299, 301 (6th Cir. 1977); *United States v. Brown*, 540 F.2d 364, 373 (8th Cir. 1976); *Mazzei*, 521 F.2d at 643. However, the Court of Appeals for the Second Circuit explained in *United States v. Auguello* that “it is enough that the extortion ‘in any way or degree’ affects commerce, though its effects be merely potential or subtle.” 451 F.2d 1167, 1169 (2d Cir. 1971). See *supra* notes 56–59, 73–84 and accompanying text.

133. See, e.g., *Stirone v. United States*, 361 U.S. 212, 215 (1960); *United States v. Peete*, 919 F.2d 1168, 1173–74 (6th Cir. 1990); *United States v. Jannotti*, 673 F.2d 578, 590 (3d Cir. 1982) (en banc); *Staszczuk*, 517 F.2d at 58 (en banc); *Mazzei*, 521 F.2d at 642; *United States v. DeMet*, 486 F.2d 816, 821–22 (7th Cir. 1973).

134. See, e.g., cases cited *supra* notes 60, 130, *infra* note 157.

135. 999 F.2d 1090 (7th Cir. 1985).

136. 768 F.2d 1518 (7th Cir. 1985).

137. 57 F.3d 553 (7th Cir. 1995).

138. See cases cited *supra* note 60. The *Stillo* case is one of a lengthening series of prosecutions stemming from federal investigation into political and judicial corruption in Cook County. See, e.g., JAMES TUOHY & ROBERT WARDEN, GREYLORD: JUSTICE CHICAGO STYLE (1989); Matt O’Connor, *20th Judge Charged with Corruption: Stillo Latest in Long Line U.S. Targeted*, CHI. TRIB., Oct. 3, 1991, at A1; Charles Mound et al, *U.S. Seeks Trial Records of 7 County Judges*, CHI. TRIB., Dec. 5, 1989, at A1. The O’Connor article lists the following record of indictments and convictions for judicial corruption in the Seventh Circuit:

client and the defendants' extortive conduct.<sup>139</sup> The trial court suggested that the time spent by Cooley and the use of his firm's equipment and personnel in preparing the Hess case might serve to satisfy the otherwise modest burden of proving the connection to interstate commerce.<sup>140</sup>

Cooley filed, as part of his representation of Hess, written documents which were prepared by firm secretarial staff on firm paper using firm equipment, such as typewriters and duplicating equipment. He also used firm telephones. In addition, he spent time on the Hess case, [sic] all of these activities have financial implications for his law firm which would deplete its assets.<sup>141</sup>

It is true that, broadly defined, an organization's secretarial staff, firm paper, office equipment and billable hours are business "assets." Prior to *Stillo*, however, the "assets" depleted in Hobbs Act case law

Defendant	Position	Case Status
John J. Devine	Associate Judge	Convicted: 15 years
Daniel Glecier	Associate Judge	Convicted: 6 years, \$50,000 fine
Reginald Holzer	Circuit Judge	Convicted: 13 years
Richard LeFevour*	Presiding Judge	Convicted: 12 years
Thomas J. Maloney†	Circuit Judge	Indicted on racketeering charges
John H. McCollum	Circuit Judge	Convicted: 11 years
John J. McDonnell	Circuit Judge	Convicted: 6 years
Michael E. McNulty	Associate Judge	Pled Guilty: 3 years, \$15,000 fine
John M. Murphy	Associate Judge	Convicted: 10 years
James L. Oakey	Associate Judge	Convicted: 6 years
Wayne W. Olson	Circuit Judge	Pled Guilty: 12 years, \$35,000 fine
John F. Reynolds	Circuit Judge	Convicted: 10 years, \$33,000 fine
Frank Salerno	Circuit Judge	Pled Guilty: 9 years, \$10,000 fine
Roger E. Seaman	Circuit Judge	Pled Guilty: 4 years
David J. Shields‡	Presiding Judge	Convicted: faces senetncng
Adam N. Stillo	Circuit Judge	Indicted on Racketeering Charges
Raymond Sodini	Circuit Judge	Pled Guilty: 8 years

\* 1st Municipal District, formerly supervising judge of Traffic Court.

†Chancery Court. Shields was sentenced to 37 months' imprisonment and three years supervised release. See *supra* notes 117-23 and accompanying text.

‡Judge Maloney was convicted of bribery on April 17, 1993. He was sentenced to fifteen years and nine months' imprisonment, and fined \$200,000 for his role in fixing three murder trials in the 1980s. See *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995); *Matt O'Connor, Ex-Judge Gets Final Fix: 15 Years*, CHI. TRIB., July 22, 1994, at A1.

139. See *United States v. Stillo*, No. 91 CR 795-1-2, 1993 WL 565988, at \*1 (N.D. Ill. Jan. 26, 1994).

140. See *id.* It is unclear whether the government or the trial judge was the author of this theory. The government's appellate brief seems to lay authorship on the trial court:

[A]s the district court noted in denying a post-trial motion to set aside the verdict, . . . Cooley "[used firm supplies and] spent time on the Hess case, [and] all of these activities have financial implications for the law firm which would deplete its assets."

Thus, the jury could reasonably conclude that Cooley's payment of a bribe to Adam Stillo would diminish the firm's "potential as a purchaser of [interstate] goods."

Direct Appeal Brief for Government, at 31, *United States v. Stillo*, 57 F.3d 553 (No. 94-2679) (quoting *Stillo*, 1993 WL 565988 at \*1; *United States v. Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978)). [hereinafter Govt. Br.]

141. *Stillo*, 1993 WL 565988 at \*1.

have been direct pecuniary outlays: the authority cited in the government's briefs and the court's opinion certainly does not suggest an expansion of the definition of the term "assets" to include services, non-pecuniary assets, or business equipment depreciation.<sup>142</sup> Neither is it clear how the court's post hoc jurisdictional analysis ensures that the jurisdictional predicate could be satisfied before federal power is exercised. As the Supreme Court has explained elsewhere:

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. . . . [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.<sup>143</sup>

Nevertheless, the Court of Appeals concluded that "the general set-up was sufficient to support the jury's finding that the payment of a bribe by Cooley could potentially deplete the assets with which the firm purchased goods and services in interstate commerce."<sup>144</sup> Whether or not *Stillo* was intended to represent first authority for the proposition that jurisdiction may be sustained by the "depletion" of the billable hours, locally-provided support services or nonpecuniary assets of the victim enterprise, this is precisely the sort of passing comment that, quoted in a parenthetical or jury instruction, has served in the past to extend federal jurisdiction under the Act.<sup>145</sup>

142. The government cited the following cases in support of its jurisdictional argument: *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994); *United States v. Morgano*, 39 F.3d 1358 (7th Cir. 1994); *United States v. Harty*, 930 F.2d 1257 (7th Cir. 1991); *United States v. Shively*, 927 F.2d 804 (5th Cir. 1991); *United States v. Heidecke*, 900 F.2d 1155 (7th Cir. 1990); *United States v. DeParias*, 805 F.2d 1447 (11th Cir. 1986); *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985); *United States v. Boulahanis*, 677 F.2d 586 (7th Cir. 1982); *United States v. Price*, 617 F.2d 455 (7th Cir. 1979); *United States v. Blakey*, 607 F.2d 779 (7th Cir. 1979); *United States v. Elders*, 569 F.2d 1020 (7th Cir. 1978).

One case cited by the government, *United States v. Zeigler*, 19 F.3d 486 (10th Cir. 1994), contained the following passage:

Mr. Zeigler was charged in count six with taking \$1500 from Rex's Fried Chicken Restaurant, a business that purchases all of its chicken and breeding formula, as well as numerous other products, directly from out-of-state suppliers. The owner testified that the monies taken would have been used to purchase more interstate goods and to pay employees, rent, utilities, and taxes.

*Id.* at 492 (cited in Govt. Br., *supra* note 140, at 29). The government's parenthetical accompanying the citation explained that a "reduction of money with which to pay utility bills, *inter alia*, supplied sufficient impact on interstate commerce." (Govt. Br., *supra* note 140, at 29.) This passage and this parenthetical represent very thin support for the proposition that a depletion of services is sufficient to invoke federal protection.

143. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986) (citations and footnotes omitted); see also *Stirone v. United States*, 361 U.S. 212, 215 (1960), *supra* notes 35-39 and accompanying text.

144. *Stillo*, 57 F.3d at 558.

145. See *supra* notes 27, 34, 44-52 and accompanying text.

An issue unaddressed in the *Stillo* opinion but argued in the appellate briefs concerns the calibration of probability in the absence of an actual effect on interstate commerce. In its charge to the jury, the district court stated, "The law does not require an actual effect. In this case you must simply determine whether the alleged extortionate transaction, if completed, had the *potential* to affect commerce, however minimally."<sup>146</sup> The defendants had objected on various grounds to the instruction.<sup>147</sup> Judge Stillo had argued that "[t]he correct test to be applied, in the absence of evidence of an actual impact on interstate commerce, is whether there is a 'realistic probability' of an effect on commerce." This standard, he continued, "is clearly more difficult to prove than the mere potential to affect commerce, however minimally."<sup>148</sup> The government responded that the Court of Appeals had previously approved of the phrase "'potential' effect upon interstate commerce" in sustaining jurisdiction.<sup>149</sup> Though the Court of Appeals declined to address Judge Stillo's argument, it had previously

146. *Stillo*, 57 F.3d at 559–60 (emphasis added). The defendants' proffered instruction read:

The interstate commerce element of affecting commerce by extortion is satisfied if the government proves beyond a reasonable doubt that Robert Cooley made monetary contributions to his law office around the time of the alleged conspiracy, and his law office used such contributions to purchase goods that originated from outside the state of Illinois.

The jury instruction used by the court read:

The interstate commerce element of the offense of affecting commerce by extortion if the government proves beyond a reasonable doubt that the law office of Robert J. Cooley customarily purchased goods that originated from outside the state of Illinois such as materials necessary for the function of his law office.

The law does not require an actual effect. In this case you must simply determine whether the alleged extortionate transaction, if completed, had the potential to affect commerce, however minimally.

*Id.*; see *United States v. Summers*, 598 F.2d 450 (5th Cir. 1979) (discussing the role of the courts and the jury in determining whether interstate commerce was affected) (citing cases).

147. See *Stillo*, 57 F.3d at 559–60. Joseph Stillo argued that the instructions required neither that the jury find that Cooley had actually contributed to his firm's office supply fund, nor that the government prove that purchases of goods traveling in interstate commerce were made at the time of the alleged extortionate acts. *Id.* at 559. The court responded that this was "more than is required" by the case law in the Seventh Circuit. *Id.* at 559.

148. A. Stillo Br., *supra* note 108, at 14 (quoting *United States v. Shields*, 999 F.2d 1090 (7th Cir. 1993)). But see *supra* notes 55–59 and accompanying text.

149. Govt. Br., *supra* note 140, at 38 n.26. The passage on which the government relied in *United States v. Morgano*, 39 F.3d 1358 (7th Cir. 1994), provides uncertain support for the government's position: "Because the Hobbs Act has been interpreted to reach the outer limit of the Commerce Clause, evidence indicating Defendants' conduct had a realistic probability, or 'potential,' of affecting interstate commerce, even if no actual effect occurred, is sufficient to support their conviction." *Morgano*, 39 F.3d at 1370 (quoting *United States v. Heidecke*, 900 F.2d 1155, 1164 (7th Cir. 1990)). *Morgano* involved the extortionate collection of "street tax" and protection money from the operators of illegal and quasi-legal gambling enterprises: fifteen percent of the gross proceeds from an illegal lottery, and approximately \$10,000 per month in protection payments from various operators. See *id.* at 1363–64.

explained,<sup>150</sup>

For Hobbs Act jurisdiction to exist, there must be a 'nexus' between the alleged extortionate conduct and interstate commerce. This nexus may be established by proof of an actual impact on commerce, even if the impact is only 'arguably de minimis,' or, in the absence of proof of an actual impact, by 'showing a realistic probability that . . . [the] extortionate transaction will have some effect on interstate commerce.'<sup>151</sup>

The judge was thus correct, yet the Court of Appeals' alternating usage suggests that the "potential effects" and "reasonable probability" standards are synonymous. Whether or not the difference constitutes reversible error, failure by the courts to insist on or adhere to such fine distinctions—indeed, their distinctions—is yet another means by which the courts have gradually extended federal jurisdiction.

It is not immediately clear from the court's opinion that the amount of money Stillo was to receive in return for the Hess ruling was ever finalized.<sup>152</sup> The previous system between the Judge and Cooley involved payments of \$100–\$200 dollars for fixing misdemeanors and \$1,000–\$2,000 for felonies. After setting out the prior fee schedule, the Court of Appeals summarized Cooley's approach to the judge: "[He] inquired of Judge Stillo if he was still accepting bribes for favorable rulings. The judge said yes and that the system was the same as before."<sup>153</sup> During a later luncheon at which Cooley disclosed the "facts" of Hess' case to Joseph, however, he suggested, "You tell me what's fair and we'll take care of it then," that is, following the disposition of the case.<sup>154</sup> As Joseph Stillo later argued—an argument undisputed by the government—"At no time during the alleged conspiracy did any person set a specific dollar amount to control the result in Hess. At no time during the controversy did Cooley pay anybody in reference to Hess. At no time did Stillo or Adam Stillo ask Cooley for money."<sup>155</sup> Federal jurisdiction was thus established on the basis of a potential depletion of the attorney Cooley's assets (if

150. See *United States v. Blakey*, 607 F.2d 779 (7th Cir. 1979).

151. *Id.* at 783 (alterations in original) (quoting *United States v. Staszczuk*, 517 F.2d 53, 60 (7th Cir. 1975) (en banc); *United States v. Craig*, 573 F.2d 513, 518 (7th Cir. 1978); *United States v. Elders*, 569 F.2d 1020, 1024 (7th Cir. 1978); *United States v. Crowley*, 504 F.2d 992, 997 (7th Cir. 1974)); see also *Govt. Br.*, *supra* note 140, at 29, 39-40.

152. See *Stillo*, 57 F.3d at 555-56, 558-59.

153. *Id.* at 555; see also *id.* at 559.

154. *Id.* at 559; see *J. Stillo Br.*, *supra* note 94, at 8-9; *Govt. Br.*, *supra* note 140, at 35.

155. *J. Stillo Br.*, *supra* note 94, at 15, 49. Judge Stillo further argued, "The infrequent purchase of a handful of items . . . do[es] not constitute customary or active engagement in interstate commerce sufficient to bring Defendant's conduct within the jurisdiction of this Court." Reply Brief for Adam Stillo, at 4-5, *Stillo*, 57 F.3d 553 (No. 94-2678). As the government pointed out, however, "[A] business owner presumptively contributes to that business."

Hess refused to pay), stemming from an agreement for an unspecified future payment that was never made, based on a transaction that was never completed, for a sum that was never settled. While the courts have never insisted on an actual effect on interstate commerce in order to sustain jurisdiction where conspiracy is charged,<sup>156</sup> *United States v. Stillo* illustrates the extent to which the jurisdictional element of the Act has been eased over the past fifty years.

Although the Court of Appeals for the Seventh Circuit relied on *United States v. Murphy* in affirming the convictions in *Shields* and *Stillo*, other courts have viewed the holding cautiously on the subject of federal jurisdiction.<sup>157</sup> In part, this lack of acceptance may indirectly reflect decisions in other districts by United States Attorneys regarding the types of cases they are willing to prosecute.<sup>158</sup> In part, it

Govt. Br., *supra* note 139, at 39 (citing *United States v. Blakey*, 607 F.2d 779, 784 (7th Cir. 1979); *United States v. O'Malley*, 796 F.2d 891 (7th Cir. 1986)).

156. See *supra* notes 28–33, 70–86 and accompanying text.

157. Outside the Seventh Circuit, only two courts of appeal have relied on *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985) in discussions regarding the depletion of assets theory and federal jurisdiction: *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994), and *Jund v. Town of Hempstead*, 941 F.2d 1271 (2d Cir. 1991). *Collins* involved the theft of a salesman's personal vehicle and mobile telephone, the result of which was an inability by the victim to attend business meetings or make business-related telephone calls. 40 F.3d at 99. The Court of Appeals for the Fifth Circuit held that the linkage to interstate commerce was "too attenuated" to satisfy the jurisdictional requirements of the Hobbs Act. See *id.* at 100. *Jund v. Town of Hempstead* involved a class action suit brought by a sanitation worker against a township and a county political committee. 941 F.2d 1271 (2d Cir. 1991). He alleged RICO and Section 1983 violations based on coercive political contributions. See *id.* at 1285. In affirming the decision that unincorporated political associations were capable of committing the predicate Hobbs Act violations, the Court of Appeals noted that the aggregate effect of all those whose contributions were extorted was sufficient to affect interstate commerce: "[W]hile the impact from any single person was undoubtedly slight, the cumulative effect on interstate commerce from all those victimized by the scheme could have been very substantial. In any event the degree of the effect on interstate commerce is immaterial because the Hobbs Act prohibits any interference with commerce through extortion." *Id.*; see also Gerard E. Lynch, *RICO: The Crime of Being a Criminal I & II*, 87 COLUM. L. REV. 661, 743 & n.344 (1987) ("The interstate commerce requirement is not a substantial obstacle. The courts have unanimously held that even if the [RICO] predicate acts do not affect commerce, federal jurisdiction exists if the enterprise does.") (citing *Murphy*, 768 F.2d at 1531)).

158. Conversely, of course, the willingness of a United States Attorney to prosecute certain cases, including those based on a de minimis depletion of the victim's assets, may reflect a sensitivity to the enthusiasm within that judicial circuit for sustaining federal jurisdiction on such an attenuated basis. This is not to say that a de minimis effect on interstate commerce has not been found sufficient to sustain jurisdiction in other circuits. See e.g., *United States v. Bailey*, 990 F.2d 119, 121–22 (4th Cir. 1993) (upholding jurisdiction based in part on three extorted campaign contributions of \$200, \$450, and \$500); *United States v. Stephens*, 964 F.2d 424, 432 n.16 (5th Cir. 1992) (involving extortion by bail bondsman of \$10–\$15 per car from a towing company and payments of between \$500 and \$1040 from motorists); *United States v. Sorrow*, 732 F.2d 176, 179 (11th Cir. 1984) (involving extortive kickback of \$1000 per purchase approval for various pieces of earth moving equipment); *United States v. Harding*, 563 F.2d 299, 301 (6th Cir. 1977) (involving sale of state licensing exam questions and answers for \$300); *United States v. Spagnolo*, 546 F.2d 1117, 1118 (4th Cir. 1976) (involving \$1500 payment and \$1 for the sale of victim's half interest in a construction company); *United States v. Hathaway*, 534 F.2d 386, 390 (1st Cir. 1976)

may also reflect the fact that *Murphy* represents, by any standards, a very hesitant endorsement of the notion that jurisdiction can be maintained based on a de minimis depletion of the victim's assets. The *Murphy* court noted, "The evidence is thin, and as an original matter we might be inclined to doubt that the 'depletion' of the lawyers' assets had much effect on commerce."<sup>159</sup> Feeling itself bound, however, by decisions such as *United States v. Staszczuk*,<sup>160</sup> the court concluded that "even a small effect touches commerce 'in any degree' and so is adequate under these cases."<sup>161</sup> Neither the *Shields* nor the *Stillo* courts subsequently expressed the ambivalence voiced in *Murphy* over questions of federal intervention.<sup>162</sup>

*Stillo*, *Shields*, *Murphy* and *United States v. Boulahanis*<sup>163</sup> in the Seventh Circuit; and *United States v. Auguello*<sup>164</sup> and *United States v. Barrett*<sup>165</sup> in the Second Circuit fairly demonstrate the present jurisdictional reach of the Hobbs Act. Cases such as *United States v. Dean*,<sup>166</sup> and *United States v. Quigley*<sup>167</sup> in the Eighth Circuit suggest that the robbery prong of the Act has likewise been broadly interpreted.<sup>168</sup> *Quigley*, for instance, involved the robbery and beating of two rural Nebraskans on their way to a liquor store; the defendants

(involving approximately \$25,000); *United States v. Auguello*, 451 F.2d 1167, 1168-69 (2d Cir. 1971) (involving \$100 payment made from the business cash register); *Esperti v. United States*, 406 F.2d 148, 150 (5th Cir. 1969) (involving robbery of \$2000); *United States v. Provenzano*, 334 F.2d 678, 683 (3d Cir. 1964) (involving monthly payments of \$200 made over a period of seven years); *United States v. Barrett*, No. 85 Cr. 472 (JFK), 1985 WL 2344 (S.D.N.Y. Aug. 22, 1985) (involving extortion of \$200 for release of impounded motor vehicle without payment of prior fines and penalties). *But see supra* notes 60 and 130 and accompanying text.

159. *Murphy*, 768 F.2d at 1530.

160. 517 F.2d 53 (7th Cir. 1975) (en banc); *see supra* notes 74-86 and accompanying text (discussing *Staszczuk* holdings).

161. *Murphy*, 768 F.2d at 1531 (quoting 18 U.S.C. § 1951 (1996)).

162. *See United States v. Stillo*, 53 F.3d 553, 558 (7th Cir. 1995); *see also United States v. Shields*, 999 F.2d 1090, 1098 (7th Cir. 1993).

163. 677 F.2d 586, 589-90 (7th Cir. 1982) (upholding jurisdiction based on a \$68 depletion of assets).

164. 451 F.2d 1167 (2d Cir. 1971).

165. No. 85 Cr. 472 (JFK), 1985 WL 2344 (S.D.N.Y. Aug. 22, 1985) (involving extortion of \$200 for release of impounded motor vehicle without payment of prior fines and penalties). The court noted that the indictment alleged that the defendant had solicited and accepted at least one such payment, and concluded, "Through such a payment, however, the City of New York was deprived of towing fees, storage fees, fines and penalties owed by the owner. . . . [The defendant's] alleged intentional deprivation of money owed to the City of New York depleted the assets of a municipality engaged in interstate commerce." *Id.* at \*2.

166. 32 F.3d 571 (8th Cir. 1994) (upholding federal jurisdiction where defendants abducted and brutalized a private citizen, stole her credit cards, attempted unsuccessfully to force her to reveal her personal identification number for her bank card, and then destroyed her vehicle).

167. 53 F.3d 909 (8th Cir. 1995). The victims were on their way to a liquor store to pick up goods they had charged on a house account over the telephone. The court explained that the transaction had been completed over the telephone before the robbery transpired. *See id.*

168. *See infra* notes 270-71 and accompanying text.

obtained only eighty cents and a small pouch of chewing tobacco.<sup>169</sup> Prosecutors attempted to establish jurisdiction by arguing that robbery of the patrons of businesses affected commerce “in any way or degree” by limiting or preventing the purchase of liquor that had traveled in interstate commerce.<sup>170</sup> The court rejected the government’s argument as overreaching the present limits of the law, noting that the prosecutors’ efforts to link private activities to interstate commerce were too tenuously drawn to warrant federal protection. Nevertheless, it is not at all clear from the opinion that the court would have reached the same conclusion had the defendants robbed the liquor store of eighty cents.

## 2. Use of the Depletion of Assets Theory Where the Money Is Provided by the FBI.

The Stillos argued that because Cooley was using funds supplied by the FBI his firm’s assets would not be depleted.<sup>171</sup> The Court of Appeals replied that the source of potential bribe money was “irrelevant.”<sup>172</sup> “the Hobbs Act proscribes not just successful extortion schemes but attempts to induce a victim engaged in interstate commerce to part with property’ and the intended victim was Cooley, not the FBI.”<sup>173</sup>

The position that the source of potential bribe money was “irrelevant” is not entirely accurate, since Hobbs Act convictions have occasionally been reversed because of FBI involvement.<sup>174</sup> In *United States v. DiCarlantonio*,<sup>175</sup> for example, two city officers sought a fee from a local businessman to lobby for changes in a safety ordinance.<sup>176</sup>

169. See *Quigley*, 53 F.3d at 910.

170. *Id.* at 910–11.

171. See *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995).

172. *Id.* at 557–59 (citing *United States v. Shields*, 999 F.2d 1090 (7th Cir. 1993)).

173. *Id.* at 559 (quoting *Shields*, 999 F.2d at 1098); see also *United States v. Rindone*, 631 F.2d 491, 493 (7th Cir. 1980).

174. See, e.g., *United States v. Freedman*, 562 F. Supp. 1378, 1383 (N.D. Ill. 1983) (holding that while an attempt to extort is punishable under the Hobbs Act, “no actual commission of Hobbs Act extortion could be charged for the [mere] receipt of what were FBI funds” unless an actual effect on interstate commerce could be shown); cf. *United States v. Archer*, 486 F.2d 670, 682 (2d Cir. 1973). The extortion convictions in *Archer* were overturned because “the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present.” See *id.* The case involved federal convictions for bribery under the Travel Act, 18 U.S.C. § 1952 (1994). See *id.*

175. 870 F.2d 1058 (6th Cir. 1989).

176. See *id.* at 1059–60. The fire chief and the city attorney had approached the owner of a propane company to propose what they promised would be a lucrative business deal. For \$30,000 in cash, defendants offered to lobby for changes in the city’s gas storage regulations. See *id.* Had defendants’ efforts succeeded, the result would have presumably been an increase in the amount of propane and gas storage equipment traveling in interstate commerce. See *id.*



The victim immediately contacted the FBI, which provided the \$30,000 demanded by the defendants. Because the defendants' lobbying efforts proved unsuccessful, the law remained unchanged and the overall flow of goods in interstate commerce remained unaffected.<sup>177</sup>

The city officers in *DiCarlantonio* had been convicted on charges of extortion and conspiracy to extort, but on appeal, the convictions for extortion were reversed.<sup>178</sup> The Court of Appeals for the Sixth Circuit concluded that an extortionate scheme must have "at least a de minimis effect" on interstate commerce to qualify as a substantive charge of extortion.<sup>179</sup> The *DiCarlantonio* court referred to a widely-cited case, *United States v. Rindone*,<sup>180</sup> in which the Court of Appeals for the Seventh Circuit rejected the argument that payments made with money supplied by the FBI necessarily thwarted jurisdiction.<sup>181</sup> Neither the *DiCarlantonio* nor the *Rindone* courts perceived jurisdictional problems based on attempted extortion where the funds used were supplied by the FBI. Both courts agreed that "the fortuitous use of FBI funds after completion of the extortion attempt" had no impact on the jurisdictional analysis.<sup>182</sup> The Courts of Appeal for the Sixth and Seventh Circuits likewise agreed that an actual effect on interstate commerce could not, however, be established based on "the mere re-

177. See *id.* at 1060.

178. See *id.* at 1060-61.

179. *Id.* (citing *United States v. Fraasch*, 818 F.2d 631, 634-35 (7th Cir. 1987); *United States v. Brantley*, 777 F.2d 159, 161-63 (4th Cir. 1985); *United States v. Rindone*, 631 F.2d 491, 491 (7th Cir. 1980); *Freedman*, 562 F. Supp. at 1383).

The *DiCarlantonio* decision may seem contrary to the holding in *United States v. Staszczuk*, 517 F.2d 53, 60 (7th Cir. 1975) (en banc), where the Court of Appeals for the Seventh Circuit upheld a conviction for extortion without actual effect on interstate commerce. See *supra* notes 74-86 and accompanying text. *Staszczuk*, however, was not decided on a depletion of assets theory, and the victimized development company was engaged in interstate commerce. Once the zoning restrictions were modified, an effect on interstate commerce was at least theoretically possible. See *Staszczuk*, 502 F.2d at 878 n.8, *aff'd in part on reh'g, rev'd in part on reh'g*, 517 F.2d 53 (7th Cir. 1975); see also *Staszczuk.*, 517 F.2d at 57 n.10 (en banc) (citations omitted). *Staszczuk*'s victim had paid the cash, completing the extortive transaction, but a subsequent change of plans halted construction before an effect on interstate commerce could be realized. In *DiCarlantonio*, on the other hand, "appellants' failure to carry out the objects of their scheme meant that interstate commerce was in no way affected by the scheme. [The use of FBI money] did not take any funds out of the stream of commerce, nor did it increase or decrease the flow of propane." 870 F.2d at 1061.

180. 631 F.2d 491 (7th Cir. 1980). *Rindone* involved the conviction of a city electrical inspector on charges of extortion and attempted extortion for a \$100 payment obtained from a contractor under color of official right. See *id.* at 492.

181. See *id.* at 493 (citing numerous cases).

182. *Id.* at 494 (quoting *Staszczuk*, 517 F.2d at 60); see *United States v. Montoya*, 945 F.2d 1068, 1074 (9th Cir. 1991); *United States v. Peete*, 919 F.2d 1168, 1175-76 (9th Cir. 1990); *United States v. McKenna*, 889 F.2d 1168, 1172-73 (1st Cir. 1989); *DiCarlantonio*, 870 F.2d at 1061. The *DiCarlantonio* court pointed out that the Hobbs Act provided for attempted and completed extortive transactions with equal severity, and concluded that adoption of the *Rindone* court's reasoning would not unduly burden law enforcement. See 870 F.2d at 1061.

ceipt of government funds.”<sup>183</sup>

The Court of Appeals for the Fourth Circuit returned a similar holding in *United States v. Brantley*, in which the court affirmed the defendants’ convictions for conspiracy to extort but reversed the extortion convictions.<sup>184</sup> The FBI had set up a fictitious gambling operation, moving undercover agents, gaming equipment, cash, and liquor into the state in order to investigate reports of local corruption; the sheriff was paid to protect the illegal casino.<sup>185</sup> In rejecting the government’s contention that the operation satisfied the jurisdictional element of the Hobbs Act, the court explained that the transactions relied upon to establish jurisdiction were mere “pretense.”<sup>186</sup> The Court of Appeals was simply unwilling to affirm the convictions for extortion where government agents had “manufacture[d] jurisdiction by contrived or pretensive means.”<sup>187</sup> The court distinguished *Brantley* from an earlier holding in *United States v. Santoni*,<sup>188</sup> a case in which the FBI had set up a similarly fictitious operation to ferret out suspected corruption in the awarding of city contracts. The cleaning company in *Santoni*, as the *Brantley* court explained, was a going concern engaged in commercial operations.<sup>189</sup> The jurisdictional predicate of the Hobbs Act was thus satisfied in *Santoni* based on legitimate transactions, albeit transactions conducted by an FBI-organized corporate shell.

None of the cases cited above would have proved helpful to the Stillos. For both jurisdictional and substantive purposes, the Stillos’ conspiracy to extort was complete at the moment of agreement: “All that was necessary, in addition to an overt act, was that the intended future conduct [the defendants] had agreed upon include all the elements of the substantive crime.”<sup>190</sup> It is firmly established that a de-

183. *DiCarlantonio*, 870 F.2d at 1061.

184. *See* 777 F.2d 159, 161 (4th Cir. 1985).

185. *See id.*

186. *See id.* at 162; *see also id.* at 163 (“There is nothing in [the cited] cases, however, to suggest that the necessary commercial connection may be shown by producing a child of fantasy.”).

187. *Id.* at 163 (citing *United States v. Gambino*, 566 F.2d 414, 419 (2d Cir. 1977); *United States v. Archer*, 486 F.2d 670, 681–82 (2d Cir. 1973)).

188. 585 F.2d 667 (4th Cir. 1978).

189. *See Brantley*, 777 F.2d at 162; *Santoni*, 585 F.2d at 670; *see also supra* note 123 (discussing *Santoni*).

190. *United States v. Rose*, 590 F.2d 232, 235 (7th Cir. 1978). It was likewise of no benefit to Judge Stillo that Cooley had made the initial overtures. In *Evans v. United States*, 504 U.S. 255, 256 (1992), *aff’g* 910 F.2d 790 (11th Cir. 1990), the Supreme Court resolved a conflict among the circuits on the question of whether an affirmative act of inducement by an official was necessary to sustain a conviction for extortion under color of official right. The Court held that such an act was not necessary. *See id.* The Stillo trial court referred to *United States v. Brausch*, 505 F.2d

endant accused of violating the Hobbs Act need not be aware that his conduct will affect interstate commerce: the conspirators need only agree to an act, "the natural effect of which will be to affect interstate commerce."<sup>191</sup> It is likewise settled that the factual impossibility of an effect on interstate commerce because FBI money is used is no defense to a charge of attempted extortion or conspiracy to extort.<sup>192</sup> The jurisdictional analysis proceeds on the basis of reasonable probabilities at the moment of agreement.<sup>193</sup>

Whatever the mixture of legitimate and illegitimate transactions engaged in by Cooley during the operation of his firm's affairs,<sup>194</sup> the government established at trial that Cooley had operated a law practice both prior to and following the Hess transaction.<sup>195</sup> Pursuant to its operations, Cooley's firm had regularly purchased goods traveling in interstate commerce.<sup>196</sup> The participation by Cooley's firm in some legitimate business transactions was thus sufficient, under *Brantley* and *Santoni*, to permit prosecutors to defeat attacks on the use of FBI funds in the operation.<sup>197</sup> The Stillos' objection to jurisdiction on this basis would not stand in any circuit.

139, 151 (7th Cir. 1974), in which the court held that the extortive transaction fell within the scope of the Hobbs Act so long as the bribe was motivated by the recipient's office. See *United States v. Stillo*, No. 91 CR 795-1-2, 1992 WL 297388, at \*4 (N.D. Ill. Oct. 7, 1992), *aff'd*, 57 F.3d 553 (7th Cir. 1995).

191. *Nick v. United States*, 122 F.2d 660, 673 (8th Cir. 1941); see also *Hulahan v. United States*, 214 F.2d 441, 445 (8th Cir. 1954); *United States v. Compagna*, 146 F.2d 524, 525 (2d Cir. 1941).

192. See *United States v. Rindone*, 631 F.2d 491, 493-94 (7th Cir. 1980) (citing *United States v. Bellomini*, 454 F. Supp. 44, 47 (W.D. Pa. 1978) ("The fact that the business enterprise was frustrated at a later time through failure of finances does not constitute a defense to a charge of attempt to extort money in violation of the Hobbs Act."); *United States v. Brooklier*, 459 F. Supp. 476, 479 (C.D. Cal. 1978) ("[W]hile legal impossibility is a defense to a charge of attempt, factual impossibility is not."); see also *supra* note 123 (discussing *Bellomini* and *Brooklier*).

193. See *United States v. Knox*, 68 F.3d 990, 997 (7th Cir. 1995), *cert. denied sub nom. Carreiro v. United States*, 116 S. Ct. 926 (1996); *United States v. Hocking*, 860 F.2d 769, 777 (7th Cir. 1988); *United States v. Jannotti*, 673 F.2d 578, 590-94 (3d Cir. 1982) (en banc); *Rindone*, 631 F.2d at 493-94.

194. See *United States v. Jones*, 30 F.3d 276, 284-86 (2d Cir. 1994) (holding that robbery during illegal drug sale affected interstate commerce because it depleted the assets of the victim drug dealer, thereby affecting the victim's ability to purchase additional cocaine which necessarily travels in interstate commerce); *United States v. Blakey*, 607 F.2d 779, 783 (7th Cir. 1979) ("We can find no cases stating that legitimate commercial activity is drawn outside the coverage of the Hobbs Act when it is conducted together with a much more profitable illegal business.").

195. See *United States v. Stillo*, 57 F.3d 553, 555-56 (7th Cir. 1995); see also *United States v. Shields*, 999 F.2d 1090, 1093-96 (7th Cir. 1993).

196. See *Stillo*, 57 F.3d at 558; see also *Govt. Br.*, *supra* note 140, at 38-40.

197. See *supra* notes 180-89 and accompanying text.

### 3. Use of the Depletion of Assets Theory Where the Money Is Provided by a Private Party

The Stillos' attorneys argued that because Cooley was using Hess' money to pay the bribe, the assets of Cooley's firm were not implicated in the alleged scheme.<sup>198</sup> The court replied that the conspiracy between the two Stillos was in place before Cooley's meeting with Joseph Stillo, at which the "facts" and financial arrangements of the Hess case were finally disclosed. The extortive scheme was thus established before Hess entered the picture. The court noted, "[i]t is the potential effect on interstate commerce at the time of the offense which is relevant. Later developments which negate or lower the potential effect on interstate commerce do not undermine the jurisdictional element."<sup>199</sup> Alternately, the court suggested that "even if the Stillos believed from the start that Hess would ultimately be footing the bill, the temporary depletion of Cooley's assets and the risk of non-payment would be sufficient to satisfy the de minimis interstate commerce requirement."<sup>200</sup>

Early cases such as *United States v. Provenzano*, *United States v. Amabile*, and *United States v. Auguello* established the proposition, settled since the mid-1970s,<sup>201</sup> that the assets depleted must be those of an enterprise.<sup>202</sup> One frequently-cited holding states:

Under the depletion of assets theory, commerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of such goods . . . . Although the Act requires only a de minimis effect on commerce, the effect still must be more than a speculative, attenuated 'one step removed' kind of effect.<sup>203</sup>

Not surprisingly, defendants have often claimed, in an attempt to negate jurisdiction, that the victim was extorted as a private citizen or

198. See *Stillo*, 57 F.3d at 558.

199. *Id.* at 558 (citing *United States v. Staszczuk*, 517 F.2d 53, 60 (7th Cir. 1975) (en banc) (noting again the 'realistic probability' to 'potential effect')).

200. *Id.* at 558-59 (citing *United States v. Lewis*, 797 F.2d 358, 365 (7th Cir. 1986)).

201. See, for example, the discussions and authority cited in *United States v. Buffey*, 899 F.2d 1402, 1404 (4th Cir. 1990); *United States v. Jackson*, 748 F.2d 1535, 1537 (11th Cir. 1984); *United States v. Boston*, 718 F.2d 1511, 1516 (10th Cir. 1983); *United States v. Phillips*, 577 F.2d 495, 501 (9th Cir. 1978); *United States v. Merolla*, 523 F.2d 51, 54 (2d Cir. 1975); *United States v. Hathaway*, 534 F.2d 386, 396 (1st Cir. 1976); *United States v. Nelson*, 486 F. Supp. 464, 470-71 (N.D. Mich. 1980); *United States v. Bryson*, 418 F. Supp. 818, 824-25 (W.D. Okla. 1975).

202. See, e.g., *United States v. Biondo*, 483 F.2d 635, 640 (8th Cir. 1973) ("The law is well settled in this regard."); *United States v. Addonizio*, 451 F.2d 49, 60, 77 (3d Cir. 1971); *United States v. Esperti*, 406 F.2d 148, 150 (5th Cir. 1969).

203. *United States v. Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978). *But see infra* notes 261-64.

used personal funds to satisfy the demand.<sup>204</sup> Equally unsurprisingly, such efforts have been largely unsuccessful. Those rare instances in which a defendant has escaped conviction have often involved situations where the extorted assets were unrelated to the business engaged in interstate commerce, or where the extortive transaction or robbery was clearly unrelated to the victim's role in organizations or enterprises so engaged.<sup>205</sup>

The Stillos were charged with, and ultimately, convicted of, conspiracy to extort. Thus, the question of who would "ultimately be footing the bill" required only the identification of a commercial source with funds reasonably tied to interstate commerce.<sup>206</sup> In this instance, that source was Robert Cooley "in his professional capacity."<sup>207</sup>

The Court of Appeals relied on *United States v. Lewis*,<sup>208</sup> in which the defendant was charged with attempted extortion of funds from a

204. See, e.g., *United States v. Bengali*, 11 F.3d 1207, 1212 (4th Cir. 1993); *United States v. Devin*, 918 F.2d 280, 293-94 (1st Cir. 1990); *United States v. DeParias*, 805 F.2d 1447, 1450-51 (11th Cir. 1986); *United States v. DiGregorio*, 605 F.2d 1184, 1191-92 (1st Cir. 1979); *United States v. Rabbitt* 583 F.2d 1014, 1023 (8th Cir. 1978); *United States v. Auguello*, 451 F.2d 1163, 1169-70 (2d Cir. 1971); *United States v. Battaglia*, 394 F.2d 304, 311-12 (7th Cir. 1968), *vacated on other grounds sub nom.* *Giordano v. United States*, 394 U.S. 310 (1969).

205. See, e.g., *Buffey*, 899 F.2d at 1404-07 (finding that extortion based on the victim's personal indiscretions suggested that the victim would pay with private funds rather than risk probable discovery by using corporate assets); *United States v. Collins*, 40 F.3d 95, 97, 99-101 (5th Cir. 1994) (holding that robbery at gun point and theft of victim salesman's private auto and mobile telephone were insufficient to sustain federal jurisdiction); *United States v. Mattson*, 671 F.2d 1020, 1024-25 (7th Cir. 1982) ("[The victim] was not conducting a business engaged in, or purchasing items from, interstate commerce. The victim in this case was an individual who had no connection with interstate commerce at all, but whose only connection was with a business which was engaged in interstate commerce."); *Elders*, 569 F.2d at 1024-25 (finding no federal jurisdiction where the assets depleted were those of a business in the process of being dissolved, and thus, there was no realistic probability of affecting goods traveling in interstate commerce); *Merolla*, 523 F.2d at 54-55 (finding no federal jurisdiction where the victim was engaged in a one-time operation with no realistic probability of future purchases of goods traveling in interstate commerce); *United States v. Blair*, 762 F. Supp. 1384, 1387-94 (N.D. Cal. 1991) (holding that withdrawal of \$12,000 from victim's personal bank account was insufficient to establish federal jurisdiction where the funds were not linked in any meaningful way to interstate commerce, citing numerous cases); *United States v. Kaye*, 593 F. Supp. 193, 197-99 (N.D. Ill. 1984) (finding no federal jurisdiction where the victim paid with personal assets and where the indictment failed to charge the victim's employer as an object of the extortion).

206. *United States v. Stillo*, 57 F.3d 553, 558 (7th Cir. 1995) (citing *United States v. Staszczuk*, 517 F.2d 53, 60 (7th Cir. 1975) (en banc); see also *United States v. DiCarlantonio*, 870 F.2d 1058, 1061 (6th Cir. 1989) ("While a substantive Hobbs Act violation requires an actual effect on interstate commerce, a conspiracy charge requires the government to prove only that the defendants' scheme would have affected commerce."); *United States v. Jannotti*, 673 F.2d 578, 591-94 (3d Cir. 1982) (en banc) (a federal interest sufficient to support federal jurisdiction is implicated at the moment when defendants agree to do acts which, if attainable, would affect interstate commerce); *Nick v. United States*, 122 F.2d 660, 673 (8th Cir. 1941).

207. *Stillo*, 57 F.3d at 560.

208. 797 F.2d 358 (7th Cir. 1986); see also *Stillo*, 57 F.3d at 559.

corporation directly engaged in interstate commerce.<sup>209</sup> Defendant Lewis had argued in part that because he had no intent to obtain the extorted funds for himself, he could not be held culpable under the Hobbs Act. The Court of Appeals responded that “loss to the victim is the gravamen of the offense.”<sup>210</sup> Where the victim enterprise agreed, however provisionally or temporarily, to the extortive scheme, the “temporary loss of the use of money constitute[d] a deprivation of property under [section] 1951.”<sup>211</sup>

The *Stillo* indictment frames the fictive Hess case as merely an opportunity for the Stillos to put their scheme into operation against Cooley:<sup>212</sup> the Stillos conspired “among themselves to obtain an amount of money from Robert J. Cooley, with his consent, said consent being induced under color of official right . . . .”<sup>213</sup> Establishing jurisdiction required that Cooley, not Hess, be the victim. Once, however, Cooley consented in principle to pay for future favorable rulings, the assets of his firm were irrevocably bound.<sup>214</sup> The *Stillo* court concluded that Cooley’s firm thereby lost (albeit an entirely theoretical loss) the use of an undetermined portion of its assets for the purchase of goods from companies engaged in interstate commerce. As the court noted, the jury’s conclusion must have reflected their belief that Cooley’s professional assets were implicated in the scheme, based on the probable liability of his law firm for Cooley’s illegitimate business obligations.<sup>215</sup> Federal jurisdiction was thereby affirmed.<sup>216</sup>

209. See *Lewis*, 797 F.2d at 362–64.

210. *Id.* at 364.

211. *Id.* at 365.

212. See Indictment, *supra* note 1, at Count II, ¶¶ 2–7. It is arguable that an argument obviously not set forth or suggested by the government that the Stillos and Cooley were co-conspirators intent on preying on a series of hapless private “victims” such as Hess. Under such circumstances the depletion of assets theory could not be utilized as a means to establish federal jurisdiction. Curiously, the government’s framing of the scheme is not undercut by the facts set forth in Joseph Stillo’s appellate brief. See *J. Stillo Br.*, *supra* note 94, at 3–25 (statement of facts). Following Cooley’s decision to work with the government as an informant, he approached Judge Stillo in chambers regarding the fictitious Hess case. See *id.* at 5, 7. Cooley informed the Judge that he had a case “coming up. . . . Judge Stillo said, ‘See my nephew do you know my nephew, Joey; see my nephew Joey.’ . . . While Cooley had seen Joe around before, Cooley and Joe Stillo were not friends, and did not have any prior dealings with each other.” *Id.* at 7. The facts are presumably intended to suggest that Joseph was merely a hapless victim; an equally plausible interpretation, however, is that the Judge and Joseph were in league. As the government pointed out in its Response Brief, “[T]he jury was entitled to draw the obvious inference that the Stillos had agreed together to extort money from Cooley.” *Govt. Br.*, *supra* note 140, at 36.

213. Indictment, *supra* note 1, at Count II ¶ 2.

214. See *United States v. Stillo*, No. 91 CR 795–1–2, 1993 WL 565988, at \*1 (N.D. Ill. Jan 26, 1994); see also *United States v. Stillo*, 57 F.3d 553, 558 (7th Cir. 1995).

215. See *Stillo*, 57 F.3d at 560 (citing *United States v. Hocking*, 860 F.2d 769, 776–77 (7th Cir. 1988) for the proposition that “the jury need only find that [the] payor of the bribe represented a

The Hobbs Act requirement that the assets depleted must be those of an enterprise or an organization customarily engaging in interstate commerce reflects a recognition that businesses or organizations purchase such goods in more substantial quantities more regularly than do individuals.<sup>217</sup> It is possible that the Supreme Court's renewed attention to federalism may lend indirect support to the position that the assets depleted must be those of an enterprise or organization.<sup>218</sup> The Court has recently clarified its understanding of Commerce Clause case law decided since *NLRB v. Jones & Laughlin Steel*.<sup>219</sup> Based on the perceived necessity to establish some limitation on the scope of congressional action, the Court has seized the opportunity to emphasize the "commercial" nature of the activities or transactions properly regulable by Congress under the Commerce Clause.<sup>220</sup> This emphasis seems far more in harmony with an interpretation of the Hobbs Act's jurisdictional element that is linked to a depletion of commercial, rather than private, assets.<sup>221</sup>

business which purchased goods from out of state and that the bribe was paid on behalf of the business").

216. See *id.* at 555.

217. See, e.g., *United States v. Boulahanis*, 677 F.2d 586, 589-90 (7th Cir. 1982); see also *supra* note 205; *infra* note 221 and cases cited therein. But see *Expansion*, *supra* note 14, at 315 (explaining that enterprises and organizations that are the victims of robbery and extortion are far more likely to replace or continue to purchase goods traveling in interstate commerce, in order to satisfy their clients, than are than are similarly situated individuals, who may simply go without).

218. See *United States v. Lopez*, 514 U.S. 549 (1995); see also *infra* Section III.C.4.

219. 301 U.S. 1 (1937).

220. See *Lopez*, 514 U.S. at 551, 561-62, 566-67.

221. Courts have regularly and consistently reaffirmed the position that the assets depleted must be those of an organization or enterprise. See, e.g., *United States v. Bolton*, 68 F.3d 396, 398 (10th Cir. 1995) ("Commerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted . . . , thereby curtailing the victim's potential as a purchaser of such goods.") (alteration in original); *United States v. Harty*, 930 F.2d 1257, 1261 (7th Cir. 1991) (same); *United States v. Devin*, 918 F.2d 280, 293-94 (1st Cir. 1990) (citing cases where the payment of the extortive demands with ostensibly personal funds nevertheless linked the victim to an organization engaged in interstate commerce); *United States v. Norris*, 792 F.2d 956, 958 (10th Cir. 1986) ("A mere 'depletion of assets' of a firm engaged in interstate commerce will meet the [jurisdictional] requirement."); *Boulahanis*, 677 F.2d at 590 ("[B]usinesses [generally] purchase on a larger scale than individuals. . . . That is the pragmatic justification for drawing the line between individuals and businesses or other enterprises so far as applying the depletion-of-assets theory is concerned. . . ."); *United States v. Rabbitt*, 583 F.2d 1014, 1023 (8th Cir. 1978) (upholding federal jurisdiction where the victim paid with personal assets but was "acting on behalf of" and was reimbursed by an organization engaged in interstate commerce); *United States v. Flores*, 855 F. Supp. 638, 643 (S.D.N.Y. 1994) ("[T]he government is still required to prove that the assets of an enterprise that conducts business in interstate commerce were depleted by the crime."). Exploration of the power of the agent to bind the principal or the partnership, as well as the assets of the principal or partnership, are beyond the scope of this Comment. It is arguable that application of the depletion of assets theory in situations where the agency relationship is absent will

#### 4. The *Stillo* Court's Response to *United States v. Lopez* and the "Substantially Affects" Interstate Commerce Requirement

In late April 1995, the Supreme Court ruled that Congress had "exceeded [its] power to legislate under the Commerce Clause."<sup>222</sup> *United States v. Lopez*<sup>223</sup> involved the conviction of a high school student for possession of a gun within a thousand feet of a public school. The federal statute under which Lopez was convicted, the Gun-Free School Zones Act of 1990, contained no provision linking the possession of firearms to interstate commerce.<sup>224</sup> A search of the Act's legislative history likewise revealed no indication that the bill's sponsors had considered the effects of the proscribed conduct upon interstate commerce.<sup>225</sup> The Court of Appeals for the Fifth Circuit, holding that

require the courts to rethink the principles implicated in this means to establish federal jurisdiction.

222. *Lopez*, 514 U.S. at 551. The Court's 1937 decision in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), ushered in the Court's "watershed" opinion in *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937), signaling a more expansive view of the federal power under the Commerce Clause. The Supreme Court's 1976 decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), was the first instance since that period in which the Court ruled Congress had overstepped its Commerce Clause authority. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8.6 n.18, § 8.7 nn.25-32 and accompanying text (2d ed. 1988); Stephen Chippendale, *supra* note 11, at 460 n.28. However, *National League of Cities*, which overturned the holding but *not* the commerce clause analysis, of *Maryland v. Wirtz*, 392 U.S. 183 (1968), was itself overturned nine years later by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 558 (1985) ("[S]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."). See Chippendale, *supra* note 11, at 460 n.28; David S. Gehrig, *The Gun Free Schools Act: The Shootout Over Legislative Findings, the Commerce Clause, and Federalism*, 22 *HASTINGS CONST. L. Q.* 179, 192-93 (1994). In 1992, the Court ruled in *New York v. United States*, 112 S. Ct. 2408 (1992), that Congress had overreached its constitutional powers by requiring that states enact legislation to keep and dispose of their own low-level nuclear waste.

223. 514 U.S. 549, 551 (1995).

224. The Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702(a), 104 Stat. 4789, 4844-45 (codified as amended at §§ 922 and 924 (1993) (prior to 1994 Amendment) [hereinafter School Zones Act]. Under the School Zones Act, possession of a firearm with 1000 feet of a public, private, or parochial school is punishable by imprisonment for up to five years and fines of up to \$5,000. See *id.*; *United States v. Lopez*, 2 F.3d 1342, 1346, 1348-60 (5th Cir. 1993); *United States v. Hunter*, 843 F. Supp. 235, 246-49 (E.D. Mich. 1994).

225. Compare *United States v. Ornelas*, 841 F. Supp. 1087, 1092 (D. Colo. 1994) *rev'd* by 56 F.3d 78 (10th Cir. 1995) (citing official testimony by police chief at House Subcommittee hearings on proposed section 922(q) that gang members were bringing weapons into the Cleveland, Ohio jurisdiction from out of state, were organizing local gangs, and therefore police were requesting federal help), with *Lopez*, 2 F.3d at 1366 ("Neither the act itself nor its legislative history reflect any Congressional determination that the possession denounced by section 922(q) is in any way related to interstate commerce or its regulation."). The Court of Appeals for the Fifth Circuit found significant the lack of findings or supportive legislative history, despite acknowledgment that a lack of such findings was not dispositive of the statute's constitutionality. See *Lopez*, 2 F.3d at 1366 n.49 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980) (Powell, J., concurring)).

The School Zones Act was subsequently amended on Sept. 13, 1994, to include congressional findings indicating the adverse effects of firearm possession in school zones upon interstate commerce; movement of firearms in interstate traffic; and an inability of the states to



Congress had failed to do "what is necessary to locate [section] 922(q) within the Commerce Clause," reversed Lopez's conviction.<sup>226</sup>

Other courts disagreed,<sup>227</sup> and in fairly quick order the Supreme Court granted certiorari. The Court affirmed the position taken in the Fifth Circuit, holding that "the proper test" of congressional power to regulate under the Commerce Clause "requires an analysis of whether the regulated activity 'substantially affects' interstate commerce. . . . Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."<sup>228</sup> The Gun-Free School Zones Act could not be upheld "under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."<sup>229</sup> Neither did the statute contain an express jurisdictional element to ensure, on a case-by-case basis, that a defendant's activities sufficiently affected interstate commerce.<sup>230</sup> The *Lopez* Court noted an exception, consistent with the overall direction of its holdings for the past fifty years: "[W]here a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."<sup>231</sup>

handle this problem by themselves. See The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125 (1994).

226. *Lopez*, 2 F.3d at 1367. For a critical and largely skeptical analysis of the Fifth Circuit's reasoning in *Lopez*, see Gehrig, *supra* note 222, at 194-208.

227. See, e.g., *United States v. Edwards*, 13 F.3d 291, 295 & n.4 (9th Cir.), *vacated by* 115 S. Ct. 1819 (1993) ("With respect, we believe the Fifth Circuit has misrepresented, or refused to follow, the decisions of the United States Supreme Court that are binding on all courts inferior to our nation's highest court."); *United States v. Glover*, 842 F. Supp. 1327, 1334-36 (D. Kan.), *rev'd by* 57 F.3d 1081 (1994); *United States v. Ornelas*, 841 F. Supp. 1087, 1092-94 (D. Colo.), *rev'd by* 56 F.3d 78 (1994); *United States v. Morrow*, 834 F. Supp. 364, 365-66 (N.D. Ala. 1993) ("Congress may be able to invent a convincing relationship between the proscription in section 922(q) and its right to regulate interstate commerce, but this court should not be called upon to dream it up for Congress."); Gehrig, *supra* note 222, at 202-08 (citing numerous cases).

228. *Lopez*, 514 U.S. at 560. The Court's analysis of the School Zones Act focused on congressional power under the Commerce Clause to regulate activities "having a substantial relationship to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Id.* at 1629-30 (citing *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937); *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)). Compare *id.* ("activities having a substantial relation to interstate commerce"), with *Perez v. United States*, 402 U.S. 146, 150 (1971) ("those activities affecting commerce"). The *Lopez* majority concluded that the School Zones Act was a criminal statute unrelated to commerce or economic enterprise. See *Lopez*, 514 U.S. at 559-561.

229. *Lopez*, 514 U.S. at 561 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *Perez v. United States*, 402 U.S. 146, 150 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942)).

230. See *id.* at 562 (citing *United States v. Bass*, 404 U.S. 336, 339, 349 n.4 (1971); *United States v. Five Gambling Devices*, 346 U.S. 441, 448 (1953)).

231. *Id.* at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)); see also *United States v. Stillo*, 57 F.3d 553, 558 n.2 (7th Cir. 1995) (quoting same).

Joseph Stillo submitted the *Lopez* decision to the Court of Appeals for the Seventh Circuit following oral argument in *Stillo*,<sup>232</sup> but the court deemed the decision unpersuasive.<sup>233</sup> The court noted that the Hobbs Act, unlike the Gun-Free School Zones Act, was directed at a type of economic activity—extortion.<sup>234</sup> The court also observed that unlike the Gun-Free School Zones Act, the Hobbs Act contained an express jurisdictional element that served to limit the reach of the statute to a “discrete set of [offenses] that additionally have an explicit connection with or effect on interstate commerce.”<sup>235</sup> The Court of Appeals concluded that *Lopez* had not “undermine[d] this [c]ourt’s precedent that minimal potential effect on commerce is all that need be proven to support a conviction,” quoting the *Wirtz* passage noted in *Lopez*.<sup>236</sup>

The court briefly referred to *United States v. Robertson*,<sup>237</sup> a per curiam Supreme Court opinion handed down one week after *Lopez*, as “more relevant” to its consideration of Stillo’s argument.<sup>238</sup> On what basis *Robertson* is more relevant, however, is unclear. *Robertson* involved the defendant’s purchase and operation of an Alaskan gold mine with funds derived from narcotics sales.<sup>239</sup> Defendant Robertson, an Arizona resident, paid \$125,000 in cash for the mining claims, then spent an additional \$100,000 for equipment and supplies, a portion of which were purchased in California and transported to Alaska. Robertson also hired as many as seven out-of-state laborers over several seasons to work the claims. During that period, the mine produced between \$200,000 and \$290,000 worth of gold, approximately \$30,000 of which the defendant personally transported out of Alaska.<sup>240</sup> The *Robertson* Court did not address the issue of whether the mine’s operation “affected commerce” since the evidence supported a finding that the enterprise was operating directly in interstate or foreign commerce. The *Stillo* court’s reference to *United States v. Robertson* is therefore puzzling. Defendant Robertson was engaged directly and substantially in interstate commerce, whereas the Stillos had argued that interstate commerce would not be substantially af-

232. *Stillo*, 57 F.3d at 558; see *id.* n.2.

233. See *id.*

234. See *id.*; see also *Lopez*, 514 U.S. at 559–562.

235. *Stillo*, 57 F.3d at 558 n.2; see *Lopez*, 514 U.S. at 561–562.

236. *Stillo*, 57 F.3d at 558 n.2 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)).

237. 514 U.S. 669 (1995).

238. *Stillo*, 57 F.3d at 558 n.2.

239. *Robertson*, 514 U.S. at 669. The *Stillo* court mistakenly identified defendant Robertson’s purchase as a silver mine. See *Stillo*, 57 F.3d at 558 n.2.

240. See *Robertson*, 514 U.S. at 670.

fectured by an unrealized, undetermined, de minimis depletion of a law firm's assets, and thus, jurisdiction could not be sustained.

While the *Stillo* court dismissed *Lopez* in a single footnote,<sup>241</sup> the Court of Appeals for the Tenth Circuit considered the Court's holding at somewhat greater length. In *United States v. Bolton*<sup>242</sup> the defendant had been arrested and convicted for a series of robberies that netted approximately \$4,300.<sup>243</sup> Like Joseph Stillo, defendant Bolton argued that the *Lopez* decision invalidated prior Hobbs Act holdings requiring only a de minimis effect on interstate commerce. After a brief review of pertinent case law,<sup>244</sup> the Court of Appeals set forth its reasoning: "[T]he Court recognized that if a statute regulates an activity which, through repetition, in aggregate has a substantial economic effect on interstate commerce, 'the de minimis character of individual instances arising under that statute is of no consequence.'"<sup>245</sup> The court first asserted that "the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce"; that robbery and extortion are a class of activities that, through repetition, may have a substantial and detrimental effect on interstate commerce; and that because the Act "regulates activities" having such an effect, the de minimis character of individual instances are of no consequence. The *Bolton* court, like the *Stillo* court, concluded that the de minimis effects theory remained untouched by the Supreme Court's holding.<sup>246</sup>

Congressional power to reach ostensibly private activity of trivial economic consequence was settled by the Supreme Court in *Wickard*

241. See *Stillo*, 57 F.3d at 558 n.2.

242. 68 F.3d 396 (10th Cir. 1995).

243. See *id.* at 397. The defendant robbed four businesses for a total of approximately \$4,100 and robbed a private party of his credit cards, which were later sold for \$250. See *id.*

244. See *id.* at 398-99 (citing *United States v. Zeigler*, 19 F.3d 486, 489 (10th Cir. 1994); *United States v. Boston*, 718 F.2d 1511, 1516 (10th Cir. 1983); *United States v. Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978)).

245. *Bolton*, 68 F.3d at 399 (quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995)).

246. *Id.* The *Bolton* court quoted the *Stillo* footnote as supporting authority for its analysis. See also *United States v. Edwards*, 894 F. Supp. 340, 343 (E.D. Wis. 1995) ("In *United States v. Stillo* the Court of Appeals for the Seventh Circuit stated that the *Lopez* decision did not 'undermine this Court's precedents that minimal potential effect on commerce is all that need be proven to support a conviction.' (Holding that the Hobbs Act, which prohibits extortion that affects interstate commerce, is constitutional).") Such citations suggest that legal accretions are already forming around the *Stillo* court's "analysis" of the *Lopez* holding. See, e.g., *United States v. Leshuk*, 65 F.3d 1105, 1112 (4th Cir. 1995) (involving Commerce Clause challenge to the constitutionality of the Comprehensive Drug Abuse Prevention and Control Act of 1970); *United States v. Arena*, 918 F. Supp. 561, 567 (N.D.N.Y. 1996) ("This court agrees with *Bolton* [and *Stillo*] that the 'Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce,' and therefore 'the de minimis character of individual instances arising under [this] statute is of no consequence.'") (citations omitted).

*v. Filburn*<sup>247</sup> and reaffirmed in *Perez v. United States*.<sup>248</sup> Nonetheless, the *Bolton* court's "analysis" to the contrary, the Hobbs Act cannot fairly be characterized as a regulatory statute,<sup>249</sup> at least in the same sense that the Fair Labor Standards Act of 1938,<sup>250</sup> the subject statute in *Maryland v. Wirtz*,<sup>251</sup> may be considered regulatory. *Wirtz* involved the constitutionality of a federal labor statute as applied to school and hospital employees operated by the states and their subdivisions: the question raised was whether the federal government had the power under the Commerce Clause to regulate the wages, terms, and working conditions of certain state workers "employed in an enterprise engaged in commerce or the production of goods for commerce."<sup>252</sup> The litigants had stipulated that the affected schools and hospitals were "major users" of goods traveling in interstate commerce, and that labor unrest, unfortunately "not infrequent, obviously interrupt[s] and burden[s] this flow of goods across state lines."<sup>253</sup> In determining whether the statute was a valid regulation of commerce, the Court noted in passing:

[A]n "enterprise" is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group of employees, which is what Congress obviously intended. So defined, the term is quite cognizant of limitations on the commerce power. Neither here nor in *Wickard* had the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory

247. 317 U.S. 111 (1942). The *Wickard* court held, "[T]hat appellee's own contribution . . . may be trivial by itself is not enough to remove him from the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-28.

248. 402 U.S. 146, 154 (1971) ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.") (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

249. The Court of Appeals for the Seventh Circuit noted this point in *United States v. Staszczuk*, 517 F.2d 53, 58 (7th Cir. 1975) ("The [Hobbs Act] is not regulatory in character, but instead is intended to remove artificial restraints on the free flow of goods.").

250. 29 U.S.C. §§ 203-07 & 216 (1964 & Supp. II).

251. 392 U.S. 183, 185-87 (1968). The Hobbs Act's jurisdictional element cannot be satisfied by reference to congressional findings regarding a class of proscribed activities, as in *Perez v. United States*, 402 U.S. 146 (1971) (Consumer Credit Protection Act). While there is general agreement that congressional findings are not necessary to sustain the constitutionality of a statute, it seems unclear from the Supreme Court's holding in *Lopez* how, short of aggressive judicial review, the courts are to determine for themselves whether instances of robbery or extortion, or robbery and extortion as classes of activities, substantially affect interstate commerce. See *United States v. Lopez*, 514 U.S. 549, 614 (1995) (Souter, J., dissenting) ("[R]eview for congressional wisdom would just be the old judicial pretension discredited and abandoned in 1937 . . .").

252. 29 U.S.C. §§ 206(a), 207(a) (1964 & Supp. II).

253. *Wirtz*, 392 U.S. at 194-95.

statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.<sup>254</sup>

In short, *Wirtz* simply did not address the issues raised by the *Stillo* or *Bolton* courts. Neither did the *Bolton* court develop any basis for its comparison between the Hobbs Act and the Fair Labor Standards Act of 1938. While the *Wirtz* Court reaffirmed its earlier holdings in *Wickard*<sup>255</sup> and *United States v. Darby*,<sup>256</sup> it refused to be drawn into a general discussion of issues unframed by the litigation.<sup>257</sup> Nonetheless, a review of post-*Lopez* case law suggests that, at least insofar as the Hobbs Act is concerned, *United States v. Lopez* is rapidly being limited to its facts: *Lopez* is frequently cited both for the *Wirtz* passage and its "aggregate effects" analysis.<sup>258</sup>

*United States v. Stillo* illustrates the current scope of federal jurisdiction under the Hobbs Act. The court's analysis also suggests the manner in which the Act's jurisdictional requirements have been relaxed over the last half-century. Where indictments are shaped to ensure general conformity with current case law, and where cases are prosecuted under a broadly worded and generously interpreted statute, few defendants escape the reach of the statute. As the Court of Appeals for the Seventh Circuit noted in *United States v. Murphy*, "in a complex economy almost any movement of funds affects commerce to some degree."<sup>259</sup> A district court in the Second Circuit recently sustained federal jurisdiction under the Child Support Recovery Act where the assets depleted were private assets.<sup>260</sup> The Court of Ap-

254. *Id.* at 196 n.27 (quoted in *United States v. Perez*, 426 F.2d 1073, 1077 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971)).

255. *See id.* at 192-93 (citing *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)).

256. 312 U.S. 100, 120-21 (1941).

257. *See Wirtz*, 392 U.S. at 199.

258. *See, e.g.*, *United States v. Bolton*, 68 F.3d 396 (10th Cir. 1995); *United States v. Arena*, 894 F. Supp. 580 (N.D.N.Y. 1995) (upholding federal jurisdiction where anti-abortion activist attacked a Planned Parenthood clinic and thereby depleted the assets available to the clinic with which to purchase goods traveling in interstate commerce); *United States v. Edwards*, 894 F. Supp. 340 (E.D. Wis. 1995); *see also United States v. Wall*, 92 F.3d 1444, 1448-49 (6th Cir. 1996) (noting correctly that "most courts have resisted urgings to extend *Lopez* beyond § 922(q).").

259. 768 F.2d 1518, 1531 (7th Cir. 1985); *see also United States v. Lopez*, 514 U.S. 549, 606-11 (1995) (Souter, J., dissenting) (discussing "the 'hopeless porosity' of 'commercial' character as a ground of Commerce Clause distinction in America's highly connected economy").

260. *See United States v. Sage*, 906 F. Supp. 84 (D. Conn. 1995), *aff'd*, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997) (involving a challenge to the constitutionality of the Child Support Recovery Act, 18 U.S.C. § 228 (1995) ["CSRA"]). The court noted:

[T]he non-payment of the 'past due support obligation' will reduce the child's consumption of goods in interstate commerce. It will also reduce the custodial parent's consumption of such goods to the extent any alimony is included in the support obligation. Thus, the very act of withholding payment causes a depletion of assets that affects interstate commerce.

peals for the Ninth Circuit has sustained Hobbs Act jurisdiction based on a similarly distant effect on interstate commerce: the economic effect on a corporation of an employee's potentially diminished work performance because of stress related to extortive demands.<sup>261</sup> The demands stemmed from personal misconduct unrelated to the victim's corporate responsibilities.<sup>262</sup> The appellate court's reasoning is thin; it is also distressingly reminiscent of the "national productivity" argument rejected by the Supreme Court as an impermissible attempt by Congress to regulate activities tied, however remotely, to the "economic productivity of individual citizens."<sup>263</sup> It is not clear, then, that the preservation of the federal balance may any more prudently be remitted to the unelected and far less closely-scrutinized wisdom of the judiciary than it may be "remitted to the political judgment of Congress."<sup>264</sup> If jurisdiction can now be secured on the basis of an

*Id.* at 90; see also *United States v. Collins*, 921 F. Supp. 1028, 1036 (W.D.N.Y. 1996); *United States v. Parker*, 911 F. Supp. 830, 838 n.11 (E.D. Pa. 1995); cf. *United States v. Harding*, 563 F.2d 299, 307 (6th Cir. 1977) (sustaining federal jurisdiction where the victim did not participate in interstate commerce but the victim's clients did). The CSRA continues to withstand constitutional attack. See, e.g., *United States v. Hampshire*, 95 F.3d 999, 1006 (10th Cir. 1996); *United States v. Mussari*, 95 F.3d 787, 791 (9th Cir. 1996); *United States v. Sage*, 92 F.3d 101, 108 (2d Cir. 1996).

261. See *United States v. Pascucci*, 943 F.2d 1032, 1035 (9th Cir. 1991) (involving the extortion of personal funds from a salesman employed by a corporation engaged in interstate commerce). The Court of Appeals upheld jurisdiction under the Hobbs Act despite the fact that the victim, who had engaged in personal indiscretions, was extorted as a private citizen rather than as an agent of an organization engaged in interstate commerce. See *id.* at 1035-36; see also *id.* at 1039-41 (Ferguson, C.J., dissenting). The *Pascucci* court recited well-known Hobbs Act case law and "principles," none of which appeared to support the propositions advanced by the court. *Id.* at 1035. It then announced that federal jurisdiction under the Act had been established. The court's reasoning is unclear, as the dissent observes. See *id.* at 1039-41. Compare *id.* at 1035, and *United States v. Frost*, 61 F.3d 1518, 1523-24 (11th Cir. 1995) (upholding federal jurisdiction where the victim was extorted in order to force his resignation from the city council, "the actions of . . . [which organization], at least to a minimal degree affect interstate commerce") and *United States v. Huynh*, 60 F.3d 1386, 1389 (9th Cir. 1995) ("[W]e have upheld Hobbs Act convictions even where the defendant sought to extort only personal assets.") (citing *Pascucci*, 943 F.2d at 1035) and *United States v. Jones*, 30 F.3d 276, 285 (2d Cir. 1994) ("The result is the same whether Ortiz was a government agent or a private individual known to be engaged in narcotics trafficking; in either case, such person's assets were depleted, thus affecting his ability to purchase a commodity [cocaine] that travels in interstate commerce.") with *United States v. Mattson*, 671 F.2d 1020, 1024-25 (7th Cir. 1982) (finding lack of federal jurisdiction where "[t]he victim . . . was an individual who had no connection with interstate commerce at all, but whose only connection was with a business which was engaged in interstate commerce").

262. See *United States v. Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978) ("Although the Act requires only a *de minimis* effect on commerce, the effect still must be more than a speculative, attenuated 'one step removed' kind of effect.").

263. *United States v. Lopez*, 514 U.S. 549, 563-65 (1995).

264. *Id.* at 1632-33.

None of us at least can think of anything under our present case law, or at least under your argument, that Congress can't do if it chooses under the Commerce Clause, so if the Federal system is to be preserved by someone, and the Commerce Clause is a means by which the Federal structure can be obliterated, and if we have no tools or

agreement to engage in conduct, the possible effect of which involves the "depletion" or utilization of an organization's pecuniary and non-pecuniary assets, or if the depletion of assets theory now includes both personal and commercial assets, it is difficult to imagine that any conduct suggested by the Act is beyond the federal reach.

The principles on which *United States v. Stillo* was decided are largely familiar to court and counsel alike. Perhaps as a consequence, Hobbs Act jurisdictional decisions are based on little more than a handful of quotations or parenthetical comments, all of which have been released from the contexts that, at the outset, illuminated and limited their meanings. While the jurisdictional predicate of the statute is intended to require that the government establish a nexus to interstate commerce on a case-by-case basis,<sup>265</sup> a review of Hobbs Act case law reveals a remarkable lack of rigor and precision in the handling of this element. The theoretically limited scope of federal intervention at least with respect to the Hobbs Act, seems largely rhetorical.<sup>266</sup>

The task of statutory interpretation, including the question of jurisdiction, involves difficult choices between competing values. To say that Congress intended the Hobbs Act to reach to the limit of its power under the Commerce Clause begs the questions of the extent of that reach and how its measure is to be determined. While the Hobbs

analytic techniques to make these distinctions, then it follows that the Federal balance is remitted to the political judgment of the Congress.

Oral Arguments Transcript, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 758950, at \*18-19 (Nov. 8, 1994). The Majority's concern for this potentially vast expansion of congressional power was apparently not fully addressed by the dissenters. See *Lopez*, 514 U.S. at 563-67, 598-601, 622-26; see also Transcripts, *supra*, at \*5-6, 10-13, 15-16, 22-24; Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 678-82 (1995).

Judge Ferguson, dissenting in *United States v. Pascucci*, likewise noted that if federal jurisdiction were sustainable based merely on an adverse effect on job performance, "the vast majority of employers would be found to have businesses related to interstate commerce." 943 F.2d at 1040.

265. See *United States v. Lopez*, 514 U.S. at 561-62 (citing *United States v. Bass*, 404 U.S. 336, 339, 349 n.4 (1971); *United States v. Five Gambling Devices*, 346 U.S. 441, 448 (1953)); cf. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 310-11 (1981) (Rehnquist, J., concurring) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)); *Stirone v. United States*, 361 U.S. 212, 218 (1960). In *Hodel* Justice Renquist stated:

[I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce. Nor is it sufficient that the person or activity reached have some nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a substantial effect on interstate commerce.

*Hodel*, 452 U.S. at 310-11.

266. See, e.g., *United States v. Pearson*, 508 F.2d 595, 597 (5th Cir. 1975) (upholding federal jurisdiction where defendants conspired to rob the safety deposit boxes of a hotel that entertained large numbers of out of state guests).

Act was originally intended to halt certain illegal labor practices and racketeering activities that burdened interstate commerce, it has been applied to a range of criminal conduct far beyond that considered in the legislative debates. The courts have, however, occasionally returned to labor law holdings, including *Maryland v. Wirtz*,<sup>267</sup> to interpret the Act.<sup>268</sup> The grudging narrowness occasionally exhibited by the judiciary in interpreting federal labor legislation, likewise the expressed will of the electorate, is revealing and stands in stark contrast to the relative enthusiasm displayed in extending the federal reach under the Hobbs Act.<sup>269</sup>

An appellate court recently suggested that the case then before the bar, a bungled robbery of a local tavern, might have been more sensibly prosecuted under state law.<sup>270</sup> Federal jurisdiction had been easily established, but the court questioned the prosecutors' resort to the Hobbs Act:

[W]e are unable to fathom why the United States felt compelled to pursue this prosecution . . . . [T]he United States could in theory prosecute virtually every would-be thief . . . , no matter how trivial the amount at issue. . . . Nevertheless, we recognize that any change must come from Congress rather than the courts.<sup>271</sup>

This is not entirely correct. It is true that Congress and not the courts bear responsibility for enacting legislation. It is also true that the courts bear no responsibility for the wisdom of that legislation. As this Comment has attempted to demonstrate, however, it is not true that the courts are without responsibility for the current jurisdictional reach of the Act.<sup>272</sup> The speed with which the lower courts dispatched

267. 392 U.S. 183 (1968).

268. See, e.g., sources cited in *supra* notes 13–16, 28, 30, 41, 62, 252, and 255–62.

269. See, e.g., *supra* notes 6, 14, 35, 43–52, 54–59, 80–85, 114–18, 139–41, 144, 148, 155–60, 222–25, and accompanying text. Compare sources cited *supra*, with, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996).

270. See *United States v. Brown*, 959 F.2d 63 (6th Cir. 1992); see also *United States v. Waters*, 850 F. Supp. 1550, 1561–62 (N.D. Ala. 1994). Defendant Brown appealed his conviction and sentencing “imposed for carrying a firearm during the commission of a crime of violence for which he could be prosecuted in federal court [i.e., the Hobbs Act], and for possession of a weapon by a convicted felon.” *Brown*, 959 F.2d at 64. The tavern which the defendant attempted to rob sold beer and snack food manufactured in other states. See *id.* Federal prosecution brought significantly stiffer sentencing. See *id.*

271. *Brown*, 959 F.2d at 69.

272. See, e.g., *United States v. French*, 628 F.2d 1069, 1076–77 (8th Cir. 1980) (sustaining jurisdiction where defendant's extortive conduct “affected the quality of interstate commerce if not its quantity”); *United States v. Harding*, 563 F.2d 299, 301 (6th Cir. 1977) (upholding federal jurisdiction based on the sale of a real estate licensing exam and answers for \$300 where the victim's clients, but not the victim, were engaged in interstate commerce).



*United States v. Lopez* in subsequent Hobbs Act holdings likewise suggests the role they have played in extending federal jurisdiction: the *Lopez* Court's de minimis "exceptions" language may soon become the holding's most widely-quoted passage.<sup>273</sup>

The law is applied to—ultimately, it is shaped on—the facts of the litigation before the courts. When confronted by "a bad man full of violent deeds" or other malefactors,<sup>274</sup> very few jurists have interpreted the language of the Act, including its jurisdictional element, so as to permit a defendant to escape. Insofar as anyone has an interest in placing principled limits on federal action, it will take more than congressional legislation. It will require an entirely different attitude towards the exercise of federal power.

273. See *supra* notes 251, 263.

274. *United States v. Sweeney*, 262 F.2d 272, 277 (3d Cir. 1959); see also *United States v. Kaye*, 593 F. Supp. 193, 194 (N.D. Ill. 1984) ("Kaye is as sleazy a human being as it is possible to imagine. . . . [However,] though he has committed criminal acts, he is not federally reprehensible and he did not commit federal criminal acts.").