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McCormick v. United States: The Quid Pro Quo Requirement in Hobbs Act Extortion under Color of Offical Right

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McCORMICK v. UNITED STATES: THE QUID PRO QUO REQUIREMENT IN HOBBS ACT EXTORTION UNDER COLOR OF OFFICIAL RIGHT

Extortion is one of the oldest crimes in Anglo-American jurisprudence.[1] While the common law offense applied exclusively to public officials,[2] contemporary extortion statutes often cover both private citizens and public officials.[3]

1. *See* EDWARDO COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 148-50 (London, Brooke 1797) (1648) (providing examples of extortion convictions in England under early common law); *see also* Evans v. United States, 112 S. Ct. 1881, 1895 (1992) (Thomas, J., dissenting) (referring to extortion as one of the oldest crimes in Anglo-American jurisprudence).

2. *See, e.g.*, United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir.) (noting that "common law . . . extortion . . . could only be committed by a public official"), *cert. denied*, 409 U.S. 914 (1972); *see also* People v. Barondess, 16 N.Y.S. 436, 438 (App. Div. 1891) (discussing expansion of common law extortion under New York Penal Law of 1865), *rev'd on other grounds*, 31 N.E. 240 (N.Y. 1892). *But see* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 837-89 (1988) (arguing that ordinary citizens could commit extortion at common law).

3. The following state and federal extortion statutes apply to both private citizens and public officials: Hobbs Act, 18 U.S.C. § 1951 (1988); ARIZ. REV. STAT. ANN. § 13-1804 (1989); ARK. CODE ANN. § 5-36-102 (Michie 1987); CAL. PENAL CODE § 518 (Deering 1983); COLO. REV. STAT. § 18-3-207 (1986); CONN. GEN. STAT. ANN. § 53a-119(5) (West 1985); DEL. CODE ANN. tit. 11, § 846 (Supp. 1992); D.C. CODE ANN. § 22-3851 (1981); GA. CODE ANN. § 16-8-16 (Michie 1992); HAW. REV. STAT. § 707-764 (1985); IDAHO CODE § 18-2403 (1987); IOWA CODE ANN. § 711.4 (West 1979); KAN. STAT. ANN. § 21-3701 (1988); KY. REV. STAT. ANN. § 514.080 (Michie/Bobbs-Merrill Supp. 1992); ME. REV. STAT. ANN. tit. 17-A, § 355 (West 1983); MASS. GEN. LAWS ANN. ch. 265, § 25 (West 1990); NEB. REV. STAT. § 28-513 (1989); N.H. REV. STAT. ANN. § 637:5 (1986); N.J. STAT. ANN. § 2C:20-5 (West 1982); N.M. STAT. ANN. § 30-16-9 (Michie 1978); N.Y. PENAL LAW § 155.05(e) (McKinney 1988); N.C. GEN. STAT. § 14-118.3 (1986); OKLA. STAT. ANN. tit. 21, § 1481 (West 1983); OR. REV. STAT. § 164.075 (1991); 18 PA. CONS. STAT. ANN. § 3923 (1983); S.D. CODIFIED LAWS ANN. § 22-30A-4 (1988); UTAH CODE ANN. § 76-6-406 (1990).

The following state exteortion statutes apply only to public officials for misuse of public office: ALA. CODE §§ 13A-8-13 to 13A-8-15 (1982); FLA. STAT. ANN. § 839.11 (West Supp. 1993); LA. REV. STAT. ANN. § 14:136 (West 1986); MD. ANN. CODE art. 27, § 562C (1992); MICH. COMP. LAWS ANN. § 750.214 (West 1991); MONT. CODE ANN. § 45-7-104 (1991); NEV. REV. STAT. ANN. § 197.170 (Michie 1992); R.I. GEN LAWS § 11-42-2 (1981); TENN. CODE ANN. §§ 2-19-204, 2-19-205 (1991); TEX. REV. CIV. STAT. ANN. art. 3909 (West Supp. 1993); VA. CODE. ANN. § 18.2-470 (Michie 1988).

The following state statutes do not recognize the abuse of public office as a basis for extortion: LA. REV. STAT. ANN. § 14:66 (West 1986); MD. ANN. CODE art. 27, § 562B (1992); MICH. COMP. LAWS ANN. § 750.213 (West 1991); NEV. REV. STAT. ANN. § 205.320 (Michie 1992); OHIO REV. CODE ANN. § 2905.11 (Anderson 1987); S.C. CODE ANN. § 16-17-640

Currently, the Hobbs Act[4] arms United States Attorneys and prosecutors in the Department of Justice's Public Integrity Section with a particularly effective weapon against state and local officials who engage in extortionate activity.[5] While Congress enacted the Hobbs Act in 1946 primarily to curtail rising labor racketeering activities,[6] the modern application of the

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(Law Co-op. 1985); TENN. CODE ANN. § 39-14-112 (1991); VT. STAT. ANN. tit. 13, § 1701 (Supp. 1992); VA. CODE ANN. § 18.2-59 (Michie 1988); WASH. REV. CODE ANN. § 9A.56.110 (West 1988); W. VA. CODE § 61-2-13 (1992); WIS. STAT. ANN. § 943.30 (West 1982); WYO. STAT. § 6-2-402 (1977).

The following states have no extortion statute on their law books: Alaska; Illinois; Indiana; Minnesota; Missouri; North Dakota.

4. 18 U.S.C. § 1951 (1988). In relevant part, the Hobbs Act states: "Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." *Id.* § 1951(a).

5. *See* United States v. O'Grady, 742 F.2d 682, 683-84 (2d Cir. 1984) ("The [Hobbs] Act is a powerful and effective law enforcement tool . . . . It has become a principal weapon in the government's arsenal against corruption in public affairs."). *See generally* Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977) (detailing the manner in which the Hobbs Act has been used to fight state and local corruption).

6. Congress initially proscribed extortion in the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979 (1934) (current version at 18 U.S.C. § 1951 (1988)). In relevant part, the 1934 Act stated:

> 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 of 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; . . .
>
> (d) . . . shall . . . be guilty of a felony . . . .

48 Stat. at 979-80.

The Supreme Court, however, instigated congressional passage of the Hobbs Act as a result of its decision in United States v. Int'l Bhd. of Teamsters Local 807, 315 U.S. 521 (1942) (*Local 807*). In *Local 807*, labor union members were violently forcing owners and drivers of trucks to pay money for each truck entering New York City. *Id.* at 526. In some cases, the union members offered to unload the trucks, but required an additional fee whether or not the services were actually performed. *Id.* Applying the 1934 Anti-Racketeering Act, the Supreme Court construed the phrase "not including, however, the payment of wages by a bona fide employer to a bona fide employee" in a manner which removed the Teamsters union activity from the scope of the Act. *Id.* at 534-39. The subsequent congressional debate on passage of the Hobbs Act revealed that the primary purpose "of the bill was to shut off the possibility opened up by the *Local 807* case, that union members could use their protected status to exact payments from employers for imposed, unwanted, and superfluous services." United States v. Enmons, 410 U.S. 396, 403 (1973). The following statement, offered by United States Congressman Hancock from the floor of the House of Representatives during congressional debate on the bill, supports the Supreme Court's interpretation of the Hobbs Act in *Enmons*:

Hobbs Act to public officials did not become prevalent until the early 1970s.[7]

The Hobbs Act prohibits two types of extortion: coercive extortion and extortion "under color of official right."[8] Federal courts, prior to 1972, refused to recognize the prosecution of public officials for extortion under color of official right unless the prosecutor made a contemporaneous showing of duress or coercion.[9] As a result, prosecutors relied exclusively on coercive extortions for indictments brought under the Hobbs Act.[10] In 1972, the United States Court of Appeals for the Third Circuit accepted the government's argument that the office of a public official is inherently coercive and adopted a disjunctive reading of the statute.[11] The remaining

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> This bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce. . . . [It] is made necessary by the amazing decision of the Supreme Court in the case of the United States against Teamsters' Union 807, 3 years ago. That decision . . . legalizes in certain labor disputes the use of robbery and extortion.

91 CONG. REC. 11,900 (1945) (statement of Rep. Hancock).

7. *See infra* notes 9-12 and accompanying text.

8. Specifically, the Hobbs Act defines "extortion" as "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." 18 U.S.C. § 1951(b)(2) (1988). Neither the language of the statute nor the legislative debate on passage of the bill explicitly defines the phrase "under color of official right." The legislative debate, however, does contain references to the common law and to the New York Penal Code for guidance in defining this phrase. Thus, federal courts have placed significant emphasis on common law and New York state law for interpretation of the "under color of official right" phrase in the Hobbs Act. *See infra* notes 62-108 and accompanying text.

9. *See, e.g.*, United States v. Hyde, 448 F.2d 815, 832-33 (5th Cir. 1971) (noting that where members of the Alabama Attorney General's office were convicted of extortion, extortion meant threatening to take official action for purposes of coercion), *cert. denied*, 404 U.S. 1058 (1972); Bianchi v. United States, 219 F.2d 182, 193 (8th Cir.) (commenting that unlawful payments, made without force, violence, or fear, constituted bribery, not extortion), *cert. denied*, 349 U.S. 915 (1955); United States v. Kubacki, 237 F. Supp. 638, 641-42 (E.D. Pa. 1965) (holding that coercion was a necessary element of extortion under color of official right, and that the mayor did not coerce the payor to provide kickbacks).

10. *See* McCormick v. United States, 111 S. Ct. 1807, 1813 n.5 (1991) (noting that prior to the early 1970s, prosecutions of public officials for extortion required a showing of force or fear, rather than an independent showing of abuse of public office). The Court specifically observed that: "Until the early 1970s, extortion prosecutions under the Hobbs Act rested on allegations that the consent of the transferor of property had been 'induced by wrongful use of actual or threatened force, violence, or fear—'; public officials had not been prosecuted under the 'color of official right' phrase standing alone." *Id.* (quoting 18 U.S.C. § 1951(b) (1988)).

11. United States v. Kenny, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). The Third Circuit ruled that a public official need not use force, violence, or fear to be convicted of Hobbs Act extortion "under color of official right." *Id.* A strict textual reading of the Hobbs Act leads to this conclusion since "extortion" is defined as "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." 18 U.S.C. § 1951(b)(2) (1988) (emphasis added).

United States Courts of Appeals ultimately followed the Third Circuit's lead and permitted the prosecution of public officials who illegally obtain property "under color of official right" without requiring an independent showing of "violence, force, or fear" on the part of the public official.[12]

The federal courts subsequently wrestled with different aspects of the phrase "under color of official right," settling on the scope and meaning of such elements as intent, public official, and the extortionate transaction.[13] Most recently, two questions have divided the federal circuits regarding Hobbs Act extortion by public officials. The first issue concerns whether a public official's passive acceptance of an unsolicited bribe is sufficient to prove extortion, or whether an affirmative act of inducement by the official is required.[14] The second question involves the evidentiary threshold necessary to convict an elected public official for extortion based on the official's

12. *See, e.g.*, United States v. Greenough, 782 F.2d 1556, 1559 (11th Cir. 1986); United States v. McClelland, 731 F.2d 1438, 1439-40 (9th Cir. 1984), *cert. denied*, 472 U.S. 1010 (1985); United States v. Williams, 621 F.2d 123, 124 (5th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); United States v. Harding, 563 F.2d 299, 306 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); United States v. Hathaway, 534 F.2d 386, 393 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); United States v. Brown, 540 F.2d 364, 372 (8th Cir. 1976); United States v. Hall, 536 F.2d 313, 320-21 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976); United States v. Trotta, 525 F.2d 1096, 1099-1100 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); United States v. Price, 507 F.2d 1349, 1350 (4th Cir. 1974); United States v. Staszcuk, 502 F.2d 875, 877-78 (7th Cir. 1974), *rev'd in part on other grounds en banc*, 517 F.2d 53 (1975), *cert. denied*, 423 U.S. 837 (1976).

13. A public official need not intend to affect interstate commerce to be guilty of extortion. Rather, any extortion which affects interstate commerce will suffice. *See, e.g.*, United States v. Spagnolo, 546 F.2d 1117, 1119 (4th Cir. 1976) (stating that any extortion affecting interstate commerce is a violation of the Hobbs Act), *cert. denied*, 433 U.S. 909 (1977); United States v. Addonizio, 451 F.2d 49, 77 (3d Cir. 1971) (stating that the Hobbs Act does not require an intention to affect interstate commerce, but only that the extortion did affect interstate commerce), *cert. denied*, 405 U.S. 936 (1972). Furthermore, a public official need not possess the actual authority so claimed to be convicted of extortion. Rather, a victim's reasonable but mistaken belief that the extortionist possessed the authority would satisfy the essential elements of Hobbs Act extortion. *See, e.g.*, United States v. Mazzei, 521 F.2d 639, 643 (3d Cir.) (stating that if the victim of the extortion reasonably believed that the defendant had the power to grant leases, the defendant's lack of such power did not preclude his guilt), *cert. denied*, 423 U.S. 1014 (1975); United States v. Salvitti, 464 F. Supp. 611, 616 (E.D. Pa. 1979) (stating that actual power is not necessary to prove extortion). Finally, an extortionate transaction is not dependant upon the extortionist's gain; instead, the victim's loss alone may establish the illegality of the transaction. *See, e.g.*, *Hyde*, 448 F.2d at 843; United States v. Provenzano, 334 F.2d 678, 686 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964).

14. *Compare* United States v. Swift, 732 F.2d 878, 880 (11th Cir. 1984) (indicating that inducement by the public official is not required), *cert. denied*, 469 U.S. 1158 (1985) *and McClelland*, 731 F.2d at 1439-40 (same) *and* 673 F.2d 578, 594-96 (3d Cir.) (en banc) (same), *cert. denied*, 457 U.S. 1106 (1982) *and* United States v. French, 628 F.2d 1069, 1074 (8th Cir.) (same), *cert. denied*, 449 U.S. 956 (1980) *and* United States v. Meyers, 529 F.2d 1033 (7th Cir.) (same), *cert. denied*, 429 U.S. 894 (1976) *with* United States v. Aguon, 851 F.2d 1158, 1162-69 (9th Cir. 1988) (departing from its previous position in *McClelland* and following the *O'Grady* holding) *and* United States v. O'Grady, 742 F.2d 682, 688-91 (2d Cir. 1984) (holding

illegal solicitation of campaign contributions.[15] Specifically, the second issue centers on whether an explicit quid pro quo, which is defined as a payment made in return for an explicit promise by the public official to perform or not to perform an official act,[16] should be required to show a violation of the Hobbs Act.[17] The majority of federal circuits have required the government to show a quid pro quo in order to prove extortion under color of official right for the illegal solicitation or receipt of campaign monies.[18] On the other hand, the United States Courts of Appeals for the Fourth and the Second Circuits have treated evidence of a quid pro quo as support for an extortion charge, rather than as an essential element of the crime.[19] The Supreme Court granted certiorari in *McCormick v. United States*[20] to resolve the conflict in circuit court decisions.

The petitioner in *McCormick*, a member of the West Virginia House of Delegates,[21] represented an economically depressed coal mining region

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that an affirmative act of inducement by an official was required for a Hobbs Act prosecution under color of official right). *See* infra note 43.

15. *See infra* notes 111-64 and accompanying text. This issue emanates from the need to prevent Hobbs Act prosecutions of lawful solicitations of campaign contributions. The solicitation of political funds is avoidable in election campaigns financed by private contributions and expenditures.

16. *See* McCormick v. United States, 111 S. Ct. 1807, 1816 (1991). Another definition for "quid pro quo" is "[w]hat for what; something for something. Used in law for the giving of one valuable thing for another. It is nothing more than the mutual consideration which passes between the parties to a contract, and which renders it valid and binding." BLACK'S LAW DICTIONARY 1248 (6th ed. 1990). An additional source defines "quid pro quo" as "[s]omething for something; giving one valuable thing for another (membership on the committee was the quid pro quo for the contribution). Consideration, reciprocity, barter, interchange, trading; retaliation. See also exchange . . . , offset . . ." WILLIAM P. STATSKY, WEST'S LEGAL THESAURUS/DICTIONARY 625-26 (1986). Synonyms for "quid pro quo" include "agreement, counterbalance, counterpoise, equipoise, exchange, express agreement, give and take, interchange, measure for measure, mutual agreement, mutual consideration, mutual understanding, one thing in return for another, reciprocality, reciprocation, reciprocity, something equivalent, something for something, substitute, understanding." WILLIAM C. BURTON, LEGAL THESAURUS 425 (1980). Professor Corbin explained that "[a] *quid pro quo* is the antithesis of something for nothing. It expresses the idea of a bargain—an exchange of this for that." ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 117 (1952).

17. *Compare, e.g.*, United States v. McCormick, 896 F.2d 61, 66 (4th Cir. 1990) (following the *Trotta* holding), *rev'd*, 111 S. Ct. 1807 (1991) *and* United States v. Trotta, 525 F.2d 1096, 1100 (2d Cir. 1975) (holding that a specific quid pro quo is not necessary to prove extortion by a public official under the Hobbs Act), *cert. denied*, 425 U.S. 971 (1976) *with* United States v. Bibby, 752 F.2d 1116, 1127 n.1 (6th Cir. 1985) (arguing that an explicit quid pro quo is required), *cert. denied*, 475 U.S. 1010 (1986) *and* United States v. Dozier, 672 F.2d 531, 537 (5th Cir.) (same), *cert. denied*, 459 U.S. 943 (1982).

18. *See infra* notes 119-40 and accompanying text.

19. *See McCormick*, 896 F.2d at 66; *Trotta*, 525 F.2d at 1100.

20. 498 U.S. 807 (1990).

21. *See* McCormick v. United States, 111 S. Ct. 1807, 1809 (1991).

which suffered from a shortage of medical personnel.[22] Consequently, Delegate McCormick was a leading advocate of a legislative program that allowed foreign medical school graduates to practice under temporary permits while studying for the West Virginia state licensing exams.[23] Under the program, a number of doctors practiced for years while repeatedly failing the exams.[24] In 1984, McCormick sponsored a bill that extended the program's expiration date and, in the 1985 session, he agreed to sponsor legislation that would grant some of the doctors a permanent license as a result of their years of experience.[25] Coalfield Health Care Association, a group organized by the foreign doctors, actively supported the legislation.[26]

During his 1984 drive for reelection, McCormick informed the foreign doctors' lobbyist that the campaign was expensive.[27] McCormick emphasized that he had already spent a significant amount of his own money on his campaign, and indicated that the foreign doctors had not yet contributed.[28] Soon thereafter, McCormick received from the doctors four cash payments which he did not list as campaign contributions or report as income on his 1984 federal income tax return.[29] Following the passage of the permanent

22. *See* Brief of Petitioner at 7-8, McCormick v. United States, 896 F.2d 61 (4th Cir. 1990) (No. 89-1918). In 1985, there were 21.4 licensed, practicing doctors for every 10,000 persons in the United States. *Id.* at 7. During the same period, the physician-to-population ratio in the state of West Virginia as a whole amounted to approximately 14.2 physicians for every 10,000 persons. *Id.* at 8. In McCormick's political district, there were 7.4 physicians for every 10,0000 persons. *Id.*

23. *Id.* Logan General Hospital, the largest in McCormick's district, relied almost entirely on temporarily licensed, foreign physicians. *Id.* By 1983, several key physicians on Logan General's staff had not been able to pass the state licensing exam, and were facing the revocation of their temporary licenses in June of 1984. *Id.* Hospital administrators projected that if these temporary permit holders were forced to end their practice, the hospital's emergency room would have to be closed immediately. *Id.* The closest emergency services in the area would then be found in Charleston, located two and one-half hours away from Logan General by car. *Id.*

24. *See McCormick*, 111 S. Ct. at 1809.

25. *Id.* at 1810.

26. *Id.* Coalfield Health Care Association hired a lobbyist, John Vandergrift, to represent the foreign doctors in the state capital. *Id.* Furthermore, representatives from the organization helped draft legislation and met with other members of the West Virginia state legislature. *See* United States v. McCormick, 896 F.2d 61, 64 (4th Cir. 1990), *rev'd*, 111 S. Ct. 1807 (1991).

27. *See McCormick*, 111 S. Ct. at 1810.

28. *Id.* McCormick told Vandergrift, the doctors' lobbyist, "that he had not heard anything from the foreign doctors." *Id.*

29. *Id.* On June 1, 1984, Vandergrift delivered an envelope to McCormick which contained nine hundred dollars in cash. *Id.* This payment provided the basis for the jury's sole extortion conviction. *Id.* at 1812. Subsequently, McCormick received a payment of two thousand dollars, which was delivered by his grandnephew, and additional payments of eight hundred dollars on November 1, 1984, and six hundred dollars on December 19, 1984, both of which Dr. Ernesto Manuel, a spokesman for the foreign physicians, delivered personally. *Id.* at 1810; *see also McCormick*, 896 F.2d at 63-64.

medical licensing legislation in 1985, the doctors sent another cash payment to McCormick.[30] Again, McCormick failed either to list the money as a campaign contribution or report the money to the Internal Revenue Service as income.[31] Subsequently, a grand jury indicted McCormick in the United States District Court for the Southern District of West Virginia[32] on five counts of violating the Hobbs Act by extorting payments under color of official right,[33] and one count of filing a false income tax return in violation of § 7206 of the Internal Revenue Code.[34]

At the end of McCormick's trial, the judge instructed the petit jury that extortion under color of official right does not occur when a "public official receives a . . . voluntary political contribution"[35] and that "[v]oluntary is that which is freely given without expectation of benefit."[36] The jury convicted McCormick on one extortion count, but failed to reach verdicts on the remaining four.[37] The district court declared a mistrial on those four counts.[38]

On appeal, the United States Court of Appeals for the Fourth Circuit upheld the conviction for Hobbs Act extortion. Recognizing that the voluntary receipt of campaign contributions by elected representatives fell outside the ambit of the Hobbs Act, the appellate court enunciated a seven-point test[39] to determine whether the funds received by McCormick were intended

30. *See* Brief for the United States at 6, McCormick v. United States, 896 F.2d 61 (4th Cir. 1990) (No. 89-1918). McCormick received nine hundred fifty dollars from Dr. Manuel on May 15, 1985, two weeks after the permanent licensing legislation became law. *Id.*

31. *See McCormick*, 111 S. Ct. at 1810.

32. *Id.*

33. 18 U.S.C. § 1951 (1988).

34. 26 U.S.C. § 7206(1) (1988). Campaign contributions were not considered taxable income under I.R.C. § 24 (1985). Thus, a jury determination that the payments in *McCormick* were campaign contributions would result in the defendant's acquittal on the charge of filing a false income tax return. Because the Supreme Court in *McCormick* ruled that even legitimate campaign contributions could form the basis of an extortion conviction, McCormick's conviction for extortion would not necessarily demonstrate that the payments were not campaign contributions and hence taxable. Nonetheless, the Supreme Court indicated that the court of appeals on remand might affirm McCormick's tax conviction on grounds independent of the extortion charge. *See McCormick*, 111 S. Ct. at 1817-18.

35. *McCormick*, 111 S. Ct. at 1817-18. The trial judge offered the instruction on voluntariness only after the jury requested to hear the instructions again with an emphasis on the definition of extortion. *Id.*

36. *Id.* at 1812. The trial court also noted that "[i]t would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions from foreign doctors who would benefit from this legislation." *Id.*

37. *Id.*

38. *Id.*

39. *See infra* note 162.

to be campaign contributions.[40] In dicta, the majority rejected the blanket requirement that the prosecution must demonstrate an explicit quid pro quo to convict a public official of extortion under the Hobbs Act.[41]

In *McCormick v. United States*,[42] the Supreme Court reversed the court of appeals and held that the government was required to show a quid pro quo; in other words, the government must prove that the public official performed or did not perform an official duty in return for the payment of campaign funds.[43] Thus, campaign contributions are extorted by an elected public official in violation of the Hobbs Act only when the official explicitly asserts that the receipt of such funds will control his official conduct.[44]

The Supreme Court's decision focused primarily on the Fourth Circuit's "legitimacy test" and on the breadth of the district court's jury instruc-

40. *See* United States v. McCormick, 896 F.2d 61, 67 (4th Cir. 1990), *rev'd*, 111 S. Ct. 1807 (1991). The court of appeals judged that "the evidence supports the conclusion that the money was never intended by any of the parties to be a campaign contribution." *Id.*

41. *Id.* at 66. The appellate court noted its "agree[ment] with the Second Circuit['s holding in *Trotta*] that alleged 'political contributions' may violate the Hobbs Act in more than one way." *Id.*

42. 111 S. Ct. 1807 (1991).

43. *See id.* at 1813 n.5. The Court did not resolve the question of inducement in *McCormick*, although the majority explicitly noted the split among the United States Courts of Appeals and implied that the issue would be addressed in the future. *Id.* In May 1992, the Supreme Court ruled that an affirmative act of inducement is not required under the Hobbs Act to prove extortion under color of official right. *See* Evans v. United States, 112 S. Ct. 1881 (1992). Before the *Evans* decision, a majority of the United States Courts of Appeals reasoned that the power inherent in public office supplied the necessary pressure or threat, and therefore public officials did not need to induce or make prior requests for the payments. *See, e.g.*, United States v. Blackwood, 768 F.2d 131, 134 (7th Cir.) (explaining that public officials' use of office to obtain money is the crux of "under color of official right"), *cert. denied*, 474 U.S. 1020 (1985); United States v. Martin, 751 F.2d 258 (8th Cir. 1984) (indicating that status of public official supplies potential threat). In such instances, the passive receipt of an unsolicited bribe amounted to extortion under color of official right. *See also* United States v. Evans, 910 F.2d 790, 796-97 (11th Cir. 1990), *aff'd*, 112 S. Ct. 1881 (1992); United States v. Paschall, 772 F.2d 68, 73 (4th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986); United States v. Jannotti, 673 F.2d 578, 595 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982); United States v. Butler, 618 F.2d 411 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980); United States v. Williams, 621 F.2d 123, 124 (5th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); United States v. Hedman, 630 F.2d 1184, 1195 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981).

On the other hand, both the Ninth Circuit and the Second Circuit required the government to prove an affirmative act of inducement by the public official in order to convict for extortion under color of official right. *See* United States v. Aguon, 851 F.2d 1158, 1166 (9th Cir. 1988) ("[P]roof that the defendant 'induced' the improper payment is an essential element in the crime of extortion . . . ."); United States v. O'Grady, 742 F.2d 682, 684 (2d Cir. 1984) ("[E]xtortion under color of official right [does not] occur[ ] when a public official merely accepts unsolicited benefits knowing that they were given because of his public office."). The Supreme Court's decision in *Evans* forced the Ninth and the Second Circuits to abandon the minority rule requiring proof of an affirmative act of inducement.

44. *See McCormick*, 111 S. Ct. at 1816.

tions.[45] To protect against the disruption of legitimate fundraising activities, the majority ruled that a specific quid pro quo, rather than the general expectation of a benefit, was necessary to qualify as a Hobbs Act violation where the defendant claimed that the money was a campaign contribution.[46]

The dissent acknowledged that legitimate political contributions fall outside the scope of the Hobbs Act,[47] but would not require proof of an explicit quid pro quo to convict an elected public official of Hobbs Act extortion.[48] Accordingly, a public official's implicit promise to perform or not to perform particular activities in exchange for the victim's money would suffice to show a violation of the Hobbs Act.[49] The dissent maintained that the crime of extortion is committed if the victim knows that the official's support of specific legislation is contingent upon the payment,[50] although the act of soliciting campaign contributions from donors who stand to benefit generally from the candidate's election is not illegitimate.[51]

Justice Scalia wrote a concurring opinion in which he closely examined the phrase "under color of official right" in the Hobbs Act.[52] Reluctantly adopting the majority's holding, Justice Scalia noted that the statute makes no reference to quid pro quos or campaign contributions,[53] but argued that the nature of the American political system required such a limitation on Hobbs Act prosecutions.[54] Nonetheless, the absence of any statutory language in support of a quid pro quo requirement disturbed him.[55] Posing an alternative interpretation, Justice Scalia suggested that extortion under color of official right might be limited to property received under false pretense of

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45. *See infra* notes 170-77 and accompanying text.

46. *See McCormick*, 111 S. Ct. at 1816. Justice White indicated that:

> [t]he receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.

Id.

47. *Id.* at 1820-21 (Stevens, J., dissenting).

48. *Id.* at 1821.

49. *Id.* Justice Stevens reasoned in the dissenting opinion that "[n]either the legislator nor the thug needs to make an explicit threat or an explicit promise to get his message across." *Id.*

50. *Id.* at 1824.

51. *Id.* Justice Stevens noted that "[a] candidate's solicitation of . . . contributions from donors who would benefit from his or her election is perfectly legitimate." *Id.*

52. *Id.* at 1818-19 (Scalia, J., concurring).

53. *See infra* note 179 and accompanying text.

54. *See infra* notes 180-82 and accompanying text.

55. *See infra* note 179 and accompanying text.

official entitlement.[56] This perspective, however, was left for consideration in the context of future cases.[57]

This Note examines the issue of a quid pro quo requirement in the context of extortion under color of official right. After a brief examination of extortion at common law, this Note reviews the statutory and judicial history of the New York extortion law upon which the Hobbs Act was modeled. It then examines the conflicting federal court decisions on the issue of quid pro quo and analyzes the recent Supreme Court decision in the case of *McCormick v. United States*. This Note concludes that the quid pro quo requirement is an appropriate and necessary qualification in the prosecution of elected public officials for extortion of campaign contributions, but that the threshold of proof for extortion under color of official right in other contexts should not be as strict.

I. Extortion Under Color of Official Right: An Historical Perspective

Since Congress adopted the Hobbs Act in 1946,[58] the federal courts have expanded the crime of extortion under color of official right from its initial narrow application to public officials who demanded or received a fee to which they were not entitled, or who extorted money by force or coercion, into a broad license for policing corruption in local and state political processes.[59] The federal courts have frequently drawn support for their decisions on official right extortion from common law[60] and from the New York Penal Code with its associated case law.[61]

A. Common Law Extortion

Extortion at common law consisted of an official's illegal receipt of money as payment for his official duties.[62] In particular, the crime was committed

56. *See infra* notes 183-85 and accompanying text.

57. *See infra* note 186 and accompanying text.

58. *See supra* note 6.

59. *See* United States v. O'Grady, 742 F.2d 682, 687 (2d Cir. 1984). The majority in *O'Grady* observed that the crime of extortion has expanded "from a narrow prohibition aimed at public officials who demand or receive a fee not due them or their office, or who extort money by force or violence, into a broad license for 'federal authorities to police influence peddling in the political processes of the states.' " *Id.* (quoting United States v. Mazzei, 521 F.2d 639, 652 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, 423 U.S. 1014 (1975)).

60. *See infra* notes 62-71 and accompanying text.

61. *See infra* notes 72-108 and accompanying text.

62. *See, e.g.*, United States v. Sutter, 160 F.2d 754, 756 (7th Cir. 1947) (stating "[a]t common law, if a public employee under color of his office demanded and received money or a thing of value to which he is not entitled, he was guilty of extortion") (citations omitted); State v. Goodman, 89 A.2d 243, 250 (N.J. 1952) (discussing extortion at common law as the illegal taking of money by a public officer "under color of office"); State v. Burton, 3 Ind. 95 (1851)

when an officer collected unwarranted fees,[63] or received more money than he was entitled to collect[64] or before he was entitled to collect.[65] The common law crime contained no requirement of force, violence, or fear.[66] Instead, the taking of money "by color of his office" required only that the officer knowingly received money to which he was not entitled for the performance of his official duties.[67] The official's plan to collect fees to which he was not legally entitled constituted the corrupt intent, which was the essence of the offense at common law.[68] The officer must have acted in his official capacity,[69] and he must have intentionally sought and received the

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(holding that the circuit court erred in quashing the indictment for extortion of an officer for taking fees for services not performed); State v. Stotts, 5 Blackf. 460, 461-62 (Ind. 1840) (same); Commonwealth v. Bagley, 24 Mass. (7 Pick.) 279, 281 (1828) (same); People v. Whaley, 6 Cow. 661, 663-64 (N.Y. Sup. Ct. 1827) (same); *see also* COKE, *supra* note 1, at 149 (discussing early English common law extortion cases). *See generally* Lindgren, *supra* note 2, at 837-89 (providing a detailed account of extortion at common law).

63. *See, e.g.*, State v. Weleck, 91 A.2d 751 (N.J. 1952); Commonwealth v. Hopkins, 69 A.2d 428 (Pa. Super. Ct. 1949).

64. *See, e.g.*, Loftus v. State, 19 A. 183 (N.J. 1890).

65. William Blackstone authored the following definition of extortion at common law: "[A]ny officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due." 4 WILLIAM BLACKSTONE, COMMENTARIES *141. "[I]n the common law, the term 'extortion'. . . designates a crime committed by an officer of the law who, under cover or color of his office, unlawfully and corruptly takes any money or thing of value that is not due to him, or more than is due, or before it is due." 35 C.J.S. *Extortion* § 1 (1960); *see also* 2 AM. JUR. 2D *Extortion, Blackmail, and Threats* § 2 (1939). *See generally* Alice K. Griep, Comment, *Criminal Law—A Study of Statutory Blackmail and Extortion in the Several States*, 44 MICH. L. REV. 461 (1945).

66. *See Sutter*, 160 F.2d at 756 (recognizing that common law extortion was characterized by misuse of public office rather than by force, threats, or pressure).

67. *See* United States v. Jannotti, 673 F.2d 578, 595 (3d Cir.) (noting that the common law definition of extortion was met where defendant city officials accepted money that was not due them or their office for the performance of official duties), *cert. denied*, 457 U.S. 1106 (1982); United States v. Rabbitt, 583 F.2d 1014, 1027 (8th Cir. 1978) (noting that the common law definition of extortion was met where the public official took a fee to which he was not entitled "for the performance or nonperformance of an official function"), *cert. denied*, 439 U.S. 1116 (1979).

68. *See* Cleaveland v. State, 34 Ala. 254, 258-59 (1859); Hood v. State, 245 S.W. 176, 176 (Ark. 1922); LaTour v. Stone, 190 So. 704, 709-10 (Fla. 1939); Lincoln v. Shaw, 17 Mass. 410, 411 (1821); State v. Gardner, 2 Mo. 23, 23 (1828); People v. Clark, 151 N.E. 631, 634-35 (N.Y. 1926); State v. Burns, 1 P.2d 229, 229 (Wash. 1931) (Beals, J., concurring); *see also* 35 C.J.S. *Extortion* § 3 (1960) (noting that "[a]t common law . . . in order to constitute extortion, the act must have been done with a corrupt intent . . . . The corrupt intent lies in the design on the part of the officer to collect fees to which he is not legally entitled").

69. *See, e.g.*, United States v. Kenny, 462 F.2d 1205, 1228-29 (3d Cir.) (noting that "common law . . . extortion . . . could only be committed by a public official"), *cert. denied*, 409 U.S. 914 (1972); Collier v. State, 55 Ala. 125, 128 (1876); *see also* Griep, *supra* note 65, at 461 (asserting that private citizens could not commit extortion at common law). *But see* Lindgren, *supra* note 2, at 837-89 (arguing that ordinary citizens could commit extortion at common law).

money.[70] Therefore, if a payor voluntarily gave money to a public official, that official could not be charged with the crime of extortion by color of office.[71]

The common law crime of extortion evolved over the years into state statutory offenses, many of which retained the character of the common law offense. New York state extortion law provides important historical guidance for an analysis of the Hobbs Act since the drafters of the federal law relied heavily on the language of the New York statute.

B. Extortion Under New York Penal Law

According to the congressional debates that preceded passage of the Hobbs Act, the term "under color of official right" emanated from the New York Penal Law of 1909.[72] Section 850 of the New York Penal Law defined the crime of extortion as the receipt of property from an individual, or the receipt of corporate property from a director of the corporation, with the consent of the provider, induced by the illegal use of violence or apprehension, or under color of official right.[73]

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70. *See, e.g.*, *Cleaveland*, 34 Ala. at 259; Dunlap v. Curtis, 10 Mass. 210, 211 (1813); *see also* 35 C.J.S. *Extortion* § 6 (1960) (noting that in order "[t]o constitute extortion at common law, there must be the receipt of money or some other thing of value"); Comment, United States v. Mazzei: *Hobbs Act Extortion Under Color of Official Right*, 62 VA. L. REV 439, 441 (1976) (indicating that common law extortion consisted of "corruptly demanding").

71. *See, e.g.*, United States v. Aguon, 851 F.2d 1158, 1163 (9th Cir. 1988); United States v. Aguon, 813 F.2d 1413, 1416 (9th Cir. 1987) ("The ordinary meaning of 'to extort' is 'to obtain from an unwilling person.' This ordinary meaning was preserved by the interpretation the [common law] courts gave to 'color of office.' "); Daniels v. United States, 17 F.2d 339, 342 (9th Cir.), *cert. denied*, 274 U.S. 744 (1927); *La Tour*, 190 So. at 709-710; *see also* 35 C.J.S. *Extortion* § 5 (1960) (noting that a voluntary payment to a public official does not constitute extortion under color of office).

72. *See, e.g.*, 91 CONG. REC. 11,900 (1945) ("[T]here is nothing clearer than the definition of robbery and extortion in this bill. They have been construed by the courts not once, but a thousand times. The definitions in this bill are copied from the New York Code substantially.") (statement of Rep. Hobbs); *id.* ("[The] definitions of robbery and extortion [in the Hobbs Act] . . . follow the definitions contained in the laws of the State of New York.") (statement of Rep. Hancock); *id.* at 11,848 (statement of Rep. Powell); *id.* at 11,904 (statement of Rep. Gwynne); 89 CONG. REC. 3227 (1943) (statement of Rep. Hobbs); *id.* at 3205 (statement of Rep. Graham); *see also* United States v. Mazzei, 521 F.2d 639, 653 (3d Cir.) ("There is little doubt that the draftsmen of the 1934 Act took the term 'color of official right' from the New York Penal Law of 1909."), *cert. denied*, 423 U.S. 1014 (1975); United States v. Nedley, 255 F.2d 350, 355 (3d Cir. 1958).

73. The New York Penal Law of 1909 specifically defined "extortion" as "the obtaining of property from another, or obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right." N.Y. Penal Law of 1909 § 850.

The phrase "under color of official right" in the New York Code traced its origin to the Field Code.[74] The Field Code defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."[75] An official comment by the drafters of the Field Code to the section on extortion referred to an early New York case, *People v. Whaley*,[76] for clarification of extortion under color of official right.[77]

In the *Whaley* case, the New York Supreme Court adopted a narrow conception of extortion under color of office.[78] After dismissing for lack of jurisdiction a lawsuit to collect money owed on a financial note against the defendant Butler,[79] Justice of the Peace Whaley secretly collected the money at a private meeting with Butler.[80] A jury found Justice Whaley guilty of extortion since he had no jurisdiction after dismissing the suit to enter a legal judgment and collect money from Butler.[81]

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74. COMMISSIONERS OF THE CODE, THE PENAL CODE OF THE STATE OF NEW YORK (1865) [hereinafter FIELD CODE]. The New York State Constitution of 1846 directed that the next state legislature appoint three commissioners "to revise, reform, simplify, and abridge the rules and practice, forms and proceedings of the courts of record." *See* FRANCIS X. CARMODY, CARMODY-FORKOSCH NEW YORK PRACTICE § 9 (8th ed. 1963) (quoting N.Y. CONST. OF 1846, art. VI § 24). As a result, the commissioners were appointed in 1847 to carry this constitutional provision into effect. David Dudley Field, the principal commissioner, oversaw the reporting of the "Code of Procedure" to the Legislatures of 1848 and 1849, which promptly enacted the provisions into law. The Code is generally referred to as the FIELD CODE in honor of David Field. *See* HERBERT PETERFREUND & JOSEPH M. MCLAUGHLIN, NEW YORK PRACTICE: CASES AND OTHER MATERIALS § 1 (3d ed. 1973).

75. FIELD CODE, *supra* note 74, § 613.

76. 6 Cow. 661 (N.Y. Sup. Ct. 1827).

77. *See* FIELD CODE, *supra* note 74, § 613 cmt.

78. *See Whaley*, 6 Cow. at 663. The court indicated that "[e]xtortion signifies, in an enlarged sense, any oppression under color of right. In a stricter sense, it signifies the taking of money by any officer, by color of his office; either, where none at all is due, or not so much due, or when it is not yet due." *Id.*

79. *Id.* at 662. The case was dismissed by the Justice of the Peace because the plaintiff did not appear in court to press his claim against Butler. *Id.* at 661. In fact, Justice Whaley indicated his intent to charge the plaintiff with court costs as a result of his non-appearance. *Id.*

80. *Id.* at 662. During this meeting, Butler confessed his guilt, Justice Whaley entered a judgment against Butler, and Whaley collected the amount owed on the note, as well as the costs of previous summonses and fees of the constable and witnesses. *Id.*

81. *Id.* at 664. The New York Supreme Court, Appellate Division, reviewing the trial court's jury instructions, stated that:

> The court charged the jury, that if they believed that [the plaintiff] *Grant* was nonsuited by the justice, or that the cause was discontinued before him, the subsequent proceedings were . . . void for want of jurisdiction; and the receipt of any money from *Butler*, as fees upon a judgment, would be extortion, if they believed [Whaley] acted through corrupt motives.

Id. at 662.

On appeal, the New York Supreme Court, Appellate Division, indicated that the controlling question with regard to extortion under color of office was whether Justice Whaley took the fee knowing that he was not entitled to the money.[82] Thus, a mistaken belief by Justice Whaley that he was entitled to the money would not support a conviction for extortion under color of office. Rather, a corrupt taking was necessary.[83] Since questions of intent are typically decided by the trier of fact, the extortion conviction was affirmed by the higher court[84] after the jury at the trial level had found Whaley's intent to be corrupt.[85]

In addition to the allusion to *Whaley*, the Field Code referred to the official comment which followed the section on larceny.[86] The larceny comment distinguished between robbery, which was defined as "a taking of property from another against his consent,"[87] and extortion, which was also defined as a taking, but one in which consent of the injured party was induced by threats or under pretense of office.[88] Consistent with this characterization of extortion, the court in *Whaley* ruled that the Justice had collected the money under false pretense of entitlement by means of his office.[89] Thus, the application of narrow common law principles in *Whaley*,[90] coupled with the distinction between robbery and extortion found in the Field Code's official comment to the section on larceny, indicate that early

82. *Id.* The appellate court noted that "if [the jury] believed the defendant acted without corrupt or dishonest motives, supposing that he had a right to proceed as he had done, it would be their duty to acquit him." *Id.*

83. *Id.* *See supra* notes 67-68 and accompanying text for references to common law cases on corrupt intent.

84. *Whaley*, 6 Cow. at 662. The New York Supreme Court, Appellate Division, concluded that "[t]he jury . . . found . . . that [Justice Whaley] received and demanded the money by color of his office, and with the corrupt intent charged in the indictment. These facts being proved, the offence was complete." *Id.* at 664.

85. *Id.* The court explained that "[t]he questions of fact and intent, were fairly submitted to the jury. It was their province to judge of both." *Id.*

86. *See* Lindgren, *supra* note 2, at 893 n.480 (citing FIELD CODE, *supra* note 74, § 613 cmt.). According to Professor Lindgren, this section of the FIELD CODE referred to the official comment which followed § 584 on larceny. In relevant part, the official comment after § 584 stated:

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

See Lindgren, *supra* note 2, at 893 n.480 (quoting FIELD CODE *supra* note 74, § 584 cmt.).

87. *See* Lindgren, *supra* note 2, at 893 n.480 (quoting FIELD CODE, *supra* note 74, § 584 cmt.).

88. *Id.*

89. *See* People v. Whaley, 6 Cow. 661, 662-63 (N.Y. Sup. Ct. 1827).

90. *See supra* notes 78-85 and accompanying text.

New York law on extortion under color of office merely covered cases involving false claims of entitlement under pretense of office.[91]

In 1881, the New York Legislature adopted an amended version of the Field Code, which included a section known as the Penal Code of 1881.[92] Subsequently, in 1892, the case of *People v. Barondess*[93] presented the New York Court of Appeals[94] with its first opportunity to interpret the new extortion statute in the Penal Code.

In *People v. Barondess*, the New York Court of Appeals reinstated a labor leader's extortion conviction,[95] following the Supreme Court's initial reversal of his conviction.[96] The Court of Appeals held that the labor leader's demand for money in exchange for the striking employees' return to work was, in fact, illegal.[97] The alleged victim was a cloak manufacturing firm in New York City named Popkin & Marks,[98] whose employees had quit work because of dissatisfaction with their wages. The employees subsequently agreed to return to work, but did so on a day-to-day basis rather than under contract.[99] One morning, however, the employees did not return as expected. Instead, Barondess approached the firm, accompanied by several employees, and indicated that the employees would not return until the firm paid him five hundred dollars. Ultimately, the firm gave Barondess one hundred dollars, and the employees returned to work.[100] Barondess was subsequently convicted for extortion.

On the initial appeal, the New York Supreme Court viewed Barondess' actions not as the illegal receipt of a fee under color of office, but rather as an explicit threat of economic harm in order to obtain money from the firm.[101]

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91. *See generally* Lindgren, *supra* note 2, at 894-95.

92. *See* United States v. Mazzei, 521 F.2d 639, 654 (3d Cir.) (noting that the Field Code "served as a prototype for a new penal statute, the Penal Code of 1881"), *cert. denied*, 423 U.S. 1014 (1975).

93. 31 N.E. 240 (N.Y. 1892).

94. The New York Court of Appeals is the state's highest court. The New York Supreme Court is the state's intermediate appellate court.

95. *See Barondess*, 31 N.E. at 241-42.

96. *See* People v. Barondess, 16 N.Y.S. 436, 437 (App. Div. 1891), *rev'd*, 31 N.E. 240 (N.Y. 1892). Referring to the threats made by Barondess, the New York Supreme Court noted that "[i]n the case at bar the elements of violence, intimidation, and physical injury to tangible property are entirely wanting. The threats made were not threats of violence . . . . Was [there] a threat to do an unlawful injury to the complainants' property? The answer . . . must be in the negative." *Id.*

97. *See Barondess*, 31 N.E. at 241-42.

98. *Id.* at 240.

99. *Id.*

100. *Id.* at 241.

101. *See* People v. Barondess, 16 N.Y.S. 436, 436 (App. Div. 1891), *rev'd*, 31 N.E. 240 (N.Y. 1892). The New York Supreme Court explained that "[t]he main question in this case is whether the obtaining of money from another, with his consent, induced by a threat to injure

The Supreme Court ruled that Barondess' demand for money was not illegal,[102] and reversed his conviction for extortion.

The Court of Appeals adopted a broader construction of "property," which included the "business" of Popkin & Marks.[103] As a result, the New York Court of Appeals reinstated Barondess' conviction for extortion, thereby reversing the Supreme Court.

Despite the high court's reversal of the intermediate appellate court's holding in *Barondess*, the Supreme Court's discussion of common law extortion doctrine was not disturbed by the Court of Appeals. The Supreme Court recognized that the New York Penal Code expanded the scope of common law extortion.[104] At common law, the court noted, an individual who obtained money by the use of force or fear was guilty, not of extortion, but of robbery.[105] According to the court, the New York Penal Law brought the common law crime of extortion and a form of robbery under one heading because in both cases the payor consented to the payment of money as a result of the extortionist's coercion; traditional robbery involved no consent on the part of the victim.[106]

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the business of the individual threatened, by persuading his employe[e]s to absent themselves from work, is 'extortion.' " *Id.*

102. *Id.* at 439. The Supreme Court in *Barondess* refused to treat the employees' labor as property of the firm. Rather, the court reversed the conviction after holding that (1) the legal rights of the employees included the right to withhold their labor for higher wages, (2) the legal rights of Barondess included the right to represent the employees in a labor dispute, and (3) Barondess' actions with respect to the firm involved no violence, intimidation, or interference. *See id.* at 437-39. While analyzing the extortion statute, the court noted that an illegal demand by Barondess or one that involved force or unwarranted intimidation against Popkin & Marks would have amounted to extortion. *Id.* at 439.

The sections of the New York Penal Code cited by the Supreme Court in the *Barondess* case include § 552 ("Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."); § 553 ("Fear, such as will constitute extortion, may be induced by a threat: 1. To do an unlawful injury to the person or property of the individual threatened . . . ."); § 557 ("A public officer who asks, or receives, or agrees to receive, a fee or other compensation for his official service, either[:] In excess of the fee or compensation allowed to him by statute therefor; or Where no fee or compensation is allowed to him by statute therefor; Commits extortion . . . ."). *Id.* at 436-38.

103. *See Barondess*, 31 N.E. at 241-42. Specifically, the Court of Appeals stated that the extortion statute in the New York Penal Code:

> does not require the narrow construction insisted upon by the defendant's counsel, for it has not been, either by its language or reasonable import, confined to the case of an actual injury to some specific article or property, but it has been made to include the threat to do any unlawful injury to property; and business is property, as much as the articles themselves which are included in its transactions.

Id. at 241. *Contra supra* note 102.

104. *See Barondess*, 16 N.Y.S. at 438.

105. *Id.*; *cf.* FIELD CODE, *supra* note 74, § 584 cmt. (distinguishing between extortion and robbery based on the consent of the victim).

106. The New York Supreme Court noted in *Barondess* that:

Significantly, a number of New York cases involving extortion from the late-nineteenth and early-twentieth century presented facts which today would clearly fall within the ambit of "official right" extortion under the Hobbs Act. Most of these cases involved labor leaders who demanded money from employers under threat of prolonged labor strikes or contractors who demanded illegal fees to commence contract work.[107] The New York courts, however, did not apply extortion under color of official right in such situations. Rather, the courts employed a rule analogous to contemporary coercive extortion in situations which involved the threat of violence or illegal economic intimidation.[108] In the absence of force or violence, the courts still imposed criminal liability for coercive extortion if reasonable fear of future economic loss arose from the illegal threat of a labor strike or boycott, as was the case in *Barondess*.

In 1946, Congress enacted the Hobbs Act,[109] a federal extortion statute comparable to the New York law. Over the next twenty-five years, the federal courts expanded the scope of the Hobbs Act significantly. Once the Third Circuit recognized extortion under color of official right as a crime

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> [t]he obtaining of money by force or fear does not . . . seem to have been extortion . . . at common law . . . . It was robbery, at common law, to extort money under the threat of charging one with an unnatural crime . . . .
>
> Section 552 of the [New York] Penal Code is in the alternative, treating extortion by force and fear as one thing, and extortion by official action as another. These two methods of extortion are separately defined in subsequent sections, but it is apparent from the language of the section providing the penalty for extortion by force or fear (section 554) that the latter is but a supplement, under the name of 'extortion,' to robbery in the first, second, and third degrees. This section (554) provides for such punishment only when the money or other property has been extorted by force or fear '*under circumstances not amounting to robbery*;' in other words, when the money or other property has been obtained 'with the consent' of the complainant, and not 'against his will,' for really the main distinction between robbery in some degree and this form of extortion lies just there.

Barondess, 16 N.Y.S. at 438 (emphasis added).

107. *See, e.g.*, People v. Sheridan, 174 N.Y.S. 327, 329 (App. Div. 1919) (affirming the conviction of an elevator inspector of extortion for threatening disclosure of faulty elevator unless landlord made payments); People *ex rel.* Short v. Warden of City Prison, 130 N.Y.S. 698, 700-01 (App. Div. 1911) (affirming the guilty verdict of a prison warden for extortion after the warden secured a position for a painter and then threatened discharge unless he was paid a portion of the painter's weekly wages), *aff'd*, 99 N.E. 1116 (N.Y. 1912); People v. Weinseimer, 102 N.Y.S. 579, 580 (App. Div.) (upholding the extortion conviction of the president of a plumber's union for refusing commencement of contract work unless he was paid a sum of money by the contractor), *aff'd*, 83 N.E. 1129 (N.Y. 1907); People v. Hughes, 32 N.E. 1105 (N.Y. 1893) (affirming the guilty verdict of extortion for a labor leader who threatened to compel retailers to cease making purchases from a manufacturer unless the manufacturer paid him a sum of money).

108. *See supra* notes 102-03 and accompanying text.

109. *See supra* note 6.

absent coercion by the official,[110] the historical practice of soliciting official campaign contributions became suspect. The federal circuit courts split over the most appropriate means to address this issue.

C. Hobbs Act Extortion Under Color of Official Right: The Quid Pro Quo Dilemma

Hobbs Act extortion under color of official right applies where the victim's motivation to pay the recipient stems from the victim's perception of the recipient's power of public office.[111] Whether the public official has "actual" power to carry out a threat or favor is irrelevant as long as the victim reasonably believes that such authority exists.[112] A number of federal appellate courts have concluded, however, that a literal application of this rule would bring all political contributions within the scope of the Hobbs Act.[113] Consequently, these circuit courts require proof that the public official received money "in exchange for *specific* promises to do or refrain from doing *specific* things."[114] Accordingly, a majority of circuit courts have held that the government must demonstrate the existence of a quid pro quo[115] in order to convict an elected public official of extortion under color of official right for solicitation or acceptance of campaign contributions.

Private contributions have played a vital role in political campaigns for public office throughout the history of the United States.[116] The United States Supreme Court has recognized the important function of financial contributions in expressing support for candidates and political viewpoints.[117] Furthermore, restricting political contributions could adversely impact the free and open exchange of ideas in the political arena, particu-

110. *See* United States v. Kenny, 462 F.2d 1205 (3d. Cir.), *cert. denied*, 409 U.S. 914 (1972). *See supra* notes 9-12 and accompanying text.

111. *See, e.g.*, United States v. Mazzei, 521 F.2d 639, 643 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975); United States v. Salvitti, 464 F. Supp. 611, 616 (E.D. Pa. 1979).

112. *See* United States v. Blackwood, 768 F.2d 131, 135-36 (7th Cir.), *cert. denied*, 474 U.S. 1020 (1985); United States v. Bibby, 752 F.2d 1116, 1127-28 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986); United States v. Sorrow, 732 F.2d 176, 180 (11th Cir. 1984); United States v. Robinson, 700 F.2d 205, 209 (5th Cir. 1983).

113. *See infra* notes 119-40 and accompanying text.

114. *Bibby*, 752 F.2d at 1127 n.1.

115. *See supra* note 16 and accompanying text for definitions of "quid pro quo."

116. *See generally* CONGRESSIONAL QUARTERLY, CONGRESSIONAL CAMPAIGN FINANCES: HISTORY, FACTS, AND CONTROVERSY (1992); GEORGE THAYER, WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT (1973).

117. *See, e.g.*, Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 300 (1981) (striking down a city ordinance which limited political expenditures because it operated as a restraint on freedom of expression and association); Buckley v. Valeo, 424 U.S. 1, 20-23 (1976) (per curiam) (noting the symbolic and practical importance of political contributions to public discourse).

larly if the limitations prevent candidates and political groups from acquiring the funds necessary to engage in broad public dialogue.[118] These concerns prompted the majority of federal circuit courts to adopt a quid pro quo requirement in order to prove official right extortion involving the solicitation or acceptance of campaign contributions by public officials.

1. Majority View: A Quid Pro Quo Requirement

A majority of federal circuits require the government to show a quid pro quo by the official in order to convict him for extortion under color of official right for the illegal receipt or solicitation of campaign contributions. The Fifth Circuit first adopted a quid pro quo requirement in *United States v. Dozier*.[119] The court held that the adoption of a quid pro quo requirement for Hobbs Act prosecutions of elected officials would not discourage legitimate requests for public contributions.[120]

Dozier was elected Commissioner of Agriculture for the state of Louisiana in December 1975.[121] A federal grand jury returned a five-count indictment against Dozier in January 1980, identifying eleven separate transactions allegedly in violation of the Hobbs Act.[122] Dozier was subsequently convicted on four of the five counts, and sentenced to serve two consecutive five-year terms of imprisonment.[123]

On appeal, Dozier maintained that his solicitations arose from the ordinary fundraising activities of a public official faced with the financial burdens of an impending election process.[124] The United States Court of Appeals for

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118. The Supreme Court has expressed grave concern over the potential effect which contribution limitations could have on public discourse, particularly in the context of political campaigns. For example, the Court in *Buckley* wrote that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

119. 672 F.2d 531, 537 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982).

120. *Id.* The court stated that "we remain unpersuaded that the Hobbs Act, as previously interpreted by this and other courts, discourages legitimate requests for political contributions." *Id.*

121. *Id.* at 535. Dozier's bid for reelection in December 1979 was unsuccessful, due primarily to significant publicity surrounding the federal investigation of his activities as commissioner. *Id.*

122. *Id.* Numerous solicitations of individuals and institutions with interests related to the Agriculture Commission provided the basis for the alleged Hobbs Act violations. *Id.*

123. *Id.* at 536. In addition to imprisonment, Dozier received fines totalling $25,000 and five years of probation. *Id.*

124. *Id.* Dozier particularly attacked the language used by the Fifth Circuit Court of Appeals in *United States v. Williams*, which affirmed a jury's conviction of an official because he "accepted the money and gratuities, knowing he was not entitled to them in the discharge of his lawful duties, and that payment was induced by his official position." United States v. Williams, 621 F.2d 123, 126 (5th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). The Court

the Fifth Circuit rejected Dozier's arguments, stating that it would rely on its own discretion to distinguish between a legitimate solicitation of political support and an extortionate demand under the veil of official power.[125] Although the appellate court recognized that a fine line often separates legitimate political solicitation from the sale of official favors, the court stressed the importance of discovering and penalizing extortionate activities under the guise of requesting political donations.[126] The Fifth Circuit concluded that Dozier's solicitation of political funds violated the Hobbs Act because he made the performance, or non-performance, of his official duties contingent upon the payment of money.[127] The Fifth Circuit accordingly affirmed Dozier's conviction for extortion.[128]

In 1985, the Sixth Circuit followed the example of the Fifth Circuit by adopting a quid pro quo requirement for the prosecution of Hobbs Act extortion under color of official right involving campaign contributions. The appellate court in *United States v. Bibby*[129] affirmed the conviction of a former Tennessee state senator and two former business executives for extortion arising out of a scheme to defraud the government.[130] The senator continuously held himself out as both knowledgeable on the issue of public bids and connected with the people who award state contracts.[131] The business executives arranged for payments to be made to the state senator in exchange for assurances that certain state computer contracts would be awarded to a particular company.[132] The appellate court recognized that the senator's office itself provided the motivation for the payments, but since the money was transferred under the auspice of campaign support, the government was required to show a quid pro quo by the senator to convict of extortion under color of official right.[133]

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refuted Dozier's argument, however, by pointing out that *Williams* did not address the problem of political fundraising. *See Dozier*, 672 F.2d at 536 n.1.

125. *Dozier*, 672 F.2d at 537. The court subsequently explained the essence of the "prohibited exchange": "Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, . . . a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act." *Id.*

126. *Id.*

127. *Id.* at 540. The Court proffered that "[a]t the very least, elected officials are, and have been, on notice that any public officer, elected or otherwise, who makes performance (or non-performance) of an official act contingent upon payment of a fee . . . is guilty of extortion 'under color of official right.'" *Id.*

128. *Id.* at 536.

129. 752 F.2d 1116 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986).

130. *Id.* at 1119.

131. *Id.* The senator also introduced the executives to other influential people in the state legislature, which ultimately led to additional contracts with state agencies. *Id.*

132. *Id.* at 1119-20.

133. The court noted that "the Hobbs Act proscribes . . . the taking of money by a public official in exchange for *specific* promises to do or refrain from doing *specific* things. In other

The Eleventh Circuit also adopted a quid pro quo requirement in order to prove extortion under the Hobbs Act by a public official for solicitation or acceptance of campaign contributions. In *United States v. Haimowitz*,[134] a jury convicted the defendants for attempted extortion under color of official right,[135] which arose out of a scheme to obtain a liquor license for Peter Abbott from the state of Florida.[136] The court of appeals reversed the verdict on the extortion counts, holding that the evidence was not sufficient to show that the state senator's demand for money was coupled with a promise by the senator to perform an act of official grace.[137] At trial, the evidence indicated that the defendants knew that Mr. Abbott was not qualified for the license.[138] The state based its charge of attempted extortion on Haimowitz' suggestion to Abbott that $1000 be given to Scarborough as a campaign contribution.[139] The court of appeals reversed the attempted extortion conviction since there was no proof that Scarborough's demand for a contribution was coupled with a promise to execute some favorable act in his official capacity. In short, there was no quid pro quo.

Despite the appearance of questionable behavior with respect to the exchange of money for political favors, the majority of jurisdictions require that a quid pro quo be shown to convict a public official of extorting cam-

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words, there must be a *quid pro quo*." *Id.* at 1127 n.1 (citations omitted). The court also upheld the guilty verdicts of the two business executives, despite their lack of actual influence in the awarding of state contracts. Their apparent access to influential legislators established "[r]easonable prospects" that the scheme would be successful. *Id.* at 1128.

134. 725 F.2d 1561 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984).

135. *Id.* at 1564-65. The relevant charges with respect to the Hobbs Act included Count Three, which charged that Haimowitz obstructed and attempted to obstruct interstate commerce by extortion in violation of 18 U.S.C. § 1951, and Count Five, which charged Haimowitz and Scarborough with obstruction and attempted obstruction of interstate commerce in violation of 18 U.S.C. § 1951. *Id.*

136. *Id.* at 1565. Harold Haimowitz was Peter Abbott's personal attorney. The other defendant convicted on the attempted extortion count was Dan Scarborough, former state senator and President Pro Tempore of the Florida Senate. *Id.*

137. *Id.* at 1573.

138. *Id.* Abbott admitted to previously defrauding from six to twelve banking institutions of between $300,000 and $750,000. *Id.* In addition, he had six larceny convictions, and admitted his participation in two Small Business Administration loan frauds, two arsons, narcotic sales, and numerous other bad acts. *Id.* Furthermore, in January 1981, Abbott pled guilty to interstate wire fraud. *Id.*

139. *Id.* at 1573 n.12. The issue was originally presented by Scarborough during a private meeting. At trial, the evidence consisted of the following taped conversation:

> Scarborough: I'm running for re-election by the way.
>
> Haimowitz: Wait a minute, we'll get into that later.
>
> Scarborough: No, no, no, I'll get into this now. I need a thousand dollars from you when I run, in the form of a company check.
>
> Abbott: No problem. I, you got it. . . .

Id.

paign contributions.[140] The standard in a minority of federal jurisdictions, however, is more lenient.

2. *Minority View: No Quid Pro Quo Requirement*

In a minority of circuits, the conviction of public officials for extortion under color of official right may be obtained without proof of a quid pro quo, even when campaign contributions are involved. For example, in *United States v. Trotta*,[141] the United States Court of Appeals for the Second Circuit reinstated a public official's indictment for extortion in the absence of an explicit promise amounting to misuse of office.[142] The court held that although a quid pro quo may be forthcoming in a Hobbs Act extortion case, it is not an essential element of the crime.[143]

Gerard Trotta, Commissioner of Public Works for the Town of Oyster Bay, Long Island, was indicted for allegedly demanding payments of political contributions to the local Republican Committee from the engineering firm Cosulich Associates.[144] Trotta, in his official capacity, executed public contracts with engineering firms on behalf of the Town of Oyster Bay and subsequently supervised the firms' performance.[145] Yet, neither agreements to provide official favors nor threats to impose official injury on the engineering firm accompanied Trotta's demands for political support.[146] The district court granted Trotta's motion to dismiss the indictment on the ground that it failed to allege with sufficient specificity all of the necessary facts comprising the offense charged, namely extortion under color of official right.[147] The court of appeals, however, indicated that a quid pro quo "is not an essential element of the crime."[148] Rather, the payment need only be motivated by the recipient's office, and the public official's acceptance of the payment must only be coupled with foreknowledge of its purpose to convict an official of extortion under color of official right.[149]

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140. *Id.* at 1573. Other cases upholding Hobbs Act convictions of elected officials which involve quid pro quo exchanges include United States v. Cerilli, 603 F.2d 415, 425-26 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); United States v. Mazzei, 521 F.2d 639, 646 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975).

141. 525 F.2d 1096 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

142. *Id.* at 1101. The Court indicated "that the indictment is sufficient on its face." *Id.*

143. *Id.* at 1100. The Court of Appeals stated that "a *quid pro quo* may, of course, be forthcoming in an extortion case, or it may not. In either event it is not an essential element of the crime." *Id.*

144. *Id.* at 1097-98.

145. *Id.* at 1098.

146. *Id.*

147. *Id.*

148. *Id.* at 1100.

149. *Id.* (referring to United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)).

The Fourth Circuit, initially addressing the question in *United States v. Barber*,[150] aligned itself with the Second Circuit on the quid pro quo issue. The court in *Barber* upheld the defendant's conviction for extortion despite the absence of any explicit quid pro quo by the official. Barber, the former commissioner of the West Virginia Alcoholic Beverage Control Commission (ABCC), used his position to obtain free liquor for himself and other high officials of the state.[151] He was convicted of extortion under color of official right.[152]

The government argued during trial that the liquor companies' fears of retaliation by the defendant public official induced the companies, which were within the official's regulatory control, to continue providing the official with services which would have otherwise ceased.[153] On appeal, Barber denied that he solicited the liquor companies for funds, and instead argued that the bottles of liquor he received from the companies constituted gifts to various state officials, including himself.[154]

The Fourth Circuit spurned Barber's arguments, noting that the distribution of large quantities of free liquor ran "altogether contrary to custom."[155] Rather than characterize the liquor that Barber had received as a gift, the court of appeals interpreted the liquor companies' actions as the natural response to Barber's implicit demand for payment with bottles of liquor in exchange for his withholding of punitive measures.[156] The court recognized that if it read the Hobbs Act too broadly, it could effectively prohibit elected officials from personally soliciting campaign contributions.[157] Nonetheless, the Fourth Circuit affirmed Barber's extortion convictions,[158] concluding that legitimate consideration of political solicitations did not "apply to si-

150. 668 F.2d 778 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982).

151. *Id.* at 780-81. ABCC legally monopolized alcoholic beverage sales in West Virginia. Under state law, representatives of the liquor companies could withdraw bottles from the state's warehouse for business promotional purposes, after which the state would bill the liquor company for the reimbursement cost of the bottles. In the defendant's case, each time he withdrew liquor from the state warehouse, he would bill a liquor company for the cost of the bottles, and process the authorization papers after-the-fact. *Id.* at 781.

152. *Id.* at 784.

153. *Id.* at 783-84. The Court noted that "[t]he giving of free liquor in substantial quantities is altogether contrary to custom, unless there is a reason, *i.e.*, an expectation of a *quid pro quo*." *Id.*

154. *Id.* at 784.

155. *Id.*

156. *Id.* The majority noted that "[w]hen the 'donee' is the state's alcoholic beverage chief, the conclusion is irresistible that absent a convincing explanation, the 'gift' was not a gift, but, rather, was in return for favors or for the withholding of punitive measures." *Id.*

157. *Id.* at 783. The court stated that "if read literally the *Hedman* language [describing the Hobbs Act] could arguably prohibit a public official from personally soliciting a campaign contribution." *Id.*

158. *Id.* at 784.

phoning off alcoholic beverages and affording free access to them by the Commissioner."[159]

II. *McCORMICK v. UNITED STATES*

The Fourth Circuit revisited the quid pro quo issue in *United States v. McCormick*.[160] The United States Court of Appeals for the Fourth Circuit articulated a standard by which legitimate campaign contributions could be distinguished from monies extorted by the misuse of political office.[161] Applying a seven-point test,[162] the court concluded that the monies received by McCormick were never intended as campaign contributions.[163] In dicta, however, the majority rejected the blanket requirement of a quid pro quo in order to convict a public official of extortion under the Hobbs Act for the receipt of campaign contributions.[164]

In *McCormick v. United States*,[165] the Supreme Court reversed the court of appeals on the quid pro quo issue. Emphasizing the historical and practical role that political contributions have played in American electoral politics,[166] the Supreme Court refused to limit the right of a public official to solicit and accept campaign contributions by bringing such activity within the scope of the Hobbs Act.[167] Instead, the majority attached to the Hobbs

159. *Id.* at 783 n.2. The court stated that "asking for a campaign contribution does not typically involve falsification of documents such as took place here. The very fact of such shenanigans bears on the extreme unlikelihood that the liquor companies regarded what they were doing as voluntary rather than compelled." *Id.*

160. 896 F.2d 61 (4th Cir. 1990), *rev'd*, 111 S. Ct. 1807 (1991).

161. *McCormick*, 896 F.2d at 65.

162. *Id.* The appellate court formulated a seven-point test to determine whether the money constituted a "legitimate" campaign contribution. The seven factors included:

> (1) whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.

Id. at 66.

163. *Id.* at 66-67. The court of appeals judged that "the evidence supports the conclusion that the money was never intended by any of the parties to be a campaign contribution." *Id.* at 67.

164. *Id.* at 66. The Court noted its "agree[ment] with the Second Circuit['s holding in *Trotta*] that alleged 'political contributions' may violate the Hobbs Act in more than one way." *Id.*

165. 111 S. Ct. 1807 (1991).

166. *Id.* at 1816-17.

167. *Id.* at 1815-17. The majority expressed concern that:

> [t]o hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is una-

Act a quid pro quo evidentiary standard to be applied in the narrow context of prosecutions of elected public officials accused of extorting campaign funds.[168] Thus, an elected public official extorts campaign contributions in violation of the Hobbs Act only when the official asserts explicitly that the terms of his promise will control his official conduct.[169]

The test for "legitimacy" enunciated by the appellate court posed the principal concern for the Supreme Court.[170] Noting that candidates for public office must finance their campaigns through private contributions and expenditures, the majority characterized the appellate court's test as overbroad.[171] The Court reasoned that a political candidate's legitimate solicitation of funds might result in a conclusion of illegitimacy under all seven factors of the test, despite the fact that such solicitations have long been considered conduct which is both lawful and necessary for the pursuit of public office in our political system.[172]

The majority also expressed concern over the breadth of the trial court's jury instructions.[173] The jury could have construed the instructions to mean that a contribution was voluntary only if the donor had made the contribu-

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voidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id. at 1816.

168. *Id.* at 1814. The Court stated that "with respect to . . . payments made to nonelected officials or to payments made to elected officials that are properly determined not to be campaign contributions[,] . . . we do not consider how the 'under color of official right' phrase is to be interpreted and applied." *Id. See also id.* at 1817 n.10. The Court explicitly declined to "decide whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value." *Id.*

169. *Id.* at 1816.

170. *Id.* at 1814-15. The Court explained: "[W]e cannot accept the Court of Appeals' approach to distinguishing between legal and illegal campaign contributions." *Id.* at 1815.

171. *Id.* at 1815-16. The Court noted that the Department of Justice Manual also recognized the danger of Hobbs Act overreaching: "[C]ampaign contributions will not be authorized as the subject of a Hobbs Act prosecution unless they can be proven to have been given in return for the performance of or abstaining from an official act; otherwise any campaign contribution might constitute a violation." *Id.* at 1817 (quoting 9 DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (P-H) § 9-85A.306, at 9-1938.134 (Supp. 1988-2)).

172. *Id.* at 1816.

173. *Id.* at 1817. The Court observed that:

> The instructions given here are not a model of clarity . . . . [U]nder the instructions a contribution was not "voluntary" if given with *any* expectation of benefit; and as we read the instructions, taken as a whole, the jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made by the doctors with the expectation that McCormick's official action would be influenced for their benefit and if McCormick knew that the payment was made with that expectation. It may be that the jury found that none of the payments was a campaign contribution, but it is mere speculation that the jury convicted on this basis rather than on the impermissible basis that even though the first payment was such a contribution, McCormick's receipt of it was a violation of the Hobbs Act. *Id.*

tion with no expectation of benefit.[174] The Court recognized that most if not all campaign contributions are given with a general expectation of benefit.[175] The Court believed that the trial court's instructions, especially when viewed in light of the appellate court's "legitimacy" test, effectively brought all political contributions within the scope of the Hobbs Act.[176] To protect against the prohibition of legitimate fundraising activities, the majority ruled that a specific quid pro quo, rather than a general expectation of benefit, was necessary to prove a Hobbs Act violation when the defendant claimed that the money was a campaign contribution.[177]

Justice Scalia, in a concurring opinion, examined the statutory text of the Hobbs Act with greater scrutiny.[178] Noting that the Hobbs Act "contains not even a colorable allusion to campaign contributions or *quid pro quos*[,]"[179] Justice Scalia hesitantly adopted the majority's conclusion.[180] Placing particular emphasis on the appropriate context for application of the quid pro quo standard, Justice Scalia argued that the requirement merely established the evidentiary threshold necessary to prove that an elected official committed extortion under color of official right in violation of the Hobbs Act for accepting or soliciting campaign contributions in return for an explicit promise to perform or not to perform official acts.[181] Only in this

174. *Id.* at 1817-18. The majority noted: "The jury might well have found that the payments were campaign contributions but not voluntary because they were given with an expectation of benefit." *Id.* at 1817.

175. *Id.* at 1816. The Court explained:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done.

Id.

176. *Id.*

177. *Id.* Justice White indicated that:

> The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.

Id.

178. *Id.* at 1818-19 (Scalia, J., concurring).

179. *Id.* at 1818.

180. *Id.* Justice Scalia explained his concern: "I find it unusual and unsettling . . . to make [the] . . . distinction [between legitimate campaign contributions and illegal payments in return for specific favors] without any hint of a justification in the statutory text." *Id.*

181. *Id.* Justice Scalia observed that:

> If the prohibition of the Hobbs Act . . . against receipt of money 'under color of official right' includes receipt of money from a private source for the performance of official duties, that ambiguously described crime assuredly need not, and . . . should not, be interpreted to cover campaign contributions with anticipation of favorable

limited context would Justice Scalia employ the quid pro quo standard for the same reasons that Justice White enumerated in the majority opinion.[182]

In his concurring opinion, Justice Scalia entertained an alternative interpretation for the phrase "under color of official right" which would render the Court's distinction between elected and nonelected officials obsolete.[183] If the Court translated the word "right" in the phrase "color of official right" to mean "entitlement," then both elected and nonelected officials would be bound by the same rule.[184] Extortion under color of official right, by this definition, would require some false assertion of official entitlement to the property.[185] Since neither party in *McCormick* briefed nor argued this issue, Justice Scalia withheld adoption of this interpretation in order to carefully consider its historical accuracy in the framework of a future case.[186]

The dissenting opinion focused on two issues: Rule 30 of the Federal Rules of Criminal Procedure (Rule 30), and the evidentiary standard which governs Hobbs Act prosecutions.[187] Justice Stevens, who wrote the dissenting opinion, opposed the Court's reversal of McCormick's conviction, as well as the Court's treatment of the trial judge's jury instructions.[188] Rule 30 requires that the petitioning party on appeal must have preserved, at trial, a specific objection to the instructions in question as a condition precedent to appellate consideration of the issue.[189] The trial record showed that McCormick failed to seek an instruction specifying that proof of an explicit quid pro quo was necessary to convict an elected official under the Hobbs Act for

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future action, as opposed to campaign contributions in exchange for an explicit promise of favorable future action.

Id. (citation omitted).

182. *Id.*; see also *supra* notes 166-69 and accompanying text, for Justice White's rationale in the majority opinion.

183. *McCormick*, 111 S. Ct. at 1818. Justice Scalia noted that "there is another interpretation of § 1951, contrary to the one that has been the assumption of argument here, that would render the distinction unnecessary." *Id.*

184. *Id.* at 1819. This interpretation would limit the application of Hobbs Act prosecutions for extortion under color of official right to officials, whether elected or appointed, who falsely claim entitlement as a result of their office to the property or money in question. *Id.* Thus, the question of protecting legitimate political solicitation of campaign funds would be rendered moot.

185. *Id.*

186. *Id.* at 1820. *See* Evans v. United States, 112 S. Ct. 1881, 1894-1904 (1992)(Thomas, J., dissenting) (urging adoption of the "color of official right" interpretation proposed by Justice Scalia in *McCormick*).

187. *McCormick*, 111 S. Ct. at 1820-25 (Stevens, J., dissenting).

188. *Id.* at 1820-21, 1825.

189. *Id.* at 1820. Rule 30 provides, in relevant part: "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." FED. R. CRIM. P. 30.

extorting a campaign contribution.[190] Thus, the dissent argued that McCormick's conviction should have been affirmed.[191] In addition, the dissent challenged the majority's premise that absent a strict evidentiary quid pro quo requirement, the Hobbs Act would subsume legitimate campaign contributions as extortionate payments.[192] The dissent argued that circumstantial evidence should suffice to support a jury's determination that the money served as an illegitimate payment for official acts rather than as a contribution for general support.[193] Otherwise, absent clear proof as to the conduct which a contributor expects the legislator to take, the mere demand for, and payment of, campaign contributions would not constitute extortion.

III. Political Solicitation Versus Criminal Extortion: Striking the Balance

The quid pro quo requirement adopted in *McCormick* is valuable because it preserves the legitimacy of political fundraising.[194] Absent such a requirement, the process of financing private political campaigns, a tradition in this country since its inception, would become chaotic. On the other hand, imposition of a strict evidentiary standard in the prosecution of public officials for Hobbs Act extortion under color of official right in all contexts would seriously curtail the effectiveness of the Hobbs Act as a tool for fighting public corruption.[195] Thus, a balance should be struck which respects legitimate political fundraising activity without destroying the effectiveness of Hobbs Act prosecutions.

A. Intent: The Controlling Issue

The overriding policy concern behind the quid pro quo requirement is protecting conduct that is lawful and necessary for the execution of political campaigns financed by private funding sources.[196] A quid pro quo require-

190. *McCormick*, 111 S. Ct. at 1815 n.9. The majority recognized that McCormick sought no such instruction at trial, and that McCormick's counsel even stated at one point that no such requirement existed. *Id.* Nonetheless, the court of appeals entertained complete arguments on the issue and presented a ruling. *Id.* The issue was fully briefed and argued before the Supreme Court, as well. *Id.* The Court, therefore, concluded that the issue was "fairly subsumed in the questions presented here." *Id.*

191. *Id.* at 1825 (Stevens, J., dissenting).

192. *Id.* at 1820-21.

193. *Id.* at 1821 (stating that "[s]ubtle extortion is just as wrongful—and probably much more common—than the kind of express understanding that the Court's opinion seems to require").

194. *See supra* notes 175, 177, 181; *see also infra* note 196.

195. *See infra* notes 206-11 and accompanying text.

196. The Court explained in *McCormick* that:

> Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constitu-

ment, however, presents a potential obstacle to the broad application of the Hobbs Act which federal prosecutors have enjoyed since *Kenny*.[197] The higher evidentiary standard risks manipulation by a shrewd political operative who explicitly and publicly characterizes his illegal solicitation of money as a campaign contribution. Despite the payor's knowledge that performance or non-performance of the official's duties is contingent upon payment of the money, the public official would be shielded from a Hobbs Act indictment absent an explicit quid pro quo.[198]

The risk of manipulation by a calculating politician, however, is tempered by the Court's emphasis on the issue of "intent" as a primary factor in a jury's determination of whether particular funds should be treated as a campaign contribution.[199] "Intent" is a question for the trier of fact,[200] which includes the issue of whether the candidate and payor intended certain monies to be campaign contributions.[201] Thus, before a trial judge decides that a quid pro quo instruction is required by *McCormick*, the jury must first determine whether the money in question was intended by the parties as a campaign contribution.[202] That the candidate explicitly misrepresents the purpose of the funds will not alleviate the jury's burden to make an independent determination of the payment's true purpose.[203] If the jury determines that the payor and candidate never intended the money as a general campaign contribution, then the quid pro quo requirement is not triggered by *McCormick* to prove extortion under color of official right.[204] In this

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> ents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant when making it a crime to obtain property from another, with his consent, 'under color of official right.' To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been since the beginning of the Nation.

Id. at 1816.

197. *See supra* notes 9-12 and accompanying text.

198. *See supra* notes 177, 193 and accompanying text.

199. *McCormick* 111 S. Ct. at 1815-17.

200. *Id.* at 1815 (referring to Cheek v. United States, 498 U.S. 192 (1991) (asserting that matters of intent are questions for the trier of fact)).

201. *Id.* The Court indicated that "in a case like this it is proper to inquire whether payments made to an elected official are in fact campaign contributions, and . . . that the intention of the parties is a relevant consideration in pursuing this inquiry." *Id.*

202. *Id.* (noting the Supreme Court's agreement with the court of appeals on the issue of intent).

203. *Id.* at 1815-16. The Court noted that "[i]t goes without saying that matters of intent are for the jury to consider." *Id.* at 1815.

204. *McCormick* did not explicitly decide whether a quid pro quo requirement exists in contexts other than campaign contributions, "such as when an elected official receives gifts, meals, travel expenses, or other items of value." *Id.* at 1817 n.10.

instance, the primary concern of the quid pro quo requirement, which is the protection of legitimate political fundraising activity, is not implicated.[205]

In general, the judicial cost of a strict evidentiary standard such as the quid pro quo requirement is the acceptance of some activity which, under a more lenient evidentiary standard, would provide a sufficient basis for conviction.[206] In the case of Hobbs Act extortion under color of official right for the solicitation of campaign funds, the importance of amassing monies for broad-based political campaigns outweighs the burden on society caused by the few cases in which the government will be unable to show a quid pro quo.[207] A more lenient approach would infuse a high degree of uncertainty into the requisite political exercise of soliciting campaign funds.[208] If the Court had adopted a more ambiguous standard of proof in *McCormick*, local and state candidates for elective office might have responded by hiring surrogates to solicit private donations in order to ensure compliance with the Hobbs Act. The legality of such solicitations would be difficult to police, since the candidates would not directly express the terms of any illegal conditions linked to the receipt of campaign funds. Thus, the universal employment of surrogates would provide a layer of deniability for the benefit of "dirty" politicians.[209]

B. Elected Officials: Narrow Application of the Quid Pro Quo Standard

The quid pro quo requirement should be applied only in the very narrow context of elected officials accused of extorting campaign funds through misuse of their official duties. Non-elected public officials do not need to solicit political funds because they are not required to seek reelection in order to maintain their public office. Since the primary purpose of the quid pro quo requirement is to protect legitimate solicitation of campaign funds, ap-

205. *Id.* at 1816.

206. *Cf.* In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (defending the strict evidentiary standard in criminal trials by noting that the "social disutility of convicting an innocent man . . . [is greater than] the disutility of acquitting someone who is guilty"); Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (stating that due process requires a strict evidentiary standard in criminal trials because the defendant has a significant interest in maintaining his liberty and freedom).

207. *See supra* notes 117-18 and accompanying text.

208. *See supra* notes 167, 175, 181 and accompanying text; *see also supra* note 193 and accompanying text for a description of the vague approach encouraged by Justice Stevens' dissent in *McCormick*.

209. *But see* Letter from David Eisenberg, former Assistant United States Attorney for the Eastern District of New York and for the District of Columbia, to Scott B. Gilly, Editor-in-Chief, *Catholic University Law Review* (Jan. 26, 1993) (on file with the *Catholic University Law Review*) (arguing that the hiring of surrogates by candidates for public office to solicit private donations will merely inject the concept of conspiracy, 18 U.S.C. § 371 (1988), or aiding and abetting, 18 U.S.C. § 2 (1988), into the prosecution).

pointed public officials should not be entitled to receive a quid pro quo jury instruction. A non-elected public official who accepts a gift of value ought to be convicted for extortion under color of official right if it can be shown at trial that the money or property was received by the official with the knowledge that it was given for the purpose of influencing his official actions.[210] Therefore, an explicit quid pro quo should not be required, but only circumstantial evidence indicating the official's awareness of the purpose for the gift.

C. False Pretense Rule: Unnecessarily Narrow

A public official's misuse of office for personal financial gain falls within the contemporary scope of extortion under color of official right.[211] If the Supreme Court were to limit application of the Hobbs Act, as Justice Scalia proposed, to those cases where an official wrongfully asserts his entitlement to the money for performance of official acts,[212] then any official could escape prosecution under the Hobbs Act by merely acknowledging the absence of his entitlement to the money.[213] Limiting the application of the Hobbs Act to such "false pretense" scenarios would seriously curtail its value as a weapon against public corruption.[214] Hobbs Act prosecutions for extortion under color of official right should include false pretense scenarios, as well as a public official's demand for payment in return for the exercise of his official duties.[215] It is the latter situation which likely provides the most frequent abuse of public office, and thus leads to the most frequent application of the Hobbs Act extortion statute. As a result, the Hobbs Act should not be lim-

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210. *See, e.g.*, United States v. Dozier, 672 F.2d 531, 537 (5th Cir. 1982) (stating that "[d]emands for money by an unelected official may constitute extortion *per se*; the latent power of office ordinarily is sufficient to taint such demands as coercive").

211. *See* Ruff, *supra* note 5, at 1186-93.

212. *See supra* notes 183-86 and accompanying text.

213. *See* Lindgren, *supra* note 2, at 895 (observing that a restriction on prosecutions for extortion "under color of official right" to "false pretense" scenarios allows public officials to avoid an extortion charge simply be admitting to the victim that the payoff was not really due).

214. *See* Brief for the United States at 20-21, McCormick v. United States, 896 F.2d 61 (No. 89-1918) (4th Cir. 1990). The United States recognized that:

> The adoption of [the "false pretense" limitation] would lead to a radical narrowing of the statute's reach. Under [this construction], a public official would commit the crime of extortion under color of official right only if he claimed that a fee was required by law when in fact no such fee was due. Under this theory, a public official would not commit extortion under color of official right when demanding a payoff in exchange for performing his job, even if there was an explicit demand for payment or a clear promise of a *quid pro quo*, unless he falsely represented that the payment was legally required.

Id.

215. *See* Lindgren, *supra* note 2, at 905-09.

ited in its application to false pretense scenarios; otherwise, its value as a federal anti-corruption statute would be significantly undermined.

IV. CONCLUSION

The Hobbs Act provides the federal government with an effective means of fighting public corruption on the state and local levels. Although the language employed by the Hobbs Act to define extortion originated in the common law and evolved with the New York Penal Code, the need to protect legitimate political fundraising activities posed no conflict under early extortion statutes. Common law extortion doctrine did not contemplate political campaigns funded by private expenditures.

Unlike common law extortion or extortion under early New York law, the application of Hobbs Act extortion under color of official right in federal prosecutions must take account and allow for legitimate political fundraising activity. If the Act sweeps too broadly, conduct long considered lawful in a political campaign would suddenly assume the illegal character of extortion under color of official right. The United States Supreme Court reconciled the need to protect such activity with the desirability of prosecuting crooked officials in *McCormick v. United States* by requiring an explicit quid pro quo to prove extortion involving campaign contributions. Because the policy interests underlying the quid pro quo requirement do not extend to appointed public officials, the mere knowledge by an appointed official that his position is the motivation for the gift, brings the payment within the scope of the Hobbs Act. This distinction preserves the future effectiveness of Hobbs Act prosecutions for extortion under color of official right.

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