Kentucky Law Journal

Volume 83 | Issue 1 Article 5

1994

The Hobbs Act: Maintaining the Distinction Between a Bribe and a Gift

Medrith Lee Hager
University of Kentucky

NOTES

The Hobbs Act: Maintaining the Distinction Between a Bribe and a Gift

Federal prosecutors have recently engaged in a campaign against government corruption, placing special emphasis on bribery at the state and local level.[1] Usually the Hobbs Act,[2] a federal statute prohibiting extortion which affects interstate commerce, has provided the vehicle for these prosecutions.[3] In fact, the Act "has become a principal weapon in the government's arsenal against corruption in public affairs,"[4] and, in the words of one federal prosecutor, "may be viewed as enacting a special code of integrity for public officials."[5] However, such an expansive reading of the Hobbs Act poses serious problems. Congress enacted the Hobbs Act primarily to deal with labor racketeering and no mention of

---

[1] *See* Charles N. Whitaker, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1648-53 (1992) (proposing the adoption of a federal statute addressing bribery of state and local officials); *see also* U.S. Dept. of Justice, Report to Congress on the Activities and Operation of the Public Integrity Section for 1990 (showing that out of 968 indictments against public officials for corruption in 1990, 353 involved state and local officials).

[2] 18 U.S.C. § 1951 (1988). The statute 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." *Id.* § 1951(b)(2).

[3] *See* James P. Fleissner, Note, *Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right*, 52 U. CHI. L. REV. 1066, 1089 (1985) (arguing that only officials who induce payments commit extortion under color of official right, a position rejected by the Supreme Court in Evans v. United States, 112 S. Ct. 1881 (1992)).

[4] United States v. O'Grady, 742 F.2d 682, 684 (2d Cir. 1984) (finding inducement to be an element of extortion under the Hobbs Act), *criticized by* Evans v. United States, 112 S. Ct. 1881 (1992).

[5] Letter from Raymond J. Dearie, United States District Attorney for the Eastern District of New York, to the United States Court of Appeals for the Second Circuit (Jan. 21, 1983) [hereinafter Letter] (clarifying the government's response to questions raised at oral argument of *United States v. O'Grady*), *quoted in O'Grady*, 742 F.2d at 694.

bribery appears in the text of the statute or in its legislative history.[6] Further, the Act imposes fines of up to $10,000, or imprisonment of up to twenty years, or both;[7] penalties comparable to those Congress assigns to bribery but wholly unsuited to other lesser forms of corruption which the statute may arguably reach.[8] The statute addressing corruption of federal officials also demonstrates congressional intent to treat bribery and lesser gratuities violations as distinct crimes.[9] Thus, the indiscriminate application of the Act to all levels of government corruption may frustrate congressional intent to distinguish bribery from less culpable behavior.[10] Two recent Supreme Court cases, *McCormick v. United States*[11] and *Evans v. United States*,[12] have presented the lower courts with the opportunity to address these concerns by limiting the use of the Hobbs Act to crimes involving actual exchanges of government influence.

In *McCormick*, the Supreme Court announced that it would consider payments characterized as campaign contributions a violation of the Hobbs Act only if the elected official who received the donation had provided an explicit promise to undertake some specific exercise of official power on the donor's behalf.[13] Citing the need to protect the entrenched American system of campaign financing,[14] the Court used this quid pro quo requirement as a means of distinguishing between a legitimate campaign contribution and an illegal bribe. In *Evans*, the Court

---

[6] *See* S. REP. NO. 1516, 79th Cong., 2d Sess. 1-2 (1946) (committee report on Hobbs Act); H.R. REP. NO. 238, 79th Cong., 1st Sess. 1, 9 (1945) (committee report on the Hobbs Act); 92 CONG. REC. 7308 (1946) (Senate passage of the Hobbs Act without debate); 91 CONG. REC. 11,899-922 (1945) (House debate and passage of the Hobbs Act); *see also* Charles C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1175 (1977) (expressing concern about prosecutorial usurpation of legislative role).

[7] 18 U.S.C. § 1951(a) (1988). The mandatory federal sentencing guidelines will guarantee that penalties far less than the maximum will result in all but the most egregious cases. The maximum penalties assigned remain significant, however, in that they appear comparable to those assigned by Congress to the crime of bribery and differ notably from those provided for the unauthorized receipt of a gratuity.

[8] *See* Joseph M. Harary, Note, *Misapplication of the Hobbs Act to Bribery*, 85 COLUM. L. REV. 1340, 1346, 1351 (1985) (exploring congressional intent and the scope of the Hobbs Act).

[9] *Id.* at 1349.

[10] *Id.* at 1351.

[11] 500 U.S. 257, 273 (1991) (imposing a quid pro quo requirement on Hobbs Act prosecutions involving alleged campaign contributions).

[12] 112 S. Ct. 1881 (1992) (holding that a Hobbs Act offense does not require inducement on the part of the public official).

[13] McCormick, 500 U.S. at 273.

[14] *Id.*

seemed to move beyond the campaign financing justification and apply the same standard to all receipts of payments by government officials.[15] By holding that conviction under the Hobbs Act does not require proof that the official induced the payment, the Court brought the crime of bribery squarely within the Act's confines; however, the Court stated that it would not convict the official unless she received the payment in exchange for an official act.[16] Thus, according to some observers, "the ruling arguably nullified the application of the Hobbs Act to the passive receipt of gratuities. At the least, it left the door open for the lower courts to continue to refuse to apply the act in such cases."[17]

These two cases raise the question of whether a prosecutor, in order to obtain a conviction for extortion under color of official right, must prove an explicit promise on the part of a public official to perform some identifiable act in exchange for an otherwise illegal payment. In other words, is an explicit quid pro quo an element of a Hobbs Act offense, or does the Act cover the passive receipt of gratuities as well as bribes? If the Act extends to gratuities violations, then any time a public official accepts a gift motivated by his office he violates the Hobbs Act and invokes its substantial penalties. If, on the other hand, the Act requires a quid pro quo, then it applies only to those who allow the receipt of a private benefit to influence their official judgment on a matter. The quid pro quo requirement leaves the punishment of conduct in which the receipt of the gift does not lead to an identifiable corrupt result to other statutes designed to fit these crimes.[18]

All Hobbs Act prosecutions should require proof of an explicit quid pro quo. If the courts fail to expressly exclude less culpable forms of illicit payment from coverage under the Hobbs Act, then prosecutors may invoke penalties tailored to discourage violent crimes against a person who, with no corrupt intent, accepts a tip or a small gift. The quid pro quo requirement effectively avoids this result by distinguishing between bribery and lesser crimes.

Part I of this Note explains the definition and the use of the quid pro quo requirement to distinguish bribery from other forms of government corruption which do not entail the use of official power for private gain.[19] Part II reviews the background of the Hobbs Act, including the

---

[15] Evans, 112 S. Ct. at 1889.

[16] *Id.*

[17] Whitaker, *supra* note 1, at 1618.

[18] *See, e.g.*, 18 U.S.C. § 201(c) (1988) (the gratuities provision of the federal bribery statute).

[19] *See infra* part I.

use of the quid pro quo analysis in pre-*McCormick* cases and an examination of the decisions in *McCormick* and *Evans*.[20] Part III considers the desirability of extending the quid pro quo requirement beyond the context of campaign contributions in order to exclude gratuities violations from the scope of the Act.[21] Part IV suggests some areas for further inquiry left open by such an exclusion.[22] This Note concludes that the expansion of the quid pro quo requirement beyond the campaign funding context finds support in the language of the United States Supreme Court, most accurately reflects the intention of Congress, and appears consistent with sound policy.[23] Therefore, the courts should impose the quid pro quo requirement in all cases of extortion under color of official right and not just those involving campaign contributions.

I. DEFINITION AND USE OF THE QUID PRO QUO

A. Definition of Quid Pro Quo

The quid pro quo requirement imposed in *McCormick* and implied in *Evans* simply means that, for behavior to be actionable, a public official must allow the receipt of a payment to influence her decision on an identifiable matter.[24] It denotes the exchange of a thing of value for a specific exercise of official power.[25] Proof of a quid pro quo does not necessarily require proof of an express agreement.[26] Such a standard would unduly hamper prosecution while encouraging more subtle forms of illegal activity.[27] Rather, "[t]he payment merely must motivate [a specific] official act."[28]

B. The Distinction Between a Bribe and a Gratuity

This quid pro quo requirement serves as the primary distinction between bribery and the lesser crime of accepting a gratuity under the

---

[20] *See infra* part II.

[21] *See infra* part III.

[22] *See infra* part IV.

[23] *See infra* part II.

[24] *See* Whitaker, *supra* note 1, at 1621.

[25] *See* McCormick v. United States, 500 U.S. 257, 273 (1991).

[26] *See* Evans v. United States, 112 S. Ct. 1881, 1892 (1992) (Kennedy, J., concurring).

[27] *See* Whitaker, *supra* note 1, at 1621 n.26.

[28] *Id.* at 1621.

anti-corruption statute that applies to federal officials.[29] The crime of bribery involves a promise to perform or not to perform an official act in exchange for a personal benefit,[30] or the "voluntary giving of property for receipt of an illicit benefit."[31] To establish the crime of offering a bribe to a federal official, the government must show that the defendant knowingly offered a payment to an official with the intent and expectation that the payment would influence the public official in the performance of some official act.[32] The donor must offer the money with more than some generalized expectation of ultimate benefit.[33]

Most courts agree that "[t]he crucial distinction between a gratuity and a bribe is that a gratuity is not the moving force behind any official act and there is no overt exchange."[34] To violate the gratuities section, an official need not accept a thing of value corruptly but may merely accept it otherwise than provided by law for the proper discharge of official duty.[35] "Thus, 201(g) [now § 201(c)(1)(B), the gratuities section]

---

[29] 18 U.S.C. § 201 (1988) provides in part:

(b) Whoever–

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act . . . shall be fined not more than three times the monetary equivalent of the thing of value, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust or profit under the United States.

(c) Whoever–

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any act performed or to be performed by such official or person . . . shall be fined under this title or imprisoned for not more than two years, or both.

[30] *See* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 796 (1985) (determining that a need exists for a more coherent law of bribery which incorporates political theory).

[31] Harary, *supra* note 8, at 1346 (arguing in favor of the approach adopted in *O'Grady* which would require the finding of a reasonable inference that inducement occurred).

[32] 18 U.S.C. § 201(b) (1988).

[33] *See* United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980) (applying 18 U.S.C. § 201).

[34] Whitaker, *supra* note 1, at 1622.

[35] 18 U.S.C. § 201(c) (1988).

makes it criminal for a public official to accept a thing of value to which he is not lawfully entitled, regardless of the intent of the donor or the donee."[36] A gratuities violation includes no exchange and involves a lower degree of culpability.[37]

C. *A Hypothetical Case*

A public official may misuse her office in a number of ways. She may threaten an individual directly or coerce him to comply with some demand. An observer could properly characterize this crime as extortion in the popular sense, as well as under the Hobbs Act. In the alternative, she may accept payment in return for some specific exercise of her power even without making a threat or initiating the contact. The government may punish such conduct under the federal bribery statute in the case of a federal official,[38] as well as under the interpretation of extortion under color of official right established in *Evans*.[39] Finally, she may merely accept unsolicited gifts which were given on account of her position but not conditioned either expressly or implicitly upon the performance of a specific act. Under federal corruption law, this last offense constitutes the crime of accepting a gratuity, and it is the distinction between this and the other, more culpable forms of conduct that the quid pro quo requirement preserves. The quid pro quo requirement removes gratuities violations from the list of behavior punishable under the Hobbs Act.

Consider, for example, the activities unearthed in a hypothetical investigation. Ms. Legislator has served in the State House of Delegates for a number of years and has throughout her tenure enthusiastically supported the State Ballet Company which receives part of its funding from the government. Knowing of Legislator's love for the ballet, Jane Smith, the ballet company's director, periodically sends Legislator complimentary tickets to performances. Smith has never asked for anything in return for these tickets, but she sends them merely to remind Legislator of the company's value when Legislator performs her duties as a member of the Appropriations Committee.

Ms. Representative has a reputation as an art lover. When a law exempting ballet dancers from state income tax comes up for

---

[36] United States v. Evans, 572 F.2d 455, 480 (5th Cir.) (involving the gratuities and bribery prosecution of an employee of the Department of Health, Education, and Welfare), *cert. denied*, 439 U.S. 870 (1978).

[37] *See id.*

[38] 18 U.S.C. § 201 (1988).

[39] 572 F.2d at 480.

reconsideration, Mr. Lobbyist, acting on behalf of a group of dancers, approaches Representative, asks her to "look out for the dancers" on this matter, and offers her $100 in cash. Representative has nothing against ballet dancers and has spent all month accepting campaign contributions up to the statutory limit of $50 per group in anticipation of her bid for re-election. She takes the money. Later, after announcing her retirement from public office and paying all her campaign debts, she accepts another $100 from Lobbyist.

Ms. Senator becomes aware of Lobbyist's efforts. Upset that she has not gotten her share, she approaches Lobbyist and offers her support in return for $100. Lobbyist pays. Later, after attending a particularly bad ballet performance, Senator informs Lobbyist that unless he pays her $500 she will immediately denounce the company and introduce a bill to repeal the tax exemption. Lobbyist complies once again.

When a federal investigation of corruption in the state legislature concludes, the dancers, as well as the public, are shocked to learn that Legislator, Representative, and Senator could all end up in federal prison. Lobbyist, who resents Senator's threats, feels especially disturbed that the prosecutor failed to distinguish her behavior from that of the others. Reacting to public outcry when the facts of the three transactions become known, the prosecuting attorney announces that he intends to stamp out corruption in all its forms, and that in each case the officials have "obstruct[ed], delay[ed] or affect[ed] commerce . . . [by] extortion . . . [by] the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, fear, or under color of official right."[40]

II. BACKGROUND OF THE HOBBS ACT AND USE OF THE QUID PRO QUO

A. Extortion Under Color of Official Right

As the successor to the Anti-Racketeering Act of 1934,[41] the Hobbs Act was adopted by Congress to combat extortion and robbery on the part of organized crime and certain labor movements.[42] For almost twenty-five years, these activities remained the focus of the Hobbs Act, and the first successful application of the statute to government corruption did not

---

[40] 18 U.S.C. § 1951(a)-(b)(2) (1988).

[41] Act of June 18, 1934, ch. 569, 48 Stat. 979 (amended in 1964 by the Hobbs Act).

[42] *See* Ruff, *supra* note 6, at 1174-75.

come until 1972.[43] In that year, the Third Circuit opened the door to prosecutions for bribery under the Hobbs Act by eliminating the need for coercion.[44] Instead, the court viewed extortion under color of official right, defined as the "wrongful taking by a public officer of money not due him or his office,"[45] as an independent basis for conviction.

To support its theory, the Third Circuit turned to the common law definition of extortion.[46] Up until this time, interpreters of the Act had relied primarily upon legislative history which indicated that the definitions contained in the Hobbs Act mirrored those found in the New York Penal Code.[47] Because some cases decided under New York law seemed to adopt a false claim of entitlement as an element of the crime, a minor controversy arose concerning the supposed mutual exclusivity of bribery and extortion.[48] Similarly, commentators split over whether extortion under color of official right and bribery remained distinct at

---

[43] The Hobbs Act may have appealed to prosecutors searching for a way to reach government corruption for a number of reasons. *See* Fleissner, *supra* note 3, at 1069. Its primary advantage lies in the broad jurisdiction it grants to federal prosecutors pursuing state officials. *Id.* Because the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce," it allows prosecutions of state officials if their conduct affects commerce in "any way." Stirone v. United States, 361 U.S. 212, 215 (1960). Additionally, the legislative history and common law background of the Act support its application to all public officials. *See, e.g.*, 91 CONG. REC. 11,911 (1945) (statement of Representative Springer) (noting that the Act "applies to every American citizen"); *see also* United States v. Culbert, 435 U.S. 371, 374-78 (1978) (exploring the legislative history of the Hobbs Act). Thus the Hobbs Act presents an effective and expansive weapon against state and local corruption, and prosecutors and courts quickly embraced it. *See* Ruff, *supra* note 6, at 1178.

[44] *See* United States v. Kenny, 462 F.2d 1205, 1211 (3d Cir.) (involving the prosecution of "highly placed public official[s] or political leader[s]" who participated in a kickback scheme), *cert. denied*, 409 U.S. 914 (1972).

[45] *Id.* at 1229.

[46] *See id.*

[47] *See* 91 CONG. REC. 11,900 (1945) (statement of Representative Hancock) (The Hobbs Act "contains definitions of robbery and extortion which follow the definitions contained in the laws of the state of New York."); *id.* (statement of Representative Hobbs) ("The definitions in this bill are copied from the New York Code substantially.").

[48] In People v. Whaley, 6 Con. 661, 664 (N.Y. Sup. Ct. 1827), referred to in the Penal Code's predecessor (the Field Code) as an example of extortion under color of official right, a justice of the peace dismissed a debt collection action, then entered judgment and took the money himself. *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 893-97 (1988). Notably, the court focused on the corrupt intent of the taker, an element required for prosecution under modern federal bribery statutes but noticeably lacking from the lesser crime of accepting a gratuity. *Id.*

common law.[49] The Supreme Court resolved this dilemma only last year in *United States v. Evans*, holding that an official convicted of extortion under color of official right need not have induced the payment[50] and effectively drawing bribery within the reach of the Hobbs Act.[51]

*B. Use of the Quid Pro Quo in Pre-*McCormick *Cases*

Following the decision in *Evans*, a related, but distinct, question arose: whether a conviction under the Hobbs Act requires proof of an actual quid pro quo. Historically most courts have adopted one of three positions. A number of circuits foreshadowed the Supreme Court's approach in *McCormick* by using a quid pro quo to distinguish legitimate campaign contributions from illicit payments, and a few implied that the requirement may have further applications.[52] Others declined to require the element even in campaign cases but seemed to rely heavily on the now discredited need for an inducement in reaching this conclusion.[53] Finally, some courts rejected both the need for inducement and for the quid pro quo, apparently acquiescing in the possible use of the statute to reach low-level state corruption.[54]

1. *Campaign Cases Imposing the Requirement*

a. United States v. Bibby

Even before *McCormick*, courts which considered the issue appeared comfortable imposing the quid pro quo requirement in cases involving

---

[49] *Compare* Fleissner, *supra* note 3, at 1071 (noting instances where the crimes remained mutually exclusive) *and* Harary, *supra* note 8, at 1348 (citing New York law which treats the crimes as mutually exclusive) *with* Lindgren, *supra* note 48, at 908 (arguing the same facts could support a conviction for either or both crimes).

[50] The early English cases discussed by Lindgren fall into one of three categories, including: a) coercive extortion, as where an entire town remained wrongfully imprisoned until paying a substantial fine, *see* Lindgren, *supra* note 48, at 839; b) false claims of entitlement; and c) voluntary exchanges, as where officials received payment for excusing jurors, *see id.* at 843, releasing accused criminals, *see id.* at 856, exempting property from taxation, *see id.* at 855, and waiving licensing requirements, *see id.* at 853. Significantly, although some initiated with the donor and some with the donee, all the cases mentioned by Lindgren appear to include an exchange.

[51] Of course, had the opposite position prevailed, no need for the quid pro quo requirement would have arisen. If the Hobbs Act did not extend to the acceptance of a bribe, then surely it would stop short of prosecuting the passive receipt of a gratuity.

[52] *See infra* notes 55-71 and accompanying text.

[53] *See infra* notes 72-80 and accompanying text.

[54] *See infra* notes 81-94 and accompanying text.

campaign contributions, for readily apparent reasons. As the Fourth Circuit Court of Appeals pointed out, "[I]f read literally, the [language in cases decided under the Act] could arguably prohibit a public official from personally soliciting a campaign contribution."[55] The Sixth Circuit foreclosed this possibility in *United States v. Bibby*,[56] a case affirming the extortion conviction of a former Tennessee state senator. Two of the senator's business associates had funneled payments characterized as campaign contributions to the senator, in return for which he insured that a certain business received state contracts.[57] The court found that the senator's office itself provided any necessary inducement but noted that the government must prove the quid pro quo in order to avoid convicting people for campaign activities sanctioned by custom and law.[58]

b. United States v. Haimowitz

The Eleventh Circuit employed a comparable standard in *United States v. Haimowitz*.[59] In this case, the defendants conspired to issue a liquor license to an unqualified applicant.[60] One defendant suggested that the applicant make a $1,000 contribution to a state senator's campaign fund in order to obtain the license.[61] The trial court convicted the defendants of extortion, but the appellate court reversed, holding that the prosecution failed to show that the senator had agreed to perform a favorable act for the applicant in return for the donation.[62] In the absence of a quid pro quo, the court regarded the payment as a permissible contribution.[63]

c. United States v. Dozier: *A Broader Perspective*

The court in *United States v. Dozier*[64] arrived at a similar conclusion on the campaign financing issue but couched its decision in slightly

---

[55] United States v. Barber, 668 F.2d 778, 783 (4th Cir.) (concerning the prosecution of a former commissioner of the West Virginia Alcoholic Control Commission), *cert. denied*, 459 U.S. 829 (1982).

[56] 752 F.2d 1116 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986).

[57] *Id.* at 1119-20.

[58] *Id.* at 1127.

[59] 725 F.2d 1561 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984).

[60] *Id.* at 1573.

[61] *Id.* at 1573 n.12.

[62] *Id.*

[63] *Id.*

[64] 672 F.2d 531 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982).

broader terms. The jury convicted Dozier, an elected commissioner of agriculture in Louisiana, of five violations of the Hobbs Act based on an indictment "rife with 'specifically identifiable' quid pro quo's."[65] Using language similar to that employed in cases distinguishing gratuities from bribes, the court reasoned that although "we do not seek to punish every elected official who solicits a monetary contribution that represents the donor's vague expectation of future benefits, . . . [w]e must, nevertheless, discover and penalize those who, under the guise of requesting 'donations,' demand money in return for some act of official grace."[66] Because Dozier's conduct so clearly involved a series of exchanges, the court expressly declined to adopt the broader reading of the statute found in *United States v. Trotta*,[67] a Second Circuit decision holding that a quid pro quo did not make up an essential element of the crime.[68] In fact, the Fifth Circuit implicitly questioned such a broad view when it stated that Trotta, whom the court convicted without a specific identification of the anticipated benefit, "may have been operating on the margin of the law."[69] Although the *Dozier* court based much of its argument on the need to separate necessary campaign solicitations from criminal behavior,[70] many of the transactions involved in the case obviously represented private payoffs.[71] Therefore, the case may have had wider implications for non-campaign as well as campaign cases.

2. *The Quid Pro Quo as a Subset of Inducement*

The Second Circuit, in *United States v. O'Grady*,[72] rejected the quid pro quo requirement in a non-campaign context, and it instead turned to the element of inducement to address many of the concerns about over-inclusiveness raised by other courts.[73] The trial court convicted Edward O'Grady, a subway inspector, of extortion under color of official right after finding that he received numerous meals, golf trips, and other

---

[65] *Id.* at 540 n.4.

[66] *Id.* at 537.

[67] 525 F.2d 1096 (2d Cir. 1975) (concerning a town commissioner of public works who received payments for engineering contracts), *cert. denied*, 425 U.S. 971 (1976).

[68] *Dozier*, 672 F.2d at 540.

[69] *Id.*

[70] *Id.* at 537.

[71] *Id.* at 538.

[72] 742 F.2d 682 (2d Cir. 1984), *criticized by* Evans v. United States, 112 S. Ct. 1881 (1992).

[73] *Id.* at 689.

entertainment from companies whose work he inspected.[74] Citing language in earlier cases which viewed the misuse of public office as the essence of a Hobbs Act violation, the court refused to convict an official for the passive acceptance of benefits.[75] According to the court, to do so would allow any gift, no matter how inconsequential, to form the basis of a federal prosecution.[76] After an examination of federal bribery and gratuities laws, the court determined that the latter crime fell beyond the reach of the Hobbs Act.[77] The court relied upon a showing of inducement, rather than prosecutorial discretion, to maintain the distinction[78] and noted that while a specific quid pro quo could prove inducement, other circumstantial evidence would suffice as well.[79] Because of subsequent rulings, most specifically *Evans*, the issues that concerned the *O'Grady* court remain very much debated today, with the quid pro quo requirement providing one of the few remaining means by which to address them. Therefore, one should not read the *O'Grady* case as a strong rejection of the quid pro quo. In fact, some have interpreted *O'Grady* to impose a quid pro quo requirement whenever the official has not received "substantial benefits."[80]

3. *Rejection of the Quid Pro Quo*

a. United States v. Holzer

Prior to *O'Grady*, the Second Circuit had maintained that not only did extortion under color of official right not require a quid pro quo, but also that it "matters not whether [the defendant] induced payments to perform his duties or not to perform his duties."[81] A few courts picked up on this idea, arguing that "it is extortion if the official knows that the bribe, gift, or other favor is motivated by a hope that it will influence him in the exercise of his office and if, knowing this, he accepts the bribe."[82] Used

---

[74] *Id.* at 685.

[75] *Id.* at 687.

[76] *Id.* at 693.

[77] *Id.* at 691.

[78] *Id.* ("Thus, extortion under color of official right begins with the public official, not with the gratuitous actions of another.").

[79] *Id.* at 691-92.

[80] *See* United States v. Campo, 774 F.2d 566, 569 (2d Cir. 1985) (Pierce, J., concurring) (concerning the prosecution of a New York City policeman).

[81] United States v. Trotta, 525 F.2d 1096, 1100 (2d Cir. 1975) (quoting United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)).

[82] *See, e.g.*, United States v. Holzer, 816 F.2d 304, 311 (7th Cir.), *vacated and*

in this sense, the word "bribe" encompasses any thing of value given to a public official and not only those given under the conditions described in the federal bribery statute.[83] The Seventh Circuit thereby dispensed with the need for an agreement between the two parties and allowed a conviction even where the purpose or effects of the gift appeared very unclear.[84]

b. United States v. Barber

The Fourth Circuit provided the most expansive reading of the statute in *United States v. Barber*.[85] Barber, a former commissioner of the West Virginia Alcoholic Beverage Control Commission, received substantial amounts of free liquor from various companies.[86] The court recognized that "the line is a fine one between an altogether 'voluntary' payment and the conferring of a benefit on someone who holds a particular public office in fear of retaliation or in expectation of benefit."[87] At trial, "there was not much direct evidence as to *why* the liquor companies continued to authorize the withdrawals of liquor by the defendant."[88] Nevertheless, the court upheld the conviction, essentially deciding that a reason for such substantial gifts must exist.[89] Because no one could explain the basis for the gifts, the "conclusion is irresistible that . . . the 'gift' was not a gift, but, rather, was in return for favors."[90] The standard articulated in *Barber* implies, rather than proves, the quid pro quo.[91]

Courts approached the quid pro quo issue in a variety of ways. A majority agreed that the element addressed the need to separate campaign contributions from criminal behavior.[92] Others relied on inducement, with the quid pro quo as a subset, to perform this function.[93] A few

---

remanded on other grounds, 484 U.S. 807 (1987); *see also* United States v. Garner, 837 F.2d 1404 (7th Cir. 1987) (involving gifts to sewer inspectors), *cert. denied*, 486 U.S. 1035 (1988).

[83] *See, e.g., Garner*, 837 F.2d at 1422 (explaining that money paid to defendants because industry understood that nonpayment would lead to increased difficulty in doing business constitutes a bribe).

[84] *Id.*

[85] 668 F.2d 778 (4th Cir. 1982).

[86] *Id.* at 781.

[87] *Id.* at 783.

[88] *Id.*

[89] *Id.* at 784.

[90] *Id.*

[91] *See id.*

[92] *See supra* notes 55-71 and accompanying text.

[93] *See supra* notes 72-80 and accompanying text.

opinions expressed concern about other issues, such as the prosecution of the receipt of certain de minimis benefits under a relatively harsh penal statute,[94] but for the most part, courts remained focused on statutory interpretation. With the foundation thus laid, the Supreme Court first chose to address the quid pro quo requirement in the context of campaign contributions made to a state legislator.

4. McCormick v. United States

McCormick v. United States concerned the conduct of a member of the West Virginia House of Delegates.[95] McCormick represented a district which suffered from a chronic shortage of doctors, and he had steadfastly supported a program which allowed foreign doctors to practice in West Virginia under temporary permits despite their having repeatedly failed state licensing exams.[96] When other legislators questioned the need for such a program, several of these doctors hired a lobbyist to work for its extension, an objective obtained through the passage of a bill sponsored by McCormick.[97] Shortly thereafter, the lobbyist met with McCormick to discuss the possibility of introducing legislation which would grant the doctors a permanent license by virtue of their experience instead of by passing the licensing exam; McCormick agreed to sponsor such a bill.[98]

Sometime after this discussion, McCormick complained to the lobbyist that while he had spent considerable sums of his own money to finance his 1984 re-election campaign, he had not heard anything from the foreign doctors.[99] The lobbyist said that he would see what he could do, and later he delivered an envelope containing $900 in cash to McCormick.[100] McCormick continued to receive payments throughout the campaign, although he never reported any of these as campaign contributions. The final payment came two weeks after the enactment of a bill, sponsored and supported on the floor by McCormick, allowing doctors to become permanently licensed without passing the state exam.[101]

---

[94] *See, e.g.*, United States v. O'Grady, 742 F.2d 682, 693-94 (2d Cir. 1984), *criticized by* Evans v. United States, 112 S. Ct. 1881 (1992).

[95] 500 U.S. 257, 260 (1991).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

Based upon this behavior, a grand jury indicted McCormick on five counts of violating the Hobbs Act by extortion under color of official right and one count of filing a false income tax return.[102] After hearing instructions which attempted to distinguish between "voluntary" campaign contributions and those made with the expectation of benefit, the jury convicted McCormick on the first Hobbs Act count but could not reach a verdict on the other charges.[103] The district court declared a mistrial on those counts.[104]

The court of appeals affirmed, noting that while the receipt of a voluntary campaign contribution did not violate the Hobbs Act, the circumstances differ when neither party intends the payment as a legitimate contribution.[105] In the latter instance, the court holds the recipient to the same standard as a non-elected official. The court may convict him without proof that he has agreed to grant some specific favor in return for the benefit paid.[106] The court listed seven factors which would point to an illegitimate campaign contribution.[107] After reviewing the evidence, it concluded that a reasonable jury could characterize the payments in this case as extortionate.[108]

The Supreme Court reversed. Expressly limiting its holding to payments described as campaign contributions,[109] the Court found that

---

[102] *Id.* at 261.

[103] *Id.* at 264-65.

[104] *Id.* at 265.

[105] *Id.*

[106] *Id.* at 266.

[107] *Id.* at 269 n.7. The factors used by the appellate court include: (1) whether the money was recorded as a campaign contribution by the donor; (2) whether the money was reported as a campaign contribution by the payee; (3) whether the payment was in cash; (4) whether it was delivered personally to the official or to his campaign; (5) whether the official acted in his official capacity in supporting legislation which would benefit the payor near the time of the payment; (6) whether the official had supported similar legislation before the payment; and (7) whether the official solicited the payment. *Id.*

[108] *Id.* at 270.

[109] Despite the facts that West Virginia law forbids campaign contributions from individuals in excess of $50 per person and that he never reported them as such, McCormick maintained that the payments represented campaign contributions and the courts acquiesced in this characterization. *Id.* at 260. The standard used to determine whether the defendant has met the threshold for calling into play the quid pro quo requirement presents one of the more unusual aspects of the case. The Court rejected the factors used by the court of appeals to distinguish outright bribes from legitimate contributions and instead substituted a test based on the intent of the parties. *Id.* at 271. Yet the Court never explained how the proof of this intent would differ materially from the factors it had dismissed and apparently treated any claimed campaign contribution as

the receipt of such payments violates the Hobbs Act "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."[110] The Court opined that the factors used by the court of appeals could not adequately reconcile the need to eradicate corruption with the need to finance political campaigns. The court stated that "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator."[111] Therefore, as long as the current system of public financing remains in place, legislators must continue to accept contributions. To hold a legislator liable for supporting legislation which furthers the interests of constituents shortly before or after receiving contributions from them would punish her for conduct which she largely cannot avoid.[112] The Court concluded that the quid pro quo requirement allows for punishment of truly extortionate conduct while preserving the current system of campaign financing.[113]

While concurring in the judgment, Justice Scalia expressed reservations about the quid pro quo requirement, believing it to represent a necessary response to practical exigencies but without textual or historical basis.[114] After briefly reviewing the history of the Act, Scalia suggested a narrower reading of the statute which would find receipt of

---

a legitimate donation without inquiring into the basis for the claim.

The alternative appears to be to accept the parties' characterization of the transaction, which will almost invariably describe an intended contribution in order to trigger the additional quid pro quo requirement and hopefully escape conviction. Perhaps the Court hesitated to make serious consequences like a Hobbs Act conviction hinge on compliance with campaign reporting requirements, which carry much smaller penalties. However, accepting the parties' description, as the Court seemed inclined to do, comes near to applying the quid pro quo requirement in all cases involving elected officials, absent extraordinary circumstances such as an announced intention not to run again or a defeat in a prior election. Looking at the hypothetical case introduced at the beginning of the Note, it appears almost certain that Representative's receipt of the contribution during the campaign would receive the benefit of the quid pro quo standard, but it seems possible that the later payment would enjoy the same treatment, although the circumstances surrounding the payments differ in significant ways. If the Court continues to use this standard, it should clarify the situations in which the standard applies. Of course, a blanket imposition of the quid pro quo in all Hobbs Act prosecutions would eliminate the problem.

[110] *Id.* at 273.

[111] *Id.* at 272.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 277 (Scalia, J., concurring).

a voluntary payment extortionate only if a pretense to entitlement occurred.[115] Since the parties had not addressed this possibility, Scalia stopped short of endorsing it.[116] Nevertheless, he obviously entertained reservations about further broadening the scope of the statute.[117]

The dissenters, represented by Justice Stevens, objected primarily on procedural grounds.[118] Since McCormick did not present an express objection to the instructions as required under Rule 30 of the Federal Rules of Civil Procedure, Stevens opined that the Court must confirm the conviction.[119] He agreed, however, that "to prove a violation of the Hobbs Act . . . it is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit."[120] Stevens clarified, however, that proof of actual fulfillment of the quid pro quo need not exist if the prosecutor can show the making of the promise, and that such proof has only evidentiary significance.[121] Thus, all three opinions support the imposition of the quid pro quo requirement in the campaign financing context, without reaching the issue of broader interpretation.

5. Evans v. United States

In *Evans v. United States*,[122] the Court returned to the "under color of official right" language, this time focusing on the element of inducement. In *Evans*, the petitioner had served as an elected member of the Board of Commissioners of DeKalb County, Georgia.[123] An FBI agent posing as a real estate developer approached Evans and sought his assistance in rezoning a twenty-five acre tract of land.[124] After discussion, the agent gave Evans a $1,000 check payable to Evans' campaign, which Evans reported on the appropriate campaign financing form, and $7,000 in cash, which Evans did not report.[125] The court of appeals upheld Evans' conviction, stating that the "passive acceptance of

---

[115] *Id.* at 279.
[116] *Id.* at 277.
[117] *Id.*
[118] *Id.* at 280 (Stevens, J., dissenting).
[119] *Id.*
[120] *Id.* at 283.
[121] *Id.*
[122] 112 S. Ct. 1881 (1992).
[123] *Id.* at 1883.
[124] *Id.*
[125] *Id.*

a benefit *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of official power."[126] The Supreme Court assumed that Evans accepted the cash knowing that the donor intended it to guarantee his support on the rezoning petition and that the acceptance constituted an "implicit promise to use his official position to serve the interests of the bribe-giver."[127] The Court upheld Evans' conviction, finding that an "official need not take any specific action to induce the offering of the benefit" in order to violate the Act.[128]

Instead, the Court held that the "Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[129] Although the Court commented that the instruction given satisfied the quid pro quo requirement of *McCormick*,[130] it never expressly indicated that it equated the $7,000 cash payment with the $1,000 check which clearly represented a campaign contribution. Justice Kennedy addressed this issue more directly, concluding that the language used by the majority "requires a quid pro quo as an element of the Government case in [any] prosecution under 18 U.S.C. § 1951"[131] and not just in those involving purported campaign contributions. Kennedy stated that this reading was consistent with the opinion of the Court, as well as with the statute's language and history. He further argued that the parties "need not state the *quid pro quo* requirement in express terms"[132] because the jury could infer the necessary agreement from the surrounding circumstances.[133] The dissenting opinion did not support a quid pro quo requirement in all cases, believing it to represent a practical response to the campaign financing dilemma but arguing for a narrow reading of extortion under color of official right which would make it unnecessary in other situations.[134] However, the dissent also read the majority opinion as imposing such a requirement.[135]

Thus, after *Evans*, four Justices believed that the government must demonstrate a quid pro quo in all cases involving extortion under color

---

[126] *Id.* at 1884.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] United States v. McCormick, 500 U.S. 257 (1991).
[131] *Evans*, 112 S. Ct. at 1892 (Kennedy, J., concurring).
[132] *Id.*
[133] *Id.*
[134] *Id.* at 1899 (Thomas, J., dissenting).
[135] *Id.*

of official right, while the opinion joined by four others included language which could arguably support such an inference. *Evans* also affects the issue in another way. With the elimination of the inducement element, the quid pro quo remains the only way to distinguish serious crimes such as extortion and bribery from less culpable conduct. Courts which dismissed the need for the quid pro quo and relied upon inducement to excuse certain de minimis payments[136] must now reevaluate their decisions in light of those same concerns. Therefore, although the holding in *Evans* limited itself to the need for inducement, the decision injects a new element of uncertainty into the quid pro quo arena.

III. AN EXPLICIT QUID PRO QUO SHOULD BE AN ELEMENT OF ALL HOBBS ACT VIOLATIONS

The Supreme Court should continue down the path laid out in *McCormick* and *Evans* and impose a quid pro quo requirement on all prosecutions under the Hobbs Act. The language of *Evans* invites such a conclusion.[137] While the legislative history and common law background of the Act lend only incidental support at best, they do not mandate a broader reading.[138] Most importantly, such a requirement would best reflect congressional intent in light of its overall scheme addressing government corruption.[139] Important policy considerations also support this view.[140] Finally, the requisite standard of proof should not prove any more unmanageable than that found in other areas of the criminal law.[141]

A. Evans *Opens the Door to This Interpretation*

According to four Supreme Court Justices, the language in *Evans* imposes a quid pro quo requirement on all Hobbs Act prosecutions. The relevant passage states, "We hold today that the government need only show that a public official has obtained a payment to which he was not

---

[136] *See* United States v. O'Grady, 742 F.2d 682, 691-94 (2d Cir. 1984), *criticized by* Evans v. United States, 112 S. Ct. 1881 (1992).

[137] *See infra* notes 142-44 and accompanying text.

[138] *See infra* notes 145-51 and accompanying text.

[139] *See infra* notes 152-79 and accompanying text.

[140] *See infra* notes 180-91 and accompanying text.

[141] *See infra* notes 182-87 and accompanying text.

entitled, knowing that the payment was made in return for official acts."[142] When the dissent protested that "[t]his *quid pro quo* requirement is simply made up,"[143] the majority did not deny having created the restriction. Rather the members of the majority merely refuted the charge by arguing that "the common-law tradition" supports the requirement.[144] The fact that the Court measures the "bribe" against the *McCormick* standard, without ever addressing the difference between the $1,000 donation to the campaign and the $7,000 received directly by Evans may also imply that the quid pro quo should appear in all cases.

B. Congressional Intent Requires the Quid Pro Quo

1. *Legislative History*

Since the Court appears receptive to re-examining its view of the statute, the case for the quid pro quo requirement rests upon a determination of congressional intent. The majority in *Evans* attempted to support the requirement by pointing to the common law derivation of the offense. The Court had little choice but to adopt such a historical approach because the legislative history on the topic appears sparse and unenlightening. The phrase "color of official right" merits only one lengthy mention in the debates over the passage of the Act.[145] In it, Senator Hobbs and others reassured objecting members that the language of the Act would not inhibit legitimate dues-collecting activities on the part of union leaders.[146] Apart from indicating that the Act's creators meant for it to reach a fairly high level of corruption, the legislative history provides little evidence in either direction.

2. *Common Law Background*

As previously discussed, Congress, in drafting the statute, assigned the phrase "under color of official right" a meaning drawn from the New

---

[142] United States v. Evans, 112 S. Ct. 1881, 1889 (1992).

[143] *Id.* at 1899 (Thomas, J., dissenting).

[144] *Id.* at 1889. This response may show a bit of deliberate obtuseness on the part of the majority. The case mentioned did in fact involve an exchange, but the comment appears more directed at the "publicness" of the act, rather than at the need for a quid pro quo. Thus, the statement may simply indicate the unwillingness of the majority to address the issue and provides only weak support, if any, to the historical argument.

[145] *See* 89 CONG. REC. 3229 (1943) (statement of Representative Hobbs).

[146] *Id.*

York Penal Code and the common law.[147] Unlike the direct legislative history, the use of the language in early cases may lend some anecdotal support to the need for a quid pro quo requirement. The majority in *Evans* mentioned the early case of *Collier v. State* as an example.[148] Although the case may not have addressed the issue directly, it, like the other cases commonly cited in a history of the Act, clearly involved some exchange; this situation holds true for both the European and early American decisions.[149] Thus, one could conceivably conclude that the common law understanding of extortion under color of official right did include an exercise of power on the part of the official.[150] At the least, it appears that nothing in the history requires that the courts interpret the phrase to include the prosecution of low-level corruption. Even under Edward Coke's definition of bribery, an official could legally accept a fee of "meat and drink" if of "small value."[151] Therefore, a decision to remove similar offenses from the scope of the Hobbs Act through judicial interpretation, rather than by prosecutorial discretion, should not run afoul of the language's background.

3. *Comparison with the Federal Bribery Statute*

The congressional intent to distinguish bribery from less serious forms of government corruption becomes clearer when one compares the Hobbs Act to the statute which Congress enacted to address the corruption of federal officials. *Evans* described the crime of extortion under color of official right as the "rough equivalent of what we would now call taking a bribe."[152] Federal law treats bribery as a serious crime which warrants harsh punishment. Section 201(b) prohibits the receipt of a thing of value by a public official in return for influence over the performance of any official act.[153] As one court explained:

---

[147] *See supra* notes 41-51 and accompanying text.

[148] *Evans*, 112 S. Ct. at 1889 n.20 (citing 55 Ala. 125 (1877)).

[149] *See, e.g.*, Lindgren, *supra* note 48, at 837-82; *see also Evans*, 112 S. Ct. at 1896-97 n.3 (1992) (Thomas, J., dissenting) (listing early cases construing state extortion statutes).

[150] *See* United States v. Rabbitt, 583 F.2d 1014, 1027 (8th Cir. 1978) (noting that at common law, extortion occurred when a public official having no entitlement took a fee "for the performance or nonperformance of an official function"), *cert. denied*, 439 U.S. 1116 (1979).

[151] EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 145 (1670).

[152] *Evans*, 112 S. Ct. at 1885.

[153] 18 U.S.C. § 201(b) (1988).

> To establish the crime of offering [or accepting] a bribe under § 201(b)(1), the government must show that the money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced. The money must be given with more than "some generalized hope or expectation of ultimate benefit on the part of the donor."[154]

Had the fictional delegates in the earlier example served in Congress rather than a state legislature, Lobbyist would have violated the statute in his dealings with both Representative and Senator. The statute would have excused the director of the ballet, however, because she had no purpose but to build up good will. In addition, the public official must have accepted the payment, or the briber must have offered it, "corruptly."[155] If the government can prove these elements, the court may fine the defendant up to three times the value of the corrupt payment and may imprison him for up to fifteen years, severe penalties similar to those found in the Hobbs Act.[156]

The crime of giving or receiving a gratuity, also defined in § 201, receives much more lenient treatment.[157] Legislator's acceptance of the ballet tickets falls into this class of offenses. A public official violates the gratuities section by receiving anything of value for or because of any official act otherwise than provided for by law.[158] When compared to the text of the bribery section, "[p]erhaps the difference in meaning is slight, but Congress chose different language in which to express comparable ideas."[159] The bribery section clearly makes necessary an explicit quid pro quo, while the illegal gratuities section contains no such requirement.[160] "It is this element of *quid pro quo* that distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple mens rea required for violation of the gratuities sections."[161] Thus, Congress has drawn a distinction between varying

---

[154] United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980) (involving the prosecution of an agent of the Federal Aviation Administration) (quoting United States v. Arthur, 544 F.2d 730, 734 (4th Cir. 1976)).

[155] 18 U.S.C. § 201(b).

[156] *Id.* § 201(b)(2)(C). The Hobbs Act allows for a fine of $10,000, a twenty-year prison term, or both. *See id.* § 1951(a).

[157] *Id.* § 201(c) provides for up to two years in prison and a fine.

[158] *See id.* § 201(c)(1)(B).

[159] United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974) (construing the bribery statute in the trial of a United States Senator).

[160] *See id.*

[161] United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978) (concerning the bribery

degrees of official corruption and has chosen the quid pro quo requirement to separate those crimes warranting severe sanctions from those justifying a lighter punishment.

Congress intended for § 201, which defines both these offenses, to serve as a "single comprehensive section of the [c]riminal [c]ode"[162] and to replace a number of existing bribery statutes. According to one court:

> It is apparent from the language of [the gratuities section] that what Congress had in mind was to prohibit an individual, dealing with a Government employee in the course of his official duties, from giving the employee additional compensation or a tip or gratuity for or because of an official act already done or about to be done. Section 201(b) [the bribery section], on the other hand, is directed against impairment of the actual and apparent integrity of public life.[163]

In the previous hypothetical, clearly Senator and Representative, who set aside their duty for personal profit, committed a more serious offense than Legislator, who only frustrated ballet lovers without tickets. The federal corruption statute[164] achieves its goal by reaching "any situation in which the judgment of a government agent might be clouded because of payments or gifts made to him by reason of his position,"[165] but it recognizes degrees of blameworthiness. Had Congress intended for the Hobbs Act to cover all possible forms of corrupt behavior, a statute serving this comprehensive purpose already would have existed. If nothing else, the distinction that Congress saw fit to create in the statute meant to make "uniform the proscribed acts of bribery as well as the intent or purpose making them unlawful,"[166] illustrates that the Hobbs Act need not, and should not, extend to the prosecution of gratuities violations simply because the Court has determined that bribery falls within its grasp.

---

conviction of a summer employee of the United States Customs Service).

[162] S. REP. NO. 2213, 87th Cong., 1st Sess. 3852 (1962).

[163] United States v. Fenster, 449 F. Supp. 435, 438 (E.D. Mich. 1978) (concerning the bribery conviction of a United States Veterinarian-Inspector) (quoting United States v. Irwin, 354 F.2d 192, 196 (2d Cir.), *cert. denied*, 383 U.S. 967 (1965)).

[164] 18 U.S.C. § 201 (1988).

[165] United States v. Evans, 572 F.2d 455, 480 (5th Cir.) (involving the gratuities and bribery prosecution of an employee of the Department of Health, Education, and Welfare), *cert. denied*, 439 U.S. 870 (1978).

[166] S. REP. NO. 2213, 87th Cong., 1st Sess. 3856 (1962).

4. *Comparison of Penalties*

A comparison of the penalties found in the statutes provides the most persuasive argument for maintaining the distinction between bribery and lesser crimes. The Hobbs Act provides for a maximum fine of $10,000 and twenty years in prison.[167] The bribery section applicable to federal employees carries similar penalties.[168] A violation of the gratuities section, on the other hand, can result in only a two-year maximum sentence or a fine.[169] Additionally, the bribery section contains a potential disqualification from public service which has no counterpart in the gratuities section.[170] Despite this disparity, if one sets aside the quid pro quo requirement, the elements of accepting a gratuity under 201(c) and extortion under color of official right under the Hobbs Act appear "remarkably similar."[171] A jury could convict a federal official of extortion under color of official right or of illegal receipt of gratuities with evidence that he accepted benefits while knowing that his official position provided the impetus for these gifts. Yet a federal official is subject to a twenty-year prison term plus a $10,000 fine under the Hobbs Act, whereas he might receive at most two years in prison plus a fine if prosecuted for the same conduct under the gratuities section. It seems similarly incongruous that a prosecutor may choose to charge a federal official under a statute imposing a two-year sentence for conduct which could result in up to twenty years in prison if carried out by a state official. Although the use of the federal sentencing guidelines should ameliorate some of the disparity,[172] their presence does not change the fact that Congress chose to treat these violations separately and used widely varying penalties to emphasize the distinction.

Apart from the issue of uneven application, attaching such severe sanctions to behavior involving what Congress obviously considers a low level of culpability may violate the intent of the federal anti-corruption scheme. As a result of their unique positions, federal and state officials receive a great deal of attention, as well as extensive lobbying.

---

[167] 18 U.S.C. § 1951(a) (1988).

[168] See *id.* § 201(b) which provides for a fine of up to three times the value of the bribe and a prison term of fifteen years.

[169] *Id.* § 201(c).

[170] *See id.* § 201(b).

[171] United States v. O'Grady, 742 F.2d 682, 691 (2d Cir. 1984) (discussing the need to separate bribery under the Hobbs Act from gratuities violations), *criticized by* Evans v. United States, 112 S. Ct. 1881 (1992).

[172] *See infra* note 181.

Arrangements such as that of Jane Smith and Legislator occur commonly. Eliminating the quid pro quo requirement from the Hobbs Act would make the receipt by a public official of everything from "a hot-dog from a street vendor [to] an expense-paid vacation to Disney World,"[173] to the innocent acceptance of ballet tickets punishable by a long prison term and a substantial fine. A single meal accepted without corrupt intent could theoretically provide the basis for a federal prosecution. "While other penalties may be appropriate, clearly the Hobbs Act was not meant to cover such de minimis violations."[174] Such a broad "interpretation of the Hobbs Act would place every public official in jeopardy by virtue of his status rather than his venal acts"[175] and surely would not reflect the congressional intent to distinguish between lesser and greater culpability for the two types of behavior.

5. *Prosecutorial Discretion Cannot Be Relied Upon to Make the Necessary Distinction*

Prosecutors have attempted to respond to such concerns on the part of judges by assuring them that "as a matter of prosecutorial discretion, it would make no sense to attempt to prosecute for . . . de minimus [sic] ambiguous conduct."[176] This assurance does not lend itself to a high comfort level regarding federal prosecutions. In the first place, prosecutors have shown little hesitation in applying the Hobbs Act to fairly low level officials.[177] In any case, one need not demonstrate that prosecutors have used the broader interpretation to reach such conduct. "The fact that ambiguous conduct *could* be prosecuted under the [alternative] interpretation raises serious constitutional questions of fair notice and overbreadth and makes a mockery of the principle that criminal statutes must be construed strictly with any ambiguity resolved in favor of lenity."[178] Without the quid pro quo requirement, the choice whether to impose a serious penalty on some "routine" conduct while

---

[173] *O'Grady*, 742 F.2d at 693.

[174] United States v. Campo, 774 F.2d 566, 569 (2d Cir. 1985) (Oakes, J., dissenting) (arguing against the assertion of federal jurisdiction over the activities of a New York patrolman).

[175] *O'Grady*, 742 F.2d at 693.

[176] Letter, *supra* note 5.

[177] *See, e.g.*, United States v. Garner, 837 F.2d 1404 (7th Cir.) (sewer inspectors), *cert. denied*, 486 U.S. 1035 (1987); *Campo*, 774 F.2d 566 (police officers); United States v. Paschall, 772 F.2d 68 (4th Cir. 1985) (transportation department officials), *cert. denied*, 475 U.S. 1119 (1986); *O'Grady*, 742 F.2d 682 (transit inspectors).

[178] *See O'Grady*, 742 F.2d at 694.

allowing other equivalent behavior to continue rests solely with a group of prosecutors. "The evil of selective prosecution is not avoided by the likelihood that *de minimis* violations will be overlooked. We remain a nation of laws rather than of men."[179]

C. *Policy Considerations Also Support the Quid Pro Quo Requirement*

The conclusion that prosecutions under the Hobbs Act require proof of an explicit quid pro quo not only reflects congressional intent to distinguish between the two types of behavior for purposes of punishment but also proves consistent with sound policy. The requirement restores a needed proportionality to this area of the law. Congress originally enacted the Hobbs Act to deal with serious, violent crimes resulting from labor unrest, and the Act carried correspondingly strict penalties.[180] Prosecuting gratuities violations under the Hobbs Act equates them with not only bribery but forcible extortion and robbery as well. Almost everyone would agree that when Senator threatened Lobbyist she engaged in behavior quantifiably different from that of Legislator, yet the penalty suited to Senator's conduct could technically apply to both. Such a grouping belittles the gravity of the more serious offenses while eroding the purpose of distinguishing between different levels of illegal behavior. When an action which Congress has determined to warrant at most a two-year sentence can result in the same twenty-year penalty as a violent crime, the entire principle of tying culpability to punishment disappears.[181] By eliminating gratuities from coverage under the Hobbs Act, the quid pro quo requirement maintains the integrity of the Act as well as avoids serious concerns of disproportionate sentencing.

Of course, maintaining proportionality effectively allows many receipts of gratuities by state officials to go unpunished. Whether because such arrangements make up a part of business as usual or because they

---

[179] *Id.*

[180] *See supra* notes 41-43 and accompanying text.

[181] Of course, the sentencing guidelines may play a role in mitigating against this result. Especially in first offenses, sentences far lower than the maximum will result. However U.S.S.G. § 2E1.5, the sentencing guideline applicable to the Hobbs Act, refers one only to § 2C1.1, the bribery guideline, which has a base level of ten. It makes no mention of the gratuities guideline contained in § 2C1.2, which provides for a base level of only seven. By equating the Hobbs Act with bribery for the purpose of sentencing, the guidelines apparently assume that the Hobbs Act does not also reach gratuities cases. Therefore, the guidelines do not have the flexibility necessary to adequately alleviate the problem caused by treating relatively minor violations in the same manner as more serious crimes.

expect reciprocal deference, local prosecutors often prove unwilling to strictly enforce state ethics rules.[182] It is important to note here, however, that only behavior corresponding to that which Congress considers relatively minor will escape prosecution. In the hypothetical, Legislator may get away, but Representative and Senator will not. The standard remains perfectly capable of capturing those officials who blatantly sell their offices to the highest bidders. Furthermore, the potential fear that the quid pro quo presents an impossibly high standard of proof lacks foundation. In order to satisfy this element, the prosecutors need not demonstrate that an express agreement existed. Rather, they must only show that the parties had a "more focused purpose . . . than merely to build a reserve of good will toward [the donor or] his company on the part of the influential official."[183]

By showing that the parties acted with a specific identifiable exercise of official power in mind, the government removes the offense from the realm of gratuities without allowing serious criminals to escape liability simply because they carefully avoid making an express statement of their intentions. Courts imply agreements quite successfully in other areas of the criminal law, most notably in proving conspiracies. In conspiracy prosecutions, "[t]he element of agreement . . . is nearly always established by circumstantial evidence, as conspirators seldom make records of their agreements."[184] As in this area, a course of dealing between the parties may give rise to an inference that repeated payments lead to given exercises of power. Simply because the offense requires an explicit quid pro quo does not mean it must contain an express statement of the bargain struck.[185] The fact finder may infer agreements from the parties' actions, as well as their conversations, in order to furnish a quid pro quo.[186]

> It is of no particular significance or consequence that not all the terms of the understanding were set out on every occasion. . . . While

---

[182] *See* Whitaker, *supra* note 1, at 1624.

[183] United States v. Fenster, 449 F. Supp. 435, 438 (E.D. Mich. 1978) (concerning the bribery conviction of a United States Veterinarian-Inspector).

[184] United States v. Short, 671 F.2d 178, 182 (6th Cir.), *cert. denied*, 457 U.S. 1119 (1982); *see also* 16 AM. JUR. 2D. *Conspiracy* § 42 (1979) ("The existence of . . . a criminal conspiracy may be proved by circumstantial as well as by direct evidence, if it affords a reasonable inference as to the ultimate facts sought to be proved. . . .") (footnotes omitted).

[185] *See* Evans v. United States, 112 S. Ct. 1881, 1889 (1992).

[186] *See id.* at 1884; *Short*, 671 F.2d at 182-83.

> the Court, as trier of fact, must consider each count separately, what was said on one occasion has a proper bearing on the question of the briber's intent on another occasion.[187]

This standard allows federal prosecutors to continue to respond to serious corruption at the federal and state level, while admittedly leaving smaller, perhaps ingrained practices to the discretion of local authorities.

Finally, while conceding that gratuities violations require policing, one must also consider whether the federal government may appropriately play such a visible and pervasive role in cases involving a relatively minor degree of local corruption. The publicity attached to such "sting" operations may make them attractive to ambitious attorneys, but the state citizens–many of whom have acquiesced in, if not condoned, the behavior–may question the allocation of so many resources to a crime which lacks any specific discernible social impact. In fact, in the long run, federal prosecutions, especially those conducted en masse, may very well result in nothing but a more subtle refinement of customary practices. People within the state may view the federal government as an interloper bent on interfering with the state's business, and they may then excuse behavior that they otherwise would condemn.[188] From a different perspective, the availability of such a powerful enforcement mechanism may discourage more reform-minded citizens from pursuing change through state channels.[189] At the very least, the presence of massive federal investigations demoralizes a state's citizens, resulting in apathy or a loss of confidence which would probably not occur if the system could remedy its own ills.[190] While the federal government may properly play a role in major instances of corruption such as outright bribery, it would perhaps produce more lasting reform to leave lower-level gratuity violations to state legal or political processes.[191] On the whole, then, the policy benefits of remaining true to the congressional corruption scheme outweigh the drawbacks resulting from a less expansive interpretation of the Hobbs Act.

---

[187] *Fenster*, 449 F. Supp. at 439 n.2.

[188] Ruff, *supra* note 6, at 1214. At times, state special prosecutors have taken responsibility for the investigation of corrupt practices, with limited success. The method presents one alternative to federal intervention. *Id.*

[189] *Id.*

[190] *Id.*

[191] *See* United States v. McNeive, 536 F.2d 1245, 1252 n.13 (8th Cir. 1976) (concerning the gratuities violations of a plumbing inspector).

D. The Hypothetical Revisited

Consider again the hypothetical state legislature in light of these concerns. Congress specifically designed the Hobbs Act to deter behavior such as Senator's and decided that the Act's strict penalties justly punished the acquisition of property through direct threats. Senator has engaged in extortion by any definition of the term. Representative has also committed a serious crime. Before the decision in *Evans*, some courts would have exempted her behavior from a Hobbs Act prosecution because she, unlike Senator, played no part in initiating the transaction. *Evans* foreclosed this possibility when it removed the inducement requirement.[192] This approach produces a just result because Congress has shown its desire to treat the crimes of extortion and bribery as equally serious, and because in either case the delegate has put her public trust up for sale. Legislator, on the other hand, did not let the receipt of the gift control any specific decision. By imposing the quid pro quo requirement, the courts may separate Legislator's less culpable behavior from that of the other delegates and accord it the more lenient treatment that Congress has decided that it deserves.

IV. THE IMPOSITION OF THE QUID PRO QUO REQUIREMENT RAISES FURTHER QUESTIONS ABOUT THE PROPER ROLE OF CONGRESS IN REGULATING ETHICS IN STATE GOVERNMENT

Once it is established that the Hobbs Act does not provide a proper means for prosecuting gratuities violations at the state and local level, one must ask how best to discourage such conduct. State prosecutors will often ignore these types of violations, yet most citizens certainly believe that they merit some consideration. This dilemma raises two important questions. First, can Congress enact a statute, much like that which applies to federal officials, to reach gratuities violations involving state and local officials? Secondly, should Congress do so?

A. Can Congress?

The answer to the first question lies almost certainly in the affirmative. The courts have a history of giving jurisdictional triggers based on the Commerce Clause a long reach.[193] This foundation, which

---

[192] *See supra* text accompanying note 128.

[193] *See* Whitaker, *supra* note 1, at 1649 n.177.

removes the necessity of expending federal resources to "uncovering some fortuitous mailing or other interstate activity on which to base a conviction,"[194] could arguably encompass the receipt of a gratuity by a state or local official. The Hobbs Act, which rests on the same jurisdictional grounds, "covers any extortions which in any degree may reasonably be regarded as affecting commerce."[195] Therefore, bringing the acceptance of a gratuity within the reach of the proposed statute requires nothing more than proof of a reasonably probable effect on commerce, however minimal, as a result of the gift.[196] Although some have argued that "if the gift is sufficiently modest that it does not deplete the resources of the giver and elicits no action of any sort in response, it is unlikely to cause even the modest interference with interstate commerce that is an essential element of" a crime implicating the Commerce Clause,[197] no actual impact need exist as long as the act could have a potential effect.[198] Given the courts' belief that the federal government has a role in maintaining the integrity of state and local officials,[199] a challenge based on the jurisdictional trigger of such a proposed statute would almost certainly fail.

B. Should Congress?

Simply deciding that Congress can enact a statute does not settle the question of whether Congress should do so. In the absence of a law specifically addressing the behavior of state and local officials, many gratuities violations will go unpunished. However, the degree to which federal investigations could intrude upon the legislative process of the

---

[194] *Id.* at 1649.

[195] United States v. Spagnolo, 546 F.2d 1117, 1119 (4th Cir. 1976) (finding that the use of money as a bribe was reasonably calculated to reduce the ability of a construction company to purchase materials in interstate commerce), *cert. denied*, 433 U.S. 909 (1977).

[196] *See id.* (discussing the Hobbs Act).

[197] United States v. O'Grady, 742 F.2d 682, 696 (2d Cir. 1984) (Van Graafeiland, J., concurring in part and dissenting in part), *criticized by* Evans v. United States, 112 S. Ct. 1881 (1992).

[198] A violation of the Hobbs Act, and presumably any other statute sharing the same jurisdictional basis, may be satisfied even if the record demonstrates that the occurrence had no actual effect on commerce. United States v. Staszcuk, 517 F.2d 53, 59-60 (7th Cir.) (noting that congressional concern is justified by the harmful consequences of the class of transactions to which the individual extortion belongs, and jurisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce), *cert. denied*, 423 U.S. 837 (1975).

[199] *See* Whitaker, *supra* note 1, at 1649.

states–possibly tainting even honest officials, destroying confidence in the legislative process, and depressing efforts at internal reform–may outweigh the costs of congressional inaction in this area. Congress may well decide that the federal government has an overriding interest in ensuring that the state officials who administer many of its programs and with whom it must continue to interact display at least a minimum level of integrity. However, it should make this determination only after an analysis of all the advantages and drawbacks such a decision would bring. At this point, it appears that Congress, the courts, and the United States Department of Justice have adopted the positive stance without making the necessary investigations.[200] Although the ultimate result will likely remain the same, the ability to point to a well-reasoned process which brought the law to this conclusion not only increases its actual and perceived legitimacy, but also has value in and of itself. No matter how difficult the resolution of these issues appears, it should not discourage the courts from applying a reasonable analysis to Hobbs Act prosecutions. Although a more detailed investigation falls beyond the scope of this Note, these questions warrant further attention.

CONCLUSION

The Supreme Court has provided the perfect opportunity to establish some common sense guidelines for the federal prosecution of government corruption at every level. Through its use of the quid pro quo, *McCormick* illustrates the means by which the courts may implement their decision,[201] while *Evans* suggests the proper subject–all Hobbs Act prosecutions.[202] Clearly, "[p]ublic officials who passively accept unauthorized gratuities do not belong in the same class as those who affirmatively put their office up for sale."[203] Yet, technically the language of the Hobbs Act treats them the same and subjects them to the same penalties.[204] This illogical position suggests that the courts should refuse to extend the Hobbs Act to cover gratuities violations. Such an interpretation accurately reflects congressional intent to treat bribery as a serious crime comparable to robbery or extortion while dealing with potential or speculative "influencing" of officials in a more lenient

---

[200] *See id.* at 1624. Whitaker goes on to suggest a statute which Congress could adopt to clarify its stance on low-level corruption in the states. *Id.* at 1648-53.

[201] *See supra* notes 95-121 and accompanying text.

[202] *See supra* notes 122-36 and accompanying text.

[203] Whitaker, *supra* note 1, at 1623.

[204] *See supra* part III.B.4.

manner.[205] The enactment of a separate statute which assigns bribery a severe penalty but punishes the acceptance of a gratuity with much smaller consequences illustrates this perspective.[206] While the stricter penalties of the Hobbs Act provide appropriate punishment for public officials who allow the possibility of private gain to dictate the exercise of their duties, they disproportionately punish those officials who look upon gifts as the fringe benefits of their office while offering nothing specific in return for them. The imposition of the quid pro quo requirement presents the most suitable way to achieve the proportionality lacking in this area of the law.

With the proposed limitation provided by the imposition of a quid pro quo requirement for Hobbs Act prosecutions comes the danger that the states will choose to ignore gratuities violations, leaving them unchecked by any outside mechanism. However, the courts' possible perception of a need to which Congress has not spoken cannot provide justification for distorting a statute beyond all recognition to fill that void. Congress intended the Hobbs Act to apply to violent crimes and those egregious displays of public corruption which interfere with the orderly functioning of society. Congress indicated this intent when it established a scheme of penalties appropriate for some of the most serious of offenses. If Congress wishes to address less culpable forms of behavior also deserving condemnation but not equaling the first group in venality or effect, then Congress may exercise that option. Until that time, however, the courts will serve society far better if they remain true to the logic established by Congress by refusing to extend the Hobbs Act to encompass crimes for which its creators never intended it.

Medrith Lee Hager

---

[205] *See supra* part III.B.4.

[206] *See supra* part III.B.3.