Seton Hall Law Review

Vol. 3 Fall 1971 No. 1

PROSECUTIONS OF LOCAL POLITICAL CORRUPTION UNDER THE HOBBS ACT: THE UNNECESSARY DISTINCTION BETWEEN BRIBERY AND EXTORTION

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The Hobbs Act,[1] by prohibiting any interference with interstate commerce by means of extortion, is one of the major statutes under which the federal government can combat local political corruption where the state is either unable or unwilling to do so.[2] While the Act has proven successful in convicting venal public officials,[3] prosecutions

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1 18 U.S.C. § 1951 (1970), which reads as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
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> (b) As used in this section—
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> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
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> (c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

2 The other major statute, 18 U.S.C. § 1952 (1970), the so-called "Travel Act," will be discussed *infra*.

3 *See, e.g.*, United States v. Addonizio, — F.2d —, Nos. 19,295, 19,391, 19,392, 19,393

are made difficult by an unnecessary and arbitrary distinction which some courts have read into the statute: the distinction between bribery and extortion. The effect of this distinction, when applied, is to preclude convictions where, in the mind of the court or of the jury, bribery, and not extortion, is proven.

This distinction has arisen out of the definition of the term "extortion" as used in the Act,[4] and a holding by some courts that the definition of extortion is, for federal purposes, dependent on the law of New York State.

During the legislative debates preceding the passage of the Act,[5] the issue of the meaning of its terms was raised. The Act "grew out of the so-called Teamsters Union case[6] in New York,"[7] and

(3d Cir. Sept. 16, 1971), affirming the conviction of the Mayor, Corporation Counsel, and Director of Public Works of New Jersey's largest city and others; United States v. Kenny, Criminal No. 570-70 (D.N.J. Aug. 10, 1971), wherein the Mayor, President of the City Council, Business Administrator, and the Purchasing Agent of New Jersey's second largest city, as well as the County Chief of Police, County Treasurer, County Freeholder, and a Commissioner of the Port of New York Authority, were all convicted of conspiracy and substantive violations of the Hobbs Act. Appeals docketed Nos. 71-1728, 71-1729, 71-1886, 71-1887, 71-1888, 71-1889, 71-1890 (3d Cir. Nov. 12, 1971).

4 18 U.S.C. § 1951(b)(2)(1970) provides:

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

5 The predecessor of the Hobbs Act was the original Anti-Racketeering Act of 1934, Act of June 18, 1934, ch. 569, §§ 1-6, 48 Stat. 979-80. It prohibited any act by "any person" in any way or in any degree affecting trade or commerce. Section 2 declared that any person who:

> (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 . . . .

The legislation was intended to overcome the limitations in the Sherman Act, 15 U.S.C. §§ 1-7 (1970), and to extend federal jurisdiction over all restraints of any commerce within the scope of the federal government's constitutional powers. S. REP. No. 532, 73d Cong., 2d Sess. (1934).

However, the Supreme Court in United States v. Local 807, 315 U.S. 521, 531 (1942), narrowly construed the Act, holding that it exempted the activities of persons who were trying to become bona fide employees of interstate trucking firms. Congress reacted to that decision by enacting the Hobbs Act. In the report accompanying the bill, the power of Congress to regulate interstate commerce is discussed in full. The report concludes:

> There must be agreement that these persons who have been impeding interstate commerce and levying tribute from freeborn American citizens engaged in interstate commerce shall not be permitted to continue such practices without a sincere attempt on the part of Congress to do its duty of protecting interstate commerce.

H.R. REP. No. 238, 79th Cong., 1st Sess. 10 (1945).

6 United States v. Local 807, 315 U.S. 521 (1942).

7 91 CONG. REC. 11843 (1945) (remarks of Congressman Cellar of New York, an opponent of the Act).

much of the debate regarding the bill concerned labor racketeering in New York City.[8] Certain congressmen from New York were the leaders of the fight against this Act[9] which they considered to be anti-labor.[10] It was not surprising, therefore, that its advocates, in explaining the Act's provisions, compared it to the existing law of New York, in an attempt to show that nothing revolutionary was proposed. Thus, Congressman Hobbs of Alabama, the sponsor of the bill, declared:

> [T]here is nothing clearer than the definitions of robbery and extortion in this bill. They have been construed by the courts not once, but a thousand times. The definitions in this bill are copied from the New York Code *substantially*.[11]

Congressman Hancock of New York, a supporter of the Act, also explained: "The bill contains definitions of robbery and extortion which *follow* the definitions contained in the laws of the State of New York."[12] These statements were made, obviously, to quiet the objectors from New York, and not, as will be shown,[13] to indicate to courts, later, that Congress intended to rely, exclusively, on New York law in construing the Act. Indeed, Congress did not even copy the New York statute[14] verbatim when it defined "extortion."

Therefore, it was curious that the court in *United States v. Nedley*[15] looked solely to the law of New York in order to determine the proper construction to be given the term "robbery" as used within the Act. The court, focusing only on a portion of the legislative history, noted that the terms were taken from the statutes of New York, and that therefore the case law of New York, construing the New York statute, must be looked to for guidance in the construction of the terms of the Hobbs Act.

This holding of the *Nedley* court, on the definition of "robbery," has led subsequent courts to the case law of New York in defining the term "extortion," which, as will be demonstrated, has provided public officials with a defense, based on a unique approach by the New York courts, in prosecutions for extortion under Hobbs. Thus, following the

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8 *Id.* at 11902.

9 *Id.* at 11900 (remarks of Congressman Hobbs).

10 *Id.* at 11901-02 (remarks of Congressman Cellar).

11 *Id.* at 11900 (emphasis added).

12 *Id.* (emphasis added).

13 *See* notes 52-55, and accompanying text, *infra*.

14 *Compare* 18 U.S.C. § 1951(b)(2) (1970) *with* Penal Law of 1909, § 850, *as amended*, Laws of 1917, ch. 518, *reprinted in* N.Y. PENAL LAW, appendix § 850 (McKinney 1967), quoted in note 51 *infra*.

15 255 F.2d 350, 355 (3d Cir. 1958).

reasoning of *Nedley*, the district court in *United States v. Kubacki*[16] also applied only the law of New York in deciding the construction of the term "extortion" as used in the Hobbs Act.

In *Kubacki* there was an indictment, under both the Hobbs Act and the Travel Act,[17] of the mayor of Reading, Pennsylvania, and another. They were accused of having demanded a kickback on the sale of parking meters to the city. Pursuant to the indictment, the government contended that the sellers of the meters were the victims of an extortion in that the public official had placed them in fear of economic loss when he told them that their bid would not be considered unless they agreed to make kickbacks. However, the court rejected this argument and dismissed the Hobbs Act count. The district court, following *Nedley*, turned to the law of New York and held that bribery and extortion are mutually exclusive under New York law, and therefore must be mutually exclusive under the Hobbs Act.

Extortion, held the court, could only be committed and fear produced, if the public official had threatened the loss of, or interference with, a property right already existing in the victim. There, the court found, the facts established only that the official stated that he would not award a *future* contract to a firm without a payoff, and that the firm had therefore neither been threatened, nor put in fear of the loss of any existing property.[18] Thus, held the court, the record was devoid of any evidence of duress as required by the Act.

In reaching this conclusion, the *Kubacki* court referred to the New York case, *People v. Dioguardi*,[19] which held that under New York law bribery and extortion are mutually exclusive, and that "bribery" involves the *voluntary* giving of something of value to influence the performance of official duty, while "extortion" involves a taking accompanied by *duress*.[20] In the absence of such a showing of fear with respect to existing property rights, the court granted defendants' motion for acquittal. The effect of this ruling has been to set a precedent which has allowed subsequent public officials charged with "extortion" under the Hobbs Act to raise the defense that they are not guilty because they have committed a "bribery" instead. This holding of the *Kubacki* court has elevated the element of proof of fear in the victim into the *sine qua non* of the government's burden of proof under the Hobbs Act.[21]

16 237 F. Supp. 638, 641 (E.D. Pa. 1965).

17 18 U.S.C. § 1952 (1970).

18 237 F. Supp. at 641.

19 8 N.Y.2d 260, 273, 168 N.E.2d 683, 692, 203 N.Y.S.2d 870, 881 (1960).

20 237 F. Supp. at 641.

21 United States v. Kennedy, 291 F.2d 457, 458 (2d Cir. 1961), wherein the court stated:

Although "fear," as used in the definition of extortion under Hobbs, suggests apprehension of physical harm to person or property, it has been established that "fear" of economic loss is sufficient.[22] Thus, where a contractor who has a contract later agrees to a kickback, the threat of economic loss is easily seen.[23] The corrupt public official may "arrange" for product rejections, harassing inspections, delays in getting paid, or needless additional requirements.[24] If, in anticipation of such problems, the contractor agrees to the kickback, fearing future economic loss to an existing property or contractual right, then, under the *Kubacki* rationale, he is the victim of an extortion.

However, the threat of economic loss is less easily understood when, at the time of the improper demand, the victim of the extortion does not have a pre-existing vested right, but is merely a prospective bidder and a competitor for a contract. In such situations, he may be told, merely, that unless he agrees to the kickback his bid will not be considered. Under the thinking of *Kubacki*, this is not extortion because the element of fear, which requires a threat against a property right, is absent.[25]

"Proof of the state of mind of the victim is relevant, indeed essential, to a prosecution for extortion . . . ."

22 United States v. Sopher, 362 F.2d 523, 527 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); United States v. Provenzano, 334 F.2d 678, 685-86 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964); Cape v. United States, 283 F.2d 430, 434 (9th Cir. 1960); United States v. Palmiotti, 254 F.2d 491, 495-96 (2d Cir. 1958); Callanan v. United States, 223 F.2d 171, 174 (8th Cir.), *cert. denied*, 350 U.S. 862 (1955); Bianchi v. United States, 219 F.2d 182, 189 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955).

23 *See, e.g.*, Bianchi v. United States, 219 F.2d 182, 189 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955), where the court ruled that a construction contract may be considered property under the Act.

The federal prosecutor need not, however, show that the defendant induced the fear, but only that he utilized it to extort money. United States v. Gordon, 449 F.2d 100, 102, (3d Cir. 1971); *accord*, Callanan v. United States, 223 F.2d 171, 174 (8th Cir.), *cert. denied*, 350 U.S. 862 (1955). Nor does he need to prove that the extortioner received any personal benefit from an extortion which he perpetrated for the benefit of another, United States v. Provenzano, 334 F.2d 678, 686 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964).

24 The contractor may be extorted by indirect means, *e.g.*, when pressure is put on someone he must rely upon; United States v. Compagna, 146 F.2d 524, 526 (2d Cir.), *cert. denied*, 324 U.S. 867 (1944).

25 Moreover, in many instances when the contractor has agreed to the kickback, the additional cost, not uncommonly 10%, is passed on to the taxpayer by increasing the bid price, or through "extras" on the project. The contractor therefore may suffer no real economic injury even if the solicitation is made after the contract has been awarded. Thus, there is a danger under the *Kubacki*-New York rationale, that a venal public official may be able to successfully argue to a court, or to a jury, that he never actually put the payor in fear, irrespective of when the request for money occurred, because the businessman knew that money requested of him would be recouped by him—often in advance of the actual payment.

The practical difficulty with all of this lies in the fact that in the final stages of political corruption a local official may not even need to solicit the kickback, much less *demand* it. The practice at that stage may be so widespread and so well known that everyone contemplating doing business with that particular governmental body *anticipates* that he will have to "take care of the boys downtown"[26] even before he bids. And, after he gets his award, he may comply with the 10% custom without any threat against him, or even any demand upon him. This, often, is where the federal intervention is most desperately needed because corruption in local government could not reach that stage of decay if the state had been able to deal with it. And yet, under the reasoning of *Kubacki*, it is precisely at the point of greatest need for federal assistance that federal aid must be denied—for when venality becomes so brazen that it is expected, so accepted that the threat and even the solicitation need not be expressed, then, under *Kubacki*, it is impossible to show "threat" or "fear" and a prosecution under the Hobbs Act would not be possible.

Fortunately, however, the Seventh Circuit has not accepted the rationale of *Kubacki*. In *United States v. Sopher*,[27] the court, without reviewing the evidence, found that a subcontractor who was asked for a kickback *prior to* the submission of his bid to the general contractor on a sewer project, had been placed in fear of economic loss within the meaning of Hobbs. The defendant public officials were, the court held, properly convicted of extortion under the Hobbs Act. The court, however, did not consider the element of duress vis-à-vis the mutually exclusive distinction between bribery and extortion and, in fact, referred to the kickback as the "extorted bribe money."[28]

While *Sopher* may be authority for the proposition that one need not have a vested right before becoming the victim of extortion under

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26 *See* STATE OF NEW JERSEY, GOVERNOR'S SELECT COMMISSION ON CIVIL DISORDER, REPORT FOR ACTION (1968):

> There is a widespread belief that Newark's government is corrupt.
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> . . . A source close to Newark businessmen said he understood from them that "everything at City Hall is for sale." A former state official, a former city official and an incumbent city official all used the same phrase: "There's a price on everything at City Hall."
>
> . . . .
>
> Testimony before the Commission, interviews with responsible people in different strata of the city's life, as well as nationally publicized articles (Life, The New York Times) leave no doubt that the belief that Newark is a corrupt city is pervasive.

Id. at 20-21.

27 362 F.2d 523 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966).

28 *Id.* at 525.

the Hobbs Act, it was not until *United States v. Addonizio*[29] that this issue was squarely faced. In rejecting the vested rights argument asserted by defendants, and in holding that the economic interest threatened may be an anticipated, and not merely a vested one, the court said:

> The . . . problem with appellants' argument is in its implicit assumption that *contractual property* rights are the only rights with which there could have been interference. In fact, contractual rights comprise only a part of the "package" of rights which can form the basis of an extortion. Contractors, engineers, and suppliers, for example, have a right to expect that, when they incur time and expense to bid on public projects, they will be awarded contracts when their bids are lowest, and that they will subsequently enjoy the full financial benefits of their efficiency and industry.[30]

In addressing itself to this question, the *Addonizio* court has not resolved the underlying problem. True, it has held that a businessman who has invested time and money in his offer has an economic interest in the fair consideration of that offer, and that this is an economic interest which may be "threatened," and that this threat may produce "fear" for the purpose of the Hobbs Act; but what of the businessman who receives the demand *before* he has invested any time or any money or even one who himself makes the solicitation?[31] This area is still open to the *Kubacki* defense.

Moreover, while the court in *Addonizio* did not expressly consider the issue of the mutual exclusivity of bribery and extortion,[32] it nevertheless implied that certain facts may create a jury question as to whether particular payments of money to public officials constitute either bribery or extortion.[33] Thus, while the court did shrink the

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29 — F.2d —, Nos. 19,295, 19,391, 19,392, 19,393 (3d Cir. Sept. 16, 1971).

30 *Id.* slip opinion at 40-41.

31 If courts insist that a public official must "threaten" to deprive the payor of his "rights" in order to commit extortion, it would seem that the argument could be made that a citizen in this country has a "right" under the due process clause and the equal protection clause of the fourteenth amendment, to the equal and the fair consideration of his bid on public work, along with all other bidders; and that he has a "right," enforceable in our courts, to bid without the necessity to kickback, irrespective of whether or not he has already expended time and money at the time of the solicitation. If there is such a "right," a threat addressed to it would constitute "extortion" even under the *Kubacki*-New York approach.

32 — F.2d —, Nos. 19,295, 19,391, 19,392, 19,393 (3d Cir. Sept. 16, 1971), slip opinion at 49.

33 *Id.* slip opinion at 40. *See* the recent opinion in United States v. Hyde, 448 F.2d 815, (5th Cir. 1971), where the Fifth Circuit reviewing the Hobbs Act extortion conviction of Richmond Flowers, the former Attorney General of Alabama, said:

rationale of *Kubacki* and the New York line of cases, which hold that these two crimes are mutually exclusive and that for a public official bribery is a defense to extortion, the prosecutor in a Hobbs Act case may still be confronted by *United States v. Kubacki*[34] and the possibility that if the evidence fails to show "threat," "fear," or "duress," he will have proven bribery, not extortion, thereby losing his case under Hobbs.

Therefore, if *Kubacki* is indeed a correct statement of federal law, the federal prosecutor must face the possibility of being unable to get his case to the jury in a Hobbs Act prosecution for extortion, and that even if he is successful, the jury may become confused by an instruction on the elements of bribery. The defense in a Hobbs Act prosecution often seeks such an instruction,[35] asserting that it is the jury's function to consider if the element of duress is present and to decide whether a specific intent to commit bribery was formed on the part of the payor, rather than an intent to compel on the part of the taker.[36] Submission of such a "defense" to the jury will generally serve only to confuse them and will often lead to the kinds of distinctions, such as that in *Kubacki*, which are almost impossible even for courts to apply.[37]

As a matter of practical application, it seems clear that as long as there exists the possibility that the courts will apply the law of New York State to the United States through the Hobbs Act, vital prosecutions may be defeated on the rather esoteric distinction between a "voluntary" payment and a "compelled" payment, made by a sophisticated businessman to a sophisticated public servant.[38]

> The defendants argue that . . . extortion occurs only when a legal right is threatened . . . .
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> . . . .
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> It is the wrongful use of an otherwise valid power that converts dutiful action into extortion. If the purpose and effect are to *intimidate* others, *forcing* them to pay, the action constitutes extortion. . . . The distinction from bribery is therefore the *initiative* and *purpose* on the part of the official and the *fear* and lack of *voluntariness* on the part of the victim.

Id. at 832-33 (emphasis added).

34 237 F. Supp. 638 (E.D. Pa. 1965).

35 *See, e.g.*, United States v. Addonizio, — F.2d —, Nos. 19,295, 19,391, 19,392, 19,393 (3d Cir. Sept. 16, 1971), slip opinion at 49. The court rejected such a request.

36 *Id.*; United States v. Kramer, 355 F.2d 891, 897 (7th Cir.), *cert. denied*, 384 U.S. 100 (1966); *accord*, United States v. Barash, 365 F.2d 395, 403 (2d Cir. 1966).

37 Thus, even in one case in which the defendants had conceded that extortion was not mutually exclusive with bribery, and instead had sought to have bribery submitted to the jury as a lesser included offense, the court properly refused to charge the jury on bribery on the ground that the case was not prosecuted on that theory and that the record did not support such a charge. Bianchi v. United States, 219 F.2d 182, 193 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955); *accord*, United States v. Miller, 340 F.2d 421, 425 (4th Cir. 1965), where the opposite situation prevailed, the court refused to charge the jury on extortion where only bribery was proved.

38 *See generally* Annot., 4 A.L.R. FED. 881 (1970).

Before addressing the final question, the question of whether or not this bribery-extortion distinction is actually required under the Hobbs Act, it is well to point out that there is a companion statute to the Hobbs Act, the "Travel Act,"[39] which prohibits both bribery and extortion. While the Travel Act also provides a significant method of combating local political corruption,[40] and indeed the defendants in *Kubacki* were ultimately convicted under this statute, it is by no means a substitute for the Hobbs Act, and does not alleviate the need to put to rest the distinction between bribery and extortion which has been read into the Hobbs Act.

One of the essential elements of the Travel Act is the requirement of travel in, or the use of the facilities of, interstate commerce. Thus, the impact on interstate commerce is not an element of the crime, and unless there is a use of interstate facilities or there is interstate travel, this Act is not applicable. The Hobbs Act, on the other hand, requires only an effect on commerce "in the slightest degree."[41]

Moreover, there is a curious ambivalence between the way the courts have construed the jurisdictional requirements under the two statutes. Under the Travel Act, the courts have required deliberate, knowing interstate travel or the similar use of interstate facilities to achieve the illegal act.[42] However, under the Hobbs Act it has been held

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39 18 U.S.C. § 1952 (1970) which reads as follows:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

40 *See, e.g.*, United States v. Zirpolo, 288 F. Supp. 993 (D.N.J. 1968), *rev'd on other grounds*, — F.2d —, Nos. 18, 142 (3d Cir. Feb. 18, 1971).

41 *See, e.g.*, Battaglia v. United States, 383 F.2d 303 (9th Cir. 1967), *cert. denied*, 390 U.S. 907 (1968), where the Court held that the forcing of an owner of a bowling alley to remove a pool table which he had received from a local firm, which had previously "imported" it from another state was sufficient interference with that commerce to warrant conviction under the Hobbs Act.

42 United States v. Ruthstein, 414 F.2d 1079, 1082 (7th Cir. 1969); United States v. Barrow, 363 F.2d 62, 65 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967). *See also* Rewis

that if, in fact, the "extortion" affected interstate commerce, there is a violation of the Act notwithstanding the absence of an intent to have this effect, or even the absence of any anticipation that such an effect might result.[43] Moreover, under the Travel Act the determination of whether or not there was a knowing use of interstate travel or facilities is left to the jury.[44] On the other hand, the courts have held that what constitutes an effect on interstate commerce under the Hobbs Act is a question of law for the court and not a question of fact for the jury.[45]

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v. United States, 401 U.S. 808 (1971), where the Supreme Court held that although neither the crossing of state lines by the customers of an illegal gambling establishment, nor the fact that such an establishment is frequented by out of state bettors, nor even the fact that it is reasonable for the proprietors of such an establishment to anticipate that customers will cross state lines, constitutes a violation of the Travel Act; however, the encouragement of such interstate travel may amount to a violation of the Act. *Contra,* United States v. Roselli, 432 F.2d 879, 890-91 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971); United States v. Hanon, 428 F.2d 101, 107-08 (8th Cir. 1970). It should be noted that in United States v. DeCavalcante, 440 F.2d 1264, 1268 n.3 (3d Cir. 1971), the Third Circuit cited *Roselli* and gave at least an indication thereby that it might reverse its position in *Barrow.*

[43] United States v. Varlack, 225 F.2d 665, 669-71 (2d Cir. 1955); to the same effect under the 1934 Act, *see* Nick v. United States, 122 F.2d 660, 673 (8th Cir.), *cert. denied,* 314 U.S. 687 (1941).

[44] United States v. Barrow, 229 F. Supp. 722, 726 (E.D. Pa. 1964), *aff'd.,* 363 F.2d 62 (3d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967).

[45] United States v. Lowe, 234 F.2d 919, 922-23 (3d Cir.), *cert. denied,* 352 U.S. 838 (1956); United States v. Varlack, 225 F.2d 665, 672 (2d Cir. 1955); Hulahan v. United States, 214 F.2d 441 (8th Cir.), *cert. denied,* 348 U.S. 856 (1954). These are not the only difficulties under this statute. The distinction between bribery and extortion, found in New York law, have started to plague the application of the Travel Act even in states which make no such distinction. *See, e.g.,* United States v. Zirpolo, 288 F. Supp. 993 (D.N.J. 1968), *rev'd on other grounds,* — F.2d —, Nos. 18, 142 (3d Cir. Feb. 18, 1971), where businessmen charged with use of interstate facilities, and travel for the purpose of bribing New Jersey officials, defended on the ground that extortion and bribery are mutually exclusive and that, as the victims of extortion, they would therefore not be guilty of bribery.

Thus the trend seems to be to use the unhappy distinction between bribery and extortion, which New York uses, not only in the Hobbs Act, but in the Travel Act as well, when the businessman-payor is prosecuted for bribery; and this in spite of the fact that Travel Act definitions of bribery and extortion are dependent on the law of the state where the acts themselves are performed, 18 U.S.C. § 1952(b)(2) (1970); United States v. Nardello, 393 U.S. 286 (1969), and in spite of the fact that *in New Jersey, as in most of her sister states, bribery and extortion are not mutually exclusive at all.* State v. Begyn, 34 N.J. 35, 47, 167 A.2d 161, 167 (1961):

> [I]t is clear that a violation of our statute occurs whenever an officer, by color of his office, receives a reward to which he is not legally entitled by reason of or in connection with his official duties. . . . This present concept of the crime thus overlaps the offense of bribery since extortion is committed even where the object of the payment is in reality to influence an officer in his official behavior or conduct without such having to be established.

Another anomaly should be noted: if *Nedley* is correct, if "extortion," for purposes of the Hobbs Act is defined by the law of the State of New York, while under *Nardello,* "extortion" for purposes of the Travel Act (18 U.S.C. § 1952 (1970)) is defined by the

Thus, in situations where interstate travel or use of interstate facilities cannot be proven, or where the knowing use of them by the public official cannot be demonstrated, the federal government will often have to prosecute local political corruption under the Hobbs Act or not at all. Take this *hypothetical* situation: The mayor of a major city anticipates the construction of a highway leading to an airport. Before the project is publicized he approaches two companies. One company is a local firm, which does no business outside the state. The other firm is a national company, which keeps substantial offices and staff within the state. The mayor tells representatives of each company about the proposed project, and advises that he will not permit the award of work to any firm which does not agree, in advance, to kickbacks of 10%.

The jurisdictional problem is obvious, for purposes of the Travel Act. If the local firm agrees and pays, using local means to raise the cash, there may be no jurisdiction to prosecute for bribery under the Travel Act. If the national company agrees and pays, using local sources and means, the same result may obtain. But even where the national firm agrees, pays, and uses interstate facilities or travel, there still may be an acquittal if the prosecution has not proven to each of the jurors, beyond a reasonable doubt, that the mayor, *who could probably care less*, knew, or intended, that such interstate travel or facilities be used in connection with the payoff.

The fact is, that under the Hobbs Act the federal government has the power to prosecute *any* interference with interstate commerce by extortion. Thus, just as any "extortion" practiced on a company which is itself engaged in interstate commerce has been held to have an effect on commerce,[46] there is also federal jurisdiction to prosecute acts of "extortion" on local companies, if such local companies are involved in projects which serve interstate commerce.[47]

Finally, even where the victim company is not itself engaged in interstate commerce, and even where the affected project does not itself serve interstate commerce, there is still jurisdiction if the "extortion" is practiced on a firm constructing a project which is otherwise dependent

law of the state where it occurs, then "extortion" as used in 18 U.S.C. § 1951 (1970) and "extortion" as used in 18 U.S.C. § 1952 (1970) mean two different things. When it is observed that "extortion" under Hobbs is punishable by up to twenty years imprisonment, while "extortion" under the Travel Act carries a maximum of five years, it must be realized that a distinction between these "extortions" will be a distinction with a difference indeed.

[46] United States v. Provenzano, 334 F.2d 678, 693 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964).

[47] *See, e.g.*, United States v. Green, 246 F.2d 155 (7th Cir.), *cert. denied*, 355 U.S. 871 (1957).

on interstate commerce for equipment or supplies for completion.[48] It is most difficult to imagine a public project of any size that does not come within the scope of this last category, because it would be difficult to name a state which produces, solely within its own borders, all of the steel, timber, machinery and supplies which a project of size requires.

Thus, in attempting to prosecute the corrupt mayor in our hypothetical situation, the prosecutor is placed on the horns of a dilemma. He can proceed under the Hobbs Act for extortion, but he may lose and the venal official will go free if his proofs do not warrant a finding of "threat" and payment through "fear." Or he can proceed on a theory of bribery, and the knowing utilization of interstate commerce or its facilities to promote bribery, under the Travel Act,[49] but here he will fail if he cannot *prove* that the *mayor knew* or *intended* the use of interstate facilities. As suggested, this choice is unnecessary.

United States v. Nedley[50] gave too narrow a reading of the legislative history of the Hobbs Act. While it is clear that the definition of extortion contained in the Hobbs Act was similar to the New York statute,[51] it is equally clear that the Congress did not intend to rely solely on the New York law.[52] Indeed, in defining extortion, the Hobbs Act departed both from the New York statutory definition and from its

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48 Hulahan v. United States, 214 F.2d 441, 445 (8th Cir.), *cert. denied*, 348 U.S. 856 (1954).

49 Assuming that the particular state bribery statute involved comports with the facts of his case. *See* United States v. Nardello, 393 U.S. 286 (1969).

50 255 F.2d 350 (3d Cir. 1958).

51 The statute provides:

> Extortion is the obtaining of property from another, or the 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.

Penal Law of 1901, § 850, *as amended*, Laws of 1917, ch. 518, *reprinted in* N.Y. PENAL LAW, appendix § 850 (McKinney 1967). This law had been on the books long before the enactment of both the Hobbs Act and its predecessor.

52 Congressman Robsion of Kentucky stated during the debate on the Act:

> The definitions of robbery and extortion set out in this bill are the same definitions set out in the New York State code of laws and *are defined in substantially the same way by the laws of every State in the Union.*

91 CONG. REC. at 11906 (1945) (emphasis added). Robsion later asked:

> Cannot the gentleman state that the definition of robbery and extortion put in this bill is that *followed by the codes and statutes generally throughout the Nation, in all the jurisdictions of the various States?*

Id. at 11910 (1945) (emphasis added). Congressman Springer of Indiana, a supporter of the Act, replied:

> The gentleman is preciselv correct. It is practically the same as the statutes in the different States of the Union.

Id. As will be demonstrated, the law of New York, as construed by its courts, is rather unique.

own predecessor, the Anti-Racketeering Act of 1934.[53] The New York definition appears virtually verbatim only in the 1934 Act, which was enacted years before any of the New York cases[54] supporting the concept of mutual exclusivity of bribery and extortion were decided. Thus, at the time the New York definition was incorporated into federal law in 1934, Congress could not have known of the later restrictive New York decisions.

When one considers the scope and import of the Hobbs Act,[55] it becomes even clearer that Congress, by substantially borrowing a well-accepted and fairly universal statutory definition of extortion, which is also found in the New York statute, did not intend to sub silentio adopt as the law of the land a defense based upon New York law. The Hobbs Act prohibits extortion affecting interstate commerce wherever it may occur throughout the United States. Why should a United States court sitting in Texas, Tennessee, Nevada or New Jersey be restricted to the *unique* interpretation given by the New York State courts to statutory language of extortion, which is common to most states, and interpreted differently by them?[56] The legislative history of the Hobbs Act gives no indication that when Congress wrote the definition of extortion into the Act it knowingly and intentionally adopted a rule of New York decisional law that is so illogical and so contrary to public policy that New York itself repealed it by statute in 1965.[57]

[53] The Hobbs Act was an amendment to this earlier statute, which was originally enacted as Act of June 18, 1934, ch. 569, §§ 1-6, 48 Stat. 979, 980, which provided:

> Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—
>
> . . . .
>
> (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. . . .

The present Act, of course, 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) (1970). (Italicized words appear in neither the New York statute nor the 1934 Act.).

[54] People v. Dioguardi, 8 N.Y.2d 260, 168 N.E.2d 683, 203 N.Y.S.2d 870 (1960); Hornstein v. Paramount Pictures, 22 Misc. 2d 996, 37 N.Y.S.2d 404 (Sup. Ct. 1942), *aff'd.*, 226 App. Div. 659, 41 N.Y.S.2d 210 (1943), *aff'd.*, 292 N.Y. 468, 55 N.E.2d 740 (1944); People v. Feld, 262 App. Div. 909, 28 N.Y.S.2d 796 (1941).

[55] *See* Stirone v. United States, 361 U.S. 212, 215 (1960), where the Court, in speaking of the Act's scope, said:

> That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference "in any way or degree."

[56] *See* note 60 *infra*.

[57] N.Y. PENAL LAW §§ 135.70, 155.10, 180.30, 200.15 (McKinney 1967).

If the Act is read in full, the distinction between bribery and extortion becomes unnecessary where public officials are involved. The Hobbs Act defines "extortion" disjunctively,[58] by prohibiting the taking of another's property, with consent, when "induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." The phrase, "under color of official right," obviously sets forth an additional means by which extortion under the Hobbs Act may be committed—a means not involving the "wrongful use of actual or threatened force, violence or fear." Although there have been no reported cases under the Hobbs Act in which the term "under color of official right" was required to be construed,[59] that term has a well-established, unambiguous meaning, both at common law[60] and in statutory definitions of extortion upon which the Hobbs Act was patterned.

The phrase "under color of official right" or its equivalent has been central to the definition of extortion at least since the time of Blackstone. Indeed, Blackstone defined extortion as "any officer's un-

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58 United States v. Varlack, 225 F.2d 665, 669 (2d Cir. 1955).

59 "Color of official right" was raised by the government in United States v. Addonizio, — F.2d —, Nos. 19,295, 19,391, 19,392, 19,393 (3d Cir. Sept. 16, 1971). However, the trial judge declined to submit that issue to the jury, and the court of appeals did not review the question of its definition in the context of the Act. *Id.* slip opinion at 22.

There have been two reasons why this phrase has not been required to be construed. First, the overwhelming majority of Hobbs Act cases have not involved public officials, 31 AM. JUR. 2d, *Extortion* § 21, at 915 (1967), and the term "under color of official right" has been held to have no applicability to the extortionate acts of private individuals. This was impliedly recognized in Bianchi v. United States, 219 F.2d 182, 193 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955), a case in which labor union official defendants contended on appeal that "under the instructions given[,] the jury could find [them] guilty if they obtained money under color of office as union representatives." The Court rejected this contention on the facts, observing that:

> Defendants are referring to the common law offense of extortion where, *in [the] case of public officers*, color of office takes the place of force, threats, and pressures.

Id. (emphasis added).

Second, in the limited number of Hobbs Act cases involving public officials, the issue has not arisen because the government elected to proceed by showing wrongful use of fear; *e.g.*, United States v. Pranno, 385 F.2d 387 (7th Cir. 1967), *cert. denied*, 390 U.S. 944 (1968); United States v. Sopher, 362 F.2d 523 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); Ladner v. United States, 168 F.2d 771 (5th Cir.), *cert. denied*, 335 U.S. 827 (1948). None of these cases, however, even remotely suggest that the term "under color of official right" is to be read out of the Hobbs Act or that it means something other than what it has consistently meant for literally hundreds of years.

60 Because common law extortion could only be committed by a public officer "under color of office" or "under color of official right," those synonymous terms have come to be well understood in the reported cases. In *Corpus Juris*, for example, the following equivalent definitions appearing in the cases were set forth:

> A wrong committed by an officer under the pretended authority of his office; an act evilly done, by the countenance of an office; an act unjustly done by the

lawfully taking, by color 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."[61] Thus, at common law "extortion" was a crime which only a public official could commit, and it required no proof of "threat," "fear," or "duress." Later, modern statutes broadened the definition to *include* private takings by the imposition of fear.[62]

The late Chief Justice Vanderbilt of the New Jersey Supreme Court succinctly stated the elements of common law extortion as follows:

> It thus appears that the essential elements of the crime of extortion . . . at common law, are (1) an officer (2) by color of his office (3) taking money (4) that is not due him.
>
> The second of these elements of extortion needs, perhaps, a word of explanation. "By color of his office" means simply that the officer must have taken money not due him for the performance of his official duties. There is no requirement that the taking precede the performance of the duties, although generally in extortion such would be the case.[63]

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countenance of an office; a pretended, not a real, exercise of an officer's jurisdiction; a pretense of official right to do an act, made by one who has no such right; a claim or assumption of right to do an act by virtue of an office, made by a person who is legally destitute of any such right; the use of official authority as a pretext or cover for the commission of some corrupt or vicious act; the mere semblance, shadow, or false appearance of official authority; the dissembling face of the right of office; a fraudulent act of an officer in the line of his duty; having the appearance, especially the false appearance, of right; corruptly or with wicked and vicious motive; color of official authority; champerty. The term is a technical expression, and implies bad faith, corruption, breach of duty.

11 C.J. *Color of Office* at 1225-26 (1917) (footnotes omitted). *See also* BLACK'S LAW DICTIONARY 331 (4th ed. 1951) which defines "color of office" as:

> An act unjustly done by the countenance of an office, being grounded upon corruption, to which the office is as a shadow and color.

[61] 4 W. BLACKSTONE, COMMENTARIES *141 (Lewis ed. 1902). *See also* 25 C.J. *Extortion* § 1, at 233 n.3a (1921); 3 WHARTON, CRIMINAL LAW §§ 1392 *et seq.* (Anderson ed. 1957).

[62] *See, e.g.*, United States v. Nardello, 393 U.S. 286, 289 (1969), where Chief Justice Warren stated:

> At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion. In many States, however, the crime of extortion has been statutorily expanded to include acts by private individuals under which property is obtained by means of force, fear, or threats.

See also United States v. Sutter, 160 F.2d 754, 756 (7th Cir. 1947), where Judge (later Mr. Justice) Minton observed:

> At common law, if a public employee under color of his office demanded and received money or a thing of value to which he was not entitled, he was guilty of extortion.
>
> . . . .
>
> . . . In the common law offense of extortion, color of public office took the place of the force, threats, or pressure implied in the ordinary meaning and understanding of the word extortion.

[63] State v. Weleck, 10 N.J. 355, 371-72, 91 A.2d 751, 759 (1952).

Clearly, then, extortion in its classic sense relates to "the wrongful taking of money by a public officer, whether accompanied by 'threats' or not."[64]

As noted above,[65] the common law definition of extortion has been "quite commonly *extended* [by statute] to include any obtaining of property from another through a wrongful use of force or fear, *thus including acts not done under color of official right.*"[66] The extension of the definition of extortion to include private taking, *if* the private taking is attended by the use of fear, has not displaced the term "under color of official right"; it has merely added to it.[67]

Thus, for example, in interpreting Arizona's extortion statute, the Supreme Court of Arizona stated:

> The common law confined extortion to the unlawful taking by an officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. 8 R.C.L. § 315, p. 293. The Penal Code, however, has enlarged the scope of this offense *so as not to confine the commission of it to those persons who act under color of official right.* Under the statute we have a very comprehensive crime . . . .[68]

A California court made a similar observation:

> At the common law, "extortion" was confined to the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due or before it is due, and it is so defined. In most of the states the crime of extortion is defined by statutes which are substantially declaratory of the common-law offense. 8 R.C.L. p. 315. In some instances, however, the statutory definitions have extended the scope of the offense beyond that of the common law, and include the unlawful taking of money or thing of value of another, by any person, whether a public officer or a private individual, and this is so in California, as will be observed from the language of section 518 of the Penal Code, which reads as follows:
>
> 'Extortion is the obtaining of property from another,

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64 State v. Begyn, 34 N.J. 35, 45, 167 A.2d 161, 166 (1961). *See also* Kirby v. State, 57 N.J.L. 320, 321, 31 A. 213 (Sup. Ct. 1894), wherein the Supreme Court in discussing extortion stated:

> The offence consists in the oppressive misuse of the exceptional power with which the law invests the incumbent of an office.

65 *See* note 62, *supra.*

66 25 C.J. *Extortion* § 2, at 234 (1921) (emphasis added). *See* United States v. Nardello, 393 U.S. 286, 289 (1969). *See also* 35 C.J.S. *Extortion* § 1, at 356 (1960).

67 *See* Bianchi v. United States, 219 F.2d 182, 193 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955). It is interesting to note that the phrase has not been construed by the New York courts, which may account for the difficulties in the New York law.

68 Bush v. State, 19 Ariz. 195, 198, 168 P. 508, 509-10 (1917) (emphasis added).

> with his consent, induced by a wrongful use of force or fear, *or under color of official right.*'[69]

The California statute quoted above is virtually identical to the Hobbs Act definition. It was based on the New York statutory provision, which in turn was derived from Field's Code, the prototype for codification throughout the United States.[70]

A federal criminal statute must, of course, be construed in accordance with its plain meaning,[71] and in construing federal criminal statutes using a term of established common law meaning, the general practice is to apply that meaning to the term.[72] The phrase "under color of official right" as used in the Hobbs Act, can only mean what courts and commentators have consistently declared it to mean, and for a prosecutor or a court to disregard it is to rewrite the Hobbs Act.

At a time when the institutions of government, both local and federal, are being subjected to increasing attack and cynicism, those responsible for the enforcement of the law and the administration of justice cannot afford to allow one of the most powerful means of combating official corruption to be emasculated by an unwarranted, restrictive interpretation. The distinction between bribery and extortion that has developed under the Hobbs Act is unnecessary when that Act is used to prosecute corruption in public office. The phrase "under color of official right" which appears in the Act's definition of extortion renders that distinction moot. Thus, if the federal prosecutor can prove that a public official is guilty of

> the obtaining of property from another, with his consent . . . under color of official right

he should not hesitate to prosecute for extortion, irrespective of whether or not he can prove duress.

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69 People v. Peck, 43 Cal. App. 638, 643, 185 P. 881, 882-83 (1919) (emphasis added).

70 CAL. PEN. CODE § 518 & Historical Note (West 1970); *In re* Sherin, 27 S.D. 232, 130 N.W. 761 (1911); State v. Logan, 104 La. 760, 29 So. 336 (1901); People v. Barondess, 61 Hun 571, 16 N.Y.S. 436 (Sup. Ct. 1891), *rev'd on other grounds*, 133 N.Y. 649, 31 N.E. 240 (1892); ANNOT., 116 AM. ST. REP. 446 (1906); 22 CALIF. L. REV. 225 (1934).

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

72 United States v. Turley, 352 U.S. 407, 411 (1957); *Cf.* 2 SUTHERLAND, STATUTORY CONSTRUCTION, §§ 4702 *et seq.* (3d ed. 1943).