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CRIMINAL LAW—HOBBs ACT—APPLICATION OF THE HOBBs ACT IN LOCAL POLITICAL CORRUPTION PROSECUTIONS BY THE FEDERAL GOVERNMENT.

I. INTRODUCTION

In 1946, Congress passed the Hobbs Act (Act)¹ in order to protect interstate commerce from the ravages of racketeering activity.² The Act was designed as a criminal statute proscribing both robbery and extortion.³ The Act’s prohibition of extortion—i.e., “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”⁴—has been consistently utilized as a means of prosecuting political corruption.⁵ The courts, however, have struggled with this definition to determine whether a viola-

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² See H.R. REP. No. 238, 79th Cong., 1st Sess. 10, reprinted in [1946] U.S. CODE CONG. & AD. NEWS 1360. The stated objective of the Act was “to prevent anyone from obstructing, delaying or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion . . . .” Id. at 9, reprinted in [1946] U.S. CODE CONG. & AD. NEWS at 1370.
³ At the time of the debates on the Hobbs Act, the term “racketeering” was not expressly defined in any federal statute. However, one court had defined it as “the organized use of threats, coercion, intimidation, and use of violence to compel the payment for actual or alleged services of arbitrary or excessive charges under the guise of membership dues, protection fees, royalties or service rates . . . .” United States v. McGlone, 19 F. Supp. 285, 287 (E.D. Pa. 1937) (prosecution of labor leader under federal law).

(1005)
tion of the Hobbs Act is established solely by a showing that property was received under color of official right, or whether an element of duress is also required. The current trend in Hobbs Act cases is to construe the term "extortion" liberally.

The combination of the liberal construction afforded the term "extortion" by the judiciary and the broad jurisdictional scope of the Act has provided federal prosecutors with a potent weapon with which to combat political corruption on both state and local levels. Indeed, the importance of the Hobbs Act in prosecuting political corruption is underscored by the indictments handed down in the "ABSCAM" cases wherein the Act was the basis for prosecuting several prominent politicians. This note will evaluate the current trend in Hobbs Act political corruption prosecutions, with special emphasis on the decisional stance of the United States Court of Appeals for the Third Circuit in light of the numerous decisions of first impression within that circuit. In addition, this note will suggest that Supreme Court review or legislative action would be appropriate to determine whether such prosecutions were actually contemplated by Congress.

II. THE HOBBS ACT AND ITS JUDICIAL GLOSS

A. Background

In 1934, Congress passed the Anti-Racketeering Act in an effort to quell the widespread racketeering which was disrupting the flow of interstate


7. See, e.g., United States v. Williams, 621 F.2d 123, 125 (5th Cir. 1980); United States v. Cerilli, 603 F.2d 415, 425 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980). See also notes 45-62 and accompanying text infra.

8. See notes 45-62 and accompanying text infra.

9. See note 36 and accompanying text infra; note 70 infra.


13. See, e.g., United States v. Criden, Nos. 80-166-(1)-(4) (E.D. Pa. filed May 22, 1980). In Criden, an indictment, which included a Hobbs Act count, was returned against four defendants. Id. See also Philadelphia Inquirer, May 23, 1980, § A, at 1, col. 5. The nature of the ABSCAM cases are explained in T. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 510-111 (5th ed. 1980).


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—
commerce. This enactment, however, proved inadequate after the United States Supreme Court held that labor union activities were not within the ambit of the Anti-Racketeering Act. Congress, recognizing this deficiency, amended the statute by adopting the Hobbs Act.

During the congressional debates on the Hobbs Act, a number of New York legislators argued against passage of the bill because they considered it to be an anti-labor measure. The Act's proponents sought to assuage the opposition by pointing out that the proposed legislation was quite similar to New York's extortion law. This reference led a number of federal courts to interpret the Hobbs Act in light of New York decisional law.

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

(d) Conspires or acts concertedly with any other persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, of both.

Id. For a discussion of the cases decided under the 1934 Anti-Racketeering Act, see Annot., 138 A.L.R. 811 (1942).

15. See 78 Cong. Rec. 448-53 (1934). During the congressional debates on the Anti-Racketeering Act, it was established that the poultry racket alone cost Americans hundreds of thousands of dollars annually. Id. at 452 (remarks of Senator Copeland). The debates also indicated that increased mobility had caused racketeering and other crimes to become interstate in character. Id. at 451 (remarks of Senator Vandenberg). The Anti-Racketeering Act was designed to control such interstate racket. Id. at 452 (remarks of Senator Copeland).

16. United States v. Local 807, Int'l Bhd. of Teamsters, 315 U.S. 521 (1942). In Local 807, the defendant union prevented out-of-state truck drivers from making deliveries in New York unless a fee was paid to the local. Id. at 526. Subsequently, the union was prosecuted for extortion under the Anti-Racketeering Act. Id. at 527. On appeal, the Supreme Court found that Congress had not intended to proscribe labor union activities through the Anti-Racketeering Act. Id. at 531.

17. See 91 Cong. Rec. 11841 (1945) (remarks of Congressman Cox); id. at 11842 (remarks of Congressman Michener); id. at 11900 (remarks of Congressman Hancock). Several Congressmen expressed the view that the Supreme Court in "the Teamsters Union case,. . . legitimated highway robbery when committed by a labor goon." Id. at 11841 (remarks of Congressman Cox).

18. See notes 1-3 and accompanying text supra.


20. Id. at 11901-02 (remarks of Congressman Celler); id. at 11917-18 (remarks of Congressman Marcantoni). For a general discussion of the legislative history of the Act, see United States v. Enmons, 410 U.S. 396, 401-08 (1973).

21. See 91 Cong. Rec. 11900 (1945) (remarks of Congressman Hobbs). Congressman Hobbs stated: "[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." Id.

The New York statute provided: "Extortion is the obtaining of property from another, . . . with his consent, induced by a wrongful use of force or fear, or under color of official right." Penal Law of 1909, § 850, as amended, Laws of 1917, ch. 518, reprinted in N.Y. Penal Law, appendix § 850 (McKinney 1975) (current version at N.Y. PENAL LAW § 155.40 (McKinney 1975)).

B. The Third Circuit's Adoption of the New York Approach

The first Hobbs Act decision which explicitly applied the New York definition of extortion was *United States v. Kubacki*, 23 a district court case in which the mayor of Reading, Pennsylvania, and another individual were charged with extortion based on their alleged demand of a kickback on a city contract to purchase parking meters. 24 The *Kubacki* court began its analysis by pointing out that New York law was to be examined in interpreting the Hobbs Act. 25 Since New York case law indicated that extortion and bribery are mutually exclusive, 26 the *Kubacki* court felt compelled to treat the Hobbs Act prosecution accordingly 27 and proceeded by focusing upon whether the victim had acted volitionally or under duress. 28

The *Kubacki* court concluded that duress was the essence of extortion 29 and that the essence of duress was the victim's fear of interference with, or loss of, an existing property right. 30 On the facts before it, the court con-

24. Id. at 640. The defendants in *Kubacki* were indicted for violations of both the Hobbs Act and the Travel Act. Id. at 639-40.


26. See *People v. Dioguardi*, 8 N.Y.2d 260, 168 N.E.2d 683, 203 N.Y.S.2d 870 (1960). In *Dioguardi*, a business concern gave the defendant a sum of money in order to secure labor peace. Id. at 666-67, 168 N.E.2d at 687-88, 203 N.Y.S.2d at 876. As a result, the defendant was indicted for extortion. Id. at 268, 168 N.E.2d at 688, 203 N.Y.S.2d at 877. The New York Court of Appeals held that, because bribery and extortion are mutually exclusive, a defendant indicted for extortion was entitled to acquittal if the jury found that the defendant's acts constituted bribery instead. Id. at 273, 168 N.E.2d at 692, 203 N.Y.S.2d at 881.

27. 237 F. Supp. at 641-42.
28. Id. at 641. The duress requirement is derived from the New York interpretation of extortion, which focuses on the victim's state of mind to determine whether an offense committed under color of office is bribery or extortion. See *People v. Dioguardi*, 8 N.Y.2d 260, 275, 168 N.E.2d 683, 693, 203 N.Y.S.2d 870, 883 (1960).


30. 237 F. Supp. at 641-42. Thus, the *Kubacki* court implied that the element of fear is necessary for conviction under the Hobbs Act, whether the prosecution is based on the obtaining of property "induced by wrongful use of actual or threatened force, violence or fear" or "under color of official right." Id. at 642. See note 3 supra.

The New York approach to extortion, therefore, created an anomalous situation whereby individuals charged with Hobbs Act extortion could seek acquittal on the ground that they were
cluded that, inasmuch as the loss or interference threatened was that of a prospective property right, duress, and thus extortion, had not been established. 31

Subsequently, the United States Court of Appeals for the Third Circuit adopted the New York approach in a political corruption prosecution, United States v. Addonizio. 32 In Addonizio, the jury found that the defendants had used their official positions with the Newark, New Jersey, city government to secure “kickbacks” from local contractors. 33 On appeal, the defendants challenged their convictions on several grounds, including the jurisdictional reach of, 34 and the interpretation of the term “extortion” under, the Hobbs Act. 35 The Third Circuit disposed of the jurisdictional question by stating that “[t]he reach of the Hobbs Act ... outlaws extortion which obstructs interstate commerce ‘in any way or degree.’ ”36 The Addonizio court dealt with the extortion issue by noting that the New York definition of extortion controls in Hobbs Act prosecutions. 37 Thus, the court found that the “kickbacks” required by the defendants provided the element of duress which, under New York law, is the essence of extortion. 38 Moreover, the instead guilty of accepting a bribe. See United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972). As one court remarked: "Proof of the state of mind of the victim is relevant, indeed essential, to a prosecution for extortion ...." United States v. Kennedy, 291 F.2d 457, 459 (2d Cir. 1961) (prosecution for extortion under the Hobbs Act). In New York, a defendant charged with extortion would be likely to assert the same argument since the penalty for extortion is more severe than the penalty for bribery. Compare N.Y. PENAL LAW § 155.40 (McKinney 1975) (extortion punishable by a maximum of 15 years imprisonment) with id. § 200.10 (bribery punishable by a maximum of seven years imprisonment).

In 1965, the New York legislature expressly eliminated such a defense by providing that extortion and bribery are not mutually exclusive. See N.Y. PENAL LAW § 155.10 (McKinney 1975) (receipt of bribe is no defense to a prosecution for larceny committed by means of extortion); id. § 135.70 (receipt of bribe is no defense in coercion prosecution); id. § 180.30 (claim of extortion is no defense in bribery prosecution of labor official); id. § 200.15 (claim of extortion is no defense in prosecution for bribery).

For a discussion of the rationale behind the introduction of these provisions, see id. § 200.15, Practice Commentaries.

31. 237 F. Supp. at 641-42. The defendants convicted under the Travel Act. Id. at 644. For a discussion of the Travel Act as an alternate basis for prosecuting political corruption, see notes 87-92 & 96-98 and accompanying text infra.


33. 451 F.2d at 54. The city officials had an understanding with all suppliers on a city project that contracts would be awarded only to those suppliers who agreed to provide “kickbacks” to the officials. Id. at 54-58.

34. Id. at 76. The defendants contended that the effect of the purported illegal activities on interstate commerce was so attenuated as to preclude prosecution under the Act. Id. For discussion of the jurisdictional aspect of the Hobbs Act, see notes 47 & 70 infra; text accompanying note 90 infra.

35. 451 F.2d at 72-73. The defendants’ arguments relating to extortion under the Hobbs Act were based on two grounds: 1) the evidence adduced at trial could only support a bribery charge; and 2) the payments made to secure future contract rights were not property within the meaning of the definition of the term “extortion” under the Act. Id.

36. Id. at 76-77, quoting Stirone v. United States, 361 U.S. 212, 215 (1960). For a further discussion of Stirone, see note 70 infra.

37. 451 F.2d at 72.

38. Id. at 72-73. The court explained that economic fear was clearly present in the case and, consequently, there was no discussion of the requirements of “color of official right” extortion. Id. at 59.
court indicated that the fact that the payments were induced in exchange for prospective, rather than existing, property rights had no significance. The court concluded that the defendants’ activities fit within the proscription of the Hobbs Act and, therefore, their convictions were affirmed.

While the adoption of the New York approach to extortion under the Hobbs Act led to criticism, it nevertheless provided a convenient reference for the judiciary in deciding the single Hobbs Act extortion prosecution conducted prior to the Third Circuit’s decision in United States v. Kenny.

C. The Third Circuit’s Abandonment of the New York Approach

The defendants in Kenny, all high level public or political officials, were indicted for their alleged involvement in a large-scale “kickback” scheme in violation of both the Hobbs Act and the Travel Act. At trial,

39. Id. at 73. But see United States v. Kubacki, 237 F. Supp. at 641-42. For a discussion of Kubacki, see notes 29-31 and accompanying text supra.
40. 451 F.2d at 73.
41. Id. at 78.
42. See Stern, supra note 12, at 1-2. Judge Stern charged that the distinction between bribery and extortion read into the Hobbs Act by Kubacki was unnecessary and arbitrary: “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.” Id. Criticism was also leveled against the Kubacki requirement of a showing of fear in the victim in all Hobbs Act prosecutions. Id. at 14.
44. 462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914 (1972).
45. 462 F.2d at 1211.
46. Id. at 1210. Count I of the indictment, the Hobbs Act count, charged that the defendants had conspired to obstruct commerce by impeding progress on municipal projects in order to obtain property from contractors with their consent induced by the wrongful use of fear and under color of official right. Id.
47. Id. at 1210-11. Count II charged the defendants with conspiracy to violate the Travel Act by using the facilities of interstate commerce to commit bribery and extortion in violation of the laws of New Jersey. Id. at 1211.

The Travel Act forbids interstate or foreign travel, or the use of interstate facilities, to further any “unlawful activity.” See 18 U.S.C. § 1952 (1976). Unlawful activity is defined to include “extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.” Id.

The Travel Act is a companion statute to the Hobbs Act; like the Hobbs Act, it provides a vehicle for prosecuting political corruption. See Note, supra note 12, at 533. The proscription of the Travel Act, however, includes both extortion and bribery. See 18 U.S.C. § 1952 (1976). In addition, the jurisdictional scope of the Hobbs and Travel Acts are quite different. Compare Stirone v. United States, 361 U.S. 212, 214-15 (1960) (Hobbs Act requires only “an effect on interstate commerce”); United States v. Pranno, 385 F.2d 387, 389 (7th Cir. 1967), cert. denied, 390 U.S. 944 (1968) (same); Battaglia v. United States, 383 F.2d 303, 305 (9th Cir. 1967), cert. denied, 390 U.S. 907 (1968) (same) with Rewis v. United States, 401 U.S. 808, 812 (1971) (Travel Act requires actual “travel in or use of the facilities of interstate commerce”); United States v. Craig, 573 F.2d 455 (7th Cir. 1977), cert. denied, 439 U.S. 870 (1978) (same); United States v. Archer, 486 F.2d 670, 680 (2d Cir. 1973) (same). The requirement of a minimal effect on interstate commerce renders a determination of what is “in” or “out” of interstate commerce irrelevant, for even an activity which is wholly intrastate in character may have an effect on interstate commerce. See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW, §§ 5-74 5-8 (1979).
the jury was instructed that "extortion . . . is committed when property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right." On appeal, the Third Circuit upheld the instruction and stated that the Hobbs Act "repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear or duress."

The jurisdictional base of the Travel Act is further narrowed by the requirement that there be a knowing and deliberate use of interstate travel or interstate facilities in order to achieve the criminal act. United States v. Archer, 486 F.2d at 680; United States v. Ruthstein, 414 F.2d 1079, 1082 (7th Cir. 1969); 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). The issue of whether there was a knowing and deliberate use of interstate travel or facilities is determined by the jury. United States v. Barrow, 229 F. Supp. at 726. Under the Hobbs Act, however, the question of what constitutes an effect on interstate commerce is a question of law for the court to determine. United States v. Cerilli, 603 F.2d 415, 424 n.11 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); United States v. Lowe, 234 F.2d 919, 922-23 (3d Cir.), cert. denied, 352 U.S. 838 (1956).

48. 462 F.2d at 1229. The jury instruction described extortion under the color of official right as the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear. . . . (E)xtortion as defined by Federal Law is committed when property is obtained by consent of the victim by wrongful use of fear or when it is obtained under color of official right.

Id. (emphasis added). Compare id. with notes 25-30 and accompanying text supra. Only one of the four defendants objected to this instruction. 462 F.2d at 1228-29.

49. 462 F.2d at 1229.

50. Id. Blackstone defined common law extortion as "any officer's unlawfully 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." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 141 (Lewis ed. 1922) (footnotes omitted). See also 3 WHARTON'S CRIMINAL LAW §§ 1985-1900 (Kerr ed. 1912); 31 AM. JUR. 2d Extortion, Blackmail and Threats § 1, at 900 (1967). For an informative survey of the elements of common law extortion, see LaTour v. Stone, 139 Fla. 681, 190 So. 704 (1939).

Several state statutes which embody the common law concept have been construed to require that, to be guilty of extortion, a public official must wilfully and corruptly demand money or property. See, e.g., Commonwealth v. Coolidge, 128 Mass. 55, 58 (1880); Adler v. Sheriff, 92 Nev. 641, 643, 556 P.2d 549, 550 (1976). In such jurisdictions, extortiorate conduct is generally considered to be a felony. See, e.g., MASS. GEN. LAWS ANN. ch. 274, § 1 (West 1970) (extortion is a felony); id. ch. 265, § 25 (extortion is punishable by imprisonment in a state prison for up to 15 years or in the house of correction for not more than 2 1/2 years, or by a fine of up to $5,000, or by both fine and imprisonment); NEV. REV. STAT. §§ 197.170 (1967) (extortion is a felony punishable by imprisonment for up to 10 years in a state prison or by a fine of up to $5,000, or both).

Other state statutes based on the common law concept, however, have been interpreted to require merely the receipt of property or money by the officer in order to consummate the offense; the officer need take no initiative. See, e.g., People v. Ritholz, 359 Mich. 539, 552, 103 N.W.2d 481, 487, cert. denied, 364 U.S. 912 (1960); State v. Savoie, 67 N.J. 439, 446, 341 A.2d 598, 602 (1975). Under these statutes, however, extortion "under color of official right" is punishable only as a misdeameanor. See, e.g., MICH. COMP. LAWS ANN. §§ 750.214, .504 (1968) (extortion by public officers is a misdeameanor punishable by 90 days imprisonment and/or a $100 fine); N.J. STAT. ANN. §§ 2A:85-7, .105-1 (West 1969) (receipt of illegal fee by a public officer is a misdeameanor punishable by up to three years imprisonment and/or a $1,000 fine). Under the "mere receipt" interpretation, the distinction between extortion and bribery vanishes. See United States v. Cerilli, 603 F.2d 415, 435-36 (3d Cir. 1979) (Aldisert, J., dissenting), cert. denied, 444 U.S. 1043 (1980); cf. 18 U.S.C. § 201(b) (1976) (federal bribery statute; receipt of anything of value constitutes the offense).

Modern statutes have broadened the scope of common law extortion to include takings by private individuals induced by fear. United States v. Nardello, 393 U.S. 286, 289 (1969) (Travel Act). For an analysis of the modern concepts of extortion, see W. LAFAVE & A. SCOTT, CRIMINAL LAW 704-07 (1972).
The court also explained that, while private persons could only violate the Act by use of fear, public officials could violate the Act by the use of fear or by taking under color of official right.

The dimensions of the Kenny approach were further defined by the Third Circuit in United States v. Mazzei, the first reported Hobbs Act case decided solely on the basis of "color of official right" extortion. In Mazzei, the victim, wishing to lease office space to the state, approached Mazzei, a state senator, who reportedly was seeking office space for a state agency. Unaware of the senator's lack of authority in the matter, the victim agreed to make a payment to a senate reelection finance committee. The Third Circuit held that the victim's reasonable belief that the defendant had the authority to control the disposition of governmental affairs on the victim's behalf was sufficient to sustain a conviction under the Hobbs Act. In so holding, the court stated that "[a] violation of the statute may be made out by showing that a public official through the wrongful use of office obtains property not due him or his office, even though his acts are not accompanied by the use of 'force, violence of fear.'"

The Kenny approach was recently reaffirmed in a political corruption prosecution when the Third Circuit decided United States v. Cerilli. In Cerilli, local supervisors of the Pennsylvania Department of Transportation

51. 462 F.2d at 1229.
52. Id. The court supported the disjunctive interpretation of extortion under the Hobbs Act by citing a number of extortion cases. See United States v. Nardello, 393 U.S. 286 (1969); United States v. Sutter, 160 F.2d 754 (7th Cir. 1947); State v. Begyn, 34 N.J. 355, 167 A.2d 161 (1961); State v. Weleck, 10 N.J. 355, 91 A.2d 751 (1952). But see note 66 infra.
54. 521 F.2d at 646-47 (Gibbons, J., dissenting). Prior to Mazzei, extortion cases prosecuted under the Hobbs Act involved fact situations in which an element of fear was present. See, e.g., United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Staszczuk, 506 F.2d 875 (7th Cir. 1974), aff'd in part, 517 F.2d 53 (7th Cir.) (en banc), cert. denied, 432 U.S. 837 (1975). Thus, prior Hobbs Act convictions were based on both the "force or fear" and "color of official right" definitions. See also United States v. Kenny, 462 F.2d at 1210. For a discussion of Kenny, see notes 45-52 and accompanying text supra.
55. 521 F.2d at 641.
56. Id.
57. Id. at 645.
used their positions in order to obtain political contributions from local contractors in exchange for contract awards. The court held that the defendants' solicitation of political contributions "under color of official right" violated the Hobbs Act. In so holding, the court noted that a contrary decision would "overrule . . . the clear law of this circuit."

Judge Adams concurred in the opinion of the court, but filed a separate opinion in order to express his agreement with the dissent's view that the parties should have been given the opportunity to address themselves to the validity of the Kenny approach. In his dissenting opinion, Judge Aldisert attacked the Kenny approach to Hobbs Act extortion by questioning that decision's departure from the New York approach. Judge Aldisert contended that the case authority cited by Kenny to support the disjoinder of the "force or fear" and "color of right" phrases of the Hobbs Act did not compel the result. Furthermore, 60. 603 F.2d at 418. Testimony elicited at trial established that at least some of the payments were made to a political committee. Id. The court noted, however, that the fact that a third party receives the benefits from the defendants' conduct does not preclude violation of the Hobbs Act. Id. at 420. Accord, United States v. Green, 315 U.S. 415, 420 (1956) (gravamen of offense is loss to victim; benefit to defendant is not required). 61. 603 F.2d at 425. 62. 603 F.2d at 426 (Adams, J., concurring). Judge Adams indicated that, even though the validity issue was initially addressed by the dissent, he still desired to allow the parties to brief and argue the point. Id. 63. 603 F.2d at 426 (Adams, J., concurring). Judge Aldisert described the cases cited by Kenny in support of the disjunctive definition of extortion as inappropriate or as providing minimal support. See id., distinguishing United States v. Nardello, 393 U.S. 286 (1969) (based on Travel Act); United States v. Sutter, 160 F.2d 754 (7th Cir. 1947) (based on statute procribing extortion by federal officer or employee); State v. Begyn, 34 N.J. 355, 91 A.2d 751 (1952) (dicta; based on state extortion statute); State v. Weleck, 10 N.J. 355, 91 A.2d 751 (1952) (dicta; based on state extortion statute).
Judge Aldisert contended that Kenny should not be viewed as overruling the Third Circuit's decision in Addonizio which had applied the New York approach. 67

III. ANALYSIS

A. Interpreting the Phrase “Color of Official Right”

The divergent approaches applied in interpreting the Hobbs Act can be attributed to the Act's ambiguous legislative history, which would support either the New York approach 68 or the Kenny approach. 69 In addition, problems in construing the Hobbs Act have resulted from the varying interpretations of the Supreme Court's dicta in prior Hobbs Act prosecutions. 70 It is submitted, however, that the broad construction of the Act in Kenny has permitted extortion prosecutions beyond the intendment of Congress. 71

The current nationwide trend in interpreting the “color of official right” branch of the Hobbs Act indicates that a public officer commits extortion by

67. 603 F.2d at 427 (Aldisert, J., dissenting). For a discussion of Addonizio, see notes 32-41 and accompanying text supra. Addonizio was the last Hobbs Act extortion case decided in the Third Circuit prior to Kenny. Under Third Circuit practice, only an en banc decision may overrule a prior panel decision of that circuit. INTERNAL OPERATING PROCEDURES OF THE THIRD CIRCUIT, ch. VIII(c) (1978).

The Cerilli defendants submitted a petition for rehearing en banc on the ground that Kenny was not an en banc decision and therefore could not overrule Addonizio. See United States v. Cerilli, No. 78-2105-07, slip op. at 1 (3d Cir., July 23, 1979) (denial of rehearing). Their petition, however, was denied. Id.

68. See Ruff, supra note 12, passim. Professor Ruff has taken the position that reliance on New York law to interpret the Hobbs Act derives from two bases: 1) the 1934 Anti-Racketeering Act—the predecessor of the Hobbs Act—used essentially the same language to define extortion as the then current New York Penal Code; and 2) the comments of certain legislators indicated that New York was the principal source of the federal definitional sections. Id. at 1183. See also note 21 and accompanying text supra.

69. See Stern, supra note 12, passim. Judge Stern maintains that the legislative debate indicated that the Hobbs Act was similar to New York law, but that Congress did not intend for the law to be interpreted solely on the basis of the New York statute. Id. at 12.

70. Compare Stirone v. United States, 361 U.S. 212, 215 (1960) with United States v. Cerilli, 603 F.2d at 423. The Cerilli court pointed to the fact that, in reference to the Hobbs Act, the Supreme Court has stated that the “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.” United States v. Cerilli, 603 F.2d at 423, quoting Stirone v. United States, 361 U.S. 212, 215 (1960). In Stirone, however, the Supreme Court was dealing with the jurisdictional requirements of the Hobbs Act. See 361 U.S. at 218. Thus, it would appear that the quoted language indicates that the Supreme Court desired to broaden only the jurisdictional requirements of the Hobbs Act and not its substantive scope. Cf. United States v. Enmons, 410 U.S. 596 (1973) (Hobbs Act does not proscribe extortionate activities by employees or union officials to attain legitimate union goals).

It should also be noted that the broad interpretation given to the Hobbs Act is contrary to the rule of lenity which provides that ambiguities concerning the ambit of criminal statutes should be resolved in favor of the defendant. Id. at 411. Accord, United States v. Adamo Wrecking Co., 434 U.S. 275, 285 (1977); Rewis v. United States, 401 U.S. 808, 812 (1971); Bell v. United States, 349 U.S. 81, 83 (1955).

the simple act of receiving money or property from a victim.\textsuperscript{72} \textit{Kenny}, the first case to define Hobbs Act extortion in this way, indicated a reliance on the common law as codified by the states.\textsuperscript{73} In so doing, however, it would appear that the Third Circuit failed to recognize that, while threatless extortion is treated as a misdemeanor in those states which proscribe it,\textsuperscript{74} the Hobbs Act punishes violators as felons.\textsuperscript{75} In order to reconcile the crime of "color of official right" extortion with the Hobbs Act's felony punishment, it is at least arguable that Congress viewed the "color of official right" language with reference to those jurisdictions which, like New York, require "wilful and corrupt" demands to constitute extortion punishable as a felony.\textsuperscript{76}

In addition, the threatless extortion concept eliminates any meaningful distinction between extortion and bribery.\textsuperscript{77} This interpretation is, it is submitted, inconsistent with the express terms of the Hobbs Act; if Congress had intended to proscribe bribery, it could have explicitly done so.\textsuperscript{78} Thus, it is contended that the application of the "color of official right" concept, as it is applied in political corruption prosecutions involving threatless extortion, was not contemplated by Congress and, therefore, should be abandoned by the courts.\textsuperscript{79}

It is submitted that the need to construe the Hobbs Act to proscribe threatless extortion is actually the product of a narrow definition of "duress" applied by the early Hobbs Act cases.\textsuperscript{80} The \textit{Kubacki} court built its definition of extortion upon two premises: 1) the essence of extortion is duress; and 2) the essence of duress is interference with, or loss of, an existing property right.\textsuperscript{81} Thus, the \textit{Kubacki} court concluded that the defendants'...
demand for a kickback on a future contract was not extortion.\textsuperscript{82} As a consequence of this holding, a large area of political corruption was left unreachable by federal authorities unless the corrupt official crossed a state line.\textsuperscript{83}

It is submitted, however, that, in attempting to fill the gap left by cases applying the \textit{Kubacki} analysis, the \textit{Kenny} court used a hatchet when a paring knife would have sufficed. By defining duress to include interference with future property rights, as the court did in \textit{Addonizio},\textsuperscript{84} the \textit{Kenny} court could have reached objectionable conduct immunized by \textit{Kubacki} while leaving intact the distinction between extortion and bribery.\textsuperscript{85} Such a construction would also eliminate the problem of punishing "mere receipt" as a felony since it would require proof that it was the official who demanded the payment.\textsuperscript{86}

\textbf{B. The Jurisdictional Element of the Hobbs Act}

Both the Hobbs Act and the Travel Act\textsuperscript{87} have been used by federal prosecutors to combat political corruption.\textsuperscript{88} The jurisdictional base of the Hobbs Act, however, is much broader than that of the Travel Act.\textsuperscript{89} Under the Hobbs Act, any effect on interstate commerce is sufficient to establish federal jurisdiction,\textsuperscript{90} while the Travel Act requires travel in, or use of the facilities of, interstate commerce as a predicate to federal jurisdiction.\textsuperscript{91} Therefore, as Judge Aldisert stated, "in situations where interstate travel or use of interstate facilities cannot be proven, or where the knowing use of them cannot be demonstrated, the federal government . . . must prosecute local political corruption under the Hobbs Act or not at all."\textsuperscript{92}

The combination of the broad jurisdictional base and the expansive interpretation of the term "color of official right"\textsuperscript{93} under the Hobbs Act has provided federal prosecutors with a powerful tool with which to combat

\textsuperscript{82} 237 F. Supp. at 641-42. See note 31 and accompanying text supra.

\textsuperscript{83} See text accompanying notes 90 & 91 infra.

\textsuperscript{84} See note 39 and accompanying text supra.

\textsuperscript{85} See note 26 and accompanying text supra.

\textsuperscript{86} This approach would also be consistent with the common law, which the \textit{Kenny} court considered to be codified by the Hobbs Act. See text accompanying note 73 supra. The "color of official right" aspect of common law extortion was essentially a substitute for proof of threat, fear, or duress. See note 50 and accompanying text supra.


\textsuperscript{88} See, e.g., United States v. Arambäsich, 597 F.2d 609 (7th Cir. 1979) (Hobbs Act prosecution); United States v. Craig, 573 F.2d 455 (7th Cir. 1977), cert. denied, 439 U.S. 870 (1978) (Travel Act prosecution); United States v. Hall, 536 F.2d 513 (10th Cir.), cert. denied, 429 U.S. 919 (1976) (Hobbs and Travel Acts prosecution).

\textsuperscript{89} See United States v. Cerilli, 603 F.2d at 436 (Aldisert, J., dissenting). For a discussion of \textit{Cerilli}, see notes 59-67 and accompanying text supra.

\textsuperscript{90} See note 47 supra.

\textsuperscript{91} See note 47 supra.


\textsuperscript{93} See notes 48-62 and accompanying text supra.
political corruption. Yet the development of such a weapon may not have been intended by Congress.

In contrast to the Hobbs Act, the Travel Act has more stringent jurisdictional requirements which assure a significant federal interest in prosecutions under the Act's provisions. Furthermore, the Travel Act expressly proscribes both extortion and bribery. It is therefore submitted that the combination of the Travel Act's strict jurisdictional scope and its substantive provisions commend it, rather than the Hobbs Act, as the more appropriate method to penalize political corruption.

C. Federal Intrusion into Local Affairs

The ease with which federal prosecutors may attack political corruption under the Hobbs Act also raises questions as to the propriety of allowing federal prosecution of corruption which might more appropriately be kept in check under state bribery or extortion statutes. The desirability of a limited role for the federal judiciary in relation to state courts rests not on statutory mandate but on policy grounds. Therefore, the federal courts


95. See notes 71-79 and accompanying text supra.

96. See Rewis v. United States, 401 U.S. 808 (1971). The Supreme Court has observed: 
"[A]n expansive [interpretation of the] Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which . . . matter[s] of happenstance, would transform relatively minor state offenses into federal felonies." Id. at 812. See also text accompanying note 91 supra.

97. 18 U.S.C. § 1952(b)(2) (1976). Consequently, acts of political corruption, manifested by either a demand for something of value (extortion) or the mere receipt of something of value (bribery), by a public official would fall within the ambit of the Travel Act. Furthermore, the Travel Act's use of the local definitions of extortion and bribery permits local input in prosecutions of local corruption. See note 47 supra.

The Travel Act is not without problems, however, in terms of federal enforcement. The activities proscribed by the Travel Act are generally defined according to the law of the state in which the prosecution takes place. See note 47 supra. Due to the lack of uniformity of the definitions given to the proscribed acts, there is a lack of uniformity in the way the statute is enforced. S. COMM. ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1977, S. REP. NO. 605, 95th Cong., 1st Sess. 627 (1977). The Travel Act also provides that proscribed activities may be defined in accordance with federal law. 18 U.S.C. § 1952(b) (1976). Despite these uncertainties, the Supreme Court has conspicuously avoided determining what the definition of extortion would be under federal law. See United States v. Nardello, 393 U.S. 286, 289 (1969).


99. See notes 105-08 and accompanying text infra. It is conceded that the Travel Act also provides a legitimate means of prosecuting political corruption because it adopts the state definitions of the crimes of extortion and bribery. See note 47 supra.

100. Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 539-40 (1947). Justice Frankfurter remarked:

The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut
need not defer to state decisionmaking power in all cases. Nevertheless, when legitimate state interests are involved, the federal courts may opt to assess the potential benefits and costs that will result from a federal court determination of the case.101

There is an obvious state interest in corruption prosecutions involving state and local officials.102 This interest is magnified when due consideration is given to the liberal construction afforded the term "extortion" under the Hobbs Act and the consequent ease with which a conviction may be obtained103 and penalties imposed thereunder.104 It is undoubtedly a prime interest of the state to eliminate political corruption; therefore, it is submitted that one must question the legitimacy of applying liberally interpreted federal legislation in areas of intimate concern to the individual states.105

The present Supreme Court has shown an inclination toward the expansion of state sovereign power at the expense of federal power.106 The Hobbs Act prosecutions, however, seem to run contrary to the spirit of the expansion of state autonomy in areas in which the states have an overriding interest.107 Thus, the argument that such prosecutions represent an uncon-
stitional or, at least, an undesirable federal incursion into the territory of exclusive state sovereignty may find favor in the contemporary Supreme Court. The danger of allowing the continued use of the Third Circuit’s present interpretation of Hobbs Act extortion has been pointed out by one commentator who suggested that the current approach might even permit the conviction of a politician who attends a fundraising dinner and solicits contributions from the businessmen present.

IV. CONCLUSION

The Hobbs Act has received liberal interpretation by the federal judiciary. While such liberality has facilitated prosecutions for corruption, its validity has been questioned in view of the Act’s legislative history. The criticism attributable to the liberal interpretation given to the term “extortion” could be avoided by expanding the scope of the term “duress.” Since the courts have failed to use this option, however, it is submitted that the Supreme Court should grant certiorari in a Hobbs Act case to address itself to the legitimacy of the liberal construction of the term “extortion” in the Act. Absent such judicial action, it might be appropriate for Congress to enact a statute which would specify penalties for corrupt political activities. Such an enactment should clearly state what acts are proscribed, what the penalty is, and the circumstances under which the statute would be invoked. If Congress does not choose to go this far, then the Act should, it is suggested, at least be amended to reduce the penalty for convictions “under color of official right.” This would bring

[b]ecause of this delicate balance of State and Federal interests involved in prosecuting local corruption, . . . [the proposed Act] provides a certification requirement for prosecutions involving State or local public servants acting under color of office. . . . The certification must state either that the State authorities were informed of, and acquiesced in, the Federal prosecution prior to the charges, or that there were no pending State proceedings regarding the conduct at the time of the charges, and the State did not appear likely to undertake such a prosecution.

Id. at 302.


109. See Ruff, supra note 12, at 1196. See also United States v. Cerilli, 603 F.2d at 437 (Aldisert, J., dissenting). For a discussion of Cerilli, see notes 59-67 and accompanying text supra.

110. See notes 45-62 and accompanying text supra.

111. See note 62 supra.

112. See notes 68-69 and accompanying text supra.

113. See notes 84-86 and accompanying text supra.

114. A precise enunciation of the illegal acts would free the courts from having to speculate about the intent of the legislature, as the courts were forced to do in interpreting the Hobbs Act. See notes 68-69 and accompanying text supra.

115. The penalty should, it is submitted, be divided into two categories: 1) an enhanced penalty for payments made at defendant’s initiative; and 2) a lesser penalty for payments received by the defendant at the victim’s initiative. See note 50 supra.

116. Specific guidelines should also be developed to ensure that the federal government does not intrude into state affairs unless it has a legitimate interest. See notes 102-08 and accompanying text supra.
the Act more into line with the common law approach to extortion. If Congress refuses to take action on the matter, it is submitted that the federal judiciary should, in the absence of clear legislative intent, apply the rule of lenity and interpret Hobbs Act extortion in accordance with the New York approach.

While the vigorous prosecution of political corruption is certainly laudable, it is not within the province of the courts to liberally interpret statutes in order to achieve a result they deem desirable. Further, the failure of the individual states to police their own public officials should not be used as a pretext by the federal government to justify an attempt to remedy all social wrongs which exist at the local level.

David E. Robbins

117. The Senate Judiciary Committee has recommended that the penalty for extortion "under color of official right" be reduced from the present twenty year maximum to a maximum of three years in prison. S. COMM. ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1977, S. REP. NO. 605, 95th Cong., 1st Sess. 633 (1977). See notes 50 & 75 supra.

118. See note 70 supra.

119. See notes 23-41 and accompanying text supra. See also notes 84-86 and accompanying text supra.

120. See Morissette v. United States, 342 U.S. 246, 263 (1952). Justice Jackson has criticized such overzealous prosecutions, stating:

The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

Id.