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Extortion "Under Color of Official Right": Federal Prosecution of Official Corruption under the Hobbs Act

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THE CONTROVERSY

In recent years the federal government has utilized the extortion provision of the Hobbs Act[1] as a major vehicle for an attack on political corruption. Extortion is defined in the Hobbs Act 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." Frequently, the government has brought cases under the Hobbs Act which allege threats of physical force or violence inducing fear in the victim. The controversy with which this note is concerned arises where a defendant in a Hobbs Act prosecution is charged with obtaining property solely "under color of official right" without any allegation of threats or violence.

The statutory language itself raises questions. The use of the word

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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.
   (b) As used in this section—
   (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.
   (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. 18 U.S.C. § 1951(b)(2) (1970).

"or" in the statutory definition of extortion, "use of actual or threatened force, violence, or fear, *or* under color of official right,"[3] indicates that the statute is drafted disjunctively. If the statute is so interpreted, it would appear that when a public official obtains property under color of official right, without more, he commits extortion under the Hobbs Act.[4] As a practical matter, the issue is whether a defendant's official position and consequent actions under color of official right create a climate of fear when duress is also proved, or, whether the disjunctive construction of the statute obviates the need to prove duress.

Clearly, more than a reading of the statute is required. Mr. Justice Frankfurter considered the most troublesome area of statutory construction to be "the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye."[5] To determine the meaning of the phrase "under color of official right," the historical background and legislative history of the Hobbs Act will be examined, with an inquiry into the general purpose for which the Hobbs Act was enacted.[6] Since extortion is a common law crime, the historical derivation of both the crime and the phrase will be explored. Furthermore, inquiry will be made into judicial interpretations of extortion. Finally, the Hobbs Act must be considered in relation to contemporary social policy.

BACKGROUND OF THE HOBBS ACT

Legislative History

In 1934, Congress enacted the Anti-Racketeering Act,[7] designed

3. *Id.* (emphasis added).

4. The intended focus of this article is on the ramifications of "extortion" as defined in the Hobbs Act; there will be no attempt at an analysis of the requisite effect on interstate commerce, nor of the term "wrongful," recently discussed by the Supreme Court in United States v. Enmons, 410 U.S. 396 (1973).

5. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947) [hereinafter cited as Frankfurter].

6. This article merely attempts to articulate the factors which must be considered in discussing the practical applications of extortion under the Hobbs Act. For guidelines in the general area of statutory construction, *see generally* Frankfurter, *supra* note 5; Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

7. Act of June 18, 1934, ch. 569, §§ 1-6, 48 Stat. 979.
The Anti-Racketeering Act, in relevant part, provides:
> 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—
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective

to penalize extortion and racketeering[8] especially by organized labor. In 1942, the Supreme Court in *United States v. Local 807*[9] drastically limited the Anti-Racketeering Act by exempting the activities of labor unions from its ambit. Congress responded to this landmark decision by enacting the Hobbs Act.[10] Because the debate over the passage of the Hobbs Act focused on the statute's effect upon organized labor, there is little in the debates which is useful in construing either the general extortion definition of the Act, or the phrase "under color of official right."[11]

Robbery and extortion are the two principal substantive offenses under the Hobbs Act. With respect to extortion, some courts have reached the questionable conclusion that the Hobbs Act follows substantive New York law, which requires proof of force or threats in cases of extortion.[12] For example, in *United States v. Nedley*,[13] the court, focusing on only a portion of the legislative history, held that the proper interpretation of the robbery offense depended upon New York law.[14] Following this reasoning, the district court in *United States v. Kubacki*[15] interpreted *Nedley* to mean that extortion under the Hobbs Act was, like the robbery provision, derived from the New

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services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

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

8. Racketeering is defined as "An organized conspiracy to commit the crimes of extortion or coercion. . . ." BLACK'S LAW DICTIONARY 1423 (4th ed. 1968).

9. 315 U.S. 521 (1942). The Supreme Court held that the activity of teamsters, who blockaded New York City and demanded money from non-union truck drivers for entry, where these payments were agreed to after threats and violence, was within the statutory exemption of a "payment of wages by a bona-fide employer to a bona-fide employee." 48 Stat. 979, § 2(a) (1934).

10. 91 CONG. REC. 11841 (1945).

11. 18 U.S.C. § 1951(b)(2) (1970).

12. In United States v. Nardello, 393 U.S. 286 (1969), the Supreme Court held that it is erroneous to assume that merely because Congress defined extortion with reference to state law in another statute that the state substantive offense would be controlling. This interpretation is particularly applicable to the Hobbs Act where it is often asserted that the frequent reference to New York law in the debates illustrates legislative intent to incorporate both the New York label of extortion and New York's substantive treatment of extortion into the Hobbs Act. The Court in *Nardello* notes the fallacy in this argument. *Id.* at 293-94. Furthermore, the Court stated that it does not make sense that Congress, in attempting to expand federal jurisdiction in national problem areas, would eradicate only those extortionate activities which any particular state has labeled extortion, rather than depending upon a broader, federal definition.

13. 255 F.2d 350 (3d Cir. 1958).

14. There are repeated statements in the debates which indicate that the robbery definition of the Hobbs Act is similar to the New York statutory definition of robbery. 91 CONG. REC. 11842 (1945) (remarks of Representative Walter); *id.* at 11843 (remarks of Representative Michener); Representative Hobbs, sponsor of the bill, said: "The definitions in this bill are copied from the New York Code substantially." *Id.* at 11900.

15. 237 F. Supp. 638 (E.D. Pa. 1965). *See* United States v. Sweeney, 262 F.2d 272 (3d Cir. 1959).

York Penal Code and, therefore, required proof of threats or force.

It is equally arguable, however, that the extortion provision of the Hobbs Act can be traced directly to the Anti-Racketeering Act which in pertinent part provided:

> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right. . . .[16]

So far as extortion is concerned, the only major change effected by the Hobbs Act was the elimination of the exception for labor organizations.[17] In *Bianchi v. United States*,[18] the court, comparing the Hobbs Act and the Anti-Racketeering Act, concluded that "the offense now labeled 'extortion' was provided for in substantially the same terms in both the present act and the one it replaced."[19] The court noted that "there appears to have been no substantial change made in the definition of extortion."[20]

Because the terms chosen by Congress to define extortion under the Hobbs Act are identical to language found in the Anti-Racketeering Act, the legislative history of the Anti-Racketeering Act provides an important guide to the interpretation of Hobbs Act extortion. As indicated by the debates, the purpose of Congress in passing the Anti-Racketeering Act was to extend federal jurisdiction over all restraints on commerce.[21] According to the disjunctive phrasing of a memorandum incorporated into the debates, extortion appears to be an offense, distinct from violence, coercion, *or* intimidation.[22] Thus, extortion under the Hobbs Act should be considered in the context of its predecessor statute which was enacted to expand federal jurisdiction over restraints on commerce. Although as previously mentioned, the wording of the two statutes is identical, New York law is never mentioned in the legislative history of the Anti-Racketeering Act. Moreover, because political corruption was not specifically contemplated by the drafters of either statute, who were more concerned with the problems of labor racketeering, there is no indication of whether extortion under color of official right should require proof of duress.

16. 48 Stat. 979, § 2(b) (1934). Compare with the wording of 18 U.S.C. § 1951 (b)(2), *supra* note 1. *See* Bianchi v. United States, 219 F.2d 182, 188 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955); United States v. Varlack, 225 F.2d 665, 672 (2d Cir. 1955).
17. United States v. Kemble, 198 F.2d 889, 891 (3d Cir. 1952).
18. 219 F.2d 182 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955).
19. *Id.* at 188.
20. *Id.* at 189; *see* United States v. Varlack, 225 F.2d 665, 672 (2d Cir. 1955).
21. 78 CONG. REC. 453 (1934) (memorandum submitted by Walter L. Rice, Special Assistant to the Attorney General).
22. *Id.*

Still, the Anti-Racketeering Act, a federal statute, appears to provide a better guide to the interpretation of federal extortion under the Hobbs Act than does the New York Penal Code accompanied by the case law of only that one state.

The congressional debates which preceded the passage of the Hobbs Act reveal no conclusive interpretation of extortion. Although portions of the debates may support the argument that the extortion definition was derived from New York law,[23] despite the comparable language of the Anti-Racketeering Act, references to extortion in these debates are few and coupled with references to robbery. Thus, the debates are inconclusive as to the applicability of New York law to the extortion definition. A second analysis of the debates suggests the conclusion that the extortion definition in the Hobbs Act was patterned after the extortion provisions of all of the states and thus flowed from the common law.[24]

It appears that legislative intent as to the meaning and application of extortion under the Hobbs Act is vague, thus eliminating as a guideline one of the more approved methods of statutory interpretation; the judiciary, reluctant to usurp legislative prerogatives, looks favorably upon a clear showing of legislative intent. Yet, the approach has met with sensible criticism.

> To say that the intent of the legislature decides the interpretation is to say that the legislature interprets in advance by undertaking

23. *See, e.g.*, remarks by Representative Michener to the effect that the robbery and extortion definitions came from New York law, 91 CONG. REC. 11843 (1945); remarks by Representative Hancock that "[t]he bill contains definitions of robbery and extortion which follows the definitions contained in the laws of the State of New York." *id.* at 11900; remarks by Representative Hobbs that "[t]he definitions [of robbery and extortion] in this bill are copied from the New York Code substantially" *id.* at 11900.

24. See the remarks of Representative Graham who, after citing the common law definitions of robbery and extortion from Pennsylvania, stated: "I purposely cited those two definitions to meet the charge that the phraseology and language used in the preparation of this bill has been closely drawn and loosely prepared, when as a matter of fact it reveals that the language used is in complete conformity with the common law definition of the various crimes." 89 CONG. REC. 3205 (1943).

Representative Robinson of Kentucky stated: "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. 11906 (1945).

Representatives Robsion and Springer had this following exchange: Robsion: "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?" Springer: "The gentleman is precisely correct. It is practically the same as the statutes in the different States of the Union." *Id.* at 11910.

Representative Russell declared: "Wherever jurisprudence has had its sway robbery and extortion have been defined. There is no use defining these terms because they are so well defined that their definition now is a matter of common knowledge." *Id.* at 11914.

> the impossibility of examining a determinable to see whether it can cover a situation which does not exist.[25]

As noted previously, the motive of Congress in enacting the Hobbs Act was to curb various kinds of labor racketeering, and the statute must be interpreted in the light of the violence surrounding the *Local 807*[26] case which spurred Congress to act. Yet, just as clearly, it was not the intent of Congress to interfere with peaceful methods of achieving legitimate labor objectives. The court in *United States v. Varlack*[27] stated that it does not follow from either of these premises that only actual or threatened violence is covered by the Hobbs Act; furthermore, union leaders can violate the Hobbs Act by obtaining personal enrichment when these leaders use "their positions and apparent influence to instill in the minds of the employers with whom they deal a fear of work stoppages or of the prolongation of strikes."[28] In *United States v. Hyde*[29] the court described extortion committed without violence.

> 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.[30]

Thus, the foregoing analysis of the purpose of the Hobbs Act and its predecessor may be a sounder guide to the interpretation of the phrase "under color of official right" than any attempt to read between the lines of a congressional debate concerned more with labor racketeering than with today's application of the Act in the area of political corruption.

Extortion of Common Law

Besides looking to the law of New York, the Anti-Racketeering Act, previously discussed, and the common law provide two other sources of the extortion definition. Because the phrasing of extortion at common law is analogous to language utilized in both the Anti-Racketeering Act and the Hobbs Act, for a better understanding of the general definition of extortion it is necessary to examine the common law.

Blackstone defined extortion as "an abuse of public justice, which consists in any officer's unlawfully taking, by color of office, from any

25. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871-72 (1930).
26. 315 U.S. 521 (1942).
27. 225 F.2d 665 (2d Cir. 1955).
28. *Id.* at 669.
29. 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972).
30. *Id.* at 833.

man, any money or thing of value which is not due to him, or more than is due, or before it is due."[31] Wharton defined it similarly; "Extortion, in its general sense, signifies any oppression by color of right; but technically it may be defined to be the taking of money by an officer, by reason of his office, either where none is due, or where none is yet due."[32] "Blackmail" was the term used at common law to indicate the obtaining of money by private persons through threats, force, or coercion.

Under English common law extortion was a crime which could be committed only by public officials.[33] The dispute over the definition of extortion arises from the confusion over the substance of the crime under American common law. The Supreme Court recently had occasion to consider the meaning of the term "extortion" in construing the Travel Act.[34] The Court in *United States v. Nardello*[35] explained:

> 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.[36]

Thus, extortion is defined in two distinct ways under the Hobbs Act.[37] One definition of extortion is the taking of another's property, with consent, when induced by wrongful use of actual or threatened force, violence, or fear. The second definition of extortion is the taking of another's property under color of official right. These two segments of the definition of extortion under the Hobbs Act spring from totally different sources and have distinct meanings. The former is derived from the statutory expansion of the application of common law extortion to offenses by private persons; the latter can be traced directly to the common law crime of extortion.[38]

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31. 4 W. BLACKSTONE, COMMENTARIES 141 (Lewis ed. 1902). *See, e.g.*, Commonwealth v. Mitchell, 66 Ky. (3 Bush) 25 (1867).
32. 2 WHARTON, CRIMINAL LAW § 1904 (12th ed. 1932); *e.g.*, People v. Whaley, 6 Cow. 661, 663-64 (N.Y. 1827); Preston v. Bacon, 4 Conn. 471, 480 (1823).
33. *See, e.g.*, La Tour v. Stone, 139 Fla. 681, 190 So. 704 (1939); Commonwealth v. Mitchell, 66 Ky. (3 Bush) 25 (1867); Commonwealth v. Bagley, 24 Mass. (7 Pick.) 279 (1828).
34. 18 U.S.C. § 1952 (1970) (prohibits traveling in interstate commerce with the intent to commit extortion or otherwise act unlawfully in violation of state or federal law).
35. 393 U.S. 286 (1969).
36. *Id.* at 289.
37. *See* United States v. Kenny, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972); United States v. Varlack, 225 F.2d 665 (2d Cir. 1955).
38. 4 W. BLACKSTONE, COMMENTARIES 141 (Lewis ed. 1902); 2 WHARTON, CRIMINAL LAW § 1904 (12th ed. 1932).

La Tour v. Stone[39] surveyed the common law elements of extortion. The offending person must be a public officer.[40] There must be a "taking" by color of office.[41] Thirdly, there must be a receipt of money or some other thing of value. Finally, the money or thing of value must have been "wilfully and corruptly demanded and received."[42] It is the word "demanded" which creates difficulty in the context of Hobbs Act prosecutions of corrupt public officials. The word "demand" connotes some active initiative on the part of the official and implies that mere passive receipt of money not due may be insufficient to establish common law extortion. The Hobbs Act, by incorporating the word "obtain," may be broad enough to hold the mere passive receipt by a public official under color of official right to be extortion. The wisdom of the common law offense teaches that when an official receives money not due him under color of official right, the office itself and the cloak of official authority are inherently coercive.

Expansion of the Definition of Extortion

The segment of the definition of extortion requiring proof of actual or threatened force, violence, or fear has undergone important expansion which bears directly on the interpretation of the "under color of official right" language. Proof of fear has been expanded beyond mere apprehension of physical harm done to person or property. In early labor cases, proof of fear of economic loss, such as disruption of an ongoing business by labor disputes, was held sufficient. The economic loss need no longer relate to a vested property right as was held by the court in *United States v. Kubacki.*[43] Today, the term "loss" as it relates to the first segment of the definition of extortion includes an intangible loss of the opportunity to undertake a new business deal.[44] All that is necessary is that the defendant generate fear in his victim, a fear which is reasonable, and which is used by the defendant to obtain money or property.[45] It has repeatedly been held

39. 139 Fla. 681, 190 So. 704 (1939).
40. *Id.* at 709.
41. *Id.*
42. *Id.* at 709-10.
43. 237 F. Supp. 638 (E.D. Pa. 1965). The court in United States v. Addonizio, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972), broadened the coverage of the Hobbs Act by stating that the economic interest threatened may be an anticipated, rather than a vested, right.
44. United States v. Sopher, 362 F.2d 523 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966).
45. Callanan v. United States, 223 F.2d 171 (8th Cir.), *cert. denied*, 350 U.S. 862 (1955).

in recent years that it is sufficient for the defendant to instill in the victim fear of economic loss rather than physical violence.[46]

The type of physical restraint and injury illustrated by the classical extortion scheme in *Local 807*[47] was clearly contemplated by the Hobbs Act. When less imminent threats confronted the courts, the scope of a sufficient threat was enlarged. Courts have expanded the application of extortion by gradually accepting more subtle threats to meet the requirements of proof under the first portion of the extortion definition. Veiled threats violate the statute as much as do express threats.[48] In *Callanan v. United States*[49] the court affirmed a conviction under the Hobbs Act without evidence of a direct threat. In reaching the same result, the court in *United States v. Tolub*[50] stated:

> [T]he *position of the defendant* as a union *official* if known to the victim, is evidence from which "deliberately imposed fear" can be inferred.[51]

In *United States v. Hyde*[52] the court found that an implied threat under official right by the defendant State Attorney General, one in a position to cause economic harm to his victims, was sufficient to sustain a Hobbs Act conviction. It should be emphasized that the prosecution's theory in *Hyde* could have been predicated on the "under color of official right" language of the Hobbs Act by relying on the leverage and coercion implicit in the defendant's official position rather than on proof of actual threats or fear.

Common sense must be used in cases which involve subtle, inexplicit threats. There is no need for the extortion to be a threat "spelled out in words of one syllable and in plain terms of a threat. . . ."[53] All that is required is sufficient evidence for the jury to infer that the defendant intended to give his victim the impression that he was faced with the practical certainty of trouble if he refused to accede to the extortionist's demands. The focus should be on the state of

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46. *See, e.g.*, United States v. Addonizio, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972); United States v. Sopher, 362 F.2d 523 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); Bianchi v. United States, 219 F.2d 182 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955).
47. 315 U.S. 521 (1942). See note 10 *supra*.
48. *E.g.*, United States v. Kramer, 355 F.2d 891 (7th Cir.), *cert. denied*, 384 U.S. 100 (1966); Callanan v. United States, 223 F.2d 171 (8th Cir.), *cert. denied*, 350 U.S. 862 (1955); United States v. Palmiotti, 254 F.2d 491 (2d Cir. 1958).
49. 223 F.2d 171 (8th Cir.), *cert. denied*, 350 U.S. 862 (1955).
50. 309 F.2d 286 (2d Cir. 1962).
51. *Id.* at 289 (emphasis added).
52. 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972).
53. United States v. Palmiotti, 254 F.2d 491, 495 (2d Cir. 1958). *See also* United States v. Tolub, 309 F.2d 286 (2d Cir. 1962).

mind created in the victim coupled with the defendant's power and position to do him harm.[54]

The acceptance of a practically threatless extortion, often inferred from the victim's state of mind, has created problems in the interpretation of the "under color of official right" language, the second segment of the definition of extortion under the Hobbs Act. Until recently, extortion cases under the Hobbs Act have been submitted to the jury solely on the theory of threatened or actual use of fear even where a public official was involved.[55] The issue of the meaning of "under color of official right" did not arise in the limited number of Hobbs Act cases involving public officials because the government elected to proceed by showing wrongful extortion by use of fear.[56] It has been held that the "under color of official right" language may have no applicability to extortionate acts committed by private individuals.[57] "But while private persons may violate the statute only by use of fear, and public officials may violate the act by use of fear, *persons holding public office may also* violate the statute by a wrongful taking under color of official right.[58]

Certain authorities indicate that the recent expansion of the American definition of extortion inherent in the violent "shakedown" model for the crime has totally replaced "color of official right" as a basis for extortion. It is asserted that absent duress, threats, or demands, bribery not extortion is proved.[59] This narrow interpretation of the statute ignores its obviously disjunctive construction[60] and misconstrues the significance of earlier cases decided in the context of labor disputes which hold that the basic test for extortion is the state of fear in the victim's mind.[61]

Proof of the element of coercion should not be required in cases of official extortion because it is inherent where money not due is

54. United States v. Emalfarb, 484 F.2d 787 (7th Cir. 1973).
55. *E.g.*, United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972); United States v. Kubacki, 237 F. Supp. 638 (E.D. Pa. 1965).
56. *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).
57. Bianchi v. United States, 219 F.2d 182, 192 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955).
58. United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972) (emphasis added).
59. Bianchi v. United States, 219 F.2d 182, 193 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955); United States v. Kubacki, 237 F. Supp. 638 (E.D. Pa. 1965).
60. *See* United States v. Kenny, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972); United States v. Addonizio, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972).
61. United States v. Varlack, 225 F.2d 665 (2d Cir. 1955).

received under color of official right. This theory clearly presents a problem in the practical application of the Hobbs Act in cases of official extortion: Does the use of this theory in prosecutions of public officials for extortion completely supplant the need for proof of the use of actual or threatened force or fear?

INTERPRETATION OF "UNDER COLOR OF OFFICIAL RIGHT"

The Statutory Language

In view of the ambiguous nature of the legislative history surrounding the Hobbs Act a sensible approach in interpreting the "under color of official right" language in the Hobbs Act would rely on a textual analysis of the statute itself. This appears to be the approach used by the Third Circuit in *United States v. Kenny* where the court, in approving the following instruction given to the jury, stated:

> The term fear, as used in the statute, has the commonly accepted meaning. It is a state of anxious concern, alarm, apprehension or anticipated harm to a business or of a threatened loss . . . .
>
> Extortion under color of official right is 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. You will note that extortion 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, and *in either instance the offense of extortion is committed.*[62]

Courts clearly have inferred that when drafting the Hobbs Act Congress intended to make the definition of extortion subject to a disjunctive interpretation. While *Kenny* is the only discovered appellate opinion directly concerned with the "color of official right" language,[63] other appellate courts have recognized, in construing the meaning of extortion, that the Hobbs Act's definition of extortion, is disjunctive. A disjunctive interpretation of the Hobbs Act was followed by the court in *United States v. Varlack.*[64] A more recent case, *United States v. Iozzi,*[65] also provides support for such a disjunctive interpretation. In *Iozzi* the court indicated that there are four types of extortion under the Hobbs Act:

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62. 462 F.2d 1205, 1229 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972) (emphasis added).

63. See also United States v. Braasch, 72 CR 979 (N.D. Ill., Oct. 5, 1973), *pending on appeal,* 74-1001-1017 (7th Cir., Dec. 21, 1973); United States v. Staszcuk, 73 CR 784 (N.D. Ill., June 23, 1973), *pending on appeal,* 73-1869 (7th Cir., Sept. 27, 1973). Both relied on this theory at the trial level.

64. 225 F.2d 665 (2d Cir. 1955).

65. 420 F.2d 512 (4th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971).

> Under the Act's definitions, extortion can be committed by (1) force, (2) violence, (3) fear, and (4) under color of official right.[66]

Unless the "under color of official right" language is read as a separate offense the words are mere surplusage. It seems incongruous that the drafters would have included the phrase unless it was intended to be given some independent meaning.

The problem with a strictly disjunctive construction, as previously stated, is that *Kenny* is the only appellate decision concerning official extortion under color of official right in which a Hobbs Act violation was found without proof of threats or violence. On the other hand, no court has ever explicitly treated the "under color of official right" language as mere surplusage.

In view of the absence of a definitive interpretation of the "color of official right" language, an examination of a similar term in a different context may be helpful. Civil rights decisions under 42 U.S.C. § 1983 which construe the phrase "under color of law" provide good source material for such an examination. The Supreme Court in *United States v. Classic*[67] defined action taken under color of state law as:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . .[68]

In legal usage the word "color" as in "color of authority," "color of office," or "color of law" means "appearance or semblance, without the substance, of legal right."[69] As the word appears in 42 U.S.C. § 1983 it relates to the misuse of state authority in ways not intended by the state. Similarly, in the area of extortion "color of official right" relates to the power of a public officer to use his position to coerce payment of money not due him.

Clearly, the phrase "under color of official right" provides a means by which extortion under the Hobbs Act may be committed, apart from the means involving "wrongful use of actual or threatened force, violence, or fear." The phrase "under color of official right" has been an integral part of the crime of extortion, at least since the time of Blackstone.[70] Thus, the ultimate resolution of the problem whether

66. *Id.* at 515.
67. 313 U.S. 299 (1941).
68. *Id.* at 326. See generally Screws v. United States, 325 U.S. 91, 107-11 (1945). *See also* Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).
69. BLACK'S LAW DICTIONARY (4th ed. 1968).
70. 4 W. BLACKSTONE, COMMENTARIES 141 (Lewis ed. 1902).

or not threatless extortion should be recognized may lie in an exploration of the common law meaning of the phrase.

Common Law Approach

The importance of seeking the historical basis of a given legal term was dramatized by Mr. Justice Frankfurter, who wrote:

> Words of art bring their art with them. They bear the meaning of their habitat . . . . And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.[71]

Extortion at common law was a crime peculiar to public officials,[72] a "taking by color of office, from any man, any money or thing of value which is not due to him, or more than is due, or before it is due."[73] It appears that extortion in its classic sense relates to "the wrongful taking of money by a public officer, whether accompanied by 'threats' or not."[74] Where statutes have enlarged common law extortion to include offenses by private persons, the element of threat has generally accompanied the innovation.[75] This subsequent modification of the crime of extortion was intended not to add an additional requirement for public extortion but rather an additional class of persons who could commit the offense in the specified manner, *i.e.*, private taking if the private taking is attended by the use of fear.[76]

A statutory interpretation of the Hobbs Act whereby a public official could be found in violation of the statute solely by obtaining property under color of official right is supported by the common law definition of extortion. Several federal courts have recognized the common law derivation, while not speaking directly to the point of the "under color of official right" language of extortion. The court in *Bianchi v. United States*[77] in analyzing a defense argument said: "Defendants are referring to the common law offense of extortion where, in the case of public officials, color of office takes the place of force, threats,

71. Frankfurter, *supra* note 5, at 537.
72. *See, e.g.*, La Tour v. Stone, 139 Fla. 681, 190 So. 704 (1939); Commonwealth v. Mitchell, 66 Ky. (3 Bush) 25 (1867); Commonwealth v. Bagley, 24 Mass. (7 Pick.) 279 (1828).
73. 4 W. BLACKSTONE, COMMENTARIES 141 (Lewis ed. 1902).
74. 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 (1894), where the court stated that "[Extortion] consists in the oppressive misuse of the exceptional power with which the law invests the incumbent of an office."
75. United States v. Nardello, 393 U.S. 286, 289 (1969).
76. The Court in *Nardello*, in construing extortion under 18 U.S.C. § 1952, the Travel Act, stated that the term "whoever" indicated legislative intent to include private individuals as well as public officials. 393 U.S. 286, 292 (1969). See note 12 *supra*.
77. 219 F.2d 182, 193 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955).

and pressure." Likewise, the Seventh Circuit in *United States v. Sutter*[78] recognized:

> 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.

Furthermore, both *Kenny* and *Nardello*[79] provide strong decisional support for the concept of official extortion in the absence of fear or threats. The court in *Kenny* stated:

> The "under color of official right" language plainly is disjunctive. That part of the definition 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.*[80]

In conjunction with the theory of threatless extortion, it is noteworthy that some states have enacted separate statutes to cover blackmail or extortion by private persons while retaining statutes based on the common law which are applicable only to public officials.[81] It is therefore arguable that Congress, in enacting the Hobbs Act, simply chose to combine in one statute extortion by public officials and private individuals instead of enacting two separate extortion statutes. Nevertheless, the combined statute as it relates to public officials retains its common law meaning. By retaining the common law concept of "under color of official right," Congress inferentially indicated that the common law meaning of extortion was not being derogated by the statute but merely supplemented. Furthermore, courts should be willing to accept the assertion that a public official need not employ demands, force, or threats on the basis of *Kenny*,[82] particularly since there is no other case which so explicitly construes the phrase "under color of official right."

Problems with the Official Right Concept

When the Hobbs Act is applied to cases of official corruption using the theory of threatless extortion, several problems arise. Of primary import is a substantive problem with jurisdictional ramifications—the

78. 160 F.2d 754, 756 (7th Cir. 1947).
79. 393 U.S. 286, 289 (1969). See text accompanying note 35 *supra.*
80. 462 F.2d 1205, 1229 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972) (emphasis added).
81. *See, e.g.,* N.J.S.A. 2A:105-1 (1973) (extortion by public officials) and N.J.S.A. 2A:105-3 (1973) (extortion by private individuals); PA. STAT. ANN. tit. 18, § 4318 (1963) (extortion by public officials) and PA. STAT. ANN. tit. 18, § 4801-03 (1963) (blackmail) both repealed effective June 6, 1973. Other states, like New York, have extortion statutes similar to the Hobbs Act. *E.g.,* ARIZ. REV. STAT. § 13-401 (1973); CAL. PEN. CODE § 518 (West 1973).
82. 462 F.2d 1202, 1229 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972).

distinction between the state crime of bribery and the federal crime of extortion. Under the first segment of the Hobbs Act definition of extortion it has been asserted that federal jurisdiction ceases where the extortionate threats become less explicit and the victim's corresponding fear diminishes to prospective economic loss. It is argued that such evidence tends to prove bribery, not extortion. The problem is magnified in cases predicated upon the "under color of official right" theory, where the government alleges that extortion may be committed without any proof of threats. Strictly applied, this doctrine would hold that a public official extorts by the mere receipt of property; he need take no initiative. The distinction between bribery and extortion, at this point, becomes virtually invisible.

The other major issue to be considered involves federalism and, more specifically, comity. Even if there is no necessary distinction between bribery and extortion under the Hobbs Act, and the "color of official right" concept becomes an accepted theory in extortion prosecutions, it is still uncertain whether it is proper for federal courts to decide questions involving local political corruption which could be heard by state courts under state bribery or extortion statutes.

THE QUESTIONABLE DISTINCTION BETWEEN BRIBERY AND EXTORTION

In *United States v. Kubacki*,[83] the court followed the analysis of a New York decision, *People v. Dioguardi*, which distinguished bribery from extortion and stated that the essence of bribery was "the *voluntary* giving of something of value to influence the performance of *official duty*" and the essence of extortion was "duress."[84] A subsequent case, *United States v. Addonizio*,[85] relied on New York law to affirm the basic distinction between bribery and extortion, stating that the latter required duress; however, the duress requirement under the definition of extortion was weakened in relation to public officials. Although the "color of official right" language was not discussed, the court held that where there is a well-known, widespread conspiracy among public officials to extort money from private citizens, the specific initiative to offer money to the public official may be taken by the private citizen and yet may still represent extortion by the public officials.

In *United States v. Hyde*, the court stated with respect to extortion:

83. 237 F. Supp. 638, 641-42 (E.D. Pa. 1965).
84. 8 N.Y.2d 260, 273, 168 N.E.2d 683, 692, 203 N.Y.S.2d 870, 882 (1960).
85. 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972).

> 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.[86]

Furthermore, *Hyde* held that even where there is a widespread conspiracy to extort on the part of public officials, if the initiative to influence an official is taken by the private citizen, it is still bribery, not extortion. In *Bianchi v. United States*,[87] the court stated that extortion could be committed without bribery, the substantial difference between the two offenses being that in cases of bribery, money or property is not demanded under threats of force or fear as in cases of extortion.

There seems to be general agreement that some distinction exists[88] and there appears to be a convincing argument in favor of retaining the distinction. Arguably, in the case of both extortion and bribery of public officials, the social harm is identical: corruption at the expense of the private citizen. Nevertheless, the consequences of extortion exceed those of bribery because an innocent victim is deprived of a legal or property right, whereas in bribery, the parties are *in pari delicto*. Although some victims may give their consent willingly,[89] others could be grievously oppressed by such coercion.[90]

The distinction between bribery and extortion is also significant at trial where the criminal culpability of the payor-victim is in question. The victim of extortion should not be prosecuted as vigorously as the initiator of a bribe, if indeed he should be prosecuted at all. In contrast, the distinction between bribery and extortion in the technical sense is meaningless for prosecutions under the "color of official right" theory. Proof of action under color of official right replaces the need to prove force, violence, or fear; the fear created by the power of the office is substituted for acts by the defendant causing duress. The substantive bribery-extortion dichotomy is illusory since, in practical terms, the elements of the offenses so closely overlap.[91]

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86. 448 F.2d 815, 833 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972).
87. 219 F.2d 182 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955).
88. *But cf.* Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 SETON HALL L. REV. 1, 17 (1971) [hereinafter cited as Stern].
89. In United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972), the victims complied to cover up their own illegal conduct.
90. In United States v. Addonizio, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972), some victims were forced to move their businesses out of state; others lost their businesses entirely.
91. The overlapping of the offenses of bribery and extortion can be demonstrated by a plain reading of the federal bribery statute and comparing it with the Hobbs Act. The same conduct can be violative of both statutes. The federal bribery statute, 18 U.S.C. § 201(c) (1970), states as follows:

No case has discussed the bribery-extortion distinction within the context of extortion under color of official right. The Seventh Circuit has dealt with and confused the issue when discussing other provisions of the Hobbs Act. In the *United States v. Sopher*[92] the court used the terms "extortionist and victim" and "briber and the bribee" synonymously. The payment was characterized as "extorted bribe money." In *United States v. Pranno*[93] the court, in affirming a Hobbs Act conviction premised upon fear, rejected a defense theory that the case was beyond the scope of the Hobbs Act since the extorted payments were bribes. A contractor seeking a building permit was told that an illegal $20,000 fee would be necessary for the permit to be issued. Judge Fairchild, writing for the court, recognized the overlapping nature of bribery and extortion:

> Under these circumstances the demand for payment was extortion whether or not it was a violation of a statute on bribery.[94]

In *United States v. Kenny*[95] the defendant officials were charged with both a bribery conspiracy to violate the Travel Act[96] and a conspiracy to violate the Hobbs Act, as well as specific Hobbs Act violations. The scheme involved the receipt of kickbacks by the defendants from contractors doing business with local governmental bodies. The court in *Kenny* did not discuss any distinction between the offenses of bribery and extortions and affirmed the convictions. *Kenny* does not hold that a Hobbs Act conviction can stand absent evidence that the victim made his payment out of fear or duress. Rather, *Kenny* holds that no direct evidence of threats is required in the context of political corruption under the Hobbs Act for circumstantial evidence of fear was present in *Kenny* and was an essential element of the holding. The essence of the offense of extortion under the Hobbs Act is not the official's mere acceptance of a payment, but rather a payment combined with circumstances which enable a jury to infer

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> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any person or entity, in return for:
> (1) being influenced in his performance of any official act; or
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
> (3) being induced to do or omit to do any act in violation of his official duty; . . . .

For the text of the Hobbs Act see note 1 *supra*.

92. 372 F.2d 523, 525 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966).
93. 385 F.2d 387 (7th Cir. 1967), *cert. denied*, 390 U.S. 944 (1968).
94. *Id.* at 390.
95. 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972).
96. 18 U.S.C. § 1952 (1970).

the presence of fear in the victim's mind induced by the defendant's misuse of official right.

The fear can be as undramatic as the realization that the extortion payment for zoning changes is just another cost of doing business; and the threat can be merely a mutual agreement that zoning changes will cost extra. This analysis is in accord with the Seventh Circuit's statement in *United States v. Sutter*[97] that in the common law offense of extortion color of public office took the place of force, threats, or pressure; but it did not replace the element of fear or duress in the victim's mind.

The Importance of Initiative

There are difficulties with the position that a public official need not resort to threats, fear, or demand to commit extortion under the second segment of the extortion definition of the Hobbs Act. It is arguable that the contention that the common law supports the view that threats or demands by a public official are unnecessary under the Hobbs Act[98] disregards both the precise language of the Hobbs Act and the language of those state statutes which were taken from the common law. State courts often interpret state extortion statutes which embody the common law crime of extortion. In *State v. Weleck*,[99] for example, the statute which the court construed provided:

> Any judge, magistrate, sheriff, coroner, constable, jailer, or other officer who shall by color of his office, *receive or take* any fee or reward whatsoever not allowed by law for doing his office, shall be guilty of a misdemeanor.[100]

The courts in *State v. Matule*[101] and *State v. Begyn*[102] construed an almost identical statute also containing words such as "receive" and "take." The word "take,"[103] used in the definitions of extortion by Blackstone and Wharton,[104] connotes less activity on the part of the extortionist than does the word "demand."[105] There is also substantial

97. 160 F.2d 754, 756 (7th Cir. 1947).
98. *See generally* Stern, *supra* note 88.
99. 10 N.J. 355, 91 A.2d 751 (1952).
100. N.J.S.A. § 2:127-1 (1898) (emphasis added), *repealed and replaced by* N.J.S.A. 2A:105-1 (1973).
101. 54 N.J. Super. 326, 148 A.2d 848 (1959).
102. 34 N.J. 35, 167 A.2d 161 (1961).
103. MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (3d ed. 1961) defines the word "take" as "to get into one's hands or into one's possession, power, or control by force or stratagem"; "to receive or accept whether willingly or reluctantly. . . ."
104. See text accompanying notes 31 and 32 *supra*.
105. MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (3d ed. 1961) defines

case authority which utilizes the word "take" when defining extortion.[106] However, other state statutes, also patterned after the common law, require that a public official wilfully and corruptly "demand" money or property to be guilty of extortion.[107] The semantics become increasingly confused when examining cases which combine and confuse several terms like "demand," "take," and "receive," when defining extortion at common law,[108] or when comparing the common law offense to its statutory counterpart.

The suggestion that common law extortion was a passive receipt or taking of money or property by a public official and closely akin to, or even indistinguishable from, bribery thus seems to be supported by Blackstone and by many state statutes which are based upon the common law. However, it does not necessarily follow that this approach is applicable to the Hobbs Act.

The Hobbs Act uses the word "obtaining"[109] as a substitute for the words "demanding" or "taking." The Supreme Court used the word "obtain" in defining common law extortion in *United States v. Nardello*. "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."[110] It can be argued that "obtain" is the broadest of the three terms, and connotes the least activity on the part of the extortionist. Although the distinction between active and passive terms is a slight one, it nevertheless seems valid when viewed in the context of the statute and the purpose for which it was enacted. Moreover, the court in *Sutter v. United States*[111] made the same kind of distinction in a different context.

> If the statute in question had defined extortion as it was known at common law, it would have been sufficient if it had provided: "an employee of the United States who under color of his office

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the word "demand" as to "ask or call for with force or authority and with expectation of compliance; . . . ."

106. *See, e.g.*, United States v. Waitz, 28 F. Cas. 386, 3 Sawy. 473 (1876); Cleaveland v. State, 34 Ala. 254 (1859); State v. Vasel, 47 Mo. 416 (1871); People v. Whaley, 6 Cow. 661 (N.Y. 1827); State v. Pritchard, 107 N.C. 921, 12 S.E. 50 (1890).

107. *See, e.g.*, Commonwealth v. Bagley, 24 Mass. (7 Pick.) 279 (1828); Shattuck v. Woods, 18 Mass. (1 Pick.) 171 (1822); Runnells v. Fletcher, 15 Mass. 525 (1819).

108. *See, e.g.*, United States v. Deaver, 14 F. 595 (1882) (taking and obtaining); Collier v. State, 55 Ala. 125 (1876) (demand and accept); People v. Rainey, 89 Ill. 34 (1878) (demand and take); Commonwealth v. Mitchell, 66 Ky. (3 Bush) 25 (1867) (take and compel payment); Ming v. Truett, 1 Mont. 322 (1871) (demand and receive); State v. Cooper, 120 Tenn. 549, 113 S.W. 1048 (1908) (demand and receive).

109. MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (3d ed. 1961) defines "obtain" as "to gain or attain possession or disposal of, usually by some planned action or method."

110. 393 U.S. 286, 289 (1969).

111. 160 F.2d 754 (7th Cir. 1947).

> *receives* money or anything of value to which he is not entitled shall be guilty of extortion."[112]

The court stated that Congress did not define extortion in the terms known to the common law and that extortion must therefore be used in its ordinary sense, requiring threats, force, or the oppressive exercise of official position.

Perhaps of greater importance than the distinction between the words used in the Hobbs Act and those used at common law is the fact that decisional law, with the possible exception of *Kenny*, does not support the position that a public official commits extortion by the mere passive receipt of money or property unless he takes some initiative in the form of demands or strong suggestions. In almost all cases in which a Hobbs Act violation by public officials was under consideration, the facts revealed some sort of initial demand or oppressive assertion of power by the public officials involved.

Finally, even those courts which have construed state statutes which were drawn from the common law have indicated that extortionate conduct by public officials must involve some initiative or oppressive assertion of power.[113] It seems clear that the weight of decisional law to date, both under the facts of the cases and from judicial interpretations of extortion statutes, is opposed to the position that a public official is guilty of extortion if he is merely the passive recipient of money or property. However, it is still arguable that the distinction of who initiated the payment of money is without merit in determining whether a Hobbs Act violation has been committed. It is conceivable that a victim in succumbing to the inherent coercion of a public official's power could make the first move in permitting the official to retain the money. Common sense would dictate that some act on the part of the official apprising the victim of his desire to obtain money is probably the way such extortions would take place. This action by the official, however, does not have to rise to the level of a direct threat or overt coercion if done under color of official right; and the conduct initiating the extortion could have been committed by the official's predecessors and communicated to the victim by hearsay.

Moreover, under the concept of "color of official right," it is generally the victim, in succumbing to the inherent coercion of the public official's power, who makes the first move that enables the office-

112. *Id.* at 756 (emphasis added).
113. *E.g.*, State v. Begyn, 34 N.J. 35, 45, 167 A.2d 161, 166 (1961); State v. Weleck, 10 N.J. 355, 91 A.2d 751 (1952).

holder to receive payment. "[I]n the final stages of political corruption a local official may not even need to solicit [the money]."[114] When the level of political corruption is such that it is a matter of common knowledge that the political official expects a tribute, the extorted money becomes a necessary way for the victims to do business. At this point, when the power of office, without more, induces the payment under color of official right and when payments by the victims are considered to be almost a "right" of the office, any insistence on proof of overt initiative by the public official would be unrealistic.

In summary, many courts in construing the Hobbs Act have relied on a distinction between bribery and extortion, the existence of which has been strongly disputed.[115] Maintaining such a distinction would greatly increase the difficulty of proving extortion in federal courts[116] and would therefore minimize federal prosecutions in the area of local political corruption. As a matter of practical application, 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.[117]

NOTIONS OF COMITY

The second major problem to be faced is whether or not federal courts should decide questions involving local political corruption. Abstention, comity, and exhaustion of state remedies all involve considerations of the kind and quantity of litigation flowing through the federal system. They represent a collection of formalized principles of federal judicial self-restraint.[118] In the name of comity federal courts defer to state action, but they do not initially surrender their power to act. If the federal courts decide they simply do not want to act, comity is "transmuted" into a refusal to take jurisdiction.[119]

> The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. [Potential] legislation . . . cannot therefore be construed without regard to the implications of our dual system of government.

Abstention due to considerations of comity is essentially a discre-

114. Stern, *supra* note 88, at 6.
115. *See generally* Stern, *supra* note 88.
116. The Travel Act, 18 U.S.C. § 1952 (1970), the other federal statute under which extortion can be prosecuted, requires a much greater connection between the extortion and interstate commerce than does the Hobbs Act for federal jurisdictional purposes.
117. Stern, *supra* note 88, at 8.
118. Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U.L. REV. 841, 860 (1972).
119. *Id.*

tionary decision, generally invoked to avoid unnecessary conflict between the federal judiciary and the state's administration of its own affairs. However, the doctrine of comity does not require the complete abdication of federal decision-making power in all questionable cases. Clearly, the desirability of a limited role for the federal courts in relation to state judiciaries rests on policy grounds rather than statutory mandate.[120] Unfortunately, local prosecutors and state courts have on occasion permitted political considerations to weigh heavily in areas involving basic constitutional rights. Certainly, in the area of local political corruption, which directly involves the relationship between a citizen and his government, it is necessary to be certain that federal and state judiciaries will be equally conscientious guardians of individual rights.

The court in *United States v. Laudani*[121] stated that extortion and blackmail are offenses which have been left to the criminal administration of the states. When legitimate state interests are at stake, such as the prosecution of local crimes, an assessment of the potential benefits and costs resulting from disposition at a federal level is necessary.[122] It is sufficient to say that unless a need to protect some federal interest is present or inherently involved, conduct such as extortion and blackmail should ordinarily be left for prosecution by the states.[123] However, one writer expressed an interesting and extremely realistic viewpoint.[124] He described federal judges, secure in lifetime appointments, as theoretically insulated from political pressures and thus more capable of applying an honest approach to constitutional issues. In contrast, the state judiciary in general exhibits none of this insulation from the political processes. The need of most state judges to run for re-election and thus maintain an affiliation with the political parties, especially in view of the relatively small districts in which

120. Frankfurter, *supra* note 5, at 539-40.

121. 134 F.2d 847, 850-51 (3d Cir. 1943), *rev'd on other grounds*, 320 U.S. 543 (1944).

122. Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U.L. REV. 841, 869 (1972):

> The potential benefits from abstention include (1) avoidance of unnecessary state antagonism to federal interests, (2) conservation of federal judicial time, (3) avoidance of premature decision of constitutional issues and (4) enhancement of state court strength and prestige. The costs include (1) delay, (2) potential weakening of federal rights, (3) erosion of the right to a federal forum and (4) decreased public confidence in the ability of federal courts to execute their primary functions.

123. *See* United States v. Laudani, 134 F.2d 847, 851 (3d Cir. 1943), *rev'd on other grounds*, 320 U.S. 543 (1944).

124. Geltner, *Some Thoughts on the Limiting of Younger v. Harris*, 32 OHIO S.L.J. 744, 746 (1971).

lower court judges run for office, reflects a system designed to foster receptiveness to the views of the local majority.

Although the trend of federal courts to take jurisdiction in the area of local political corruption is already firmly entrenched, it is still important to consider whether it is politically and socially desirable for the federal government to act upon essentially local criminal problems. The federal government's interest plainly is no longer the protection of interstate commerce but rather the prevention of local crime, especially political corruption. Although disposition by federal courts may appear to usurp a local government function, it is interesting to note that this trend has not raised outcries from the defenders of states' rights. Their acquiescence may be due to the gradual extension of federal criminal jurisdiction in the area of local crimes which may be uncontrollable by local governments or the recognition that some crimes will simply not be aggressively prosecuted at local levels. Until local government is willing to prosecute in this area, recourse to federal courts may be inevitable.

CONCLUSION

The theory in controversy is that a public official may commit extortion by inducing victims to pay money not due him or his office without resorting to force, violence, or fear. Certain public offices by their very nature are inherently coercive and no threatening action by the persons holding these offices is necessary to induce consent of the person victimized under color of official right. The major concern in the interpretation of the "under color of official right" language should be to give effect to the legislative purpose as applied in the new context of political corruption. However, it does not follow from the lack of legislative history concerning the "under color of official right" language that threatless extortion cannot be committed.

The plain meaning of a statute can rarely be determined. "[E]very process of interpreting statutes is utlimately a choice between a strict or slightly less strict construction."[125] A strict application of the common law concept that no proof of fear or duress is required to convict a public official of extortion would result in liability without the intent to extort. Arguably, in its purest sense the statutory method for committing extortion under color of official right would obviate the necessity of proof of threats.

125. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 880-81 (1930).

The expansion of the first segment of the extortion definition by the judiciary to include fear of economic loss and subtle threats does not supplant extortion under color of official right; rather, the expansion of the definition may indicate a judicial tendency to accept the theory of threatless extortion committed by a public official. That is not to say that extortion can be committed under the Hobbs Act without instilling fear in the victim. Simply, it is a practical recognition that proof of duress is unnecessary where the extortionist as a public official holds an inherently coercive position which constitutes an adequate substitute for the proof of subtle threat and fear of economic loss required under the first segment of the extortion definition.

It is arguable that federal jurisdiction in the area of local crimes is an intervention into state problems. Yet, if the state were to actively prosecute local crimes of this nature, no federal intervention would be necessary in absence of an overriding national concern. Thus, as of the present, it cannot be argued that federal prosecution in the area of local political corruption is an unwarranted invasion of state affairs where state prosecutions of corrupt public officials have been virtually nonexistent.

United States v. Kenny,[126] in its discussion of extortion under color of official right, may represent the beginning of a new trend in the interpretation and application of official extortion at both the state and federal levels. Furthermore, the government, relying on the theory of threatless extortion, has recently been successful at the trial level.[127] If federal courts recognize extortion under color of official right as a distinct means of violating the Hobbs Act, political corruption may face more active prosecution. In the event that courts hesitate to accept this concept of official extortion, Congress should re-examine the present interpretive confusion and amend the Hobbs Act to clarify whether threatless extortion "under color of official right" is, in fact, extortion.

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126. 462 F.2d 1205, 1229 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972).
127. *E.g.*, United States v. Braasch, 72 CR 979 (N.D. Ill., Oct. 5, 1973), *pending on appeal*, 74-1001-1017 (7th Cir., Dec. 21, 1973); United States v. Staszcuk, 73 CR 784 (N.D. Ill., June 23, 1973), *pending on appeal*, 73-1869 (7th Cir., Sept. 27, 1973).