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# Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption

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## NOTE

### **Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption**

While fraud, waste, and abuse continue to plague government, Congress has passed several statutes that are useful in combating this problem. This note discusses these statutes and their application to government fraud. Part A discusses the Travel Act. Part B reviews the mail fraud statute. Part C examines the Hobbs Act, and Part D analyzes the federal bribery statute. In addition, parts E and F survey the major points involved in the conflict of interest statutes, and RICO's use in government corruption cases.

#### A. THE TRAVEL ACT

##### I. Construction and Purpose

The Interstate and Foreign Travel in Aid of Racketeering Enterprises Act, more commonly known as the Travel Act<sup>1</sup>, received congressional approval in 1961, as part of United States Attorney General Robert Kennedy's program to curb organized crime and racketeering.<sup>2</sup> The Act supports state and local law enforcement ef-

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1 18 U.S.C. § 1952 (1976).

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

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

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

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

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

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

2 See Miller, *The "Travel Act": A New Statutory Approach to Organized Crime in the United States*, 1 DUQ. L. REV. 181, 184 (1963) (Mr. Miller was Assistant Attorney General in charge of the Criminal Division, Department of Justice, when the Travel Act was passed); Pollner,

forts by allowing for federal prosecution of persons engaged in certain unlawful business activities.<sup>3</sup> In many cases, organized crime members reside in one state and conduct their criminal operations in another. By creating federal jurisdiction, the Travel Act controls criminal conduct which would otherwise be beyond the authority of state and local governments.<sup>4</sup> The Travel Act prohibits any person from conducting illegal activity through use of any means or facility of interstate commerce.

Broadly stated, the Travel Act makes it a federal offense to travel interstate, or to use any interstate facilities, with intent to: (1) distribute the proceeds of any unlawful activity; (2) commit a violent crime in furtherance of any unlawful activity; or (3) promote or facilitate any unlawful activity. The Act defines "unlawful activity" to include any business enterprise involving gambling, illegal liquor, narcotics, or prostitution offenses, as well as conduct involving extortion, bribery or arson. After the defendants' unlawful activity has been discovered, the government must prove the defendant performed one of the three types of conduct listed above. Even though the government must produce substantial evidence to prove its case, the Travel Act still provides the government with a valuable tool in prosecuting political corruption cases.

### A. *Legislative History*

Congressional members initially disagreed on the scope and purpose of the Act.<sup>5</sup> Both houses materially modified Attorney General Kennedy's original bill.<sup>6</sup> The Senate bill prohibited the travel in or use of any facility in interstate commerce which furthered "extortion or bribery in violation of the laws of the state in which committed or of the United States."<sup>7</sup> The House version of the bill limited its coverage of extortion and bribery activities to those connected with

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*Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 BROOKLYN L. REV. 37 (1962).

3 See *United States v. Nardello*, 393 U.S. 286, 290-91 (1968), *Legislation Relating to Organized Crime: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 19 (1961) [hereinafter *House Hearings*]; *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings Before Senate Comm. on Judiciary*, 87th Cong., 1st Sess. 1 (1961) [hereinafter *Senate Hearings*].

4 *House Hearings*, *supra* note 3, at 336; *Senate Hearings*, *supra* note 3, at 15 and 103.

5 See generally Pollner, *supra* note 2, at 37.

6 S. REP. NO. 644, 87th Cong., 1st Sess. (1961); H. REP. NO. 966, 87th Cong., 1st Sess., reprinted in 1961 U.S. CODE CONG. & AD. NEWS 2664.

7 S. REP. NO. 644, 87th Cong., 1st Sess. (1961); 107 CONG. REC. 18,815 (1961).

gambling, liquor, narcotics and prostitution offenses.<sup>8</sup> The ensuing House-Senate conference resulted in compromise; the Senate version was adopted, thus making extortion and bribery separate indictable offenses.<sup>9</sup>

The Senate—sponsored and approved—bill added a third element to the Travel Act. As originally drafted, the Travel Act's only requirement was travel in or use of a facility of interstate commerce with intent to commit one of the proscribed unlawful activities.<sup>10</sup> No subsequent overt act was required. Consequently, one Senator commented that the Travel Act created crimes out of pure intent unaccompanied by subsequent action.<sup>11</sup> In the final version of the Act, therefore, Congress included a requirement that the defendant must have committed an overt act in furtherance of the scheme.<sup>12</sup> This version of the Act subsequently became law in 1961.<sup>13</sup>

As originally proposed, the Travel Act contained two sections, one section covering travel and one section covering transportation in interstate commerce.<sup>14</sup> In reviewing the Senate bill, the House combined these two sections, purportedly attempting to "tidy up" the language.<sup>15</sup> The House—approved language extended the Act's coverage to "whoever travels in interstate commerce or *uses any facility* in interstate commerce."<sup>16</sup> Though innocent on its face, this change greatly expanded the Travel Act's scope. Apparently neither the

8 H. REP. NO. 966, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 2664.

9 107 CONG. REC. 18,815 (1961). The Justice Department had sent a letter to the Chairman of the House Judiciary Committee after reading the House approved bill. Deputy Attorney General White objected that the House bill "removes from the purview of the bill, bribery of state, local, and federal officials". See *United States v. Nardello*, 393 U.S. 286, 292 (1968). After receiving White's letter, the House agreed to the Senate version. *Id.*

10 *House Hearings*, *supra* note 3, at 9.

11 *Senate Hearings*, *supra* note 3, at 252 and 328; Miller, *supra* note 2, at 185. *But see House Hearings*, *supra* note 3, at 336-37 (Assistant Attorney General Miller testified that the Travel Act does not punish purely intent, since the proposed bill requires that intent be proven by referring to some overt conduct).

12 Senator Ervin and Assistant Attorney General Miller extensively debated the necessity of an overt act requirement. Senator Ervin's tenacity finally forced Miller's capitulation. See *Senate Hearings*, *supra* note 3, at 251-60.

13 See *United States v. Nardello*, 393 U.S. 286, 293 (1968); *United States v. Archer*, 486 F.2d 670, 679 (2d Cir. 1973); H. REP. NO. 966, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 2664; S. REP. NO. 644, 87th Cong., 1st Sess. (1961); H. REP. NO. 1161, 87th Cong., 1st Sess. (1961); 107 CONG. REC. 18,814-15 (1961).

14 107 CONG. REC. 13,942-43 (1961).

15 H. REP. NO. 966, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 2664; 107 CONG. REC. 16,541 (1961).

16 *Id.* See also *United States v. Archer*, 486 F.2d at 679 n.10.

House<sup>17</sup> nor the conference committee<sup>18</sup> recognized the implications of this change. As submitted by Robert Kennedy, the bill covered only interstate travel.<sup>19</sup> As passed by Congress and interpreted by the courts, however, the present bill covers not only interstate travel, but also interstate telephone calls and any use of communication devices.<sup>20</sup>

### B. *Purpose of the Travel Act*

The principal purpose of the Travel Act is to aid local law enforcement officials in their battle against organized crime figures who travel between states to avoid apprehension.<sup>21</sup> Since the Travel Act's express purpose is to control organized crime, those outside an organized crime network appear safe from prosecution. The courts, however, have not limited the Act to persons involved in organized crime.<sup>22</sup>

The courts generally delineate the type of conduct proscribed in section 1952(b) by analyzing the term "business enterprise." Congress has defined, and the courts have interpreted, this term to mean a "continuous course of conduct." Under this analysis, isolated violations would not be included in the business enterprise definition, since they do not constitute a "continuous course of conduct."<sup>23</sup> In categorizing Travel Act offenses, the courts quickly noted that the "business enterprise" requirement is found only in section 1952(b)(1), which relates only to gambling, narcotics, liquor, and prostitution offenses. "Business enterprise" is not used in conjunction with extor-

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17 1961 U.S. CODE CONG. & AD. NEWS 2664 (emphasis added) ("[T]he amendment combines . . . sections 1 and 2 of the bill as it was passed by the Senate but makes *no substantial change* in the provisions of the bill.") (emphasis supplied).

18 107 CONG. REC. 18,815 (1961) ("[T]he amendment . . . merely adds a new section). See generally Pollner, *supra* note 2, at 38-42; Miller, *supra* note 2, at 190-91.

19 *House Hearings, supra* note 3, at 9.

20 One of the first courts to discuss this amendment held that Congress, by combining the two sections, effectively included the telephone within the definition of the term "facility." *United States v. Borgese*, 235 F. Supp. 286, 298 (S.D.N.Y. 1964). See also *United States v. Villano*, 529 F.2d 1046, 1052 n.6 (10th Cir.), *cert. denied*, 426 U.S. 953 (1976); *United States v. Kelly*, 395 F.2d 727, 729 (2d Cir.), *cert. denied*, 393 U.S. 963 (1968).

21 See note 3 *supra*. See also *United States v. Wander*, 601 F.2d 1251, 1257 (3d Cir. 1979).

22 *Erlenbaugh v. United States*, 409 U.S. 239, 247 n.21 (1972) (the Supreme Court stated "the reach of the statute clearly was not limited to . . . organized criminal activity"); *United States v. Roselli*, 432 F.2d 879, 885 n.5 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971) ("[T]he statute applies to all persons and not only to persons engaged in organized crime").

23 *United States v. Kaiser*, 660 F.2d 724, 731 (9th Cir.), *cert. denied*, 455 U.S. 956 (1981); *United States v. Donaway*, 447 F.2d 940, 944 (9th Cir. 1971); H. REP. NO. 966, 87th Cong., 1st Sess., *reprinted in* U.S. CONG. CODE & AD. NEWS 2664, 2666, 107 Cong. Rec. 13,945 (1961).

tion, bribery, or arson under section 1952 (b)(2).<sup>24</sup> The omission of "business enterprise" from section 1952(b)(2) allows a public official to be prosecuted for extortion or bribery without first meeting the enterprise continuity requirement. While the Travel Act's original purpose may have been to fight organized crime of a continuous and long-term nature, prosecutors today can employ the Act to fight non-organized crimes, such as political corruption. In short, bribery of political officials need not be part of a "continuous course of conduct."

## II. Elements of the Offense

The Travel Act reaches anyone who: (1) travels in or uses a facility of interstate commerce with intent to promote or facilitate unlawful activity; and (2) who thereafter actually performs or attempts to perform an act in furtherance of those activities.<sup>25</sup> Though passed by Congress in 1961, the Travel Act was not extensively employed by prosecutors to combat political corruption until the mid-seventies.<sup>26</sup> In some respects, courts have treated political and non-political corruption prosecutions similarly.<sup>27</sup> Certain elements available under section 1952, however, receive special treatment in political trials.<sup>28</sup>

### A. *Travel in or Use of a Facility of Interstate Commerce*

The use of an interstate facility or means of interstate travel to promote an unlawful activity provides federal courts with jurisdiction over crimes which would otherwise require local prosecution.<sup>29</sup> Travel Act liability can attach even though a defendant does not reasonably foresee that he will be engaged in interstate activity.<sup>30</sup>

24 *United States v. Wander*, 601 F.2d 1251, 1257 (3rd Cir. 1979); *United States v. Gooding*, 473 F.2d 425, 427 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *United States v. Mahler*, 442 F.2d 1172, 1175 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971).

25 *United States v. Jones*, 642 F.2d 909, 912 (5th Cir. 1981); *United States v. Stevens*, 612 F.2d 1226, 1231 (10th Cir.), *cert. denied*, 447 U.S. 921 (1979).

26 *United States v. Craig*, 573 F.2d 455 (7th Cir.), *cert. denied*, 439 U.S. 820 (1978); *United States v. Hall*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976); *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *United States v. Archer*, 486 F.2d 670 (2d Cir. 1974).

27 Compare *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (prosecution of a former Illinois governor), with *United States v. O'Dell*, 671 F.2d 191 (6th Cir. 1982) (prosecution of a massage parlor operator).

28 See notes 33-37 *infra* and accompanying text.

29 *United States v. Craig*, 573 F.2d 455, 489 (7th Cir.), *cert. denied*, 439 U.S. 820 (1978); *United States v. Peskin*, 527 F.2d 71, 78 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976).

30 *Rewis v. United States*, 401 U.S. 808 (1971).

Likewise, a defendant may be convicted under the Travel Act without proof that he knowingly caused interstate travel or use of an interstate facility.<sup>31</sup> The Travel Act, however, does require that the defendant use an interstate means, intending to promote or carry on an unlawful activity.<sup>32</sup>

In a federal prosecution under section 1952, courts must analyze the connection between the illegal scheme and interstate element.<sup>33</sup> A major area of disagreement among the circuits concerns the required degree of interrelationship between these two components. Some courts hold a minimal relationship will suffice,<sup>34</sup> while others require a more direct and substantial connection.<sup>35</sup> Interestingly, with one exception,<sup>36</sup> courts in political corruption trials have adhered to the more stringent jurisdictional nexus requirement.<sup>37</sup>

The jurisdictional test in a political corruption case requires the court to examine the nature and degree of interstate activity associated with the state law crime.<sup>38</sup> Generally stated, if the travel in or use of interstate facilities is more than "minimal, incidental, [or] fortuitous,"<sup>39</sup> this jurisdictional test is satisfied.

The first court to clearly articulate the Travel Act's jurisdictional requirement was the Seventh Circuit in *United States v. Isaacs*.<sup>40</sup> The *Isaacs* court held that the fortuitous use of interstate commerce will not satisfy the Travel Act's jurisdiction requirement.<sup>41</sup> Hence, when an essentially local bribe is funded by a check cleared through

31 *Peskin*, 527 F.2d at 78; *United States v. LeFaivre*, 507 F.2d 1288, 1297 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

32 *Craig*, 573 F.2d at 489.

33 See generally *White-Collar Crime: Second Annual Survey of the Law*, 19 AM. CRIM. L. REV. 173, 341 (1981) [hereinafter cited as *White-Collar Crime*].

34 *United States v. Alsobrook*, 620 F.2d 139 (6th Cir.), *cert. denied*, 449 U.S. 847 (1980); *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979); *United States v. LeFaivre*, 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

35 *United States v. Hathaway*, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973).

36 *United States v. Wechsler*, 392 F.2d 344 (4th Cir.), *cert. denied*, 392 U.S. 932 (1968).

37 See note 26 *supra*.

38 *Isaacs*, 493 F.2d at 1148.

39 *Id.* at 1146.

40 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). *Isaacs* involved the prosecution of two individuals, a former Illinois governor and a former Illinois Revenue Director, for accepting bribes for their political influence on behalf of certain Illinois racing interests. *Id.* at 1131. The prosecution predicated federal jurisdiction upon evidence that three checks drawn and deposited in Illinois at an Illinois bank were cleared through the Federal Reserve Bank in St. Louis, Missouri. *Id.* at 1146.

41 The Seventh Circuit relied upon the Supreme Court's decision in *Rewis v. United States*, 401 U.S. 808 (1970).

the Federal Reserve System, the interstate commerce is too fortuitous.<sup>42</sup> The government, moreover, cannot "create" the necessary jurisdiction by, for example, making interstate phone calls to a suspected Travel Act offender.

Prosecutions under the Travel Act may also be premised upon the interstate activities of a defendant's agents or employees.<sup>43</sup> Therefore, aides or personal representatives may inculcate a public official who counsels them to commit a section 1952(b) violation while using interstate means. The federal aiding and abetting statute<sup>44</sup> has been used to obtain Travel Act convictions against those encouraging unlawful activity.<sup>45</sup>

In a recent political corruption case, *United States v. Clark*,<sup>46</sup> an Arkansas county judge was convicted under the Travel Act upon proof that his representative traveled in interstate commerce to promote an unlawful bribery scheme. The defendant, Clark, received kickbacks and rebates from suppliers based on the amount of orders he placed with their firms.<sup>47</sup> Clark felt the evidence failed to show he had either induced or caused the supplier to carry on unlawful activity by interstate means.<sup>48</sup> Clark admitted the supplier traveled interstate to participate in the bribery scheme. According to Clark,

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42 The court reasoned that "were the § 1952 counts here to be upheld the federal-state balance would be seriously upset." 493 F.2d at 1147. The Second Circuit's jurisdictional test requires use of interstate facilities to be more than a "casual [or] incidental occurrence." *United States v. Archer*, 486 F.2d 670, 682 (2d Cir. 1973); *United States v. Corallo*, 413 F.2d 1303, 1325 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969). *Archer* concerned the federal investigation of corruption in the New York criminal justice system. In organizing a bribery attempt, several interstate phone calls were made, but none were initiated by the defendant. These interstate calls were placed by federal investigators admittedly to provide jurisdiction for a Travel Act indictment. The Second Circuit stressed that these calls, serving no purpose not equally served by an in-state call, were too "casual and incidental" to support federal jurisdiction. 486 F.2d at 674. The court held the interstate calls "insufficient to transform this sordid, federally provoked incident of local corruption into a crime against the United States." *Id.* at 683.

43 *See generally* *Rewis v. United States*, 401 U.S. 808, 813 (1970).

44 18 U.S.C. § 2 (1976): "(a) whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

45 *United States v. Dean*, 647 F.2d 779 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 2296 (1982); *United States v. Alsobrook*, 620 F.2d 139 (6th Cir.), *cert. denied*, 449 U.S. 843 (1980); *United States v. Prince*, 529 F.2d 1108 (6th Cir.), *cert. denied*, 429 U.S. 838 (1976).

46 646 F.2d 1259 (8th Cir. 1981).

47 In Arkansas, county judges serve in an administrative or executive capacity. One of the county judge's duties is to approve and authorize payment of county bills and accounts. *Id.* at 1260.

48 The supplier's principal place of business was in Memphis, Tennessee, and on several occasions he had traveled to Arkansas to pay Clark his "commission." *Id.* at 1267.



however, it does not therefore follow that he had actually induced the interstate travel.<sup>49</sup>

Clark compared his situation to the one presented the Supreme Court in *Rewis v. United States*.<sup>50</sup> In *Rewis*, the Court reversed a Travel Act conviction, finding no jurisdictional nexus between the alleged interstate travel and the defendant's illegal activity.<sup>51</sup> The lower court grounded jurisdiction upon the interstate travel of a gambling operation's customers. Writing for the court, Justice Marshall stated that the Travel Act requires more for jurisdiction than the travel of a customer patronizing unlawful activities.<sup>52</sup> The *Clark* court, distinguishing *Rewis*, held that the supplier was more than a mere customer of the bribery scheme.<sup>53</sup> The supplier instead played an integral and vital part in the scheme's success.

A Travel Act prosecution based on the interstate activities of someone other than the defendant may also be grounded in conspiracy theory.<sup>54</sup> One member of a conspiracy attributed with his co-conspirator's interstate travel may face a substantive Travel Act conviction. In *United States v. Peskin*,<sup>55</sup> a lawyer served as the middleman in a bribery scheme involving a real estate development company (K&B) and several members of an Illinois zoning board.<sup>56</sup> The government maintained that the jurisdictional nexus was met when the K&B vice-president (Stulberg) traveled from Detroit to Chicago in order to promote the bribery scheme.<sup>57</sup> Peskin argued that the travel could not be attributed to him since there was no proof that he had caused or induced the travel.<sup>58</sup> The court rejected this argument. Under conspiracy theory, members are liable for all acts, whether or not committed by themselves, which further criminal conduct.<sup>59</sup> Since Stulberg's travel from Detroit to Chicago furthered the illegal bribery scheme, Peskin could also be held liable.<sup>60</sup>

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49 *Id.*

50 401 U.S. 808 (1970).

51 *Id.* at 814.

52 *Id.* at 811.

53 646 F.2d at 1268.

54 For use of conspiracy theory in political corruption cases, see *United States v. Craig*, 573 F.2d 455 (7th Cir.), *cert. denied*, 439 U.S. 820 (1978); *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975).

55 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976).

56 *Id.* at 74.

57 *Id.* at 75.

58 *Id.*

59 *Id.*

60 *Id.* at 76.

### B. *Intent to Promote, Manage, Establish, or Facilitate an Unlawful Activity*

The Travel Act requires intent to promote or facilitate unlawful activity.<sup>61</sup> The statute does not expressly require that the defendant intend to use interstate facilities.<sup>62</sup> The Travel Act thus proscribes intent to promote unlawful activity through interstate means, not the intent to use interstate means to promote unlawful activity.

In *United States v. Graham*,<sup>63</sup> defendant Graham, a Seattle politician, violated the Travel Act by receiving \$5,000 in exchange for exerting his political influence in an engineering contract negotiation. In a phone conversation with Graham, an engineering company representative agreed to pay Graham "influence" money upon the latter's next visit to Washington, D.C.<sup>64</sup> The court ruled that Graham had intended to facilitate the bribery scheme by traveling interstate.<sup>65</sup> Graham was convicted even though he did not intend to travel interstate to facilitate the bribery's commission. In sum, courts hold that the Travel Act proscribes intent to facilitate unlawful activity, not intent to travel interstate.

While defendant's intent to promote unlawful activity must be proved, the defendant's intent to violate state law is not usually relevant in Travel Act cases.<sup>66</sup> The Travel Act does not require the defendant to commit the underlying state crime.<sup>67</sup> The Travel Act crime is the use of interstate facilities to further an unlawful activity, not the violation of state law.<sup>68</sup>

### C. *Overt Act Requirement*

The Travel Act contains an overt act requirement.<sup>69</sup> Under this requirement, anyone conducting unlawful activities in New York who travels to Florida must not only have the requisite criminal intent but also must commit an act furthering those unlawful activities after traveling to Florida. These "thereafter acts" need not be com-

61 18 U.S.C. § 1952 (a).

62 *See, e.g., Clark*, 646 F.2d at 1268 n.16; *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1980); *Peskin*, 527 F.2d at 78.

63 581 F.2d 789 (9th Cir. 1978).

64 *Id.* at 790.

65 *Id.*

66 *Peskin*, 527 F.2d at 77; *Isaacs*, 493 F.2d at 1148. *But see United States v. Hall*, 536 F.2d 313, 329-30 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976). *See generally White-Collar Crime, supra* note 3, at 345.

67 *Peskin*, 527 F.2d at 79 n.3.

68 *Id.*

69 *See* notes 10-13 *supra* and accompanying text.

mitted in the destination state<sup>70</sup> and, standing alone, they may be perfectly legal.<sup>71</sup> These acts must occur, as their name implies, after the travel in or use of interstate facilities. Even though it may sometimes be difficult to determine whether these acts have occurred, the courts have been willing to find any act, whether or not fundamental to the illegal scheme, a "thereafter act," as long as it was intended to further the unlawful activity.<sup>72</sup>

### III. Defenses

Several defenses have been raised in Travel Act trials. These defenses have met with mixed results.

One defense that has been raised in Travel Act trials is the "pure" intent defense. The motives for interstate travel are often diverse and numerous. Since an intent to facilitate unlawful activity is required under the Travel Act, defendants argue that this means "pure" intent. If not motivated for solely corrupt purposes, therefore, there can be no Travel Act conviction.

The courts have rejected this argument.<sup>73</sup> They have held that travel motivated by two or more purposes, some lying outside the Travel Act's scope, will not preclude conviction under the Act if the requisite intent is also present.<sup>74</sup> The courts have based these decisions on their inability to find anything in the Act's legislative history or purpose to suggest that Congress intended to include a so-called "mixed motive" defense. Since Congress said nothing, the courts have refrained from reading any such congressional limitation into the Travel Act.<sup>75</sup>

Entrapment theory has also been used as a defense in Travel Act cases. A successful entrapment defense requires proof that the gov-

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70 *Peskin*, 527 F.2d at 78; *United States v. Wechsler*, 392 F.2d 344, 347 (4th Cir.), *cert. denied*, 392 U.S. 932 (1968).

71 *Craig*, 573 F.2d at 489.

72 *Peskin*, 527 F.2d at 78. *United States v. Craig*, 573 F.2d 455 (7th Cir.), *cert. denied*, 439 U.S. 820 (1978), involved a conspiracy to bribe several Illinois legislators. The object of the bribe was to increase the amount of cement which trucks could haul on Illinois roads. A co-conspirator trucked from Chicago to Indianapolis to solicit and collect financial support for the bribe. Though unsuccessful, upon his return to Chicago the co-conspirator continued his efforts to raise bribe money. The court ruled that these activities satisfied the "thereafter act" requirement, since the co-conspirator's travel included the requisite intent. 573 F.2d at 489.

73 *United States v. Graham*, 581 F.2d 789 (9th Cir. 1978); *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976).

74 Claiming that interstate travel or use of interstate facilities served a dual purpose, one legal and one illegal, does not require dismissing Travel Act charges. 581 F.2d at 790; 527 F.2d at 75.

75 *Id.*

ernment created a criminal situation solely to induce a defendant's participation.<sup>76</sup> Before joining this contrived criminal scheme, the defendant must not have been predisposed toward similar activity.<sup>77</sup> If the defendant would have committed the crime regardless of the government "baiting," no entrapment defense exists.

Several Travel Act defendants have claimed the government either orchestrated interstate travel or placed interstate phone calls in order to induce unlawful activity falling within the statute's jurisdiction. Courts addressing this issue have uniformly held that if the government initiates or manufactures the interstate element, a Travel Act conviction will not stand.<sup>78</sup>

The Travel Act has withstood numerous constitutional challenges.<sup>79</sup> Those courts addressing the Act's constitutionality have held the Travel Act to be a valid exercise of the federal commerce power and have found that it does not infringe upon the powers reserved to the states by the tenth amendment.<sup>80</sup> The Travel Act has also withstood scrutiny under the fifth amendment. The defendants in a number of early cases argued that the Travel Act's wording was vague and ambiguous, thus rendering enforcement a denial of due process of law. These early courts, however, uniformly held that the Travel Act was sufficiently definite and certain to warn of the proscribed activities. Because the Act provides a clear standard of conduct, it does not violate the fifth amendment.<sup>81</sup> Some defendants have also asserted that the Act infringes upon first amendment freedoms. They have argued that, by regulating the use of interstate communication facilities, the Travel Act abridges freedom of speech.

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76 W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 371 (1972).

77 *Id.* at 373.

78 In *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973), federal agents devised a scheme to elicit criminal activity from within New York's criminal justice system. Furthering the scheme, agents staged a fictitious arrest, falsified arrest records, and crossed state lines solely to provide jurisdiction under the Travel Act. In upholding the entrapment argument, *Archer* emphasized that two of the three interstate calls that served as the jurisdictional nexus resulted from government plants of misinformation. The calls would not have been made without the government's initiative. In effect, the government entrapped the defendant into using interstate facilities, forcing the court to reverse the conviction. See also *United States v. Bagnorial*, 665 F.2d 877, 898 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2040 (1982); *Hall* 536 F.2d at 327.

79 See generally *White-Collar Crime*, *supra* note 33, at 349; Annot., 1 A.L.R. FED. 838, 847-861 (1969).

80 *Gilstrap v. United States*, 389 F.2d 6 (5th Cir.), *cert. denied*, 391 U.S. 913 (1968); *United States v. Barrow*, 363 F.2d 62 (3d Cir.), *cert. denied*, 385 U.S. 1001 (1968); *Marshall v. United States*, 355 F.2d 999 (9th Cir. 1966), *cert. denied*, 385 U.S. 815 (1968).

81 *Spinelli v. United States*, 382 F.2d 871 (8th Cir.), *rev'd on other grounds*, 393 U.S. 410 (1967); *United States v. Barrow*, 363 F.2d 62 (3d Cir.), *cert. denied*, 385 U.S. 1001 (1968).

Courts have consistently upheld the Travel Act in face of these assertions, since the first amendment does not protect unlawful speech.<sup>82</sup>

#### IV. Conclusion

The Travel Act's interpretation by the courts and use by federal prosecutors has undergone substantial change over the past twenty years. From passage in 1961 until approximately 1971, political officials were not prosecuted under the Travel Act. Since then, however, prosecutors and courts alike have found the Travel Act to be another valuable weapon in their continuing battle against the debilitating effects of political corruption.

### B. THE MAIL FRAUD ACT: SECTION 1341

#### I. Construction and Purpose

The mail fraud statute prohibits use of the United States mails to further unlawful and fraudulent schemes.<sup>83</sup> To establish a mail fraud violation, the government must first prove that an individual devised a scheme to defraud, and second, that he implemented the scheme using the United States mails.<sup>84</sup>

An essential component of mail fraud is the specific intent to defraud. The defendant need not intend to use the mails, but he must intend to commit a fraudulent scheme.<sup>85</sup> By requiring proof of specific intent, Congress created a complete defense to mail fraud—

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<sup>82</sup> *United States v. Lockretis*, 385 F.2d 487 (7th Cir.), *vacated on other grounds*, 390 U.S. 338 (1967), *rev'd on other grounds*, 398 F.2d 64 (7th Cir. 1968).

<sup>83</sup> 18 U.S.C. § 1341 (1976) provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or the place at which it is directed to be delivered by the person whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

<sup>84</sup> *Pereira v. United States*, 347 U.S. 1, 9 (1954); *United States v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982); *United States v. Mandel*, 591 F.2d 1347, 1358 (4th Cir.), *cert. denied*, 445 U.S. 961 (1979).

<sup>85</sup> *Curry*, 681 F.2d at 410; *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976).

good faith. A defendant's good faith intention not to defraud will bar conviction under the mail fraud statute.<sup>86</sup>

Courts have defined "scheme to defraud" in an expansive manner. As one judge remarked, the law does not require a definition of fraud, since its versatility is limited only by human ingenuity.<sup>87</sup> No matter how imaginative or innovative the scheme, if the elements of common law fraud are met, a conviction may result.

### A. Legislative History

The mail fraud statute, originally enacted in 1872, has enjoyed a long and respected existence.<sup>88</sup> The legislative history surrounding the passage of the statute, however, is sparse.<sup>89</sup> The 1872 Act provided penalties for anyone who devised a scheme to defraud while intending to use the mails to execute the plan and who thereafter actually mailed a letter.<sup>90</sup> Persons guilty under this provision could be fined up to \$500 and imprisoned for eighteen months.

Congress amended the mail fraud statute in 1889 and specifically proscribed several fraudulent activities.<sup>91</sup> The 1889 amendment also greatly expanded the statute's scope, adding five significant new words. The original Act required the defendant to have actually used the United States mails. After 1889, however, a person placing a letter in *or causing the use of* the U.S. mails to further a scheme to defraud violated the mail fraud statute.<sup>92</sup> Prosecutors using the mail fraud statute between 1872 and 1909, therefore, had to prove three elements: (1) a scheme or artifice to defraud, (2) an

86 *Curry*, 681 F.2d at 410; *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981); *United States v. Sherer*, 653 F.2d 334 (8th Cir.), *cert. denied*, 454 U.S. 1034 (1981).

87 See Judge Holmes' majority opinion in *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir.), *cert. denied*, 314 U.S. 687 (1941).

88 In a recent law review article, a former federal prosecutor remarked:

[t]o federal prosecutors of white-collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call conspiracy law 'darling', but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity.

Rakoff, *The Federal Mail Fraud Statute*, 18 DUQ. L. REV. 771 (1980).

89 *United States v. McNeive*, 536 F.2d 1245, 1248 (8th Cir. 1976) ("The legislative history, which may have given some insight into the congressional considerations underlying the statute, is sparse.") See also, Morano, *The Mail Fraud Statute: A Procrustean Bed*, 14 J. MAR. L. REV., 45, 45-47 (1980).

90 Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (1872).

91 Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873 (1889). The numerous counterfeit schemes and swindles enumerated in the statute's text under this revision caused one author to call them a "laundry list" of fraudulent activities. Morano, *supra* note 89, at 45-46.

92 Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873 (1889).

intent to use the mails to effect this scheme, and (3) actual use of the mails, evidenced by either the receipt or mailing of a letter.<sup>93</sup>

The mail fraud statute underwent another fundamental change in 1909. In its 1909 amendment, Congress removed the words "to be effected by opening or intending to open correspondence," which had followed the scheme to defraud element.<sup>94</sup> With this amendment Congress eliminated the intent requirement.<sup>95</sup> Thus, the mail fraud statute may now be used not only to prosecute individuals who scheme to use the mails with intent to defraud, but also to prosecute those individuals scheming to defraud who, either by accident or design, use the mails while pursuing this scheme.<sup>96</sup>

### B. *Purpose of the Mail Fraud Statute*

The legislative history does not conclusively indicate Congress' purpose in enacting the mail fraud statute.<sup>97</sup> As a result, courts have had to discern the purpose and reach of the statute, guided only by the statute's expansive language.<sup>98</sup> The early courts viewed the statute as having a dual purpose. First, the statute was designed to prevent fraudulent misuse of the U.S. mails, regardless of whether or not the scheme to defraud violated state law.<sup>99</sup> Second, and more importantly, courts held that the statute was enacted to protect the public from fraudulent schemes and devices.<sup>100</sup>

The statute covers two types of schemes: those intended to deprive individuals of money and other tangible property interests,<sup>101</sup>

93 *Stokes v. United States*, 157 U.S. 187, 189 (1895).

94 Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1139 (1909).

95 *United States v. Young*, 232 U.S. 155, 161 (1913). The *Young* court cited precedent for this abrupt change, *Ex parte King*, 200 F. 622 (N.D. Ga. 1912) and *United States v. Maxey*, 200 F. 997 (E.D. Ark. 1912).

96 See generally *Morano*, *supra* note 89, at 46-47 n.2. The mail fraud statute has been amended three more times since 1909. None of these amendments, however, are of major consequence. See Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763 (1948); Act of May 24, 1949, ch. 139, § 34, 63 Stat. 94 (1949); Act of Aug. 12, 1970, Pub. L. 91-375, § 6(j)(10), 84 Stat. 778 (1970).

97 See note 89 *supra*.

98 *McNeive*, 536 F.2d at 1248.

99 *Badder v. United States*, 240 U.S. 391, 393 (1916) ("The overt act of putting a letter into the post office . . . is a matter that Congress may regulate. Whatever the limits to its power, it may forbid any . . . acts done in furtherance of a scheme it regards as contrary to public policy, whether it can forbid the scheme or not." See also *United States v. States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

100 *Durland v. United States*, 161 U.S. 306, 314 (1896); *Keane*, 522 F.2d at 544. See generally Note, *Survey of the Law of Mail Fraud*, 1975 U. ILL. L.F. 237, 239-240.

101 *United States v. Britton*, 500 F.2d 1257 (8th Cir. 1974) (insurance fraud); *United States v. Street*, 529 F.2d 226 (6th Cir. 1976) (check kiting fraud); *Kloian v. United States*, 349 F.2d

and those intended to deprive individuals of certain intangible political and civil rights.<sup>102</sup> The majority of political corruption cases fall within this second category of cases.

## II. Elements of the Offense: Mail Fraud

Since 1909, two elements have been necessary for a mail fraud violation: the formation of a scheme with intent to defraud and the use of the mails to further that scheme.<sup>103</sup> The use of the mails need not be essential to the scheme's success.<sup>104</sup> While specific state law violations are indictable under the mail fraud statute, alleging a state law offense is not required for conviction.<sup>105</sup> The fraudulent scheme need not succeed for there to be a mail fraud violation.<sup>106</sup> Further, mail fraud convictions are not precluded because the unlawful scheme failed to defraud its victims.<sup>107</sup> Under the mail fraud statute, each mailing in furtherance of the fraudulent scheme creates a separate indictable offense.<sup>108</sup>

### A. *Intent to Devise a Scheme to Defraud*

Since the enactment of the mail fraud statutes in 1872, Congress has neither defined nor established precise limits for the words "scheme or artifice to defraud."<sup>109</sup> Congress' failure to enunciate the statute's purpose in the legislative history has forced the courts to

291 (5th Cir. 1965)(credit card fraud); *United States v. Ashdown*, 509 F.2d 793 (5th Cir.), *cert. denied*, 423 U.S. 829 (1975) (securities fraud).

102 *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982); *United States v. Curry*, 681 F.2d 406 (5th Cir. 1982); *United States v. Mandel*, 591 F.2d 1347 (4th Cir.), *cert. denied*, 445 U.S. 961 (1979); *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976); *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

103 *Pereira v. United States*, 347 U.S. 1, 8 (1954); *Curry*, 681 F.2d at 410; *Keane*, 522 F.2d at 544.

104 347 U.S. at 8.

105 *Mandel*, 591 F.2d at 1361; *McNeive*, 536 F.2d at 1247 n.2; *Keane*, 522 F.2d at 544; *United States v. Edwards*, 458 F.2d 875, 880 (5th Cir.), *cert. denied*, 409 U.S. 891 (1972).

106 *Keane*, 522 F.2d at 545; *United States v. Shavin*, 287 F.2d 647, 651-52 (7th Cir. 1961).

107 *United States v. Barber*, 688 F.2d 778, 785 (4th Cir. 1982); *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981); *United States v. Bassler*, 651 F.2d 600 (8th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982).

108 *Badders v. United States*, 240 U.S. 391 (1916). *See also* SECTION OF CRIMINAL JUSTICE, A.B.A., THE PROSECUTION AND DEFENSE OF RICO AND MAIL FRAUD CASES 7 (1980)(remarks of Richard Beckler on August 14, 1979 at the A.B.A. Annual Meeting, Dallas, Texas).

109 *Mandel*, 591 F.2d at 1360; *McNeive*, 536 F.2d at 1248.



determine the statute's scope. Early in the history of the mail fraud statute, an attempt was made to limit the definition of the phrase "scheme to defraud."<sup>110</sup> Proponents for limiting the statute suggested that common law fraud principles should be used to define the parameters of "scheme to defraud."<sup>111</sup> Under this narrow interpretation, the mail fraud statute would only have applied in schemes involving misrepresentations of existing facts. Individuals making false promises or suggestions about future conduct or events could not have been prosecuted under the mail fraud statute, even though they intended to defraud.

In an 1896 decision, the Supreme Court rejected this argument.<sup>112</sup> The Court felt that limiting the statute's scope to common law fraud schemes would contradict congressional intent. According to the Court, Congress intended to prohibit all attempts to defraud through the use of any form of misrepresentation.<sup>113</sup> Since 1896, the courts have thus broadly defined "scheme to defraud."<sup>114</sup>

The broadest reading of the words "scheme to defraud" is found in political corruption cases.<sup>115</sup> For many years, political officials who deprived citizens of tangible interests, such as money or property, have been prosecuted under the mail fraud statute.<sup>116</sup> Recent political corruption cases have also found mail fraud actionable, however, absent any loss of a citizen's money or property.<sup>117</sup> These cases follow one of two different scenarios. The first occurs when politicians fail to disclose a conflict of interest in matters under their political authority.<sup>118</sup> Courts have found that this failure defrauds the public of its right to a government free from corruption, fraud, and dishonesty. The second scenario occurs when a politician makes a statement to a public body in order to personally benefit from a

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110 *Durland v. United States*, 161 U.S. 306 (1896).

111 *Id.* at 312.

112 *Id.* at 312-13.

113 *Id.* at 313.

114 *United States v. Keane*, 522 F.2d 534, 544 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976); *United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

115 For further discussion of this development, see Note, *A Survey of the Mail Fraud Act*, 8 MEM. ST. U.L. REV. 673 (1978); Comment, *The Intangible-Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562 (1980).

116 See, e.g., *Bradford v. United States*, 129 F.2d 274 (5th Cir.), *cert. denied*, 317 U.S. 683 (1942); *Leche v. United States*, 118 F.2d 246 (5th Cir.), *cert. denied*, 314 U.S. 617 (1941); *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941), *cert. denied*, 313 U.S. 574 (1942).

117 See note 102 *supra*.

118 *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976).

program currently under consideration.<sup>119</sup> This scheme deprives citizens of the honest and faithful participation of a public official in governmental affairs.

The breadth of the "scheme to defraud" language is measured by the intangible rights doctrine. Though discussed in earlier cases,<sup>120</sup> the intangible rights doctrine did not receive extensive judicial evaluation until 1973 in *United States v. States*.<sup>121</sup> In that case, two candidates for St. Louis committeeman falsified voter registration affidavits and cast fraudulent absentee ballots in an attempt to "rig" the election.<sup>122</sup> Appealing their conviction, the former committeemen argued that the express language of the mail fraud statute mandates finding an offense only if the fraudulent scheme involved money or property interests. The defendants claimed that the first phrase of the mail fraud statute, "scheme or artifice to defraud," must be read in conjunction with the second phrase, "obtaining money or property by means of false or fraudulent pretenses, representations, or promises."<sup>123</sup> Under this construction "money or property" limits "scheme to defraud," thereby undercutting the foundation for the intangible rights theory. The court found no support for this argument in either legislative history or case law. The more natural construction, according to the court, was to view the phrases as independent from, rather than complementary to, each other.<sup>124</sup>

In later cases this argument was expressed in terms of constructive fraud.<sup>125</sup> Defendants prosecuted under the mail fraud statute for intangible rights violations argued that, absent monetary or property loss, any breach of a fiduciary duty would amount to no more than constructive fraud. Since the mail fraud statute does not cover constructive fraud, the defendants claimed that they had been wrongly convicted.<sup>126</sup> Facing this challenge, courts devised a two-part test for determining if an infringement upon intangible rights is indictable

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119 *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974), *cert. denied*, 421 U.S. 964 (1975); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

120 *See, e.g.*, *United States v. Edwards*, 458 F.2d 875 (5th Cir.), *cert. denied*, 409 U.S. 891 (1972); *United States v. Faser*, 303 F. Supp. 380 (E.D. La. 1969). *See generally* Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 129-30 (1981).

121 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

122 *Id.* at 762-63.

123 *Id.* at 763-64.

124 *Id.* at 764. For criticism of this interpretation, see Comment, *supra* note 115, at 570-72.

125 *See Mandel*, 591 F.2d at 1359-60; *Isaacs*, 493 F.2d at 1149.

126 *Isaacs*, 493 F.2d at 1149.

under the mail fraud statute. First, there must be a breach of a fiduciary duty and second, some evidence of actionable fraud must exist.<sup>127</sup>

A breach of fiduciary duty by a public official, standing alone, is not enough to support a mail fraud conviction.<sup>128</sup> Failure to disclose a conflict of interest entails a breach of a fiduciary duty but does not necessarily involve actionable mail fraud. A conflict of interest could support a mail fraud conviction only if coupled with a material misstatement or omission of an operative fact.<sup>129</sup> For example, a public official may have a personal interest in some property currently up for rezoning. Assuming the mails were used, the official would violate the mail fraud statute only if he either lied to the public or failed to disclose his competing material interest in the property.

Recently, one court has had to determine the extent of the fiduciary relationship between the public and government officials.<sup>130</sup> The court had to decide if public officials, whether or not elected, were subject to a fiduciary obligation concerning possible conflicts of interest. An expansive reading of the mail fraud statute risked including under its coverage people who participated in the political process only to a limited extent—such as lobbyists and minor party functionaries.<sup>131</sup> A restrictive interpretation, however, would preclude, as a matter of law, the prosecution of non-elected

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127 *Mandel*, 591 F.2d at 1363; *Bush*, 522 F.2d at 647.

128 *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976). *McNeive* involved the mail fraud prosecution of a former St. Louis plumbing inspector. The government alleged that the inspector had received a five-dollar gratuity for every plumbing permit application he processed. The court ruled there could be no mail fraud conviction since no evidence was presented showing the inspector to have materially misrepresented any facts to insure that the gratuities continued. There was also no evidence that the inspector actively concealed his receipt of the gratuities. Even though receiving the gratuities was arguably a breach of the inspector's duty to the public, that could not by itself support a mail fraud conviction. *Id.* at 1251.

129 *See, e.g., United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976). *Bush* was a former press secretary for Chicago's Mayor Daley. *Bush* actively concealed and materially misstated his interest in an advertising firm which was subsequently awarded a city contract. This conflict of interest, coupled with the material misrepresentations he made to Mayor Daley, were enough to prosecute him for mail fraud. *Id.* at 648. In *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976), Keane, a city alderman, used his position to secure preferential treatment for properties in which he had an undisclosed interest. When voting on matters affecting his property, Keane actively concealed his interest from the other aldermen. The court found this intentional conduct defrauded Keane's constituents of their right to his loyal and honest services. *Id.* at 546.

130 *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982).

131 *Id.* at 120.

officials even if they exerted substantial "de facto" control of governmental processes.<sup>132</sup>

The court posited two tests for determining the measure of fiduciary status—the reliance test and the de facto control test.<sup>133</sup> Under the reliance test, a court examines the extent to which people rely upon a particular official. If an official is relied upon to a substantial extent, his non-elected status will not eliminate his fiduciary obligation to the public.<sup>134</sup> The de facto control test, on the other hand, examines whether a person makes governmental decisions. If a person, through de facto power, makes decisions affecting governmental policy, he will be considered in a fiduciary relationship with the public.<sup>135</sup> The second test closely parallels the corporate law treatment afforded "de facto" corporate officers and directors.<sup>136</sup> Even though the officer may not have been officially elected, he can still be held under a fiduciary obligation to shareholders if he exerts substantial control over the corporation's affairs.<sup>137</sup> These tests create a "safe harbor" for the party official motivated by strictly partisan reasons.<sup>138</sup> By employing these tests, courts can distinguish between government business and purely political party affairs. The official can act without fear of being prosecuted for mail fraud until he begins to exert a dominant influence in government decisionmaking. Upon reaching this point, the official is under a fiduciary obligation to both speak truthfully and divulge possible conflicts of interest.

Like other crimes arising out of deceitful conduct, mail fraud requires proof of specific criminal intent.<sup>139</sup> Since mail fraud prosecutions only require evidence of a scheme to defraud, not actual fraud, the intent element takes on greater importance.<sup>140</sup> The term "scheme to defraud" connotes a certain degree of planning by the

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132 *Id.*

133 *Id.* at 122. The *Margiotta* court relied extensively on an article written by Columbia Law Professor John C. Coffee. See Coffee, *supra* note 120, at 147.

134 688 F.2d at 122.

135 *Id.*

136 See Coffee, *supra* note 120, at 147.

137 *Id.* See also H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES §222 (2d ed. 1970).

138 688 F.2d at 122. See also Coffee, *supra* note 120, at 147-48.

139 *United States v. Bush*, 522 F.2d 641, 644 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976).

140 *United States v. Diggs*, 613 F.2d 988, 997 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980) (describing this element as "critical"); *United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976) (describing this element as "essential"); *United States v. McNeive*, 536 F.2d 1245, 1247 (8th Cir. 1976) (same).

defendant. Therefore, the prosecutor must prove intent to defraud. The prosecutor need not prove, however, that the defendant intended to use the mails to effectuate the scheme.<sup>141</sup>

Specific intent under the mail fraud statute need not be proven by direct evidence, but may be "inferred" from examining all relevant facts in the development of the schemes.<sup>142</sup> In political corruption cases, courts require proof that schemes employing the mails were "reasonably calculated to deceive persons of ordinary prudence and comprehension."<sup>143</sup> If this test is met, the statutory intent requirement is satisfied.<sup>144</sup>

### B. *Use of the Mails in Furtherance of the Scheme*

Besides demonstrating a scheme to defraud, prosecutors must also establish use of the mails. This "mailing element" contains two separate requirements. First, the defendant must "cause" the use of the mails, and second, this use must be "for the purpose of executing" the fraudulent scheme.<sup>145</sup>

There are two methods for determining when a person "causes" the mails to be used. A person "causes" the mails to be used when he possesses actual knowledge that in the ordinary course of business use of the mails will form a part of the scheme.<sup>146</sup> The defendant need not specifically intend to use the mails. If, however, the use of the mail was reasonably foreseeable, this will satisfy the causation ele-

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141 *United States v. Maze*, 414 U.S. 395, 399 (1974).

142 *United States v. Alston*, 609 F.2d 531, 538 (D.C. Cir.), *cert. denied*, 445 U.S. 918 (1979); *United States v. Beecroft*, 608 F.2d 753 (9th Cir. 1979).

143 *Bush*, 522 F.2d at 648 (citing non-political cases as authority: *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1975); *United States v. Shavin*, 287 F.2d 647, 650 (7th Cir. 1961), *cert. denied*, 375 U.S. 944 (1963); *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir.), *cert. denied*, 348 U.S. 828 (1954)).

144 *United States v. Diggs*, 613 F.2d 988, 1002-03 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980) (Diggs, a Michigan congressman, was prosecuted for inflating his clerk's salaries and using the increases to pay off personal expenses. The court found that Diggs had placed the clerks on his payroll so he could use them to funnel funds to himself); *United States v. Brown*, 540 F.2d 364, 375 (8th Cir. 1976) (Brown was a St. Louis building commissioner who convinced a building company to bid on demolition contracts. Once the company received the bid, Brown would subcontract the project at a lower price and split the proceeds with the building company. The Eighth Circuit found criminal intent because Brown actively concealed the scheme by instructing the building company to "camouflage" its accounting records). *But see* *United States v. McNeive*, 536 F.2d 1245, 1252 (8th Cir. 1976) (holding that the acceptance of a gratuity did not evidence any "widespread municipal corruption or fraudulent enterprise").

145 *United States v. Rabbit*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Brown*, 540 F.2d at 375-76.

146 *Pereira v. United States*, 347 U.S. 1, 8-9 (1953).

ment.<sup>147</sup> A defendant can, therefore, cause a mailing even if he never places a letter in a mail box. Applying this law to a political corruption case, a mailing by a clerk, aide, or co-schemer can support mail fraud charges against an official, if he could have reasonably foreseen that such mailing would occur.<sup>148</sup>

Mailings are considered to be in furtherance of a scheme even if they are only incidental to an essential part of the scheme.<sup>149</sup> To convict a defendant of a mail fraud violation, however, the mailings must have been "sufficiently closely related" to the fraudulent scheme.<sup>150</sup> Neither mailings made after the scheme's completion<sup>151</sup> nor mailings conflicting with the scheme's purpose<sup>152</sup> satisfy the "in furtherance of" requirement. Courts have found, however, that mailings promoting a scheme<sup>153</sup> or mailings concerning the acceptance of the illegal "fruits" of a scheme<sup>154</sup> do further the unlawful activity.

Mailings made after the successful completion of the scheme can support a mail fraud prosecution only if they have been sent as "lulling letters."<sup>155</sup> Mailings which are designed to lull the victim into a false sense of security or merely to postpone any reports to the authorities about the scheme will meet the "in furtherance" requirement.<sup>156</sup> These "lulling letters" can be essential to the success of the fraudulent scheme. This is especially true where the fraud is not isolated and where the scheme is to be repeated with different victims or

147 *Id.* See also *Rabbit*, 583 F.2d at 1022.

148 See, e.g., *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980) (court found that Diggs could have reasonably foreseen that his clerk would receive proceeds of a fraudulent check scheme through the mails, since the clerk was stationed in Diggs' home office in Detroit, Michigan). *United States v. Brown*, 540 F.2d 364, 376 (8th Cir. 1976) (court found no evidence that Brown had actual knowledge mails were used. Brown, however, could have reasonably foreseen that non-defendants would use the mails to transfer the scheme's funds). One commentator has noted that construing "caused" to mean "reasonably foreseeable" dilutes the added requirement of a mailing "in furtherance of the scheme." In effect, this construction makes the term "synonymous with any mailing, no matter how tenuously related to the scheme." Morano, *supra* note 89, at 51-52.

149 *Pereira v. United States*, 347 U.S. 1, 8-9 (1954). See also *United States v. Curry*, 681 F.2d 406, 410 (4th Cir. 1982); *Diggs*, 613 F.2d at 988; *Brown*, 540 F.2d at 376.

150 *United States v. Maze*, 414 U.S. 395, 399 (1974).

151 *Id.*

152 *United States v. Staszczuk*, 502 F.2d 875 (1974), *rev'd in part on rehearing en banc*, 517 F.2d 53 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975).

153 *United States v. Curry*, 681 F.2d 406 (4th Cir. 1982).

154 *United States v. Isaacs*, 493 F.2d 1124, 1152 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

155 *United States v. Sampson*, 371 U.S. 75 (1962).

156 *United States v. Maze*, 414 U.S. 395, 403 (1974).

continued with the same victim over an extended period of time.<sup>157</sup>

Summarizing this section, the final element under the mail fraud statute is the use of the mails in furtherance of a fraudulent scheme. In order to "cause" the mails to be used, a defendant must execute the scheme either knowing that the mails will be used or having reasonably foreseen that the mails would be used. Additionally, although the mailings need not be essential to the scheme's success or failure, they must be "sufficiently closely related" to the scheme.

### III. Defenses

Since an essential element of mail fraud is specific intent,<sup>158</sup> good faith is a complete defense.<sup>159</sup> If a defendant believed in good faith that his alleged misrepresentations were accurate, he cannot be convicted of mail fraud.<sup>160</sup> In other words, if the defendant believed when he made his statement that it was true, it does not make any difference if the statement was in fact false. Evidence of good faith is considered in light of all the facts and circumstances of the case.<sup>161</sup> To place the good faith defense before the jury, the defendant need only offer minimal evidence in support, even if purely circumstantial.<sup>162</sup> Any evidence of good faith, no matter how dubious, weak, or inconsistent, places this issue before the jury.<sup>163</sup>

### IV. Conclusion

As with the Travel Act, federal prosecutors and courts are now realizing the potential uses for the mail fraud statute in combating political corruption. The relative ease of proving mail fraud violations and the apparent increase in corrupt political activities have caused more political officials to face mail fraud prosecutions. The recent successful prosecution of a non-elected political official fore-

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157 *United States v. Angelli*, 660 F.2d 23 (2d Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); *United States v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979).

158 *See* notes 139-44 *supra* and accompanying text.

159 *United States v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982); *Beck v. United States*, 305 F.2d 595, 599 (10th Cir.), *cert. denied*, 371 U.S. 890 (1962).

160 *United States v. Curry*, 681 F.2d 406, 416 (4th Cir. 1982).

161 *MANUAL ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES*, Mail Fraud Offenses, 36 F.R.D. 457, 600-08 (1965).

162 *United States v. Curry*, 681 F.2d at 416 n.25. The court noted that to require direct evidence of good faith, i.e., elicited from the defendant while on the stand, would "effectively eviscerate the accused's right not to testify." *Id.*

163 *United States v. Curry*, 681 F.2d at 416 (citing *United States v. Goss*, 650 F.2d 1336, 1341 (5th Cir. 1981), as supporting precedent).

shadows the continuing evolution of the mail fraud act as one of the public's protectors against bribery and extortion committed by government personnel.

### C. THE HOBBS ACT: THE FEDERAL GOVERNMENT'S ANSWER TO LOCAL POLITICAL CORRUPTION

#### I. Purpose and Legislative History

The Hobbs Act<sup>164</sup>, as it is commonly known, is the current law combating local political corruption. The Hobbs Act supplanted the Anti-Racketeering Act of 1934<sup>165</sup> (1934 Act), which was designed primarily to reach extortion and racketeering activities engaged in by organized crime members.<sup>166</sup> The Supreme Court's decision in *United States v. Local 807 Brotherhood of Teamsters*<sup>167</sup> prompted congressional action that resulted in the Hobbs Act.

In *United States v. Local 807*,<sup>168</sup> Teamsters labor union members conspired to use and actually used violence and threats to force owners and drivers of trucks to pay a sum of money for each truck entering the city. In some cases, the union members offered to unload the trucks, but required a fee payment whether or not they actually performed any services.<sup>169</sup> The Court held these activities beyond the reach of the 1934 Act.<sup>170</sup>

The Hobbs Act was intended to reach activity similar to that in *Local 807* and to fill the gap in the 1934 Act.<sup>171</sup> Congressman Hobbs said the purpose of his proposed bill was to protect interstate commerce and free the highways of robbers.<sup>172</sup> Most of the debate over amendment of the 1934 Act centered on the Act's effect on labor and labor activities.<sup>173</sup>

164 18 U.S.C. § 1951 (1976). See text accompanying note 175 *infra*.

165 49 Stat. 979 (1934).

166 *United States v. Local 807 Bhd. of Teamsters*, 315 U.S. 521, 530 (1942).

167 315 U.S. 521 (1942)

168 *Id.*

169 *Id.* at 526.

170 *Id.* at 538-39. The Court interpreted the "exclusion of payment of wages by a bona-fide employer to a bona-fide employee" in the 1934 Act to apply to the *Local 807* situation. Whether or not this could be considered a bona-fide employer-employee relationship is indeed questionable.

171 91 CONG. REC. 11,905 (1945). See also *United States v. Franks*, 511 F.2d 25, 31 n.7 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Beck*, 511 F.2d 997, 1000 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975).

172 91 CONG. REC. 11,912 (1945).

173 See *id.* at 11,899-922.



The evolution of the Hobbs Act would startle the student of legislative history. The statute indeed reaches labor activity,<sup>174</sup> but the language of the Hobbs Act has also been construed in a different direction. This analysis of the Act will consider the Hobbs Act's redirection and expansion to cover local political corruption, which is now the clear, albeit unlikely, focus of the Hobbs Act.

The Hobbs Act, in pertinent part, provides:

(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)(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.<sup>175</sup>

Part (a) requires an affect on interstate commerce, and confers jurisdiction for federal prosecution of extortion. Part (b)(2) defines extortion, providing two approaches for prosecution: extortion by wrongful use of actual or threatened force, violence, or fear; and extortion under color of official right.

Until the early 1970's and the landmark case of *United States v. Kenny*<sup>176</sup>, "extortion under color of official right" was largely ignored. The meaning of the phrase "under color of official right," like the purpose of the Hobbs Act, seemed clear from legislative history.

Mr. Day: . . . but what do the words [color of] official right mean?

Mr. Hobbs: In other words, you pretend to be a police officer, you pretend to be a deputy sheriff, but you are not.<sup>177</sup>

Mr. Hobbs' response seems in line with the Act's original purpose to reach labor activity. In the above example, the Act would reach labor members who pose as public officials to extort money.<sup>178</sup>

The phrase "under color of official right" has been interpreted broadly, however, and now represents the vehicle for federal prosecu-

174 See, e.g., *United States v. Callanan*, 223 F.2d 171 (8th Cir.), cert. denied, 350 U.S. 862 (1955); *United States v. Green*, 350 U.S. 415 (1956).

175 18 U.S.C. § 1951 (1976).

176 462 F.2d 1205 (3d Cir. 1972). See text accompanying note 296 *infra*.

177 89 CONG. REC. 3229 (1943).

178 The "color" language assists in closing the gap in the 1934 Act created by the *Local 807* case, because the union members who interfered with commerce by stopping vehicles while posing as public officials would come within the purview of the new act.

tion of public officials. The following sections discuss the requirements for bringing a political corruption prosecution under the Hobbs Act.

Part II discusses the jurisdictional requirement of effect on interstate commerce, as well as the remaining elements required under the Hobbs Act, as they pertain to the prosecution of public officials. Part III addresses attempted extortion and conspiracy. Part IV considers defenses to prosecution, and Part V concludes with a look to the future of Hobbs Act prosecutions. The expansion of the Hobbs Act is fascinating, but one wonders whether there are any limits.

## II. Elements of the Offense

### A. *Jurisdiction*

Congressional power to enact the Hobbs Act came from the commerce clause of the United States Constitution.<sup>179</sup> Under that authority, Congress has the broad power to regulate interstate commerce.<sup>180</sup> The breadth of Congress' control over interstate commerce partly accounts for the relaxed interpretation of the "effect on commerce" language in section 1951 of the Hobbs Act.

The cases<sup>181</sup> remind us that Congress' commerce clause power is plenary, and that section 1951 contemplates the full use of that power.<sup>182</sup> The Supreme Court itself recognized that the Hobbs Act speaks in broad terms, designed to utilize all of Congress' power to punish interference with interstate commerce.<sup>183</sup>

The language of the statute itself is of clear import: whoever *in any way or degree* obstructs, delays, or affects commerce is drawn within the scope of the Act.<sup>184</sup> The nexus between the extortionate activity and interstate commerce need only be *de minimis*.<sup>185</sup> For example, in one case,<sup>186</sup> the extortion victim bought copper wire for his

179 U.S. CONST. art. I, § 8, cl. 3.

180 *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253-58 (1964); *Wickard v. Filburn*, 317 U.S. 111, 118-29 (1942). *See also* *United States v. Gill*, 490 F.2d 233, 236 (7th Cir. 1973).

181 *See, e.g.*, *United States v. Mazzei*, 521 F.2d 639, 642 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975); *United States v. DeMet*, 486 F.2d 816, 821-22 (7th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

182 *See, e.g.*, *United States v. Mazzei*, 521 F.2d 639, 642 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975); *United States v. DeMet*, 486 F.2d 816, 821-22 (7th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

183 *Stirone v. United States*, 361 U.S. 212, 215 (1960).

184 18 U.S.C. § 1951(a) (1976).

185 *United States v. DeMet*, 486 F.2d 816, 822 (7th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). *See also* *United States v. Hathaway*, 534 F.2d 386, 397 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976).

186 *United States v. Price*, 617 F.2d 455 (7th Cir. 1979).

business, which normally travelled through the channels of interstate commerce; that fact was sufficient for the jurisdictional nexus, even though the victim's purchases were infrequent.<sup>187</sup> This type of case demonstrates situations where there is some *real* effect on interstate commerce.

The United States Court of Appeals for the Seventh Circuit, sitting *en banc*, held that the jurisdictional nexus is met even where the extortion had no *actual* effect on commerce.<sup>188</sup> The court held that jurisdiction is satisfied by showing a *realistic probability* that an extortion will have some effect on interstate commerce.<sup>189</sup> In *United States v. Staszczuk*, an alderman accepted \$3,000 for not opposing a zoning change that would permit certain construction.<sup>190</sup> The construction never took place,<sup>191</sup> but the court found, through testimony by an estimator for one of the contractors, that *had* the construction occurred, it would have involved the use of out-of-state supplies.<sup>192</sup>

The courts interpret the "realistic probability" concept loosely, perhaps stretching the concept beyond what it can logically endure. The probability of effect on commerce is strained in two areas: in the depletion of assets cases and in FBI-related cases.

Several circuits have advanced the depletion of assets theory, extending the potential effect theme.<sup>193</sup> The theory is simple: any extortion that reduces a victim's ability to participate in interstate commerce satisfies the "effect" requirement.<sup>194</sup> For example, if a victim paid \$500 to the public official, he (the victim) had \$500 less in

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187 *Id.* at 457.

188 *United States v. Staszczuk*, 517 F.2d 53, 58 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 837 (1975).

189 517 F.2d at 60.

190 *Id.* at 56.

191 *Id.*

192 *Id.* The Court of Appeals for the Seventh Circuit stated that Congress was as much concerned with the *threatened* impact of prohibited conduct as with its actual effect. *Id.* Even possible delay satisfies the jurisdictional nexus required. *See United States v. Pranno*, 385 F.2d 387, 389 (7th Cir.), *cert. denied*, 390 U.S. 944 (1967). *See also United States v. Phillips*, 577 F.2d 495 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). In *United States v. Addonizio*, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972), the court found that obtaining a tribute from contractors engaged in local construction of *facilities to serve* interstate commerce was subject to Hobbs jurisdiction; the purpose of the extortion need not be to affect commerce, but that one of the natural effects of the extortion be an effect on interstate commerce. 451 F.2d at 77. *See also Huluhan v. United States*, 214 F.2d 441, 445 (8th Cir.), *cert. denied*, 348 U.S. 856 (1954).

193 *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *United States v. Phillips*, 577 F.2d 495 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978); *United States v. DeMet*, 486 F.2d 816 (7th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

194 *DeMet*, 486 F.2d at 822.

assets which he *could* have used to purchase interstate goods. The *possibility* that the extorted money would have been used to buy interstate goods can be sufficient.<sup>195</sup> The theory presumes the victim engages in interstate commerce at least infrequently.

*United States v. Hyde* expanded this concept. The Fifth Circuit in *Hyde* held that the victim company need not be engaged in interstate commerce at the moment of the extortion,<sup>196</sup> so long as the company was formed for the *purpose* of engaging in interstate commerce.<sup>197</sup> In contrast, the Second Circuit<sup>198</sup> stressed that the victim's interstate purchases must be of a continuing nature, or the nexus between the commerce and the extortion is rendered merely conjectural.<sup>199</sup>

The circuit courts, however, have affirmed convictions in many instances where it was *impossible* for the extortion scheme to ever affect interstate commerce. Several cases involve FBI undercover operations. In one attempt prosecution case,<sup>200</sup> the Seventh Circuit

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195 See, e.g., *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *United States v. Staszczuk*, 517 F.2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975). In *Cerilli*, the court rejected the contention that the depletion of assets theory should only be applied where the victim is itself an interstate business, *id.* at 424; the victim need only minimally participate in interstate commerce. Here, the victims purchased fuel and supplies that travelled in commerce.

196 448 F.2d 815, 836 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972).

197 *Id.*

198 *United States v. Merolla*, 523 F.2d 51 (2d Cir. 1975).

199 In *Merolla*, the victim's involvement in the construction appeared to be a single venture, and nothing indicated he had worked any other construction jobs. Additionally, all the materials required for the construction channels, though surely travelling through interstate commerce, previously had arrived and there was little likelihood the victim would have purchased additional interstate goods. Thus, depletion of the victim's assets would not have resulted in an effect on interstate commerce. *Id.* at 55. This case is conservative, if not unique, in its analysis and result. Compare *United States v. Crowley*, 504 F.2d 992, 997 (7th Cir. 1974), where the court rejected the notion that interstate commerce cannot be affected once the goods have come to rest. The Seventh Circuit noted that this result was directed by the Supreme Court in *Burke v. Ford*, 389 U.S. 320 (1967). Although the Supreme Court's pronouncement came in a Sherman Act case, the Seventh Circuit applied the principle since the Hobbs Act requires only a *de minimis* effect while the Sherman Act requires a substantial effect.

200 *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974). In *Crowley*, the FBI provided the last in a series of payments on which the arrest was based. The court did not rely exclusively on the FBI payment to substantiate the depletion of assets theory since the victims had made five prior payments, but the court did not exclude the FBI payment from its analysis. See also *United States v. Glynn*, 627 F.2d 39 (7th Cir. 1980). In *United States v. Rindone*, 631 F.2d 491 (7th Cir. 1980), all of the extorted funds were provided by the FBI. The court conceded as plausible the defendant's argument that, since the FBI provided the money paid, no depletion of the victim's assets was possible. *Id.* at 492. But the court circumvented the argument and found the required "effect." The court characterized the offense as an attempted extortion; the defendant's offense was complete when he demanded, not received, the payment, even though the money was paid and the extortion completed. The use of FBI

sustained the depletion of assets theory where the FBI provided the extortion money; that the FBI provided the payoff money was considered irrelevant to the jurisdictional inquiry.<sup>201</sup>

In another case,<sup>202</sup> the victim was an FBI-created corporation with no interstate contacts. The defendants argued that, since their activities could not constitute a completed Hobbs Act violation, they could not be convicted of an attempt to violate the Hobbs Act.<sup>203</sup> The court rejected this impossibility defense.<sup>204</sup>

A few other cases have sustained the depletion of assets theory where any interstate commerce effect was factually impossible, in situations where the payment was intended to be recovered immediately,<sup>205</sup> and where the victim was a company not yet formed or established and which never purchased goods interstate.<sup>206</sup> These cases indicate that it is enough that the extortion scheme, if successful

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money after completion of the extortion attempt does not reduce the reasonable probability that, at the time of the attempt, the victim's assets would be potentially depleted. *Id.* at 493. *See also* *United States v. Harding*, 563 F.2d 299 (6th Cir. 1977), where the official was paid to help the victim cheat on a real estate brokers exam; the victim did not participate in interstate commerce, but the real estate brokers who may take the test did.

201 *United States v. Rindone*, 631 F.2d 491, 494 (7th Cir. 1980). The court noted that the well-settled law of the Seventh Circuit is that jurisdiction is met by an implied unrealizable threat to affect the future business of a victim. *Id.* These cases also raise questions regarding the "obtaining of property of another" as required by the Hobbs Act. *See* notes 244-63 *infra* and accompanying text. Is it important that the property obtained from the victim is not really his and was provided to him especially for extortion payments? Perhaps it should be, especially if the Hobbs Act's focus is on the victim's loss. *See* note 255 *infra* and accompanying text.

202 *United States v. Brooklier*, 459 F. Supp. 476 (C.D. Cal. 1978). *See also* *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 990 (1979) (where the victim was an FBI-created company that required interstate materials for a contract it entered into during the extortion scheme); *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977) (where the FBI-created sanitation company bought out-of-state equipment and dumped garbage across state lines in New Jersey), *cert. denied*, 435 U.S. 952 (1978).

203 *United States v. Brooklier*, 459 F. Supp. at 479.

204 *Id.* at 482. The court discusses the distinction between legal and factual impossibility. Three approaches are identified and outlined by the court. *Id.* at 479-82. The Third Circuit would dismiss the Hobbs charge in *Brooklier* because the extortion could not have affected interstate commerce, since the company was merely a shell not engaged in any commerce. The Second Circuit would not dismiss, since the defendants would have violated the Act but for the circumstances unknown to them, i.e., that the company was not engaged in interstate commerce. The Fifth Circuit would also not dismiss, since the activities of the defendants strongly and unequivocally corroborate an intent to violate the Hobbs Act. The *Brooklier* court adopted the Fifth Circuit approach. *Id.* at 483.

205 *United States v. Phillips*, 577 F.2d 495 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) (involving a conspiracy charge under the Hobbs Act).

206 *United States v. Bellomini*, 454 F. Supp. 44, 47 (W.D. Pa. 1978). The court said that the only inquiry is whether the attempt was made on an enterprise which *intended* to engage in interstate commerce. *See also* notes 196 & 197 *supra* and accompanying text.

or not, *would have* affected commerce. The defendant's ignorance of the facts making an effect on commerce impossible — that the FBI provided the pay or that the company was not engaged in interstate commerce — will not relieve him of guilt.<sup>207</sup>

The Hobbs Act appears most concerned with averting adverse impact on interstate commerce. But the language of the statute is not specifically limited to adverse impact, although the words "delay or obstruct" convey that impression. The language should be construed in its entire context—"whoever in *any* way . . . affects commerce."<sup>208</sup> A beneficial effect, then, could satisfy the jurisdictional nexus.

Some cases do reach the conclusion that "affect" means to affect in any way—adversely or beneficially. The Seventh Circuit has held that facilitating the flow of building materials across state lines satisfies the jurisdictional nexus.<sup>209</sup> The Eighth Circuit specifically examined the government's contention that the Hobbs Act is not limited to extortion which has an adverse effect.<sup>210</sup> The court avoided deciding the issue by finding the effect elsewhere, but expressed its difficulty with the theory. The Court's concern centered on notions of comity, that basing jurisdiction on an adverse *or* beneficial effect would extend Hobbs jurisdiction to common law crimes

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207 See, e.g., *United States v. Rindone*, 631 F.2d 491, 494 (7th Cir. 1980). The defendant's lack of knowledge regarding the circumstances of the transaction is somewhat at odds with the intent requirement discussed in the text accompanying notes 218-22 *infra*. As pointed out there, no specific intent to affect interstate commerce is required, but a general intent is required, usually proved by the inference that one is presumed to intend the consequences that reasonably flow from his actions. Can it realistically be asserted that an effect on interstate commerce reasonably flows from actions that could never affect interstate commerce? Is an effect reasonably probable when it is impossible? The government tries to avoid answering such questions by characterizing the crime as an attempt. Two problems arise: first, in most of the cases, the extortion money is actually paid and the crime completed; second, attempt is a specific intent crime.

208 18 U.S.C. § 1951(a) (1976).

209 *United States v. Kuta*, 518 F.2d 947, 951 (7th Cir.), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Staszuk*, 517 F.2d 53, 56 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975). The Seventh Circuit held in both cases that facilitating interstate commerce satisfied the jurisdictional requirement, but neither defendant specifically argued the beneficial-adverse distinction. In *Staszuk*, the alderman took \$3,000 and later implicitly supported a proposal for a zoning change favorable to the victim, yet the victim never built what the change would have allowed. The court found that, had the victim built, the construction would have required interstate goods, i.e., would have increased the flow of commerce. In *Kuta*, also involving zoning, the public official accepted money to not object to a proposed change, which change later passed. The constructions could not have been built under the prior zoning laws, and those buildings used materials from interstate commerce.

210 *United States v. French*, 628 F.2d 1069, 1076-77 (8th Cir.), *cert. denied*, 449 U.S. 956 (1980).

traditionally covered by state law.<sup>211</sup> The court put aside the broadness of the Hobbs language and focused instead on legislative history; this history indicates no intent to punish activity not adversely affecting commerce.<sup>212</sup>

The Eighth Circuit's discussion expresses concern with the expansive tendency in Hobbs Act prosecutions.<sup>213</sup> Yet limiting jurisdiction to only those cases where interstate commerce is adversely affected seems ill-advised, since some extortionate activity could escape prosecution. Moreover, use of the word "affects" would be redundant if the word meant "adversely affects" since "delay" and "obstruct" sufficiently convey that meaning.

Jurisdiction is the easiest of the Hobbs Act elements to demonstrate. Any actual, probable, or potential delay, obstruction, or effect will do. But this showing must not be overlooked. In *United States v. Elders*,<sup>214</sup> the government failed to meet its burden of proving some interstate effect on commerce. The government argued that the extortion payments paid by a construction company artificially inflated the charges to the city. The city treasury, therefore, had fewer dollars available for municipal projects requiring use of interstate goods or services provided by interstate contractors.<sup>215</sup> The court, in finding that this theory lacked logic,<sup>216</sup> essentially curtailed the expansion of the *de minimis* effect theory. Though *de minimis*, the effect must be more than a "speculative, attenuated 'one step removed' kind of effect."<sup>217</sup>

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211 628 F.2d at 1077.

212 *Id.*

213 Although the Eighth Circuit refused to expand the jurisdictional basis of the Hobbs Act by including beneficial effects, the court did advance an expansive concept of its own. The court opined that even if the extorter did not affect the quantity of interstate commerce, he surely affected the *quality* of commerce. *Id.* at 1078. The defendant became involved with a company in interstate commerce, and created an incentive to corrupt practices. That is, the defendant infused corrupt practices into a company whose activities crossed state lines. Query: would activity that "benefitted" the "quality" of interstate commerce be sufficient? It seems that it would.

214 569 F.2d 1020 (7th Cir. 1978).

215 *Id.*

216 *Id.* at 1025.

217 *Id.* The Seventh Circuit in *United States v. Mattson*, 671 F.2d 1020 (7th Cir. 1982), confronted a 'one step removed' type of effect and denied jurisdiction. The court held that the extortion of \$3,000 from an individual so he could obtain an electrician's license could not be said to affect interstate commerce because the victim's employer (Playboy) had interstate ties. 671 F.2d at 1025. "The Hobbs Act requires interstate commerce to be affected by *extortion*, not by a result of extortion." *Id.* One district court has, however, taken an additional step. In *United States v. Bryson*, 418 F. Supp. 818 (W.D. Okla. 1975), the court seized on the last clause of § 1951(b)(3), which includes all other commerce over which the United States

### B. *Intent*

The government need not demonstrate any specific intent of the public official.<sup>218</sup> The public official does not have to intend to affect interstate commerce; it is immaterial whether or not the defendants intended or even contemplated an effect on interstate commerce.<sup>219</sup> All that must be shown is that the public official extorted or attempted to extort, and that those acts affected or would affect interstate commerce.<sup>220</sup> This proof of general intent is simple, since one is held to have intended the consequences that reasonably flow from his actions.<sup>221</sup> In the indictment, the government need only allege the effect on interstate commerce in conclusory terms.<sup>222</sup>

### C. *Extortion*

The Hobbs Act prohibits interference with interstate commerce by robbery or extortion.<sup>223</sup> Robbery is defined in section 1951(b)(1). A public official could violate section 1951(b)(1) just as any other individual. Since the crime does not depend in any way on the perpetrator's status as a public official, a discussion of robbery is beyond the scope of this note.

Extortion, however, provides two alternate theories of prosecution: extortion by use of force, fear, or violence, *or* extortion under color of official right.<sup>224</sup> The public official could violate either.<sup>225</sup> Although the relationship to official position is clearer under color of

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has jurisdiction. In *Bryson*, the court noted that the National Bank Act (an act of Congress) regulates commerce; thus, the operations or commerce of a bank chartered under the act would be within Hobbs Act commerce. 418 F. Supp. at 824. The district court observed that the statute uses "commerce" and not "interstate commerce," although the latter is specifically included in the former. *Id.*

218 *United States v. Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *United States v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977); *United States v. Gupton*, 495 F.2d 550, 551 (5th Cir. 1974); *United States v. Pranno*, 385 F.2d 387, 389 (7th Cir. 1967), *cert. denied*, 390 U.S. 944 (1968). In *Cerilli*, the court did not specifically state that specific intent is required, but inferred such by stating that the purpose of the extortion need not be to affect interstate commerce.

219 *United States v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976), *cert. denied*, 433 U.S. 882 (1977).

220 *See* note 192 *supra*.

221 *United States v. Mitchell*, 463 F.2d 187, 192 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973); *United States v. Green*, 246 F.2d 155, 159-60 (7th Cir.), *cert. denied*, 355 U.S. 871 (1957). *See* note 207 *supra* and accompanying text.

222 *United States v. Williams*, 679 F.2d 504 (5th Cir. 1982).

223 18 U.S.C. § 1951(a) (1976).

224 18 U.S.C. § 1951(b)(2) (1976).

225 *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). *See, e.g.*, *United States v. Lynn*, 608 F.2d 132 (5th Cir. 1979) (assistant police chief extorted



official right, extortion both through force or fear and under color of official right relate somewhat to official position. The office puts the individual in a position to successfully extort money or property from another.

### 1. Definition of Public Official

For purposes of extortion by fear, the Hobbs Act does not require status as a public official. Extortion under color of official right, however, presupposes some public trust position.

The original intent of Congress regarding who is "under color of official right" is confusing. Congressman Hobbs, the bill's sponsor, defined "under color of official right" as pretending to be a public official.<sup>226</sup> Congressman Simmons, in trying to explain the term to a colleague, said the language means money obtained by someone claiming to be a public officer.<sup>227</sup> Members of Congress expressed concern over possible misinterpretation, but passed no amendment to clarify the language.<sup>228</sup>

Discussion in the cases is clear.<sup>229</sup> The language has been interpreted to mean extortion by a public official.<sup>230</sup> Yet the parameters defining when one becomes a public official, and for how long one remains a public official, are fuzzy. In one case,<sup>231</sup> the Second Circuit held that the chairman of a state Republican Party violated the Hobbs Act.<sup>232</sup> Although he was not an officer of the federal or state government, he had control, in his position as chairman, over area

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money through threats of physical violence); *United States v. Mazzei*, 521 F.2d 639 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975) (state senator extorted money under color of official right).

226 89 CONG. REC. 3229 (1943). These remarks are from the discussions the first time the Hobbs bill was introduced; the bill as later passed was substantially unchanged from the original version.

227 *Id.* See note 177 *supra* and accompanying text.

228 *Id.*

229 Although the court cases clearly interpret the Hobbs Act to include extortion by a public official, the legislative history on this point is not so clear. This result is, however, partially supported in the legislative history. The Hobbs Act, according to Hobbs, was drafted using New York state law as a model. 91 CONG. REC. 11,843 (1945). Under New York law, extortion tracked the common law definition, meaning wrongfully obtaining money by a public official. *Id.* See *United States v. French*, 628 F.2d 1069, 1073 (8th Cir.), *cert. denied*, 449 U.S. 956 (1980). Such a construction, however, seems contrary to the founding purpose of the Hobbs Act, which was to curb illicit labor activity. 91 CONG. REC. 11,843 (1945).

230 See, e.g., *United States v. Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972).

231 *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982).

232 *Id.* at 131.

public officials.<sup>233</sup> On the basis of 18 U.S.C. §2(b), the court concluded the defendant chairman was punishable as a principal.<sup>234</sup>

Candidates for public office can also violate the Hobbs Act.<sup>235</sup> *United States v. Meyers* involved not a substantive violation of the Hobbs Act, but a conspiracy: the court drew a distinction and suggested that perhaps the candidate for public office could not substantively violate Hobbs, but could conspire to do so.<sup>236</sup>

At the other end of the spectrum, the Seventh Circuit Court of Appeals said that Hobbs extortion is a continuing offense.<sup>237</sup> No statute of limitations problem arises where the official arranges for continuous payments over a period of time.<sup>238</sup> Even though the official receives the last payments months after his term expires, the violation continues up to and including that latter date.<sup>239</sup> This extension seems quite logical, since the original violation under color of official right is what prompts the final payment, even though the official no longer has any "official" power.<sup>240</sup>

Although the concept of "public official" is somewhat limited, anyone can be a victim of a Hobbs extortion. The victim need not be completely innocent or worthy of protection. In one case, the Seventh Circuit convicted a public official for extorting money from an illegal business.<sup>241</sup> The FBI is the "victim" in its undercover operations.<sup>242</sup> Moreover, the *subject* of the extortion need not constitute

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233 *Id.*

234 *Id.* 18 U.S.C. § 2(b) (1976) reads: "[W]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

235 *United States v. Meyers*, 529 F.2d 1033 (7th Cir.), *cert. denied*, 429 U.S. 894 (1976). The defendants in *Meyers* were candidates as a result of a primary election held earlier.

236 *Id.* at 1035-36. The court stressed that "under color of official right" modifies "obtaining of property from another" and not conspiracy; therefore, the defendants were charged and convicted of conspiracy to obtain property under color of official right and not with conspiracy under color of official right. The court seems to suggest the latter would not include candidates for office, but clearly indicates that the former does include the candidates. The court rejected an impossibility defense, *id.* at 1037, intimating that had the candidates not ultimately been installed in office, the conviction could still stand. Conviction of a candidate who is never elected is doubtful, however, for two reasons. First, the court stressed that the conspiracy was a continuing offense and did not end until after they took office. Second, these particular defendants were in a viable position to actually obtain the office, as winners in the primary election.

237 *United States v. Forszt*, 655 F.2d 101, 104 (7th Cir. 1981).

238 *Id.*

239 *Id.*

240 See notes 270 & 271 *infra* and accompanying text.

241 *United States v. Blakey*, 607 F.2d 779, 783 (7th Cir. 1979).

242 See the cases in notes 200-03 *infra* and accompanying text.

interstate commerce.<sup>243</sup> This construction is logical, since the focus of the Hobbs Act, as in any criminal statute, is on the perpetrator of the crime and not on its prey. The real victim of a Hobbs violation is the general public, which has conferred upon the official a position of trust and authority. The official's abuse of his office injures the entire community and the reputation of government; the Hobbs Act makes the particular victim hardly seem relevant.

## 2. Property

Section 1951(b)(2) refers to obtaining property from another. The first indication of the property's scope is the variance in terminology from section 1951(b)(1) which refers to personal property,<sup>244</sup> to section 1951(b)(2), where no such limitation exists. The concept of "property" under the Hobbs Act is broad enough to encompass both tangible and intangible interests. The courts reject a narrow interpretation of "property."<sup>245</sup>

These tangible and intangible interests are related, creating a two-tiered deprivation in a Hobbs Act extortion. The first tier is the actual payment made by the victim, a tangible interest. The second and underlying tier involves the threatened deprivation or action by the official, an intangible interest. When the latter interest is conditioned on the former, extortion exists.

First-tier tangible rights are easier to spot. The victim makes some sort of payment to the official—money, property, services, or personalty. The common law definition of extortion is helpful: under the common law, extortion is the obtaining, by a public official, money not due his office, or not yet due his office.<sup>246</sup> That is, the

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243 *United States v. Nakaladski*, 481 F.2d 289, 298 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973). Following the requirement that there be only a reasonable probability that interstate commerce be affected, the victim himself need not be in interstate commerce at all. In *Nakaladski*, the defendant extorted money from an individual, and not from his store, which engaged in commerce. The court concluded that there was a reasonable probability that the payments made by the victim would affect his payments to suppliers of interstate goods. *Id.* at 299. See also *United States v. Spagnolo*, 546 F.2d 1117 (4th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977), where the target of the extortion was the financial source of a construction company which purchased interstate materials. The required interstate effect was met, since withdrawal of the financial source was reasonably likely to hinder the construction firm's ability to purchase interstate goods.

244 Section 1951(b)(1) reads in pertinent part: "[T]he term robbery means the unlawful taking or obtaining of personal property from the person . . . ."

245 See, e.g., *United States v. Hathaway*, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 828 (1976).

246 4 W. BLACKSTONE, COMMENTARIES 146. See also *United States v. Mazzei*, 521 F.2d 639, 650 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975).

official has not the authority or right to request, demand, or accept any payment. His office has no right to the victim's property.

The interpretation of "wrongful" in section 1951(b)(2) is also enlightening. "Wrongful" indicates that the extortionist must have had no lawful rights in the property concerned.<sup>247</sup> One court explained that section 1951 does not apply to wrongful use of force to achieve a legitimate goal; "wrongful" could not modify the force or threats since they are wrongful in themselves.<sup>248</sup> In one case,<sup>249</sup> the extortionist defendants had contract rights under a management agreement which entitled them to money. They demanded a \$50,000 payment and threatened eviction of the victims. Although the defendants had rights in the property, the court sustained the convictions since the defendants did not act in reliance on those rights.<sup>250</sup> The extortionist, then, must have no lawful right to the property concerned.

The second-tier intangible rights or interests are tougher to spot because of their abstract nature. The proper starting focus of any extortion inquiry is whether or not the victim's interest was sufficient.<sup>251</sup> Yet, the concept of property under the Hobbs Act includes "any valuable right considered as a source of wealth."<sup>252</sup> It appears, then, that the interest must at least have economic value, and the cases support this notion. Examples of sufficient property interests include the right to be free of police harassment in operating a business;<sup>253</sup> the right to avoid economic loss;<sup>254</sup> the right to bid for state contracts without paying a fee;<sup>255</sup> the right to lease space in a bowling alley free from threats;<sup>256</sup> the right to solicit accounts;<sup>257</sup> and the right to solicit business free from threatened destruction and physical

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247 *United States v. Enmons*, 410 U.S. 396, 400 (1973); *United States v. Arambasich*, 597 F.2d 609, 611 (7th Cir. 1979); *United States v. Quinn*, 514 F.2d 1250, 1257 (5th Cir.), *cert. denied*, 424 U.S. 955 (1975).

248 *United States v. Enmons*, 410 U.S. 396, 400 (1973).

249 *United States v. Porcano*, 648 F.2d 753 (1st Cir. 1981).

250 *Id.* at 760.

251 *United States v. Hathaway*, 534 F.2d 386, 395 n.6 (1st Cir.), *cert. denied*, 429 U.S. 828 (1976).

252 *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

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

254 *United States v. DeMet*, 486 F.2d 816, 819 (7th Cir.), *cert. denied*, 416 U.S. 969 (1973).

255 *United States v. Mazzei*, 521 F.2d 639 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975).

256 *United States v. Battaglia*, 383 F.2d 303 (9th Cir.), *cert. denied*, 390 U.S. 907 (1967).

257 *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

harm.<sup>258</sup> Inhibiting another from doing business, then, is a taking of property.<sup>259</sup>

*United States v. Hyde*<sup>260</sup> provides an interesting example of the two levels of deprivation. In *Hyde*, public officials coerced companies into paying fees to avoid legal action by the state attorney general's office.<sup>261</sup> The companies were first deprived of the money paid in "fees". Second, the court said the officials deprived the victims of their right to an impartial determination of the propriety of legal action.<sup>262</sup>

Extortion depends on the victim's consent.<sup>263</sup> The victim must give the property to the extorter, in contrast to section 1951(b)(1) robbery, where the property is taken by force. The distinction seems illusory, however, when considering the "voluntariness" of the victim's extorted payment. Of course the victim consents to paying the official, but what are his alternatives?

### 3. The Transaction

Although the defendant must extort property, the extortion scheme need not benefit the extortionist.<sup>264</sup> A Hobbs Act inquiry focuses not on the extortionist's gain, but rather on the victim's loss.<sup>265</sup> The Supreme Court stated that extortion in no way depends on the extortionist's direct benefit.<sup>266</sup> The lower courts have followed the Supreme Court's assertion by requiring that no benefit, indirect or direct, be proved.<sup>267</sup> One court held that the government need only prove the payments were made at the extortionist's direction to

<sup>258</sup> *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

<sup>259</sup> The intangible rights may be present rights or rights pertaining to future expectations. In *United States v. Hathaway*, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 828 (1976), the defendants argued that since the victim had no existing property right in the contract on which he bid, he could not fear or suffer economic loss if he did not get the contract. The court rejected such a narrow interpretation of property and economic rights, stating that some property rights existed or the victim would have no incentive to succumb to the defendant's demands. *See* notes 288-92 *infra* and accompanying text.

<sup>260</sup> 448 F.2d 815 (5th Cir.), *cert. denied*, 404 U.S. 1058 (1971).

<sup>261</sup> *Id.* at 820. *See* notes 302-05 *infra* and accompanying text.

<sup>262</sup> 448 F.2d at 833.

<sup>263</sup> 18 U.S.C. § 1951(b)(2) (1976).

<sup>264</sup> *United States v. Hyde*, 448 F.2d 815, 843 (5th Cir.), *cert. denied*, 404 U.S. 1058 (1971); *United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964).

<sup>265</sup> *Provenzano*, 334 F.2d at 686; *Hyde*, 448 F.2d at 843.

<sup>266</sup> *United States v. Green*, 350 U.S. 415, 420 (1956).

<sup>267</sup> *United States v. Clemente*, 640 F.2d 1069, 1079 (2d Cir.), *cert. denied*, 454 U.S. 820 (1981); *United States v. Trotta*, 525 F.2d 1096 (2d Cir.), *cert. denied*, 425 U.S. 971 (1975); *United States v. Hyde*, 448 F.2d 815, 843 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972).

a person named by him.<sup>268</sup> Some courts hold that neither the extortionists nor anyone else need ever be paid or benefit from the unlawful activity.<sup>269</sup> The act of inducing the payment, rather than receiving it, is the crime.

Just as the extortionist need not receive any benefit, he need not provide anything either. The government is not required to prove that the defendant actually possessed the power to carry out his threats or to provide what he promised.<sup>270</sup> The only inquiry in this regard is whether or not the victim reasonably believed the official had power, regardless of the official's actual power.<sup>271</sup>

#### 4. Fear

For extortion by force, violence, or fear, the victim's state of mind is a critical element,<sup>272</sup> because the government must prove reasonable fear in the victim. Proof of fear requires a showing of three factors: (1) the victim feared; (2) the fear was reasonable; and (3) the defendant exploited the fear.<sup>273</sup> The victim's testimony regarding what others said to him and other's statements regarding what they said to the victim are admissible.<sup>274</sup> Because this evidence establishes the state of mind of the victim, it falls within that exception to the hearsay rule.<sup>275</sup> The evidence, however, may not be used to prove the extortion itself;<sup>276</sup> it is restricted to proof of state of mind.<sup>277</sup>

Whether the defendant must create the fear or merely exploit it is uncertain. At a minimum, guilt is established if the defendant cre-

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268 *United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964). In *Provenzano*, the extorted payment was made to the defendant's friend instead of the defendant. 334 F.2d at 68-86. In *Trotta*, the wrongful payments were made to a political party. 525 F.2d at 1097-98.

269 *United States v. Dozier*, 672 F.2d 531, 546 (5th Cir.), *cert. denied*, 103 S. Ct. 256 (1982).

270 *United States v. Mazzei*, 521 F.2d 639, 643 (3d Cir.) (state senator had no statutory, *de jure* power to control the granting of state leases, but his exploiting of victim's reasonable belief that he had such power is sufficient for extortion), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Salvitti*, 464 F. Supp. 611, 616 (E.D. Pa. 1979) (government need not prove that defendant actually had the power to carry out his threats).

271 *See id.*

272 *United States v. DeMet*, 486 F.2d 816, 819-20 (7th Cir.), *cert. denied*, 416 U.S. 969 (1973); *United States v. Addonizio*, 451 F.2d 49, 59 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972); *United States v. Hyde*, 448 F.2d 815, 845 (5th Cir.), *cert. denied*, 404 U.S. 1058 (1971).

273 486 F.2d at 820; 448 F.2d at 845.

274 448 F.2d at 845. *See* FED. R. EVID. 803(3).

275 448 F.2d at 845.

276 FED. R. EVID. 803(3).

277 *Id.*

ates and exploits fear in the victim.<sup>278</sup> Some courts hold, however, that defendants need only exploit an existing fear of the victim.<sup>279</sup> Under this interpretation, a defendant can be convicted of extortion by force or by exploiting a victim's fears, regardless of the source creating the fear and despite the absence of threats.<sup>280</sup>

The victim's fear can encompass fear of loss of money, economic advantage, property—anything within the definitions of property discussed above.<sup>281</sup> Fear of economic loss is the broadest category, especially since proof of verbal or physical threat is unnecessary for a conviction.<sup>282</sup>

*United States v. DeMet*<sup>283</sup> illustrates the scope of the fear requirement. In that case, the victim admitted his contacts with the extortionists were friendly, and the defendant never indicated he would cause trouble.<sup>284</sup> The court said that fear need not be a consequence of a direct threat; rather, it is a consequence of the total circumstances surrounding the extortion.<sup>285</sup> Subtle extortions are covered in the Hobbs Act, and all the government must show is that the circumstances surrounding the alleged extortion rendered the victim's fear reasonable.<sup>286</sup>

Fear is reasonable in a wide range of cases, and dependent on

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278 *Callanan v. United States*, 223 F.2d 171, 175 (8th Cir.), *cert. denied*, 350 U.S. 862 (1955).

279 *United States v. Duhon*, 565 F.2d 345, 351 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978). Clearly, for attempted extortion, an attempt to instill fear in the victim is sufficient. *See United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). In *Duhon*, the court stated that the defendant need not have originally caused the fear, nor need the cause of the fear itself be wrongful. 565 F.2d at 351.

280 *Duhon*, 565 F.2d at 350 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978) (no explicit requests for money, but, under the circumstances, the ambiguous statements made by the defendant could be understood as requests for money); *United States v. Brown*, 540 F.2d 364, 372-73 (8th Cir. 1976) (the victims provided services for defendant due to a self-imposed fear of refusal); *United States v. DeMet*, 486 F.2d 816, 820 (7th Cir.) (a bar owner paid policeman not to enforce closing hours, but no direct threats were required and no direct requests for payment were made by the officer), *cert. denied*, 416 U.S. 969 (1973).

281 *See* notes 244-54 *supra* and accompanying text.

282 *See* note 285 *infra*. Fear of physical threats or violence are less likely in cases involving public officials—their tactics are probably more discreet.

283 486 F.2d 816 (7th Cir.), *cert. denied*, 416 U.S. 969 (1973).

284 486 F.2d at 819. *See also* *United States v. Hyde*, 448 F.2d 815, 834 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972) (that the extorters and the victims had cordial relations is consistent with extortion; from the circumstances, the victims could have known of the general pattern of extortion and sought out the defendant with the knowledge they would have to eventually deal with him anyway).

285 486 F.2d at 820.

286 *United States v. Sander*, 615 F.2d 215, 218 (5th Cir.), *cert. denied*, 449 U.S. 835 (1980).

the totality of circumstances.<sup>287</sup> Especially interesting and indicative of the broadness of Hobbs are the cases where the victim fears loss of property not presently owned.<sup>288</sup> For example, in the fear of economic injury cases, fear of loss of expected monies has been held sufficient.<sup>289</sup> In *United States v. Addonizio*<sup>290</sup>, the victims paid extorted money to acquire future contract rights, rather than to protect presently owned contract rights.<sup>291</sup> The Third Circuit did not require the government to prove the payments were made because of threatened interference with then-existing contract rights.<sup>292</sup>

The distinguishing feature of Hobbs extortion under-color-of-official-right section is that a showing of extortion under color of official right does not additionally require a showing of fear.<sup>293</sup> This was not always the case. In *United States v. Kubacki*,<sup>294</sup> the court held that, since the public official did not coerce the victim into paying, no extortion resulted, because coercion is an element of the offense.<sup>295</sup> This may partially explain why color of official right was largely ignored by prosecutors until 1972: if the government must prove fear, the prior section was equally appropriate for prosecution.

Then, in 1972, in *United States v. Kenny*,<sup>296</sup> the Third Circuit characterized section 1951(b)(2) differently. First, the "under color of official right" language was read separately from the "fear" language because of the disjunctive connector "or".<sup>297</sup> Second, the "color" language, once separate, was embodied with the common law definition of extortion; under common law, extortion required no proof of threat or fear, and could only be committed by a public official.<sup>298</sup> Presently, then, no proof of coercion is required in a prosecution for extortion under color of official right.<sup>299</sup>

287 See note 285 *supra*.

288 See note 259 *supra* and accompanying text.

289 See, e.g., *United States v. Hathaway*, 534 F.2d 386, 395 (1st Cir.), *cert. denied*, 429 U.S. 828 (1976); *United States v. Addonizio*, 451 F.2d 49, 73 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972).

290 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972).

291 451 F.2d at 73.

292 *Id.*

293 *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972).

294 237 F. Supp. 638 (E.D. Pa. 1965).

295 *Id.* at 641-42.

296 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972).

297 462 F.2d at 1229. See also *United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.), *cert. denied*, 429 U.S. 828 (1976).

298 462 F.2d at 1229; 534 F.2d at 393.

299 *Id.* Circuit Judge Tate, concurring in *United States v. Williams*, 621 F.2d 123, 126-27 (5th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981), vehemently objected to this conclusion. He felt that the clear congressional intent was to punish, by up to twenty years of imprisonment,



In some courts, the "office" itself is said to provide the coercive element.<sup>300</sup> These courts posit that the coercive element on the part of the official and the duress or fear element on the part of the victim are implied from the public official's position of authority over the victim.<sup>301</sup>

The use of public office to induce payments is the focus of the "color" language.<sup>302</sup> The official may induce payments to perform his duties, not to perform his duties,<sup>303</sup> to perform acts unrelated to his duties, or not to perform acts unrelated to his duties.<sup>304</sup> As long as the victim's payment focuses on the recipient's office, section 1951 is violated.<sup>305</sup> The government need not prove that the official had

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only extortion by coercion. Whether the "color" language was intended to repeat the common law definition of extortion is unclear. Legislative history offers little indication. Congressman Hobbs stated that the "color" language referred to one pretending to be a public officer, thus suggesting that the language did not parallel the common law definition. See notes 223 & 224 *infra* and accompanying text. Elsewhere in the legislative debates, however, Hobbs and others indicate that the language was drawn substantially from the New York State law, which follows the common law definition of extortion (by a public official and not requiring proof of duress). See note 226 *infra*. The Hobbs Act is a federal statute, and looking to state law to define federal standards is not entirely appropriate. This is especially true when the bill drafter has specifically defined the terms and the statute's purpose indicates the correctness of that interpretation. See *United States v. Nardello*, 393 U.S. 286, 293-94 (1968), where the Supreme Court, analyzing a similar situation regarding the Travel Act, 18 U.S.C. § 1952, said that even though extortion is defined with reference to state law, Congress does not necessarily incorporate all state interpretations.

300 *United States v. Burkhart*, 682 F.2d 589 (6th Cir.), *cert. denied*, 103 S. Ct. 228 (1982); *United States v. Butler*, 618 F.2d 411 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980); *United States v. Harding*, 563 F.2d 299 (6th Cir.), *cert. denied*, 434 U.S. 1062 (1977).

301 *Burkhart*, 682 F.2d at 592; *Butler*, 618 F.2d at 418; *Harding*, 563 F.2d at 304. This interpretation logically justifies a dispensation of the fear requirement. The focus of "color" extortion is on the public office; the reason the victim pays the official is because he holds that office and maintains some control, at least apparent, over the victim's present or future situation.

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

303 See *United States v. Dozier*, 672 F.2d 531, 540 (5th Cir.), *cert. denied*, 103 S. Ct. 256 (1982); *United States v. Hyde*, 448 F.2d 815, 832 (5th Cir.), *cert. denied*, 404 U.S. 1058 (1971).

304 *Braasch*, 505 F.2d at 151.

305 *Id.* *United States v. Sutter*, 160 F.2d 754 (7th Cir. 1947), exemplifies a court not focusing on the recipient's office. In this case, a federal employee obtained money, claiming that he would distribute it to various charities. The court reversed the conviction, noting that the evidence failed to show that the defendant used his employment to extort, but showed he merely used appealing devices to defraud. *United States v. Dozier*, 672 F.2d at 537, discusses a related situation. Where a public official is authorized to solicit funds, a fine line separates a request for support and a sale of a favor. All politicians, according to the court, are aware of the underlying hope in any donation; therefore, the laws are not designed to punish every official who solicits money which represents the donor's "expectations." Rather, the quest centers on those officials who demand money for future "services" under the guise of donations.

the power to do or to prevent what he claims he can do or prevent, as long as the victim reasonably believed that the official had such power.<sup>306</sup>

The public official need not initiate the transaction;<sup>307</sup> the old distinction between bribery and extortion has faded. Most cases hold that the two crimes are *not* mutually exclusive.<sup>308</sup> That the proscribed conduct may constitute the crime of bribery is irrelevant,<sup>309</sup> and the language of the statute does not preclude this conclusion. Section 1951 refers only to obtaining property of another and not to a "demand", and it seems that bribery falls within this language. The courts insist, though, that mere voluntary payment of money would not be extortion under the Hobbs Act.<sup>310</sup> The difficulty stems from the fine line between a completely voluntary payment and one made because of the official's position of authority. It seems, then, that if the public official *knows* that the motivation of the victim rests on the office, this is enough to bring the conduct within Hobbs Act extortion.<sup>311</sup> In the indictment, the government need only allege extortion in conclusory terms.<sup>312</sup>

### III. Attempted Extortion and Conspiracy

#### A. *Attempted Extortion*

An attempt to extort is clearly within the Hobbs Act, and is punishable as severely as any completed extortion. In *United States v. Rosa*,<sup>313</sup> the Third Circuit held that section 1951 forbids attempted extortion that would have, if completed, affected commerce.<sup>314</sup> In *Rosa*, a public official asked a prospective contractor for a "donation" to ensure him the award of a project, and the contractor re-

306 *United States v. Meyers*, 529 F.2d 1033, 1038 (7th Cir.), *cert. denied*, 429 U.S. 894 (1976); *United States v. Mazzei*, 521 F.2d 639, 643 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Price*, 507 F.2d 1349, 1350 (4th Cir. 1974); *Braasch*, 505 F.2d at 151; *United States v. Salvitti*, 464 F. Supp. 611, 616 (E.D. Pa. 1979); *See note 271 supra* and accompanying text.

307 *United States v. Nelson*, 486 F. Supp. 464, 487 (W.D. Mich. 1980).

308 *United States v. Hall*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976); *United States v. Hathaway*, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

309 *See Braasch*, 505 F.2d at 151. *See also note 308 supra*.

310 *See, e.g., United States v. Hedman*, 630 F.2d 1184, 1195 n.4 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981).

311 *See, e.g., United States v. Barber*, 668 F.2d 778, 783 (4th Cir.), *cert. denied*, 103 S. Ct. 70 (1982); 630 F.2d at 1194 n.4.

312 *United States v. Trotta*, 525 F.2d 1096, 1099 (2d Cir. 1975).

313 560 F.2d 149 (3d Cir. 1977).

314 *Id.* at 153.

fused payment.<sup>315</sup> Since the construction would have involved interstate commerce (through use of supplies), the attempted extortion, if successful, would have obstructed commerce.<sup>316</sup>

The *Rosa* court discussed the language of section 1951 referring to attempts.<sup>317</sup> The pertinent part reads: “[w]hoever in any way or degree obstructs, delays, or affects commerce . . . by . . . extortion, or attempts . . . so to do . . .” is guilty of the offense. The official argued that “attempts” modifies “obstruction of commerce” and not “extortion;” that is, section 1951 forbids an attempt to interfere with commerce by a completed extortion.<sup>318</sup> The court rejected the argument based on legislative history and precedent.<sup>319</sup> Since one violating the Hobbs Act need not *intend* to interfere with commerce,<sup>320</sup> and an attempt requires intent, an attempt to interfere with commerce is impossible. Attempted extortion, then, occurs when an official attempts to induce a person involved in interstate commerce to give up his property.<sup>321</sup>

### B. *Conspiracy*

Conspiracy is a separate and distinct offense under the Hobbs Act.<sup>322</sup> Thus, a defendant can be charged with both a substantive violation and with conspiracy to violate the Hobbs Act. In a conspiracy prosecution, it is irrelevant whether or not the substantive offense is completed.<sup>323</sup> Conspiracy is an agreement between two or more

315 *Id.* at 152.

316 See note 189 *supra* and accompanying text.

317 560 F.2d at 152.

318 *Id.*

319 *Id.* at 152-53. In a footnote, the court also rejected the defendant's contention that if § 1951 is construed to mean “attempted” extortion, the section is void for vagueness. *Id.* at 154 n.5.

320 See notes 218-21 *supra* and accompanying text.

321 *United States v. Rindone*, 631 F.2d 491, 493 (7th Cir. 1980).

322 *United States v. Callanan*, 364 U.S. 587, 597 (1961); *United States v. Shelton*, 573 F.2d 917, 919 (6th Cir.), *cert. denied*, 439 U.S. 827 (1978); *United States v. Jacobs*, 451 F.2d 530, 535 (5th Cir.), *cert. denied*, 405 U.S. 955 (1971). Again, the disjunctive language of § 1951(a) suggests that extortion and conspiracy are separate offenses, punishable consecutively. In *Callanan*, the Supreme Court discussed the sentences of a defendant convicted of both a substantive and a conspiracy violation of the Hobbs Act. Finding that the two were distinct crimes, the Court upheld the consecutive separate sentences, which together exceeded 20 years. In dissent, Justice Stewart expressed much concern that one defendant could receive a 100-year prison sentence for committing one criminal transaction. Justice Stewart suggested that the Hobbs Act be construed to impose only one penalty for each interference with commerce, not for each means used to restrain commerce. 364 U.S. at 601. See note 336 *infra* and accompanying text.

323 See *Callanan*, 364 U.S. 587 (1961). The irrelevance of the substantive offense's completion makes sense, since extortion and conspiracy are separate and distinct offenses.

persons to commit extortion.<sup>324</sup> Conspiracy is a continuing offense that can continue until the goal of the scheme is achieved,<sup>325</sup> and the fact that the conspiracy is unsuccessful will not vitiate a Hobbs Act violation.<sup>326</sup> Participation in a conspiracy need not be proved by direct evidence; a common purpose or plan may be inferred from a development or collection of circumstances.<sup>327</sup>

The requirement of effect on interstate commerce is nearly extinguished for a conspiracy charge. The Third Circuit has stated that, where the defendants agree to do acts which, *had* they been attainable, would have affected commerce, regardless of whether or not an actual affect on commerce was reasonably probable, a sufficient federal interest is implicated.<sup>328</sup> That the conspiracy failed is of no moment; moreover, that the ends of the conspiracy were from the beginning objectively unattainable is irrelevant.<sup>329</sup>

#### IV. Defenses

The defenses available to a Hobbs Act defendant are few and, for the most part, very weak. Jurisdiction is nearly impossible to challenge since such a low threshold of proof is required of the government.<sup>330</sup> Even attempted extortion meets the jurisdictional requirements. Since the bribery/extortion distinction has eroded,

324 *Callanan*, 364 U.S. at 597; *United States v. Hedman*, 630 F.2d 1184, 1192 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *Jacobs*, 451 F.2d at 539.

325 *Shelton*, 573 F.2d at 919; *Jacobs*, 451 F.2d at 539; *United States v. Meyers*, 529 F.2d 1033, 1036 (7th Cir.), *cert. denied*, 429 U.S. 894 (1976).

326 *United States v. Jannotti*, 673 F.2d 578, 591 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982); *Shelton*, 573 F.2d at 919; *Jacobs*, 451 F.2d at 535. The irrelevance of the conspiracy's success rests on the potential effect theory; that is, if the conspiracy would have been successful, commerce would have been affected. Interestingly, the person with whom the official directly interacts need not himself be involved in interstate commerce, so long as one of those involved in the conspiracy engages in commerce. *United States v. Angelilli*, 660 F.2d 23, 35 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1258 (1982). When a group acts as a unit in a scheme, the acts of one not dealing in commerce are "kippered" with those who deal in commerce. *Id.* at 35.

327 *United States v. Cerilli*, 603 F.2d 415, 422 (3d Cir.), *cert. denied*, 444 U.S. 1043 (1979).

328 *Jannotti*, 673 F.2d at 592.

329 *Id.* The district court in *Jannotti* held that Hobbs Act jurisdiction is not achieved through a defendant's erroneous perception that his action could affect commerce or by hypothetical potential impacts on commerce which are impossible. *United States v. Jannotti*, 501 F. Supp. 1182, 1185 (E.D. Pa. 1981). The Third Circuit reversed. 673 F.2d 578 (3d Cir.), *cert. denied*, S. Ct. 2906 (1982).

330 See notes 189-217 *supra* and accompanying text. One narrow avenue is available in some circuits, however. Since it is not clear that a beneficial impact on commerce will confer federal jurisdiction, a defendant could allege that the affect was not adverse. See notes 208-12 *supra* and accompanying text.

bribery is no longer a valid defense to extortion.<sup>331</sup> Only a clear showing that the payment was completely voluntary—a burden, at best, difficult to meet—will suffice.<sup>332</sup> For extortion by force or fear, a defendant could argue that either no fear existed in the mind of the victim or that the fear was unreasonable under the particular circumstances;<sup>333</sup> again, the problems of proof will hinder the defendant. For extortion under color of official right, the office itself will generally provide the coercive element, and defenses that the money was passively received and unmotivated by the office are weak at best.<sup>334</sup> Impossibility of success—both to affect interstate commerce and to extort—has also been rejected as a defense.<sup>335</sup> Double jeopardy is precluded as a defense when both conspiracy and extortion are charged.<sup>336</sup> Even arguments that the Hobbs Act is unconstitutional have failed, as the statute has been upheld under the ninth and tenth amendments.<sup>337</sup>

## V. Conclusion: Notions of Comity

Since the expansion of the Hobbs Act, the statute has been used extensively for prosecution of local political and government officials.<sup>338</sup> This has traditionally been the function of the individual states. The Hobbs Act allows the federal government to enter this state domain without consent by state or local officials.

The importance of attacking local corruption and assisting the

331 See notes 307-08 *supra* and accompanying text.

332 See note 310 *supra* and accompanying text.

333 See notes 274-92 *supra* and accompanying text. Moreover, in those courts requiring the defendant to both create and exploit the fear, a defense that the extorter did not create the fear is possible. Of course, the defendant can always argue that the fear was not reasonable.

334 See notes 300-02 *supra* and accompanying text.

335 See notes 200-07 *supra* and accompanying text. It is also no defense that the defendant's acts did not constitute racketeering; this need not be alleged or proved by the government. *United States v. Culbert*, 435 U.S. 371, 372 (1978).

336 See note 322 *supra*.

337 See, e.g., *United States v. Howe*, 353 F. Supp. 419, 424 (W.D. Mo. 1973) (Hobbs Act does not violate the 9th or 10th amendments); *Carbo v. United States*, 314 F.2d 718, 733 (9th Cir.), *cert. denied*, 377 U.S. 953 (1963). In *United States v. Starks*, 515 F.2d 112, 124 (3d Cir. 1975), the court held that no exemption exists in the Hobbs Act which permits extortion for religious purposes. In addition, overlapping coverage under other criminal statutes will not diminish the scope of the Hobbs Act. *United States v. Labina*, 614 F.2d 1207, 1209 (9th Cir. 1980).

338 It is interesting to note that in *United States v. Gillock*, the Supreme Court held that there exists no privilege in federal criminal prosecutions barring introduction into evidence of legislative acts of a state legislator; only federal privilege law applies in federal criminal cases (Hobbs) and a state's evidentiary privilege will not apply. 445 U.S. 360, 368 (1980). Where federal interests are at stake, principles of comity yield. *Id.* at 373.

states in quashing government fraud, waste, and abuse cannot be denied. Since the states have voiced no outcry in opposition to the federal government's helping hand, one could assume that they welcome the statute and need its protection.<sup>339</sup>

## D. BRIBERY OF PUBLIC OFFICIALS

### I. Legislative Intent of Federal Bribery Statute

The federal bribery statute<sup>340</sup> proscribes certain conduct

339 The political climate in a local community may well explain why a state would welcome *federal* prosecution of its officials. Judges and prosecutors on the state level will know the ranking public officials from their everyday dealings with them. Moreover, the local judges and prosecutors are elected and would be concerned about upcoming elections and the possible interference that a disgruntled official could create.

340 18 U.S.C. § 201 (1976). Subsections (b) and (c) of the statute govern the payment and receipt of bribes:

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent —

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(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 other 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

...

Shall be fined not more than \$20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Subsections (f) and (g) of the statute govern the payment and receipt of illegal gratuities:

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be

deemed to obstruct impartiality and public confidence in government.<sup>341</sup> The bribery statute was enacted in 1962 as part of a conflict-of-interest legislation package.<sup>342</sup> The bribery statute revision purportedly “[substituted] a single comprehensive section of the criminal code for a number of existing statutes concerned with bribery.”<sup>343</sup> Congress intended this consolidation neither to make significant changes nor to restrict the courts’ broad construction of the present bribery statute.<sup>344</sup> The committee’s object in drafting the statute “was to bring uniformity into the law, both with respect to the criminal conduct which constitutes bribery and the penalty for the offense.”<sup>345</sup>

One can see the bribery statute’s underlying policy concerns by examining its legislative history.<sup>346</sup> The courts have recognized these concerns by promoting objective and independent government actions. As the courts have noted, “society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision.”<sup>347</sup>

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a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . . .

. . . . .

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

341 President Kennedy eloquently expressed the need to uphold the public confidence in government in a message dealing with the conflict of interest legislation. Noting the government’s responsibility to maintain high ethical standards of behavior in government, the president stated:

[t]here can be no dissent from the principle that all officials must act with unwavering integrity, absolute impartiality and complete devotion to the public interest. This principle must be followed not only in reality but in appearance. For the basis of effective government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter.

1 PUB. PAPERS 326 (1961) (President John F. Kennedy), *reprinted in* 107 CONG. REC. 6835 (1961).

342 Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119 (codified in 18 U.S.C. § 201 (1976)).

343 S. REP. NO. 2213, 87th Cong., 2d Sess. 8, *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 3853.

344 *Id.*

345 107 CONG. REC. 14,778 (1961) (statement of Rep. McCulloch).

346 *See generally* Exec. Order No. 11,222, 3 C.F.R. 306 (Supp. 1965), *reprinted in* 18 U.S.C.A. § 201, at 274 (1969) (integrity and conduct in all official actions is vital to public trust); 1 PUB. PAPERS (President John F. Kennedy), *supra* note 341; S. REP. NO. 2213, *supra* note 343.

347 *United States v. Jannotti*, 673 F.2d 578, 601 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982); *United States v. Muntain*, 610 F.2d 964, 968 (D.C. Cir. 1979); *United States v. Jacobs*,

## II. ELEMENTS OF BRIBERY OFFENSE

### A. *Public Official*

The person bribed in a section 201<sup>348</sup> offense must have been a public official,<sup>349</sup> a person who had been selected to be a public official,<sup>350</sup> or a sworn witness.<sup>351</sup> Section 201 provides similar penalties<sup>352</sup> for solicitation and receipt<sup>353</sup> of bribes by these parties.

The courts have broadly interpreted the meaning of "public official." In *United States v. Jennings*,<sup>354</sup> the United States Court of Appeals for the Second Circuit held that a person charged under section 201 need not know that the bribee is a federal official.<sup>355</sup> In *United States v. Griffin*, the United States District Court for the Southern District of Indiana found that a private corporation's president was a "public official."<sup>356</sup> The court noted that, because the Department

431 F.2d 754, 759 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971) (quoting *United States v. Labovitz*, 251 F.2d 393, 394 (3d Cir. 1958)).

348 See note 340 *supra*.

349 18 U.S.C. § 201(a) (1976) defines "public official" as "Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government or a juror."

350 18 U.S.C. § 201(a) (1976) defines "person who has been selected to be a public official" as "any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed."

351 18 U.S.C. § 201(d) describes bribery of a sworn witness, which is not included within the scope of this article.

352 See note 340 *supra*.

353 The statutory language describing proscribed activity by the party receiving the bribe includes "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive." 18 U.S.C. § 201(c) (officials) and (e) (sworn witnesses). These subsections demonstrate the statute's broad scope. Assuming that the requisite mental intent exists (*see* notes 403-38 *infra* and accompanying text), the statute covers both actual receipt of the bribe and mere solicitations. The bribery statute contains no separate attempt section. Actual receipt of the bribe is not necessary if the bribe has been "offered or promised" with the requisite intent to influence an official act. *See Jacobs*, 431 F.2d at 760.

354 471 F.2d 1310 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973). The Court stated that the conduct prohibited by the statute is the corrupt offer of "anything of value to any public official . . . with intent to influence any official act." *Id.* at 1312. In *Jennings*, the defendant argued that he thought the official was a state official (police officer), rather than a federal official (FBI agent). The court rejected this argument, but recognized that the offense required the official to have been a federal official. However, after viewing the statute's legislative history the court concluded that the sole scienter required is the corrupt nature of the offer and "intent to influence [an] official act." *Id.* (citing 1962 U.S. CODE CONG. & AD. NEWS 3852, 3856).

355 471 F.2d at 1312.

356 401 F. Supp. 1222 (S.D. Ind. 1975), *aff'd sub nom.*, *United States v. Metro Management Corp.*, 541 F.2d 284 (7th Cir. 1976).



of Housing and Urban Development (HUD) had awarded Griffin an area management broker contract, he was in a position of responsibility, acting for and on behalf of HUD.<sup>357</sup>

State employees involved with federal programs may also be section 201 "public officials." An interesting line of cases dealing with this issue has evolved. In *United States v. Del Toro*,<sup>358</sup> Morales, a New York city employee, was responsible for locating office space for a new branch office of the federal "model cities" program.<sup>359</sup> Morales arranged to have "model cities" rent buildings from prospective landlords in return for payoffs.<sup>360</sup> The court found that Morales was not a section 201 public official. The court reached this conclusion even though the federal government had funded the entire cost of the "model cities" program and provided 80% of its salaries, and though HUD had partially supervised the activities.<sup>361</sup>

In *United States v. Loschiavo*,<sup>362</sup> the Second Circuit vacated Loschiavo's conviction for bribing Morales, whom the same court had earlier held in *Del Toro* not to be a public official. The Second Circuit expanded upon its reasoning in *Del Toro* and noted that the most significant factors in determining "public official" status are the character and attributes of the employment relationship with the federal government.<sup>363</sup>

Recently, in *United States v. Mosley*,<sup>364</sup> the United States Court of Appeals for the Seventh Circuit held that an Illinois Bureau of Employment employee working with the Chicago Comprehensive Employment and Training Program Act (CETA) was a section 201(a) "public official."<sup>365</sup> The Seventh Circuit distinguished *Loschiavo* and *Del Toro* on the grounds that neither of those cases had involved an entirely separate statutory program.<sup>366</sup> The *Mosley* court indicated

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357 The court found Griffin to be a public official "acting for or on behalf of the United States" for the purpose of the bribery statute even though Griffin acted as an independent contractor and exercised no final judgment as to awarding jobs or paying contractors for those jobs. 401 F. Supp. at 1230.

358 513 F.2d 656 (2d Cir. 1975), *cert. denied*, 423 U.S. 826 (1976). The court noted that the bribed "model cities" official was a city employee working under another city employee. Three city agencies screened the bribed official's recommendations prior to HUD approval. 513 F.2d at 662.

359 *Id.* at 659.

360 *Id.*

361 *Id.* at 661.

362 531 F.2d 659 (2d Cir. 1976).

363 *Id.* at 661.

364 659 F.2d 812 (2d Cir. 1981).

365 *Id.* at 816. This state employment program was regulated by CETA.

366 *Id.* at 814.

that the CETA program's provisions and history required substantial federal government involvement.<sup>367</sup> The court found that this degree of involvement was present; therefore, Mosley was a public official "acting for or on behalf of the United States" Department of Labor.<sup>368</sup> The court listed three important factors for purposes of ascertaining whether Mosley was a "public official" under section 201(a): (1) substantial government involvement in the program; (2) federal objectives of the program; and (3) Mosley's responsibility to exercise discretion to act for and on behalf of the government in administering federal funds.<sup>369</sup> The court combined these factors with section 201's purpose and broad construction to conclude that Mosley was a section 201(a) public official.<sup>370</sup>

The Seventh Circuit reaffirmed its position in *United States v. Hinton*,<sup>371</sup> where a community-based non-profit corporation's Executive Director and Housing Rehabilitation Coordinator were found to be section 201(a) public officials. The court found that the Housing and Community Development Act's statutory scheme in *Hinton* was similar to the CETA plan in *Mosley*.<sup>372</sup> The court again found substantial government involvement in the program to be an important factor, noting that the Act was intended to improve federal supervision over federal housing and urban development programs.<sup>373</sup> The court even characterized the defendants as "federal agents in the sense of having discretion in administering the expenditure of federal funds."<sup>374</sup>

In *United States v. Hollingshead*,<sup>375</sup> the Ninth Circuit followed the Seventh Circuit's reasoning in *Hinton* and *Mosley* in holding a San Francisco Federal Reserve Bank employee to be a "public official."

367 *Id.* at 815.

368 *Id.* In examining CETA's legislative history, the court found congressional intent "that the secretary have ultimate responsibility for assuring that manpower programs and policies are carried out in accordance with the purposes and provisions of the Act." H.R. REP. NO. 659, 93rd Cong., 1st Sess., reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2935, 2942.

369 659 F.2d at 814-16.

370 659 F.2d at 815-16. *But see* *United States v. Hoskins*, 520 F. Supp. 410 (N.D. Ill. 1981) (a state employee working for the Illinois Bureau of Employment Security was found to be not working for or on behalf of the Secretary of Labor and therefore not a § 201(a) public official). The *Mosley* court stated that it regarded the *Hoskins* decision as having been reached incorrectly. 659 F.2d at 814 n.2.

371 683 F.2d 195 (7th Cir. 1982).

372 *Id.* at 197.

373 *See* S. REP. NO. 693, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4273, 4274.

374 683 F.2d at 199.

375 672 F.2d 751 (9th Cir. 1982).

Hollingshead's duties at the bank included soliciting and obtaining bona fide competitive bids from qualified contractors for certain Federal Reserve Bank capital projects.<sup>376</sup> The court applied the *Los-chiavo* test; looking at the character of the employment relationship with the federal government, the court noted that Hollingshead worked for a fiscal arm of the federal government.<sup>377</sup> Applying the *Mosley* factors, the court noted: (1) the substantial government involvement in federal reserve banks; (2) the federal objectives of the banks;<sup>378</sup> and (3) Hollingshead's authority to give recommendations that resulted in Federal Reserve Bank approval for expenditures.<sup>379</sup> The court held that these circumstances were sufficient to find Hollingshead was acting for or on behalf of the federal government as a section 201 public official.

These recent cases provide some guidelines to determine when a person is acting "for or on behalf of the United States" as a "public official" within the bribery statute. The tests applied in these cases focus on the degree of government involvement in the potential public official's activity and whether important federal objectives are involved. This test leaves the courts a great deal of discretion and promotes a broad interpretation of the "public official" requirement of section 201 bribery prosecutions.

### B. *Official Act*

A section 201 bribery offense requires more than a public official's involvement; the official must also either promise the performance or be engaged in the performance of an "official act."<sup>380</sup> In *United States v. Birdsall*,<sup>381</sup> the Supreme Court of the United States broadly construed this "official act" requirement, stating that the act need not be prescribed by statute but may simply be a lawful requirement of the department under whose authority the officer was acting.<sup>382</sup> However, it is important to realize that the "public official" and "official act" requirements are interdependent, and both

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376 *Id.* at 752.

377 *Id.* at 753. The twelve federal reserve banks are depositories for United States Treasury Currency. The banks also provide essential services for the Treasury. *Id.* at 754.

378 *Id.*

379 *Id.*

380 18 U.S.C. § 201(a) (1976) defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

381 233 U.S. 223 (1914).

382 The Court further stated that the requirement need not be prescribed by a written

must be scrutinized to determine whether section 201 applies. Thus, purely ministerial or low-level functions, even of government employees, will not usually constitute "official acts" because these persons are not section 201 "public officials."<sup>383</sup>

Although an official act must be involved to sustain a bribery conviction, the official need not personally perform, or even be capable of performing, the official act.<sup>384</sup> The statute proscribes influencing an official act,<sup>385</sup> as well as being influenced in the performance of the official act.<sup>386</sup> The statute manifests congressional intent to eliminate the temptation inherent in situations where federal officials receive gifts or compensation. Even if no corruption is intended, a donee may still tend to provide his donor preferential treatment, thus leading to inefficient and patently unfair public affairs management.<sup>387</sup>

The courts, following congressional intent, have also broadly interpreted section 201's "official act" requirement. In *United States v. Arroyo*,<sup>388</sup> the appellants propounded an interesting, although unavailing, argument based on the statute's "official act" language. The appellants contended that they had not violated section 201(c)(1) because their solicitation had commenced after the public

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rule or regulation, but might instead be a common practice or fixed duty of the department involved. *Id.* at 231.

383 See generally *Krichman v. United States*, 256 U.S. 363 (1921) (baggage porter of railroad under control of and being operated by the United States is not acting for the United States in an official function, and therefore cannot be a "public official" performing an "official act").

384 The bribery statute includes attempts within proscribed conduct. Thus, the "bargained for" act need not be performed. See *United States v. Arroyo*, 581 F.2d 649, 653-55 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *United States v. Evans*, 572 F.2d 455, 479 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978); *United States v. Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975); *United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

385 18 U.S.C. § 201, which prohibits bribing federal officials, includes sections that prohibit influencing such a public official to commit a fraud on the United States (§ 201 (b)(2)) and inducing such person to violate his lawful duty (§ 201(b)(3)).

386 18 U.S.C. § 201(c) corresponds to § 201(b) and prohibits a public official from soliciting, accepting, or agreeing to accept a bribe.

387 572 F.2d at 480. The *Evans* court spoke of the judgment of the official being clouded. Any outside influence (giving or receiving something of value) in performing official acts should be viewed as inherently destructive to the orderly process of government. This principle is articulated in *United States v. Booth*, 148 F. 112 (D. Or. 1906), where the court stated that to permit parties interested in the matters before government officers to pay agreements for compensation for services would countenance the rendering of services oftentimes inconsistent with fidelity to the best interests of the government, to which the employee owes his first and highest obligation. *Id.* at 116.

388 581 F.2d 649 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

official had completed his official act. The court relied upon the statutory language in rejecting this argument. The statute prohibits the official from "being influenced in his performance of any official act."<sup>389</sup> The court noted that accepting the appellants' statutory interpretation would encourage the very conduct that Congress had condemned. Under the appellants' interpretation, an official could perform his official act and afterwards corruptly solicit or accept the bribe by creating in the potential briber's mind the impression that the official act had not yet occurred.<sup>390</sup> This interpretation loses sight of the statute's purpose: to determine if a corrupt solicitation has been made.<sup>391</sup> The court discerned no congressional intent to exclude past acts. The Senate Report,<sup>392</sup> when the statute was enacted in 1962, had manifested an intention contrary to that asserted by the appellants. The report stated: "The term 'official act' is defined to include *any* decision or action *taken* by a public official in his capacity as such."<sup>393</sup>

In *United States v. Carson*,<sup>394</sup> the Second Circuit followed this intent and held that an administrative assistant to Senator Fong of the Judiciary Committee violated section 201 when the assistant received money in return for requesting a Justice Department official to quash an action pending before that department. The court delineated the scope of an "official act" as "the corruption of official positions through misuse of influence in government decision-making which the bribery statutes make criminal."<sup>395</sup>

In *United States v. Muntain*,<sup>396</sup> the United States Court of Appeals for the District of Columbia Circuit refused to extend section 201's scope to include the misuse of public office and contacts gained through that office to promote private ends. The Assistant Secretary

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389 18 U.S.C. § 201(c)(1) (1976).

390 581 F.2d at 653-54.

391 *Id.* at 654.

392 S. REP. NO. 2213, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 3852.

393 *Id.* at 3856 (emphasis added).

394 464 F.2d 424 (2d Cir. 1972). A similar approach to *Carson* has been used in defining "official acts" in *United States v. Evans*, 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978) (HEW official with responsibility for student loan program received payments from a private collection agency that had sought contracts for the collection of delinquent loans); *United States v. Arroyo*, 581 F.2d 649 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) (loan officer with small business administration paid by applicant for SBA loan); and *United States v. Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976) (administrator of federal prison paid by son of prison inmate).

395 464 F.2d at 434.

396 610 F.2d 964 (D.C. Cir. 1979).

for Labor Relations for the United States Department of Housing and Urban Development (HUD) was the defendant in *Muntain*.<sup>397</sup> During his employment with HUD, Muntain had become involved in a private scheme to sell group automobile insurance to labor unions as a negotiated benefit in union contracts.<sup>398</sup> He had often combined automobile insurance promotions with trips taken at government expense for legitimate conferences with labor officials.<sup>399</sup> However, the court refused to hold that Muntain had engaged in an official act, stating that no evidence had shown Muntain's insurance discussions with labor officials had involved a subject that could properly have been brought before Muntain in his official capacity.<sup>400</sup> The court labeled Muntain's activities "reprehensible," but not criminal within section 201(g).<sup>401</sup> The court refused to construe the statute in the manner the government advocated, which, as previously noted, would have prohibited using a public office to promote private gains.<sup>402</sup>

The *Muntain* court's "official act" interpretation was correct. Congress intended the bribery statute to prevent a party from influencing an *official* in his *official* duties. In this capacity, the public requires, and indeed demands, unbiased, informed decisions. The bribery statute was *not* intended to encompass all public office misconduct. By refusing to expand the scope of "official act" to include conduct outside official duties, the court followed the legislative intent to regulate only conduct directly connected with official duties.

### C. *Intent*

The fundamental difference between the bribery and illegal gratuity subsections of section 201 is the requisite degree of intent.<sup>403</sup> The bribery subsections (201(b) and (c)) specify that the act must have been done "corruptly," while the illegal gratuity subsections

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397 *Id.* at 965.

398 *Id.* at 966.

399 *Id.* at 966-67.

400 *Id.* at 968. The court, citing *Birdsall*, 233 U.S. 223 (1914), in a footnote, noted that "official acts" included duties set forth in a job description as well as duties customarily associated with a particular job. However, the court found no evidence in the case to associate Muntain's actions with his official or customary duties. 610 F.2d at 967.

401 *Id.* See note 340 *supra*.

402 610 F.2d at 967-68.

403 As noted in *United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974), "The different and higher requisite degree of criminal intent, then, is the additional element which is essential to make the offense of bribery under section 201(c)(1) the greater offense in relation to the lesser included offense of accepting an illegal gratuity under section 201(g)".

(201 (f) and (g)) require an act to have been done "otherwise than as provided by law for the proper discharge of official duty, directly or indirectly."

A recent Second Circuit case involving an ABSCAM prosecution,<sup>404</sup> *United States v. Myers*,<sup>405</sup> focused on the meaning of "corruptly" in subsections 201(b) and (c). The court examined a 1961 Report by the House Committee on the Judiciary<sup>406</sup> that emphasized that the purpose for which the recipient knows the bribe is offered or given determines the act's criminality.<sup>407</sup> This report manifests a congressional purpose to apply a subjective intent test, that is, to determine what the accused himself had intended.<sup>408</sup> In *United States v. Strand*,<sup>409</sup> the Ninth Circuit upheld the validity of jury instructions that defined "corruptly" and the specific intent required to act "corruptly" in a manner that required application of a subjective intent test.<sup>410</sup>

As previously stated, the statute makes attempted bribery a crime. Any offer or promise of a bribe, coupled with the requisite intent "to influence an official act," constitutes bribery.<sup>411</sup> Proof of an ability and desire to pay or receive the bribe establishes the requisite intent.<sup>412</sup> Of course, the official need not necessarily be corrupted, nor must the object of the bribe be attainable.<sup>413</sup> The official may be entirely innocent and, since the bribe's payment and receipt are independent offenses,<sup>414</sup> the bribee's and briber's intents may dif-

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404 See note 452 *infra*.

405 692 F.2d 823 (2d Cir. 1982).

406 H. REP. NO. 748, 87th Cong., 1st Sess. 18 (1961).

407 *Id.*

408 See J. MARSHALL, INTENTION—IN LAW AND SOCIETY 108-16 (1968).

409 574 F.2d 993 (9th Cir. 1978).

410 *Id.* at 996. *Accord*, *United States v. Johnson*, 621 F.2d 1073 (10th Cir. 1980); *United States v. Heffler*, 402 F.2d 924 (3d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969); *United States v. Irwin*, 354 F.2d 192 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

However, it is uncertain why Congress included the term "corruptly" in § 201(b) and (c). See Comment, *The Federal Bribery Statute: An Argument for Cautious Revision*, 68 KY. L.J. 1026, 1037-38 n.54 (1979-80), which suggests that a statement by then Assistant Attorney General Katzenbach may have been responsible: "The danger that innocent conduct may fall within the provisions of proposed sections 201 and 202 may be avoided by the inclusion of a term such as 'willfully' or 'corruptly' in subsection (b). 'Corruptly' is employed in title 18, United States Code section 1503 and has never presented any serious obstacle to conviction." *Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412, and H.R. 7139 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 30, 36 (1961).

411 431 F.2d at 760.

412 *Id.*

413 *Id.* at 759-60.

414 *United States v. Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991

fer. Thus, a section 201 bribery conviction requires separate proof of both the bribee's and briber's intents.

An explicit *quid pro quo* is necessary to establish bribery.<sup>415</sup> In addition, the briber must be the mover or producer of the official act.<sup>416</sup> *United States v. Fenster*<sup>417</sup> provides an example of a *quid pro quo* arrangement. Fenster offered payments to a United States Veterinarian Inspector with the expectation that more hogs would pass inspection, less frequent production line shutdowns would occur, and an overzealous inspector would be controlled.<sup>418</sup> The court held that this exchange constituted the kind of *quid pro quo* arrangement that established a section 201(b) violation.<sup>419</sup>

Although a bribery conviction requires an act to be done "corruptly," the corresponding gratuity sections require only that the act be done "otherwise than as provided by law for the proper discharge of official duty."<sup>420</sup> In *United States v. Brewster*,<sup>421</sup> the District of Columbia Circuit noted that the two clauses are not equivalents. "Corruption" bespeaks a higher degree of criminal knowledge and purpose than does the corresponding gratuity language.<sup>422</sup> An official can accept something of value "otherwise than as provided by law," yet not accept it "corruptly." Congress desired to prohibit public officials from accepting things of value with either degree of criminal intent and, therefore, legislated different requisite intents and penalties for the offenses.<sup>423</sup> In *United States v. Irwin*,<sup>424</sup> the Sec-

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(1975); *United States v. Brewster*, 506 F.2d at 71; *United States v. Michelson*, 165 F.2d 732, 733 (2d Cir.), *aff'd*, 335 U.S. 469 (1948).

415 506 F.2d at 72. Black's Law Dictionary defines "quid pro quo" as "giving one valuable thing for another . . . mutual consideration." BLACK'S LAW DICTIONARY 1123 (rev. 5th ed. 1979).

416 506 F.2d at 72.

417 449 F. Supp 435 (E.D. Mich. 1978).

418 *Id.* at 438-39.

419 *Id.* Another *quid pro quo* exchange resulted in a bribery prosecution in *United States v. Heffler*, 402 F.2d 924 (1968), *cert. denied*, 394 U.S. 946 (1969). Cecching, senior technician at the Army Aviation Material Command, approached Eggart, a manufacturer, and offered, for a fee, to insure that Eggart would be the successful bidder on contracts to be awarded by the Air Force Material Command. Cecching made reports and recommendations in the performance of his duties that were likely to influence the contract awards. The court held Cecching's conduct to be the very kind of corrupt solicitation of official misconduct for value that section 201(c) makes criminal. 402 F.2d at 926.

420 *See* note 1 *supra*.

421 506 F.2d 62 (D.C. Cir. 1974).

422 *Id.* at 71.

423 *Id.* The court explains that Congress intended the gratuity subsections "to take care of the case where the illegal payer offers a public official a gift for doing what the public official is paid to do anyway. Both the giving and receipt of gifts for doing official acts are thus forbidden." *Id.* at 72 n.26.



ond Circuit held that, in a gratuity conviction, the government must prove that the accused acted knowingly and purposely, and not through accident, misunderstanding, inadvertence, or other innocent reasons.<sup>425</sup>

Another important aspect of the bribery/gratuity dichotomy involves the purpose in accepting or soliciting the thing of value. The statute delineates the intent requisite to a bribery conviction. The bribery subsections prohibit the receipt of anything of value “*in return for* being influenced in [the] performance of any official act,” while the gratuity subsections prohibit the receipt of anything of value “*for or because of* any official act performed or to be performed by him.”<sup>426</sup> The bribery subsections’ “in return for” language contemplates a *quid pro quo* exchange. The gratuity subsections’ “for or because of” language encompasses a wider range of situations.

Because the official may accept a gratuity for an act he has already performed, the statute contains no requirement of an exchange or *quid pro quo*.<sup>427</sup> A gift to an official for an act already performed may thus fall within the scope of this section. As stated in *United States v. Evans*,<sup>428</sup> “specific intent is not an element of Section 201(g) . . . the gravamen of each offense, then, is not an intent to be corrupted or influenced, but simply the acceptance of an unauthorized compensation.”<sup>429</sup> For example, goodwill gifts and favors to government officials that are motivated by a donor’s generalized hope of benefit will not satisfy the requisite intent for bribery, but will probably be construed to be an illegal gratuity.<sup>430</sup>

424 354 F.2d 192 (2d Cir. 1965).

425 *Id.* at 197. The court noted that one may regard requiring the government to prove this state of mind as either a degree of specific intent or as a limitation on the acts within the purview of the subsections. *Id.*

426 *See* note 340 *supra* (emphasis added).

427 *Id.*

428 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978).

429 572 F.2d at 481. *See also* *United States v. Brewster*, 506 F.2d at 72-74 n.26; *United States v. Umans*, 368 F.2d 725, 728-30 (2d Cir. 1966), *cert. dismissed*, 389 U.S. 1025 (1967); *United States v. Forgione* 487 F.2d 364, 365 (1st Cir. 1973), *cert. denied*, 415 U.S. 976 (1974); *United States v. May*, 175 F.2d 994, 1006 (D.C. Cir. 1949).

430 *See* *United States v. Arthur*, 544 F.2d 730 (4th Cir. 1976), where the court held that expenditures made in the hope that officials will be more likely to award government business to the donor is an influence that does not amount to bribery. *Id.* at 735. This case is of questionable importance, since the court based its decision on West Virginia’s Bribery and Gratuity statutes. W. VA. CODE §§ 61-5A-3 and 61-5A-6 (1977). The gratuity section provides for certain exceptions that are not considered to be illegal gratuities, including “trivial gifts or gratuities involving no substantial risk of affecting official impartiality.” *Id.* at § 61-5A-6(b)(2). The federal statute provides for no such exceptions. For a discussion of “good-

In *United States v. Umans*,<sup>431</sup> the Second Circuit described the illegal gratuity subsections as “[making] it criminal to pay an official a sum which he is not entitled to receive regardless of the intent of either payor or payee with respect to the payment.”<sup>432</sup> As noted in *Brewster*,<sup>433</sup> this statement (as well as the previously quoted statement in *Evans*)<sup>434</sup> could mean that the Second Circuit has interpreted the gratuity subsections to require no intent whatsoever. The *Brewster* court did “not necessarily disagree” with this analysis when the recipient was an Internal Revenue agent or other appointed official, but when an elected public official was involved, the court found a practical need for a criminal intent requirement under the gratuity subsections.<sup>435</sup>

The section 201 bribery subsections apply where a specific intent, which the statute describes as “corruptly,” can be established. Since “corruptly” does not appear in the unlawful gratuity subsections, those subsections carry a less formidable burden of proof and encompass a wider variety of situations. Further, due to the severity of the bribery penalty, which includes possible exclusion from public office upon conviction,<sup>436</sup> the courts may more willingly convict on illegal gratuity charges. Thus, the unlawful gratuity subsections must be broadly construed<sup>437</sup> to accomplish their manifest legislative purpose: to maintain high ethical standards of behavior as government becomes more complex and involves more private sector contact.<sup>438</sup>

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will” gratuities, see Perry, *The Fuzzy World of Illegal Gratuities*, DISTRICT LAWYER, June/July 1979, at 25, 26-27.

431 368 F.2d 725 (2d Cir. 1966), cert. denied, 389 U.S. 1025 (1967).

432 *Id.* at 730.

433 506 F.2d at 73 n.26.

434 572 F.2d 455 (5th Cir. 1978).

435 506 F.2d at 73 n.26. The court explained that some criminal intent must be required when applying the statute to an elected public official's acts. Every campaign contribution is probably given to an elected public official because of some acts already done or to be done by the official. The donee at least supports the acts of this official. If no intent requirement was presumed under the gratuity subsections, then great difficulty would arise in applying these subsections to elected public officials, for no distinction would exist between an illegal gratuity and a legitimate campaign contribution. *Id.*

436 See note 340 *supra*.

437 *United States v. Evans*, 572 F.2d at 480; *United States v. Anderson*, 509 F.2d at 333; *Parks v. United States*, 355 F.2d 167, 168 (5th Cir. 1965).

438 See S. REP. NO. 2213, 87th Cong., 2d Sess., reprinted in 1962 U.S. CODE CONG. & AD. NEWS 3852-53.

### III. Defenses

#### A. *Entrapment*

The entrapment defense focuses on the defendant's predisposition to commit a crime.<sup>439</sup> Entrapment occurs when a defendant who is not predisposed to commit the crime does so as a result of government inducement.<sup>440</sup> The inquiry does not focus on government conduct, but is a subjective inquiry into the defendant's predisposition. If the court finds that the defendant was predisposed to commit the act, the entrapment defense does not apply.<sup>441</sup>

As the United States Court of Appeals for the Fifth Circuit noted in *United States v. Anderton*,<sup>442</sup> if the defendant is eagerly waiting to violate the law, a criminal in search of a crime, then government actions merely assisting him to that end are irrelevant.<sup>443</sup> Thus, a government agent's single offer or solicitation of a bribe will not automatically establish entrapment.<sup>444</sup> Rather, a court must find that the defendant was not predisposed to commit the crime with which he has been charged, but did so only after government inducement.

#### B. *Outrageous Conduct*

The accused invokes the outrageous conduct defense to bribery when he asserts that the conduct at issue violates the fifth amendment due process clause's constitutional standard regarding "immutable and fundamental principles of justice."<sup>445</sup> This defense differs from entrapment because the inquiry centers on the amount and nature of government conduct, not on the defendant's state of mind.

In *United States v. Russell*,<sup>446</sup> the Supreme Court recognized that this defense was plausible, stating "the conduct of law enforcement agents [may be] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to ob-

439 See *United States v. Russell*, 411 U.S. 423 (1973); *Hampton v. United States*, 425 U.S. 484 (1976). In *Russell*, Justice Rehnquist commented that "[e]ntrapment is a relatively limited defense [rooted] . . . in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the government." 411 U.S. at 435.

440 *United States v. Jannotti*, 673 F.2d 578, 597 (3d Cir. 1982).

441 *Id.*

442 679 F.2d 1199 (5th Cir. 1982).

443 *Id.* at 1201.

444 See *United States v. Valencia*, 645 F.2d 1158, 1170-72 (2d Cir. 1980).

445 See *Rochin v. California*, 342 U.S. 165, 176 (1952) (pumping petitioner's stomach violated due process clause of the fourteenth amendment).

446 411 U.S. 423, 431-32 (1973).

tain a conviction.<sup>447</sup> Courts have hesitated to reverse a conviction or dismiss an indictment based on outrageous government conduct.<sup>448</sup> In *United States v. Twigg*,<sup>449</sup> the Third Circuit accepted this due process defense. However, because of the substantial government involvement and enticement in *Twigg*, one should not read this case to signify broad judicial acceptance of the outrageous conduct defense.<sup>450</sup>

The Third Circuit subsequently refused to accept the outrageous conduct defense in *United States v. Jannotti*,<sup>451</sup> an ABSCAM<sup>452</sup> case involving illegal bribes. The court distinguished *Twigg* on two grounds. First, in *Jannotti*, the government had provided neither material nor technical assistance to the defendants, as it had in *Twigg*. Instead, the government merely created the fiction that it sought to buy the officials' influence.<sup>453</sup> Second, in *Jannotti*, the government was not involved in both the buying and selling sides of the transac-

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447 The issue arose three years later in *Hampton v. United States*, 425 U.S. 484 (1976). A majority of the Court (with three dissenting and two concurring Justices) rejected the position that the entrapment defense is the only available defense where "the Government has encouraged or otherwise acted in concert with the defendant." *Id.* at 492 n.2. The court noted that the entrapment defense focuses only on the defendant's predisposition to commit the crime. Where this predisposition is established, the defendant cannot rely on government misconduct in asserting the entrapment defense. Thus, the outrageous conduct defense is wholly separate from entrapment.

448 The Third Circuit's statements in *United States v. Jannotti*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S.Ct. 2906 (1982), illustrate the court's view regarding this defense. The court noted "[w]e must necessarily exercise scrupulous restraint before [denouncing] law enforcement conduct as constitutionally unacceptable. . . ." *Id.* at 607-08. Only the most intolerable government conduct will merit this constitutional defense. *See also United States v. Esquer-Gamez*, 550 F.2d 1231 (9th Cir. 1977) (due process challenge to undercover agent's encouragement rejected even though one defendant was solicited twenty times before committing an offense); *United States v. Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (due process challenge rejected even though the defendant was tempted by a million-dollar cash deal and prodded by veiled threats).

449 588 F.2d 373 (3d Cir. 1978).

450 In *Twigg*, the government assisted the two defendants in setting up a narcotics laboratory. The government supplied glassware and phenyl-2-propamone, an indispensable ingredient. The government agent purchased practically all of the supplies and was completely in charge, furnishing all the laboratory expertise. Neither defendant had the knowledge with which to manufacture methamphetamine. When the defendants encountered problems in locating a production site, the government provided an isolated farmhouse well-suited for the laboratory operation. *Id.* at 380-81.

451 673 F.2d 578, 608 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

452 ABSCAM (short for Abdul Scam) was an FBI undercover operation involving Congressmen and public officials. The two-year investigation started in the world of white-collar crime, but expanded into a massive corruption probe that eventually involved even United States Senators. *See R. GREENE, THE STINGMAN* 5 (1981).

453 673 F.2d at 608.

tion, as it had been in *Twigg*.<sup>454</sup> According to the court, the government's activities in *Jannotti* failed to rise to a level that violated the defendants' due process rights.

Appellants in other recent ABSCAM prosecutions have also raised the outrageous conduct defense. ABSCAM was an unconventional "sting" operation involving substantial government participation and direction.<sup>455</sup> Despite this excessive government involvement, several courts have upheld the ABSCAM prosecutions against outrageous conduct arguments.<sup>456</sup> In *United States v. Myers*,<sup>457</sup> the Second Circuit held that the due process limit on governmental participation in crime, although not clearly established, was not reached in ABSCAM.<sup>458</sup> The court allowed the government agent's conduct in ABSCAM, which it saw as bare suggestions to a Congressman that he take a bribe, because the public had the right to expect its public officials to have sufficient integrity to refuse such suggestions.<sup>459</sup> The *Myers* court did not think that the government's conduct in ABSCAM had approached the "outrageous conduct" that the courts had discussed in *Hampton* and *Russell*.<sup>460</sup>

The Supreme Court has never specifically upheld the outrageous government misconduct defense.<sup>461</sup> Although *Hampton* and *Russell* have failed to define "outrageous" government conduct, these cases provide the only guidance available until the Supreme Court provides a definition. Courts that continue to follow the imprecise statements these cases have provided will probably continue to re-

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454 *Id.*

455 Robert C. Stewart, the attorney in charge of the Newark Strike Force, noted ABSCAM's unique nature. Stewart saw a fundamental difference between the subject matter of a conventional sting operation and that of ABSCAM. In a conventional operation, the subject matter (such as a stolen television) is contraband and incriminating per se. Any discussion involving the item's disposition therefore provides a basis for further investigation. In ABSCAM, there was nothing inherently illegal about the general topic of conversation. The officials were not incriminated by simply having been offered the bribe. Thus, the opposite presumption (of legality) must operate in ABSCAM. The decision for further investigative action must then rest on other facts and inferences. *United States v. Kelly*, 539 F. Supp. 363, 371-72 (D.D.C. 1982) (citing *Myers* due process exhibit 15 at 3-4).

456 See notes 452-55 *supra* and accompanying text. *But see United States v. Kelly*, 539 F. Supp. 363 (D.D.C. 1982) (virtue testing in ABSCAM exceeded the concept of fundamental fairness where the government persisted after the Congressman had initially rejected the illegal offer).

457 692 F.2d 823 (2d Cir. 1982).

458 *Id.* at 837.

459 *Id.* at 843.

460 *Id.*

461 *United States v. Marcello*, 537 F. Supp. 1364, 1369 (E.D. La. 1982).

strictively construe the "outrageous government misconduct" defense.

### C. *Vagueness and Overbreadth*

Courts have held that section 201 is neither overbroad nor impermissibly vague.<sup>462</sup> The statute's standards are not vague, for they are sufficiently explicit to prevent arbitrary and discriminatory application.<sup>463</sup> The statute also provides a person of ordinary intelligence a reasonable opportunity to know what acts are prohibited so that he may act accordingly.<sup>464</sup> The courts have determined that they should construe the statutory language, particularly the words "corruptly," "value," and "influence," in their ordinary, everyday senses.<sup>465</sup>

A clear and precise enactment may nevertheless be overbroad if it prohibits constitutionally protected conduct.<sup>466</sup> Section 201 has consistently withstood this constitutionally based attack,<sup>467</sup> since the statute's possible overbreadth must be judged in relation to its plainly legitimate sweep.<sup>468</sup>

### C. *Speech or Debate Clause*

A senator or representative indicted for bribery may raise the defense of immunity under the speech or debate clause of the Constitution. That clause provides: "[F]or any speech or debate in either house, they [senators or representatives] shall not be questioned in

462 *See, e.g.*, *United States v. Alessio*, 528 F.2d 1079, 1083 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); *United States v. Brewster*, 506 F.2d 62, 76 (D.C. Cir. 1974); *United States v. Irwin*, 354 F.2d 196 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *United States v. Passman*, 460 F. Supp. 912, 914 (W.D. La. 1978).

463 *United States v. Brewster*, 506 F.2d at 77.

464 *Id.* at 77 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The *Grayned* Court delineated three important values that vague laws offend. First, laws must provide a person of ordinary intelligence a reasonable opportunity to know what acts are prohibited, so that he may act accordingly. Vague laws may not provide such fair warning. Second, to prevent arbitrary and discriminatory enforcement, laws must provide explicit standards for those who apply them. Third, a vague statute related to first amendment freedoms may inhibit the exercise of these freedoms. 408 U.S. at 108-09.

465 *See United States v. Brewster*, 506 F.2d at 76-77; *United States v. Pommerening*, 500 F.2d 92, 97 (10th Cir.), *cert. denied*, 419 U.S. 1088 (1974); *United States v. Irwin*, 354 F.2d at 197; *United States v. Passman*, 460 F. Supp. 912 (W.D. La. 1978).

466 *See Zwickler v. Koota*, 389 U.S. 241, 249-50 (1967) and cases cited therein. *See generally* Note, *Campaign Contributions and Federal Bribery Law*, 92 HARV. L. REV. 451 (1978).

467 *Brewster*, 506 F.2d at 77; *Irwin*, 354 F.2d at 196; *Passman*, 460 F. Supp. at 914.

468 506 F.2d at 78 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). The *Broadrick* Court noted that this principle becomes most important when conduct, rather than mere speech, is involved. In such a case, the overbreadth must be real and substantial. *Id.*

any other place."<sup>469</sup> In *United States v. Johnson*,<sup>470</sup> the Supreme Court held that the speech or debate clause precludes judicial inquiry into the motivation for, as well as the content of, a Congressman's speech.<sup>471</sup> However, in affirming Senator Brewster's conviction in *United States v. Brewster*,<sup>472</sup> the Supreme Court stressed the clause's limitations. The clause does not protect all conduct relating to the legislative process; it protects only those acts that are clearly a part of the legislative process.<sup>473</sup>

*United States v. Helstoski*<sup>474</sup> involved a former Congressman who had been charged with taking bribes to help enact certain legislation. The Supreme Court held inadmissible not only evidence dealing with the proposed legislation's actual introduction, but also "evidence of discussions and correspondence which describe legislative acts."<sup>475</sup> However, the Court held that the clause's protection extends only to an act that has already been performed.<sup>476</sup> A promise to deliver a speech, to vote, or to solicit other votes at a future date is not "speech or debate"; a promise to introduce a bill is not a legislative act.<sup>477</sup> Therefore, under *Helstoski*, future acts and promises to act are outside the clause's protection. However, even after *Helstoski*, the scope of the speech or debate clause in the criminal context, including bribery prosecutions, is unresolved.<sup>478</sup>

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469 U.S. CONST. art I, § 6. See generally Note, *Statutory Proposal for Case-by-Case Congressional Waiver of the Speech or Debate Privilege in Bribery Cases*, 3 CARDOZO L. REV. 465 (1982).

470 383 U.S. 169 (1966).

471 *Id.* at 185. The court in *Johnson* expressly left open the clause's applicability to a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute that Congress passed to regulate its members. *Id.* The Supreme Court also refused to resolve this issue in *United States v. Helstoski*, 442 U.S. 477, 492 (1979). See Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 347-48 (1965).

472 408 U.S. 501 (1972).

473 *Id.* at 515-16. The Court, in examining the clause's history, noted that the clause was intended to protect the legislative branch's independence, not to immunize members of Congress from criminal responsibility. *Id.*

474 442 U.S. 477 (1979). For a good discussion of the speech or debate clause and its application in *Helstoski*, see Note, *Evidentiary Implications of the Speech or Debate Clause*, 89 YALE L.J. 1280 (1979).

475 442 U.S. at 486.

476 *Id.* at 490.

477 *Id.*

478 The *Brewster* Court noted that "taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." 408 U.S. at 526. Of course, taking or giving a bribe is not conduct that the speech or debate clause protects. The clause may thwart the prosecution of this conduct by rendering essential evidence inadmissible. The Court has firmly established that evidence of past legislative acts is inadmissible. However, because

#### IV. Conclusion

The federal bribery statute effectively deters and punishes bribery involving public officials. Since its enactment, the statute has been broadly interpreted to effectuate this purpose. If courts continue this broad interpretation and Congress is receptive to further bribery legislation, the statute's purpose of assuring the public's trust and confidence in government will be fulfilled.

#### E. CONFLICTS OF INTEREST

Conflicts of interest occur when motives other than fulfilling official responsibilities taint a government official's performance. These conflicts can arise when an official advances his own or an affiliate's interest, when an official assists a private party or receives compensation from a non-government source or does both, and when an ex-government official works for a private party against the government after leaving public employment.<sup>479</sup> For years, Congress and the states<sup>480</sup> have struggled to deal with conflicts of interest in all areas<sup>481</sup> of government.<sup>482</sup> Although numerous statutes exist, a select few dominate conflict of interest prosecutions.

Recently, the government has become extremely sensitive to the revolving door between employment in the public and private sectors.<sup>483</sup> When their employees leave for related private employment, government agencies often become vulnerable to the ex-employee's expertise and knowledge. Well-intended attempts to limit abuse, clarify officials' duties,<sup>484</sup> and determine which situations constitute

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bribery often involves a promise to act or to refrain from activity, such conduct is not within the speech or debate clause under the holding in *Helstoski*.

479 For a broad discussion of conflict of interest theory, see R. AXELROD, *CONFLICT OF INTEREST: A THEORY OF DIVERGENT GOALS WITH APPLICATIONS TO POLITICS* (1970); R. PERKINS, *THE NEW FEDERAL CONFLICT OF INTEREST LAW* (1963).

480 See generally Hall, *Official Misconduct Under the Arkansas Criminal Code*, 30 ARK. L. REV. 160, 176 (1976); Shapiro, *The Post-Employment Restrictions of the Ohio Ethics Law: Prior Practice and Recent Amendments*, 7 OHIO N.U.L. REV. 913 (1980); Comment, *Legislative Conflicts of Interest—An Analysis of the Pennsylvania Legislative Code of Ethics*, 19 VILL. L. REV. 82 (1973).

481 See generally R. GETZ, *CONGRESSIONAL ETHICS; THE CONFLICT OF INTEREST ISSUE* (1966); R. VAUGHN, *CONFLICT-OF-INTEREST IN THE FEDERAL EXECUTIVE BRANCH* (1979).

482 See generally B. MANNING, *FEDERAL CONFLICT OF INTEREST LAW* (1964); R. PERKINS, *supra* note 479.

483 See *Kessinich v. Commodity Futures Trading Comm'n*, 684 F.2d 88, 98 (D.C. Cir. 1982).

484 See, e.g., Note, *The Fiduciary Duty of Former Government Employees*, 90 YALE L.J. 189 (1980).



conflicts<sup>485</sup> partially offset the benefits<sup>486</sup> (and, some claim, necessity)<sup>487</sup> of the revolving door. By offering invaluable experience, the government attracts both enthusiastic young professionals and high-level experts from the private sector. The government thereby provides quality work product, and the public as well as the employee profits from the revolving door. To facilitate this use of experts and consultants, Congress has distinguished "special Government employees," who may be excused from or subject to only limited restrictions under the federal conflict-of-interest laws.<sup>488</sup>

Congress has directed its revolving door legislation at executive branch and independent agency employees.<sup>489</sup> This conflict of interest provision disqualifies ex-officials, including ex-special employees, from representing anyone but the United States in matters on which the ex-officials had worked personally and substantially while with the government.<sup>490</sup> Furthermore, Congress prohibits an ex-official, for two years after leaving government employment, from communicating or appearing before an agency or department concerning any matter that had been pending under his official responsibility.<sup>491</sup> Whenever a department has "a direct and substantial interest" in a matter, Congress restricts an ex-employee's communications to the department on that matter. In such instances, however, the special government employee receives special consideration.<sup>492</sup> Violations of the revolving door legislation are punishable by imprisonment, a fine, or both.<sup>493</sup> Because of their nature, these statutory violations often involve violations of the American Bar Association's Code of

485 See *Department of Energy v. Brimmer*, 673 F.2d 1287, 1292-94 (Temp. Emer. Ct. App. 1982).

486 See Guiletti, *Disqualifying Former Government Lawyers*, 7 LITIGATION, Winter 1981; T. Morgan, *Appropriate Limits on Participation By a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1.

487 See Mundheim, *Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON L. REV. 707 (1981).

488 18 U.S.C. § 202 (1976) (defines "special Government employee"). Individual conflict of interest statutes limit their own application to "special Government employees."

489 See 18 U.S.C. § 207 (Supp. V 1981).

490 See 18 U.S.C. § 207(a) (Supp. V 1981).

491 See 18 U.S.C. § 207(b) (Supp. V 1981). A refusal does not remove a matter from within an official's responsibility. *United States v. Dorfman*, 542 F. Supp. 402, 407-09 (N.D. Ill. 1982).

492 See 18 U.S.C. § 207(c) (Supp. V 1981). On the other hand, § 207 broadly includes an ex-official's partners within its scope. *Id.* § 207(g). See also Note, *Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualifications*, 1977 DUKE L.J. 512.

493 Violations of § 207 may result in imprisonment for not longer than two years, a fine of not more than \$10,000, or both. An agency head may also extend a suspension period for up to five years. 18 U.S.C. § 207(j) (Supp. V 1981).

### Professional Responsibility.<sup>494</sup>

Conflict of interest violations often occur with bribery offenses as well.<sup>495</sup> These conflicts occur when an official has abused his presently held position. Congress has attacked such conflicts in all three branches of government<sup>496</sup> through two statutes which proscribe similar conduct.<sup>497</sup> A third, related statute applies only to executive branch and independent agency employees.<sup>498</sup>

Under these statutes, federal officials may not receive compensation from non-government sources in exchange for services<sup>499</sup> the officials performed while acting in their official capacities.<sup>500</sup> Without regard to compensation, Congress has also largely prohibited federal employees from simply assisting or advising private parties in matters in which the United States has a direct and substantial interest.<sup>501</sup> Additionally, executive branch and independent agency employees may not receive non-government, supplemental income for services performed for the United States (not the income source).<sup>502</sup> While special government employees are subject to the full scope of the compensation-services exchange restrictions, they are excluded from the supplemental income provisions<sup>503</sup> and only partly subject to the private assistance restrictions.<sup>504</sup> Despite their close relationship to bribery, these conflicts of interest are easily distinguishable on the elements because they require no corruption on the public official's

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494 See *Dorfman*, 542 F. Supp. at 410; MORGAN, *supra* note 486, at 30.

495 See, e.g., *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3567 (U.S. Jan. 17, 1983) (No. 82-1255).

496 See, e.g., 18 U.S.C. § 203 (1976); 18 U.S.C. § 205 (1976) (both statutes apply to officials and employees of the legislative, executive, and judicial branches). Section 203 includes officials-elect within its coverage.

497 *Myers*, 692 F.2d at 857 (struggles to distinguish § 203 and § 205—§ 205 requires formal involvement of the government official while § 203 covers even informal involvement).

498 See 18 U.S.C. § 209 (Supp. V 1981).

499 The term "services" is liberally construed to include mere advice. *Myers*, 692 F.2d at 856-58.

500 See 18 U.S.C. § 203(a) (1976). Section 203 requires only that the official receive compensation in connection with the performance of an actual or contemplated official duty. *United States v. Alexandro*, 675 F.2d 34, 43 (2d Cir.), *cert. denied*, 103 S. Ct. 78 (1982). Neither an act nor specific intent is required, and the official's and compensator's intents may differ. *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978).

501 See 18 U.S.C. § 205 (1976). Section 205 does not require that the employee advise the private party on a matter that is related to the employee's official duties. *United States v. Bailey*, 498 F.2d 677, 679-80 (D.C. Cir. 1974).

502 See 18 U.S.C. § 209 (Supp. V 1981).

503 See 18 U.S.C. § 209(c) (1976).

504 See 18 U.S.C. § 205 (1976).

behalf.<sup>505</sup>

Both the compensation-services restrictions and the supplementary income provision provide for prosecution of the public official and, unlike the assistance restrictions, the non-government associate (the party paying the compensation) as well.<sup>506</sup> Convictions for receiving compensation in exchange for services or for unlawfully assisting a private party may result in punishments identical to the revolving door punishments. However, supplemental income violations carry only half the potential penalty of the conflict-of-interest violations.<sup>507</sup> Furthermore, an official convicted of receiving compensation for services will be barred from holding any position of honor, trust, or profit under the United States.<sup>508</sup>

In an effort to stifle conflicts of interest at an early stage of development, Congress has banned executive branch and independent agency employees from participating in official government business when the employees have an opportunity to advance their personal interests thereby.<sup>509</sup> The statute likewise restricts special government employees.<sup>510</sup> Personal interests include an official's spouse's, children's, and partner's interests.<sup>511</sup> The personal interest disqualification becomes especially important in government contracting when the official has an interest in the other party to the contract. Any such interest disqualifies the official from participating in the contract.<sup>512</sup>

The punishment for violating the personal interest disqualification is identical to the punishment for revolving door violations.<sup>513</sup> However, unique to the personal interest restriction, an official may avoid disqualification if he fully discloses his interest to his superior

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505 *United States v. Raborn*, 575 F.2d 688, 692 (9th Cir. 1978); *Evans*, 572 F.2d at 480 (both cases distinguish the elements of bribery and conflicts of interest).

506 *See* 18 U.S.C. § 203(b) (1976). *United States v. Carpentier*, 689 F.2d 21 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3509 (U.S. Jan. 11, 1983).

507 Section 203 and § 205 convictions may result in imprisonment for no more than two years, a fine of not more than \$10,000, or both. 18 U.S.C. § 203 (1976); 18 U.S.C. § 205 (1976). *See* note 493 *supra* and accompanying text. Violations of § 209 may result in imprisonment for not more than one year, a fine of not more than \$5,000, or both. 18 U.S.C. § 209(1) (1976).

508 *See* 18 U.S.C. § 203 (1976).

509 *See* 18 U.S.C. § 208 (Supp. V 1981).

510 *Id.*

511 *See* 18 U.S.C. § 208(a) (Supp. V 1971).

512 *See United States v. Irons*, 640 F.2d 872, 878 (7th Cir. 1981).

513 Section 208 violations are punishable by no more than two years in prison, a fine of no more than \$10,000, or both. 18 U.S.C. § 208(a) (Supp. V 1981). *See* note 493 *supra* and accompanying text.

and the superior determines that the interest will not affect the integrity of the official's work.<sup>514</sup>

Conflicts of interest will affect the integrity of officials' work in a number of combinations in any number of circumstances. Yet, the primary step in combating conflicts of interest, defining exactly what constitutes a conflict, may be the most difficult step. Because of continued disagreement over the definition of a conflict of interest, the applicability and compatibility of the federal restrictions will shift as they are adjusted in the future.

## F. RICO

Although generally categorized as an "organized crime" statute,<sup>515</sup> RICO can also be used to combat corruption in government.<sup>516</sup> Essentially, RICO can be applied to government cases by defining an agency or government office as an "enterprise."<sup>517</sup> To

514 See 18 U.S.C. § 208(b) (Supp. V 1981).

515 See *United States v. Turkette*, 452 U.S. 576, 584 (1981). RICO is an acronym for Racketeer Influenced and Corrupt Organizations. RICO is found at 18 U.S.C. §§ 1961-1968 (1976). For a general discussion of RICO, see Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980). For a discussion of RICO's application to white collar crime in general, including government corruption, see *White-Collar Crime: A Survey of Law*, 18 AM. CRIM. L. REV. 169, 308-20 (1980) and *White-Collar Crime: Second Annual Survey of Law*, 19 AM. CRIM. L. REV. 173, 351 (1981).

516 See note 517 *infra*. See also Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 268 & n.93 (1982).

517 *United States v. Thompson*, 685 F.2d 993 (6th Cir. 1982) (en banc) (*Thompson II*) (operating Tennessee governor's office to obtain bribery and extortion); *United States v. Angelilli*, 660 F.2d 23 (2d Cir.) (RICO applied to extortion in connection with the running of the New York City Circuit Court), *cert. denied*, 102 S. Ct. 1442 (1981); *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981) (RICO applied to fixing of traffic ticket by a judge), *cert. denied*, 102 S. Ct. 1451 (1982); *United States v. Lee Stoller Enters., Inc.*, 652 F.2d 1313 (7th Cir.) (sheriff found guilty on RICO charges for taking kickbacks from prostitutes and for skimming money from his deputies' association), *cert. denied*, 102 S. Ct. 636 (1981); *United States v. Long*, 651 F.2d 239 (4th Cir.) (state senator held guilty of RICO violations for bribery in connection with his state senate seat), *cert. denied*, 102 S. Ct. 396 (1981); *United States v. Stratton*, 649 F.2d 1066 (5th Cir. 1981) (various officials of the Florida state courts found guilty of selling justice and seizing marijuana under RICO); *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981) (Arkansas county judge found guilty under RICO for taking kickbacks and bribes in office); *United States v. Bright*, 630 F.2d 804 (5th Cir. 1980) (RICO applied to sheriff's office); *United States v. Altomare*, 625 F.2d 5 (4th Cir. 1980) (West Virginia prosecuting attorney held guilty under RICO for gambling violations); *United States v. Karas*, 624 F.2d 500 (4th Cir. 1980) (RICO applied to bribery and misuse of offices by county law enforcement officials), *cert. denied*, 449 U.S. 1078 (1981); *United States v. Baker*, 617 F.2d 1060 (4th Cir. 1980) (sheriff guilty under RICO of taking bribes from prostitutes); *United States v. Bacheler*, 611 F.2d 443 (3d Cir. 1979) (employees of the Philadelphia traffic court found guilty of taking bribes under RICO); *United States v. Grzywacz*, 603 F.2d 682 (7th Cir. 1979) (police officers convicted under RICO of using office to obtain bribes and sexual

discover how RICO may be used in government cases, the statute must be briefly examined. Then, the statute's application to government by including agencies and offices within the statutory term "enterprises" may be examined.

### I. RICO Summarized

RICO has three major divisions. First, RICO defines several key terms and, then, based on these definitions, prohibits various activities relating to corrupt and corrupted organizations. Second, RICO establishes a unique two-tier system and liberal court procedures. Finally, RICO mandates liberal construction of the statute by the courts.

Section 1961(a) defines "racketeering activity" in terms of a wide range of state and federal crimes: predicate offenses.<sup>518</sup> These

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favours), *cert. denied*, 446 U.S. 935 (1980); *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977) (massive corruption in the Pennsylvania Bureau of Cigarette and Beverage Taxes); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977) (protection racket run through city police department), *cert. denied*, 435 U.S. 905 (1978); *United States v. Dozier*, 493 F. Supp. 554 (M.D. La. 1980) (employees of the Louisiana Department of Agriculture convicted under RICO); *United States v. Barber*, 476 F. Supp. 182 (S.D. W.Va. 1979) (motion to deny a RICO charge for defining the West Virginia Alcoholic Beverage Control Commission as an enterprise denied); *United States v. Sisk*, 476 F. Supp. 1061 (M.D. Tenn. 1979) (lower court opinion in *Thompson*); *United States v. Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1979), *aff'd mem.*, 605 F.2d 1199 (1979) (traffic court judge receiving kickbacks from employees and bribes from defendants), *cert. denied*, 444 U.S. 1072 (1980); *United States v. Salvitti*, 451 F. Supp. 195 (E.D. Pa.), *aff'd mem.*, 588 F.2d 824 (3d Cir. 1978) (member of the Philadelphia Redevelopment Authority convicted of taking bribes to fix city contracts through RICO). *See also Maryland v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245 (D. Md. 1980) (civil suit against various government officials and private parties for rigging bids for city demolition contracts). *Contra United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), *rev'd other grounds*, 591 F.2d 1347 (4th Cir.), *rev'd en banc*, 602 F.2d 653 (4th Cir. 1979) (governor of Maryland charged with corruption in office).

<sup>518</sup> 18 U.S.C. § 1961(1) states:

'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 472 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to interstate transportation of wagering paraphernalia), section 1954

range from traditional, state-defined felonies (murder, arson, and robbery among others) to federal statutes relating to embezzlement from pension and welfare funds.<sup>519</sup> Section 1961(5) goes on to state that a “‘pattern of racketeering activity’ requires at least two [racketeering acts listed in § 1961(1)], one of which occurred after [1970] and the last of which occurred within ten years . . . after the commission of a prior act . . . .”<sup>520</sup> A person engages in a pattern of racketeering activity by committing two of the predicate offenses listed in section 1961(c) within a period of ten years.

Section 1962 proscribes a range of corrupt practices. It is unlawful for any person to:<sup>521</sup>

- a) use or invest income derived from a pattern of racketeering activity in any enterprise engaged in interstate commerce;<sup>522</sup>
- b) acquire or maintain an interest in or control over an enterprise through a pattern of racketeering activity;<sup>523</sup>
- c) conduct the affairs of an enterprise through a pattern of racketeering activity;<sup>524</sup> or
- d) conspire to any of the above.<sup>525</sup>

The statute thus envisages four forms for the relationship between a person and the enterprise: the enterprise may be the person’s victim, prize, instrument, or agent.<sup>526</sup>

Violation exposes the perpetrator to both criminal and civil penalties. In a criminal action, the court may fine a defendant up to

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(relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States . . . .

519 18 U.S.C. § 664 (1976). These statutes include the Hobbs Act, *see* part C *supra*, the Travel Act, *see* part A *supra*, and bribery, *see* part D *supra*.

520 18 U.S.C. § 1961(5) (1976).

521 “Person” is also a defined term. “[P]erson” includes any individual or entity capable of holding a legal or beneficial interest in property . . . .” 18 U.S.C. § 1961(3) (1976).

522 18 U.S.C. § 1962(a) (1976). “Enterprise” is defined by § 1961(4) as “any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity . . . .”

523 *Id.* § 1962(b).

524 *Id.* § 1962(c).

525 *Id.* § 1962(d).

526 *See* Note, *RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 NOTRE DAME L. REV. 382 (1982).

\$25,000 and/or impose a prison sentence of up to twenty years.<sup>527</sup> Furthermore, conviction mandates forfeiture to the United States of any interest acquired or maintained through a pattern of racketeering activity.<sup>528</sup> In addition, the court may use such restraining orders "as it shall deem proper."<sup>529</sup>

In civil cases brought under RICO, both the Attorney General and private plaintiffs may obtain injunctions ordering the defendant(s) to: divest themselves of any interest in any enterprise, restrict future activity, dissolve or reorganize any enterprise, and/or conform to any other orders of the court.<sup>530</sup> Private parties may recover treble damages, costs, and reasonable attorney's fees.<sup>531</sup> Private plaintiffs may also make use of RICO's collateral estoppel clause: final judgments or decrees in criminal cases estop the convicted from contesting issues settled in the criminal case.<sup>532</sup>

Ancillary procedural sections provide liberal venue<sup>533</sup> and process<sup>534</sup> rules. Civil actions may sometimes be expedited, if "of general public importance,"<sup>535</sup> and proceedings may be closed.<sup>536</sup> Section 1968 establishes rules and procedures of "Civil Investigative Demand."<sup>537</sup>

Lastly, Congress provided that courts should liberally construe RICO in order to effectuate its remedial purposes.<sup>538</sup>

## II. Government as "Enterprise"

Defendants object to RICO's application to corruption cases by claiming that the section 1961(e) definition of "enterprise" does not include a government agency. These defendants cite the definition itself, legislative history, congressional policy, and various rules of

527 18 U.S.C. § 1963(a) (1976).

528 *Id.* § 1963(c). If this interest is not exercisable or transferable for value by the United States, it shall expire and shall not revert to the convicted person. *Id.*

529 *Id.* § 1963(b).

530 *Id.* § 1964(a).

531 *Id.* § 1964(c).

532 *Id.* § 1964(d).

533 *Id.* § 1965(a) (in "any district in which [the defendant] resides, is found, has an agent, or transacts his affairs").

534 *Id.* § 1965(b)-(d) (nationwide in some cases).

535 *Id.* § 1966.

536 *Id.* § 1967.

537 *Id.* § 1968 (this provision has never been used because of Department of Justice guidelines).

538 Organized Crime Control Act of 1970, § 904(a), Pub. L. No. 91-452, 84 Stat. 947 (1970).

construction. A flood of cases has rejected these arguments.<sup>539</sup>

The starting point in every case involving the construction of a statute is the language itself;<sup>540</sup> therefore, the first line of analysis here is RICO. Section 1961(4)<sup>541</sup> does not, *prima facie*, exclude government agencies; in fact, the definition includes government agencies in two ways.<sup>542</sup> First, a government agency could qualify as a "legal entity" described in the first clause. A government agency is an entity<sup>543</sup> and it is, by definition, legal. Second, the agency or those corrupted within it could be classed as a "group of individuals associated in fact" under the second clause (both clauses result in the same remedial options).

Nothing within the definition itself would prevent either construction. Nor does either reading create internal contradictions within RICO.<sup>544</sup> The liability and procedural provisions function perfectly well in government agency cases. While certain remedies may not be applicable in government agency cases,<sup>545</sup> courts may merely read those sections to be inapplicable under those conditions. In short, allowing government agencies to be "enterprises" in RICO cases does not strain the statute.

In addition, restricting RICO to non-government cases would misread the legislative history and the congressional policy expressed therein and in the Organized Crime Control Act of 1970 (OCCA).<sup>546</sup>

Although the legislative history only scantily covers this question, several illuminating items indicate general congressional policy. Senator McClellan, the chief sponsor of OCCA and the chairman of the committee that drafted it, declared that:

To exist and to increase its profits . . . organized crime has found it necessary to corrupt the institutions of our democratic processes, something no society can tolerate . . . For with the necessary expansion of governmental regulation of private and business activity, its power to corrupt has given organized crime a greater control

<sup>539</sup> See note 516 *supra*.

<sup>540</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

<sup>541</sup> See note 522 *supra*.

<sup>542</sup> For somewhat different analysis, see Blakey, *supra* note 516, at 268 n.93 & 299 n.158.

<sup>543</sup> "Entity" is defined broadly in *United States v. Angelilli*, 660 F.2d 23, 30-31 (2d Cir.), *cert. denied*, 102 S. Ct. 1442 (1981).

<sup>544</sup> The Supreme Court has stated that, in construing statutes, "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *United States v. Turkette*, 452 U.S. 576, 580 (1981).

<sup>545</sup> See, e.g., *United States v. Angelilli*, 660 F.2d 23, 43 (1981) (Friendly, J., concurring).

<sup>546</sup> RICO is Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 81 Stat. 922 (1970) (partially codified in 18 U.S.C.). See Blakey, *supra* note 516, at 268 n.93.



over matters affecting the everyday life of each citizen.<sup>547</sup>

Others echoed this same concern. Senator Murphy noted that "organized crime flourishes only where it has corrupted local officials."<sup>548</sup> Representative St. Germain even told the House that "[t]he greatest danger from organized crime lies not in its provision of illegal goods and services, but in its penetration of the country's legitimate institutions . . . . One of the most ominous statistics turned up by the President's Crime Commission in their surveys was the estimated \$2 billion paid out each year by organized crime to public officials in and out of the criminal justice system to buy immunity from the law."<sup>549</sup>

This concern for the viability of all levels of government in the face of a sustained and well-financed attack by organized crime also appeared in the OCCA. In the OCCA's "Statement of Finding and Purpose," Congress made several fact findings, including a recognition that organized crime "subvert[s] and corrupt[s] our democratic processes."<sup>550</sup>

Preventing application of RICO to government agencies would subvert these findings and policies by limiting RICO's coverage to only one part of the problem it was designed to remedy. While Congress did not expressly include government agencies in section 1961(4), the statute's general language and policy indicate that government agencies may be considered "enterprises."

The federal courts have accepted the more liberal view towards section 1961(4).<sup>551</sup> Most recently, the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, upheld the application of RICO to government cases in *United States v. Thompson*.<sup>552</sup> The government had charged the governor of Tennessee (and others) with conspiring to conduct the affairs of the office of the governor of Tennessee through a pattern of racketeering activity.<sup>553</sup> All defendants pled guilty but appealed the legality of the indictments, challenging the classification of the governor's office as a RICO "enterprise."<sup>554</sup> A Sixth Circuit panel reversed on the grounds that the broad reme-

547 115 CONG. REC. 5874 (1969).

548 116 CONG. REC. 962 (1970).

549 116 CONG. REC. 35,199-200 (1970).

550 84 Stat. 922-23 (1970).

551 See note 517 *supra*.

552 *United States v. Thompson*, 685 F.2d 993 (6th Cir.) (*en banc*) (*Thompson II*), *rev'g* 669 F.2d 1143 (6th Cir. 1982) (*Thompson I*).

553 685 F.2d at 994.

554 *Id.* at 995.

dial provisions of RICO indicated the statute should not apply to government agencies.<sup>555</sup> The panel's decision was the first court of appeals decision to refuse to hold that governmental units could be "enterprises."<sup>556</sup>

The full Sixth Circuit rejected the panel's reasoning and upheld the indictments.<sup>557</sup> The court based its decision on the broad statutory language of section 1961(4), the near unanimity of the judicial precedent, and the legislative history.<sup>558</sup> The court decisively held that a government agency *could* be an enterprise under RICO.<sup>559</sup>

The court did, however, question the prosecutorial decision to define the governor's office as the "enterprise." The court felt this form of indictment threatened the comity of federal-state relations.<sup>560</sup> This was particularly important to the court because of the availability of substitute language the court thought would avoid this problem.<sup>561</sup> According to the Sixth Circuit, the government could just as easily have defined the defendants themselves as the enterprise (an association in fact).<sup>562</sup> The court did not consider the limit on the scope of the remedies available to the government and any private plaintiffs.<sup>563</sup>

The Supreme Court has never ruled on the application of section 1961(4) to government agencies. In *United States v. Turkette*,<sup>564</sup> however, the Court considered a related question—whether an enterprise could be an illegitimate or illegal organization as well as a legal entity.

The Court decided that "enterprise" could include illegitimate organizations. According to the court, the statutory language plainly included both sorts of organizations.<sup>565</sup> Structurally, the expansive reading of the definition did not result in any internal incongruities or ambiguities in the statute.<sup>566</sup> (If it had, presumably the Court would have ruled the other way.) Moreover, the Court felt that incongruities would be created by a restrictive reasoning because of

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555 *Thompson I*, 669 F.2d at 1150.

556 *See note 517 supra*.

557 *Thompson II*, 685 F.2d at 994.

558 *Id.*

559 *Id.*

560 *Id.* at 994-95.

561 *Id.* at 995.

562 *Id.* at 1000.

563 *Id.* at 1001.

564 452 U.S. 576 (1981).

565 *Id.* at 581-82.

566 *Id.* at 582-83.

the logic of the statute and the legislative history.<sup>567</sup>

The Court also dismissed application of rules of construction to section 1964(4).<sup>568</sup> Such rules, it noted, are used only as a sort of legal last resort when the statute is ambiguous and section 1961(4) contains no such ambiguity.<sup>569</sup> Use of the rules might conflict with the liberal construction clause as well.

### III. Conclusion

Indictments and complaints including RICO counts may properly allege government agencies or offices as "enterprises" as required by the liability provisions of section 1962.<sup>570</sup> Section 1961(4) permits, on its face, such a construction. This construction creates no structural difficulties throughout the rest of the statute. Also, RICO's legislative history does not rule out government agencies serving as section 1961(4) "enterprises." In fact, permitting government agencies to be called "enterprises" fulfills the overall policy behind RICO. Courts overwhelmingly agree that RICO can properly be applied to government offices and agencies.

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*Kenneth F. Plifka*  
*A. Joseph Relation*  
*Stephen T. Toohill*

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<sup>567</sup> *Id.* at 588-93.

<sup>568</sup> *Id.* at 582.

<sup>569</sup> *Id.*

<sup>570</sup> Constitutional and prudential considerations may limit RICO's applicability to state government. Among these possible limitations could be the tenth amendment (preventing Congress from interfering with the states' regulation of their own integral state functions. *National League of Cities v. Usery*, 426 U.S. 833 (1976)); the eleventh amendment (preventing suits against states in federal courts, but limited by waiver and the *Ex parte Young* (209 U.S. 123 (1908)) line of cases, which limits eleventh amendment immunity to state officials acting only in their official capacities); separation of powers; comity; and federalism. To date, these limitations have not been of great importance in the reported cases, although the court in *Thompson II* did express some concern over disruption of federal-state comity. 685 F.2d at 994-95. The court considered and dismissed tenth amendment problems. *Id.* at 1001.