

Hobbs Act & Mail Fraud

940. 18 U.S.C. Section 1341(2)—Elements of Mail Fraud [the mailing of the letter]

"There are two elements in mail fraud: (1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts)." *Schmuck v. United States*, 489 U.S. 705, 721 n. 10 (1989); *see also Pereira v. United States*, 347 U.S. 1, 8 (1954) ("The elements of the offense of mail fraud under . . . § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme."); Laura A. Eilers & Harvey B. Silikovitz, *Mail and Wire Fraud*, 31 Am. Crim. L. Rev. 703, 704 (1994) (cases cited).

18 USC Ch. 63: MAIL FRAUD AND OTHER FRAUD OFFENSES

§1341. Frauds and swindles

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 deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

(June 25, 1948, ch. 645, 62 Stat. 763; May 24, 1949, ch. 139, §34, 63 Stat. 94; Pub. L. 91-375, §(6)(j)(11), Aug. 12, 1970, 84 Stat. 778; Pub. L. 101-73, title IX, §961(i), Aug. 9, 1989, 103 Stat. 500; Pub. L. 101-647, title XXV, §2504(h), Nov. 29, 1990, 104 Stat. 4861; Pub. L. 103-322, title XXV, §250006, title XXXIII, §330016(1)(H), Sept. 13, 1994, 108 Stat. 2087, 2147; Pub. L. 107-204, title IX, §903(a), July 30, 2002, 116 Stat. 805; Pub. L. 110-179, §4, Jan. 7, 2008, 121 Stat. 2557.)

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., §338 (Mar. 4, 1909, ch. 321, §215, 35 Stat. 1130).

The obsolete argot of the underworld was deleted as suggested by Hon. Emerich B. Freed, United States district judge, in a paper read before the 1944 Judicial Conference for the sixth circuit in which he said:

A brief reference to §1341, which proposes to reenact the present section covering the use of the mails to defraud. This section is almost a page in length, is involved, and contains a great deal of superfluous

language, including such terms as "sawdust swindle, green articles, green coin, green goods and green cigars." This section could be greatly simplified, and now-meaningless language eliminated.

The other surplusage was likewise eliminated and the section simplified without change of meaning.

A reference to causing to be placed any letter, etc. in any post office, or station thereof, etc. was omitted as unnecessary because of definition of "principal" in section 2 of this title.

1949 Act

This section [section 34] corrects a typographical error in section 1341 of title 18, U.S.C.

Editorial Notes

Amendments

2008—Pub. L. 110–179 inserted "occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or" after "If the violation".

2002—Pub. L. 107–204 substituted "20 years" for "five years".

1994—Pub. L. 103–322, §330016(1)(H), substituted "fined under this title" for "fined not more than \$1,000" after "thing, shall be".

Pub. L. 103–322, §250006, inserted "or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier," after "Postal Service," and "or such carrier" after "causes to be delivered by mail".

1990—Pub. L. 101–647 substituted "30" for "20" before "years".

1989—Pub. L. 101–73 inserted at end "If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 20 years, or both."

1970—Pub. L. 91–375 substituted "Postal Service" for "Post Office Department".

1949—Act May 24, 1949, substituted "of" for "or" after "dispose".

Mail and wire fraud: Both carry a maximum prison sentence of up to 20 years. If the scheme also involved a bank, the potential fine increases to up to \$100,000: [18 U.S.C. Section 1343]

<https://www.justice.gov/archives/jm/criminal-resource-manual-940-18-usc-section-1341-elements-mail-fraud>

901. Scope of the General Statutes Prohibiting Fraud Against the Government

While Congress has enacted numerous specific statutes to deal with particular types of fraud against the government, enforcement efforts rely principally on five rather general statutes: 18 U.S.C. §§ 287 (false claims), 371 (conspiracy), 1001 (false statements), 1341 (mail fraud) and 1343 (wire fraud). The mail fraud and wire fraud statutes (18 U.S.C. §§ 1341, 1343) are discussed in another part of the JM; the other statutes are discussed in this chapter. One fundamental concern common to these statutes is the relationship that the fraudulent act or statement must have with the Federal government in order to warrant Federal prosecution.

PRACTICE TIP: This part of the JM provides only an introduction to the many topics concerning fraud against the government; the reader should be aware of standard research devices that are available, including computerized research, texts, law reviews, looseleaf services, Department seminar materials, other courses materials and various other publications. See generally *The Criminal Law Reporter* (Bureau of National Affairs); O. Obermaier and R. Morvillo, *White Collar Crime: Business and Regulatory Offenses* (1990); E. Devitt, C. Blackmar & K. O'Malley, *Federal Jury Practice and Instructions*, (1990); L. Sand, J. Siffert, W. Loughlin & S. Reiss, *Modern Federal Jury Instruction* (1995); Project, *Tenth Annual Survey of White Collar Crime*, 32 Am. Crim. L. Rev. 137 (1995).

[cited in [JM 9-42.001](#)]

[◀ Criminal Resource Manual 901-999 up 902. 1996 Amendments to 18 U.S.C. § 1001 ▶](#)

Updated January 21, 2020

18 U.S.C. § 1951 Hobbs Act Extortion and Robbery (18 U.S.C. § 1951)

6.18.1951 Hobbs Act - Elements of the Offense (18 U.S.C. § 1951) (revised 2014)

6.18.1951-1 Hobbs Act - Robbery Defined

6.18.1951-2 Hobbs Act - Extortion by Force, Violence, or Fear (revised 2016)

6.18.1951-3 Hobbs Act - "Unlawful Taking by Force, Violence or Fear" Defined

6.18.1951-4 Hobbs Act - "Fear of Injury" Defined

6.18.1951-5 Hobbs Act - Property

6.18.1951-6 Hobbs Act - Extortion Under Color of Official Right (revised 2017)

6.18.1951-7 Hobbs Act - Affecting Interstate Commerce (revised 2017)

6.18.1951 Hobbs Act - Elements of the Offense (18 U.S.C. § 1951)

In order to sustain its burden of proof for the crime of interfering with interstate commerce by (robbery)(extortion) as charged in Count (No.) of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

First: That Defendants AG/US/WA took from (the victim alleged in the indictment) the property described in Count (No.) of the indictment.

Second: That (name) did so knowingly and willfully by (robbery) (extortion); and

Third: That as a result of (name)'s actions, interstate commerce (an item moving in interstate commerce) was obstructed, delayed, or affected.

Comment

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions § 53.03 [hereinafter O'Malley et al., supra].

18 U.S.C. § 1951(a) provides:

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 under this title or imprisoned not more than twenty years, or both.

If the defendant is charged with an attempt the court should adapt this instruction and should also give Instruction 7.01 (Attempt).

Likewise, if the defendant is charged with conspiracy to violate this statute, the appropriate instructions on conspiracy should be given. See Instruction 6.18.371A et seq. It should be noted that a Hobbs Act conspiracy does not require proof of an overt act. See *United States v. Salahuddin*, 765 F.3d 329 (3d Cir. 2014). Further, if the defendant is charged with conspiracy to obtain something of value under the color of official right, the government is not required to establish that the defendant obtained something of value. See *United States v. Salahuddin*, 765 F.3d 329 (3d Cir. 2014). The Third Circuit also held that “the specific benefits that the members of the conspiracy sought to obtain is not a required element of Hobbs Act conspiracy;” accordingly, the trial court does not have to instruct the jury specifically as to unanimity as to the benefit sought. *Salahuddin*, 765 F.3d 329.

The Third Circuit has held:

[A] conviction under the Hobbs Act requires proof beyond a reasonable doubt that (1) the defendant knowingly or willfully committed, or attempted or conspired to commit, robbery or extortion, and (2) the defendant's conduct affected interstate commerce.

See *United States v. Powell*, 693 F.3d 398 (3d Cir. 2012).

In *United States v. Traitz*, 871 F.2d 368, 380-81 (3d Cir. 1989), the trial court gave the following instruction:

In order to meet its burden of proving that the defendants committed extortion under the Hobbs Act, the Government must prove each of the following elements:

First, the defendants induced or attempted to induce others to part with their property.

Second, the defendants did so with the victims' consent, but this consent was compelled by the wrongful use or threat of force, violence, or fear.

Third, that interstate commerce or an item moving in interstate commerce was delayed, obstructed, or affected in any way or degree; and

Fourth, the defendants acted knowingly and willfully.

The Third Circuit quoted the instructions but remarked only that the defendants did not challenge the trial court's “general recitation of the essential elements of the Hobbs Act.” *Traitz*, 871 F.2d at 381. See also *United States v. Driggs*, 823 F.2d 52 (3d Cir. 1987). In *Driggs*, the court noted:

The essential elements that the government must prove are that the defendant obstructed, delayed, or affected commerce or attempted to do so; by extortion (“the obtaining of property from another, with his consent, . . . under color of official right”); and that the defendant acted knowingly and willfully.

823 F.2d at 54. (Revised 2014)

6.18.1951-1 Hobbs Act - Robbery Defined Robbery is the unlawful taking or obtaining of personal property from the person or in the presence of another, against (his)(her) will, by means of actual or threatened force, or violence, or fear of injury, whether immediately or in the future, to (his)(her) person or property, or property in (his)(her) custody or possession, or the person or property of a relative or member of (his)(her) family or anyone in (his)(her) company at the time of the taking or obtaining.

Comment

O’Malley et al., supra, § 53-05.

18 U.S.C. § 1951(b)(1) provides:

As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, using actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

6.18.1951-2 Hobbs Act - Extortion by Force, Violence, or Fear

Extortion is the obtaining of another person’s property or money, with (his)(her) consent when this consent is induced or brought about through the use of actual or threatened force, violence or fear.

[In order for (name) to have obtained the property of another there must have been a transfer of possession of, or a legal interest in, that property from that other person to (name) or a designee of (name).]

Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 50-9 (Matthew Bender 2003) [hereinafter, Sand et al., supra]; O’Malley et al., supra, § 53.09.

18 U.S.C. § 1951(b)(2) provides:

As used in this section- * * *

(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.

Extortion may be committed either through force, violence, fear or under the color of official rights. *United States v. Manzo*, 636 F.3d 56 (3d Cir. 2011). The court should use this instruction when the defendant is charged with extortion through force, violence, or fear. The court should also give Instructions 6.18.1951-3 (Hobbs Act - “Unlawful Taking by Force, Violence or Fear” Defined), 6.18.1951-4 (Hobbs Act - “Fear of Injury” Defined), and 6.18.1951-5 (Hobbs Act - Property Defined). If the defendant is charged with extortion under color of official right, the court should give Instruction 6.18.1951-6 (Hobbs Act - Extortion Under Color of Official Right).

The bracketed language should be included if there is a question concerning whether the defendant acquired property rather than simply depriving the victim of property. Mere deprivation of property or interference with the use of the property is not sufficient under the statute. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court addressed the definition of “extortion” under § 1951. The Court stated, “we have construed the extortion provision of the Hobbs Act at issue in these cases to require not only the deprivation of but also the acquisition of property.” *Id.* at 404.

(Revised 2016)

6.18.1951-3 Hobbs Act - “Unlawful Taking by Force, Violence or Fear” Defined The government must prove beyond a reasonable doubt that (name) unlawfully took (the alleged victim)’s property against (his)(her) will by actual or threatened force, violence, or fear of injury, whether immediately or in the future. You must determine whether (name) obtained the property by using any of these unlawful means, as outlined in the indictment. The government does not need to prove that force, violence, , and fear were all used or threatened. The government satisfies its burden of proving an unlawful taking if you unanimously agree that (name) employed any of these methods; that is, the government satisfies its burden only if you all agree concerning the particular method used by (name).

In considering whether (name) used, or threatened to use force, violence, or fear, you should give those words their common and ordinary meaning and understand them as you normally would. A threat may be made verbally or by a physical gesture. Whether a statement or physical gesture by (name) actually, was a threat depends upon the surrounding facts.

Comment

Sand et al., *supra*, 50-5.

If the defendant is charged with an attempt the court should modify this instruction accordingly. See *United States v. Parkin*, 319 F. App’x. 101 (3d Cir. 2009) (non-precedential) (holding that where the

defendant was charged with attempted extortion, the government did not need to establish that the defendant caused fear).

(Revised 12/09)

6.18.1951-4 Hobbs Act - "Fear of Injury" Defined

Fear exists if a victim experiences anxiety, concern, or worry over expected personal (physical)(economic) harm. The fear must be reasonable under the circumstances existing at the time of the defendant's actions.

Your decision whether (name) used or threatened fear of injury involves a decision about (the alleged victim)'s state of mind at the time of (name)'s actions. It is impossible to prove directly a person's subjective feelings. You cannot look into a person's mind to see what (his)(her) state of mind is or was. But a careful consideration of the circumstances and evidence should enable you too decide whether (the alleged victim) was in fear and whether this fear was reasonable.

Looking at the overall situation and the actions of the person in question may help you determine what (his)(her) state of mind was. You can consider this kind of evidence - which is called "Circumstantial evidence" - in deciding whether (name) obtained property through the use of threat or fear.

You have also heard the testimony of (the alleged victim) describing (his)(her) state of mind – that is, how (he)(she) felt about giving up the property. This testimony was allowed to help you decide whether the property was obtained by fear. You should consider this testimony for that purpose only.

You may also consider the relationship between (name) and (the alleged victim) in deciding whether the element of fear exists. However, even a friendly relationship between the parties does not preclude you from finding that fear exists.

Comment

Sand et al., *supra*, 50-6. See also *United States v. Provenzano*, 334 F.2d 678, 687 (3d Cir. 1964) (*citing United States v. Tolub*, 309 F.2d 286 (2d Cir. 1962) (fear experienced by the victim must be reasonable)); *United States v. Addonizio*, 451 F.2d 49, 72 (3d Cir. 1972) (fear may be of economic or physical harm).

6.18.1951-5 Hobbs Act - Property Defined

The term "property" includes the money and other tangible and intangible things of value.

Comment

Sand et al., supra, 50-4.

In many cases, there will be no need to instruct the jury on the meaning of the term “property.” When an intangible property is involved, the court should include this instruction. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 402 (2003), the Supreme Court recognized that the term property includes intangible as well as tangible things of value. However, the property must be transferrable. *Sekhar v. the United States*, 133 S. Ct. 2720, 2725 (2013). In *Sekhar*, the jury convicted the defendant of Hobbs Act extortion because he sought to force the general counsel of the New York State Comptroller to recommend approval of a commitment to purchase shares in a fund managed by the defendant’s firm on behalf of a retirement fund for state employees. *Sekhar*, 133 S. Ct. at 2724. The Court held that the recommendation did not qualify as obtainable property and therefore could not support a conviction under the Hobbs Act. *Sekhar*, 133 S. Ct. at 2726.

(Revised 11/2013)

6.18.1951-6 Hobbs Act - Extortion Under Color of Official Right

The government alleges that (name) committed extortion under color of official right. A public (official)(employee) commits “extortion under color of official right” if (he)(she) uses the power and authority of (his)(her) office in order to obtain money, property, or something of value from another to which neither that public (official)(employee) nor that government office has an official right.

Extortion under color of official right means that a public official induced, obtained, accepted, or agreed to accept a payment to which he or she was not entitled, knowing that the payment was made in return for taking, withholding, or influencing official acts. *[The government may show that the benefit was meant to be given to the public official directly, or to a third party who is not a public official.]*

The government is not required to prove an explicit promise to perform the official acts in return for the payment. Passive acceptance of a benefit by a public official is a sufficient basis for this type of extortion if the official knows that (he)(she) is being offered payment in exchange for (his)(her) ability to do official acts.

The government is not required to prove that (name) made any specific threat or used force or fear to cause (the victim alleged in the indictment) to part with the property that the indictment alleges (name) obtained by extortion under color of right. However, the government must prove beyond a reasonable doubt that (name) knowingly and deliberately used (his)(her) official position in order to obtain something of value, to which (name) had no right.

[The government is not required to prove that (name) possessed the official power to

guarantee, deny, or influence any actions. It is enough to show that (victim alleged in indictment) reasonably believed that (name) had the actual, residual, or anticipated official power to help (him)(her) concerning matters pending before a government agency.]

[In order for (name) to have obtained the property of another there must have been a transfer of possession of, or a legal interest in, that property from that other person to (name) or a designee of (name).]

Comment

Sand et al., supra, 50-9; O'Malley et al., supra, § 53.09. See also *United States v. Munchak*, 2013 WL 2382618 (3d Cir. 2013) (non-precedential) (discussing instructions).

18 U.S.C. § 1951(b)(2) provides:

As used in this section-

* * *

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

Extortion may be committed either through force, violence, fear or under the color of official rights. *United States v. Manzo*, 636 F.3d 56 (3d Cir.2011). This instruction and the one that follows address extortion by the color of official right, which is distinct from extortion through force, violence, or fear, and may only be committed by a public official (although a non-public official may be guilty of aiding and abetting extortion by the color of official right). The Supreme Court has noted that extortion under color of official right is the “rough equivalent of what we would now describe as ‘taking a bribe.’” *Evans v. the United States*, 504 U.S. 255, 260, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992)

A public official may also be charged with conspiracy to obtain something of value under the color of official right. To obtain a conspiracy conviction, the government is not required to establish that the defendant obtained something of value. See *United States v. Salahuddin*, 765 F.3d 329 (3d Cir. 2014). In addition, the Supreme Court has held that a public official may be convicted of conspiracy to obtain something of value under the color of official right based on the official’s agreement with the victim of the Hobbs Act extortion. The government need not prove that the conspirators sought or obtained money from someone outside the conspiracy or that each member of the conspiracy was capable of carrying out the Hobbs Act extortion. *Ocasio v. United States*, 136 S.Ct. 1423 (2016). Instructions on conspiracy are found supra at § 6.18.371A et seq.

In *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir. 1972), the Third Circuit held that the following instruction properly defined extortion under the statute:

The term ‘extortion’ means the obtaining of property from another with his consent induced either by wrongful use of fear or under the color of official right. The term ‘fear,’ as used in the statute, has a

commonly accepted meaning. It is a state of anxious concern, alarm, apprehension of anticipated harm to a business or a threatened loss.

* * *

Extortion under color of official right is the wrongful taking by a public officer of money not due to him or his office, whether or not the taking was accomplished by force, threats, or use of fear. You will note that extortion, as defined by Federal Law, is committed when the property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right, and in either instance, the offense of extortion is committed.

The defendant complained that the instruction defined extortion disjunctively, allowing the jury to find extortion if the defendant obtained money or property either by use of fear or under color of official right. The Third Circuit rejected the defendant's argument and explained:

[W]hile private persons may violate the statute only by use of fear and public officials may violate the act by use of fear, persons holding public office may also violate the statute by a wrongful taking under color of official right. The term "extortion" is defined in § 1951(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." The "under color of official right" language is disjunctive. That part of the definition repeats the common law definition of extortion, a crime that could only be committed by a public official, and which did not require proof of threat, fear, or duress. The disjunctive charge on § 1951 extortion was correct.

Id. at 1229 (citations omitted). See also *United States v. Fountain*, 792 F.3d 310 (3d Cir. 2015). In *United States v. Urban*, 404 F.3d 754, 768 (3d Cir. 2005), the Third Circuit explained that "[i]n order to prove Hobbs Act extortion 'under color of official right,' the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."

In some cases, the court may want to define "official act" for the jury. The definition of the term is the same under § 1951 as under the federal bribery statute, § 201 and is set out in Instruction 6.18.201B1-2. In *McDonnell v. United States*, 136 S.Ct. 2355 (2016), the Supreme Court clarified the meaning of "official act" and held that the trial court committed reversible error when it failed properly to instruct the jury on the meaning of the term, allowing the government to rely on an overly-broad definition. Instruction 6.18.201B1-2 reflects the Court's holding in *McDonnell*, and that decision is discussed in the Comment to Instruction 6.18.201B1-2. In *United States v. Repak*, 852 F.3d 230 (3d Cir. 2017), the Third Circuit held that the requirements of *McDonnell* were met by evidence demonstrating that the defendant, who was the Executive Director of the Johnstown Redevelopment Authority, facilitated the award of Redevelopment Authority contracts. In *Repak*, the court also rejected the defendant's argument that the instructions permitted the jury to convict him for any official act; the court noted that the evidence and government theory in the case focused only on one particular set of official acts. *Repak*, 852 F.3d at 256.

There need not be one benefit for one official act. Instead, a conviction may be based on proof that the official accepted a "stream of benefits" in exchange for one or more official acts. See *United*

States v. Donna, 366 F. App'x. 441 (3d Cir. 2010) (non-precedential) (citing United States v. Kemp, 500 F.3d 257, 282 (3d Cir. 2007)).

The government may show that the benefit was meant to be given to the public official directly, or to a third party who is not a public official. See generally *United States v. Antico*, 275 F.3d 245, 255-56 (3d Cir. 2001); *United States v. Bradley*, 173 F.3d 225, 231-32 (3d Cir. 1999); *United States v. Margiotta*, 688 F.2d 108, 133 (2d Cir. 1982) (“A Hobbs Act prosecution may lie where the extorted payments are transferred to third parties, including political allies and political parties, rather than to the public official who has acted under color of official right.”).¹

The offense of extortion under color of official right does not have to involve force or threat on the part of the public official. The coercive element is provided by the existence of the public office itself. *Evans v. the United States*, 504 U.S. 255, 265 (1992); *United States v. Fountain*, 792 F.3d 310 (3d Cir. 2015); *Antico*, 275 F.3d at 255 n.14; *United States v. Jannotti*, 673 F.2d 578, 594 (3d Cir. 1982).

The government need not prove that the defendant acted exclusively with corrupt intent. See *United States v. Donna*, 366 F. App'x. 441 (3d Cir. 2010) (non-precedential) (remarking that trial court’s “dual motive” instruction stating that a person commits extortion under color of official right when that person has “a partly corrupt intent and a partly neutral intent” constituted a correct statement of the law).

In *McCormick v. the United States*, 500 U.S. 257 (1991), the Court held that, when an elected official is charged with extorting campaign contributions, the government must prove “an explicit promise or undertaking” by the public official. In other cases, an explicit promise to perform the official acts in return for the payment is not required. See *Evans*, 504 U.S. at 268; *United States v. Salahuddin*, 765 F.3d 329 (3d Cir. 2014); *Antico*, 275 F.3d at 255-56; *Bradley*, 173 F.3d at 231. Passive acceptance of a benefit by a public official is a sufficient basis for this type of extortion if the official knows that he or she is being offered payment in exchange for his ability to do official acts. The government need not prove that the public official first suggested or solicited the giving of money or property. *Evans*, 504 U.S. at 259; *United States v. Blandford*, 33 F.3d 685, 698-99 n.15 (6th Cir. 1994). Extortion occurs if the official knows that the payment or benefit is motivated by a hope that it will influence the official in the exercise of his or her office or influence any action that the official takes because of the official position, and if, knowing this, the official accepts or agrees to accept the payment or benefit or have it accepted by another person. *United States v. Holzer*, 816 F.2d 304, 311 (7th Cir. 1987); *United States v. Butler*, 618 F.2d 411, 417-19 (6th Cir. 1980); *United States v. Trotta*, 525 F.2d 1096, 1101 (2d Cir. 1975) (“To repeat, it is the use of the power of public office itself to procure the payments of money not owed to the public official or his office that constitutes the offense.”); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974).

1 As originally published, the instruction included the additional requirement that the third party was acting in concert with the public official. In *United States v. Salahuddin*, 765 F.3d 329 (3d Cir. 2014), although the issue was not before the court, the Third Circuit questioned in footnote 7 of the opinion whether proof of action in concert is required. That language was removed from the instruction.

The government doesn't need to prove that the defendant misused or attempted to misuse the power of his/her office insofar as the defendant granted some benefit or favor to the payors. Though the payors may not have gotten any more than their due in the defendant's performance of his office, the defendant's acceptance of money or a benefit, in return for the use of, or the attempted use of, his/her office is extortion. See *United States v. Fountain*, 792 F.3d 310 (3d Cir. 2015); *Antico*, 275 F.3d at 255-58; *United States v. Evans*, 30 F.3d 1015, 1019 (8th Cir. 1994); *United States v. Loftus*, 992 F.2d 793, 797 (8th Cir. 1993); *Holzer*, 816 F.2d at 308; *United States v. Paschall*, 772 F.2d 68, 71, 74 (4th Cir. 1985) (citing *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939)); *United States v. Bibby*, 752 F.2d 1116, 1128 (6th Cir. 1985) ("[I]t is not essential that an [public] official be able to guarantee a certain result before his acceptance of money to bring about that result will run afoul of the law."); *United States v. Butler*, 618 F.2d 411, 420 (6th Cir. 1980).

The public official's agreement to take or refrain from taking an action on behalf of the payor need not be expressed. *United States v. Repak*, 852 F.3d 230 (3d Cir. 2017); *Antico*, 275 F.3d at 255-57; *United States v. Donna*, 366 F. App'x. 441 (3d Cir. 2010) (non-precedential). In *Repak*, the Third Circuit held that the third paragraph of this instruction accurately defined the required proof and confirmed that the government need not prove an agreement. *Repak*, 852 F.3d at 250-51.

The official need not possess the power to provide, deny, or influence a particular action. *United States v. Mazzei*, 521 F.2d 639, 645 (3d Cir. 1975); *United States v. Nedza*, 880 F.2d 896, 902 (7th Cir. 1989); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974). It is the payor's reasonable belief in such power that is relevant. *United States v. Fountain*, 792 F.3d 310 (3d Cir. 2015); *Mazzei*, 521 F.2d at 643; *United States v. McDonough*, 56 F.3d 381, 388 (2d Cir. 1995); *Nedza*, 880 F.2d at 902; see *United States v. Brown*, 540 F.2d 364, 372 (8th Cir. 1976). The mere agreement to exercise influence will suffice. See *United States v. Bencivengo*, 749 F.3d 205, 212 (3d Cir. 2014).

The bracketed language in the last paragraph should be included if there is a question concerning whether the defendant acquired property rather than simply depriving the victim of property. Mere deprivation of property or interference with the use of the property is not sufficient under the statute. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court addressed the definition of “extortion” under § 1951. The Court stated, “we have construed the extortion provision of the Hobbs Act at issue in these cases to require not only the deprivation of but also the acquisition of property.” *Id.* at 404.

If the public official plays a role in more than one aspect of government, the court may want to specify the particular office that the extortion threatened to corrupt. *See, e.g., United States v. Mister*, 2010 WL 1006693 (3d Cir. 2010) (non-precedential) (rejecting defendant’s variance argument in part because jury instructions clearly stated the corruption at issue in the case).

(Revised 2017)

6.18.1951-7 Hobbs Act - Affecting Interstate Commerce

The third element that the government must prove beyond a reasonable doubt is that (name)’s conduct affected or could have affected interstate commerce. Conduct affects interstate commerce if it in any way interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce between or among the states. The effect can be minimal. It is not necessary to prove that (name) intended to obstruct, delay or interfere with interstate commerce or that the purpose of the alleged crime was to affect interstate commerce. Further, you do not have to decide whether the effect on interstate commerce was to be harmful or beneficial to a particular business or commerce in general. You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the offense potentially caused an effect on interstate commerce to any degree, however minimal or slight.

Comment

Sand et al., *supra*, 50-7 and 50-15.

18 U.S.C. § 1951(b) provides:

As used in this section—

(3) The term “commerce” means commerce within the District of Columbia or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

The government need not prove that the defendant intended to affect interstate commerce but only that it was one natural effect of the defendant's conduct. See *United States v. Powell*, 693 F.3d 398 (3d Cir. 2012) (citing model instructions as reflecting circuit precedent). See also *United States v. Ligon*, 580 F. App'x. 91 (2014) (non-precedential) (stating approval of model instruction); *United States v. Addonizio*, 451 F.2d 49, 77 (3d Cir. 1972); *United States v. Reyes*, 363 F. App'x. 192 (3d Cir. 2010) (non-precedential).

In *United States v. Haywood*, 363 F.3d 200, 209-10 (3d Cir. 2004), the Third Circuit addressed the interstate commerce element:

To sustain a conviction for interference with commerce by robbery under § 1951, the government must prove the element of interference with interstate or foreign commerce by robbery. "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." However, "[i]f the defendants' conduct produces any interference with or effect upon interstate commerce, whether slight, subtle or even potential, it is sufficient to uphold a prosecution under [§ 1951]." Moreover, "[a] jury may infer that interstate commerce was affected to some minimal degree from a showing that the business assets were depleted." (Citations omitted).

In *Taylor v. United States*, 136 S.Ct. 2074 (2016), the Court recognized that Congress intended the Hobbs Act to have a broad reach. The Court held that the government satisfied the interstate commerce requirement by proving that the defendant's robberies targeted marijuana and marijuana proceeds, even though they did not net any drugs or drug proceeds. The Court concluded, further, that it was inconsequential that the targeted dealers dealt only in intrastate marijuana. Because Congress has authority under the Commerce Clause "to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession, and sale of this controlled substance," Congress "may also regulate intrastate drug theft." *Taylor*, 136 S.Ct. at 2077. The Court noted that "[t]he production, possession, and distribution of controlled substances constitute a 'class of activities that in the aggregate substantially affect interstate commerce.'" *Taylor*, 136 S.Ct. at 2080. The Court emphasized the simplicity of the interstate commerce requirement in the case:

To obtain a conviction under the Hobbs Act for the robbery or attempted robbery of a drug dealer, the Government need not show that the drugs that a defendant stole or attempted to steal either traveled or were destined for transport across state lines. Rather, to satisfy the Act's commerce element, it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds, for, as a matter of law, the market for illegal drugs is "commerce over which the United States has jurisdiction." And it makes no difference under our cases that any actual or threatened effect on commerce in a particular case is minimal.

Taylor, 136 S.Ct. at 2081. See also *Ligon*, 580 F. App'x. 91 (2014) (non-precedential) (rejecting the argument that instruction allowing conviction based on *de minimis* or potential effect on interstate commerce was an error); *United States v. Shavers*, 693 F.3d 363 (3d Cir. 2012) (holding that the government is not required to show a substantial effect on interstate commerce, and it is sufficient if the government establishes some interference with or effect upon interstate

commerce, even if it is only slight). In *Haywood*, the court held that the following instruction was proper:

[I]f the government proves beyond a reasonable doubt that this business purchased goods or services that came from outside St. Thomas, Virgin Islands, and that, therefore, all or part of the personal property obtained from this business, because of the alleged robbery, came from outside St. Thomas, Virgin Islands, then you are instructed that you may find that the defendants obtained, delayed, or affected commerce as this term is used in these instructions.

The court held further that the government satisfied its burden on this element by introducing the testimony of a police officer that the victim business sold some beers that were not manufactured in the Virgin Islands but came instead from the mainland *United States*. *Haywood*, 363 F.3d at 210. *See also United States v. Powell*, 693 F.3d 398 (3d Cir. 2012) (stating that conviction requires only de minimis effect on commerce); *United States v. Clausen*, 328 F.3d 708, 710-11 (3d Cir. 2003) (stating that effect on commerce may be minimal); *United States v. McLean*, 702 F. App'x. 81 (3d Cir. 2017) (non-precedential) (holding proof sufficient where evidence established that defendant conspired and attempted to commit robbery of cocaine); *United States v. Berroa*, 2010 WL 827617 (3d Cir. 2010) (non-precedential) (affirming conviction where robbery targeted store with inventory purchased in interstate commerce and store closed for part of the day as a result of robbery); *United States v. McNeill*, 360 F. App'x. 363, 365 (3d Cir. 2010) (non-precedential) (concluding that evidence defendant robbed business that purchases goods in interstate commerce and had customers who traveled in interstate commerce is sufficient).

In *Powell*, the Third Circuit held that evidence that the defendants targeted store owners, "seeking to steal the stores' earnings and assets," provided sufficient evidence of the effect on interstate commerce, even though the defendants robbed the individual store owners rather than the businesses. *Powell*, 693 F.3d at 405-06. In *Shavers*, the Third Circuit declined to adopt "a heightened interstate commerce requirement when the victim of the alleged crime is an individual rather than a business." 693 F.3d at 376.

In *United States v. Urban*, 404 F.3d 754, 762 (3d Cir. 2005), the Third Circuit held that the following instruction properly conveyed how the government could establish the effect on commerce through depletion of assets theory:

You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the extortion--of the money payment, potentially caused an effect on interstate commerce to any degree, however minimal or slight. Payment from a business engaged in interstate commerce satisfies the requirement of an effect on interstate commerce. If the resources of a business are expended or diminished as a result of the payment of money, then interstate commerce is affected by such payment and may reduce the assets available for the purchase of goods, services, or other things originating in other states.

In *United States v. Powell*, 693 F.3d 398 (3d Cir. 2012), the court held that the evidence was sufficient to establish the effect on commerce through depletion of assets and that the trial court did not commit error when it supplemented the Model Instruction with the following language explaining depletion of assets:

You can, but are not required to, find an effect on interstate commerce if the defendant's actions reduced the assets of a business engaged or purchasing goods or services in interstate commerce, which assets would otherwise have been available for conducting the purchase of such goods or services in interstate commerce.

The instruction served "to exemplify one way the required nexus can be established."

In *United States v. Reyes*, 363 F. App'x. 192 (3d Cir. 2010) (non-precedential), the court noted that the government need not show an actual effect on interstate commerce and held that the following instruction was correct:

The defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect as a natural consequence of his actions. If you find that the defendant intended to take certain actions, that is, he did the acts charged in the indictment in order to obtain property, and you find those actions have either caused or would probably cause an effect on interstate commerce no matter how minimal, then you may find the requirements of this element satisfied.

See also Ligon, 580 F. App'x. 91 (2014) (non-precedential); *United States v. Powell*, 693 F.3d 398 (3d Cir. 2012) (stating that effect may be potential not actual).

(Revised 2017)

2404. Hobbs Act -- Under Color Of Official Right

In addition to the "wrongful use of actual or threatened force, violence, or fear," the Hobbs Act (18 U.S.C. § 1951) defines extortion in terms of "the obtaining of property from another, with his consent . . . under color of official right." In fact, the under color of official right aspect of the Hobbs Act derives from the common law meaning of extortion. As the Supreme Court explained in a recent opinion regarding the Hobbs Act,

"[a]t common law, extortion was an offense committed by a public official who took 'by color of his office' money that was not due to him for the performance of his official duties. . . . Extortion by the public official was the rough equivalent of what we would now describe as 'taking a bribe.'" *Evans v. United States*, 504 U.S. 255 (1992).

In order to show a violation of the Hobbs Act under this provision, the Supreme Court recently held that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." While the definition of extortion under the Hobbs Act with regard to force, violence or fear requires the obtaining of property from another with his consent *induced* by these means, the under color of official right provision does not require that the public official take steps to induce the extortionate payment: It can be said that "the coercive element is provided by the public office itself." *Evans v. United States*, 504 U.S. 255 (1992); *see United States v. Margiotta*, 688 F.2d 108, 130 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) ("[t]he public officer's misuse of his office supplies the necessary element of coercion . . .").

This theory of extortion under color of official right has resulted in the successful prosecution of a wide range of officials, including those serving on the federal, state and local levels. For example: *United*

States v. O'Connor, 910 F.2d 1266 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 953 (1991) (police officer accepts payments from FBI agents posing as crooked auto parts dealers); *United States v. Stephenson*, 895 F.2d 867 (2d Cir. 1990) (international trade official in Department of Commerce accepts payments to influence ruling); *United States v. Spitler*, 800 F.2d 1267 (4th Cir. 1986) (state highway administrator accepts money from road building contractor); *United States v. Wright*, 797 F.2d 245 (5th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987) (city prosecutors accept money for not prosecuting drunk drivers); *United States v. Greenough*, 782 F.2d 1556 (11th Cir. 1986) (city commissioner accepts money for awarding city concession); *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) (judges accept payments to fix cases); *United States v. Mazzei*, 521 F.2d 639 (3d Cir.) (en banc), *cert. denied*, 423 U.S. 1014 (1975) (state senator accepts money from landlord seeking government office lease). In *United States v. Stephenson*, 895 F.2d at 871-73, the defendant, who was a federal official, unsuccessfully contended that the Hobbs Act only applied to state and local officials and that prosecution of federal official for extortion would have to be exclusively brought under 18 U.S.C. §872: extortion by officers and employees of the United States. The court found that the government could seek a charge under whichever of these two overlapping statutes it thought appropriate. Moreover, "it is not a defense to a charge of extortion under color of official right that the defendant could also have been convicted of bribery." *Evans v. United States*, 504 U.S. 255 (1992).

GENERAL RULE: The usual fact situation for a Hobbs Act charge under color of official right is a public official trading his/her official actions in a area in which he/she has actual authority in exchange for the payment of money.

Some cases under certain fact situations, however, have extended the statute further. For example:

- Some courts have held that a Hobbs Act violation does not require that the public official have *de jure* power to perform any official act paid for as long as it was reasonable to believe that he/she had the *de facto* power to perform the requested act. See *United States v. Nedza*, 880 F.2d 896, 902 (7th Cir. 1989) (victim reasonably believed state senator had the ability to impact a local business); *United States v. Bibby*, 752 F.2d 1116, 1127-28 (6th Cir. 1985); *United States v. Sorrow*, 732 F.2d 176, 180 (11th Cir. 1984); *United States v. Rindone*, 631 F.2d 491, 495 (7th Cir. 1980) (public official can extort money for permit beyond control of his office, so long as victim has a reasonable belief that he could affect issuance); *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *United States v. Harding*, 563 F.2d 299 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976); *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. Mazzei*, 521 F.2d 639, 643 (3rd Cir.) (en banc), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Price*, 507 F.2d 1349 (4th Cir. 1974).
- Most courts have held that a Hobbs Act violation does not require that the public official be the recipient of the benefit of the extortion, and that a Hobbs Act case exists where the corpus of the corrupt payment went to a third party. However, consistent with the federal offenses of bribery and gratuities under 18 U.S.C. § 201 (see 9 U.S.A.M. §§ 85.101 through 85.105), where the corpus of the corrupt payment inures to the benefit of a person or entity other than the public official most courts have also required proof of a *quid pro quo* understanding between the private corrupter and the public official. See *United States v. Haimowitz*, 725 F.2d 1561, 1577 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984) ("a Hobbs Act prosecution is not defeated simply because the extorter transmitted the extorted money to a third party."); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (insurance agency made kickbacks to brokers selected by political leader of town); *United States v. Scacchetti*, 668 F.2d

643 (2d Cir.), *cert. denied*, 457 U.S. 1132 (1982); *United States v. Forszt*, 655 F.2d 101 (7th Cir. 1981); *United States v. Cerilli*, 603 F.2d 415 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Brennan*, 629 F.Supp. 283 (E.D.N.Y.), *aff'd*, 798 F.2d 581 (2d Cir. 1986). *But see McCormick v. United States*, 500 U.S. 257 (1991) (allegedly corrupt payment made in the form of a campaign contribution to a third party campaign organization was insufficient to support a Hobbs Act conviction absent evidence of a *quid pro quo*).

- Some courts have held that the Hobbs Act can be applied to past or future public officials, as well as to ones who presently occupy a public office at the time the corrupt payment occurs. *See United States v. Meyers*, 529 F.2d 1033, 1035-38 (7th Cir.), *cert. denied*, 429 U.S. 894 (1976) (court answered affirmatively the question "whether, within the meaning of the Hobbs Act, it is a crime for candidates for political office to *conspire* to affect commerce by extortion induced under color of official right during a time frame beginning before the election but not ending until after the candidates have obtained public office."); *United States v. Lena*, 497 F.Supp. 1352, 1359 (W.D. Pa. 1980), *aff'd mem.*, 649 F.2d 861 (3rd Cir. (1981); *United States v. Barna*, 442 F.Supp. 1232, 1235 (M.D.Pa. 1978), *aff'd mem.*, 578 F.2d 1376 (3rd Cir.), *cert. denied*, 439 U.S. 862 (1978).
- Some courts have held that *private* persons who are not themselves public officials can be convicted under this provision if they *caused* public officials to perform official acts in return for payments to the non-public official. *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (court upheld conviction of head of local Republican Party under color of official right where defendant could be said to have *caused*, under 18 U.S.C. §2(b), public officials to induce a third party to pay out money); *see United States v. Haimowitz*, 725 F.2d 1561, 1572-73 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984) (private attorney's conviction of Hobbs Act violation upheld due to complicity with state senator); *United States v. Marcy*, 777 F.Supp. 1398, 1399-400 (N.D.Ill. 1991); *United States v. Barna*, 442 F.Supp. 1232 (M.D. Pa.), *aff'd mem.*, 578 F.2d 1376 (3rd Cir.), *cert. denied*, 439 U.S. 862 (1978). *But see United States v. McClain*, 934 F.2d 822, 829-32 (7th Cir. 1991) ("we believe that, as a general matter and with caveats as suggested here, proceeding against private citizens on an 'official rights' theory is inappropriate under the literal and historical meanings of the Hobbs Act, irrespective of the actual 'control' that citizen purports to maintain over governmental activity.").
- Some courts have also held that *private* individuals who *make* payments to a public official can be charged under the Hobbs Act, either as an aider and abettor or co-conspirator, if he or she is truly the instigator of the transaction. *See United States v. Torcasio*, 959 F.2d 503, 505-06 (4th Cir. 1992); *United States v. Spitler*, 800 F.2d 1267, 1276-79 (4th Cir. 1986) (conviction affirmed for aiding and abetting extortion under color of official right even though defendant, who paid kickbacks from corporate coffers, was an officer of the victim corporation); *United States v. Wright*, 797 F.2d 245 (5th Cir. 1986). *But see United States v. Tillem*, 906 F.2d 814, 823-24 (2d Cir. 1990) (consultant employed to help restaurants obtain approvals from corrupt health inspectors had no stake in the conspiracy and was not promoting the outcome).
- Finally, in a federal prosecution of a state legislator, there is no legislative privilege barring the introduction at trial of evidence of the defendant's legislative acts. The Supreme Court has held that in such a prosecution a speech or debate type privilege for state legislators cannot be made applicable through Fed.R.Evid. 501. The Court said such privilege is not required by separation of powers considerations or by principles of comity, the two rationales underlying the Speech or Debate Clause of the U.S. Constitution, art. I, §6, cl. 1. *United States v. Gillock*, 445 U.S. 360, 368-74 (1980).

CAVEAT: *The Hobbs Act and Campaign Contributions*. The Supreme Court has held that, when an allegedly corrupt payment masquerades as a campaign contribution, and when there is no evidence that the corpus of the "contribution" inured to the personal benefit of the public officer in question or was a product of force or duress, the Hobbs Act requires proof of a *quid pro quo* agreement between the contributor and the public officer. *McCormick v. United States*, 500 U.S. 257 (1991). However, the Court has also held that proof that a *quid pro quo* agreement existed in a corruption case brought under the Hobbs Act may be proven circumstantially. *Evans v. United States*, 504 U.S. 255 (1992). This interpretation of the dimensions of the Hobbs Act in corruption scenarios is consistent with the parameters of the facts needed to prove the federal crimes of bribery and gratuities under 18 U.S.C. § 201. See *United States v. Brewster*, 50-6 F.2d 62 (D.C. Cir. 1972), 9 U.S.A.M. §§ 85.101 through 85.105, *supra*.

CAVEAT: *The Hobbs Act and evidence of a quid pro quo*. When the Hobbs Act is applied to public corruption scenarios that lack evidence of actual "extortionate" duress, some courts have interpreted the Hobbs Act very strictly to require proof of a *quid pro quo* relationship between the private and the public parties to the transaction, even where the corpus of the payment inured to the personal benefit of the public official. See *United States v. Martinez*, 14 F.3d. 543 (11th Cir. 1994)(Hobbs Act did not apply to pattern of in-kind payments given personally to Florida mayor in the absence of evidence of a *quid pro quo* relationship between the mayor and alleged private corrupter); *United States v. Taylor*, 993 F.2d 382 (4th Cir. 1993)(same); *United States v. Montoya*, 945 F.2d 1086 (9th Cir. 1991)(same); *contra United States v. Brandford*, 33 F.3d 685 (6th Cir. 1994)(Hobbs Act does not require proof of *quid pro quo* where corpus of corrupt payment inured to the personal benefit of public officer). In addition, some courts require that corruption cases brought under the "color of official right" clause of the Hobbs Act be accompanied by proof that the public official induced the payment. See *Montoya*, *supra*.

At the very least, the courts will probably not extend the "color of official right" clause of the Hobbs Act beyond the parameters of crimes of bribery and gratuities in relation to *federal* officials that are described in 18 U.S.C. § 201. See *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974), 9 U.S.A.M. §§ 85.101 through 85.105, *supra*. This means that where the corpus of the alleged corrupt payment passed to someone or something other than the public official personally (including those where it passed to a political committee), the Hobbs Act probably does not apply unless there is also evidence of a *quid pro quo*. And even then, some Circuits, such as the Ninth, require additional proof that the payment was induced by the public official.

PRACTICE TIP: The Public Integrity Section possesses considerable expertise in using the Hobbs Act to **prosecute public corruption**. While not required, AUSAs are strongly urged to consult with the Public Integrity Section in the investigation and **prosecution of corruption cases** under this statutory theory. Public Integrity can be reached at **202-514-1412, or by fax at 202-514-3003**.

[cited in [JM 9-131.010](#)]

[◀ 2403. Hobbs Act -- Extortion By Force, Violence, Or Fear up 2405. Form Indictment -- Interference With Commerce By Extortion Consisting Of Threats, Violence Or Fear \(18 U.S.C. 1951\) ▶](#)

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