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# Private Actors and Public Corruption: Why Courts Should Adopt a Broad Interpretation of the Hobbs Act

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# NOTE

## Private Actors and Public Corruption: Why Courts Should Adopt a Broad Interpretation of the Hobbs Act

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*Federal prosecutors routinely charge public officials with "extortion under color of official right" under a public-corruption statute called the Hobbs Act. To be prosecuted under the Hobbs Act, a public official must promise official action in return for a bribe or kickback. The public official, however, does not need to have actual authority over that official action. As long as the victim reasonably believed that the public official could deliver or influence government action, the public official violated the Hobbs Act. Private citizens also solicit bribes in return for influencing official action. Yet most courts do not think the Hobbs Act applies to private citizens, even those who also create and exploit a belief that they have the ability to influence official action. This Note argues that interpreting "extortion under color of official right" to exclude private actors is incorrect. The test for anyone acting under color of official right should be whether the victim reasonably believes that person can influence official action.*

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## Introduction

In 2001, Monte D. McFall, a lobbyist and former public official, worked to raise money and political support for a friend running for public office in California.[1] Thanks in part to McFall and his associates, the friend, Lynn Bedford, won the vacant county supervisor seat.[2] Shortly after Bedford's appointment, McFall and his partners formed two entities to maximize their financial interests through Bedford, including SMTM Partners, LP—short for "Show Me The Money."[3]

As soon as Bedford was appointed to the seat, McFall started telling people that he was Bedford's proxy.[4] In 2001, McFall contacted an attorney who represented a development company and invited him to a fundraiser for Bedford.[5] Bedford, McFall, and the developer met a few weeks later, and Bedford indicated that McFall could help the developer secure the necessary permits for his project.[6] Later, McFall told the developer that he could deliver Bedford's vote if the developer paid McFall between $50,000 and $100,000.[7]

As a result, prosecutors charged McFall with attempted "extortion under color of official right" under a public-corruption statute known as the Hobbs Act.[8] McFall proceeded to trial, was convicted, and received a sentence of 121 months in prison.[9] On appeal, McFall argued that he was improperly convicted because as a private citizen, not a public official, he could not act under color of official right without aiding and abetting a public official.[10] The Ninth Circuit reversed the Hobbs Act conviction. Because McFall himself was not a public official, the court reasoned, he could be held liable only if he acted in concert with a public official.[11] On re-sentencing for

1. United States v. McFall, 558 F.3d 951, 953 (9th Cir. 2009).
2. *Id.*
3. *Id.* at 953–54.
4. *Id.* at 953.
5. *Id.* at 955.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 954.
10. *Id.* at 958–59.
11. *Id.* at 960.

other charges, McFall received 78 months, a significant decrease from his original sentence of 121 months.[12]

This scenario is all too common. Private citizens act under the guise of official authority and solicit payouts in return for the delivery of official action. Yet they escape extortion charges because most federal courts apply the requisite extortion statute, the Hobbs Act, only to public officials.[13] These courts exclude private citizens who, like McFall, use their corrupt influence over official actions to solicit bribes from victims.[14]

In the context of the Hobbs Act, courts have interpreted extortion to be, essentially, what most people think of as bribery.[15] The legal difference between extortion and bribery is the culpability of the parties.[16] In bribery cases, both the person who receives the bribe and the person who pays it are criminally culpable.[17] By way of contrast, in extortion cases the person who pays is considered instead a victim coerced by the extortioner, so only the person who receives the bribe is legally culpable.[18] There is a federal bribery statute,[19] but it applies only to corruption by federal officials,[20] whereas the Hobbs Act applies to state and local officials.

In Hobbs Act cases, the phrase "under color of official right" is notoriously ambiguous, and courts disagree on its meaning.[21] Many courts find that only a public official can act under color of official right.[22] Other courts find that the Act reaches beyond officials to include public employees.[23]

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12. Amended Judgment at 3, United States v. McFall, No. 2:02CR00468-001 (E.D. Cal. Oct. 2, 2009).

13. *See infra* notes 74–92 and accompanying text.

14. *See infra* notes 74–92 and accompanying text.

15. James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 817–18 (1988) ("[S]ince the early 1970s, extortion has been held to include behavior that most people would think of as bribery.").

16. J. Kelly Strader, Understanding White Collar Crime 191 (3d ed. 2011).

17. *Id.*

18. *Id.*

19. 18 U.S.C. § 201 (2012).

20. *See id.* (defining "public officials" as those "acting for or on behalf of the United States").

21. United States v. Manzo, 636 F.3d 56, 62 (3d Cir. 2011) ("[C]ourts have grappled with ambiguity embedded in the text of the Hobbs Act, and in particular, the 'under color of official right' language."); *see also* United States v. Abbas, 560 F.3d 660, 663 (7th Cir. 2009) ("Remarkably, there appears to be no source for the undisputed meaning of the term 'under color of official right.'"); United States v. Tomblin, 46 F.3d 1369, 1383 (5th Cir. 1995) ("The plain meaning of the statute does not clearly indicate who can act under color of official right . . . .").

22. *See, e.g.*, United States v. Rashad, 687 F.3d 637, 642 (5th Cir. 2012) ("[O]nly public officials are charged with extorting property under color of official right."); *see also* United States v. McClain, 934 F.2d 822, 831 (7th Cir. 1991) ("[A]s a general matter and with caveats as suggested here, proceeding against private citizens on an 'official right' theory is inappropriate under the literal and historical meaning of the Hobbs Act, irrespective of the actual 'control' that citizen purports to maintain over governmental activity.").

23. *See infra* notes 100–102 and accompanying text.

Some find private citizens liable under accomplice liability.[24] And finally, a handful of district courts have upheld convictions for private citizens charged with extortion under color of official right,[25] including an explicit endorsement of applying the Act to private citizens in *United States v. Phillips*, a Northern District of Illinois case.[26] In 2011, the Third Circuit called the question of Hobbs Act applicability to private actors a "significant and novel question."[27] The Supreme Court has never explicitly addressed this issue.

Although disagreement exists, the large majority of courts interpret the Hobbs Act to apply only to public officials. Prosecutors started using the Hobbs Act to target public corruption in 1972.[28] Since then, federal courts have overturned convictions of or dismissed charges against a number of different kinds of private actors: private attorneys who solicited bribes from their clients to influence public officials;[29] a businessman who took a $250,000 loan in return for influencing a U.S. Senator's office;[30] and candidates for office who took a $27,500 bribe in return for official actions once elected.[31] In all of these cases, courts dismissed the charges or overturned the convictions because the defendants, private citizens, were not acting under color of official right.

By way of contrast, a public official may be liable under the Hobbs Act if she accepts a bribe in return for official action, even if she has no authority over that action.[32] This principle stems from *United States v. Mazzei*, a seminal Third Circuit case.[33] For example, the Third Circuit recently upheld the conviction of a New Jersey mayor who accepted a bribe to influence a school board contract—an action that, as the mayor, he lacked the authority to

24. *See infra* notes 103–109 and accompanying text.

25. *E.g.*, United States v. Lena, 497 F. Supp. 1352, 1359 (W.D. Pa. 1980) ("One who is not himself a public official may extort money under color of official right if he purports to exercise influence over those who are public officials."), *aff'd*, 649 F.2d 861 (3d Cir. 1981) (unpublished table decision).

26. 586 F. Supp. 1118, 1122–23 (N.D. Ill. 1984).

27. United States v. Manzo, 636 F.3d 56, 61 (3d Cir. 2011).

28. Peter J. Henning & Lee J. Radek, The Prosecution and Defense of Public Corruption 7–8 (2011).

29. *See, e.g.*, United States v. Saadey, 393 F.3d 669, 674–76 (6th Cir. 2005) (conviction reversed); United States v. Gonzales, 620 F. Supp. 1143, 1147 (N.D. Ill. 1985) (charges dismissed); United States v. Freedman, 562 F. Supp. 1378, 1384–87 (N.D. Ill. 1983) (charges dismissed).

30. United States v. Tomblin, 46 F.3d 1369, 1382–83 (5th Cir. 1995) (conviction reversed).

31. *Manzo*, 636 F.3d at 59–61 (charges dismissed); *see also* United States v. Abbas, 560 F.3d 660 (7th Cir. 2009) (holding that applying a sentencing enhancement for color of official right was harmless error for a private citizen who masqueraded as a public official); United States v. McClain, 934 F.2d 822, 830 (7th Cir. 1991) (dictum) (deciding that it is inappropriate to charge a private citizen who influenced a city contract with extortion under official right).

32. *See infra* Section III.A.

33. 521 F.2d 639 (3d Cir. 1975) (en banc).

take.[34] Under the *Mazzei* principle, however, as long as the victim believes the public official has the ability to influence the action, the public official has committed extortion under color of official right.

Thus, when evaluating prosecutions of public officials, courts look to the victim's perception; yet when evaluating prosecutions of private citizens, courts do not consider whether the victim believed that the private citizen had the ability to influence official action.[35] This Note contends that the *Mazzei* reasonable-impression test should inform all color-of-official-right cases, regardless of the defendant's actual authority.

This more expansive test is appropriate because anyone who contributes to the problem of public corruption, whether public official or private citizen, should be penalized. Public corruption is "one of the most serious offenses in any organized political system."[36] It continues to infect government at high levels. Federal prosecutors have, for example, convicted the mayor of Detroit[37] and several state-level officials in New York.[38]

Specifically, public corruption undermines the public's faith in its elected officials.[39] And, according to Attorney General Loretta Lynch, corruption disproportionately affects poor communities and minorities. When Lynch was a U.S. Attorney, she noted that convicted public officials often represent constituents from historically underrepresented communities, "who place their faith in their elected officials."[40] When private citizens create the belief that they can influence official action, victims of extortion believe official results are for sale. Whether grounded in truth or not, this belief undermines faith in government.

This Note argues that the Hobbs Act applies to extortion by private citizens acting under the guise of official authority. Courts should address this problem by applying a "reasonable impression" test—that is, a test that asks whether the extortioner created and exploited the reasonable impression that she had the ability to influence an official action—regardless of her status as a public official or her actual authority. Part I traces the problem of

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34. United States v. Bencivengo, 749 F.3d 205, 212–13 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 236 (2014).

35. *See infra* notes 93–99 and accompanying text.

36. Henning & Radek, *supra* note 28, at 2.

37. Press Release, FBI, Former Detroit Mayor Kwame Kilpatrick, Contractor Bobby Ferguson, and Bernard Kilpatrick Sentenced on Racketeering, Extortion, Bribery, Fraud, and Tax Charges (Oct. 17, 2013), http://www.fbi.gov/detroit/press-releases/2013/former-detroit-mayor-kwame-kilpatrick-contractor-bobby-ferguson-and-bernard-kilpatrick-sentenced-on-racketeering-extortion-bribery-fraud-and-tax-charges [http://perma.cc/U9LM-JUGS].

38. Testimony of Loretta E. Lynch, U.S. Att'y for the E.D.N.Y., Moreland Commission Public Hearing (Sept. 17, 2013) [hereinafter Lynch testimony].

39. *See, e.g.*, Patrick Fitzgerald, *Combating Corruption: Keynote Address November 5, 2011*, 2012 U. Chi. Legal F. 1, 4 (2012) (noting that the "priceless cost" of public corruption is "loss of trust in government"); Lynch testimony, *supra* note 38, at 7 (noting that public corruption cases "increase the level of cynicism and distrust of our elected officials—weakening our faith in the political system").

40. Lynch testimony, *supra* note 38, at 3.

private actors escaping punishment for acts of extortion. Part II asserts that the text of the Hobbs Act suggests that both public officials and private citizens can act under color of official right. Part III argues that the reasonable-impression test currently applied to public officials should extend to private citizens as well, because private citizens also undermine the public's faith in government.

## I. Private Actors Escape Hobbs Act Convictions for Extortion Under Color of Official Right

The Hobbs Act makes it a crime to affect interstate commerce through the use of fear or "under color of official right."[41] The text reads as follows:

> 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 . . . shall be fined under this title or imprisoned not more than twenty years, or both. . . . 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.[42]

Prosecutors generally charge Hobbs Act cases under one of the two prongs of the statute: extortion by fear or extortion under color of official right.[43] For the purposes of this Note, "the Hobbs Act" refers to the color-of-official-right prong of the statute unless otherwise noted.

This Part addresses the development of courts' Hobbs Act jurisprudence, specifically how courts have treated private citizens who prosecutors have charged with extortion under color of official right. Section I.A traces the development of the Hobbs Act as a tool for federal prosecutors fighting public corruption. Section I.B discusses how courts have approached cases involving private citizens charged with official-right extortion.

### A. *The Development of the Hobbs Act as a Public-Corruption Statute*

Congress passed the Hobbs Act in 1946 as a successor to the Anti-Racketeering Act of 1934.[44] Prosecutors did not use it to prosecute public corruption until the 1970s.[45] In 1970, federal prosecutors in New Jersey charged several Jersey City officials with a scheme that involved extorting kickbacks

41. 18 U.S.C. § 1951(b)(2) (2012).

42. *Id.* §§ 1951(a), (b)(2).

43. *See, e.g.*, United States v. Urban, 404 F.3d 754, 768 (3d Cir. 2005) ("[T]he statute supports two classes of extortion: extortion induced by 'wrongful use of force' and extortion 'under color of official right.'") (quoting United States v. Antico, 275 F.3d 245, 255 (3d Cir. 2001)); Strader, *supra* note 16, at 191.

44. Henning & Radek, *supra* note 28, at 107; *see also infra* notes 136–146 and accompanying text (discussing history of the Hobbs Act).

45. Henning & Radek, *supra* note 28, at 8.

from contractors.[46] Several of the city officials were convicted.[47] The case inspired prosecutors across the country to start charging the Hobbs Act—federal prosecutors in New York, Baltimore, Chicago, Philadelphia, and Pittsburgh soon followed Newark's lead.[48] By the mid-1970s, federal prosecutors were pursuing Hobbs Act convictions against more than 300 state officials a year.[49]

Today, the Hobbs Act is one of the statutes prosecutors most frequently use to combat public corruption.[50] Since there is no comprehensive federal law that addresses public corruption,[51] federal prosecutors use a combination of different federal statutes,[52] including the Hobbs Act, the Travel Act,[53] the mail-fraud statute,[54] the federal bribery statute,[55] and the Racketeer Influenced and Corrupt Organizations Act.[56] Among these statutes, prosecutors consider the Hobbs Act one of the primary weapons for prosecuting bribery by state and local officials.[57]

Prosecutors prefer the Hobbs Act for several reasons. First, it reaches state and local officials,[58] whereas the federal bribery statute only applies to

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46. United States v. Kenny, 462 F.2d 1205, 1216–17 (3d Cir. 1972). John Kenny, the leader of the Jersey City officials, was a mentee of legendary Jersey City political boss, Mayor Frank Hague. John T. Noonan, Jr., Bribes 584 (1984).

47. Noonan, *supra* note 46, at 585–87 ("The main instrument of his machine's downfall had been the Hobbs Act."). Notably, Kenny, who started the entire line of under-color-of-official-right cases, was not himself a public official. He "held no public office or official party position in the years in question," yet "was de facto the absolute boss of the political party in power." *Kenny*, 462 F.2d at 1211. The Third Circuit noted that Kenny "ruled the political life of both city and county," while every other defendant held a position in city or county government. *Id.* at 1216–17. Kenny determined who would hold office and organized a system of collecting kickbacks in return for government action. *Id.* at 1217. Kenny, whose health was failing, pleaded guilty to tax evasion and was never actually convicted of the Hobbs Act charge, so the issue was not raised. Noonan, *supra* note 46, at 585.

48. Noonan, *supra* note 46, at 587.

49. *Id.*

50. *See, e.g.*, Strader, *supra* note 16, at 171 (noting that the Hobbs Act and the federal bribery statute are the "primary means" for targeting government corruption); *Analysis: What Is the Hobbs Act and How Does It Apply to the McDonnell Case?*, WAMU 88.5 (Jan. 22, 2014), http://wamu.org/news/14/01/22/analysis_what_is_the_hobbes_act_and_how_does_it_apply_to_the_mcdonnell_case [http://perma.cc/2W9P-9U42] (noting that the Hobbs Act and honest services mail and wire fraud are the "two most common vehicles for federal prosecution of state or local officials in corruption cases").

51. George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 Notre Dame L. Rev. 247, 254 (1998).

52. Henning & Radek, *supra* note 28, at 3 ("[F]ederal corruption law is at best a hodgepodge."); Brown, *supra* note 51, at 254.

53. 18 U.S.C. § 1952 (2012).

54. *Id.* § 1341.

55. *Id.* § 201.

56. *Id.* § 1962.

57. Henning & Radek, *supra* note 28, at 8.

58. *Id.*

federal officials.[59] Second, it is easier for prosecutors to meet the elements of the Hobbs Act than the elements of other corruption statutes. For example, the Travel Act requires travel in interstate commerce,[60] while the Hobbs Act only requires a slight effect on interstate commerce.[61] Third, the Hobbs Act carries higher penalties than other statutes. The Hobbs Act carries a twenty-year maximum penalty.[62] The federal bribery statute carries a fifteen-year maximum,[63] and the Travel Act carries five years for nonviolent acts.[64] As one commentator notes, prosecuting corruption under the Hobbs Act has "several advantages from the standpoint of federal prosecutors, not the least of which was a severe twenty-year maximum punishment."[65]

### B. *The Supreme Court's Approach*

The Supreme Court has never directly addressed the applicability of the official-right prong of the Hobbs Act to private citizens. But, the Court has briefly acknowledged that the question is open.[66] In *Evans v. United States*, the Court held that the Hobbs Act does not require the extortioner to affirmatively induce a bribe.[67] The government only needs to prove 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."[68] The Court adopted the definition of extortion at common law, writing that "a statutory term is generally presumed to have its common-law meaning."[69] In a footnote, the Court recognized that "[a]t least one commentator has argued that, at common law, extortion under color of official right could also be committed by a private individual,"[70] citing an article by Professor James Lindgren.[71] Thus, the Court acknowledged, albeit only once and in a footnote, that the common-law definition might encompass a private individual committing extortion under color of official right.

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59. 18 U.S.C. § 201.

60. *Id.* § 1952.

61. Herbert J. Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 SETON HALL L. REV. 1, 9 (1971); *see also* Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 905 n.62 (2005) ("A further advantage of using the Hobbs Act is that the required jurisdictional nexus is broader than those specified by other federal statutes applicable to such bribery.").

62. 18 U.S.C. § 1951(a).

63. *Id.* § 201(b).

64. *Id.* § 1952(a)(3)(A).

65. Smith, *supra* note 61, at 905.

66. Evans v. United States, 504 U.S. 255, 264 n.13 (1992).

67. *Id.* at 268.

68. *Id.*

69. *Id.* at 259 (quoting Taylor v. United States, 495 U.S. 575, 592 (1990)).

70. *Id.* at 264 n.13.

71. Lindgren, *supra* note 15, at 876.

### C. *Other Courts' Approaches to Extortionate Acts by Private Actors*

Even after *Evans*, the widely held belief among federal courts remains that only public officials may commit official-right extortion, although private citizens may be charged under an aiding-and-abetting theory. This approach allows three types of private actors to extort bribes without conspiring with a public official: those who take a bribe in return for a promise to exercise influence over public officials or official action; those who masquerade as public officials; and those who previously held public office or hope to hold public office in the future, but accept a payment while a private citizen. Courts have used three main arguments to support the assertion that only public officials can be charged with official-right extortion. First, and most importantly, the statute reflects the common-law meaning of extortion. Courts and scholars widely believe that at common law, only public officials could commit extortion. Second, the act of holding public office provides an element of coercion that parallels the coercive element of extortion by fear or violence in the other prong of the statute. And third, public officials are more culpable simply because they are abusing the public trust. This Subsection describes each of these arguments and then considers cases in which courts have upheld convictions for private citizens under different legal theories.

In *Evans*, the Supreme Court wrote that language in the Hobbs Act reflects the common-law understanding of the word extortion.[72] The Court described the common-law understanding of extortion as "an offense committed by a public official who took 'by colour of his office' money that was not due to him for the performance of his official duties."[73] Post-*Evans* courts have relied on this language when analyzing Hobbs Act cases involving private citizens.

The Fifth, Third, and Seventh Circuits have rested on this line of statutory interpretation. In *United States v. Tomblin*, for example, the Fifth Circuit overturned the conviction of a private businessman who solicited a $250,000 loan in return for exercising influence over a U.S. Senator.[74] The court ruled that "Congress preserved the common law definition of extortion, under which extortion could only be committed by a public official."[75]

Likewise, the Seventh[76] and Third[77] Circuits relied on the *Evans* Court's statement that extortion mirrors the common-law definition. In *United States v. Manzo*, the Third Circuit considered a candidate for office and his

72. *Evans*, 504 U.S. at 263–64.

73. *Id.* at 260 (footnote omitted). The Court relied on Blackstone, who defined extortion as "an abuse of public justice, which consists in an officer's unlawfully taking, *by colour of his office*, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due." *Id.* at 260 n.4.

74. 46 F.3d 1369, 1375, 1386 (5th Cir. 1995).

75. *Tomblin*, 46 F.3d at 1383 (footnote omitted).

76. United States v. Abbas, 560 F.3d 660, 663 (7th Cir. 2009).

77. United States v. Manzo, 636 F.3d 56, 62 (3d Cir. 2011).

brother, who solicited $27,500 from a developer (actually an FBI informant) to steer a contract and promote a certain city employee once the candidate was in office.[78] Because Manzo lost the election, federal prosecutors charged him with conspiracy to commit extortion under color of official right.[79] The court held that the Manzos were not acting under color of official right because, "[a]t common law, the phrase 'extortion under color of official right' was a legal term of art that encompassed only the actions of public officials."[80]

Courts also reject Hobbs Act liability for private citizens because they believe that holding public office amounts to coercion. This line of reasoning allows the color-of-official-right prong of the Hobbs Act to parallel the "fear of harm" prong of the statute. In *Tomblin*, the Fifth Circuit explained that "the official's position provides the coercive element that the threats and fear of the other ground supply."[81] In *Manzo*, the Third Circuit wrote that Congress intended to criminalize only coercive exchanges,[82] and the misuse of public office constitutes the coercion in color-of-official-right cases.[83] The "essence of the offense was the abuse of the public trust that inhered in the office."[84] In *United States v. McClain*, the Seventh Circuit noted that Congress intended to set off "under color of official right" from the other prong of the statute because private citizens just do not have the same power.[85] To extort, a private person would generally need to use threats or intend to injure.[86] "In private person cases, therefore, prosecution under the fear prong is available, and the government may not ordinarily have a basis for resorting to the 'official right' theory."[87] Similarly, the Northern District of Illinois held, "[t]he coercion leading to the extortion must flow from perceived official power."[88]

The third reason courts limit Hobbs Act prosecutions to public officials is that public officials are more culpable because they are abusing the public trust. Only a few courts have rested on this reasoning. In *United States v. Abbas*, the Seventh Circuit wrote that "what makes extortion under color of official right so pernicious is that the state . . . has given the offender the power to harm his victims."[89] For that reason, such an offender should be

78. *Id.* at 59–60.

79. *Id.* at 60–61.

80. *Id.* at 62, 68–69.

81. United States v. Tomblin, 46 F.3d 1369, 1383 (5th Cir. 1995).

82. *Manzo*, 636 F.3d at 65.

83. *Id.*

84. *Id.* at 62 (quoting United States v. Mazzei, 521 F.2d 639, 650 (3d Cir. 1975) (en banc) (Gibbons, J., dissenting)).

85. 934 F.2d 822, 830 (7th Cir. 1991).

86. *McClain*, 934 F.2d at 830.

87. *Id.*

88. United States v. Gonzales, 620 F. Supp. 1143, 1147 (N.D. Ill. 1985).

89. 560 F.3d 660, 664 (7th Cir. 2009).

singled out for a "special brand of criminal liability."[90] The court acknowledged that private citizens pretending to be public officials can cause just as much harm as an extortioner who is in fact a public official.[91] But crimes with "identical effects" can be punished differently, based on the intent and manner of the crime.[92]

Because many courts emphasize official authority in these cases, they largely ignore the victim's perception of the extortioner's ability to influence official action. The *Tomblin* court, for example, overturned the defendant's Hobbs Act conviction because the defendant's authority "was not official power; it was unofficial power over an official."[93] The court did not consider whether, despite the defendant's only wielding unofficial power, the victim believed the defendant could deliver official action.[94] In *McClain*, prosecutors charged a private individual with official-right extortion after he took a bribe from a company competing for a city contract in Chicago.[95] The defendant "boasted colorfully of the power he wielded over city contract awards."[96] Yet the court concluded that it is generally inappropriate to charge private individuals with extortion under color of official right, "irrespective of the actual 'control' that citizen purports to maintain over governmental activity."[97] Finally, the Ninth Circuit in *United States v. McFall* overturned McFall's conviction because "McFall himself made no claim of official right."[98] Though he claimed to have "outsized political influence," he never represented himself as a public official so could not be convicted without a jury instruction on aiding and abetting.[99]

Courts employ these three arguments when considering private citizens who are government *employees*, though not *officials*. For example, in *United States v. Freeman*, the Ninth Circuit extended the Hobbs Act to a California state legislative aide who accepted $6,500 to shepherd a bill through the state legislature.[100] Although the legislative aide was unelected and unappointed, the court held the Hobbs Act covered his conduct because it "reaches anyone

90. *Abbas*, 560 F.3d at 664.

91. *Id.*

92. *Id.*

93. United States v. Tomblin, 46 F.3d 1369, 1383 (5th Cir. 1995).

94. *See id.*

95. United States v. McClain, 934 F.2d 822, 824 (7th Cir. 1991).

96. *Id.*

97. *Id.* at 831.

98. United States v. McFall, 558 F.3d 951, 959 (9th Cir. 2009).

99. *Id.* at 959–60.

100. 6 F.3d 586, 593–94 (9th Cir. 1993).

who actually exercises official powers."[101] Similarly, the Middle District of Louisiana upheld the conviction of an unelected aide to the governor.[102]

Similarly, the First, Second, Fourth, and Fifth Circuits have upheld official-right extortion convictions for private citizens under an accomplice-liability theory.[103] The Fifth Circuit, for example, ruled that a private-citizen defendant's participation in an agreement with public officials "suffices to establish conspiratorial guilt."[104] Likewise, the Second Circuit held that a private citizen, the chairman of the local Republican Committee, caused the public official to commit the extortion.[105] "[A]n individual with the requisite criminal intent may be held liable as a principal if he is a cause in fact in the commission of a crime, notwithstanding that the proscribed conduct is achieved through the actions of innocent intermediaries."[106]

The Seventh Circuit also upheld the convictions of two private citizens for conspiring to extort under color of official right. In *United States v. Meyers*, two candidates for office took $6,000 in bribes in return for the promise of future action.[107] Since they won the election, the conspiracy continued into the period when they were actually in office.[108] The court wrote, "it is no less of a crime under the Hobbs Act to sell one's public trust before, rather than after, one is installed in public office."[109]

A handful of district courts have fully extended the Hobbs Act to private citizens, even if they did not conspire with or aid and abet public officials. For example, the Western District of Pennsylvania upheld the conviction of a school board member, even though he accepted payments when he was no

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101. *Freeman*, 6 F.3d at 593; *see also* United States v. Casiano, No. 93-1782, 1994 WL 283909, at *4 (1st Cir. June 24, 1994) (per curiam) ("[O]ne need not be an elected or appointed public official even to be convicted *as a principal* under the Hobbs Act's 'color of official right' provision.").

102. United States v. Ray, 690 F. Supp. 508, 512 (M.D. La. 1988) ("[T]he Act itself appears to reach anyone who *in fact* exercises official rights or functions, regardless of whether those powers were conferred by reason of his being elected or appointed to an office . . . .").

103. United States v. Rashad, 687 F.3d 637, 643 (5th Cir. 2012); *Casiano*, 1994 WL 283909 at *4; United States v. Spitler, 800 F.2d 1267, 1279 (4th Cir. 1986); United States v. Margiotta, 688 F.2d 108, 131 (2d Cir. 1982), *overruled on other grounds by* United States v. Bahel, 662 F.3d 610 (2d Cir. 2011); *see also* United States v. Saadey, 393 F.3d 669, 673, 675–76 (6th Cir. 2005) (reversing conviction for private individual who solicited $16,000 to fix a criminal case because, "[i]n this circuit, a private citizen who is not in the process of becoming a public official may be convicted of Hobbs Act extortion under the 'color of official right' theory only if that private citizen either conspires with, or aids and abets, a public official").

104. *Rashad*, 687 F.3d at 643.

105. *Margiotta*, 688 F.2d at 112, 131.

106. *Id.* at 131.

107. 529 F.2d 1033, 1035 (7th Cir. 1976).

108. *Meyers*, 529 F.2d at 1036.

109. *Id.* at 1038. The government in the candidates' case from the Third Circuit, *see supra* notes 78–80 and accompanying text, tried to rely on *Meyers*. The Third Circuit rejected that argument because the defendants in *Manzo* lost their election. United States v. Manzo, 636 F.3d 56, 68–69 (3d Cir. 2011).

longer in office.[110] The court held it was "immaterial" that he was no longer in office because "[o]ne who is not himself a public official may extort money under color of official right if he purports to exercise influence over those who are public officials."[111] Similarly, the Eastern District of Pennsylvania upheld the conviction of a former tax assessor who accepted payments after he had left office.[112] In the Middle District of Pennsylvania, defendants challenged an indictment because the government had failed to prove they were members of a school board.[113] The court deemed this fact immaterial, effectively endorsing application of official-right extortion to private citizens.[114]

The Northern District of Illinois has provided the most explicit endorsement of applying the Hobbs Act to private citizens who have never been public officials, are not planning to be public officials, and are not conspiring with public officials. In *United States v. Phillips*, the court upheld the indictment of a private attorney for attempted extortion under color of official right after examining the text, legislative history, and intent of the Hobbs Act.[115] These examples show that courts' approaches vary widely and lack consistency, both in their holdings and their rationales.

## II. The Hobbs Act Should Apply to Private Citizens

This Part argues that as a matter of statutory interpretation, private actors can commit extortion under color of official right. Section II.A argues that the text of the statute—both its contemporary and common-law meanings—supports the application of the Act to private actors under an official-right theory. Section II.B contends that the legislative history further supports this application. Section II.C argues that lower courts should follow the Supreme Court's mandate to interpret the Hobbs Act broadly.

### A. *The Text of the Hobbs Act Supports a Broad Reading*

Statutory interpretation begins with the text of the statute.[116] There is no definition of "under color of official right" in the Hobbs Act,[117] and courts

110. United States v. Lena, 497 F. Supp. 1352, 1359 (W.D. Pa. 1980), *aff'd*, 649 F.2d 861 (3d Cir. 1981).

111. *Id.*

112. United States v. Furey, 491 F. Supp. 1048, 1064, 1068 (E.D. Pa. 1980), *aff'd*, 636 F.2d 1211 (3d Cir. 1980).

113. United States v. Barna, 442 F. Supp. 1232, 1235 (M.D. Pa. 1978), *aff'd*, 578 F.2d 1376 (3d Cir. 1978).

114. *Id.*

115. 586 F. Supp. 1118, 1120 (N.D. Ill. 1984); *see also infra* notes 188–197 and accompanying text.

116. *E.g.*, Muscarello v. United States, 524 U.S. 125, 127 (1998) ("We begin with the statute's language."); *see, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995).

117. 18 U.S.C. § 1951 (2012); United States v. Freeman, 6 F.3d 586, 592 (9th Cir. 1993) ("The Hobbs Act does not define 'under color of official right.'").

have struggled to define the phrase. Because the statute leaves so much to interpretation, courts vary in how they interpret it. For example, some courts hold that the "fear" prong of the Hobbs Act applies to private citizens, while the "official right" prong applies to public officials.[118] The text of the statute, however, does not identify certain classes of individuals who can only be convicted under certain prongs of the Act.

When a statute does not define a term, generally that term is given its ordinary meaning.[119] The ordinary meaning of "under color of official right" might suggest either a guise or appearance of authority, or actual, vested authority. One means of interpreting vague statutory language is to consult a dictionary.[120] *Black's Law Dictionary* suggests that "under color of official right" means the appearance of official power—not actual power. The definition of "color" is "appearance, guise, or semblance; esp., the appearance of a legal claim to a right, authority, or office."[121] Specifically, "[a]cts taken under the color of an office are vested with, *or appear to be vested with*, the authority entrusted to that office."[122] Similarly, *Merriam-Webster's* defines "color" as "a legal claim to or appearance of a right, authority, or office."[123] The "under color" language encompasses those who act under the guise of official right—suggesting that actually holding the authority of an office is not necessary under the Act. Indeed, at least one court has relied on this argument to find that a private individual committed extortion under color of official right.[124]

Interpreting "under color of official right" to mean "under the appearance of official authority" is entirely consistent with the *Evans* Court's interpretation: that the drafters of the Hobbs Act intended the term "extortion" to reflect its common-law meaning.[125] To be sure, commentators and courts have written that only public officials could commit extortion at common law.[126] But one scholar, Professor Lindgren, has argued that private citizens

118. *See, e.g.*, United States v. McClain, 934 F.2d 822, 829–30 (7th Cir. 1991); *see also* Randy J. Curato et al., Note, *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption*, 58 NOTRE DAME L. REV. 1027, 1058 (1983) ("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.").

119. *See, e.g.*, United States v. Santos, 553 U.S. 507, 511 (2008).

120. *See, e.g.*, *id.* at 511; *Muscarello*, 524 U.S. at 128; *Babbitt*, 515 U.S. at 697; Smith v. United States, 508 U.S. 223, 228–29 (1993).

121. *Color*, BLACK'S LAW DICTIONARY (9th ed. 2009).

122. *Id.*, *color of office* (emphasis added).

123. *Color*, MERRIAM-WEBSTER, http:// www . merriam - webster . com / dictionary / color [http://perma.cc/BX4X-8XTC].

124. United States v. Phillips, 586 F. Supp. 1118, 1120–22 (N.D. Ill. 1984). In *Phillips*, the court held that "under color of" suggested a disguise or pretext of authority, and wrote that the statute applies "not only to actual public officials but also to any person purporting to wield effective governmental power." *Id.* at 1121; *see also* United States v. Ray, 690 F. Supp. 508, 511 (M.D. La. 1988) ("On its face, the Hobbs Act does not limit official right extortion to 'public officers.'").

125. *See* Evans v. United States, 504 U.S. 255, 260–64 (1992).

126. Lindgren, *supra* note 15, at 875–76.

could commit extortion at common law.[127] The Supreme Court acknowledged Lindgren's argument in a footnote in *Evans*: "At least one commentator has argued that, at common law, extortion under color of official right could also be committed by a private individual."[128]

Indeed, Lindgren extensively researched prosecutions of private citizens for extortion at common law. He found that the majority of prosecutions at common law were of public officials.[129] But he noted that "on more occasions than can be dismissed as aberrations, early courts prosecuted private individuals for extortion."[130] If Congress adopted the common-law meaning of the term "extortion," it follows that private actors are included, as they were at common law. The Supreme Court could have rendered a conclusion on this but chose not to, indicating a willingness by the Court to at least consider that private actors extort under color of official right. Thus, the text of the statute suggests that private actors may extort under color of official right.

### B. *Legislative History Supports the Application of the Hobbs Act to Private Actors*

The legislative history of the statute, while sparse, also supports the statute's application to private citizens.[131] Most of the floor debate around the bill focused on the bill's impact on organized labor, which meant that legislators barely discussed the color-of-official-right theory.[132] And the floor debate that does exist is difficult to follow.[133] What is clear, however, is that Congress did not explicitly restrict the bill to public officials.[134] Since the legislative history is unclear,[135] however, courts should not rely on it to assume that only public officials can act under color of official right.

The origin of the statute suggests Congress did not intend to restrict official-right extortion to public officials. Congress passed the Hobbs Act as

127. See *id.* at 875–82 for a discussion of extortion by private citizens at common law.

128. *Evans*, 504 U.S. at 264 n.13 (citing Lindgren, *supra* note 15, at 875).

129. Lindgren, *supra* note 15, at 876.

130. *Id.*

131. The Supreme Court often turns to legislative history when the text of the statute is unclear. *See, e.g.*, Muscarello v. United States, 524 U.S. 125, 132 (1998); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 (1995).

132. *See* United States v. Culbert, 435 U.S. 371, 377 (1978) ("The primary focus in the Hobbs Act debates was on whether the bill was designed as an attack on organized labor.").

133. *See* Curato et al., *supra* note 118, at 1058 ("The original intent of Congress regarding who is 'under color of official right' is confusing").

134. *See infra* notes 136–158 and accompanying text.

135. *See* Curato et al., *supra* note 118, at 1058 n.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.").

a successor to the Anti-Racketeering Act of 1934[136] in response to the Supreme Court's decision in *United States v. Local 807 of International Brotherhood of Teamsters*.[137] The Hobbs Act replaced language about the use of force or threats in the Anti-Racketeering Act with prohibitions against robbery and extortion.[138] Some of the new language about extortion came from a proposed penal code known as the Field Code.[139] Other areas of the new statute borrowed language from a separate code, the Penal Code of New York.[140] The New York provision only applied official-right extortion to public officials, but the Field Code provided that anyone could commit extortion under color of official right.[141] The eventual Hobbs Act mirrored the language from the Field Code and omitted the language from the New York code that limited official-right extortion to public officials.[142]

The statements of members of Congress at the time the bill passed also demonstrate that the Act was not restricted to those with actual authority. The sponsor of the bill, Congressman Samuel Hobbs, explained that actual authority is not a requirement for conviction of extortion under color of official right.[143] During a debate about an early version of the bill,[144] Congressman Stephen Day moved to delete the official-right language, an amendment that provoked "five minutes of confused and inconsistent debate."[145] Day asked if color of official right would apply to an initiation fee for a union.[146] The exchange then went as follows:

> Mr. HOBBS. Certainly not. "Color of official right" means absence of right but pretended assertion of right.

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136. Henning & Radek, *supra* note 28, at 107.

137. United States v. Local 807 Int'l Bhd. of Teamsters, 315 U.S. 521 (1942), *superseded by statute, 18 U.S.C. § 1951 (2012), as recognized in* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003); Henning & Radek, *supra* note 28, at 107. Teamsters looking for work were attacking farmers as they crossed into New York. Lindgren, *supra* note 15, at 889. This was not considered extortion because the truckers were seeking wages, a loophole in the Anti-Racketeering Act. *See id.*

138. United States v. Culbert, 435 U.S. 371, 377 (1978).

139. Lindgren, *supra* note 15, at 889–90.

140. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 403 (2003).

141. Lindgren, *supra* note 15, at 899–900.

142. *See id.* at 899 ("Congress, however, did not enact the language of the New York statute limiting extortion under color of official right to public officials."); Jeremy N. Gayed, Note, *"Corruptly": Why Corrupt State of Mind Is an Essential Element for Hobbs Act Extortion Under Color of Official Right*, 78 Notre Dame L. Rev. 1731, 1757 (2003) ("The Field Code's definition of extortion is almost identical to the corresponding language in the Hobbs Act extortion provision."); *see also* Stern, *supra* note 61, at 12 ("While it is clear that the definition of extortion contained in the Hobbs Act was similar to the New York statute, it is equally clear that the Congress did not intend to rely solely on the New York law." (footnotes omitted)).

143. 89 Cong. Rec. 3228–29 (1943).

144. The 1943 version of the bill passed the House but not the Senate. *See* United States v. French, 628 F.2d 1069, 1073 n.4 (8th Cir. 1980).

145. Lindgren, *supra* note 15, at 890.

146. 89 Cong. Rec. 3228.

> Mr. DAY. I know; but what do the words "official right" mean?
>
> Mr. HOBBS. The same thing.
>
> Mr. DAY. It has not got to be by some authority?
>
> Mr. HOBBS. In other words, you pretend to be a police officer, you pretend to be a deputy sheriff, but you are not.
>
> Mr. DAY. I think the change should be made that I have mentioned.
>
> Mr. HOBBS. It could not possibly apply if there were any bona fide right; it applies only to pretended right.[147]

Although Hobbs is likely referring to someone impersonating a public official, the statement allows for a few inferences, based on Hobbs's sponsorship of the bill. First, Congress did not intend the Act to apply exclusively to public officials. Otherwise, Hobbs's example would not work—an actual public official could not impersonate one. And second, Hobbs was not concerned with the extortioner's actual authority, but rather the *impression* of authority that the extortioner created. Courts have largely ignored the significance of these statements when interpreting the Hobbs Act. Only a handful of courts have considered them, and those that have do not afford them much weight.[148] The Seventh Circuit, for example, wrote that Hobbs's statement was not dispositive because it was "completely at odds with the accepted interpretation of the term both before and after the Hobbs Act was enacted."[149] But the accepted interpretation of the term "under color of official right" is hardly concrete,[150] especially since prosecutors have only used that particular prong of the statute since the 1970s.[151]

Even the floor debate about organized labor refutes the argument that Congress intended any part of the Hobbs Act to apply only to certain individuals. For example, Congressman William Whittington said the bill was to prevent violence by members of labor unions against truck drivers: "It punishes extortion and robbery no matter by whom committed."[152] Similarly,

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147. *Id.* at 3228–29. Professor Lindgren notes that this exchange provides further support for the argument that the color of official right Hobbs Act language was taken from the Field Code, which authorized extortion by private actors, rather than the New York Penal Code, which did not. Lindgren, *supra* note 15, at 890.

> Hobbs could not have been talking intelligently about New York law. If New York law were intended, the one example Hobbs gave to illustrate official right extortion would not have been official right extortion. . . .
>
> . . . Only by taking this historical approach could Congress interpret the official right language of the Hobbs Act as applying to private individuals as Congress obviously thought it was doing.

*Id.* at 890–91.

148. *E.g.*, *French*, 628 F.2d at 1073 n.4 ("The brief debate that occurred in 1943, however, was not clear enough to be determinative of the scope of the 'color of official right' language . . . .").

149. United States v. Abbas, 560 F.3d 660, 663 n.3 (7th Cir. 2009).

150. *See supra* note 117 and accompanying text.

151. *See supra* notes 45–49 and accompanying text.

152. 91 Cong. Rec. 11,913 (1945).

Congressman Raymond Springer noted that "there is nothing in this legislation which relates to labor. Labor is not mentioned in the bill. It applies to every American citizen."[153] These statements suggest that the key players involved in the passage of the Hobbs Act never intended the Act to treat separate classes of people differently, regardless of whether the defendants were members of labor unions or public officials. Although Congress did not focus on the color-of-official-right theory when voting on the bill, the bill's legislative history nonetheless proves ambiguous. Therefore, the legislative history can reasonably be interpreted to show that the Hobbs Act applies not only to public officials but to those acting under the pretense of public authority as well.

### C. *The Supreme Court Construes the Hobbs Act Broadly*

Finally, the Supreme Court has explicitly stated that courts should interpret the Hobbs Act broadly, which supports expanding its application to private citizens.[154] In *United States v. Culbert*, the Court considered whether the fear prong of the Hobbs Act required the government to prove racketeering as an element, which would have imposed an additional burden on prosecutors and limited the conduct that the Hobbs Act criminalizes.[155] The Court found that the legislative history and purpose of the statute indicated that the Act should not be limited. Rather, the court concluded, the Act's language sweeps broadly, including "all persons who have . . . 'affect[ed] commerce . . . by robbery or extortion.'"[156] The Court found that "the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language."[157]

In other words, the Court declined to make it more difficult for prosecutors to charge the Hobbs Act, because the Hobbs Act is meant to apply broadly. To be sure, *Culbert* is distinguishable because "racketeering" is not in the Hobbs Act, whereas "extortion . . . under color of official right" is in the text of the statute.[158] Also, the Court was considering the extortion-by-fear prong of the statute.[159] Still, *Culbert* shows the Court generally encourages a broad reading of the Hobbs Act. And lower courts that have extended official-right extortion to non-elected officials have relied in part on this case.[160] The Ninth Circuit, for example, used it to hold that a non-elected

153. *Id.* at 11,911.

154. *See* United States v. Culbert, 435 U.S. 371, 380 (1978).

155. *Id.* at 372.

156. *Id.* at 373 (alteration in original) (quoting 18 U.S.C. § 1951(a) (1976)).

157. *Id.* at 380; *see also* Stirone v. United States, 361 U.S. 212, 215 (1960) ("[The Hobbs] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.").

158. 18 U.S.C. § 1951(b)(2) (2012).

159. *Culbert*, 435 U.S. at 372.

160. *See, e.g.*, United States v. Freeman, 6 F.3d 586, 593 (9th Cir. 1993).

legislative aide could be charged with official-right extortion,[161] while the First Circuit upheld the conviction of a private citizen who aided and abetted a public official in part based on *Culbert*.[162]

Congress intended the Hobbs Act to apply broadly, to sweep in a wide array of criminal conduct—"*all conduct* within the reach of the statutory language."[163] Based on the absence of the words "public official" in the statute, and the use of the word "color" to suggest a guise of—as opposed to actual—authority, extortion by private officials falls "within the reach of the statutory language."[164]

Taken together, these factors indicate that courts should interpret the Hobbs Act to apply to private citizens as well as public officials. The statute's plain language and legislative history, Congress's intent, and the Supreme Court's explicit instruction to interpret the Hobbs Act broadly, all make it so, as a statutory matter, it is entirely consistent to apply the statute to private officials who nevertheless sell the public trust.

## III. The Reasonable-Impression Test Should Apply in All Official-Right Extortion Cases

Private citizens who wield influence over public actions should be covered under the Hobbs Act, regardless of whether they are technically public officials or not. The current practice of finding otherwise creates inconsistent results, especially in cases in which both public officials and private citizens create the false impression that they have the ability to influence a government action but courts only uphold convictions for public officials. Moreover, private citizens who solicit bribes in return for influencing government undermine the public's faith in government just as much as a public official's doing so.

This Part argues that the test courts use to apply the Hobbs Act to public officials who do not have actual authority to deliver the action they promise is the same test that courts should apply to private citizens. Section III.A discusses courts' applications of a reasonable-impression test in cases dealing with public officials, highlighting that public officials need not have actual authority to be convicted under the Hobbs Act. Section III.B analyzes courts' applications of a similar reasonable-impression test in cases not involving public officials. Section III.C concludes that, because both public officials and private citizens can create the impression of influence regardless of their actual authority, the same reasonable-impression test should apply to each group.

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161. *Id.*

162. United States v. Casiano, No. 93-1782, 1994 WL 283909, at *4 (1st Cir. June 24, 1994) (per curiam) (upholding conviction because the conduct "clearly fell within the relevant statutory language").

163. *Culbert*, 435 U.S. at 380 (emphasis added).

164. *Id.*

### A. *Public Officials and the Reasonable-Impression Test*

To be convicted of a Hobbs Act violation, a public official need not have any actual authority to carry out the action he promises.[165] In cases against public officials, courts focus on the exploitation of the victim's belief.[166] If the victim reasonably believes the public official has the ability to influence the promised action, the public official is acting under color of official right, regardless of his actual authority. "[T]he issue is whether the payer had a reasonable belief about the official's authority to engage in the promised conduct and not the actual scope of the official's authority."[167]

This principle as applied to public officials stems from *United States v. Mazzei*,[168] a seminal Third Circuit case decided en banc. Every other circuit has since adopted this principle.[169] In *Mazzei*, a state senator accepted a bribe to fix a state lease, which he had no actual authority to do. The Third Circuit upheld his conviction, ruling that the jury only needed to find that the victim "held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the effective authority."[170]

Examples of how the reasonable-impression test works in practice may prove illuminating. The Sixth Circuit upheld a Hobbs Act conviction for a defendant who offered to sell a copy of a licensing examination to two applicants for $300.[171] Although the defendant had no power to actually issue such licenses, the court upheld his conviction because the applicants believed "they were in effect purchasing a broker's license."[172] Likewise, the Seventh Circuit upheld the color-of-official-right conviction of a county recorder of deeds in Indiana, who promised, among other things, to help an FBI informant sign a Purge of Lien Notice for $400.[173] Drafting Purge of

165. United States v. Mazzei, 521 F.2d 639, 643 (3d Cir. 1975) (en banc).

166. *See infra* notes 169–170 and accompanying text; *see also* HENNING & RADEK, *supra* note 28, at 119 ("The understanding of the victim is crucial when the defendant does not have actual authority over the exercise of governmental authority but claims the ability to effectuate a decision in favor of the payers in exchange for a payment.").

167. HENNING & RADEK, *supra* note 28, at 119.

168. 521 F.2d 639.

169. *See, e.g.*, United States v. Harding, 563 F.2d 299, 306 (6th Cir. 1977) ("The law is well settled that an official need not have the *de jure* power to effectuate the end for which he accepts or induces payment in order to be convicted under the Hobbs Act."); United States v. Hall, 536 F.2d 313, 320 (10th Cir. 1976) ("[I]t is unnecessary that the accused have absolute power to determine the issue. It is sufficient that it is within his jurisdiction (the scope of his office) and that the victim has a reasonable belief that he does have the power."); United States v. Hathaway, 534 F.2d 386, 394 (1st Cir. 1976) ("The relevant question was whether [the defendant] imparted and exploited a reasonable belief that he had effective influence over the award of Authority contracts.").

170. *Mazzei*, 521 F.2d at 643.

171. *Harding*, 563 F.2d at 301, 307.

172. *Id.* at 307.

173. United States v. Carter, 530 F.3d 565, 567–69, 574–75 (7th Cir. 2008).

Lien Notices was not an actual part of the recorder's job duties.[174] But the court found that whether the acts fell within the Recorder of Deeds's responsibilities in fact was "irrelevant"[175] because the victim "reasonably believed that [the defendant] could deliver these items based on his position."[176]

Courts have expanded this principle to cover influence over official action. That is, if the victim knows the person accepting the payment does not have effective authority, but believes the person can merely *influence* an official action, the victim's belief in the public official's mere influence is sufficient to sustain a conviction under the Hobbs Act.[177] The Third Circuit, for example, upheld the conviction of a mayor who accepted a bribe to affect a school board contract.[178] The victim knew the mayor had no actual authority over the school board. But the victim believed that the mayor could influence the school board, and this belief was enough to sustain the mayor's conviction.[179] The court explained:

> [W]here a public official has, and agrees to wield, influence over a governmental decision in exchange for financial gain, or where the official's position could permit such influence, and the victim of an extortion scheme reasonably *believes* that the public official wields such influence, that is sufficient to sustain a conviction under the Hobbs Act, regardless of whether the official holds any *de jure* or *de facto* power over the decision.[180]

The victim's reasonable belief of mere influence is sufficient to sustain a conviction under the Hobbs Act.[181] The Sixth, Seventh, and Eighth Circuits have also expanded the *Mazzei* test in this way.[182]

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174. *Id.* at 574.

175. *Id.*

176. *Id.* at 575.

177. *See, e.g.*, United States v. Bencivengo, 749 F.3d 205, 212–13 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 236 (2014).

178. *Id.*

179. *Id.* at 212.

180. *Id.* at 212–13.

181. *Id.*; *see also* United States v. Fountain, 792 F.3d 310, 317 (3d Cir. 2015) ("We will uphold a conviction for Hobbs Act extortion where the evidence indicates (1) that the payor made a payment to the defendant because the payor held a reasonable belief that the defendant would perform official acts in return, and (2) that the defendant knew the payor made the payment because of that belief.").

182. *See, e.g.*, United States v. Loftus, 992 F.2d 793, 795–96 (8th Cir. 1993) (upholding conviction of a county commissioner who accepted $25,000 from an undercover FBI agent to enact a city zoning change because, although he did not have actual authority over the city zoning board, he had "influence and authority over a means to that end"); United States v. Blackwood, 768 F.2d 131, 135–36 (7th Cir. 1985) (affirming the conviction of a court police officer who accepted bribes from an FBI agent to influence judicial decisions, because a jury could have found that the agent reasonably believed the officer could influence judicial decisions); United States v. Bibby, 752 F.2d 1116, 1119, 1128 (6th Cir. 1985) (upholding conviction of state senator who accepted bribes for brokering a county contract because he said he had "influence" in that county).

### B. *Private Actors and the Reasonable-Impression Test*

Courts have adopted some of this logic in analyzing cases dealing with private citizens. For example, when the Ninth Circuit upheld the conviction of the California legislative aid, the court actually applied the reasonable-impression test to public employees: "[W]e conclude that the Hobbs Act reaches those public employees who may lack the actual power to bring about official action, but create the reasonable impression that they do possess such power and seek to exploit that impression to induce payments."[183]

Some courts have applied the reasonable-impression test without explicitly adopting the standard. The Fifth Circuit, for example, upheld a conviction for a bail bondsman who extorted a bribe from a motorist.[184] The bail bondsman was also a town alderman.[185] The court concluded that because the driver *believed* the bail bondsman could fix his ticket, the bail bondsman was acting under color of official right.[186] The court based its decision on the victim's belief, not on the bail bondsman's status in fact as a public official.[187]

In clearer terms than other district courts, the Northern District of Illinois explicitly adopted the reasonable-impression test for private individuals.[188] In *United States v. Phillips*, a private attorney, who was appointed guardian ad litem and later as trustee in a state court matter, told another attorney that a decision favorable to his client could be obtained for $10,000.[189] He was indicted for attempted extortion under color of official right and moved to dismiss the indictment.[190]

The *Phillips* court examined the text, legislative history, and legislative intent of the Act. The court wrote that on its face, the Hobbs Act does not contain class limitations—rather it applies to "whoever" affects commerce by extortion, a broad phrasing.[191] On the legislative history, the court noted that another statute in effect at the time Congress passed the Hobbs Act prohibited extortion under color of office by federal employees acting under their office, "or *under color of his pretended or assumed office*."[192] This demonstrates, the court wrote, that Congress had already recognized that a private person could commit extortion under color of official right.[193]

183. United States v. Freeman, 6 F.3d 586, 593 (9th Cir. 1993).

184. United States v. Stephens, 964 F.2d 424, 426, 430 (5th Cir. 1992).

185. *Id.* at 429.

186. *Id.* at 430.

187. *Id.*

188. *See* United States v. Phillips, 586 F. Supp. 1118, 1122–23 (N.D. Ill. 1984).

189. *Id.* at 1119.

190. *Id.*

191. *Id.* at 1120–21.

192. *Id.* at 1121 (quoting Act of June 28, 1906, ch. 3574, § 5481, 34 Stat. 546).

193. *Id.*

Addressing the common-law argument, the court wrote that Congress intended the Hobbs Act to apply more broadly than the common law.[194] From a legislative history perspective, "[t]he statute's legislative sponsors repeatedly emphasized that the purpose of the bill was to punish all forms of extortive conduct which affected commerce in any way."[195] Ultimately, the *Phillips* court wrote that the test should be "whether the extortion victim reasonably believed that the defendant was in a position to wield governmental power to the victim's detriment."[196] The court rejected any "public official-private citizen distinction."[197]

Other district courts have also used the reasonable-impression test to uphold convictions of private citizens. The Middle District of Pennsylvania used the reasonable-impression test when defendants argued that the government had failed to prove they were members of a school board.[198] The court wrote that there was still evidence to convict them under color of official right because the victim thought the defendants could secure the contract.[199] In other words, the defendants' status as public officials was irrelevant, as long as the victims believed in the defendants' influence.[200] Likewise, the Eastern District of Pennsylvania applied this test to a private citizen, a former tax assessor, who continued to take bribes after leaving office.[201] The government needed to prove only that the victim "reasonably believed" the former public employee had the ability.[202] The court explained that "[t]he issue does not turn on the present official status of the defendant or whether he has the *de jure* power to carry out his extortion plan."[203]

Although the majority of courts that have considered this issue have opted not to apply the Hobbs Act to private citizens, a handful of courts have applied the reasonable-impression test to private citizens. These cases add further support to the application of the Hobbs Act to private citizens.

### C. *The Public/Private Distinction Leads to Logical Inconsistency*

This Subsection considers counterarguments, but concludes that the logic of the reasonable-impression test should explicitly animate all Hobbs Act color-of-official-right cases. The common theme in these cases is not that a public official had authority *in fact*, but that the victim *believed* the

194. *Id.* The case was decided in 1984, pre-*Evans*.

195. *Id.*

196. *Id.* at 1122; *see also id.* at 1123.

197. *Id.* at 1122.

198. *See* United States v. Barna, 442 F. Supp. 1232, 1235 (M.D. Pa. 1978).

199. *Id.*

200. *See id.*

201. *See* United States v. Furey, 491 F. Supp. 1048, 1066 (E.D. Pa. 1980).

202. *Id.*

203. *Id.* at 1067.

person could take—or even influence—an official action.[204] Since both public officials and private citizens can create the impression of influence, the test should be universal regardless of actual authority.

Some might argue that reading the Hobbs Act broadly would implicate lobbyists, who essentially accept money from clients in return for influence over government officials. But several factors distinguish lobbying from extortion and bribery. First, lobbyists advocate for legislators to take actions that are legal, such as changing the laws through the legislative process.[205] By contrast, consider violators of the Hobbs Act: public officials who try to deliver permits,[206] steer contracts,[207] and deliver licenses to those who have not earned them.[208] In all of these examples, the extortioner is promising improper government action—as Lindgren puts it, extorting a "corrupt payment."[209] Also, lobbying is regulated[210] and thus is at least somewhat transparent, whereas extortion is, of course, not.

Also, courts have read a quid pro quo requirement into the Hobbs Act. In *McCormick v. United States*, the Supreme Court held that when the payment at issue is a campaign contribution, there must be a quid pro quo, meaning the public official must make an "explicit promise or undertaking" to perform or not perform an official act.[211] It is unclear whether the Court intended a quid pro quo requirement to apply to cases outside of campaign contributions, but many courts have interpreted *McCormick* as requiring a quid pro quo in all official-right extortion cases.[212] And the *Evans* Court described a similar quid pro quo, noting that the Hobbs Act covers a public official who "has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[213] Thus a lobbyist's conduct would only fall under the Hobbs Act, even under the reasonable-

204. *See supra* notes 165–182 and accompanying text.

205. Bård Harstad & Jakob Svensson, *Bribes, Lobbying, and Development*, 105 Am. Pol. Sci. Rev. 46, 46 (2011) ("We define lobbying, taking the form of campaign contributions or influence-buying through other means, as an activity that is aimed at *changing* existing rules or policies. We view bribery, in contrast, as an attempt to *bend* or *get around* existing rules or policies."); *see also* Michael Maiello, *Corruption, American Style*, Forbes (Jan. 22, 2009, 6:00 PM), http://www.forbes.com/2009/01/22/corruption-lobbying-bribes-biz-corruption09-cx_mm_0122maiello.html [http://perma.cc/KV3T-DBTV] ("A briber wants a [sic] to circumvent the law. A lobbyist wants to change it.").

206. *See supra* notes 4–6 and accompanying text.

207. *See supra* notes 78, 95–96, 178 and accompanying text.

208. *See supra* note 171 and accompanying text.

209. James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. Pa. L. Rev. 1695, 1696 (1993) ("Historically, extortion under color of office is the seeking or receipt of a corrupt payment by a public official (or a pretended public official) because of his office or his ability to influence official action.").

210. Harstad & Svensson, *supra* note 205, at 46.

211. 500 U.S. 257, 273 (1991).

212. Strader, *supra* note 16, at 171.

213. Evans v. United States, 504 U.S. 255, 268 (1992).

impression test, if the lobbyist made an explicit promise to deliver an improper government action in return for a payment.[214]

Moreover, some courts argue that public officials and private citizens should be treated differently because the misuse of office in and of itself satisfies the element of coercion.[215] The Seventh Circuit, for example, wrote that public officials have a special brand of criminal liability because victims are especially vulnerable to those holding public office.[216] But this distinction does not hold up under the reasonable-impression test, which universally animates courts' jurisprudence on public-official cases.[217] If the victim believes the extortioner has the ability to influence official action, the reasonable-impression test is satisfied. In private-citizen cases, the victim either thinks the extortioner *is* a public official,[218] or believes that the extortioner can influence official action.[219] The effect on the victim is the same. Moreover, the effect on society is the same—in both cases, the public loses faith in government because it believes official results are for sale.

These arguments against expanding the Hobbs Act are outweighed by a simple fact: the judge-created distinction between private actors and public officials leads to inconsistency in the law for similarly culpable actors. For example, on the public official side, the New Jersey mayor had no authority over the school board but was convicted under the Hobbs Act.[220] The legislative aide in California had no power over legislation but created the reasonable impression that he could move a bill to the governor's desk.[221] The executive director of the real estate board had no power to issue licenses but was convicted, because the victims thought they were buying a real estate license.[222] And the Indiana official who had no power over Purge of Lien Notices was convicted because his victim reasonably believed he could deliver.[223]

Yet Monte McFall, who also wielded influence over a public official—his friend—was not convicted. Likewise, in *Tomblin*, the businessman who purported to influence a U.S. Senator in return for $250,000 was not convicted

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214. Of course, there are some who believe that lobbying *is* the same as bribery. *E.g.*, Maiello, *supra* note 205 (statement of former Secretary of Labor Robert Reich) ("What's the real difference between me bribing a customs agent so that I can bring a banned substance into the country or me contributing money to a senator and then cajoling him into making the substance legal for import? . . . Frankly, I don't see much difference.").

215. *See e.g.*, United States v. Manzo, 636 F.3d 56, 65 (3d Cir. 2011) (*quoting* United States v. Hathaway, 534 F.2d 386, 393 (1st Cir. 1976)).

216. United States v. Abbas, 560 F.3d 660, 664 (7th Cir. 2009).

217. *See supra* notes 165–182 and accompanying text.

218. *See Abbas*, 560 F.3d at 661.

219. *See, e.g.*, *id.* at 664; United States v. McFall, 558 F.3d 951, 953 (9th Cir. 2009); United States v. Tomblin, 46 F.3d 1369, 1383 (5th Cir. 1995); United States v. McClain, 934 F.2d 822, 830 (7th Cir. 1991).

220. *See supra* text accompanying notes 177–181.

221. *See supra* text accompanying notes 100–102.

222. *See supra* text accompanying notes 171–172.

223. *See supra* text accompanying notes 173–176.

of extortion because he only wielded "unofficial power."[224] And in the Seventh Circuit, a private individual who "colorfully boasted" about his influence over public officials was not convicted of official-right extortion.[225]

In all of these examples, the defendant lacked actual authority over the action he accepted money to undertake. The defendants all created, and exploited, their victims' beliefs that public officials or actions could be bought. Yet courts upheld some of these convictions and not others. The only distinction is that some are public officials or employees and some are not.

## Conclusion

When courts interpret the Hobbs Act, they require individuals acting under the "color of official right" to be public officials, or have aided and abetted public officials. But this restriction does not appear in either the text or history of the Hobbs Act. As a result of this loophole, private individuals who leverage their influence over government officials and actions escape punishment for extortion. To solve this problem, courts should interpret the Hobbs Act broadly and expand the reasonable-impression test to explicitly include private citizens.

Federal prosecutors should be able to wield the Hobbs Act against any person who creates and exploits the belief that he has the ability to influence official action. Regardless of the person's status as a public official or private sidekick, that person is acting under the guise of official right and should be charged accordingly.

224. *See supra* text accompanying notes 93–94.

225. *See supra* text accompanying notes 96–97.