SUPREME COURT OF THE UNITED STATES

No. 90–6105

JOHN H. EVANS, JR., PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May 26, 1992]

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

The Court gives a summary of its decision in these words: "We hold today 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." *Ante*, at ___. In my view the dissent is correct to conclude that this language requires a *quid pro quo* as an element of the Government's case in a prosecution under 18 U. S. C. §1951, see *post*, at ___, and the Court's opinion can be interpreted in a way that is consistent with this rule. Although the Court appears to accept the requirement of a *quid pro quo* as an alternative rationale, in my view this element of the offense is essential to a determination of those acts which are criminal and those which are not in a case in which the official does not pretend that he is entitled by law to the property in question. Here the prosecution did establish a *quid pro quo* that embodied the necessary elements of a statutory violation. I join part III of the Court's opinion and concur in the judgment affirming the conviction. I write this separate opinion to explain my analysis and understanding of the statute.

With regard to the question whether the word "induced" in the statutory definition of extortion applies to the phrase

"under color of official right," 18 U. S. C. §1951(b)(2), I find myself in substantial agreement with the dissent. Scrutiny of the placement of commas will not, in the final analysis, yield a convincing answer, and we are left with two quite plausible interpretations. Under these circumstances, I agree with the dissent that the rule of lenity requires that we avoid the harsher one. See *post*, at ___. We must take as our starting point the assumption that the portion of the statute at issue here defines extortion as "the obtaining of property from another, with his consent, induced . . . under color of official right."

I agree with the Court, on the other hand, that the word "induced" does not "necessarily indicat[e] that the transaction must be *initiated* by the" public official. *Ante*, at ___ (emphasis in original). Something beyond the mere acceptance of property from another is required, however, or else the word "induced" would be superfluous. That something, I submit, is the *quid pro quo*. The ability of the official to use or refrain from using authority is the "color of official right" which can be invoked in a corrupt way to induce payment of money or to otherwise obtain property. The inducement generates a *quid pro quo*, under color of official right, that the statute prohibits. The term "under color of" is used, as I think both the Court and the dissent agree, to sweep within the statute those corrupt exercises of authority that the law forbids but that nevertheless cause damage because the exercise is by a governmental official. Cf. *Monroe* v. *Pape*, 365 U. S. 167, 184 (1961) ("`Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken `under color of' state law'") (quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941)).

The requirement of a *quid pro quo* means that without pretense of any entitlement to the payment, a public official violates §1951 if he intends the payor

to believe that absent payment the official is likely to abuse his office and his trust to the detriment and injury of the prospective payor or to give the prospective payor less favorable treatment if the *quid pro quo* is not satisfied. The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.

The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor. See *McCormick* v. *United States*, 500 U. S. ___, ___ (1991) ("It goes without saying that matters of intent are for the jury to consider"). In this respect a prosecution under the statute has some similarities to a contract dispute, with the added and vital element that motive is crucial. For example, a *quid pro quo* with the attendant corrupt motive can be inferred from an ongoing course of conduct. Cf. *United States* v. *O'Grady*, 742 F. 2d 682, 694 (CA2 1984) (Pierce, J., concurring). In such instances, for a public official to commit extortion under color of official right, his course of dealings must establish a real understanding that failure to make a payment will result in the victimization of the prospective payor or the withholding of more favorable treatment, a victimization or withholding accomplished by taking or refraining from taking official action, all in breach of the official's trust. See Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. Rev. 815, 887–888 (1988) (observing that the offense of official extortion has always focused on public corruption).

Thus, I agree with the Court, that the *quid pro quo* requirement is not simply made up, as the dissent asserts. *Post*, at ___. Instead, this essential element of the offense is derived from the statutory requirement that the official receive payment under color of official right, see *ante*, at ___, n. 20, as well as the inducement requirement. And there are additional principles of construction which justify this interpretation. First is the principle that statutes are to be construed so that they are constitutional. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988), and cases cited therein. As one Court of Appeals Judge who agreed with the construction the Court today adopts noted, "the phrase `under color of official right,' standing alone, is vague almost to the point of unconstitutionality." *United States* v. *O'Grady*, , *supra*, at 695 (Van Graafeiland, J., concurring in part and dissenting in part) (citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498–499 (1982)). By placing upon a criminal statute a narrow construction, we avoid the possibility of imputing to Congress an enactment that lacks necessary precision.

Moreover, the mechanism which controls and limits the scope of official right extortion is a familiar one: a state of mind requirement. See *Morissette* v. *United States*, 342 U. S. 246 (1952) (refusing to impute to Congress the intent to create a strict liability crime despite the absence of any explicit *mens rea* requirement in the statute). Hence, even if the *quid pro quo* requirement did not have firm roots in the statutory language, it would constitute no abuse of judicial power for us to find it by implication.

Morissette legitimates the Court's decision in an additional way. As both the Court and the dissent agree, compare *ante*, at ___ with *post*, at ___, n. 5, Congress' choice of the phrase "under color of official right" rather than "by colour of his office" does not

reflect a substantive modification of the common law. Instead, both the Court and dissent conclude that the language at issue here must be interpreted in light of the familiar principle that absent any indication otherwise, Congress meant its words to be interpreted in light of the common law. *Morissette*, *supra*, at 263. As to the meaning of the common law, I agree with the Court's analysis, and therefore join part III of the Court's opinion.

While the dissent may well be correct that prior to the enactment of the Hobbs Act a large number of the reported official extortion cases in the United States happened to involve false pretenses, those cases do not so much as hint that a false pretense of right was ever considered as an essential element of the offense. See, *e.g.*, *People* v. *Whaley*, 6 Cow. 661, 663–664 (N.Y. Sup. Ct. 1827) ("Extortion signifies, in an enlarged sense, any oppression under color of right. In a stricter sense, it signifies the taking of money by any officer, by color of his office; either, where none at all is due, or not so much due, or when it is not yet due"); *Hanley* v. *State*, 125 Wis. 396, 104 N.W. 57, 59 (1905) ("The common-law offense of extortion is said `to be an abuse of public justice, which consists in any officer's unlawfully taking by color of his office, from any man, any money or thing of value that is not due him, or more than is due him, or before it is due") (quoting W. Blackstone, 4 Commentaries 141). Furthermore, as the Court demonstrates, see *ante*, at ___, during the same period other American courts affirmed convictions of public officials for extortion based upon corrupt receipt of payment absent any claim of right.

Morissette is relevant in one final respect. As I have indicated, and as the jury instructions in this case made clear, an official violates the statute only if he agrees to receive a payment not due him in exchange for an official act, knowing that he is not entitled to the payment. See App. 13 (requiring "wrongful use of

otherwise valid official power"). Modern courts familiar with the principle that only a clear congressional statement can create a strict liability offense, see *Morissette*, *supra*, understand this fundamental limitation. I point it out only because the express terms of the common law definition of official extortion do not state the requirement that the official's intent be corrupt, see, *e.g.*, *Whaley*, *supra*, at 663–664; *Hanley*, *supra*, at 401–402, 104 N.W., at 59; Lindgren, *supra*, at 870–871 (setting forth six colonial-era definitions of official extortion), and some courts in this country appear to have taken the view that the common-law offense had no *mens rea* requirement. See, *e.g.*, *Commonwealth* v. *Bagley*, 7 Pick. 279, 281 (Mass. 1828) (affirming the conviction "of an honest and meritorious public officer, who by misapprehension of his rights [had] demanded and received a lawful fee for a service not yet performed"). On the other hand, in other jurisdictions corrupt motive was thought to be an element of the offense. *E.g.*, *Whaley*, *supra*, at 664 (remarking that the jury found that the defendant accepted payment "with the corrupt intent charged in the indictment"). In any event, even if the rule had been otherwise at common law, our modern jurisprudence would require that there be a *mens rea* requirement now. In short, a public official who labors under the good-faith but erroneous belief that he is entitled to payment for an official act does not violate the statute. That circumstance is not, however, presented here.

The requirement of a *quid pro quo* in a §1951 prosecution such as the one before us, in which it is alleged that money was given to the public official in the form of a campaign contribution, was established by our decision last term in *McCormick* v. *United States*, 500 U. S. ___ (1991). Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies not only in campaign contribution cases, but

all §1951 prosecutions. That is as it should be, for, given a corrupt motive, the *quid pro quo*, as I have said, is the essence of the offense.

Because I agree that the jury instruction in this case complied with the *quid pro quo* requirement, I concur in the judgment of the Court.