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 THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The Court's analysis is based on the premise, with which I fully agree, that when Congress employs legal terms of art, it ```knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind.''' *Ante*, at 4 (quoting *Morissette* v. *United States*, 342 U. S. 246, 263 (1952)). Thus, we presume, Congress knew the meaning of common-law extortion when it enacted the Hobbs Act, 18 U. S. C. §1951. Unfortunately, today's opinion misapprehends that meaning and misconstrues the statute. I respectfully dissent.

Extortion is one of the oldest crimes in Anglo-American jurisprudence. See 3 E. Coke, Institutes *541. Hawkins provides the classic common-law definition: ``[I]t is said, that Extortion in a large Sense signifies any Oppression *under Colour of Right*; but that in a strict Sense it signifies the Taking of Money by any Officer, *by Colour of his Office*, either where none at all is due, or not so much is due, or where it is not yet due.'' 1 W. Hawkins, Pleas of the Crown 170 (2d ed. 1724) (emphasis added). Blackstone echoed that definition: ``[E]xtortion is an abuse of public justice, which consists in any 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.'' 4 W. Blackstone, Commentaries on the Laws of England 141 (1769) (emphasis added).

These definitions pose, but do not answer, the critical question: what does it mean for an official to take money ``by colour of his office''? The Court fails to address this question, simply assuming that common-law extortion encompassed *any* taking by a public official of something of value that he was not ``due.'' *Ante*, at 4–5.

The ``under color of office'' element of extortion, however, had a definite and well-established meaning at common law. ``At common law it was essential that the money or property be obtained under color of office, *that is, under the pretense that the officer was entitled thereto by virtue of his office*. The money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority.'' 3 R. Anderson, Wharton's Criminal Law and Procedure §1393, pp. 790–791 (1957) (emphasis added).[1] Thus,

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[1]That was straightforward black-letter law at the time the Hobbs Act was passed in 1946, and continues to be straightforward black-letter law today. See, *e.g.*, 1 W. Burdick, Law of Crime §275, p. 395 (1946) (``At common law, the money or other thing of value must be taken under color of office. That is, the service rendered, or to be rendered, or pretended to have been rendered, must be apparently, or pretended to be, *within official power or authority, and the money must be taken in such an apparent or claimed capacity*'') (emphasis added; footnotes omitted); 31A Am.Jur. 2d §11, p. 600 (1989) (``In order to constitute extortion, the taking must take place under color of office—that is, *under the pretense that the officer is entitled to the fee by virtue of his or her office*. This requires that the service rendered must be apparently, or pretended to be, within official power or authority, and the money *must be taken in such apparent or claimed authority*'') (emphasis added; footnotes omitted). Cf. 7 Cyclopedia of Law and

although the Court purports to define official extortion under the Hobbs Act by reference to the common law, its definition bears scant resemblance to the common-law crime Congress presumably codified in 1946.

The Court's historical analysis rests upon a theory set forth in one law review article. See *ante,* at 4–5, and nn. 4–6 (citing Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. Rev. 815 (1988)). Focusing on early English cases, the article argues that common-law extortion encompassed a wide range of official takings, whether by coercion, false pretenses, or bribery. Whatever the merits of that argument as a description of early English common law,[2] it is beside the point here—the critical inquiry for

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Procedure 401–402 (1903) (defining ``color of office'' as ``a pretense of official right to do an act made by one who has no such right; the mere semblance, shadow, or false appearance of official authority; the dissembling face of the right of office; the use of official authority as a pretext or cover for the commission of some corrupt or vicious act; an act evilly done, by the countenance of an office; an act unjustly done by the countenance of an office; an act wrongfully done by an officer under the pretended authority of his office; and is always taken in the worst sense, being grounded upon corruption, of which the office is as a mere shadow or color; under statutes, the phrase is used to define an illegal claim of right or authority to take the security; some illegal exertion of authority, whereby an obligation is extorted which the statute does not require to be given'') (footnotes omitted).

[2]Those merits are far from clear. Most commentators maintain that extortion and bribery were distinct crimes at early English common law. See, *e.g.*, J.

our purposes is the American understanding of the crime at the time the Hobbs Act was passed in 1946. Cf. *Harmelin* v. *Michigan*, 501 U. S. ——, —— (slip op., at 15–16) (1991) (plurality opinion) (English historical background is relevant in determining the meaning of a constitutional provision, but the ``ultimate question'' is the meaning of that provision to the Americans who adopted it).

A survey of 19th and early 20th century cases construing state extortion statutes in light of the common law makes plain that the offense was understood to involve not merely a wrongful taking by a public official, but a wrongful taking *under a false pretense of official right*. A typical case is *Collier* v. *State*, 55 Ala. 125 (1877). The defendant there was a local prosecutor who, for a fee, had given legal advice to a criminal suspect. The Alabama Supreme Court

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Noonan, Bribes 398, 585–587 (1984); Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L. J. 1171, 1179–1180 (1977). While—as I explain below—Professor Lindgren may well be correct that common-law extortion did not contain an ``inducement'' element, in my view he does not adequately account for the crime's ``by color of office'' element. This latter element has existed since long before the Founding of the Republic, and cannot simply be ignored. As Chief Justice Montague explained over four centuries ago, *colore officii sui* (``by color of his office'') ``signifies an Act badly done *under the Countenance of an Office*, and it bears *a dissembling Visage of Duty*, and is properly called Extortion.'' *Dive* v. *Maningham*, 1 Plowd. 60, 68, 75 Eng. Rep. 96 (C.B. 1550) (emphasis added). See also 3 E. Coke, Institutes *542 (describing extortion as ``more odious than robbery; for robbery is apparent, and hath the face of a crime, but *extortion puts on the visure of virtue*'') (emphasis added).

rejected the State's contention that the defendant's receipt of the fee—even though improper—amounted to ``extortion,'' because he had not taken the money ``under color of his office.'' ``The object of the [extortion] statute is . . . not the obtaining money by mere impropriety of conduct, or by fraud, by persons filling official position.'' *Id*., at 127. Rather, the court explained, ``[a] taking under color of office is of the essence of the offense. *The money or thing received must have been claimed, or accepted, in right of office, and the person paying must have been yielding to official authority.*'' *Id.*, at 128 (emphasis added). That a public official took money he was not due was not enough. ``[T]hough the defendant may have been guilty of official infidelity, the wrong was to the State only, and no wrong was done the person paying the money. That wrong is not punishable under this indictment. Private and public wrong must concur, to constitute extortion.'' *Ibid*. Numerous decisions from other jurisdictions confirm that an official obtained a payment ``under color of his office'' only—as the phrase suggests—when he used the office to assert a false pretense of official right to the payment.[3]

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[3]See, *e.g.*, *People* v. *Whaley*, 6 Cow. 661 (N.Y. Sup. Ct. 1827) (affirming the extortion conviction of a justice of the peace who had charged a litigant a court fee when none was due); *Commonwealth* v. *Bagley*, 24 Mass. 279, 281 (1828) (affirming the extortion conviction of a deputy jailkeeper who had demanded and received a fee when none was due); *State* v. *Stotts*, 5 Black. 460, 460–461 (Ind. 1840) (affirming the extortion conviction of a constable who had charged a greater fee than was due for performance of his services); *State* v. *Burton*, 3 Ind. 93, 93–95 (1851) (affirming the extortion conviction of a county treasurer who had charged a fee for his services where none was due); *Williams* v. *State*, 34 Tenn. 160,

Because the Court misapprehends the ``color of office'' requirement, the crime it describes today is not the common-law crime that Congress presumably incorporated into the Hobbs Act. The explanation for this error is clear. The Court's historical foray has the single-minded purpose of proving that common-law extortion did *not* include an element of ``inducement''; in its haste to reach that conclusion,

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162 (1854) (affirming the extortion conviction of a county constable who had charged a fee for official services that he did not perform); *State* v. *Vasel*, 47 Mo. 416, 417–418 (1871) (affirming the extortion conviction of a deputy constable who had wrongfully collected a fee before it was legally due); *Cutter* v. *State*, 36 N.J. 125, 128 (1873) (reversing the extortion conviction of a justice of the peace who had charged for his services a fee to which he was not entitled, but may have done so under a mistaken belief of right); *Loftus* v. *State*, 19 A. 183, 184 (N.J. 1890) (affirming the extortion conviction of a justice of the peace who had charged an excessive fee for his services); *Commonwealth* v. *Saulsbury*, 152 Pa. 554, 559–560, 25 A. 610, 611–612 (1893) (reversing, on evidentiary grounds, the extortion conviction of a deputy constable who had charged an excessive fee for his services); *Hanley* v. *State*, 125 Wis. 396, 401–402, 104 N.W. 57, 59 (1905) (affirming the extortion conviction of two constables who wrongfully demanded a fee for executing a warrant); *State* v. *Cooper*, 120 Tenn. 549, 552–554, 113 S.W. 1048, 1049 (1908) (reinstating the extortion indictment of a justice of the peace who had collected a fee as a bail bond before it was due); *Dean* v. *State*, 9 Ga. App. 303, 305–306, 71 S.E. 597, 598 (1911) (affirming the extortion conviction of a constable who had used his office to collect money that he was not due); cf. *La Tour* v. *Stone*, 139 Fla. 681, 693–694, 190 So. 704, 709 (1939) (describing common-law extortion).

the Court fails to consider the elements that common-law extortion *did* include. Even if the Court were correct that an official *could* commit extortion at common law simply by receiving (but not ``inducing'') an unlawful payment, it does not follow either historically or logically that an official *automatically* committed extortion whenever he received such a payment.

The Court, therefore, errs in asserting that common-law extortion is the ``rough equivalent of what we would now describe as `taking a bribe,''' *ante*, at 5. *Regardless* of whether extortion contains an ``inducement'' requirement, bribery and extortion are different crimes. An official who solicits or takes a bribe does *not* do so ``under color of office''; *i.e.*, under any pretense of official entitlement. ``The distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in *demanding* a fee or present *by color of office*.'' *State* v. *Pritchard*, 107 N.C. 921, 929, 12 S.E. 50, 52 (1890) (emphasis added). Where extortion is at issue, the public official is the sole wrongdoer; because he acts ``under color of office,'' the law regards the payor as an innocent victim and not an accomplice. See, *e.g.*, 1 W. Burdick, Law of Crime §§273–275, pp. 392–396 (1946). With bribery, in contrast, the payor *knows* the recipient official is not entitled to the payment; he, as well as official, may be punished for the offense. See, *e.g.*, *id.*, §§288–292, pp. 426–436. Congress is well aware of the distinction between the crimes; it has always treated them separately. Compare 18 U. S. C. §872 (``*Extortion* by officers or employees of the United States'' (emphasis added), which criminalizes extortion by federal officials, and makes no provision for punishment of the payor), with 18 U. S. C. §201 (``*Bribery* of public officials and witnesses'' (emphasis added), which criminalizes bribery of and by federal officials). By stretching the

bounds of extortion to make it encompass bribery, the Court today blurs the traditional distinction between the crimes.[4]

Perhaps because the common-law crime—as the Court defines it—is so expansive, the Court, at the very end of its opinion, appends a qualification: ``We

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[4]The Court alleges a ``complete absence of support'' for the definition of common-law extortion set forth in this dissent, and cites five American cases that allegedly support its understanding of the crime. *Ante,* at 14–16. The Court is mistaken on both counts: even a brief perusal of 19th and early 20th century cases, as well as treatises and hornbooks, shows that my description of the crime is anything but novel, and the cases cited by the Court in no way support its argument.

The Court first cites two intermediate-court cases from Pennsylvania, *Commonwealth* v. *Wilson,* 30 Pa. Super. 26 (1906), and *Commonwealth* v. *Brown*, 23 Pa. Super. 470 (1903). Those opinions, both written by one Judge Rice, display an obvious misunderstanding of the meaning of ``color of office.'' Citing the definition of that phrase set forth in the Cyclopedia of Law and Practice, see n. 1, *supra*, the Court confuses a false pretense of official authority *to receive a payment* with a false pretense of official authority *to do an official act*. See *Wilson, supra,* at 31 (``Bribery on the part of an officer and extortion are not identical, but they are very closely allied; and whilst the former does not necessarily involve a pretense of official authority *to do the act for which the bribe is given*, yet, if such pretense is used *to induce* its payment, we see no reason to doubt that the taking of it is common-law extortion as well as bribery'') (emphasis added). But, as Hawkins, Blackstone, and all other expositors of black-letter

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 13 (emphasis added). This *quid pro quo* requirement is simply made up. The Court does not suggest that it has any basis in the common law or the language of the Hobbs Act, and I have found no treatise or

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law make clear, the crux of common-law extortion was the unlawful taking of money by color of office, *not* the unlawful taking of money to do an act by color of office.

In any event, the Pennsylvania court's unorthodox understanding of common-law extortion in no way supports the Court's definition of the crime, as the Pennsylvania court explicitly required a pretense of authority to *induce* the unlawful payment—precisely the requirement the Court today rejects. See also *Commonwealth* v. *Francis*, 201 Pa. Super. 313, 322–323, 191 A.2d 884, 889 (1963) (citing *Wilson* and *Brown* for the proposition that ``the extraction of money or other things of value *under a threat of using the power of one's office* may constitute extortion'' and explaining that ``[a]lthough we have recognized that the crimes of common law extortion and bribery may coincide at times, . . . it is generally held that they are mutually exclusive crimes'') (emphasis added).

The third case cited by the Court, *State* v. *Sweeney*, 180 Minn. 450, 231 N.W. 225 (1930), does not involve extortion at all—it upheld a Minneapolis alderman's conviction for *bribery*. At trial on one charge of receiving a bribe, the State introduced evidence that the defendant had received other bribes, some from gambling-houses. He challenged the admission of the evidence of other crimes; the court rejected that challenge on evidentiary grounds. In passing, however, the court said: ``It may be noted, however,

dictionary that refers to any such requirement in defining ``extortion.''

Its only conceivable source, in fact, is our opinion last Term in *McCormick* v. *United States*, 500 U. S. —— (1991). Quite sensibly, we insisted in that case that, unless the Government established the existence of a *quid pro quo*, a public official could not be convicted of extortion under the Hobbs Act for

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that *it may be* that the defendant and [another alderman], in dealing with the gambling houses, were guilty of extortion under [the state statute].'' *Id.,* at 456, 231 N.W., at 228 (emphasis added). That is all. The Court's parenthetical claim that ``dicta'' in the opinion support the proposition that ``alderman's acceptance of money for the erection of a barn, the running of a gambling house, and the opening of a filling station *would* constitute extortion'' is, at best, a gross overstatement.

Fourth, the Court cites *State* v. *Barts*, 132 N. J. L. 74, 76, 83, 38 A.2d 838, 841, 844 (1944), which upheld the extortion conviction of a police officer, based essentially on a bribery rationale. As the New Jersey Supreme Court has neatly explained, however, that case represented a *departure* from the traditional common law of extortion:

``Our extortion statute, which had its origin at least as early as 1796, appears on its face to have been originally intended to be reiterative of the common law. The essence of the offense was the receiving or taking by any public officer, by color of his office, of any fee or reward not allowed by law for performing his duties. The purpose would seem to be simply *to penalize the officer who non-innocently insisted upon a larger fee than he was entitled to or a fee where none was permitted or required to be paid for the performance of an obligatory function of his office*. The matter was obviously of particular importance in the days when public officials received their

accepting a campaign contribution. We did not purport to discern that requirement in the common law or statutory text, but imposed it to prevent the Hobbs Act from effecting a radical (and absurd) change in American political life. ``To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so

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compensation through fees collected and not by fixed salary. Our early cases dealt with precisely this kind of a situation. [citing, *inter alia*, *Cutter* v. *State* and *Loftus* v. *State*, see n. 3, *supra*].

``After a couple of opinions possibly indicating an extension to cover payments demanded for the favorable exercise of discretionary powers of the officer, *an enlarged construction of the statute to its present day scope* was announced in *State* v. *Barts*. . . . This *present* construction of the crime thus overlaps the offense of bribery since extortion is committed even where the object of the payment is in reality to influence an officer in his official behavior or conduct without such having to be established.'' *State* v. *Begyn*, 34 N. J. 35, 46–47, 167 A. 2d 161, 166–167 (1961) (emphasis added; citations omitted). If the Court wishes to adopt the ``modern'' view of extortion, fine; but it should not attempt to present that view as ``common-law history.''

Finally, the Court cites *White* v. *State*, 56 Ga. 385 (1876). There the Georgia Supreme Court reversed the extortion conviction of a special constable who was charged with improperly keeping a fee that he had collected. The court first explained that a transaction was *not* extortion if the defendant ``took the money in good faith, *without any claim to it*.'' *Id.,* at 389 (emphasis added). The court then went on, in dicta, to assert that if an officer ``should use his authority, or any process of law in his hands, for the purpose of *awing or seducing* any person into paying

long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.'' *Id.,* at 14–15. We expressly limited our holding to campaign contributions. *Id.*, at 16, n. 10 (``[W]e do not decide whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value'').

Because the common-law history of extortion was neither properly briefed nor argued in *McCormick*, see 500 U. S., at 10, n. 6; *id.,* at 1 (SCALIA, J., concurring), the *quid pro quo* limitation imposed there represented a reasonable first step in the right direction. Now that we squarely consider that history, however, it is apparent that that limitation was in fact overly modest: at common law, McCormick was innocent of extortion *not* because he failed to offer a *quid pro quo* in return for campaign contributions, but because he did not take the contributions under color of official right. Today's extension of *McCormick*'s

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him a bribe, that would, doubtless, be extortion.'' *Ibid.* (emphasis added). For this latter proposition the Georgia court cited no authority. The court's error is manifest: it confused the common-law meaning of extortion (an officer wrongfully taking money under color of his office) with the colloquial meaning of the term (which conjures up coercion, and thus is at once broader and narrower than the common law). To the extent that *White*'s dicta cuts against my understanding of common-law extortion, of course, it cuts equally strongly against the Court's, for, like the Pennsylvania cases cited earlier in this footnote, it quite obviously requires that the extorted payment be ``induced'' by the officer — the very requirement the Court today rejects.

reasonable (but textually and historically artificial) *quid pro quo* limitation to *all* cases of official extortion is both unexplained and inexplicable—except insofar as it may serve to rescue the Court's definition of extortion from substantial overbreadth.

As serious as the Court's disregard for history is its disregard for well-established principles of statutory construction. The Court chooses not only the harshest interpretation of a criminal statute, but also the interpretation that maximizes federal criminal jurisdiction over state and local officials. I would reject both choices.

The Hobbs Act defines ``extortion'' as ``the obtaining of property from another, with his consent, *induced* by wrongful use of actual or threatened force, violence, or fear, or *under color of official right*.'' 18 U. S. C. §1951(b)(2) (emphasis added).[5] Evans argues, in part, that he did not ``induce'' any payment. The Court rejects that argument, concluding that the verb ``induced'' applies *only* to the first portion of the definition. *Ante*, at 10. Thus, according to the Court, the statute should read: ```The term ``extortion'' means the obtaining of property from another, with his consent, *either* [1] induced by wrongful use of actual or threatened force, violence, or fear, *or* [2] under color of official

[5]I have no quarrel with the Court's suggestion, see *ante* at 5, n. 4, that there is no difference of substance between the classic common-law phrase ``by colour of his office'' and the Hobbs Act's formulation ``under color of official right.'' The Act's formulation, of course, only underscores extortion's essential element of a false assertion of *official right* to a payment.

right.'''' *Ante,* at 10, n. 15. That is, I concede, a *conceivable* construction of the words. But it is—at the very least—forced, for it sets up an unnatural and ungrammatical parallel between the *verb* ``induced'' and the *preposition* ``under.''

The more natural construction is that the verb ``induced'' applies to *both* types of extortion described in the statute. Thus, the unstated ``either'' belongs *after* ``induced'': ``The term `extortion' means the obtaining of property from another, with his consent, induced *either* [1] by wrongful use of actual or threatened force, violence, or fear, *or* [2] under color of official right.'' This construction comports with correct grammar and standard usage by setting up a parallel between two prepositional phrases, the first beginning with ``by''; the second with ``under.''[6]

Our duty in construing this criminal statute, then, is clear: ``The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'' *McNally* v. *United States*, 483 U. S. 350, 359–360 (1987). See also *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C.J.). Because the Court's expansive interpretation of the statute is not the only plausible one, the rule of lenity compels

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[6]This is, moreover, the construction long espoused by the Justice Department. See U. S. Dept. of Justice, United States Attorneys' Manual §9–131.180 (1984) (``[T]here is some question as to whether the Hobbs Act defines [official] extortion as `the obtaining of property from another under color of official right,' or as `the obtaining of property from another, with his consent, *induced* under color of official right.' . . . [T]he grammatical structure of the Hobbs Act would appear to support the latter language'') (emphasis added).

adoption of the narrower interpretation. That rule, as we have explained on many occasions, serves two vitally important functions:

> ``First, `a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.'' *United States* v. *Bass*, 404 U. S. 336, 348 (1971) (citations omitted; footnote omitted).

Given the text of the statute and the rule of lenity, I believe that inducement is an element of official extortion under the Hobbs Act.

Perhaps sensing the weakness of its position, the Court suggests an alternative interpretation: even if the statute *does* set forth an ``inducement'' requirement for official extortion, that requirement is always satisfied, because ``the coercive element is provided by the public office itself.'' *Ante*, at 11. I disagree. A particular public official, to be sure, may wield his power in such a way as to coerce unlawful payments, even in the absence of any explicit demand or threat. But it ignores reality to assert that *every* public official, in *every* context, automatically exerts coercive influence on others by virtue of his office. If the Chairman of General Motors meets with a local court clerk, for example, whatever implicit coercive pressures exist will surely not emanate from the clerk. In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), of course, this Court established a presumption of ``inherently compelling pressures'' in the context of official custodial interrogation. *Id.*, at 467. Now, apparently, we assume that *all* public officials exude an aura of coercion at *all* places and at *all* times.

That is not progress.

The Court's construction of the Hobbs Act is repugnant not only to the basic tenets of criminal justice reflected in the rule of lenity, but also to basic tenets of federalism. Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials. See generally Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L.J. 1171 (1977). That expansion was born of a single sentence in a Third Circuit opinion: ``[The `under color of official right' language in the Hobbs Act] repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress.'' *United States* v. *Kenny*, 462 F. 2d 1205, 1229, cert. denied, 409 U. S. 914 (1972). As explained above, that sentence is not necessarily incorrect in its description of what common-law extortion did *not* require; unfortunately, it omits an important part of what common-law extortion *did* require. By overlooking the traditional meaning of ``under color of official right,'' *Kenny* obliterated the distinction between extortion and bribery, essentially creating a new crime encompassing both.

> ``As effectively as if there were federal common law crimes, the court in *Kenny* . . . amend[ed] the Hobbs Act and [brought] into existence a new crime—local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun.'' J. Noonan, Bribes 586 (1984).

After *Kenny*, federal prosecutors came to view the

Hobbs Act as a license for ferreting out *all* wrongdoing at the state and local level—```a special code of integrity for public officials.''' *United States* v. *O'Grady*, 742 F. 2d 682, 694 (CA2 1984) *(en banc)* (quoting Letter from Raymond J. Dearie, U. S. Attorney for the Eastern District of New York, to the United States Court of Appeals for the Second Circuit, dated Jan. 21, 1983). In short order, most other circuits followed *Kenny*'s lead and upheld, based on a bribery rationale, the Hobbs-Act extortion convictions of an astonishing variety of state and local officials, from a state governor, see *United States* v. *Hall*, 536 F. 2d 313, 320–321 (CA10), cert. denied, 429 U. S. 919 (1976), down to a local policeman, see *United States* v. *Braasch*, 505 F. 2d 139, 151 (CA7 1974), cert. denied, 421 U. S. 910 (1975).

Our precedents, to be sure, suggest that Congress enjoys broad constitutional power to legislate in areas traditionally regulated by the States—power that apparently extends even to the direct regulation of the qualifications, tenure, and conduct of state governmental officials. See, *e.g.*, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 547–554 (1985). As we emphasized only last Term, however, concerns of federalism require us to give a *narrow* construction to federal legislation in such sensitive areas unless Congress' contrary intent is ``unmistakably clear in the language of the statute.'' *Gregory* v. *Ashcroft*, 501 U. S. ——, —— (1991) (slip op., at 7) (internal quotation marks omitted). ``This plain statement rule is nothing more than a acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'' *Ibid.* *Gregory*'s teaching is straightforward: because we ``assume Congress does not exercise lightly'' its extraordinary power to regulate state officials, *id.,* at —— (slip op., at 6), we will construe ambiguous statutory provisions in the least

intrusive manner that can reasonably be inferred from the statute. *Id.*, at —— (slip op., at 13).

Gregory's rule represents nothing more than a restatement of established law:

> ``Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . As this Court emphasized only last Term in *Rewis* v. *United States*, [401 U. S. 808 (1970)—a case involving the Hobbs Act's counterpart, the Travel Act], we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'' *United States* v. *Bass*, 404 U. S., at 349 (footnote omitted).

Similarly, in *McNally* v. *United States*, 483 U. S. 350 (1987)—a case closely analogous to this one—we rejected the Government's contention that the federal mail fraud statute, 18 U. S. C. §1341, protected the citizenry's ``intangible right'' to good government, and hence could be applied to all instances of state and local corruption. Such an expansive reading of the statute, we noted with disapproval, would ``leav[e] its outer boundaries ambiguous and involv[e] the Federal Government in setting standards of disclosure and good government for local and state officials.''[7] Cf. Baxter, Federal Discretion in the

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[7] Prior to our decision in *McNally*, the Government's theory had been accepted by every Court of Appeals to consider the issue. We did not consider that acceptance to cure the ambiguity we perceived in the

Prosecution of Local Political Corruption, 10 Pepp. L. Rev. 321, 336–343 (1983).

The reader of today's opinion, however, will search in vain for any consideration of the principles of federalism that animated *Gregory*, *Rewis*, *Bass*, and *McNally*. It is clear, of course, that the Hobbs Act's proscription of extortion ``under color of official right'' applies to all public officials, including those at the

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statutory language; we simply reiterated the traditional learning that a federal criminal statute, particularly as applied to state officials, must be construed narrowly. See 483 U. S., at 359–360. ``If Congress desires to go further,'' we said, ``it must speak more clearly than it has.'' *Id.*, at 360.

The dissent in *McNally* argued strenuously that the Court's interpretation of the statute should be informed by the majority view among the Courts of Appeals and Congress' subsequent silence:

``Perhaps the most distressing aspect of the Court's action today is its casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present. . . . I [can] not join a rejection of such a longstanding, consistent interpretation of a federal statute. See *Commissioner of Internal Revenue* v. *Fink*, 483 U. S. 89, 101 (STEVENS, J., dissenting); *Citicorp Industrial Credit, Inc.* v. *Brock*, 483 U. S. 27, 40 (1987) (STEVENS, J., dissenting); *Runyon* v. *McCrary*, 427 U. S. 160, 189 (1976) (STEVENS, J., concurring).'' *Id.,* at 376–377 (STEVENS, J., dissenting).

The interpretation given a statute by a majority of the Courts of Appeals, of course, is due our most respectful consideration. Ultimately, however, our attention must focus on the *reasons* given for that interpretation. Error is not cured by repetition, and we do not discharge our duty simply by counting up the circuits on either side of the split. Here, the

state and local level. As our cases emphasize, however, even when Congress has clearly decided to engage in *some* regulation of the state governmental officials, concerns of federalism play a vital role in evaluating the *scope* of the regulation.[8] The Court today mocks this jurisprudence by reading two significant limitations (the textual requirement of ``inducement'' and the common-law requirement of

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minority position of the Second and Ninth Circuits (both *en banc*) is far more thoughtfully reasoned than the position of the majority of circuits, which have followed the Third Circuit's lead in *Kenny* ``without setting forth a reasoned elaboration for their conclusions.'' *United States* v. *Cerilli*, 603 F. 2d 415, 427, and n. 5 (CA3 1979) (Aldisert, J., dissenting). Moreover, I reject the notion—as this Court has on many occasions—that Congress, through its silence, implicitly ratifies judicial decisions. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989) (``It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval'' of judicial interpretation of a statute) (internal quotation marks omitted).

I find it unfortunate that the arguments we rejected in *McNally* today become the law of the land. See *ante*, at 13–14 (``Our conclusion is buttressed by the fact that so many other courts that have considered the issue over the last 20 years have interpreted the statute in the same way. Moreover, given the number of appellate court decisions . . . it is obvious that Congress is aware of the prevailing view'' and has ratified that view through its silence).

[8]This case is, if anything, more compelling than *Gregory* v. *Ashcroft,* 501 U.S. —— (1991). In both cases, Congress clearly chose to engage in some regulation of state governmental officials. In *Gregory*, however, that regulation was sweeping on its face,

``under color of office'') *out* of the Hobbs Act's definition of official extortion.

I have no doubt that today's opinion is motivated by noble aims. Political corruption at any level of government is a serious evil, and, from a policy perspective, perhaps one well suited for federal law enforcement. But federal judges are not free to devise new crimes to meet the occasion. Chief Justice Marshall's warning is as timely today as ever: ``It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.'' *United States* v. *Wiltberger*, 5 Wheat. 76, 96 (1820).

Whatever evils today's opinion may redress, in my view, pale beside those it will engender. ``Courts must resist th[e] temptation [to stretch criminal statutes] in the interest of the long-range preservation of limited and even-handed government.'' *United States* v. *Mazzei*, 521 F. 2d 639, 656 (CA3 1975) *(en banc)* (Gibbons, J., dissenting). All Americans, including public officials, are entitled to

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and our task was to construe an *exemption* from that otherwise broad coverage. We decided the case on the ground that the exemption must be *assumed* to include judges unless a contrary intent were manifest. ``[I]n this case we are not looking for a plain statement that judges are excluded. We will not read the [statute] to cover state judges unless Congress has made it clear that judges are *included*. . . . [I]t must be plain to anyone reading the Act that it covers judges.'' *Id.,* at —— (slip op., at 13). Here, in contrast, our task is to construe the primary scope of the Hobbs Act.

protection from prosecutorial abuse. Cf. *Morrison* v. *Olson*, 487 U. S. 654, 727–732 (1988) (SCALIA, J., dissenting). The facts of this case suggest a depressing erosion of that protection.

Petitioner Evans was elected to the Board of Commissioners of DeKalb County, Georgia, in 1982. He was no local tyrant—just one of five part-time Commissioners earning an annual salary of approximately $16,000. The Board's activities were entirely local, including the quintessentially local activity of zoning property. The United States does not suggest that there were any allegations of corruption or malfeasance against Evans.

In early 1985, as part of an investigation into ``allegations of public corruption in the Atlanta area,'' a Federal Bureau of Investigation agent, Clifford Cormany, Jr., set up a bogus firm, ``WDH Developers,'' and pretended to be a land developer. Cormany sought and obtained a meeting with Evans. From March 1985 until October 1987, a period of some *two and a half years*, Cormany or one of his associates held 33 conversations with Evans. Every one of these contacts was initiated by the agents. During these conversations, the agents repeatedly requested Evans' assistance in securing a favorable zoning decision, and repeatedly brought up the subject of campaign contributions. Agent Cormany eventually contributed $8,000 to Evans' reelection campaign, and Evans accepted the money. There is no suggestion that he claimed an official entitlement to the payment. Nonetheless, he was arrested and charged with Hobbs Act extortion.

The Court is surely correct that there is sufficient evidence to support the jury's verdict that Evans committed ``extortion'' under the Court's expansive interpretation of the crime. But that interpretation has no basis in the statute that Congress passed in 1946. If the Court makes up this version of the crime today, who is to say what version it will make up

tomorrow when confronted with the next perceived rascal? Until now, the Justice Department, with good reason, has been extremely cautious in advancing the theory that official extortion contains no inducement requirement. ``*Until the Supreme Court decides upon the validity of this type of conviction*, prosecutorial discretion should be used to insure that any case which might reach that level of review is worthy of federal prosecution. Such restraint would require that only significant amounts of money and reasonably high levels of office should be involved.'' See U. S. Dept. of Justice, United States Attorneys' Manual §9–131.180 (1984) (emphasis added). Having detected no ``[s]uch restraint'' in this case, I certainly have no reason to expect it in the future.

Our criminal-justice system runs on the premise that prosecutors will respect and courts will enforce the boundaries on criminal conduct set by the legislature. Where, as here, those boundaries are breached, it becomes impossible to tell where prosecutorial discretion ends and prosecutorial abuse, or even discrimination, begins. The potential for abuse, of course, is particularly grave in the inherently political context of public-corruption prosecutions.

In my view, Evans is plainly innocent of extortion.[9] With all due respect, I am compelled to dissent.

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[9]Evans also was convicted of filing a false income-tax return. He now challenges that conviction on the ground that the jury was given improper instructions. He did not, however, challenge those instructions at trial or in the court of appeals. Thus, his current challenge is not properly before this Court. See *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346, 362 (1981); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970).