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# Bouncing the Proverbial Blank Check: An Argument for Including Candidates for Public Office Within the Scope of the Hobbs Act

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# BOUNCING THE PROVERBIAL BLANK CHECK: AN ARGUMENT FOR INCLUDING CANDIDATES FOR PUBLIC OFFICE WITHIN THE SCOPE OF THE HOBBS ACT

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## Abstract

The Hobbs Act, codified at 18 U.S.C. § 1951, criminalizes bribery of and extortion by public officials. Under the statute, "'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." But the meaning of "under color of official right" remains ambiguous. This Note examines the ambiguity created by the phrase "under color of official right" to decide whether a candidate for public office can be held accountable under the Hobbs Act for extortion. More specifically, this Note addresses whether a candidate for office qualifies as a public official who can violate § 1951(a) of the Hobbs Act by accepting a bribe in return for a promise of future action if the candidate is elected.

This Note argues that candidates for public office who accept bribes in return for a promise of future action ought to be, and in fact are, prosecutable under the Hobbs Act. Excluding candidates for public office from the reach of the Hobbs Act would be inconsistent with public policy. Indeed, this would be fundamentally inconsistent with basic Western sensibilities, which recognize that public official corruption "destroys democracy, replacing the vote of the people with the vote of the dollar." Because of uncertainty as to whether the Hobbs Act applies to candidates for public office, prosecutors usually rely on 18 U.S.C. § 599, titled "Promise of appointment by candidate," as an alternative to prosecute candidates for office who receive bribes. Under this weaker statutory alternative, a candidate for office who takes a bribe during an election faces at most two years in prison for his crime, compared to a maximum of twenty years in prison if the candidate is prosecuted under the Hobbs Act. This effectively hobbles the Hobbs Act, stripping away its significant deterrent value for non-incumbent candidates. Therefore, courts should stop bouncing the proverbial blank check, and treat candidates for office as public officials who can violate the Hobbs Act by accepting bribes in return for promised official action once elected.

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## INTRODUCTION

Imagine an election in the fall of 2014. Mayor Carmine Polito is running for reelection in his hometown of Camden, New Jersey.[1] During his campaign, Mayor Polito receives money from a small local advocate group in exchange for his promise of future action if he is reelected. Mayor Polito's ultimate goal when making the promise is to create jobs for his community members and revitalize the city. Polito, however, does not declare the small amount of money he receives. In this situation, the federal government may imprison Mayor Polito for up to twenty years for extortion "under color of official right" under the Hobbs Act.[2]

Now consider a different scenario: Mayor Polito's challenger, Victor

1. This hypothetical is loosely based on the movie *American Hustle*. *See* AMERICAN HUSTLE (Columbia Pictures Dec. 13, 2013).

2. Hobbs Act, 18 U.S.C. § 1951 (2012).

Taleggio, in exchange for several million dollars, also promises future action if he is elected. Unbeknownst to the community, Taleggio's promise of future action would damage the small city of Camden. Yet, if Taleggio does not win the election, he only faces imprisonment for up to two years, even though his act was worse in every way than Mayor Polito's, and even though it took place in a political campaign for the same office.[3] This outcome stems from the recent holding of the U.S. Court of Appeals for the Third Circuit in *United States v. Manzo*.[4] To support this counterintuitive holding the Third Circuit reasoned that the Hobbs Act does not proscribe extortion by a losing non-incumbent candidate because a losing candidate cannot extort "under color of official right."[5] But does the Hobbs Act really make this distinction?

Under the Hobbs Act, "'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."[6] The Hobbs Act criminalizes extortion, attempted extortion, or conspiracy to extort "under color of official right."[7] Yet, the meaning of "under color of official right" remains ambiguous.[8] This Note examines the ambiguity created by the "under color of official right" language to determine whether a candidate for public office can be held accountable under the Hobbs Act for extortion "under color of official right." More specifically, this Note investigates whether a candidate for office is considered a public official who can violate § 1951(a) of the Hobbs Act by accepting a bribe in return for a promise of future action.

Modern societies have reached a general consensus about the illegality of public official corruption.[9] Society views public official

3. *See* 18 U.S.C. § 599. With the unavailability of the Hobbs Act to prosecute non-incumbent candidates, 18 U.S.C. § 599, which only provides for a maximum of two years in prison, is the main tool to prosecute a candidate like Taleggio in this scenario. *See infra* note 21 and accompanying text.

4. 636 F.3d 56, 69 (3d Cir. 2011) (holding that a candidate for public office who received a bribe in exchange for a promise of future action once elected could not be acting "under the color of official right" under the Hobbs Act).

5. *Id.* at 65.

6. 18 U.S.C. § 1951(b)(2).

7. *Id.*

8. *See, e.g.*, *Manzo*, 636 F.3d at 62 ("[C]ourts have grappled with ambiguity embedded in the text of the Hobbs Act, and in particular, the 'under color of official right' language."); Evans v. United States, 504 U.S. 255, 275 (1992) (Kennedy, J., concurring) ("'[T]he phrase "under color of official right," standing alone, is vague almost to the point of unconstitutionality.'" (quoting United States v. O'Grady, 742 F.2d 682, 695 (2d Cir. 1984) (en banc) (Van Graafeiland, J., concurring in part and dissenting in part))).

9. *See* Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 894, 896–97 (2013); Jeremy

corruption, which includes extortion and bribery, not only as illegal behavior, but also as normatively wrongful conduct.[10] Corruption of public officials gives an unfair advantage to those who are able to pay, while the general public suffers from inflated costs and a loss of faith in government.[11] In recent decades, one of the U.S. government's major objectives has been to investigate and reduce acts of corruption by public officials.[12] The Federal Bureau of Investigation, for instance, has made reducing public corruption an official top priority for the past several years.[13] As Patrick Fitzgerald, U.S. Attorney for the Northern District of Illinois, stated: "Vigorous prosecution of public corruption has always been vital to our country."[14] Furthermore, reduced funding at all levels of government means that vigorous prosecution of public official corruption is more important than ever.[15]

The Hobbs Act is a strong tool to prosecute public officials for extorting or receiving bribes,[16] and "under color of official right"

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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, 1733 (2003).

10. *Id.*

11. Patrick Fitzgerald, *The Costs of Public Corruption – And the Need for the Public to Fight Back*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/usao/briefing_room/fin/corruption.html (last visited Nov. 12, 2014). For a more detailed explanation of the definition of corruption and the negative effects of corruption on societies across the world, see generally *Helping Countries Combat Corruption: The Role of the World Bank*, WORLD BANK, http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm (last visited Nov. 12, 2014).

12. *See* Lauren Garcia, Note, *Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of "Implicit" Quid Pro Quos Under the Federal Funds Bribery Statute*, 65 RUTGERS L. REV. 229, 230 (2012) ("Presently, investigating public corruption ranks first among the FBI's criminal priorities—the most common forms of which include bribery and extortion." (footnote omitted)); *cf.* John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J.L. REFORM 1, 22 (2010) ("Bribery, like political extortion, is at the center of political corruption cases."); Ilissa B. Gold, Note, *Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s*, 36 WASH. U. J.L & POL'Y 261, 264–66 (2011) (noting the increased application of the Hobbs Act "to public officials for government corruption").

13. Garcia, *supra* note 12, at 230.

14. Fitzgerald, *supra* note 11.

15. *Id.*

16. James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 861 (1988); Peter D. Hardy, Note, *The Emerging Role of the Quid Pro Quo Requirement in Public Corruption Prosecutions Under the Hobbs Act*, 28 U. MICH. J. L. REF. 409, 456 (1995) ("[T]he Hobbs Act remains one of the most potent weapons for combating local and public corruption."); CRIM. RESOURCE MANUAL § 9-131.00, at 2404, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9crm02404.htm (last visited Nov. 12, 2014).

prosecutions are widely recognized today.[17] Courts have consistently recognized the legitimacy of the Hobbs Act.[18] The Hobbs Act provides severe sentencing guidelines for public official extortion "under color of official right": up to twenty years of imprisonment, monetary penalties, or both.[19]

Failing to include candidates for public office in the Hobbs Act is inconsistent with public policy. Indeed, this failure is fundamentally inconsistent with basic Western sensibilities, which recognize that public official corruption "destroys democracy, replacing the vote of the people with the vote of the dollar."[20] Because prosecutors cannot use the Hobbs Act to prosecute non-incumbent candidates, they must usually rely on 18 U.S.C. § 599, titled "Promise of appointment by candidate," as an alternative to prosecute such candidates for public office who receive bribes.[21] Under this weaker statutory alternative, a candidate for office who took a bribe during an election faces two years in prison, at most, compared to a maximum of twenty years for an officeholder prosecuted under the Hobbs Act.[22]

This Note argues that courts should stop bouncing the proverbial blank check when interpreting the Hobbs Act. Candidates for public office who accept bribes in return for a promise of future action should be, and in fact are, prosecutable under the Hobbs Act for extortion "under color of official right." The Note proceeds in four Parts. Part I introduces the historical context and modern application of the Hobbs Act. Part II argues that the purpose of the Hobbs Act is best served by reading "under color of official right" as applicable to candidates for public office who accept bribes. Part III shows that candidates for

17. *See* CRIM. RESOURCE MANUAL § 9-131.00, at 2404, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02404.htm (last visited Nov. 12, 2014) (listing cases where the Department of Justice successfully prosecuted individuals for extortion "under color of official right"); Lindgren, *supra* note 16, at 905 (referring to the Hobbs Act as "a current darling of the federal prosecutor's nursery").

18. CRIM. RESOURCE MANUAL § 9-131.00, at 2404, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02404.htm (last visited Nov. 12, 2014).

19. Hobbs Act, 18 U.S.C. § 1951(a) (2012).

20. JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 225 (2002).

21. *See* 18 U.S.C. § 599 ("Whoever, being a candidate, directly or indirectly promises or pledges the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.").

22. *Compare id.* (providing that a candidate taking bribes prosecuted under 18 U.S.C. § 599 "shall be fined . . . or imprisoned not more than two years, or both"), *with id.* § 1951(a) (providing that a person prosecuted under the Hobbs Act "shall be fined . . . or imprisoned not more than twenty years, or both").

public office receiving money in exchange for future acts are, at minimum, attempting or conspiring to extort money "under color of official right," which are inchoate crimes explicitly prosecutable under the Hobbs Act. Finally, Part IV discusses why the government should be able to directly prosecute non-incumbent candidates for public office for extortion "under color of official right" based on the phrase's ambiguity and the use of similar language that has allowed for the prosecution of non-state actors in civil rights cases.

## I. THE HOBBS ACT: AN INTRODUCTION AND BRIEF HISTORY

This Part introduces the historical context of the Hobbs Act. It surveys the early common law background behind the Act and summarizes some of the gloss courts have provided in significant decisions since its adoption.

### A. *The Hobbs Act as Codified: 18 U.S.C. § 1951*

"Corruption" encompasses a broad range of crimes, including extortion, bribery, fraud, racketeering, and other similar acts.[23] Early common law prohibitions of extortion originated from the Magna Carta principle that the rights of citizens cannot be bought or sold.[24] Early common law definitions of extortion focused on unwarranted takings by public officials.[25] Sir William Blackstone, for instance, defined extortion as "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 him, or more than is due, or before it is due."[26]

The Hobbs Act modified the common law meaning of extortion. The Act governs both extortion by public officials "under color of official right" and private extortion "induced by wrongful use of actual or threatened force, violence, or fear,"[27] which greatly expands the common law definition.[28]

### B. *A Historical Perspective of the Hobbs Act*

Initially, Congress passed the Hobbs Act as an amendment to the

23. John S. Gawey, Note, *The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes*, 87 NOTRE DAME L. REV. 383, 387 (2011).

24. *Id.* at 396.

25. Lindgren, *supra* note 16, at 847.

26. WILLIAM C. SPRAGUE, BLACKSTONE'S COMMENTARIES ABRIDGED 459 (9th ed. 1915).

27. 18 U.S.C. § 1951(b)(2).

28. Evans v. United States, 504 U.S. 255, 261 (1992).

Anti-Racketeering Act of 1934.[29] The Anti-Racketeering Act of 1934 was passed to "protect trade and commerce against interference by violence, threats, coercion, or intimidation."[30] Congress originally intended this Act to punish organized crime,[31] and did not even mention preventing political corruption.[32] In 1941, seven years after Congress enacted the Anti-Racketeering Act, the Supreme Court first considered the Act's scope in *United States v. Local 807*.[33] The Court's interpretation of the Anti-Racketeering Act became widely unpopular and this led Congress to promptly amend that Act with the Hobbs Act in 1946.[34]

Congress originally intended for the Hobbs Act to narrowly "combat extortion and robbery on the part of organized crime and certain labor movements"[35] and prevent labor racketeering activities.[36] Congress never discussed the meaning of "under color of official right,"[37] perhaps because it never explicitly intended the Hobbs Act to be a weapon against political corruption.[38] Congress did, however, omit § 3(a) of the Anti-Racketeering Act from the Hobbs Act.[39] Section 3(a) of the Anti-Racketeering Act narrowly defined "wrongful" as acts done "in violation of the criminal laws of the United States" in reference to the Act's use of "wrongful" in the phrase "wrongful use of force or fear, or under color of official right."[40] Congress excluded § 3(a) from the Hobbs Act to provide greater prosecutorial latitude on both the federal and state levels.[41] This omission allowed prosecutors to use the Hobbs

29. *See* Anti-Racketeering Act of 1934, Pub. L. No. 73-376, 48 Stat. 979, *repealed by* Hobbs Act, Pub. L. No. 79-537, 60 Stat. 420 (codified as amended at 18 U.S.C. § 1951); *see also* Gayed, *supra* note 9, at 1752 & n.129.

30. *See* Anti-Racketeering Act of 1934, 48 Stat. 979–80.

31. *See* S. REP. NO. 73–1440, at 1 (1934); *see also* H.R. REP. NO. 73-1833 (1934).

32. Gayed, *supra* note 9, at 1753; *see also* Anti-Racketeering Act of 1934, 48 Stat. at 979–80.

33. 315 U.S. 521 (1942), *superseded by statute*, Hobbs Act, 60 Stat. at 420, *as recognized in* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003).

34. Gayed, *supra* note 9, at 1755.

35. Medrith Lee Hager, *The Hobbs Act: Maintaining the Distinction Between a Bribe and a Gift*, 83 KY. L. J. 197, 203 (1994–95).

36. Gold, *supra* note 12, at 264.

37. *See* H.R. REP. NO. 73-1833 (1934); *see also* Joseph Maurice Harary, Note, *Misapplication of the Hobbs Act to Bribery*, 85 COLUM. L. REV. 1340, 1346 (1985).

38. Gayed, *supra* note 9, at 1756.

39. *Compare* Anti-Racketeering Act of 1934, 48 Stat. 979, *with* Hobbs Act, 18 U.S.C. § 1951.

40. Anti-Racketeering Act of 1934, 48 Stat. at 980.

41. *See* Thomas H. Henderson, Jr., *The Expanding Role of Federal Prosecutors in Combating State and Local Political Corruption*, 8 CUMB. L. REV. 385, 390–93 (1977) (describing the expansion and development of the "color-of-official-right doctrine"); Randy J. Curato et al., Note, *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting*

Act as a weapon against a wider range of corrupt acts, which later included public official corruption.[42]

In *United States v. Kenny*,[43] federal prosecutors urged the Third Circuit to revise the definition of "under color of official right."[44] The defendants in *Kenny* were public officials who had allegedly received kickback payments from contractors.[45] The prosecutors charged the defendants under two theories of extortion: (1) "wrongful use of fear" and (2) "under color of official right."[46] The Third Circuit affirmed the defendant's conviction and defined extortion "under color of official right" as "the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear."[47] The Third Circuit held that the Hobbs Act applied to public officials who extort without the use of force, fear, or violence.[48] Almost every other United States Court of Appeals has followed the Third Circuit's holding in *Kenny*.[49] Today, the Hobbs Act is widely used to prosecute public officials for extortion.[50]

Two decades after *Kenny*, in *Evans v. United States*,[51] the Supreme Court held that the Hobbs Act also applied to public officials who did

*Official Corruption*, 58 NOTRE DAME L. REV. 1027, 1049–50 (1983) (discussing the purpose and legislative history of the Hobbs Act); Harary, *supra* note 37, at 1341–46 (discussing the history of the Hobbs Act in relation to the Anti-Racketeering Act of 1934).

42. *See, e.g.*, United States v. Iozzi, 420 F.2d 512, 514 (4th Cir. 1970) (prosecuting a union president for threatening to stop construction projects unless he was paid a bribe); United States v. Tolub, 309 F.2d 286, 288–89 (2d Cir. 1962) (prosecuting a union agent for receiving bribes to prevent a labor dispute); United States v. Palmiotti, 254 F.2d 491, 493–95 (2d Cir. 1958) (prosecuting a union business agent who threatened to call a strike unless bribes were paid); Hulahan v. United States, 214 F.2d 441, 443–45 (8th Cir. 1954) (prosecuting a labor representative who threatened labor unrest unless tribute was paid).

43. 462 F.2d 1205 (3d Cir. 1972).

44. *Id.* at 1229.

45. *Id.* at 1211.

46. *Id.* at 1210.

47. *Id.* at 1229–30.

48. *Id.* at 1229 (reasoning that "while private persons may violate the statute only by use of fear . . . persons holding public office may also violate the statute by a wrongful taking under color of official right").

49. *See, e.g.*, United States v. Swift, 732 F.2d 878, 880 (11th Cir. 1984); United States v. Williams, 621 F.2d 123, 124–25 (5th Cir. 1980); United States v. Price, 617 F.2d 455, 457 (7th Cir. 1979); United States v. Harding, 563 F.2d 299, 302–07 (6th Cir. 1977); United States v. Brown, 540 F.2d 364, 371–72 (8th Cir. 1976); United States v. Trotta, 525 F.2d 1096, 1100 (2d Cir. 1975); United States v. Mazzei, 521 F.2d 639, 644–45 (3d Cir. 1975); United States v. Price, 507 F.2d 1349, 1350 (4th Cir. 1974). The U.S. Court of Appeals for the D.C. Circuit has not addressed this issue because prosecutions of public officials in the District of Columbia, like prosecutions of federal officials, fall under the federal bribery statute. *See* 18 U.S.C. § 201 (2012).

50. Garcia, *supra* note 12, at 230.

51. 504 U.S. 255 (1992).

not induce the bribery.[52] In *Evans*, the petitioner was a commissioner convicted of accepting a bribe in exchange for agreeing to rezone a piece of land for a project.[53] The petitioner argued that he was improperly convicted for extortion "under color of official right" under the Hobbs Act because he never induced the bribe.[54] The Supreme Court rejected this argument and held that a public official does not need to induce the bribe under the Hobbs Act's definition of extortion—merely receiving a bribe while in office is sufficient.[55] Accordingly, after *Evans*, the Hobbs Act has been one of prosecutors' favorite tools in public corruption cases.[56]

## II. PUBLIC POLICY PERSPECTIVE: WHY PUNISH CANDIDATES FOR PUBLIC OFFICE AS SEVERELY AS CURRENT PUBLIC OFFICIALS

The U.S. Department of Justice views federal election crimes as a "high law enforcement priority."[57] As Justice Clarence Thomas stated in his dissent in *Evans*, "[p]olitical corruption at any level of government is a serious evil."[58] Due to their influence, public officials have a special position in society and are the focus of powerful lobbyists.[59] Corrupt public officials hurt democracy at its core, and corruption by public officials creates diffuse negative social consequences that may cause substantial harm to society.[60] Public official corruption undermines the legitimacy of the government and the entire political system.[61] Public

52. *Id.* at 265 ("[The Hobbs Act] merely requires of the public official that he obtain 'property from another, with his consent, . . . under color of official right.' The use of the word 'or' before 'under color of official right' supports this reading." (second alteration in original) (footnote omitted)).

53. *Id.* at 257.

54. *Id.* at 257–58.

55. *Id.* at 268.

56. *See* Garcia, *supra* note 12, at 230, 233 n.30.

57. CRAIG C. DONSANTO & NANCY L. SIMMONS, FEDERAL PROSECUTION OF ELECTION OFFENSES 10 (7th ed. 2007), *available at* http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf.

58. *Evans*, 504 U.S. at 295 (Thomas, J., dissenting).

59. For example, in *United States v. O'Grady*, 742 F.2d 682, 693 (2d Cir. 1984) (en banc), the U.S. Court of Appeals for the Second Circuit emphasized the unique position that public officials have in society because of the influence and power they wield and the attention they receive from lobbyists.

60. *See* Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1830–32 (2011) (describing the harm of corruption on society); *see, e.g.*, Kim, *supra* note 9, at 901 ("[E]mpirical work has found high levels of corruption to be associated with underinvestment in education.").

61. FRANK ANECHIARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE, at xiii (1996).

official corruption also threatens national security and touches all U.S. citizens.[62] Additionally, public official corruption is the direct cause of billions of dollars of waste every year.[63] Therefore, society correctly expects corrupt public officials to be severely reprimanded. Society thus needs an appropriate enforcement response to regulate public integrity and prevent such damaging corruption.[64]

### A. *Alternatives to the Hobbs Act*

Since the 1970s, the Hobbs Act has proven to be an efficient tool to combat public official corruption[65] and is frequently used to prosecute public officials for corrupt acts.[66] In 1974, 213 public officials were successfully prosecuted under the Hobbs Act.[67] In 1977, this number more than doubled.[68] And in 2012, the number of public officials successfully prosecuted under the Hobbs Act increased to 1060.[69] The spectrum of public officials convicted is broad, ranging from a city electrical inspector to a governor.[70] And public officials have been convicted of extortion for having received various forms of property, ranging from cash payments to golf vacations.[71]

Congress has attempted to pass legislation to address issues

62. *Public Corruption*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/investigate/corruption (last visited Nov. 12, 2014) ("Public corruption poses a fundamental threat to our national security and way of life.").

63. *Id.* (stating that corruption "takes a significant toll on our pocketbooks, wasting billions in tax dollars every year").

64. Griffin, *supra* note 60, at 1816.

65. *See* Garcia, *supra* note 12, at 233; *cf.* United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir. 1972) ("[P]ersons holding public office may also violate the [Hobbs Act] by a wrongful taking under color of official right.").

66. Gayed, *supra* note 9, at 1732; CRIM. RESOURCE MANUAL § 9-131.00, at 2404, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9crm02404.htm (last visited Nov. 12, 2014).

67. Gawey, *supra* note 23, at 399–400.

68. *Id.* at 400.

69. U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2012, at 24 tbl.1 (2012), *available at* http://www.justice.gov/criminal/pin/docs/2012-Annual-Report.pdf. The U.S. Department of Justice reported that 369 federal officials, 78 state officials, 295 local officials, and 318 others were successfully prosecuted under the Hobbs Act in 2012. *Id.*

70. James P. Fleissner, Comment, *Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right*, 52 U. CHI. L. REV. 1066, 1066 n.2 (1985) (citing United States v. Price, 617 F.2d 455, 456 (7th Cir. 1979) (city electrical inspector) and United States v. Hall, 536 F.2d 313, 316 (10th Cir. 1976) (governor)).

71. *Id.* at 1066 & n.3 (citing United States v. Campo, 744 F.2d 944, 945 (2d Cir. 1984) ($250 cash payment); United States v. Trotta, 525 F.2d 1096, 1097–98 (2d Cir. 1975) ($3000 campaign contribution); United States v. O'Grady, 742 F.2d 682, 697 n.1 (2d Cir. 1984) (en banc) (golf vacations and entertainment)).

associated with corrupt political campaign funds and corrupt candidates for public office.[72] Candidates for public office have a right to receive campaign funds, if appropriately declared, from businesses and individuals who expect to influence the candidates' conduct once in office.[73] But 18 U.S.C. § 599 makes it a crime for candidates, regardless of their incumbency, running for public office to solicit, extort, or receive bribes in the form of campaign contributions in return for supporting a person for public or private employment.[74] The statute establishes that candidates for public office may receive up to two-years imprisonment, a fine, or both if they willfully solicit a bribe in conjunction with their candidacy.[75] Section 599 provides that:

> Whoever, being a candidate, directly or indirectly promises or pledges the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.[76]

The existence of § 599 does not suggest that extortion by a candidate for public office should not be prosecuted under the Hobbs Act. According to the legislative history, Congress's main intention when passing 18 U.S.C. § 599 was to reduce the corrupt practice among candidates for public office who were auctioning office appointments in exchange for money during their political campaign.[77] The existence of § 599 could be interpreted as a sign that Congress has thought about the criminality of corruption by candidates for public office.

Additionally, the Federal Election Campaign Act (FECA) governs

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72. *See, e.g.*, Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 2 U.S.C. (2012)). For further discussion of laws that promote government transparency and discourage corruption see Karl Gruss, Note, *Freedom of Information Act and Federal Licensing Procedures: Invoking Exemption 7(F) to Protect Examination Materials*, 66 FLA. L. REV. 1403, 1414–15 (2014).

73. *See* Federal Election Campaign Act of 1971 § 201, 2 U.S.C. § 431(8)(A)(i) (2012); Gayed, *supra* note 9, at 1731.

74. 18 U.S.C. § 599.

75. *Id.*

76. *Id.*

77. Stuart Minor Benjamin & Mitu Gulati, *"Mr. Presidential Candidate: Whom Would You Nominate?,"* 42 LOY. L.A. L. REV. 293, 317 (2009) ("Beyond these textual considerations, the legislative history of 18 U.S.C. § 599 reveals that Congress targeted corruption in the form of candidates secretly auctioning government appointments in return for money and political patronage from corrupt interests.").

contributions and expenditures made to both political committees and candidates for federal offices.[78] Congress passed FECA in response to the public's increasing concern over growing political corruption.[79] FECA provides a comprehensive framework of campaign finance regulations by specifically establishing limits for contributions and expenditures.[80] It prohibits, for instance, personal use of contributions.[81] Misdemeanor violations of FECA by a candidate for office are punishable by a fine, imprisonment for no more than one year, or both, while felony violations are punishable by a fine, imprisonment for no more than five years, or both.[82]

In comparison to the Hobbs Act, which provides up to twenty years of imprisonment for extortion "under color of official right,"[83] 18 U.S.C. § 599 and FECA are weak. The disparities between punishments for elected officials and non-incumbent candidates running for public office do not reflect the views of society, which do not distinguish between a corrupt unelected candidate and a corrupt elected public official. If the Hobbs Act does not apply to non-incumbent candidates for public office who receive a bribe in exchange for promised behavior once elected, severe inconsistencies will indeed arise under the law. While current public officials promising future conduct may be severely reprimanded and imprisoned under the Hobbs Act for up to twenty years,[84] non-incumbent candidates making the same promises would not receive the same punishment. A public official currently in office may be imprisoned for twenty years under the Hobbs Act,[85] while a candidate may be imprisoned for only two years under 18 U.S.C. § 599.[86] This is noticeably inconsistent, particularly for a crime whose eradication is a high level priority for government agencies.[87] Further, "[j]ust enforcement of the criminal laws requires a high degree

78. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 2 U.S.C.).

79. *See* Jessica Furst, Note, *Money and Politics: Will Expenditure Limits Take Candidates Out of the Money Race and Put Them Back in the Office?*, 59 FLA. L. REV. 873, 876 (2007) (noting that Congress was "[a]ware that the increasingly tight bond between money and politics presented ample opportunity for corruption, at least in the public's perception," and that as a result, this awareness "culminated in the passage of the Federal Election Campaign Act of 1971").

80. *Id.* at 876–77.

81. 2 U.S.C. § 439a(b)(1).

82. *Id.* § 437g(d)(1)(A).

83. 18 U.S.C. § 1951.

84. *Id.*

85. *Id.*

86. *Id.* § 599.

87. *See supra* text accompanying notes 57–64.

of consistency."[88] A possible solution to this apparent structural flaw is to read the prohibitions of the Hobbs Act as including the corrupt behavior of candidates for public office receiving bribes in exchange for future promises to act once elected.

### B. *Examples of Inconsistent Cases*

When candidates for public office who accept a bribe in return for a promise of future action are not included within the scope of "under color of official right," inconsistent cases arise. Comparing *McCormick v. United States*[89] to *United States v. Manzo*[90] illustrates this principle. In *McCormick*, Robert McCormick was a member of the West Virginia House of Delegates when he received bribes from a lobbyist.[91] In the early 1980s, West Virginia was experiencing a shortage of licensed medical doctors.[92] In response, the state legislature created a program to allow medical students to receive temporary licenses to practice while the students studied for the state licensing exam.[93] When some of temporary license holders repeatedly failed to pass their licensing exams, the legislature considered reforming this program.[94] Consequently, a group of temporary license holders formed a political interest group and hired a lobbyist in order to retain the temporary license program.[95] The lobbyist contacted McCormick, who agreed to sponsor the bill to continue the temporary license program.[96] McCormick sponsored the House version of the proposed legislation, and a bill was passed extending the program for another year.[97] Shortly thereafter, McCormick also agreed to sponsor legislation during the 1985 legislative session that would grant the doctors a permanent medical license by virtue of their years of experience.[98] When McCormick ran for reelection in 1984, he advised the lobbyist of his "expensive" campaign and urged the lobbyist to contact the political interest group of temporary license holders.[99] Consequently, McCormick received several cash payments from the political interest group in exchange for a promise to continue to support the temporary

88. Griffin, *supra* note 60, at 1846.
89. 500 U.S. 257 (1991).
90. 636 F.3d 56 (3d Cir. 2011).
91. *McCormick*, 500 U.S. at 259–60.
92. *Id.* at 259.
93. *Id.*
94. *Id.*
95. *Id.* at 259–60.
96. *Id.*
97. *Id.* at 260.
98. *Id.*
99. *Id.*

license program once reelected.[100] But he never listed those contributions on his tax return.[101] As a result, McCormick was prosecuted under the Hobbs Act.[102]

In *McCormick*, the U.S. Supreme Court held that if the payments are made "for an explicit promise or undertaking by the official to perform or not to perform an official act," then the extortion is "under color of official right" under the Hobbs Act.[103] Because McCormick was still in office when he received the money in exchange for a promise of action once he was reelected, the Supreme Court held that McCormick could be convicted under the Hobbs Act for having received the bribes, even though the bribes were contingent on his reelection.[104]

On the other hand, the defendant in *Manzo* was not convicted under the Hobbs Act.[105] In *Manzo*, the defendant, Louis Manzo, was an unsuccessful candidate, who also received a bribe in exchange for his express promise to perform specific acts once in public office.[106] Manzo was running for mayor of Jersey City.[107] During his campaign, Manzo agreed to receive cash payments from Solomon Dwek, who was posing as a real estate developer.[108] In exchange, Manzo promised that, if elected, he would help Dwek with matters involving the city's government.[109] Manzo received part of the bribe during his mayoral campaign and was promised the other part of the bribe once in office.[110] In *Manzo*, the Third Circuit focused its analysis on the meaning of acting "under color of official right" and whether a candidate fell into this classification.[111] The court concluded that "[c]onduct by an unsuccessful candidate in an election does not meet th[e] [Hobbs Act] requirement[s]."[112]

The results of *McCormick* and *Manzo* illustrate that a distinction between candidates and elected public officials under the Hobbs Act produces arbitrary results. In *McCormick*, the defendant was a current public official,[113] while the defendant in *Manzo* had not yet been elected

100. *Id.*
101. *Id.*
102. *Id.* at 261.
103. *Id.* at 273.
104. *Id.*
105. 636 F.3d 56, 69 (3d Cir. 2011).
106. *Id.* at 59.
107. *Id.*
108. *Id*.
109. *Id*. at 59–60.
110. *Id.*
111. *Id.* at 65.
112. *Id.* at 69.
113. *McCormick*, 500 U.S. 257, 259 (1991).

to public office. The defendants in the two cases acted similarly, however, the defendant in *McCormick* was running for reelection, and thus held the office at the time that he received the bribe for a promise to act when reelected.[114]

This inconsistency between the results of *McCormick* and *Manzo* is contrary to society's goal to deter public corruption.[115] Manzo's loss of an election had nothing to do with his crime of accepting a bribe and agreeing to act on the payer's behalf once in office. While the bribe might not have been efficient because a losing candidate cannot fulfill his promise to the bribing party, society still has an interest in punishing and deterring candidates from accepting bribes. Additionally, corruption cases tend to focus on a public official's criminal intent when taking a bribe, rather than whether the public official actually acted.[116] Therefore, because public policy dictates that society should strongly punish public officials who have criminal intent, and because such crime threatens social order,[117] candidates for public office should be prosecutable under an efficient prosecutorial tool. The Hobbs Act can offer this efficiency.

## III. THE HOBBS ACT GOVERNS THE INCHOATE CRIME OF EXTORTION

Candidates for public office receiving money in exchange for future acts are, at minimum, attempting or conspiring to extort money "under color of official right," which is explicitly prosecutable under the Hobbs Act. Indeed, punishing candidates for inchoate crimes, such as attempting or conspiring to extort money "under color of official right," is consistent with how courts have generally interpreted the Hobbs Act.

Indeed, the question of whether a non-incumbent candidate for office who wins an election be charged for violation of the Hobbs Act is not new. The United States Court of Appeals for the Seventh Circuit encountered the question in *United States v. Meyers.*[118] The court held that a non-incumbent candidate could be charged under the Hobbs Act when he accepted a bribe during his campaign in return for a promise for future action once elected, and started to perform his promise once in office.[119] In *Meyers*, the court reasoned that the person paying the bribe to the candidate could have reasonably believed that the candidate

114. *Id.* at 259–60.
115. *See supra* notes 57–64 and accompanying text.
116. *See* Hardy, *supra* note 16, at 456.
117. *See supra* notes 60–63 and accompanying text.
118. 529 F.2d 1033, 1036 (7th Cir. 1976).
119. *Id.*

would be elected.[120] Therefore, the court broadened the Hobbs Act's application by charging a public official for his conduct as a non-incumbent candidate for public office.[121] The court determined that the most relevant part of its analysis is whether the briber believed that the candidate would be elected and able to perform his promise, and not whether the candidate was actually in office at the time of the promise.[122] The court also reasoned that "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."[123] Nevertheless, the *Meyers* court did not discuss whether a candidate for public office who subsequently lost the election would be included under this reasoning.[124]

### A. *An Explicit Inclusion of the Inchoate Crime of Extortion*

The Hobbs Act prohibits actual and attempted extortion, as well as conspiracy to commit extortion by public officials.[125] Both attempt and conspiracy are inchoate crimes[126] that are prosecutable even though they may not be completed.[127] Conspiracy occurs when an alleged criminal promises to act in an unlawful manner and actually acts in a way that shows that he will attempt to accomplish the act.[128] The Third Circuit, in *United States v. Jannotti*,[129] correctly reasoned that "[t]he ultimate failure of conspiracy may diminish, but does not eliminate, the threat it poses to social order; therefore, the illegality of the agreement does not depend on the achievement of its ends."[130] Likewise, a candidate for public office receiving a bribe threatens social order. Accepting a bribe in return for a promise of future action once in office is equivalent to

120. *Id.* at 1038.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See id.* at 1035–36.

125. 18 U.S.C § 1951(a) (2012).

126. Black's Law Dictionary lists "attempt" and "conspiracy" as inchoate crimes and states that "inchoate . . . means just begun, undeveloped." BLACK'S LAW DICTIONARY 830 (9th ed. 2009) (internal quotation marks omitted). Further, "[a] principal feature of these crimes is that they are committed even though the substantive offence is not successfully consummated." *Id.*

127. *See* United States v. Williams, 553 U.S. 285, 300 (2008) (reasoning that "impossibility of completing the crime because the facts were not as the defendant believed is not a defense" to an inchoate crime such as attempt or conspiracy).

128. *See, e.g.*, United States v. Rosner, 485 F.2d 1213, 1229 (2d Cir. 1973) ("Conspiracy . . . is an agreement plus an overt act, and the possibility of success has never been thought to be of its essence."); United States v. Jacobs, 451 F.2d 530, 539 (5th Cir. 1971) ("The offense of conspiracy is complete when the criminal agreement has been entered into and at least one overt act has been performed in furtherance thereof.").

129. 673 F.2d 578 (3d Cir. 1982) (en banc).

130. *Id.* at 591.

attempting or conspiring to commit extortion "under color of official right."

A candidate for public office hopes to be elected, but getting enough votes to be elected is beyond the candidate's control. Further, factual impossibility is not a defense to inchoate crimes.[131] Factual impossibility occurs when a defendant faces extraneous circumstances—unknown to him or beyond his control—that render impossible his successful completion of the crime.[132] Thus, impossibility in getting elected should not be a defense to the crime of conspiring to extort "under color of official right."

The Third Circuit, however, disagreed with applying this approach in *Manzo*, where the court reasoned that a losing candidate could not be prosecuted under the Hobbs Act for a bribe he received before winning office.[133] The Third Circuit's reasoning in *Manzo* overlooked the most important part of the conspiracy analysis: Because Manzo had received part of the bribe and had made the promise to act in a corrupt manner once in office, Manzo had already committed the crime of conspiracy to commit extortion "under color of official right." Because inchoate crimes do not have to be completed to be prosecutable, the court should have focused on whether Manzo had attempted or conspired to get a payment "under color of official right," and not whether Manzo was already in office while conspiring or even capable of completing his intended crime.[134]

In its brief, the government properly contrasted the situation in *Manzo* with the facts of *United States v. Ledesma–Cuesta*.[135] In *Ledesma–Cuesta*, the defendant possessed cocaine on board a vessel going to the United States, but the drugs were discovered before the defendant entered U.S. waters.[136] An essential element of the offense, however, was that the defendant had to be "subject to the jurisdiction of the United States."[137] Nevertheless, the Third Circuit correctly held that the government could charge the defendant with an attempt to sell cocaine in the United States before the defendant actually reached U.S. territory.[138] The court reasoned that when the defendant was arrested, he

131. *Williams*, 553 U.S. at 300; *see also Hobbs Act May Prohibit a Conspiracy by Candidates for Public Office,* United States v. Meyers*, 529 F.2d 1033 (7th Cir. 1976)*, 1977 WASH. U. L. Q. 326, 331 [hereinafter *Hobbs Act May Prohibit a Conspiracy*].

132. United States v. Hsu, 155 F.3d 189, 199 (3d Cir. 1998).

133. United States v. Manzo, 636 F.3d 56, 59, 69 (3d Cir. 2011).

134. *See* Brief for Petitioner at 13–14, United States v. Manzo, 636 F.3d 56 (3d Cir. 2011) (No. 10-2489).

135. *Id.* at 20–21; United States v. Ledesma–Cuesta, 347 F.3d 527 (3d Cir. 2003).

136. *Ledesma–Cuesta*, 347 F.3d at 527–28.

137. *Id.* at 530–32.

138. *Id.* at 532.

had already taken sufficient steps to accomplish the drug possession crime, "subject to the jurisdiction of the United States."[139]

In *Manzo*, the government argued that the Third Circuit should take a similar approach.[140] As in *Ledesma–Cuesta*, the defendant in *Manzo* could not fully accomplish the act he was charged with. Indeed, the defendant in *Manzo* was not yet an elected public official, he was only a candidate, and thus may not have fully accomplished one of the Hobbs Act's elements, acting "under color of official right." Even if the Hobbs Act's "under color of official right" extortion requires an alleged offender to be a current public official, this does not change the fact that, similar to the defendant in *Ledesma–Cuesta*, the defendant in *Manzo* took substantial steps to accomplish that element of the offense. Manzo was running for office, was in the middle of a political campaign, and had already received part of the bribe. At a minimum, Manzo either attempted or conspired to extort money "under color of official right" and, therefore, should have been prosecutable under the Hobbs Act.

### B. *An Overview of Existing Cases*

Punishing political candidates for attempting or conspiring to extort money "under color of official right" is consistent with how courts have generally interpreted the Hobbs Act. While the Hobbs Act's use of the phrase "under color of official right" presupposes a public trust position, as long as the briber had a reasonable belief that the public official would be able to act in a certain way once elected, the official does not need to have the actual authority to perform his promise.[141] Violators of the Hobbs Act acting "under color of official right" do not need to have final authority, control, or actual power to carry out their promise.[142] Even though the violator lacked the de jure power to carry out the

139. *Id.* at 531–32.

140. Brief for Petitioner, *supra* note 134, at 20–21.

141. *See, e.g.*, United States v. Wingo, 723 F. Supp. 798, 804 (N.D. Ga. 1989) ("[A]lthough extortion under color of official right presupposes some public trust position, the public official need not actually have the authority that he allegedly misused. This element is satisfied if the defendant exploited a victim's reasonable belief that the official had such power." (citing United States v. Mazzei, 521 F.2d 639, 643 (3d Cir.1975) (en banc))); United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 825 (9th Cir. 1985) (finding that the district court properly stated the law when it instructed the jury that a person may be convicted of bribery even if the person does not have official power to perform).

142. United States v. Collins, 78 F.3d 1021, 1032 (6th Cir. 1996) (stating that "contrary to Defendant's position, it is not necessary that the public official have final authority or control"); *Id.* ("[T]he 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."); s*ee also* United States v. Gonzales, 620 F. Supp. 1143, 1147 (N.D. Ill. 1985).

promise, the briber's belief in the de facto power of the violator is sufficient to allow for prosecution of the violator.[143] Additionally, the briber does not even have to be aware of the title or position of the so-called public official.[144]

In *United States v. Mazzei*, the Third Circuit upheld the conviction of Senator Paul Mazzei for extortion "under color of official right" even though Mazzei had no actual power to achieve what he had promised.[145] Senator Mazzei received a bribe from the owner of a building in exchange for a promise that the government would lease space in the owner's building.[146] Consequently, Senator Mazzei was charged with extortion "under color of official right" under the Hobbs Act.[147] Because it is well known that legislators do not have the actual power to lease space from a building on behalf of the government, Senator Mazzei argued he had not acted "under color of official right."[148] The Third Circuit disagreed and held that if the briber reasonably believed that the violator had the actual power to fulfill his promise, then an act of extortion "under color of official right" was committed under the Hobbs Act.[149]

This reasoning is consistent with the Supreme Court's recent reasoning in *Evans v. United States*.[150] In *Evans*, the Court reasoned that once a public official has unlawfully accepted a bribe in return for a requested service, no additional inducement is needed for a Hobbs Act extortion conviction.[151] The Court reasoned that the public official's "acceptance of the bribe constituted an implicit promise to use his official position to serve the interests of the bribegiver."[152] Under the Hobbs Act definitions of extortion, the violator's actual power to perform the promise is irrelevant.[153] Similarly, the actual power of a candidate receiving a bride to perform once elected is irrelevant, as long as the briber reasonably believed that the candidate would be elected.

143. *Mazzei*, 521 F.2d at 650 ("'[I]t appears that a de facto as well as a de jure officer is punishable for extortion, as he is for any other malfeasance in office.'" (quoting Kitby v. State, 31 A. 213, 213 (N.J. 1894))).

144. United States v. Tomblin, 46 F.3d 1369, 1382 (5th Cir. 1995) (reasoning that "the victim need not actually know the official's position; it is enough that the victim reasonably believe the official can do what he threatens").

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

146. *Id.* at 641.

147. *Id.* at 640.

148. *See id.* at 643–44.

149. *Id.* at 645.

150. 504 U.S. 255 (1992).

151. *Id.* at 259.

152. *Id.* at 257.

153. *Id.* at 268.

Thus, there is no reason why a corrupt candidate could not be charged with attempt or conspiracy to extort under the Hobbs Act. The candidate has already taken substantial steps towards extortion "under color of official right": he has received an unlawful bribe in exchange for a promise to act corruptly once elected.

### C. *Consistency with Federal Bribery Statutes*

Congress has also criminalized the act of giving a bribe to a public official.[154] Both the public official receiving the bribe and the person offering the bribe commit the crime of bribery.[155] In fact, 18 U.S.C. § 201 makes it a crime to bribe public officials and witnesses alike.[156] Similar to the Hobbs Act, the purpose of 18 U.S.C. § 201 is to protect the public by discouraging or "preventing the corruption of a federal official."[157] Similar to the Hobbs Act, the corrupt public official's actual power to perform the requested act is irrelevant to the crime of bribery under 18 U.S.C. § 201.[158] The crime of bribery is complete when the bribe is accepted, regardless of whether the recipient actually performs the promised act.[159] As long as the public official accepts the bribe and the briber intends for the bribe to influence the public official's decisions, the offense of attempted bribery is complete.[160]

Similarly, a violator of the Hobbs Act does not need to have the actual power to perform his promise once he receives a bribe.[161] Accordingly, under the Hobbs Act, a losing candidate for public office should be prosecutable for attempt or conspiracy to extort. If someone gives a bribe to a candidate in exchange for a promise to act once elected, the briber reasonably believes that the public official can or will

154. 18 U.S.C. § 201 (2012).

155. *See id.*; Gawey, *supra* note 23, at 395.

156. 18 U.S.C. § 201(b).

157. United States v. Gjieli, 717 F.2d 968, 972 (6th Cir. 1983) (citing Kemler v. United States, 133 F.2d 235, 238 (1st Cir. 1942)); *Kemler*, 133 F.2d at 237–38 (discussing the former version of 18 U.S.C. § 201 and stating the "clear purpose of the statute is to protect the public from the evil consequences of corruption in the public service").

158. *See Gjieli*, 717 F.2d at 973 (noting that "the Second, Seventh, Fourth, Fifth and District of Columbia Circuits . . . have all imposed § 201 liability on bribers who erroneously perceived that the duties of a public official would give that official the authority to accomplish the desired act").

159. *See* Howard v. United States, 345 F.2d 126, 129 (1st Cir. 1965).

160. *See id.* at 128; *see also* United States v. Troop, 235 F.2d 123, 124–25 (7th Cir. 1956) ("We hold the offense of attempted bribery of a Federal Officer is complete upon the tender of the bribe to such Officer with intent to influence his decisions and acts in an official capacity. We think it is entirely immaterial that for some reason, subsequently determined, the Officer could not have brought about the result desired by the person offering the bribe. We think the authorities are in accord.").

161. *See supra* notes 141–44 and accompanying text.

act once in office. Likewise, the candidate intends and hopes to be elected. As the court stated in *Howard v. United States*, "[o]bviously no one would give or offer a bribe unless he expected to gain some advantage thereby, and since attempting to gain an advantage by this means is the evil which the statute is designed to prevent," it does not make any difference whether the act for which the bribe is given is actually done or even whether the act could be done.[162]

Courts agree that 18 U.S.C. § 201 should be interpreted broadly.[163] The courts should also interpret the Hobbs Act broadly enough to make candidates for public office who receive a bribe in exchange for promised behavior once elected prosecutable for at least attempt or conspiracy to commit extortion "under color of official right."

## IV. A BROADER INTERPRETATION OF "UNDER COLOR OF OFFICIAL RIGHT": THE NEED TO INCLUDE CANDIDATES FOR PUBLIC OFFICE

The words "under color of official right" are ambiguous. Courts have historically grappled with the meaning of this clause and the debate over its interpretation is ongoing.[164] As Justice Anthony Kennedy stated in his concurring opinion in *Evans*, "the phrase, 'under color of official right,' standing alone, is vague almost to the point of unconstitutionality."[165] The language certainly does not foreclose the prosecution of candidates for public office under the Hobbs Act when they receive a bribe in exchange for a promise to act once elected.[166] Neither the legislative history of the Hobbs Act nor of its predecessor the Anti-Racketeering Act illuminates the meaning or interpretation of

162. *See Howard*, 345 F.2d at 129 (quoting Kemler, 133 F.2d at 238).

163. *See, e.g.*, Parks v. United States, 355 F.2d 167, 168 (5th Cir. 1965) ("This Court has approved the cases from those circuits which have given a broad construction to this statute."); Wilson v. United States, 230 F.2d 521, 524 (4th Cir. 1956) (reasoning that "in the face of such sweeping language and the purpose it was designed to accomplish, we find no reason to find any intent on the part of Congress that the statute must be narrowly construed, to exclude any person or any conduct fairly within the broad statutory ambit"); Hurley v. United States, 192 F.2d 297, 300 (4th Cir. 1951) ("The term 'person acting for the United States in an official function' is broad enough to include officers and employees.").

164. United States v. Manzo, 636 F.3d 56, 62 (3d Cir. 2011)*; see also* Evans v. United States, 504 U.S. 255, 264–66 (1992) (noting disagreement among courts over terms in the Hobbs Act).

165. *Evans*, 504 U.S. at 275 (1992) (Kennedy, J., concurring) (quoting United States v. O'Grady, 742 F.2d 682, 695 (2d Cir. 1984) (en banc) (Van Graafeiland, J., concurring in part and dissenting in part).

166. *See* 18 U.S.C § 1951(b)(2) (2012) ("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.").

"under color of official right."[167] Congress passed the Hobbs Act to reduce corrupt activities in government.[168] Congress may have purposely made the Hobbs Act broad to permit it to evolve over time. So, does "under color of official right" include candidates for public office receiving bribes in exchange for a promise to perform once in office?

The Third Circuit in *Manzo*, in analyzing whether "under color of official right" includes candidates for public office, first addressed the plain meaning of the words.[169] Due to the inherent ambiguity of "under color of official right," the court was unable to use a plain meaning approach.[170] The court then considered the legislative history to determine Congress's intended meaning of the clause.[171] Because the legislature did not discuss the meaning directly, this too proved unsatisfactory.[172]

The *Manzo* court proceeded to use common law sources to explain the original meaning of "under color of official right."[173] While this approach is common,[174] the court misapplied it in the *Manzo* ruling. First, while it is true that according to some older common law theories "under color of official right" did not include candidates for public office,[175] this narrow interpretation is inconsistent with the reality that government is more concerned than ever about corruption.[176] Thus, it is difficult to argue that Congress would not want the Hobbs Act, widely used to combat public corruption, to apply in cases where candidates for office receive bribes in exchange for promises to perform once in

167. *See* Harary, *supra* note 37, at 1346.

168. *See* 91 CONG. REC. 11,899–922 (1945); H.R.REP. NO. 73-1833, at 2 (1934) (including a letter from Attorney General Homer Cummings to the Chairman of the House Judiciary Committee stating "the purpose of the legislation is . . . to set up severe penalties for racketeering by violence, extortion, or coercion"); s*ee also* Harary, *supra* note 37, at 1347 & n.38 (1985) ("[T]he only significant mention during the House debates of the 'color of official right' langnage [sic] was an amendment offered by Representative Day to expunge it. The amendment was voted down after Representative Hobbs, the bill's sponsor, explained that this language would not apply to a union official trying to collect initiation fees or dues in a labor union." (citation omitted) (citing 89 CONG. REC. 3228–29 (1943))).

169. *Manzo*, 636 F.3d at 61.

170. *Id.* at 62.

171. *Id.*

172. *Id.* at 63.

173. *Id.* at 64–65.

174. *See* Evans v. United States, 504 U.S. 255, 259–60 (1992); *id.* at 260, 263 (discussing the common law definition of extortion when interpreting the Hobbs Act).

175. *See id.* at 260; United States v. Mazzei, 521 F.2d 639, 650 (3d Cir. 1975).

176. *See* Garcia, *supra* note 12, at 234 (describing how the Hobbs Act was rarely used to prosecute public officials committing extortion until the 1970s).

office.[177]

Second, the *Manzo* court improperly concluded that because Congress had the opportunity to use different language when it created the Hobbs Act, and since it did not, the "under color of official right" language was to be given its common law meaning.[178] Congress passed the Hobbs Act to replace the Anti-Racketeering Act,[179] and since 1946 courts have interpreted many provisions of the Hobbs Act contrary to the common law. At least partially due to court interpretations, statutory extortion is currently far different from common law extortion. For instance, contrary to common law extortion, courts have interpreted the Hobbs Act to not require a corrupt state of mind.[180] Additionally, Congress never expressly commented on the use of the Hobbs Act as a weapon against political corruption,[181] and yet, since the 1970s, the Hobbs Act is one of the leading prosecutorial tools against political corruption.[182] In light of Congress's silence on the issue, and in light of the evolution of the Hobbs Act throughout the years, a better analysis of "under color of official right" would consider societies' modern view on the issue of public official corruption. Because courts have focused on criminal intent when accepting a bribe rather than a violator's actual power to fulfill a promise,[183] a candidate for public office should be considered capable of acting "under color of official right" regardless of the outcome of an election.

Third, Congress may have purposely left the language of the Hobbs Act vague for courts to properly interpret the Act in accordance with modern society's views on the issue of political corruption. It is well established that Congress sometimes defers statutory interpretation to courts,[184] particularly because inflexible legislation may become quickly outdated.[185] Courts often clarify the scope of legislation and elaborate on the legislative intent behind criminal statutes.[186] Congress's purpose in enacting the Hobbs Act was "to prevent interference with

177. However, judicial activism might be preferred here since Congress is comprised of elected public officials who might be less likely to pass public official anti-corruption measures.

178. *See Manzo*, 636 F.3d at 63.

179. *See id.*

180. *See, e.g.*, *Evans*, 504 U.S. at 270.

181. *See supra* Section I.B.

182. *See* Garcia, *supra* note 12, at 233 & n.30.

183. *See supra* Part III.

184. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347.

185. Griffin, *supra* note 60, at 1828.

186. *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 471 (1996).

interstate commerce by robbery or extortion."[187] Such a broad purpose is consistent with Congress's intent to pass broad anti-corruption legislation and to leave room for courts to interpret the Hobbs Act. Additionally, courts have already given a broad interpretation to Congress's intent under the Hobbs Act.[188]

As the Seventh Circuit stated, "[t]he use of office to obtain payments is the *crux* of the statutory requirement of 'under color of official right.'"[189] Thus, the relevant analysis is whether the candidate for public office used the pretext of office to receive a bribe and not whether the candidate was actually in office when receiving the bribe. A candidate for public office extorting money for the promise to act once elected has committed the crux of the statutory requirement of extortion "under color of official right." And contrary to the Third Circuit's opinion in *Manzo*, a candidate for public office extorting money for promises to act if elected is indeed committing extortion "under color of official right."

Courts have used similar reasoning in Civil Rights Act cases based on the analysis of the "crux" of the statutory requirement. In *United States v. Price*,[190] the defendants were charged with conspiracy to injure and punish three persons in custody in county jail without due process.[191] Among the defendants were state officials as well as non-official defendants.[192] The question arose as to whether the non-official defendants could be acting "under color of law" in participating in the conspiracy due to their cooperation with the state officials.[193] The Supreme Court held that both public officials and private citizens who engaged with a public official in a prohibited civil rights crime could be punished under the Civil Rights Act of 1968.[194] That is, a private citizen can act "under color of law" without being an officer of the state if the private citizen willfully participated in a crime with the state or its agents,[195] because "they were participants in official lawlessness."[196]

In *United States v. Lester*,[197] the U.S. Court of Appeals for the Sixth Circuit also upheld the conviction of a private citizen for extortion

187. H.R. REP. NO. 79-238, at 1 (1945).
188. *See Hobbs Act May Prohibit a Conspiracy*, *supra* note 131, at 334.
189. United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974) (emphasis added).
190. 383 U.S. 787 (1966).
191. *Id.* at 789–90.
192. *Id* at 790–91.
193. *Id.* at 791–93.
194. *Id.* at 794.
195. *Id.*
196. *Id.* at 795.
197. 363 F.2d 68 (6th Cir. 1966).

under the Civil Rights Act of 1968.[198] The defendant in that case was charged with conspiracy to violate 18 U.S.C. § 242—addressing the deprivation of rights under color of law—for arresting and imprisoning the victim without due process.[199] The defendant argued that, as a private citizen, he was incapable of acting "under color of law" and thus could not be prosecuted for violation of 18 U.S.C. § 242.[200] The Sixth Circuit disagreed and held that the defendant could be convicted for extortion "under color of law," even though the defendant was not a public official and the defendant's alleged accomplices—the public officials—were not convicted.[201] The Sixth Circuit reasoned, *inter alia*, that the "'willfulness' [of committing the criminal act] may reside in a person wholly incapable of committing the forbidden act."[202]

Therefore, under the Hobbs Act, a candidate for public office may acquire official status by proximity to public office alone.[203] This is because"[t]he aura of officialdom is expansive enough to engulf those who acquire officiality by association."[204] Thus, "under color of official right" may also be interpreted to include private citizens who do not have de jure public official power, but are sufficiently associated with public office to be attributed the official status required by the Hobbs Act. Because a briber would not waste his money on someone he believes has no chance of winning an election, a private citizen running for office who receives a bribe in exchange for a promise to act once elected is sufficiently close to public office.

Courts may have concerns with promoting a broader interpretation of the Hobbs Act. They may fear making valuable political activity—political campaign contributions—a crime.[205] But under the Hobbs Act, the objects of scrutiny should be public officials and non-incumbent candidates unlawfully extorting money from private citizens. Such behavior, by either classification, has no positive value for society.

198. *Id.* at 74.

199. *Id.* at 69.

200. *Id.* at 72.

201. *Id.* at 73–74.

202. *Id.* at 73.

203. *See Hobbs Act May Prohibit a Conspiracy*, *supra* note 131, at 328 n.16 (noting that because in certain instances private persons are able to commit extortion "under color of law" this may suggest that "under color of official right" may not be a rigid standard limited to actions of de jure public officials); *see also* United States v. Price, 383 U.S. 787, 794 (1966) (noting that private citizens can act "under color" of law when that private citizen is a joint participant in unlawful activity and engaged by public officials); *Lester*, 363 F.2d 68 at 73–74 (1967) (upholding the conviction of a private citizen who conspired with police officers to falsely arrest someone).

204. *Hobbs Act May Prohibit a Conspiracy*, *supra* note 131, at 328 n.16.

205. *See* Hardy, *supra* note 16, at 412–13.

Because corruption should have no place in a democratic society, bribery should not be referred to as a political activity. Bribery is different than legal political contributions: It hurts democracy at its core.[206] Additional anti-corruption regulation would not deter candidates for public office from seeking political contributions in traditional settings without the use of extortion or bribery.[207] Therefore, society would benefit from harsher sentences to deter political corruption, and courts should not fear imposing appropriate sanctions on corrupt public officeholders or non-incumbent candidates running for public office.

## CONCLUSION

All elected public officials were once candidates for office. The importance of combating corruption among candidates is thus as important as combating corruption among current public officials. The Hobbs Act is a powerful tool to combat political corruption. Candidates for public office who receive a bribe in exchange for a promise to act once elected have shown precisely the corrupt intent that society seeks to expunge and prevent. Such candidates have accepted a bribe before ever setting foot in office, thus already tainting the faith society has placed in them as elected officials. Refusing to punish non-incumbent candidates at the same level as current public officials is inconsistent with the broader goal of preventing *all* political corruption.

Society views corruption as a serious political evil, and courts have an opportunity to respond to this growing concern among citizens. The criminal justice system would be well served if Congress reformed and harmonized anti-corruption laws. But until Congress acts to resolve these inconsistencies, courts should stop bouncing the proverbial blank check and interpret the Hobbs Act to reconcile this disharmony and make the Hobbs Act the flexible anti-corruption weapon that prosecutors need. Courts should include candidates for public office in the meaning of "under color of official right" because courts have consistently interpreted the Hobbs Act beyond the common law meaning of extortion to reflect the evolution of society. Additionally, because the Hobbs Act's "under color of official right" language is ambiguous, courts should interpret the words in the manner that benefits society most. Therefore, courts should treat non-incumbent candidates for public office as public officials who can violate 18 U.S.C. § 1951(a) of the Hobbs Act by accepting bribes in return for a promise of future action.

206. BRAITHWAITE, *supra* note 20, at 225.

207. Laws like the FECA, see *supra* notes 78–82, explain how to seek political campaign contributions in this traditional setting.