Supreme Court of the United States

In the Matter of:

UNITED STATES OF AMERICA,	
Appellant;	
vs.	
JOSEPH FRANCIS NARDELLO AND ISADORE WEISBERG	
Appellees.	

Docket No. 51

Place Washington, D. C.

Date November 12, 1968

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October [redacted], 1968

UNITED STATES OF AMERICA,

Appellant;

vs. No. 51

JOSEPH FRANCIS NARDELLO AND ISADORE WEISBERG,

Appellees.

Washington, D. C.
Tuesday, November 12, 1968

The above-entitled matter came on for argument at 11:45 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. Douglas, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 51, The United States, appellant, versus Joseph Francis Nardello and Isadore Weisberg, appellees.

THE CLERK: Counsel are present.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.

ON BEHALF OF APPELLANT UNITED STATES OF AMERICA

MR. LACOVARA: Mr. Chief Justice, and may it please the court, this case which is here on direct appeal from the United States District Court for the Eastern District of Pennsylvania arose out of the efforts to uncover and prosecute the members of a multi-state ring which specializes in extorting money from victims upon threat to accuse them of homosexual activities.

The indictments in the present case were returned under a Federal interstate racketeering statute, the so-called Travel Act, Section 1952 of the Federal Criminal Code, which makes it a Federal offense to travel in Interstate Commerce with the intent to carry on unlawful activity, including extortion in violation of the laws of the state in which committed, and thereafter to perform an act promoting that objective.

The indictments in the present case were on appellee's motion to dismiss by the District Court. The court found first in using the term "extortion" Congress intended that the term

should track closely the legal understanding of that term under state law, but that in Pennsylvania the crime captioned "extortion" is the common law form of extortion, that is the crime committed by a public officer who takes an unauthorized or excessive fee, and that since the appellees had not been alleged to be public officers and in fact were conceded not to be, the indictment failed to state an offense against them.

The Government's contention is that this statute uses the term "extortion" and the other terms that are listed in the statute generically, so that conduct has referred to a sort of criminal activity, and that interstate travel to promote this type of act is reached by the Federal statute so long as the conduct is made unlawful by the law of the state, whatever the particular label the state happens to attach to it.

The issue before the court this morning is whether the Government's construction rather than the District Court is the correct one.

The Travel Act which was enacted in 1961 as part of a series of measures to combat organized crime and racketeering makes it a general offense, and provides generally that interstate travel to promote an unlawful activity as subsequently defined is a Federal violation.

Unlawful activity could be in violation of the law of the state or of the United States, and for relevant purposes the statute makes it a Federal violation to travel in

Interstate Commerce to carry on extortion in violation of the laws of a particular state.

The allegations in the present indictments allege that at least one of the conspirators travels in Interstate Commerce from Chicago to Philadelphia in two cases, and from Camden, New Jersey, to Philadelphia, in a third, with the intent to promote an activity unlawful under Pennsylvania law.

The controversy in this case arises from the fact that under Pennsylvania law extortionate conduct is termed "blackmail" rather than "extortion," but Pennsylvania does have as I mentioned the continuation of the original ancient common law notion of extortion, the acceptance by a public officer of unlawful fees.

The District Court on its analysis of the language of the statute and its legislative history concluded that Congress intended when it spoke of extortion and violation of the laws of the State in which committed, that the Federal term should track closely the legal understanding of that term in State law.

We contend that this construction of the statute deserves the remedial part of this legislation an insupportable narrows its plain meaning.

I should like to turn first to the background and purpose of the statute. I mentioned that this was one of a series of measures submitted by the Department of Justice in 1961 to bring Federal resources and Federal criminal process

to bear on a problem which had outgrown the capacity of State and local Governments to deal with, and that is the situation which we have encountered through the ability of the modern organized syndicate criminal that conducts illegal operations from a remote State, sending minions back and forth across State lines to carry out various forms of illicit activity, using long distance telephone to manage or carry out various forms of violations of State law.

This mobility, and this diffusion of organization, made it extremely difficult for State and local authorities to investigate or to prosecute violations of their local laws.

Now, the statute, as it is clear both from its language and its legislative history, does not purport to close off the channels of Interstate Commerce to all attempts to violate State law. Because its focus was organized crime and racketeering.

The organization of communication from one State to another were to be interrupted for those who travel in Commerce with unlawful activities, only with respect to activities which years of investigation by State and local crime commissions, and by the Federal Government and by congressional committees had shown to be the mainstays of organized crime, and for that reason the term "unlawful activity" in the Travel Act is defined to include only business enterprises involving gambling, prostitution, liquor, and narcotics violations, and

extortion, bribery, and arson in violation of State or Federal law.

These were the activities that these investigations had established to be the principal occupations of the organized modern nation-wide criminal operations.

The question before the court is what Congress intended to reach by using the term "extortion" in violation of the laws of the State in which committed. The District Court has held that in Pennsylvania, and therefore as it recognized in at least 12 other States which also do not condemn extortionate activities under the heading of extortion, but instead maintain some continuation of the common law notion of extortion -- that this Federal statute reaches only travel in Interstate Commerce into a State by a public official of that State to accept an unauthorized fee.

It is our contention that this narrow construction by the District Court is plainly in error. Abuse of office was not one of the principal forms of violations that motivated Congress to pass this Federal legislation dealing with Interstate travel to promote extortion.

There are several reasons that make that clear.

First, it is unlikely that a public official of a State is going to be a member of an organized criminal syndicate, but in any event his opportunity in the District Court's analysis to commit extortion in the common law sense derives

from his position as a public officer within the State, and therefore he is not the type of individual who is unlikely to be ameniable to investigation and prosecution by the local authorities.

Q In reading the briefs in this case, I was impressed, negatively impressed, by the seeming lack of legislative history bearing very explicitly on this question. I assume that there is none; is that correct?

A That is correct.

The Senate and House hearings do not reveal any specific focus on the question of what extortion meant. However, I think it is significant that in the course of wending its way through Congress, this bill was sought to be amended by the House in a way which I think will illustrate the actual intent and focus that Congress had in using the term "extortion."

As I mentioned, the unlawful activities are defined to mean for illegal business operations as well as extortion, bribery and arson. The House committee, subsequently ratified by the Full House, tried to limit extortion and bribery to offenses committed in connection with the illegal businesses otherwise defined in the statute.

The Department of Justice vigorously objected, the Department of Justice had sponsored the measure, to that amendment and wrote to Chairman Celler of the House committee that this amendment would eliminate from the purview of the statute

extortions which were unrelated to the other business enterprises mentioned in the statute, but which were and had historically been major forms of extortion petpetrated by organized crime.

This letter from the Justice Department explicitly mentioned that such forms of extortion practiced by organized crime includes shakedown rackets, Shylocking or the charging of usury interest on loans and labor extortion.

Q Where is that?

A It is not in the brief.

Q Is it in the record?

A No, this case arises on dismissal of an indictment and there is no record. It is quoted in a law review article which we cite, the Palmer Article in Volume 28 of the Brooklyn Law Review.

Apparently it was not published as part of the hearings or the committee reports, because it was submitted after the reports had been printed by the various committees.

All that we have is the conference report which merely states the conclusion that the Senate had agreed to the House.

Q The only record you have of this letter is in a law review?

A It was written by an attorney of the Department of Justice, I realize that may seem self-serving, but we have

no reason to doubt his good faith, but that is the only place.

Q Where did he get the letter?

A Apparently he wrote it.

Q If you want to use a letter like that, you must find it in the Department files.

A I am sure that we can obtain a copy of it and submit it if the court wishes to see the full text of the letter.

Q If you want us to look at any of it, I think that you would furnish the whole letter.

A Very fine, I will make arrangements to do that. But it was in that context that the conference committees deleted the limiting language, and restored the bill to its fuller scope. We don't realize solely on that one isolated and perhaps not terribly accessible piece of legislative history.

Our basic argument, as we went into in great length in the brief, is that the background of the legislation shows that we are dealing with the types of activity engaged in by organized crime syndicates, and public officer actions are not a principal form of this activity.

The other terms used in the statute also are clearly used in their generic sense. The term "gambling" or "narcotics violations" clearly as the hearings themself will show, does not point only to a section of a State law which is captioned "gambling," or "narcotic violations." This is an effort by

Congress to refer us to categories of crime, which if made unlawful by the State where the activity is going to be conducted ---

Q Now extortion is linked here with bribery, and bribery involves by definition public officers, doesn't it?

A Yes. That I think underscores the soundness of our position, because under the District Court's approach the use of those two terms side by side in this statute would make one of them superfluous in at least a third to a quarter of the States.

Q I don't understand that.

Was arson added later?

A It was added in 1965.

Q The original language was extortion or bribery?

A That is right.

Q Is there any reference in the brief to the letter we were talking about?

A Not except in the citation of the law review article, there is not.

MR. CHIEF JUSTICE WARREN: We will recess at this time.

(Whereupon, at 12 o'clock noon, the Court recessed, to reconvene at 12:30 p.m. the same day.)

AFTERNOON SESSION

12:35 p.m.

MR. CHIEF JUSTICE WARREN: Mr. Lacovara, you may continue your argument.

MR. LACOVARA: Thank you, Mr. Chief Justice.

I would like to resume by returning to the point that Mr. Justice Stewart raised in his question noting the relative sparseness of the legislative history on the question of what Congress understood by the term "extortion."

I began to respond to the question by suggesting that since Congress dealt in the clause in which it uses the term extortion, with another offense which it termed bribery, that the District Court's analysis would in Pennsylvania and about at least seven, and perhaps many more States, make one or the other of these two terms redundant, because in Pennsylvania the crime captioned extortion is simply a form of bribery.

That I think is not the limit of the fair inferences that can be drawn from the legislative history.

I mentioned earlier that this legislation was considered along with a package of other measures that had been submitted in 1961 to deal with the subject of organized crime.

There were two other statutes which were submitted and being considered by Congress at the very same time the hearings in both the house and Senate were held on a series of measures, and two of the bills that were before Congress at the

time used the term extortion in the sense that we suggest Congress understood it in passage of the Travel Act.

The first was a measure to amend and expand the Fugitive Felon Act which at the time was limited only to those who had fled from states to avoid prosecution of certain defined felonies, certain enumerated felonies, one of which was extortion by threat of violence.

Another one of the measures Congress was considering at the very time it had the Travel Act before it was a proposal to provide for a grant of immunity in situations where there was an arguable violation of either the Labor Management Relations Act or the Hobbs Act which punished opposite sides of the same coin.

The Hobbs Act punishes extortion, presumably covering labor extortion, and the 1947 Labor Act makes it an offense for an employer to give money or a thing of value to a union official apart from his wages.

So that there was before Congress at the time it was considering the Travel Act two pieces of legislation which used the term extortion in the precise generic sense of a coercive exaction under threat of force or accusation that had been used to underlie the earlier measures.

Q Am I correct in my belief that no where in the statutes under consideration did Congress use the word "blackmail"?

A That is correct, sir. That is the source of the

difficulty. We have suggested on a related alternative argument that blackmail has for a hundred years or more been considered a synonym for extortion, and indeed the Pennsylvania courts and Pennsylvania Legislature used these terms interchangeably in cases which the District Court saw fit to reject as ill considered. The Pennsylvania courts have in fact sustained indictments drawn under the blackmail statutes alleged in the instant indictments even though those indictments in the state court charged extortion by henious crime.

Q Have you made any study to determine how many states consider the facts in this case as being extortion?

A Yes. In our appendix to our brief, Mr. Chief Justice, we set forth that there are at least thirteen states which punish this form of conduct under a blackmail statute.

In at least seven of those states, extortion is a separately defined offense, but it relates to the common law form of extortion.

We also set forth that there are other classifications of extortion conducted in other states, robbery, threats and menaces. In a number of those other states, similarly, there is a crime expressly called extortion. That does relate either to the public officer exaction or some particular notion of extortion.

In five or six states the only offense called extortion is charging by a railroad company of unfair carrier

and presumably under the District Court mechanical analysis the only offenses which would be reached by the Travel Act in those States would be submission by mail of a bill by a railroad company of an inflated charge.

That is not in any way related to the organized crime focus on this measure.

We did not collect in our appendix all of the possible permutations of relating the categorization of the statutes.

You will notice, Mr. Chief Justice, that the last category on pages 30 and 31 of our Breif lists statutes which make some mention in their caption of extortion. Some of them are, however, hybrids like fear used to extort or larceny by extortion.

In some of those states there is a crime captioned simply extortion which is the public officer exaction. How the District Court would deal with these we can't imagine. But this confirms, we believe, we should be looking not to labels but to substance in interpreting this statute.

The focus of the Congressional concern in this area with the type of activity which years of investigation have shown organized crime syndicates customarily resorted to in mulching their profits. They had not been shown and no one has yet suggested, not even the District Court, that acceptance of unlawful fees is a traditional form of organized crime. We consider rather that Congress used the term extortion as it

used the other terms in this statute in its generic sense as relating to a category of possible unlawful conduct, an attempt to obtain money or property from an individual by threat, either to commit injury upon him or his family or his property, or to obtain some advantage or to accuse him of a heinous crime or some other indictable offense.

The District Court supported its analysis by pointing to the language of the statute and to the undisputed Congressional policy of respecting the variations in state criminal law definitions.

Neither of these factors, however, supports the District Court analysis.

First, the language of the statute does not even say that it is an offense to travel in interstate commerce to engage in activity in violation of extortion laws of the state.

We might have a somewhat graver problem in accepting the Government's construction if that were the usage, but we have instead an act which punishes interstate commerce to promote extortion in violation of the laws of the state in which committed.

We suggest that this is quite susceptible and of the construction that is in fact the intended construction meaning Congress was concerned about a category of activity, and so long as that activity, that type of activity is actually made unlawful under the laws of the state in which the activity

is committed it's reached by this federal statute.

Similarly, the Congressional awareness that the contours of criminal activity will vary from state to state, even within a particular type of activity, in no way suggests that the label of the particular state happens to affix in outlawing some form of that activity should rigidly control the interpretation of the federal statute.

The exchanges in the legislative history relied on by the District Court related to gambling. It was expressly recognized that for several reasons an individual who operated a lawful gambling business in Nevada would not be in violation of this statute if he traveled to promote that activity.

Now, the District Courts somewhat extrapulated from that that Congress intended that the definition of the term used in the federal statute should track closely their legal understanding under state law. The cited passage in no way supports that. No one either on the Committee or any of the witnesses testifying indicated that whether or not the gambler, the Los Vegas gambler travel was unlawful, was going to turn on whether or not his activities were dealt with under a statute talking of gambling.

It was assumed throughout the legislative history that even if the state had a statute outlawing a lottery under a statute of gambling and outlawed bookmaking separately under a statute entitled bookmaking, a bookmaker who traveled in

interstate commerce would still be in violation of this statute.

Q Is this the first time this question has arisen in the District Court?

A Yes. There have been other prosecutions under the extortion branch of this statute, including some for extortion conduct engaged in in states which punish only blackmail, punish a crime called blackmail, and which have instead under the heading extortion public officer exaction cases.

There is a reported decision to that effect in United States versus Hughes, 385 Federal Second, where the extortion was conducted in North Carolina, which is one of the states listed in our blackmail list and which also has an extortion statute similar to that in Pennsylvania.

There was no challenge in that statute to the reach of the extortion term in this legislation.

Q When was that passed?

A That Act was passed in 1961. This is another argument, we believe, supports our construction, even though concedingly the legislative history is not expressed on the question of how Congress defined or understood the term.

When Congress legislates on a criminal subject in the 1960's we think it highly desirable that it be taken to be using terms in their commonplace every day sense, because it is this sense in which the average man of ordinary intelligence, who must gauge his conduct by the measure, should be held to

understand it.

As we have seen recently, the Federal legislation as well as the Pennsylvania judicial and legislative treatment and the scholarly opinions cited in our Brief, all illustrate that today in the 1960's extortion does not mean an exaction by a public official.

The mere acceptance of an unauthorized fee, even in the absence of any coercion, it means rather an attempt to obtain something of value from the individual by making it a threat to do some injury to him or to his reputation.

Q Does it not make the statute rather vague, if you do not confine it to the crime which is named?

A No, not necessarily. If we look at the Pennsylvania law to see what the man of ordinary intelligence in Pennsylvania would have understood this conduct to describe, we submit he would have been on Federal notice the federal statute was prohibiting his conduct, even though the conduct is termed blackmail in Pennsylvania.

I have already referred to the judicial decisions in Pennsylvania which sustain extortion indictments under blackmail statutes.

The blackmail statutes themselves use the term whoever intends to extort, make certain types of threats.

If the individual consulted the general index to the Pennsylvania statutes to see what extortion in violation of

state laws meant one of the earliest listings under the heading extortion is a reference to the blackmail statutes.

There is a cross reference under the extortion statute in Pennsylvania which says for extortion by others than public officers, see the sections involved in this case. So I think not only do we have the ordinary understanding of the average citizen in Pennsylvania and elsewhere in the English speaking world that extortion means a coercive intent to obtain property under threat, but we have expressed authority that Pennsylvania regards this form of conduct as extortion, and we see no notice or vagueness problems in the statute.

Q Do you think your argument runs afoul of the general principle that criminal statutes must be strictly construed?

A Well, we accept the general validity of that proposition. We don't think it cuts against us here. We want this statute strictly construed according to the fair meaning of its term. We are not trying to expand the notion of extortion beyond what it normally means. We are not trying to reach the remote extensions of what may be extortion.

It is perhaps notable to point out, as the District Court recognized, this conduct is mala in se. It is clearly violation of Pennsylvania law. So we don't have a situation where the individual is completely blameless or not depending on the meaning of the Federal statute. His guilt under the Federal statute may turn on what extortion means, but we are

not trying to use a God out of the air to impose criminal liability on otherwise innocent conduct. So we think that there is no offense here against the general maxim about construing criminal statutes.

I would like to save any remaining time for rebuttal, if the Court has no questions.

MR. CHIEF JUSTICE WARREN. You may. Mr. Fitzpatrick.

ORAL ARGUMENT OF F. EMMETT FITZPATRICK, JR., ESQ., ON BEHALF OF APPELLEE

MR. FITZPATRICK: Mr. Chief Justice, may it please the Court.

The law of Pennysylvania in its definition of extortion is not a new or unusual definition. It tracks very closely, if I might borrow a term from the District Court's opinion, the common law definition of extortion, and it requires, without getting any more detailed than is necessary for purposes of this argument, that at least one of the parties involved in an exchange of money to do something must be an individual who is a public officer and a public officer who has something to do with the reason why the money is passed.

This statute was applied in Pennsylvania to prosecute when there are discovered officials who have breached their duty, their sacred trust of the public, and have accepted a bribe.

It is not as it has been characterized by the Government

in its Brief and its oral argument merely a statute that involves excessive fees. The excessive fee measure is solely to exclude the defense, "well, I didn't know I couldn't charge $2.50 for a $1.50 dog license."

This is the statute that Pennsylvania uses when it is necessary to prosecute corrupt officials.

The crime of bribery in Pennsylvania is further defined by the legislature and is set down in the Penal Code of 1939 and that involves a few different elements; but a bribery must be given or accepted by certain enumerated officials. No longer just an undefined class of public officials. And it has to do with specific actions that they are suppose to take.

I might say that by defining extortion I know, and by defining bribery I assume, and by all of its definition of common law crimes Pennsylvania has not limited violations of these crimes to those things which are contained in the statute.

There are cases dealing with what Pennsylvania calls common law extortion, and these cases quite frankly are generally in the area of who should be a public official.

The common law definition of public official has for some reason by the courts been granted a wider sphere than the statutory definition. But in no instance in the Commonwealth of Pennsylvania is activity which takes place between two individuals who are not public officials or not named in a statute whereby one says to the other, "if you don't give me a certain

amount of money I will expose you or I will beat you up or I will print something in the newspaper about you."

In no instance is this particular type of conduct prosecutable either by extortion or under the bribery statute.

Q Suppose this prosecution had taken place in, say, California where this factual situation would be covered by the extortion statutes, would this conviction stand?

A Assuming the facts as your Honor has stated them, and I certainly defer to your judgment in that area, I think it would. I would assert that it would.

I will admit that in other states it could result in a conviction if their statute were drawn differently.

Q Well, then, wouldn't that indicate that Congress intended to proscribe this kind of conduct by this statute?

A No, sir, it would not. And I say that most respectfully. I think really that the prosecution that you have just mentioned and the fact that a successful prosecution may be obtained in California under these same set of facts was not within the intention or the purview of the individuals who drew the Travel Act. I think this is a bonus that frankly they never considered, for reasons that I would like to set forth.

Q Yes, sir, go right ahead.

A In Pennsylvania, there is absolutely no question but that the set of circumstances described in the bill of indictment could not have resulted in a conviction for the crime of

extortion in violation of the laws of Pennsylvania.

The United States Government admits this in this instance because the Government when it drew the bill of indictments, as set forth in the appendix, charges in the to-wit section that the defendants have committed not the crime of extortion as the Act requires, but two different crimes of blackmail in Pennsylvania, and from this jumping off point with the understanding that under no circumstance could these defendants have been convicted in Pennsylvania of the crime of extortion or bribery.

I would like to adapt for just one moment, if I may, the example used by my brother at the Bar, the average man.

Now, here comes the average man and he views the Travel Act of 1961, which is an Act in its philosophical content which is designed to do many things to straighten out the country But, of course, we are limited to what it says. And let us assume for one moment hypothetically because we cannot counsel people to commit crimes, and very seldom can we give them much good counsel after they have committed.

Let's assume running through the mind of the average man who is suppose to understand the law and to whom the known certainty of the law is safety of all, whether or not if he takes time to examine it he is able to conclude clearly and beyond any doubt and without any vagueness that his intended or past conduct is a violation of the Travel Act.

Q How about the average Congressman, do you think when he put this word extortion in there he did or did not intend to cover this specific passage?

A I frankly, sir, do not think that the average Congressman ever thought of this particular type of activity.

Q Do you think it is unreasonable to think that Congress intended extortion to mean what it was generally understood to cover in 1961?

A Yes, sir, I do, as defined by the Government in this instance.

Q Do you believe that in 1961 the word extortion, in its generic sense as it was understood at that time, was broad enough to cover the facts in this indictment?

A I will have to admit that. I will have to admit under one definition it was. But may I respectfully suggest the key term here is not extortion.

If extortion were left alone in this statute I would not be before this court. Extortion was not left alone in this statute.

Extortion was further modified by a term "in violation of the laws of the state wherein committed," and at the time this was passed,the Travel Act, the United States Congress had to be aware of a fact set forth in the Government's Brief, that there are at least seventeen of the fifty states that define extortion as Pennsylvania does.

Q Can you point to any of the legislative history that says Congress was aware of that fact?

A No, sir, I cannot. There is a complete negation of the legislative history in this area.

Q You do agree there was a general understanding that it would cover the word extortion?

A I do feel if the word extortion were not modified by Congress within violation of the laws of this State it would have covered these circumstances.

I do further feel if Congress had specifically intended this particular type of activity to be covered under this Act it would have defined extortion as it did in the Hobbs Act.

It set forth an entirely descriptive term of exactly what the conduct was that it was proscribing.

I further respectfully point out or urge upon the Court that by not doing that and that by limiting the term extortion by the words "in violation of the laws of the State" Congress meant that what was to result was not uniformity but the diversion or the divisiveness that was already present in the United States among the various states. Now, why?

The only reason that I can suggest again by hindsight, and I suppose this is the greatest game of imagination that a lawyer can play, is that extortion and bribery have a common bound and the common bound is governmental corruption.

In either one of those the forces of local government have to be corrupted.

Let us back off just one step. Congress did not by the passage of the Travel Act intend to expand either the definition of crime or the jurisdiction of the United States Government or anything else. The Travel Act is wedded body and soul to State law. If the State law does not declar it to be a crime regardless of the conduct, it is not a crime under the Travel Act.

Q What bothers me and what prompted my question was this: I know in California and maybe other states too, many years ago there was great confusion as to what would constitute larceny as distinguished from larceny by trick and division and from obtaining money under false pretenses, and it confused the courts and confused everyone, so they combined all three and called it theft.

Now, would you say if the Government had said larceny in here in those states where they called it theft, instead of larceny, that it would not be?

A No, sir, I would not.

Q What is the distinction between that and your case?

A The distinction there, sir, is what the Government is doing is picking out and element which is a part, a clear part of a larger crime. That is theft. Larceny is one of three section of theft, according to the definition presently

before us. In this instance, extortion is not that. And this is not extortionist conduct.

I respectfully suggest there is no clearer way that Congress could have said extortion,using the word in its technical sense, in the Commonwealth of Pennsylvania in violation of the laws of the State.

If extortion were part of a larger overall generic conglomeration of bribery and extortion and blackmail, and Congress had used the word, I would admit, as I do in the hypothetical posed by your Honor, that they would have been guilty under this particular section. But that is not the case here.

Q I understand here from this Brief of the Government that there are some twenty-five states -- I haven't counted them all but I think it is about that -- where the facts in this case would be covered by the word extortion?

A That is correct, sir.

Q Now, in those states you say that this law would be applicable?

A That is correct. And in seventeen it would not.

Q Even though the same conduct would be criminal in those states?

A Correct. And I think really that we have faced the problem, but the problem is precisely this. We cannot assume Congress did not know it. We have to assume that Congress did

know it and did what it did, not to provide uniformity, but to take into account the existing law in the states.

Q What was the purpose of Congress in passing this law? Wasn't it to stop crime in commerce?

A I think that apparently is true. And I think that is the label or the intention or the purpose behind almost everything.

But now let us be very realistic for a moment, although no one knows much about organized crime in this country except what we read in law review articles and Life Magazine.

But I beg to point out that the President's Commission, at least the last one, had, I understand, a very intimate knowledge of the workings of one smaller city in Pennsylvania. When it mentioned the city by the name of Wincotton, I understand that was a label to apply to a city in Pennsylvania. So we cannot assume they were completely ignorant of it. But what they are attempting to cut off is the income, as I have heard it defined here.

I have never heard of two private citizens who have a relationship such as exists here where one says to the other if you do not pay me five hundred or five thousand I will accuse you of being a homosexual. I have never heard of this being a part of organized crime or putting a dollar in the organized crime coffers.

Q There are others who have heard of that, and I am one

of them. That has been an instrument of interstate crime for ages, this very situation that you are talking about, where people will lure someone into a compromising position and then threaten them that if they don't come through with some money that they are going to prosecute them for a crime, and assuming that they are police officers themselves when they are not police officers. That is just as common as clay.

A I wouldn't deny that, sir. But I would say most respectfully what I have not heard of is that money when it is paid going to organized crime. I have never heard of this particular scheme, which I certainly admit exists, being a tool of organized crime. And I respectfully suggest to you that a clear reading of this Act indicates only one thing, and that is Congress never heard of it either when it passed this Act.

Q I respectfully suggest you should read some of the material that was given to Congress before this bill was passed.

A That may well be.

Q From an agency that does know something about organized crime, the United States Department of Justice.

A Well, then, may I respectfully--

Q Don't go to your law review articles, why don't you try that?

A May I respectfully suggest that if they did have this knowledge they did not include it within this statute. If this really was an important factor in Congress' mind they

did a very poor job of--

Q I suppose Congress should have said if somebody holds up somebody and threatens to expose them unless they pay money, that will be a crime, end quote?

A Congress has done it, may I respectfully say, in the Hobbs Act which they passed just a short time before.

Q We are talking about this one.

A I understand that. All I am saying is that Congress had the right, the power and ability to define extortion.

Q You will admit that extortion meant the same thing to you that I think it meant to Congress, you admit that?

A Extortion does, there is no question about it, in its broadest terms includes everything.

Q In order to make a national law, Congress also intended that it should cover all the vagaries of all the forty-eight states then?

A When you say "cover," if you mean take into account that they are different and recognize that difference in the Act, yes, I do admit that.

If you are asking me if I feel Congress meant by this term extortion to include generally extortionist conduct, no, sir, I do not. I think they intended and recognized the problems there were different definitions in different states and they wanted to let them alone. They cover in all fifty states that type of extortionist conduct that deals with

governmental officials. I know of no state exempt. In any one of the fifty states extortion certainly defines any act of crime by which a governmental official is corrupt, and so does bribery.

What I am suggesting to this Court by hindsight what Congress intended to do was to insure that local governments were able to cope with the problem, and once having assured that, to withdraw the federal government from the field of law enforcement in this area. And really that makes as much sense as the Travel Act because the Travel Act does not create anything that is a new crime.

The Travel Act merely says if you travel in interstate commerce to commit a crime, in violation of the law of the state, you have committed a separate federal offense.

In this instance, these people could very well have been arrested and prosecuted in the Commonwealth of Pennsylvania.

As a matter of fact, I am informed that some of them were. Exactly who, when and where I do not know and it is outside of the record. But there is no reason in the world that these people could not be convicted of a crime if indeed they committed it and if indeed the prosecution took place in accordance with the accepted procedure.

We are not saying these people should walk the street. What we are doing is trying to define what Congress said in this Act, and I respectfully suggest it makes just as much sense to

believe that Congress intended to recognize there were differences among the various states when it stated "in violation of the laws of the state wherein committed." And when it said "in violation of the laws of the state," to me this meant a little bit more than the definition of the laws of the state.

We may have other procedural problems building within a state like the statute of limitations or even other things beyond imagination. I think Congress clearly intended when it stated "in violation of the laws of the State" just that, that if this was not a type of activity that was in violation of the laws of the state it could not be an unlawful activity for purposes of this particular Act.

Q Do you think Congress could pass a law providing that any man who leaves one state and goes into another and engages in certain conduct which is not a violation of the rule of law, Congress could make that a crime?

A Yes, sir.

Q Suppose it was a purely local crime, ordinarily treated as such?

A I think by virtue--

Q Could the commerce clause be used for that purpose?

A In my opinion it could.

Q For the purpose of giving the federal government power to create crimes in states if the person had traveled in inter-state commerce for the purpose of engaging in that kind of--

A In my opinion, Congress could make a criminal law. The Congress and federal government could punish. I don't know they could create a violation of the state law. I don't think the defined conduct would be necessarily a violation of the law of Pennsylvania or New Jersey. But it could be a violation of the federal law if Congress chose to dothat. I think they have done that with the Hobbs Act. They have defined extortion to include the generally accepted term of extortion and they have provided criminal penalties therefor regardless of the laws of Pennsylvania.

Now, in this instance they did not do that and they said specifically that this is only a crime in those states where it is in violation of the laws of those states.

Q What you are saying is they could do the other but when they say violate a particular thing that is a crime in the state that you should read it and not do any more than that?

A That is correct. I think that Congress had the ability and the power and the knowledge to broaden this statute to where we see by hindsight today it would be more effective but for some reason they did not.

I really hate to defend what they did because I know so little about it. I don't know what their intention was at thattime. We have heard there was an intention to water this down by saying that the extortion and the bribery should pertain only to gambling offenses and prostitution and there was an

objection to this and that was removed. But we really don't know what was in the mind of Congress when they passed it except by a clear reading of it.

And the average man, if I may return to him, who has to read these things, I respectfully suggest could just as easily come to the conclusion that this type of conduct in Pennsylvania is not a violation of the Travel Act.

Q Violation of the laws of Pennsylvania?

A Violation of the laws of Pennsylvania, it is clear, and there is no question this complained of conduct was a violation of the laws of Pennsylvania.

What this Court has to decide is whether this federal government should punish it or Pennsylvania.

But I might respectfully point out this to the Court. If the United States District Court judge could come to the conclusion this is not a violation of the laws of Pennsylvania, from reading it, so could our average man. And really the vagueness provision in this instance, if we are getting that far into it, is something that violates basic rights.

If Congress intended that extortion should mean extortionist conduct or cover these set of circumstances, they had the full power to do it. But they did not.

Q You don't have the Hobbs Act cited in your Brief?

A The Hobbs Act is cited in the Court's Opinion, I

believe. I do not have the Opinion page at the moment. I remember reading it. Page 25. The term extortion means the obtaining of property from another with his consent induced by wrongful use of actual or threatened force by violence or fear or under color of official right. If it were here I would not have the pleasure of appearing before this Court.

Q When was that enacted?

A I do not know independently. The Court speaks of it as being an earlier. But I do not know how much earlier than the Travel Act, sir.

Q All right, thank you.

A I do not believe and must disagree respectfully with my brother when he tells the Court that the interpretation as imposed upon this section by the United States District Court would seriously hamper the government's attempt to wipe out interstate crime, particularly organized crime.

With all due respect, I once again say that I do not know and have not seen widely circulated, at least, that this particular type of extortion is at least as large a tool of organized crime as prostitution, as gambling, as liquor law violations, as loan sharking; and I think what the government is trying to do in this particular section of the Travel Act in this one little section, with the exception of arson which was added later, is to insure that local law enforcement is able through non corrupt officials to deal with these and with many other

problems.

Q How about loan sharking, would that be reached by this law?

A Yes, I think at least those sections of the law, sir, that have to deal with the threatened violence of loan sharking would be reached by another section of the law.

Q Which one?

A The one that is not quoted widely herein, subsection 2.

Q Unlawful activity as defined would not include loan sharking?

A You are quite correct.

Q Unless it was extortion?

A Well, therein lies the very difficult problem. If a man owes a debt--

Q That is the problem that is in this case?

A Not necessarily.

Q You would admit, I suppose, if the state law covered loan sharking as extortion, the statute with the label extortion on it would have been construed to include loan sharking, you wouldn't have any problem?

A That is right.

Q If the State law used to construe extortion statute could cover a, b, c, d and e, and they refined their statutes and they took out from under extortion and they called it loan

sharking--

A I would have no problem with that.

Q Why wouldn't you if it isn't called extortion? Isn't extortion illegal under state law? Isn't loan sharking illegal under the state law?

A It is illegal under those sections of the state law, at least in Pennsylvania, which have to do with the charging of unlawful interest. There are, of course, numerous exceptions. But the only vehicle that Pennsylvania has to deal with loan sharking has to do with the charging of excessive interest and really comes under our banking code. It is not in Pennsylvania a criminal offense, it is a criminal offense--

Q We have gotten off the track in a hypothetical case. But I suppose your argument should make and you certainly stick to it, if some state had a specific statute on shylocking and it was no longer indictable or punishable under the extortion statute, they said we are going to split this out and make it a separate offense, that wouldn't be extortion under interstate law?

A It would not at that time. But I would frankly have less problem with that as I would have with the Chief Justice's hypothetical, as this is larger--

Q The only reason it wouldn't be is because the extortion and common understanding would cover situations like that where money is collected under a threat of violence?

A Yes, but in my opinion--

Q That is precisely the government's argument.

A Not as I understood it. As I understood it, the government's argument in this case was Congress intended it to include something broader than it said. We are not really dealing here with the loan sharking situation. We are dealing with not an undefined area of crime. We are dealing here with the specific violation of the law of Pennsylvania. The crime in Pennsylvania that was committed here was blackmail by accusation of a heinous crime. There is a specific statute in Pennsylvania. It is not an undefined thing that used to be a part of something else. This is a specific statute and it was never even in the common law included under the term extortion.

Now, extortion has certainly today expanded and I have to admit it, and it can include almost anything that comes close to the area. I have to admit that too.

But I cannot conceive that Congress, even though it recognized this as an average man, as a good lawyer, as a good legislative research man, that Congress intended by the language that is used here to apply this definition of extortion. It could have done so so easily in a number of other different ways but it did not.

In this instance it says in violation of the laws of the state and it had to mean something by that term, a limitation as it appears, at least in this instance, but that term had to

mean something.

If they had not put in violation of the laws of the state, once again I don't think I would be before this Court even though they had used the term extortion. I don't think I would have gotten beyond the District Court with the argument.

Q Mr. Fitzpatrick, you were calling our attention to the practical problems with which Congress presumably was attempting to deal, that is, the actual activities which are said to create large income for organized crime in this country, and pointed out that that particular activity, while well known, is not one that does so, as compared to gambling and other things.

But while we are on that practical level, a person would never travel realistically in interstate commerce for the purpose of extortion in the limited sense that Pennsylvania uses. A police officer in Pennsylvania doesn't travel to New York, he has to operate in Pennsylvania, doesn't he? This would be meaningless.

A Unless, sir, the very circumstance that he would go to New York for the pay, or someone would come to Pennsylvania to pay off a judge or legislator or chief of police.

Q Generally, the leverage that a law officer has to extort is right within his own state using his office, using his state office?

A That is right. But there could be circumstances,

particularly in a city like Philadelphia, that is, in one instance the individuals were accused of coming from Camden, which is just across the river. One of these defendants lived in Camden and in a circumstance like that it might very well be that someone who had a gambling operation in Philadelphia might live in Camden and might pay off a police official and we might get them under the Act in that fashion.

Q I was just looking at what the late Robert Kennedy had to say. He was attorney general at that time. And his interpretation of this law is that this law has the broadest scope and the greatest potential of the new anti-racketeering statutes.

Wouldn't that indicate to you that they meant the term extortion not to be a limited term but a term that would incorporate the meaning of extortion as it is known in any part of the United States?

A I once again must agree that the term extortion does do that to me. I cannot stand before this Court and take an unreasonable position. But I once again must point out in my opinion the limiting phrase "in violation of the laws of the state" must mean something also; and if it does in Pennsylvania, at least it limits it not to the kind of activity.

Might I respectfully point out that in the opinion of the Court that I just read this morning I believe they quoted Professor Weaken who had almost the opposite to say about this

statute, that it was not very meaningful and did not reach out and did not do the things that some of its proponents had thought that it should do.

The purpose of it, I think, is noble, and I have no objection to that and I really have no objection to those sections of it which are clear. But I cannot, in my own mind, rationalize that Congress intended to do that which it could have done so easily. But the language it used in this instance, perhaps Congress did not intend it, and I think in this vagueness is the reason why the District Court thought it should fall and that is the reason I urge upon you to sustain the District Court.

Q Suppose a law would be passed by Congress stating anyone who goes from Pennsylvania to Montana for the purpose of lending money to individuals there at more than three percent interest would be guilty of a federal crime. What would you say about that?

A Well, what I would say, I am afraid, does not come as a result of accumulated experience over the years. But my frank horseback opinion is could the federal government in one fashion or another justify such a law?

Q Would you argue then like you are arguing here?

A No, sir. If the Congress had intended, in my opinion, to outlaw extortion activity--

Q Do you think it could pass a law to regulate the

interest rate in Montana and put it down as low as three percent?

A Whether they would get it at three percent is not something I want to get involved with the bankers. But I do think if Congress felt it would aid in its drive on organized crime or aid some other noble purpose, they could pass such a statute. That again would depend upon the circumstances at the time. But I should hope if they did pass it they would not put in language which is so vague and confusing as it is in this case, that they would say exactly what they meant.

MR. CHIEF JUSTICE WARREN: Thank you.

REBUTTAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.

MR. LACOVARA: Mr. Justice White, I am not sure what the result of the colloquy was between counsel and you on the question of possible effect of re-labeling or separating out provisions that at one time were called extortion, but on page 22 of our Brief I would like to call your attention to up to 1939 the homosexual extortion conduct presently termed blackmail was in fact called extortion by threats to accuse of an infamous crime.

Mr. Chief Justice, you also mentioned an anomaly that would be caused by accepting the appellee's position, that is, this statute would not apply to conduct unlawful in Pennsylvania but would apply to conduct unlawful in California, simply because of the difference in the labels atop the statutes.

We needn't speculate about that. There is presently

before the Court on petition for writ ofcertiorari the case of Pine vs. United States, number 507, which does involve the identical type of homosexual extortion scheme involved here, but there the gang members went from Chicago west to Utah which caused the conduct to be extortion, rather than east to Pennsylvania.

We submit there is no reason for thinking Congress didn't wish to reach both types of conduct unlawful under state law and the Order of the District Court should be reversed.

(Whereupon, the above-entitled oral argument was concluded.)
