In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Appellant,

vs. No. 71-1193

TRAVIS PAUL ENMONS, JACKIE J. BENDO, ED WAYNE BARTON, and MILTON RAY WOODWARD,

Appellees.

Washington, D. C.
December 4, 1972

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Washington, D. C.
Monday, December 4, 1972

The above-entitled matter came on for argument at 11:22 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM BRADFORD REYNOLDS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Appellant.

BERNARD DUNAU, ESQ., 912 Dupont Circle Building, N.W., Washington, D. C., 20036; for the Appellees.

C O N T E N T S

* * *

Afternoon session begins at page 28.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1193, United States against Enmons.

Mr. Reynolds, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,

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

This case is here on direct appeal from the dismissal of an indictment by the United States District Court for the Eastern District of Louisiana. The indictment, which is set forth in the jurisdictional statement at Appendix C, pages 12a to 16a, contains a single count charging the several named defendant appellees with conspiring among themselves and with two others to obstruct, delay, and affect interstate commerce and the movement in commerce of electrical energy and other articles and commodities by extortion, in violation of 18 U.S.C. 1951, which is the so-called Hobbs Act, and with committing physical violence to property in furtherance of said plan to obstruct, delay, and affect commerce.

The damaged property consisted of four separate transformer substations, all located in the State of Louisiana and owned and operated by Gulf States Utilities Company. The company supplies electrical energy to the

State of Louisiana, Texas, and Mississippi, and the transformer substations involved here were connected to and part of an interstate electrical network. Moreover, materials necessary for construction and maintenance of the damaged facilities moved in interstate commerce.

The appellees were at the time of the indictment members and officers of one or the other of two union locals of the International Brotherhood of Electrical Workers, which represented employees of Gulf States and employees of independent contractors employed by Gulf States.

During the period in question, the union members were on strike against Gulf States in an effort to secure a contract which, among other things, called for higher wages. The indictment charges that appellees and their co-conspirators conspired to obtain property of Gulf States in the form of wages and other things of value by inducing the company and its officers to agree to the aforementioned contracts through the wrongful use of actual force, violence, and fear of economic injury, to wit, committing acts of physical violence and destruction against property owned by Gulf States.

Five separate acts of violence are described in the indictment. On October 30, 1969, two of the co-conspirators allegedly fired a high-powered rifle into a transformer substation owned by the company, the so-called

Alcyn Substation. Approximately ten days later, on or about November 10, 1969, two others fired a high-powered rifle into another transformer substation of the company known as the Lindsey Substation. About a month later on December 9, 1969, the Lindsey Substation was fired on again by some of the co-conspirators. And on the same day, it is alleged that yet another transformer substation had the oil drained from it so that it malfunctioned. That was the Port Hudson Substation. Then on June 2, 1970, the co-conspirators allegedly blew up the Sandy Creek Substation of the company, using 12 sticks of dynamite.

Appellees moved in the district court to dismiss the indictment on the ground that the allegations therein do not constitute an offense under the Hobbs Act. The district court granted the motion. He construed the statute as not covering acts of force and violence when used in furtherance of a legitimate labor objective such as the obtaining of higher wages for company employees.

Since the indictment in this case was returned on October 15, 1970, prior to the effective date of the 1971 amendment to the Criminal Appeals Act, the United States appealed directly to this Court under former Section 3731 of Title 18, because a dismissal order was based on the district court's construction of the underlying statute, that is, the Hobbs Act.

At the outset, it should be observed that the Hobbs Act is not an anti-labor statute. It is not a statute directed only at labor union activity. It is, as are all criminal statutes, aimed at certain conduct. Its prohibition reaches, and I quote "whoever in any way or degree obstructs, delays, or affects commerce," and the statute defines commerce to include all commerce between a point in a state and a point outside thereof, "where the movement of any article or commodity in commerce by robbery or extortion or whoever attempts or conspires so to do or commits or threatens physical violence to any person or property in furtherance of a plan or purpose so to do."

First, let me say that there is no dispute in this case that the indictment alleges acts sufficient to show a conspiracy to interfere with commerce within the meaning of the statute. Thus, the issue here concerns only whether the allegations of the indictment demonstrate that appellees' interference with commerce was in furtherance of a plan to extort.

Q Mr. Reynolds, I take it that there is nothing in the record which discloses whether the wages sought in this economic strike would be regarded as excessive or as something that is normally requested in an economic strike; am I correct?

MR. REYNOLDS: No, Your Honor. The indictment

alleges that the contract call for higher wages and other monetary benefits, but there is nothing in the record to indicate whether the request for wages, either in the contract or otherwise, were excessive.

Q I take it then you are driven in your position to any violence really in connection with interstate commerce is regarded as extortion under the Hobbs Act?

MR. REYNOLDS: No, Your Honor, I do not believe our position is that. I think directly to your point, wages or money in the hands of an employer that is demanded as earned wages is, we believe, properly within the meaning of the extortion provision, and as I understand appellees' brief, they do not contend otherwise, and we believe that when you are negotiating for a contract for higher wages, those wages are still the property of the employer. The employee has no right to those wages. And our position is not affected by whether the wages, the demand for wages, is excessive or not excessive.

As to the question of whether any violence at all, I would like to, if I could, come back to that in a second.

The Hobbs Act defines extortion to mean, and I quote, "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."

Looking intially just at that language, it is strikingly unambiguous. The first element of the offense is an obtaining of property. Congress did not say, as appellees have urged in their brief, a misappropriation of property. Nor did it use the phrase, and I quote, "an unlawful taking of property" as it did in defining the term robbery in this statute. It said simply an obtaining of property.

Second, the property to be obtained must be received from another with his consent. And that consent must have been induced by wrongful means, including the wrongful use of force, violence, or fear.

Q Let me get back to where I am troubled. If a man threw a stone through a window of the office building, is this covered by the Hobbs Act?

MR. REYNOLDS: Your Honor, I think that that particular act would not sustain a Hobbs Act conviction. The Hobbs Act is a criminal statute, and it requires criminal intent as an element of the offense. I think that often during the course of a strike violence will erupt and you will have a spontaneous outburst or, as the Ninth Circuit said in the Caldes and Lowery case, a byproduct of a frustration engendered by a prolonged collective bargaining negotiation. That may technically fit within language of the statute, but I think that before you can return a

conviction, it must be established that the perpetrator of the violence, the one who threw the stone through the window, for example, had the criminal intent by his violent act to induce the victim to part with a property that is obtained. And I do not think in your example that you would be able to prove to a jury that the criminal intent was present.

Q There has to be robbery or extortion or a conspiracy to rob or extort, does there not?

MR. REYNOLDS: That is correct, Your Honor.

Q Violence alone is certainly not enough.

MR. REYNOLDS: Violence alone is not what the statute is aimed at. And I think that you do need that element of a criminal intent to coerce the employer to part with the property.

Q By robbery or extortion.

MR. REYNOLDS: By robbery or extortion.

Q Can you not have all of those things with throwing a rock through the window?

MR. REYNOLDS: You could have all of those things, I believe, but that is a matter for the jury to decide, and it is not a matter--

Q What you really mean, I guess, is how you ever would instruct a jury as to the distinction between using dynamite and throwing a rock through the window.

MR. REYNOLDS: I do not think that there is a

distinction. I think what you have to instruct the jury on is the question of criminal intent, whether the perpetrators' intent by this act of violence, be it a rock through a window or dynamite, was to extort, and that is, as in every criminal statute, that element of criminal intent is for the jury. Here we do not reach that problem because we have a dismissal of an indictment and the question is--

Q Let me change the facts a little bit, add additional facts. Suppose at a point during the economic negotiations the union negotiator said--and this is part of the evidence that I am hypothesizing--that if we don't get agreement by the end of this week, you won't have much of a plant left. And then following that utterance, you had not one but 30 or 40 men heaving bricks through all of the windows of the plant and onto the machinery. You would have your intent, the nexus between the negotiations and the violence, would you not?

MR. REYNOLDS: I believe you would.

Q Would that be Hobbs Act?

MR. REYNOLDS: I believe that that, as you stated it, would sustain a Hobbs Act conviction. I think that the appellee's argument is that the Hobbs Act reaches only those wrongful uses of force and violence that are aimed at an illegitimate objective. And if the objective is legitimate, then the Hobbs Act cannot reach it.

Q Mr. Reynolds, let me come back, before you go on, to Mr. Justice Blackmun's question. You say that the throwing the stone through the window by the single man would be a question for the jury. I take it here too, if this indictment were sustained, it is still the Government's job to convince a jury. Do I understand you are right in thinking that an indictment could be drawn under the Hobbs Act that would withstand a motion to dismiss in which you allege that a single individual threw a stone through the window of a plant and that he intended thereby to extort property?

MR. REYNOLDS: I think there is always a question of whether on the facts a jury could reasonably infer that the act was intended. I think there is also another element of whether it could reasonably be inferred from the acts that the victim would have been coerced or induced by that particular act to part with the property. And it may be that you could dismiss an indictment where it could not be reasonably determined on the basis of the facts alleged that a jury could find the requisite intent.

I think as a general matter that Congress did not intend to confine the scope of the Hobbs Act to wrongful use of violence for illegitimate objectives. The racketeer, for example, who threatens to destroy a man's bowling alley if the victim does not agree to install his pinball machine or his jukebox certainly comes within the extortion definition of the

Hobbs Act. So too does the individual who through threats of physical or personal violence forces a competitor to sell to him a portion of the business. In each of those instances, the end is not itself an illegitimate objective. Had the racketeer obtained permission to install his pinball machine through negotiation or had he confined his efforts to expand his business through lawful competition, there would be no offense under the Hobbs Act. But it is the unlawful means used that bring it within the act's definition.

Appellees' position thus must be that what Congress intended, although it did not say so in the language of the statute, was a special exemption from the extortion prohibition for members of labor unions, if their wrongful use of force or violence is in furtherance of a legitimate labor objective such as the obtaining of a contract for higher wages.

That, of course, was precisely the case under the predecessor statute to the Hobbs Act, the anti-racketeering act of 1934. By its terms it specifically excluded from its coverage the actual or threatened use of force, violence, or coercion to obtain "the payment of wages from a bona fide employer to a bona fide employee."

In United States v. Local 807, at 315 U.S., this Court held that that exclusionary provision in the 1934 act was to be construed broadly so as to protect those who were

actually employees as well as those seeking the status of employees. Their acts of violence in that case against out-of-state truckers to compel them to pay the union members upon entering New York City the equivalent of what would be a day's wage for unloading the trucks---their acts of violence were considered beyond the scope or the reach of the anti-racketeering act if their objective was to obtain the payment of wages.

Congress responded to the Local 807 decision by rewriting the anti-racketeering act.

Q In your view that takes the three-fifteen case out of this problem?

MR. REYNOLDS: I believe that does take the three-fifteen case out of the problem, Your Honor.

The Congress did not simply narrow the exemption in the 1934 statute after Local 807 so that the term bona fide employee would apply solely to employees seeking wages for actual services rendered. It did not leave intact an exemption for those bona fide employees seeking to obtain the payment of wages by coercion as opposed to force and violence. Efforts to amend the anti-racketeering act along such lines were unsuccessful. What Congress did was enact a whole new statute, the Hobbs Act. It eliminated entirely the exemption for those seeking a payment of wages. It also deleted the provision in the 1934 act which stated that wages

were not included in the statutory term property. The prohibition was rewritten to proscribe any interference by anyone with interstate commerce by robbery or extortion. And, as I have earlier pointed out, the term "extortion" was defined in terms of the wrongful means used without regard to whether the objective of the extortioner was or was not otherwise legitimate.

Even without reference to the legislative history, it is plain from a comparison of the 1934 anti-racketeering act and the Hobbs Act of 1946 that Congress intended by the new statute to eliminate any exemption based on the fact, as is the case here, that the objective of the one who is using actual or threatened force or violence is to obtain the wages from a bona fide employer. And this is precisely the point that members of Congress made over and over again in the legislative debate.

Congressman Hobbs, the principal sponsor of the bill that was enacted into legislation, perhaps stated it most succinctly. He said, and I quote: "This bill is grounded on the bedrock principle that crime is crime no matter who commits it, and that robbery is robbery and extortion extortion whether or not the perpetrator has a union card. It covers whoever in any way or degree interferes with interstate or foreign commerce by robbery or extortion."

This Court has already had occasion to review the

legislative history of the Hobbs Act. It did so in United States v. Green, at 350 U.S., and concluded, and again I quote: "The legislative history makes clear that the new act was meant to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer/employee relationship. The words were defined to avoid any misunderstanding."

Just as the plain language of the statute reveals no basis for according to union members the special protection urged by appellees, so too there is nothing in the legislative history of the Hobbs Act to support their position. They rely essentially on a number of statements made on the floor of the House to the effect that the new statute was not intended to reach legitimate labor activity or "demands" for higher wages. And so it was not. But when that otherwise legitimate labor activity or those demands are combined with the type of violence that is alleged in this indictment, they assume a wholly different character. In this regard, the Green decision is particularly relevant to the instant case. There the district court construed the indictment as charging an attempt to obtain from the employer money in the form of wages for made work, that is, work actually to be performed as distinguished from standby services, which is the performance of no work at all. That construction was not contested by the Government on its appeal to this Court. Thus

the Green indictment, just as the indictment here, charged the defendant with wrongful use of force and violence in an effort to obtain a legitimate labor objective. This Court held that the indictment charged interference with commerce by extortion within the meaning of the act. It said this, and I quote: "Title Two of the Hobbs Act provides that the provisions of the act shall not affect the Clayton Act, the Norris-LaGuardia Act, the Railway Labor Act, or the National Labor Relations Act. There is nothing in any of those acts, however, that indicates any protection for unions or their officials in attempts to get personal property through threats of force or violence. Those are not legitimate means for improving labor conditions."

Similarly here, the shooting and dynamiting of Gulf States' transformer substations are not legitimate means for obtaining from the company higher wages and other monetary benefits. The fact that that objective could perhaps have been achieved through lawful collective bargaining negotiations provides no basis for immunizing appellees' chosen course of conduct from criminal punishment under the Hobbs Act. They are entitled to no different treatment from the racketeer who attempts by force and violence to induce the proprietor of a bowling alley to install his pinball machine or his jukebox. In both instances, because of the wrongful means used, the obtaining of property is extortion,

and Congress intended to reach such extortionist activity whoever the perpetrator if, as charged here, it has an adverse effect on interstate commerce.

The question of whether these appellees actually intended by their acts of violence to induce Gulf States to agree to a contract calling for higher wages, as is alleged in the indictment, is a matter for the jury to decide. We believe the district court's dismissal order, which deprived the jury of an opportunity to pass on the question of appellees' criminal intent was an error and that it should be reversed.

Mr. Chief Justice, I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Reynolds.

Mr. Dunau.

ORAL ARGUMENT OF BERNARD DUNAU, ESQ.,

ON BEHALF OF THE APPELLEES

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

There is a strike, there is violence in the course of this strike. The violence is said to be shooting a rifle into three substations, dynamiting a substation, draining the oil from an electrical transformer. That violence, like the strike itself, has a purpose. The purpose is to get a union contract calling for higher wages and other monetary benefits.

The dynamiting, the shooting, the draining of oil are wrongs. They are punishable in Louisiana where the acts are alleged to have occurred as aggravated arson, arson, criminal mischief to property, aggravated criminal mischief to property. No one claims that these are not punishable offenses and seriously punishable. Our question is whether in addition to have Louisiana and every other state in the union which has like laws punishing such conduct, whether in addition to that Congress has made such conduct, strike violence, a crime by calling it extortion within the meaning of the Hobbs Act. It will be helpful, I think, before we address the Hobbs Act specifically, to look at what it means to say that strike violence constitutes a crime of extortion.

Q I suppose that what you have just said could be said with equal accuracy and force on the federal statute that relates to using coercion to--the loan-sharking statute is the one I am thinking of. The conduct there would be a state offense too, would it not?

MR. DUNAU: Yes, Your Honor.

Q But Congress thought that it needed federal protection because of the interstate factor and within the last year or so we have sustained that, have we not?

MR. DUNAU: We have no doubt of the constitutional power of Congress to reach strike violence as a federal crime when it affects interstate commerce. Our question is

whether Congress did do so. And indeciding whether or not Congress did do so, I think it is pertinent to look at some of the considerations Congress must be said to have resolved in making strike violence a federal crime.

Strike violence is criminally punishable in every state. It is civilly remedial in every state. It is traditionally within the control of state criminal jurisdiction. We are therefore asked to say that the Congress in establishing a crime called extortion and robbery has made a major federal encroachment into a traditional state domain and there can be nothing more traditional than maintenance of law and order, the proscription of violence.

Q I suppose this conduct could be the subject of an unfair labor practice charge too under some circumstances?

MR. DUNAU: If it can be said to have interfered with the right of employees to refrain from strike activity, it would constitute a violation of Section 8(b)(1)(A) of the National Labor Relations Act as intimidation, coercion to restrain employees from refraining from strike activity. And it was only to that marginal, limited degree that Congress has ever entered the field of strike violence. Indeed, when we look to what Congress in fact thinks the appropriate scope of federal and state authority in this area is, we have a very good indication by looking at what the Norris-LaGuardia

Act says. The Norris-LaGuardia Act prohibits a federal court from issuing an injunction in a labor dispute. It makes an exception. A federal court may issue an injunction to restrain fraud or violence, but there has to be a specific finding before a federal court can do that. The finding must be that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. Only if you can show a breakdown of state protection can a federal court enter this arena even by civil means. We are asked, therefore, to believe that no federal court can act in this area to issue a strike injunction against violence without a showing of a breakdown of state protection that nevertheless that same federal court can send people to jail for 20 years for the conduct which it cannot civilly restrain. We do not think that is the way to read a congressional statute or to ascertain congressional meaning.

In this case, if this kind of conduct, if strike violence can be reached by the Hobbs Act, then every act of strike violence from the fist fight to murder, from a deflated tire to arson, becomes the work of the Federal Bureau of Investigation, of the United States Attorneys, of federal judges and federal juries.

Q Did not the Green case deal with that Norris-LaGuardia point that you were just making? I assume you were

referring to the Norris-LaGuardia Act when you suggested that this was a criminal act which could not be reached by civil injunction.

MR. DUNAU: The great difference between the Green case and this case is that in Green you had conventional extortion. In Green the indictment alleges that forced was used to get money from the employer for imposed, unwanted, superfluous and fictitious services. If the services are imposed and unwanted, the employer has rejected them. If they are fictitious and superfluous, they are no work or a sham substitution for no work. If you use violence to get from an employer that for which you give him nothing in return, if you take money from him and give him no work, that is extortion. The whole difference between Green and this case is the world of difference between getting money or seeking money for desired, valuable, and wanted work, which the Government is now telling us is extortion and getting money for imposed, unwanted, and superfluous fictitious services which we agree in the conventional sense is extortion because you are using violence to get from another that which you have no right to have at all.

Q Suppose a man had some money in the bank and it was subject to a garnishment, and he did not understand or agree with the garnishment process, on the theory of your last argument, he came into the bank and shot the place up

in protest against their refusing to allow withdrawals. Would you not have an analogous situation? He is entitled to the money ultimately in some form. I am going at your argument that the application of the act turns on whether there is entitlement to the money or no entitlement.

MR. DUNAU: In our view, the application of the act turns on whether you have, one, a felonious misappropriation of property, stealing, larceny, plus violence, that you need the conjunction of the two to make out extortion and that when you are seeking a union contract calling for higher wages and other monetary benefits, whatever else you may do, you are not misappropriating property, you are not stealing, you are not engaging in larceny. What you are seeking is to fix the price of the work that is to be performed.

When the employer enters into a union contract, he makes a promise to pay for work to be performed for him. When he gives up his money, he gives up money in exchange for work he wants done. Now, an employer and a union can be at loggerheads with each other as to how much should be paid for the work to be performed. The employer may want to pay less. The worker may want more. But the employer is no more having his property misappropriated when he wants to pay the worker less for the work he wants performed than the worker is having his labor misappropriated when the employer does not

want to pay him more than the worker thinks it is worth.

Q Mr. Dunau, suppose the issue in a strike is the so-called feather-bedding issue. What would your position be?

MR. DUNAU: We think that the Hobbs Act reaches only the wages for the performance of no work or sham substitution or no work. We do not believe that it reaches a claim that the work to be performed is useless. We think that is outside the scope of the Hobbs Act as it is outside the scope of Section 8(b)(6) of the National Labor Relations Act. But if there is any quarrel as to the scope of the Hobbs Act, it relates only to whether it reaches only, as we claim, to wages for the performance of no work or the sham substitution for no work or whether it also reaches make-work, useless work. But if it reaches useless work or if that is where our fall is, it precisely demonstrates what the Hobbs Act does not reach. Because what we have here is no claim that you have no work performed; we have no claim that you have useless work. What we have is a claim that when you seek a union contract to get higher wages and other monetary benefits for work which the employer wants performed, which is useful to him, which he desires, that this is nevertheless extortion.

Under no stretch of the imagination, I think, can one say in interpreting a criminal statute that where the

only quarrel that one can have in terms of the reach of a statute is, Does it go beyond no work to reach made work, that then you jump from made work to work which is valuable to and desired by the employer?

Q Is the test that you are suggesting--does it have anything to do with what is or what is not a compulsory subject of collective bargaining under the federal labor laws? I should suppose it does have to do with that, does it not? You are not contending that your clients had a right to this money, but you are contending that they had a perfectly legitimate right to ask for this money, as contrasted with a traditional extortionist, are you not?

MR. DUNAU: We are certainly claiming that we have a right to bargain for higher wages--

Q You are not claiming you had a right to the money as a matter of legal right; you had a right to demand it, that this was a subject of compulsory bargaining.

MR. DUNAU: Correct. No one has any right to money, even when a collective bargaining agreement is executed. The only right to money you get is when the work is performed. So, all we have--and what we have here, we are at the inner core of mandatory bargaining, namely, negotiation for higher wages and other monetary--

Q Is the test whether or not this is the subject of mandatory bargaining under the federal labor laws? Is

that the test that you would propose? Perhaps you have not thought of that.

MR. DUNAU: We have made the argument that this cannot be a Hobbs Act violation, because what we are dealing with is a mandatory subject of collective bargaining.

Q But is that an exclusive definition?

MR. DUNAU: No, sir. We think that--

Q Why not?

MR. DUNAU: Because we think that the definition which is required under this statute and defining the elements of extortion is whether you have a felonious misappropriation of property, larceny, stealing. That is what we think the test is. In applying that test, we think that any subject which would be a mandatory subject of bargaining cannot possibly then be converted into money which we cannot seek, money which we are stealing. But I am unwilling to say, because I have not thought of the parameters of saying it is only mandatory bargaining; I am unwilling to say that something beyond mandatory bargaining would therefore fall within the misappropriation concept which we think is the limiting concept under the Hobbs Act.

Q Perhaps over the luncheon period you might think of the parameters of that; would you?

MR. DUNAU: Yes, Your Honor, I shall.

Q Mr. Dunau, you used the term "misappropriate."

Of course, 1951(b)(2) defines extortion as meaning the obtaining of property. Do you think misappropriate and obtain are synonyms in this sense?

MR. DUNAU: I think in this statute they are, because I think that when you talk about extortion and then define extortion, that if we look traditionally to what we mean by extortion and what we mean by robbery, we mean a compound offense, the taking of property unlawfully, and we mean wrongful means to effectuate that taking. In that history, in that concept, when the words "obtaining property from another" are used, we think they must be translated to mean the felonious misappropriation of property. If it means something else, then it is a departure from our conventional concepts of robbery and extortion, and we should expect a very clear indication from Congress that they want something different from what we normally expect when we deal with an extortion and a robbery statute.

Q Is not the very presence of that definition, though, perhaps such an indication?

MR. DUNAU: No, Your Honor, because that definition was taken from the New York statute and precisely taken from the New York statute to repel any notion that what Congress was enacting in the Hobbs Act was anti-labor intentive. And when we looked to New York law to find out how New York applies that extortion definition, we find that New York says

the dividing line between what labor activity is extortionate and what is not is the felonious misappropriation of property.

MR. CHIEF JUSTICE BURGER: You may continue after the luncheon recess.

MR. DUNAU: Thank you, sir.

[Whereupon, at 12:00 o'clock noon the Court was recessed until 1:00 o'clock p.m.]

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AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Dunau.

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

We have pondered the question that Mr. Justice Stewart put to us, and we conclude that we cannot embrace the suggestion that the dividing line is mandatory collective bargaining rather than the one we have thought is essential, namely, misappropriation of property. Mandatory collective bargaining draws the line between what an employer and a union must bargain over. There are permissive subjects of bargaining which are perfectly legal, and we therefore do not think that we can exclude and put within the scope of the extortion statute permissive subjects of bargaining. And, therefore, we think consistently with what this statute is about, extortion and robbery, that the line we need to draw is at the misappropriation of property.

Q One side of the coin I am sure you would be delighted to embrace, and that is surely and at least where you are talking about a subject that is subject of mandatory bargaining, then certainly this act cannot apply.

MR. DUNAU: Yes, Hour Honor. That is the innermost position. We are not willing to accept it as the outermost position. And accepting it as the innermost position, we are well within any such line in this case.

Q I am still at loss a little bit on your use of the term "misappropriation." You seem to place a great deal of emphasis on that. Extortion does not involve misappropriation, the claim of extortion. It is taking something away from someone by threats or force.

MR. DUNAU: Well, it is not simply, Your Honor, as we see it, taking something away from somebody else. It is taking it away from him with a felonious intent. It has got to be a larcenist intent. It has got to be an intent to steal. And that is why we do not accept the Government's view, which is simply that the taking of property of itself constitutes the essential element of the crime. We think it has got to be an unlawful taking. And that is why we stressed the misappropriation of property as an essential element of the crime, of a Hobbs Act crime.

Q It becomes unlawful by reason of the means used under the statute, as I read it. It is the means.

MR. DUNAU: It is the means directed to a misappropriation of property, Your Honor. That is our line, and we do not think that it can be drawn simply at getting property from another regardless of your intent to steal it. We do not think, for example, in this case, which is necessarily the Government's position, that simply because you are seeking a collective bargaining agreement and a collective bargaining agreement is a chosen action, it is property, that

therefore you have met the statutory test of obtaining property from another because you are seeking to get them in a collective bargaining agreement and then letting the whole burden of the illegality of the conduct fall on the wrongful means. If you do that, then what this statute reaches is strike violence simpliciter. And strike violence simpliciter is neither robbery nor extortion.

Q You would agree that this statute is not aimed--I think you said that earlier--it is not aimed at employer/employee problems primarily, is it?

MR. DUNAU: It is a broad statute applicable to everyone.

Q The language is the term "extortion" means the obtaining--obtaining--of property from another induced by wrongful use of actual or threatened force, violence, or fear.

MR. DUNAU: That is exactly the language, Your Honor, of the New York statute which was deliberately copied so as to repel a notion that we were doing anything very revolutionary in enacting the Hobbs Act. And the New York cases at the time the Hobbs Act was enacted are perfectly clear that you cannot have extortion and you cannot have robbery when you are dealing with labor action unless it is conjoined with felonious intent to misappropriate property. So that when the labor action which is taken is designed to

collect union dues, for example, or more broadly to advance the cause of unionism, it is not extortion or robbery within the New York concept; when it is taken in order to get money and put it in your pocket, a payoff, something dissociated from a legitimate labor objective, it is extortion and it is robbery. If we do not accept the line of misappropriation of property, what we have here is a statute which deals with strike violence standing alone, and we do not think in 1945 Congress enacted a statute dealing with strike violence standing alone. If it is strike violence standing alone, there is no line that can be drawn between a fist fight and murder, between a deflated tire and arson. The Government suggests, "Well, what the line is is your intent to get a union contract by throwing a rock through a window pane.

Q Let us suppose for a moment that the setting is not such as it was here but it was a bus company with 300 buses, each with four tires presumably, maybe six on some of them. Suppose they deflated all the tires in the same setting otherwise as this. It would be your claim that deflating 1200 tires so as to immobilize the bus line and its operations would not be within the reach of the Hobbs Act?

MR. DUNAU: That is correct, Your Honor, because we cannot draw the line, as we see it, between major violence and minor violence. We can draw the line sensibly between

stealing and not stealing, between misappropriating property and not misappropriating property.

Q Mr. Dunau, is language found in 1951(b)(2) where extortion is defined as the obtaining of property from another, is that same definition of extortion found in haec verba in the New York statute?

MR. DUNAU: Yes, Your Honor.

Q Is that covered at page 40 of your brief? I could not find it in so many words.

MR. DUNAU: No. I am sorry, we neglected in our brief to quote precisely what the New York statute was at the time that the Hobbs Act was enacted. But the New York Penal Law of 1905, which was in effect at the time the Hobbs Act was enacted, defined extortion as "extortion is the obtaining of property from another or the obtaining the property of a corporation from an officer, agent, or employee thereof, with his consent induced by wrongful use of force or fear or under color of official right." So, aside from the deletion of the words "or the obtaining the property of a corporation from an officer, agent, or employee thereof," it is precisely the same. Extortion is the obtaining of property from another with his consent induced by a wrongful use of force or fear or under color of official right.

Q You are not suggesting that when Congress adopted this, they took all of New York's meanings as we know

under some circumstances?

MR. DUNAU: No, sir. What we are suggesting that the Congress did is that it adopted the conventional notion of robbery and extortion as a compound offense which requires not simply the use of wrongful means but the use of those wrongful means directed to the misappropriation of property. As the Third Circuit put it, what the Hobbs reaches is a larceny type offense. If it reaches a larceny type offense--and we think that is an exactly apt summarization--it is not stealing to get a union contract calling for higher wages.

The words "with his consent" in extortion or "against his will" in robbery, if I may say so, are the metaphysics which go back to an old notion of how you distinguish robbery from an extortion. If you apply a lot of force, you are said to have overcome the man's will. If you apply less than a lot of force but enough to cause him to part with his property, you say it is parting with his property with his consent. But no one who has tried to parse the words "with his consent" as "against his will" has been able to make a sensible distinction between the two. I think the use of the words "with his consent" are simply responsive to the fashion in defining extortion, but they do not give us any particular meaningful analysis.

Q Does it happen in some cases you find it in

that context or the extortion context as meaning "with his apparent consent"?

MR. DUNAU: It can never be with his consent, Your Honor--

Q "Apparent." That is why I put the adjective in.

MR. DUNAU: That would be the only explanation for the use of the words "with his consent," would be to translate it "with his apparent consent," because in every one of these cases, whether it is robbery or an extortion that you deal with it, you are getting a man to give up something which but for the exertion of a wrongful means he would keep in his own pocket.

I think perhaps I can illustrate--

Q Let us pursue that. Does it have to go that far? The extortion may never be consummated, is that not true?

MR. DUNAU: Then it would be an attempt to extort, Your Honor. And the statute reaches an attempt to extort.

Q Yes, you can have an effort to extort which is not consummated which nevertheless violates the statutes.

MR. DUNAU: That is correct, Your Honor. You can have attempts which are not consummated. You can have conspiracies which are not consummated. But whether it is an attempt, a conspiracy, or a consummated offense, the indispensable ingredient of it is not only the wrongful means

but the misappropriation of property.

The Government seeks, because it is forced by its argument, to agree that if a jury were to find that throwing a rock through a window pane was with the intent to get the employer to sign a union contract that that is extortion. It does not like that line to which it is put because it puts the FBI, every federal judge, every United States Attorney in the position of being a police court. So, it says, "Well, we have an exception." At page 19 of its main brief it says, "Except in substance incidental injury to person or property that not infrequently occurs as a consequence of the charged atmosphere attending a prolonged labor dispute."

If Congress had ever written a statute which said, "We will reach strike violence except that which constitutes incidental injury not infrequently occurring as a consequence of the charged atmosphere attending a prolonged labor dispute," I should suppose we would have not much trouble turning it down as a standardless crime, as an unknowable offense. Who can say whether violence is incidental or not, whether the dispute has been prolonged sufficiently so we are going to excuse the intentional act because of frustration? This is a standardless crime that the Government would now impose upon us. Since Congress has not given us that standardless crime, we do not think the Court should be asked

to invent it in order to make a limiting construction of what is otherwise a perfectly open-ended and unacceptable view of this statute.

There is a perfectly acceptable view of this statute, one which gives it a sensible and a strict construction, namely, obtaining property from another means the larsenist getting your property, the unlawful taking.

Q How would your test apply to the facts of Local 807?

MR. DUNAU: Local 807, Your Honor, as I read it, comes down to this. A truck driver wants a job. The employer does not want to hire him. The truck driver says, "Give me the money for the work anyway." The employer says, "I won't." And the truck driver breaks his head to get the money. But for the exception in the anti-racketeering act of 1934, that is clearly extortion. You are forcing the man to give up his property, his money, and you are giving him nothing in return for it. We think that is perfectly conventional misappropriation of money.

Q Therefore, you would completely concede that with the 1946 amendment, Local 807 should be decided differently from the way it was.

MR. DUNAU: Local 807 must be decided differently on the 1945 amendment to the anti-racketeering act. When the Court had the first case interpreting the 1945 amendment,

the indictment there read, as I said, "imposed, unwanted, superfluous, and fictitious services," we think that mirrors what Local 807 was about. We think that mirrors what Congress intended to reach. We think that mirrors the total scope of this statute and that if you go beyond that, perhaps one can construct plausible arguments to go beyond that, but at that point we are inventing with respect to what is a criminal statute, and of all the things we know by way of historical emphasis, what we do in a free society we do not invent crimes; we ask Congress to be pretty explicit about what it wants before we put a man in jail.

The Government had no problem in Local 807 when it was arguing to this Court in distinguishing between strike violence as such and extortion. And it said to this Court in its brief at page 46, which we quote at page 48 of our brief, "If the defendants had been seeking to achieve a legitimate labor objective, we doubt whether their activities would come within the scope of the act simply because of the presence of violence." The whole tenor of the act indicates that Congress intended to punish activities similar to extortion. Violence used as a means of obtaining a lawful labor union objective is not extortion but simply a breach of the peace or other kindred unlawful act.

Local 807 was overruled to reach extortion. Extortion means misappropriation of property. Getting a human

contract is not stealing. It is not racketeering. It is not highway robbery. It is not the work of bandits. It is not an offense within the meaning of the Hobbs Act.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Reynolds, do you have anything further? You have seven minutes.

REBUTTAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,

ON BEHALF OF THE APPELLANT

MR. REYNOLDS: Just a few comments, Mr. Chief Justice, if I may.

Appellees have argued that an application of the act turns on whether there is a misappropriation of property. Extortion traditionally has not required that there be a misappropriation of property. I think the most traditional incident of extortion is where somebody uses force or violence to force someone to pay over a debt that is due to them, money that they are already entitled to. It is extortion if they use force or violence to get that debt repaid.

The California Supreme Court in People v. Beggs under an extortion statute which is identical to the one that is now in the Hobbs Act and is also identical to the New York statute, said this about this concept of misappropriation of property. It says, "It is the means employed with the law denounces and though the purpose may be to collect a just indebtedness, it is nevertheless within the statutory

inhibition. Hence, the fact that the end accomplished by such means is rightful cannot avail one as a defense in such prosecution any more than such facts will constitute a defense where one compels payment of a just debt by the threat to do an unlawful injury to the person of the debtor."

What Congress did here, is they use the word "obtain," not misappropriation. It is the same definition they used in the Consumer Protection Act, as the Chief Justice earlier pointed out, to define extortion.

Appellees rely on New York law. The New York definition is not completely identical to the definition in the Hobbs Act. The New York statute went on to define the word "fear," and it said that the term "fear" includes where one is induced by threat to do an unlawful injury to person or property. In all the New York cases cited by appellees, the question was whether or not the threat in those cases was made with the intent to extort. The question of felonious intent. We agree that the matter of intent is a necessary element, but on determining whether or not the indictment should be dismissed, it does not come into play. It is a question for the jury. And the New York courts say exactly that in all the decisions that are cited by the appellees.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Reynolds. Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:20 o'clock p.m. the case was submitted.]

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