In the

Supreme Court of the United States

UNITED STATES,	)	
	)	
Petitioner,	)	
	)	
Vs.	)	No. 77-142
	)	
DONALD LAVERN CULBERT,	)	
	)	
Respondent.	)	

Washington, D. C.
January 11, 1978

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UNITED STATES, Petitioner,	:	
v.	:	No. 77-142
DONALD LAVERN CULBERT, Respondent.	:	

Washington, D. C.

Wednesday, January 11, 1978.

The above-entitled matter came on for argument at 1:39 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MRS. SARA S. BEALE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner.

JAMES F. HEWITT, ESQ., Federal Public Defender, 450 Golden Gate Avenue, San Francisco, California; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-142, United States v. Donald Lavern Culbert.

Mrs. Beale, you may proceed whenever you are ready.

ORAL ARGUMENT OF SARA S. BEALE, ESQ.,

ON BEHALF OF THE PETITIONER

MRS. BEALE: Mr. Chief Justice, and may it please the Court:

This case comes before this Court on the government's petition for review of a decision of the Ninth Circuit Court of Appeals holding that, although respondent's conduct in this case falls within the language of the Hobbs Act (18 U.S.C. 1951), it was nontheless not within the reach of that Act because it did not also constitute racketeering.

Accordingly, the Court of Appeals concluded that respondent's conduct fell within the exclusive criminal jurisdiction of the State of California. Let me reiterate at the outset that there is no dispute that respondent's conduct fell within the express terms of the Act which prohibits -- which reaches the conduct of whoever in any way or in any degree obstructs, delays or affects commerce by either robbery or extortion or who attempts or conspires to do so.

QUESTION: You say there is no dispute except that the court didn't seem to follow that?

MRS. BEALE: Well, there is no dispute that falls

within that language. The question is whether the Act should be construed to have an additional limitation to racketeering, but it falls within the express terms.

The evidence showed that in April of 1975, respondent and his accomplice attempted to extort $100,000 from a federally insured bank that was doing business in interstate commerce. Respondent's accomplice telephoned the bank's president and threatened to detonate remote controlled bombs at both the bank and the home of the bank president unless certain instructions were followed.

The bank president then took a package of false currency that had been supplied by the Federal Bureau of Investigation and left it at the spot that had been designated by respondent's accomplice. The respondent and his accomplice never picked up this package because it was found almost immediately by two small children who opened it and tore apart the packages of false currency.

Following the jury trial in the Northern District of California, respondent was convicted of both violation of the Hobbs Act and also of attempted bank robbery. Although the Court of Appeals reversed both of these two convictions, the government seeks review in this Court only of its ruling regarding respondent's conviction under the Hobbs Act.

The Court of Appeals concluded, relying upon an earlier decision of the Sixth Circuit, that conduct such as respondent's

which is prescribed by the expressed terms of the Hobbs Act, must also be proven to constitute racketeering in order to be within the reach of that Act. The court rested this construction of the Act on two distinct grounds: First, on its reading of congressional intent, and, second, on its view of the considerations of federalism. The court did not in its opinion define the term "racketeering," and that is the point to which I will return later in my argument. It did, however, conclude that there was no evidence of racketeering in the present case. Judge Carter dissented from the reversal of the conviction under the Hobbs Act.

I want to stress that the Court of Appeals did not suggest and respondent does not content that Congress lacked the constitutional authority to prohibit all of the conduct which does fall within the expressed terms of the Hobbs Act. The breadth of Congress' power under the Interstate Commerce Clause is firmly established and it is in no way questioned here.

The Court of Appeals simply concluded that considerations of federalism militated against any conclusion that Congress had intended what that court viewed as a major incursion into areas of state concern, and as a result that court adopted the limiting construction of the Act which is at issue here.

The language of the Act itself, which is of course the primary guide to its meaning, contains no support for this construction. The Act does not define nor does it even mention the

term "racketeering," nor does it contain any qualifying words that might be thought to exempt conduct which might not amount to racketeering. Instead, the Act is broadly drafted to reach anyone who in any way or degree obstructs or affects commerce by either robbery or extortion.

Accordingly, the heart of this case is respondent's contention that the sweeping language which Congress employed requires the limiting construction of the Act in order to prevent a wholesale invasion of the criminal jurisdiction of the states, a result which respondent contends was not within the intention of Congress.

I would like to turn first to the question of the legislative history of the Act. I will not attempt here to review in great detail the various congressional committee reports that were issued in connection with both the Hobbs Act and its immediate predecessor, the Act of June 18, 1934, nor will I try and review in detail the debates. These matters are discussed at length in our brief.

I do want to make two principal points in connection with --

QUESTION: I take it the theory of your case is that you don't need to look at the legislative history at all?

MRS. BEALE: Well, I think that the language of the Act is very plain, but when one looks at the legislative history, one finds nothing that supports a conclusion that is really at

variance with that plain and very broad language.

My first point in connection with the legislative history of the Act is that although it was an outgrowth of congressional concern with so-called racketeering, that in no way indicates that Congress intended some unstated limitation which appears neither in the Act itself nor in the committee reports to some concept of racketeering, whatever that may be.

QUESTION: Mrs. Beale, has the government utilized the Act in cases such as this only recently?

MRS. BEALE: I think there has been no substantial change in the enforcement of the Hobbs Act in its some thirty years since it was enacted. It has received no new construction and I am not aware of any substantial change in enforcement practices.

QUESTION: Hasn't it usually been restricted to where you cross state lines?

MRS. BEALE: Well, there are several policies that are currently used by the department to determine what are appropriate areas or appropriate kinds of cases in which Hobbs Act enforcement -- in which the Hobbs Act should be enforced, and they differ according to whether robbery or extortion is at issue. The department at present -- and I am not certain when this policy was first promulgated -- it is not of particular recent origin, but in robbery cases the department as a matter of policy restricts prosecution in most instances to cases where

there is either a showing of organized crime involvement or an extensive scheme of some sort.

Now, in practice there is also an attempt to limit other kinds of cases to areas where there is what is thought to be a substantial federal concern. And a point that I want to discuss shortly is that concerns really the reality of the concern with the invasion of state interests. And a point that I was going to mention is that there were only 166 nationwide indictments under the Hobbs Act in 1976, and that perhaps will give some kind of an idea of what the enforcement pattern currently is.

QUESTION: Mrs. Beale, you mention that the department limits its prosecution to cases where there is substantial federal concern. You cited the Staszcuk case in your brief, if you remember. What was the substantial federal concern there?

MRS. BEALE: Well, the Staszcuk case was a prosecution under the color of official right portion of the Act.

QUESTION: It was a zoning bribery case, wasn't it?

MRS. BEALE: Right.

QUESTION: Local zoning?

MRS. BEALE: Right. Well, I think one of the considerations is, of course, a -- and a theme that recurs in the legislative history of the Act -- is a real concern for offenses which (a) affect commerce, and (b) where the states have not acted and are not prosecuting offenses --

QUESTION: In other words, the substantial federal concern is that the state isn't doing a good job in enforcing its own laws?

MRS. BEALE: Well, I think that where interstate commerce is interfered with by means of extortion, where color of official right is involved, that is an area, particularly where the concern that Congress express where in fact the states were not acting is at issue.

QUESTION: There wasn't really a terrible interference with interstate commerce in that case, was there?

MRS. BEALE: The veterinary hospital was never built. I wouldn't disagree that Staszcuk may be a case that on the fringes and that there may not among 166 prosecutions in a year be some which are on the edge and some such as the present case are clearly in the main --

QUESTION: Isn't it true that the statute has frequently been used, at least in the Seventh Circuit, to prosecute political type crimes where the local law enforcement authorities were not enforcing the local laws?

MRS. BEALE: Well, I guess I am not prepared to discuss particularly the Seventh Circuit enforcement. I do think it is clear that the Act itself contains a specific provision dealing with extortion under color of official right and that that fits quite comfortably with the concern in the legislative history that where there are crimes affecting interstate

commerce, and particularly where the states don't act, and that is very likely to happen in cases of official corruption, that that would be an appropriate area of federal concern. So I would not be surprised to see a pattern such as that in the Seventh Circuit.

QUESTION: Well, why do you say you wouldn't be surprised to see such a pattern in the Seventh Circuit?

[Laughter]

MRS. BEALE: I'm not sure I intended quite that. That was only in response to the earlier question.

QUESTION: Well, you mentioned 166 cases in a year, and in addition you have 94 United States Attorneys offices in policing, the monitoring, perhaps I should say, the monitoring of the day-to-day decisions. That is not a simple task, I suppose.

MRS. BEALE: Oh, I think that is quite right, but there is -- and this is the only point that we raise in our brief to suggest that there is an effort to try and exert some kind of control on the part of the department which is I think wholly consistent with the fact that the Act is very broadly drafted, and it was merely in response to the question of how was the Act enforced. At any rate --

QUESTION: The bank here -- may I interrupt -- was a national bank, wasn't it?

MRS. BEALE: Pardon me?

QUESTION: The bank that was the subject of this extortion was a national bank?

MRS. BEALE: That's quite right, it was a federally insured bank and there was also evidence of its doing business in interstate commerce, and I think that is not at all any --

QUESTION: Suppose it had been a state bank, not insured under the FDIC, would that have made a difference?

MRS. BEALE: Well, it seems to me at least -- and we have argued in our brief -- that the banking industry is one in which really occupies a special position in interstate commerce and really serves as one of the channels of interstate commerce, and I think a prosecution for extortion of a state bank would not be an inappropriate exercise of federal power, and I think it could be shown to have an effect probably on interstate commerce in a given case.

QUESTION: And the proof in this case showed interstate commerce?

MRS. BEALE: That's correct.

QUESTION: Well, the statutory authority is the motives of the United States Attorney, is that dispositive or very important?

MRS. BEALE: No, I think that they are not dispositive and, as I say, this was raised only in connection with trying to quantify what is the practice under the Act, how many prosecutions are there, because that goes to the issue suggested

by respondents and the concern raised by the Court of Appeals as to whether the broad language of this Act has resulted or will result in some kind of widespread incursion into areas of traditional state concern. I think it is only relevant for that reason because of the concern expressed below.

QUESTION: Mrs. Beale, under the literal language of the Act, I suppose, wouldn't you agree, it would cover robbery of goods from a department store that were destined to move and had moved in interstate commerce and was destined to be sold to customers of the store?

MRS. BEALE: I think an effect on interstate commerce can be shown, and it is clear that the Act applies where an act is shown --

QUESTION: And wouldn't it apply to that case?

MRS. BEALE: Well, I think that that could be established.

QUESTION: Would it also apply to the furniture that was in the home, that it had been shipped in interstate commerce?

MRS. BEALE: I think we may be getting near the fringes.

QUESTION: Well, if it is robbery, it has to be robbery or extortion affecting commerce?

MRS. BEALE: Right.

QUESTION: But I would like to get back to this

question. I have been trying to get a word in edgewise. The court below relied on the --

MRS. BEALE: That's exactly right.

QUESTION: And this was the robbery of a K Mart store?

MRS. BEALE: That's correct.

QUESTION: Do you think that is a different kind of case?

MRS. BEALE: Well, I see no reason for distinguishing either in terms of the legislative intent or the considerations of federalism as to whether some kind of additional concept not stated in the Act should be applied or construed into the Act. The legislative history makes it quite clear that at the time the Hobbs Act was enacted, those who opposed the Act argued that every state had laws covering both extortion and robbery, and they argued that this Act should not be passed because it would be a wholly unwarranted incursion into these areas of state concern, that the states had laws. The proponents of the bill did not in any way disagree with that. They said yes, this is an area, every state has laws regarding extortion and regarding robbery, but insofar as it affects interstate commerce these laws have not been enforced in many instances, there is a burden and effect on interstate commerce and the Hobbs Act must be passed in order to protect the flow of interstate commerce. That is the argument that carried the day. No distinction was drawn either in the legislative history or in these

debates as to either robbery or extortion and it --

QUESTION: Let me ask you an unfair question then. Why didn't the Solicitor General seek cert in Yokley?

MRS. BEALE: I really can't answer that question. I think at that point the facts of that case are different from this case.

QUESTION: Could there be an embezzlement that wouldn't be under this statute?

MRS. BEALE: An embezzlement?

QUESTION: Of money? Because money travels in interstate commerce.

MRS. BEALE: Well, I would not think, considering the normal --

QUESTION: Doesn't that affect interstate commerce, embezzlement of money?

MRS. BEALE: Well, the Act is limited to robbery and extortion affecting interstate commerce and I wouldn't think that the normal case of embezzlement would fall within the definition of the Act.

QUESTION: But robbery would?

MRS. BEALE: Because robbery is specifically defined in the Act.

QUESTION: Well, why would you draw a line between robbery and embezzlement? What is to stop Congress from passing one on embezzlement?

MRS. BEALE: I see no constitutional impediment against Congress passing such a law.

QUESTION: Well, how about stealing from a will, can you steal money? I'm just wondering what is left to the state.

MRS. BEALE: I'm not certain what effect that would be on interstate commerce that could be relied upon by Congrsss in the case of stealing from a will.

QUESTION: In agriculture, does money move in interstate commerce? It has to.

MRS. BEALE: Well, that is a very broad statement. Whether that would support the exercise of --

QUESTION: Well, California doesn't make any money. They don't manufacture money, do they? So the money --

MRS. BEALE: They certainly should not be.

QUESTION: So the money in California has moved in interstate commerce.

MRS. BEALE: That's correct.

QUESTION: Which is covered by this statute?

MRS. BEALE: I'm not sure that I --

QUESTION: If you rob money in this state, you would be covered by this Act.

MRS. BEALE: Well, it is not clear that merely because some article has at one time passed in interstate commerce at will, that that would provide a sufficient basis for Congress, that Congress either would want to or would have the power to

-- would be able to make findings that any robbery affected interstate commerce.

QUESTION: It says whoever in any way or degree obstructs, delays or affects commerce.

MRS. BEALE: Right. That's correct.

QUESTION: And so if you rob somebody of money, you could at least affect commerce. That money is in commerce, isn't it?

MRS. BEALE: Well, counsel might be able to make that argument, but I suspect a jury would not find that there had really been an effect on interstate commerce, if I robbed someone of five dollars on the corner. At any rate, I do want to make a few additional points.

One is that the legislative history clearly indicates that there was no settled meaning for the term "racketeering," although Congress was concerned in 1934 and in 1946 with a variety of problems that were described as racketeering. That term had no distinct meaning. The committee which was investigating the problem of racketeering found it necessary to adopt a working definition to guide its investigation, and it stated that it was necessary to adopt such a definition because the term "racketerring" was being used to refer to activities that were not even criminal, to activities that were immoral, to activities that were fraudulent, to wide varieties.

Another point is that it seems inconceivable in that

regard, that a committee that was so aware of the vagueness of the definition of the term "racketeering" would nevertheless have intended to make that a part of a federal criminal statute without mentioning it in the Act, without defining it, without making it clear in the committee reports.

Another point regarding the legislative history of the Act is that there is a suggestion both in respondent's brief and by the court below that because the originating committee was concerned with racketeering and because there are various expressions of support for the bill as an anti-racketeering measure, the bill should be construed as limited to this one kind of problem, only to racketeering.

If that were true, it seems to me that all of the 90-some bills that were proposed by this same committee at the close of its investigation on racketeering, which range from kidnapping to mutiny in federal prisons, to interstate transportation of stolen property, that all of those would likewise have to be limited to racketeering. And it seems to me that it is simply not reasonable to construe all of the committee's work as limited to racketeering when it never expressed the desire that that should be done, and when this was not made an element of the particular statute.

I have already mentioned the fact that the debates on the Hobbs Act made very clear the fact that Congress was well aware of the fact that the crimes being defined in the Hobbs

Act were crimes which are already punishable under state law. And indeed it was recognized that the definitions which appear in the Hobbs Act were derived and were taken directly from the New York Penal Code.

QUESTION: The Hobbs Act doesn't preempt state law, does it?

MRS. BEALE: No, that is exactly right. No one has ever suggested that merely because Congress found it desirable and necessary to define this area to allow federal prosecutions that it had intended that the states should not be allowed to prosecute robbery and extortion, and indeed they do so today.

I think it is time to turn from the legislative history to the considerations of federalism which really underlay the court's reading of the legislative history.

The first point that I would like to make is one which I touched on somewhat earlier. The Court of Appeals suggested that the limiting construction which it applied to the Act was essential in order to prevent a really widescale invasion and incursion onto the criminal jurisdiction of the states.

I just mention in response to Mr. Justice Rehnquist's question that the Act has never been interpreted nor was it intended to preempt the statees. In addition, as I noted earlier, there has been no widescale incursion into areas causing a general problem. There were 166 prosecutions

nationwide in 1976.

Again turning to this particular prosecution, we think it is a good example of one where there is a strong federal interest involved. The federal government we believe has the compelling interest in prosecuting under its own laws an attempted extortion from a bank that it insures, that serves businesses in many states, and that is part of an industry that perhaps more than any other facilitates the flow of interstate commerce.

In any event, even assuming that there are factual situations that fall within the literal language of the Hobbs Act, but in which there is no substantial federal interest, requiring proof of racketeering would in no way serve to screen out those cases in which there is minimal federal interest.

Although the Court of Appeals provided no definition of racketeering, it seems clear that there is nothing inherent in that concept which suggests that racketeers could prey only on businesses or on persons who are heavily involved in interstate commerce. Indeed, the respondent's brief indicates and cites a good portion of the legislative history to show that many rackets are of essentially local character, therefore limiting the Act to racketeering seems to have very little to do with a legitimate concern for state sovereignty.

Indeed, the fact that the prosecution we have at issue here falls outside the scope of the Act as it was defined

by the Court of Appeals, despite the vital federal interest, demonstrates the fallacy of assuming that the Act, that limiting the Act to racketeering will somehow serve the purpose of screening out these cases which are less directly related to the federal interest.

QUESTION: Mrs. Beale, you said that many rackets are of purely local interest. What did you mean by the term "rackets"?

MRS. BEALE: I was referring to the portions of the legislative history that are particularly cited and emphasized in respondent's brief. There are many problems in the legislative history which are so-called rackets or racketeering, many definitions. But some of those with which Congress was clearly concerned as shown by the legislative history seem to be of an essentially local nature, and it seems clear that Congress took the definition, the working definition of the committee in 1934 and adapted that definition in the 1934 Act to make it suitable for federal, for use in a federal criminal statute. It changed the definition in two primary ways. The working definition was an organized conspiracy to commit either coercion or extortion -- excuse me, robbery or coercion. The committee added to that definition in the 1934 Act the requirement that there be an impact on interstate commerce, and they deleted the requirement that there be an organized conspiracy.

QUESTION: Mrs. Beale, wasn't there considerable

testimony about crossing state lines during the debates on the Hobbs Act?

MRS. BEALE: There certainly were expressions of --

QUESTION: Didn't Mr. Hoover testify on that ground?

MRS. BEALE: I am not entirely sure --

QUESTION: My point is you say it was strictly local. I think you are wrong. I think they were worried about crossing state lines.

MRS. BEALE: I think I have perhaps confused two separate points. One is that some --

QUESTION: I'm confused actually.

MRS. BEALE: No. One is that some things that were described in the legislative history as "rackets" were indicated to be areas of primarily local concern. But as to what the Act is aimed at and the debates reflect, it clearly is matters where there is some basis for federal jurisdiction, where there was a crossing of state lines, where there was an institution such as the federal bank here, where a federally insured bank here, where there is really a substantial federal interest, and certainly --

QUESTION: Mrs. Beale, this might be a good time to remind us of what Mr. Justice Frankfurter once said, that when the legislative history is ambiguous and confused, you turn to the clear language of the statute. I don't remember the name of that case.

MRS. BEALE: In fact, I think that a close examination of the legislative history really makes a stronger case than that. There simply is other than the fact that there are expressions of concern regarding racketeering, there is no showing that any unstated, any limitation that was unstated in the Act to some definition of racketeering was intended, so it is even a clearer case than that, which you make.

In sum, we believe that since neither the legislative history nor any concerns for federalism justify importing a vague concept into the Act which will simply make more difficult its enforcement, without in any way screening out cases in which there is a lesser federal interest, shows that there is no grounds for the construction of the Act urged by the -- chosen by the Court of Appeals, and we therefore respectfully submit that its judgment should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hewitt.

ORAL ARGUMENT OF JAMES F. HEWITT, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I suppose if Erle Stanley Gardner were to give a title to this case, he could title it "The Lamentable Loophole," because I think that is what the government is faced with.

When the Bank Robbery Act which came as a result of

the anti-gangster throes of the mid-thirties was considered, and it was considered in conjunction with the racketeering act, the title given to the predecessor of the Hobbs Act, the ultimate statute that came out of the 1937 amendments involved a crime of bank robbery which included as an element intimidation, the essence of extortion. It required this intimidation or the obtaining of the money to be from the person or presence of the bank officer and with the structure of the bank -- with the structure at that time of the bank larceny statute, there was this gaping hole, unless the property was taken from the person or presence of a bank officer, it was not a federal bank robbery, nor would it be a larceny if the taking were not trespassory in nature.

So we were left with one narrow class of offense that was uncovered, extortion not from the person. The government is left then with three alternatives. They could have gone to Congress and have that loophole filled, corrected by legislation, they could find another statute that fits, or they could leave the enforcement to the states.

Well, the government has taken to take the second alternative and stretch a commerce statute that was aimed at racketeering to fill a loophole, and by doing so the inevitable consequence is a blanket incursion into an area traditionally enforced by the states.

QUESTION: When you say it was aimed at racketeering,

Mr. Hewitt, what do you mean by racketeering?

MR. HEWITT: I think the definition, the working definition adopted by the committee pretty well expresses what racketeering meant in the thirties and I suppose what it means to most people at the present time, an organized criminal conspiracy, perhaps an on-going criminal conspiracy, not certainly an isolated event.

QUESTION: Do you think anyone could be punished under this statute then?

MR. HEWITT: As the statute is presently written?

QUESTION: Yes.

MR. HEWITT: Yes. I think an isolated robbery of a corner liquor store is a violation of the Hobbs Act, if we give it the interpretation asked by the government. The Yokley case was the stickup of a K Mart department store.

QUESTION: But you are saying neither of those can be punished under this statute, aren't you? You agree with Yokley?

MR. HEWITT: Yes.

QUESTION: What I am asking you is if you take Yokley as the law and the decision of the Ninth Circuit in this case as the law, do you think anyone can be validly indicted under this particular section, in view that you have to read in the racketeering qualification, which to me is rather amorphous?

MR. HEWITT: Yes, I think that they could be indicted

and prosecuted and convicted if they were found to be engaged in racketeering, and I see no reason why the definition could not be the definition offered by the Copeland committee as the working definition.

QUESTION: Even though it doesn't appear in the statute?

MR. HEWITT: Even though it doesn't appear in the statute. They must have considered the definition of felony in the Jerome case, the word felony has the common meaning of a crime involving punishment in excess of a year, but the court went beyond that to the legislative history and determined that it only pertained to felonies affecting national banks.

QUESTION: Mr. Hewitt, what in this statutes requires us to go to the legislative history?

MR. HEWITT: Well --

QUESTION: What word or phrase?

MR. HEWITT: -- I think it is the obvious breadth of the statute.

QUESTION: The in terrorem effect?

MR. HEWITT: Yes, Your Honor. The obvious --

QUESTION: Are we allowed to do that?

MR. HEWITT: I think the Court must because I think what has happened is that the evolution of interstate commerce is --

QUESTION: Well, do you say it is unconstitutional?

MR. HEWITT: No. No, I'm not saying that.

QUESTION: Then why do we have to do this?

MR. HEWITT: Because I think it is the duty upon this Court to make sure that there is no unwarranted intrusion or incursion into traditional state police power matters. Now, at the time --

QUESTION: Where do we find that limitation?

MR. HEWITT: This Court made the suggestion in a number of cases.

QUESTION: But where do we find it in the Constitution somewhere?

MR. HEWITT: Just the Tenth Amendment, reserving the powers to the states certainly would be a constitutional --

QUESTION: And do you think the protection of national banks was reserved exclusively to the states then?

MR. HEWITT: No, Your Honor, national banks is a different problem here.

QUESTION: Isn't that what we've got here?

MR. HEWITT: Well, we have a national bank but we don't have a national bank that is protected by the banking provisions. We have a national bank that is sought to be protected as an instrumentality of interstate commerce, and it is clear that that is not what Congress was thinking of in the thirties. They weren't aiming this legislation at national banks. They were aiming the Bank Robbery Act at national

banks. This was aimed at interstate commerce as it was known in 1934 and 1937, and we know that in that era, in the New Deal era, Congress was very sensitive about intruding into the state's reserve powers.

QUESTION: Well, how about the Fair Labor Standards Act, which was passed in 1938, would you say that was an example of congressional sensitivity?

MR. HEWITT: I think there was certainly recognition and discussion of whether or not this would be an intrusion into the vested powers of the states, and the resolution I think was made that this was an area where the federal goverrment does have an interest.

My concern here is that what has happened is that the definition of interstate commerce has evolved with the operation of the de minimis rule to cover just about any instrumentality, including the corner grocery store.

QUESTION: But do we need to worry about the corner grocery store in a case where we are dealing with a national bank.

MR. HEWITT: Well, I admit, Your Honor, I would feel safer if I were here with the K Mart department store in the Sixth Circuit.

QUESTION: Or the corner liquor store?

MR. HEWITT: Well, if the statute itself could be so broadly interpreted, and if the only limitation upon its

application where there is a threat of intrusion and an upsetting of the balance of federalism, the only limitation is the discretion of the prosecutor that he is not going to push, he is not going to enforce the statute as broadly as is read, but he will choose to limit it so as not to intrude upon the vested interests of the states, I don't think that is a sufficient protection to preserve that balance.

QUESTION: Mr. Hewitt, I have another problem with your reading in this exception for racketeering. If racketeering is a conspiracy to use intimidation to extort money or whatever the language was, why isn't that what this was anyway? This was two people involved in this plan to rob, to threaten this person with violence in order to get money out of the bank. Why doesn't it fit right within the racketeeering definition anyway?

MR. HEWITT: Well, it was never prosecuted on that theory nor was it submitted to --

QUESTION: Well, it was prosecuted on the theory that it violated the statute, and you say no, it doesn't violate the statute because it is not racketeering, and then you describe racketeering in a way that I think fits these facts, or did I miss something?

MR. HEWITT: Well, I think the concept of racketeering, if we are to give it the meaning that Congress obviously intended in the thirties, must be an on-going operation more

than an isolated transaction, kind of an organized criminal conspiracy, as they define it, and I --

QUESTION: It will be on-going if he goes to the penitentiary. Obviously, if he goes to the penitentiary, it will be on-going.

MR. HEWITT: It may well be that this were evidence of a series of bank robberies by these same individuals, we might have some organized crime or racketeering that would fit within --

QUESTION: Your observation would put a rather severe crimp on the federal kidnapping statute, would it not?

MR. HEWITT: Well --

QUESTION: Usually you don't have chain store operations with kidnappings, even though we did in the thirties. Kidnapping is an isolated act, as this was conceived as an isolated act.

MR. HEWITT: Well, I think the legislative history behind the kidnapping act is certainly going at the isolated transaction rather than any on-going enterprise, and certainly Congress had indicated in enacting the kidnapping statute that it was intruding into what would be ordinarily state police power, but it made specific findings that because of the mobility of the kidnapper the states were powerless to have proper control.

QUESTION: Well, is not the same thing true about the

loan sharking statute that we sustained two or three years ago?

MR. HEWITT: Yes, and I think Congress could very well, similar to the loan shaking statute, find that racketeering has such an effect on interstate commerce that all racketeering may be punished federally.

QUESTION: Well, is this farther away from federal concern than loan sharking?

MR. HEWITT: I don't think so.

QUESTION: This case.

MR. HEWITT: This case?

QUESTION: This case, this statute.

MR. HEWITT: I think the primary federal concern here is incidental only, that is that it is a national bank over which the federal government has plenary power and interest.

QUESTION: Whereas in the loan sharking case, you don't have any national aspect except that it had some, as the dissenters thought, some very remote effect and impact on interstate commerce.

MR. HEWITT: But Congress there, Your Honor, made a finding that loan sharking does affect commerce either under the bankrupcy clause or the commerce clause that is very difficult to show as an element of proof in connection with commerce to justify jurisdiction, therefore the class of activity at which the legislation was aimed in Perez, loan sharking, it was

sufficient to show that the person was a member of that class and nothing more. Congress could have done the same thing here but they didn't. My suggestion is that the legislative history indicates very clearly that Congress was talking about, frankly they were talking about labor racketeering.

QUESTION: But do you have a quarrel, Mr. Hewitt, with the constitutional basis for this particular prosecution, that there was insufficient basis for connecting this particular extortion with the movement of goods in interstate commerce?

MR. HEWITT: I don't think we can, Your Honor. I think the predicate was laid in the course of the trial that most banks, I almost say all banks have a sufficient connection upon interstate commerce, a sufficient connection with it under the depletion of assets theory and many others.

QUESTION: To me this is a better case for the government than Perez which I think, frankly, had I been on the Court, I would have regarded as quite doubtful, in spite of the blanket congressional findings. But here it seems to me you have factual findings by a trier of fact.

MR. HEWITT: No, that facet doesn't bother me. I agree, this is a much stronger case than Perez.

QUESTION: Constitutionally?

MR. HEWITT: Constitutionally.

QUESTION: But you are not making a constitutional

claim?

MR. HEWITT: No, sir, I'm certainly not. I'm simply saying that in the legislative history, it is clear that Congress was talking in the Hobbs Act and the Copeland Act before about extortion and robbery affecting interstate commerce. During the same legislation, at the same time the legislation was being considered, they were protecting national banks with the bank robbery statute. Now, they left a gaping hole and the question is whether that hole can be filled without doing violence to the considerations of federalism, and we suggest that it can.

QUESTION: Well, just exactly what constitutional right was denied to your client?

MR. HEWITT: Well, I'm not really making a constitutional argument, Mr. Justice Marshall.

QUESTION: Well, what federal statute was violated? I'm trying to find out what your complaint is that we can get to.

MR. HEWITT: The complaint is that the court below held --

QUESTION: I know what the complaint is. Any time you lose a case, you have a complaint.

MR. HEWITT: I certainly do.

QUESTION: But I want to know something that we can grasp --

MR. HEWITT: The complaint is --

QUESTION: You say it is not constitutional, so it must be statutory.

MR. HEWITT: Well, yes, it is statutory. He was convicted of a statute that requires a showing of more than simply an act affecting commerce under the de minimis theory.

QUESTION: Your theory is that by some provision of the Constitution, you read into a statute something that isn't in the statute.

MR. HEWITT: Well, I think that I am asking this Court to read into the statute a limitation that will prevent the statute from being applied, thereby intruding into the vested police power of the states.

QUESTION: Then it seems to me you are obliged to show that if we don't do that, your client has had some constitutional provision violated. If not, why are you here?

MR. HEWITT: No, I don't think there is any constitutional issue --

QUESTION: It seems to me that unless we rule with you, your client is being denied a constitutional right.

MR. HEWITT: I suppose I could always use due process. That might be broad enough. But the constitutional right would be to be tried and convicted by a state court for an offense against the state that is not a federal offense.

QUESTION: What if the amount extorted or sought to

be extorted was enough to render the national bank insolvent, would you think then if the demand had been that large you would have a real impact on interstate commerce?

MR. HEWITT: Your Honor, I'm not concerned with the impact on commerce. I think there is sufficient impact here to support constitutional jurisdiction.

QUESTION: But then if there is a sufficient impact, doesn't that give a federal concern which seems to be the fulcrum of your argument, that there is insufficient federal concern here?

MR. HEWITT: No, that is not my argument either.

QUESTION: I thought you said you wanted to be convicted by a state court.

MR. HEWITT: That's right, he wants to be convicted for a legitimate crime rather than have the federal law twisted around to inject the federal government into an area where they don't belong unless Congress has specifically indicated we wish to inject federal enforcement into this narrow area.

QUESTION: Of course, if you really can't be tried by the state court, has the statute run?

MR. HEWITT: No, I don't believe it has, Your Honor. He couldn't be tried by the state only because California has a penal code provision that prohibits it. If he were prosecuted in the state, he could be prosecuted again in the federal

government or in a state in which no provision was made.

QUESTION: But he hasn't been indicted in the state court.

MR. HEWITT: No.

QUESTION: And how long is the statute in the state court?

MR. HEWITT: Five years.

QUESTION: Are you familiar with the Camen Eddy case, Mr. Hewitt, back a good many years ago, 1917, involving the Mann Act, where the legislative history of the Mann Act was very clear that it was directed at the so-called white slave traffic, where the literal terms of the statute covered cash holding on commercial episode between Missouri and Kansas, Kansas City, Missouri and Kansas City, Kansas, I think, and the conviction was affirmed here?

MR. HEWITT: Yes, Your Honor.

QUESTION: Isn't the argument you are making precisely the kind of argument that was rejected in that case?

MR. HEWITT: No, for this reason: I think that it is fairly clear that Congress was directing the Mann Act at that isolated single --

QUESTION: No, it was clear that Congress was directing it at commercialized vice and interstate transportation of so-called white slaves, and it was the legislative history -- the legislative history was crystal clear that the literal

terms of the statute covered this single casual non-commercial episode and this Court, in an opinion by Mr. Justice Day, I think it was, affirmed the conviction.

MR. HEWITT: Yes, I recall that case as very close in many regards to this but --

QUESTION: Maybe we are now in a different era. That decision has been greatly criticized.

MR. HEWITT: I can recall the hyperbole being used of driving across the 14th Street Bridge with evil intent would violate the Mann Act at that time. Of course, Congress in the thirties was very sensitive to the considerations of federalism. The Justice Department at that time, statements were made by Attorney General Mitchell and later by Attorney General Cummings that they were concerned with the fiscal consequences of injecting the federal government into the states and assuming too much responsibility, fear that otherwise if they injected themselves too greatly into state law enforcement that the states would themselves stop beefing up their police and stop chasing after gangsters, so the gangster era.

So I think it is fairly clear that the Racketeering Act of 1934 was aimed at the primary federal interest of interstate commerce. But certainly a secondary interest was racketeering. And having defined racketeering as an organized conspiracy to commit extortion, we suggest that the court could turn to that definition as the definition that Congress

obviously was using when it was considering this legislation.

As suggested before, this Court in Jerome looked over legislative history to define felony as that term was used in Jerome.

QUESTION: But if as a moment ago, as Mr. Justice Day's opinion is thought by the Congress and accepted by the Court that this was not an undue incursion into state's police power, hasn't the world become more complex and travel much swifter and all other things going opposite from the direction that you argue?

MR. HEWITT: It certainly has, and I would have to concede that were Congress to consider this bill today, Congress would probably find that it is advantageous to assume this role and this responsibility in the states and I'm sure that they would enact a statute as broad as this if not broader, if possible. But I don't think that we can consider what their intent might be today under similar circumstances. I think the question is what was the intent of Congress in 1934 and '37 and later in 1946 when the Hobbs Act amended the Anti-Racketeering Act, and I submit that there is no indication --

QUESTION: Well, I was speaking of the lapse of time between Mr. Justice Day's opinion and the late thirties. That was the movement of all legislation at that time, that suddenly the country discovered that automobiles and airplanes and a lot of other things have come on the scene and changed the

whole pattern of criminal activity, especially when people could commit crimes near state borders and then slip across the next border.

MR. HEWITT: I think this is reflected in the legislation, the outgrowth of the thirties legislation, with the mobility and the change in the world. Like I say, I think Congress could now do this if it made that decision, that it is going to enact legislation --

QUESTION: Isn't that why they made that decision? Didn't they make that decision in the thirties?

MR. HEWITT: No, I don't think in this particular statute they did. I think in some areas that was debated, resolved that they would, racketeering and gangster activities were such that the federal government had to protect federal banks, therefore the Bank Robbery Act came out. As we pointed out in our brief, there were 25 or 30 pieces of legislation that grew out of that crime package. The only one called the Racketeering Act was this particular statute that we feel was aimed at racketeering.

QUESTION: Who called it that?

MR. HEWITT: Pardon?

QUESTION: Who called it that?

MR. HEWITT: Congress called it that.

QUESTION: In the legislation itself?

MR. HEWITT: Yes. That was the title of this

particular bill, was the --

QUESTION: In the language of the statute --

MR. HEWITT: -- the Racketeering Act.

QUESTION: In the language of the particular statute we are applying here?

MR. HEWITT: The title.

QUESTION: No, I am talking about the statute.

MR. HEWITT: Within the statute, no, of course they didn't use the term there. Perhaps Congress assumed that everyone would know that they were talking about racketeering. I concede, as the government points out, that when they passed the recent crime bill, they defined racketeering specifically.

QUESTION: But they could have done all of that with this bill.

MR. HEWITT: They certainly could have --

QUESTION: But they didn't.

MR. HEWITT: -- if they felt that it was necessary.

QUESTION: And we are stuck with not what they could have done but with what they did do.

MR. HEWITT: Well, in forty years I suppose Congress realized that they may have to define terms more specifically than they did in the middle thirties. At that time they felt that there probably would be no encroachment upon state police power since at that time a direct effect upon interstate commerce was required. They were speaking in terms of the

poultry racket and the shakedowns that gave rise to this Court's decision in Local 807. They weren't thinking that interstate commerce would mean a corner grocery store or a small business with just a de minimis effect on commerce. And I don't think that there is any suggestion in the legislative history that Congress dreamed that this extortion act aimed at labor racketeering would ever be used to fill the loophole in the bank robbery statute, and I think that is precisely what has been done here. I don't think that relying upon the Justice Department to limit itself will solve the problem. I think that the Court has to find whether or not this statute being broadly applied would be an intrusion into state sovereignty, I think the Court should give it a restrictive gloss and prevent any upsetting of that delicate balance.

If there are no further questions, I would thank Your Honors.

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

Do you have anything further, Mrs. Beale?

ORAL ARGUMENT OF SARA S. BEALE, ESQ.,

ON BEHALF OF THE PETITIONER--REBUTTAL

MRS. BEALE: Just a few brief points. The first is that, despite respondent's argument, there is not one shred of legislative history that indicates an intent to place an unstated limitation on this broad language to limit it only to some kind of activities called racketeering. The 1934 Act was

officially titled "An Act to protect trade and commerce against interference by violence, threats, coercion or intimidation." That word "racketeering" is not mentioned in either of the two Acts, it is not mentioned in the titles, and we do not believe a fair reading of the legislative history indicates that there was intended to have some unstated limitation. We think the fact that there is no definite definition of racketeering fully supports that point.

There is a definition of racketeering in section 1961 of Title 18. That definition was adopted I believe in 1970, and certainly it cannot be suggested that that definition was intended to apply in 1934. The committee definition is clearly not what Congress intended to reach in either of the two Acts, the committee's working definition, in view of the fact that the committee reports clearly reflect the fact that no limitation to a conspiracy or some kind of organized activity was intended to be required by this Act. They purposely omitted that particular element.

Indeed, I should note that the committee's working definition was first publicly published in a report that appeared in 1937 detailing three years of its work. That working definition does not appear in the committee reports which were put out to define the scope of the 1934 Act that we have in question here, and they do not appear directly in connection with the legislative history of that Act. Simply a working

definition of all of the work of a committee that introduced 90-some bills in 1934, bills relating to kidnapping, to mutiny in federal penal institutions, to interstate transportation of stolen property, as well as to the Act we have under consideration here.

The respondent seems to be arguing that what Congress ought to have done is to have defined racketeering as it did in section 1961 and then to have made that kind of activity punishable either generally because it found that all racketeering affects interstate commerce or only insofar as it affects interstate commerce. But Congress simply did not do that. The legislative history does not reflect an intent to do that and certainly the language of the Act does not relfect any such intent.

Furthermore, the purpose which respondent is suggesting the limitation of an Act is required, the purpose of keeping the federal government from intruding into the areas of state concern is in no way served by limiting this Act to racketeering. It simply will not have the purpose of screening out cases where there is no very strong or very great federal interest as it might be defined by individual judges or justices.

Indeed, we think, as the questions indicated by the Court today, that this is a case with very strong federal interest. But at least as the Ninth Circuit construes the Act

with the racketeering requirement, this case falls outside of the scope of the Hobbs Act, so we think it is not a sensible limitation to limit the incursion on state jurisdiction and there is no support for it in the language or in the legislative history which is detailed fully in our brief.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

[Whereupon, at 2:30 o'clock p.m., the above-entitled case was submitted.]

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