OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOHN H. EVANS, JR., Petitioner v. UNITED STATES

CASE NO: 90-6105

PLACE: Washington, D.C.

DATE: Monday, December 9, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN H. EVANS, JR., :

Petitioner :

v. : No. 90-6105

UNITED STATES :

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Washington, D.C.

Monday, December 9, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:40 p.m.

APPEARANCES:

C. MICHAEL ABBOTT, ESQ., Atlanta, Georgia; on behalf of the Petitioner.

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(1:40 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-6105, John H. Evans, Jr. v. United States.

Mr. Abbott.

ORAL ARGUMENT OF C. MICHAEL ABBOTT

ON BEHALF OF THE PETITIONER

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

The two issues presented in the case of Evans v. the United States have to do with first, under the Hobbs Act, title 18, United States Code, section 1951(b)(2), whether an affirmative act of inducement by a public official such as a demand or threat has to be shown by the Government in an extortion case under color of official right.

The second issue presented is whether, in the absence of that Hobbs Act conviction, should we be successful here, the petitioner was properly convicted for making a false statement on his income tax return when he failed to report a $7,000 payment given by an FBI undercover agent.

QUESTION: What about if the conviction is valid?

MR. ABBOTT: Then we are out of luck on count

two, Your Honor.

QUESTION: Yes. Thank you.

MR. ABBOTT: The petitioner was convicted on one count of extortion, one count of false statement that was affirmed by the Eleventh Circuit Court of Appeals in September of 1990.

Briefly, in summarizing the facts, in March of 1985 the FBI began an undercover investigation of John Evans that was to continue for approximately 31 months. They were investigating allegations that there was public corruption in zoning matters. The agent, the FBI agent, posed as a land developer who was new to the Atlanta area. They first met with Evans in March of 1985. That meeting essentially was one in which they indicated they would be meeting with governmental bodies. Evans indicated that he would be glad to assist them if he were able to, and he made no attempt to recontact them after that meeting.

They met again in August of 1985 and the scenario is much the same except that that particular meeting was videotaped. The focus of the investigation began or it began to heat up in May of 1986, because at that time Evans was running for reelection as a commissioner of DeKalb County, Georgia. And if elected, it would be his second term.

There were two contributions made during the

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course of the investigation. In May of 1986, in a meeting with the undercover agent and some associates, Evans was asked if in fact he needed any expenses. There had been previous talk of campaign -- of his reelection campaign, and he took the reference to mean campaign expenses. He indicated that he needed expenses -- or a campaign contribution for a precinct mailing. They gave him $300. He reported the contribution. He sent a thank-you note. He made no attempt to recontact the agents, and in fact, he spent approximately $300 that month for his precinct mailing. He was not charged for that particular event.

The focus of this particular case concerns the events of July 23rd, 24th, and 25th, 1986. There was another meeting on July 8th prior to that in which a specific parcel of land was identified by the undercover agent as one they were interested in rezoning. On July 23rd, there were three different calls between Evans and the undercover agent. The middle call was recorded. The undercover agent did not record either the first call or the third call.

There were two factual disputes centering from those two calls. One, who initiated the call. Evans said the agent did and he was returning the agent's call. In fact, he introduced into evidence his phone records which showed that the agent had called him at about the time he

said, at his undercover apartment, and leaving that number. In the third call, Evans said that the agent asked him to bring to a meeting that he was setting up for the following day a list of his campaign needs, because the campaign, the primary campaign, was approximately 2 weeks away. The agent said he did not ask Evans to bring any such list, although he concedes that he did set up a meeting for the following day.

In any case, on July 24th, Evans promised his assistance before anything was offered to him, as he had every time he had met them since March of 1985. He had previously indicated that he thought a meaningful contribution would be around $1,000. He told them that in May of 1986. But he had brought with him a budget for this 2-week period before the primary campaign which showed a budget of $14,000, and he had an $8,000 shortfall. The agent indicated that he was willing to give Evans $8,000.

Evans testified at that point he was so stunned by the amount of the contribution that what he did was he reported only $1,000 of it. He took $7,000 of it in cash and did not report it until much later, after he was aware of the investigation. He did send a thank-you note to the agent at the time for the contribution and told him when he received it that he was just thankful that the agent

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would even talk to him about a campaign contribution.

Evans testified that he used that campaign contribution --

QUESTION: Did he thank him for $1,000 or for $8,000?

MR. ABBOTT: I don't believe there was any reference to the amount of the contribution, Your Honor.

He testified -- Evans testified that he used that contribution, $7,000 which was not reported, $4,100 went back to his mother who had given him a cash contribution of $5,200 in 1982, 4 years earlier -- which was duly recorded. And the other $2,900 he paid back to himself because he had made loans to his own campaign, in fact, some 350 loans, all of which were duly documented over the years.

Evans' contention is he did not condition his assistance on any payment to him whatsoever. The undercover agent admitted as much on cross-examination, that Evans did not condition his assistance. The Eleventh Circuit agreed in their opinion that in fact Evans did not condition his assistance, but they said he's not required to.

The Eleventh Circuit says that in extortion under color of official right, no inducement is required. As the Court is familiar, nine circuits employ what is

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known as the majority rule, which is basically that if a public official accepts a payment and he knows that that payment is made to him to influence his official action, that is sufficient. Although the nine circuits, or most of them appear to pay some lip service to the word inducement, which is a part of the statute, many of them say that the power of the office itself provides all the coercion necessary. And in fact, that's what the Eleventh Circuit says.

QUESTION: Now at common law, I suppose, that would have been the case, that extortion under color of right would not be said to require inducement.

MR. ABBOTT: There certainly are cases, Justice O'Connor, under common law, in which that is true.

QUESTION: Quite a few.

MR. ABBOTT: There are quite a few. In fact, at common law it was a -- the offense was a misdemeanor. Many of those cases are cases --

QUESTION: What difference does that make? I know you make that point in your brief, and say well, it's more serious here, I don't see what difference that would make.

MR. ABBOTT: I think it makes a difference because when you back to 1946 when the Hobbs Act was passed, it seems unlikely to me that Congress intended to

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take a common law misdemeanor in which you could commit the offense by passive acceptance and put it into a statute aimed at professional gangsters where the problem was coercion, violence, and extortion, and make it a 20-year felony without giving an explanation.

QUESTION: Well, I guess everyone agrees that it was patterned -- that color of right aspect was patterned after the New York law?

MR. ABBOTT: We certainly contend that, and I believe the Government does also, although at least they did in the McCormick case. Now, the New York law is interesting, because first of all it is, of course, a misdemeanor. It does allow passive acceptance. But it's receiving a fee in excess of that allowed by statute. What it appears to be, if I understand it correctly, is something like a bill collector who collects fees for the body politic. And the offense is committed when he either charges you more than you're supposed to pay, or he charges you when you don't really owe anything, or he charges you before it's actually due. Those are how the statutes are normally worded. And that's very similar, in fact, to the common law.

But in this particular case, he was collecting fee in excess of a fee allowed by statute. It seems to me in that kind of a case there is actually, probably,

coercion, even though you just receive it. If a bill collector comes to my door and he wants to collect a fee from me, I know that when he's collecting for the body politic, if I don't pay, there's going to be a penalty for that. I mean, he is a coercive individual simply by the fact of his presence. That is not true, I think, of John Evans or anybody who, as an independent agent running a campaign, whether he's just running for office for the first time, or like Evans, in fact he's running for reelection.

Secondly, as you know, extortion schemes then and now, even to present day, make a distinction between a victim, whose the person who's the payor, and the extortionist, who is the payee. We do not prosecute the victim, we prosecute only the person who extorts it. Bribery, on the other hand, we prosecute both parties; the person who offers the bribe and the person who receives the bribe.

There is no better case, I think, that blurs the distinction than the Evans case. Because clearly in the Evans case, the FBI agent here, even leaving aside his undercover role, was clearly the aggressor in the scenario. By the time that he made the contribution he had courted Evans for some 16 months. By our count, he had offered Evans money some 30 times. He made virtually

every call to Evans. He virtually set up every meeting to Evans, with exception of one call which was disputed on July 23rd. So it's very hard to perceive of the undercover agent in our case as a victim. Certainly, had he not been an undercover agent, you would presume that he would have been prosecuted because it was a bribe.

So I think it's -- it is significant, I think, that both New York and in common law it was a misdemeanor.

QUESTION: You say on these facts evidence, could have been convicted of bribery but not of extortion?

MR. ABBOTT: Whether or not he could convict it, Your Honor, I don't know, but certainly that I think it is -- it is a classic bribery case. I'm offering you money, here's what I want you to do.

QUESTION: You say that you agree the legal elements are there, whether or not a jury would find him guilty or not guilty.

MR. ABBOTT: Yes, I do.

It simply seems very unlikely to me that when the Hobbs Act was passed in 1946, Congress intended to make this common law misdemeanor into a 20-year felony and allow passive acceptance, where in fact the statute itself was aimed at violence, at coercion, and at extortion. It seemed to me unlikely that Congress intended to incorporate this into what appears to be an 18th and 19th

century scheme of collecting fees at a time when the people who collected those fees were basically paid.

QUESTION: Do you think inducement requires more than just acceptance of money by somebody who holds an office that if he acts in a certain way it will help you?

MR. ABBOTT: I do, Your Honor. I think that you have to ignore the plain meaning of the word extortion, not to say that inducement requires more than that.

In its brief in McCormick, the Government said -- took a position that I agree with -- that the common understanding of extortion is obtaining money by consent when that consent is induced by some kind of future threat. And if in fact you look at the extortion statutes on the books of the Federal Government today, in title 18, virtually every one of them, and I think every one of them, either talks about a demand or a threat. Those are, it seems to me, the two key words for extortion --

QUESTION: So it wouldn't be sufficient inducement in your mind if someone just let it be known around town, or if he just solicited money -- just solicited monies. You know, I've got -- I'm in a position in the Government. I can do you a lot of good. How about paying me a little bit? And he doesn't say otherwise I'll oppose you, he just solicits. That wouldn't be enough,

would it? Not in your view.

MR. ABBOTT: I think if he makes a demand or --

QUESTION: He didn't make a demand, he just solicits. And he doesn't threaten anything.

MR. ABBOTT: Then I think it depends on what you believe that he means when he says it. If what he means is if you want to deal with me, then you must pay me money in advance, if he's conditioning his performance, yes, I think it's extortion. If you're not conditioning his performance, I think it's a bribe. I think that is the distinction. It's a distinction that's not required under the majority rule, but I think it's a distinction that's present in all the extortion statutes, and certainly in the title 18, 1951(b)(2).

QUESTION: Mr. Abbott, you certainly could read the Hobbs Act as the -- the under color of official right language modifying the verb obtaining rather than the inducement language. In other words, extortion is defined in the Hobbs Act. We don't have to look to some common present-day meaning. It's defined there. Meaning the obtaining of property from another with his consent induced by wrongful use of actual or threatened force or fear, or under color of official right. So it could be that it means obtaining property under color of official right, no inducement there at all required. I mean that

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certainly -- it could be read that way.

MR. ABBOTT: I think -- I find that a strange reading. I note with interest that the Government makes that argument in this case, although they took the opposite argument when the McCormick brief was -- when the McCormick case was briefed and argued back in January.

It's -- certainly the easiest way to have done that, if that's what Congress intended, would have been to put the under color of official right language at the beginning and the other language at the end. And then that would have been clear. Likewise it seems to me that you have take the language with his consent, because it's with his consent and induced. That is not, I think, the way one would commonly read it. And if Congress intended to do that, all they had to do is put that under color of official right, right at the beginning and put the other at the ending, it would have been very clear.

Likewise, it just doesn't seem to be likely that Congress intended to do that, making passive acceptance a part of a statute which is aimed at violence, coercion and extortion. Certainly under color --

QUESTION: Well, under your -- they didn't even need to put on under color of official right under your -- they didn't add a thing.

MR. ABBOTT: Well, I think that it was

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necessary, apparently --

QUESTION: Or under color -- what did it mean if -- I mean you could, under your provision, it would cover no more than what the threat of -- what the threat language would take care of.

MR. ABBOTT: You could make that argument. The course of extortion part says force, violence, or fear. And what we say is it has to be a demand or a threat under color of official right, which comports with the common understanding of extortion. Why they would put that, under color of official right, in an extortion statute, if they didn't intend to comport with the basic understanding of extortion, will certainly remain a mystery, I think. But I understand the point Your Honor is making.

QUESTION: Well, it's hardly a mystery if they intended to incorporate the old common law offense. It's not a mystery at all. It's plain as day.

MR. ABBOTT: I think it is a mystery, Your Honor, if in fact they intended to equate -- you'd have to believe, obviously Congress intended to equate passive acceptance with violence, coercion or extortion under -- by a private individual.

QUESTION: Well, that's Congress' privilege, to lump things together in concocting criminal offenses.

MR. ABBOTT: It certainly is, although I think

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in doing so, they are also incorporating a new meaning of extortion, a sense of extortion that we have not known before.

QUESTION: An old meaning of extortion, not a new one, a very old meaning of extortion.

MR. ABBOTT: Meaning the common law.

QUESTION: Yes.

MR. ABBOTT: Yes, sir.

QUESTION: May I just ask -- I don't want to interrupt you -- this one question. You keep using the term passive acceptance -- I think that's what your term is.

MR. ABBOTT: Yes, sir.

QUESTION: Is this passive acceptance, in your view: a constituent comes to a legislator and says, I will give you a $10,000 campaign contribution if you vote yes on bill so-and-so. And he says, I agree. Is that passive acceptance?

MR. ABBOTT: Yes.

QUESTION: That's your idea of passive acceptance.

MR. ABBOTT: Yes, sir.

QUESTION: Even though it's a specific undertaking? A promise to do something for money.

MR. ABBOTT: Yes. I mean, I know that is the

Court's -- admonition of the Court, that it has to be a specific undertaking.

QUESTION: No, only if it's a campaign contribution.

MR. ABBOTT: If it's a campaign contribution, yes, Your Honor. Yes, it seems to me that's passive acceptance -- and it's essentially a bribe, Your Honor. It's essentially what we classically refer to as a bribe.

QUESTION: But isn't it possible that the same transaction could be a bribe by the giver of the money and extortion by the recipient of the money?

MR. ABBOTT: Yes. I mean it could be. I don't think in the illustration you gave me that it was.

QUESTION: Well, it would be a bribe by the donor.

MR. ABBOTT: It would be a bribe by the donor. I think it's accepted as a bribe by the donee. If he doesn't demand it, if he doesn't say I won't perform unless you give it to me, it seems to me it's not extortion. It certainly may be illegal, it may be a bribe.

QUESTION: I must say that's a very odd use of the term passive acceptance. In the law of contracts, we wouldn't say there's an implied contract or a passive contract, we would say there's an explicit contract in the

hypothetical Justice Stevens put to you.

MR. ABBOTT: Well, there's certainly acceptance of the money offered, but there's certainly no condition that I'm not going to do it unless that's a part of the scenario, that's part of your factual scenario. I think it's a classic bribery case. I offer you money in exchange for you doing whatever you're going to do.

QUESTION: Well, I think we're all agreed it's a classic bribery case, the question is what does passive acceptance mean. It seems to me that's a very strange use of the term.

MR. ABBOTT: Well, my position, of course, is to fit it into an extortion definition. It's got to be something more than simply acceptance, whether you call it passive acceptance or merely accepting money that is offered. I think it's got to be more than merely accepting money. I don't know if it's the passive part that bothers you or what it is, but it's certainly not a demand or a threat. It's certainly what we -- not what we commonly refer to as extortion.

QUESTION: Mr. Abbott, you said in response to Justice O'Connor that you concede that what the Government is arguing for is an ancient common law meaning of extortion. Is that the ancient common law meaning of it, what the Government is arguing for?

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MR. ABBOTT: That apparently is what the Government is arguing for, although I would note that under the New York law it wasn't exactly the common law meaning, it was the fee collection by statute that was the misdemeanor under New York law. Now at common law, it was a little broader than that. It wouldn't necessarily be a fee collection by statute. I suppose that if the sheriff wanted to let somebody out of jail in return for money, that might have been a common law misdemeanor.

QUESTION: Even though the sheriff -- even though the sheriff told the person he was letting out of jail I know I'm not entitled to this money, but if you give it to me, I'll let you out of jail. That was extortion?

MR. ABBOTT: Apparently that was extortion in common low.

QUESTION: Would that have been called under color of right? I mean, you've been arguing about the text of the statute. This doesn't say under color of law, or it doesn't say under color of office, it says under color of right. What color of right is there in this case?

MR. ABBOTT: To me, I think you have to interpret the statute as under color of office, even though I understand it says under color of right.

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QUESTION: Why do you have to do that?

MR. ABBOTT: Because that has been the historically, I think, how that term has been -- has been defined, even though I know there are some cases in which there's an assumption of false pretense.

QUESTION: Historically beginning when?

MR. ABBOTT: Historically, certainly beginning in 1934 and in 1946 with the Hobbs Act.

QUESTION: Beginning in '46 with the Hobbs Act. I'm aware of some court of appeals decisions that went in that direction, but I'm not aware that that was the common law meaning of it or the meaning of it under the New York statute.

MR. ABBOTT: The meaning of it under the New York statute was a fee collection, as I've indicated. The common law, as I've indicated, I think was a little broader than that and brings to mind your -- our example about the sheriff.

QUESTION: You say the New York statute was fee collection?

MR. ABBOTT: Yes.

QUESTION: What do you mean by fee collection?

MR. ABBOTT: An officer or a public official who collects a fee authorized by statute. That's what it was under New York.

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QUESTION: And claims that the fee is in fact authorized when it's not.

MR. ABBOTT: Yes. When it's not or when it's more than --

QUESTION: I can understand calling that under color of right. He pretends to be entitled to it and he's not.

MR. ABBOTT: Exactly. To me that is --

QUESTION: But you're not arguing for that meaning.

MR. ABBOTT: No, I'm not.

QUESTION: Well, let's say a registrar of deeds, the fee for filing a quick claim deed is $10. The registrar of deeds comes to the window and says that'll be $20 when I bring it. Is that under color of right?

MR. ABBOTT: Yes, sir, that is under color of right. But that, I think, is very different from a politician who is seeking a campaign contribution.

QUESTION: Well, I know, but what if he isn't -- just forget the campaign contribution for a little while. Suppose you agree that he doesn't take the money as a campaign contribution.

MR. ABBOTT: If he is a public official.

QUESTION: Well, yes, he's a Congressman, or he's a State legislator.

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MR. ABBOTT: If he doesn't take the money as a campaign contribution, obviously he's certainly guilty of something. He has no reason to be taking money other than as a campaign contribution. Now whether he's guilty of extortion --

QUESTION: Well, that's what I want to know. Is he -- does he commit a Hobbs Act violation?

MR. ABBOTT: Only if he conditions his performance on under color of official right, yes. Only if he --

QUESTION: He says if you don't give me the money, I will oppose what you want. That certainly is.

MR. ABBOTT: Yes, absolutely.

QUESTION: But it has to be something like that.

MR. ABBOTT: Under color of official right, yes. Now there certainly is the --

QUESTION: He just can't -- he doesn't violate the Hobbs Act if a constituent comes and says, I'll give you $10,000 to help me out and he says, I'll take the money, but I won't promise you a thing.

MR. ABBOTT: Well --

QUESTION: He just takes the money.

MR. ABBOTT: It seems to me he's certainly guilty of bribery.

QUESTION: Well, I know, but not extortion, you

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say.

MR. ABBOTT: Not extortion under color of official right.

QUESTION: Why don't you take the -- I'm sorry. Why don't you just make the argument that Justice Scalia suggested that color of right refers to -- refers back to right to fees? And in a case in which a public official is not entitled to fees, that condition can never be satisfied in a Hobbs Act case.

MR. ABBOTT: Well, that's certainly true in terms of taking the New York misdemeanor that was applied to the Hobbs Act. That was a fee statute. And if that's where the Hobbs Act came from, then you could certainly make that argument.

QUESTION: Isn't that the best reading of how we get the word right in there as opposed to color of law or abuse of authority or something of that sort?

MR. ABBOTT: I understand the argument you're making, Justice Souter, and I certainly agree that is a plausible argument to make. And in that case, certainly we wouldn't be under color of official right because it's not under color of the fee statute, which was adapted from New York law. That is correct, and I agree with that.

QUESTION: Yes, but under that argument the official can say I will vote against you unless you give

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me X dollars. I mean, a legislator can just go around and say I'm going to introduce a bill condemning your house if you don't give me $100,000. And that would not be extortion under that reading.

MR. ABBOTT: Under that definition it was would not be extortion.

QUESTION: And no court has ever bought that reading yet.

MR. ABBOTT: No court has ever bought that.

QUESTION: That's why you're not arguing it today.

MR. ABBOTT: That's why I'm not arguing it, Justice Souter.

QUESTION: Now, wait a minute. It wouldn't be extortion under color of official right, but it could be the obtaining of property from another induced by actual or threatened force, violence, or fear, couldn't it?

MR. ABBOTT: That's true. And perhaps that is what Justice White --

QUESTION: So you don't need the official right, except the reason you need the color of official right is the person who says you have to pay me this money because I'm entitled to it does not put anybody in any fear of anything at all. So you need that separate section. But you don't need it for the situation you've just responded

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to.

MR. ABBOTT: If you define fear as being a demand or a threat, then you're right, Justice Kennedy.

QUESTION: And no court has ever done that either, has it? They've always used that phrase to talk about the thug who goes out and threatens physical violence.

MR. ABBOTT: They seem to compare the coercive section with the under color of official rights section, obviously, assuming that color of office has something to do with coercion. But certainly I think that's not true in your normal campaign --

QUESTION: It doesn't say color of office. That's the point, it does not say color of office.

MR. ABBOTT: You're right.

QUESTION: It could have said color of office. It could have said color of authority. It could have said color of law. It says color of right. I don't know how you can just so blithely ignore criminal statute.

MR. ABBOTT: It is a criminal statute, and certainly the rule of lenity applies, Your Honor. You're absolutely right. And certainly we have a fee statute, and I have no problem with the argument that you are making. It's just that no court to my knowledge has ever made that argument. But it certainly --

QUESTION: Counsel may have made the argument --

QUESTION: This may be your last chance.

(Laughter.)

MR. ABBOTT: Well, to the extent you make the fee argument, it is certainly one that I can live with, Justice Scalia.

QUESTION: It certainly was laid on your plate -- laid right on your plate in McCormick by Justice Scalia.

MR. ABBOTT: Yes, it was, Your Honor. Yes, it was.

QUESTION: And you're still not making it. k

MR. ABBOTT: Well, it was not an argument that we had made in the appellate court, you can argue that under rule -- you know, under the Supreme Court rules we have no right to present it now. Just as you said in McCormick, they had no right to present it. But that was the real problem with us. Our brief was already through the appellate courts and we had not made that argument yet.

I understand what Justice Scalia is saying, certainly to the extent that the New York law, which everybody agrees is the law, was a fee statute. And certainly in this particular case the petitioner was not

trying to collect money under a fee statute. So to that extent, it would not apply.

Let me just very briefly come to count two, which is only, of course, alive if in fact you should vote for me on count one. Our argument on count two is very simple and very brief, that count one and count two are inextricably linked, that on count two the jury had to find that it was a campaign contribution and that Evans used it to pay campaign expenses or debt. If they do not find that, then obviously he didn't report it, he was guilty.

It's our belief if the jury finds extortion on count one, the natural inference is that in fact an extortion of payment is an illegal payment, and therefore not a campaign contribution. And in fact, I note in the McCormick argument that there were several questions from this Court along the same lines. One of the justices asked the question, if we assume the judge told the jury a campaign contribution is legal, must we therefore not conclude when they found him guilty of extortion, that it wasn't a campaign contribution? I think that is the natural inference.

In this case you have even more, because the judge told the jury that if it comes in the form of a campaign contribution, it still may be extortion,

suggesting -- in other words, he didn't say if it is a campaign contribution, but if it's accepted in exchange for requested exercise of official power, it is still extortion. He said if it comes in the form of the campaign contribution as such, it becomes disguised as a campaign contribution, if it comes labeled as a campaign contribution, or if it comes in the form of a campaign contribution, it's still extortion. I think the jury would naturally infer a campaign contribution was illegal if in fact they found extortion.

Finally in this case we have the additional element not present in McCormick, that it was a campaign contribution made by an undercover agent. And the question arises, can an undercover agent make a campaign contribution? An issue we raised in the district court as to who has the burden to show that. And to the extent that we believe that the focus of the charge was on the undercover agent, rather than on John Evans. The undercover agent's position, as the Government's position, certainly was that it was not a campaign contribution. So I think if they found extortion on count one, they were likely to find it was not a campaign contribution, therefore, convict on count two.

I would like to reserve the rest of my time for rebuttal. I see that I'm out of time.

QUESTION: Thank you, Mr. Abbott.

Mr. Bryson.

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE RESPONDENT

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

Our position in this case is that the under color of official right portion of the Hobbs Act codifies, in effect, the old common law crime of official extortion, which was taken directly from New York law, which in turn had this crime of official extortion.

QUESTION: Mr. Bryson, if you're right on that, why is a maximum 20-year penalty attached to this particular offense, whereas at both the common law and in New York law, as I understand it, it is a misdemeanor with a very minor penalty?

MR. BRYSON: Well, of course, at common law, Your Honor, a misdemeanor didn't mean that -- what it now means, which was that you would, in Federal law for example, be subject only to a 1-year penalty, but it rather meant that it was not a crime that was subject to the death penalty, typically, and forfeiture of property. So a misdemeanor could be -- could result in imprisonment for life.

QUESTION: Well, could you be imprisoned for

life under a common law rule --

MR. BRYSON: Yes. Yes, Your Honor.

QUESTION: -- for the extortion?

MR. BRYSON: Yes, you could, Your Honor.

QUESTION: And the registrar of deeds who asked for $20 and got -- when he was only entitled to $10?

MR. BRYSON: Yes, Your Honor. It was a misdemeanor, but again misdemeanor applied to a very large number of cases. And the number of crimes that were subject to felony description was really rather small. It was still larger than those crimes that are subject to the death penalty today.

QUESTION: How about under New York law?

MR. BRYSON: Under New York law it was a misdemeanor. And that did not subject you to a long period of incarceration. But I think the answer to the question is that what the Hobbs Act did was to take a whole range of offenses right out of New York law, including some very serious violent offenses, and say we're putting a, as it was originally passed, a 10-year cap on this and you can sentence from anything from zero up to 10 years. And the crimes, of course would range in seriousness from very serious violent crimes, perhaps resulting in death, to armed robberies, to very violent extortions, down to something that you might regard as

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being quite minimal such as taking $10 to which you weren't entitled, if you were a public official. And the sentencing court would of course have the freedom to sentence from anything from probation up to 10, and as it was later changed to 20 years.

But we think it's so clear that Congress intended simply to take the entire New York law of extortion, which included not only what we now could call official extortion, but also coercive extortion, two separate crimes, and put it into Federal law defining those two crimes separately. That is so clear that you have to look to New York law and the common law that undergirds New York law to determine what the scope of under color of official right is.

QUESTION: Mr. Bryson, do you know of any New York case? I looked in McCormick,and I could not find any -- could not find a single New York case that involved this crime of extortion, that is, under color of official right, that did not involve the classic case of asking for money that you were not entitled to by your office.

MR. BRYSON: The only prosecution that we could find under the official extortion branch of the New York law was the old Whaley case.

QUESTION: The Whaley case. That's the only one I could find.

MR. BRYSON: That's right. Now that on its facts did involve, as you pointed out in your concurring opinion in McCormick, did involve a false pretenses type of offense.

QUESTION: A claim of official right.

MR. BRYSON: Well, if the claim --

QUESTION: And you don't think that's suspicious, that the language says official right? And the only case you can find under it in fact involved a claim of official right over how long a period? It was an old law. It went way back to --

MR. BRYSON: It's an old case, sir. Your Honor --

QUESTION: In all those years, the only prosecution happens just accidentally to track the language of the statute.

MR. BRYSON: Your Honor, the -- what's important, I think about the Whaley case, which was the source for the penal code, which in turn is the basis for the New York statutory code, the important thing about Whaley is not what it in fact involved. Yes, it involved in fact a false pretenses type of extortion. And there's no question that false pretenses type of violation by an official was included within the common law notion of official extortion. But so was bribery and so was, for

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that matter, coercive activity by the official.

And the point of the Whaley case is found, I think, not so much in its facts, as in what that court says the crime is. And what's really critical here, I think, is to look at the description of the crime, which is described in exactly the terms that Hawkins uses, and cites Hawkins -- Hawkins' Pleas of the Crown -- which is the taking by color of office. It doesn't say taking by color of official right. What the penal code did --

QUESTION: Bribery was a separate offense under New York law, wasn't it? Bribery was not reached through this.

MR. BRYSON: Bribery could certainly be reached through this. This was an alternate means of punishing bribery. It was called official extortion.

QUESTION: Never used.

MR. BRYSON: It was not used -- well, we don't know if it was never used. Well, all we know is that the cases did not come to the appellate courts. There were some instances, for example of -- there was at least one instance of a police disciplinary action which was premised on that statute for taking money on the side in which there was no indication that there was a false pretenses aspect of it. But that was not a prosecution as such.

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But what's important, I think, about the way the case is, to repeat, is that it adopts in haec verba the common law formulation of official extortion, color of office, and what I think the penal code and later the New York statutes themselves meant by official right is not right to the fee, but authority to perform official services. In other words, color of official right is not my claim of right to be paid, but my claim of right to take these kinds of activities.

And the example I would give, Your Honor, is the policeman, who as in a case which is very parallel to the New York statute coming from Pennsylvania in which the policeman said, give me $50, and I'll let you open this house of prostitution. Now, there's no question that there was no assertion of entitlement to the $50 by virtue of there being a $50 fee associated with opening houses of prostitution. Everyone that was a party to that transaction understood that the $50 was not legitimate, not a legitimate fee.

But nonetheless, it was by virtue of his authority, his claim of right, his use of his office, or misuse of his office -- that was the basis for his obtaining the $50, and that is consistent with everything in the common law, all the way back to the first statute of Westminster in 1275, when -- where there was no crime

of bribery at all. The crime that was created was the crime of official extortion, and it covered a whole range of official misconduct, including classic bribery conduct, including conduct involving false representation, and including coercive conduct.

And some examples, and I think the best source for these examples is the Law Review article which we cite several times by Lindgren. But he goes through a number of these cases. The examples from the common law, one after another after another, are cases in which, for example, a jailer says to somebody who's being held, and says, I will let you out if you give me some money. Everybody -- there's no indications that there's -- it's a representation by the jailer that he's entitled to that fee, it's an obviously corrupt transaction. That's extortion under color of office.

Now our contention is that's exactly the crime that the New York law codified in 1881 when it passed what amounts to the penal code.

QUESTION: So you say in effect that under color of office means pretty much the same thing as under color of right?

MR. BRYSON: Exactly. We say it means the same thing. And I think you can find the source for that in the New York law itself because if you take the New York

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statute that was enacted after the penal code, this was the statute of 1881, and the provisions of this statute have continued right on through the period in which the Hobbs Act was enacted, and right up until there was a large revamping of New York criminal law in 1965. But throughout the period Congress was looking at both the Antiracketeering Act and the Hobbs Act.

QUESTION: Mr. Bryson, do your -- I'm sorry. Do your examples take you the further step to make it clear that in common law it would have been official extortion if the official had not made the first statement, give me the $50 and I'll let you out, but instead had been the recipient of the statement saying, here's $50, it's yours if you let me out. Would that have been comprehended in common law to?

MR. BRYSON: We think absolutely and I --

QUESTION: Do you have examples like the examples you just gave to us?

MR. BRYSON: I can't give you a case which says specifically that only in cases in which the official was not the initiator of the transaction he is nonetheless guilty. But it's quite clear that no common law case turned on who was the initiator of the transaction. And in fact, the treatises that discuss the common law all talk in terms of obtaining property, not in terms of

soliciting it or going out and seeking property.

QUESTION: There's this argument to be made, isn't there, that at least in the nonofficial extortion by force, threat, and so on, the person who's going to end up with the money is making some kind of affirmative act to, in other words, making the threat or applying the force, twisting the arm, or whatnot. And that at least would be our analogy with the official who initiates the transaction by saying, I will do thus and so if you give me the money. Whereas that analogy doesn't hold if he just simply sits there and in response to the offer takes the money.

MR. BRYSON: Well, actually I think the analogy -- first of all I think that the way the common law courts looked at this problem was to say that someone's office itself has a very powerful potential coercive effect, and the officer doesn't have to underscore the matter by going out and soliciting. But I think the analogy further breaks down because there are coercive extortion cases in which the defendant is not the person who puts someone at fear, the defendant, let's say a mob boss, is not the person who either initiates the fear or takes any sort of steps to put the person in fear. He merely exploits the fear. He knows that that person fears that if he does not pay money to be allowed to run

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his business in the neighborhood, for example, that he will -- something will happen to him.

QUESTION: Yes, but that's because he's broken somebody else's arm.

MR. BRYSON: Well, not necessarily.

QUESTION: At some point, he's initiated something.

MR. BRYSON: Well, that is typically true, of course, in official extortion, too. There's a reason that people come to officials thinking that they may benefit from dealing with this official. But setting that aside, it isn't necessary to show that he has threatened somebody in the past, merely that he knows that he is feared and that he takes money exploiting that fear.

But in any event, it's quite clear that the common law did not distinguish between payments that were excepted without solicitation, as in classic bribery cases, and payments in which one went out and solicited a bribe.

QUESTION: So is there an instruction required that the payor must know that if he doesn't pay that there will be adverse action taken against him?

MR. BRYSON: Well, it doesn't matter. You mean in the course of extortion cases such as I --

QUESTION: Yes.

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MR. BRYSON: No, no. That's not necessary. All that's necessary is that the payee believe that the payor is paying either in order to induce the payor to take action for -- in his favor, out of fear that adverse action will be taken. In the --

QUESTION: But in this case was the jury instructed that there had to be some anticipation or fear on the grounds of the payor that adverse action would be taken?

MR. BRYSON: No, no, it was not. And that isn't necessary, we contend, under official extortion. In other words, extortion --

QUESTION: Is that because we presume that that fear is present whenever you're dealing with an official?

MR. BRYSON: No. It is because in the common law, and again in the New York law, there didn't have to be a sense of compulsion and a sense of fear in order to establish official extortion, even if you were seeking only benefit. In other words, even if you had nothing, no concern at all that you would be dealt with unfairly unless you made the payment, but were seeking only to get an unfair advantage over all your competitors, let's say in bidding, you would be guilty of -- or the official who takes the money would be guilty of official extortion.

QUESTION: How do you know that under New

York -- and I say the only case I know of involving this under New York law, is that one case that you mentioned. And what I also know about New York law is that bribery was a separate crime, and that if you proved that the payment was voluntary, you could not be convicted of extortion. That was the great divide between bribery and extortion. If it was a voluntary payment it was bribery.

MR. BRYSON: Your Honor, two points. First of all, with respect to the latter point, there is -- that the cases to which you are pointing in New York law regarding this distinction between bribery and extortion related to coercive extortion. That is to say, those cases involved the leg-breaker type extortion. And there, sensibly enough, the court said, you can't be convicted of bribery if somebody has threatened to break your leg unless you pay. Those cases --

QUESTION: But would it not make sense to put in with those cases official extortion in the very narrow sense of extortion by an official who says you've got to make the payment. I won't break your arm, but I'll put you in jail. It's a matter of right. I have a right to this payment as a Government official. It makes sense to put that in with the arm-breaker.

MR. BRYSON: Let me go to my second point, which is to read the provision of the 1881 New York code, which

again has come all the way through the period of the Hobbs Act to 1965, that relates to official extortion, that goes beyond just the definitional section that found its way into the Hobbs Act.

There were three different pertinent sections of New York law here. First there was the definitional section, which is almost identical to the section that appears as the definition of extortion in the Hobbs Act. Then there was another section which described extortion by fear, that is to say coercive extortion. Then there was a section that separately set out the offense of official extortion. Let me read it to you and see if this doesn't resolve what exactly it was that this offense was directed at, because I think it's quite clear.

QUESTION: Is this in your brief?

MR. BRYSON: Yes.

QUESTION: Where?

MR. BRYSON: This is -- this statute is not set out, but it is described at page -- let's see, at page 25 of our brief, in the middle. And I think -- yes, that's where it appears. But let me read it, that section for you. It says --

QUESTION: On page 55?

MR. BRYSON: 25. I'm sorry. 25 of our brief.

QUESTION: Section 855.

MR. BRYSON: It's a -- yeah, section 855, which was originally section 557 of the 1881 code. In 1909 it was changed to 855.

Extortion by public officers: a public officer who asks or receives or agrees to receive a fee or other compensation for his official service commits extortion. That includes someone not only who asks, but also who receives. Those are alternate grounds for liability. Compensation --

QUESTION: Could you read that once more?

MR. BRYSON: Certainly. A public officer who asks or receives or agrees to receive a fee or other compensation for his official service. There's no suggestion here that there is a claim of right to that money. This is simply an I'm taking it for official services, and official services as understood throughout the common law was --

QUESTION: So I take it if some constituent just sends in $10,000 to a Congressman or a Senator saying, I know you're performing great services for the country, and I want to supplement your compensation. And the fellow takes it.

MR. BRYSON: I think that would not be, Your Honor, because that would not be a payment -- the common law is very clear, the payment had to be related to a

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specific service. If, however, the constituent sent the money and had said I want to pay you for having -- or for voting on bill X, or even for having voted on bill X --

QUESTION: I know you're a great supporter of the farmer, and I'm a farmer.

MR. BRYSON: Well, the closer you get to saying thank -- you know, please vote for the farm bill, here's $10,000. Setting aside the campaign contribution complexity, but --

QUESTION: From the language you read, it sounds as if the registrar of deeds who asks for $10 to record a deed and the fee is $10 is guilty of extortion.

MR. BRYSON: Well, no, Your Honor, I think this -- when they refer to fee or other compensation --

QUESTION: Well, the registrar asks for fees.

MR. BRYSON: I'm sorry, but the rest of the statute goes on for a while and says in excess of the amount permitted or where it's not permitted. I --

QUESTION: Thank you.

(Laughter.)

MR. BRYSON: That is -- well, I think it's not pertinent to our inquiry here because there's no question that we're not talking about --

QUESTION: Why isn't it pertinent, Mr. Bryson? Our statute is quite different. It refers only to

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obtaining property from another with his consent under color of official right.

MR. BRYSON: That's right.

QUESTION: It doesn't have a limiting factor. It doesn't say in excess of. So why isn't the $10 fee extortion?

MR. BRYSON: Well, because this -- our statute picks up on the New York definition. And in order to determine what New York law is, we would have to go down to this section --

QUESTION: I'm not talking about that. If we refer to the Hobbs Act --

MR. BRYSON: Yes.

QUESTION: The term extortion means the obtaining of property from another with his consent under color of official right.

MR. BRYSON: Right. That's right.

Now, the way we suggest that this has to be read is that it has to be read as incorporating New York law. But we have to determine what does obtaining property under color of official right -- and what it means is with respect to official extortion, you have to look to section 557 of the New York law, which talked in terms as the common law had of taking compensation which is beyond that which is permitted to you. There's no question that you

can take the -- you can cash your check each week without violating the Hobbs Act. And that New York law makes clear, as does Federal law, there's no question --

QUESTION: Well, I understand that, but the statute doesn't say that.

MR. BRYSON: Well, the statute uses a term of art, and our position is that term of art is not -- it has to be read in light of its origins, which were in New York law and the common law. And its origins make quite clear that we are talking about compensation in excess of that which you are permitted.

QUESTION: But you will admit that on its face it has no limiting principle?

MR. BRYSON: Well, I think, yes, I think that the words under color of official right on their face do not answer the question of how broad the statute is. That's true of many common law terms that show up in criminal statutes. You can have -- the word mayhem in and of itself does not strike one as having a particular meaning, but you look to the common law for the meaning of a term like that when it shows up in a statute.

QUESTION: Mr. Bryson, the step in the argument that I guess I'm unclear on is taking the definition as you just read it from the New York statute, how does that become subsumed under the term of art that is being used

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in the Hobbs Act? I mean, the New York statute didn't use the same term that the Hobbs Act used.

MR. BRYSON: No. The New York statute uses the term in its definitional section of extortion under color of official right. That is clear that that points to official --

QUESTION: Okay, but it did use that term?

MR. BRYSON: Oh, absolutely.

QUESTION: Okay.

MR. BRYSON: The language from the definitional section was taken word for word and put right into the 1934 act, which was the predecessor of the Hobbs Act, and the Hobbs Act changed about two words that aren't pertinent here.

QUESTION: Mr. Bryson, I'd like to ask you two questions. One, I think you may have misspoken, and I want to be sure, or I misunderstood you. I think you said that if a constituent sends in a check for $10,000 and says I'm giving you this money because last year you voted for bill X, may he keep that check?

MR. BRYSON: He may not.

QUESTION: Even if it's for past services?

MR. BRYSON: For past services.

QUESTION: I mean, no prior communication between them at all and no quid pro quo there?

MR. BRYSON: Well, that would involve the gratuity as opposed to the taking of a bribe. But we think that the Hobbs Act does extend to certain kinds of gratuities when the performance and the payment are linked as closely as they would be in your hypothetical. And let me give you a case that exemplifies why that is so. The Cuda case from the Seventh Circuit involved a case in which a, I suppose it was a builder in Chicago sought a zoning -- permission to have a zoning variance from an alderman. The alderman gave his permission, and then the builder went back later and said how much do I owe you. And the alderman said $1,500.

Now there was no prior understanding or arrangement or whatnot, but that was deemed to be extortion under color of official right because it was a compensation for a specific official act. That, we think, would apply.

QUESTION: Yes, but the evidence there would suggest that the parties understood that compensation would be paid sooner or later. I'm not sure that's similar.

MR. BRYSON: I'm sorry.

QUESTION: I say I'm not sure that's exactly like my hypothetical.

MR. BRYSON: Well, it is our position --

QUESTION: But in any event, that's not raised by this case.

MR. BRYSON: That's right. That isn't this case, but it would be our position that at least with respect to a specific payment for a specific act, it would include certain kinds of gratuities.

QUESTION: May I ask one other question, just as a matter of information? If we disagreed with your reading of the extortion statute, is there a provision of the criminal code that covers the knowing acceptance of money that the donor expects to be used to pay for a legislative vote or something like that?

MR. BRYSON: I would think you would have to go to the Travel Act, which is the statute that governs interstate travel or transportation, the use of interstate facilities to effect a violation of State bribery or extortion laws. Then you would have to prove, of course, there was some --

QUESTION: But there's no independent, just plain garden variety, like a bribe, that no separate crime other than extortion -- Federal crime -- for the receipt of a bribe?

MR. BRYSON: Well, except with respect to official -- Federal officials, of course. Federal officials would be covered, but with respect to State

officials and local officials --

QUESTION: Oh, I see.

MR. BRYSON: -- they would not be covered. I'm sorry, section 201 covers Federal officials. The Travel Act would cover, depending on what the particular State law was, would cover bribery and extortion.

QUESTION: And also the donor, the donor is not picked up under this statute either. I mean, you just get the person who receives it for the extortion, unlike the bribery statutes which typically get both giver and receiver.

MR. BRYSON: That's right, although there's a question, the question would be open as to whether you can prosecute the donor under certain circumstances for aiding and abetting. But that is a separate question on which there has been some case law. But it has not been resolved.

QUESTION: Were donors or payers ever prosecuted under the New York statute?

MR. BRYSON: Well, since -- well, there haven't been, to my knowledge, very many prosecutions under that statute. I am not aware of donors ever being prosecuted for extortion under either the New York statute or even any of the other State statutes where prosecutions were more common, as in New Jersey or Pennsylvania, where the

prosecutions were more common.

You found in those cases, as I mentioned before, standard bribery-type conduct, but you always found only the recipient, the official being prosecuted. And that is consistent with the traditional common law approach, which is to say this is a crime committed by the official. It's really a violation against public justice rather than any form of property crime or any form of crime as to which the payor would be separately liable.

I think, if I may very briefly address the question of the language of the statute, not the official right, but the inducement feature, if you look at the 1934 act, it becomes even clearer, I think, than it is in the 1946 act, that induced, the induced clause, applies to the coercive instruction portion of the statute, and not to the under color of official right. The 1934 statute says, whoever obtains with his consent property, comma, induced by fear or force, comma, or under color of official right. In other words, it makes the -- there's less language in the coercive induced section, and therefore it's clearer that the induced relates to force or fear and not to color of official right.

And that is consistent with the common law concept of obtaining property under color of official right. You never find in the treatises of the time, in

the cases, you never find the language induced under color of official right. You find obtains or takes by color of office, or under color of office, or again --

QUESTION: But is it not true that most of the courts of appeals that have addressed this have assumed that the induced -- that it was inducement to accept the money in exchange for the commitment?

MR. BRYSON: That's correct. They have assumed that. And I think the assumption was incorrect because I think they found it unnecessary to -- nothing turned on it because they say well, the office does the inducing, therefore, it -- no additional inducement is required.

If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bryson.

Mr. Abbott, your time had expired, so the case is submitted.

(Whereupon, at 2:37 p.m., the case in the above-entitled matter was submitted.)

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