

ESSAY

SPEAKING LOUDER THAN WORDS: FINDING AN OVERT ACT REQUIREMENT IN THE HOBBS ACT

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Federal conspiracy law has a problem. It is sometimes easier to put someone in prison for twenty years than it is to put her away for five—for the very same crime. This situation stems from a bright-line rule to which the Supreme Court has long adhered: when Congress wants an overt act requirement, Congress will explicitly so specify. Consider the resulting status quo. The general federal conspiracy statute requires proof of an overt act. Its maximum sentence is five years. In contrast, the Hobbs Act contains no overt act requirement, yet it provides for a maximum sentence of twenty years when a defendant conspires to violate the Act. The problem becomes clear: if a defendant is charged under both statutes for the same crime, it is easier to imprison her for twenty years than for five. Other statutes have text that mirrors the Hobbs Act's, expanding the problem's scope. This Essay attempts to show that the Court's explicit-language rule should not apply to the Hobbs Act. It demonstrates that Congress codified a baseline overt act requirement in the general conspiracy statute. Further, this Essay argues that the Hobbs Act's legislative history undermines the Court's rule. It thus concludes that the Act provides an ideal vehicle to revisit that rule.

INTRODUCTION	68
I. GENERAL ISSUES IN CONSPIRACY LAW	71
II. THE STATE OF HOBBS ACT CONSPIRACY LAW	73
A. Supreme Court Overt Act Precedente	74
B. Circuits That Have Held There is No Overt Act Requirement in the Hobbs Act	76
C. Circuits That Have Found the Overt Act is an Element of a Hobbs Act Conspiracye	78

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III. FINDING AN OVERT ACT REQUIREMENT IN THE HOBBS Acte.....	80
A. <i>The Statutory Text</i>	81
B. <i>The Legislative History</i>	86
CONCLUSION.....	91

INTRODUCTION

On February 18, 2010, a grand jury returned a five-count indictment against Ronald Salahuddin, former Deputy Mayor of Newark, New Jersey.¹ The government accused Salahuddin of steering city demolition contracts to a specific contractor.² The contractor then steered the work to Salahuddin’s choice of subcontractor—Salahuddin’s alleged business partner.³ The contractor, it turned out, was an FBI informant who had turned over tapes of their conversations to the Bureau.⁴

The prosecution charged Salahuddin in part under 18 U.S.C. § 1951, the Hobbs Act,⁵ a federal anti-racketeering statute. Its main provision is broad in scope and provides, in relevant part, that “[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts *or conspires* so to do” is guilty of a crime.⁶

Hobbs Act prosecutions are common. As of October 2, 2018, there were 886 prosecutions year-to-date in which § 1951 was the lead charge.⁷ This charge also appears to be an increasingly common weapon in the prosecutor’s arsenal: the number of prosecutions in 2018 represented an almost 24 percent increase from 2017 and a 111 percent increase from 1998.⁸ “Moreover,” as Salahuddin’s petition for a writ of certiorari pointed out, “because these numbers track only cases where the Hobbs Act was the ‘lead charge,’ the data undercount the actual number

¹ United States v. Salahuddin, 765 F.3d 329, 334–35 (3d Cir. 2014).

² *Id.* at 335–36.

³ *See id.*

⁴ *See id.* at 334.

⁵ Hobbs Act, 18 U.S.C. § 1951 (2016).

⁶ 18 U.S.C. § 1951(a) (2006) (emphasis added).

⁷ *See Prosecutions for 2018: Lead Charge: 18 USC 1951 - Hobbs Act*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Oct. 2, 2018), <http://tracfed.syr.edu/results/9x205bb3a24b5d.html>. On defining the “lead charge”: “When more than one charge is involved, the most serious or so-called lead charge is commonly used. Different data systems use different criteria for determining which of the charges to pick as the most serious or lead charge.” *About the Data: Understanding the Terminology Which Agencies Use*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, <http://tracfed.syr.edu/help/data/dataTerminology.html>.

⁸ *See Prosecutions for 2018, supra* note 7. *See also Prosecutions for September 2015: Lead Charge: 18 USC 1951 - Hobbs Act*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Oct. 22, 2018), <http://tracfed.syr.edu/results/9x205bce3296f8.html> (tracking increases in Hobbs Act prosecutions by month rather than by year).

of prosecutions.”⁹ A related thorn is the fact that prosecutors routinely include conspiracy charges when indicting multiple defendants.¹⁰

The Hobbs Act’s broad language has led to some surprising results. “The majority of federal appellate court opinions in which campaign contributions are alleged to be bribes arise not in the context of the Federal Bribery Statute, but in the context of the Hobbs Act.”¹¹ The broadness of its language and scope makes the Hobbs Act a particularly attractive tool for prosecutors, which in turn makes it important to understand the statute’s parameters.

With respect to conspiratorial liability under the Hobbs Act, the circuits are currently split over whether the Act requires the defendant to have committed an overt act in furtherance of the conspiracy.¹² In Salahuddin’s case, this stung particularly hard: after the district court judge refused to instruct the jury that a Hobbs Act conspiracy requires an overt act, the jury acquitted Salahuddin on all counts—except the Hobbs Act conspiracy charge.¹³ In other words, his guilt may have rested entirely on conversations. Indeed, as Salahuddin’s certiorari petition argued, if the charges had “been brought in [another circuit], the government would have been required to prove that [Salahuddin] committed an overt act.”¹⁴ This requirement may have changed the result.

The government’s opposition to certiorari in Salahuddin’s case pointed out that only two courts have considered this issue when the parties briefed it.¹⁵ Both of those courts found that an overt act is not a required element.¹⁶ The courts that *have* acknowledged an overt act requirement have merely stated so without scrutiny.¹⁷ Building on those courts’ apparent intuition that an overt act is a necessary protection, this Essay strives to provide the analysis that they did not. There are strong arguments in favor of finding an overt act requirement in the Hobbs Act. Hopefully, this Essay will open the door to extending the inquiry to other

⁹ Petition for Writ of Certiorari at 17, *Salahuddin v. United States*, No. 14-654 (U.S. Dec. 2, 2014) [hereinafter *Salahuddin Petition*].

¹⁰ *See id.*

¹¹ Brennan T. Hughes, *The Crucial “Corrupt Intent” Element in Federal Bribery Laws*, 51 CAL. W. L. REV. 25, 44 (2014).

¹² The First, Second, Third, and Eleventh Circuits have rejected the overt act requirement in Hobbs Act conspiracies. *See infra* Section II.B. The Fifth, Sixth, and Seventh Circuits have embraced it. *See infra* Section II.C.

¹³ *See United States v. Salahuddin*, 765 F.3d 329, 336 (3d Cir. 2014).

¹⁴ *Salahuddin Petition*, *supra* note 9, at 7.

¹⁵ *See Brief for the United States in Opposition* at 14, *Salahuddin v. United States*, No. 14-654, (U.S. Apr. 6, 2015) [hereinafter *Government’s Opposition Brief*] (referring to the Third and Eleventh Circuits).

¹⁶ *Id.*

¹⁷ *Id.*

statutes where it is very likely that a broad-based textualist rule, at least as the Supreme Court has announced it, would lead to the wrong result.¹⁸

Indeed, it is important that the Supreme Court revisit its conspiracy jurisprudence.¹⁹ Essentially, the Court believes that Congress will always say explicitly when a criminal conspiracy requires an overt act; if Congress does not want an overt act requirement, it simply omits that language from the statute and lets the common law definition of conspiracy, which requires no overt act, control.

This seemingly innocuous understanding actually produces an absurd result. The general federal conspiracy statute, 18 U.S.C. § 371, carries a potential five-year sentence and explicitly requires proof of an overt act.²⁰ The Hobbs Act, by contrast, can be used to put a defendant in prison for twenty years, but it does not have overt act language.²¹ Notice what this means: if a defendant is charged under both statutes, it is more difficult to put him or her in prison for five years than for twenty.

This Essay pushes back against this bizarre state of affairs. The Hobbs Act's legislative history calls the Supreme Court's bright-line, one-size-fits-all rule into doubt. Further, although Congress has adopted its own definition of a conspiracy in § 371, one that unambiguously requires an overt act in all circumstances, courts now assume Congress is ignoring the overt act requirements it has plainly laid out elsewhere when it fails to use overt act language in that instance. This assumption is strange. Either courts should require an overt act to convict for a conspiracy or they should not. Imagining a reason for this discrepancy among statutes, other than an effort to make the prosecutor's job easier in certain arbitrary instances, is difficult.²² One standard of proof should apply any time the government wants to convict someone of a criminal conspiracy.

To argue these points, this Essay first provides an overview of relevant conspiracy law concepts. It also delves into important Supreme Court precedent, before examining the circuit split on the Hobbs Act.

¹⁸ Whether the Hobbs Act's "or conspires" phrasing calls for an overt act requirement is almost certainly not limited only to that statute. Other statutes use the same "or conspires" formulation following a substantive offense. *See* Salahuddin Petition, *supra* note 9, at 17 (pointing to 18 U.S.C. §§ 1366(a), 2332, 2339A(a), 2339B(a)(1) and 50 U.S.C. § 1705(a)). Additionally, some of these statutes have already been the subject of their own circuit splits over whether they require overt acts for conspiratorial liability. For instance, 18 U.S.C. § 2339B(a)(1) penalizes "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts *or conspires* to do so . . ." 18 U.S.C. § 2339B(a)(1) (2012) (emphasis added). The Fifth Circuit requires an overt act here, but the Fourth Circuit does not. *See* Salahuddin Petition, *supra* note 9, at 18 (citing United States v. El-Mezain, 664 F.3d 467, 537 (5th Cir. 2011) and United States v. Hassan, 742 F.3d 104, 140 n.30 (4th Cir. 2014)).

¹⁹ *See infra* discussion accompanying notes 50–64.

²⁰ 18 U.S.C. § 371 (2016).

²¹ 18 U.S.C. § 1951 (2016).

²² This Essay considers plausible explanations in the discussion accompanying note 140.

Then it makes the case for requiring an overt act as an element of Hobbs Act conspiracies and calls on courts to reexamine more generally the wisdom of the modern overt act regime.

I. GENERAL ISSUES IN CONSPIRACY LAW

Conspiracy law, as the Court once put it, “identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed.”²³ In a sense, then, conspiracy law seeks to address inchoate crimes before even the attempt stage.

This area of the law is a morass that has drawn judicial and scholarly criticism.²⁴ Judge Learned Hand famously referred to conspiracy law as the “darling of the modern prosecutor’s nursery.”²⁵ Many of us are intuitively uncomfortable with the idea of “thought crimes.” “[C]onspiracy seems to be an aberration of criminal law; without overt acts, those prosecuted for conspiracy have neither committed the crime that was their objective nor taken any actions towards it.”²⁶ Two scholars have argued that conspiracies should be protected under the First Amendment until some action moves it “beyond the stage of pure thought.”²⁷

The key question is whether courts should punish the conspiratorial agreement itself or require some overt act in furtherance of it—albeit an overt act that falls short of a full attempt.²⁸ Indeed, though it helps to effectuate the goal of the conspiracy, an overt act is often “noncriminal”

²³ *United States v. Feola*, 420 U.S. 671, 694 (1975) (citing *United States v. Bayer*, 331 U.S. 532, 542 (1947)). It is noteworthy, given the overt act language in the definition, that *Bayer* was decided right after Congress passed the Hobbs Act. For a helpful survey of conspiracy law from that period, see generally *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959).

²⁴ See, e.g., Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 967 (1977) (“Until the charge is curbed, the conspiracy doctrine will remain the source of considerable confusion and, more troublingly, the source of at least occasional injustice.”).

²⁵ *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). See generally Solomon A. Klein, *Conspiracy—The Prosecutor’s Darling*, 24 BROOK. L. REV. 1 (1957).

²⁶ Martin H. Redish and Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 704 (2013).

²⁷ See *id.* at 732; see also Steven R. Morrison, *Conspiracy Law’s Threat to Free Speech*, 15 U. PA. J. CONST. L. 865, 917 (2013) (“[C]onspiracy law puts serious pressure on the principles of free speech.”). Even the *mens rea* requirements in some of these statutes have come under attack. “The cluster of federal criminal laws that can be described as anti-bribery statutes are alarmingly easy to violate.” Hughes, *supra* note 11, at 26.

²⁸ Although it is beyond the scope of this Essay, it is worth emphasizing that there is a distinction between an attempt and an overt act. See *Hyde v. United States*, 225 U.S. 347, 387–88 (1912) (Holmes, J., dissenting) (“[C]ombination, intention and overt act may all be present without amounting to a criminal attempt—as if all that were done should be an agree-

and “relatively minor.”²⁹ Although the common law did not require proof of an overt act for conspiratorial liability to attach, the Model Penal Code adopted the overt act requirement for conspiracies to commit crimes other than first-degree and second-degree felonies.³⁰ “Since Justice Harlan’s opinion in *Yates v. United States*,³¹ overt act provisions have been supported by a dual justification: . . . assur[ing] that a credible threat of an actual substantive crime exists, and also [guarding] against the unwarranted indictment of innocent persons under the conspiracy rubric.”³² In other words, an “evil state of mind” alone should not be punishable.³³ The overt act requirement is not always present, nor is the overt act always something that even looks criminal. But, at least under one theory, the overt act requirement allows “the defendant to withdraw from the agreement, after it was entered, but before any affirmative act is done to put the agreement into effect, without incurring criminal liability.”³⁴ The opportunity to renounce is a key protection in avoiding the punishment of thoughts.

States have followed the Model Penal Code’s overt act provision to varying degrees. Some require proof of a “substantial step,” whereas others preserve the common law’s rejection of the overt act requirement.³⁵ Note, however, that only eight states fall into the latter category; a strong majority of states require an overt act in some form.³⁶ Some states, such as Oregon, have not codified the overt act requirement because they believe the lax interpretation of the requirement in practice makes it “almost meaningless.”³⁷ New Jersey, on the other hand, views

ment to murder a man fifty miles away and the purchase of a pistol for the purpose. [To qualify as an attempt, t]here must be dangerous proximity to success.”).

²⁹ *Developments in the Law: Criminal Conspiracy*, *supra* note 23, at 946.

³⁰ See MODEL PENAL CODE § 503(5) (AM. LAW INST., Official Draft 1985). The commentaries explain that the purpose of the overt act is that “it affords at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists.” *Id.* at cmt. 453. But “when the agreed-upon crime is grave enough to be classified as a felony of the first or second degree,” it is possible to dispense with this added protection because of the importance of “preventive intervention.” *Id.*

³¹ *Yates v. United States*, 354 U.S. 298 (1957). Here the overt act was a speech given at a Communist Party meeting. *See id.* at 333–34.

³² Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1155 (1975).

³³ *Id.*

³⁴ Mario Pittoni, Comment, *The “Overt Act” in Conspiracy*, 18 BROOK. L. REV. 263, 264 (1952). The theory is known as “locus poenitentiae.” *Id.*

³⁵ *See* Buscemi, *supra* note 32, at 1153–54.

³⁶ *See id.*

³⁷ *See id.* at 1157. This seems like a cop-out. Had the Oregon legislators wanted the requirement, they surely could have crafted it so that it had teeth.

the conspiratorial agreement itself as the overt act, effectively repealing the requirement.³⁸

II. THE STATE OF HOBBS ACT CONSPIRACY LAW

Federal conspiracy law, similarly, is quite messy. The trigger for an overt act requirement is sometimes unclear.³⁹

In 1909, when Congress codified the first general criminal conspiracy statute, it provided, in relevant part, that “[i]f two or more persons conspire[d] to commit any offense against the United States, . . . and one or more of such parties [did] any act to effect the object of the conspiracy, each of the parties to such conspiracy [would] be fined . . . or imprisoned.”⁴⁰ In 1946, Congress passed the Hobbs Act. In 1948, when Congress revised Title 18, it codified both § 371 (the general conspiracy statute) and § 1951 (the Hobbs Act).

Section 371 adopts almost verbatim the language from the 1909 statute:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.⁴¹

Elsewhere, the Hobbs Act provides as follows:

³⁸ See *id.* (citing *State v. Carbone*, 91 A.2d 571 (N.J. 1952)). *Carbone* stands for the confusing, circular proposition that intent is not indictable, but once an agreement exists “to carry it into effect, the very plot is an act itself.” See *Carbone*, 91 A.2d at 574.

³⁹ Other scholarship on the Hobbs Act has not addressed this question. Most of it deals with the meaning of other phrases in the statute. See, e.g., Kristal S. Stippich, *Behind the Words: Interpreting the Hobbs Act Requirement of “Obtaining of Property from Another”*, 36 J. MARSHALL L. REV. 295, 295, 325 (2003) (addressing the Act’s definition of extortion and how to interpret its use of “property”); Medrith Lee Hager, Note, *The Hobbs Act: Maintaining the Distinction between a Bribe and a Gift*, 83 KY. L. J. 197, 200–02 (1994) (distinguishing between a bribe and a gratuity); Thomas A. Secretst, Note, *Bribery Equals Extortion: The Supreme Court Refuses to Make Inducement a Necessary Element of Extortion “Under Color of Official Right” Under the Hobbs Act, § 1951(b): Evans v. United States* 112 S. Ct. 1881 (interim ed. 1992), 19 U. DAYTON L. REV. 251, 251–52, 281–82 (1993) (arguing the Supreme Court “failed to interpret the Hobbs Act correctly” by conflating bribery and extortion). This bribery/extortion distinction is a common thread. Compare James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993), with Herbert J. Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 SETON HALL L. REV. 1 (1971).

⁴⁰ Act of Mar. 4, 1909, Pub. L. No. 60-350, § 37, 35 Stat. 1096 (1909).

⁴¹ Act of June 25, 1948, Pub. L. No. 80-772, § 371, 62 Stat. 683, 701 (1948).

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts *or conspires* so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.⁴²

Thus, this is the timeline: First, in 1909, Congress establishes a general conspiracy offense that requires an overt act in no uncertain terms and with no exceptions.⁴³ Second, in 1946, it passes the Hobbs Act.⁴⁴ Third, two years later, it reaffirms its commitment to an overt act in codifying § 371 without meaningfully modifying the 1909 statute.⁴⁵

What to make of the fact that the Hobbs Act does not contain overt act language? Although the Supreme Court has not directly addressed whether the Act requires proof of an overt act, several circuit courts have. In order to understand the decisions of the courts of appeals, it is first necessary to review some of the Supreme Court cases that guided them.

A. Supreme Court Overt Act Precedent

The Court has sent conflicting messages on conspiracy law. On the one hand, it has made special note of the potential for abuse when it comes to conspiracy charges. In *Grunewald v. United States*,⁴⁶ for example, the Court recalled cases in which it “repeatedly warned that [it] will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.”⁴⁷ Justice Jackson, at one point, referred to conspiracy law as “elastic, sprawling and pervasive.”⁴⁸ Further, four decades ago, the Court gave some credence to the idea of an overt act being a general element of a conspiracy.⁴⁹

But on the other hand, some significant cases have limited protections like the overt act requirement. In *United States v. Shabani*,⁵⁰ the

⁴² 18 USC § 1951(a) (emphasis added).

⁴³ See Act of Mar. 4, 1909, *supra* note 40.

⁴⁴ 62 Stat. at 420.

⁴⁵ See Act of June 25, 1948, *supra* note 41.

⁴⁶ *Grunewald v. United States*, 353 U.S. 391 (1957).

⁴⁷ *Id.* at 404 (citing *Delli Paoli v. United States*, 352 U.S. 232 (1957); *Lutwak v. United States*, 344 U.S. 604 (1953); *Krulewitch v. United States*, 336 U.S. 440 (1949); *Bollenbach v. United States*, 326 U.S. 607 (1946)).

⁴⁸ *Krulewitch*, 336 U.S. at 445 (Jackson, J., concurring).

⁴⁹ See *supra* discussion accompanying note 23 (noting that the Court defined conspiracy as a criminal agreement “plus an overt act in pursuit of it”).

⁵⁰ *United States v. Shabani*, 513 U.S. 10 (1994).

Court dismissed as dictum “whatever exasperation” it had expressed in *Grunewald* toward conspiracy prosecutions.⁵¹ In *Shabani*, the defendant was a supplier in a drug distribution scheme and was charged with conspiracy to distribute cocaine under 21 U.S.C. § 846,⁵² the federal drug conspiracy statute.⁵³ The Court noted that neither the original statute nor its amendment mentioned an overt act requirement, and it refused to read one into it.⁵⁴ In a manner reminiscent of some state courts,⁵⁵ the Court noted that the “prohibition against criminal conspiracy . . . does not punish mere thought; the criminal agreement itself is the *actus reus*.⁵⁶

More recently, the Court confronted a similar question in *Whitfield v. United States*.⁵⁷ There the defendants were executives of an entity known as Greater Ministries International Church.⁵⁸ Greater Ministries swindled its investors by taking their money and not making promised investments; as a result, the defendants “together allegedly received more than \$1.2 million in commissions.”⁵⁹ The government charged them under 18 U.S.C. § 1956(h),⁶⁰ the conspiracy provision of the federal money laundering statute, and the district court denied their request for an overt act instruction.⁶¹ The Eleventh Circuit affirmed based on the Court’s decision in *Shabani*.⁶² The Supreme Court, in affirming the Eleventh Circuit, noted that the original statute did not itself contain any conspiracy provisions. The government would thus rely on the general conspiracy statute, 18 U.S.C. § 371, under which it may charge a defendant for conspiring to commit any offense against the United States.⁶³ Congress specifically changed § 1956 in 1992, before *Shabani* and *Whitfield* were decided, and inserted a provision with language that closely mirrored the statute at issue in *Shabani*.⁶⁴ The Court interpreted Congress’s move to mean no overt act was necessary.⁶⁵

⁵¹ See *id.* at 14.

⁵² “Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

⁵³ See *Shabani*, 513 U.S. at 11.

⁵⁴ See *id.* at 13.

⁵⁵ See, e.g., *supra* note 38.

⁵⁶ *Shabani*, 513 U.S. at 16.

⁵⁷ *Whitfield v. United States*, 543 U.S. 209 (2005).

⁵⁸ *Id.* at 211.

⁵⁹ *Id.*

⁶⁰ “Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.”

⁶¹ *Whitfield*, 543 U.S. at 211.

⁶² See *Whitfield*, 543 U.S. at 212 (citing *United States v. Hall*, 349 F.3d 1320, 1323–24 (11th Cir. 2003)).

⁶³ *Whitfield*, 543 U.S. at 213. See also Act of June 25, 1948, *supra* note 41.

⁶⁴ See *Whitfield*, 543 U.S. at 213.

⁶⁵ See *id.* at 214.

The question is how this fits into the context of the Hobbs Act. Neither *Shabani* nor *Whitfield* dealt with that statute or its exact wording.⁶⁶ Nevertheless, the cases have proven very influential in some of the circuits that faced this question.

B. Circuits That Have Held There is No Overt Act Requirement in the Hobbs Act

Perhaps unsurprisingly given the Hobbs Act's lack of overt act language, some courts have found that *Shabani* and *Whitfield* should control the outcome here. Only two circuits, the Third and the Eleventh, have dealt with the issue when the parties briefed it, and they both came out the same way: an overt act is not a requirement of a Hobbs Act conspiracy. The more recent decision is the Third Circuit's opinion in *Salahuddin*. That case was a matter of first impression for the circuit,⁶⁷ and the court held unequivocally that a "Hobbs Act conspiracy under § 1951 does not require an overt act."⁶⁸ In so holding, the court relied on *Shabani* and *Whitfield*. With respect to the latter, it noted that "[it] is only the last in a line of Supreme Court decisions applying the principle that when a conspiracy statute is silent as to whether an overt act is required, there is no such requirement."⁶⁹ The government obviously argued for that result.⁷⁰ It is worth noting, however, that the government has not always assumed that under the Hobbs Act no overt act is required. Indeed, the Third Circuit remarked in a different case, adjudicated just a few years prior and well after *Shabani* and *Whitfield*, that the government argued "that the [Hobbs Act] conspiracy count is valid because both elements of a conspiracy are met: (1) criminal intent and (2) *an overt act*."⁷¹

The Eleventh Circuit also dealt with this specific issue as a matter of first impression. In *United States v. Pistone*,⁷² the defendant discussed plans with his co-workers to rob an armored car, but "[n]o overt act was listed in the indictment and none was presented at trial."⁷³ The court put it bluntly after acknowledging the existence of a circuit split: "We follow the First and Second Circuits: no overt act must be alleged and

⁶⁶ See *infra* Section III.A.

⁶⁷ *Salahuddin*, 765 F.3d at 337.

⁶⁸ *Id.* at 338.

⁶⁹ *Id.*

⁷⁰ See *Salahuddin* Petition, *supra* note 9, at 10 n.3.

⁷¹ *United States v. Manzo*, 636 F.3d 56, 66 (3d Cir. 2011) (emphasis added). See also *United States v. Kale*, 2010 WL 1718291, *4 n.3 (E.D. Pa. 2010) (noting that the "Government asserts that proof of a Hobbs Act conspiracy also requires proof of an overt act").

⁷² *United States v. Pistone*, 177 F.3d 957 (11th Cir. 1999).

⁷³ *Id.* at 959.

proved.”⁷⁴ In so deciding, the court found both the Supreme Court’s decision in *Shabani* and the “plain language” of the statute instructive.⁷⁵

As the Eleventh Circuit noted, the First and Second Circuits have indeed rejected the overt act requirement. Neither has done so, however, based on a briefing of the issue. In a recent First Circuit case, the defendant was convicted of planning an armed robbery of some armored trucks in Puerto Rico.⁷⁶ He argued, among other things, that “the district court erred by failing to instruct the jury that it needed to determine that [he] agreed to commit the overt act mentioned in Count One of the indictment.”⁷⁷ The court rejected this argument out of hand: “Evidence of an overt act is not required to establish a Hobbs Act conspiracy.”⁷⁸

This out-of-hand treatment also appeared in the Second Circuit. In *United States v. Clemente*,⁷⁹ the defendants worked in the New York City Department of Buildings and “regularly demanded payoffs” for the issuance of certain certificates and the assurance that paperwork would not get lost.⁸⁰ They argued on appeal that the government failed to prove any actual racketeering actions.⁸¹ The court did not care: “While a Hobbs Act substantive offense requires proof of (1) interference with commerce and (2) extortion, . . . a Hobbs Act conspiracy charge does not carry those same requirements. In order to establish a Hobbs Act conspiracy, the government does not have to prove any overt act.”⁸² These circuits did not explain their reasoning, as is also true of those courts that have found an overt act requirement.⁸³

⁷⁴ *Id.* at 960.

⁷⁵ See *id.* For a recent, compelling, and relevant attack on the plain meaning rule, see William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 546 (2017) (“Upon closer examination, there is something puzzling about the plain meaning rule. There are reasons to consider all pertinent information. There are reasons to categorically discard certain kinds of pertinent information. But why consider it only *sometimes*?”).

⁷⁶ See *United States v. Monserrate-Valentín*, 729 F.3d 31, 36 (1st Cir. 2013).

⁷⁷ *Id.* at 62.

⁷⁸ *Id.* at 46 (citing *United States v. Palmer*, 203 F.3d 55, 63 (1st Cir. 2000)). Interestingly, this position has its roots in the Fifth Circuit’s tacitly overruled decision in *Ladner v. United States*, 168 F.2d 771 (5th Cir. 1948), discussed *infra* note 95. See *United States v. Tormos-Vega*, 959 F.2d 1103, 1115 (1st Cir. 1992) (citing *Ladner* for the proposition that “§ 1951 does not require proof of an overt act in furtherance of the conspiracy”).

⁷⁹ *United States v. Clemente*, 22 F.3d 477 (2d Cir. 1994).

⁸⁰ *Id.* at 478–79.

⁸¹ *Id.* at 480.

⁸² *Id.* See also *United States v. Maldonado-Rivera*, 922 F.2d 934, 983 (2d Cir. 1990) (citing *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987)) (comparing the Hobbs Act to § 371 and noting that the “government need not prove an overt act in order to establish a Hobbs Act conspiracy”). The trust in *Persico* may be misplaced. The overt act discussion in that case dealt with the RICO Act, not the Hobbs Act. The Hobbs Act has its own complexities as an anti-racketeering statute, and it is not obvious why the court’s reasoning on RICO conspiracies necessarily applies to the Hobbs Act.

⁸³ Fourth Circuit dictum indicates it agrees with these circuits. See *United States v. Ocasio*, 750 F.3d 399, 409 n.12 (4th Cir. 2014), *a’ffd*, 136 S. Ct. 1423 (2016) (“Although the

C. Circuits That Have Found the Overt Act is an Element of a Hobbs Act Conspiracy

The Fifth Circuit has displayed the strongest fidelity to an overt act requirement in the Hobbs Act. In *United States v. Stephens*,⁸⁴ the indictment charged that the defendant, a bail bondsman and town alderman, conspired with members of the “police department to extort money from travelers passing through the town, in exchange for the dismissal or reduction of driving while intoxicated . . . charges, the return of the travelers’ driver’s licenses and the release of their vehicles from impoundment, and obtaining bond without being jailed.”⁸⁵ He challenged the sufficiency of the evidence to sustain his Hobbs Act conspiracy conviction, arguing specifically that “he was not a part of [the conspiracy] and had no knowledge of it.”⁸⁶ The court framed the rule thus: “To convict for criminal conspiracy under 18 U.S.C. § 1951, the jury must find an agreement between two or more persons to commit a crime, and an overt act by one of the conspirators to further the conspiracy.”⁸⁷

The Fifth Circuit has reaffirmed this holding in two follow-up cases. *United States v. Box*⁸⁸ was another bail bondsman case. The scheme there was “designed to extort money (through bonds and fines) from travelers arrested at a roadside park in exchange for promises that the charges, usually public lewdness or indecent exposure, would be dropped or reduced.”⁸⁹ To resolve the case, the court quoted the exact rule from *Stephens*.⁹⁰ *United States v. Hickman*⁹¹ involved a series of eight armed robberies of local restaurants and stores.⁹² Several defendants challenged their Hobbs Act conspiracy convictions on sufficiency-of-the-evidence grounds. The court cited the same rule from *Stephens* in affirming the convictions.⁹³ Both of these cases were decided after *Shabani*, and their clear commitment to the *Stephens* rule is noteworthy, especially given

elements of [the] offenses are similar, a § 371 conspiracy requires proof of an overt act, while a § 1951 conspiracy does not.”). Oddly enough, in affirming *Ocasio*, the Supreme Court may have cast doubt on this claim. See *infra* discussion accompanying notes 175–178.

⁸⁴ *United States v. Stephens*, 964 F.2d 424 (5th Cir. 1992).

⁸⁵ *Id.* at 426.

⁸⁶ *Id.* at 427–28.

⁸⁷ *Id.* at 427. Then, using a “totality of the circumstances” approach, the court found “a common plan and purpose” and affirmed Stephens’s conviction. *Id.* at 428.

⁸⁸ *United States v. Box*, 50 F.3d 345 (5th Cir. 1995).

⁸⁹ *Id.* at 348.

⁹⁰ See *id.* at 349 (quoting *Stephens*, 964 F.2d at 427).

⁹¹ *United States v. Hickman*, 151 F.3d 446 (5th Cir. 1998), *rev’d on other grounds*, 179 F.3d 230 (5th Cir. 1999) (en banc).

⁹² See *id.* at 450–52.

⁹³ See *id.* at 454 (citing *Stephens*, 964 F.2d at 427).

the opposite result from the Third and Eleventh Circuits following that case. Even after *Whitfield*, the court held to the *Stephens* rule.⁹⁴

There is one wrinkle in the Fifth Circuit story. The circuit first dealt with this issue in 1948 in *Ladner v. United States*⁹⁵—and it came out the other way. In that case, the Fifth Circuit held that “[the Hobbs Act] . . . does not require an overt act to complete the offense, although the existence of the conspiracy may be inferred from the commission in concert of overt acts by the defendants.”⁹⁶ The Government’s Opposition brief in the *Salahuddin* case argued that the Fifth Circuit will follow *Ladner* if the discrepancy is ever brought to its attention. This argument was based on a prior statement from the court: “Our rule in this circuit is that where holdings in two of our opinions are in conflict, the earlier opinion controls and constitutes the binding precedent in the circuit.”⁹⁷ Perhaps the government is correct, but that seems like wishful thinking. There are not “two opinions” conflicting here; there are at least four newer opinions that conflict with *Ladner*, all of which had the opportunity to evaluate *Ladner*’s statement. The circuit has made its preference for an overt act requirement quite clear, even if it has not provided much of a rationale for that preference.

Two other circuits also require an overt act to prove a Hobbs Act conspiracy. The Sixth Circuit heard a case in which the two defendants were a commissioner of roads and a director of public works in Shelby County, Tennessee.⁹⁸ They used their official positions “to obtain money and other things of value from persons in Shelby County in exchange for their actions in advancing priorities for the construction and appropriation of monies for certain road projects in the County.”⁹⁹ The court made special mention of the fact that the “indictment [] set forth 42 overt acts committed separately and/or in combination by [defendants] in furtherance of the alleged conspiracy.”¹⁰⁰ Evaluating the Hobbs Act conspiracy, the court had this to say: “In showing the existence of a conspiracy, two elements must be proven: an agreement between two or more persons to

⁹⁴ See generally *United States v. Herrera*, 466 F. App’x. 409 (5th Cir. 2012). The defendants were associated with the Barrio Azteco prison gang, whose “primary criminal activity involved the extortion of payments . . . from narcotics traffickers” that sold drugs in Barrio Azteco territory. *Id.* at 413. Two of them challenged the sufficiency of the evidence of their Hobbs Act conspiracy convictions. *Id.* at 417. The court again quoted the *Stephens* formulation of the rule. See *id.* District courts also hold to the requirement post-*Whitfield*. See, e.g., *United States v. Enriquez*, 2009 WL 522722, at *3 (W.D. Tex.) (quoting the *Stephens* rule). It is important to note that no court since *Stephens* has even tried to trim the “overt act” language from its rule.

⁹⁵ *Ladner v. United States*, 168 F.2d 771 (5th Cir. 1948).

⁹⁶ *Id.* at 773.

⁹⁷ *Boyd v. Puckett*, 905 F.2d 895, 897 (5th Cir. 1990).

⁹⁸ See *United States v. Butler*, 618 F.2d 411, 413 (6th Cir. 1980).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

act together in committing an offense, and an overt act in furtherance of the conspiracy.”¹⁰¹ More dramatically, the circuit heard a case in which the defendant was charged under both the Hobbs Act and under the drug conspiracy statute, 21 U.S.C. § 846.¹⁰² The court stated its position with little explanation but with remarkable clarity: “[C]onspiracy to violate 21 U.S.C. § 846 does not require proof of an overt act, while conspiracy to violate 18 U.S.C. § 1951 does require proof of an overt act.”¹⁰³ This has strong implications. Note that although this was decided before *Shabani*, the *Shabani* Court agreed that § 846 does not require an overt act. Thus, there is reason to think that there is something different about the Hobbs Act, at least in this circuit, and that the difference is worth investigating.

Finally, the Seventh Circuit has indicated that it approves of the overt act requirement in Hobbs Act conspiracies. In *United States v. Tuchow*,¹⁰⁴ the defendants appealed on “sufficiency-of-the-evidence grounds and the court of appeals, in reviewing their claims, stated that the government must prove an overt act to establish conspiracy to commit extortion under the Hobbs Act.”¹⁰⁵ Specifically, the court said that “to establish a conspiracy, the government must prove that there was an agreement between two or more persons to commit an unlawful act, that the defendant was a party to the agreement, and that an overt act was committed in furtherance of the agreement by one of the coconspirators.”¹⁰⁶ The court did not delve into the details, but note that the federal statutory elements of conspiracy, enshrined in § 371,¹⁰⁷ operate in the background here.¹⁰⁸ That is the realm to which this Essay now turns.

III. FINDING AN OVERT ACT REQUIREMENT IN THE HOBBS ACT

Many commentators have argued for a stronger overt act requirement in general, one that moves us farther away from simply punishing the agreement.¹⁰⁹ Their argument has merit. Before getting there, how-

¹⁰¹ *Id.* at 414 (quoting *United States v. Williams*, 503 F.2d 50, 54 (6th Cir. 1974)). See also *United States v. Richardson*, 596 F.2d 157, 160, 162 (6th Cir. 1979) (calling attention to the “32 overt acts” set forth in the indictment before quoting the *Williams* conspiracy rule).

¹⁰² See *United States v. Benton*, 852 F.2d 1456, 1458–59 (6th Cir. 1988).

¹⁰³ *Id.* at 1465.

¹⁰⁴ *United States v. Tuchow*, 768 F.2d 855 (7th Cir. 1985).

¹⁰⁵ *Salahuddin Petition*, *supra* note 9, at 9 (citing *Tuchow*, 768 F.2d at 869).

¹⁰⁶ *Tuchow*, 768 F.2d at 869. See also *United States v. Stodola*, 953 F.2d 266, 272 (7th Cir. 1992) (quoting the overt act rule from *Tuchow*).

¹⁰⁷ See 19 U.S.C. § 371 (2016).

¹⁰⁸ But see *United States v. Corson*, 579 F.3d 804, 810 n.† (7th Cir. 2009) (noting that “some of our decisions list an overt act as an element, without discussion of the issue”) (emphasis added).

¹⁰⁹ There are many examples, though none of the commentators has focused on the problem of getting courts to recognize the requirement. Writing on the relatively new “fantasy defense” in criminal law—whereby a defendant argues that “his expression represented not conspiracy agreement, but fantasy role play”—Kaitlin Ek argues that weak overt act require-

ever, it is crucial to confront the tactical reality that courts must recognize the overt act requirement in a given statute. Thus, this Essay's purpose is to show that courts should require any kind of overt act, however strong, in Hobbs Act conspiracy cases.

Despite the fact that the Fifth, Sixth, and Seventh Circuits have not explained *why* an overt act should be an element of a Hobbs Act conspiracy, it almost certainly is. This Part endeavors to provide the missing explanation. It first concedes that, based on Supreme Court precedent, textualist arguments are unfavorable. But it then demonstrates why a textualist reading alone is incomplete: such a reading produces the absurd result of the same crime requiring a lower standard of proof yet carrying a harsher punishment,¹¹⁰ and it overlooks illuminating and important legislative history.

A. *The Statutory Text*

Textualism, at least as the Supreme Court has applied it, produces the wrong result when interpreting the Act. While we might intuit that the statutory language “or conspires,” connects in some way to the federal understanding of conspiracy outlined in § 371,¹¹¹ the Court has rejected this connection. Unfortunately, that rejection has had bizarre

ments pose a particularly acute danger to those who invoke the defense. See Kaitlin Ek, Note, *Conspiracy and the Fantasy Defense: The Strange Case of the Cannibal Cop*, 64 DUKE L.J. 901, 901, 937 (2015). Ek argues forcefully for a strengthening of the requirements, specifically advocating for a reformulation of the overt act requirement that “include[s] the requirement that an overt act must independently make it more likely that the defendant actually intended an unlawful goal; an overt act should not be equally consistent with guilt or innocence.” *See id.* at 942–45. Other scholarship has argued that recent Supreme Court jurisprudence on overt acts is wrong. Kevin Jon Heller contends that *Shabani* was incorrectly decided: “*Shabani*’s elimination of the overt act requirement [in drug conspiracies] not only encourages the government to bring drug conspiracy cases to trial with evidence that cannot possibly prove the defendant’s guilt beyond a reasonable doubt, it also insulates convictions obtained in such cases from meaningful appellate review.” Kevin Jon Heller, Note, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and United States v. Shabani*, 49 STAN. L. REV. 111, 142 (1996). *But see* GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 223–25 (2000) (advocating for the value of overt act requirements in conspiracy law but also noting that “[m]aking the overt act part of the offense implied, to the government’s advantage, that venue could be laid in any jurisdiction in which an act was committed in furtherance of the conspiracy, and each additional act set the statute of limitations running anew”).

¹¹⁰ Note that this Essay does not invoke the traditional understanding of the absurd results canon. That canon is an exception to the plain meaning principle. It allows courts to deviate from the text of the statute if its application would lead to an absurd result. *See* Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 127–28 (1994). This Essay’s claim is that the absence of certain language in the Hobbs Act does not make its meaning plain.

¹¹¹ The Salahuddin Petition makes a stronger, if perhaps overstated, version of this argument. It says that “[t]he most logical interpretation of Section 1951(a)’s two-word reference to a conspiracy offense is that Congress intended to incorporate then-existing requirements of the general federal conspiracy standard, including proof of an overt act.” Salahuddin Petition, *supra* note 9, at 11.

consequences for federal conspiracy law. This Section examines those consequences.

In assessing the connection to § 371 claim, recall the timeline laid out above.¹¹² As the Salahuddin Petition argued, “The terms of that more specific statute [] elucidate Congress’s intent with respect to the Hobbs Act’s conspiracy clause.”¹¹³ Indeed, the Supreme Court deployed this related-statutes canon in *FDA v. Brown & Williamson Tobacco Corp.*,¹¹⁴ noting that “the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”¹¹⁵ It seems reasonable to assume that Congress’s intent was to incorporate what it had already determined to be an element of any general conspiracy—and what it reaffirmed after passing the Hobbs Act.

The Salahuddin Petition agreed: “If Congress wished to depart from the general requirements of a federal conspiracy offense when it enacted the Hobbs Act, it could, and would, have said so.”¹¹⁶ The Court itself has noted that “it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.”¹¹⁷ The use of the phrase “or conspires,” particularly in the context of the legislative history recounted below, does not at all indicate that Congress intended to waive the overt act requirement that had been around for almost forty years.¹¹⁸ Additionally, the language of § 371 contains no carve-outs for first-degree or second-degree felonies, such as the one in the Model Penal Code,¹¹⁹ and Congress has never added any such exceptions. Proof of an overt act is a blanket requirement for any conviction under the section.

But again, the elephant in the room is the problem of squaring all this with Supreme Court precedent. The Court assumes that, without a specifically delineated overt act requirement, the common law controls—meaning no overt act is required. In *Shabani*, the Court explained, “[w]e have consistently held that the common law understanding of conspiracy does not make the doing of any act other than the act of conspiring a

¹¹² See *supra* discussion accompanying notes 40–44.

¹¹³ Salahuddin Petition, *supra* note 9, at 11.

¹¹⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

¹¹⁵ *Id.* at 133 (citing *United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998); *United States v. Fausto*, 484 U.S. 439, 453 (1988)).

¹¹⁶ Salahuddin Petition, *supra* note 9, at 12.

¹¹⁷ *Fausto*, 484 U.S. at 453.

¹¹⁸ See also Salahuddin Petition, *supra* note 9, at 12 (“Congress’s use of the short phrase ‘or conspires’ provides no basis for altering the generally-applicable requirements of a federal conspiracy conviction.”). It is true that the Court had already interpreted the Sherman Act to be an exception here. See *infra* discussion accompanying notes 127–28.

¹¹⁹ See note 30.

condition of liability.”¹²⁰ Further, as discussed in note 160, the Court based its holding on the notion that it is a “settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms.”¹²¹

In *Whitfield*, the Court observed that Congress was on notice of its method of interpretation as announced in *Shabani*.¹²² But that obviously cannot be true of the Hobbs Act, which was passed forty-eight years prior to *Shabani*. The Court addressed this objection with respect to the statute in question in *Whitfield*: “While *Shabani* was decided two years after § 1965(h) was enacted, the rule it articulated was established decades earlier in *Nash* and *Singer*.¹²³ The Court was referring to *Nash v. United States* and *Singer v. United States*,¹²⁴ two cases that were each decided before Congress passed the Hobbs Act. They are therefore worth examining.

Nash probably does not dictate the result here. In that case, the Court held that “the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability.”¹²⁵ Later, in *Shabani*, the Court put it thus: “[B]y choosing a text modeled on § 371, [Congress] gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement.”¹²⁶ The latter is not the case here. The Hobbs Act was enacted in part to shore up the Sherman Act’s shortcomings as an antiracketeering statute.¹²⁷ The evidence suggests that the way in which Congress attempted to respond to the shortcomings of the Sherman Act was via the substantive offenses of the Hobbs Act, not the granting of unbounded power to prosecutors. Congress’s rejecting the Sherman Act

¹²⁰ *United States v. Shabani*, 513 U.S. 10, 13–14 (1994) (quoting *Nash v. United States*, 229 U.S. 373, 378 (1913)).

¹²¹ *Shabani*, 513 U.S. at 13.

¹²² See *Whitfield v. United States*, 543 U.S. 209, 216 (2005) (noting that “Congress is presumed to have knowledge of the governing rule described in *Shabani*”). The Court also used the presumed knowledge of *Shabani* to reject use of “vague” legislative history. *See id.* at 216–17. Again, the drafters of the Hobbs Act could not have had knowledge of *Shabani*.

¹²³ *Id.* at 216.

¹²⁴ *Nash v. United States*, 229 U.S. 373 (1913); *Singer v. United States*, 323 U.S. 338 (1945).

¹²⁵ *Nash*, 229 U.S. at 378. The Court continued: “[W]e can see no reason for reading into the Sherman Act more than we find there.” *Id.*

¹²⁶ *United States v. Shabani*, 513 U.S. 10, 14 (quoting *United States v. Sassi*, 966 F.2d 283, 284 (7th Cir. 1992)) (1994) (internal quotation marks omitted).

¹²⁷ See S. REP. NO. 73-532, at 1 (1934) (quoting a Department of Justice memorandum describing the problems with using the Sherman Act to prosecute racketeers). *See also* H.R. REP. NO. 73-1833, at 2 (1934) (reproducing a letter from Attorney General Homer Cummings that said, in part, “The Sherman Antitrust Act is too restricted in its terms and the penalties [sic] thereunder are too moderate to make that act an effective weapon in prosecuting racketeers.”).

in this instance should make us doubt that the Hobbs Act's drafters used it as a template. Instead, § 1951(a) creates a conspiracy offense "through the inclusion of a two-word phrase ('or conspires') in the sentence that establishes the *substantive offense*."¹²⁸

Singer is more difficult. There the Court engaged in a rigorous grammatical analysis of the Selective Training and Service Act before concluding that a conspiracy to violate that Act does not require an overt act.¹²⁹ The conspiracy clause in question was very similar to the one in the Hobbs Act—"or conspire so to do"—except it followed a list of seven separate substantive offenses.¹³⁰ The Government's Opposition Brief argued that Salahuddin "offer[ed] no reason why the Hobbs Act—which uses the same sentence structure—should be interpreted in a fundamentally different way."¹³¹ Salahuddin weakly responded that the statute in *Singer*, unlike the Hobbs Act, was already largely about joint or concerted action.¹³² The statute in *Singer* specified seven different, substantive offenses, some of which dealt with joint action, and it would have been more reasonable to expect Congress to include references to overt acts as it detailed these offenses.¹³³ The "or conspire" provision is merely a "catch-all."¹³⁴ The Hobbs Act, Salahuddin further argued, has no concerted actions inherent in its substantive offenses; the "or conspires" language creates an entirely new substantive offense on its own.¹³⁵ That might be right, but it seems to be reaching. The Court has almost certainly spoken on the textual issue at hand.¹³⁶

This precedent proves to be extremely problematic. It suggests that Congress intended to punish the mere agreement in only certain instances. Perhaps that is so, but the final result is illogical. Under this regime, a prosecutor can bring a general conspiracy charge against someone for a maximum sentence of five years, and in so doing, the prosecu-

¹²⁸ Salahuddin Petition, *supra* note 9, at 13–14 (emphasis added).

¹²⁹ See *Singer*, 323 U.S. at 341.

¹³⁰ *Id.* at 340.

¹³¹ Government's Opposition Brief, *supra* note 15, at 13.

¹³² See Reply Brief for the Petitioner at 5–6, *Salahuddin v. United States*, No. 14-654 (U.S. Apr. 22, 2015) [hereinafter Salahuddin Reply Brief].

¹³³ *Id.*

¹³⁴ *Id.* at 5.

¹³⁵ *Id.* at 6.

¹³⁶ There is one other unique piece to the Hobbs Act textual puzzle. Following the "or conspires" language, the statute specifically targets a perpetrator who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." This looks like an overt act requirement, at least for violence or threats of violence. Of course, it is possible that Congress intended to require overt acts only in cases of violence. That seems bizarre. Why would violence beget a higher standard of proof than any other act in furtherance of a Hobbs Act conspiracy? More likely, given the Act's labor-violence roots (discussed *infra* Section III.B), is that Congress wanted to call attention to this specific facet of what the statute penalizes.

tor must prove an overt act. But for a subset of crimes, ones that carry substantially harsher penalties, the common law definition suddenly again applies, and the prosecutor needs to prove only the existence of an agreement. To reiterate the problem in its starker terms, someone could even be charged both under § 371 and the Hobbs Act—and it would be easier for the prosecutor to win on the latter, despite its harsher penalty. This makes little sense.

In spite of this damning flaw, the *Whitfield* court in peculiar dictum observed that “[m]ere use of the word ‘conspires’ surely is not enough to establish the necessary link between these two separate statutes.”¹³⁷ When drafting the Hobbs Act, however, Congress did not know about the *Shabani/Whitfield* aversion to connecting § 371 with other statutes. Salahuddin pointed out that the petitioners in *Whitfield* were arguing that the statute in that case did not establish a separate conspiracy offense and that it provided only enhanced penalties for a conviction under § 371.¹³⁸ The Court rejected this “idiosyncratic claim” because if Congress had intended this result, it would have been much clearer about the cross-reference to § 371.¹³⁹ Fair enough now that the Court has asked for this twice. But what else could Congress have done to make the connection clearer back in 1948 as it was codifying both § 371 and § 1951? Would Congress even have fathomed the absurd result that this distinction would produce?

Perhaps the response is that Congress did intend this result. It may be difficult to catch crafty kingpins in racketeering schemes. Consider a case like Salahuddin’s. If Salahuddin were simply directing someone else to steer demolition contracts, let us assume, *arguendo*, that he did no *act* beyond having conversations. It may seem sensible, then, to make it easier to prosecute the mere agreement.¹⁴⁰ Yet notice that this is perverse: the head of the conspiracy is punishable under § 371 without committing an overt act, while the underlings, who did commit such an act, can be prosecuted under the Hobbs Act *and* § 371. The kingpin potentially gets twenty years, the foot soldier twenty-five. That is disquieting. Of course, prosecutorial and sentencing discretion can assuage some of these fears, but that does not provide a stable, consistent solution to the very real problem with the state of the law itself. Further, the idea that Congress was singularly focused on taking down kingpins is unmoored from the legislative history.

¹³⁷ *Whitfield v. United States*, 543 U.S. 209, 215.

¹³⁸ Salahuddin Reply Brief, *supra* note 132, at 6.

¹³⁹ See *id.* at 6–7 (quoting *Whitfield*, 543 U.S. at 215).

¹⁴⁰ But one might take this too far and argue that neither the Hobbs Act nor § 371 should require an overt act. As discussed above, many have argued that the overt act is an important protection against government power.

Salahuddin could not or did not make these arguments, and in any event the Supreme Court denied his certiorari petition.¹⁴¹ This Essay strives to produce a happier ending. The legislative history demonstrates that Congress did not intend for these results. And when a plain reading of a statute produces such oddities, even Justice Scalia suggested that legislative history may be helpful: “I think it entirely appropriate to consult . . . the legislative history . . . to verify that what seems to us an unthinkable disposition . . . was indeed unthought of.”¹⁴² The next Section examines what Congress did (and did not) do as it worked to pass and codify the Hobbs Act.

B. The Legislative History

Textualist arguments alone obscure the fact that a Hobbs Act conspiracy should require proof of an overt act. But the legislative record suggests that textualist arguments alone should not control the outcome. *Shabani* and *Whitfield* fail to capture the nuances of the Hobbs Act, whose history raises plausible doubts about the applicability of their “no overt act language, no overt act requirement” rule. In the case of the Hobbs Act, the word “conspires” should still invoke the federal definition of conspiracy, as originally defined in the 1909 statute and reaffirmed in § 371.

The Hobbs Act came into being due to outrage over the Supreme Court’s decision in *United States v. Local 807 International Brotherhood of Teamsters*.¹⁴³ Union members had been stopping out-of-state trucks entering New York City and demanding “that the drivers pay regular union-fees and permit union-members to drive and unload the trucks.”¹⁴⁴ The Court affirmed the reversal of the union members’ convictions because of an exception in the Anti-Racketeering Act of 1934.¹⁴⁵ That statute provided for criminal liability for a defendant “who, in connection with or in relation to any act affecting trade or commerce . . . [o]btain[ed] or attempt[ed] to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations.”¹⁴⁶ It contained an important exemption, however, for payments “of wages by a bona fide employer to a bona fide em-

¹⁴¹ See *United States v. Salahuddin*, 765 F.3d 329, *cert. denied*, 135 S. Ct. 2309.

¹⁴² *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1988) (Scalia, J., concurring in the judgment).

¹⁴³ *United States v. Local 807 International Brotherhood of Teamsters*, 315 U.S. 521 (1942).

¹⁴⁴ John S. Gawey, Note, *The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes*, 87 NOTRE DAME L. REV. 383, 383–84 (2001) (citing *Local 807*, 315 U.S. at 526).

¹⁴⁵ See *id.* at 384 (citing Anti-Racketeering Act of 1934, Pub. L. No. 73-376, 48 Stat. 979 (1934)).

¹⁴⁶ 48 Stat. at 979–80.

ployee.”¹⁴⁷ Concluding “that Congress intended to exempt militant labor-activity from the statute’s reach, the Court held that an ‘outsider who “attempts” unsuccessfully by violent means to achieve the status of an employee and to secure wages for services falls within the exception.’”¹⁴⁸ This strange move outraged members of Congress, who passed the Hobbs Act after a failed attempt to amend the Anti-Racketeering Act of 1934.¹⁴⁹

Remarking on “the amazing decision of the Supreme Court,” Representative Clarence Hancock had this to say:

Of course, it was never the intent of Congress to legitimize crime; nevertheless, the decision of the Supreme Court in the teamsters’ case will be the supreme law of the land . . . until Congress acts to correct and supersede the decision and adopts a new law written in clear and unmistakable language. *That is all this bill does.*¹⁵⁰

Importantly for this Essay’s purposes, if it is the case that the Hobbs Act was attempting to fix a loophole for labor unions, there is no reason to think there is anything particularly special about the Act’s implicit connection to § 371.

In their quest to shore up the union-violence oversight, the drafters of the Hobbs Act adopted language from a New York statute.¹⁵¹ In 1909, New York Penal Law § 850 defined extortion as “the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, under color of official right.”¹⁵² Elsewhere, the New York Penal Code made its overt act requirement for conspiracies clear: “No agreement except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement.”¹⁵³

A question arises: How much should courts make of Congress’s incorporating New York penal law? The Congressional Record contains this exchange:

¹⁴⁷ 48 Stat. at 980. Section 6 of the statute also told courts not to “apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.” *Id.*

¹⁴⁸ Gaway, *supra* note 144, at 384 (quoting *Local 807*, 315 U.S. at 531).

¹⁴⁹ See *id.* at 384.

¹⁵⁰ 91 CONG. REC. 11900 (1945) (emphasis added).

¹⁵¹ See *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 403 (2003) (“Congress used two sources of law as models in formulating the Hobbs Act: the Penal Code of New York and the Field Code, a 19th-century model penal code.”).

¹⁵² N.Y. PENAL LAW § 850 (1909).

¹⁵³ N.Y. PENAL LAW § 583 (1909).

Mr. EBERHARTER. Will the gentleman state for the record, please, whether or not this bill would change the present statutes insofar as they define robbery and extortion or conspiracy to commit either of those crimes?

Mr. HANCOCK. The bill contains definitions of robbery and extortion which follow the definitions contained in the laws of the State of New York. It would change no state statutes . . .¹⁵⁴

Hancock, unfortunately, was not more explicit on the definition of “conspiracy.” Still, his answer appears to indicate that Congress intended New York law to be the definitional framework for at least parts of the Act. One possibility is that Hancock’s answer was incomplete and that Congress intended to adopt New York’s definition of conspiracy. More plausible is that Congress intended to retain its own understanding of conspiracy—the one enshrined in § 371. But either way, New York had updated its penal laws in 1909, the same year Congress had done so, and both at that time explicitly delineated an overt act requirement.¹⁵⁵ If Congress were abandoning the requirement, there should be something in the record to support that proposition—yet nothing is there.

The Judiciary Committee report on the update to the codification provides some important additional insights. In the notes on § 371, the Report says, “A number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title, were omitted because adequately covered by this section.”¹⁵⁶ In other words, Congress wanted § 371 to cover conspiracies to violate certain other sections of the Code—that is, *it used § 371 as its baseline*.

So how did Congress decide when it was worth retaining independent conspiracy language in certain separate statutes? The Report has the answer: “A few exceptions were made, (1) where the conspiracy would constitute the only offense, or (2) where the punishment provided in this section would not be commensurate with the gravity of the offense.”¹⁵⁷

¹⁵⁴ 91 CONG. REC. 11900 (1945).

¹⁵⁵ See *supra* discussion accompanying note 119. Congress’s statute was even stronger on the overt act requirement—it contained no exceptions to the requirement at all, unlike New York’s exceptions for things like arson or burglary.

¹⁵⁶ H.R. REP. NO. 80-304, at A29 (1947).

¹⁵⁷ *Id.* The report continues: “Special conspiracy provisions were retained in sections 241, 286, 372, 757, 794, 1956, 1201, 2271, 2384 and 2388 of this title. Special conspiracy provisions were added to sections 2153 and 2154 of this title.” *Id.* Sections 241, 286, 372, 1956, 2271, and 2384 are standalone conspiracy crimes. Sections 757, 794, 1201, 2388 are separate crimes with conspiracy subsections. See the relevant sections of Title 18 of the United States Code. This list is not exhaustive; section 1951, the Hobbs Act, does not appear. With respect to sections 2153 and 2154, the report notes that the “punishment provisions of the general conspiracy statute, section 371 of this title, are inadequate.” H.R. REP. NO. 80-304, at A137. Both sections, however, still carry overt act requirements. See 18 U.S.C. §§ 2153, 2154 (2016).

In the case of the Hobbs Act, exception (1) does not apply; the Act outlines its own major substantive offense and uses “or conspires” language to capture a conspiracy to violate it. Thus, Congress must have felt a Hobbs Act violation was serious enough to warrant an extended sentence. This makes sense: § 371 carries a maximum prison sentence of five years, while § 1951 carries a maximum of twenty.¹⁵⁸ It is crucial to note that neither exception implies anything about the elemental requirements of § 371, including the overt act, being changed.

The report also discusses specific changes with respect to the Hobbs Act language that left us with “or conspires”:

The words “attempts or conspires so to do” were substituted for sections 3 and 4 of the 1946 act, omitting as unnecessary the words “participates in an attempt” and the words “or acts in concert with another or with others”, in view of section 2 of this title which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything towards the accomplishment of the crime, a principal himself.¹⁵⁹

Perhaps it is not clear what constitutes *participation* “in an unlawful enterprise,” though one might reasonably think it implies some kind of action. But the catch-all language—doing something “towards the accomplishment of the crime”—seems to correspond to the modified conspiracy language. Indeed, the committee appears to have believed that some kind of criminal deed, however small, was required to bring the actor under the auspices of the Act. In addition, there is a reasonable argument to be made, at least based on its findings here, that the committee’s concern in drafting the “or conspires” language was concision. If that is the case, it is unsurprising that it did not tack on any clunky language specifying an overt act requirement.

Perhaps most notable is the fact that nowhere in the report does it suggest that failing to mention an overt act requirement means one does not exist. It is true that the Court has looked at it the other way and that, in the absence of other indications, will assume that Congress intended to adopt the common law definition of terms.¹⁶⁰ But it is not clear that is

¹⁵⁸ See *supra* notes 20–21.

¹⁵⁹ H.R. REP. NO. 80-304, at A131. Section 2 is the operative language of the original Hobbs Act. See Pub. L. No. 79-486, 60 Stat. 420 (1946) (“Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.”).

¹⁶⁰ See *Shabani*, 513 U.S. at 13 (noting that it is a “settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms”).

what Congress intended here. Congress specifically laid out its definition of conspiracies in § 371 and took care to examine each conspiracy against that backdrop, evaluating whether § 371's punishments were severe enough. Where that was the case, Congress omitted separate mention of conspiracy under the theory that § 371 captured it.¹⁶¹ Elsewhere, in fact, Congress omitted conspiracy language altogether in part because it was not consistent with § 371's overt act requirement.¹⁶² Repeatedly Congress has shown its consideration of § 371 as the starting point, the minimum standard.

There is more. The report's section on 18 U.S.C. § 493, which deals with counterfeit financial instruments, has this interesting insight into the committee's thoughts on overt acts: "There is no sound reason for differentiating between types of credit, insurance, banking and lending agencies in the punishment of conspiracy or in the requirement as to proof of overt acts."¹⁶³ Even more important for present purposes, however, is the sentence that follows: "Since conspiracies involving offenses equally serious such as obstruction of justice, *bribery*, embezzlements, counterfeiting and false statements and offenses against the Treasury of the United States as well as the Federal Deposit Insurance Corporation and the Home Owners' Loan Corporation are punishable under the general conspiracy statute, the same rule should be applied to lesser agencies."¹⁶⁴ The bribery language quite nicely encapsulates Hobbs Act crimes, especially as the government uses the Act today.¹⁶⁵ We therefore have a clear congressional statement that in the face of such crimes, the general conspiracy statute would apply. With respect to the Hobbs Act, Congress decided to increase the penalty. But there is little reason to think it also intended to abandon the requirements of proving a § 371 conspiracy.¹⁶⁶

The most serious charge that one can level against this story is the fact that some statutes still mention overt act requirements while others do not.¹⁶⁷ Although the Supreme Court certainly found this fact dispo-

¹⁶¹ H.R. REP. NO. 80-304, *supra* note 156.

¹⁶² See *id.* at A84 ("The provisions of section 1424 of title 42, U. S. C., 1940 ed., The Public Health and Welfare, relating to conspiracy were omitted as inconsistent with the general conspiracy statute, section 371 of this title, both as to punishment and allegation and proof of an overt act.").

¹⁶³ *Id.* at A42. This Essay argues that there is no sound reason for differentiating between any conspiracy and the requirement to prove an overt act.

¹⁶⁴ *Id.* (emphasis added).

¹⁶⁵ See *supra* discussion accompanying note 11.

¹⁶⁶ See also *supra* discussion accompanying notes 116–18.

¹⁶⁷ The Government's Opposition Brief points to 18 U.S.C. § 1201(c) ("conspiracy to kidnap"); 18 U.S.C. § 1511(a)(1) ("conspiracy to obstruct enforcement of criminal laws with the intent to facilitate illegal gambling"); and 18 U.S.C. § 2153(b) ("conspiracy to obstruct national defense activities"). Government's Opposition Brief, *supra* note 15, at 8. It further argues that the "inclusion of overt-act requirements in those statutes indicates that Congress

tive in *Whitfield*,¹⁶⁸ the legislative history recounted above has enough force to call this proposition into doubt, at least when it comes to the Hobbs Act. At the time Congress passed that statute, the record suggests it took for granted that an overt act was a necessary piece of the puzzle. So it was, too, with the Supreme Court when it decided *Bayer* in 1947.¹⁶⁹ Again, nowhere in explaining why it specifically delineated conspiracies in certain crimes did Congress express a desire to eliminate § 371's overt act requirement.¹⁷⁰ It would make sense, given the higher stakes and the attendant absurd result, to expect some sort of affirmative statement, even a hint or an implication, that Congress intended this to be the case. Instead, the signs point the other way.¹⁷¹

CONCLUSION

Whether an overt act is an element of a Hobbs Act conspiracy has long divided the circuits. This Essay has argued that the Act does require proof of an overt act. It bases this on several factors: a reading of the statutory text that rejects an absurd result, an examination of legislative history, and an overarching presumption that Congress does not frivolously and incoherently redefine conspiracy. This is certainly contestable; the Supreme Court's recent overt act jurisprudence suggests it may look with some skepticism on these claims.

In a sense, the conventional approach to statutory interpretation is backwards in this realm. Rather than presume that, in the absence of evidence to the contrary, Congress has legislated against the common law, courts should presume Congress has legislated against its own definition of conspiracies in § 371. Once Congress has adopted a definition, it should take a clear congressional statement to the contrary to defeat the presumption that Congress is using its own definition. Ultimately, the Court should view the “or conspires” formulation with the healthy skepticism toward broad conspiracy statutes that some of its past members

states its intent expressly when it seeks to deviate from the common law meaning of a conspiracy offense.” *Id.*

¹⁶⁸ See *Whitfield v. United States*, 543 U.S. 209, 216 (2005) (noting Congress has demonstrated its ability to add the overt act requirement when it wants to).

¹⁶⁹ See *supra* note 23 and the accompanying discussion.

¹⁷⁰ See H.R. REP. NO. 80-304, at A29.

¹⁷¹ For this reason, the Court's recent remarks on the rule of lenity show that it is incompatible with this Essay's arguments. The “rule applies only when a criminal statute contains a grievous ambiguity or uncertainty, and only if, after seizing everything from which aid can be derived, the Court can make no more than a guess as to what Congress intended.” *Ocasio v. United States*, 136 S. Ct. 1423, 1434 n.8 (2016) (quoting *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998)) (internal quotation marks omitted). The legislative history provides much more than a mere guess about what Congress intended.

have shown.¹⁷² And indeed, as noted above, although the Court has not been consistent here, neither has the government.¹⁷³

The Court declined to hear the *Salahuddin* case, but it will surely have the opportunity again someday. After all, the Court has recently shown significant interest in the Act. In 2016, it vacated the sentence of former Virginia Governor Bob McDonnell, significantly narrowing the scope of what is an “official act.”¹⁷⁴

More dramatically, in another recent case, *Ocasio*,¹⁷⁵ the Court compounded the incoherence this Essay has identified. The defendant was charged under both § 371 and the Hobbs Act.¹⁷⁶ The Court explained that all that is necessary for a Hobbs Act conspiracy conviction is that “each conspirator must have specifically intended that *some conspirator* commit each element of the substantive offense.”¹⁷⁷ Yet the Court further noted, in a footnote attached to that very sentence, that § 371 “also requires that one of the conspirators commit an overt act in furtherance of the offense. Petitioner does not dispute that this element was satisfied.”¹⁷⁸ It is difficult to see how the Court was not tacitly backpedaling on the connection to § 371.

Perhaps, then, the Court has already opened the door. In any event, hopefully the Court does decide to address the unpalatable result this Essay has identified. Why Congress would require an overt act for lesser offenses with more lenient sentences and not require one for more serious offenses when more is on the line is, frankly, baffling. A cleaner rule would afford all defendants the protection of an overt act requirement. The Hobbs Act is a good place to start.

¹⁷² See *supra* discussion accompanying notes 46–49. This is true also in the *mens rea* context. Without the right *mens rea* requirement, Hughes argues, “swaths of benign political activity would be criminal. For this reason, the United States Supreme Court has stated that anti-corruption laws should be narrowly construed.” Hughes, *supra* note 11, at 26. It seems reasonable to extend this reasoning to finding overt act requirements in an anti-corruption law like the Hobbs Act.

¹⁷³ See *supra* notes 69–71 and the accompanying discussion (showcasing the government’s inconsistent position on the overt act in prosecuting Hobbs Act cases).

¹⁷⁴ See generally *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

¹⁷⁵ *Ocasio*, 136 S. Ct. at 1423.

¹⁷⁶ *Id.* at 1427.

¹⁷⁷ *Id.* at 1432.

¹⁷⁸ *Id.* at 1432 n.5.