ALM | LAW.COM

New York Law Journal

WHITE-COLLAR CRIME

# Supreme Court To Decide Scope of Key Federal Corruption Statute

February 29, 2024

By **Elkan Abramowitz**

And **Jonathan S. Sack**

Section 666 of Title 18 has become one of the most important legal tools used in the federal prosecution of state and local corruption. The law applies broadly to public and private organizations funded by the federal government and makes it a crime to "corruptly solicit[ ][,] demand[ ][,]…or accept[ ]…anything of value" with the "inten[t] to be influenced or rewarded in connection with" an organization's activities. 18 U.S.C. §666(a)(1)(B).

Public corruption is a perennial focus of prosecutors, so the reach of Section 666 is of importance. The new Whistleblower Pilot Program of the U.S. Attorney's Office for the Southern District, for instance, expressly seeks to help the office "bring[ ] complex public corruption cases," among others.

Section 666 will soon be taken up by the U.S. Supreme Court. In *United States v. Snyder*, 71 F.4th 555 (7th Cir. 2023), *cert. granted*, 2023 WL 8605740 (Dec. 13, 2023), the Supreme Court will decide whether the law criminalizes "gratuities," and not simply "bribes," given to state and local officials. Section 666 does not use the terms "bribe" or "gratuity." It refers to giving or receiving "anything of value" with the "inten[t] to be influenced or rewarded." The law has been understood to apply to bribes—when a state or local official accepts or agrees to accept something of value in return for favorable action in the future (a *quid pro quo* agreement).

The issue lies in whether Section 666 applies when something of value is given (or agreed upon) *after* a favorable action has been taken by the state or local official—*i.e.*, a gratuity is given.

Application of Section 666 to gratuities has led to a split in the circuits. Five circuits, including the U.S. Court of Appeals for the Second Circuit, have construed the statute to apply to an official

ELKAN ABRAMOWITZ *and* JONATHAN SACK *are members of Morvillo Abramowitz Grand Iason & Anello. Mr. Abramowitz is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York. Mr. Sack is a former chief of the criminal division in the U.S. Attorney's Office for the Eastern District of New York.* EMILY SMIT, *an associate at the firm, assisted in the preparation of this column.*

who is "influenced or rewarded" after official action (a gratuity), without evidence of a quid pro quo agreement to take future action.

Two circuits, the U.S. Courts of Appeals for the First and Fifth Circuits, have read the statute to apply to an official only if evidence of a quid pro quo agreement existed before the action took place (a bribe).

In this article, we begin with a discussion of another important federal anti-corruption statute, 18 U.S.C. §201, which provides context in which to view the language of Section 666. We then describe the competing interpretations of Section 666 and conclude with comments on the implications of a Supreme Court decision in *United States v. Snyder*.

**Statutory Background**

Section 201 of Title 18 criminalizes the corrupt payment or receipt of things of value in connection with official acts of federal government officials. The law prohibits bribes and gratuities in separate subsections.

Subsection (b) criminalizes "corruptly giv[ing]" or "receiv[ing]…anything of value" to or by a "public official…with intent to influence" an official act, which the Supreme Court has construed as a "bribery provision" for which "there must be a quid pro quo."

Subsection (c), in contrast, criminalizes "giv[ing], offer[ing], or promis[ing] anything of value" to a "public official…for or because of" an official act—a "gratuity provision" for which proof of a quid pro quo is not required. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999).

Section 666 of Title 18 became law in 1984 during the pendency of a case in which the Supreme Court was expected to resolve whether Section 201 applied to local and state as well as federal officials. *Dixson v. United States*, 465 U.S. 482 (1984) (holding that employees of nonprofit which administered federal funds were public officials under Section 201). A Senate Report said the purpose of Section 666 was to "vindicate significant acts of theft, fraud, and bribery involving federal monies which are disbursed to private organizations or state and local governments pursuant to a federal program." S. Rep. No. 98-225, at 369 (1984).

Congress amended the law in 1986. The reference in the text to payments "for or because of" official action was changed to payments to "influence or reward" official action.

Under Section 666, "[a]gents" of certain organizations, including state and local government agencies, are prohibited from "corruptly solicit[ing] or demand[ing][,]…or accept[ing]… anything of value…intending to be influenced or rewarded in connection with" an organization's activities "involving anything of value of $5,000 or more," 18 U.S.C. §666(a)(1); and persons are prohibited from "corruptly giv[ing], offer[ing], or agree[ing] to give anything of value…with intent to influence or reward an agent" of a covered entity. 18 U.S.C. §666(a)(2). The law applies to organizations that receive $10,000 or more in federal funding in a given year.

Courts have construed Section 666 broadly. For example, in *Salinas v. United States*, 522 U.S. 52, 55 (1997), the Supreme Court held that Section 666(a)(1)(B)'s "expansive, unqualified language, both as to bribes forbidden and the entities covered" does not require proof that a bribe had an effect on federal funds. Expansive interpretations of Section 666 have

led prosecutors and lower courts to apply the law to gratuities.

**Majority View**

Five circuits have interpreted section 666(a)(1)(b) to reach gratuities. These courts have reasoned that Section 666 does not contain a requirement for the government to demonstrate a quid pro quo agreement to sustain a conviction. *See, e.g., United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009) ("[W]hile a '*quid pro quo* of money for a specific…act is sufficient to violate the statute,' it is 'not necessary.'").

The Second Circuit, which has long recognized Section 666's applicability to gratuities, has largely relied on a textual analysis of Section 666 to reach that conclusion. *United States v. Ganim*, 510 F.3d 134, 150 (2d Cir. 2007); *see also United States v. Crozier*, 987 F.2d 893 (2d Cir. 1993) (Section 666 "like §201 (which it was enacted to supplement), should be construed to include gratuities as well.").

The reasoning of the U.S. Court of Appeals for the Seventh Circuit in *United States v. Snyder,* 71 F.4th 555 (7th Cir. 2023), now before the Supreme Court, is illustrative. The former Mayor of Portage, Indiana, James Snyder, was prosecuted and convicted for accepting $13,000 from a truck dealer after the city awarded the company two contracts to purchase garbage trucks. Snyder was not alleged to have engaged (prior to the award) in a quid pro quo agreement with the company, but rather the government alleged he was given a reward for his influence over the bidding process.

The district court denied Snyder's motion to dismiss the indictment and his proposed jury instructions, which would have required a finding of a quid pro quo.

The Seventh Circuit affirmed Snyder's conviction. The court emphasized inclusion of the word "rewarded" in Section 666. In the court's view, "rewarded" is broad enough to encompass gratuities as well as bribes, as supported by the Supreme Court's definition of an illegal gratuity in Section 201(c) in *Sun-Diamond* as "a *reward*… for a past act that [a public official] has already taken." 526 U.S. at 405 (emphasis added.) In addition, "rewarded" is not found in Section 201(b) (the federal bribery provision), which has been held to require proof of some prior agreement to take or refrain from particular actions.

The court found that, if Section 666 did not apply to gratuities, an unjustified disparity would exist between gratuities paid to federal officials (criminalized by Section 201(c)) and gratuities paid to state and local officials.

**Minority View**

Two circuits, the First and Fifth, have also looked to the text of Section 666 and its relationship with Section 201, but reached a different conclusion. These courts have relied on Section 666's use of the words "corruptly" and "influence" to require a prospective agreement to act improperly, and on the text's similarity to that of Section 201(b) (the bribery provision). The Fifth Circuit has also relied on federalism and due process concerns. *See United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022).

The U.S. Court of Appeals for the Fourth Circuit has expressed skepticism that Section 666 covers gratuities but has not decided the question. *See United States v. Lindberg*, 39 F.4th 151, 171 n.17 (4th Cir. 2022).

In *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013), the First Circuit reversed the convictions of a state legislator and businessman because the

jury instructions permitted the jury to find them guilty on a gratuity theory. The court began its analysis by explaining that Congress amended Section 666 in 1986 to conform its language to that of Section 201(b), which requires a quid pro quo. That amendment replaced Section 666's "for or because of" language (found in Section 201's "gratuity provision" (subsection (c)) with the words "intending to be influenced or rewarded"—language similar to that found in Section 201's "bribery provision" (subsection (b)). Next, the court noted that Congress added the word "corruptly" to section 666, which appears in Section 201(b) but not in Section 201(c).

The court analyzed Section 666's reference to an intent to "reward" or "be rewarded" in connection with an organization's activities—words that other courts have relied upon to find Section 666 extends to gratuities. In the court's view, the use of "reward" and "be rewarded" "merely clarifies 'that a bribe can be promised before, but paid after, the official's action on the payor's behalf'" (quoting *United States v. Jennings*, 160 F.3d 1006, 1015 n.3 (4th Cir. 1998)).

The First Circuit also relied on the "dramatic discrepancy" in penalties between Section 666 and Section 201's gratuity provision (subsection (c)): up to 10 years under Section 666(a)(1)(B), and up to two years under Section 201(c). In the court's view, that discrepancy "makes it difficult to accept that the statutes target the same type of crime," and the unlikelihood that Congress would condense two distinct offenses in Section 201 into one subsection in Section 666.

The Seventh Circuit in *Snyder*, which reached a different conclusion, rejected the importance of this difference in the statutory maximum penalties. In its view, the difference could reasonably be explained by Section 666's requirement that the reward be "corruptly" paid or accepted.

In *Hamilton*, 46 F.4th at 398 n.3, the Fifth Circuit reversed the conviction of a real-estate developer who gave money to members of the Dallas City Council, accepting the First Circuit's statutory analysis and adding that, if Section 666 applied to the full range of interactions with local officials, it would create a "hoard of constitutional problems," including federalism and due process concerns like those cited by the Supreme Court in *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

To avoid such problems, the court applied the rule of lenity to resolve any doubts in favor of the defendant and a narrow statutory construction.

**Conclusion**

The breadth and flexibility of Section 666 has led one author to call it the "beast of the federal criminal arsenal," Daniel Rosenstein, "The Beast in the Federal Criminal Arsenal", 39 Cath. U.L. Rev. 673, 673 (1990)—reminiscent of Senior Judge Jed Rakoff of the U.S. District Court for the Southern District of New York's description of the mail fraud statute as a federal prosecutor's "Louisville Slugger." Section 666 has thus far been given broad interpretation by the courts. That breadth will be tested in *Snyder*.

In recent years, the Supreme Court has tended to reject expansive readings of white-collar criminal statutes, particularly the federal mail/wire fraud statutes in the context of alleged public corruption. It will be important to watch how these forces play out in *Snyder*.