Taming The Beast: Why Courts Should Not Interpret 18 U.S.C. § 666 To Criminalize Gratuities

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ABSTRACT

In light of the vast amount of funding the U.S. Government provides for federal programs and its desire to abate corruption, Congress enacted 18 U.S.C. § 666 to protect federal funds from being used to further illegal activity. Section 666 was enacted to supplement the provisions of the federal bribery statute, 18 U.S.C. § 201, and enable federal prosecutors to combat the misuse of federal funds, even at the state and local level. While § 201 specifically prohibits both bribes and gratuities, § 666 does not explicitly prohibit gratuities in addition to bribes.

For many years, the federal courts of appeals consistently held that § 666 criminalizes both bribes and gratuities. In the summer of 2013, however, the First Circuit broke ranks and became the first federal appellate court to exclude gratuities from the reach of § 666. The First Circuit found that the plain language of the statute, as well as the legislative history, indicate that Congress did not intend for § 666 to criminalize gratuities as well as bribes. Furthermore, the First Circuit noted, the maximum penalty imposed under § 666 and public policy concerns also weigh in favor of limiting § 666's proscription only to bribes.

This Comment first discusses the history of § 666, and its predecessor, § 201, including U.S. Supreme Court interpretations of each statute. This Comment then examines the split in the federal courts over whether § 666 criminalizes gratuities as well as bribes and analyzes the advantages and disadvantages of each approach. Finally, this Comment advocates Congressional intervention to clarify the scope of § 666 in accordance with the First Circuit's interpretation that § 666 prohibits only bribes, not gratuities.

Table of Contents

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I. INTRODUCTION

Headlines exposing high-profile public corruption are far from scarce in this country. One example is the recent trial and conviction of former New Orleans Mayor Ray Nagin. Despite coming into office as a reformer pledging to crack down on public corruption, Nagin was convicted in early 2014 of accepting hundreds of thousands of dollars in bribes and other favors from businesses hoping to curry favor with his

administration.[1] Nagin was sentenced to ten years in federal prison after being found guilty of twenty counts of bribery, wire fraud, conspiracy, money laundering, and tax evasion, some of which occurred during the city's post-Hurricane Katrina recovery.[2]

Bribery is not a new phenomenon, but rather a social evil that has threatened society since antiquity, so ubiquitous that it is mentioned in both Biblical Scriptures[3] and the U.S. Constitution.[4] Corruption has always been an acute concern in this country[5], and as a result, Congress has promulgated several federal statutes aimed at curtailing various forms of corruption.[6]

The federal government funds a wide range of social programs and therefore has an interest in protecting those funds from illegal activity.[7] To facilitate this purpose, courts have recently begun interpreting these corruption statutes very broadly, to the extent that federal prosecutors have set their sights on corruption at state and even local levels.[8] One such statute is 18 U.S.C. § 666.[9] Section 666 prohibits any agent from corruptly soliciting or demanding on behalf of another person or "accept[ing] or agree[ing] to accept anything of value" as a reward for an action connected to the business or activities of the agency or government, so long as the transaction is valued at $5000 or more.[10]

Congress enacted § 666 to supplement the provisions of the general bribery statute, 18 U.S.C. § 201.[11] Section 201 specifically prohibits: (1)

1. Matt Smith & Deanna Hackney, *Ex-New Orleans Mayor Ray Nagin Guilty After Courtroom "Belly Flop,"* CNN *Feb. 14, 2014, 9:38 AM), http://www.cnn.com/2014/02/12/justice/louisiana-nagin-convicted/.

2. Kathy Finn, *Former New Orleans Mayor Nagin Gets 10 Years in Corruption Case*, REUTERS (July 9, 2014, 2:23 PM), http://www.reuters.com/article/2014/07/09/us-usa-neworleans-mayor-sentence-idUSKBN0FE1RD20140709.

3. *Deuteronomy* 16:19; *Proverbs* 15:27.

4. U.S. CONST. art. II, § 4.

5. JOHN T. NOONAN, JR., BRIBES 430 (1984) (discussing the Framers' concerns about corruption at the Constitutional Convention).

6. *See, e.g.*, 18 U.S.C. § 1951 (2012) (Hobbs Act); 18 U.S.C. § 1341 (2012) (mail fraud); 18 U.S.C. § 1343 (2012) (wire fraud); 18 U.S.C. § 1346 (2012) (honest services fraud); 18 U.S.C. § 1952 (2012) (Travel Act); 18 U.S.C. § 1961-1968 (2012) (Racketeer Influenced and Corrupt Organizations Act); 18 U.S.C. § 201 (2012) (federal official bribery and gratuity statute); 15 U.S.C. § 78dd-1 (2012) (Foreign Corrupt Practices Act); 18 U.S.C. § 666 (2012) (federal programs bribery).

7. *See* Justin Weitz, *The Devil is in the Details: 18 U.S.C. § 666 after* Skilling v. United States, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 805, 816 (2011).

8. *See* Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 699 (2000).

9. 18 U.S.C. § 666 (2012).

10. *Id.*

11. 18 U.S.C. § 201 (2012).

individuals from offering both bribes and gratuities to federal officials and (2) federal officials from accepting such offers.[12] Section 666, however, does not clearly distinguish between a bribe and a gratuity.[13] Currently, the U.S. Circuit Courts of Appeals are split on the question of whether § 666 criminalizes gratuities as well as bribes.[14]

The Second, Seventh, and Eighth Circuits have addressed the issue directly, all holding that, similar to § 201, § 666 criminalizes both bribes and gratuities.[15] In 2013, however, the First Circuit expressly disagreed with the majority approach and held that § 666 criminalizes only bribes and does not extend to gratuities.[16]

This Comment will provide an in-depth analysis of the circuit split regarding the proper scope of § 666 and argue that courts should decline to interpret § 666 to include gratuities, in accordance with the First Circuit's recent decision. Part II will discuss the history of the statute, U.S. Supreme Court precedent that influenced lower court interpretations of § 666, and the current split between U.S. Circuit Courts of Appeals regarding the proper interpretation of § 666.[17] Part III will discuss the reasons why the First Circuit's interpretation is superior and will propose that Congress or the U.S. Supreme Court should explicitly limit the scope of § 666 to cover only bribes and not gratuities.[18]

II. BACKGROUND

A. 18 U.S.C. § 201: The General Federal Bribery Statute

In 1962, Congress made bribery a statutory offense by enacting 18 U.S.C. § 201, titled Bribery of Public Officials and Witnesses.[19] Section 201 makes it a crime for any person to "directly or indirectly, corruptly give[], offer[], or promise[] anything of value to any public official . . . with intent to influence any official act[,]"[20] and for any public official to

12. *Id.*
13. 18 U.S.C. § 666.
14. *Compare* United States v. Crozier, 987 F.2d 893, 899 (2d Cir. 1993), United States v. Boender, 649 F.3d 650, 655 (7th Cir. 2011), *and* United States v. Zimmerman, 509 F.3d 920, 927 (8th Cir. 2007), *with* United States v. Fernandez, 722 F.3d 1, 2 (1st Cir. 2013).
15. United States v. Bonito, 57 F.3d 167, 171 (2d Cir. 1995); United States v. Crozier, 987 F.2d 893, 899 (2d Cir. 1993); United States v. Agostino, 132 F.3d 1183, 1190 (7th Cir. 1997); United States v. Zimmerman, 509 F.3d 920, 927 (8th Cir. 2007).
16. United States v. Fernandez, 722 F.3d 1, 26 (1st Cir. 2013).
17. *See infra* notes 19–184 and accompanying text.
18. *See infra* notes 185–246 and accompanying text.
19. Steven M. Levin, *Illegal Gratuities in American Politics: Learning Lessons from the* Sun-Diamond *Case*, 33 LOY. L.A. L. REV. 1813, 1819 (2000).
20. 18 U.S.C. § 201(b)(1) (2012).

"demand[], seek[], receive[], accept[], or agree[] to accept anything of value . . . in return for being influenced in the performance of any official act."[21] In addition to criminalizing bribery, § 201 specifically makes it illegal to give or receive an illegal gratuity.[22] Payment of an illegal gratuity occurs when an individual gives something of value to a public official either to "tip" the official for an action previously performed or to influence an official as to an action the official has already resolved to take.[23]

While bribes and illegal gratuities seem quite similar, they are in fact two different crimes.[24] Both bribes and illegal gratuities require: (1) something of value (2) that accrues to a public official, (3) an official act, and (4) a relationship between the thing of value and the official act.[25] The key distinction between bribery and illegal gratuities, however, is that illegal gratuities do not require a corrupt intent, as is required for a bribery conviction.[26] That is, bribery requires that the defendant intend

21. *Id.* § 201(b)(2).

22. *Id.* § 201(c).

23. *See* Suzette Richards & Robert Warren Topp, *Federal Criminal Conflict of Interest*, 36 AM. CRIM. L. REV. 629, 631 (1999).

24. Levin, *supra* note 19, at 1820.

25. 18 U.S.C. § 201; *see also* Levin, *supra* note 19, at 1820; Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 797 (1985).

26. 18 U.S.C. § 201; *see also* United States v. Bustamante, 45 F.3d 933, 940 (5th Cir. 1995) (discussing the distinction between bribery and illegal gratuities); United States v. Mariano, 983 F.2d 1150, 1159 (1st Cir. 1993) (same); Richards & Topp, *supra* note 23, at 631. Section 201 defines bribery and acceptance of a bribe, respectively, in subsections (b) and (c):

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . or offers or promises any public official . . . to give anything of value to any other person or entity, with intent --
> (1) to influence any official act; or
> (2) to influence such public official . . . to commit . . . any fraud . . . on the United States; or
> (3) to induce such public official . . . to do or omit to do any act in violation of his lawful duty, or
> (c) Whoever, being a public official . . . directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
> (1) being influenced in his performance of any official act; or
> (2) being influenced to commit . . . any fraud on the United States; or
> (3) being induced to do or omit to do any act in violation of his official duty

Section 201 defines gratuities, on the other hand, as:

> (f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . ; or

to receive a benefit in exchange for the payment.[27] A conviction for the lesser included offense of illegal gratuities, however, requires only that the defendant gave the gratuity *because of* some official act; not that the defendant intended for the official to take that particular action.[28] For example, suppose Arthur is the head of a trade association comprised of the nation's largest milk producers. Carl is a legislator who has voted against several bills that would have negatively affected the interests of Arthur's trade association. Because of his appreciation for Carl's commitment to opposing legislation that is unfavorable to the trade association, Arthur decides to contribute to Carl's campaign. In this scenario, Arthur has violated the gratuities provision but is not guilty of a bribery offense. If, however, Arthur promised to give Carl something of value in exchange for Carl's vote against the unfavorable legislation, Arthur would be guilty of bribery.

From its creation, § 201 proved inadequate to combat the bribery of and illegal gratuities to federal officials.[29] One reason for this inadequacy is the language of the statute itself.[30] Section 201 requires that the individual receiving the bribe or gratuity be a "public official" and defines that term as an individual "acting for or on behalf of the United States."[31] Correspondingly, judicial interpretations of § 201 severely limited the scope of the statute by finding that it did not apply in situations where individuals bribed officials who fall outside the statute's definition of "public official," even if such officials were in charge of

> (g) Whoever, being a public official . . . otherwise than as provided by law for the proper discharge of official duty, directly or asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him[.]

18 U.S.C. § 201.

27. United States v. Muldoon, 931 F.2d 282, 287 (4th Cir. 1991).

28. *Id.* at 287.

29. Daniel N. Rosenstein, Note, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673, 675 (1990) (discussing federal courts of appeals decisions that demonstrated "substantial loopholes" in the application of § 201's "public official" requirement).

30. *Id.* Similarly, the federal theft statute, 18 U.S.C. § 641 (2012), was unsatisfactory for prosecuting theft of property belonging to the United States, principally due to the language of the statute. *Id.* For example, the prosecution found it very difficult to prove that the property belonged to the United States; state and local law enforcement were lax in prosecuting thefts that primarily injured the federal government; and judicial interpretations limited the scope of § 641. *Id.; see, e.g.*, United States v. Fleetwood, 489 F. Supp. 129, 132 (D. Or. 1980) (acquitting defendant of a § 641 violation because the court found that the savings bonds stolen and concealed by the defendant were not property of the United States); United States v. Largo, 775, F.2d 1099, 1101 (10th Cir. 1985); United States v. Smith, 659 F. Supp. 833, 835 (S.D. Miss. 1987).

31. 18 U.S.C. § 201(a)(1) (2012).

federal monies.[32] Further such judicial interpretations of § 201 created a significant loophole in the bribery statute that Congress sought to close by enacting § 666.[33]

B. Overview of 18 U.S.C. § 666

1. Plain Language of § 666

Section 666 has been called "the beast in the federal criminal arsenal"[34] because its vague language has generated many unanswered questions regarding its scope and applicability.[35] Enacted as part of the Comprehensive Crime Control Act of 1984[36] and captioned "[t]heft or bribery concerning programs receiving Federal funds," § 666 prohibits any agent of an organization, government, or agency from "corruptly solicit[ing] . . . demand[ing] . . . or accept[ing] or agree[ing] to accept, anything of value from any person, intending to be influenced or rewarded" in connection with a transaction involving a minimum of $5000.[37]

32. Rosenstein, *supra* note 29, at 680 n.58. When enacting § 666, Congress specifically mentioned three cases addressing the definition of "public official" that it intended the statute to address. S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511; *see* United States v. Del Toro, 513 F.2d 656, 663 (2d Cir. 1975) (concluding that § 201 is applicable only if the defendant bribed a "public official" and holding that an employee of New York City was not a "public official" for purposes of the statute); United States v. Mosley, 659 F.2d 812, 814 (1981) (finding that the defendant employee of the State of Illinois Bureau of Employment Security was acting on behalf of the United States because the defendant had significant discretion in administering federal funds); United States v. Hinton, 683 F.2d 195, 197-200 (7th Cir. 1982) (stating that defendants' convictions were dependent on their classification as federal employees), *aff'd sub nom.* Dixson v. United States, 465 U.S. 482 (1984); *see also* United States v. Loschaivo, 531 F.2d 659, 661 (2d Cir. 1976) (noting that in determining whether an individual is a public official within the meaning of the statute, "it is not the aspects of the particular project which are of the greatest significance, but the character and attributes of his employment relationship, if any, with the federal government").

33. Rosenstein, *supra* note 29, at 684–85.

34. *Id.* at 673.

35. *Id.* at 700; *see also* Mark S. Gaioni, *Federal Anticorruption Law in the State and Local Context: Defining the Scope of 18 U.S.C. § 666*, 46 COLUM. J.L. & SOC. PROBS. 207, 212 (2012).

36. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

37. 18 U.S.C. § 666 (2012). Section 666 reads in pertinent part:

> **(a)** Whoever, if the circumstance described in subsection (b) of this section exists--
>
> **(1)** being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

Since its enactment, Congress has amended § 666 only three times, with the 1986 amendment being most relevant to this Comment.[38] The original language of § 666 paralleled the language in § 201's gratuity provision, making it illegal to solicit, demand, accept, or agree to accept something of value "for or because of the recipient's conduct in any transaction" involving $5000 or more.[39] The 1986 amendment made two alterations to the original language.[40] First, Congress replaced the "for or because of" language in § 666(a)(1)(B) and § 666(a)(2) with "intending to be influenced or rewarded" and "with intent to influence or reward," respectively.[41] Congress's decision to remove the language in § 666 that mirrored the gratuity provision of § 201 perhaps indicates that Congress did not consider § 666 to prohibit gratuities.[42] Second, Congress added the word "corruptly" to the beginning of the two provisions.[43] The addition of the word "corruptly" before "with intent to influence or reward" in § 666 makes that provision nearly identical to the language of § 201's bribery provision, which features the phrase "corruptly . . . with intent to influence."[44] Congress could reasonably have intended this amendment to clarify that § 666 applies to bribery only and does not

> **(A)** embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--
> **(i)** is valued at $ 5,000 or more, and
> **(ii)** is owned by, or is under the care, custody, or control of such organization, government, or agency; or
> **(B)** corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $ 5,000 or more; or
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $ 5,000 or more shall be fined under this title, imprisoned not more than 10 years, or both.

Id.

38. Congress amended § 666 in 1986 (P.L. 99-646, § 59(a), 100 Stat. 3612), 1990 (P.L. 101-647, Title XII, §§ 1205(d), 1208, 104 Stat. 4831, 4832) and 1994 (P.L. 103-322, Title XXXIII, § 330003(c), 108 Stat. 2140).

39. Pub. L. No. 98-473, 98 Stat. 1837, 2143 (1984); *see also* Gaioni, *supra* note 35, at 214.

40. *See* Pub. L. No. 99-646, § 59(a), 100 Stat. 3612; United States v. Jennings, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998).

41. Pub. L. No. 99-646, § 59(a), 100 Stat. 3612.

42. *See* United States v. Jennings, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998).

43. *Id.*

44. *Id.*

incorporate the gratuities provision of § 201.[45] For a better view of what Congress intended to achieve by enacting § 666, it is appropriate to examine the statute's legislative history.

2. Legislative History and Congressional Intent

While the legislative history of § 666 is rather limited, the Senate Reports reveal that Congress intended to close some of the gaps left open by prior corruption statutes.[46] Congress "designed [§ 666] to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program."[47] The Sixth Circuit recognized this purpose in *United States v. Valentine*,[48] stating that "Congress intended to expand the federal government's prosecutorial power to encompass significant misapplication of federal funds at a local level."[49]

Prior to the enactment of § 666, the only weapons the government possessed to combat theft of government property and bribery of public officials were two statutes that did not sufficiently confront the problem, namely, 18 U.S.C. § 641 and 18 U.S.C. § 201.[50] Unlike 18 U.S.C. § 641,[51] which requires the Government to prove that stolen property belongs to the United States,[52] § 666's theft provision requires only a relationship between the government and the entity from which the property was stolen.[53] In the bribery context, § 201 requires a direct link

45. *Id.*

46. S. Rep. No. 98-225, at 369 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11 (Senate Committee on the Judiciary).

47. S. Rep. No. 98-225, at 369 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11 (Senate Committee on the Judiciary); *see also* Weitz, *supra* note 7, at 817; George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 Notre Dame L. Rev. 247, 277 (1998) [hereinafter Brown, *Stealth Statute*].

48. United States v. Valentine, 63 F.3d 459, 463 (6th Cir. 1995).

49. *Id; see also* United States v. Smith, 659 F. Supp. 833, 835 (S.D. Miss. 1987) (holding that a bribe in violation of § 666 did not require proof that the bribe was paid with federal funds; the congressional intent behind the statute aimed to make it easier for prosecutors to secure a conviction by eliminating the need to trace the bribe to federal funds); United States v. Westmoreland, 841 F.2d 572, 577 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 62 (1988) (same).

50. 18 U.S.C. § 641 (2012) (theft); 18 U.S.C. § 201 (2012) (bribery). For a discussion of the limitations of these two statutes that Congress sought to remedy by enacting § 666, see sources cited *supra* notes 30, 32.

51. 18 U.S.C. § 641 (2012).

52. *Id.* § 641.

53. *Id.* §§ 666(a)(1)(A), (b)*; see also* Paul Salvatoriello, *The Practical Necessity of Federal Intervention Versus the Ideal of Federalism: An Expansive View of Section 666 in the Prosecution of State and Local Corruption*, 89 GEO. L.J. 2393, 2397 (2001).

between the individual giving or receiving the bribe and the federal government.[54] Section 666, on the other hand, requires only that the individual giving or receiving the bribe be directly linked to an entity that receives federal funding.[55] Thus, by enacting § 666, Congress closed the gaps in the anti-corruption framework and enabled federal prosecutors to reach state and local corruption involving federal funds.[56]

To further contextualize the enactment of § 666, it is important to note that Congress was also concerned about a pending U.S. Supreme Court case[57] regarding whether § 201 applied to state and local officials.[58] Before the Court issued its decision, however, Congress decided to clarify that the federal bribery laws applied to bribes of state and local officials by enacting § 666.[59] This preemptive action supports the notion that Congress seriously intended to expand the federal Government's ability to prosecute more instances of bribery involving federal funds; § 666 became the preferred vehicle for achieving that objective.[60] Despite this clear goal, it is unclear whether Congress intended the statute to address gratuities as well.

C. Supreme Court Interpretations of § 666

Although the U.S. Supreme Court has not directly addressed the issue of whether § 666 criminalizes both bribes and gratuities, the Court has previously interpreted § 666 and § 201 in three important cases. Although these prior interpretations do not provide clear guidance to the lower courts on whether § 666 proscribes gratuities as well as bribes, a brief examination of these cases sheds light on how the U.S. Supreme Court has previously analyzed the language of the two bribery statutes and offers a foundation upon which to consider how the Court may interpret § 666 in the future.

54. 18 U.S.C. § 201(a)(1).

55. Brown, *Stealth Statute*, *supra* note 47, at 689.

56. *See* Salvatoriello, *supra* note 53, at 2397; *see also* Brown, *Stealth Statute*, *supra* note 47, at 673-74.

57. Dixson v. United States, 465 U.S. 482 (1984). When this case was decided, the Court defined "public official" under § 201 as an individual "responsible for carrying out tasks delegated by a federal agency and [is] subject to substantial federal supervision". *Id.* at 498.

58. S. Rep. No. 98-225, 370, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511.

59. Weitz, *supra* note 7, at 816; Salinas v. United States, 522 U.S. 52, 58 (1997) (outlining the legislative purpose behind § 666 in advance of the U.S. Supreme Court's *Dixson* ruling).

60. Rosenstein, *supra* note 29, at 688.

1. *Salinas v. United States*[61]

The U.S. Supreme Court first interpreted § 666 in *Salinas v. United States*, where the Court unanimously held that the plain language of § 666 should control its interpretation.[62] Salinas was a deputy of Sheriff Brigido Marmolejo of Hidalgo County, Texas.[63] The Hidago County Prison had an agreement with the federal government whereby the county would house federal prisoners in exchange for federal grants to the county and a per diem allowance for each federal prisoner.[64] One of the federal prisoners housed at the county prison was Homero Beltran-Aguirre.[65] During his incarceration, Beltran-Aguirre paid Marmolejo several thousand dollars each month in exchange for the special privilege of "contact visits" with his wife and occasionally with his girlfriend.[66] If Marmolejo was not available, Salinas would arrange the visits, in exchange for which Salinas received two watches and a pickup truck.[67] Salinas was convicted of two counts of bribery under § 666(a)(1)(B).[68] The Fifth Circuit affirmed the conviction and the U.S. Supreme Court granted certiorari on the issue of whether 18 U.S.C. § 666(a)(1)(B) required the Government to prove federal funds were involved in the bribery transaction.[69]

Salinas argued that a conviction under § 666(a)(1)(B) required the Government to prove that the bribe in question affected federal funds.[70] The U.S. Supreme Court upheld Salinas's conviction, however, on the grounds that the plain language of the statute does not support such a narrow construction as that advocated by Salinas.[71] The Court evaluated each prong of the statute, noting its "expansive, unqualified language[,]" which includes the word "any" in front of the business or transaction clause[72] and uses the phrase "anything of value" to define what

61. Salinas v. United States, 522 U.S. 52 (1997).
62. *Id.* at 56-57.
63. *Id.* at 54.
64. *Id.*
65. *Id.* at 55.
66. *Salinas*, 522 U.S. at 55.
67. *Id*.
68. *Id.* Marmolejo was indicted and tried along with Salinas, but this case deals only with Salinas's conviction. *Id.*
69. *Id.* at 56–57.
70. *Id.* at 55–56.
71. *Salinas*, 522 U.S. at 61.
72. Section 666 is violated when a person "corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more . . ." 18 U.S.C. § 666 (2012).

constitutes a bribe.[73] The breadth of this language, the Court reasoned, indicates that Congress intended that the statute be construed broadly to reach a wide variety of activities that could affect federal program funds.[74]

The Court also examined the statutory framework of federal bribery legislation that existed prior to the enactment of § 666.[75] The Court reasoned that the broad language of the statute indicates a scope that encompasses more than transactions relating to federal funds, particularly in light of the underlying purpose of § 666, which was to expand the reach of federal bribery statutes to prosecute misuse of federal funds even at the local level.[76]

In its analysis, the Court further stated that it need not consider whether "some other kind of connection" between the bribe and federal funds is required. The Court held only that the Government does not have to prove "any particular influence on federal funds."[77] The Court justified its holding by stating that the facts of the case placed it clearly within the requirements of § 666, regardless of the exact connection that § 666 may require.[78] Nevertheless, the Court's statement suggests that the justices did not believe the statute required a direct connection between a bribe and federal funds.[79] The Court confronted that question seven years later in *Sabri v. United States*.[80]

73. *Salinas*, 522 U.S. at 56–57.

74. *Id.* at 58. The *Salinas* decision began a trend of expansive readings of § 666. *See* George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U. L. REV. 403, 420 (2005) [hereinafter Brown, *Carte Blanche*]. Some commentators blame this decision for the ascendance of § 666 as a powerful tool in the hands of federal prosecutors to prosecute state and local crime, overstepping the bounds of federalism. *See generally* Richard W. Garnett & John P. Elwood, *Section 666, The Spending Power and Federalization of Criminal Law*, THE CHAMPION, May 25, 2001, at 26 (discussing the use of the Spending Power to avoid the constitutional issues that would otherwise prohibit federal control over local affairs); Beale, *supra* note 8, at 699-700 (2000) (examining the ways in which federal prosecutors began to use existing federal laws to prosecute corruption at the state and local levels); Brown, *Carte Blanche*, *supra* at 409 (discussing the broad construction of § 666 in *Salinas* and *Sabri* and arguing that § 666 may be the "long-sought general [anti-corruption] statute").

75. *Salinas*, 522 U.S. at 58.

76. *Id.* at 58-59. The Court seemed particularly concerned with the Second Circuit Court of Appeals' decision in United States v. Del Toro, 513 F.2d 656 (1975). For further information regarding the Congressional intent in enacting § 666, see *supra* text accompanying notes 47–49.

77. *Salinas*, 522 U.S. at 61.

78. *Id.* at 59.

79. Gary Lawson, *Making a Federal Case Out of It:* Sabri v. United States *and the Constitution of the Leviathan*, 2004 CATO SUP. CT. REV. 119, 126 n.33 (2004).

80. Sabri v. United States, 541 U.S. 600 (2004).

2. *Sabri v. United States*

In *Sabri v. United States*, the U.S. Supreme Court addressed whether the enactment of 18 U.S.C. § 666 constituted a valid exercise of congressional authority.[81] Basim Sabri was a real estate developer who proposed a commercial development project in Minneapolis.[82] Concerned about his ability to obtain the proper regulatory approvals, the land necessary for his project, and the financing to support it, Sabri allegedly offered three separate bribes to a city councilman.[83] The Government subsequently charged him with bribery of federal funds under 18 U.S.C. § 666.[84] In the district court, Sabri challenged his indictment on the grounds that the statute was facially invalid because it includes no requirement that there be a connection between the federal funds and the bribe.[85] The district court agreed with Sabri, but the Eighth Circuit reversed and held that the statute was constitutional under the Necessary and Proper Clause[86] of the U.S. Constitution.[87] The U.S. Supreme Court granted certiorari to resolve a circuit split over whether 18 U.S.C. § 666 required a nexus between federal funds and a bribe.[88]

The Court affirmed the Eighth Circuit's conclusion, unanimously holding that Congress unmistakably acted within its authority when it enacted § 666.[89] The Court reasoned that the combination of the Spending Power[90] and the Necessary and Proper Clause empowers Congress to ensure that federal funds are used for the general welfare of the country rather than funneled away to benefit corrupt individuals.[91] The Court justified its holding on the grounds that "money is fungible,"

81. *Id.* at 602. The Necessary and Proper Clause gives Congress the authority "to make all Laws which shall be necessary and proper for carrying into execution" the powers granted to the federal government by the Constitution. U.S. CONST. art. 1, § 8, cl.18; *see also* McCulloch v. Maryland, 17 U.S. 316, 321 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). In *Sabri*, the Court found that § 666(a)(2) was a necessary means for executing Congress's spending power because the federal government has an interest in policing the funds it disburses for federal programs. *Sabri*, 541 U.S. at 605.

82. *Sabri*, 541 U.S. at 602.

83. *Id.* at 602-03.

84. *Id.* at 602–03.

85. *Id.* at 603–04.

86. U.S. CONST. art. 1 § 8, cl. 18.

87. *Sabri*, 541 U.S. at 604.

88. *Id.*

89. *Id.*

90. U.S. Const. art. 1 § 8, cl. 1.

91. *Sabri*, 541 U.S. at 605.

and, as a result, a direct nexus between the federal money and the corrupt act cannot always be proven.[92] Nonetheless, Congress retains an interest in curtailing the misuse of federal money even in the absence of a direct nexus between the alleged bribe and federal funds.[93]

While *Sabri* holds that § 666 is facially constitutional, the opinion also includes dicta relevant to the topic of this Comment.[94] After discussing the scope of the federal interest under § 666, the Court remarked that Congress aimed § 666 at bribes that "go[] well beyond liquor and cigars."[95] One commentator has noted that the Court's language suggested "some sort of de minimis exception for small payments and gifts."[96] This view is particularly convincing given that the statute provides a threshold dollar amount that the "thing of value" must exceed to constitute a bribe.[97] The Court's denial in *Sabri* of a nexus requirement for purposes of § 666 diverges from the Court's previous holding in *United States v. Sun-Diamond Growers*,[98] which addressed the same issue in the context of § 201's gratuity provision.[99]

3. *United States v. Sun-Diamond Growers*

The final U.S. Supreme Court case that sheds light on the interpretation of the federal bribery and illegal gratuities statutes is *United States v. Sun-Diamond Growers*.[100] *Sun-Diamond* does not specifically address § 666, but rather, involves § 201's gratuity provision.[101] The question before the Court in *Sun-Diamond* was whether there must be a specific link between a gratuity given to a public official and the performance of a specific act by that official in order to sustain a conviction under § 201(c)(1)(a).[102]

Sun-Diamond Growers was an agricultural trade association that performed lobbying activities on behalf of its member cooperatives.[103] The association was charged with violating § 201(c)(1)(a) for giving Michael Espy, the U.S. Secretary of Agriculture, illegal gratuities,

92. *Id.* at 606.
93. *Id.*
94. *Id.*
95. *Id.*
96. Weitz, *supra* note 7, at 827.
97. *Id.*
98. United States v. Sun-Diamond Growers, 526 U.S. 398, 400 (1999).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Sun-Diamond*, 526 U.S. at 400–01.

including sports tickets, meals, luggage, and other gifts.[104] At the time these gifts were given, Sun-Diamond had an interest in two matters before the Secretary of Agriculture.[105] The Government argued that it needed to prove only that Sun-Diamond gave the gratuity because of Espy's position as the Secretary of Agriculture.[106] Sun-Diamond argued that the Government must prove that a nexus existed between the gratuity and a specific official act.[107] The U.S. Supreme Court held that "the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."[108] The Court concerned itself with the implications of adopting the broad standard proposed by the Government.[109] That standard, the Court explained, would permit absurd results, such as making it a criminal offense to give replica jerseys to the President after a sports team wins a championship.[110] The Court adopted what it found to be the most natural reading of the statute, noting that "when Congress has wanted to adopt such a broadly prophylactic criminal prohibition upon gift giving, it has done so in a more precise and more administrable fashion."[111] Further, the Court reasoned that due to the abundance and complexity of statutes and regulations in the anti-corruption field, a statute "that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."[112] Put differently, when a statute that is part of a greater legal framework has more than one reasonable interpretation, the statute should be interpreted narrowly and with precision. This language will perhaps guide the U.S. Supreme Court on the issue of whether § 666 should be interpreted to criminalize gratuities in addition to bribes.

The U.S. Supreme Court's decision to narrow § 201 in *Sun-Diamond* is not unique when compared to the Court's previous treatment of anti-corruption statutes. In recent years, the Court has similarly narrowed the scope of other such statutes, including the Hobbs Act[113] and

104. *Id.* at 401.
105. *Id.* at 402.
106. *Id.* at 405.
107. *Id.*
108. *Sun-Diamond*, 526 U.S. at 414.
109. *Id.* at 406.
110. *Id.* at 406–07.
111. *Id.* at 408.
112. *Id.* at 412.
113. 18 U.S.C. § 1951 (2012). *See* McCormick v. United States, 500 U.S. 257, 274 (1991) (holding that a quid pro quo is necessary for conviction under the Hobbs Act when an official receives a campaign contribution); Sekhar v. United States, 133 S.Ct. 2720, 2724 (2013) (holding that an attempt to compel a person to recommend that his

the honest services fraud provision of the federal mail and wire fraud statute.[114] These holdings may be relevant should the Court be presented with the question of whether § 666 criminalizes gratuities as well as bribes, as the Court could continue its trend of narrowly construing anticorruption statutes.

Nevertheless, the U.S. Supreme Court has yet to address this specific issue, and the absence of clear guidance has generated uncertainty in the lower courts. The Second, Seventh, and Eighth Circuits have all held that § 666 includes illegal gratuities within its scope.[115] The Fourth Circuit expressed doubts about such a conclusion, suggesting that it would interpret the statute to exclude gratuities if confronted with that precise issue in the future.[116] The First Circuit recently created a circuit split by holding that § 666 proscribes only bribes and does not cover gratuities.[117] These varying approaches and inconsistent results demonstrate the need for Congress or the U.S. Supreme Court to clarify the proper scope of § 666.

D. Circuit Split Over Whether § 666 Criminalizes Gratuities

1. Majority Approach: The Second, Seventh, and Eighth Circuits Interpret § 666 to Impose Criminal Liability for Gratuities.

In *United States v. Crozier*,[118] the Second Circuit became the first U.S. Court of Appeals to consider whether § 666 applied to gratuities as well as bribes. Crozier appealed his conviction for conspiring to bribe a public official on the grounds that § 666 cannot be violated on a gratuity theory.[119] The facts of the case are as follows: Crozier's firm secured a contract for his architectural services for a civic center in Albany County, New York.[120] Albany County Executive, James Coyne, Jr., who was heavily involved in the project, played a major role in Crozier obtaining

employer approve an investment does not qualify as "the obtaining of property from another" required for a conviction under the Hobbs Act).

114. *See* Skilling v. United States, 130 S. Ct. 2896, 2933 (2010) (narrowing the scope of § 1346—the honest services fraud statute—to include only bribes and kickbacks).

115. *See* United States v. Crozier, 987 F.2d 893, 899 (2d Cir. 1993); United States v. Bonito, 57 F.3d 167, 171 (2d Cir. 1995); United States v. Boender, 649 F.3d 650, 655 (7th Cir. 2011); United States v. Agostino, 132 F.3d 1183, 1190 (7th Cir. 1997); United States v. Zimmerman, 509 F.3d 920, 927 (8th Cir. 2007); United States v. Griffin, 154 F.3d 762, 764 (8th Cir. 1998).

116. *See* United States v. Jennings, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998).

117. United States v. Fernandez, 722 F.3d 1, 26 (1st Cir. 2013).

118. United States v. Crozier, 987 F.2d 893, 895 (2d Cir. 1993).

119. *Id.* at 895.

120. *Id.* at 896.

the contract for the civic center.[121] After the project commenced, Crozier gave Coyne a payment of $30,000, which Crozier claimed was a loan.[122] However, the purported loan entailed no loan documents, no repayment schedule, and no interest charges.[123] As a result of this transaction, Crozier was indicted for and later convicted of, among other charges, conspiracy to "corruptly [] give or agree to give anything of value to Coyne 'for or because of' Coyne's conduct in connection with transactions involving the civic center project in violation of 18 U.S.C. former § 666(c)."[124] Crozier argued that the trial court's instructions invited the jury to convict him on a gratuity theory, which was improper because § 666 prohibited only bribery.[125]

The Second Circuit, interpreting the pre-revised version of § 666, disagreed with Crozier and held that § 666, like § 201 before it, covers both bribes and gratuities.[126] The Second Circuit pointed to the broad language of the statute to justify its holding.[127] In addition, the court noted that the "for or because of" language in the then-current version of § 666 mirrored the language of § 201's gratuities provision.[128] The court wrote, "[i]t logically follows . . . that where Congress used the same language in two statutes, the second of which was enacted to supplement the first, the same meaning should be applied to both."[129]

The Second Circuit rejected the lower court's belief that the absence of the words "gift" and "gratuity" in the legislative history and title of §

121. *Id.* at 895.
122. *Id.* at 896.
123. *Crozier*, 987 F.2d at 896.
124. *Id.* It is important to note that the Second Circuit was interpreting the pre-amendment § 666, whose language stated "for or because of conduct previously performed."
125. *Id.* at 897-98. Generally, the issue of whether § 666 applies to both bribes and gratuities reaches appellate review through a defendant's challenge that the jury charge invited the jurors to convict the defendant on a gratuity theory, rather than bribery. This problem arises because, unlike § 201, § 666 does not have separate provisions under which an individual can be charged for either bribery or gratuities. *See, e.g.*, *Crozier*, 987 F.2d at 898-99 (rejecting defendant's argument that the jury charge improperly invited conviction based on either a bribery or gratuity theory, on the grounds that § 666 proscribes both bribery and gratuities); United States v. Fernandez, 722 F.3d 1, 26 (1st Cir. 2013) (finding jury instructions improper on grounds that they invited the jury to convict the defendant for gratuities rather than bribery); United States v. Jennings, 160 F.3d 1006, 1018 (4th Cir. 1998) (holding that jury instruction that failed to distinguish between a bribe and a gratuity was not plain error, after "assum[ing] (without deciding) that § 666 does not prohibit gratuities").
126. *Crozier*, 987 F.2d at 898.
127. *Id.* at 899.
128. *Id.*
129. *Id.*

666 implied that the statute covered only bribes.[130] According to the Second Circuit, the legislative history indicated that Congress intended § 666 to augment the class of individuals covered by § 201, noting that the Senate Report only mentioned § 201 in general terms, never specifying whether it meant to augment that section's bribery or gratuity provision.[131] Furthermore, the legislative history made it clear that Congress enacted § 666 in part as a response to situations involving state officials who violated the gratuity provision of § 201.[132] Although the *Crozier* court acknowledged that the maximum sentence under § 666 was closer to that of the bribery provision of § 201, suggesting that Congress intended § 666 to proscribe only bribes,[133] the court stated that Crozier's case did not implicate such concerns.[134] The court thereby held that § 666 applies to both bribery and gratuities.[135]

The Second Circuit interpreted the current version of § 666 in *United States v. Bonito*[136] and reaffirmed its prior holding that § 666 includes gratuities.[137] The *Bonito* court observed that the new language of § 666 closely resembles that of the earlier version and therefore still covers gratuities as well as bribes.[138]

The Seventh and Eighth Circuits subsequently agreed with the Second Circuit's conclusion that § 666 applies to both bribes and gratuities.[139] In *United States v. Boender,*[140] the Seventh Circuit reached

130. *Id.* at 899-900 (criticizing Judge Sweet's opinion in United States v. Jackowe, 651 F. Supp. 1035 (S.D.N.Y. 1987)).

131. *Crozier*, 987 F.2d at 899-900.

132. *Id.* at 900. *See* United States v. Mosley, 659 F.2d 812, 814 (1981) (involving a state employee in charge of administering federal funds who was convicted for receiving money in exchange for providing preferential treatment under the Comprehensive Employment and Training Programs Act). Congress explicitly mentioned *Mosley* as part of its motivation for enacting § 666. S. Rep. No. 98-225, at 369 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511.

133. *Crozier*, 987 F.2d at 900*; see also Jackowe*, 651 F. Supp. at 1036 ("[I]f § 666(c) were construed to track § 201(f) in proscribing gift-giving, the law would be faced with the uncomfortable anomaly that giving gifts to *federal* officials dispensing federal program funds is punishable by only two years, whereas giving gifts to *state* officials dispensing federal program funds is punishable by ten.").

134. *Crozier*, 987 F.2d at 900.

135. *Id.*

136. United States v. Bonito, 57 F.3d 167 (2d Cir. 1995).

137. *Id.* at 171.

138. *Id.*

139. *See* United States v. Boender, 649 F.3d 650, 655 (7th Cir. 2011); United States v. Agostino, 132 F.3d 1183, 1190 (7th Cir. 1997); United States v. Griffin, 154 F.3d 762, 764 (8th Cir. 1998); United States v. Zimmerman, 509 F.3d 920, 927 (8th Cir. 2007).

140. United States v. Boender, 649 F.3d 650 (7th Cir. 2011).

this conclusion based on the plain language of § 666 and its relationship to § 201.[141] In that case, the court stated that

> § 201(b) is complemented by § 201(c), which trades a broader reach—criminalizing any gift given "for or because of any official act performed or to be performed"—for a less severe statutory maximum of two, rather than fifteen, years' imprisonment. Section 666(a)(2) has and needs no such parallel: *by its plain text, it already covers both bribes and rewards.*[142]

The Eighth Circuit, on the other hand, engaged in a rather sparse analysis of the issue before reaching the conclusion that gratuities are within the scope of § 666.[143] In *United States v. Griffin*,[144] the Eighth Circuit briefly mentioned the fact that the Sentencing Guidelines list both the guideline addressing bribes and the guideline addressing gratuities as applicable to violations of § 666 in support of its conclusion that § 666 proscribes gratuities as well as bribes.[145] While the majority of circuit courts to address the issue have held that § 666 criminalizes both bribes and gratuities, not all courts are so convinced. Most notably, the Fourth Circuit communicated its skepticism about such a holding in *United States v. Jennings*.[146]

2. Turning the Tide? The Fourth Circuit Posits That § 666 May Not Include Gratuities.

In *United States v. Jennings*, a contractor appealed his conviction on three counts of violating § 666 for payments made to a city official who had the authority to award contracts on behalf of the city.[147] The contractor, Jennings, argued that his conviction should be overturned because § 666 prohibits only bribes, not gratuities.[148] The Fourth Circuit ultimately upheld the conviction because it found that sufficient evidence existed to prove that the payments made to the city official constituted

141. *Id.* at 654-55; s*ee also* Gaioni, *supra* note 35, at 222, 225.
142. *Boender*, 649 F.3d at 655 (emphasis added).
143. Gaioni, *supra* note 35, at 221.
144. United States v. Griffin, 154 F.3d 762 (8th Cir. 1998).
145. *Id.* at 763; U.S. SENTENCING GUIDELINES MANUAL §§ 2C1.1, 2C1.2 (2010); *see also* United States v. Zimmerman, 509 F.3d 920, 927 (8th Cir. 2007) (holding that § 666 "prohibits both the acceptance of bribes and the acceptance of gratuities intended to be a bonus for taking official action").
146. United States v. Jennings, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998) (assuming, but not deciding, that gratuities are outside the scope of § 666).
147. *Id.* at 1010.
148. *Id.*

bribes.[149] Although the court outlined some distinctions between the application of § 666 and § 201, it did not explicitly decide whether § 666 prohibits gratuities like its predecessor, § 201.[150]

Despite this holding, however, the Fourth Circuit proceeded to outline two reasons why a court, if faced squarely with the issue, could reasonably disagree with the majority approach charted by the Second, Seventh, and Eighth Circuits and interpret § 666 narrowly to find gratuities outside the scope of § 666's proscription.[151] The first reason detailed by the Fourth Circuit is that the language of § 666(a)(2) more closely resembles the language of § 201's bribery provision than it does § 201's gratuity provision.[152] The phrase "corruptly . . . with intent to influence" appears in both § 666 and § 201(b), the bribery provisions, whereas the gratuity provision of § 201 uses the "for or because of" language that Congress removed from § 666 with its 1986 amendment.[153]

According to the Fourth Circuit, a court could also find gratuities outside the scope of § 666 because the 1986 amendment of § 666 narrowed the statute to prohibit only bribes.[154] The timing and resemblance between the § 666 amendment and the amendment to the bank bribery statute, 18 U.S.C. § 215,[155] justifies this interpretation.[156] These two amendments were enacted at the same time and the language in each mirrored the other.[157] Because Congress indisputably intended the amendment to § 215 to narrow that statute, a court could reasonably conclude that Congress similarly intended the § 666 amendment to narrow § 666 to include only bribery, not gratuities.[158] Nevertheless, the Fourth Circuit avoided creating a circuit split by ruling on narrower grounds in *Jennings*.[159] It was not until the First Circuit's ruling in *United States v. Fernandez*[160] that a circuit court explicitly held that § 666 does not proscribe gratuities.[161]

149. *Id.* at 1012.
150. *Id.* at 1013-14.
151. *Jennings*, 160 F.3d at 1015 n.4.
152. *Id.*
153. *See id.*
154. *Id.*
155. 18 U.S.C. § 215 (2012).
156. *Id.*; *See Jennings*, 160 F.3d at 1015 n.4.
157. *Jennings*, 160 F.3d at 1015 n.4.
158. *Id.*
159. *Id.*
160. United States v. Fernandez, 722 F.3d 1 (1st Cir. 2013).
161. *Id.* at 2.

3. Breaking Ranks: The First Circuit Holds That § 666 Does Not Proscribe Gratuities.

The First Circuit officially created the circuit split when it overturned the convictions of Juan Bravo Fernandez ("Bravo") and Hector Martínez Maldonado ("Martínez") for violations of § 666.[162] Bravo, a businessman, purchased a trip to and hotel room in Las Vegas for Martínez, a senator for the Commonwealth of Puerto Rico.[163] Following the trip, Martínez voted in favor of a bill that would benefit Bravo's business.[164] Both Bravo and Martínez were convicted of, among other things, federal programs bribery in violation of § 666.[165] On appeal, Bravo and Martínez argued that the trial court's instructions permitted the jury to convict them on a gratuity theory rather than a bribery theory.[166] The First Circuit agreed.[167] The issue of whether § 666 applied to gratuities as well as bribes presented a question of first impression for the court.[168]

The *Fernandez* court first analyzed the text and legislative history of § 666, explaining that neither supported the conclusion that the statute prohibited gratuities.[169] The way in which the 1986 amendments altered § 666's statutory language particularly persuaded the court. The amendments made § 666 almost identical to § 201's bribery provision, which further distinguished it from the language of § 201's gratuity provision.[170] The court also focused on the ambiguity of the word "reward" in § 666, noting that § 666 makes it illegal to corruptly offer something of value with an intent to "influence or reward," while § 201 does not include the words "or reward."[171]

The court explained that there were two reasonable interpretations for the word "reward" in § 666.[172] The first interpretation rests on the difference between a bribe and a gratuity: a bribe is payment with intent to influence a future action, but a gratuity is a payment given to reward an official's past conduct.[173] Under the second possible interpretation, the words "or reward" do not create a separate gratuity offense, but could

162. *Id.*
163. *Id.* at 4-5.
164. *Id.* at 5-6.
165. *Fernandez*, 722 F.3d at 6-7.
166. *Id.* at 31-32.
167. *Id.* at 33.
168. *Id.* at 32.
169. *Id.* at 22-26.
170. *Fernandez,* 722 F.3d at 26.
171. *Id.* at 23.
172. *Id.*
173. *Id.* at 23-24.

"merely [] clarify that a bribe can be promised before, but paid after, the official's action on the payor's behalf."[174] In the face of this ambiguity, the First Circuit heeded the advice of Justice Scalia in *Sun-Diamond* to "choose the scalpel" and held that gratuities were outside the scope of § 666.[175]

Additionally, the court reasoned that § 666 applies only to bribery because the penalty for bribery under § 201 is more akin to the penalty imposed by § 666.[176] Under § 201's bribery provision, the maximum penalty is 15 years imprisonment, while a violation of § 201's gratuity provision carries a maximum penalty of two years imprisonment.[177] Section 666 imposes a maximum penalty of ten years imprisonment for *any* violation.[178] The court did not believe Congress intended to create two drastically different penalties for the same conduct, contingent upon the statute chosen to charge the defendant.[179]

The court finally considered whether Congress enacted § 666 solely to supplement § 201's bribery provision.[180] The court reasoned that bribery is a more severe offense, as evidenced by its higher maximum penalty and the increased culpability of individuals committing bribery as opposed to gratuities.[181] The Court inferred that Congress may have chosen to supplement only the bribery provision because the seriousness of that crime necessitated a more far-reaching tool in the prosecutor's arsenal.[182] Likewise, the court reasoned that Congress may have sought to avoid overcriminalization and overstepping the bounds of federalism by limiting § 666 to bribery because the federal interest is much stronger in that context.[183] Thus, after considering the statutory language, the legislative history, the possible absurd results in terms of maximum penalties imposed, and the relevant policy concerns, the First Circuit held that § 666 does not criminalize gratuities.[184] In light of the First Circuit's decision in *Fernandez*, it is essential for Congress or the U.S. Supreme Court to intervene and settle this open question of law.

174. *Id.* at 23.
175. *Fernandez*, 722 F.3d at 25.
176. *Id.* at 24-25 .
177. 18 U.S.C. § 201 (2012).
178. *Id.* § 666.
179. *Fernandez*, 722 F.3d at 24.
180. *Id.* at 25.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Fernandez*, 722 F.3d at 25-26.

III. ANALYSIS

Regardless of the outcome, each of the courts that have considered whether § 666 criminalizes both bribes and gratuities have examined and based their conclusions on the statutory language, legislative history, sentencing guidelines, and policy concerns. One commentator has noted that even the various courts that hold gratuities to be within the scope of § 666 reach that conclusion through a variety of rationales.[185] While there are some benefits to the view that § 666 criminalizes gratuities as well as bribes, the First Circuit's opposing view provides the best solution. In any event, because § 666 plays a significant role in combatting corruption—a high priority for the federal government—Congress or the U.S. Supreme Court must resolve the confusion by clarifying the scope of § 666.

A. Superiority of the First Circuit's Approach

First, the First Circuit's interpretation is more faithful to the plain language of the statute.[186] Second, the First Circuit's narrow interpretation is consistent with the congressional intent suggested in the legislative history.[187] Third, the First Circuit's reading of § 666 is congruent with the penalties imposed in the Sentencing Guidelines for bribes and gratuities and avoids the remarkable sentencing disparity inherent in the majority approach.[188] Finally, the First Circuit's interpretation is mindful of the more critical policy concerns implicated by a broad interpretation of § 666.[189] As such, the U.S. Supreme Court should adopt the First Circuit's understanding of § 666, or Congress should amend the statute to reflect the First Circuit's narrow interpretation.

1. The First Circuit's Interpretation is More Faithful to the Plain Language of § 666.

The plain language of § 666 provides one of the strongest arguments for interpreting § 666 to criminalize only bribes. According to the U.S. Supreme Court in *Sun-Diamond*, the crucial difference between bribes and gratuities involves the element of intent.[190] Likewise,

185. Gaioni, *supra* note 35, at 221.
186. *See infra* Part III.A.1.
187. *See infra* Part III.A.2.
188. *See infra* Part III.A.3.
189. *See infra* Part III.A.4.
190. United States v. Sun-Diamond Growers, 526 U.S. 398, 404-05 (1999).

the First Circuit noted the "conspicuous difference" between the language of § 201 and § 666 with regard to intent.[191] Congress introduced the current language of § 666 in the 1986 amendments.[192] Prior to those amendments, the language of § 666 mirrored that of § 201's gratuity provision.[193] Section 201(c) prohibits giving or receiving "anything of value . . . for or because of any official act,"[194] while the original language of § 666 proscribed giving or receiving "anything of value for or because of the recipient's conduct."[195] The 1986 amendments to § 666 removed the phrase "for or because of" and substituted the words "with intent to influence or reward."[196]

The First Circuit notably observed that the pre-amendment language paralleled the language of § 201's *gratuity* provision, while the post-amendment language of § 666 more closely resembled the language of § 201's *bribery* provision.[197] Thus, Congress amended the text of the statute in a way that made its language consistent with the bribery provision of § 201, while simultaneously abandoning the language that mirrored § 201's gratuity provision.[198] When the Second Circuit interpreted the pre-amended version of § 666 in *Crozier*, the court stressed that "where Congress used the same language in two statutes . . . the same meaning should be applied to both."[199] The practical application of this principle would be to interpret § 666 as a bribery-only statute. Nevertheless, the Second Circuit justifies its broad interpretation of § 666 by asserting that "the actual wording of the statute . . . allows room for a more expansive reading."[200]

Other observers argue that the similarity in language between § 201's bribery provision and § 666 does not conclusively determine the

191. United States v. Fernandez, 722 F.3d 1, 23 (1st Cir. 2013) ("[W]hile § 666 prohibits . . . corruptly offering a thing of value with intent to 'influence or reward' an agent, and prohibits an agent from corruptly soliciting or demanding a thing of value with intent to be 'influenced or rewarded' . . . § 201(b), does not include the alternative 'reward.'"). *Id.*

192. Pub. L. No. 99-646, 100 Stat. 3592 (1986).

193. 18 U.S.C. § 666 (1984), amended by Criminal Law and Procedure Technical Amendments Act of 1986 ("CLPTA"), Pub. L. No. 99-646, 100 Stat. 3592 (1986).

194. 18 U.S.C. § 201(c) (2012).

195. 18 U.S.C. § 666 (1984), amended by Criminal Law and Procedure Technical Amendments Act of 1986 ("CLPTA"), Pub. L. No. 99-646, 100 Stat. 3592 (1986).

196. *Id.*

197. United States v. Fernandez, 722 F.3d 1, 21-22 (1st Cir. 2013).

198. *Id.* at 23-24.

199. United States v. Crozier, 987 F.2d 893, 899 (2d Cir. 1993). For this reason, the Second Circuit was forced to modify its justification when it reaffirmed its view that § 666 covered both bribes and gratuities, instead explaining that the new language had substantially the same meaning. *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995).

200. *Bonito*, 57 F.3d at 172.

scope of § 666. The U.S. Supreme Court has indicated that where the statutory language is ambiguous, courts may examine the legislative history.[201] In the legislative history of § 666, the First Circuit properly found more support for its view that gratuities were outside the scope of § 666.

2. The First Circuit's Approach Reflects a More Accurate Understanding of § 666's Legislative History.

In support of its broad interpretation of § 666, the Second Circuit cited the legislative history of the statute for the proposition that § 666 was enacted in order to fill the gaps left by § 201 and enable the federal government to prosecute more individuals for illegal gratuities.[202] However, three key features of the legislative history of § 666 substantiate the First Circuit's conclusion that § 666 does not apply to gratuities. First, Congress's stated purpose for the 1986 amendments was "to avoid its possible application to acceptable commercial and business practices."[203] Congress recognized that socializing with public officials over dinner or attending sporting events together plays an important role in our society and therefore sought to protect these types of legitimate business activities from being swept up by § 666.[204]

Second, the 1986 amendments to § 666 were enacted just after the amendments to the statute criminalizing bank bribery, § 215, and paralleled the language of the § 215 amendments.[205] The amendments to § 215 altered the wording of that statute to read "whoever corruptly gives, offers, or promises anything of value to any person, with intent to influence or reward an officer . . ."[206] Similarly, the amendments to § 666 resulted in the current language of the statute covering anyone who "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent."[207] The House

201. Dixson v. United States, 465 U.S. 482, 491 (1984) ("As is often the case in matters of statutory interpretation, the language of [the statute] does not decide the dispute . . . . We must turn, therefore, to the legislative history . . . to determine whether these materials clarify which of the proposed readings is consistent with Congress's intent.").

202. *See Crozier*, 987 F.2d at 900; S. Rep. No. 98-225, at 369 (1984) reprinted in 1984 U.S.C.C.A.N. 3182, 3511.

203. H.R. Rep. No. 99-797, at 30 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6138, 6153.

204. Joseph F. Savage Jr. & Brian Kelly, *Courts Divide on Corruption Statute as 1st Circuit Limits 18 U.S.C. § 666 to Bribes*, WESTLAW JOURNAL WHITE-COLLAR CRIME, Dec. 31, 2013, at 1, *available at* 28 No. 4 Westlaw Journal White-Collar Crime 2.

205. 18 U.S.C. § 215 (2012); *see also* United States v. Jennings, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998).

206. Pub. L. No. 99-370, 100 Stat. 779 (1986).

207. 18 U.S.C. § 666 (2012).

Report relating to the § 215 amendments stresses that Congress intended the amendment "to amend the current bank bribery offense so that it more precisely defines the prohibited conduct and does not include within its prohibitions otherwise legitimate conduct."[208] Congress noted that the previous language "reache[d] all kinds of otherwise legitimate and acceptable conduct" and "would prevent financial institutions from conducting day-to-day business."[209] Thus, Congress intended for the amendments to narrow the scope of § 215.[210] The temporal relationship between the amendments to § 666 and § 215 and the nearly identical language in each statute supports the view that Congress intended, through the 1986 amendments, to clarify that § 666 applies only to bribes, not gratuities.[211] Finally, the word "gratuity" appears nowhere in the legislative history to § 666.[212] Instead, the House and Senate reports speak only of theft and bribery with respect to § 666.[213] Moreover, the title of § 666 is "Theft or bribery concerning programs receiving Federal funds."[214] In light of this legislative history, the First Circuit's narrow interpretation represents the most defensible view of the scope of § 666. For those who remain skeptical of the value of legislative history, the maximum penalty imposed under § 666 provides another compelling justification for interpreting § 666 as a bribery-only statute.

3. The Maximum Penalty for Violations of § 666 Suggests the Statute is Aimed at the More Serious Crime of Bribery Rather than Gratuities.

An examination of the relevant federal sentencing guidelines shows that the guidelines weigh in favor of the First Circuit's narrow interpretation of § 666. The maximum penalty for a violation of § 201's bribery provision is imprisonment for 15 years and/or a fine, while the maximum penalty for violation of that statute's gratuity provision is two years imprisonment and/or a fine.[215] Notably, the maximum penalty for any violation of § 666 is ten years imprisonment and/or a fine.[216]

208. H.R. REP. 99-335, at 1 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1782, 1784.
209. *Id.* at 3.
210. *See Jennings*, 160 F.3d at 1015 n.4.
211. *See* Gaioni, *supra* note 35, at 238; *see also Jennings*, 160 F.3d at 1015 n.4; United States v. Fernandez, 722 F.3d 1, 21 (1st Cir. 2013).
212. United States v. Jackowe, 651 F. Supp. 1035, 1036 (S.D.N.Y. 1987); S. Rep. No. 98-225, at 369 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11.
213. H.R. Rep. No. 99-797, at 30 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6138, 6153; S. Rep. No. 98-225, at 369 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11.
214. 18 U.S.C. § 666 (2012).
215. 18 U.S.C. § 201 (2012).
216. 18 U.S.C. § 666.

The U.S. Supreme Court has instructed that harsher penalties are justified for crimes that involve increased levels of intent.[217] In this context, the penalty attached to bribery is more severe than the penalty for gratuities because of the increased level of intent required for bribery.[218] An individual who commits bribery intends to corrupt the official.[219] Alternatively, an individual does not intend to corrupt an official when the individual rewards the official for past conduct.[220] Stated differently, bribery is more serious, and therefore warrants a greater penalty, because bribery corrupts the federal official whereas gratuities involve arguably non-corrupt conduct that merely appears improper.[221]

The First Circuit viewed the incongruity between the maximum penalties in § 201 and § 666 as a significant indicator that § 666 should only apply to bribes.[222] The majority wrote:

> This dramatic discrepancy in maximum penalties between § 666 and § 201(c) makes it difficult to accept that the statutes target the same type of crime—illegal gratuities. The difference in sentences contemplated by § 201(b) and § 666 is both less dramatic and more understandable: § 201(b) targets (primarily) federal officials, while § 666 targets non-federal officials who happen to have a connection to federal funds.[223]

The distinction in the treatment of federal and state officials under §201(b) and § 666 regarding the receipt of bribes is likely premised on the government's belief that federal officials receiving bribes are more blameworthy than their state counterparts.[224]

Finally, the court explained that in enacting § 666, Congress may have only intended to supplement the bribery provision of § 201 because bribery poses a greater threat to society.[225] As such, a comparison of the

217. Morissette v. United States, 342 U.S. 246, 264 (1952).

218. *See* Charles B. Klein, *What Exactly Is an Unlawful Gratuity After* United States v. Sun-Diamond Growers*?*, 68 GEO. WASH. L. REV. 116, 118 (1999).

219. *Id.*

220. *Id.*

221. *Id; see also* United States v. Sun-Diamond Growers, 526 U.S. 398, 405 (1999) (discussing the difference in the maximum sentences allowed under § 201(b) and (c) and stating that "[t]he punishments prescribed for the two offenses reflect their relative seriousness"); Charles N. Whitaker, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1622 (1992) (noting that the lower penalty imposed for gratuity offenses "evidences the lesser degree of culpability in accepting a gratuity as opposed to a bribe").

222. United States v. Fernandez, 722 F.3d 1, 24 (1st Cir. 2013).

223. *Id.*

224. *Id.*

225. *Id.* at 25.

penalties associated with bribery and illegal gratuities under § 201 and the penalty imposed for violations of § 666 endorses the First Circuit's view that Congress did not intend § 666 to criminalize gratuities as well as bribes.

4. Excluding Gratuities from § 666's Proscription Best Serves Important Public Policy Concerns.

The two main public policy concerns that support the First Circuit's narrow interpretation of § 666 are overcriminalization and federalism. Although these concerns are present outside the context of § 666, they are particularly acute in this arena because of the "seemingly limitless scope" of § 666.[226]

Overcriminalization has become so severe that in May 2013, Congress created the Overcriminalization Task Force to investigate and analyze the causes and effects of the overcriminalization phenomenon and to offer recommendations for meaningful solutions to the problem.[227] Among the causes of overcriminalization is Congress's "tendency to pass laws that are so vaguely worded that the limit of their reach is constrained only by the charging prosecutor's creativity."[228] That is certainly the case with § 666, as courts have struggled with its vague language since its enactment in 1984.

Likewise, due to the volume and overlapping characteristics of federal criminal laws, defendants are often charged with violating several statutes for the same conduct or incident and are thus potentially subject to excessive penalties.[229] When the duplicative nature of these statutes is combined with the vague language that is the hallmark of federal criminal statutes, it becomes difficult, if not impossible, for a layperson to distinguish between criminal conduct and otherwise innocuous behavior.[230] As one commentator put it, "[w]hen the law becomes a trap for the unwary, it becomes an engine of oppression rather than a

226. Rosenstein, *supra* note 29, at 701.

227. John G. Malcolm & Norman L. Reimer, *Over-criminalization Undermines Respect for Legal System*, WASH. POST, Dec. 11, 2013, http://www.washingtontimes.com/news/2013/dec/11/malcolmreimer-over-criminalization-undermines-resp/; *see also ABA Criminal Justice Section Resolution Addresses Overcriminalization*, THE FEDERALIST SOC'Y FOR LAW AND PUB. POLICY STUDIES (Aug. 6, 2013), http://www.fed-soc.org/publications/detail/aba-criminal-justice-section-resolution-addresses-overcriminalization.

228. Malcolm & Reimer, *supra* note 227.

229. THE FEDERALIST SOC'Y FOR LAW AND PUB. POLICY STUDIES, *supra* note 227.

230. *Id.*

statement of the moral and ethical requirements of a society's citizens."[231]

In cases involving criminal statutes that are so overly broad and vague as to render them confusing to the average citizen, courts should use discretion and apply the rule of lenity, which states that courts should resolve any ambiguity in a criminal statute in favor of the defendant.[232] This principle likely informed the U.S. Supreme Court's statement in *Sun-Diamond* that "a statute that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."[233] In holding that § 666 does not criminalize gratuities, the First Circuit acknowledged concerns about federal overcriminalization as a possible reason that Congress intended to limit § 666 only to bribery.[234]

Even more troubling than the problem of overcriminalization, federalism concerns are among the most hotly debated issues in the federal anticorruption context, particularly with respect to prosecuting state and local officials.[235] Although constitutional challenges to § 666 on federalism grounds have not been successful,[236] concerns about federal overreach remain a recurrent theme in case law and scholarly literature.[237] The federalism debate rests on two competing values: "the practical necessity of federal intervention" and the "intellectual ideal of federalism."[238]

231. HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 166 (2011).

232. *See The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2422–23 (2006) (describing rule of lenity).

233. United States v. Sun-Diamond Growers, 526 U.S. 398, 414 (1999).

234. United States v. Fernandez, 722 F.3d 1, 25 (1st Cir. 2013).

235. *See generally* George D. Brown, *Should Federalism Shield Corruption? - Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225 (1997) (arguing that the prosecution of state and local officials for honest services fraud and other governmental corruption charges raises significant federalism concerns); Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75 (2004) (asserting that federal prosecution of state and local officials is consistent with the principles of federalism); Anthony A. Joseph, *Public Corruption: The Government's Expansive View in Pursuit of Local and State Officials*, 38 CUMB. L. REV. 567 (2008) (contending that the Justice Department's sweeping use of federal corruption laws at the state and local levels places unsuspecting public officials in a precarious position); Whitaker, *supra* note 221 (advocating Congressional intervention to limit federal prosecutions of state and local officials to only those instances in which the prohibited conduct is specifically defined and to punish corrupt public officials only in proportion to the severity of the crime).

236. United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y. 1995); United States v. Bigler, 907 F. Supp. 401, 402 (S.D. Fla. 1995).

237. *See* Brown, *Stealth Statute*, *supra* note 47, at 250; Rosenstein, *supra* note 29, at 702; Brown, *Carte Blanche*, *supra* note 74, at 443.

238. Salvatoriello, *supra* note 53, at 2394.

The concern about violating the principles of federalism is not merely an academic one. Some scholars warn that a broad interpretation of § 666 disturbs the delicate balance between state and federal power with regard to criminalizing corrupt or harmful behavior.[239] Essentially, a broad reading of the statute would authorize the federal government to overstep the bounds of federalism by superseding the states' rights to determine how to deal with corruption.[240] The U.S. Supreme Court has demonstrated an interest in preserving the principles of federalism when interpreting other statutes with a potentially broad scope such as that of § 666.[241] However, Congress has previously responded to narrow interpretations by broadening the scope of the statute.[242] Although concerns about protecting federal money disbursed to state or local programs are valid and should not be overlooked, the U.S. Supreme Court or Congress should limit the scope of § 666 to criminalize only bribes. Doing so will avoid overcriminalization and running roughshod over the principles of federalism.

In light of § 666's statutory language, legislative history, maximum penalty, and the policy concerns implicated by a broad interpretation, the following section represents a proposal for the best way to resolve the confusion between the circuits.

B. Resolving the Split: Congress or the U.S. Supreme Court?

The ideal solution to the circuit split calls on Congress to amend § 666 to clarify that it does not apply to gratuities. Congress should be the body to resolve the split because the debate between the circuits goes directly to the language of the statute and congressional intent. When faced with a similarly vague statute in *Skilling v. United States*,[243] the U.S. Supreme Court hesitated to clarify a criminal statute with ambiguous language.[244] At oral argument for *Skilling*, Justice Kennedy stated that "[t]he Court shouldn't rewrite the statute; that's for the

239. Brown, *Stealth Statute*, *supra* note 47, at 253; Gaioni, *supra* note 35, at 243.

240. Gaioni, *supra* note 35, at 243.

241. *See* Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (narrowing the scope of the Age Discrimination and Employment Act as applied to appointed state judges on federalism grounds); McNally v. United States, 483 U.S. 350, 360 (1987) (limiting prosecutions under the mail fraud statute to only those cases involving the loss of tangible property, partially on federalism grounds).

242. Beale, *supra* note 8, at 717 (noting that Congress responded quickly to the narrow interpretation of the mail and wire fraud statute in *McNally v. United States* by enacting another statute that would allow prosecutions based on the loss of intangible rights such as the right to honest services).

243. Skilling v. United States, 130 S. Ct. 2896 (2010).

244. *Id.* at 2931.

Congress to do."[245] Justice Scalia echoed this sentiment in his dissent to the Court's redefinition of the statute, stating that such action involved "wielding a power [the Court] long ago abjured: the power to define new federal crimes."[246] Thus, Congress is best situated to clarify whether § 666 criminalizes gratuities.

IV. CONCLUSION

Congress enacted § 666 for the purpose of protecting the integrity of federal funds. Since its creation, however, courts have struggled to determine the intended meaning and scope of § 666, which has caused a circuit split in the federal courts over whether § 666 criminalizes gratuities as well as bribes.[247] The Second Circuit has consistently held gratuities to be within § 666's proscription, and the Seventh and Eighth Circuits have adopted that approach as well.[248] The First Circuit recently took a narrower approach and held that § 666 applies only to bribes, not gratuities.[249]

An analysis of the statutory language, legislative history, penalties imposed by § 666, and policy concerns reveals that these factors all weigh in favor of the First Circuit's narrow interpretation. The federal courts, nonetheless, remain divided on this critical feature of § 666, and this division requires resolution for two important reasons. First, the competing interpretations applied by the circuit courts of appeals result in criminalizing conduct in some states that is entirely lawful in other states.[250] Second, the confusion over the scope of § 666 permits prosecutors to abuse or overextend § 666 to reach broader anticorruption goals.[251] Thus, it is imperative that Congress intervene and definitively specify that § 666 does not criminalize gratuities as well as bribes.

245. Transcript of Oral Argument at 43, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394).

246. *Skilling*, 130 S. Ct. at 2395 (Scalia, J., concurring). At least one scholar, however, has argued that the Court's re-writing of the statute in *Skilling* was an unconstitutional intrusion into the powers of the legislature. *See* Julie R. O'Sullivan, Skilling: *More Blind Monks Examining the Elephant*, 39 FORDHAM URB. L.J. 343, 348 (2011).

247. *See supra* Part II.D.

248. *See supra* Part II.D.1.

249. *See supra* Part II.D.3.

250. Savage & Kelly, *supra* note 204, at 1.

251. Weitz, *supra* note 7, at 816.