

Federal Anticorruption Law in the State and Local Context: Defining the Scope of 18 U.S.C. § 666

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Federal law proscribes theft and bribery relating to federally funded programs under 18 U.S.C. § 666. The language of § 666 appears clear enough on its face, but this clarity quickly dissolves when one attempts to define what types of actions the statute actually prohibits. Courts faced with this question have reached divergent conclusions about whether § 666 only forbids explicit quid pro quo transactions, or if it also extends to less explicit exchanges between officials and those seeking to curry their favor. This Note explores these positions with the goal of answering two questions: first, whether § 666 encompasses only bribes, or both bribes and illegal gratuities; and second, if the statute does include gratuities, what must be shown to secure a gratuities conviction. This Note argues that the best interpretation of the statute is one that encompasses both bribes and gratuities, and requires that, in order to obtain a conviction, the government prove corrupt intent, but not a link between the conferral of the benefit and a specific official act. This result is most consistent with the statutory text, legislative history, and broader federal anticorruption regime.

I. INTRODUCTION

On March 22, 2007, Charles Abbey was convicted of one count of conspiracy to bribe a public official and one count of solicitation of a bribe by a public official in violation of 18 U.S.C. § 666,¹ the federal statute prohibiting “[t]heft or bribery concerning pro-

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1. 18 U.S.C. § 666 (2006).

grams receiving federal funds.”² At trial, prosecutors showed that while Abbey served as a city administrator for the city of Burton, Michigan, he had accepted a plot of land from Albert Louis-Blake Rizzo, a local real estate developer, with Abbey’s secretary and possible mistress serving as an intermediary.³ The government introduced no evidence that, at the time of this transfer, Rizzo and Abbey had an explicit agreement that Abbey would take a specific official action in exchange for the land. Rizzo testified at trial, however, that, in giving Abbey the land “for free”⁴ he had hoped to receive favorable treatment in future development projects.⁵ Prosecutors asserted that Abbey did, in fact, use his influence to help Rizzo in connection with several subsequent projects, including securing favorable public financing for Rizzo to develop a plot of land that he owned.⁶ After he was convicted, Abbey appealed to the Sixth Circuit, arguing that the trial court erred in failing to instruct the jury that § 666 requires proof of a quid pro quo, an explicit exchange of a benefit for an official act.⁷ The Sixth Circuit affirmed his conviction,⁸ but the issue that his appeal raised — the proper scope of § 666 — remains an open question, one that has resulted in a split among the federal circuits.

Passed as part of the Comprehensive Crime Control Act of 1984, § 666, governing “[t]heft or bribery concerning programs receiving Federal funds,” provides an important tool for combating corruption of state and local political actors. In contrast to many of the other anticorruption statutes in use by federal prosecutors, § 666 does not consist of broad language that has been repurposed to address the problem of corruption by local officials,

2. Final Brief of Appellant at 1, *United States v. Abbey*, 560 F.3d 513 (6th Cir. 2009) (No. 07-2278), 2008 WL 5485272. The conspiracy conviction was pursuant to 18 U.S.C. § 371, the general conspiracy statute, with § 666 being the underlying violation. *Abbey*, 560 F.3d at 515. Abbey was also convicted on one count of extortion by a public official in violation of the Hobbes Act. *Id.*

3. *United States v. Abbey*, 560 F.3d 513, 515 (6th Cir. 2009).

4. Abbey argued that the land had not actually been given to him for free, since he had been required to pay an amount equal to what he thought the land was worth in order to clear title. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 519–20. Abbey’s appeal also challenged his indictment and the jury instructions for his conviction under the Hobbs Act, and his sentence. *Id.* at 516. The court affirmed on these grounds as well. *Id.* at 516, 519, 523.

8. *Id.* at 521.

but rather was specifically drafted with that evil in mind.⁹ Even with this explicit focus, § 666 has received attention from a number of scholars, who have warned of the federalism concerns raised by federal prosecution of corruption on the part of state political actors.¹⁰ Most commentators have neglected, however, to thoroughly address the substantive conduct and mens rea elements of § 666.¹¹ Put simply, it remains unclear what conduct § 666 actually outlaws: how explicit must an exchange be before it comes within the statute's scope?

This confusion is certainly not unique to § 666. The difficulty of defining the proper scope of anticorruption statutes has come into focus in recent years following the Supreme Court's high-profile decisions in cases like *McCormick v. United States*,¹² *United States v. Sun-Diamond Growers of California*,¹³ and *Skilling v. United States*,¹⁴ which addressed the range of actions reached by the Hobbs Act, the federal bribery and gratuities statutes, and the "honest services" fraud provision of the mail and wire fraud statutes, respectively.¹⁵ In all three cases, the Court significantly

9. Contrast the Hobbs Act, 18 U.S.C. § 1951 (2006), the mail fraud statute, 18 U.S.C. § 1341 (2006), the Travel Act, 18 U.S.C. § 1952 (2006), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2006) [hereinafter "RICO"]. See generally Paul Salvatoriello, Note, *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, 2393–94 (2001). Salvatoriello explains that "[t]he Hobbs Act was meant to target extortion and violence committed by members of organized crime. The mail fraud statute, enacted in 1872, focuses on the use of the Postal Service to further fraudulent activity. Finally, the Travel Act and RICO were initially intended to give federal prosecutors additional tools against organized crime. Of these 'anticorruption' statutes, only § 666 was specifically enacted for the prosecution of public officials." *Id.* at 2399. Congress's expression of this aim with § 666 can be seen in the Senate Report on the law. S. REP. NO. 98–225, at 369 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3510. For a full history of § 666's adoption, see *infra* Part II.A.

10. See, e.g., George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U. L. REV. 403 (2005); Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75 (2004); Anthony A. Joseph, *Public Corruption: The Government's Expansive View in Pursuit of Local and State Officials*, 38 CUMB. L. REV. 567 (2008); Daniel N. Rosenstein, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673 (1990).

11. One notable exception is George D. Brown, *Stealth Statute-Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 307–11 (1998) (arguing, inter alia that § 666 should be read to cover bribery but not illegal gratuities).

12. 500 U.S. 257 (1991).

13. 526 U.S. 398 (1999).

14. 130 S. Ct. 2896 (2010).

15. See *supra* notes 12–14.

circumscribed the scope of the statute at issue.¹⁶ Taken together, the decisions suggest that the Court is increasingly inclined to curtail expansive readings of anticorruption statutes.¹⁷

At the same time, prosecution of corruption by public officials has become a top priority of federal law enforcement,¹⁸ with an increasing focus on crimes committed by state and local officials.¹⁹ In 2010, the number of corruption cases brought by United States Attorneys' offices against state and local officials surpassed the number brought against federal officials,²⁰ and prosecutions of prominent figures, like Rod Blagojevich and George Ryan, have made headlines in national news.²¹

Given the backdrop of intense federal law enforcement focus on prosecuting corruption and a Court hostile to loosely defined anticorruption prohibitions, it has become increasingly important to clarify the actus reus and mens rea boundaries of laws like § 666. In the absence of a statement by the Court on the scope of the substantive elements of § 666, the requisite degree of explicit exchange of benefit (or promise thereof) for favorable treatment (or promise thereof) is unclear. Too narrow a reading creates the risk that, in future cases, a politician like Abbey will be able to escape conviction where the government has a strong circumstantial evidence, but is unable to prove an explicit exchange — which can be very difficult to establish where influence can be pur-

16. See *supra* notes 12–14. For *Sun-Diamond*, see also *infra* Part II.B.

17. For a fuller analysis of the implications of the Court's *Skilling* decision for § 666, 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 (2011).

18. The FBI lists public corruption at the top of its list of criminal priorities, ahead of civil rights, organized crime, white-collar crime, and violent crime and major thefts, and behind only its three national security priorities: terrorism, counterintelligence, and cyber crime. *What We Investigate*, FED. BUREAU OF INVESTIGATIONS, <http://www.fbi.gov/about-us/investigate> (last visited Oct. 19, 2012).

19. In 1991, the Department of Justice reported charging 803 federal officials with committing corruption-related offenses, as compared to 357 state and local officials; in 2010 422 federal officials were charged, in comparison to 464 state and local officials. *Report to Congress on the Activities and Operations of the Public Integrity Section for 2010*, U.S. DEPT OF JUSTICE 29–30 (2010), <http://www.justice.gov/criminal/pin/docs/arpt-2010.pdf>.

20. *Id.*

21. See, e.g., Monica Davey & Emma G. Fitzsimmons, *Ex-Governor Found Guilty of Corruption*, N.Y. TIMES, June 28, 2011, at A1; Monica Davey & Gretchen Ruethling, *Former Illinois Governor Is Convicted in Graft Case*, N.Y. TIMES, Apr. 18, 2006, at A14.

chased with a wink and a nod.²² On the other hand, a standard that is too broad runs the risk of hampering legitimate political activities, like campaign fundraising and communicating with voters, that form the basis of the democratic process.²³

The federal appellate courts have failed to reach a consensus on two related questions underlying this inquiry. The first is whether § 666 encompasses bribes alone, illegal gratuities alone, or both offenses. Simply defining the two offenses presents a preliminary obstacle. Often, bribes and gratuities are defined with reference to 18 U.S.C. § 201, the statute proscribing such conduct for federal officials.²⁴ On this basis, bribes are defined as entailing an explicit quid pro quo exchange where a benefit is conferred with the corrupt intent that the receiving official be influenced in a specific official action.²⁵ Gratuities, in contrast, are said to lack a corrupt-intent element, and only involve a benefit conferred for or because of an official act.²⁶ As this Note will show, however, the use of definitions based solely on the language of § 201 is problematic when analyzing other statutes like § 666.²⁷

The second question is, if § 666 does encompass gratuities, must the government show a quid pro quo transaction or something less than that to secure a conviction?²⁸ The current state of

22. See, e.g., *Evans v. United States*, 504 U.S. 255, 274 (1992) (“The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law’s effect could be frustrated by knowing winks and nods.”); George D. Brown, *The Gratuities Debate and Campaign Reform: How Strong Is the Link?*, 52 WAYNE L. REV. 1371, 1398 (2006) (“As for deterrence through prophylactic measures, it may be particularly important in the context of transfers of value for influence. Specific agreements are not written down; they may not exist at all.”).

23. See Brown, *supra* note 22, at 1395–96 (discussing the critique advanced by some scholars of overzealous anticorruption regulation, which they view as impeding the necessary role played by interest groups in the democratic process); George D. Brown, *Putting Watergate Behind Us — Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747, 758–60 (2000).

24. See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999); Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 797 (1985) (giving definitions of bribery and gratuities in general terms, but analyzing only the differences between the language in the bribery and gratuities provisions of § 201); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 919 (2005) (defining the two crimes with citation to *Sun-Diamond* and §§ 201(b) and (c)).

25. Lowenstein, *supra* note 24, at 797.

26. *Id.*

27. See *infra* Parts II.B, III, IV.A.

28. For a summary of the different federal circuits’ approaches, see *infra* Parts III and IV for a proposal for the proper structure for this inquiry.

the law does not answer these questions, thus failing to provide clear guidance about what actions fall within the scope of § 666's criminal prohibition and risking inconsistent application of the law across the circuits.

This Note will address these questions, proposing a reading of § 666 that is consistent with the statutory text, legislative history, and broader federal anticorruption regime. Part II.A will outline the legislative history of § 666 and explain the emergence and evolution of § 666 in relation to two other statutes, 18 U.S.C. §§ 201 (the statute governing bribery of and gratuities to federal employees) and 215 (the bank-bribery statute). An understanding of the interconnected history of these three provisions is crucial to an accurate interpretation of § 666. Part II.B will then outline the relevant Supreme Court jurisprudence on these statutes. Next, Part III will detail courts' divergent interpretations of § 666, demonstrating the pronounced lack of clarity surrounding this issue. Finally, Part IV will argue that the best reading of § 666 is that the statute encompasses both bribes and illegal gratuities, and that a gratuities conviction requires a corrupt intent, but does not require a quid pro quo, such that the statute extends to gifts given to curry favor generally, without the need to prove a connection to a specific official action.

II. DEVELOPMENT AND INTERPRETATION OF § 666 AND RELATED STATUTES

An understanding of § 666's development over time is crucial to a complete analysis of its proper scope. Part II will provide this background, beginning in Part II.A with the legislative history of § 666, and its development alongside two related provisions: 18 U.S.C. § 201 (the statute governing bribery of and gratuities to federal officials), and 18 U.S.C. § 215 (the bank-bribery statute). Part II.B will then summarize relevant Supreme Court jurisprudence on these statutes, with particular emphasis on the Court's interpretation of § 201 in *United States v. Sun-Diamond Growers of California*.²⁹

29. 526 U.S. 398 (1999).

A. LEGISLATIVE HISTORY OF § 666 AND RELATED STATUTES

Prior to 1984, federal bribery prosecutions of state and local officials were carried out under 18 U.S.C. § 201, “[b]ribery of public officials and witnesses.” Section 201 creates two separate crimes:³⁰ § 201(b) outlaws bribery by prohibiting persons from corruptly giving (and officials from corruptly accepting) anything of value “with intent to influence [or in return for being influenced in the performance of] any official act;”³¹ § 201(c)(1) outlaws illegal gratuities, namely, the giving or accepting of anything of value “for or because of any official act.”³² Over time, however,

30. *See id.* at 404.

31. The relevant portions of § 201(b) read as follows:

(b) Whoever —

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent —

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person . . .

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 201(b) (2006).

32. The relevant portions of § 201(c)(1) read as follows:

(c) Whoever —

(1) otherwise than as provided by law for the proper discharge of official duty —

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be per-

Congress grew concerned with judicial decisions in cases such as *United States v. Del Toro*,³³ decided by the Second Circuit, which read “public officials” narrowly to exclude state and local officials administering federally funded programs. The Senate Report for § 666 noted that this interpretation “gives rise to a serious gap in the law, since even though title to the monies may have passed, the federal government clearly retains a strong interest in assuring the integrity of such program funds.”³⁴

Thus, Congress enacted § 666 as part of the Comprehensive Crime Control Act of 1984,³⁵ “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.”³⁶ In its original form, § 666 mirrored the language in § 201(c) (§ 201’s gratuities provision), prohibiting the soliciting, accepting, giving, and offering of benefits “for or because of the recipient’s conduct in any transaction or matter or any series of transactions or matters” involving \$5000 or more.³⁷ The same legislation also amended the federal bank-

formed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person . . .

shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(1) (2006).

33. 513 F.2d 656, 661–62 (2d Cir. 1975). The Seventh Circuit had reached a different conclusion. See *United States v. Mosley*, 659 F.2d 812 (7th Cir. 1981) (holding that “public official” did extend to state and local officials); *United States v. Hinton*, 683 F.2d 195 (7th Cir. 1982), *affd. sub nom. Dixon v. United States*, 465 U.S. 482 (1984) (same).

34. S. REP. NO. 98-225, at 369 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510.

35. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18, 19, 21, 28, 29, 31, and 42 U.S.C.).

36. *Id.* That same year, the Supreme Court in *Dixon*, 465 U.S. at 496, upheld the broader reading of § 201, finding it applicable to officials of a local organization administering a federally funded program, but by only a five-to-four margin — indicating the closeness of the question prior to § 666’s passage.

37. The text of the original provisions read, in relevant part, as follows:

(b) Whoever, being an agent of an organization, or of a State or local government agency, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of the recipient’s conduct in any transaction or matter or a series of transactions or matters involving \$5,000 or more concerning the affairs of such organization or State or local government agency, shall be impr-

bribery statute, 18 U.S.C. § 215, using similar language (in that case, criminalizing benefits offered or conferred “for or in connection with” the recipient’s conduct) to describe the nature of the transactions covered.³⁸

This language changed in 1986, however, when Congress amended both § 215 and § 666. First, in August of that year, it altered the bank-bribery statute by (1) adding the requirement that the giving or receiving party acted “corruptly. . . with intent to influence” and (2) removing the words “for or” preceding “in connection with.”³⁹ Section 215 thus currently covers “whoever corruptly gives, offers, or promises anything of value to any person, with intent to influence or reward an officer . . . of a financial institution in connection with any business or transaction of such

soned for not more than ten years or fined not more than \$100,000 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater, or both so imprisoned and fined.

(c) Whoever offers, gives, or agrees to give to an agent of an organization or of a State or local government agency, described in subsection (a), anything of value for or because of the recipient’s conduct in any transaction or matter or any series of transactions or matters involving \$5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned for not more than ten years or fined not more than \$100,000 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater, or both so imprisoned and fined.

Pub. L. No. 98-473, 98 Stat. 1837, 2143 (1984).

38. 18 U.S.C. § 215 (1984), *amended by* Pub. L. No. 99-370 (1986). After the 1984 amendments, the text read as follows:

(a) Whoever, being an officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, except as provided by law, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value, for himself or for any other person or entity, other than such financial institution, from any person or entity for or in connection with any transaction or business of such financial institution; or

(b) Whoever, except as provided by law, directly or indirectly, gives, offers, or promises anything of value to any officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, or offers or promises any such officer, director, employee, agent, or attorney to give anything of value to any person or entity, other than such financial institution, for or in connection with any transaction or business of such financial institution, shall be fined not more than \$5,000 or three times the value of anything offered, asked, given, received, or agreed to be given or received, whichever is greater, or imprisoned not more than five years, or both; but if the value of anything offered, asked, given, received, or agreed to be given or received does not exceed \$100, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

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

institution,” and the converse for any official who accepts such a benefit.⁴⁰ As the House Report for that amendment notes, the primary concern motivating the rewording was that the original language encompassed a wide range of otherwise legitimate conduct.⁴¹ Requiring only that something of value be sought or given in connection with the business of the institution swept up such innocuous practices as a bank customer paying for lunch with a bank official, or a bank’s payment of interest on its employees’ accounts.⁴² The Subcommittee on Criminal Justice rejected arguments advanced by the Justice Department that United States Attorney Manual guidelines were sufficient to limit the law’s application, and decided instead to narrow the scope of the statute through the addition of a corrupt-intent element.⁴³ It concluded that

this approach will enable the Department of Justice to prosecute conduct that involves an effort to undermine an employee’s fiduciary duty to his or her bank employer, without stigmatizing as “criminal” conduct that is not culpable or wrongful. [The change] narrows the bank bribery offense so that it punishes only that activity which ought to be illegal.⁴⁴

In November of 1986, Congress amended § 666 to parallel the new wording of § 215. It did so in separate legislation described by its title as making “minor or technical amendments to provisions enacted by the Comprehensive Crime Control Act of 1984.”⁴⁵ As the House Report for the law notes, these amendments sought to avoid application of the statute “to acceptable commercial and business practices.”⁴⁶ The Report states in a footnote that the new wording was intended to mirror that of § 215, and cites to the House Report on the § 215 amendments.⁴⁷ The current version of § 666 thus subjects to prosecution whoever “corruptly gives, offers, or agrees to give anything of value to any person, with intent

40. 18 U.S.C. § 215 (2006).

41. H.R. REP. 99-335, at 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1782, 1784.

42. *Id.*

43. *Id.* at 5.

44. *Id.*

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

46. H.R. REP. 99-797, at 30 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6138.

47. *Id.* at 34 n.9.

to influence or reward an [official], in connection with any business, transaction, or series of transactions . . . involving anything of value of \$5,000 or more,” and the converse for officials who accept or solicit such benefits.⁴⁸

The legislative history of § 666 is thus closely intertwined with those of § 201 and § 215. As this Note will show, untangling these relationships is central to determining the scope Congress intended to give to § 666.⁴⁹

B. SUPREME COURT JURISPRUDENCE

The Supreme Court has weighed in twice on the proper interpretation of § 666, addressing the provision’s constitutionality, and the necessary connection between the conduct at issue and federal funds.⁵⁰ But the Court has yet to clarify the substantive scope of § 666, nor has it done so with respect to the similar language in § 215. In the absence of a definitive statement in this area, two different interpretations have emerged in the lower

48. The current version of § 666 reads in relevant 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 —

(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.

18 U.S.C. § 666 (2006).

49. See *infra* Parts III, IV.

50. See *Sabri v. United States*, 541 U.S. 600 (2004) (holding that the statute does not require a nexus between federal funds and the criminal activity at issue); *Salinas v. United States*, 522 U.S. 52 (1997) (holding that the statute does not require that the benefit conferred have a demonstrated effect on federal funds).

federal courts, which will be discussed in Part III. As that Part will show, while most courts to have addressed the issue have found § 666 to cover both bribes and gratuities, the Fourth Circuit has strongly indicated that it considers the statute only to reach bribes.

The Supreme Court has, however, clarified the elements of a violation of § 201, the statute on which §§ 666 and 215 were originally modeled, in *United States v. Sun-Diamond Growers of California*.⁵¹ Given the close connection between these three statutes, it is important to consider the *Sun-Diamond* decision in some detail here.

The defendant in *Sun-Diamond* was a trade association that lobbied and coordinated marketing campaigns on behalf of cooperatives of dried-fruit and nut growers.⁵² The organization was charged under § 201(c)(1)(A) (the gratuities provision) with making illegal gifts — including sports tickets, luggage, meals, and memorabilia — to then-Secretary of Agriculture Michael Espy at a time when the agency was considering two matters in which the organization had an interest.⁵³ The defendant moved to dismiss on the grounds that the indictment failed to allege a specific connection between the matters under consideration and the gifts, but the trial court denied the motion, holding that § 201(c) did not require allegation of a “direct nexus between the value conferred . . . and an official act performed or to be performed.”⁵⁴ It then gave similar instructions to the jury, stating that “[t]he government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all.”⁵⁵ The defendant appealed its subsequent conviction, and the D.C. Circuit reversed in part.⁵⁶ Relevant to the discussion here, it held that the district court’s jury instructions “invited the jury to convict on materially less evidence than the statute demands,” but it also

51. 526 U.S. 398 (1999).

52. *Id.* at 400.

53. *Id.* at 401.

54. *Id.* at 402 (quoting *United States v. Sun-Diamond Growers of Cal.*, 941 F. Supp. 1262, 1265 (D.D.C. 1996)).

55. *Id.* at 403 (quotation marks omitted).

56. *Id.* The D.C. Circuit also affirmed *Sun-Diamond*’s wire-fraud conviction and reversed on two points related to sentencing. *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 974 (1998).

rejected the defendant's position that the government must link a gratuity to one or more specific acts.⁵⁷

The Supreme Court affirmed the reversal, and went even farther than the court of appeals in narrowing the scope of § 201.⁵⁸ The Court began by noting that § 201 enumerates two separate crimes: subsection (b) covers bribery, while subsection (c) covers illegal gratuities.⁵⁹ It explained that the primary distinction between the two is the intent element:

Bribery requires intent “to influence” an official act or “to be influenced” in an official act, while illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act. In other words, for bribery there must be a *quid pro quo* — a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.⁶⁰

The Court rejected, however, the government's contention that the statute could be satisfied by a mere showing that the defendant gave the gratuity to the Secretary because of his position as Secretary.⁶¹ Such a broad reading, the Court reasoned, would extend even to gifts only aimed at fostering goodwill, in the hope that this might benefit the giver in some unspecified current or future acts.⁶² The Court found that this was not a fair interpretation of the statutory text.⁶³ Instead, in its view, the fact that § 201 “prohibits only gratuities given or received ‘for or because of *any official act* performed or to be performed’ . . . means ‘for or because of some particular official act of whatever identity.’”⁶⁴ This language requires that “in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between

57. *Id.* at 968–69.

58. *Sun-Diamond*, 526 U.S. at 414.

59. *Id.* at 404. See *supra* notes 31–32 for the full statutory text.

60. 526 U.S. at 404–05.

61. *Id.* at 405.

62. *Id.* at 405–06.

63. *Id.*

64. *Id.* at 406 (quoting 18 U.S.C. § 201 (2006)).

a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.”⁶⁵ Thus, according to the Court, the difference between bribes and gratuities under § 201 lies in the degree to which the exchange explicitly ties the conferral of a benefit to the performance of an official act; whereas bribery requires a quid pro quo for a specific action, an illegal gratuity merely requires a connection to a specific action.⁶⁶ For example, “[a]n illegal gratuity . . . may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.”⁶⁷

In addition to providing a concrete example of the Court’s approach to interpreting anticorruption statutes, the *Sun-Diamond* decision is key to understanding the scope of § 666. As Part IV will argue, the fact that the original language of § 666 borrowed directly from the statute under consideration in *Sun-Diamond* makes it both logical and necessary to reconcile any proposed reading of § 666 with the *Sun-Diamond* Court’s reasoning. Before doing so, however, it is necessary to first consider the federal appellate courts’ interpretations of § 666, and explain why their various approaches have failed to clarify the issue. Part III will summarize these decisions.

III. THE CIRCUIT SPLIT REGARDING THE PROPER SCOPE OF § 666

The federal courts of appeals have reached two distinct conclusions in interpreting what the government must prove to secure a conviction under § 666.⁶⁸ Five circuits have held that § 666 encompasses both bribes and illegal gratuities, and that the statute does not require proof of a quid pro quo.⁶⁹ In contrast, while

65. *Id.* at 414.

66. *Id.* at 404–06.

67. *Id.* at 404–05.

68. None of the circuits addressed this issue prior to the 1986 amendments discussed in Part II.A *supra*.

69. *United States v. Bahel*, 662 F.3d 610, 638 (2d Cir. 2011); *United States v. Boender*, 649 F.3d 650, 654–55 (7th Cir. 2011); *United States v. Redzic*, 627 F.3d 683, 691–92 (8th Cir. 2010); *United States v. McNair*, 605 F.3d 1152, 1184–95 (11th Cir. 2010); *United States v. Abbey*, 560 F.3d 513, 519–21 (6th Cir. 2009); *United States v. Ganim*, 510 F.3d 134, 150–52 (2d Cir. 2007); *United States v. Zimmermann*, 509 F.3d 920, 927 (8th Cir.

it has not ruled definitively on the subject, the Fourth Circuit has strongly indicated that it understands § 666 only to prohibit bribes and thus to require proof of a quid pro quo.⁷⁰ The remaining courts of appeals have not yet weighed in on the meaning of § 666.

Unfortunately, when viewed together, the appellate courts' holdings have tended to confuse the issue more than elucidate it. As Part III.A will show, while the majority of courts have reached largely the same conclusion, disagreement still persists on some key points. And where these courts have come out the same way, they have done so using a variety of interpretive approaches. Thus, despite general agreement on what the correct outcome should be, there remains little consensus on *why*. Part III.B will then examine the Fourth Circuit's approach and explain why it reaches the opposite position, despite basing its analysis on much of the same material relied on by other circuits. Part III.C will argue that this lack of consensus stems primarily from a failure to untangle what are really two separate inquiries: (1) whether § 666 includes both bribes and gratuities, or bribes alone; and (2) what the minimum standard for a gratuities conviction under § 666 should be.

A. CIRCUITS ADOPTING A BROADER READING OF § 666

The Second, Sixth, Seventh, Eighth and Eleventh Circuits have held that § 666 encompasses both bribes and gratuities, and/or that the statute does not require proof of a quid pro quo.⁷¹ Their inconsistency in differentiating between the bribery-gratuity issue makes it difficult to synthesize their holdings — a problem only compounded by the fact that they have arrived at these holdings through divergent lines of reasoning. Some opi-

2007); *United States v. Gee*, 432 F.3d 713, 714–15 (7th Cir. 2005); *United States v. Griffin*, 154 F.3d 762 (8th Cir. 1998); *United States v. Agostino*, 132 F.3d 1183, 1189–91 (7th Cir. 1997); *see also infra* Part III.A.

70. *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1997); *see also infra* Part III.B.

71. *See Bahel*, 662 F.3d at 638; *Boender*, 649 F.3d at 654–55; *Redzic*, 627 F.3d at 691–92; *McNair*, 605 F.3d at 1184–95; *Abbey*, 560 F.3d at 519–21; *Ganim*, 510 F.3d at 150–52; *Zimmermann*, 509 F.3d at 927; *Gee*, 432 F.3d at 714–15; *Griffin*, 154 F.3d at 764; *Agostino*, 132 F.3d at 1189–91.

nions reach their conclusions without substantive analysis,⁷² while others ground their position in reasoning based on plain language and § 666's place within the broader anticorruption regime.⁷³

1. *Interpreting the Plain Language of § 666 and Situating it Within the Broader Anticorruption Regime*

As compared to the Eighth Circuit, the Second, Sixth, Seventh, and Eleventh Circuits have articulated more robust rationales in adopting this broader reading of § 666. As this section will show, their approaches vary considerably. But the approaches can be usefully summarized as employing two types of arguments. First, they make arguments based on the plain language of the statute: they note that, not only does its text omit the phrase “quid pro quo,” or words to that effect, but that the language it does employ extends beyond bribery while still stopping short of criminalizing legitimate behavior. Second, they explore the statute's relationship to § 201, as interpreted in *Sun-Diamond*, reaching similar — but not identical — conclusions using different analytical approaches.

The first approach — the plain language rationale — has been taken by the Sixth, Seventh, and Eleventh Circuits. The Seventh Circuit adopted its current position on § 666 in *United States v. Agostino*.⁷⁴ It held there that proof of a quid pro quo is not an element of § 666(a)(2), and clarified that an earlier decision, *United States v. Medley*,⁷⁵ had not held § 666(a)(1)(B) to contain such an element.⁷⁶ The court briefly reasoned that the plain language of the statute does not contain a specific quid pro quo requirement, and thus an indictment under § 666(a)(2) must merely allege that “the defendant act[ed] ‘corruptly with intent to influence or reward.’”⁷⁷ In a 2005 case, *United States v. Gee*,⁷⁸ the court

72. *Redzic*, 627 F.3d at 691–92; *Zimmermann*, 509 F.3d at 927; *Griffin*, 154 F.3d at 764; see also *infra* Part III.A.2.

73. *Boender*, 649 F.3d at 654–55; *McNair*, 605 F.3d at 1184–95; *Abbey*, 560 F.3d at 519–21; *Ganim*, 510 F.3d at 150–52; *Gee*, 432 F.3d at 714–15; *Agostino*, 132 F.3d at 1189–91; see also *infra* Part III.A.1.

74. 132 F.3d 1183.

75. 913 F.2d 1248 (7th Cir. 1990).

76. *Agostino*, 132 F.3d at 1190.

77. *Id.*

78. *Id.*

reaffirmed that, based on the language of the statute, proof of a quid pro quo is sufficient but not necessary under § 666(a)(1)(B).

Gee was cited with approval by the Sixth Circuit as it reached the same conclusion in *United States v. Abbey*.⁷⁹ Similarly, in *United States v. McNair*,⁸⁰ the Eleventh Circuit rejected the consolidated appeals of sewer contractors and county officials from their convictions for giving and receiving benefits that included cash payments, property improvements, and travel expenses.⁸¹ The *McNair* court made the same plain language observation: the text of § 666 does not contain the words “quid pro quo,” and “nothing in the plain language of [the statute] requires that a specific payment be solicited, received, or given in exchange for a specific official act.”⁸²

In addition to these surface-level plain language readings of the statute, courts have considered how its text can most logically be read as implementing a carefully delineated regulatory goal. The Second and Eleventh Circuits, in particular, have parsed the text of § 666 to hold that the statute’s intent element allows it to extend beyond quid pro quo transactions without also sweeping up legitimate activities. This can be seen, for example, in the next portion of the Eleventh Circuit’s *McNair* decision: after making the plain-language point, the court went on to reason that, rather than requiring proof of a quid pro quo, the statute instead achieves the goal of avoiding criminalization of legitimate business practices by including “corruptly” as a mens rea element.⁸³ It explained that “[a]n act is done ‘corruptly’ if it is performed voluntarily, deliberately and dishonestly for the purpose of either accomplishing an unlawful end result or of accomplishing some otherwise lawful end or lawful result by an[y] unlawful method or means.”⁸⁴ It emphasized that this intent (to corruptly influence or

78. 432 F.3d 713.

79. 560 F.3d 513 (6th Cir. 2009).

80. 605 F.3d 1152 (11th Cir. 2010). The Eleventh Circuit had earlier held in *United States v. Castro*, 89 F.3d 1443, 1454 (11th Cir. 1996), that the government was not required to show a direct quid pro quo relationship between defendants and an agent of the agency receiving the federal funds. More recently, the Eleventh Circuit cited *McNair* in dismissing a similar appeal. *United States v. Langford*, 647 F.3d 1309, 1331–32 (11th Cir. 2011).

81. *McNair*, 605 F.3d at 1165–84.

82. *Id.* at 1187–88.

83. *Id.*

84. *Id.*

be influenced “in connection with any business or transaction”)⁸⁵ is distinct from “an intent to engage in any specific quid pro quo.”⁸⁶

The Second Circuit relied on similar reasoning in *United States v. Ganim*.⁸⁷ In an opinion by then-Judge Sotomayor, the court clarified that an earlier decision stood for the proposition that both bribes and gratuities are included under the current § 666 because it prohibits benefit made to either “influence” or “reward”; it reasoned that “a payment made to ‘influence’ connotes bribery, whereas a payment made to ‘reward’ connotes an illegal gratuity.”⁸⁸ Similarly, in *United States v. Bahel*, the Second Circuit reaffirmed its view that § 666 extends to gratuities, and emphasized the “conspicuous breadth” of § 666.⁸⁹ It held that this breadth, along with the plain language of the statute and Second Circuit precedent, “makes clear that, in the case of a gratuity, the corrupt intent required under Section 666 refers to an individual’s state of mind at the time the payment is received”⁹⁰

Lastly, courts taking the broader interpretive approach to § 666 have sought to position it within the context of the wider federal anticorruption framework, drawing comparisons and distinctions between it and § 201, as interpreted in *Sun-Diamond*. For example, the Sixth Circuit has stated explicitly that *Sun-Diamond*’s holding — that an illegal gratuity requires a benefit given “for or because of” an official act — does not apply to § 666.⁹¹ *United States v. Abbey*, in particular, made three key points in distinguishing *Sun-Diamond*. First, “§ 666 . . . [does not] con-

85. *Id.* (quotation marks omitted).

86. *Id.*

87. 510 F.3d 134 (2d Cir. 2007).

88. *Id.* at 150. *Ganim* cited *Sun-Diamond* for the proposition that, under 18 U.S.C. § 201 (2006), “[b]ribery requires intent ‘to influence’” whereas an illegal gratuity “may constitute merely a reward for some future act” 510 F.3d at 150 (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999)). The court also held that to prove a quid pro quo, the government need not draw a one-to-one connection between individual payments and individual acts: when a defendant is charged with bribery, proof of a quid pro quo “may be satisfied upon a showing that a government official received a benefit in exchange for his promise to perform official acts or to perform such acts as the opportunities arise.” 510 F.3d at 142.

89. 662 F.3d 610, 638 (2d Cir. 2011) (citing *United States v. Rooney*, 37 F.3d 847 (2d Cir. 1994)).

90. *Id.* at 638.

91. *United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009).

tain[] the ‘official act’ language that the *Sun-Diamond* Court found ‘pregnant with the requirement that some official act be identified and proved.’⁹² Second, the Supreme Court’s concern in *Sun-Diamond* with preserving legal gratuities is inapposite where a statute also contains additional corrupt-intent and minimum-gift-value requirements, as § 666 does.⁹³ Finally, the Supreme Court’s concern in *Sun-Diamond* with upsetting the “intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials”⁹⁴ does not apply in the case of § 666: because § 666 does not stand among a plethora of other statutes and regulations governing the actions of federal officials in the same way as § 201 does, there is less risk that a broad illegal-gratuities standard will upset the balance of the rest of the regulatory framework.⁹⁵

The Seventh Circuit has devoted further attention to this relationship between §§ 201 and 666.⁹⁶ Like the Sixth Circuit, it has also held that *Sun-Diamond* should not apply to § 666, but has done so by focusing on the statutory language.⁹⁷ In *United States v. Boender*,⁹⁸ the court rejected the defendant’s argument that *Sun-Diamond* should cause the court to reconsider its earlier cases.⁹⁹ Focusing on the textual differences between §§ 201 and 666, the court held that the two statutes must be interpreted separately.¹⁰⁰ First, it contrasted § 201(b)’s “with intent to influence any official act” language with § 666’s less-stringent “with intent to influence or reward” requirement.¹⁰¹ It went on to state 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:

92. *Id.* (quoting *Sun-Diamond*, 526 U.S. at 406).

93. *Id.*

94. *Id.* (quoting *Sun-Diamond*, 526 U.S. at 409).

95. *Id.*; see also *infra* notes 215–24 and accompanying text.

96. *United States v. Boender*, 649 F.3d 650, 654–55 (7th Cir. 2011).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 655.

by its plain text, it already covers both bribes and rewards.¹⁰²

Moreover, the *Boender* court strongly suggested that, even if *Sun-Diamond* should inform a reading of § 666, the fact that the language of § 666 encompasses both bribes and gratuities means that the threshold for conviction under § 666 should be the *Sun-Diamond*'s gratuities standard (requiring "the identification of a specific official act 'for or because of which' a gift was given"),¹⁰³ and not the standard it enunciated for bribery (requiring proof of a quid pro quo).

Such discussion is only somewhat present in the Second Circuit's *Ganim* decision, which, despite its clarity in stating that § 666 encompasses both bribes and illegal gratuities, leaves open the question of what a gratuity conviction requires: proof of a quid pro quo, the somewhat lower standard set out in *Sun-Diamond*, or something else altogether. The court noted in *Ganim* that § 666 lacks the "for or because of language" emphasized in *Sun-Diamond*, while also stating that there is no "principled reason to extend *Sun-Diamond*'s holding beyond the illegal-gratuity context."¹⁰⁴ But it left unsaid whether there is a principled reason for extending it to illegal gratuities under other statutes.

These varied approaches to scope of § 666 show the difficulty of synthesizing courts' analyses in this area, even where they are in general agreement on the correct outcome. In part, this results from inconsistency in separating the bribes-gratuities distinction from the quid pro quo question. For example, while the Seventh Circuit clearly recognized the differences between these two issues in its *Boender* decision, the Eleventh Circuit's opinion in *McNair* ignored the former and focused only on whether § 666 requires a quid pro quo. Such fundamental, differences between these opinions result in analytical incoherence where there should be clarity and consensus.

102. *Id.* (citation omitted).

103. *Id.* (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406 (1999)).

104. *United States v. Ganim*, 510 F.3d 134, 146 (2d Cir. 2007).

2. *The Eighth Circuit's Failure to Engage in Substantive Analysis*

Of the five courts taking the general position that § 666 does not require proof of a quid pro quo, the Eighth Circuit's decisions are the least fully developed, devoting considerably less attention to explaining the reasoning supporting their holdings than other circuits. In *United States v. Griffin*, the Eighth Circuit's original statement on the matter, the court assumed without discussion that the statute covers both bribes and illegal gratuities, and does not require proof of a quid pro quo.¹⁰⁵ The *Griffin* court rejected the appeal of a former Speaker of the Missouri House of Representatives who had challenged the trial court's application of the bribery sentencing guideline after he had plead guilty to violating § 666.¹⁰⁶ The Eighth Circuit affirmed the conviction on the ground that there was sufficient proof to support application of the bribery guideline, but its discussion contemplated that application of the gratuities guideline to a § 666 conviction could be appropriate as well.¹⁰⁷ Nine years later, the Eighth Circuit explicitly adopted *Griffin*'s assumption in *United States v. Zimmerman*, in which the court upheld a conviction under § 666 for accepting gratuities and explicitly stated that gratuities fell under the statute's scope.¹⁰⁸

More recently, the Eighth Circuit had an opportunity to reaffirm this holding, but did not do so. In *United States v. Redzic*, the defendant argued that the 1986 amendments (removing "for or because of" and inserting "corruptly . . . with intent to influence or reward . . . in connection with") to § 666 were meant to exclude gratuities from the statute's scope and restrict its coverage to bribes alone.¹⁰⁹ The court's decision referenced its earlier statements to the contrary in *Griffin* and *Zimmerman*, but it did not rely on those precedents in reaching its holding.¹¹⁰ Instead, the court found that it was unnecessary to address the issue of § 666's extension to gratuities, affirming the conviction on the narrower

105. *United States v. Griffin*, 154 F.3d 762, 763–64 (8th Cir. 1998).

106. *Id.* at 763.

107. *Id.*

108. 509 F.3d 920, 927 (8th Cir. 2007) ("Section 666(a)(1)(B) prohibits both the acceptance of bribes and the acceptance of gratuities intended to be a bonus for taking official action.").

109. *United States v. Redzic*, 627 F.3d 683, 691, 693 n.5 (8th Cir. 2010).

110. *Id.*

ground that the defendant's actions constituted a quid pro quo transaction, which, in the court's view, sufficed to sustain his conviction for bribery.¹¹¹

None of the Eight Circuit's opinions provide much insight into the court's reasoning. As a result, they do little to address the confusion surrounding § 666.

B. THE FOURTH CIRCUIT'S APPROACH: PROOF OF QUID PRO QUO REQUIRED

Out of all the circuits, the Fourth Circuit has advanced the narrowest reading of § 666. In its only case considering the issue, *United States v. Jennings*,¹¹² the court indicated in dicta that it viewed § 666 as restricted to bribes.¹¹³ The *Jennings* court affirmed a construction contractor's conviction for making cash payments to a local housing authority official in exchange for being awarded repair contracts at favorable rates.¹¹⁴ He claimed that, because the official testified to having done no special favors for him, he had only provided gratuities and his actions thus fell outside the statute.¹¹⁵ The court held that the government had presented sufficient evidence for the jury to find him guilty of bribery, rejecting as irrelevant the defendant's argument that § 666 only covers bribes.¹¹⁶ The court began from the premise that bribery requires proof of a quid pro quo transaction, while payment of illegal gratuities does not.¹¹⁷ It thus reached no final decision on whether § 666 contemplates a conviction for illegal gratuities without proof of a quid pro quo.

While the opinion ultimately assumed without deciding that § 666 is restricted to quid pro quo bribes, the court's criticism of contrary cases and lengthy discussion of the issue in the case's footnotes strongly suggest that the court would have made this holding had it been necessary to do so. The court countered the

111. *Id.*

112. 160 F. 3d 1006 (4th Cir. 1997).

113. *Id.* at 1023 n.4.

114. *Id.* at 1010–12.

115. *Id.* at 1012.

116. *Id.* at 1012–1023.

117. *Id.* The court took this position with reference to the elements of § 201. *Id.* As this case was decided prior to *Sun-Diamond*, the Fourth Circuit did not discuss the standard for illegal gratuities laid out in that decision.

Seventh Circuit's position in *Agostino* — that an indictment under § 666 need not allege a quid pro quo — reasoning that § 666 mirrors § 201(b) and only encompasses quid pro quo bribery.¹¹⁸ It found support for this position both in the text and in § 666's legislative history.

First, the court noted that other courts have interpreted corrupt intent under § 201(b) to mean the “the intent to engage in a relatively specific quid pro quo.”¹¹⁹ It stated that this intent is the primary distinction between bribery under § 201(b) and illegal gratuities under § 201(c)(1), the latter of which it defined as “a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event. No corrupt intent to influence official behavior is required. The payor simply must make the payment ‘for or because of’ some official act.”¹²⁰ The court emphasized, however, that even in a bribery prosecution, the government is not obligated to draw a connection between each payment and a specific act: “Rather, it is sufficient to show that the payor intended for each payment to induce the official to adopt a specific course of action. In other words, the intended exchange in bribery can be ‘this for these’ or ‘these for these,’ not just ‘this for that.’”¹²¹ It stated that a court could “reasonably conclude” that the operative language in § 666 has the same effect as that in § 201(b) in that the former’s “corruptly . . . with intent to influence or reward,” language is closer to the latter’s “corruptly . . . with intent to influence” than it is to § 201(c)’s “for or because of.”¹²² Unlike the Second and Seventh Circuits, it did not find the use of “reward” to expand the statute’s scope to gratuities.¹²³ Instead, it viewed the word as simply emphasizing that the difference between a bribe and gratuity is the intent of the payor, not the timing of the payment.¹²⁴ In other words, its inclusion in § 666 serves merely to clarify that a bribe can be paid not just before, but also after the action it is intended to induce.

118. *Jennings*, 160 F. 3d at 1023 n.4.

119. *Id.* (“The Seventh Circuit in *Agostino* did not acknowledge that under § 201 courts equate ‘corrupt intent’ with the intent to engage in a relatively specific quid pro quo.”)

120. *Id.* at 1014.

121. *Id.* (citation omitted). The Second Circuit cites this point favorably in its *Ganim* decision. See *United States v. Ganim*, 510 F.3d 134, 148–49 (2d Cir. 2007); *supra* note 88.

122. *Jennings*, 160 F.3d at 1023 n.4.

123. *Id.* at 1023 n.3.

124. *Id.*

Second, the court reasoned that the purpose of the 1986 amendments to § 666 — aimed at narrowing the scope of the statute to exclude otherwise legitimate conduct — was to clarify that the statute only encompasses bribes. Citing the House Report, it noted that Congress intended the changes to parallel those made to § 215 (the bank-bribery statute), with the goal in both instances being to narrow the range of conduct criminalized.¹²⁵ Refraining from a more definitive statement, it concluded that “[t]he Report has an arguable implication for § 666 . . . : that Congress changed § 666, by adding the ‘corruptly. . . with intent to influence or reward’ language, to clarify that § 666 (like § 215) prohibits only bribes.”¹²⁶

Thus, while the *Jennings* decision does not reach a definitive conclusion, its discussion of the statutory language and legislative history strongly suggests that the Fourth Circuit will adopt a narrow reading of § 666 if given another opportunity to do so. But the Fourth Circuit’s treatment of the issue is frustrating in that it presents an alternative interpretation but fails to provide much explanation for why it views that reading as being superior.

C. THE CONFUSION WITHIN THE CIRCUITS AND THE NEED FOR CLARIFICATION

Considered together, the courts’ statements on § 666’s scope lack consistency. The conflict between the Fourth Circuit and the remaining appellate courts to have reached the issue represents an important disagreement on the interpretation of a key piece of the federal anticorruption framework. Though the Fourth Circuit has not yet formally adopted the position it laid out in *Jennings*, doing so would create significant differences in the conduct subject to prosecution under § 666 across jurisdictions. Reaching consensus on § 666’s scope is thus a pressing goal for the federal courts. A thorough analysis is particularly needed given that even among those courts in general agreement that the statute extends beyond quid pro quo bribery, important differences persist. The Second, Sixth and Seventh Circuits, for example, are the only courts in this group to have grappled with the proper stan-

125. *Id.* at 1023 n.4.

126. *Id.*

dard for gratuities convictions under § 666, and each has followed somewhat different reasoning in reaching its conclusion.¹²⁷ In contrast, the Eighth and Eleventh Circuits have failed to address this issue at all.¹²⁸ In Part IV, this Note will seek to resolve these conflicting positions.

IV. DEFINING THE SCOPE OF § 666

In order to make sense of the tangle of statutory text and legislative history surrounding the issue, two questions must be addressed separately: (1) whether § 666 encompasses bribes alone, or illegal gratuities as well; and (2) if it does include gratuities, what degree of explicit exchange must be shown under that offense. Parts IV.A and IV.B will argue that the most defensible reading of § 666 is that it covers both bribes and gratuities. Part IV.A will show that the textual similarities between §§ 666 and 201(b) do not support reading § 666 as restricted to bribes. Part IV.B will argue that the legislative histories of §§ 666, 201, and 215 make it clear that § 666 does, in fact, extend to gratuities. Finally, Part IV.C will argue that the *Sun-Diamond* decision should not be applied to § 666, and that a gratuities conviction under the statute should require corrupt intent, but no link to a specific official act.

A. THE TEXT OF § 666 DOES NOT RESTRICT THE STATUTE TO BRIBERY ALONE

Approaching the text of § 666 in its current form, the Fourth Circuit in *Jennings* viewed the linguistic similarities between § 666 and § 201(b) as evidence that the two provisions describe the same crime.¹²⁹ The former subjects to punishment any person who “corruptly gives . . . anything of value . . . with intent to in-

127. Compare *United States v. Boender*, 649 F.3d 650, 654–55 (7th Cir. 2011), with *United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009), and *United States v. Ganim*, 510 F.3d 134, 146 (2d Cir. 2007); see also *supra* Part III.A.1.

128. See *United States v. Redzic*, 627 F.3d 683, 691–92 (8th Cir. 2010) (expressly declining to resolve the question); *United States v. McNair*, 605 F.3d 1152, 1184–95 (11th Cir. 2010) (failing to reach the question); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007); *United States v. Griffin*, 154 F.3d 762, 764 (8th Cir. 1998) (same).

129. See *Jennings*, 160 F.3d at 1015 n.4. The *Jennings* court also discussed the relevance of § 666’s evolution from its 1984 passage through the 1986 amendments. *Id.*

fluence or reward [an official] in connection with any business, transaction or series of transactions,”¹³⁰ while the latter covers anyone who “corruptly gives . . . anything of value . . . with intent to influence any official act.”¹³¹ While these provisions differ in some respects, the general structures and much of the operative language are the same. Given that § 201(b) indisputably only covers bribery,¹³² it may seem logical to conclude that § 666 is also restricted to bribery alone, especially since § 666’s current language is much closer to § 201(b) than it is to § 201(c)’s gratuities provision, which prohibits giving “anything of value . . . for or because of any official act.”¹³³ According to one commentator, there are two differences between a bribe and a gratuity: (1) a bribe requires a corrupt intent while a gratuity does not, and (2) while a gratuity requires conferral of a benefit “for or because of” an official act, unlike bribery, there is no requirement that the act be influenced by the benefit.¹³⁴ On this reading, because the current text of § 666 requires that the benefit be given with a corrupt intent to influence, it must be restricted to bribes.

On closer examination, however, this interpretation is subject to a serious flaw. A basic problem with analyzing § 666 on the basis of definitions derived wholly from the language of § 201 is that those definitions do not address what the terms “bribe” and

130. 18 U.S.C. § 666(a)(1)(B) (2006).

131. 18 U.S.C. § 201(b)(1)(A) (2006).

132. See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999).

133. 18 U.S.C. § 201(c)(1)(A). The title of § 666 (“Theft or bribery concerning programs receiving Federal funds”), 18 U.S.C. § 666, seems to support this position as well. See *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Trainmen v. Balt. & Ohio R. Co.*, 331 U.S. 519, 528–529 (1947) (“[T]he title of a statute and the heading of a section’ are ‘tools available for the resolution of a doubt’ about the meaning of a statute.”)). One could argue that the title of § 666 makes no mention of gratuities, and thus should be limited to bribes. But the title of § 201, which (per *Sun-Diamond*) most certainly includes both offenses, is similarly limited to “[b]ribery of public officials and witnesses.” 18 U.S.C. § 201.

134. Lowenstein, *supra* note 24, at 797. Professor Lowenstein discusses federal and state bribery statutes generally. *Id.* Although he references § 201 in a footnote as being representative of the field, *id.* at 796 n.42, he does not restrict his enumeration of the elements of bribery and gratuities to that statute, *id.* Professor Smith has also explained the differences between bribes and gratuities:

Illegal-gratuities offenses are distinguished from, and far less culpable than, bribery. Bribery requires a quid pro quo, or a trade on the officeholder’s government position, whereas illegal gratuities may reflect nothing more than an expression of approval of, or gratitude for, an official act that was already performed in the honest exercise of public office.

Smith, *supra* note 24, at 919 (citing *Sun-Diamond* and 18 U.S.C. §§ 201(b)–(c)).

“gratuity” mean outside the context of § 201. Describing the difference between bribes and gratuities solely in terms of the distinctions between §§ 201(b) and 201(c) is of little use, because it provides no basis for distinguishing the two crimes in statutes that do not employ exactly the same language.

Section 666 does contain the “bribery language” identified above, but it does not necessarily follow that the statute is restricted to bribes. This is true for two reasons, which will be outlined below in Parts IV.A.1 and IV.A.2. First, while the Supreme Court has drawn a specific connection between the corrupt-intent requirement and bribery in § 201(b), the word “corruptly” does not exclusively denote bribery; its definition in other contexts is, in fact, somewhat broader. Second, the text of § 666 does not precisely mirror that of § 201 — it also contains additional words, which seem to change the scope of the activities covered, and which would be rendered superfluous if § 666’s scope were interpreted to parallel that of § 201.

1. “Corruptly” Encompasses Activities Beyond Bribery

Taken outside the context of § 201, the term “corruptly” cannot be read on its own as signaling that a quid pro quo exchange is required. Dictionary definitions state that “corruptly” encompasses bribery, but is not limited to describing that offense.¹³⁵ Webster’s Third defines “corrupt” as “of debased political morality: characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements.”¹³⁶ *Black’s Law Dictionary* defines the term as “[h]aving an unlawful or depraved motive; esp., influenced by bribery.”¹³⁷ Its entry on “corruptly” expands on this broader view, stating in relevant

135. The Supreme Court has often looked to the dictionary in interpreting ambiguous statutory terms. See, e.g., *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002–03 (2012) (noting that “[t]hat a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense,” and determining the ordinary meaning of “interpreter” by comparing definitions in a variety of dictionaries); *FCC v. AT & T Inc.*, 131 S. Ct. 1177, 1181 (2011) (citing dictionary definitions in determining the meaning of the word “personal”); *United States v. Santos*, 553 U.S. 507, 511 (2008) (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)) (stating that “[w]hen a term is undefined, we give it its ordinary meaning,” and then confirming meaning of the word “proceeds” by looking to dictionary definitions).

136. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 513 (3d ed. 1981).

137. BLACK’S LAW DICTIONARY 371 (9th ed. 2009).

part, “As used in criminal-law statutes, *corruptly* usu[ally] indicates a wrongful desire for pecuniary gain or other advantage.”¹³⁸

From a historical perspective, “corruptly” was first used to denote *malum in se* offenses (those with a basis in morality).¹³⁹ It stood in contrast to the term “illegal,” which denoted *malum prohibitum* offenses (acts whose wrongness lies in the fact that they are prohibited by man-made laws).¹⁴⁰ Over time, however, this distinction became blurred, and both improper acts and unlawful acts came to be included under the rubric of “corruptly.”¹⁴¹

Today, “corruptly” appears in a range of federal criminal statutes,¹⁴² but its ambiguity has led a number of legal institutes and commissions to advocate against its use.¹⁴³ In one of the few Supreme Court statements on the meaning of the term, Justice Scalia stated in a separate opinion in *United States v. Aguilar* that “corruptly” is used in the context of 18 U.S.C. § 1503¹⁴⁴ to characterize “[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another.”¹⁴⁵ In other words, even actions that do not involve conferral of a benefit by a third person can be corrupt.

These definitions are consistent with a reading of § 666 that covers both bribes and gratuities. The example of Charles Abbey, cited in this Note’s introduction, is instructive in this regard.¹⁴⁶ As explained above, Abbey argued that despite having accepted land from a developer and having acted in a way that benefited that developer, did not violate § 666 because there was no explicit agreement tying the benefit to his actions.¹⁴⁷ The Sixth Circuit

138. *Id.*

139. Eric J. Tamashasky, Note, *The Lewis Carroll Offense: The Ever-Changing Meaning of “Corruptly” Within the Federal Criminal Law*, 31 J. LEGIS. 129, 133 (2004).

140. *Id.*

141. *Id.* at 133–34, 140–41.

142. *Id.* at 129 n.6.

143. *See id.* at 129 n.7.

144. Section 1503 is titled, “Influencing or injuring officer or juror generally.” 18 U.S.C. § 1503 (2006).

145. 515 U.S. 593, 616 (1995) (quoting *United States v. Ogle*, 613 F.2d 233, 238 (10th Cir. 1979)).

146. *See supra* Parts I, III.A.2.

147. *United States v. Abbey*, 560 F.3d 513, 515–20 (6th Cir. 2009); *see supra* Parts I, III.A.2.

rejected this argument, holding that a corrupt intent could exist without proof of the quid pro quo necessary for bribery.¹⁴⁸ This decision makes sense given the definitions of “corrupt” just outlined; surely even without a quid pro quo, Abbey’s actions could still be characterized as having been motivated by a “wrongful desire for pecuniary gain or other advantage”¹⁴⁹ or having been “done with an intent to give some advantage inconsistent with official duty and the rights of others.”¹⁵⁰ The inclusion of “corruptly” in § 666 thus should not, on its own, preclude gratuities convictions for individuals like Abbey.

2. Section 666 Should Be Interpreted to Avoid Surplusage

Equating the language of § 666 with that in § 201(b) is also problematic because it ignores the textual differences that do exist between §§ 666 and 201. Such a reading does not account for the fact that § 666 covers benefits intended to “influence or reward” officials “in connection with any business, transaction or series of transactions,”¹⁵¹ while § 201(b) only covers those intended to “influence . . . official acts.”¹⁵² A standard canon of statutory interpretation is that statutes should not be read in a way that would make their terms superfluous.¹⁵³ Viewing §§ 201(b) and 666 as identical would do just that.

Both “in connection with” and “influence or reward” can be read to broaden the scope of § 666 beyond § 201(b). For the former phrase, this is clear from a straightforward reading of the plain language. A benefit described as intended to “influence . . .

148. *Abbey*, 560 F.3d at 521–22.

149. BLACK’S LAW DICTIONARY, *supra* note 137, at 372.

150. *Aguilar*, 515 U.S. at 616.

151. 18 U.S.C. § 666 (2006) (emphasis added).

152. 18 U.S.C. § 201(b) (2006).

153. *See* *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (articulating the canon and stating, “[w]e are especially unwilling to [fail to give meaning to a term] when the term occupies so pivotal a place in the statutory scheme.”); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–98 (1995) (“[U]nless the statutory term ‘harm’ encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define ‘take.’ A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary’s interpretation.”). *But see* *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (“The canon requiring a court to give effect to each word ‘if possible’ is sometimes offset by the canon that permits a court to reject words ‘as surplusage’ if inadvertently inserted or if repugnant to the rest of the statute”).

official acts” suggests a direct exchange: a quid pro quo of benefit for action. The introduction of “in connection with” certainly does not imply a stricter standard. If the phrase is to mean anything at all, it must suggest that a less explicit exchange is necessary; it implies that the benefit need only have some articulable bearing on the actions in question. This makes sense in practice: gifts made to curry favor because the giver knows that the receiving official may make decisions affecting the giver in the future may not be intended to influence a specific official act, but could be characterized as “in connection with” official acts.

For the term “reward,” resort to dictionaries is useful. While Black’s lacks an entry on the term “reward,” Webster’s Third defines it in the verb form as “to make a return or give a reward to (as a person) or for (as a service or accomplishment).”¹⁵⁴ It defines the noun “reward,” in turn, as either “something that is given in return for good or evil done or received . . . and esp. that is offered or given for some service or attainment,” or “compensation for services: a sum of money paid or taken for doing or forbearing to do some act.”¹⁵⁵ Again returning to the example of Abbey, under these definitions, it would be possible to say that the land he accepted was “offered or given for some service or attainment” (i.e., his actions serving the developer’s interests), without the presence of any quid pro quo.

The words “reward” and “in connection with” are thus consistent with interpreting § 666 to cover gratuities. This consistency is, admittedly, inconclusive on its own. The federal appellate courts’ conflicting interpretations of the word “reward,” however, suggest that the term is, at the very least, ambiguous. The Fourth Circuit read the term in *Jennings* as specifying that the benefit in a bribe could be given before or after the service was performed, whereas the Second and Seventh Circuits read the term as denoting an illegal gratuity.¹⁵⁶ This latter reading fits with the use of the term in the Supreme Court’s *Sun-Diamond*

154. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 136, at 1945.

155. *Id.*

156. Compare *United States v. Jennings*, 160 F.3d 1006, 1006 n.4 (4th Cir. 1997) (reading “reward” as serving to clarify that a bribe can be given either before or after the official action it seeks to influence), with *United States v. Boender*, 649 F.3d 650, 655 (7th Cir. 2011) (finding “reward” to establish a broader standard than § 201(b)’s “with intent to influence any official act” language), and *United States v. Ganim*, 510 F.3d 134, 150 (2d Cir. 2007) (stating that “a payment made to ‘reward’ connotes an illegal gratuity.”).

decision as well.¹⁵⁷ But, as the Court has stated, when the language of a statute is ambiguous, other evidence of congressional intent may be considered.¹⁵⁸

B. SECTION 666 COVERS BRIBES AND GRATUITIES

The legislative history, and the evolution of § 666 over time, alongside §§ 201 and 215, show that Congress intended § 666 to cover both bribes and gratuities. This section will show that Congress enacted § 666 with the intention of mirroring § 201(c)'s gratuities provision, and that the narrowing of scope in the 1986 amendments was achieved by tightening the requirements for a gratuities conviction, rather than by eliminating gratuities altogether. It will argue that this reading is consistent with the evolution of the statutory language, and the treatment of the statute in the Federal Sentencing Guidelines. It will conclude by arguing that rule of lenity and federalism concerns are insufficient to overcome this interpretive evidence to require restricting the statute to bribes.

As summarized in Part II, § 666 was adopted to address a perceived loophole in § 201's coverage.¹⁵⁹ Federal appellate courts had split over whether the term "public officials" in § 201 included state and local officials administering federal funded programs, or whether it was restricted to those employed directly by the federal government.¹⁶⁰ The legislative history of § 666's pas-

157. The Supreme Court in *Sun-Diamond* used the word "reward" to describe gratuities in the same sense as *Boender*. See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999) ("An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.").

158. See *Dixson v. United States*, 465 U.S. 482, 491 (1984) ("As is often the case in matters of statutory interpretation, the language of section 201(a) does not decide the dispute. The words can be interpreted to support either petitioners' or the Government's reading. We must turn, therefore, to the legislative history of the federal bribery statute to determine whether these materials clarify which of the proposed readings is consistent with Congress's intent."); *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154–55 (1932) ("In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress."). *But see Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005) (holding that, because the statutory text at issue was clear on its face, there was no need to resort to legislative history); *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186 (2004) (same).

159. See *supra* notes 33–37 and accompanying text.

160. See *supra* note 34 and accompanying text.

sage in 1984 shows that this relationship was at the forefront of the congressional debate; in § 666, Congress intended to use the same statutory scheme set up in § 201 to cover a different group of people.¹⁶¹ Within this context, the use in § 666 of the same operative language as § 201's gratuities provision strongly indicates that Congress intended the new statute to cover gratuities.

In contrast, the legislative history of § 666's amendment in 1986 features no discussion of the relationship to § 201.¹⁶² Instead, the only other statute referenced in congressional reports was § 215, the bank-bribery statute.¹⁶³ Again, recall that beginning in 1984, § 215 bore the same operative language as §§ 666 and 201(c) (gratuities).¹⁶⁴ In 1986, however, Congress amended § 215 to cover anyone who "corruptly gives . . . anything of value to any person, with intent to influence or reward an officer . . . of a financial institution in connection with any business or transaction of such institution."¹⁶⁵ It found that, in the context of operating a bank, simply conducting business required that certain wholly innocuous benefits be conferred upon employees and officers.¹⁶⁶ By modifying the statute to require a corrupt intent to "influence or reward" the official for actions "in connection with" the bank's business (rather than "for or in connection with" the bank's business), Congress sought to avoid criminalizing this otherwise innocuous conduct.¹⁶⁷ In doing so, it provided a number of examples of the sorts of activities it thought should not be criminalized: activities like payment of interest on employee accounts and lunches between bank officials and customers.¹⁶⁸ When Congress modified § 666 later that same year, it voiced the same concern with sweeping up legitimate activities for state and local officials.¹⁶⁹ The House Report provided no concrete examples of what these activities might be in the context of administering federal funds, but it stated that the new language was intended

161. See *supra* notes 34–38 and accompanying text.

162. See *supra* notes 45–48 and accompanying text.

163. See *supra* notes 45–48 and accompanying text.

164. See *supra* note 38 and accompanying text.

165. See *supra* notes 39–40.

166. See *supra* notes 41–44.

167. See *supra* notes 41–44.

168. See *supra* note 41.

169. See *supra* note 46.

to mirror that in § 215, citing to the legislative history of the amendments to that section.¹⁷⁰

The legislative history of neither 1986 amendment makes any mention of § 201.¹⁷¹ This silence, and the fact that both amendments included additional language not found in § 201(b) (“influence *or reward*” and “in connection with”), do not support the proposition that Congress meant to enact the dramatic change of entirely removing gratuities from § 666’s scope.¹⁷² It is true that the stated goal of the amendments was a narrowing of scope that sought to avoid coverage of legitimate business practices.¹⁷³ But it does not necessarily follow that gratuities were eliminated from the statute’s coverage. The more straightforward reading of these changes and statements (as well as the lack of a stated intention to exclude gratuities) is rather that Congress meant to require more for a gratuities conviction under § 666 by including a corrupt-intent requirement. As discussed in Part IV.A above, such a requirement is broad enough to encompass benefits given in the absence of a *quid pro quo*.

The Federal Sentencing Guidelines’ treatment of §§ 201, 215, and 666 also weighs in favor of a conclusion that § 666 encom-

170. See *supra* note 47.

171. See *supra* note 39–48 and accompanying text.

172. As the Supreme Court has stated, in what has come to be referred to as the canon of “the dog that doesn’t bark,” the fact that the legislative history gives no indication that Congress meant to enact a major change suggests that a more modest alteration was intended; the Court has endorsed the canon in some cases, but has rejected it in others. See *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (expressing reluctance to read the Bankruptcy Code as making “a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.”); *United Savings Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988) (“[I]t is most improbable that [a significant change] would have been made without even any mention in the legislative history.”); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 588–89 (1982) (Stevens, J., dissenting) (citing *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)) (“This sort of unremarkable change is consistent with the purpose of the statute, as well as with a legislative history that fails to make any comment on its significance. As Justice Rehnquist has perceptively observed in another context, the fact that the dog did not bark can itself be significant.”). *But see* *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (“We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie.”); *Williams v. United States*, 458 U.S. 279, 294 (1982) (Marshall, J., dissenting) (stating that, where the language of a statute fairly encompasses an activity, the fact that Congress did not explicitly identify that activity in the legislative history should not exclude it from the statute’s scope); *Harrison*, 446 U.S. at 592 (Stewart, J.) (“[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.”).

173. H.R. REP. 99-797, at 34, n.9 (1986); see also *supra* Part II.A.

passes bribes and gratuities. The Guidelines' Statutory Index applies separate guidelines for § 201(b) (bribes) and § 201(c)(1) (gratuities),¹⁷⁴ and it lists both those guidelines as being applicable to § 666.¹⁷⁵ While the Sentencing Commission is not a congressional body and does not have the authority to amend statutes, it does submit proposed Guidelines to Congress;¹⁷⁶ those proposals automatically become effective after 180 days, as long as Congress does not disapprove or modify them.¹⁷⁷

The fact that Congress did not disapprove of including both guidelines for § 666 is certainly not conclusive evidence that it meant the statute to cover both crimes; it is possible, for example, that this failure instead resulted from an oversight or an inability to agree on what, exactly, was wrong with the Sentencing Commission's approach. The Supreme Court has not clarified the degree of deference to be afforded to interpretations of statutes embodied in the Sentencing Guidelines.¹⁷⁸ Still, the Court has stated that in at least some instances, congressional silence in the face

174. U.S. SENTENCING GUIDELINES MANUAL app. A (2011) [hereinafter SENTENCING GUIDELINES].

175. *Id.* In contrast, § 215 receives an entirely different sentencing guideline. See SENTENCING GUIDELINES, *supra* note 174, § 2B4.1.

176. 28 U.S.C. § 994(p) (2006); SENTENCING GUIDELINES, *supra* note 174, § 2.

177. 28 U.S.C. § 994(p).

178. See *DePierre v. United States*, 131 S. Ct. 2225, 2236 (2011) (citation omitted) ("We have never held that, when interpreting a term in a criminal statute, deference is warranted to the Sentencing Commission's definition of the same term in the Guidelines. And we need not decide now whether such deference would be appropriate . . ."); *Neal v. United States*, 516 U.S. 284, 295 (1996) (rejecting the Commission's interpretation where it contravened judicial precedent, stating that "[i]n these circumstances, we need not decide what, if any, deference is owed the Commission in order to reject its alleged contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."). Here, unlike *Neal*, the Commission's application of the gratuities guideline to § 666 does not contravene existing precedent. While the language quoted from *DePierre* expresses some skepticism regarding deferring to the Guidelines, the Court has stated elsewhere that the Guidelines are "the equivalent of legislative rules adopted by federal agencies," because "[t]he Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking . . . and through the informal rulemaking procedures in 5 U.S.C. § 553." *Stinson v. United States*, 508 U.S. 36, 44–45 (1993). This suggests that, in a case like this one, where there is no contrary judicial precedent, the Court might afford the Guidelines deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which held that where "Congress' silence or ambiguity has 'left a gap for the agency to fill,' courts must defer to the agency's interpretation so long as it is 'a permissible construction of the statute.'" *Stinson*, 508 U.S. at 44 (quoting *Chevron*, 467 U.S. at 842–43).

of agency action¹⁷⁹ can be interpreted as acquiescence in those actions.¹⁸⁰ The Court has noted that the significance of congressional acquiescence “is greatest when the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme.”¹⁸¹ In this case, the Sentencing Commission gives testimony, makes reports and submits amendments to Congress on a regular basis¹⁸² and in at least one instance, Congress has rejected an amendment proposed by the Commission.¹⁸³ The Sentencing Commission has submitted amendments relating to the guidelines for § 666 on four occasions, and Congress has allowed all four to become effective.¹⁸⁴ That the gratuities guideline has persisted through this process does not provide strong evidence on its own that Congress meant § 666 to cover gratuities, but it does provide some support for reading the statute broadly based on its language and legislative history.

179. Note, however, that the Sentencing Commission is an independent agency within the judicial branch, 28 U.S.C. § 991(a) (2006), while the Court’s analysis of congressional responses to agency action have typically dealt with executive-branch agencies. *See, e.g., Chevron*, 467 U.S. at 844.

180. *See Grove City Coll. v. Bell*, 465 U.S. 555, 568 (1984) (“Congress’ failure to disapprove the regulations is not dispositive, but, as we recognized in *North Haven Board of Education v. Bell*, [456 U.S. 512, 533–34 (1982)], it strongly implies that the regulations accurately reflect congressional intent.”); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 74 (1988) (quotation marks omitted) (“[T]he Court will often find that congressional failure to disapprove of executive department regulations, while not dispositive . . . strongly implies that the regulations accurately reflect congressional intent”). *But see Zuber v. Allen*, 396 U.S. 168, 185 n. 21 (1969) (“Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.”).

181. *Id.*

182. *See* U.S. SENTENCING COMM’N, *Congressional Testimony, Reports, and Submissions*, http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/index.cfm (last visited Sept. 25, 2012).

183. *See Kimbrough v. United States*, 552 U.S. 85, 99 (2007) (explaining that, in 1995, the Sentencing Commission submitted a proposed amendment that would have changed the divergent treatment of crack and powder cocaine under the Guidelines, but that Congress rejected this proposal).

184. All of these made either minor, non-substantive changes, or changes that did not affect § 666’s bribery or gratuities guidelines. *See* SENTENCING GUIDELINES, *supra* note 174, app. C (containing Amendment 359, effective Nov. 1, 1990, separating the guidelines for § 666(a)(1)(A)’s theft provision from its bribery/gratuities provision; Amendment 496, effective Nov. 1, 1993, changing a reference to § 666(a)(1)(C) to § 666(a)(2), presumably correcting an error in previous versions; Amendment 617, effective Nov. 1, 1990, making a change related to theft under § 666(a)(1)(A)); and Amendment 638, effective Nov. 1, 2002, making a change to the guidelines for theft under § 666(a)(1)(A)).

Those believing that § 666 should be restricted to bribes might object that, under the rule of lenity, the confusion surrounding the statute's language should require courts to resolve the ambiguity in favor of defendants, restricting its coverage to bribes alone.¹⁸⁵ This rule of lenity concern should not, however, be enough to overcome the reading of the statute just presented. That the Supreme Court has applied the canon somewhat inconsistently¹⁸⁶ should caution against relying on it too heavily. More importantly, the Court has stated that the rule of lenity "is not an inexorable command to override common sense and evident statutory purpose Nor does it demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the law-makers."¹⁸⁷ In this case, § 666's legislative history and relevant

185. See, e.g., Weitz, *supra* note 17, at 812–13 (raising rule of lenity considerations, but noting that "judicial construction of § 1346, § 666, and other criminal statutes that address white-collar crime and public corruption has frequently failed to follow [the rule of lenity]."). The rule of lenity is an oft-repeated canon of statutory interpretation. See *United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("The rule of lenity is of course a well-recognized principle of statutory construction"); *Williams v. United States*, 458 U.S. 279, 290 (1982) (internal quotation marks omitted) ("The Court has emphasized that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").

186. See *United States v. Nofziger*, 878 F.2d 442, 456 (D.C. Cir. 1989) (Edwards, J., dissenting) ("[M]y review of the nearly one hundred federal cases in which reviewing courts in the last ten years have paid lip service to the principle reveals that, almost without exception, courts have found the rule to be altogether inapplicable to the facts before them. In the rare cases in which it has been applied, the rule has most often been used only in its 'corollary' function, i.e., to decrease the extent of the punishment attached to a single conviction, rather than to overturn a conviction or an entire statute."); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 899 (2004) ("The rule of lenity today has very little practical effect in decisions interpreting criminal statutes in either state or federal courts."). But see Note, *The New Rule of Lenity*, 119 *HARV. L. REV.* 2420, 2428, 2435 (2006) (analyzing forty-eight Supreme Court cases considering the rule between 1986 and 2005 and finding that "the Court applies the rule of lenity in a predictable and principled fashion as a strong presumption against the criminalization of innocent conduct.>").

187. *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (citations omitted) (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997)) ("The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of [the rule of lenity], for most statutes are ambiguous to some degree. . . . 'The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.'). *United States v. Moore*, 423 U.S. 122, 145 (1975) (quoting *United States v. Brown*, 333 U.S. 18, 25–26 (1948)); see also *Moskal v. United States*, 498 U.S. 103, 108, (1990) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)) ("[W]e have

sentencing guidelines demonstrate an “evident statutory purpose” to cover bribes as well as gratuities, and the Supreme Court’s inconsistent application of the rule of lenity does not support marshaling the small uncertainties that may remain to undermine an otherwise consistent reading.

Similarly, scholars who have written about the federalism concerns posed by statutes like § 666 argue that federal prosecution of local officials infringes on states’ rights to craft their own standards and solutions for the evils of corruption.¹⁸⁸ Justice White’s opinion for the Court in *McNally v. United States* echoes these concerns, giving some reason to think that gratuities should be read out of § 666.¹⁸⁹ In *McNally*, the Court rejected an interpretation of the mail-fraud statute¹⁹⁰ that had formed the basis for prosecuting state officials (among others) for schemes to defraud individuals and states of their “intangible right to honest and faithful government.”¹⁹¹ The Court found that this broad reading of the statute “leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials.”¹⁹²

always reserved lenity for those situations in which a reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.”). *But see* *United States v. Hayes*, 555 U.S. 415, 436 (2009) (Roberts, J., dissenting) (quoting *Crandon v. United States*, 494 U.S. 152, 160 (1990)) (“Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.”). In the context of anticorruption statutes, however, the concern expressed by Chief Justice Roberts in *Hayes* seems misplaced. In that case, the Chief Justice took issue with the majority’s reliance of legislative history to find that no domestic relation need exist for a domestic violence conviction to serve as a predicate offense for a criminal possession of a firearm conviction. In the context of a *malum in se* offense like accepting gratuities, these fair notice concerns are less relevant, since public officials can be expected to know that accepting undue benefits is wrong.

188. *See, e.g.*, Brown, *supra* note 10, at 411 (arguing that the federal interest in prosecuting corruption at the state level is weak and that the practice in fact runs counter to “notions of state autonomy, sovereignty, and dignity”).

189. 483 U.S. 350 (1987). The Court has also held that, in the face of ambiguity, it “will not attribute to Congress an intent to intrude on state governmental functions.” *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

190. 18 U.S.C. § 1341 (2006).

191. *McNally*, 483 U.S. at 360.

192. *Id.* at 360–61. Congress responded to this decision by enacting a new statute, 18 U.S.C. § 1346, which explicitly defined “scheme or artifice to defraud” as encompassing the honest-services fraud theory rejected by the *McNally* Court. *Skilling v. United States*, 130 S. Ct. 2896, 2927 (2010). The Court subsequently limited the scope of this provision in its decision in *Skilling*. *Id.* at 2927–40.

Section 666, however, presents quite a different case. As an initial matter, warnings about federal usurpation of the states' role in anticorruption enforcement may be beside the point, given that states often are incapable of combating corruption as effectively as the federal government. States face barriers to effective corruption prosecution, including limited resources, local prosecutors' lack of expertise in corruption matters, potential conflict-of-interest issues raised by the relatively small scale of the local political apparatus, and the fact that state law and pragmatic limitations may render local grand jury investigations less effective than their federal counterparts.¹⁹³ That states often welcome federal assistance in prosecuting corrupt local officials is evidenced by the fact that at least in some cases, states have responded to such prosecutions by stepping up their own enforcement measures.¹⁹⁴ Federal involvement in this sphere thus has not only complemented state efforts, but has also proved to be a catalyst for more robust state enforcement.¹⁹⁵

Furthermore, the concern expressed in *McNally* may be misplaced, in that § 666 reaches crimes with arguably a more direct federal interest. Federal jurisdiction under the mail-fraud statute is predicated on use of the mails,¹⁹⁶ but the statute is often used to reach fraudulent conduct that is, at best, tangentially related to that usage.¹⁹⁷ In contrast, § 666 requires that the prose-

193. See Michael W. Carey et. al., *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and Proposal for Reform, Part One*, 94 W. VA. L. REV. 301, 304–11 (1991/1992).

194. See *id.* at 316–17. Carey et al. note that, after federal prosecutions of local officials in Massachusetts, Tennessee, and West Virginia, those states adopted new anticorruption statutes and initiated new enforcement practices. *Id.* at 316. Carey et al. also explain the range of obstacles, both legal and practical, that prevent local authorities from effectively combating corruption, arguing that these impediments make federal prosecution a necessary component of anticorruption measures. *Id.* at 304–11.

195. *Id.*

196. See *Kann v. United States*, 323 U.S. 88, 95 (1944) (“The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.”).

197. See *United States v. Sawyer*, 85 F.3d 713, 723 n.5 (1st Cir. 1996) (citing Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435 (1995)) (“Some have observed that these statutes are increasingly used effectively to convict and punish for the substantive fraud, and that the use of the mails or wires is merely a ‘jurisdictional hook’ to bring the conduct within the proscription of the mail and wire fraud statutes.”).

cuted official be employed by an entity receiving federal funds,¹⁹⁸ implicating a more immediate federal interest than is at issue in mail-fraud prosecutions, where the federal interest is limited to protecting the integrity of a federal instrumentality. In contrast, violations of § 666 directly injure the federal government by causing the waste or misuse of its funds; this type of immediate harm is present even when those funds are not directly involved in the corrupt act itself. As the Supreme Court has noted, “Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value.”¹⁹⁹ Again, considering the text and legislative history of § 666, the most defensible reading is that Congress intended the statute to cover both bribes and gratuities by state and local officials. It is not at all clear that the concerns raised in *McNally* translate to § 666, and to the extent they do, they should be outweighed by the strong federal interest that § 666 was designed to protect: ensuring the integrity of organizations that receive federal funds.

C. SECTION 666 DOES NOT REQUIRE A LINK TO A SPECIFIC OFFICIAL ACT

Having concluded that § 666 should extend to both bribes and gratuities, the minimum standard of explicit exchange necessary for a conviction must still be considered. Under the interpretation just advanced, a person commits a gratuities violation under § 666 by giving something of value to an official, corruptly intending to reward the official in connection with any business of the official’s organization or agency. In the context of § 201(c), *Sun-Diamond* specified that the government must prove a link between a benefit and a specific official act.²⁰⁰ In other words, benefits given to curry favor generally in the hope that the official will act in the giver’s favor at some unspecified point in the future do not violate § 201(c). Given the intertwined legislative histories of

198. 18 U.S.C. § 666(b) (2006).

199. *Sabri v. United States*, 541 U.S. 600, 606 (2004). The Court continued, “Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there. And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers.” *Id.*

200. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 40–45 (1999).

§§ 201 and 666 just outlined, it may seem that § 666 should also require proof of such a link.²⁰¹ As the Sixth and Seventh Circuits have rightfully observed, however, the *Sun-Diamond* Court's rationale for the link requirement for § 201(c) does not apply in the case of § 666.²⁰² As this sub-Part will demonstrate, without the *Sun-Diamond* factors to support requiring a specific link, the more natural reading of § 666's text is that no specific act must be identified.

Chief among the differences between the two statutes is their language. The Supreme Court placed considerable weight on § 201(c)'s requirement that the benefit be given "for or because of any official act."²⁰³ It found that this language, together with the fact that the statute defined "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity,"²⁰⁴ to be "pregnant with the requirement that some particular official act be identified and proved."²⁰⁵ If Congress had not meant to require a link, the Court reasoned, it would make little sense to go to the trouble of specifying such a careful definition.²⁰⁶ Section 666, in contrast, includes no definition of "business, transaction, or series of transactions" (the equivalent to § 201(c)'s "official act"), even as it does define "agent,"²⁰⁷ "government agency,"²⁰⁸ "local,"²⁰⁹ "State,"²¹⁰ and "in any one-year period."²¹¹ Nor does its language connote the same specificity as that in § 201(c). Instead of requiring that the benefit be "for or because of any official act,"²¹² gratuity under § 666 only requires the benefit be "in connection with any business, transaction, or series of transac-

201. No appellate court has adopted this position, nor has research revealed any scholarly articles that have done so — but it seems to be a plausible interpretation, and is worth considering here.

202. See *United States v. Boender*, 649 F.3d 650, 651–55 (7th Cir. 2011); *United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009).

203. *Sun-Diamond*, 526 U.S. at 426–27.

204. 18 U.S.C. § 201(a)(3) (2006).

205. *Sun-Diamond*, 526 U.S. at 406.

206. *Id.*

207. 18 U.S.C. § 666(d)(1) (2006).

208. 18 U.S.C. § 666(d)(2) (2006).

209. 18 U.S.C. § 666(d)(3) (2006).

210. 18 U.S.C. § 666(d)(4) (2006).

211. 18 U.S.C. § 666(d)(5) (2006).

212. 18 U.S.C. §§ 201(b)(1)(A), 201(b)(2)(A) (2006).

tions.”²¹³ The focus of this language is not on the official’s actions, but rather on the business of the agency that the official serves, and the benefit need only be “in connection with” (that is, related to) these activities. This wording suggests that the arrangement the Court found outside the scope of § 201 — gifts given because of an official’s position in hopes of influencing the him to act in the giver’s favor at some unspecified future time — lies within the reach of § 666.

Sun-Diamond’s two policy rationales similarly do not require application of the holding to § 666. First, the Court noted that adopting too broad a standard for illegal gratuities in § 201 would upset the “intricate web of regulations” governing the acceptance of benefits by federal officials.²¹⁴ This concern does not translate to the state and local context, however, as the majority of that web — composed not only of criminal statutes, but a vast array of civil penalties and administrative rules as well — only applies to federal employees. There is considerably less risk of upsetting the balance of federal regulations in the state and local context, where a far more limited range of federal criminal statutes apply. In addition to § 666, the primary federal corruption statutes in this field are the Hobbs Act,²¹⁵ the mail²¹⁶ and wire fraud statutes,²¹⁷ the Travel Act,²¹⁸ and RICO.²¹⁹ While certainly not insubstantial, this list pales in comparison to a federal system that includes not only these statutes and § 201, but also a range of statutes regulating employees’ activity after leaving federal service,²²⁰ employees’ interested decision-making,²²¹ and employees’ non-government sources of income,²²² among other subject matters.²²³ These statutes are also supplemented by a wide range of

213. 18 U.S.C. §§ 666(a)(1)(B), 666(a)(2) (2006).

214. *United States v. Sun-Diamond Growers of Cal*, 526 U.S. 398, 410–12 (1999).

215. 18 U.S.C. § 1951 (2006).

216. 18 U.S.C. § 1341 (2006).

217. 18 U.S.C. § 1343 (2006).

218. 18 U.S.C. § 1952 (2006).

219. 18 U.S.C. § 1961–1968 (2006); *see also* Carey et. al., *supra* note 193, at 32–25 (1992) (identifying this list of federal statutes as the ones applying to state and local officials).

220. 18 U.S.C. § 207 (2006).

221. 18 U.S.C. § 208 (2006).

222. 18 U.S.C. § 209 (2006).

223. *See United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 409–10 (1999) (listing other such provisions).

regulations establishing ethical rules for each branch of the federal government.²²⁴ With a much simpler set of federal rules in the state and local context, the surrounding anticorruption framework poses fewer barriers to a more expansive gratuities provision.

Second, both *Sun-Diamond* and the 1986 amendments to § 666 were concerned with ensuring that otherwise legitimate activities were not criminalized by overly broad language. The 1986 amendments show, however, that Congress chose to go about this limiting task differently in the context of § 666. The *Sun-Diamond* Court reasoned that failing to require a link to a specific act in § 201 could potentially sweep up, for example, a baseball cap given to the Secretary of Education by a high school principal to commemorate the Secretary's visit to the school.²²⁵ By requiring a link to a specific action, the Court enunciated a reading of § 201 that avoided this absurd result. The same goal is achieved in § 666 by requiring that the benefit be given or received with a corrupt intent.²²⁶ The government would surely be unable to show such intent in the Court's hypothetical, since the gift of the baseball cap gives no indication of being done corruptly — that is, “with an intent to give some advantage inconsistent with official duty and the rights of others.”²²⁷

Applying each of the *Sun-Diamond* Court's rationales to § 666, there is insufficient justification to import its holding into a statute amended two decades earlier to use different wording, situated in a different regulatory context, and taking a different approach to excluding benign transfers. The more sensible read-

224. See, e.g., 5 C.F.R. §§ 2634–35 (2012) (executive employees); SENATE RULE XXXV, STANDING RULES OF THE SENATE S. DOC. NO. 104-1 (rev. July 18, 1995), available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXXV> (senators and Senate employees); HOUSE RULE XXV, RULES OF THE HOUSE OF REPRESENTATIVES, 112th Cong. (rev. Jan. 5, 2011), available at <http://www.rules.house.gov/singlepages.aspx?NewsID=145&rsbd=165> (congressmen and House of Representatives employees); CODE OF CONDUCT FOR U.S. JUDGES, Canon 4(D)(4) (2009), available at <http://www.uscourts.gov/RulesAndPolicies/CodesofConduct/CodeConductUnitedStatesJudges.aspx> (federal judges); see also *Sun-Diamond*, 526 U.S. at 410.

225. *Sun-Diamond*, 526 U.S. at 399.

226. Section 666 also fails to cover the hypothetical baseball cap because, unlike § 201, it only criminalizes benefits worth \$5000 or more. 18 U.S.C. §§ 666(a)(1)(B), 666(a)(2) (2006); see also *United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009) (noting the effect of § 666's requirements regarding minimum monetary value of gifts).

227. *United States v. Aguilar*, 515 U.S. 593, 616 (1995); see also *supra* Part IV.B.1.

ing is that gratuities convictions under § 666 require proof of corrupt intent, but no link to a specific official act.

V. CONCLUSION

The scope of § 666 is in dire need of clarification, and this Note has attempted to give some order to the statute's tangled history. The reading of § 666 that is most in line with the statutory text, legislative history, and broader anticorruption framework is that both bribes of and payment of illegal gratuities to state and local officials in connection with federally funded programs are proscribed, and that a gratuities conviction under the statute requires corrupt intent, but no link to a specific official action.

The project of regulating the actions of public officials to eliminate corruption is fraught with these sorts of problems. Legislatures face a daunting task in attempting to draft statutory language that differentiates actions we view as legitimate from those we perceive as impermissible. The range of possible interactions between officials and those seeking unfair advantages, and the myriad ways in which influence can be bought and sold necessitate relatively broad statutory language. Courts, then, must undertake to give content to the sweeping language that results, and must do so while grappling with the specific facts presented by the case at bar. Because these facts vary so widely, it is often difficult to generalize from one case to another. In the absence of easy answers, courts must do the best they can to give content to the statutory texts with which they are presented. For statutes like § 666, this means striving not for tidy solutions, but rather for the most faithful approximation of congressional intent possible, and the framework that best addresses the very real evils of corruption.