Courts Divide on Corruption Statute as 1st Circuit Limits 18 U.S.C. § 666 to Bribes

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The 1st U.S. Circuit Court of Appeals has held — contrary to the 2nd, 7th and 8th circuits — that 18 U.S.C. § 666 is solely a bribery statute and does not criminalize gratuities to state and local officials. For companies whose employees regularly interact with public officials, resolving the scope of this statute could prove important. If this often-used law is limited to bribes, routine business socializing with public officials — such as by sharing meals, attending ball games and the like — may be less likely to be scrutinized by federal prosecutors.

On the other hand, if the statute is interpreted to ban only bribes, then companies will be unable to resolve statutory charges by characterizing an allegedly unlawful payment as a relatively minor “gratuity.” In addition, the lack of a gratuity option may cause prosecutors to treat more minor transactions as bribes. And — at least for the moment — certain conduct that is unlawful in New York or Chicago, for example, cannot be prosecuted in Boston or Providence. This circumstance complicates compliance.

While the U.S. Supreme Court has generally described the distinction between a bribe and a gratuity, the convoluted legislative history of federal anti-corruption statutes makes divining congressional intent regarding Section 666 difficult. In United States v. Sun-Diamond Growers of California, the court explained that the “distinguishing feature of each [the bribery and gratuity] crime is its intent element.” It also noted that bribery necessitates a *quid pro quo* — “a specific intent to give or receive something of value in exchange for an official act” — whereas a gratuity is merely remuneration 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.”

In Sun-Diamond and many cases before it, the Supreme Court concluded that when Congress enacted 18 U.S.C. § 201 in 1962 it deliberately made bribes and gratuities to federal public officials separate crimes. Subsection 201(b) outlawed giving, taking or promising anything of value to any public official “with the intent to influence” any official act. With its emphasis on inducement of corrupt activity, Section 201(b) is the statute’s bribery provision. In contrast, subsection 201(c) outlawed giving, taking or promising anything of value “for or because of” any official act. This subsection emphasizes mere connectedness to corrupt activity; it is the statute’s gratuity provision.

Section 201’s bifurcated structure kept the distinction between bribes and gratuities uncontroversial. In 1984, Congress sought to extend federal anti-corruption prohibitions to certain state and local public officials working for entities that receive federal funding (and to private individuals who provided improper benefits to them). Newly enacted Section 666 prohibited the exchange of or offer to exchange anything of value to or by a state/local official “for or because of” government-related conduct. Congress mimicked the “for or because of” language of Section 201(c)’s gratuity provision, but it omitted the “with the intent to influence” language in Section 201(b)’s bribery provision. Thus, it appeared that Congress had enacted a statute that prohibited gratuities but not bribes.
Two years later, Congress attempted to remedy this drafting oversight. But instead of creating distinct bribery and gratuity subsections as it did with Section 201, Congress retained Section 666’s original, single-provision format. As rewritten, Section 666(a) banned the exchange of or offer to exchange anything of value to or by a state/local official “with the intent to influence or reward” government-related conduct. Courts were then left to decide whether Congress had added a bribery prohibition or replaced the gratuity prohibition with a bribery ban.

Three federal appeals courts have concluded that the amended Section 666(a) imposes both bribery and gratuity liability. In United States v. Ganim, the 2nd Circuit held that Section 666(a)’s omission of the phrase “for or because of” was inconsequential because it had “been replaced with language that is to the same effect — namely that the payment must be made to ‘influence or reward’ the official conduct.” The 8th Circuit agreed in United States v. Zimmermann, concluding that Section 666(a) “prohibits both the acceptance of bribes and the acceptance of gratuities intended to be a bonus for taking official action.” The court paused only to note that a bribe requires a quid pro quo arrangement while a gratuity does not. In United States v. Anderson, the 7th Circuit looked to Sections 2C1.1 and 2C1.2 of the U.S. sentencing guidelines, which respectively define bribe and gratuity offenses, and treated those guidelines’ express applicability to Section 666(a) as conclusive evidence of the statute’s criminalization of both.

THE 1ST CIRCUIT BREAKS RANK

The 1st Circuit considered the scope of Section 666(a) after Juan Bravo Fernandez and Hector Martinez were convicted in 2012 of bribery under the statute. Both men received four-year prison sentences.

Fernandez, the president of a Puerto Rican private security firm, urged the Puerto Rican Senate to pass certain security-related legislation. Martinez, then a Puerto Rican senator and the chairman of the Senate’s Public Safety Committee, submitted Fernandez’s favored bill for consideration in the Senate, presided over a hearing on Fernandez’s bill (at which Fernandez testified), and then issued a committee report in May 2005 supporting Fernandez’s bill. Soon after, Fernandez booked first-class airline tickets to Las Vegas for himself and Martinez. Fernandez and Martinez then traveled together to Las Vegas, where Fernandez paid for many of the senator’s personal expenses. Upon return to Puerto Rico, Martinez called for an immediate vote on Fernandez’s bill and voted in favor of it.

At trial, the court instructed the jury:

[A] defendant is not required to have accepted or received a thing of value before the business, transaction, or series of transactions. Rather, the government may prove that defendant Martinez solicited, demanded, accepted, or agreed to accept the thing of value before, after, or at the same time as the business, transaction, or series of transactions. Therefore, the government does not need to prove that defendant Martinez solicited, demanded, accepted or agreed to accept the trip to Las Vegas before defendant Martinez performed any official act or series of acts.

The 1st Circuit vacated the convictions, concluding that the trial court erred when it instructed the jury that it could find the defendants guilty under Section 666(a) solely on a theory of gratuity liability.

The 1st Circuit reasoned that Section 666(a)’s key language — the exchanging of or offering to exchange anything of value to or by state/local officials “with the intent to influence or reward” government-official conduct — incorporated only Section 201(b)’s bribery provision. The court explained that the “intent to influence” and the “intent to reward” clauses of Section 666(a) simply refer to two different types of quid pro quo bribery and do not create a separate gratuity offense. “Influence” bribes pertain to situations in which a payment is made to a public official in order to induce him to engage in official conduct. “Reward” bribes pertain to situations in which a promise of payment is made before the official’s conduct is undertaken and payment is delivered only after the official complies with the payer’s request. The 1st Circuit emphasized that, in either case, the offer is made before the illicit conduct occurs.

The 1st Circuit also noted that Section 666’s legislative history demonstrated congressional intent to proscribe only bribery. In the House reports preceding passage of Section 666, the term
“gratuity” was wholly absent, while “bribe” was mentioned with great frequency and emphasis.\textsuperscript{14} The court stressed that Congress’ amendment of Section 666 just two years after its enactment was meant to cleanly sever the statute’s textual connection to Section 201’s “for or because of” gratuity provision.

Finally, the 1st Circuit concluded that Congress did not intend for Section 666(a) to proscribe gratuities because the statute’s maximum penalty of 10 years in prison comports more closely with Section 201(b)’s 15-year maximum penalty for bribery than Section 201(c)’s two-year maximum penalty for gratuities.\textsuperscript{15}

\textbf{FORECASTING A RESOLUTION}

Should the Supreme Court choose to resolve the differing views of Section 666(a), it will have to address the tension between many recent cases that have narrowly construed statutes criminalizing white-collar behavior and the more expansive reading of Section 666(a) adopted by the 2nd, 7th and 8th circuits.

The tendency to narrowly construe white-collar criminal statutes is well engrained. More than two decades ago, in \textit{McCormick v. United States}, the Supreme Court reversed a conviction and held that an explicit \textit{quid pro quo} is necessary for a Hobbs Act extortion conviction in the context of campaign contributions.\textsuperscript{16} In 1999, the court held in \textit{Sun-Diamond} that Section 201 applies only when something is given for an official act — and does not prohibit payments motivated by the recipients’ official status.\textsuperscript{17}

The court also narrowly construed 18 U.S.C. § 1346 — the “honest services” mail fraud statute — in a triumvirate of 2010 cases including \textit{Skilling v. United States}.\textsuperscript{18} The justices there unanimously agreed to apply the statute to “bribes and kickbacks” but refused to read it to “proscribe a wider range of offensive conduct” due to “the due process concerns underlying the vagueness doctrine.”\textsuperscript{19}

Most recently, in its 2013 \textit{Sekhar v. United States} decision, the Supreme Court concluded that compelling a person to recommend that his employer approve an investment cannot constitute extortion under the Hobbs Act.\textsuperscript{20} It reasoned that an investment recommendation is not a form of property that is capable of being “obtained.” The court’s narrow construction of white-collar statutes is part of a broader chorus, which has warned that numerous broadly worded criminal statutes have spawned over-criminalization and a risk of converting average citizens into unknowing felons.\textsuperscript{21}

Despite this significant track record and an accompanying philosophical impulse to narrowly construe white-collar statutes, Justice Antonin Scalia — who along with Justice Clarence Thomas serves as the court’s premiere advocate for narrow textualism in criminal cases — stated in a 2009 denial of \textit{certiorari} that Section 666(a) “[prohibits] bribes and gratuities against public officials.”\textsuperscript{22} Justice Scalia observed that Section 666(a)’s “clear rules against certain types of corrupt behavior” do not suffer from the “freestanding, open-ended” phrasing of provisions like Section 1346.\textsuperscript{23}

Furthermore, even when the court has scaled back anti-corruption statutes, as it did in \textit{Sun-Diamond}, it has used the word “reward” as part of the definition of “gratuity” under Section 201(c).\textsuperscript{24} Finally, the Supreme Court may refuse to believe that Congress unequivocally intended for Section 666(a) to permit gratuities collected by state and local officials while simultaneously criminalizing their receipt by federal officials in Section 201.

In any event, until the circuit split is resolved, those who have business dealings with state and local officials cannot know for sure which day-to-day conduct falls within the prohibition of the federal statute that most explicitly addresses state and local corruption.

\textbf{NOTES}

\textsuperscript{1} \textit{United States v. Fernandez}, 722 F.3d 1 (1st Cir. 2013).

\textsuperscript{2} 526 U.S. 398, 404-05 (1999).


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7 510 F.3d 134, 150 (2d Cir. 2007) (citations omitted).
8 509 F.3d 920, 927 (8th Cir. 2007).
9 517 F.3d 953, 961-62 (7th Cir. 2008).
11 United States v. Fernandez, 722 F.3d 1, 17 (1st Cir. 2013) (emphasis in original).
12 Id. at 27.
13 Id. at 23.
14 Id. at 21.
15 Id. at 24.
17 United States v. Sun-Diamond, 526 U.S. 398, 406 (1999) (“[T]he government’s alternative reading ... would criminalize, for example, token gifts to the president based on his official position and not linked to any identifiable act.”).
19 Skilling, 561 U.S. at 393.
22 Sorich v. United States, No. 08–410, cert. denied (U.S. 2009), 129 S. Ct. 1308, 1311 (Scalia, J., dissenting from denial of certiorari) (emphasis added).
23 Id.
24 Sun-Diamond, 526 U.S. at 405.