1990

Section 666: The Beast in the Federal Criminal Arsenal

Daniel N. Rosenstein

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol39/iss2/11
SECTION 666: THE BEAST IN THE FEDERAL CRIMINAL ARSENAL

An essential element of modern American society is the Federal Government’s role in developing, maintaining, and financing a variety of programs designed to assist its citizens and protect the nation. Such federal programs include various types of social insurance, community funds for development, and funds to private contractors working on federal projects. Because the government provides large quantities of funds, benefits, grants, and contracts to private organizations and state and local governments, the Federal Government has an interest in protecting those funds from use in criminal activity.

Prior to 1984, federal criminal statutes provided for the punishment of individuals who committed crimes affecting federal resources. However, those statutes were inadequate to cover the panoply of crimes involving entities independent of the Federal Government. Two significant areas of federal concern were the theft of government property and the bribery of government officials. While punishment for these offenses was provided for by traditional federal criminal statutes, these provisions were ill-equipped to deal with the growing power and influence of the Federal Government. Under the federal theft and bribery statutes in force prior to 1984, the United States could successfully prosecute theft and bribery involving federal funds only if the funds were under federal control or the individuals involved were federal employees. As a result of these constraints, federal ju-

5. Id.
risdiction over government-distributed monies was limited, producing a gap in the existing federal criminal law.8

Dissatisfied with this subversion of federal interests, Congress reformed the federal criminal law in 1984,9 and in doing so, enacted section 666. Section 666 of title 1810 avoids the problems of the existing federal bribery and theft statutes by eliminating the government's burden of establishing a link between the stolen property or the bribed official and the Federal Government.11 The passage of section 666 enhances the Federal Government's ability to monitor federal program funds by creating potential federal jurisdiction over the criminal conduct of employees or agents employed by any entity receiving federal benefits.12 However, in eliminating the problems caused by the narrow boundaries of the earlier statutes, Congress enacted a general federal criminal statute of potentially limitless scope and effect.

This Note considers Congress' attempt to protect from criminal use federal monies received by private organizations and state, local, and Indian tribal governments pursuant to federal aid programs. First, this Note focuses on Congress' passage of legislation creating a federal cause of action against agents or employees of groups receiving federal funds who commit substantial acts of theft or bribery, regardless of whether the act is related to, traced to, or connected to such federal funds. It then discusses sections 201 and 641 of title 18, the federal bribery and theft statutes in effect prior to 1984, emphasizing those statutes' inadequacies. Next, this Note analyzes section 666 of title 18, which Congress enacted in response to its dissatisfaction with the limited scope, force, and effect of sections 201 and 641. This analysis contrasts the literal language of section 666 with the earlier theft and bribery statutes, reviews a range of judicial decisions interpreting the scope of section 666, and analyzes the statute's potential impact on federal theft and bribery cases decided prior to the enactment of section 666. Finally, this Note demonstrates that while section 666 achieves Congress' goal

9. K. FEINBERG & S. SCHREIBER, COMPREHENSIVE CRIME CONTROL ACT OF 1984 (1985) (the enactment of the Comprehensive Crime Control Act was a significant reform in federal criminal law); see generally S. REP. No. 307, 97th Cong., 1st Sess. 726, 803 (1981) (the legislation was enacted to correct recurring problems in the areas of theft and bribery).
11. S. REP. No. 225, supra note 4, at 369, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3510. Earlier federal statutes provided punishment only for bribery of "public officials" and theft of "property of the United States." Id.
12. 18 U.S.C. § 666. Examination of the language of section 666 reveals that the Federal Government can obtain jurisdiction over the employees or agents of certain organizations simply because that organization receives federal funds. For a complete discussion of section 666, see infra notes 95-151 and accompanying text.
of closing a gap in federal criminal law, the statute's broad language permits its applicability to areas and individuals well beyond both congressional intent and federal concern.

I. THE SHORTCOMINGS OF THE FEDERAL THEFT AND BRIBERY STATUTES

Prior to the enactment of section 666 of title 18, the primary weapons the Federal Government used to punish the theft of federal property and the bribery of public officials were section 201 and section 641. Although these two statutes are still in effect, interpretation of the provisions of these statutes by federal courts limited their scope and restricted their effectiveness.


(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 ... 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 ... to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud ...; or

(C) to induce such public official ... to do or omit to do any act in violation of the lawful duty

... shall be fined not more than three times the monetary equivalent of the thing of value, or imprisoned for not more than fifteen years, or both ... .

Id.


Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than two years, or both.

Id.

15. See, e.g., United States v. Del Toro, 513 F.2d 656, 663 (2d Cir. 1975) (Section 201 of Title 18 is applicable only if the defendant bribed a "public official," as defined by the statute. United States v. Tana, 618 F. Supp. 1393, 1395 (S.D.N.Y. 1985) (A defendant can be convicted under section 641 of title 18 only if the property stolen is "property of the United States.").

Section 641 of title 18 provides that an individual who commits theft or fraud, embezzles or converts virtually any type of property or "thing of value" which either belongs to the United States or involves a contract to which the United States is a party, violates federal law. Furthermore, the statute states that it is a federal crime to receive such illegally acquired property. Despite the statute's apparently broad language, judicial interpretation severely restricted its scope. Specifically, congressional examination of the effectiveness of section 641, as applied to organizations receiving federal monies, revealed several serious problems. First, Congress recognized that it was often impossible for the United States Attorney to prove that the stolen property was of federal character. Second, Congress noted that state and local law enforcement agencies were reluctant to expend the time and money needed to prosecute such thefts, because the primary injured party was the Federal Government. Third, Congress acknowledged that judicial decisions restricting the application of section 641 to only those instances in which the stolen property was property of the United States sharply curtailed the statute's effectiveness.

The supervision and control the Federal Government exerts over the property is a key factor in the court's determination of whether misappropriated property is property of the United States, and thus within the confines of section 641. In United States v. Smith, the government charged Smith and others with defrauding the United States by stealing College Work-

17. Id. The language "property of the United States" is the most important element of section 641 and receives particular scrutiny from the courts. See generally Tigar, The Right of Property and the Law of Theft, 62 Tex. L. Rev. 1443, 1461-62 (1984)(defining section 641 and providing a general discussion of the significant language).
19. Id.
21. Id.
22. Id.
23. Id. The wording of section 641 restricts its use to those thefts involving property of the Federal Government. See United States v. Fleetwood, 489 F. Supp. 129, 132 (D. Oregon 1980); see also Tigar, supra note 17, at 1463-64 (under section 641, the government claims that it controls the res, which is capable of being stolen).
24. See United States v. Smith, 596 F.2d 662, 664 (5th Cir. 1979) ("[T]he key factor is the supervision and control contemplated and manifested on the part of the government.") (emphasis added); see also United States v. Tana, 618 F. Supp. 1393, 1396 (S.D.N.Y. 1985) (discussing the government's lack of sufficient control); Fleetwood, 489 F. Supp. at 132 (government control is an essential element of the crime).
25. 596 F.2d 662 (5th Cir. 1979).
study funds,26 provided by the Higher Education Act of 1965.27 The defendants challenged their convictions, asserting that the stolen money was outside the scope of section 641 because it was not "money of the United States."28 The United States Court of Appeals for the Fifth Circuit addressed the degree of supervision and control necessary to qualify the misappropriated funds for protection under section 641.29

While acknowledging that a grant paid to a recipient or otherwise disbursed is no longer federal,30 the Fifth Circuit emphasized that funds "in transit" from the government to the beneficiary are still federal in nature.31 The court reasoned that such funds, although no longer in exclusive federal possession, were "still subject to substantial federal controls,"32 making their theft an offense punishable under section 641.33 According to the Smith rationale, the Federal Government's exercise of supervision and control over the property in question is the fundamental factor in determining the applicability of section 641.34

While the Smith court's analysis of the nature of federal funds resulted in a decision favorable to the government, two federal district courts considered cases with facts similar to Smith, and reached the opposite result. In United States v. Fleetwood,35 the United States District Court for the District of Oregon overturned the section 641 conviction of a defendant who embezzled United States Savings Bonds and Freedom Share Notes.36 In addition to its consideration of the degree of federal control over the allegedly stolen property,37 the court added a twist to the analysis by holding that section

26. Id. at 663.
28. Smith, 596 F.2d at 663.
29. Id. at 664.
30. Id. See, e.g. United States v. Owen, 536 F.2d 340, 342, 344 (10th Cir. 1976) (when federal money is paid to a recipient or is commingled with nonfederal funds it loses its federal identity); United States v. Farrell, 418 F. Supp. 308, 311 (M.D. Pa. 1976) (section 641 of title 18 requires the Federal Government to have title to or possession of the stolen property).
31. Smith, 596 F.2d at 664.
32. Id.
33. Id. at 664; see also United States v. Fleetwood, 489 F. Supp. 129, 132 (D. Oregon 1980) (absence of federal possession does not negate federal control) disapproved in United States v. Wyatt, 737 F.2d 1499 (9th Cir. 1984) (rejecting the Fleetwood court's holding on the issue of the government's actual loss, but approving its analysis of supervision and control).
34. Smith, 596 F.2d at 664 (citing United States v. Evans, 572 F.2d 455, 470-71 (5th Cir.) (the court held that the primary consideration is the supervision and control exercised by the government), cert. denied, 439 U.S. 870 (1978)).
36. Id.
37. Id. at 132.
641 requires the Federal Government to suffer an actual property loss. In *Fleetwood*, the government neither controlled nor possessed title to the stolen bonds. In the absence of evidence indicating federal ownership and actual financial loss, the court held that the defendant stole the bonds from a private citizen. Thus, the court’s inability to discern a link between the stolen property and the Federal Government permitted the defendant to escape the statute’s sanctions.

The United States District Court for the Southern District of New York reached a result similar to *Fleetwood* in *United States v. Tana*. In *Tana*, the defendants stole and converted property which was pledged to the Federal Government as security on federal loans to begin a new business operation. The court considered whether the government’s interest in the pledged property was a “thing of value” within the meaning of section 641. Because a security interest is an inchoate interest in property over which the government may never exercise dominion, the court determined that the requisite federal control and supervision were absent. Accordingly, the district court ruled that a security interest vested in the Department of Commerce was not a “thing of value,” and therefore, the defendant, who had converted the property in which the government had the interest, did not violate section 641.

More significant than the holding of *Tana* was the caveat the court mentioned in dicta. Writing for the court, Judge Goettel warned that accepting the Federal Government’s allegation that conversion of a security interest was a federal crime under section 641 permitted prosecution of “[a]nyone, anywhere, who, knowingly or unknowingly, misappropriated” federal property. Thus, Judge Goettel’s words reiterated that the Federal Government must prove that the property or funds in question were subject to sufficient

---

38. *Id.*; see *United States v. Collins*, 464 F.2d 1163, 1165 (9th Cir. 1972) (section 641 requires that the government suffer actual property loss).
40. *Id.* at 132.
42. *Id.* at 1395.
43. *Id.*
44. *Id.*
45. *Id.* at 1397. The court reasoned that an inchoate, or partial, interest in assets was insufficient to hold the defendants culpable under section 641 because the assets never actually were United States property. *Id.*
46. *Id.* at 1395. The court determined that the Federal Government merely anticipated an interest in the “thing” and therefore, the government did not exercise the requisite control. *Id.*
47. *Id.* at 1397.
48. *Id.* Despite this judicial warning, the legislature expanded the federal criminal law by enacting 18 U.S.C. § 666.
federal supervision and control\textsuperscript{49} to qualify as property of the United States within the meaning of section 641.\textsuperscript{50} The court concluded that failure to meet this supervision and control burden, even where a significant governmental interest existed, removed federal jurisdiction\textsuperscript{51} and permitted the theft of such nonfederal property to slip through the cracks of this federal criminal theft statute.\textsuperscript{52}


Section 201 of title 18,\textsuperscript{53} which provides for the prosecution of individuals engaging in bribery or making gratuitous offers to public officials, was of limited assistance to the Federal Government in its efforts to thwart the bribery of officials in programs receiving federal funds.\textsuperscript{54} In fact, restrictive judicial interpretations of the statute's "public official" requirement seriously curtailed the effectiveness of the provision.

Under section 201, an individual who influences or attempts to influence a federal official by promising payment in exchange for improper conduct is in violation of federal law.\textsuperscript{55} Before invoking section 201, the statute requires that the Federal Government prove that the person to whom the bribe is offered is a public official, as defined by subsection 201(a)(1) of title 18.\textsuperscript{56} To
determine whether an individual meets the public official criteria, courts focus on whether the person was "acting for or on behalf of the United States." Three United States Circuit Courts of Appeal decisions reflect the shortcomings of the section's public official element.

1. Early Constructions of the "Public Official" Requirement

Two early cases that addressed the public official element of section 201 of title 18 are United States v. Del Toro and United States v. Loschiavo. Both cases arose from the attempted bribery of Pedro Morales, the Deputy Director of the Harlem-East Harlem Office of the New York Model Cities Administration, a federal housing program supervised and funded by the Department of Housing and Urban Development (HUD). Morales, a city-level administrator of the federal program, was responsible for awarding Model Cities leases to private contractors. Because Model Cities was a federally created and funded program, the Federal Government invoked subsections 201(b)(1) and (2) of title 18 to prosecute the defendants who attempted to bribe Morales. These subsections provide for the prosecution of individuals who attempt to influence the actions of public officials. Although decided a year apart, the results of Del Toro and Loschiavo were identical; the United States Court of Appeals for the Second Circuit held that Morales was not a public official under section 201. The failure of the government's prosecution revealed a substantial loophole in the federal bribery statute resulting solely from the public official requirement.

In Del Toro, the Second Circuit reasoned that despite Morales' responsibility for administering federal funds, he was merely a city

---

57. Del Toro, 513 F.2d at 662 (quoting 18 U.S.C. § 201(a)(1)).
58. United States v. Mosley, 659 F.2d 812, 814 (1981); Loschiavo, 531 F.2d at 659; Del Toro, 513 F.2d at 656; S. Rep. No. 225, infra note 4, at 369-70 (because section 201 only punishes bribery of public officials, those who bribe nonpublic officials escape prosecution under the federal bribery statute, even if the bribed individual has the power to disburse federal funds), reprinted in 1984 U.S. CODE Cong. & Admin. News at 3510-11.
59. 513 F.2d 656 (2d Cir. 1975).
60. 531 F.2d 659 (2d Cir. 1976).
61. Del Toro, 513 F.2d at 658; Loschiavo, 531 F.2d at 660.
62. Del Toro, 513 F.2d at 661-62.
63. Id. at 658; Loschiavo, 531 F.2d at 661.
64. Del Toro, 513 F.2d at 660-61; Loschiavo, 531 F.2d at 661.
65. Del Toro, 513 F.2d at 662; Loschiavo, 531 F.2d at 661.
66. Del Toro, 513 F.2d at 662.
67. Id. at 661.
employee, and therefore outside the scope of section 201. The court based this decision on a series of factors. First, the court noted that Morales was a city employee, performing a duty assigned to him by another city employee. Next, the Second Circuit acknowledged that the City of New York, rather than the Federal Government, had the authority to approve Morales' leasing decisions prior to the use of federal funds. Finally, the court recognized that HUD did not have the power to hire or fire individuals in Morales' position. According to the Second Circuit, these factors outweighed the government's liberal reading of the "acting for or on behalf of the United States" requirement of section 201(a).

In addition, the Second Circuit considered the government's prosecution incomplete, because it failed to prove that Morales acted for or on behalf of the United States, or "under or by authority of" the Federal Government. In conclusion, the court reasoned that the relationship between the employee and the Federal Government was of greater importance than the actual infrastructure and operation of the particular project.

In 1981, six years after Del Toro, the United States Court of Appeals for the Seventh Circuit examined the public official requirement in United States v. Mosley. Mosley, an Intake and Eligibility Officer hired by the State of Illinois Bureau of Employment, screened applicants for jobs provided by the Comprehensive Employment and Training Act (CETA). The government charged Mosley with accepting gratuities in exchange for preferential treatment of certain applicants. In rejecting Mosley's claim that, as a state

68. Id. at 662.
69. Id. The court carefully noted that although Morales may have been acting on behalf of the United States, he was not acting under its authority. The fact that the government could not hire or fire people in Morales' position, and that the city had to approve Morales' plans before federal funds were requested, supported the court's conclusion. Id. Because Morales was not subject to federal authority, the court reasoned that he was outside the category of federal "public official," as defined by Congress. Id.; see also Note, supra note 53, at 1074 (discussing issue of whether state employees involved with federal programs may be section 201 "public officials").
70. Del Toro, 513 F.2d at 662.
71. Id.
72. Loschiavo, 531 F.2d at 661.
73. Del Toro, 513 F.2d at 663.
74. Id. at 662.
75. Id. at 662-663 (referring to the standard articulated at 18 U.S.C. § 201(a)).
76. Id. at 661.
77. 659 F.2d 812 (7th Cir. 1981).
79. Mosley, 659 F.2d at 813. The Federal Government indicted Mosley under section 201(g) of title 18, which provides for the prosecution of any public official who solicits or demands "anything of value" as payment for an "official act performed or to be performed by [him]." 18 U.S.C. § 201(g).
employee, he was not a federal public official, the Seventh Circuit ruled that the "substantial amount of federal Government involvement" in CETA indicated that Mosley acted "for or on behalf of the United States Department of Labor." Although the state hired Mosley and classified him as a state employee, the United States Government paid his salary and funded the program that he administered. This arrangement, coupled with the program's federal objectives, led the Seventh Circuit to determine that Mosley was "a substitute for a federal employee."

2. "Public Official" as a Public Trustee

The Supreme Court of the United States provided a new approach to the public official requirement of section 201 in *Dixson v. United States*. The United States District Court for the Central District of Illinois convicted Dixson and a co-defendant, Hinton, for soliciting money in exchange for awarding housing contracts funded by the Federal Government pursuant to the Housing and Community Development Act. In affirming the conviction, the Supreme Court established a test for determining whether a defendant is a public official pursuant to federal criminal law. Specifically, the Court focused on whether the individual at issue occupied "a position of public trust with federal responsibilities." The Court established that an individual falling within the parameters of this broader definition of public official is subject to the penalties of section 201 of title 18.

---

81. *Id.*
82. *Id.*
83. *Id.* at 815.
84. *Id.; see also* Note, supra note 53, at 1074-75 ("Mosley's responsibility to exercise discretion to act for and on behalf of the government," as well as the significant government involvement in the program, supported the court's holding that Mosley was a public official.).
85. 465 U.S. 482 (1984). See Note, supra note 53, at 1075 (providing a brief synopsis of the rationale behind the ruling of the United States Court of Appeals for the Seventh Circuit in United States v. Hinton, 683 F.2d 195 (7th Cir. 1982), aff'd sub nom. Dixson v. United States, 465 U.S. 482 (1984), wherein the Seventh Circuit echoed the reasoning of the *Mosley* court, and held that the discretionary power of Hinton and Dixon in administering federal monies was sufficient to meet the section 201 public official requirement).
86. *Hinton*, 683 F.2d at 196. The convictions of Dixson and Hinton rested on subsections (c)(1) and (2) of section 201 of title 18. The statute provides for the prosecution of those individuals, selected to be public officials, who accept bribes in the course of their official duty. 18 U.S.C. § 201(c)(1), (2).
89. *Id.* at 496.
90. *Id.*
In dicta, however, the Court appended both a limitation and warning to its decision in *Dixson*. Although Dixson and Hinton were found to be public officials, the Court warned that “the mere presence of some federal assistance [does not] bring[ ] a local organization and its employees within the jurisdiction of the federal bribery statute.” Rather, the Court emphasized that section 201 mandates that the individual administering a federal program must possess some degree of discretion and official responsibility. This limitation, which the Court stated in dicta, provided defendants with a loophole in section 201, thus weakening the overall potency of the statute.

In interpreting section 641 and section 201, the courts have not rendered the statutes powerless. Both statutes continue to serve an important purpose and play an integral part in protecting the Federal Government’s interests against theft and bribery. However, judicial interpretations of these statutes have imposed serious limitations on their effectiveness in deterring certain acts of theft and bribery. The supervision and control requirement of section 641 and the public official limitation of section 201 force the United States to trace the stolen or embezzled property and link the bribed individual directly to the Federal Government or a federal program. The government’s difficulty in meeting these requirements spurred Congress into enacting a new, more inclusive, federal criminal statute to handle theft and bribery problems in federally funded programs.

II. CLOSING THE HOLES: THE NEW FEDERAL THEFT AND BRIBERY STATUTE

A. Removal of the “Property of the United States” Condition in Theft Prosecution

The Comprehensive Crime Control Act of 1984 (the Act), containing section 666 of title 18, was the culmination of legislative activity that began

---

91. *Id.* at 499.
92. *Id.* at 499-500.
94. S. REP. NO. 225, supra note 4, at 369, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3510-11. At the same time that section 666 was enacted, the district courts and courts of appeal enforced a narrow definition of section 201’s public official requirement. Soon after the enactment of the new legislation, the Supreme Court broadened the definition by including those individuals acting as “public trustees” within the scope of section 201. See United States v. Dixson, 465 U.S. 482 (1984).
96. *Id.*; see 18 U.S.C. § 666 (1988). The section is entitled *Theft or Bribery Concerning Programs Receiving Federal Funds.*
in the 1960's.\textsuperscript{97} While much of the Act simply reformed existing federal criminal law,\textsuperscript{98} Congress also supplemented those amendments with additional provisions designed to address white collar crime.\textsuperscript{99}

In enacting section 666 of title 18, Congress intended to "augment the ability of the United States to vindicate significant acts of theft, fraud and bribery involving Federal" money distributed to private organizations, state or local governments,\textsuperscript{100} or Indian tribal governments\textsuperscript{101} through federal programs or grants.\textsuperscript{102} Congress modeled the theft provision of section 666 after section 665 of title 18,\textsuperscript{103} another federal statute which creates a federal offense for acts of theft or embezzlement by an officer or employee of any agency receiving assistance under CETA or the Job Partnership Training Act.\textsuperscript{104} Other than section 665, no federal theft statute was specifically tailored to protect funds that Congress disburses through specific federal programs.\textsuperscript{105} Thus, prior to section 666, the government was forced to ground prosecutions for theft on section 641,\textsuperscript{106} the general theft provision.\textsuperscript{107} Therefore, Congress determined that a statutory provision patterned after the extensive scope of section 665 was the logical means of closing the gaps identified by the courts in broader federal theft and bribery statutes.

\textsuperscript{97} Pub. L. No. 98-473, 98 Stat. 2143 (1984); see K. Feinberg & S. Schreiber, supra note 9, at 250. "[T]he fact is that the bulk of the new statute was not sprung on an unsuspecting Congress but, rather, has a long history going back to the late 1960's." \textit{Id.}

\textsuperscript{98} K. Feinberg & S. Schreiber, supra note 9, at 250. The Act represents the combination of various congressional efforts at remaking the federal criminal code.

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} S. Rep. No. 225, supra note 4, at 369, \textit{reprinted in} 1984 U.S. CODE CONG. & ADMIN. NEWS at 3510. See, e.g., United States v. Little, 687 F. Supp. 1042, 1049 (N.D. Miss. 1988) ("[T]he purpose of section 666 is to fill the gaps in the federal criminal law caused by section 201 [and section 641].").

\textsuperscript{101} Pub. L. No. 99-646, 100 Stat. 6138 (1986). This amendment expanded the scope of section 666 to include an agent of an Indian tribal government.

\textsuperscript{102} S. Rep. No. 307, 97th Cong., 1st Sess. 726 (1981). The statute was designed to "remedy a gap" in prior federal criminal laws. \textit{Id.}

\textsuperscript{103} \textit{Id.}


\textsuperscript{105} See S. Rep. No. 225, supra note 4, at 369, \textit{reprinted in} 1984 U.S. CODE CONG. & ADMIN. NEWS at 3510; S. Rep. No. 307, 97th Cong., 1st Sess. 726 (1981) (CETA was the only organization with a theft statute tailored to its need. Other federal programs or agencies relied on section 641, which had the onerous "property of the United States" requirement.).


\textsuperscript{107} For a full discussion of 18 U.S.C. § 641, see supra notes 16-52 and accompanying text.
By enacting subsections 666(a)(1)(A)\textsuperscript{108} and (b),\textsuperscript{109} Congress eliminated the problems inherent in section 641 by lessening the government’s burden of proof. The statute’s language indicates that in order to bring a defendant within its jurisdictional parameters, the government must demonstrate that the defendant and the defendant’s organization satisfy four criteria.\textsuperscript{110} First, the defendant must be the agent of an organization or a state, local, or tribal government.\textsuperscript{111} As defined by the statute, an agent is one who possesses the authority “to act on behalf of another person or a government,”\textsuperscript{112} such as an employee, director, manager, or representative.\textsuperscript{113} Second, the organization or government for whom the defendant is an agent must receive from a federal assistance program an amount in excess of $10,000 in any one year.\textsuperscript{114} Third, the types of programs falling under the statute’s protection include grants, government contracts, and subsidies.\textsuperscript{115} Finally, the government must establish that the defendant embezzled, stole, fraudulently obtained, or willingly converted property,\textsuperscript{116} worth at least $5,000,\textsuperscript{117} under the control, care, or supervision of the agency or government of the defendant’s employ.\textsuperscript{118}

\textsuperscript{108} 18 U.S.C. § 666(a)(1)(A) (1988). This portion of the statute states that:
(a) Whoever, if the circumstance described in subsection (b) of this section exist—
   (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 . . . .
   shall be fined under this title, imprisoned not more than 10 years, or both.
\textit{Id.}

\textsuperscript{109} \textit{Id.} § 666(b). Section 666(b) states: “The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.” \textit{Id.} (emphasis added).

\textsuperscript{110} See generally \textit{Id.} § 666(a)(1)(A), (b), \textit{supra} notes 108 and 109.

\textsuperscript{111} 18 U.S.C. § 666(a)(1).

\textsuperscript{112} \textit{Id.} § 666(d)(1). Subsection (d) provides definitions of terms in section 666. Subsection 666(d)(1) defines an “agent” as a person who is “authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.” \textit{Id.}

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.} § 666(b). For the full text of this subsection, see \textit{supra} note 109.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.} § 666(a)(1)(A). For the full text of this subsection, see \textit{supra} note 108.

\textsuperscript{117} \textit{Id.} § 666(a)(1)(A)(i). For the full text of this subsection, see \textit{supra} note 108.

\textsuperscript{118} \textit{Id.} § 666(a)(1)(A)(ii). For the full text of this subsection, see \textit{supra} note 108.
In contrast to section 641, section 666(a)(1)(A) does not require the government to demonstrate that the stolen or converted property was of a federal character. The statute is concerned not with the relationship between the Federal Government and the converted property, but rather with the relationship between the Federal Government and the agency or government from which the property was stolen. Congress apparently concluded that a strong interest in protecting federal program money leads to an equally strong interest in maintaining the integrity of the organization or government controlling the monies. In an effort to protect this interest, Congress wove a large net potentially affecting all individuals employed by an entity having access to section 666 property. Furthermore, by focusing on the nonfederal entity, rather than the property, Congress hoped to eliminate the reluctance of local prosecutors to safeguard federal program monies. Just as the Federal Government is more dedicated to protecting federal interests, local law enforcement officials would be more inclined to take the prosecutorial initiative when a state or local organization was the victim of the theft.

The monetary threshold requirements of section 666 constitute a significant limitation on the otherwise broad scope of the statute. Congress included these restricting features "to insure against an unwarranted expansion of Federal jurisdiction into areas of little Federal interest." Moreover, Congress limited the scope of section 666 to crimes involving substantial monetary amounts in order to curtail excessive federal intervention into state and local matters. The statute's scope is further limited by the definition of "federal programs." All federal programs are not within the scope of section 666. Specifically, Congress included only those programs for which there "exist[s] a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives."

120. See generally S. Rep. No. 307, 97th Cong., 1st Sess. 726 (1981). Congress reasoned that although the monies used in the programs were not federal, the government still retained a strong interest in assuring their integrity. Id.
121. Id.
122. Id. Congress stated that, in its opinion, “[s]tate and local prosecutors [were] often not inclined to commit their limited resources . . . deeming the United States” the only injured party. Id.
123. Id.
127. Id.
B. Elimination of the “Public Official” Requirement in Bribery Prosecutions

Section 666 attacks bribery in much the same way that it attacks theft.\textsuperscript{128} The paramount focus under the bribery sections of 666, namely sections 666(a)(1)(B)\textsuperscript{129} and 666(a)(2),\textsuperscript{130} is the relationship between the person receiving the bribe and the organization or government benefiting from the federal funds.\textsuperscript{131} Under the statute, the amount or type of bribe is immaterial.\textsuperscript{132} The structure of the statute and the elements of the crime reflect congressional intent to reach more acts of bribery than section 201, which prohibits illegal payments to federal public officials.\textsuperscript{133}

Under subsection 666(a)(1)(B),\textsuperscript{134} a federal offense occurs when any agent corruptly solicits or demands on behalf of another person\textsuperscript{135} or “accepts or

\textsuperscript{128} A comparison of the two statutes reveals that the key to each is the establishment of a federal characteristic. Under the theft statute, the stolen property must be federal in nature and according to the bribery provisions, the individual bribed must be linked to the Federal Government.

\textsuperscript{129} 18 U.S.C. § 666(a)(1)(B) (1988). This portion of the statute states:

(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—

\ldots

(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 anything of value of $5,000 or more; \ldots

\ldots

shall be fined under this title, imprisoned not more than 10 years, or both.

\textit{Id.} (emphasis added).

\textsuperscript{130} Id. § 666(a)(2). This subsection provides that:

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

\ldots

(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; \ldots

\ldots

shall be fined under this title, imprisoned not more than 10 years, or both.

\textit{Id.} (emphasis added).

\textsuperscript{131} See \textit{id.} § 666(a)(1)(B), (b).

\textsuperscript{132} See \textit{id.} § 666(a)(2).

\textsuperscript{133} S. REP. No. 225, \textit{supra} note 4, at 369, \textit{reprinted in} 1984 \textit{U.S. CODE CONG. & ADMIN. NEWS} at 3510.

\textsuperscript{134} 18 U.S.C. § 666(a)(1)(B). For the full text of this subsection, see \textit{supra} note 129.

\textsuperscript{135} \textit{Id.}
agrees to accept *anything of value"* as a reward\textsuperscript{136} for an action connected to the business or activities of the agency or government,\textsuperscript{137} so long as the transaction is valued at $5,000 or more.\textsuperscript{138} The language of subsection 666(a)(1)(B) suggests three potential conclusions. First, the statute on its face does not require that federal funds be involved in the transaction or that the person receiving the bribe have any connection to a federal program.\textsuperscript{139} The statute suggests that the government may obtain a bribery conviction so long as the agency or government employing the agent benefits under a federal program. Second, the statute does not require that the bribe itself affect the specific division, department, or branch of the agency or government that benefits from the federal program.\textsuperscript{140} Thus, pursuant to the statute, any bribe of any employee appears to fulfill this prerequisite, provided the entity has a general link to the government through a benefit program.\textsuperscript{141} Third, the statute states that the bribe can be “*anything of value*.”\textsuperscript{142} While this language is subject to judicial interpretation, the most logical inference, and indeed one accepted by the courts, is that any monetary amount, piece of property, or other interest qualifies as something of value under section 666.\textsuperscript{143}

The framework of subsection 666(a)(1)(B), which punishes an agent for seeking a bribe, is also found in section 666(a)(2), which punishes the individual offering the bribe.\textsuperscript{144} Section 666(a)(2), however, requires intent. The express language of this subsection requires that the person offering the bribe must intend to influence or reward the person whom he attempts to bribe.\textsuperscript{145} In this regard, Congress included in section 666 the mens rea element required by section 201.\textsuperscript{146} In addition, courts interpret the statutory language “in connection with any business, transaction or series of transactions” to require only that the bribe occur during the ordinary course of business of

\textsuperscript{136} \textit{Id.} (emphasis added).
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{See id.} § 666(a)(2) (the plain language of the statute does not require that either the briber or the individual bribed be “federal”).
\textsuperscript{140} \textit{See id.} § 666(a)(1)(B), (2) (the statute does not require that the bribe be motivated by the desire to influence a federal program).
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.} § 666(a)(1)(B).
\textsuperscript{143} \textit{See United States v. Little, 687 F. Supp. 1042, 1050 (N.D. Miss. 1988) (the item given as a bribe need not have a specific worth or value).}
\textsuperscript{144} \textit{See 18 U.S.C.} § 666(a)(2). Both subsections, 666(a)(1)(B) and (a)(2), pertain to bribery. The former creates an offense for the individual demanding or accepting the bribe; the latter creates an offense for the individual offering or giving the bribe.
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.; cf. id.} § 201(b). For the text of section 201(b), see \textit{supra} note 13.
the entity receiving federal funds.\textsuperscript{147} “Anything of value” means any property or item,\textsuperscript{148} a similarly de minimis standard.

The general purpose of the bribery subsections, 666(a)(1)(B) and (a)(2), as with the theft section, is to protect “money distributed pursuant to Federal programs from undue influence.”\textsuperscript{149} Again, Congress sought to achieve this goal by shifting the statute’s focus from the link between the individual being bribed and the United States to the relationship between the individual’s employer, whether a private organization or governmental entity, and the Federal Government.\textsuperscript{150} In effect, Congress created a criminal offense that treats nonfederal entities that receive federal monies as federal agencies for the purpose of bribery and theft. Thus, the statute suggests that a relationship between the private organization or governmental entity and the Federal Government, resulting from a federal grant or benefit program, opens the door to federal jurisdiction over any employee of that entity, regardless of any specific connection that employee might have to either the federal program or the Federal Government.\textsuperscript{151}

Neither an examination of the limited legislative history pertaining to section 666 nor a strict analysis of the statutory language gives an accurate description of the true force and effect of the statute. Section 666’s scope and the extent to which it fulfills the congressional goal of augmenting the federal theft and bribery statutes depends on both judicial interpretation and the manner in which prosecutors choose to employ the statute.

\textsuperscript{147} See, e.g., United States v. Jackowe, 651 F. Supp. 1035, 1036 (S.D.N.Y. 1987) (section 666 requires only that the defendant attempt to “influence the recipient’s conduct in the course of his employ”).

\textsuperscript{148} See Little, 687 F. Supp. at 1050. In discussing the “anything of value” language, the court states that the thing given, in the bribery context, or stolen, in a theft scenario, need not have a specific or ascertainable worth, so long as the transaction or series of transactions that lead to a bribe has a value of $5,000 or more. \textit{Id}.

\textsuperscript{149} S. REP. No. 307, 97th Cong., 1st Sess. 726, 803 (1981). The statute is designed to punish individuals or entities disbursing federal monies as a result of bribery or other outside influence.

\textsuperscript{150} See, e.g., \textit{Little}, 687 F. Supp. at 1049 (noting that local or state officials, although they controlled large sums of federal funds, could not be prosecuted under section 201 because they were not federal public officials).

III. JUDICIAL INTERPRETATIONS OF SECTION 666: PRECISION TOOL OR CATCHALL NET

A. Statutory Interpretations of Section 666

Federal court decisions interpreting section 666 are limited because of the statute's relative infancy.\textsuperscript{1}\textsuperscript{5}\textsuperscript{2} However, the existing case law indicates that federal courts have construed the statute broadly and have embraced its lower threshold of proof.\textsuperscript{1}\textsuperscript{5}\textsuperscript{3} These existing cases illustrate the usefulness\textsuperscript{1}\textsuperscript{5}\textsuperscript{4} and limitations\textsuperscript{1}\textsuperscript{5}\textsuperscript{5} of section 666.

1. Bolstering Government Prosecutions Through Application of Section 666

a. Eliminating the Requirement of Tracing Stolen Property to the Government for Section 666 Prosecutions

According to two federal courts that have reviewed the statute's scope, section 666 does not require the Federal Government to trace the embezzled or stolen property to a federal program.\textsuperscript{1}\textsuperscript{5}\textsuperscript{6} In \textit{United States v. Smith},\textsuperscript{1}\textsuperscript{5}\textsuperscript{7} the United States Government, relying on section 666, indicted the supervisor of Newton County, Mississippi, for accepting bribes.\textsuperscript{1}\textsuperscript{5}\textsuperscript{8} The county received federal benefits in excess of $10,000.\textsuperscript{1}\textsuperscript{5}\textsuperscript{9} The United States District Court for the Southern District of Mississippi held the statute applicable\textsuperscript{1}\textsuperscript{6}\textsuperscript{0} and rejected the defendant's claim that section 666 applied only when federal money was used in the bribe.\textsuperscript{1}\textsuperscript{6}\textsuperscript{1} The court determined, in light of the available legislative history, that tracing the bribe to specific federal funds is not an essential element of proving a crime under section 666.\textsuperscript{1}\textsuperscript{6}\textsuperscript{2} The court concluded that the plain meaning of the statute indicated that the bribery of a

---

\textsuperscript{1}\textsuperscript{5}\textsuperscript{2} To date, there are only nine published opinions dealing with section 666. For a complete list of each circuit or district court which addressed the statute and the name of the reported cases, see \textit{infra} notes 225 and 226.

\textsuperscript{1}\textsuperscript{5}\textsuperscript{3} \textit{See, e.g.}, \textit{Little}, 687 F. Supp. at 1049 (the court interpreted the legislative history to indicate that section 666 expanded the reach of the federal criminal law); \textit{see generally} United States v. Smith, 695 F. Supp. 833 (S.D. Miss. 1987) (applying section 666 to a \textit{county} supervisor).

\textsuperscript{1}\textsuperscript{5}\textsuperscript{4} \textit{See generally} Duwall, 846 F.2d 966; \textit{Westmoreland}, 841 F.2d 572.


\textsuperscript{1}\textsuperscript{5}\textsuperscript{6} \textit{Westmoreland}, 841 F.2d at 578; \textit{Smith}, 659 F. Supp. at 835.

\textsuperscript{1}\textsuperscript{5}\textsuperscript{7} 659 F. Supp. 833 (S.D. Miss. 1987).

\textsuperscript{1}\textsuperscript{5}\textsuperscript{8} \textit{Id.}

\textsuperscript{1}\textsuperscript{5}\textsuperscript{9} \textit{Id.}

\textsuperscript{1}\textsuperscript{6}\textsuperscript{0} \textit{Id.} at 835.

\textsuperscript{1}\textsuperscript{6}\textsuperscript{1} \textit{Id.}

\textsuperscript{1}\textsuperscript{6}\textsuperscript{2} \textit{Id.} at 835. After analyzing the available legislative history, the court stated that "[s]ection 666 was designed to fill a gap which the difficulty of tracing federal monies caused."
local government agent employed by a government receiving in excess of $10,000 in federal benefits was sufficient.\textsuperscript{163}

The United States Court of Appeals for the Fifth Circuit, in \textit{United States v. Westmoreland},\textsuperscript{164} echoed the finding of the \textit{Smith} court. In \textit{Westmoreland}, the court upheld the conviction of a county supervisor whose county benefited from over $10,000 in federal program monies.\textsuperscript{165} The court noted that nothing in section 666 indicated that "any transaction" actually meant "any federally funded transaction."\textsuperscript{166} The court asserted that the legislative history of section 666,\textsuperscript{167} which reflected congressional intent to enhance prosecutorial efforts by eliminating the difficult task of tracing federal funds, supported its finding.\textsuperscript{168} By dispensing with the requirement that the illegal act be linked to the Federal Government, section 666 permits the government to retain jurisdiction over and monitor nonfederal employees who administer federal funds not otherwise under federal control and supervision.

The Fifth Circuit further held that it is reasonable to protect federal monies with a statute that does not require proof that federal funds were used in the illegal act.\textsuperscript{169} Because not all programs use the same bureaucratic processes, proving the federal character of the offense could lead to inconsistent prosecutions and protective measures.\textsuperscript{170} Therefore, the court determined that, because of the various ways the different federal programs disburse and administer funds, eliminating the tracing element was a reasonable method for Congress to protect federal monies.\textsuperscript{171} As reflected by the \textit{Smith} and \textit{Westmoreland} decisions, the elimination of the Federal Government's need to trace the bribe or stolen property to the United States permits section 666 to reach offenses outside the scope of section 641.

\textit{b. Imposing a Threshold Requirement for the Value of the Stolen or Embezzled Property for Section 666 Prosecutions}

Section 666's requirement that the bribe be connected with any transaction worth at least $5,000 also has been subject to judicial review. Under the

\begin{itemize}
  \item \textit{Id.} Interpreting section 666 to require tracing bribes to a specific federal program would undermine Congress' goal of broadening the scope of section 201. \textit{Id.}
  \item \textsuperscript{163} \textit{Id.}
  \item \textsuperscript{164} 841 F.2d 572 (5th Cir.), \textit{cert. denied}, 109 S. Ct. 62 (1988).
  \item \textsuperscript{165} \textit{Id.} at 574.
  \item \textsuperscript{166} \textit{Id.} at 576 (emphasis added).
  \item \textsuperscript{167} \textit{Id.}
  \item \textsuperscript{168} \textit{Id.} (citing S. REP. No. 225, supra note 4, at 369 (Congress reported that the Government's inability to establish the federal nature of certain stolen property hampered federal prosecutorial efforts), \textit{reprinted in} 1984 U.S. CODE CONG. & ADMIN. NEWS at 3510).
  \item \textsuperscript{169} \textit{Westmoreland}, 841 F.2d at 577.
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Id.}
\end{itemize}
language of section 666, the stolen or embezzled property must have a value of $5,000. Furthermore, federal courts interpreting the $5,000 threshold requirement have permitted the government to aggregate offenses in order to achieve the $5,000 amount, so long as the “multiple conversions were part of a single scheme.”

By permitting the aggregation of the amounts involved in the transactions, federal courts have prevented those who repeatedly steal small amounts of property from escaping the purview of section 666. Determining whether the statute intended to require the $5,000 threshold amount to apply to the bribe or to the transaction giving rise to the bribe is not clear on the face of the statute. However, the courts have determined that the $5,000 requirement applies to the amount of business conducted by the organization or government, not the amount of the bribe. In United States v. Duvall, the United States Court of Appeals for the Fifth Circuit stated that the plain meaning of the statute mandated conviction of a defendant who accepted “anything of value.” Likewise, in United States v. Little, the United States District Court for the Southern District of Mississippi held that section 666 did not include a facial requirement that the bribe be $5,000 in value. The court further asserted that the statute’s focus on the agency or employer’s business dealings, rather than on the agent or employee and the amount of the bribe, was the logical interpretation of section 666, given Congress’ desire to fill the gaps in section 201.

---


173. United States v. Webb, 691 F. Supp. 1164, 1168 (N.D. Ill. 1988). The court’s decision to permit aggregation to reach the $5,000 floor required by section 666 rested on prior case law permitting a series of misdemeanor larcenies to be aggregated to create a felony larceny, if there is continuing intent. See United States v. Billingslea, 603 F.2d 515, 520 n.6 (5th Cir. 1979).

174. Webb, 691 F. Supp. at 1168. Criminals cannot escape prosecution even if each theft is less than $5,000 when the thefts are part of a single plan or scheme.

175. See, e.g., United States v. Little, 687 F. Supp. 1042, 1049-50 (N.D. Miss. 1988)(much of the court’s energy focused on whether the $5,000 described the bribe or the transaction giving rise to the bribe).

176. Id. at 1050; see also United States v. Duvall, 846 F.2d 966, 976 (5th Cir. 1988).

177. Duvall, 846 F.2d at 976; Little, 687 F. Supp. at 1050. The Duvall court, relying on simple statutory interpretation, stated that “[t]he wording of the section does not place a value on the bribe.” Duvall, 846 F.2d at 976.

178. 846 F.2d 966 (5th Cir. 1988).

179. Id. at 976.


181. Id. at 1050.

182. Id. at 1049. This court, like other courts interpreting section 666, relied on congressional intent as manifested in the limited legislative history of S. 1620 and S. 1762. The purpose of section 666, according to both Congress and the court, is to bring those state and local officials or agents who administer federal funds within the jurisdiction of the federal criminal
Another aspect of section 666, further enhancing the statute’s protective force, is the government’s ability to apply it in conjunction with other statutes. In United States v. Sadlier, the United States District Court for the District of Massachusetts permitted prosecution of a defendant under the Medicare Fraud and Kickback Act (Medicare Fraud Act) and the bribery portion of section 666. The district court’s decision to allow prosecution under both statutes rested on two lines of reasoning. First, the district court relied on Supreme Court precedent permitting the United States to prosecute a defendant under two separate criminal statutes if the elements of proof required by the two statutes differed. Because violation of the Medicare Fraud Act requires a kickback specifically involving Medicare, and section 666 requires that the person receiving the kickback be employed by an organization receiving at least $10,000 in benefits, the court determined that the two statutes created distinct criminal offenses. An alternative rationale relied upon by the Sadlier court stemmed directly from the court’s analysis of the legislative history of section 666. The court opined that because Congress intended section 666 to create a new offense, the statute did more than simply strengthen other statutes; it stood apart as an independent offense.

2. Constraining the Government’s Prosecutions Under Section 666

Although the Federal Government has benefited from broad judicial interpretation of section 666, the statute is not one of unlimited scope. Two federal courts have imposed constraints on section 666 that limit its

---

184. 649 F. Supp. at 1560.
187. Id. at 1562-64.
188. In Blockburger v. United States, 284 U.S. 299 (1932), the United States Supreme Court announced the test for determining whether a defendant can be charged with multiple counts for one offense: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Id. at 304
190. Id.
191. Id. at 1563.
193. Id.
194. Id.
effectiveness. Specifically, these courts have required that the government prove the defendant possessed specific intent to bribe the recipient, and that the entity disbursing the federal funds derive some benefit from those funds.

a. Requiring Specific Intent for Section 666 Prosecutions

In United States v. Jackowe, the United States District Court for the Southern District of New York held that in order to obtain a conviction under the bribery subsection of 666 the United States must prove that the defendant intended to "influence the recipient's conduct." In Jackowe, the United States prosecuted a nonfederal employee for bribery. The district court held that congressional failure to mention a specific intent requirement did not eliminate that element of the government's burden of proof.

Furthermore, the district court reasoned that imposing an intent element eliminates two potential constitutional challenges to the statute. First, the court recognized that if the intent element of section 666 was ambiguous, a defendant could raise a due process claim based on lack of appropriate notice. Second, the court noted that Congress' failure to include an intent element in the statute permits a nonfederal employee, convicted under the bribery portion of section 666, to claim a violation of equal protection because a federal employee convicted under section 201, the federal bribery statute, could be treated differently for the same offense. In particular, the district court opined that a nonfederal employee might argue that the penalty for giving a gift in a section 666 scenario, which can result in a fine and/or a maximum of ten years in prison, is disproportionately more severe than the punishment imposed on a federal employee convicted of the identical offense under section 201(f), which can result in a fine plus a

198. Id. at 1036.
199. Id. at 1035.
200. Id. at 1036 (citing United States v. Morissette, 342 U.S. 246, 263 (1952) (the omission of intent in the wording of a criminal statute does not eliminate intent as an element of the offense)). Because the bribery portion of section 201 includes an intent element, it is logical for section 666, which deals with the same offense, to have the same intent requirement. Id.
201. Id. The court recognized that the punishment provided under the bribery subsection of 666 was on par with that of the bribery, as opposed to the gratuity, subsection of 201. Id.
202. Id.
203. Id.
maximum of two years in prison.\textsuperscript{206} Thus, the court determined that specific intent, although unstated, was a necessary prerequisite to a conviction pursuant to section 666.

\textit{b. Establishing a Benefit Requirement for Section 666 Prosecutions}

In \textit{United States v. Webb},\textsuperscript{207} the District Court for the Northern District of Illinois refused to apply section 666 to an accounting firm, Hill and Company (Hill Taylor),\textsuperscript{208} which managed and disbursed funds to landlords selected by the Department of Housing and Urban Development.\textsuperscript{209} The district court interpreted section 666 to include a requirement\textsuperscript{210} that an entity disbursing the funds derive a direct benefit from those funds.\textsuperscript{211} The court recognized that the accounting firm was not a beneficiary of the federal program or the federal funds,\textsuperscript{212} but was merely a repository for the funds while awaiting federally-determined allocation.\textsuperscript{213} Thus, acknowledging that section 666 might constitute "a significant intrusion of federal law enforcement into traditional areas of local concern,"\textsuperscript{214} the court recognized Congress' limitation on the statute's scope and restricted its reach to offenses involving organizations or governments that receive a benefit from the federal funds.\textsuperscript{215}

In addition, the district court reasoned that because the accounting firm never exercised control over the distribution of the funds,\textsuperscript{216} the funds remained federal property\textsuperscript{217} and subject to the theft sanction of section 641.\textsuperscript{218} The court asserted that because section 641 provided a sufficient means of punishment, the prosecution of Hill Taylor under section 666
would be outside the scope of the statute. In reaching this decision, the court acknowledged that Congress intended section 666 to augment, not replace, existing federal theft law. The Webb decision indicates that, despite the presence of section 666, courts still invoke section 641 to vindicate acts of theft perpetrated against the government.

B. Constitutional Interpretations of Section 666

United States v. Little presented the United States District Court for the Northern District of Mississippi with a constitutional challenge to section 666. In Little, the United States charged the defendants with bribery and mail fraud. The defendant, in turn, counterclaimed against the United States, alleging that section 666 was vague and overbroad. Because the defendants presented no evidence to support their contentions, however, the court refused to speculate as to the statute's possible constitutional flaws.

The exact scope of section 666 cannot be measured solely by evaluating existing case law because, to date, the United States Supreme Court has not reviewed any of the aforementioned decisions nor handed down any decision otherwise discussing section 666. Furthermore, the available case law reflects the opinions of only three federal circuit courts of appeal and five federal district courts. Thus, the full scope and effect of section 666 is still unsettled.

219. Id. While the court acknowledged the section's broad scope, it refused "to stretch the term 'receives ... benefits' beyond recognition, particularly where doing so would merely make [section] 666 redundant of other federal statutes." Id.

220. Id. The court stated that since the funds remained in a federal account until disbursed by Hill Taylor, theft of those funds constitutes theft of government property, punishment for which is provided by section 641.

221. 687 F. Supp. 1042 (N.D. Miss. 1988).

222. Id. at 1043.

223. Id. at 1051.

224. Id. at 1052. In a footnote, the Little court found no constitutional shortcomings: " '[I]t is clear that Congress has cast a broad net to encompass local officials who may administer federal funds regardless of whether they actually do.' " Id. at 1049 n.5 (quoting United States v. Westmoreland, 841 F.2d 572, 577 (5th Cir.), cert. denied, 109 S. Ct. 62 (1988)).

225. The only circuit court opinions addressing section 666 are from the United States Court of Appeals for the Fifth Circuit, in Westmoreland, 841 F.2d 572, and United States v. Duvall, 846 F.2d 966 (5th Cir. 1988); the United States Court of Appeals for the Ninth Circuit, in United States v. Bordallo, 857 F.2d 519 (9th Cir. 1988) (holding section 666 does not apply to the former governor of Guam because Guam is not a "state" for the purposes of the bribery section); and the United States Court of Appeals for the Tenth Circuit, in United States v. Barquin, 799 F.2d 619 (10th Cir. 1986) (moot because of enactment of Pub. L. No. 99-646, 100 Stat. 6138 (1986) adding Indian tribes to the scope of section 666).

226. Five federal district courts have also dealt with section 666: the Northern District of Illinois (United States v. Webb, 691 F. Supp. 1164 (N.D. Ill. 1988)); the District of Massachu-
C. A Retrospective Application of Section 666 to Cases Decided Under Sections 641 and 201

Due to the limited case law that exists regarding section 666 of title 18, the full scope of the statute cannot be discerned. However, one method for assessing the scope of section 666 is via a retrospective analysis applying the new statute to the earlier section 641 and 201 cases. While such a method is theoretical, it presents the opportunity to speculate whether a defendant, who escaped conviction under section 641 or 201, might otherwise have been successfully prosecuted under section 666.

As previously noted, in United States v. Del Toro\textsuperscript{227} the defendants avoided conviction under section 201 because the United States Court of Appeals for the Second Circuit determined that Morales, the individual allegedly bribed, was not a public official.\textsuperscript{228} Although not a public official, Morales was responsible for administering funds provided by HUD pursuant to Model Cities, a low-income housing program.\textsuperscript{229} Applying the criteria of section 666 to the Del Toro case, a district court would likely find sufficient statutory authority to convict Del Toro and his codefendant of bribery. While not within the ambit of section 201, Del Toro's actions would likely fall within the prohibitions of section 666 because the latter statute does not contain a public official requirement.\textsuperscript{230} Under section 666, Morales' employment by an organization that disbursed federal funds would be sufficient to sustain a bribery conviction.\textsuperscript{231} Thus, applying section 666 to Del Toro illustrates that the relationship between the government and the entity receiving the funds is the linchpin of the statute's applicability.\textsuperscript{232}

\textsuperscript{227} 513 F.2d 656 (2d Cir. 1975). For a more thorough discussion of Del Toro, see supra notes 59-76 and accompanying text.
\textsuperscript{228} Id. at 662.
\textsuperscript{229} Id.
\textsuperscript{230} A comparison between the language of section 666 and section 201 demonstrates that only the latter contains a "public official" requirement. For the complete text of section 666, see supra notes 108, 129, and 130. For the complete text of the applicable portion of section 201, see supra note 13.
\textsuperscript{231} Under section 666(a)(2), Morales' employment in an agency disbursing federal funds is sufficient to obtain a conviction of the individuals who attempted to bribe him. For a complete discussion of section 666(a)(2), see supra notes 144-51 and accompanying text.
\textsuperscript{232} For a detailed explanation of the benefits of 18 U.S.C. § 666 as the new weapon in fighting certain types of theft and bribery, see supra notes 95-151 and accompanying text.
Furthermore, in *United States v. Little*, the court interpreted section 666 to permit federal jurisdiction over individuals employed by state or local governments that benefit from a federal program, especially if such individuals control the disbursement of the funds. Even under this interpretation, Morales, having responsibility for the disbursement of HUD funds, and his co-defendants, would have been convicted had section 666 been in effect. This potential reversal in the outcome of the *Del Toro* case highlights the significance section 666 places on the relationship between the Federal Government and the beneficiary of the federal funds. Again, this hypothetical demonstrates that the defendant’s status as a public or private official is not determinative of federal jurisdiction. Rather, the entity’s status as an organization receiving federal monies permits the Federal Government to invoke section 666.

Another example of section 666’s potential effect on federal prosecutions is apparent in a review of *Dixson v. United States*. In *Dixson*, the United States Supreme Court upheld the section 201 convictions of two defendants who solicited bribes in exchange for preferential treatment in a federal program they administered. Although the Supreme Court affirmed the convictions of the *Dixson* defendants, the majority decision defined “public official” in such a way as to limit the applicability and scope of section 201. The Court’s restraint, which indicated that federal jurisdiction depended on whether the employees of local organizations responsible for administering or benefiting from federal funds have official responsibility or duty related to those funds, appears moot in light of the absence of the public official requirement in section 666.

As with section 201, it is likely that certain cases decided under section 641 would have been decided differently had section 666 been the statute


234. *Id.* at 1049.

235. 465 U.S. 482 (1984); see also supra notes 85-92 and accompanying text.


237. *Id.* at 499. In the majority opinion in *Dixson*, Justice Marshall stated that:

> By finding petitioners to be public officials . . . we do not mean to suggest that the mere presence of some federal assistance brings a local organization and its employees within the jurisdiction of the federal bribery statute or even that all employees . . . responsible for administering federal grant programs are public officials . . . To be a public official . . . an individual must possess some degree of official responsibility for carrying out a federal program or policy.

*Id.* at 500. As a result of the enactment of section 666, the above statement wilts. Under the statute, the mere presence of federal monies in a state or local government or private organization does indeed create federal jurisdiction over all employees.

against which the court applied the facts. Section 666's elimination of the requirement of federal supervision and control over the stolen property likely would have influenced the court's rationale in United States v. Smith. In Smith, the United States Court of Appeals for the Fifth Circuit determined that the defendants were within the parameters of section 641 only after the United States demonstrated significant federal control and supervision over the stolen work-study money. Under section 666, however, such a factor is irrelevant. The new statute completely dispenses with the supervision and control requirement, an essential element of proof in prosecutions based on section 641. Moreover, there is no need to establish a link between the Federal Government and the stolen property. Thus, section 666 eliminated the requirement that the government prove supervision and control over the stolen or embezzled funds in certain theft prosecutions. In addition to eliminating the control and supervision requirement, section 666 arguably negates the requirement that the government prove an actual loss, a necessary element in United States v. Fleetwood. Specifically, the statute requires only that the stolen property have a minimum value of $5,000 and that it be stolen from an entity receiving federal funds. Nowhere does section 666 indicate that the Federal Government must be adversely affected by the criminal act.

IV. A BEAST UNCHAINED: HAS SECTION 666 GONE TOO FAR?

Clearly, section 666 is necessary for the protection of federal interests in the state, local, and private arena. The legislative history of section 666 indicates that white collar crime has a significant impact on programs and organizations receiving federal aid. According to the United States Chamber

239. 596 F.2d 662 (5th Cir. 1979); see also supra text accompanying notes 25-34.
240. Smith, 596 F.2d at 664.
241. See generally 18 U.S.C. § 666(a)(1)(A) (1988) (the theft subsection of the statute does not require the Federal Government to have supervision and control over the stolen property). For the full text of this subsection, see supra note 108.
242. See id.
243. See id. For a full discussion of this subsection, see supra text accompanying notes 108, 110, 116-28. See, e.g., United States v. Tana, 618 F. Supp. 1393 (S.D.N.Y. 1985) (defendants escaped prosecution because the government could not show substantial control or supervision over a security interest); United States v. Fleetwood, 489 F. Supp. 129 (D. Oregon 1980) (a government issued savings bond is not federal property, as defined by section 641 of title 18).
245. 489 F. Supp. at 132.
246. See generally 18 U.S.C. § 666(a)(1)(A). For the full text of this subsection, see supra note 108.
247. S. REP. NO. 225, supra note 4, at 369-70, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3510-11. In all relevant legislative history, Congress stressed the need to
of Commerce, approximately $40 billion is lost to white collar crime annually.248 As the section 666 cases demonstrate, the shortcomings of sections 641 and 201 in dealing with theft and bribery in federally funded programs were too great to be left unaltered. However, section 666, in its current form, poses additional questions as to whether it is the best tool to strengthen the Federal Government's arsenal for the prosecution of theft, fraud, and bribery involving federal funds.

Although section 666 symbolizes Congress' intent to close the gaps left open by sections 641 and 201,249 the statute's broad language is amenable to interpretations that create a potentially limitless scope. The statute's focus on the relationship between the entity receiving the federal monies and the Federal Government, rather than on the link between the individual defendant and the government, raises unique problems. For example, a person who has been bribed or who has committed theft might be subject to the statute's sanctions solely by virtue of his employment status in a state or local government or private organization benefiting from a federal program.

To illustrate this example, assume that a county government receives over $10,000 in aid pursuant to a federal program, for use in improving that county's highways. An individual working in the county's housing office, who is unaware of either the federal program or the grant, accepts a bribe in the course of a transaction valued at over $5,000. Despite the fact that the bribe may concern purely local matters and may be totally unrelated to the federal program, the clerk may be subject to sanctions under section 666. While this conclusion appears both reasonable and defensible, based upon the statutory language of section 666, it does not seem to reflect or effectuate Congress' stated goal of enhancing the protection of federal monies disbursed to governments and private organizations.250 The funds earmarked for use on the county's highways are no safer simply because this clerk, who did not even know of the highway funds, can be convicted of a federal offense. This scenario is not designed to demonstrate that section 666 is unnecessary, rather, it proves that section 666 must be more narrowly drafted to achieve Congress' desired result.

In addition, the above scenario reflects a situation in which the Federal Government could be forced to prosecute a criminal matter more appropri-

---

250. Id.
ately reserved to a particular county or state government. Such federal intervention into matters properly handled on a local level runs counter to two other congressional expectations under section 666: First, because the new statute applies in a nonfederal arena, local officials would accept a greater prosecutorial burden in theft and bribery prosecutions; and second, the statute only pertains to substantial criminal acts. Although strict judicial interpretation and construction of section 666 can eliminate the problems this hypothetical exposes, such judicial action does not guarantee uniform results or enforcement. Rather, judicial interpretation of section 666 would be more consistent, intellectually honest, and judicially efficient if Congress confined the scope of section 666 to its specific purpose.

In applying this statute, courts should remember that beneath the words is a purpose, and that purpose, although directed at nonfederal individuals and entities, is still distinctly federal. As previously stated, Congress’ objective in enacting section 666 was to protect federal funds, disbursed under a federal program. Section 666 was the beast created to effectuate this congressional goal, but the beast cannot effectively stalk its prey if the jurisdictional forest is too vast.

V. CONCLUSION

Federal programs and federal grants play an integral role in the functioning of state and local governments and private organizations. The incidence of theft and bribery in these programs necessitated congressional enactment of a criminal statute tailored to the unique methods by which federal programs operate and disburse federal funds. The case law dealing with sections 201 and 641 of title 18 highlight the inadequacies of those provisions in controlling bribery and theft in federal programs. As this Note demonstrates, section 666 of title 18 gives the Federal Government greater ability to safeguard its interests in the disbursement of federal funds. Section 666 affords this protection by providing for federal prosecution of theft and bribery occurring in nonfederal entities receiving federal funds. Yet, as also discussed, section 666’s seemingly limitless scope can result in misapplication thereby undermining its effectiveness.

Because the focus of section 666 is on the relationship between the Federal Government and the entity benefiting from federal monies, the statute does not require that either the stolen property or the bribe have any direct link to the federal program. Based upon the statutory language of section 666, any employee of an entity receiving federal benefits exceeding $10,000 in a single

\[251. \text{Id.} \]  
\[252. \text{Id. at 3511.} \]
year, who commits theft or accepts a bribe, is subject to federal prosecution, regardless of whether the employee personally administers the funds, or in any way participates in or knows of the federal program or its benefits. If this is indeed the scope of the new statute, it is not reflected in the legislative history. Furthermore, with such a result, the possibility of federal ingress into the activities of employees of state, local, and private entities becomes virtually boundless.

Section 666 of title 18 is a valuable statute — a statute necessary to protect federal interests in the state and private sector. However, the courts should not forget that Congress enacted the statute for a specific purpose, the prevention of corruption in federally funded programs by nonfederal employees. This goal will be undermined if the statute is subject to indiscriminate use by overzealous prosecutors seeking to impose federal jurisdiction where none exists. To prevent this misuse, Congress must define more precisely the activities subject to prosecution under section 666, thereby narrowing the statute's scope. However, until such a redrafting occurs, the federal courts must recognize their responsibility in ensuring that the application of section 666 conforms with its congressional purpose.

Daniel N. Rosenstein