

18 U.S.C. § 666: IS IT A BLANK CHECK TO FEDERAL AUTHORITIES PROSECUTING STATE AND LOCAL CORRUPTION?

I. INTRODUCTION

Section 666 of Title 18 of the United States Code provides that it is a federal crime to steal or obtain by fraud property worth \$5,000 or more from any organization that “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.”¹ The statute also makes it a federal crime to solicit, offer, or accept bribes “in connection with any business, transaction, or series of transactions of [the federally funded agency] involving any thing of value of \$5,000 or more.”² Congress enacted 18 U.S.C. § 666 in 1984 to expand the power of federal prosecutors to “protect the integrity of the vast sums of money distributed through Federal programs.”³ In the last several years, however, courts have differed in their interpretation of the scope of the authority granted to prosecutors by section 666.⁴

The first conflict to arise regarding section 666 concerned the proper interpretation of when an organization “receives . . . benefits . . . under a Federal program.”⁵ In *United States v. Fischer*,⁶ the Eleventh Circuit held that a health care provider who treated patients who directly received Medicare Part B payments did “receive[] . . . benefits . . . under a Federal program” for purposes of section 666 even though elderly and disabled patients were the primary beneficiaries of the program.⁷ The Tenth Circuit, however, in *United States v. LaHue*,⁸ disagreed and held that health care providers treating patients receiving Medicare benefits

1. 18 U.S.C. § 666(b) (1994).

2. *Id.* § 666(a)(1)(B) & (a)(2).

3. S. REP. NO. 98-225, at 370 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3511.

4. See *United States v. Fischer*, 168 F.3d 1273 (11th Cir. 1999), cert. granted, 528 U.S. 962 (1999), aff'd, 529 U.S. 667 (2000); *United States v. LaHue*, 170 F.3d 1026 (10th Cir. 1999); *United States v. Dakota*, 188 F.3d 663 (6th Cir. 1999), reh'g granted, No. 97-2256, 1999 U.S. App. LEXIS 32819 (6th Cir. 1999), amended by 197 F.3d 821 (6th Cir. 1999); *United States v. Santopietro*, 166 F.3d 88 (2d Cir. 1999); *United States v. Zwick*, 199 F.3d 672 (3d Cir. 1999).

5. 18 U.S.C. § 666(b).

6. 168 F.3d 1273 (11th Cir. 1999).

7. *Fischer*, 168 F.3d at 1276.

8. 170 F.3d 1026 (10th Cir. 1999).

are not subject to section 666.⁹ Last term, the United States Supreme Court granted certiorari in *Fischer* to resolve the question of whether the statute covers fraud involving organizations participating as Medicare providers.¹⁰ The Court held that it did, thus resolving the split between the Tenth and Eleventh Circuits.¹¹

The second conflict regarding section 666 involves the issue of whether section 666 requires the government to show that the corruption at issue in some way affected the federal funds received by the organization. The United States Supreme Court explicitly declined to address this question in *Salinas v. United States*,¹² and the circuits have again split over an interpretation of section 666.¹³

This Article will focus on the remaining unresolved issue of interpretation of section 666. It will address the conflicting holdings on the issue and look at the language and history of the statute to determine the most plausible interpretation. In addition, the Article will examine the implications of the alternative interpretations of section 666.

II. HOW HAVE COURTS INTERPRETED SECTION 666?

A. History of the Split Between the Circuits

The Fifth Circuit in *United States v. Westmoreland*¹⁴ was the first judicial circuit to interpret section 666 with regard to the relationship between state and local corruption and federal monies. In *Westmoreland*, the defendant, a county supervisor, was convicted under section 666 for accepting kickbacks in exchange for approving fraudulent invoices.¹⁵ On appeal, Westmoreland argued that the statute reached only acts of bribery involving federal funds and that the Government did not show that her bribery affected any federal funds.¹⁶ The court rejected this argument and held that the Government need not prove that federal monies directly funded a corrupt transaction.¹⁷

In reaching this conclusion, the Fifth Circuit held that the language

9. *LaHue*, 170 F.3d at 1031-32.

10. 528 U.S. 962 (1999).

11. *Fischer v. United States*, 120 S. Ct. 1780, 1786-89 (2000).

12. 522 U.S. 52, 59 (1997).

13. See *United States v. Dakota*, 188 F.3d 663 (6th Cir. 1999), *reh'g granted*, No. 97-2256, 1999 U.S. App. LEXIS 32819 (6th Cir. 1999), *and amended by* 197 F.3d 821 (6th Cir. 1999); *United States v. Santopietro*, 166 F.3d 88 (2d Cir. 1999); *United States v. Zwick*, 199 F.3d 672 (3d Cir. 1999).

14. 841 F.2d 572 (5th Cir. 1988).

15. *Westmoreland*, 841 F.2d at 574.

16. *Id.*

17. *Id.* at 578.

of section 666, or lack thereof, was “plain and unambiguous.”¹⁸ The court found the fact that section 666(b) contains no qualifying language stating that a corrupt transaction must involve federal funds to be determinative.¹⁹ Despite holding that an examination of the legislative history of the statute was unnecessary, the court also found that a Senate report supported its interpretation of section 666.²⁰ The court summarized the report as showing that one of the purposes of the statute was to allow prosecution of theft from or bribery in organizations receiving federal funds while avoiding the problems associated with tracing federal monies.²¹

The *Westmoreland* court, however, failed to recognize that this statutory language and legislative history did not squarely address the situation in that case. *Westmoreland*’s argument was not that section 666 required the Government to pinpoint the precise federal funds affected by the corruption. Instead, *Westmoreland* argued that the federal funds received by the county were completely segregated and were in no way affected by *Westmoreland*’s fraudulent invoices.²² The Fifth Circuit, however, saw the question as a dichotomy—the statute must be interpreted either as requiring the Government to trace federal funds directly to corrupt transactions or as requiring no connection whatsoever between the corruption and any federal monies received by an organization.²³ Later cases illustrate that an interpretation of section 666 falling between these two extremes may be most plausible.

Before that interpretation emerged, however, the Sixth Circuit in *United States v. Valentine*²⁴ agreed with the *Westmoreland* court’s reasoning. In *Valentine*, a city employee was charged with a violation of section 666 for diverting money from payments of city parking tickets and copying fees for her own personal use and for using city employees to do personal errands for her during working hours.²⁵ The employee argued in her defense that “the funds [she] misappropriated were not connected to a federal program,” and, therefore, she could not be convicted under section 666.²⁶

The Sixth Circuit disagreed and held that there need be no direct connection between the stolen funds and the federal funds.²⁷ The court agreed with the Fifth Circuit’s reasoning in *Westmoreland* that because

18. *Id.* at 576.

19. *Id.*

20. *Westmoreland*, 841 F.2d at 576-77.

21. *Id.*

22. *Id.* at 575.

23. *Id.* at 578.

24. 63 F.3d 459 (6th Cir. 1995).

25. *Valentine*, 63 F.3d at 461.

26. *Id.* at 462.

27. *Id.* at 464.

there is no reference in section 666 to a connection between the misappropriation and the federal funds in the language of the statute, the plain language of the statute clearly indicates that no connection need be shown.²⁸ The court also noted that the legislative history of section 666 indicates that it was intended to expand federal prosecutors' authority to prosecute corruption that did not fall within any previous anti-corruption statute.²⁹

Valentine argued alternatively that interpreting section 666 to include her activities violated principles of federalism because her actions affected strictly local monies.³⁰ The Sixth Circuit rejected this argument as well, holding instead that "Congress intended to protect federal funds by exerting control over the agencies that benefit from them, a purpose well within its authority."³¹

While the Fifth and Sixth Circuits found that the absence of any required connection to federal funds in the plain language of section 666 made clear that no connection to federal funds was necessary to prove a violation of the statute, the Second Circuit held just the opposite in *United States v. Foley*.³² In *Foley*, a member of the Connecticut General Assembly's House of Representatives was charged with violating section 666 as a result of allegedly accepting bribes in exchange for agreeing to influence certain legislation.³³ *Foley* took the bribes totaling \$25,000 from local developers, and in exchange, promised to use his influence to persuade his fellow legislators to create a one-year exemption for the developers' company from a new law that would cost the company a significant amount of money.³⁴ The Connecticut General Assembly subsequently passed the legislation desired by the developers.³⁵ The trial court in *Foley* instructed the jury that in order to find a violation of section 666 "it is not necessary for the transaction or transactions by the state government actually to have involved any federal funds received by the state."³⁶

Looking to the same statutory language and legislative history as the *Valentine* court, the court in *Foley* reached a contrary result.³⁷ The Second Circuit held that while the legislative history makes it clear that the Government is not required to actually trace the corruption to the federal program funds, section 666 is not violated unless "the preservation of

28. *Id.*

29. *Id.*

30. *Valentine*, 63 F.3d at 464.

31. *Id.* at 465.

32. 73 F.3d 484 (2d Cir. 1996).

33. *Foley*, 73 F.3d at 486.

34. *Id.*

35. *Id.*

36. *Id.* at 487 (quoting Trial Transcript at 83).

37. *Id.* at 489, 492.

federal funds [is] implicated by the defendant's conduct."³⁸ In reaching this result, the court considered the purpose of the statute stated in a report of the Senate Judiciary Committee prior to passage of the bill. That report stated that section 666 was "designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies."³⁹ The court also interpreted language in the Senate report that stated "[t]he term Federal program means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives" to mean that Congress intended to require some connection between the corruption and the federal funds.⁴⁰ The court then reversed Foley's conviction on the grounds that the Government failed to show that the legislative exemption that Foley solicited in return for his bribes had any effect on federal funds.⁴¹

B. *The Supreme Court Speaks in Salinas v. United States*

The split between the Second, Fifth, and Sixth Circuits set the stage for the Supreme Court to consider the disputed issue. In *Salinas v. United States*,⁴² a case from the Fifth Circuit, the Court addressed the conflict. In doing so, however, the Court cleared up only part of the issue, but explicitly left the more difficult aspect unresolved. In *Salinas*, a Texas county sheriff and his deputy, Petitioner Salinas, accepted money and property from a prisoner in exchange for allowing him conjugal visits from his wife and girlfriend.⁴³ Like those convicted under section 666 in *Valentine* and *Foley*, Salinas argued that to convict him of violating the statute, the government had to show that the bribes "in some way affected federal funds."⁴⁴ The Court rejected Salinas' argument, but limited its holding to the facts in his case.⁴⁵ Justice Kennedy, speaking for the Court, stated that the broad language used by Congress in enacting section 666 did not support a finding that a bribe must directly affect federal funds to violate the statute.⁴⁶ In addition, he stated that the plain language of section 666, because it speaks in broad and expansive terms, is unambiguous as to whether there must be a direct connection between

38. *Foley*, 73 F.3d at 492.

39. S. REP. NO. 98-225, at 369 (1984), reprinted in 1984 U.S.C.C.A.N. 3510 (emphasis added).

40. *Foley*, 73 F.3d at 490 (quoting S. REP. NO. 98-225, at 370).

41. *Id.* at 493.

42. 522 U.S. 52 (1997).

43. *Salinas*, 522 U.S. at 54-55.

44. *Id.* at 55-56.

45. *Id.* at 59-60.

46. *Id.* at 56-57.

the corrupt activity and a federal program.⁴⁷ The Court went on to say, however:

We need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves. And that relationship is close enough to satisfy whatever connection the statute might require. . . .

Furthermore, there is no serious doubt about the constitutionality of [the part of section 666 dealing with bribery] as applied to the facts of this case. . . . Whatever might be said about [the statute's] application in other cases, [its application] to Salinas did not extend federal power beyond its proper bounds.⁴⁸

This language and the Court's refusal to go beyond the facts of the *Salinas* case did little to resolve the split between the circuits regarding the scope of section 666. In fact, due at least in part to the confusing language of *Salinas*, the division over the proper interpretation of section 666 has grown deeper.⁴⁹

C. *The Unresolved Issue*

The Second Circuit was the first to address the question left open by the Supreme Court in *Salinas*.⁵⁰ The procedural history of the court's decision in *United States v. Santopietro* serves as a useful illustration of the development of the law in this area. The original case, "*Santopietro I*,"⁵¹ involved a conspiracy among "Santopietro, the former Mayor of Waterbury, Connecticut, Piscioti, the former Republican Town Chairman of Waterbury, and Vitarelli, the former President of the Waterbury Board of Aldermen."⁵² These officials accepted bribes in exchange for using their influence to affect decisions by various city agencies.⁵³ The City of Waterbury, however, suffered no direct financial loss from the scheme.⁵⁴ Nevertheless, the Second Circuit, in *Santopietro I*, upheld the convictions under section 666.⁵⁵

47. *Id.* at 57.

48. *Salinas*, 522 U.S. at 59-61.

49. See *United States v. Zwick*, 199 F.3d 672, 682-83 (3d Cir. 1999) (referring to the Sixth Circuit's interpretation of section 666 as "troubling").

50. See *United States v. Santopietro*, 166 F.3d 88 (2d Cir. 1999).

51. *United States v. Santopietro*, 996 F.2d 17 (2d Cir. 1993), *post conviction relief granted by Santopietro v. United States*, 948 F. Supp. 145 (D. Conn. 1996), *aff'd in part, vacated in part*, *United States v. Santopietro*, 166 F.3d 88 (2d Cir. 1999).

52. *Santopietro*, 166 F.3d at 91.

53. *Id.*

54. *Id.*

55. *Id.*

Shortly after *Santopietro I*, however, the Second Circuit considered *United States v. Foley*⁵⁶ and held that to prove a violation of section 666, the Government must show that the defendant's conduct in some way implicated the preservation of federal funds.⁵⁷ The Waterbury officials then moved the trial court to vacate their convictions in light of *Foley*.⁵⁸ The trial court vacated their convictions under section 666, but resentenced them for other convictions.⁵⁹ The officials then appealed the resentencing.⁶⁰

In the meantime, the Supreme Court decided *Salinas*, and the Government, in *Santopietro III*, cross-appealed, asking the Second Circuit to reverse the vacation of the section 666 convictions in light of the Court's holding in *Salinas*.⁶¹ In *Santopietro III*, the court considered to what extent its decision in *Foley* had been overruled by the Supreme Court in *Salinas*.⁶² Because the Second Circuit ultimately found that the Waterbury officials' conduct did threaten the integrity of a federal program, its statements regarding the scope of section 666 were merely dicta.⁶³ The court, however, interpreted the Supreme Court's language in *Salinas* to mean that the application of section 666 in *Salinas* was only saved from the constitutional challenge because the corruption was a "threat to the integrity and proper operation of [the] federal program."⁶⁴ The court took from this that the converse could also be true—that if corruption did not threaten the integrity of a federal program, to find a violation of section 666 would be unconstitutional.⁶⁵ This interpretation may be questionable considering that the Supreme Court only spoke to the constitutionality of section 666 as applied to the facts of *Salinas* and made no predictions as to the outcome in the converse situation.⁶⁶

The Second Circuit also made a bold statement on the issue, declaring that "to the extent that *Foley* requires at least some connection between the bribe and a risk to the integrity of the federal[ly] funded program, nothing in *Salinas* disturbs such a requirement."⁶⁷ In reaching its conclusion in *Santopietro III*, the Second Circuit gave an example of an impermissible use of section 666—prosecuting a bribe made to the city meat inspector just because the city parks department received federal

56. 73 F.3d 484 (2d Cir. 1996).

57. See *supra* text accompanying notes 32-41.

58. *United States v. Santopietro*, 948 F. Supp. 145, 148 (D. Conn. 1996) ("*Santopietro II*"), *aff'd in part, vacated in part*, 166 F.3d 88 (2d Cir. 1999).

59. See *Santopietro*, 948 F. Supp. at 155-56.

60. *Santopietro*, 166 F.3d at 91 ("*Santopietro III*").

61. *Id.* at 91-92.

62. *Id.* at 92-93.

63. *Id.* at 93-94.

64. *Id.* at 93 (quoting *Salinas v. United States*, 522 U.S. 52, 61 (1997)).

65. See *Santopietro*, 166 F.3d at 93.

66. See *Salinas*, 522 U.S. at 59.

67. *Santopietro*, 166 F.3d at 93.

funds.⁶⁸ The Sixth Circuit, however, in *United States v. Dakota*,⁶⁹ upheld a bribery conviction under section 666 where the connection between the bribery and the federal funds was no less tangential than in the Second Circuit's hypothetical.⁷⁰

In *Dakota*, an agent of the Keweenaw Bay Indian Community was convicted under section 666 for receiving kickbacks on the lease of gaming machines to be used in a casino on the tribe's reservation.⁷¹ Dakota received the money from a company called International Gaming Management ("IGM"), which funneled the money first through another company, Spectrum Communications.⁷² The money was a share of the profits generated for IGM from the operations of the gaming machines.⁷³ Dakota argued on appeal that there must be at least some connection between the kickbacks and the federal funding received by the tribe.⁷⁴ With minimal discussion of the issue, the Sixth Circuit rejected his argument, citing to *Salinas* and its previous decision in *United States v. Valentine*,⁷⁵ in which the court held that there need be no direct connection between the stolen funds and the federal funds.⁷⁶

The Third Circuit, in *United States v. Zwick*⁷⁷ and *United States v. DeLaurentis*,⁷⁸ has also expressed its view of the proper interpretation of section 666. In the most comprehensive analysis of the proper scope of the statute, the court in *Zwick* sided with the Second Circuit, but unlike that court, did not heavily rely on the Supreme Court's language in *Salinas*.⁷⁹ Instead, the Third Circuit returned to an in-depth analysis of the language and legislative history of the statute itself.⁸⁰

In *Zwick*, an elected member of the Ross Township, Pennsylvania Board of Commissioners was accused of soliciting bribes from two developers in exchange for facilitating the approval of their projects in the town.⁸¹ There was no apparent connection between the bribes taken by Zwick and federal funds or programming.⁸² Pointing out this fact, Zwick challenged his convictions under section 666 and argued that if the court

68. *Id.*

69. 188 F.3d 663 (6th Cir. 1999), *reh'g granted*, No. 97-2256, 1999 U.S. App. LEXIS 32819 (6th Cir. 1999), *amended by* 197 F.3d 821 (6th Cir. 1999).

70. Richard Cooper, *Business Crime: Circuits Split—Again*, NAT'L L.J., Feb. 28, 2000, at A13.

71. *Dakota*, 188 F.3d at 666.

72. *Id.*

73. *See id.*

74. *Id.* at 668.

75. 63 F.3d 459 (6th Cir. 1995).

76. *Dakota*, 188 F.3d at 668; *see also supra* text accompanying notes 24-31.

77. 199 F.3d 672 (3d Cir. 1999).

78. 230 F.3d 659 (3d Cir. 2000).

79. *Zwick*, 199 F.3d at 678-88.

80. *Id.*

81. *Id.* at 676-78.

82. *Id.* at 688.

found the statute was properly applied, then its application in his case was unconstitutional.⁸³

The court found that while the plain language of section 666 did not explicitly require a connection between corruption and federal funding, the title of the statute, "Theft or bribery concerning programs receiving Federal funds," implied that a connection is required.⁸⁴ Considering the two possible meanings of the plain language of the statute, the Third Circuit found that the proper scope of section 666 was ambiguous from its language alone.⁸⁵ Therefore, the court then examined the legislative history of the statute. The court relied upon the title of the relevant legislative history, "Program Fraud and Bribery," and a statement that the purpose of the statute was to "vindicate significant acts of theft, fraud, and bribery involving Federal monies."⁸⁶ From this, the court concluded that Congress intended for some impact, however indirect, on a federally funded program in order to find a violation of section 666.⁸⁷ Ironically, this passage from the legislative history of the statute is the same one cited by the Fifth Circuit in *Westmoreland* to support its conclusion that no connection is required.⁸⁸

The Third Circuit reaffirmed its interpretation of section 666 last year in *United States v. DeLaurentis*.⁸⁹ The court recognized that it was bound by its previous decision in *Zwick*, but distinguished the case from *Zwick* on its facts.⁹⁰ In the Government's appeal from the district court's dismissal of an indictment under section 666, the court found that there was no impediment to charging the defendant because it held that a reasonable jury could find a link between the defendant's actions and his local government employer's receipt of federal funds.⁹¹

While the Supreme Court in *Salinas* resolved the issue of whether, under section 666, there must be a direct link between state or local corruption and a federally funded program, courts still differ on the question *Salinas* left unresolved. Looking to the same cases and the same legislative history, three circuits reached different results for different reasons. This Article will now turn to an analysis of the plausibility of the varying interpretations and an examination of the implications of each.

83. *Id.* at 678.

84. *Zwick*, 199 F.3d at 682.

85. *Id.* at 682-83.

86. *Id.* at 684 (quoting S. REP. NO. 98-225, at 369-70 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3510-11).

87. *Id.* at 684, 687.

88. *United States v. Westmoreland*, 841 F.2d 572, 576-77 (5th Cir. 1988).

89. 230 F.3d 659 (3d Cir. 2000).

90. *DeLaurentis*, 230 F.3d at 661-62.

91. *Id.* at 662.

III. HOW BROADLY SHOULD SECTION 666 BE INTERPRETED?

A. *An Examination of the Plain Language of Section 666*

In order to ascertain the proper scope of section 666, it is first necessary to examine its plain language. The plain language of section 666(b) makes no mention of any requisite tie between corruption by a state or local agency and that agency's receipt of federal funds.⁹² This seems to suggest that the Sixth Circuit was correct to allow a conviction under the statute without requiring the Government to show the slightest connection between the corruption and federal funds.⁹³ However, as the Third Circuit noted, the title of section 666, "Theft or bribery concerning programs receiving Federal funds," at least suggests that the corruption must "concern" the agency's receipt of federal funds.⁹⁴ This contradiction in the plain language of the statute can be reconciled by examining section 666's legislative history, prior Supreme Court jurisprudence in this area, and general principles of statutory construction.

B. *An Examination of the Legislative History of Section 666*

At least one court has considered an inquiry into the legislative history of section 666 improper in light of the Supreme Court's holding in *Salinas* that the plain language of the statute is unambiguous.⁹⁵ The *Salinas* Court, however, only stated that the language of the statute was unambiguous in addressing the question of whether there must be a *direct* connection, akin to a traceable connection, between the corruption and federal funds.⁹⁶ The Court did not address the more difficult question of whether the language of section 666 is unambiguous as to whether the statute requires any effect at all on federal funds.⁹⁷ Therefore, as the Third Circuit recognized in *United States v. Zwick*, an inquiry into the legislative history in order to address this question is not foreclosed by *Salinas*.⁹⁸ Turning now to section 666's legislative history, it provides evidence that Congress intended the statute to be used only to prosecute corruption that in some way affected federal funds. The title of the section of the Senate report detailing section 666's purpose, "Program Fraud and Bribery," suggests that Congress had in mind pro-

92. See 18 U.S.C. § 666 (1994).

93. See *United States v. Dakota*, 188 F.3d 663, 668 (6th Cir. 1999).

94. 18 U.S.C. § 666.

95. See *United States v. McCormack*, 31 F. Supp. 2d 176, 186 (D. Mass. 1998), *amended and dismissed by* No. 97-10168-NG, 1998 U.S. Dist. LEXIS 21617 (D. Mass. Nov. 25, 1998).

96. See *Salinas v. United States*, 522 U.S. 52, 59 (1997).

97. See *id.*

98. *United States v. Zwick*, 199 F.3d 672, 682-83 (3d Cir. 1999).

tecting federal programs when it enacted section 666.⁹⁹ Also in the text of that section, Congress gave an example of conduct that should not be considered a violation of section 666: "For example, if a government agency lawfully purchases . . . equipment from a supplier, it is not the intent of this section to make a theft . . . from the supplier a Federal crime."¹⁰⁰ From this language, it seems unlikely that Congress intended for section 666 to reach state corruption that had no effect on federal funds simply because the states received money from the federal government.

Furthermore, section 666 was intended primarily as a gap-filler in the previously existing anti-corruption statutes.¹⁰¹ Prior to the passage of section 666, there were two similar statutes aimed at preventing corruption of federal funds. Title 18, section 641 of the United States Code made it a federal crime to embezzle or steal property belonging to the federal government or any department or agency of the federal government.¹⁰² In order to convict a person under section 641, however, the government was required to trace the stolen property back to its federal source.¹⁰³ Title 18, section 201 of the United States Code made it a federal crime to bribe a public official, but defined "public official" to include only members of Congress, officers of the United States government, or federal government employees.¹⁰⁴

In contrast, section 666 was designed to apply in cases in which money involved in corruption could not be directly traced back to the federal government or in which the person receiving a bribe was not directly employed by the federal government.¹⁰⁵ The fact that Congress clearly intended to close the loopholes in federal anti-corruption law supports a broad interpretation of section 666. This purpose of section 666, however, is sufficiently furthered by merely abandoning the requirement of a direct connection between corruption and federal funds. Looking to other evidence of congressional intent, it becomes clear that Congress did not consider it necessary to extend the scope of section 666 to the point where it makes a federal crime out of state and local corruption that has no impact on federal funds.

While the fact that section 666 was intended as a gap-filler has led some to adopt the broadest interpretation of the statute's scope, the gaps that Congress sought to fill pertained to cases in which the current stat-

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

100. *Id.* at 370, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511.

101. *Id.* at 369-70, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11.

102. 18 U.S.C. § 641 (1994 & Supp. IV 1998).

103. *See, e.g.,* *United States v. Largo*, 775 F.2d 1099, 1101 (10th Cir. 1985); *United States v. Smith*, 659 F. Supp. 833 (S.D. Miss. 1987); *see also* S. REP. NO. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3510.

104. 18 U.S.C. § 201(a)(1) (1994).

105. *See* S. REP. NO. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510.

utes did not reach corruption that implicated federal interests. In enacting section 666, Congress specifically stated that the statute was aimed at addressing the scenarios in the cases of *United States v. Hinton*,¹⁰⁶ *United States v. Del Toro*,¹⁰⁷ and *United States v. Mosley*.¹⁰⁸ In each of those cases, the defendants challenged their convictions under section 201 because they argued that the Government could not prove that they were "public officials" within the meaning of that statute.¹⁰⁹

More importantly, however, each of those cases involved state or local corruption that directly implicated federal funds. For example, in *United States v. Hinton*, officers of a non-profit corporation solicited bribes from contractors in exchange for awarding them housing rehabilitation contracts.¹¹⁰ In that case, the non-profit corporation had entered into a contract with the City of Peoria to administer federal funds awarded to the city in the form of a Community Development Block Grant and a Federal Metro Reallocation Grant from the United States Department of Housing and Urban Development.¹¹¹ The contractors from whom bribes were solicited were to be paid for their work directly from the federal block grant monies.¹¹²

In *United States v. Del Toro*,¹¹³ the defendants conspired to bribe an administrator of the Harlem-East Harlem Model Cities Program to secure a lucrative lease from the program in one of the defendants' office buildings.¹¹⁴ The Model Cities Program received 100% of its program funding from the federal government.¹¹⁵ Finally, in *United States v. Mosley*,¹¹⁶ the defendant, an employee of the State of Illinois Bureau of Employment Security, received bribes in exchange for giving preferential treatment to applicants for the Comprehensive Employment and Training Programs Act ("CETA").¹¹⁷ CETA was funded exclusively by the federal government, and the defendant had significant discretion in administering the federal funds.¹¹⁸

In each of these cases, there was a significant connection between the corruption and a federally funded program. Therefore, there is no reason to think that Congress, in its attempt to enact a statute to reach

106. 683 F.2d 195 (7th Cir. 1982).

107. 513 F.2d 656 (2d Cir. 1975).

108. 659 F.2d 812 (7th Cir. 1981), *aff'd* by *Dixson v. United States*, 465 U.S. 482 (1984); *see also* S. REP. NO. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511.

109. *Hinton*, 683 F.2d at 197; *Mosley*, 659 F.2d at 814; *Del Toro*, 513 F.2d at 661.

110. *Hinton*, 683 F.2d at 196.

111. *Id.*

112. *Id.* at 197.

113. 513 F.2d 656 (2d Cir. 1975).

114. *Del Toro*, 513 F.2d at 658.

115. *Id.* at 661.

116. 659 F.2d 812 (7th Cir. 1981).

117. *Mosley*, 659 F.2d at 813.

118. *Id.*

the conduct in each of these cases, intended to go beyond that conduct to also reach state and local corruption with no impact on federal funds.

C. An Examination of the Supreme Court's Prior Interpretation of Section 666

The United States Supreme Court's resolution of the split among the circuits with regard to the proper statutory definition of "benefits . . . under a Federal program"¹¹⁹ also indicates that section 666 should not be interpreted too broadly. In *Fischer v. United States*,¹²⁰ Petitioner Fischer was part owner of Quality Medical Consultants ("QMC").¹²¹ Fischer secured a \$1.2 million loan to QMC from the West Volusia Hospital Authority ("WVHA"), a municipal agency that operated two hospitals that participated in the federal Medicare program.¹²² An investigation revealed that the loan was fraudulently obtained and that QMC never repaid the money to WVHA.¹²³

Fischer was convicted under section 666 for defrauding an organization that receives benefits under a federal assistance program.¹²⁴ On appeal, he argued that the Medicare payments received by the WVHA hospitals were simply reimbursements for patient care, and, therefore, the patients received the benefits, not the WVHA.¹²⁵ The Government countered by arguing that an organization receives benefits from a federal program for purposes of section 666 any time the federal government is the source of the payment.¹²⁶

The Supreme Court rejected both interpretations of section 666.¹²⁷ Instead, the Court held that the WVHA received "benefits" within the meaning of the statute because it received funding and other benefits from the federal Medicare program beyond just simple reimbursements for patient care.¹²⁸

The Court also provided some guidance in the resolution of the current conflict over interpretation of section 666 when it stated, in dicta:

Our discussion should not be taken to suggest that federal funds disbursed under an assistance program will result in coverage of all recipient fraud under § 666(b). Any receipt of federal funds can, at some level of generality, be characterized as a benefit.

119. 18 U.S.C. § 666(b) (1994).

120. 529 U.S. 667 (2000).

121. *Fischer*, 529 U.S. at 669.

122. *Id.* at 670.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Fischer*, 529 U.S. at 676-77.

127. *Id.* at 677.

128. *Id.* at 680.

The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance.¹²⁹

While this language was not part of the essential holding of the case, courts should heed the same warning given by the Court in *Fischer* when determining whether section 666 requires a connection between state or local corruption and federal funds. If section 666 is interpreted so broadly as to encompass any corruption involving an entity that receives federal funds, regardless of how tangential the connection, this too "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance."¹³⁰

D. An Examination of Principles of Statutory Construction

In interpreting the language and legislative history to determine the proper scope of section 666, several principles of statutory construction should also be considered. First, courts should not interpret a statute so that it significantly alters the balance of power between the federal government and the states, unless Congress has explicitly stated that it intended to do so.¹³¹ As previously noted, Congress, in enacting section 666, did not clearly state that it intended for the statute to be a tool for prosecution, as a federal crime, of local corruption that in no way implicates federal funds. To read the statute as authorizing such prosecutions would impermissibly alter the federal-state balance by allowing federal prosecutors to step into matters of predominantly local concern without an express indication of Congress' intent for them to do so. To say that any act of corruption involving an entity that receives a certain level of federal funds is a violation of section 666 would also require a major expenditure of federal dollars prosecuting crimes that are already covered by state criminal statutes.

In interpreting a criminal statute, courts must also be mindful of the doctrine of lenity, a principle of statutory construction that requires an ambiguous statute to be read in the light most favorable to a criminal defendant.¹³² Obviously, a broad reading of section 666 would cause more conduct to qualify as violations of the statute. This would lead to harsher results for criminal defendants by adding an additional federal charge to conduct that is undoubtedly already covered by state laws.

129. *Id.* at 681

130. *Id.*

131. *United States v. Bass*, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

132. *Bass*, 404 U.S. at 347.

Finally, in interpreting ambiguous statutes, the doctrine of constitutional doubt requires courts to construe statutes to avoid unconstitutional results.¹³³ The next section will discuss why this may be a concern if courts give a broad construction of section 666.

IV. A BROAD INTERPRETATION OF SECTION 666 MAY EXCEED CONGRESS' POWER UNDER THE SPENDING CLAUSE

Congress enacted section 666 pursuant to its power under the Spending Clause of Article I of the United States Constitution.¹³⁴ This clause provides that Congress shall have the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."¹³⁵ This broad grant of power authorizes Congress to place conditions on the receipt of federal funds, even to achieve ends that Congress is not authorized to reach by direct regulation.¹³⁶ While broad, the spending power is not unlimited; it is subject to four general limitations.¹³⁷

The first is that Congress can only exercise its spending power for "the general [W]elfare" of the country.¹³⁸ This has not been a great limitation, however, because courts have been instructed to defer substantially to the judgment of Congress in this area.¹³⁹ Second, if Congress intends to condition the receipt of federal funds on certain conduct by the recipients, it must do so unambiguously so as to afford the recipients an opportunity to make a knowing choice as to their conduct.¹⁴⁰ Third, any conditions of the grant of federal funds must be related "to the federal interest in particular national projects or programs."¹⁴¹ Finally, a valid exercise of the spending power may still be illegitimate under some other provision of the Constitution.¹⁴²

In the case of section 666, only the third limitation on Congressional spending power causes any real concern, but that concern is a serious

133. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

134. *United States v. Russo*, No. 96-1394, 1997 WL 168276, at *2 (2d Cir. Apr. 8, 1997); *United States v. McCormack*, 31 F. Supp. 2d 176, 187 n.18 (D. Mass. 1998), *amended and dismissed* by 1998 U.S. Dist. LEXIS 21617 (D. Mass. Nov. 25, 1998); *United States v. Ferrara*, 990 F. Supp. 146, 152 (E.D.N.Y. 1998).

135. U.S. CONST. art. I, § 8, cl. 1.

136. *United States v. Butler*, 297 U.S. 1, 66 (1936); *see also Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

137. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

138. *Dole*, 483 U.S. at 207 (quoting U.S. CONST. art. I, § 8, cl. 1).

139. *Id.* (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

140. *Id.*

141. *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

142. *Id.* at 208 (citing *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968)).

one. In *New York v. United States*,¹⁴³ the Supreme Court held that there must be some real content to this "relatedness" requirement.¹⁴⁴ In that case the Court stated that unless there was some real relatedness requirement, "the spending power could render academic the Constitution's other grants and limits of federal authority."¹⁴⁵ These words of caution are also particularly significant in light of the Court's recent decisions that have placed limits on Congress' once seemingly limitless commerce power.¹⁴⁶

At least one court has recognized the constitutional concern presented by a broad interpretation of section 666 and has found that it is unconstitutional as applied to cases in which there is no connection at all between federal funds and local corruption.¹⁴⁷ In *United States v. McCormack*, McCormack was indicted for giving cash payments to a local police officer, apparently to persuade the officer to cease investigating McCormack for local drug offenses.¹⁴⁸ McCormack moved to dismiss his indictment on the grounds that his conduct was not within the scope of section 666, or in the alternative, that section 666, as applied to his case, was unconstitutional.¹⁴⁹

The court characterized the question presented in the case as whether "§ 666 give[s] federal authorities a blank check to prosecute ostensibly significant acts of corruption . . . just because [a] department receives a certain level of federal funds."¹⁵⁰ The court answered in the negative and held that an affirmative answer would make the statute unconstitutional.¹⁵¹ The court found the case involved "no connection whatsoever between the alleged conduct and either the federal funds that conferred jurisdiction, or the programs those funds authorized."¹⁵² Recognizing that Congress can only place conditions on federal funds that relate to a federal interest in a federal program, the court held that to apply section 666 to McCormack's case would cause the statute to exceed Congress' spending power.¹⁵³ If Congress did indeed intend to give federal prosecutors the broad power to reach corruption with no effect

143. 505 U.S. 144 (1992).

144. *New York*, 505 U.S. at 141.

145. *Id.* at 167.

146. See *United States v. Lopez*, 514 U.S. 549 (1995).

147. *United States v. McCormack*, 31 F. Supp. 2d 176, 181 (D. Mass. 1998), *amended and dismissed by* 1998 U.S. Dist. LEXIS 21617 (D. Mass. Nov. 25, 1998).

148. *McCormack*, 31 F. Supp. 2d at 177.

149. *Id.*

150. *Id.* at 181.

151. *Id.* at 189.

152. *Id.* at 186.

153. *McCormack*, 31 F. Supp. 2d. at 188-89. In contrast, prior to *McCormack*, the Second Circuit upheld the constitutionality of section 666, but the court only considered the first of the four limitations of Congressional spending power—whether an exercise if the power is in pursuit of the country's general welfare. *United States v. Russo*, No. 96-1394, 1997 WL 168276, at *2 (2d Cir. Apr. 8, 1997).

on federal funds, there is serious doubt that Congress is exercising its power to further a federal interest in a federal program.¹⁵⁴ This is precisely the issue that the Supreme Court avoided addressing in *Salinas*.¹⁵⁵ As illustrated by *McCormack*, to construe section 666 broadly to make every act of corruption involving an agency that receives a certain level of funds a federal crime risks creating a constitutional violation. Therefore, it seems unlikely that section 666 should ever reach such conduct.

V. CONCLUSION

The Second and Third Circuits, which have interpreted section 666 narrowly even in light of the Supreme Court's opinion in *Salinas*, appear to be on the right track. First, the plain language of the statute is ambiguous.¹⁵⁶ There are two possible interpretations given the expansive and unqualified language of the statute itself, contrasted with the title of the statute, "Theft or bribery concerning programs receiving Federal funds,"¹⁵⁷ which suggests that there must be at least some connection between the federal funds and the corruption.

As a result, it is necessary to look to section 666's legislative history. Section 666's history indicates that Congress enacted it to close gaps in other anti-corruption statutes that allowed significant corruption involving federal funds to go unpunished.¹⁵⁸ As a result, there is no indication from legislative history that Congress intended to go beyond prosecuting corruption that implicated federal monies.

In addition, courts should also consider principles of statutory construction such as the doctrines of lenity and constitutional doubt and avoid major shifts in the federal-state balance without explicit direction from Congress.¹⁵⁹ Lenity requires that section 666 be interpreted in the light most favorable to a criminal defendant, while constitutional doubt requires that the statute be interpreted to avoid an unconstitutional result. The doctrine of constitutional doubt is particularly significant here, given that an excessively broad interpretation of section 666 may exceed Congress' power under the Spending Clause.¹⁶⁰ Finally, courts should remember the Supreme Court's admonition in *Fischer v. United States* that a broad interpretation of section 666 "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal

154. See *United States v. McCormack*, 31 F. Supp. 2d 176 (D. Mass. 1998), amended and dismissed by 1998 U.S. Dist. LEXIS 21617 (D. Mass. Nov. 25, 1998).

155. *Salinas v. United States*, 522 U.S. 52, 59 (1997).

156. See *supra* Part III.A.

157. 18 U.S.C. § 666 (1994).

158. See *supra* Part III.B.

159. See *supra* Part III.D.

160. See *supra* Part IV.

balance.”¹⁶¹ All of these factors suggest that a narrow interpretation of section 666 is most appropriate.

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161. 529 U.S. 667, 681 (2000).