

SCOTUS Narrows the Federal Program Bribery Statute

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The Supreme Court's recent decision in *Snyder v. United States*, No. 23-138 (U.S. June 26, 2024), narrowed the federal program bribery statute, 18 U.S.C. § 666, to prohibit only bribery.

This result is based substantially on arguments that had been asserted by Winston & Strawn LLP in the First and Fifth Circuits. Every Court of Appeals to have considered the issue had found that Section 666 prohibited gratuities, as well as bribes, until Winston partner Christopher Man persuaded the First Circuit to conclude the statute did not reach gratuities in *United States v. Fernandez*, 722 F. 3d 1 (1st Cir. 2013). More recently, they persuaded the Fifth Circuit to do the same in *United States v. Hamilton*, 46 F. 4th 389 (5th Cir. 2022). The Supreme Court granted certiorari to review a Section 666 conviction on the gratuity theory that had been upheld by the Seventh Circuit, and then adopted the minority position of the First and Fifth Circuits. Man filed an *amicus* brief with the Supreme Court urging it to reach that conclusion on behalf of the Washington Legal Foundation and Due Process Institute.

Construing Section 666 as creating a federal felony for offering or accepting a gratuity had created an overly broad statute that was capable of producing nonsensical results. Unlike the *quid pro quo* that is required to prove bribery, a gratuity is merely a gift to thank a covered person for something they would have done anyway. Prohibited gratuities would include giving a child's teacher a holiday gift card or handing a bottle of water to the postman or garbage collector. As it often does, the Supreme Court rejected the government's argument that the statute could operate as a dragnet that would broadly ensnare even such innocuous conduct because it could trust the government not to abuse its power. Nevertheless, respecting federalism principles, state and local governments remain free to limit or prohibit gratuities as they see fit.

The opinion is significant because federal prosecutors have increasingly relied upon Section 666 in response to the Supreme Court paring back the scope of other federal anti-corruption statutes, most notably by limiting the honest services fraud statute, 18 U.S.C. § 1346, to bribes and kickbacks. Although Section 666 appears to be a narrowly tailored statute designed to protect only federally funded programs that receive more than \$10,000 in federal benefits, courts have read the jurisdictional scope broadly to reach any state, local, or even private entity that receives more than \$10,000 in federal funds, even where the alleged misconduct had nothing to do with the federally funded program. For example, in the various so-called Varsity Blues cases, parents who paid bribes or gratuities to the athletic staff at private universities, who helped their children gain admission to the universities, were charged with federal felonies under Section 666 based on federally funded research projects in other

university departments. In theory, every company that accepted more than \$10,000 in federal benefits under the Paycheck Protection Program also subjected itself to federal criminal jurisdiction under Section 666, too. For such companies, commercial bribery and, until *Snyder*, even mere gratuities could result in a federal felony carrying a potential sentence of imprisonment for 10 years.

Many issues concerning the scope of Section 666 remain, and there is still the need for a tighter nexus between the federally funded program and the alleged misconduct. Most notably, the Supreme Court has limited the *quo* in most *quid pro quo* bribery contexts to “official acts” in *McDonnell v. United States*, 579 U.S. 550 (2016), but most Courts of Appeals have construed Section 666 to reach much more broadly to anything an official may do. Although the Supreme Court did not squarely have that issue of whether Section 666 required an “official act” before it in *Snyder*, the issue was raised in Winston’s *amicus* brief, and *Snyder* used the phrase “official act” 27 times in its opinion. The dissent used the same phrase another nine times. This certainly suggests at least one other way to limit Section 666 in the future: limiting the statute’s reach to “official acts.”

KEY TAKEAWAYS

Snyder limits Section 666 violations to bribery and eliminates the possibility of convictions under a gratuity theory, but gratuities may still be restricted by state and local law. Therefore, it remains important to ensure compliance with such restrictions before offering or accepting a gratuity.

The Supreme Court’s willingness to narrow Section 666 in *Snyder* may portend a willingness to narrow the statute in other ways. Anyone facing a potential Section 666 prosecution should explore arguments to further narrow the statute, in consultation with experienced counsel.

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