CLIENT ALERTS & INSIGHTS

“Tip” Away?! SCOTUS Rules That 18 U.S.C. § 666 Does Not Criminalize Gratuities

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On Wednesday, June 26, 2024, the Supreme Court ruled that the federal anti-bribery statute does not make it a crime for state and local officials to accept a gratuity for acts taken in the past. Writing for a six-justice majority, Justice Brett Kavanaugh, in no uncertain terms, explained that “§666 leaves it to state and local governments to regulate gratuities to state and local officials” rather than “subjecting 19 million state and local officials to up to 10 years in federal prison for accepting even commonplace gratuities.”

The Court opined that six reasons, taken together, confirm that 18. U.S.C. § 666 is a *bribery* statute, not a gratuities statute-text, statutory history, statutory structure, statutory punishments, federalism, and fair notice.

First, on its face, § 666 resembles a bribery statute as opposed to a statute that prohibits gratuities. A cursory review of § 666 reveals that, in order to be in violation, most state and local officials must “corruptly” solicit, accept, or agree to accept “anything of value.” This language mirrors that found in 18 U.S.C. § 201(b), which prohibits bribery as to federal officials. By contrast, § 666 bears little resemblance to 18 U.S.C. § 201(c), the anti-gratuities statute for federal officials, which contains no *mens rea* requirement.

Second, the statutory history suggests that Congress did not intend to outright prohibit gratuities paid to state and local officials. When enacted, § 666 borrowed language from § 201(c), however two years after it passed, Congress amended § 666 and modeled it after § 201(b). The Court noted that suggesting that an amended statute “mean[s] the same thing now as that it did before the amendment” would be “strange.”

Third, given the structure of § 666, the Court outright refused to interpret it as a “two-for-one bribery-and-gratuities statute”-particularly as there are no other provisions in the U.S. Code that prohibit such crimes in the same provision.

Fourth, the historic separation of bribery and gratuities comes with good reason: the crimes receive different punishments that “reflect their relative seriousness.” If the Court were to interpret § 666 to prohibit gratuities, it would lend support to the notion that Congress inexplicably authorized a punishment for state and local authorities that is five times more severe than those levied upon federal officials.

Fifth, “[i]nterpreting § 666 as a gratuities statute would significantly infringe on bedrock federalism principles.” When discussing what appears to be the basis for the decision, Justice Kavanaugh states that “carefully calibrated” state and local policy decisions “would be gutted” if the Court were

to read § 666 to create a federal prohibition on gratuities and apply it to "19 million state and local officials." It refuses to adopt such a reading in light of the fact that "Congress does not lightly override state and local governments on such core maters of state and local governance."

Sixth, and finally, there are no clear lines identifying which gratuities are "wrongful" and which are not. Absent guidance, state and local officials would be left to guess what gifts they are permitted to accept under federal law with the threat of up to ten years of federal prison looming over their heads. That is not fair notice, and "[t]hat is not how federal criminal law works."

Justice Kavanaugh closed his opinion by noting that "Congress can always change the law if it wishes to do so," but notably, it has not since 1986.

What then does *Snyder* mean for local officials, as well as those who work in and closely with governments? Well, contrary to many of the day-of headlines, bribery remains *entirely* illegal. State officials may not "corruptly" solicit, accept, or agree to accept "anything of value" with the intent of being influenced or rewarded in connection with "any official business or transaction worth $5,000 or more." In other words, § 666 still criminalizes bribes, and other statutes, such as the aforementioned § 201, still criminalizes after-the-fact gratuities under a reward theory.

The most important question left open by this decision, in our view, is what it means to act "corruptly." While not necessarily raising it to the level of strict liability, we have noticed a trend in recent § 666 prosecutions of essentially charging a transfer of anything of value, however *de minimis*, coupling it with the performance of an official duty, and then basically presuming corrupt intent. With the clarification this decision brings, it seems possible that proof of corrupt intent will become the central focus in many of these cases. We may see that the field has been leveled and the likelihood that only those who engaged in intentional criminal wrongdoing will be punished. Indeed, there are no shortage of pending, politically important prosecutions that have charged § 666 violations under pre-*Snyder* theories. Whether through case-dispositive motions and rulings, arguments over jury instructions, and the like, the prospect of conviction is at least somewhat more tenuous.

The impact of *Snyder* nonetheless remains unknown. Businesses should remain vigilant and cautious when engaging in lobbying activities or offering gratuities or other benefits to public officials. They should be sure to review, and perhaps revise, policies and procedures regarding government interactions and lobbying, and further use this as an opportunity to train and educate employees on the same.

The Benesch White Collar, Government Investigations, and Regulatory Compliance Group is well-versed in the *Snyder* decision, its potential impact on those that regularly engage with public officials, and best practices by which to abide when doing so.

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