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FEDERAL PROGRAM BRIBERY, NEW FEDERALISM, AND THE MISSING FEDERAL INTEREST

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I. INTRODUCTION

In October of 1983, Donald V. Morano stood before the United States Supreme Court and argued his position in *Dixson v. United States*.² In his thick New England accent, he argued that his clients, city officers responsible for the management and expenditure of federal funds, were not “public officials” within the definition of a federal bribery statute, 18 U.S.C. § 201, which prohibits offering something of value to a public official with the illicit intent of influencing an

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² 465 U.S. 482 (1984) (holding that executives of private, nonprofit corporation having operational responsibility for administration of federal housing grant program within city under terms of subgrant from city were “public officials” within meaning of federal bribery statute, and thus were subject to prosecution under statute).

official act. If his clients were not public officials within the meaning of the statute, then they could not be convicted under the statute.

At a superficial glance, a question of this nature would appear immaterial. The defendants were criminals who misappropriated funds for an amount of personal gain. Why care whether federal or state law pursued them? They were malefactors; they deserved punishment; (seemingly) end of story. However, a second, more careful look reveals the issue was not only material, but foundational-- foundational in that the prosecutorial authority and role of the federal government was arguably beyond the federal scope, i.e., beyond the role of the federal government.

Fearing the Court would rule unfavorably in *Dixson*, Congress quickly augmented § 201 by passing 18 U.S.C. § 666, which detailed federal program bribery. Section 666 serves as a statutory mechanism for the federal prosecution of bribery and corruption of persons who are not federal employees or "public officials" under § 201. It is § 666 which draws similar, arguably more complicated, foundational issues.

The role in and authority of the federal government to prosecute federal corruption charges levied against state and local officials has historically been a relatively uncontentious issue. However, the development of so-called New Federalism principles articulated by the United States Supreme Court in, most notably, *United States v. Lopez*³ and *United States v. Morrison*,⁴ caused far-reaching stir. The stir's effect raised the question of whether § 666, the bribery statute applicable to state and local officials, was legislated with proper congressional authority.

Part One of this note will discuss the elements and jurisprudential evolution of § 201, which criminalizes the

³ 514 U.S. 549 (1995) (holding the Gun Free School Zone Act exceeded Congress' Commerce Clause authority, since possession of gun in local school zone was not economic activity that substantially affected interstate commerce).

⁴ 529 U.S. 598 (2000) (holding the Commerce Clause did not provide Congress with authority to enact civil remedy provision of the Violence Against Women Act (VAWA), inasmuch as the relevant provision was not regulation of activity that substantially affected interstate commerce).

bribery of federal officials and the payment or receipt of official gratuities. Part Two will detail federal program bribery under § 666, which criminalizes the bribery and corruption of non-federal employees, including state and local officials. Part Three will dissect New Federalism and its impact on the discussion surrounding the federal interest on which congressional authority to pass § 666 rests. Finally, Part Three, set against the backdrop of one of Tennessee's infamous corruption investigations, Operation Rocky Top, will attempt to provide a solution to the illusive, missing federal interest in the prosecution of corrupt state and local officials by adding a requirement to § 666's jurisdictional hook. Such a solution potentially satisfies federalism principles while keeping the federal anti-corruption statutes intact.

II. THE EVOLUTION OF § 201

Due to the supplementary nature of § 666, it is nearly impossible to meaningfully discuss § 666 without addressing the statutory section which it supplements, § 201. Section 201 covers two branches of corruption: bribery⁵ and illegal gratuities.⁶ Both bribery and illegal gratuities require proof that (1) with illicit intent, (2) something of value was requested, offered, or given to a (3) public official, with the goal of (4) influencing an official act.⁷

An act of bribery differs from an illegal gratuity in a crucial respect, the intent element. Bribery⁸ requires *quid pro quo*— an official act in exchange for something of value.⁹ An illegal gratuity, on the other hand, requires that the thing of value be offered or solicited “otherwise than as provided for the proper discharge of [the federal official's] official duty[.]”¹⁰ In *United States v. Sun-Diamond Growers of California*,¹¹ the Court elaborated on this distinction. The Court stated that the

⁵ 18 U.S.C. § 201(b) (2014).

⁶ 18 U.S.C. § 201(c) (2014).

⁷ 18 U.S.C. § 201 (2014).

⁸ 18 U.S.C. § 201(b)(1) (2014) (applicable to the offeror/payor); 18 U.S.C. § 201(b)(2) (2014) (applicable to the offeree/payee).

⁹ 18 U.S.C. § 201(b) (2014).

¹⁰ 18 U.S.C. § 201(c) (2014).

¹¹ 526 U.S. 398 (1999).

illegal gratuities prohibition,¹² unlike the bribery statute did not require a connection between the offeror's intent and the specific official act. Thus, for the purposes of illegal gratuities, the intent requirement is satisfied if the offeror sought merely "to build a reservoir of goodwill" which may be connected to a future or past unspecified act.¹³

A. QUID PRO QUO AND CORRUPT INTENT

Under § 201's bribery prohibition, the corrupt intent element is intertwined with the concept of *quid pro quo*. Foundationally, in *United States v. Johnson*, the Tenth Circuit held that "[section 201's intent element required that] the government must show the money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced."¹⁴ The money must be given with more than "some generalized hope or expectation of ultimate benefit on the part of the donor."¹⁵

An adjacent issue is what if the illegal *quid pro quo* bargain goes unfulfilled? Under § 201, the offense is complete when a bribe or gratuity is either offered or solicited.¹⁶ The bargained for act need not be done to give rise to criminal act. Additionally, if the offeree never performs the requested action or has no authority to perform, a criminally briborous act has nonetheless been committed.¹⁷

As an illustration, in *United States v. Valle*, the defendant, an Immigration and Customs Enforcement agent, solicited a \$20,000 bribe from an immigrant in return for removing "criminal charges" from the immigrant's file.¹⁸ The defendant knew the file contained no criminal charges, and as a result, he argued that he never intend to follow through.

¹² 18 U.S.C. § 201(c)(1)(A) (2014) (applicable to the offeror/payor); 18 U.S.C. § 201(c)(1)(B) (2014) (applicable to the offeree/payee).

¹³ *Sun-Diamond Growers*, 526 U.S. at 405.

¹⁴ *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980).

¹⁵ *Id.* (citing *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976)).

¹⁶ See 18 U.S.C. § 201(b) (2014).

¹⁷ *United States v. Valle*, 538 F.3d 341, 347 (5th Cir. 2008).

¹⁸ *Id.* at 343.

Thus, he argued, he could not be convicted.¹⁹ The court rejected this argument, citing the Second Circuit case of *United States v. Meyers*.²⁰ In *Meyers*,²¹ a defendant unsuccessfully asserted the defense that he was “playacting,” i.e., never intended to commit the act for which the bribe was exchanged.²²

In response to such reasoning, Judge Weiner offered an intriguing dissent in *Valle*.²³ He reasoned that if the offeree has no legal authority or actual ability to do the official act, then the offeree could “never have specifically intended to deliver the *quid pro quo* required by *Sun-Diamond*. . . .”²⁴ *Valle* is significant because it is an ideal example of the statutory interpretative lengths to which courts have gone to expand the conduct covered under § 201’s umbrella, as evidenced by Judge Weiner’s well-reasoned specific-intent objection to the majority’s holding.

Moreover, if § 201 had been ruled inapplicable to the facts of *Valle*, it is not as if the defendant would have walked out the courthouse doors. Under the same facts, the defendant was convicted of extortion under 18 U.S.C. § 872.²⁵ The extortion statute, unlike § 201, required no interpretational gamesmanship to fit the crime.

B. BRIBERY AND GRATUITIES- “OFFICIAL ACT”

Another element of § 201 requires that the briborous actor seek to influence an “official act.”²⁶ Generally, courts have also read the “official act” language broadly to force the statute fit the crime.²⁷ In *United States v. Biaggi*, the court held that the statute “refers to ‘any’ action taken on a matter brought before the public official in [the official’s] capacity.”²⁸

¹⁹ *Id.*

²⁰ *Id.* at 347.

²¹ *United States v. Meyers*, 692 F.2d 823 (2nd Cir. 1982).

²² *Id.* at 831.

²³ *Valle*, 538 F.3d at 350 (5th Cir. 2008) (Weiner, J., dissenting).

²⁴ *Id.*

²⁵ *Id.* at 352.

²⁶ 18 U.S.C. § 201(b)(1)(a).

²⁷ *See, e.g., United States v. Biaggi*, 853 F.2d 89, 97-99 (2nd Cir. 1988).

²⁸ *Id.* at 98.

However, the D.C. Circuit had a different perspective on the interpretation of “official act.” In *Valdes v. United States*,²⁹ the D.C. Circuit read the “official act” requirement narrowly. In that case, an officer searched a law enforcement data base to obtain vehicle registration information in exchange for cash from an undercover informant. The D.C. Circuit reasoned that the “officer’s actions” lacked a sufficiently “formal” relationship to his official duties, and thus, an official act was not influenced.³⁰ The court provided a helpful example:

[A]sking questions (of people, databases, and real evidence) is certainly a part of investigating. . . . But it would constitute an enormous expansion of the gratuities provision to define “action” on a “matter” as encompassing every question asked and answered, or even every question that somehow parallels those an official might ask as part of his official duty and whose answer might entail a use of government resources. It would bring under the clause a broad range of moonlighting activities that in any way paralleled an official's regular work (and perhaps that of a broad spectrum of fellow workers, as well). Thus, a Department of Justice lawyer who used a government Westlaw account to look up a legal question for a friend would be, in the dissenters' view, “deci[ding]” a “question” that might “be brought before [him].”³¹

This D.C. Circuit rationale signaled that the seemingly ever-expanding, nearly-boundless scope of federal corruption statutes must have limits.

C. BRIBERY AND GRATUITIES - “THING OF VALUE”

²⁹ *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

³⁰ *Id.* at 1342-3.

³¹ *Id.* at 1326.

Section 201 also requires that the offeror offer, or the offeree accept, something of value for an official act. The “thing of value” has been understood to comprise anything that has a subjective value to the accepting party, the offeree.³² The Second Circuit, in *United States v. Williams*,³³ held that “corruption of office occurs when the officeholder agrees to the misuse of his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe.”³⁴

D. BRIBERY AND GRATUITIES- “PUBLIC OFFICIAL” AND *DIXSON V. UNITED STATES*

As the final, heavily litigated element, § 201 requires that the bribe or gratuity be offered, requested, or received by a “public official” or a “person who has been selected to be a public official.”³⁵ This element brings us squarely back to the Supreme Court chamber in October of 1983 with Donald Morano. Following opening pleasantries and rehearsed opening points, the degree to which most Justices were unconvinced by Morano’s defensive argument was evident from the tone of their questions and responses to Morano’s less-than-helpful answers.³⁶

In the midst of oral argument, Morano’s sympathizers showed their cards as well. For instance, during the government’s segment, Justice O’Connor stated, “It is somewhat of a concern to think that any potential recipient of federal money might be subject to [§ 201].”³⁷ The government’s advocate, Richard G. Wilkins, responded by stating, “Certainly, it is a matter of some concern, but . . . [§ 201] applies only to a person acting for or on behalf of the

³² See generally 1 SARAH N. WELLING ET AL, FEDERAL CRIMINAL LAW AND RELATED CIVIL ACTIONS § 7.3 (1988).

³³ *United States v. Williams*, 705 F.2d 603 (2nd Cir. 1983).

³⁴ *Id.* at 623.

³⁵ 18 U.S.C. § 201(a)(1) & (2) (2014).

³⁶ *Dixson v. United States*- Oral Argument, Oyez: U.S. Supreme Court Media, IIT Chicago-Kent College of Law, http://www.oyez.org/cases/1980-1989/1983/1983_82_5279#sort=vote.

³⁷ *Dixson v. United States*- Oral Argument, Oyez, at 34:15 (Justice O’Connor speaking).

United States in an official function, so it isn't just anyone who receives some sort of federal fund or some sort of federal subsidy."³⁸

The Court found the government's answer persuasive because it echoed similar sentiments in its majority opinion. The majority held that § 201 was a comprehensive statute applicable to all persons performing activities for or on behalf of the United States.³⁹ Articulating in more detail, the Court pronounced "the proper inquiry [when determining whether an individual is a public official] is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with federal responsibilities." Thus, in *Dixson*, despite Congress's fear it would rule otherwise, the Court concluded that "[t]he government has a strong and legitimate interest in prosecuting [local officials in charge of distributing federal funds] for their misuse of government funds," due to the fact that these officials had the sort of national, public trust Congress intended to encompass.⁴⁰

E. JUSTICE O'CONNOR'S DISSENT IN *DIXSON*

In *Dixson*, Justice O'Connor found the majority's "public officer or employee with federal responsibilities" answer to be overly inclusive and vague, and she sought to provide legal ammunition to those who might challenge the majority's broad interpretation of "public official" in the future. Her dissent, in which an unlikely cast of Justices Brennan, Rehnquist, and Stevens joined, maintained the position that *grantee autonomy*, i.e., the independence and relatively high level of discretion of a state or local grantee with regard to how federally granted funds are used, should be determinative.⁴¹ "The main defining characteristic of the category is the principle of grantee autonomy: although grants impose conditions on the use of grant funds, grantees are left

³⁸ *Dixson v. United States*- Oral Argument, at 34:23 (Richard G. Wilkins speaking).

³⁹ *Dixson v. United States*, 465 U.S. 482, 496 (1984).

⁴⁰ *Id.* at 482.

⁴¹ *Id.* at 508 (O'Connor, J., dissenting).

considerable discretion to design and execute the federally assisted programs without federal intrusion.”⁴² As a result, grants-in-aid to state or local governments, managed and dispersed by their state and local employees or contractors, should be treated as categorically different from other types of federal activities.⁴³ Thus, Justice O’Connor reasoned, § 201 was not applicable to facts of *Dixson*.⁴⁴

Justice O’Connor expounded on this concept of *grantee autonomy* by explaining the principle has particular importance in two circumstances. First, grantee autonomy is strongest in “block grant” programs, such as the program at issue in *Dixson*. “In such programs, federal control over the spending of the distributed funds is minimized, and the grant recipient cannot plausibly be said to be acting for anyone but itself.”⁴⁵ Second, due to longstanding federalism principles, “the principle of grantee autonomy applies with special force when federal grant recipients are state or local governments.”⁴⁶ She stated:

Such principles must shape the construction of the statutory language . . . [And] demand a strong presumption that state and local governments are carrying out their own policies and are acting on their own behalf, not on behalf of the United States, even when their programs are being funded by the United States.⁴⁷

In the years that followed *Dixson*, circuit courts embraced the “public officer or employee with federal

⁴² *Id.* (citing 41 U.S.C. § 504 (definition of “grant” requires that “no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity”)).

⁴³ *Dixson*, 465 U.S. at 508 (O’Connor, J., dissenting).

⁴⁴ *Id.* at 510-11.

⁴⁵ *Id.* at 509.

⁴⁶ *Id.* (citing *See* Shapek, *MANAGING FEDERALISM: EVOLUTION AND DEVELOPMENT OF THE GRANT-IN-AID SYSTEM* (1981)).

⁴⁷ *Dixson*, 465 U.S. 509-10 (O’Connor, J., dissenting).

responsibilities” rationale of the majority and were reluctant to seize and act on the grantee-autonomy distinction articulated in Justice O’Connor’s dissent.⁴⁸

As a final note, the expansion of § 201’s applicability widened further in 2001 when a *private* citizen, who performed some delegated government function, was held to be a “public official.” In *United States v. Thomas*,⁴⁹ the Fifth Circuit held that a prison guard who was employed by a private company, which contracted with the Immigration and Naturalization Service to run a prison, and who performed the same duties, had the same responsibilities and potential criminal culpability as a federal prison guard.⁵⁰

III. 18 U.S.C. § 666 - FEDERAL PROGRAM BRIBERY

Congress feared the Supreme Court would rule the opposite way it did in *Dixson*, i.e., that the defendants, city employees in charge of dispersing and managing federal funds, were not public officials under § 201, so as an uncharacteristically preemptive measure, Congress augmented § 201 with § 666 while *Dixson* was being litigated.⁵¹ This federal program bribery statute is a mechanism by which the federal prosecution of bribery may be undertaken against persons who are not federal employees or “public officials.” Rather than predicate the statutes applicability on federal employment or public official status, § 666 predicates its applicability on the receipt of federal “benefits.”⁵²

The statute makes it a federal criminal offense if (1) an agent of a state, local government or agency (2) corruptly solicits or accepts anything of value of \$5,000 dollars or more (3) intending to be influenced in connection with *any* transaction the state or local organization for whom the agent

⁴⁸ See, e.g., *United States v. Strissel*, 920 F.2d 1162 (4th Cir. 1990) (executive director of city housing authority who distributed HUD funds); *United States v. Velazquez*, 847 F.2d 140 (4th Cir. 1988) (county deputy who worked in local jail with contract to house federal prisoners).

⁴⁹ 240 F.3d 445 (5th Cir. 2001).

⁵⁰ *Thomas*, 240 F.3d at 448.

⁵¹ *Salinas v. United States*, 522 U.S. 52, 58 (1997).

⁵² 18 U.S.C. § 666(b) (2014).

works, and (4) such organization receives \$10,000 in federal benefits within a year's time.⁵³

The statute met its first major challenge in 1997 when the Supreme Court granted certiorari to answer whether government must prove the bribe at issue, in some way, affected federal funds before the bribe violated § 666(a)(1)(B). The case, *Salinas v. United States*, involved the chief deputy of a state prison facility.⁵⁴ The facility housed several federal prisoners, and in exchange for housing them, the state facility received considerable federal funds, and these funds easily constituted \$10,000 in benefits required by § 666.⁵⁵ The chief deputy at the facility received two designer watches and a truck, which had a value greater than \$5,000, in exchange for allowing a federal prisoner conjugal visits.⁵⁶

The defense made a nexus argument which would require the federal government to prove that the bribery affected federal funds in order to convict a state or local actor under § 666. Focusing on the word "any" in § 666(a)(1)(B), the Court stated the statute broadly encompassed an agent of a state or local government which receives \$10,000 in federal benefits be influenced or rewarded in connection with *any* business, transaction, or series of transactions of the defined organization, government or agency.⁵⁷ As a result, the Court held that the "expansive and unqualified [language], both as to the bribes forbidden and the entities covered" does not support the argument that federal funds must be affected before the acts could be criminal in nature.⁵⁸

A. 18 U.S.C. § 666 - CONGRESSIONAL AUTHORITY CHALLENGE TONED IN FEDERALISM

The *Salinas* opinion was equivocal, and as an aftereffect, a circuit split developed on the issue of whether the

⁵³ 18 U.S.C. § 666(b) & (d)(5) (2014). The statute provides the applicable punishment, a fine and imprisonment of "not more than ten years, or both." 18 U.S.C. § 666(a)(2) (2014).

⁵⁴ *Salinas*, 522 U.S. at 52.

⁵⁵ *Id.* at 54.

⁵⁶ *Id.* at 55.

⁵⁷ *Id.* at 57.

⁵⁸ *Id.* at 52.

criminal acts prohibited by § 666 required any type of nexus between the corrupt act and a risk to federal funds. To address this split, the Court heard the case of *Sabri v. United States*.⁵⁹ As a ramification of the presented nexus issue, congressional authority to enact § 666 became integral to the proceedings and decision.

Sabri concerned a member of the Minneapolis Community Development Agency (“MCDA”) and a real estate developer.⁶⁰ Both were accused of violating § 666(a)(2) when each was involved in bribes and kickbacks, which exceeded \$5,000, relating to various regulatory approvals and eminent domain proceedings.⁶¹ Minneapolis received approximately \$29,000,000 per year in federal funds, and the MCDA received \$23,000,000 per year, which easily satisfies the statute’s other jurisdictional requirement.⁶²

Sabri raised a facial challenge to the statute when he argued, “the law can never be applied constitutionally because it fails to require proof of any connection between a bribe or kickback and some federal money.”⁶³ The Court replied that it “do[es] not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook[.]”⁶⁴ the nexus between the corrupt act and federal funds. Further, the Court expressed, “there is no occasion even to consider the need for such a requirement where there is no reason to suspect that enforcement of a criminal statute would extend beyond a legitimate interest cognizable under Article I, § 8.”⁶⁵ The Court further stated:

Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated

⁵⁹ *Sabri v. United States*, 541 U.S. 600 (2004).

⁶⁰ *Id.* at 602.

⁶¹ *Id.* 602-3.

⁶² *Id.* at 602.

⁶³ *Id.* at 604.

⁶⁴ *Id.* at 605.

⁶⁵ *Id.*

under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.⁶⁶

After losing the first portion of the Spending Clause round, the petitioner went into the remainder of the round wielding *Morrison*⁶⁷ and *Lopez*.⁶⁸ In those cases of similar rationale, the Court reasoned, it would be necessary “to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”⁶⁹ Thus, the congressional authority to enact such statutes was not present. In *Sabri*, however, the Court found that no pile of inference upon inference was needed. The federal government was within its “power to keep a watchful eye on expenditures and on the reliability of those who use public money[.]”⁷⁰

In a final effort, the petitioner asserted that the condition attached to such funds, i.e., that their misuse would result in criminal culpability, was unduly coercive under the Tenth Amendment-related test established in *South Dakota v. Dole*.⁷¹ If such were held true, then § 666 would be unconstitutional. However, the Court quickly distinguished *Dole* from the facts of *Sabri* by aptly stating that § 666 brings “federal power directly to bear on individuals who convert public spending into unearned private gain,” not on a State’s public policy decision-making ability, as in *Dole*.⁷²

Concurring,⁷³ Justice Thomas expressed his doubt about the federal government’s interest his colleagues used to justify the congressional authority to enact § 666 under the

⁶⁶ *Id.*

⁶⁷ *United States v. Morrison*, 529 U.S. 598 (2000).

⁶⁸ *United States v. Lopez*, 514 U.S. 549 (1995).

⁶⁹ *Id.* at 608 (citing *Lopez*, 514 U.S. at 567).

⁷⁰ *Sabri*, 541 U.S. at 608.

⁷¹ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

⁷² *Sabri*, 541 U.S. at 601.

⁷³ *Id.* at 610 (Justices Kennedy and Scalia also concurred, but only for the purpose of revoking their indorsement of Part III of the opinion, which the authoring justices deemed an “afterword”).

Spending Clause. He reasoned that merely noting the fungible nature of money does not explain how the federal government could gain an interest in all instances of local bribery. Justice Thomas provided an example: “noting that ‘[m]oney is fungible,’ . . . for instance, does not explain how there could be any federal interest in ‘prosecut[ing] a bribe paid to a city’s meat inspector in connection with a substantial transaction just because the city’s parks department had received a federal grant of \$10,000[.]’”⁷⁴ Justice Thomas concluded the federal interest in the bribe at issue in *Sabri* was comparably attenuated, “yet the bribe is covered by the expansive language of § 666(a)(2).”⁷⁵

B. THE ACADEMIC DISCOURSE SURROUNDING § 666

Sabri was announced in 2003, the same term as *McConnell v. FEC*.⁷⁶ *McConnell* held that the federal government’s interest in combatting corruption outweighs the ever-important First Amendment rights involved in the political process.⁷⁷ This decision coupled with *Sabri*, “confirm[ed] the high priority that the Court places on the National Government’s authority to fight corruption at any level in order to protect the democratic process and public confidence in it.”⁷⁸ Accordingly, George D. Brown, Professor of Law at Boston College Law School, labeled the Court’s 2003 term the “Anti-Corruption Term.”⁷⁹

Further, Brown predicted these two cases could be seen as “two important steps down the road toward more vigorous anti-corruption efforts.”⁸⁰ On a federal level, the federal government’s concern with the efficiency of its

⁷⁴ *Id.* at 623 (Thomas, J., concurring) (citing *United States v. Santopietro*, 166 F.3d 88, 93 (2nd Cir. 1999)).

⁷⁵ *Sabri*, 541 U.S. at 601 (Thomas, J., concurring).

⁷⁶ *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003), *overruled by* *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010).

⁷⁷ *McConnell*, 540 U.S. at 143-44, *overruled by* *Citizens United*, 558 U.S. 310 (2010).

⁷⁸ George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U. L. REV. 403, 404 (2005).

⁷⁹ *Id.* at 405.

⁸⁰ *Id.* at 407.

operations is clear.⁸¹ However, the federal government's interest in "sub-national" corruption is significantly more attenuated.⁸² Brown posed, "What concern is to Washington if Smallville is inefficient, lax on ethical standards, and even allows their salaries through liberal use of municipal property and funds?"⁸³

First, "the conduct of all government officials is something the public views in unitary terms, regardless of the level at which it occurs. Thus, corruption at any level can undermine confidence in the system as a whole."⁸⁴ This argument is "short on empirical justification"⁸⁵ but has an "intuitive appeal."⁸⁶ In other words, at the time this article was written, no studies had been conducted much less conclusively proven that members of the general public were unable to distinguish between federal, state, and local officials. Even if such a distinction could not be made in the minds of average citizens, it is unlikely that such a lack of understanding or misconception provided a solid basis for establishing the federal government's interest necessary for § 666's legislation.

Second, Brown stated that "interstate externalities" may be offered as a federal government's interest.⁸⁷ Essentially, corruption in State A may affect State B. This inference-based justification is "the familiar race to the bottom argument for national intervention."⁸⁸ Brown dismissed both of these potential federal interests as "hardly overwhelming."⁸⁹ Moreover, conceivable federal interests used to justify federal prosecution of state and local actors under federal bribery programs "run directly counter to . . . New Federalism."⁹⁰

⁸¹ *Id.* at 409.

⁸² *Id.* at 409-10.

⁸³ *Id.*

⁸⁴ *Id.* at 410.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 411.

⁹⁰ *Id.*

IV. NEW FEDERALISM AND FEDERAL ANTI-CORRUPTION STATUTES

The late 1990's and early 2000's saw, perhaps, the main thrust of the resurgence of federalism principles.⁹¹ "New Federalism," as it was dubbed, is essentially two principles: an emphasis on the Constitution's enumeration of federal powers as limiting the powers of the federal government,⁹² and the concept of states as quasi-sovereign, largely autonomous entities owed great respect by the co-equal national government.⁹³ New Federalism principles are likely the most controversial Rehnquist Court legacies.⁹⁴

One prevailing theme of the Rehnquist Court's New Federalism "insiste[d] that it is the task of the Justices to enforce both textual and structural limitations on federal power – i.e., that 'political safeguards are not enough[.]'"⁹⁵

Structural federalism is sometimes said by the Justices not only to facilitate optimal outcomes through competition and choice, or diversity and experimentation; the Court's decisions and reasoning are animated as well by claims that decisionmakers and regulators ought to be "accountable" to those they serve, and that this accountability is enhanced by the dual sovereignty and decentralization preserved by our Constitution.⁹⁶

⁹¹ See, e.g., Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) ("[T]here has been a revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism."); Lynn Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195 (2001).

⁹² See, e.g., *Pritz v. United States*, 521 U.S. 898, 929-30 (1997).

⁹³ See, e.g., *Lopez*, 514 U.S. at 552; *Seminole Tribe v. Florida*, 517 U.S. 44, 47, 54, 72, 76 (1996).

⁹⁴ Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 12 (2003).

⁹⁵ *Id.* at 15 (citing See, e.g., Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001)).

⁹⁶ Garnett, 89 CORNELL L. REV. at 20 (citing See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting)

It is from this view of the Constitution's "text, history, and structure"⁹⁷ that produces the congressional authority battle played out in the context of federal corruption statutes. Particularly at issue is the federal government's power or authority to enact legislation which reaches state and local officials.

A. POTENTIAL SOURCES OF CONGRESSIONAL AUTHORITY TO ENACT § 666: HENNING'S CORRUPTION LEGACY

Peter J. Henning, Professor of Law at Wayne State University, offered a potential source of congressional authority to enact § 666 by offering a novel argument that the Constitution has an "Anti-Corruption Legacy."⁹⁸ Henning argued that congressional involvement in the prosecution of state and local official is not a threat to federalism.⁹⁹ In fact, Henning believed federalism is strengthened by federal prosecution of such crimes because corruption at state and local levels undermines the balance federalism creates.¹⁰⁰

In support of congressional authority to combat corruption at the federal level, Henning cited:

"Bribery" as one of the grounds for impeachment; the prohibition of both change in the President's compensation during his term of office and of his receipt of "'any other Emolument from the United States, or any of them''"; the prohibition on federal officeholders' receipt of emoluments from foreign sources; the prohibition on members of Congress being appointed "to any federal office 'which shall

("We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption to build a procedural bridge across the political accountability gap between States and administrative agencies.")).

⁹⁷ Garnett, 89 CORNELL L. REV. at 22.

⁹⁸ Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 80-2 (2003).

⁹⁹ *Id.* at 81-2.

¹⁰⁰ *Id.*

have been created, or the Emoluments whereof shall have been increased during such time' that the member was in office[; and,] [t]he Appropriations Clause requir[ing] congressional authorization before [the executive] can disburse funds."¹⁰¹

Taken in conjunction with one another, Henning asserted these Constitutional provisions are "structural standards designed to limit the possibility of corruption in the Federal government."¹⁰²

Regarding Constitutional provisions creating structural standards applicable to the federal government combatting corruption at the state level, Henning cites two constitutional provisions: the Seventh Amendment guarantee of a jury trial and the Article III provision for diversity jurisdiction of federal courts.¹⁰³ Both, in his view, provide a certain level of protection against corrupt state and local government bias in judicial proceedings.¹⁰⁴

Henning's "Anti-Corruption Legacy" argument regarding the federal government's authority to criminalize acts of its own employees is unnecessary. The federal government has a clear interest in and authority to regulate the acts of its employees which are likely to undermine the employee's duties. Thus, Henning likely made those points for purposes of boosting his Anti-Corruption Legacy argument relating to the criminalization of acts of state and local officials.

After close examination, the inferences and logical backflips needed to find congressional authority to criminalize and prosecute various acts of state and local officials under this Anti-Corruption Legacy argument are hardly persuasive due to their less-than-concrete nature. Such inferences may frighten a jurist or academician wishing to build a congressional authority argument on such a basis. George D.

¹⁰¹ George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U. L. REV. 403, 415-416 (2005) (citing Henning, 92 KY. L.J. at 86-7).

¹⁰² Henning, 92 KY. L.J. at 87.

¹⁰³ *Id.* at 89.

¹⁰⁴ *Id.* at 91.

Brown agreed that Henning's argument is "hardly dispositive"¹⁰⁵ and he, along with Adam H. Kurland, discussed another potential source of congressional power to regulate the conduct at issue, the Guarantee Clause.

B. KURLAND AND THE GUARANTEE CLAUSE

Kurland, Professor of Law at Howard University, a strong advocate for prosecution on a federal level, wrote that federal prosecution of state and local officials on the basis of congressional authority such as the Commerce Clause was dubious.¹⁰⁶ Thus, Kurland looked elsewhere in the Constitution for congressional authority. His search led him to examine the Guarantee Clause. The Guarantee Clause states, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government[.]"¹⁰⁷ Kurland believes:

[T]he primary federal interest in combating local corruption . . . is based on the principle that the public is entitled to honest government at all levels. The faith that the citizenry places in all levels of government is the foundation of the republic. Thus, anything that erodes that foundation is of substantial federal interest. The citizens of the United States are therefore entitled to federal protection from abuses of power by those who govern.¹⁰⁸

Further, Kurland saw the Guarantee Clause as akin to the Fourteenth Amendment in that he views it as "a constitutional provision that necessarily intrudes on state

¹⁰⁵ Brown, 54 CATH. U. L. REV. at 417.

¹⁰⁶ Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 486 (1989).

¹⁰⁷ U.S. CONST. art. IV, § 4.

¹⁰⁸ Brown, 54 CATH. U. L. REV. at 418 (citing Kurland, 62 S. CAL. L. REV. at 376-77).

sovereignty and alters the normal federal state balance.”¹⁰⁹ Additionally, Kurland believed the Guarantee Clause could be a source of congressional power to enact a generally applicable anti-corruption statute.¹¹⁰

The immediate benefit of his thesis is that it is a plausible basis for “dealing directly with the problem of the prosecutions: validation under a general statute, of those prosecutions.”¹¹¹ However, Congress has never taken such a broad view of its power.¹¹² More importantly, recent Supreme Court discussion of the Guarantee Clause seems to view the clause more “as a source of state autonomy than a font of federal power.”¹¹³ Thus, New Federalism, discussed previously, blocks the Guarantee Clause from being a source a federal power, at least as it is currently viewed.

V. OPERATION ROCKY TOP - AN ILLUSTRATIVE CASE STUDY & RESTRICTING § 666’S SCOPE BY ADDING A JURISDICTIONAL ELEMENT

A. OPERATION ROCKY TOP

By 1985, fearing circumvention of Tennessee’s strict gambling prohibitions, the Tennessee General Assembly began to heavily regulate charitable bingo operations, which were generating an estimated \$31 million a year.¹¹⁴ For instance, the legislature began limiting the times a person could play within a specified time period and the types of

¹⁰⁹ Brown, 54 CATH. U. L. REV. at 419 (citing Kurland, 62 S. CAL. L. REV. at 459).

¹¹⁰ Brown, 54 CATH. U. L. REV. at 420 (citing Kurland, 62 S. CAL. L. REV. at 452-53).

¹¹¹ Brown, 54 CATH. U. L. REV. at 420.

¹¹² *Id.* (citing Kurland, 62 S. CAL. L. REV. at 493).

¹¹³ Brown, 54 CATH. U. L. REV. at 420 (citing *Printz*, 521 U.S. at 918-9 (listing the Guarantee Clause among provisions that reflect the Constitution’s commitment to state sovereignty)).

¹¹⁴ Interview with Tennessee State Senator Randy McNally, Chairman of the Finance, Ways, & Means Committee, in Oak Ridge, TN. (Mar. 21, 2015); Ronald Smothers, *Tennessee Republicans See an Election Weapon in State’s Bingo Scandal*, N.Y. TIMES, January 28, 1990, available at <http://www.nytimes.com/1990/01/28/us/tennessee-republicans-see-an-election-weapon-in-state-s-bingo-scandal.html>.

prizes which could be won.¹¹⁵ During this time, the Secretary of State's office oversaw compliance with the relevant bingo law and regulations.¹¹⁶

In the fall of 1985, then-state Representative James R. "Randy" McNally ("McNally"), who represented a portion of East Tennessee, received a call from a member of the local chapter of the Fraternal Order of Eagles ("Eagles"), an organization geared toward health-related charitable efforts,¹¹⁷ and the member told McNally of concerns he had with the bingo practices of a local branch of the Army & Navy Union ("Army-Navy"),¹¹⁸ an armed services veteran's social organization. The Eagles member explained that Army-Navy was not adhering to Tennessee law in various ways.¹¹⁹ Consequentially, McNally began to investigate the law and Army-Navy.¹²⁰

Simultaneous to investigating the matter, McNally contacted Secretary of State's office, and expressed his concerns about the practices of the Army-Navy branch, and he asked the office to look into Army-Navy's practices.¹²¹ By February of 1986, McNally said he was frustrated because his efforts to prompt the Secretary of State to investigate "were going nowhere."¹²² At approximately the same time, McNally received a call from three fellow House members, and one in particular asked McNally to meet with a Bingo Association lobbyist. Initially, McNally was reluctant; however, as a courtesy, he consented.¹²³

¹¹⁵ Interview with Tennessee State Senator McNally (Mar. 21, 2015) (on file with author).

¹¹⁶ *Gentry Crowell*, 57; *Top Tennessee Aide*, N.Y. TIMES, December 22, 1989, available at <http://www.nytimes.com/1989/12/22/obituaries/gentry-crowell-57-top-tennessee-aide.html>.

¹¹⁷ Fraternal Order of Eagles, *About*, <http://www.foe.com/About.aspx> (last visited Mar. 22, 2015).

¹¹⁸ Army and Navy Union, *Home*, <http://www.armyandnavyunion.org/home/> (last visited Mar. 22, 2015).

¹¹⁹ Interview with Tennessee State Senator McNally, *supra* note 115.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

At the end of the same legislative work week, McNally met with the lobbyist at the Hermitage for a luncheon to discuss bingo practices.¹²⁴ McNally explained that “the meeting went normally until the [lobbyist] said some of the legislators that [the lobbyist] dealt with liked to get their money during campaign season, and others liked the money to be spread out over the year.”¹²⁵ McNally found the statement deeply unsettling.¹²⁶ What type of money was the lobbyist talking about-- campaign contributions or something else? Even if he were only referencing legal campaign contributions, why would the legislators prefer the funds be “spread out” over the year?

He considered the statement over the weekend, and returned to Nashville the proceeding Monday but was unsure how to proceed.¹²⁷ He worried about being framed as an “alarmist.”¹²⁸ As a Rotary Club member, McNally attended a Rotary meeting that Monday, and the civic-driven message conveyed by the meeting, pushed him to delve deeper into the lobbyist’s statement, regardless of the potential political and social ramifications.¹²⁹ He called the Federal Bureau of Investigation (“F.B.I.”).¹³⁰

A call screener at the F.B.I.’s Nashville office answered the phone, obtained the necessary information, and told McNally he would be contacted soon.¹³¹ Within five minutes, they called back.¹³² F.B.I. agent, Richard Knudsen, expressed that the F.B.I. was interested in McNally’s information.¹³³ Additionally, McNally learned that Knudsen had been working in conjunction with an agent of the Tennessee Bureau of Investigation (“T.B.I.”), Roger Farley, on this matter.¹³⁴

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

McNally was instructed not to initiate conversations with the Bingo Association's lobbyist.¹³⁵ McNally said, "if [he] called, I was supposed to tell them, 'I was ok; I was satisfied' with the legality of their operation."¹³⁶ Approximately two weeks after the Hermitage luncheon, another player revealed himself.¹³⁷

W.D. "Donnie" Walker ("Walker"), head of the Charitable Solicitations division of the Secretary of State's office, contacted McNally, and ominously asked, "everything ok?"¹³⁸ McNally gave an affirmative response, but the interested parties must not have been convinced because a week later, while McNally was on his way to a committee meeting in the General Assembly's main office building, the War Memorial Building, the Bingo Association's lobbyist handed McNally a white envelope, and said, "we appreciate you."¹³⁹

As a result, he was immediately faced with a crucial decision: whether to risk raising alarm by skipping the committee meeting and reporting the event, or go to the meeting with an envelope filled with unknown content in his coat jacket's side pocket.¹⁴⁰ After a brief moment of consideration, McNally called Agents Knudsen and Farley.¹⁴¹ The agents told McNally to leave the immense, yet crowded, office building without being seen, and they would pick him up immediately.¹⁴²

After stopping at nearby fast-food restaurant, the agents took the envelope from McNally, examined it, and preserved it as evidence.¹⁴³ Upon opening the envelope, McNally found three hundred dollars.¹⁴⁴ At the direction of the agents, McNally made a recorded phone call to the

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

lobbyist.¹⁴⁵ McNally thanked him for the money and expressly asked whether it should be reported as a campaign contribution.¹⁴⁶ The lobbyist said they did not intend to report it, and neither should he.¹⁴⁷

A lull in the relevant events occurred until June of 1986 when the “drop dead” contribution reporting date approached.¹⁴⁸ McNally was concerned about whether to report the three-hundred dollars because the Secretary of State oversaw the reporting and recording of contributions.¹⁴⁹ The F.B.I. was proceeding with a particular degree of caution because Abscam, a corruption investigation ending with the overturning of several charges due to entrapment issues, was a not-so-distant memory.¹⁵⁰ The F.B.I. and T.B.I. wanted more evidence, so when the lobbyist in question came calling, they sent McNally to meet with him in July of 1986.¹⁵¹

Prior to the meeting, set to take place at the Regas in Knoxville, McNally was fitted with a wire and transmitting device. He was “sweating bullets” during the dinner.¹⁵² The conversation centered around lobbying and the Army-Navy matter.¹⁵³ The lobbyist explained that he knew “how the [legislative] game was played.”¹⁵⁴ With McNally (and investigating officials) listening, he proceeded to tell McNally that the game is best played when a lobbyist can get close to a legislator, obtain money for the legislator to vote a certain way on a hotly-contested bill, and the legislator and lobbyist split the corresponding illegal funds.¹⁵⁵ To the investigators’ and McNally’s deeper surprise, the lobbyist cited specific votes and members the lobbyist had helped influence.¹⁵⁶

The dinner had gone on quite some time when suddenly McNally heard the previously set codeword over the

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

Regas's intercom system.¹⁵⁷ He quickly excused himself, and met with agents in the men's bathroom.¹⁵⁸ Apparently, the tape recorder he was wearing was nearly out of recording capacity, and McNally was forced to end the dinner quickly without raising suspicion.¹⁵⁹ McNally returned to the table, and the dinner ended anti-climatically with no further material facts developing, and to much disappointment, no money was exchanged.¹⁶⁰

Tapes in hand, the F.B.I. brought the case before Washington officials.¹⁶¹ After reviewing the tapes, the investigation received high priority, i.e., reinforcements were deployed.¹⁶² Most notably, the F.B.I. sent an undercover agent to pose as a lobbyist.¹⁶³

In September of 1986, another major effort to gather evidence occurred.¹⁶⁴ The lobbyist, Walker, and McNally met in the parking lot of an East Tennessee hospital.¹⁶⁵ With the F.B.I. and T.B.I. watching, McNally received one-thousand dollars after feigning dissatisfaction with the prior bribe.¹⁶⁶ Serendipitously, reports of a peeping Tom had been made to the local police, and the entire surveillance of the event was almost exposed when a local police unit rolled by and saw the surveillance van.¹⁶⁷

Thinking the van may be connected to the peeping Tom reports, the local police officer got out, and began asking questions of the T.B.I. and F.B.I. agents within.¹⁶⁸ Quickly, the agents identified themselves, and asked the officer to leave.¹⁶⁹ Meanwhile, McNally calmed the lobbyist and Walker, who had seen the local police unit, by telling them to "just be

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

cool.”¹⁷⁰ When the officer left, the parties went their separate ways.¹⁷¹

In November of 1986, McNally was elected to the Tennessee Senate.¹⁷² Nearly three years later, the investigation was publicly announced by the F.B.I. and T.B.I.¹⁷³ Many and varying federal indictments were issued as result of the information gathered as a result of the information collected by F.B.I, the T.B.I., and McNally.¹⁷⁴ Particularly, the lobbyist and Walker were offered plea deals in return for cooperation.¹⁷⁵ Both initially rejected.¹⁷⁶ However, the ‘big break’ in the case occurred when Walker became a witness for the prosecution.¹⁷⁷ “Mr. Walker . . . pleaded guilty in a plea agreement and provided details of how he helped operators obtain fraudulent charters as charities so that they could legally organize bingo games.”¹⁷⁸

Walker detailed that he arranged “secret partnerships” in the operations for some current and former elected officials, and he helped organize the bingo operators into a group called “the Association,” whose goal was funneling money to legislators willing to become a part of a secret partnership.¹⁷⁹ “Armed with Mr. Walker’s testimony, grand juries began their indictments. Among those indicted were a former member of the Alcoholic Beverage Commission, a labor leader, a former legislator, and State Election Commissioner and an incumbent legislator[.]”¹⁸⁰ as well as the previously discussed defendants.

Operation Rocky Top reached its highest political actor with Secretary of State. After testifying before the federal

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Ronald Smothers, *Tennessee Republicans See an Election Weapon in State’s Bingo Scandal*, N.Y. TIMES, January 28, 1990, available at <http://www.nytimes.com/1990/01/28/us/tennessee-republicans-see-an-election-weapon-in-state-s-bingo-scandal.html>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

grand jury, the Secretary was called another time.¹⁸¹ Knowing that the recall was likely to end in his indictment, he committed suicide.¹⁸² In response to the revelations of the investigation, the Tennessee General Assembly established new, more rigid ethical boundaries: limits on campaign contributions and new lobbying restrictions.¹⁸³ However, perhaps federal intervention was unnecessary.

B. AN ADDITIONAL JURISDICTIONAL ELEMENT

The rationale used by the Court to support congressional authority to pass § 666 is arguably unconvincing. The highly policed Commerce Clause provided no basis; the Taxing and Spending rationale of *Salinas* and *Sabri* is wanting; Henning's "Anti-Corruption Legacy" begged for serious inferences, and the Guarantee Clause provided no help in the face of the resurgence of Federalism principles, i.e., New Federalism.

If, as a counterfactual, § 666 were found to have been without congressional authority and Senator McNally had accepted the bribes offered, the F.B.I.'s lack of power to investigate the matter would not cause the sky to fall on the heads of the people of the State of Tennessee. The State, a quasi-sovereign federalism partner, would address the matter from an investigatory, prosecutorial, and adjudicative role. Specifically, the T.B.I.'s white collar division would investigate, seek to prosecute, and have the matter of public corruption adjudicated.

At the heart of federal corruption statutes is the lack of trust the federal government has in states to discover, investigate, and fairly adjudicate a matter of corruption which involves the state's local and/or state-level officials. The federal assumption essentially is that a state from which corruption spawns is thereby ill-equipped to help itself, to

¹⁸¹ *Tennessee Secretary of State Dies after Suicide Attempt*, DAILY NEWS, Bowling Green, Kentucky, Page 4-A, December 21, 1989, available at <https://news.google.com/newspapers?nid=1696&dat=19891221&id=9PMaAAAAIBAJ&sjid=kkcEAAAIAAJ&pg=7052,6125595&hl=en>.

¹⁸² *Id.*

¹⁸³ Interview with Tennessee State Senator McNally, *supra* note 115.

address the matter. This assumption is a fallacy of the worst order. It is a generalization.

All states in which corruption exists are not necessarily unable to address the matter merely because a corrupt act germinated within its boundaries. A determination as to whether the state is capable of addressing the matter must be made with regard to the nature and extent of the corrupt activities at issue. If the corrupt activities are so pervasive as to call reasonable doubt as to whether the state agency or branch of government in charge of investigating, prosecuting, or adjudicating the matter can fairly handle the matter then, perhaps, federal intervention is needed. Otherwise, the state should be allowed to address the matter with its agents and under its criminal law.

To effectuate this policy, § 666's jurisdictional hook need only be amended. The jurisdictional hook currently requires, an agent of a State, local government or agency to corruptly solicit or accept anything of value of \$5,000 or more, and such organization of which that agent is a part receive \$10,000 in federal benefits within a year's time.¹⁸⁴ It should be amended to additionally require that "there be reasonable belief that the state agency or agencies with jurisdiction to investigate, prosecute, or adjudicate the alleged corrupt matter will be unable to fairly decide whether to proceed with the matter due to potential bias, political or otherwise, created by the pervasive nature of the corruption scheme at issue."

This additional requirement would, in effect, remedy the generalization fallacy at the heart of § 666 as well as curb the nearly boundless scope of the statute. The concern regarding the lack of significant, traceable federal interest articulated by Justice Thomas's concurrence in *Sabri* would also be quieted because the federal government could articulate reasonable doubt as to the ability of the state to handle the state or local matter, and thereby gain an interest in legislating and enforcing § 666.

Take Justice Thomas's city meat inspector example. Recalling his concurrence in *Sabri*, Justice Thomas was unpersuaded by the argument that the fungible nature of money gave rise to a federal interest in prosecuting a bribe paid to a city's meat inspector in connection with a substantial

¹⁸⁴ 18 U.S.C. § 666(b) & (d)(5) (2014).

transaction just because the city's parks department had received a federal grant of \$10,000.¹⁸⁵ The additional jurisdictional requirement as to the ability of the state to handle the matter of the unsavory meat inspector would add significant weight to the federal government's interest that Justice Thomas felt unconvincingly light (or non-existent).

To have palpable impact, the suggested additional jurisdictional requirement would necessarily have to be one which is proven to the jury at the time of trial. From an evidentiary perspective, for the federal government to be able to proceed with the prosecution of the meat inspector, they would be required to produce evidence showing that the state would be unable to fairly decide whether to further investigate and potentially prosecute because, to extend facts of the example, the meat inspector's unscrupulous behavior was merely a small tributary of a much larger, pervasive corruption scheme—a scheme which reasonably could leave a state-led investigation without the ability to fairly decide whether to proceed.

Specifically, the federal government would be required to produce evidence showing that the local or state regulatory agency in charge of the meat inspector's compliance with applicable law was tainted by the corruption scheme. Ideally, the federal government would produce evidence, such as video recordings, financial statements, or collaborative testimony, which demonstrates further bribes or a portion of the briberous scheme reached the highest overseeing local and state actors as to render those actors without the ability, due to their involvement, to execute their investigative duties.

In the context of Operation Rocky Top, if McNally had taken a \$5000 bribe, § 666 would be applicable because the State of Tennessee receives far more than \$10,000 in federal benefits in a year's time, and the bribe would have been in connection with his capacity as a legislator. Should the additional jurisdictional element suggested have existed then, the federal prosecutor would have had to demonstrate to the jury that the T.B.I., the state prosecutorial authority, or state adjudicating body was unable to fairly decide whether to

¹⁸⁵ *Sabri*, 541 U.S. at 614 (Thomas, J., concurring).

proceed with the matter due its bias, political or otherwise, created by the pervasive nature of the corruption scheme.

Ideally, the prosecutor would present lawfully obtained testimony, recordings, or official or business records which would show that the bingo-related illegal funds or political influence spread from the legislature and into the relevant investigatory department of the T.B.I., the prosecuting official, or adjudicative body as to taint a link in the state's criminal justice process.

Specifically, the new element could have been satisfied by a prosecutorial showing of the scheme's taint reaching the relevant, white-collar arm of the T.B.I. or the local judicial official who would likely hear the case if filed. Such a showing would demonstrate a reasonable belief that the pervasive nature of the corruption scheme at issue destroyed the objective stance of state agency tasked with the investigation, prosecution, or adjudication of the Association's bingo-related practices. A taint of this nature would, in effect, render the state's justice process unable to properly address the corruption matter. Upon that evidentiary showing, then federal interdiction into a state or local corruption matter would be proper.

However, the facts of investigation fell short of this jurisdictional requirement due to the fact that no evidence was presented that the corruption scheme reached into the T.B.I. or the state court system which would have adjudicated the matter. Had these been contemporary events and had the additional jurisdictional hook been in place, the State of Tennessee's semi-autonomous nature would have been respected and left undisturbed by federal intervention.

VI. CONCLUSION

Since *Dixon*, courts have seen the scope of § 201 become nearly boundless, and cases limiting its scope have had a nominal effect.¹⁸⁶ By preemptively passing § 666, Congress further augmented the scope federal corruption crimes. After discussing various potential sources of congressional authority, the unconvincing Spending Clause

¹⁸⁶ See, e.g., *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

rationale was revealed. Startlingly, the Court stated that the federal interest required for congressional authority to pass § 666 stemmed from the fact that \$10,000 in federal funds were merely in the vicinity of corruption. In the face of New Federalism, such logic, such a tenuous articulation of federal interest cannot stand. However, a solution was presented.

The additional requirement to § 666's jurisdictional hook, i.e., the federal government would be required to forbear intervention into what could largely be qualified as an intra-state matter unless the federal government could demonstrate the state's inability to help itself, would significantly lessen the tenuous nature of the federal interest as well as satisfy New Federalism principles, at least from a theoretical perspective.

To demonstrate the jurisdictional requirement's pragmatic efficacy, Operation Rocky Top, a Tennessee corruption investigation, served as case study in which examples of how such a requirement could be met with a sufficient evidentiary showing. In short, the requirement would place a duly heavy burden on a federal prosecutor pursuing a § 666 action against a state actor, but that is precisely the point. Such a heavy burden is necessary to give the federal government its required interest in the criminal matter and comport with New Federalism principles. The additional jurisdictional requirement reins federal authority, and by predicating federal authority on a respect for a state's semi-autonomous nature, the federal government is placed in an on-deck posture.