Corruption Clarified: Defining the Reach of "Agent" in 18 USC § 666

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INTRODUCTION

A governor peddles a Senate seat;[1] a mayor accepts kickbacks to push a major construction project;[2] an undercover officer dupes a state senator into taking bribes.[3] Public corruption captures the attention of journalists and prosecutors alike.

In cases like these, prosecutors are finding a relatively new addition to their anticorruption toolkit useful: 18 USC § 666. Section 666 targets "[t]heft or bribery concerning programs receiving Federal funds."[4] The statute covers "agent[s]" of government organizations and private entities receiving over $10,000 in federal funds, as well as those who attempt corruptly to influence such agents.[5] All states and thousands of local governments exceed the $10,000 threshold,[6] so § 666 covers any agent of these state and local governments.

But the application of § 666 has encountered impediments, as courts disagree about the reach of the statute. In particular, circuits diverge over the scope of the term "agent." The statute defines "agent" as "a person authorized to act on behalf of

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1 Jeff Coen, Rick Pearson, and David Kidwell, *Arrested: U.S.: Blagojevich Tried to Sell Senate Seat in 'Political Corruption Crime Spree'*, Chi Trib C1 (Dec 9, 2008).

2 Samuel Rubenfeld, *City News: Trenton Mayor Is Indicted*, Wall St J A21 (Dec 7, 2012).

3 Ryan Haggerty, John Chase, and Ray Long, *Rep. Smith Charged in Bribe Case: He Took $7,000 to Back Deal, Prosecutors Say*, Chi Trib C4 (Mar 14, 2012).

4 Pub L No 98-473, 98 Stat 1837, 2143–44 (1984), codified at 18 USC § 666.

5 18 USC § 666.

6 See United States Census Bureau, *Federal Aid to States for Fiscal Year 2010* 1 (US Government Printing Office Sept 2011), online at http://www.census.gov/prod/2011pubs/fas-10.pdf (visited Sept 13, 2013) (showing that no state received fewer than two billion dollars in federal government grants and other payments in fiscal year 2010); George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 Notre Dame L Rev 247, 276 (1998) (concluding that many local governments receive over $10,000 in federal funds, including some municipalities with populations under 10,000).

another person or a government," including employees, servants, and those in managerial positions.[7] The statute clearly includes those directly employed by organizations receiving federal funds ("recipient organizations"), like bureaucrats or senators. But whether § 666 covers individuals more distantly related to the recipient organization is a more difficult question. To illustrate, the statute's definition of "agent" unquestionably encompasses the corrupt mayor of a town receiving federal funds. But if the town hires a financial services firm to manage its assets, does § 666 also cover an employee of that firm? Similarly, if the town enlists an outside firm for janitorial services, do those janitors count as agents of the town?

In addition to the "agent" disagreement, § 666 faces constitutional constraints. The Spending Clause, in conjunction with the Necessary and Proper Clause, permits Congress to protect the integrity of the taxpayer money it spends.[8] Because Congress enacted § 666 under its spending authority, courts have been forced to inquire whether the statute exceeds that authority in cases where the connection between the alleged agent and recipient of federal funds is attenuated. In particular, local, self-funded agencies, though they often operate as a part of a municipal or state government that receives federal funds, do not receive funds from the overarching municipal or state government. As these agencies therefore lack a direct financial connection to federal funds, can § 666 constitutionally reach these agencies' employees? The answer to this Spending Clause question bears directly on § 666's ability to capture all those who fall within the scope of the term "agent." An individual, though she may fall within the letter of § 666(d)(1)'s definition of "agent," cannot constitutionally be prosecuted under the statute if she lacks a sufficient connection to federal funds. The Spending Clause issue, therefore, potentially establishes the outer bounds of whom the statute can constitutionally reach.

In confronting these questions, three approaches have emerged. The Fifth Circuit has determined that the term "agent" only includes individuals with some connection to the recipient organization's funds. The Third and Eleventh Circuits have deemed the statutory definition of "agent" to be unambiguous, encompassing anyone "authorized to act on behalf of" the

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7 18 USC § 666(d)(1).

8 See Part IV.C.

recipient organization. And, finally, a lone district court has held that courts should interpret "agent" according to traditional agency principles codified in the Restatement (Second) of Agency.

This Comment addresses this disagreement with two aims. First, it seeks to clarify the scope of the discord among the circuits. Though courts disagree about the proper scope of the term "agent," the Third and Eleventh Circuits have misconstrued Fifth Circuit jurisprudence in a way that magnifies the controversy. Second, this Comment criticizes the three existing approaches detailed above and proposes a workable interpretation of § 666(d)(1)'s definition of "agent." This Comment ultimately submits that, for an individual to qualify as an "agent" under § 666, she must: (1) fall within one of § 666(d)(1)'s expressly included categories of agents (that is, employee, servant, partner, director, officer, manager, or representative of the recipient organization); or (2) be authorized to act in the interest of the recipient organization.

Part I of this Comment provides a brief background of federal corruption law, including § 666. Part II discusses the "agent" controversy, detailing the three different approaches outlined above. Part III evaluates each of the three approaches. Finally, this Comment concludes by advancing the solution above.

I. BACKGROUND OF FEDERAL CORRUPTION LAW AND 18 USC § 666

Section 666's place within the federal statutory scheme informs its purpose. Accordingly, this Part seeks to put § 666 in context and to provide an overview and history of the statute itself. Part I.A traces the development of federal fraud statutes, with particular emphasis on 18 USC § 201 and the judiciary's narrow interpretation of that statute, which prompted Congress to pass § 666. Part I.B summarizes § 666 and the Supreme Court's interpretation of it.

A. The Development of Federal Fraud Crimes

In 1872, Congress enacted the original mail fraud statute, the precursor to modern-day federal fraud legislation.[9] Communication technology developed, and Congress updated

[9] Ch 335, 17 Stat 283, 323 (1872), codified at 18 USC § 1341.

mail fraud with wire fraud in 1952.[10] Together, the statutes are commonly termed "mail and wire fraud." The mail and wire fraud statutes criminalize the use of mail or wire transmissions with the intent to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses."[11] Famously dubbed the prosecutor's "Stradivarius,"[12] the crimes of mail and wire fraud remain the instruments of choice for fraud prosecutions thanks to their "simplicity" and "adaptability."[13]

Mail and wire fraud's malleability has grown since the statutes' inception. Congress originally intended the modest goal of protecting the integrity of the Postal Service.[14] Over time, the scope of mail and wire fraud has widened. Congress has amended the statutes to cover much more than postal mail and wire communications; § 1343 now covers technologies like radio and television communication.[15] Courts have also helped expand the reach of the statutes to keep up with technological change by interpreting mail and wire fraud to include things like fax and internet transmissions.[16] Furthermore, courts acknowledge that the mail or wire transmission requirement only serves a jurisdictional purpose.[17] As a result, generally any use of mail or wire transmission in the course of executing a scheme to defraud suffices to establish liability.[18]

Prosecutors used the mail and wire fraud statutes to prosecute public corruption under the "intangible rights" theory.[19] While mail and wire fraud were traditionally limited to situations

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10 Communications Act Amendments of 1952 § 18, Pub L No 82-554, ch 879, 66 Stat 711, 722, codified at 18 USC § 1343.

11 18 USC §§ 1341, 1343.

12 Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duquesne L Rev 771, 771–72 (1980) (discussing why prosecutors prefer mail and wire fraud to federal criminal statutes).

13 Id.

14 See William M. Sloan, *Mail and Wire Fraud*, 48 Am Crim L Rev 905, 906 (2011).

15 18 USC § 1343.

16 See Sloan, 48 Am Crim L Rev at 906–07 (cited in note 14).

17 See, for example, *United States v Reid*, 533 F2d 1255, 1260 n 19 (DC Cir 1976) (concluding that the mailing requirement "serves only a jurisdictional purpose, assuring a reasonable connection between the scheme to defraud and the use of the instrumentality over which federal power exists").

18 See Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U Ill L Rev 683, 702–03.

19 See Brette M. Tannenbaum, Note, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud after* Skilling, 112 Colum L Rev 359, 368 (2012).

where a defendant directly deprived a victim of money or property, the intangible rights theory extended the crimes to include situations where defendants deprived victims of the defendant's "honest services."[20] For example, a mayor who accepted bribes in exchange for awarding contracts deprived the city's citizens of the mayor's honest services, and therefore could be held liable under the intangible rights theory.[21] In *McNally v United States*,[22] the Supreme Court rejected the intangible rights theory.[23] But Congress promptly superseded *McNally* by codifying the intangible rights theory in the honest services statute, 18 USC § 1346. Section 1346 defined a "scheme or artifice to defraud"—as the phrase is used in the mail and wire fraud statutes—to include "depriv[ing] another of the intangible right of honest services."[24] Today, honest services fraud plays a central role in public corruption prosecutions.[25]

A number of other federal statutes punish public corruption, many of them overlapping with mail and wire fraud and § 666. The Hobbs Act,[26] for example, punishes robbery or extortion that affects interstate commerce.[27] Prosecutors have been successful using the Hobbs Act to target bribery-like situations.[28] Other statutes that are applied to public corruption include: the

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[20] See *Skilling v United States*, 130 S Ct 2896, 2926 (2010) (discussing the differences between the original core of mail and wire fraud and the advent of honest services fraud). The intangible rights theory was first sanctioned by a federal appeals court in 1941. See *Shushan v United States*, 117 F2d 110, 115 (5th Cir 1941).

[21] See *Skilling*, 130 S Ct at 2926.

[22] 483 US 350 (1987).

[23] Id at 360.

[24] Pub L No 100-690, 102 Stat 4181, 4508 (1988), codified at 18 USC § 1346.

[25] See Jennifer I. Rowe, Comment, *The Future of Honest Services Fraud*, 74 Albany L Rev 421, 423–24 (2010). Note that § 1346 has also been applied in the private-sector context on the theory that a person can be liable for depriving an employer of her right to an employee's honest services. See, for example, *United States v Rybicki*, 354 F3d 124, 126–27 (2d Cir 2003) (en banc). The statute, however, suffered a recent setback when the Supreme Court narrowed the statute to only bribery and kickback schemes. *Skilling*, 130 S Ct at 2931 (2010).

[26] 18 USC § 1951.

[27] 18 USC § 1951(a).

[28] See, for example, Federal Bureau of Investigation, Press Release, *Former Police Chief Admits Accepting Cash in Return for Protecting Drug Deals, Purchasing Restricted Police Equipment* (Jan 4, 2013), online at http://www.fbi.gov/pittsburgh/press-releases/2013/former-police-chief-admits-accepting-cash-in-return-for-protecting-drug-deals-purchasing-restricted-police-equipment (visited Sept 13, 2013) (reporting that a former police chief pleaded guilty to three violations of the Hobbs Act for accepting payments "from a purported drug dealer, who was an undercover FBI agent, to protect drug shipments").

Racketeer Influenced and Corrupt Organizations Act[29] (RICO), which punishes patterns of racketeering activity as part of a criminal enterprise; 18 USC § 641, which punishes the theft and embezzlement of federal government property; and 18 USC § 201, described below.

Section 201 is § 666's closest relative. Enacted in 1962, § 201 targets bribes and gratuities involving federal "public official[s]."[30] The statute requires that the defendant offered or agreed to receive a "thing of value" as part of a scheme designed either (1) to influence the public official in an "official act," (2) to commit fraud on the United States, or (3) to act in violation of the public official's lawful duty.[31] Because courts have generally interpreted the statute broadly, § 201 remains a reliable tool for prosecutors.[32]

In 1984, the Supreme Court granted certiorari to resolve a circuit split over whether employees of private entities acting for the government can be considered public officials for the purposes of § 201.[33] Before the Supreme Court decided the case, Congress passed § 666 in order to "augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program."[34] The Supreme Court in *Dixson v United States*[35] ultimately ruled that employees of private entities could be "public officials" under § 201, so long as the employees have "federal responsibilities."[36]

B. Bribery and Theft Involving Federal Funds: 18 USC § 666

As noted in the Introduction, § 666 imposes penalties on those involved in bribery of agents of organizations receiving

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29 Organized Crime Control Act of 1970 Title IX, Pub L No 91-452, 84 Stat 922, 941–48, codified as amended at 18 USC § 1961 et seq.

30 Act of Oct 23, 1962, Pub L 87-849, 76 Stat 1119, 1119–20, codified at 18 USC § 201.

31 18 USC § 201.

32 For example, a "thing of value" is measured by a flexible subjective measure, in contrast to a dollar amount. See, for example, *United States v Williams*, 705 F2d 603, 622–23 (2d Cir 1983).

33 *Dixson v United States*, 459 US 1085 (1982) (granting certiorari).

34 *Comprehensive Crime Control Act of 1983*, S Rep No 98-225, 98th Cong, 1st Sess 369–70 (1983), reprinted in 1984 USCCAN 351.

35 465 US 482 (1984).

36 Id at 496.

federal funds.[37] The statute punishes an agent of an entity receiving over $10,000 in federal funds who:

> (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
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> (i) is valued at $5,000 or more, and
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> (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or
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> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more . . .[38]

Section 666(a)(2) also imposes liability on nonagents who solicit corruption from agents of the recipient organization, punishing anyone who "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization . . . or any agency thereof, in connection with any business, transaction, or series of transactions of such organization."[39] For liability to apply, the statute requires that the recipient organization receive in excess of $10,000 in federal funds[40] and that the property involved in the corrupt activity be valued at $5,000 or more.[41]

The Senate Judiciary Committee's report on § 666 (1983 Senate Report) is the only formal insight into Congress's intent.[42] The 1983 Senate Report describes Congress's intent to create a bribery and theft statute of "general applicability" for organizations receiving federal funds. Further, the report explains § 666's purpose as "protect[ing] the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery."[43] Two elements of the report are particularly relevant to defining "agent" under the statute. First, the report references the then-pending issue

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37 18 USC § 666.

38 18 USC § 666(a)(1).

39 18 USC § 666(a)(2).

40 18 USC § 666(b).

41 18 USC § 666(a)(1)(A)(i), (a)(1)(B), (a)(2).

42 S Rep No 98-225 at 369–70 (cited in note 34).

43 Id at 370.

before the Supreme Court regarding § 201, noting that under § 201 "there [was] some doubt as to whether or under what circumstances persons not employed by the Federal Government may be considered as a 'public official' under [§ 201]."[44] The confusion surrounding § 201 motivated Congress to create a statute that would expressly include certain agents of private organizations within its scope. Second, the report states that the definition of agent "require[s] no further explication." This report thus provides a limited view of Congress's intent in enacting § 666.[45]

The application of § 666 has raised a number of questions about its scope, and the Supreme Court has twice stepped in to provide answers. The Court first offered guidance in *Salinas v United States*.[46] There the Court addressed whether § 666 required proof that the corrupt activity directly implicated federal funds. *Salinas* involved a deputy sheriff accused of facilitating corrupt deals with prisoners. Under the alleged scheme, the deputy sheriff accepted payments from a prisoner and, in return, the prisoner was allowed contact visits with his wife and girlfriend.[47] The defendant argued that his conviction should be reversed in the absence of a showing that "the bribe . . . affected federal funds, for instance by diverting or misappropriating them."[48]

The Court disagreed with the defendant, holding that "§ 666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds."[49] To support its conclusion, the opinion cited the broad language in both the statutory text and legislative history. Section 666, the Court reasoned, employs "expansive, unqualified language, both as to the bribes forbidden and the entities covered";[50] § 666(a)(1)(B) applies to "any business" of the recipient organization, regardless of any link to the federal funds.[51] To further support its broad interpretation of the statute, the Court called upon the 1983 Senate Report, emphasizing that § 666 was a response to courts' narrow construction of § 201.[52] The Court

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44 Id at 369–70.

45 For further discussion of legislative intent, see Part IV.B.

46 522 US 52 (1997).

47 Id at 54–55.

48 Id at 55–56.

49 Id at 61.

50 *Salinas*, 522 US at 56–57, quoting 18 USC § 666(a)(1)(B).

51 *Salinas*, 522 US at 57.

52 See id at 58. See also notes 33–34 and accompanying text.

held that the plain text of § 666 rejected the requirement that federal funds be directly involved in the bribe or theft in question.[53]

The Supreme Court further clarified the scope of § 666 in *Sabri v United States*,[54] where the petitioner mounted a facial challenge to the constitutionality of the statute.[55] In that case, the petitioner was convicted under § 666(a)(2) for offering three bribes to a city councilman.[56] The petitioner argued that § 666 as interpreted by *Salinas*—that is, as lacking a requirement that the bribe in question be linked to federal funds—exceeded Congress's Spending Clause power.[57] The Spending Clause authorizes Congress to spend taxpayer money to promote the general welfare of the United States.[58] And under the Necessary and Proper Clause, Congress may "make all Laws which shall be necessary and proper for" executing its enumerated powers, including measures necessary for executing laws under Congress's spending authority.[59] The Court held that § 666 was a valid exercise of Congress's authority under the Spending and Necessary and Proper Clauses, as § 666 was necessary to protect federal monies paid to local governments and other entities.[60] In so holding, the Court emphasized the fungible character of money. Proof of a bribe's effect on federal funds, according to the Court, is unnecessary where the recipient organization receives federal funding, since federal grants to one division of a recipient organization simply free up funds in another division.[61]

Sabri's interpretation of § 666 leaves a number of loose ends. In addition to the difficulty in defining the term "agent," which is discussed in Part II, courts have struggled to determine the definition of "anything of value" under the statute.[62] Furthermore, some scholarship addresses whether a bribe under § 666 requires a quid pro quo arrangement.[63] Courts and

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53 *Salinas*, 522 US at 61.

54 541 US 600 (2004).

55 Id at 604–05.

56 Id at 602.

57 Id at 604–05.

58 US Const Art I, § 8, cl 1.

59 US Const Art I, § 8, cl 18.

60 *Sabri*, 541 US at 605.

61 Id at 606.

62 18 USC § 666(a)(1)(B), (2).

63 See Mark S. Gaioni, Note, *Federal Anticorruption Law in the State and Local Context: Defining the Scope of 18 U.S.C. § 666*, 46 Colum J L & Soc Probs 207, 207 (2012).

scholars have also debated whether—in the wake of a recent Supreme Court decision limiting honest services fraud under 18 USC § 1346 to bribery and kickback schemes[64]—§ 666 is similarly limited.[65]

II. THE "AGENT" DISAGREEMENT

This Comment focuses on the disagreement among courts about the scope of the term "agent" under § 666. Recall that § 666 requires that an agent of the recipient organization is involved in the crime in some way; either the defendant is herself the agent and solicits bribes or commits theft, or the defendant attempts to bribe an agent of the organization. Also recall that § 666(d)(1) defines an "agent" as "a person authorized to act on behalf of" the recipient organization, expressly including within the definition "a servant or employee, and a partner, director, officer, manager, and representative" of the organization.[66] In many cases, courts can easily discern whether the defendant acts as an agent, since the defendant is directly employed by the recipient organization. But in some cases, the defendant works only indirectly with the recipient organization; in such cases, the outer limits of the term "agent" determine the defendant's guilt or acquittal under § 666.

For example, consider Tara Trader, who is employed by the firm Fund Co. A local government agency ("Agency"), which receives federal funds, enlists Fund Co for financial services. Assume that Fund Co, through Tara Trader, regularly enters investments under Agency's name in exchange for regular payments from Agency. If Tara Trader were to accept bribes in the course of her duties, few would suggest that she was not "authorized to act on behalf of" Agency; Tara Trader indeed transacted directly under the Agency's name.

Now consider Barney Builder, employed by Construction Co. Agency commissions Construction Co to build a new office. Barney Builder serves as site manager on this project; he's responsible for managing the budget, scheduling deadlines, and acquiring labor and materials. He reports to the Vice President of Construction for Construction Co. Barney Builder, during the

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64 See *Skilling*, 130 S Ct at 2931. See also notes 19–25 and accompanying text.

65 For a discussion of the effect of the *Skilling* decision on § 666, see generally Justin Weitz, Note, *The Devil Is in the Details: 18 U.S.C. § 666 after* Skilling v. United States, 14 NYU J Legis & Pub Pol 805 (2011).

66 18 USC § 666(d)(1).

course of the project, makes all purchases and enters into any transactions under Construction Co's name (as opposed to Agency's name). Imagine further that Barney Builder, with the help of bricklayer Clay Stacker, accepts bribes from subcontractors. Is Barney Builder "authorized to act on behalf of" Agency, despite the fact that he is unauthorized to make any decisions in Agency's name? And is Clay Stacker—a bricklayer without managerial responsibilities—"authorized to act on behalf of" Agency? This hypothetical presents the primary difficulty in interpreting § 666(d)(1).

An additional difficulty arises in the case of self-funded agencies, that is, agencies that rely entirely on their own revenue stream. Common examples of such agencies are state lottery commissions, which typically fund themselves through lottery ticket sales.[67] Other examples of self-funded agencies include tax assessors,[68] municipal water commissions,[69] and web site managers.[70] Such agencies belong to a state or local government, many of which receive sufficient federal funds to fall within the ambit of § 666. Because these agencies do not receive money from the state and local governments (which are the recipient organizations in these cases), they arguably lack a direct connection to the federal funds that § 666 intends to protect. And given that these agencies lack a connection to federal monies, does prosecution of their employees under § 666 exceed Congress's spending authority?

To date, courts have paid little attention to the difficulty of the two issues highlighted above—that is, courts have ignored § 666(d)(1)'s ambiguity and the constitutional problems posed by self-funded agencies.[71] Courts have, however, attempted to define "agent" under § 666. As noted in the Introduction, courts fall into three camps. This Part overviews each camp in turn.

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67 See, for example, Oregon Lottery, *Lottery Frequently Asked Questions*, online at http://www.oregonlottery.org/About/FAQ (visited Sept 13, 2013).

68 See, for example, *United States v Phillips*, 219 F3d 404, 412 (5th Cir 2000).

69 See, for example, Joint Municipal Water and Sewer Commission, *About Our Organization* (2013), online at http://www.lcjmwsc.com/about/background.shtml (visited Sept 13, 2013) (explaining that the multicounty water and sewer commission in South Carolina utilizes "the systems resources available from its members, as well as the resources of its own").

70 See, for example, *About Vermont.gov*, online at http://www.vermont.gov/portal/help/about.php (visited Sept 13, 2013) (explaining that Vermont.gov is run by a self-funded agency).

71 The Fifth Circuit, however, has addressed these constitutional concerns. See Part II.A.

A. The Fifth Circuit's Nexus-to-Funds Requirement

The Fifth Circuit has held that, for an individual to be an "agent" under § 666, she must either (1) fall within one of the expressly included categories in § 666(d)(1)[72] or (2) be "authorized to act on behalf of the [recipient organization] with respect to its funds."[73] This Comment will refer to the second element as the "nexus-to-funds requirement." The Fifth Circuit has provided three primary rationales for this interpretation: the purpose of the statute, consistency with precedent, and constitutional concerns.[74]

The Fifth Circuit first ruled on the issue in *United States v Phillips*.[75] In that case, defendant Chaney Phillips worked as the Tax Assessor for St. Helena Parish, Louisiana.[76] Phillips was accused of engaging in a number of corrupt transactions with his political ally.[77] St. Helena Parish received over $10,000 in federal funding, sufficient to satisfy § 666's minimum threshold. But Phillips was directly employed by the Tax Assessor's office; the parish neither supervised the office's activities nor paid the salaries for the office's employees.[78] It appears, however, that the Louisiana Constitution defined a Tax Assessor as a "parish official."[79] Despite the Tax Assessor's legal connection to the parish, the court determined that the lack of financial connection was dispositive.

After deeming the plain language of the statute "elastic[ ],"[80] the *Phillips* court ruled that § 666(d)(1)'s definition of "agent" included only individuals authorized to act with respect to a recipient organization's funds. Specifically, it reasoned that Congress's choice of title, "Theft or bribery concerning programs receiving Federal funds,"[81] demonstrated that the statute intended

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72 Recall that the statutorily defined categories are employees, servants, partners, directors, officers, managers, and representatives. 18 USC § 666(d)(1).

73 *Phillips*, 219 F3d at 411.

74 See id at 412–15.

75 219 F3d 404 (5th Cir 2000).

76 Id at 407.

77 Id.

78 Id at 412. The Tax Assessor's office appeared to have been "completely funded by a tax millage." Brief for Appellants, *United States v Phillips*, No 98-30968, *13 (5th Cir filed June 7, 1999).

79 See Brief for Appellee, *United States v Phillips*, No 98-30968, *48 (5th Cir filed Aug 19, 1999).

80 *Phillips*, 219 F3d at 411.

81 18 USC § 666.

to take aim at funds.[82] And the history of § 666's enactment, the court noted, also "reveal[ed] Congress' concern with a defendant's ability to administer or control the federal funds provided to a particular agency."[83] The *Phillips* court also concluded that Supreme Court and circuit precedent demanded a connection between the defendant and the funds of the recipient organization. The court mentioned that *Salinas* left unresolved whether the statute required a connection between an agent and the funds of the recipient organization. And the court added that the Fifth Circuit, among other courts, required "some nexus between the criminal conduct and the agency receiving federal assistance."[84] Finally, the *Phillips* court expressed concern that allowing § 666 to reach the defendant, who received no money from the St. Helena Parish government, risked exceeding Congress's spending power. In order to interpret § 666 as to avoid constitutional issues, the Fifth Circuit therefore required that the defendant be an agent with respect to St. Helena Parish's funds.[85]

Note, however, one could plausibly read the *Phillips* decision as not establishing any nexus-to-funds requirement at all, but instead concluding merely that Phillips himself could be liable only if he was linked financially to St. Helena Parish. The majority opinion repeatedly referred to the facts of the case not amounting to proof of an agency relationship under § 666.[86] Indeed, the court explicitly denied establishing a nexus requirement in footnote ten of the opinion, stating instead that it "simply appl[ied] the statute to the facts of this case."[87] The court added that the defendant's relationship to the funds of the organization was dispositive only under the facts of this specific case.[88]

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82 *Phillips*, 219 F3d at 411 n 8.

83 Id at 411 n 7.

84 Id at 413–14 (emphasis omitted), quoting *United States v Moeller*, 987 F2d 1134, 1137 (5th Cir 1993). See also *Phillips*, 219 F3d at 414, citing *United States v Foley*, 73 F3d 484, 490 (2d Cir 1996).

85 *Phillips*, 219 F3d at 414–15.

86 See id at 411 ("[I]n the context of the facts of this appeal . . . the question of whether Phillips was an agent of St. Helena Parish within the meaning of § 666, turns on whether Phillips, as tax assessor, was authorized to act on behalf of the parish with respect to its funds."); id at 411–12 n 9 ("Because of the absence of evidence that connects the assessor's office to control or expenditure of any funds of the parish, we need not consider whether there is yet some remoteness of connection to federal funds that § 666 will not reach.").

87 Id at 412 n 10.

88 Id.

But, for two reasons, *Phillips* does impose a nexus-to-funds requirement. First, and most importantly, the Fifth Circuit in *United States v Whitfield*[89] interpreted *Phillips* as holding that "for an individual to be an 'agent' for the purposes of section 666, he must be 'authorized to act on behalf of [the agency] with respect to its funds.'"[90] In *Whitfield*, the court held that two Mississippi state court judges were agents of the Mississippi Administrative Office of the Courts (AOC), an agency handling "nonjudicial business of the courts of the state."[91] The judges spent AOC funds to hire chambers staff.[92]

Second, the language of footnote ten is likely intended to reconcile the Fifth Circuit's nexus-to-funds requirement with the expressly included categories of agent listed in § 666(d)(1). Recall that the court concluded that, for Phillips to have been an agent, he must have been an agent with respect to the funds of the *recipient* organization, St. Helena Parish.[93] In footnote ten, the court references the statutorily defined "agent[s]"—for example, employees or directors of the organization receiving federal funds—as an exception to any nexus-to-funds requirement.[94] Presumably, therefore, had Phillips been directly employed by the parish, he would have been an "agent" under the statute. A sensible interpretation of Fifth Circuit precedent, taking *Phillips* and *Whitfield* together, is that an individual is an "agent" under § 666 only if the individual is authorized to act for the recipient organization with respect to the organization's funds—the exception being if the individual falls under one of the expressly included categories of "agent" under § 666(d)(1).

B. The Third and Eleventh Circuit's Broader View of "Agent"

The Third and Eleventh Circuits both hold that the term "agent" under § 666 requires only that an individual be authorized to act for the recipient organization.[95] These courts reject the Fifth Circuit's nexus-to-funds requirement as textually un-

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89 590 F3d 325 (5th Cir 2009).

90 Id at 344, quoting *Phillips*, 219 F3d at 411.

91 *Whitfield*, 590 F3d at 344, quoting Miss Code Ann § 9-21-1.

92 *Whitfield*, 590 F3d at 345.

93 See *Phillips*, 219 F3d at 411.

94 Id at 412 n 10.

95 See, for example, *United States v Keen*, 676 F3d 981, 991 (11th Cir 2012) (holding that a former zoning official was an "agent" under § 666). See also *United States v Vitillo*, 490 F3d 314, 323 (3d Cir 2007).

supported.[96] They conclude that the plain text of § 666(d)(1) is sufficiently clear.[97] As will be discussed in the following paragraphs, it isn't clear to what extent the three decisions adopting this plain-text view of § 666(d)(1) disagree with the Fifth Circuit, because none of these decisions have fully addressed the Fifth Circuit jurisprudence.

The Third Circuit first addressed the scope of the term "agent" post-*Phillips* in *United States v Vitillo*.[98] The recipient organization in that case was the Reading Regional Airport Authority (RRAA). The court held that independent contractors working for the RRAA qualified as agents within the context of § 666(d)(1). The defendant contractors, John Vitillo and his affiliated entities, argued that they fell outside the statute because, as contractors, they lacked control over any federal funds.[99] The Third Circuit rejected the defendants' argument, concluding that the language of § 666(d)(1) was sufficiently clear that "extrinsic sources" were unnecessary for interpreting the statute.[100]

Notably, the Third Circuit in *Vitillo* ignored the majority opinion in *Phillips*,[101] though it is not clear that the *Phillips* decision would dictate a different outcome on the facts of *Vitillo*. Vitillo was paid directly by the RRAA and allegedly overbilled the RRAA in violation of § 666.[102] In *Phillips* the court emphasized the fact that the defendant's salary was not paid by the recipient organization (St. Helena Parish).[103] The Fifth Circuit, therefore, might still have upheld Vitillo's conviction because he was directly financially connected to the recipient organization (RRAA). But depending on how the phrase "with respect to [the recipient organization's] funds"[104] is construed, the Fifth Circuit approach might arguably dictate that Vitillo was not an "agent" under § 666(d)(1). Vitillo was not authorized to use the RRAA's funds; instead Vitillo only received payment from the RRAA.[105] As the facts of *Vitillo* demonstrate, the extent to which the

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96 See *Keen*, 676 F3d at 989 ("Because [the defendant's] argument turns on an interpretation of the term 'agent' that is unsupported by the plain language of § 666, we reject it."). See also *Vitillo*, 490 F3d at 323.

97 See *Keen*, 676 F3d at 989. See also *Vitillo*, 490 F3d at 323.

98 490 F3d 314 (3d Cir 2007).

99 Id at 322–23.

100 Id at 323, citing *Phillips*, 219 F3d at 422 n 2 (Garza dissenting).

101 See *Vitillo*, 490 F3d at 322–23.

102 See id at 318–19, 322.

103 *Phillips*, 219 F3d at 412–13.

104 Id at 411.

105 *Vitillo*, 490 F3d at 318–19.

broader and narrower constructions of § 666(d)(1) conflict hinges on how the Fifth Circuit applies its nexus-to-funds requirement.

The Third Circuit directly addressed *Phillips* in *United States v Beldini*,[106] a recent unpublished opinion. There the court read *Phillips* as requiring a connection between the individual's authorization and *federal* funds. But, as noted in Part II.A, *Phillips* requires only a connection between the alleged agent and any of the recipient organization's funds—not specifically the federal funds.[107] Citing *Vitillo*, the court concluded that "the current precedent of this Court and the Supreme Court do not require any nexus between conduct prohibited by § 666 and federal funds."[108] As *Beldini* therefore misreads Fifth Circuit jurisprudence, it provides little guidance as to how the Fifth and Third Circuits diverge on this question.

In *United States v Keen*,[109] the Eleventh Circuit also rejected the Fifth Circuit's interpretation of "agent."[110] In that case the Eleventh Circuit held that the text of § 666(d)(1) was unambiguous, noting that "[n]owhere does the statutory text either mention or imply an additional qualifying requirement that the person be authorized to act *specifically with respect to the entity's funds*."[111] To qualify as an "agent," therefore, the *Keen* court determined that an individual need only be authorized to act on behalf of the recipient organization.[112] The court reconciled its interpretation with both § 666's legislative history and Supreme Court precedent, noting that Congress crafted the statute using "expansive, unqualified language" to effectuate the "ambitious objective" of protecting the integrity of federal programs.[113]

In sum, courts interpreting "agent" narrowly have held that the term is unambiguous as defined in § 666(d)(1) and therefore requires no further explanation. For these courts, any individual authorized to act on behalf of an entity receiving sufficient federal funds is an "agent" under § 666. And the Eleventh Circuit in *Keen* has suggested that an individual acting outside the

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106 *United States v Beldini*, 443 F Appx 709, 718–19 (3d Cir 2011) (holding that a deputy mayor of Jersey City, New Jersey, was an agent of Jersey City for the purposes of § 666(d)(1)).

107 See id at 719.

108 Id.

109 676 F3d 981 (11th Cir 2012).

110 Id at 991–92 (holding that a zoning official for Dixie County, Florida, was an agent of the county for the purposes of § 666(d)(1)).

111 Id at 989–90.

112 Id.

113 *Keen*, 676 F3d at 990–91, quoting *Salinas*, 522 US at 56.

scope of his authorization to act on behalf of the recipient organization can still be considered an "agent" under § 666.[114]

C. A Lone District Court and the Restatement (Second) of Agency

In *United States v Ferber*,[115] the earliest of the discussed decisions, the District of Massachusetts adopted wholesale the definition of "agent" from the Restatement (Second) of Agency.[116] In that case, the court held that the defendant, a financial advisor retained by multiple state-level authorities receiving federal funds, was not an "agent" under § 666.[117] The court cited three requirements for an agency relationship: (1) the agent must have power to alter legal relationships between the principal and other parties, including the agent; (2) the principal must have the right to control the agent within the scope of the principal-agent relationship; and (3) the agent must owe a fiduciary obligation to the principal in matters within the scope of the principal-agent relationship.[118]

The court reasoned that the defendant's relationship with the recipient organizations did not meet the first and second prongs of the Restatement; the government failed to present evidence that the defendant was authorized to alter legal relationships between the recipient organization and third parties, nor did the government provide evidence that the recipient organization could control the defendant's actions.[119] The court cited two cases, presumably intending to support its decision to use the Restatement: one in which a court expressly *declined* to apply the Restatement in the context of § 666,[120] and another in which a court cited the Restatement in its conclusion that the defendant, an employee of the recipient organization, was an "agent" under the statute.[121]

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114 See *Keen*, 676 F3d at 989–92.

115 966 F Supp 90 (D Mass 1997).

116 Id at 100.

117 Id at 100–01.

118 Id at 100, citing Restatement (Second) of Agency §§ 12–14 (1958).

119 *Ferber*, 966 F Supp at 100.

120 *United States v Toro*, 1989 WL 63118, *2 (SDNY) ("By its own words, therefore, Congress stated its intent to use its own definition of 'agent,' and not to incorporate the definitions already available in the *Restatement (Second) of Agency* and elsewhere.").

121 *United States v Wyncoop*, 789 F Supp 345, 347 (D Or 1992), revd on other grounds, 11 F3d 119 (9th Cir 1993).

Other courts have commented on the possibility of the Restatement (Second) of Agency's application to § 666. Most notably, the majority and dissenting opinions in *Phillips* diverged on this issue.[122] Courts eschewing the use of the Restatement have reasoned that the text of § 666(d)(1) is sufficiently clear as not to require the help of extrinsic sources like the Restatement.[123]

As this Part shows, the state of the law regarding the outer limits of the term "agent" remains muddled. How much disagreement exists among the circuits depends on both how seriously the Fifth Circuit maintains the nexus-to-funds requirement and whether other circuits follow the Fifth Circuit's lead in the future. But as the remainder of this Comment will argue, the resolution of this issue should focus on questions largely ignored by decisions to date.

III. EVALUATING CURRENT APPROACHES

This Part discusses the problems with existing approaches to the "agent" disagreement. It concludes that the Fifth Circuit and District of Massachusetts approaches are textually unsupported, while the Third and Eleventh Circuit approach ignores uncertainties in the text.

A. The Fifth Circuit View: A Textually Unsupported Approach

Recall that the Fifth Circuit in *Phillips* and *Whitfield* imposed a nexus-to-funds requirement, demanding that an "agent" under § 666 act as an agent with respect to the recipient organization's funds. At first glance, this approach appears to enjoy its share of advantages. By connecting the interpretation of "agent" to the recipient organization's funds, the Fifth Circuit tethered the term to the statute's purpose of protecting the integrity of federal funds. This interpretation also avoids the Spending Clause issues highlighted in Part I.B by ensuring the financial involvement of the recipient organization.

But the Fifth Circuit's approach fails in two respects. First, the approach unjustifiably narrows the scope of § 666(d)(1). This

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[122] Compare *Phillips*, 219 F3d at 412 n 12 (majority) (entertaining the possibility that the Restatement's requirement that a principal control its agent applies to § 666(d)(1)'s definition of the term agent), with id at 422 n 2 (Garza dissenting) (rejecting the majority's argument that Restatement principles apply to § 666).

[123] See, for example, *Vitillo*, 490 F3d at 323 ("There is nothing in the statute to suggest that we should consult extrinsic sources, such as the Restatement of Agency, in attempting to further define 'agent.'").

nexus-to-funds requirement excludes those with responsibilities that significantly affect funding of the recipient organization but who lack control over the organization's funds. Indeed, the best example of this type of situation is *Phillips* itself, where the defendant impaired the revenue stream of the recipient organization. Certainly the integrity of federal funds was at stake, as tax assessment determined the revenue that the parish government received.

Second, excluding cases like *Phillips* from the ambit of § 666 contradicts Supreme Court precedent. *Sabri* articulates an interest in punishing conduct that threatens the integrity of federal funds.[124] As noted, the tax assessor in *Phillips*, who was legally an official of the parish government, impacted the revenue stream of the parish government, despite lacking direct control over the parish's funds. Requiring agency "with respect to the [recipient organization's] funds," therefore, turns a blind eye to corrupt activity performed by individuals otherwise "authorized to act on behalf of" the recipient organization—corrupt activity that, in the case of *Phillips*, clearly imperils the organization's funds.

B. The Third and Eleventh Circuit View: Ignoring Uncertainties

The Third and Eleventh Circuits assume that § 666(d)(1) is unambiguous, therefore requiring no further explication. On its face, this interpretation appears a simple, textually grounded rule. Indeed, in many situations the phrase "authorized to act on behalf of" should adequately identify who is or is not an "agent" under the statute. But a closer look at § 666(d)(1) reveals uncertainty, which calls for further clarification, despite these circuits' (and Congress's) assertion to the contrary.[125]

The broader view rests upon the assumption that prior Supreme Court decisions construing § 666 justify a sweeping construction of the term "agent," but this assumption mischaracterizes Supreme Court precedent. These courts have cited the Supreme Court's description of § 666 as containing "expansive, unqualified language" to support the proposition that § 666(d)(1) should be interpreted broadly.[126] Nowhere in *Salinas* did the

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[124] See *Sabri*, 541 US at 606.

[125] See S Rep No 98-225 at 369–70 (cited in note 34).

[126] See, for example, *Keen*, 676 F3d at 990–91 ("[R]eading § 666 to narrow its scope seems inconsistent . . . with the 'expansive, unqualified language' that Congress has

Supreme Court state that the entirety of § 666 should be construed broadly; rather, the court decided that Congress's choice of words justified a broad interpretation with respect only to "*bribes* [ ] and the *entities covered*":[127]

> The enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B). . . . Furthermore, the broad definition of the "circumstances" to which the statute applies provides no textual basis for limiting the reach of the bribery prohibition. The statute applies to all cases in which an "organization, government, or agency" receives the statutory amount of benefits under a federal program. § 666(b). The language reaches the scheme alleged, and proved, here.
>
> Neither does the statute limit the type of bribe offered. It prohibits accepting or agreeing to accept "anything of value." § 666(a)(1)(B).[128]

Note that the Court fails to refer to § 666(d)(1), the sole definition of "agent" in the statute. In fact, the expansive language the *Salinas* Court pointed to was in the description of bribes ("*anything* of value"[129]) and the description of situations to which the statute applies ("*any*" business or transaction[130]); analogously broad language is strikingly absent in § 666(d)(1)'s definition of "agent." While this Comment, like the Third and Eleventh Circuits, ultimately proposes a broad construction of § 666(d)(1), it rejects the proposition that *Salinas* dictates a broad construction of the entire statute.

C. The *Ferber* View: Close, but Too Far

The final approach, employed by a District of Massachusetts court in *United States v Ferber*, adopts general Restatement principles to define "agent" under § 666. Though the court failed

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elected to use."), citing *Salinas*, 522 US at 56. See also *Beldini*, 443 Fed Appx at 718–19, quoting *Salinas*, 522 US 56–57.

127 *Salinas*, 522 US at 56 (emphasis added).

128 Id at 56–57.

129 Id (emphasis added), quoting 18 USC § 666. The Court also points to the broad definition of "circumstances" under which the statute applies—that is, it applies to all cases where an "'organization, government, or agency' receives the statutory amount of benefits under a federal program." *Salinas*, 522 US at 56–57, quoting 18 USC § 666(b).

130 *Salinas*, 522 US at 56–57 (emphasis added), quoting 18 USC § 666.

to explain why it called upon the Restatement, it probably did so via the canon of construction that presumes statutory language retains its common law meaning "[a]bsent contrary direction from Congress."[131] In the case of § 666, however, Congress's contrary intent is evident in the text of the statute.

First, the court inappropriately employed this canon of construction, for it only applies "[w]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it."[132] Since Congress expressly defined "agent" in § 666(d)(1), this canon is inapplicable.

But even if this canon could be applied to § 666, the requirements for an agency relationship under the Restatement (Second) of Agency conflict with § 666(d)(1)'s definition of "agent." Under common law agency principles, a principal-agent relationship requires that: (1) the agent "holds a power to alter the legal relations between the principal and third persons and between the principal and himself,"[133] (2) the agent acts as "a fiduciary with respect to matters within the scope of his agency,"[134] and (3) "[a] principal has the right to control the conduct of the agent with respect to matters entrusted to him."[135] By contrast, § 666's definition of "agent" avoids any mention of altering legal relationships, fiduciary duties, or control; § 666(d)(1) requires only that the individual is "authorized to act on behalf of" the organization. The *Ferber* court therefore erred in replacing § 666(d)(1) with the Restatement (Second) of Agency.

IV. A BACK-TO-BASICS APPROACH TO § 666

This Comment arrives at a solution to the "agent" controversy by reframing the difficulties posed by § 666(d)(1)'s definition of "agent." As discussed in Part III, existing approaches to this problem either oversimplify the language of § 666(d)(1) or add extratextual limitations. Courts, moreover, have provided rules that are insufficient to address the situations where § 666(d)(1)'s definition of "agent" proves ambiguous.

The hypotheticals from Part II illustrate the difficulties for § 666(d)(1). The first scenario involves parties contracting with

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131 *Scheidler v National Organization for Women, Inc*, 537 US 393, 402 (2003).

132 *Moskal v United States*, 498 US 103, 114 (1990), quoting *United States v Turley*, 352 US 407, 411 (1957).

133 Restatement (Second) of Agency § 12 (1958).

134 Id at § 13.

135 Id at § 14.

the recipient organization. Recall Barney Builder, whom Agency commissioned to construct its new building.[136] While Barney Builder acts in Agency's interest, he arguably is unauthorized to represent Agency, as he does not act under Agency's name; instead he acts under the name of Construction Co, his direct employer.[137] And Clay Stacker, Construction Co's bricklayer, clearly does not act for Agency in a representative capacity. Are either Barney Builder or Clay Stacker "authorized to act on behalf of" Agency, and therefore "agent[s]" under § 666(d)(1)?

The second scenario focuses on self-funded agencies, like the tax assessor's office in *United States v Phillips*.[138] In these situations, the alleged agent represents the recipient organization but lacks a monetary connection to it. Because Congress's authority to enact § 666 rests on Spending Clause grounds, this lack of monetary connection raises red flags. Can § 666 constitutionally reach employees of self-funded agencies?

This Comment answers "yes" to both questions. This Part identifies two plausible interpretations of "agent" as defined in § 666(d)(1) and—after applying canons of construction—favors the broader of the two. Ultimately, this Comment proposes that for an individual to be an "agent" under § 666(d)(1), she must be authorized to act in the interest of the recipient organization.

The case for this solution is presented in three parts. Part IV.A outlines the two possible interpretations of § 666(d)(1), which this Comment dubs the "Interest Construction" and the "Representative Construction." Next, Part IV.B argues that the plain text of § 666(d)(1), with the aid of canons of construction, weighs in favor of the broader Interest Construction. This Part concludes by turning to the problem of self-funded agencies and Congress's spending power, deciding that these constitutional concerns may limit the reach of § 666 in the future.

A. Two Possible Interpretations of "Agent" under § 666(d)(1)

The meaning of § 666(d)(1)'s definition of "agent" creates more uncertainty than acknowledged by the Third and Eleventh Circuits, both of which held that the provision required no further explanation.[139] Recall that § 666(d)(1) unambiguously

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[136] See Part II.

[137] For further discussion of whether Barney serves Agency in a representative capacity, see note 144.

[138] See Part II.A.

[139] See Part II.B.

deems as "agents" certain categories of individuals, like employees, servants, directors, officers, managers, and representatives of the recipient organization. But individuals falling outside the expressly included categories—for example, Clay Stacker, who serves as the bricklayer on the construction project paid for by Agency[140]—face more uncertainty; these individuals are agents of the recipient organization only if they are "authorized to act on behalf of" the recipient organization. It is in this phrase, "authorized to act on behalf of," where the difficulty lies.

When Congress leaves a term undefined, the term receives its ordinary meaning.[141] Dictionary definitions of "behalf" reveal that the phrase "authorized to act on behalf of" can be construed two ways: the phrase might mean that one is authorized to act "in the interest of" another (the Interest Construction),[142] or the phrase might instead include only those authorized to act "as a representative of" another (the Representative Construction).[143] The Interest Construction is broader than the Representative Construction; all representatives of an organization are charged with acting in the organization's interest, but authorization to act in an organization's interest does not necessarily include authorization to represent that organization. The statutory definition of "agent" presents a fork in the road: a broader interpretation of "agent" (the Interest Construction) and a narrower one (the Representative Construction).

The hypotheticals in Part II demonstrate the stakes of choosing which road to take. Recall that Agency contracted with Fund Co for the provision of financial services, and Fund Co's employee Tara Trader—as the representative of Agency—entered into a number of transactions in Agency's name. In this hypothetical, Tara Trader falls within the scope of one of the expressly included categories (she is a "representative" of Agency) and therefore qualifies as an "agent" within § 666(d)(1). And Tara Trader also qualifies as an "agent" regardless of the expressly included categories because, as its representative, she is "authorized to act on behalf of" Agency under either interpretation of that phrase.

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140 See Part II.

141 See, for example, *United States v Santos*, 553 US 507, 511 (2008), citing *Asgrow Seed Co v Winterboer*, 513 US 179, 187 (1995). As noted, an established common law meaning of a term supersedes its ordinary meaning. However, no common law meaning exists for the phrase "authorized to act on behalf of."

142 *Merriam-Webster's Collegiate Dictionary* 110 (Merriam-Webster 11th ed 2009).

143 Id.

Now turn to the case of Construction Co and its employees, Barney Builder and Clay Stacker: Agency authorizes Barney Builder and Construction Co to manage the construction project, but Barney Builder acts in the name of Construction Co, not Agency. Barney Builder is unauthorized to act in Agency's name, for he only provides Agency the service of constructing a new office space; he therefore cannot be a servant, manager, partner, or representative.[144] As a result, Barney Builder falls outside of § 666(d)(1)'s expressly included categories. Clay Stacker, whose sole responsibility is to lay brick in accordance with Barney Builder's orders, similarly falls outside the expressly included categories because he is neither employed by Agency nor authorized to represent it. Whether § 666 reaches Barney Builder or Clay Stacker turns on whether the Representative Construction or the Interest Construction prevails. As noted, neither Barney Builder nor Clay Stacker serves as representatives of Agency, and consequently both escape the reach of § 666(d)(1) under the Representative Construction. But under the Interest Construction, § 666(d)(1) captures both Barney Builder and Clay Stacker, for both individuals act in Agency's interest in building Agency's new office space.

Thus, § 666(d)(1) proves ambiguous. The question remains how ambiguous, as that will determine whether statutory text and structure resolve the issue, on the one hand, or a rule of construction does, on the other.

If § 666(d)(1) does demand canons of construction, the rule of lenity is relevant. This rule only applies to criminal statutes and requires the construction of a statute most favorable to the defendant. The rule applies when "a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure . . .' of the statute."[145] The Supreme Court has justified the rule on two grounds: First, the rule safeguards

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144 One might argue Barney qualifies as a "representative" of Agency. But Barney's company is in essence selling a customized office space, and Barney functions as the manager on that project. While Agency likely has a certain degree of control over Barney's actions in the course of his duties—for example, they likely have a say in Barney's choice of piping, among many other elements of the design—he is not required to assume the role of Agency at any point. Contrast this with the role of Tara Trader, who like Barney sells a form of service. But for Tara Trader to deliver her service, she must assume the role of Agency—that is, represent them—to buy or sell assets in managing Agency's financial portfolio. Barney, on the other hand, has no authority to step into the shoes of Agency; rather he is only authorized to provide a new office space.

145 *Moskal v United States*, 498 US 103, 108 (1990), quoting *Bifulco v United States*, 447 US 381, 387 (1980).

fair warning to the citizenry of what behavior rises to the level of criminal conduct.[146] Second, because of the gravity of criminal punishment, which often "represents the moral condemnation of the community," the rule ensures that "legislatures[,] not courts[,] [ ] define criminal activity."[147]

Legislative history and statutory purpose may sufficiently rebut the application of the rule of lenity, though this is controversial.[148] Regardless, the mere possibility of a narrower interpretation fails to overcome evidence from the language and structure of a statute strongly suggesting a broader interpretation.[149] So the choice between the Interest and Representative Constructions turns on the weight of any evidence in the text and structure of § 666, and possibly its legislative history and policy rationales. If this evidence supports the Interest Construction and renders the Representative Construction unreasonable, then the Interest Construction should be preferred. On the other hand, if only weak evidence supports the Interest Construction, the rule of lenity dictates the adoption of the Representative Construction. As the next two Sections will argue, the Interest Construction is superior.

B. The Proposed Interpretation: The Interest Construction

This Section advances three reasons for adopting the Interest Construction over the Representative Construction: (1) the Interest Construction adheres to the canon of construction that demands that every word in a statute be given meaning ("rule against surplusage"); (2) under the canon *noscitur a sociis*, the words surrounding "authorized to act on behalf of" signal Congress's preference for the Interest Construction; and (3) the 1983 Senate Report favors the Interest Construction, as it shows Congress's intent to protect federal funds. The arguments in favor of the Representative Construction, however, have some force; one might argue that the rule of lenity weighs in favor of the narrower Representative Construction. This Section will first advance the arguments in favor of the Interest Construction, then will turn to (and ultimately rebut) arguments in favor of the Representative Construction.

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146 See *United States v Bass*, 404 US 336, 348 (1971).

147 Id.

148 See note 166.

149 See *Moskal*, 498 US at 108.

1. The Interest Construction is more faithful to the statutory text and legislative intent.

The Representative Construction, which limits "agent" to those authorized to represent the recipient organization, violates the rule against surplusage. This canon requires that "every . . . word of a statute" be given effect.[150] The proper interpretation of a statute should therefore avoid rendering any word in the statute "insignificant" or "superfluous."[151] The Court has dubbed this rule the "cardinal principle of statutory construction."[152]

As noted, the Representative Construction violates this cardinal principle. Recall that § 666(d)(1) lists a "representative" as one of the expressly included categories of agent. The Representative Construction would render superfluous the phrase "authorized to act on behalf of," for the Representative Construction defines this phrase as "authorized to act [as a representative of]," which is already an expressly included category in § 666(d)(1). The Interest Construction avoids this problem: because it defines "authorized to act on behalf of" broadly to encompass anyone who acts in the interest of the organization, the Interest Construction includes situations where individuals act as representatives in addition to situations where individuals do not act as representatives. The Interest Construction therefore avoids redundancy, complying with the rule against surplusage.

The rule of *noscitur a sociis*, which allows statutory terms to be defined by their context,[153] also weighs in favor of the Interest Construction. *Noscitur a sociis* holds that a word in a statute may be "known by the company it keeps."[154] This rule is not inviolate, however, as a "word may have a character of its own not to be submerged by its association."[155] Here, the expressly included categories of agents help inform the phrase "authorized to act on behalf of." Section 666(d)(1) begins by defining an "agent" as an individual who is "authorized to act on behalf of" the recipient organization, then states that the definition of agent "*includes* a servant or employee, and a partner, director, officer, manager,

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150 *Duncan v Walker*, 533 US 167, 174 (2001), quoting *United States v Menasche*, 348 US 528, 538–39 (1955).

151 *Duncan*, 533 US at 174.

152 Id, quoting *Williams v Taylor*, 529 US 362, 404 (2000).

153 See *Graham County Soil and Water Conservation District v United States*, 130 S Ct 1396, 1402 (2010).

154 Id, quoting *Russell Motor Car Co v United States*, 261 US 514, 519 (1923).

155 *Russell Motor Car Co*, 261 US at 519.

and representative."[156] The structure of this definition implies that, for the purposes of § 666(d)(1), servants, employees, etc, are "authorized to act on behalf of" the recipient organization. The inclusion of the word "servant" reveals the most; while the other expressly included categories of agent all involve positions of a representative capacity, a servant does not necessarily serve in such a role.[157] The common law definition of the master-servant relationship only requires that the master have the right to control the actions of the servant.[158] This might include anything from the highest-level employees, like a ship captain, to the lowest level, like a manual laborer.[159] While the term "servant" certainly includes some individuals authorized to act in a representative capacity, it clearly includes many who aren't, like manual laborers. The Representative Construction therefore cannot include a servant within its definition of "agent." On the other hand, the Interest Construction accommodates the common law definition of servant, as it simply requires that one act in the interest of the recipient organization. Even a manual laborer toils in his employer's interest. *Noscitur a sociis* doctrine, therefore, prefers the Interest Construction.

The legislative history of § 666, which consists solely of the 1983 Senate Report, further buttresses the Interest Construction.[160] The 1983 Senate Report expresses § 666's purpose as "protect[ing] the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery."[161] Recall also that the Supreme Court in *Sabri* concluded that, given the fungible nature of money, § 666 imposed no requirement that the bribery or theft directly affect federal funds.[162] The Representative Construction draws the line at those individuals authorized to represent the recipient

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156 18 USC § 666(d)(1) (emphasis added).

157 At common law, a servant was not presumed to act in a representative capacity unless so authorized. See, for example, *Hodges v Standard Wheel Co*, 52 NE 391, 393 (Ind 1898) (holding that the appellant acted as a servant, not a representative, of his master, while noting that a representative capacity requires higher-level duties than those delegated to a servant).

158 See Restatement (Second) of Agency § 220 (1958) (defining a servant as one "subject to the [master's] control").

159 See id at § 220, comment a.

160 As noted later in this Part, the role of legislative history in rebutting the rule of lenity is contested, so this may be the weakest argument in support of the Interest Construction. See note 166.

161 S Rep No 98-225 at 369–70 (cited in note 34).

162 See Part I.B; *Sabri*, 541 US at 606.

organization, but no principled difference exists between those paid to represent the recipient organization and those paid to perform services for the recipient organization. To return to the hypotheticals from Part II, both Tara Trader, the corrupt financial asset manager who represents Agency in a series of transactions, and Clay Stacker, the corrupt bricklayer who helps construct Agency's new office space, squander federal funds. Considering that § 666 aims to protect *all* federal funds, the Interest Construction offers the more sensible approach. Unlike the Representative Construction, it does not draw an arbitrary line between different means of squandering funds.

2. On the rule of lenity: summarizing and rebutting the case for the Interest Construction.

The best defense of the Representative Construction calls on the rule of lenity. If invoked, the rule of lenity favors the more restrictive interpretation of a criminal statute, which in this case is the Representative Construction. This Section reviews and rebuts this argument in favor of the Representative Construction.

The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them"[163] absent a "clear instruction" from Congress to the contrary.[164] As noted earlier in this Part, the rule has its limits. Even where the plain text of a statute proves ambiguous, the rule of lenity only applies if "reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure . . .' of the statute."[165] The Supreme Court, moreover, has disagreed with itself over whether the rule of lenity takes precedence over analysis of a statute's legislative history.[166] Textual considerations, therefore, clearly trump the rule of lenity, but conflicting policy considerations and legislative history may not sufficiently rebut the application of the rule. The rule of lenity cannot apply to § 666(d)(1) because traditional canons of construction applied to

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163 *Santos*, 553 US at 514.

164 *Skilling v United States*, 130 S Ct 2896, 2933 (2010).

165 *Moskal*, 498 US at 108, quoting *Bifulco*, 447 US at 387.

166 Compare *Moskal*, 498 US at 108 (concluding that the rule of lenity is inapplicable where the legislative history and motivating policies of the statute resolve "reasonable doubt" about a statute's correct interpretation), with *Hughey v United States*, 495 US 411, 422 (1990) (concluding that the rule of lenity precludes resolving ambiguity against a defendant "on the basis of general declarations of policy in the statute and legislative history").

the text render it unambiguous. Though two potential interpretations of § 666(d)(1) exist, after applying the rule against surplusage and *noscitur a sociis*, only the Interest Construction remains plausible. As demonstrated in Part IV.A, the text and structure of § 666(d)(1) strongly favor the Interest Construction since the Representative Construction renders parts of § 666(d)(1) redundant and violates *noscitur a sociis*. Because the provision's ambiguity is thus resolved on a textual basis, the rule of lenity is unnecessary. Indeed, the Supreme Court has rejected the rule of lenity where the narrower construction fails to "give effect . . . to every clause and word of [the] statute."[167] And the legislative history and policy rationales of § 666 further tip the scales toward the Interest Construction.[168] Since the ambiguity is adequately resolved by textual considerations—along with policy and legislative history—the rule of lenity is irrelevant.

C. The Problem of Self-Funded Agencies: Not Much of a Problem (at Least for Now)

The *Phillips* court expressed constitutional concerns in resolving the "agent" controversy. As noted in Part I.B, Congress's authority to enact § 666 comes from the Spending Clause of the Constitution, which authorizes Congress to protect the integrity of the taxpayer money it spends.[169] Recall that in *Phillips*, the defendant tax assessor was legally an official of the parish government (the recipient organization) yet received no funding from the parish; the tax assessor's office instead funded itself through revenues collected.[170] In reversing Phillips's conviction, the court expressed the following concerns: Is convicting a defendant who appears financially unconnected to the recipient organization justifiable under the Spending Clause?[171] Does such a conviction protect the integrity of federal funds?[172] Without any financial connection, a self-funded agency does not affect the funds of a recipient organization; and without affecting the

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[167] *Moskal*, 498 US at 109–10. See also *Burgess v United States*, 553 US 124, 135 (2008) (noting that the rule of lenity applies only if traditional canons of interpretation do not resolve ambiguity).

[168] See Part IV.B.1. But recall, as noted in the preceding paragraph, that the Court has not resolved whether evidence of legislative intent and policy rationales trump the rule of lenity.

[169] See *Sabri*, 541 US at 605, citing US Const Art I, § 8, cl 1.

[170] See *Phillips*, 219 F3d at 412, 422–23.

[171] See id at 414–15.

[172] See id at 414.

funds of the recipient organization, the self-funded agency in turn lacks a financial connection to any federal funds. Arguably, therefore, an individual employed by a self-funded agency might fall beyond the scope of Congress's spending authority. Answering this question requires digging deeper into the world of self-funded agencies in order to determine just how financially (un)connected these agencies are from the recipient organizations.

As discussed, the Spending Clause of the Constitution authorizes Congress to spend taxpayer money to promote the general welfare of the United States.[173] And the Necessary and Proper Clause empowers Congress to ensure those funds "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."[174] *Sabri* decided that Congress validly exercised its spending power in enacting § 666 because, given the fungible character of funds, corruption within recipient organizations compromised the integrity of federal funding regardless of whether the illicit activity directly affected federal funds.[175] So under *Sabri*, federal funds must only be involved *somewhere* in the mix; it does not matter where.

The typical self-funded agency sustains itself from revenue earned through a service the agency provides to the public. State lottery commissions, for instance, pay for operating expenses entirely from lottery ticket sales.[176] Unlike other agencies, self-funded agencies receive nothing in the way of funding or grants from the overarching state or local government.[177] In addition to lottery commissions, self-funded agencies exist in many contexts, often managing grants of permits.[178] While these agencies

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[173] US Const Art I, § 8, cl 1.

[174] *Sabri*, 541 US at 605.

[175] Id at 605–06. For a detailed discussion of *Sabri*, see Part I.B.

[176] See, for example, Oregon Lottery, *Lottery Frequently Asked Questions* (cited in note 67); Louisiana Lottery Corporation, *Lottery Operations*, online at http://www.louisianalottery.com/index.cfm?md=faq&tmp=home&navID=114&cpID=0&cfmID=0&catID=5#Q15 (visited Sept 13, 2013).

[177] See notes 67–70 and accompanying text.

[178] Departments responsible for liquor licensing are often self-funded, as are many professional licensing boards. See, for example, *State of Arizona Department of Liquor Licenses and Control: FY 2012 Annual Report, July 1, 2011 - June 30, 2012* 11 (Sept 28, 2012), online at http://www.azliquor.gov/assets/documents/Annual%20Report/12_annualrpt.pdf (visited Sept 13, 2013) (reporting on the budget and finance of the self-funded Arizona liquor licensing board); *California Acupuncture Board: Sunset Review Report 2011* 10 (Oct 31, 2011), online at http://www.acupuncture.ca.gov/pubs_forms/sunset_report_2011.pdf (visited Sept 13, 2013); *California Board of Accountancy: 2010 Sunset Review Report* 17

receive no federal funds, nearly all of them send excess revenue to the general fund of the state or local government. The Louisiana lottery, for instance, sends over 30 percent of ticket revenue to Louisiana's general fund.[179] In other situations, an agency might loan revenue in excess of operating expenses to the general fund, only to be repaid with interest down the road.[180] And still further, some self-funded agencies, like the tax assessor in *Phillips*, control decisions that have a major impact on overall government revenue. Regardless, nearly all such agencies have some fiscal connection to the overarching state or local government.

Given the fiscal connection between self-funded agencies and the overarching government, Spending Clause concerns are likely overblown. *Sabri* cited the fungible nature of funds—that is, that funds to one part of an organization free up funds in another—as the rationale for allowing § 666 to reach bribery and theft that did not directly impact federal funds. Revenue from self-funded agencies similarly frees up funds in other areas of the overarching state or local government. Bribery or theft by employees at a self-funded agency, therefore, withholds funds that otherwise would go to the general fund of the recipient organization; and since the general fund includes federal monies, the illegal actions within the self-funded agency affect the integrity of these federal funds. Section 666, therefore, can constitutionally reach self-funded agencies.

New developments in the area of web-based services may raise cause for the concern in the future, however. At least 29 states and 3,500 state and local agencies have adopted a distinct self-funded approach to the provision of web-based government services.[181] Under this approach, a private company manages the web portal through which government services are provided; this web portal costs the government nothing, but the private company earns revenue by charging a user fee to the citizens and businesses that purchase the government service.[182]

(Oct 1, 2010), online at http://www.dca.ca.gov/cba/publications/sunset_review_2010.pdf (visited Sept 13, 2013).

179 Louisiana Lottery Corporation, *Lottery Operations* (cited in note 176).

180 See, for example, *California Board of Accountancy: 2010 Sunset Review Report* at 19 (cited in note 178).

181 *eGovernment Services That Create Value* (NIC, Inc), online at http://www.egov.com/Solutions/Pages/CostSavings.aspx (visited Sept 13, 2013).

182 See *Self-Funded Online Government Services* (NIC, Inc), online at http://www.egov.com/Solutions/Funding/Pages/SelfFunding.aspx (visited Sept 13, 2013).

One major player in this industry, the National Information Consortium (NIC), provides web portals for state departments of motor vehicles, transportation agencies, professional licensing boards, and other types of government entities.[183] Companies like NIC appear to act under the government's name; on many web sites run by NIC, nothing readily indicates that the web site is run by a private entity.[184] By appearing to act in the government's name, employees of NIC might therefore be considered "agents" under § 666(d)(1).[185] And under either construction outlined above—either the Interest or Representative Construction—acting in the name of the recipient organization sufficiently qualified one as an "agent" under § 666(d)(1). But because it neither receives money from the overarching government's general fund nor pays revenues to the fund,[186] NIC appears not to have a financial connection to the government. And if NIC is without financial connection to the government, it also likely is without financial connection to federal funds under *Sabri*. To be sure, in some cases NIC employees can be constitutionally ensnared by § 666. For example, an NIC employee might accept bribes in exchange for providing certain government services free through the web portal. In this case, the bribe directly affected government revenue (the lost revenue from the government service provided free of charge) and, under *Sabri*, sufficiently affected any funds that government should have received. But if the bribe or theft only involved NIC company property, or perhaps only the user fees charged to businesses and citizens by NIC, then it is much more difficult to establish a connection between NIC.

The case of public-private partnership in web portals presents an extremely narrow situation, but one that may well be growing. Privatization exists in other areas of government services, such as bridge management, parking meters, and toll roads. Further, it is possible that branches of government

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183 *Industry-Leading eGovernment Services* (NIC, Inc), online at http://www.egov.com/Solutions/CoreServices/Pages/default.aspx (visited Sept 13, 2013).

184 For an example of an NIC-run website, see http://www.biz.indygov.org (visited Sept 13, 2013). See also *NIC's eGovernment Engagements* (NIC, Inc), online at http://www.egov.com/Partners/Pages/default.aspx (visited Sept 13, 2013).

185 See Part IV.A.

186 See Jon P. Gant, *New Models of Collaboration: A Guide for Managers* 5–7 (Center for Technology in Government 2003), online at http://www.ctg.albany.edu/publications/online/new_models/cases/access_indiana.pdf (visited Sept 13, 2013) (describing the self-funding business model Indiana uses).

themselves may one day lack any connection. For example, agencies that fund themselves primarily from licensing—such as professional licensing boards or liquor licensing commissions discussed above—conceivably could no longer be required to turn over excess monies to the general fund. There are, as a result, a number of plausible scenarios in which a significant government service is delivered in a way financially unconnected to the state or local government itself.

These situations would test the limits of the Spending Clause. Based on the Court's decision in *Sabri*, however, it would be difficult to justify a conviction of an employee of one of the agencies listed above. The fungibility argument, the main principle the Court relied upon, would no longer apply. Accordingly, if privatization of government services grows, the scope of § 666 may contract.

CONCLUSION

The "agent" controversy presents an interesting problem regarding the scope of federal public corruption law. Courts approaching this issue have attempted to reconcile § 666's legislative intent, Supreme Court jurisprudence, and the statute's plain text. While the Supreme Court and Congress have provided little guidance, canons of statutory interpretation help fill the gaps.

The term "agent" in § 666 will be clear much of the time; in many prosecutions the defendant will be directly employed by the organization receiving federal monies. But where this is not the case, the § 666(d)(1) definition of "agent" is ambiguous. The statute's text permits two plausible interpretations: either "agent" includes anyone authorized to act in the interest of the recipient organization, or the term is restricted to those authorized to act in a representative capacity. Canons of interpretation favor the Interest Construction. But as Part IV.C demonstrates, questions regarding the statute's reach do not end at the text. Congress's spending authority may serve to limit the scope of § 666 in the future. If self-funded agencies grow more independent, or the government opts for further privatization, § 666's scope may diminish.