Cahill

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Supreme Court says Timing is Everything for Bribes and Gratuities

On June 26, 2024, the U.S. Supreme Court held that 18 U.S.C. § 666(a)(1)(B), a federal law prohibiting state and local officials from accepting corrupt payments, does not make it a crime for those officials to accept rewards or gratuities, after the fact, for their prior official acts. The Court's holding narrows the reach of the statute while leaving state and local governments the task of regulating post-hoc rewards and gratuities paid to their officials. Though the decision has triggered some speculation about the potential for future dilution of other anti-bribery statutes such as the Foreign Corrupt Practices Act ("FCPA"), that statute has not frequently been used to prosecute post-hoc rewards and gratuities, and in any event, FCPA prosecutors would still contend, even based on *Snyder*'s logic, that companies and individuals can be charged for such after-the-fact payments, provided that the payment in question was offered before the official act, regardless of when it was actually made.

Background

Snyder v. *U.S.* concerned a $13,000 payment that Petitioner James Snyder, a former mayor of Portage, Indiana, solicited and accepted from an entity with which the city contracted. In 2013, when Snyder was serving as mayor, Portage awarded contracts worth approximately $1.1 million to a local truck company for the purchase of garbage trucks. Shortly after those contracts were awarded, Snyder solicited from the truck dealership a payment that he later explained related to information technology and health insurance consulting work he had provided. Notably, no written agreements, work product, evidence of meetings, invoices, or other documentation was ever produced relating to any consulting work performed by Snyder.

In 2016, a federal grand jury charged Snyder with violating 18 U.S.C. § 666(a)(1)(B), which makes it a crime for state and local officials to "corruptly" accept a payment "intending to be influenced or rewarded" for an official act:

> Whoever . . . being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof [that receives more than $100,000 in federal funds annually] ***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; . . . shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 666(a)(1)(B) (emphasis added). The indictment alleged that Snyder "did corruptly solicit, demand, accept, and agree to accept a bank check in the amount of $13,000, intending to be influenced and rewarded." *See* Slip Op. at 14 (Jackson, J., dissenting). A jury found Snyder guilty of violating Section 666. On appeal, Snyder argued that Section 666 criminalized only bribes, not gratuities. The Seventh Circuit disagreed and affirmed Snyder's conviction.

The Supreme Court's Decision

In light of a split among courts of appeals, the Supreme Court granted certiorari to resolve whether 18 U.S.C. § 666(a)(1)(B) makes it a federal crime for state and local officials to accept after-the-fact payments, or gratuities, for their past official acts. In a 6-3 decision, the Court said the answer is no.

Majority Opinion

The majority opinion—delivered by Justice Kavanaugh and joined by Chief Justice Roberts and Justices Thomas, Alito, Gorsuch,[1] and Barrett—held that Section 666 is a bribery statute and not a gratuities statute. The decision was based in part on federalism principles, with the majority finding that the Court "should hesitate before concluding that Congress prohibited gratuities that state and local governments have allowed," and speculating that applying the statute to gratuities would lead to a lack of fair notice and "traps for unwary state and local officials." Slip Op. at 11 (majority opinion). The majority further expressed concerns over possible confusion and unfairness if Section 666 were applied to "benign gratuit[ies]" such as a $100 coffee-shop gift card or an end-of-term celebratory dinner at a fast-casual chain that would otherwise be permissible under state law. *Id.* at 12; *see also id.* at 2 (characterizing the following as commonplace—and possibly innocuous—gratuities: a holiday tip for a mail carrier, a gift basket for a public school teacher, a college sweatshirt for a city council member, and a bottle of wine for a legislator).

The majority pointed out that federal prosecutors are not without a remedy to prosecute the acceptance of gratuities by federal officials, given that another statute (18 U.S.C. § 201(c)) specifically covers such payments, while imposing significantly lower penalties. Nor did the majority rule out the application of Section 666 to payments made after an official action, provided it can be shown that such payments were offered and accepted before the fact:

> A state or local official can violate §666 when he accepts an up-front payment for a future official act or agrees to a future reward for a future official act. . . . But a state or local official does not violate §666 if the official has taken the official act before any reward is agreed to, much less given. Although a gratuity offered and accepted after the official act may be unethical or illegal under other federal, state, or local laws, the gratuity does not violate §666.

Id. at 16.

Dissent

In a dissenting opinion, Justice Jackson (joined by Justices Sotomayor and Kagan) explained that the question presented could be resolved entirely by looking at the statute's plain text. Slip. Op. at 2 (Jackson, J., dissenting) ("The Court's reasoning elevates nonexistent federalism concerns over the plain text of this statute and is a quintessential example of the tail wagging the dog."); *see also id.* at 4. Justice Jackson pointed out the use of the term "reward" in the statute, noting that the dictionary definition "confirm[s] what common sense tells us about what it means to be rewarded" and encompasses the concept of gratuities. *See id.* at 5 (citing majority opinion at 15). The dissent also took issue with the majority's reference to statutory and legislative history, finding that the Congressional

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[1] In a concurring opinion, Justice Gorsuch reasoned that, for "all th[e] reasons" outlined in the majority opinion, "any fair reader of [Section 666] would be left with a reasonable doubt about whether [Section 666] covers the defendant's charged conduct." Slip Op. at 1 (Gorsuch, J., concurring). Gorsuch explained that in light of such a result, "judges are bound by the ancient rule of lenity" and concluded that "lenity is what's at work behind [the Court's] decision." *Id.* at 1–2.

record did not "evince[] clear congressional intent to extract an entire category of previously covered illicit payments from §666." *Id.* at 9. On the subject of "fair notice," the dissent reasoned that the statutory language "weaves together multiple other elements (that the Government must prove beyond a reasonable doubt), which collectively do the nuanced work of sifting illegal gratuities from inoffensive ones." *Id.* at 15; *see also id.* at 18 (recognizing that "[o]ther prosecutions of gratuities that the Government has brought under §666—successfully or unsuccessfully—do not remotely resemble the holiday tips, gift baskets, and sweatshirts around which the majority crafts its decision").

Agreeing with the majority's concern that federal law should not be read to subject neighbors, friends, and hometown heroes to prosecution when community members show their thanks, the dissent concluded that "nothing about the facts of this case implicates any of that kind of conduct" and that the text of Section 666 clearly covers the kind of corrupt payment at issue in the case, even if it was not a strict *quid pro quo* agreed to in advance of official action. *Id.* at 22.

Broader Implications

There has been some speculation about whether this decision will have an impact on the enforcement of other bribery statutes, including the FCPA. While the FCPA is similar to Section 666 in that it prohibits any offer, payment, promise, or authorization to pay a thing of value corruptly in order to influence an official act, the statute has not frequently been enforced in connection with payments made after official actions have been taken.[2] Moreover, as noted, the majority decision made clear that payments offered and accepted before an official action, would still be covered by the statute even if they are paid after official action is taken, assuming all other elements are met. Thus, it is important to recognize that this decision does not give individuals and companies *carte blanche* to simply delay the payment of illegal bribes, though it could potentially support a defense in future hypothetical FCPA cases involving payments made to foreign officials after an official act and without a clear upfront offer and understanding.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Brian Markley (partner) at 212.701.3230 or bmarkley@cahill.com; Jennifer Potts (counsel) at 212.701.3390 or jpotts@cahill.com; or Mary Hornak (associate) at 212.701.3486 or mhornak@cahill.com; or email publicationscommittee@cahill.com.

[2] *But see In re Herbalife Nutrition Ltd.*, SEC File No. 3-19948 (Aug. 28, 2020) (citing request by government official to be a consultant for respondent after official act among other examples of allegedly corrupt activity), https://www.sec.gov/files/litigation/admin/2020/34-89704.pdf.