Criminal Law - Does 18 U.S.C. 666 Apply to the Corrupt Solicitation of Political Services in Exchange for Municipal Jobs

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CRIMINAL LAW—DOES 18 U.S.C. § 666 APPLY TO THE CORRUPT
SOLICITATION OF POLITICAL SERVICES IN EXCHANGE FOR MUNICIPAL JOBS?

United States v. Cicco (1991)

I. INTRODUCTION

Bribery is defined as “the offering . . . of something of value for the purpose of influencing the action of an official in the discharge of his or her public or legal duties.”1 Its origins trace back to 2400 B.C.2 Over the years, government employees have participated in such activity by accepting bribes in exchange for specified action.3 In order to curtail bribery in both the public and private sector, Congress has enacted federal theft and bribery statutes.4 However, for many years, these statutes only allowed the United States to prosecute bribery successfully in two ways: first, the United States could prosecute bribery that involved federal funds under federal control,5 and second, it could prosecute bribery involving individuals who were federal employees.6

2. JOHN T. NOONAN, JR., BRIBES 5 (1984). One of the earliest examples of bribery took place between Urukagina, king of Lagash and his god, Ningirsu. Id. In return for Ningirsu’s favor, Urukagina agreed, among other things, not to do injustice to “the widow and the orphan.” Id.
6. 18 U.S.C. § 641. Section 641 states:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; . . .
6. 18 U.S.C. § 201. Section 201 covers prosecution of federal employees. Id. To fall within the parameters of § 201, one must be a “public official or witness.” Id.; see also Dixson v. United States, 465 U.S. 482, 496 (1984) (defining “public employee” as one with position of public trust with federal responsibilities). The Dixson Court noted that the mere presence of some federal assistance does not bring a local organization and its employees within the jurisdiction of the federal bribery statute. Id. at 499; see also United States v. Yu, 954 F.2d 951

(1033)
In response to these limitations on prosecution, in 1984 Congress enacted 18 U.S.C. § 666 to supplement prior bribery statutes. Under § 666, the government no longer has to establish a connection between the federal government and the stolen property or bribed official. Rather, the federal government may obtain jurisdiction over employees of an organization solely because the organization receives federal funds. This enhancement of federal authority has led one commentator to remark that Congress "enacted a general federal criminal statute of potentially limitless scope and effect."  

The United States Court of Appeals for the Third Circuit tested the scope of § 666 recently in United States v. Cicco. The opinion did not apply § 666 to a bribe per se, but rather to the solicitation of political services in exchange for municipal jobs. The distinction between such solicitation and bribery per se is central to the Third Circuit's holding.  

The purpose of this Casebrief is threefold. First, after reviewing the

8. Id.
9. See id. § 666(b) (includes jurisdiction over any "organization, government, or agency [receiving] in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance").
10. Rosenstein, Note, supra note 5, at 674.
12. Id. at 442-43. For a full discussion of the facts of Cicco, see infra notes 18-34 and accompanying text.
13. Cicco, 938 F.2d at 442-43. The Supreme Court has decided a number of cases concerning the legality of political patronage practices in a civil context. See, e.g., Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion). In 1976, a divided Court held that the discharge of low-level public employees based solely upon political affiliation impossibly burdens the exercise of employees' political beliefs. Id. at 355. However, the Elrod court limited its holding to non-policymaking positions, those with more limited and narrow responsibilities. Id. at 367.

In 1980, the Court replaced the policymaker/non-policymaker distinction with a new test. Branti v. Finkel, 445 U.S. 507 (1980). It ruled that "[t]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Id. at 518. The Third Circuit has interpreted this test to mean that courts must decide on a case-by-case basis whether party affiliation is an appropriate requirement for the effective performance of the public office involved. Ness v. Marshall, 660 F.2d 517, 520 (3d Cir. 1981).

Recently, the Supreme Court extended Elrod and Branti to all employment decisions, including hiring, promotion, transfer and recall from layoff. Rutan v. Republican Party of Illinois, 497 U.S. 62, 79 (6-3 decision), reh'g denied, 497 U.S. 1050 (1990).

Notably, while the Court may not have provided guidance on employee party affiliations, many of the Court's decisions have described the role of patronage in American society. See, e.g., Branti, 445 U.S. at 522 (Powell, J., dissent-
facts of the Cicco case, this Casebrief will discuss the district court’s holding. Second, this Casebrief will detail the Third Circuit’s treatment of Cicco. Cicco is the first case to consider the compatibility of § 666 and 18 U.S.C. § 601, a statute addressing favoritism in federally-funded employment, and may set the tone for future decisions in other jurisdictions. Finally, this Casebrief will analyze the possible effect of Cicco on future Third Circuit decisions.

II. FACTS

The two defendants in Cicco were municipal officials in Guttenberg, New Jersey. The first defendant was Nicholas Cicco, the mayor of Guttenberg. The second defendant was Vincent Tabbachino, a member of the city council. The federal government charged both defendants with soliciting political services and loyalty in exchange for granting city jobs. The jobs in question were assignments as “special police of-

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14. For a discussion of the district court’s holding, see infra notes 35-44 and accompanying text.
15. For a discussion of the Third Circuit’s holding, see infra notes 45-92 and accompanying text.
16. For a discussion of § 601 and its compatibility with § 666, see infra notes 78-92 and accompanying text.
17. For an analysis of the potential impact of Cicco, see infra notes 93-94 and accompanying text.
18. Id. at 444. The town of Guttenberg is very small, with a population of approximately 8,000 people. Tracy Schroth, Legal Costs Jump 1,000 Percent, N.J. L. J., July 4, 1991, at 12. It is located west of New York City on the Hudson River.
19. Cicco, 938 F.2d at 442.
20. Id. The government offered the following statement of Tabbachino as an example of political patronage: “How could I support someone who is against me, when someone who was with me was going to be passed up for someone who was against me?” United States v. Cicco, No. 90-5947, slip op. at 16-17 (D.N.J. Oct. 5, 1990), vacated and remanded, 938 F.2d 441 (3d Cir. 1991).
ficers," whose task was to assist the police department in their duties. The assignments were for a one year term.

The town's electorate was heavily Democratic, but in 1988, a Republican, Andy Juncosa, made a strong challenge for a seat on the city council. That same year, Michael Postorino and Francisco Marrero served as special police officers. Postorino and Marrero were both friends of Juncosa, but did not actively campaign for him in the November 1988 election. In addition, the men did not canvass for Democratic incumbent Tabbachino. Shortly after the election, the police department told Postorino and Marrero that no work would be assigned to them until they spoke to Mayor Cicco.

Cicco told Marrero that the city council was displeased with Marrero and Postorino because they failed to actively support the Democratic slate in the election. He then told Marrero that neither he nor Postorino would be able to work as a special police officer until they displayed party loyalty.

Marrero revealed this information to Juncosa, the Republican challenger, and Juncosa set up a meeting with the prosecutor's office in Hudson County, New Jersey. As a result of the meeting, the out-of-work officers agreed to tape their next conversation with Cicco. During that next meeting, the mayor outlined three reasons for dismissing Postorino and Marrero: municipal cutbacks, Postorino and Marrero's failure to actively support the Democratic slate in the November election and reports that Postorino had threatened a Democratic campaign worker. Postorino and Marrero recorded the entire conversation.

In January 1989, the police department did not reappoint Postorino or

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21. Cicco, 938 F.2d at 442-43. Although the district court focused on Cicco's and Tabbachino's manipulations of the special police officer positions, the court also noted that the defendants allegedly had caused school crossing guard Thomas Oriolo to be fired because Oriolo's wife and son were running in a primary against candidates supported by Cicco and Tabbachino. Id. at 443. Oriolo was rehired after he agreed to have his wife and son withdraw from the election. Cicco, No. 90-5947, slip op. at 2.

22. Cicco, 938 F.2d at 443.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id. Cicco also told Marrero and Postorino that they would not be appointed as regular policeman until they showed loyalty to the party. United States v. Cicco, No. 90-5947, slip op. at 2 (D.N.J. Oct. 5, 1990), vacated and remanded, 938 F.2d 441 (3d Cir. 1991).
30. Cicco, 938 F.2d at 443.
31. Id.
32. Id.
33. Id.
Marrero as special police officers.\textsuperscript{34}

III. THE DISTRICT COURT'S HOLDING

In Cicco, two counts of the indictment focused on 18 U.S.C. § 666.\textsuperscript{35} The district court concentrated on whether § 666 was applicable to the facts in Cicco.\textsuperscript{36} Section 666 provides in part:

(a) Whoever, if the circumstance described in subsection (b) of this section exists —

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof —

(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; . . .

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.\textsuperscript{37}

\textsuperscript{34} Id.

\textsuperscript{35} United States v. Cicco, No. 90-5947, slip op. at 14 (D.N.J. Oct. 5, 1990), vacated and remanded, 938 F.2d 441 (3d Cir. 1991).

\textsuperscript{36} Id.


The statute has also been applied in other circuits several times since Cicco. See, e.g., United States v. Peery, 977 F.2d 1230 (8th Cir. 1992), cert. denied, 113 S.
At the trial level, the jury returned a guilty verdict on the two counts of the indictment alleging violations of § 666. The district court, however, entered a post-judgment verdict of acquittal. The court reasoned that, viewed in the light most favorable to the government, the evidence at the close of the government’s case revealed an implied promise by the defendants that Marrero and Postorino would be allowed to keep their jobs if they demonstrated political loyalty and granted services to the defendants’ party. The district court stated that this implied promise took the activity outside of the scope of § 666.

The district court supported this judgment of acquittal on two different grounds. First, the court determined that Congress did not intend § 666 to apply to the defendant's actions. Second, the court held

38. *Cicco*, 938 F.2d at 443.
40. Id. at 16. The district court stated:
There was no evidence of any demands for payments, salary kickbacks, or contributions of services with a readily ascertainable pecuniary value. According to the government, political loyalty and services are things 'of value' because the defendants put value on them, regardless of whether the loyalty and services had any pecuniary value.

41. Id.
42. Id. This analysis centered on the legislative history of the statute. For a discussion of the legislative history of § 666, see infra notes 60-77 and accompanying text. In addition to consulting the legislative history, the district court also considered a Supreme Court case, *United States v. Enmons*, 410 U.S. 396 (1973), and decided that even though activity may fall within the literal terms of a statute, the legislative history may lead the court to the conclusion that the statute does not cover the activity in question. *Cicco*, No. 90-5947, slip op. at 17-18.

The *Enmons* court affirmed the dismissal of an indictment under the Hobbs Act, 18 U.S.C. § 1951 (1988). *Enmons*, 410 U.S. at 411. In *Enmons*, a union strike against a public utility caused violence and sabotage. *Id.* Union officials were subsequently indicted under the Hobbs Act. *Id.* The indictment in *Enmons* charged that the officials:
would obtain the property of [the utility] in the form of wages and other things of value with the consent of the [utility] . . ., such consent
that the government's interpretation of § 666 was unconstitutionally vague and thus deprived the defendants of fair notice.\textsuperscript{43}

The United States Government appealed the district court order ac-

\textsuperscript{43} Cicco, 938 F.2d at 442. The rationale for providing notice is that crimes must be clearly defined so individuals have fair warning of what is forbidden by a statute. Notice ensures that a statute does not trap the innocent nor violate due process of law. John C. Jeffries, Jr., \textit{Legality, Vagueness, and the Construction of Penal Statutes}, 71 Va. L. Rev. 189, 205 (1989).

The district court held that the requirement of fair notice also mandated the strict interpretation of § 666. Cicco, No. 90-5947, slip op. at 22. The court stated: "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Id. at 22 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)). In adopting this reasoning, the district court stated:

\textsuperscript{43} Cicco, No. 90-5947, slip op. at 22. The court stated: "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Id. at 22 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)). In adopting this reasoning, the district court stated:

\textsuperscript{43} Cicco, No. 90-5947, slip op. at 22. The court stated: "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Id. at 22 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)). In adopting this reasoning, the district court stated:

\textsuperscript{43} Cicco, No. 90-5947, slip op. at 22. The court stated: "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Id. at 22 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)). In adopting this reasoning, the district court stated:
Courts have applied the requirement of fair notice regardless of the seriousness of the underlying crime, and even in the most cruel circumstances. See, e.g., Screws v. United States, 325 U.S. 91 (1945) (overturning conviction under federal criminal civil rights law because of lack of fair notice even though victim was brutally murdered).

In Cicco, the district court concluded that application of § 666 to the political patronage would deny defendants fair notice for the following reasons:

1. Political patronage has a long history in American politics, and was openly practiced;
2. Prior to 1976, patronage firings did not even result in civil liability, much less criminal liability; and
3. Patronage practices are still legitimate where “the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public offices involved.”

The trial court granted the motion for acquittal on Counts 1, 2, 7, 8 and 9 with respect to both defendants; granted the motion on Counts 6 and 12 with respect to Tabbachino; denied the motion on Counts 10 and 11 with respect to both defendants; denied the motion on Counts 3, 6 and 12 with respect to defendant Cicco; reserved decision on Counts 4 and 5 with respect to both defendants; and reserved decision with respect to Count 3 on defendant Tabbachino.

The district court, however, denied the defendants' motions for acquittal on the other counts of the indictment. Since a defendant can only appeal from a final order of the district court, and “[f]inal judgment in a criminal case means sentence,” the convictions on the other counts were not before the Third Circuit. Thus, the Cicco court limited its review to the portion of the district court's order granting the defendant's motions with respect to the counts based on § 666.

The Third Circuit applied plenary review to the district court's interpretation of § 666. See generally Chrysler Credit Corp. v. First Nat'l Bank & Trust Co., 746 F.2d 200, 202 (3d Cir. 1984) (applying plenary review to statutory construction).

Postorino and Marrero also brought a civil suit. They originally sought $6 million in damages, but settled with the town for $200,000. The settlement was
IV. THIRD CIRCUIT’S HOLDING

A. Introduction

Four elements must be present to comprise a violation of §666(a)(1)(b): “1) corrupt solicitation; 2) of anything of value; 3) with the intention of being influenced in connection with any transaction of a local government or organization receiving at least $10,000 in federal funds annually; 4) where the transaction involves anything of value of $5,000 or more.”

B. The Doctrine of Lenity

To begin its analysis, the Third Circuit implicitly applied the doctrine of lenity to determine that the conduct in question was outside of the scope of the statute. The doctrine of lenity was originally adopted by the judiciary of eighteenth century England. The United States Supreme Court has employed the doctrine of lenity in interpreting crim-approved by the town council. Tracy Schroth, It’s Not $6 Million, But It’ll Do, N.J. L.J., Aug. 15, 1991, at 12. In approving the settlement, the town council stated that the suit is based on “doubtful and disputed claims,” but should be settled to avoid “a huge expenditure of taxpayers’ monies in the defense and trial of the lawsuit.”

45. Cicco, 938 F.2d at 444.

46. Id. The government argued that the requested political services were "something of value." Brief for Appellant at 18, Cicco, 938 F.2d 441 (No. 90-5947). The government stated: "If the defendants had solicited construction work on their homes or a donation of $1,000 to their party, there would be no question that the statute would apply. The fact that the 'thing of value' demanded was services for their political party does not preclude prosecution." Id.

Appellee Tabbachino’s brief also focused on the definition of "something of value." It stated:

The government, by its indictment, basically contends that a state of mind, that is, a willingness to work for and be loyal to the Guttenberg Democratic Party, amounts to "something of value" under the intend-
ment of Section 666. It clearly does not. To permit such an expansive, indefinite and amorphous reading of the term would be to stretch the statute beyond the constitutional breaking point.

Brief for Appellee Tabbachino at 12, Cicco, 938 F.2d 441 (No. 90-5927). Tabbachino further argued that "[t]he statute is a theft and bribery statute in the traditional sense; and the term 'anything of value' as used in subsection (a)(1)(B) of Section 666 means money or property having tangible pecuniary value." Id. at 13.

The district court assumed arguendo that the political services sought by the defendants were "things of value." Cicco, No. 90-5947, slip op. at 16. For a discussion of the district court's basis for its holdings, see supra notes 35-44 and accompanying text.

47. Cicco, 938 F.2d at 444.

48. Id.

49. Id. at 442. The Third Circuit expressly followed the lead of the district court which had applied the doctrine of lenity in determining that the evidence in this case did not fall within the ambit of "corrupt solicitation of things of value." Cicco, No. 90-5947, slip op. at 14.

50. See Jeffries, supra note 43, at 198 ("Faced with a vast and irrational
inal statutes. When statutory language cannot be clearly interpreted or is ambiguous, lenity compels a court to construe the statute in favor of the defendants. This rule is necessary because it implements the principle of legality, which forbids the creation of crimes by the judiciary. Moreover, courts have previously applied the rule of lenity to § 666.

C. Express Language of § 666

The Third Circuit began its application of the doctrine of lenity by interpreting the express language of the statute. The court found two

proliferation of capital offenses, judges invented strict construction to stem the march to the gallows.”).


Recently, in Crandon v. United States, 494 U.S. 152 (1990), the United States Supreme Court reaffirmed the rule of lenity:

In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. Moreover, because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of [the statute] is uncertain, this “time honored interpretive guideline” serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.

Id. at 158 (citations omitted). The narrow construction of criminal statutes “is based upon a concern for individual rights that may be endangered by overly expansive interpretations and the 'principle that the power of punishment is rested in the legislative, not in the judicial department.'” Brief for Appellee Cicco at 16, Cicco, 938 F.2d 441 (No. 90-5947) (quoting Dowling v. United States, 473 U.S. 207, 213 (1985)).

53. Crandon, 494 U.S. at 158.

54. See United States v. Webb, 691 F. Supp. 1164, 1170 (N.D. Ill. 1988) (using doctrine of lenity in determining that organization did not receive $10,000 in federal funds, and therefore did not fall within scope of § 666).


It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain,
reasonable ways to interpret the statute. First, the court stated that the literal language of the statute encompasses corrupt solicitation of political services in exchange for municipal jobs. The court also referred to this activity as "political patronage." The court, however, also reasoned that a judge could read the express language of the statute as being limited to offenses of theft or bribery. The court found this ambiguity troubling and turned to the legislative history of § 666 for guidance.

and if the law is within the constitutional authority of the law making body which passed it, the sole function of the courts is to enforce it according to its terms.

Id.

56. Cicco, 938 F.2d at 444. The fact that particular activity falls within the literal language of the statute does not necessarily guarantee that the statute covers such activity. See, e.g., Office of Personnel Management v. Richmond, 496 U.S. 414, 438 (1990) (Marshall, J., dissenting) ("Where necessary to effectuate Congress' intent . . . this Court therefore often interprets the apparently plain words of a statute to allow a claimant to obtain relief where the statute on its face would bar recovery."); United States v. American Trucking Ass'ns, 310 U.S. 534, 543 ("[E]ven when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.").

57. Cicco, 938 F.2d at 44; see also Hartman v. Board of Trustees of Community College, No. 90C 5281, 1991 WL 24519, at *3-5 (N.D. Ill. Feb. 20, 1991) (college administrator threatened with "future action" if did not yield to administrators' requests for political patronage). In Cicco, the government attempted to argue that the activity was "corrupt extortion," and not merely "political patronage." Brief for Appellant at 27-28, Cicco, 938 F.2d 441 (No. 90-5947).

58. United States v. Cicco, No. 90-5947, slip op. at 19 (D.N.J. Oct. 5, 1990), vacated and remanded, 938 F.2d 441 (3d Cir. 1991). The district court noted that "18 U.S.C. § 666 is entitled 'Theft or bribery concerning programs receiving Federal funds,' suggesting that Congress was most concerned with theft and bribery." Id. The court continued, "Nothing in the language of § 666 suggests that Congress intended § 666 to apply to political patronage practices of local governments. Clearly there is no explicit expression of congressional intent to attack local political appointment processes that involve the solicitation of political loyalty and party services." Id. The Third Circuit concurred in this evaluation. Cicco, 938 F.2d at 445-46.

Other courts have limited the scope of § 666 through strict statutory construction. See, e.g., United States v. Barquin, 799 F.2d 619-21 (10th Cir. 1986) (holding Indian tribes or their business councils not included in ambit of § 666); United States v. Jackowe, 651 F. Supp. 1035, 1036 (S.D.N.Y. 1987) (finding intent level of § 666 is equal to that required in bribery statute); see also Hammer, Note, supra note 51, at 219-20 ("When the statutory language is ambiguous . . . the plain meaning rule does not govern and judicial interpretation is required.").

59. Cicco, 938 F.2d at 444. Courts frequently turn to the legislative history of a statute to aid in statutory interpretation. See, e.g., American Trucking Ass'ns, 310 U.S. at 543 (noting that legislative history is persuasive evidence of purpose of statute); see also Hammer, Note, supra note 51, at 220 ("If legislative history removes ambiguity from the statute, judicial interpretation must be in accord with legislative intent." (citing 2A N. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 45.05, at 20-22 (4th ed. 1984))).
D. Legislative History of § 666

Congress enacted § 666 in 1984 as part of the Comprehensive Crime Bill. It was "designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud and bribery . . . ." The Third Circuit noted Congress intended § 666 to fill


Appellee Tabbachino's brief mentioned the instances in which the United States Attorneys' Manual provisions determined that § 666 is appropriate. Brief for Appellee Tabbachino at 14-15, Cicco, 938 F.2d 441 (No. 90-5927). The Manual states:

Three types of offenses are denoted in section 666. Subsection (a) prohibits the embezzlement, stealing, purloining, misapplication, obtaining by fraud or otherwise unauthorized conversion to one's own use or that of another, of property having a value of $5,000 or more by an agent, typically an employee, of an organization or of a state or local government agency that receives $10,000 or more annually in federal funds. Subsection (b), which also applies only to agent (sic) of state or local government agencies or of organizations receiving $10,000 or more annually in federal funds, prohibits them from soliciting or accepting a bribe because of their conduct in a transaction or matter of their agency or organization involving $5,000 or more. Subsection (c) applies to anyone, and proscribes the offering of a bribe for such a person to an agent of an organization or of a state or local government agency receiving $10,000 or more annually in federal funds. The maximum penalty is imprisonment for ten years and a fine of the greater of $100,000 or twice the amount obtained, solicited, or given in violation of the section.

The new section is designed to facilitate the prosecution of persons who steal money or otherwise divert property or services from state and local governments or private organizations — for example, universities, foundations and business corporations — that receive large amounts of federal funds. Under prior law, with minor exceptions, thefts from such governments or organizations could be prosecuted only under the general theft statute, 18 U.S.C. Section 641. Use of this statute was often precluded because title to the property stolen had passed from the federal government before it was stolen or the funds were so commingled that their federal character could not be shown. With respect to bribery, there was a question whether 18 U.S.C. Section 201, which punished corrupt payments to federal public officials, covers payments to a person employed by a private or state organization receiving federal funds. Id. (quoting UNITED STATES ATTORNEYS' MANUAL: 9-46.120 (1985) (emphasis added)). The Tabbachino brief then noted that the Manual required all federal prosecutors to consult with the Public Integrity Section of the Criminal Division prior to using the bribery provisions of § 666. Id. at 15 (citing UNITED STATES ATTORNEYS' MANUAL: 9-46.133).
THIRD CIRCUIT REVIEW

Gaps not addressed in existing statutes, and not to cover activity already addressed by a statute.\(^{62}\) The Third Circuit held that the design, object and policy of § 666 revealed that Congress intended to protect federally funded projects from financial corruption and mismanagement.\(^{63}\) The statute was not to be used as a weapon against local patronage practices, an area already covered by § 601.\(^{64}\)

Section 666 addresses particular deficiencies in the law. For example, 18 U.S.C. § 665 makes theft or embezzlement by an employee of an agency receiving assistance under the Job Training Partnership Act a federal offense.\(^{65}\) Prior to the enactment of § 666, however, there was no general statute covering theft or embezzlement in agencies receiving financial support from the federal government.\(^{66}\) As a result, before § 666, thefts from these agencies could only be prosecuted under the general theft of federal property statute, 18 U.S.C. § 641.\(^{67}\) In addition,

\(^{62}\) Cicco, 938 F.2d at 444-45; Cicco, No. 90-5947, slip op. at 19-20. The legislative history of § 666 states:

With respect to theft, 18 U.S.C. § 665 makes theft or embezzlement by an officer or employee of an agency receiving assistance under the Job Training Partnership Act a federal offense. However, there is no statute of general applicability in this area, and thefts from other organizations or governments receiving Federal financial assistance can be prosecuted under the general theft of Federal property statute, 18 U.S.C. § 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds. Indeed, a recurring problem in this area (as well as in the related area of bribery of the administrators of such funds) has been that State and local prosecutors are often unwilling to commit their limited resources to pursue such thefts, deeming the United States the principal party aggrieved.


"[T]he purpose of [18 U.S.C. § 666] is to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud and undue influence by bribery."


\(^{63}\) Cicco, 938 F.2d at 445; Cicco, No. 90-5947, slip op. at 19.

\(^{64}\) Cicco, 938 F.2d at 445-46; Cicco, No. 90-5947, slip op. at 22. Appellee Tabbachino's argued that the statute "has not been applied in the factual context hereto attempted by the government. Indeed, the factual common denominator to all of the cases involving the statute is bribes, kickbacks and embezzlements of monies." Brief for Appellee Tabbachino at 13, Cicco, 938 F.2d 441 (No. 90-5927).


\(^{66}\) Cicco, 938 F.2d at 445.

\(^{67}\) Id.
the government could prosecute under § 641 only if it could show that
the property stolen was property of the United States.68 Section 666
helps fill these gaps by covering a much broader set of employees.69
Under § 666, even if the government loses or no longer has title to the
stolen property, it can still prosecute a defendant for theft or
embezzlement.70

Section 666 also has filled gaps in other statutes such as 18 U.S.C.
§ 201, the primary bribery statute in effect at the time of the enactment
of § 666. Section 201 applies only to cases involving "public offi-
cials."71 Before the enactment of § 666, the courts of appeals were split
upon whether people employed by a private organization receiving federal
monies pursuant to a program were public officials.72 Congress wanted
to ensure that officials of private organizations that received federal
funds came within the reach of the bribery laws.73 Section 666 now
makes this the case.74

Therefore, the Cicco court concluded that the legislative history re-
vealed that Congress' purpose in enacting § 666 was to fill gaps in ex-

69. For the pertinent text of § 666, see supra text accompanying note 37.
70. Cicco, 938 F.2d at 445.
72. Cicco, 938 F.2d at 445 (emphasis added) (citing S. REP. No. 225, supra
makes specific reference to United States v. Loschiavo, 531 F.2d 659 (2d Cir.
1976). The Cicco court explained the importance of Loschiavo, stating:
[T]he government charged Loschiavo with bribing a public official in
violation of 18 U.S.C. § 201. Loschiavo had paid off Morales, the De-
puty Director of the Harlem-East Harlem office of the New York Model
Cities Administration, in order to obtain from Model Cities a lease on a
building he owned. The evidence showed that the federal government
paid 80 per cent of Morales' salary and 100 per cent of the costs of
program he was administering. A jury found Loschiavo guilty of brib-
ing a public official.

The court of appeals vacated the conviction. The court concluded
that Morales was not a federal "public official" within the meaning of
the statute because "he was not acting 'under or by authority of any . . .
department, agency or branch of [the federal] Government.'" The
court explained:
The type of public project involved, or the amount of federal
funding entailed, may be important in applying other parts of the
statute, . . . but for the purpose of deciding Morales' status as a
"public official" under § 201(a), it is not the aspects of the particu-
lar project which are of the greatest significance, but the character
and attributes of his employment relationship, if any, with the fed-
eral government.

Cicco, 938 F.2d at 445 (citing S. REP. No. 225, supra note 61, reprinted in 1984
U.S.C.C.A.N. 3182 (quoting Loschiavo, 531 F.2d 659)). Therefore, the federal
government was not able to prosecute private agency employees who took kick-
backs in return for awarding government contracts.
73. Cicco, 938 F.2d at 445.
74. Id.
isting legislation, not to cover a crime such as political solicitation in exchange for municipal jobs, an activity already covered under existing statutes. The court concluded that the statute did not apply to elected city officials such as Cicco and Tabbachino. Because the Third Circuit determined that Congress did not intend for § 666 to apply to the present case, it did not reach the issue of the constitutionality of the statute.

E. Analysis of § 601

Although the Cicco court rejected the government's attempt to prosecute the defendants under § 666, it found that § 601 encompassed the activity alleged in Cicco.

The Cicco court is the first court to compare and analyze § 666 and § 601. Two counts of the indictment were based on § 601, and the government obtained convictions against both defendants on those counts. Section 601 states:

(a) Whoever, directly or indirectly, knowingly causes or attempts to cause any person to make a contribution of a thing of value (including services) for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of —

(1) any employment, position, or work in or for any agency or other entity of the Government of the United States, a State, or a political subdivision of a State, or any compensation or benefit of such employment, position, or work; or

(2) any payment or benefit of a program of the United States, a State, or a political subdivision of a State;

if such employment, position, work, compensation, payment or benefit is provided for or made possible in whole or in part by an Act of Congress, shall be fined not more than $10,000, or imprisoned not more than one year, or both.

75. Id.
76. Id. at 445-46.
77. Id. at 444.
78. Id. at 446.
79. Id. at 445.
80. Id. Count 12 charged both defendants with violations of § 601. Id. The district court granted Tabbachino's motion for acquittal with respect to the count, but denied Cicco's motion. The jury found Cicco guilty. Id. at 445 n.3. The Third Circuit, however, vacated the district court's decision to deny Cicco's motion for judgment of acquittal on count 12 and granted the motion because the government was not able to establish jurisdiction under § 666. Id. at 444. For a discussion of the jurisdictional requirements under § 666, see supra note 9 and accompanying text.
The Third Circuit noted that § 601, enacted to prohibit partisan favoritism in federally-funded employment, is not mentioned in the legislative history of § 666. The court concluded that "Congress enacted § 666 to remedy specific deficiencies in existing federal theft and bribery statutes. When it did so, Congress made no suggestion that § 666 was also designed to supplement § 601. Rather, Congress intended § 666 to address different and more serious criminal activity."  

The government, however, is often motivated to try defendants under § 666 because the punishment under § 666 is ten times greater than the punishment under § 601. Violations of § 666 are felonies, while violations of § 601 are prosecuted as misdemeanors. The Cicco court determined that if Congress wanted § 666 to cover activity included in § 601, and thereby change the classification of the crime, it would have expressly stated so in either the statute or the legislative history of § 666.

The Third Circuit supported its conclusion with two theories. First, if Congress had decided to dramatically increase the punishment for specific activity, it would have debated the issue. This topic was not discussed in any congressional debates. Second, the legislative history of § 666 does refer specifically to other related statutes, such as § 201, § 641, and § 645. The Third Circuit concluded that if Congress intended to include the type of activity covered by § 601 in § 666, the legislative history of § 666 would have specifically indicated this intention.

After analyzing the case in the manner described above, the Third Circuit vacated the order and remanded with instructions to dismiss the counts of the indictment concerning § 666. Though agreeing in principle with the district court's holding, the Third Circuit remanded the case to implement a procedural correction.  

82. Cicco, 938 F.2d at 446.
83. Id.
84. Id.; see also 18 U.S.C. §§ 601(a) (maximum imprisonment of one year), 666(a)(2) (maximum imprisonment of ten years).
85. Cicco, 938 F.2d at 446.
86. Id. at 444-46.
87. Id. at 446.
90. Cicco, 938 F.2d at 446.
91. Id.
92. Id. The Third Circuit corrected the district court's erroneous "order of acquittal," which was granted after the jury's guilty verdict. Id. In doing so, the Third Circuit stated that "an order of acquittal . . . is appropriate only where the court finds "the evidence is insufficient to sustain a conviction."" Id. The district
V. CONCLUSION

The Third Circuit addressed the compatibility of § 601 and § 666 as an issue of first impression. The Cicco court definitively declared the statutes' lack of synchronicity. Through the doctrine of lenity and an examination of the legislative history, the Cicco court determined that § 666 does not encompass the corrupt solicitation of political services in exchange for municipal jobs.93

In the Third Circuit, therefore, participation in such activity by government officials is not felonious. Because § 666 does not apply to the solicitation of political services in exchange for municipal jobs, the government must continue to prosecute this type of activity under § 601.94

The Third Circuit should be commended for its decision that recognizes that a fine line exists between long accepted practices of political patronage and activities considered illegal under § 666. A possible unintentional breaking of the law should be punished, but a felony penalty for such activity would be inequitable.

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court ruled as a matter of law that two counts of the indictment concerning § 666 were inappropriate, and the court of appeals agreed. Therefore, the district court did not need to weigh the evidence. Id.

93. For a discussion of the court's holding that § 601 and § 666 do not apply to the same offenses, see supra notes 55-92 and accompanying text.

94. For a discussion of the court's conclusion that § 666 does not apply to the facts in Cicco, see supra notes 60-77.