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Convictions Under Section 666 and Requiring Proof of a Quid Pro Quo

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I. INTRODUCTION

Leona Beldini, once the Deputy Mayor of Jersey City, now faces up to three years in prison for federal program bribery in violation of 18 U.S.C. § 666.[1] Beldini was one of forty-six people arrested in a 2009 Federal Bureau of Investigation corruption sting – the largest sting of this kind in New Jersey history.[2] With corruption present in all levels of the government, it has become imperative for prosecutors to find effective ways to utilize federal bribery statutes in order to bring public officials who engage in these types of activities to justice. One of the important tools available to prosecutors in achieving this objective is § 666.

In her official capacity, Beldini reported directly to Jersey City Mayor Jerramiah Healy.[3] Solomon Dwek, using the name David Esenbach, posed as a real estate developer with the objective of bribing Mayor Healy to expedite his fictitious real estate development plans. [4] Beldini facilitated the meetings between Dwek and Healy, and received money from Dwek including two checks for $10,000 in exchange for alleged official assistance with the development plans.[5] Among the evidence gathered against Beldini were her statements that she could "definitely help [Dwek] get through a lot of red tape,"[6] an agreement on her part to refrain from putting Dwek's name on any documents in order to conceal his involvement,[7] and a reassurance she made to Dwek that "Jerramiah Healy remembers his friends."[8] On February 11,

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[1] Joe Ryan, *Former Jersey City Deputy Mayor Leona Beldini gets Three Years in Prison*, THE STAR LEDGER, (June 14, 2010), http://www.nj.com/news/index.ssf/2010/06/former_jersey_city_deputy_mayo_1.html.
[2] Jason Grant, *U.S. Appeals Court Denies Former Jersey City Deputy Mayor Leona Beldini's Conviction Appeal*, THE STAR LEDGER (Sep. 6, 2011).
http://www.nj.com/news/index.ssf/2011/09/us_appeals_court_denies_former.html.
[3] United States v. Beldini, 2011 WL 3890964, at *1.
[4] *Id.*
[5] *Id.* at *2.
[6] *Id.* (citing Appellee's Br. at 11).
[7] *Id.* at *3 (citing Appellee's Br. at 14).
[8] *Beldini*, 2011 WL 3890964, at *3.

2010, a jury convicted Beldini of two counts of bribery.[9] Beldini appealed the conviction on several grounds, including the claim that the district court erred by failing to instruct the jury that a quid pro quo is required by 18 U.S.C. § 666(a)(1)(b).[10] The Third Circuit affirmed the conviction and refrained from requiring that a quid pro quo be proven in order for Beldini's bribery conviction to stand.[11]

A quid pro quo, Latin for "something for something,"[12] requires a specific intent to give or receive something of value in exchange for an official act.[13] A significant split in the federal circuit courts has developed concerning whether a conviction under § 666 requires proof of a quid pro quo. In certain cases, the ability to convict officials may very well turn on whether or not the prosecutor must prove to the jury that such an exchange occurred. If a quid pro quo requirement existed and the jury had been so instructed, would the jury still have convicted Beldini of two counts of bribery under § 666? Courts on one side of the split would likely hold that Beldini's bribery conviction requires some proof of a quid pro quo.[14] In contrast, courts on the other side of the split would likely agree with the Third Circuit's holding that Beldini's conviction does not require this type of proof.[15] While the Supreme Court has held that a quid

[9] *Id.*
[10] *Id.*
[11] *Id.* at *8.
[12] BLACK'S LAW DICTIONARY (9th ed. 2009) ("An action or thing that is exchanged for another action or thing of more or less equal value; a substitute").
[13] 12 AM. JUR. 2D *Bribery* § 6 (2011) (citing United States v. Alfisi, 308 F.3d 144 (2d Cir. 2002); United States v. Kemp, 500 F.3d 257 (3d Cir. 2007), *cert denied*, 128 S. Ct. 1329, 170 L. Ed. 2d 138 (2008); United States v. Quinn, 359 F.3d 666 (4th Cir. 2004)); *See also* Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1621 (1992) ("a quid pro quo occurs when an official allows her official decisions to be influenced by the receipt of a payment").
[14] *See* United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998) (holding that a conviction under § 666 required the jury to find that the defendant engaged in a specific quid pro quo); United States v. Ganim, 510 F.3d 134 (2d Cir. 2007) (holding that the quid pro quo need not be specific or identifiable at the time of the exchange in order to convict a defendant for bribery under the statute).
[15] *See* United States v. Abbey, 560 F.3d 513 (6th Cir. 2009) (holding that a conviction under § 666 did not require proof of a quid pro quo); United States v. Gee, 432 F.3d 713 (7th Cir. 2005) (holding that identification of a quid pro quo was not necessary for conviction under § 666, and that the jury's finding of corrupt intent was sufficient); United States v. Zimmerman, 509 F.3d 920 (8th Cir. 2007) (holding that it was unnecessary to prove a quid pro quo

pro quo is necessary for convictions under both the Hobbs Act[16] and 18 U.S.C. § 201(c)(1)(A),[17] the Court has yet to address whether analogous reasoning requires proof of quid pro quo to convict under § 666.

Section 666 has a broad jurisdictional trigger: it applies as long as the state or local government has received $10,000 in federal program funding and the bribery-induced theft or transaction is more than $5,000.[18] However, the courts have disagreed whether the statute and its application should be interpreted narrowly or broadly. A narrow interpretation would include a quid pro quo requirement and suggest that a quid pro quo is inherently inferred by the statute's language and legislative intent.[19] A broader interpretation, conversely, would refrain from adopting a quid pro quo in its entirety. For reasons related to congressional intent and public policy, the best solution would require prosecutors and juries to identify an implicit quid pro quo in order to convict individuals under § 666.

This Note explores the current split in the circuit courts regarding whether § 666 contains a quid pro quo requirement and takes the position that injecting an implicit quid pro quo

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of any kind in order to convict an individual for receiving bribes under the statute); United States v. McNair, 605 F.3d 1152 (11th Cir. 2010) (holding that the statute did not impose a specific quid pro quo requirement).

[16] *See* McCormick v. United States, 500 U.S. 257, 272–73 (1991) (The Court emphasized that a conviction of an official "under color of official right" would occur "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." The Supreme Court has also only applied the quid pro quo requirement in those situations where campaign contributions are issue in Hobbs Act prosecutions).

[17] *See* United States v. Sun–Diamond Growers of California, 526 U.S. 398, 406 (1999) (holding that the illegal gratuity statute required a quid pro quo because the § 201 (c)(1)(A) prohibition on gratuities given "for or because of any official act performed or to be performed" seemed "pregnant with the requirement that some particular official act be identified and proved").

[18] Paul Salvatoriello, Note, *The Practical Necessity of Federal Intervention Versus the Ideal of Federalism: An Expansive View of Section 666 in the Prosecution of State and Local Corruption*, 89 GEO. L. J. 2393, 2401 (2001); (citing 18 U.S.C. § 666 (2010)); *See* Elahna S. Weinflash, Annotation, *Validity, Construction, and Application of 18 U.S.C. § 666(a)(2) Pertaining to Bribery Concerning Programs Receiving Federal Funds*, 5 A.L.R. FED. 2d 571 (2005) ("Despite being a criminal statute, courts have generally interpreted 18 U.S.C.A. § 666(a)(2) broadly as to the prohibited conduct and the organizations covered, to cast a wide umbrella to protect federal funds.").

[19] Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 824 (1985) (Lowenstein suggests that under the narrowest reading of "the intent to influence" element, a defendant must have had intent to form an agreement, but the agreement did not necessarily have to be explicit and did not have to relate to any particular official act. So while a narrow reading of the statute would include the quid pro quo requirement in general, Lowenstein suggests that the narrowest reading would encompass a more implicit requirement.).

requirement into the statute is in accordance with congressional intent, and is desirable for reasons of public policy. Part II of this Note explores the role of the quid pro quo and the different choices available for expressing a quid pro quo. Part III of this Note compares similar federal statutes that, on their face, do not require a quid pro quo. Part IV discusses the current circuit split and the reasoning behind the courts' decisions whether to require proof of a quid pro quo under § 666. Lastly, Part V concludes that the adoption of a quid pro quo requirement is desirable, but that proof of such a quid pro quo need not be explicit.

II. A QUID PRO QUO: EXPLICIT, IMPLICIT, OR NON-EXISTENT

The law of bribery is neither "precise," "consistent," nor "clear cut."[20] Successful convictions for bribery depend on the prosecutor's ability to prove the individual's motivation, but because motivation can be difficult to prove, bribery is also difficult to prove.[21] The quid pro quo, or agreement between parties to exchange a benefit in return for an official act, is an essential element of bribery.[22] There are options available to the circuits and to the Supreme Court if certiorari were to be granted on this issue, regarding how the quid pro quo can be interpreted. The Court could choose to require prosecutors and juries to identify an explicit quid pro quo, an implicit quid pro quo, or no quid pro quo at all. The issue facing the courts is essentially twofold: should a quid pro quo requirement be read into the statute, and if so, must the requirement be explicit in nature or can it be implied from the dealings at issue?

James Lindgren, a law professor and noted scholar in the area of extortion, defined bribery as "a corrupt benefit given or received to influence official action so as to afford the

[20] *Id.* at 801.
[21] Robert Sherrill, *Bribes*, GRAND STREET Vol. 4, No. 4, 140, 145 (1985).
[22] Lowenstein, *supra* note 19, at 819 (noting that "Bribery often is assumed to require a quid pro quo, an agreement that in exchange for such and such a benefit, the official will perform (or omit) such and such an official act in the desired manner.").

giver better than fair treatment."[23] A classic quid pro quo deal between a public official and a briber is often easily recognized and prosecuted, but certain situations are inevitably unclear.[24] It is "notoriously difficult" to separate bribery from gifts, tips, legitimate campaign contributions, and log-rolling.[25] An explicit quid pro quo requires the fact-finder to identify a specific exchange between individuals, something analogous to the holding in *McCormick v. United States* whereby extortion could be proven "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."[26] An implicit quid pro quo, however, does not require the fact-finder to pinpoint a specific promise or official act between the parties. With an implicit requirement, a jury could infer from the actions and behavior of the defendant whether he or she engaged in illegal activity with another, even if evidence of an express conversation was not available. Both the adoption of a quid pro quo, and the distinction between an explicit and an implicit proof, would change the way in which the statute is used and affect its reach in prosecuting corrupt behavior.

The Supreme Court has not adopted the terms explicit or implicit, but it has provided a framework in which to understand what evidence each type of proof would encompass. The Court, in its analysis regarding similar federal bribery statutes, referred to the level of proof as either specific or implied. We can look to other federal statutes to help determine legislative

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[23] James Lindgren, *The Theory, History, and Practice of the Bribery–Extortion Distinction*, 141 U. PA. L. REV. 1695, 1700 (1993) (Lindgren goes on to say that bribery is usually thought to consist of paying for better than fair treatment, and that "both the person giving and the person receiving the benefit are guilty of bribery"); *see* Rex v. Vaughan, 98 Eng. Rep. 308, 311 (K.B. 1769) (Mansfield, L.) ("Wherever it is a crime to take, it is a crime to give: they are reciprocal.").

[24] Anthony A. Joseph, *Public Corruption: The Government's Expansive View in Pursuit of Local and State Officials*, 38 CUMB. L. REV. 567, 579 (2008) (Examples of unclear situations may include those times when a "person makes an honest campaign contribution without receiving an immediate appointment…or immediate support for favorable legislation, but the contribution is made to "plant a seed" with the recipient," or when "an invitation is extended to a public official for an out-of-town hunting trip or sporting event or when an expensive Christmas or birthday gift is given to the public official.").

[25] Lindgren, *supra* note 23, at 1707.

[26] *McCormick*, 500 U.S. at 273.

intent, and the way in which the Supreme Court has previously analyzed the quid pro quo element.

III. A COMPARISON OF FEDERAL BRIBERY STATUTES

Section 666, entitled Theft or Bribery Concerning Programs Receiving Federal Funds, is but one of several federal bribery statutes used to curtail public corruption and ensure that individuals who either solicit or accept bribes in violation of those statutes are brought to justice.[27] While the general objective of all of these statutes is similar in nature, each has been crafted with a relatively specific purpose in mind. With respect to the application of a quid pro quo requirement in each of these statutes, the Supreme Court has addressed the issue as it pertains to 18 U.S.C § 201[28] and the Hobbs Act.[29] Section 666 is different from § 201 and the Hobbs Act in both its language and its scope, but similar in its aim, and the Supreme Court has yet to decide whether or not the prosecution must prove a quid pro quo to satisfy a conviction under the statute.

A. 18 U.S.C. § 201: *SUN–DIAMOND* AND PROOF OF A QUID PRO QUO

Section 201 of Title 18 of the United States Code, titled Bribery of Public Officials and Witnesses, provides that it is a federal crime to corruptly give, offer, or promise anything of value to any public official.[30] This statute prohibits two types of payments to federal officials: bribes and illegal gratuities.[31] The determination of whether a payment constitutes a bribe or an illegal gratuity depends on the intent of the payor.[32] A bribe requires that the payment be made

[27] 18 U.S.C. § 666 (2011).
[28] *See Sun–Diamond*, 526 U.S. at 398.
[29] *See McCormick*, 500 U.S. at 257.
[30] 18 U.S.C. § 201 (2011).
[31] *Id.*
[32] *Jennings*, 160 F.3d at 1013.

or promised "corruptly," whereas an illegal gratuity is a payment made to an official concerning a specific official act, or omission, that the payor expected to occur in any event (and where corrupt intent to influence official behavior is not required).[33] This statute is primarily concerned with criminalizing corrupt conduct where public officials are involved in accepting bribes to further official acts.

The courts have treated bribes and illegal gratuities differently. The ability to convict an individual or public official under § 201 for bribery requires proof of a quid pro quo. The Supreme Court held that in order to establish a violation under 18 U.S.C. § 201(c)(1)(A),[34] the government must prove a link between a thing of value conferred upon a public official and a specific official act for which it was given.[35] The distinction between the bribe and illegal gratuity plays a role here in that only the bribe requires a quid pro quo, defined by the Court as a specific intent to give or receive something of value in exchange for an official act.[36] The Court in *Sun–Diamond* found that the insistence upon an "official act" within the text of the statute where this language was so carefully defined seems "pregnant with the requirement that some particular official act be identified and proved."[37] Aside from its decision that this type of interpretation exemplifies the more natural meaning of the language in § 201(c)(1)(A), the Court was persuaded to require proof of a quid pro quo because of the "peculiar results" that an

[33] *Id. See* United States v. Griffin, 154 F.3d 762, 764 (8th Cir. 1998) ("The core difference between a bribe and a gratuity is…the *quid pro quo*, or the agreement to exchange cash for official action."); *See also* Lowenstein, *supra* note 18, at 797 (1985) (comparing the elements of an unlawful gratuity offense with bribery: "The requirement that there be a public official is substantially the same. A transaction involving a former official, however, can be an unlawful gratuity but not a bribe. This is because a bribe must be made in contemplation of a future official act, whereas an unlawful gratuity may be made in contemplation of an act in the future or the past.").
[34] 18 U.S.C § 201(c)(1)(a) (Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official.).
[35] *Sun–Diamond*, 526 U.S. at 414.
[36] *Id.* at 404–05.
[37] *Id.* at 406.

alternative reading of the statute would produce.[38] In essence, under an alternative reading, the individual who gives gifts or the public official who receives them, would violate the statute and face potential prosecution.[39]

B. THE HOBBS ACT AND A QUID PRO QUO: REQUIRED BUT SUBJECT TO INTERPRETATION

The Hobbs Act makes it a crime to obstruct, delay, or affect commerce by robbery or extortion.[40] Extortion is defined in the Act as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[41] These provisions were enacted as part of the Anti-Racketeering Act of 1934 and remained unchanged in the Hobbs Act of 1948.[42] Yet it was not until 1972 that any court applied the Act to bribery.[43] Originally, extortion convictions of individuals who had received property depended upon a showing of actual or threatened force or fear, but courts later began to accept the notion that public officials could violate the statute without employing either.[44] The Supreme Court has since acknowledged that the statute applies to the acceptance of bribes by public officials,[45] and the Hobbs Act has become another successful tool for prosecutors in battling public corruption and bribery.

The Supreme Court held in *McCormick v. United States*[46] that proof of a quid pro quo is necessary for conviction under the Hobbs Act, but only in certain situations. If payments

[38] *Id.* At 406–07 (noting that such a reading would criminalize, for example, token gifts to the President based on his official position or a high school principal's gift of a school baseball cap to the Secretary of Education by reason of his office).
[39] *Id.* at 408.
[40] 18 U.S.C. § 1951 (2011).
[41] 18 U.S.C. §1951(a), (b)(2); *See also* Lindgren, *supra* note 23, at 1696 (Extortion under color of official right can be defined as "the seeking or receipt of a corrupt payment by a public official (or a pretended public official) because of his office or his ability to influence official action.").
[42] *McCormick*, 500 U.S. at 277 (Scalia, J., concurring).
[43] *Id.* at 278 (Scalia, J., concurring); *See* United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir. 1972).
[44] Peter D. Hardy, Note, *The Emerging Role of the Quid Pro Quo Requirement in Public Corruption Prosecutions Under the Hobbs Act*, 28 U. MICH. J.L. REFORM, 409, 411 (1995).
[45] *Id.* at 411–12 (citing Evans v. United States, 504 U.S. 255 (1992)).
[46] 500 U.S. at 257.

constitute campaign contributions, such proof is necessary.[47] The government is required to prove that the public official performed or refrained from performing an official duty in return for the payment of campaign funds.[48] The Court emphasized that "the receipt of such contributions is…vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."[49] Furthermore, a specific quid pro quo is necessary, not just a general expectation of a benefit.[50] While the Court made it clear that a quid pro quo was necessary for a conviction under the Hobbs Act in those instances where campaign contributions were involved, it is unclear whether this requirement applies to all Hobbs Act prosecutions, including those that do not involve campaign contributions.

The Court again addressed the issue of whether a quid pro quo is required to convict individuals under the Hobbs Act in *Evans v. United States*.[51] There the Court declined to limit the Act further and held that an official can commit extortion under color of official right without having "induced" payments from another.[52] While the Court again found that proof of a quid pro quo is required in cases where campaign contributions are at issue, the opinion suggests that the requirement is not as stringent as *McCormick* might indicate.[53] The agreement in *Evans* was required to concern a specific official act, but it did not have to be explicit. An agreement could be implied from an official's words or actions.[54] Despite this slight departure, the quid pro quo requirement for campaign contribution cases prosecuted under the Hobbs Act remained intact.

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[47] *Id.* at 274.
[48] *Id.*
[49] *Id.* at 273.
[50] *Id.*
[51] *Evans v. United* States, 504 U.S. 255 (1992).
[52] 504 U.S. at 265–66.
[53] Hardy, *supra* note 44, at 423.
[54] Ilissa B. Gold, Note, *Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000's*, 36 WASH. U. J. L. & POL'Y 261, 282 (2011).

In a post *Evans* world, the identification of a quid pro quo is required in order to convict an individual under the Hobbs Act for extortion whenever campaign contributions are at issue. It is unclear whether this type of proof is an explicit or an implicit one, and it is undecided as to whether this requirement applies to other prosecutions under the Hobbs Act.[55] In spite of the conflicting interpretations that have arisen as a result of the holdings in *McCormick* and *Evans*, there is at least some Supreme Court guidance in determining the requirements for conviction under § 201 and the Hobbs Act. There is even less direction, however, as to whether a quid pro quo is required for convictions under § 666.

C. SECTION 666: A SUPPLEMENTAL TOOL IN COMBATING PUBLIC CORRUPTION

Section 666 provides that it is a federal crime to embezzle, steal, or obtain by fraud property worth $5,000 or more from an organization that "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, subsidy, loan, guarantee, insurance, or other form of Federal assistance."[56] The statute also makes it a crime to corruptly give, solicit, or accept bribes "in connection with any business transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more."[57] In enacting the statute as part of the Comprehensive Crime Control Act of 1984, Congress intended 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."[58]

[55] *See Id.* at 271 ("The circuits that have confronted public official extortion cases since Evans…have been left to reconcile the requirement of explicitness in a quid pro quo agreement from McCormick with Justice Kennedy's argument that a quid pro quo need not be express.").
[56] 18 U.S.C. § 666(b) (2011).
[57] *Id.* § 666(a)(1)(B), (a)(2).
[58] S. REP. NO. 98-225, at 369 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3510.

This statute seems to expand upon the already existing federal bribery statutes by increasing the federal government's reach in prosecuting corruption in state and local governments that receive federal money. Aside from expanding upon the Hobbs Act and § 201, § 666 could be viewed as a possible response to their inadequacies. The statute as a whole avoids the problems of its predecessors by eliminating the government's burden of establishing a link between the stolen property or the bribed official and the federal government.[59] Although § 201(b) requires that a bribe be given or received to influence an "official act" or "in return for an official act," § 666 sweeps more broadly than either § 201(b) or (c) because it requires only that money be given with the intent to influence or reward a government agent "in connection with *any* business, transaction, or series of transactions."[60] The differences between these two statutes centers on the language: namely an "official act" compared with "any business, transaction, or series of transactions" and "in return for" or "because of" compared with "in connection with." Additionally, the relevance of the $5,000 threshold is to avoid prosecutions for minor kickbacks and limit violations to cases of significant or outright corruption.[61] Since its creation, § 666 has become a significant tool in combating bribery in connection with federal funds.

IV. THE CIRCUIT SPLIT: REQUIRING PROOF A QUID PRO QUO FOR CONVICTIONS UNDER § 666

The quid pro quo requirement, as it pertains to § 666, has been the subject of bribery suits in multiple federal circuit courts and has also resulted in a circuit split.[62] Defendants in these cases have been prosecuted under § 666(a)(1)(B) or § 666(a)(2), but the same operative language has been applied to both subsections. Currently, the Second and Fourth Circuits have held that

[59] Salvatoriello, *supra* note 18, at 2397.
[60] *McNair*, 605 F.3d at 1191(emphasis added) (citing 18 U.S.C. § 666(a)(1)(B) & (a)(2)).
[61] *Abbey*, 560 F.3d at 522.
[62] *Beldini*, 2011 WL 3890964, at *7.

bribery convictions under § 666 require proof of a quid pro quo, yet they differ on the level of specificity required to prove the exchange.[63] Conversely, the Sixth, Seventh, Eighth, and Eleventh Circuits have deemed it unnecessary to prove a quid pro quo in any capacity in order to convict an individual of soliciting or accepting bribes in violation of § 666.[64]

A. THE SECOND AND FOURTH CIRCUITS: INJECTING A QUID PRO QUO REQUIREMENT INTO § 666

In *United States v. Jennings*,[65] the Fourth Circuit held that a jury must find a specific quid pro quo in order to convict an individual of violating § 666.[66] A jury found Larry Jennings Sr., a housing repair contractor, guilty of three counts of violating § 666 after he made cash payments to Charles Morris, the administrator of the Vacancy Special Funding Program ("VSFP") in order to secure contractor positions in housing unit renovations.[67] Jennings paid cash to Morris on five separate occasions. After the initial payment, VSFP contracts and payment checks regularly flowed from the company Morris worked for to Jennings's companies.[68] Morris admitted to accepting cash from Jennings, but unsuccessfully argued that he took gifts, not bribes.[69] The court labeled Jennings's intent sufficiently corrupt to constitute his payments as "bribes" and upheld Jennings's conviction because "the evidence was sufficient to prove that he intended to influence Morris's official acts by paying him money, that is, Jennings intended to engage in a quid pro quo."[70]

According to the Fourth Circuit, a court instructing a jury on § 666(a)(2) must define the "corrupt intent" element in the same way as it would if instructing on § 201(b), i.e., only if it finds that an individual intended to exchange a payment for some relatively specific official act

[63] *See Jennings*, 160 F.3d at 1006; *Ganim*, 510 F.3d at 134.
[64] *See Abbey*, 560 F.3d at 513; *Gee*, 432 F.3d at 713; *Zimmerman*, 509 F.3d at 920; *McNair*, 605 F.3d at 1152.
[65] *Jennings*, 160 F.3d at 1006.
[66] *Id.* at 1019.
[67] *Id*. at 1011.
[68] *Id.*
[69] *Id.* at 1012.
[70] *Id.* at 1015.

or course of action.[71] The jury must be instructed that "corrupt intent" includes a quid pro quo requirement; otherwise the instructed definition of "corrupt intent," an essential element of bribery, would be erroneous.[72]

Similar to the Fourth Circuit's ruling in *Jennings*, the Second Circuit has also held that a quid pro quo requirement exists, but it has refrained from applying the same degree of explicitness.[73] Joseph Ganim served as the mayor of Bridgeport, Connecticut from 1991 through 2003.[74] He was convicted under § 666 for receiving bribes despite his claim that the cash, meals, clothing, wine and other gifts he received were given out of friendship or legitimate lobbying activity.[75] The Second Circuit held that, as long as the jury found that an official or agent accepted gifts in exchange for a promise to perform official acts for the giver, it was not necessary to identify the specific act to be performed at the time of the promise or to link each specific benefit to a single official act.[76] The reasoning for this holding lies in the reality that ongoing schemes such as the one present in *Ganim* are no less "extortionate" simply because payments are set up as an exchange for specific official acts as the opportunities to commit those acts arises:[77] "[a] reading of the statute that excluded such schemes would legalize some of the most pervasive and entrenched corruption [and] cannot be what Congress intended."[78] A jury is required only to find that a particular payment was made in exchange for a commitment to

[71] *Id.* at 1019 ("One has the intent to corrupt an official only if he makes a payment or promise with the intent to engage a fairly specific quid pro quo with that official. Of course, a court need not resort to Latin to make this point. It simply may explain that the defendant must have intended for the official to engage in some specific act (or omission) or course of action (or inaction) in return for the charged payment."). *Id.* at 1018–19.
[72] *Id.* at 1020–21.
[73] *Ganim*, 510 F.3d at 134.
[74] *Id.* at 140.
[75] *Id.*
[76] *Id.* at 147.
[77] *Id.*
[78] *Id.*

perform beneficial official acts in the future.[79] The court recognized that while particular bribes will frequently be linked to particular official acts at the time a corrupt agreement is made, this will not always be the case. It is therefore important to relax the quid pro quo requirement in order for § 666 to cover even those violations where a specifically linked quid pro quo is not before the jury.[80]

In sum, the Second and Fourth Circuits have held that bribery convictions under § 666 require some proof of a quid pro quo, although those requirements differ in the specificity of the quid pro quo agreement. The Fourth Circuit requires a finding of a relatively specific quid pro quo,[81] while the Second Circuit has held that the beneficial act need not be specific or even identifiable at the time of the exchange.[82]

B. The Sixth, Seventh, Eighth and Eleventh Circuits: No Such Proof of a Quid Pro Quo Necessary

Former City Administrator of Burton, Michigan, Charles Abbey, was convicted for receiving bribes from Albert Louis-Blake Rizzo, a local land developer.[83] The government in this case did not introduce any evidence establishing that Rizzo and Abbey had an express agreement for a specific official act to be performed in return for Rizzo's gift, but it did assert that Abbey used his influence and position to assist Rizzo with several land developments.[84] The Sixth Circuit, focusing primarily on the plain language of the statute which lacks a reference to any requisite proof, found that a conviction under § 666 did not require a quid pro quo.[85] The

[79] *Id.*
[80] *Ganim*, 510 F.3d at 147.
[81] *Jennings*, 160 F.3d at 1011.
[82] *McNair*, 605 F.3d at 1190 (discussing the Second Circuit's ruling in *Ganim* and stating that the court's analysis lay somewhere beyond a "no-quid pro quo requirement" as adopted by the Sixth, Seventh, and Eleventh Circuits and the Fourth Circuit's requirement).
[83] *Abbey*, 560 F.3d at 515.
[84] *Id.*
[85] *Id.* at 521.

court asserted that *Sun–Diamond's* heightened quid pro quo requirement for § 201 convictions is inapplicable to both § 666 and the Hobbs Act due to the fact that they are "markedly different" statutes.[86] The district court's jury instructions were not improper for failing to include a requirement that the government prove a direct link from some specific payment to a promise of some specific official act.[87] According to the Sixth Circuit, the jury was only required to find what it did, namely that Abbey accepted property with the corrupt intent to use his official influence in Rizzo's favor.[88]

A similar conclusion was reached by the Seventh Circuit when it held that the absence of a quid pro quo would not prevent conviction under § 666.[89] A jury concluded that Carl Gee caused the Opportunities Industrialization Center of Greater Milwaukee ("OIC") to pay Gary George, who at the time was the majority leader of Wisconsin's state senate, for his assistance in directing welfare-program-management contracts to OIC and further preventing the state from auditing OIC's performance.[90] Gee caused OIC to pay kickbacks to George and these kickbacks violated § 666 because OIC received more than $10,000 annually in federal grants.[91] The court held that "a *quid pro quo* of money for a specific legislative act is *sufficient* to violate the statute but it is not *necessary*."[92] The court also held that a sensible jury would be able to conclude that George had corrupt intent, which is required by the statute, and that Gee conspired with George

[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Gee*, 432 F.3d at 713.
[90] *Id.* at 714.
[91] *Id.*
[92] *Id.* (emphasis added) (The court goes further to explain that it is enough if someone "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 anything of value over $5,000 or more," quoting directly the language from the statute).

to carry out a plan whereby federal money in OIC's hands was exchanged for George's influence.[93]

In *United States v. Zimmerman*,[94] the Eighth Circuit held that the government was not required to prove any quid pro quo for a conviction under § 666(a)(1)(B).[95] Gary Dean Zimmerman represented the sixth ward on the Minneapolis City Council from 2002 until 2005 and was one of the six members on the council's zoning and planning committee.[96] Gary Carlson, a real estate developer, was planning a multimillion dollar mixed-use project on the edge of the sixth ward, and recognized that his rezoning application faced opposition due to neighborhood resistance to additional retail in the area.[97] After several meetings, Zimmerman solicited $100,000 from Carlson for the legal bill he and other plaintiffs had incurred in an unsuccessful challenge to an earlier redistricting plan.[98]

On one particular occasion, Carlson, while wearing a wire, attended a fundraiser for Zimmerman and requested his help to lobby the planning commission members in advance for the upcoming vote on his rezoning application and Zimmerman promptly agreed.[99] More money was exchanged between the parties regarding the rezoning plan and Zimmerman's campaign, but Zimmerman argued that the government presented insufficient proof that he intended a quid pro quo in his dealings with Carlson.[100] Zimmerman claimed that he could not be found guilty of accepting payment for official actions that would have been taken regardless of whether Carlson paid him.[101] The court noted that § 666(a)(1)(B) prohibits both the acceptance of bribes and

[93] *Id.* at 415.
[94] *Zimmerman*, 509 F.3d at 920.
[95] *Id*. at 927.
[96] *Id.* at 922.
[97] *Id.* at 922–23.
[98] *Id.*
[99] *Id.* at 923.
[100] *Zimmerman*, 509 F.3d at 927.
[101] *Id.*

acceptance of gratuities intended to be a bonus for taking official action.[102] Zimmerman was indicted, convicted of, and sentenced for accepting gratuities rather than bribes, and the government was not required to prove any quid pro quo.[103] On appeal, the Eighth Circuit held that it was unnecessary to prove a quid pro quo of any kind in order to convict an individual for receiving either gratuities *or* bribes under the statute.[104]

The Eleventh Circuit was confronted with a consolidated appeal arising from five bribery and public corruption cases relating to the $3 billion repair and rehabilitation of a sewer and wastewater treatment system in Jefferson County, Alabama.[105] The defendants argued that their bribery convictions under § 666 should be vacated because the indictments failed to allege that the contractor-defendants provided specific benefits to county employees in exchange for, and with the intent that the employees perform a specific official act.[106] The Eleventh Circuit again looked to the plain language of the statute and concluded that while the requirement of a "corrupt' intent in § 666 did narrow the conduct that violates the statute, it did not impose a specific quid pro quo requirement.[107] The government was required to show only what is expressed in the statute, which does not include an intent that a specific payment was solicited, received, or given in exchange for a specific official act (i.e., a quid pro quo).[108]

Without uniform interpretation or guidance from the Supreme Court or Congress, several circuits have treated the quid pro quo requirement differently. The Fourth Circuit required proof of an explicit quid pro quo for convictions under § 666, while the Second Circuit relaxed the requirement and applied an implicit quid pro quo. The Sixth, Seventh, Eighth, and Eleventh

[102] *Id.* (noting the language of § 666(a)(1)(B) "corruptly solicits or demands…intending to be influenced or rewarded").
[103] *Id.*
[104] *Id.* at 920.
[105] *McNair*, 605 F.3d at 1164.
[106] *Id.* at 1184.
[107] *Id.* at 1118.
[108] *Id.*

Circuits, in contrast, have declined to inject a quid pro quo requirement in § 666 convictions altogether. In light of this significant split, a standard should be recognized and implemented by the Supreme Court in order to achieve some consistency. Otherwise, a politician in one state may face conviction under § 666, while another politician in the next state over may not, even if the two engage in identical conduct.[109]

V. AN IMPLICIT QUID PRO REQUIREMENT IS THE BEST SOLUTION

The recognition of an implicit quid pro quo requirement by the courts in § 666 is the most effective and equitable solution in light of the current circuit split. An explicit quid pro quo would prove too onerous a requirement for prosecution, and the lack of any quid pro quo requirement would allow for innocent individuals to become susceptible to prosecution. Despite the absence of any reference to a quid pro quo in the language of the statute, such a requirement can be inferred from legislative intent. In addition to intent, it further makes sense to apply an implicit proof because of the policy implications that would result if no such requirement existed. Furthermore, based on its ruling in *McCormick* and *Evans*, the Supreme Court might take a similar approach and require a quid pro quo for conviction under § 666, despite the lack of any direct reference to one in the statutory text.

A. LIMITS OF THE STATUTORY LANGUAGE

Section 666, on its face, does not require a quid pro quo to convict people of soliciting or accepting bribes in relation to federal funds. The text of § 666(a)(1)(B), which applies to the alleged recipient of a bribe, provides that an official has violated the statute when he or she "corruptly" accepts a gift "intending to be influenced or rewarded in connection with any

[109] Justin Weitz, Note, *The Devil is in the Details: 18 U.S.C. § 666 After Skilling v. United States*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 805, 831 (2011).

business, transaction, or series of transactions."[110] The Supreme Court held in *Sun–Diamond* that § 201, which also does not expressly require a quid pro quo, does in fact require one.[111] This could be attributable to the fact that bribery, as it is generally understood, constitutes an exchange of one thing for another, i.e., a quid pro quo.[112] One could argue that if Congress desired to inject a quid pro quo limitation for convictions under § 666, it could have easily written this into the statute.[113] However, despite a lack of any reference to a quid pro quo, one may be inferred simply because the essence of bribery embodies the quid pro quo.[114]

The Sixth Circuit distinguished § 201 from both the Hobbs Act and § 666. Neither § 666 or the Hobbs Act contains the "official act" language that the *Sun–Diamond* Court found "pregnant with the requirement that some particular official act be identified and proved."[115] The Supreme Court's statement in *Sun–Diamond* that bribery requires a quid pro quo, defined as "the specific intent to give or receive something of value in exchange for an official act,"[116] was made in the context of a statute that was "merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self–enriching actions by public officials."[117] Section 666 is similar to § 201 and to the Hobbs Act in that all fail to include any "quid pro quo" language in the statutory text. The plain language makes no mention of any requisite tie between the business transaction and the bribe being solicited or accepted. As discussed in Part III above, this uncertainty has led to a significant split in the circuits over whether a quid pro quo requirement should be read into the statute, and whether

[110] 18 U.S.C. § 666(a)(1)(B) (2011).
[111] *Sun–Diamond*, 526 U.S. at 405.
[112] McNair v. United States, 2010 WL 4163763, at *11.
[113] *See* Salvatoriello, *supra* note 18, at 2410 (discussing a federal interest limitation and noting that if Congress wanted to include a federal interest limitation under § 666, it could have easily done so by writing it into the text of the statute or into the legislative history).
[114] *See* McNair v. United States, 2010 WL 4163763, at *11.
[115] *Abbey*, 560 F.3d at 521 (citing *Sun–Diamond*, 526 U.S. at 406).
[116] *Sun–Diamond*, 526 U.S. at 404–405 (emphasis omitted).
[117] *Abbey*, 560 F.3d at 521 (citing *Sun–Diamond*, 526 U.S. at 409).

reasoning analogous to that in *Sun–Diamond* and *McCormick* also justifies the injection of such a requirement into § 666.

As a last resort doctrine, the rule of lenity may provide some direction for the courts in their decision to require proof of a quid pro quo for convictions under § 666. "The rule of lenity is applied when a broad construction of a criminal statute would 'criminalize a broad range of apparently innocent conduct.'"[118] An expansive interpretation of this criminal statute would likely result in this type of criminalization.[119] It is important to have a determinative criminal threshold that would allow for defendants to be on notice of what types of actions would constitute a violation under the statute and allow for the statute to cover the type of criminal behavior it was intended to reach.[120] The Eleventh Circuit out right dismissed the application of the rule of lenity to cases involving convictions under § 666.[121] In *McNair,* the court noted that the defendants failed to identify a "grievous ambiguity" within the statute or to show that the statutory language criminalizes innocent behavior.[122] The court reasoned that the mere possibility of a narrower statutory construction by itself does not make the rule of lenity applicable.[123] However, interpreting and reconciling the statute "as is" has proven to be an arduous task, and its tendency toward ambiguity requires that it be resolved in favor of lenity.[124]

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[118] McNair v. United States, 2010 WL 4163763 at *25 (citing United States v. Svete, 556 F.3d 1152, 1192 (11th Cir. 2009) (*en banc*) (quoting Liparota v. United States, 471 U.S. 419, 426 (1985)).
[119] John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. Mich. J. L. Reform 1, 23 (2010).
[120] *Id.* at 32 (describing the justifications for the application of the lenity rule when criminal statutes are ambiguous in nature the author notes that "[t]he rule also ensures that the legislature, and not the executive acting through its agent-prosecutor, proscribes and determines the threshold of criminal behavior"); *See* Lindgren, *supra* note 23, at 1740 ("To prosecute corruption fairly, legislatures and courts must give notice of what's prohibited and what's not.").
[121] *McNair,* 605 F.3d at 1192.
[122] *Id.*
[123] *Id.*
[124] *See* McNair, 2010 WL 4163763 at *27 ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (quoting Cleveland v. United States, 531 U.S. 12, 25 (2000)).

A strict adherence to the § 666 statutory text alone, where a quid pro quo is not expressly required, could result in unconstitutional vagueness "because '[w]hat renders a statute vague is…the indeterminacy of precisely what…fact must be established to show guilt.'"[125] The absence of a quid pro quo here leaves the question of what exactly is needed to convict an individual under the statute completely open to interpretation by the courts and the defendant guessing as to whether he or she is acting in violation of the law. Vagueness in the language of the statute leaves the interpretation of the law to the discretion of individual prosecutors.[126]

While the text in § 666 does not recognize a quid pro quo requirement, the analysis should not stop at the statutory text alone. In the cases of § 201 and the Hobbs Act, the Court applied the requirement despite its absence in the text. Because the statutory language is not clear here, we must look beyond the plain language to discern congressional intent in order to determine what type of proof requirement is intended and most desirable.

B. AN IMPLICIT REQUIREMENT COMPORTS WITH CONGRESSIONAL INTENT

Section 666 should not be read literally and without reference to its legislative context. In enacting § 666, Congress "merely adopt[ed] into federal statutory law a concept of crime already so well defined in common law and statutory interpretation" that Congress' silence on the requirement of a quid pro quo cannot be taken to mean that none is required.[127] Section 666 was enacted for a specific purpose: the prevention of corruption in federally funded programs by nonfederal employees.[128] Congress expressly intended to "augment the ability of the United

[125] McNair v. United States, 2010 WL 4163763 at *25 (citing United States v. Williams, 553 U.S. __, at 306 (2008). (*See also* Skilling v. United States, 130 S. Ct. 2896, 2927–28 (2010) (noting "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.") (internal quotations omitted).
[126] Weitz, *supra* note 109, at 833.
[127] McNair v. United States, 2010 WL 4163763, at *11 (*See also* Morisette v. United States, 342 U.S. 246, 261–62 (1952)).
[128] Daniel N. Rosenstein, Note, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673, 702 (1990).

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."[129] Congress went further to state that it "intends that the term 'Federal program…' be construed *broadly*, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through federal programs."[130] Therefore, the best reading of the statute would include an implicit requirement, so that any and all corrupt dealings related to the use of federal funds could be prosecuted, not just those in which the solicitors or recipients expressed an explicit exchange.

Lindgren puts forth two situations that both involve corrupt takings on the part of officials without an explicit quid pro quo:

> (1) An elected judge approaches a lawyer in a major case pending before the judge and says, "I haven't heard from you yet. Would you donate $100,000 to my re-election fund?"
> (2) An elected legislator approaches a businessman and says, "If you pay me $100,000 for my campaign, I can't promise you how I'll vote on the many pieces of legislation affecting your company– that would be illegal. But if you contribute, I predict that I will vote your way."[131]

A quid pro quo could be implied in these situations, but they are not explicit.[132] These examples refer to campaign contributions and would ordinarily be subject to prosecution under the Hobbs Act. However, the same type of problem would occur concerning situations pertaining to § 666, if, for example, bribery in connection with organizations receiving federal money was at issue instead of campaign contributions. The line between an explicit and implicit quid pro quo may

[129] S. REP. NO. 98-225, at 369 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3510.
[130] *Id.* (emphasis added); *See* United States v. Valentine, 63 F.3d 459, 463 (6th Cir. 1995) (noting "it is apparent that Congress intended to expand the federal government's prosecutorial power to encompass significant misapplication of federal funds at a local level").
[131] Lindgren, *supra* note 23, at 1711 (discussing the holding of *McCormick* and the explicitness requirement for official extortion and finding that these scenarios would not be considered extortion under Justice White's holding because they are not explicit in nature).
[132] *Id.* (neither of these scenarios explicitly promises any specific action to be undertaken as a result of the payoff).

be unclear at times,[133] but requiring proof of a specific exchange only may prevent prosecution of otherwise corrupt or unlawful conduct.[134] It was the purpose of the statute to actually expand upon the previous federal bribery statutes in prosecuting corruption, and an explicit requirement would effectively limit the statute's scope.

Justice White, writing for the majority in *McCormick*, endorsed an explicit quid pro quo requirement for convictions under the Hobbs Act in order to prevent legitimate transactions from being prosecuted.[135]

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates…Whatever ethical considerations and appearances may indicate, *to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents*, shortly before or after campaign contributions are solicited and received from those beneficiaries, *is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right."*[136]

Without an explicit quid pro quo requirement, Justice White argued that prosecution of both legal and unavoidable conduct, such as the exchange of legitimate campaign contributions or passage of beneficial legislation, would ultimately result.[137]

Justice Stevens, writing for the majority in *United States v. Evans*,[138] provided for a less rigorous, and therefore more encompassing quid pro quo requirement.[139] The defendant's

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[133] Diamond, *supra* note 119, at 19.
[134] *See* Lowenstein, *supra* note 19, at 825–26 (Lowenstein, who ultimately argued that generally reading a quid pro quo requirement into the majority of bribery statutes simply to simplify the law of bribery would be arbitrary, noted that: "Corrupt arrangements in the most conventional sense and in the most conventional settings often carried out with express quid pro quo agreements.").
[135] *McCormick*, 500 U.S. at 272.
[136] *Id.* (emphasis added).
[137] *Id.* ("To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation").

acceptance of a bribe "constituted an implicit promise to use his official position to serve the interests of the bribe-giver."[140] The inducement is criminal if it is either expressly stated or implied from the words or actions of the briber.[141] The Court's justification for its departure from the *McCormick* standard was that otherwise "the law's effect could be frustrated by knowing winks and nods."[142] Both opinions express realistic concerns regarding the effects that each type of proof may have, but the *Evans* standard, as applied to § 666 cases, would comport better with the legislative intent present here.

C. PUBLIC POLICY CONCERNS AND OTHER CONSIDERATIONS

Justice Stewart, when describing pornography, famously stated "I know it when I see it."[143] This characterization could be applied to cases concerning bribery or theft, but the reality remains that different courts can reach different conclusions even when presented with essentially the same facts.[144] What looks like on obvious bribe to one juror may seem like a legitimate exchange to another. A quid pro quo requirement would eliminate the discrepancies among the courts and make it clear to defendants, prosecutors, and juries exactly what a violation of § 666 entails.[145]

The absence of a quid pro quo requirement could lead to convictions that, on their face, would not be considered illegal transactions.[146] The imposition of a quid pro quo requirement, though it does not need to reach the level of explicitness advocated by Justice White, would at least provide clarity as to what a prosecutor must prove under § 666 to secure a conviction and

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[138] *Evans*, 504 U.S. 255 (1992).
[139] Hardy, *supra* note 44, at 422.
[140] *Evans*, 504 U.S. at 257.
[141] Lindgren, *supra* note 23, at 1733–34.
[142] *Evans*, 504 U.S. at 274.
[143] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[144] Lindgren, *supra* note 23, at 19–20.
[145] *See* Diamond, *supra* note 119, at 25 ("It is [the] elusiveness of evidence of bribery that both protects the guilty and threatens the innocent.").
[146] *See McCormick*, 500 U.S at 257.

what instructions must be provided to the jury.[147] The Eleventh Circuit argued that a quid pro quo was not necessary because the language of the statute is sufficient on its own.[148] However, reliance on the corruption requirement alone is subject to ambiguity.[149] A quid pro quo requirement would provide clearer notice to defendants as compared to a simple corruption requirement.[150]

Aside from affording better notice to defendants allegedly in violation of the statute, a quid pro quo requirement would afford juries significant guidance in their decision-making.[151] The Fourth Circuit therefore correctly concluded that a jury instruction regarding violations of § 666 was erroneous unless an explanation of "corrupt intent" required the jury to find a "relatively specific" quid pro quo.[152] A jury would not be required to pinpoint an explicit tradeoff or identify a specific official act; instead, it would only have to imply from the dealings that the parties intended to engage in an exchange.[153] The Eleventh Circuit, however, did not require the jury to find a quid pro quo, and instead relied on a simplistic reading of the statutory language.[154]

The district court in *McNair* gave a jury charge that merely repeated the language of the statute, and the only definition of "corruptly" provided to the jury was that "[a]n act is done 'corruptly' if it is performed, voluntarily, deliberately, and dishonestly for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or

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[147] *See* Lindgren, *supra* note 23, at 1737.
[148] *McNair*, 605 F.3d at 1188 ("To be sure many § 666 bribery cases will involve an identifiable and particularized official act, but that is not required to convict. Simply put, the government is not required to tie or directly link a benefit or payment to a specific official act by that County employee. The intent that must be proven is *an intent to corruptly influence or to be influenced "in connection with any business" or "transaction,"* not an intent to engage in any specific quid pro quo) (emphasis added).
[149] Lindgren, *supra* note 23, at 1737.
[150] *Id.*
[151] *Id.*
[152] *Jennings*, 160 F.3d at 1022.
[153] *See id.*
[154] *McNair*, 605 F.3d at 1188.

lawful result by an unlawful method or means."[155] This circular definition of "corruptly" hardly informs the jury of what it must identify.[156] In contrast, instructing the jury to identify either an implied or explicit quid pro quo would make it easier for the jury to understand the task at hand and avoid issues of ambiguity and confusion.[157]

While Justice White's concerns regarding the possibility of lawful, everyday activity falling within the ambit of prohibited transactions have some merit, an implicit quid pro quo requirement (as opposed to an explicit one) would prevent unlawful transactions from potentially slipping through the cracks.[158] Imposing an explicit requirement could potentially protect those corrupt officials who are smart or careful enough to avoid making explicit transactions.[159] While certain cases may suggest that an explicitness requirement would not prove to be a significant obstacle for prosecutors because officials often implicate themselves in relatively clear and explicit ways,[160] an implicit requirement would reach those situations where officials refrain from making explicit exchanges. Undercover government agents and informants, such as Dwek in the *Beldini* case, can purposefully render an official's transactions conveniently explicit.[161] However, subtle bribery is just as unlawful and perhaps equally, if not more so, common than explicit bribery.[162] An implicit quid pro quo would strike a balance between the concerns of

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[155] McNair v. United States, 2010 WL 4163763 at *35 (arguing that this particular instruction essentially told the jury that McNair did something corruptly, causing his conduct to be illegal, if it was done "dishonestly" to accomplish an illegal purpose).
[156] *Id.*
[157] *See Evans*, 504 U.S. at 274 (Kennedy, J., concurring) ("The criminal law…concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.").
[158] Hardy, *supra* note 44, at 441.
[159] *Id. See also* Lindgren, *supra* note 23, at 1733, 1737 (criticizing an explicitness requirement stating that "[i]f you can prove a quid pro quo beyond a reasonable doubt, why should you also have to prove beyond a reasonable doubt that the quid pro quo is explicit?...if one must test extortion by whether it's corrupt in any event, a reciprocity requirement only adds another layer that may exculpate those otherwise guilty of wrongful extortion.").
[160] Hardy, *supra* note 44, at 451–52.
[161] *Id.* at 453.
[162] *Id.* at 442. *See McCormick*, 500 U.S. at 282 (Stevens, J., dissenting) ("subtle extortion is just as wrongful–and probably much more common–than the kind of express understanding that McCormick seems to require").

protecting lawful behavior from prosecution and reaching those acts which would escape liability under an explicitness requirement.

Providing a quid pro quo requirement for § 666 convictions could also yield other practical benefits.[163] Not only would judges, juries, and defendants have a similar standard to look to as to what constitutes a violation under the statute, but a single or similar standard across similar bribery statutes may provide for uniformity and ease of decision making.[164] Questions may still arise as to what exactly constitutes an implicit quid pro quo. However, this type of proof requirement comports with legislative intent because it best expresses the scope of behavior that Congress meant to criminalize. In many instances, individuals are accused of violating several federal bribery statutes in one case. Although it is not imperative or substantially rewarding to harmonize these statutes, it may provide an even more uniform standard for judges, juries, and litigators to follow, thereby reducing the potential for conflicting convictions as applied to the same facts in any given case.

VI. CONCLUSION

Section 666 is a useful tool employed by the federal government to fight public corruption as it pertains to federal programs and funding. It is imperative that the legislature, using the federal statutes at hand, provides an effective means in which to combat such corruption. The proof required to convict an individual under § 666 has been debated by the courts, and the result is an ambiguous application of the statute. Despite the absence of any express reference to a quid pro quo in the statute, the plain language, when read in light of the

[163] *McCormick*, 500 U.S. at 433.
[164] *Id*. at 442 (arguing that tailoring the Hobbs Act requirement to the quid pro quo requirement under § 201 would be beneficial and "promote substantive fairness by treating equally defendants who have committed the same crime but are prosecuted under different federal statutes").

legislative intent, dictates that parties must intend to engage in a quid pro quo in order to be convicted under § 666. Furthermore, an implicit quid pro quo comports with legislative intent because it would allow prosecutors to reach corrupt exchanges lacking explicitness. The Second and Fourth Circuits aptly found jury charges lacking instruction on a quid pro quo to be erroneous. Judges, lawyers, defendants, and juries alike would benefit from a uniform, identifiable standard. The Supreme Court has previously applied a quid pro quo requirement to other similar federal bribery statutes, and would thus likely require the same type of proof under § 666. An implicit quid pro quo requirement would decrease existing confusion of the application of § 666 and allow for a greater accounting of public corruption for which the statute was created to combat in the first place.