A Solution to the Conflict over the Appropriate Unit of Prosecution for 18 USC Sec. 666

Christine M. Woodin
Christine.Woodin@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Woodin, Christine M. ( ) "A Solution to the Conflict over the Appropriate Unit of Prosecution for 18 USC Sec. 666," University of Chicago Legal Forum. Vol. 2012: Iss. 1, Article 17.
Available at: http://chicagounbound.uchicago.edu/uclf/vol2012/iss1/17

This Comment is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
A Solution to the Conflict over the Appropriate Unit of Prosecution for
18 USC § 666

Christine M. Woodin†

INTRODUCTION

The federal statute concerning the theft or bribery of funds in programs receiving federal funding ("the Statute") prohibits embezzlement and bribery using property under the control of a government agency. To trigger criminal liability under the Statute, the value of the property must be greater than $5,000 and the federal program or government agency must itself receive benefits in excess of $10,000 from federal funding. For a federal court to have subject matter jurisdiction in a prosecution brought under the Statute, both minimums must be met. But once a court has jurisdiction, the Statute does not specify under what circumstances multiple qualifying transactions by the same defendant should be aggregated into one count or split into multiple counts. Recently, a decision by the First Circuit highlighted the conflict over what the appropriate unit of prosecution is under the Statute: a single transaction, or an aggregate of multiple transactions.

The four federal circuit courts to consider the question all agree that transactions can be aggregated to reach the $5,000 threshold for subject matter jurisdiction, so long as they are part of a single scheme or plan to steal more than $5,000. However, it

† BS 2010, California Institute of Technology; JD Candidate 2013, The University of Chicago Law School.

1 See 18 USC § 666.
2 See 18 USC § 666.
3 See 18 USC § 666(a)–(b) (providing the $5,000 and $10,000 requirements); United States v Lipscomb, 299 F3d 303, 308–09 (5th Cir 2002) (explaining that the text of § 666 contains two monetary thresholds that must be met for a federal court to have subject matter jurisdiction).
5 See United States v Hines, 541 F3d 833, 837 (8th Cir 2008); United States v Cruza-
is not clear under what circumstances separate qualifying trans-
actions of at least $5,000 should be treated as multiple violations
of the Statute. This question gives rise to concerns about dupli-
city and multiplicity. Duplicity is the joining in a single count of
two or more distinct and separate offenses. A jury must agree
unanimously on which crime it is convicting the defendant of
committing, and the bundling of offenses could lead to a guilty
verdict without unanimous agreement on which count the prose-
cution has proven. In such a situation, it is possible the jury did
not unanimously agree to convict on any offense, yet the defend-
ant was still convicted of a crime. Multiplicity occurs when the
government charges a defendant with multiple counts of a crime
for a violation stemming from a single act. This might lead to
multiple convictions and punishments for the same crime, which
would violate the Double Jeopardy Clause of the Fifth Amend-
ment.

To resolve issues of multiplicity and duplicity in indictments
brought under the Statute, courts should establish distinct units
of prosecution. Courts are pulled toward different definitions
based on whether the concern with the indictment arises in a
multiplicity or duplicity context. To resolve this conflict, courts
may need to define different units of prosecution for embez-
zellement schemes and bribery under the Statute. This Comment
will suggest a unifying solution to this conflict. The solution address-
es multiplicitous and duplicitous indictments under the Statute
and takes into account the differences between bribery and em-
bezzlement. Duplicitous indictments are more likely to arise un-
der the bribery portion of the Statute and multiplicitous indict-
ments are more likely to arise under the embezzlement portion.
This Comment argues that the two sections of the Statute, 18
USC § 666(a)(1) and 18 USC § 666(a)(2), require different solu-
tions to best address these issues. A unit of prosecution focusing

---

6 See United States v Verrecchia, 196 F3d 294, 297 (1st Cir 1999).
7 For an example of multiplicity, see Bell v United States, 349 US 81 (1955).
8 See US Const Amend V (requiring that no person “be subject for the same offence
to be twice put in jeopardy of life or limb”).
9 See United States v Moyer, 674 F3d 192, 204 (3d Cir 2012) (beginning the analysis
of whether a count is duplicitous by ascertaining the allowable unit of prosecution); United
States v Song, 924 F2d 105, 108 (7th Cir 1991) (explaining that multiplicity arises
when several counts correspond to a single offense and that to “determine whether the
defendant’s conduct constitutes a single offense or several it is necessary to identify the
unit of prosecution of the offense charged”).
on the transactions by the defendant addresses the duplicity concerns associated with bribery indictments, and a unit of prosecution that focuses on the defendant’s scheme of violations will address potentially multiplicitous embezzlement indictments.

Part I provides background to the question, including a brief overview of the legislative history of the Statute. Part II describes the current state of the law and the circuit split arising from the use of different units of prosecution under § 666(a)(1)(A), the embezzlement portion of the Statute. Part III explains why a distinct unit of prosecution is needed and why traditional modes of analysis have proved unsatisfactory. Part III also proposes a solution to the problem, applies it to the First and Second Circuit cases, and addresses its shortcomings. Part IV concludes.

I. BACKGROUND

A. Overview of the Legislative History

18 USC § 666 regulates theft or bribery by agents of programs receiving federal funds. Congress enacted the provision as part of the Comprehensive Crime Bill of 1984 and “designed [the Statute] to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a Federal program.”10 The legislative history of the Statute suggests it was enacted to “protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud and undue influence by bribery.”11

The Statute penalizes both bribery and embezzlement by agents of programs receiving federal funds.12 The embezzlement portion of the Statute, § 666(a)(1), penalizes one who:

[B]eing an agent of an organization, or of a State, local or Indian tribal government, or any agency thereof——

---

12 These provisions are found at 18 USC § 666(a)(2) and 18 USC § 666(a)(1), respectively.
(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government or agency; or 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 of $5,000 or more.  

The bribery portion criminalizes one who:

[C]orruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof 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.  

Section 666(b) of the Statute requires that the organization or agency in question receives in excess of $10,000 under a federal program involving some form of federal assistance in any one-year period. 

The Statute was designed to augment 18 USC § 201, the general federal bribery statute. 18 USC § 201 penalizes bribery committed with the intent to influence an official act or to cause the official to commit fraud or act in violation of the law. Section 201 applies only to “public officials,” which the statute defines as “an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of

13 18 USC § 666(a)(1).
14 18 USC § 666(a)(2).
15 18 USC § 666(b).
16 See S Rep No 98-225 at 369 (cited in note 10) (describing the present federal law and stating that the legislation was “designed to create new offenses 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”).
17 18 USC § 201(b).
Government thereof, [ ] in any official function, under or by authority of such department, agency, or branch.” Federal appellate courts split on whether local or state officials and members of private organizations receiving federal funding fell into this definition of “public official.” Section 666 was enacted in part to address this circuit split and the potential gap in the statute. The class of defendants under § 666 is much larger; the Statute extends to anyone receiving federal funds or an agent of an entity receiving federal funds, so long as both jurisdictional money thresholds are met. Senate reports suggest the terms of the Statute are “to be construed broadly, consistent with the purpose of this section to protect the integrity of vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.”

While the legislative history of the Statute implies Congress intended to create an expansive regime to combat high-stakes bribery and embezzlement of federal funds regardless of whether the defendant was an employee of the federal government itself, it does not make clear the intended unit of prosecution.

B. Aggregation to Meet the Jurisdictional Limit is Allowed

Courts generally agree that multiple transactions may be aggregated to reach the $5,000 jurisdictional minimum so long as the transactions form a single scheme. Soon after the Statute was passed, this question was addressed by the District Court for

---

18 USC § 201(a).
19 See United States v Rooney, 37 F3d 847, 851 (3d Cir 1994) (discussing the uncertainty surrounding the “public official” definition in § 201). See also S Rep No 98-225 at 369 (cited in note 10) (explaining that there is some doubt as to whether “public official” in 18 USC § 201 reaches individuals employed by a private organization receiving federal funds). Compare United States v Del Toro, 513 F2d 656, 661–62 (2d Cir 1974) (holding that a city employee was not acting under the authority of a department or branch of the federal government and thus did not qualify as a “public official” under 18 USC § 201), with United States v Mosley, 659 F2d 812, 814–16 (7th Cir 1981) (holding that the defendant, a state employee, qualified as a “public official” under 18 USC § 201 because the program he administered was funded by the federal government for federal objectives).
21 Compare 18 USC § 666, with 18 USC § 201.
24 See Webb, 691 F Supp at 1168; United States v Hines, 541 F3d 833, 837 (8th Cir 2008), citing United States v Cruzado-Laureano, 404 F3d 470, 484 (1st Cir 2005), United States v Yashar, 166 F3d 873, 876 (7th Cir 1999), and United States v Valentine, 63 F3d 459, 466 (6th Cir 1995).
the Northern District of Illinois in *United States v Webb*. The court held that aggregation under the Statute was proper provided that the “multiple conversions were part of a single scheme or plan the intent of which was to steal more than $5,000.” The court analogized to the standards used to evaluate a prosecutor’s aggregation of a series of misdemeanor larcenies to obtain a felony larceny charge. Further, the court supported its analysis by referring to the legislative history of the Statute, inferring that Congress wished to cover transactions involving large amounts of money and leave illegal activity involving smaller sums within the arena of state law. The court argued that the ability to aggregate transactions that are part of a single scheme does away with the incentive to split transactions in order to escape prosecution under the Statute. This interpretation of the Statute is widely followed by courts throughout the United States.

The ability to aggregate transactions to reach the $5,000 jurisdictional threshold does not determine whether qualifying transactions or groups of transactions should be treated as multiple violations under the Statute. The circuits are split on this question.

II. CIRCUIT SPLIT

A. The Second Circuit’s Position

In *United States v Urlacher*, the District Court for the Western District of New York consolidated two separate indictments under the Statute on the grounds that they were multiplicitous. Gordon Urlacher, former Police Chief of the City of Rochester, was indicted and charged with five counts of violating the Statute following an undercover investigation by the FBI. The five counts corresponded to the five fiscal years between

26 Id.
27 Id, citing *United States v Billingslea*, 603 F2d 515, 520 (5th Cir 1979) (holding a series of misdemeanor larcenies may be aggregated to a felony larceny only if there is a continuous impulse or scheme).
28 *Webb*, 691 F Supp at 1168.
29 Id (“This does not mean, however, that individuals can escape the federal government’s power under § 666 ‘as long as they make sure each theft is under $5,000.’”).
30 See, for example, *Cruzado-Laureano*, 404 F3d at 484; *Yashar*, 166 F3d at 876; *Valentine*, 63 F3d at 466.
32 *Urlacher*, 784 F Supp at 65.
1987 and 1991, one count for each year.\textsuperscript{34} The prosecution alleged that during this time Urlacher misappropriated funds in the care of the police department in the course of his duties as police chief. Another grand jury subsequently charged Urlacher with three additional counts for money embezzled from another source, covering 1988–90.\textsuperscript{35} The prosecution relied upon the rule from Webb allowing aggregation of transactions that are part of a single scheme to meet the jurisdictional limit for each indictment.\textsuperscript{36} Urlacher moved to dismiss the second indictment on the grounds that it was multiplicitous, claiming he should not be charged with two counts of embezzlement for conduct during a single fiscal year simply because the money came from different sources.\textsuperscript{37}

The district court attempted to identify the appropriate unit of prosecution in order to determine whether the counts were multiplicitous.\textsuperscript{38} The only difference between Urlacher's two indictments was the source of the money: one indictment alleged he had embezzled monies in the care of the Rochester Police Department, the other from the Monroe County Probation Department and Chase Lincoln First Bank.\textsuperscript{39} Therefore, the district court examined whether the Statute was "source-specific"; that is, "whether it permits the government to charge the defendant with a separate violation based upon the source of the funds he is alleged to have embezzled."\textsuperscript{40}

The language of the Statute is very broad, and the court pointed out the lack of a requirement that the property embezzled be federal money or be traceable to federal money.\textsuperscript{41} Rather, "[a]ny property, regardless of its source, which is embezzled from the local government or agency falls under the [S]tatute, so long as the property is under the care or control" of the agency.\textsuperscript{42}

Since the government is permitted to aggregate multiple conversions to reach the $5,000 minimum, the court concluded that permitting them "to start over again in a separate and dis-

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} \textit{Urlacher}, 784 F Supp at 64, citing \textit{Webb}, 691 F Supp at 1168.
\textsuperscript{37} See \textit{Urlacher}, 784 F Supp at 62.
\textsuperscript{38} See id at 63.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} See \textit{Urlacher}, 784 F Supp at 63–64. For the statutory language, see 18 USC § 666(a)(1) (penalizing anyone who embezzles property that is owned by, or under the control of an organization, government, or agency receiving federal funding).
\textsuperscript{42} \textit{Urlacher}, 784 F Supp at 63–64 (emphasis in original).
tinct count is illogical and certainly unfair." If the offense is the scheme to steal more than $5,000, charging a defendant with a separate violation for each source of money is multiplicitous. The court concluded by defining the unit of prosecution in an embezzlement case as "$5,000 or more, from whatever source, in any one year period in which the government or agency at issue receives more than $10,000 in Federal aid." The court held the government could not charge separate counts for the different sources from which Urlacher embezzled funds during a single fiscal year.

B. The First Circuit's Position

1. The facts of the case.

In United States v Newell, Robert Newell was charged under the Statute for the conversion and misapplication of money from federal funding in his role in a tribal government. Newell was the tribal governor of the Passamaquoddy Tribe from 2002 to 2006. The tribal government consisted of the Office of Governor, a tribal council, and a twelve-member joint tribal council formed with its sister reservation. Tribal council members received no salary, but were often employed by the government in other capacities. The Tribe received grants from the Bureau of Indian Affairs, the Department of Health and Human Services (HSS), sub-administrations of HSS, the Department of Justice, the Environmental Protection Agency, and the Department of Housing and Urban Development, which the Tribe used to fund a variety of services. Each of these grants or contracts contained terms limiting the tribe's use of the money to funding specific programs and the associated administration costs.

---

43 Id at 64.
44 Id.
45 Id (quotation marks omitted).
46 Urlacher, 784 F Supp at 64.
47 658 F3d 1 (1st Cir 2011).
48 Id at 4.
49 Id.
50 Id.
51 Newell, 658 F3d at 4.
52 Id.
53 Id.
Newell's co-defendant, James Parisi, served as the finance director to Newell during his term as tribal governor. As governor, Newell had extensive control over the Tribe's finances. Newell transferred funds from grants between various accounts to pay for unauthorized expenses and caused the Tribe's funded programs to loan hundreds of thousands of dollars each year to the tribal government. He used this money to assist friends, family, and supporters, and the loans were never repaid. As the tribal government went further into debt, Newell continued to borrow more money from incoming federal grants despite being warned by auditors that using federal funds for unapproved purposes was illegal.

2. The duplicity question under 18 USC § 666.

Newell was charged with misapplying retirement, police, housing authority, and other program funds. The counts under the Statute occurred over a period of years and involved misapplications from various sources; as a result, the defendants raised duplicity objections to the indictment. The court explained the concern with duplicitous counts, citing Supreme Court precedent holding that the jury is required to "unanimously agree as to which instances of a crime the defendant committed." Then, the court turned to the question of whether the counts against Newell described distinct violations of the Statute and therefore required jury instructions concerning unanimity.

The First Circuit found the text of the Statute unilluminating as to the proper unit of prosecution. The court explained that the § 666(b) requirement that the organization receive at least $10,000 in benefits in any one-year period "is consistent with either (a) treating all qualifying transactions within

---

54 Id at 5.
55 Newell, 658 F3d at 5.
56 Id.
57 Id.
58 Id at 7–8.
60 See id at 22.
61 Id at 22–23, citing Schad v Arizona, 501 US 624, 651 (1991) (Scalia concurring) (rejecting a challenge to Arizona’s murder statute, which permitted conviction on either premeditation or felony murder) and Richardson v United States, 526 US 813, 815 (1999) (holding a jury must agree unanimously which individual violations make up a “series of violations” element in a charge under the federal continuing criminal enterprise statute).
62 See Newell, 658 F3d at 23.
63 See id at 24.
a one-year period as aggregated together to state one offense under § 666 (a)(1)(A), or (b) treating each qualifying transaction as an independent offense.”

Similarly, the court said the statement of the Statute’s purpose in the Senate Reports does not indicate Congress’s preferred unit of prosecution. Because of the lack of case law pertaining to this issue, the court turned to other cases arising under the Statute, those where aggregation was allowed to reach the jurisdictional floor.

Courts have allowed aggregation to reach the $5,000 minimum in order to hear cases involving transactions that fall below the jurisdictional minimum and would otherwise not be independent violations. The First Circuit explained that without an aggregation rule, one could escape liability under the Statute by ensuring one’s bribery was split into transactions falling under the $5,000 limit. However, the aggregation rule may not be necessary when the transactions already involve sums larger than the statutory minimum.

The court compared the situation before it to the one in United States v Verrecchia, a First Circuit case considering the unit of prosecution under the federal felon-in-possession statute. In Verrecchia, the defendant was charged with two counts for violating the felon-in-possession statute: one for two weapons found in his truck, and a second for twenty-one weapons found in a barn. The court rejected the defendant’s contention that the counts were duplicitous and that the lower court was required to give a unanimity instruction to the jury. The court held the counts were properly grouped by the place of possession and therefore were not duplicitous. If they were duplicitous, the court explained, the government could have charged him twenty-three separate times for each of the guns he possessed, and this kind of ambiguity in a statute should be resolved against charging a defendant multiple times for what is arguably a single transaction.

---

64 Id.
65 See id; S Rep No 98-225 at 369–70 (cited in note 15).
66 See Newell, 658 F3d at 24.
67 See id.
68 See id at 25 (comparing this line of reasoning to Urlacher).
69 196 F3d 294 (1st Cir 1999).
70 See Newell, 658 F3d at 25–26, citing Verrecchia, 196 F3d at 297–301.
71 Verrecchia, 196 F3d at 296.
72 Id at 298.
73 Id.
In Verrecchia, the First Circuit relied in part on precedent from the Supreme Court in Bell v United States,74 emphasizing a policy of resolving doubts against the imposition of harsher punishment.75 In Bell, the Court stated: “If Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.”76 Applying this principle to Verrecchia, the First Circuit held that the indictment correctly grouped the transactions based on the place of possession.77 Comparing this precedent to the facts in the case before it in Newell, the court explained, “there is a compelling claim that misapplying funds from agency A in March and misapplying funds from agency B in July is also sufficient to constitute two distinct transactions.”78 Therefore, the seven counts in Newell’s indictment amounted to distinct transactions and violations of the Statute.79 The court concluded by holding that the resulting indictment was duplic- itous and a unanimity jury instruction was required to ensure the jury understood that they must unanimously agree as to which instances of a crime the defendant committed.80

C. The South Dakota District Court’s Position in the Context of Bribery

A district court in the Eighth Circuit examined the unit of prosecution of the Statute in United States v Nystrom.81 John Nystrom was charged with seven counts of bribery involving programs receiving federal funds and moved to consolidate the seven counts on the grounds they were multiplicitous.82 Nystrom was accused of corruptly giving money to an agent of Crow Creek Sioux Tribe and Crow Creek Tribal Schools, agencies that received benefits in excess of $10,000 in federal funds during the year in which Nystrom’s alleged bribery took place.83 Each of the seven counts corresponded to a check written by Nystrom, five of which were greater than or equal to $5,000, two of which were

74 349 US 81 (1955)
75 See Verrecchia, 196 F3d at 297.
76 Bell, 349 US at 84.
77 Newell, 658 F3d at 25.
78 Id at 26 (emphasis omitted).
79 See id.
80 See id at 28.
81 2008 WL 4833984 (D SD).
82 Id at *1.
83 Id.
less than $5,000. Nystrom argued that under the Statute each check is not a bribe punishable as a discrete offense, but rather "is one transaction in a series of transactions made in furtherance of the same scheme or plan to bribe an official." Alternatively, Nystrom moved to dismiss the two counts for checks less than $5,000.

To resolve the multiplicitous contention, the court, like the First and Second Circuits, looked first to the text of the Statute. The "anything of value" language in the bribery section of the Statute is broad: there is no limit on the type or amount of bribe offered. The court concluded that the $5,000 requirement of § 666(a)(2) refers to "the value of the business, transaction, or series of transactions of the agency that the bribe is being given for." The court decided that one may read "anything of value" to mean the Statute criminalizes each act of bribery, but like the circuit courts, concluded the text of the Statute does not conclusively show Congress's intended unit of prosecution.

After the text of the Statute proved inconclusive, the court moved on to examine the legislative history. Before the enactment of the Statute, the criminal code contained a general bribery provision that applied only to "public officials." The Statute was enacted to "extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds." Because of Congress's intent to create new offenses to augment existing statutes, the Nystrom court concluded that case law interpreting other bribery statutes, particularly 18 USC § 201, was relevant to identifying the appropriate unit of prosecution under the Statute. The court argued that this ap-

84 Id at *2.
85 Nystrom, 2008 WL 4833984 at *2.
86 Id.
87 Id at *5.
88 Id at *6, citing United States v Little, 687 F Supp 1042, 1050 (ND Miss 1988) (explaining that the bribe "need not have any specified value, so long as the business, transaction, or series of transactions in connection with which the bribe is given involves anything of value amounting to $5,000 or more").
89 See Nystrom, 2008 WL 4833984 at *6 ("The plain language of the [S]tatute does not conclusively identify the unit of prosecution.").
90 See id.
91 See id at *7 ("Public officials [are] defined in the [S]tatute as an employee or officer acting on behalf of the United States or any agency thereof.").
93 See Nystrom, 2008 WL 4833984 at *8 ("The legislative history of § 666 makes it clear that the scope of § 666 is expansive."). See also S Rep No 98-225 at 369 (cited in note
proach is supported by the legislative history of the Statute, which shows it was modeled after 18 USC § 201.94

An examination of case law interpreting 18 USC § 201 and the Statute led the court to conclude: “Congress intended to punish each act of bribery as a separate offense under § 666(a)(2).”95 The court distinguished this unit of prosecution from aggregation to meet the $5,000 jurisdictional limit, explaining that “the issue of whether the government should be allowed to aggregate in order to meet the $5,000 threshold for prosecution under § 666 is a distinct issue from whether the government is required to consolidate separate acts.”96 Therefore, Nystrom’s multiplicity argument failed and the court declined to consolidate the seven counts of bribery.

III. DISCUSSION

As outlined in Part II, the lack of a clear unit of prosecution has created a split in the courts of appeals. Part IIIA describes problems arising from inconsistencies in counting offenses and why the traditional approaches used by courts have failed in the context of the Statute. It is clear courts have been concerned with multiplicitous and duplicitous indictments under the Statute.97 Parts IIIB and IIIC lay the groundwork for the solution in Part IIID. Part IIIB argues that bribery indictments under the Statute are more likely to raise concerns of duplicity. Part IIIC explains why embezzlement indictments are more likely to be multiplicitous. Part IIID provides a solution consisting of different units of prosecution for the two parts of the Statute. This Part argues that duplicity concerns are better addressed by focusing on separate transactions violating the Statute, so the unit of prosecution of the bribery portion should focus on single transactions. On the other hand, embezzlement is more likely to arise as a scheme, and using this as the unit of prosecution bet-


95 Nystrom, 2008 WL 4833984 at *11 (“Particularly persuasive is the fact that § 201, the predecessor to the bribery component of § 666 with the same ‘anything of value’ language, punishes each act of bribery as a separate offense even if all the bribes were made in furtherance of the same scheme or enterprise.”).

96 Id (emphasis in original). As the court explained, the government may only aggregate when the conversions are part of a single plan or scheme contained within a single one-year period. Id.

97 See generally Urlacher, 784 F Supp 61; Newell, 658 F3d 1.
ter prevents multiplicitous indictments. Part IIIE applies this solution to the facts of the courts of appeals cases discussed in Part II. Finally, Part IIIF addresses some challenges to the solution.

A. Problems Arising from the Lack of a Distinct Unit of Prosecution

Without a distinct unit of prosecution, courts face a recurring problem of how to characterize offenses under the Statute.98 As outlined in Jeffrey Chemerinsky’s note, Counting Offenses, there are a number of tests and tools available to courts to ascertain the appropriate unit of prosecution under different statutes.99 In the context of 18 USC § 666, courts have reached inconsistent results in attempting this analysis.100

Courts sometimes choose to examine the legislative history of the statute in question to determine whether Congress exhibited any preference pertaining to the unit of prosecution.101 Here, the legislative history of the Statute provides little insight into the intent of Congress.102 It is clear the Statute was designed to expand on the scope of 18 USC § 201.103 While the courts might receive some guidance from § 201 in indictments brought under the bribery portion of the statute, § 201 does not criminalize embezzlement. Thus, the legislative history leaves courts with an understanding that the Statute was designed to cast a wider net than § 201, but little guidance as to the proper unit of prosecution.104

A second tool used by courts is looking at the “criminal impulse” of the defendant.105 Such an approach is equally unsatisfying in the case of the Statute. The criminal-impulse approach allows a separate offense for each “impulse” to violate the statute in question.106 For example, in United States v Universal CIT

98 See, for example, Bell, 349 US 81.
100 Compare Urlacher, 784 F Supp at 64, with Newell, 658 F3d at 27–28.
102 See Nystrom, 2008 WL 4833984 at *6–8 (explaining that the plain language of the Statute does not identify the unit of prosecution and the legislative history only makes it clear the Statute is intended to be expansive).
104 See Nystrom, 2008 WL 4833984 at *6–8; Newell, 658 F3d at 24.
106 See id at 717–20, citing Blockburger v United States, 284 US 299, 302 (1932), and United States v Universal CIT Credit Corp, 344 US 218, 224 (1952).
Credit Corp,107 the Supreme Court interpreted the Fair Labor Standards Act to treat “as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single impulse.”108 Embezzlement of federal money may occur as a continuous scheme over periods of years.109 While it may be easier to define the “impulse” associated with bribery, it is still extremely ambiguous. It is unclear whether the moment of planning a scheme violating the Statute amounts to an “impulse,” or whether each separate transaction requires a new moment of intent. This standard does little to help the courts, particularly because indictments under the Statute might easily be schemes requiring advance agreement and planning.110

Another approach used to determine the correct unit of prosecution is to define the “act” criminalized.111 Using the “act” as the unit of prosecution leads to similar difficulties with the embezzlement portion of the Statute. The “act” of embezzlement is difficult to define, particularly when it occurs as a continuous scheme.112 As described by Chemerinsky, this approach is particularly unsatisfying for continuous crimes and often rests on vague ideas of wrongness or the court’s particular opinion in the case before it.113 Conversely, the bribery portion of the Statute might lend itself to an act-based unit of prosecution, as the “act” of bribery is a two-sided transaction comprising a quid pro quo.114 As the court in Nystrom explained, criminalizing each individual act of bribery is also consistent with the legislative history and perceived intent of Congress.115

108 Id at 224 (quotation marks omitted).
110 See Chemerinsky, Note, 58 Duke L J at 720–23 (cited in note 99) (explaining the ambiguity of a “criminal-impulse” unit of prosecution, including the difficulties when the violation is a scheme or set of agreements to engage in multiple transactions).
111 See id at 711.
112 See, for example, Newell, 658 F3d at 4–8; Urlacher 979 F2d at 935.
115 See Nystrom, 2008 WL 4833984 at *11 (“Congress intended to punish each act of bribery as a separate offense under § 666(a)(2).”).
Finally, examining the time period during which offenses under a statute take place can sometimes aid courts in determining the appropriate number of counts. Since the Statute already sets a time period of a year for qualifying conduct to take place, this approach is not helpful. Further, the time-based approach does little to differentiate between levels of culpability or to deter additional conduct during that time period.

The text of the Statute provides no guidance as to the correct unit of prosecution, and the legislative history does little to answer what the intended unit is. Further, the Statute criminalizes two classes of violations, making it more difficult still to define the course of conduct that should amount to one count.

B. Duplicity is More Likely to Occur in the Context of Bribery under the Statute

Duplicity is "the joining in a single count of two or more distinct and separate offenses." Courts recognize that duplicitous indictments may abridge a defendant's due process rights, because a general jury verdict may not actually be unanimous with respect to either of the two or more distinct and separate offenses. Requiring juror unanimity ensures the government has carried its burden beyond a reasonable doubt.

*The Law Dictionary* defines bribery as "the offense of giving or receiving a gift or reward intended to influence a person in the exercise of a judicial or public duty." The bribery portion of the Statute penalizes one who "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward." A violation of this portion of the Statute is a single

---

117 See id at 730 (explaining why a time standard will be flawed "according to deterrence and retributive rationales of punishment").
120 See Lundy, The Champion at 49 (cited in note 119), quoting *United States v Lee*, 317 F3d 26, 36 (1st Cir 2003). See also *Schad v Arizona*, 501 US 624, 651 (1991) (Scalia concurring) ("We would not permit ... an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday.").
121 *The Law Dictionary* at 65 (cited in note 114). See also *Sun-Diamond Growers*, 526 US at 404–05 (describing bribery as intent "to give or receive something of value in exchange for an official act") (emphasis in original).
122 18 USC § 666(a)(2) (emphasis added).
act of giving anything of value to a qualifying individual. When a defendant has violated this portion of the Statute multiple times, it is likely that prosecutors will present different evidence to obtain a conviction for each offense. A violation necessarily involves an interaction, motivated by intent to influence or reward, between the defendant and an agent of an organization receiving federal funds as described by the Statute.

The rationale for raising due process concerns with duplicitous indictments is that such indictments might compromise jury unanimity. If a defendant is charged with two distinct offenses in one indictment, it will be unclear whether the jury agrees on which offense the defendant is guilty of. Since each violation of the bribery portion of the Statute involves a transaction between two individuals, it is likely that an aggregated charge will give rise to duplicity concerns. Each two-sided transaction may require the jury to consider a different set of evidence.

Duplicity may, of course, also occur in an indictment under the embezzlement portion of the Statute. For example, in Newell, the defendant argued that the indictments he faced were duplicitous because the counts under the Statute occurred on various dates throughout the year in question and involved misapplications of funds from multiple sources. The court agreed and explained that misapplications of funds from different agencies at different times are sufficient to qualify as multiple transactions.

C. Multiplicity is More Likely to Occur in the Context of Embezzlement under the Statute

A multiplicitous indictment is one where the defendant receives multiple charges for what should be a single crime. Such indictments may be unconstitutional because they run afoul of the Double Jeopardy Clause of the Fifth Amendment, which states: “Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” This clause protects defendants from receiving multiple punishments for the same criminal act. Multiplicity does not exist if separate counts require the

123 See Starks, 515 F2d at 116.
124 See Newell, 658 F3d at 22.
125 See id.
126 See Blockburger, 284 US at 304.
127 US Const Amend V.
prosecution to prove a different set of facts; in that case the
counts represent properly separated crimes.\footnote{128}{See John-Alex Romano and Scott B. Markow, Preliminary Proceeding: INDICTMENTS, 86 Geo L J 1397, 1417 (1998), citing Blockburger, 284 US at 304; United States \textit{v} Grant, 114 F3d 323, 329 (1st Cir 1997) (holding that an indictment charging four counts was not multiplicitous because each count required proof of a distinct set of facts).}

Embezzlement is defined by \textit{The Law Dictionary} as "the appropriation to his own use, by an agent or employee, of money or property received by him for and on behalf of his employer."\footnote{129}{\textit{The Law Dictionary} at 147 (cited in note 114).} The embezzlement portion of the Statute criminalizes embezzling, stealing, converting, or intentionally misapplying property which is "under the care, custody, or control of [the qualifying] organization, government or agency" by an agent of that organization.\footnote{130}{18 USC § 666(a)(1).} Unlike bribery, embezzlement is a transaction which does not, by its nature, require the agent to interact with another individual. Multiple violations of this portion of the Statute are difficult to define, as embezzlement often occurs as part of a scheme to misapply or convert property of the organization by an agent over a period of time.\footnote{131}{See, for example, \textit{Newell}, 658 F3d at 4–9.}

The rationale for raising multiplicity concerns with indictments is that they may not be constitutional under the Double Jeopardy Clause of the Fifth Amendment.\footnote{132}{See \textit{Blockburger}, 284 US at 304; US Const Amend V.} If each offense requires proof of a different element, then the indictment is constitutional.\footnote{133}{Compare, for example, \textit{Newell}, 658 F3d at 4–9 (describing the defendant misapplying funds from a wide range of sources during his tenure as tribal governor, creating loans from the organizations receiving funds to the tribal government), with \textit{Urlacher}, 784 F Supp at 64–66 (describing how the chief of police embezzled funds entrusted to him in the course of his duties).} There are many ways a potential defendant can embezzle funds.\footnote{134}{See \textit{Blockburger}, 284 US at 304 ("The test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").} Because of its one-sided nature, it is more difficult to separate embezzlement into distinct transactions than it is to do with bribery. Even if bribery occurs in a scheme, it still involves payments to an individual—just over multiple transactions. Embezzlement may easily be continuous.\footnote{135}{See, for example, \textit{Newell}, 658 F3d at 4–9 (describing a continuous conversion of tribal funds for private and unauthorized use).}

Thus, when a defendant faces multiple charges under the embezzlement portion of the Statute, the indictment may be multiplicitous. If a continuous scheme to convert funds from an
agency were split into time periods or money sources, the resulting charges might violate the Double Jeopardy Clause, since the defendant would arguably be punished for the same scheme more than once.\textsuperscript{136}

D. A Solution to the Problem of the Unit of Prosecution of 18 USC § 666

This Part presents a possible solution to the problem of finding a workable unit of prosecution of the Statute. As described above, charges brought under the bribery portion of the Statute are more likely to result in a duplicitous indictment, while charges brought under the embezzlement portion are more likely to result in a multiplicitous one. This Comment argues that a transaction-based unit of prosecution is suited to resolve duplicity concerns, while a scheme-based unit of prosecution is better suited to ensure indictments are not multiplicitous. Therefore, 18 USC § 666(a)(1) and § 666(a)(2) should have different units of prosecution.

1. A transactional unit of prosecution solves problems of duplicity and should be the unit of prosecution for the bribery portion of the Statute.

When an indictment is duplicitous, the court is concerned with a lack of jury unanimity.\textsuperscript{137} Different evidence may be required to prove the different charges against the defendant, resulting in a complicated and confusing process.\textsuperscript{138} In order to ensure a count is not duplicitous, courts can use a “transaction” unit of prosecution.\textsuperscript{139} By separating the different transactions the defendant engages in, the court can ensure that the evidence required to prove each charge is clear: that which relates to the distinct transaction.

The transaction-based approach directly addresses the concerns of duplicity, ensuring the jury is unanimous in its understanding of each transaction in which the defendant engaged. In the context of the Statute, this approach can be applied by making the transaction the unit of prosecution for the bribery por-

\textsuperscript{136} See, for example, \textit{Urlacher}, 784 F Supp at 64.
\textsuperscript{137} See \textit{Starks}, 515 F2d at 116.
\textsuperscript{138} See Lundy, The Champion at 49 (cited in note 119).
\textsuperscript{139} See, for example, \textit{Verrecchia}, 196 F3d at 296–98 (using a transaction unit-of-prosecution approach to analyze a potentially duplicitous indictment for gun possession).
tion. The transaction is the instance where one “corruptly gives, offers, or agrees to give anything of value” in order to influence or reward. As discussed above, the two-sided transaction of bribery makes indictments more susceptible to duplicity objections, since each instance may require a different set of evidence.

Further, the language of the Statute and legislative history support the use of a transactional unit of prosecution for bribery. The Statute prohibits giving “anything of value,” which can be read to imply that each bribe of “anything of value” should constitute a separate offense. As explained by the court in Nystrom, the Statute arguably criminalizes each act of bribery. Further, the legislative history of the act suggests the Statute was enacted to create an expansive regime to combat high-stakes bribery. Therefore, a transactional unit of prosecution is consistent with the suggestion by members of Congress that the terms of the Statute were “to be construed broadly, consistent with the purpose of this section to protect the integrity of vast sums of money distributed through Federal programs.”

2. A scheme-based unit of prosecution solves problems of multiplicity and should be the unit of prosecution for the embezzlement portion of the Statute.

Concerns with multiplicity are very different from those raised by duplicity and result in the combination of counts rather than their division. A transaction-based approach does not function as a solution to the problem of multiplicity in the same way it does for duplicity; rather, it has the potential to exacerbate the problem. If the concern with the indictment is that it may violate the Double Jeopardy Clause, splitting the charge along a “transactional” line may result in the defendant being punished twice for a single set of transactions that amounts to one violation of the Statute.

---

140 18 USC § 666(a)(2).
141 See, for example, Nystrom, 2008 WL 4833984 at *12 (applying a transactional unit of prosecution to the bribery portion of 18 USC § 666).
142 18 USC § 666. See also, Nystrom, 2008 WL 4833984 at *5.
143 See Nystrom, 2008 WL 4822984 at *6.
146 See, for example, Urlacher, 784 F Supp at 65.
Indictments charging embezzlement under the Statute are more likely to fall into this category because of the one-sided and continuous nature of the crime. A “scheme” unit of prosecution can address the multiplicity concerns, since it ensures that the defendant receives one count for each violation of the Statute, even if the violations occurred over time. This approach can be applied to the Statute by making the “scheme” of embezzlement, misapplication, or conversion the unit of prosecution for § 666(a)(1).

In cases where the defendant engages in a single transaction that violates the embezzlement portion of the Statute, the single transaction could be the “scheme.” In this sense the “transaction” and “scheme” units of prosecution overlap. However, in cases where the defendant engages in a continuous misapplication or embezzlement of funds from an agency receiving government funding, the prosecutor would define one or more schemes depending on the circumstances. This would ensure that, in cases where the defendant engages in multiple violations (each less than the $5,000 jurisdictional limit), the government is not able to aggregate until the jurisdictional limit is reached and then “start over again” in a separate count. That practice, as the court in *Urlacher* explained, would be “illogical and certainly unfair.”

E. Application of the Scheme-Based Unit of Prosecution to *Urlacher* and *Newell*

In *Urlacher*, the defendant was charged in two separate indictments under the Statute. The only difference between the two indictments was the source of the money Urlacher embezzled. The court concluded the Statute was not “source-specific” and the government could not charge a defendant with a separate violation based solely on the source of the funds. Both indictments alleged that Urlacher embezzled funds that were in his care as an agent of the Rochester Police Department (“an agency of the City of Rochester”); the two pools of funds simply

---

147 See, for example, *Newell*, 658 F3d at 5–8 (describing the defendant’s continuous embezzlement and conversion of tribal funds).
148 *Urlacher*, 784 F Supp at 64.
149 See id at 62.
150 See id at 63.
151 See id.
came into his care as Chief of Police through two separate means. 152

While the court in *Urlacher* did not exactly apply a scheme-based unit of prosecution, it held the indictments were multiplicitous and consolidated them. 153 A "scheme" unit of prosecution would lead to the same result—*Urlacher*’s scheme was embezzling from the funds in his care, unrelated to the source from which the Police Department obtained them. 154

In the indictments in *Newell*, the counts under the Statute occurred on various dates and involved misapplications from different sources. 155 As tribal governor, Newell transferred funds from government grants among various accounts to pay for unauthorized expenses, creating loans from the Tribe’s government funded programs to the tribal government. 156 This money was wrongfully used to assist friends, family, and supporters, through cash gifts and fraudulent salaries for nonexistent positions. 157 The counts described numerous such transactions and the court held that since each transaction independently violated the Statute, the indictments were duplicitous and required a unanimity instruction to the jury. 158

The court applied a transaction-based unit of prosecution in *Newell*, based on a precedent involving gun possession and the rule of lenity, a canon of construction that resolves ambiguity in favor of the defendant. 159 The court held that "misapplying funds from agency A in March and misapplying funds from agency B in July" might be sufficient to constitute two transactions and two violations of the Statute. 160

---

152 See *Urlacher*, 784 F Supp at 63.
153 See id at 63.
154 See id at 63–64.
155 *Newell*, 658 F3d at 22.
156 Id at 5.
157 Id.
158 See id at 22 ("Counts . . . of the indictment each contained descriptions of numerous transactions . . . . Each of these transactions would seem, on its face, to be enough to make out an independent violation of § 666(a)(1)(A).”).
159 See *Newell*, 658 F3d at 25–26, citing *Verrecchia*, 196 F3d at 296 (holding one count for the possession of multiple guns was not duplicitous) and *Bell*, 349 US at 81 (emphasizing the resolution of doubts against the imposition of harsher punishment as follows: "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity"). The transaction-based unit of prosecution being used to resolve the duplicity contention in this case supports the argument that it solves duplicity concerns with indictments.
A scheme-based unit of prosecution would have led to a different result. It would depend on the relationship between the misapplication from agency A in March and from agency B in July. If both occurred, for example, through Newell's withdrawal of funds from the tribal account to pay a salary for an unauthorized or nonexistent position, they may be properly characterized as a single scheme. If, however, they were unrelated events, they would be part of different schemes and the count would remain duplicitous.

In a case with complicated facts and continuous violations of the embezzlement portion of the Statute, a scheme-based unit of prosecution would alleviate both duplicitous and multiplicitous worries. The court in Newell was worried about duplicity and therefore would have preferred the counts be split along transactional lines. But if the government had charged Newell for each individual transaction violating the Statute—which, according to the facts of the case, were quite numerous—Newell would almost certainly have argued the counts were multiplicitous and violated the Double Jeopardy Clause. The continuous embezzlement of funds to pay a fraudulent salary would constitute multiple transactions, but would also arguably be a single, continuous violation of the Statute. By differentiating Newell's crimes based on schemes, however specific, the government would ensure that a single set of facts would need to be proven for each individual count and that Newell would not be charged multiple times for a single violation of the Statute.

F. Challenges to the Transactional- and Scheme-Based Units of Prosecution

One flaw with this solution may lie in defining "transactions" and "schemes." A transaction violating the bribery portion of the Statute is relatively easily defined. As discussed, bribery is by its nature a two-sided transaction, so separating a course of action into transactions should be relatively straightforward for courts and prosecutors. It may, however, be difficult to define what constitutes a "scheme" in embezzlement cases. In order

---

161 See id.
162 Compare id at 5–8, with Urlacher, 784 F Supp at 63–64.
163 18 USC § 666(a)(2) (penalizing one who "corruptly gives, offers, or agrees to give").
164 See Nystrom, 2008 WL 4833984 at *12 (holding that § 666 criminalizes each act of bribery).
165 See, for example, Newell, 658 F3d at 5–8 (describing defendants' long course of
to combat this difficulty, courts can employ similar tests to those used in conspiracy cases to individuate conspiracies and count agreements. The use of a "scheme" unit of prosecution for embezzlement does leave a substantial amount of room for prosecutorial discretion, but still creates a clearer category for prosecutors and judges to employ.

If a defendant engages in embezzlement that is better defined as a single transaction, or a discrete set of transactions, the "scheme" can be defined accordingly and will still be effective as a unit of prosecution. However, if a defendant engages in a "scheme" of high-stakes bribery, he may arguably be over-prosecuted for his actions. That said, given the legislative history of the Statute, concerns regarding over-prosecution may be minimal. There is evidence that Congress intended the Statute to create new offenses in order to combat bribery using federal monies. Congress stated that the terms of the Statute were "to be construed broadly," and therefore prosecuting each individual act of bribery may be consistent with the legislative history of the Statute. Further, if the bribery "scheme" simply consists of splitting the bribe payment into multiple installments, this would still be a single transaction under the Statute because there was really only one quid and one quo.

IV. CONCLUSION

Members of Congress indicated that they hoped for 18 USC § 666 “to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a Federal program.” The legislative history of the Statute implies § 666 was intended to create an expansive regime to combat high-stakes bribery and embezzlement of federal funds, but neither

---

166 See, for example, Urlacher, 784 F Supp at 64, citing United States v Korfant, 771 F2d 660, 662 (2d Cir 1985) (examining whether the conspiracy charges are multiplicitous using the factors from Korfant to individuate conspiracies).
167 If the bribes are less than $5,000, they will probably be aggregated to meet the jurisdictional limit. If, however, they are more than $5,000, they will likely be charged as separate counts using a transaction-based unit of prosecution.
169 Rooney, 37 F3d at 851, quoting S Rep No 98-225 at 369 (cited in note 10). See also Urlacher, 784 F Supp at 64.
the plain language nor congressional reports shed light on the appropriate unit of prosecution.\textsuperscript{171}

As discussed above, the lack of a clear unit of prosecution has resulted in duplicitous and multiplicitous indictments and a circuit conflict over what is appropriate under the Statute: a single transaction, or an aggregate of multiple transactions.\textsuperscript{172} In order to resolve issues of multiplicity and duplicity, this Comment proposes different units of prosecution for bribery and embezzlement under the Statute. Because a grouping of bribery counts is more likely to be duplicitous and an embezzlement count is more likely to be multiplicitous, the units of prosecution should be transaction-based and scheme-based, respectively.

This approach also addresses multiplicitous bribery indictments and duplicitous embezzlement indictments, the situations argued to be less common. The case of embezzlement raises concerns about potential duplicity and corresponding under-deterrence when the defendant engages in an elaborate and intertwined scheme. This problem could be solved by applying a narrow or flexible view of the “scheme.” A scheme-based unit of prosecution has the additional benefit of unifying the factual evidence jurors must consider on each count and thereby ensuring unanimity on the conviction.

The mirror image of this problem occurs in the bribery context, when the defendant is engaged in a bribery scheme and a transaction-based unit of prosecution is used. While we may excessively punish the defendant who accidentally splits his bribe into multiple transactions greater than $5,000, potential defendants are not incentivized to split their bribes to lessen punishment. Either such a defendant pays the bribe, and potentially receives one count under the Statute, or he pays the bribe in multiple installments less than $5,000 and those transactions are aggregated under the theory from Webb.

The scheme and transaction units of prosecution for embezzlement and bribery, respectively, solve the issues of multiplicity and duplicity that arise in § 666 indictments. Further, they provide a clear guideline to prosecutors and courts on how to characterize these violations, creating a more consistent enforcement regime.

\textsuperscript{171} See id. See also Webb, 691 F Supp at 1168; Newell, 658 F3d at 24.

\textsuperscript{172} Compare Newell, 658 F3d 1, with Urlacher, 784 F Supp 61.