Course Outline for Corporate and White Collar Crime
Exam: Essays. 3 hours. Floating exam. Closed-book. But in the exam packet will be a photocopy of the statutory supplement. Brickey will be out of town from Dec. 3-6. The last class will be cancelled. She won’t be able to answer questions after the beginning of the exam period.

I. Corporate Criminal Liability
   A. Corps have the capacity to commit criminal acts.
      1. New York Central & Hudson River RR (p.1) – RR and two employees were each held liable for bribing sugar refiners, an anti-competitive practice in violation of the Elkins Act. RR held liable b/c the crime was committed for the sake of the RR’s economic gain, the bribes were paid for with the RR’s funds, and the RR benefited by gaining a temporary competitive edge. S. Ct. Justice Day asked rhetorically, how else are we supposed to correct these kinds of abuses if not through criminal sanctions? Note that there are pros & cons of imposing criminal liability on corps: potential to change the corp’s culture and set new industry-wide standards (pros); potential unfairness to shareholders, innocent employees, and consumers (cons).
      2. C.R. Bard, Inc. (p.10) – A corp was held liable for its violations of FDA regulations, which led to serious injuries and deaths. Misconduct pervasive and motivated by greed; the executives approved it. Ct. held that the plea agreement at issue was reasonable b/c it had certain features: it allowed for criminal prosecution of individual employees; it imposed fines; and it imposed a compliance program involving more intense FDA oversight.
   B. Usual way of meeting an actus reus requirement: the respondeat superior doctrine: A corp can be held liable under this theory if (1) a corp agent (even the most menial employee) acted (2) within the scope of his or her employment authority (i.e., the acts were directly related to the performance of the type of duties the employee had a general duty to perform, actually or apparently) and (3) on behalf of the corp (4) w/ the intent to benefit the corp. This is defn. of the federal rule, and it’s the rule most prevalent in state courts.
      1. Beneficial Finance Co. (p.18) – A group of small loan companies bribed public officials so that they could keep interest rates high (which benefited them). If an employee was in a position such that he or she had enough power, duty, responsibility, and authority to act for and on behalf of the corp, then the employee’s acts which were committed within that scope may be imputed to the corp. Title/position does not conclusively determine authority.
      2. Lessoff & Berger (p.24) – A law partnership was held liable for fraud, even though only one of the partners was involved in the commission of the crime. “Harsh, but rational.” Harsh: Other partners who were clueless about the misconduct suffered. Rational: The other partners also stood to gain from the fraud, and they should have had incentives to do a better job of policing.
      3. Hilton Hotels (p.26) – Corp held liable for the acts of its rogue employee, even though corp had explicit policy that it wouldn’t engage in illegal boycotts and the employee acknowledged receiving specific instructions to the same effect. The employee just went off the deep end b/c of “anger and personal pique.” If a corp entrusts an employee with enough responsibility so that it’s possible for the employee to get into significant trouble with the law while acting within the scope of his employment, then the corp should take the precaution of policing the employee to the extent that that risk exists. Note that mgmt’s diligence is no defense: If the agent acts willfully, then we can impute the agent’s act to the principal.
   C. Alternative way of meeting an actus reus requirement: proving that there was a corporate policy. If the misconduct was performed, authorized, ratified, adopted, or tolerated (even recklessly tolerated) by the corp’s directors, officers, or other “high managerial agents” who are
sufficiently high in the hierarchy to warrant the assumption that their acts in some substantial sense reflect corporate policy, then the corp can be held criminally liable. This is MPC standard. Proof problems: higher-ups usually cover their tracks.

D. Mens rea requirements: knowledge and willfulness. Two ways of proving knowledge: (1) one or more agents had actual knowledge; (2) collective knowledge doctrine (i.e., if one employee knows one piece of info, and another knows another piece, then the employer can be charged with the aggregate knowledge). Two ways of proving willfulness: (1) one or more agents acted willfully; (2) there was flagrant organizational indifference (serves as a proxy for proof of willfulness on the part of a single agent).

1. **Bank of New England** (p.31) – Bank held liable for violating the Currency Transaction Reporting Act; customer withdrew more than $10K in cash by presenting multiple checks simultaneously to a single bank teller. Other employees gossiped about how unusual and suspicious this was, and yet no one reported or even inquired whether the transactions should be reported. The Bank didn’t even make any effort to report after it received a federal grand jury subpoena (the transactions at that point were still reportable). Ct. held that the Bank’s flagrant indifference to its reporting obligations could serve as a proxy for willfulness.

II. Personal Liability in an Organizational Setting

A. Direct participants: Federal law doesn’t recognize any distinction bet. principals and accessories.

1. **Wise** (p.50) – A corporate officer may be held personally liable if he knowingly participates in illegal conduct – whether he authorizes, orders, or helps perpetrate the crime – even if he’s acting in a representative capacity. Both the corp and the officer can be prosecuted. We punish the corp to encourage supervision and the implementation of compliance programs; we punish the officer b/c that has a particularly powerful deterrent effect.

B. Knowing participation.

1. **Brown I** (p.53) – Employees were held personally liable for the actions of their subordinates b/c they were in positions of power and authority, they knew that their subordinates were engaging in antitrust violations (the billboard case), and yet they did nothing to stop the violations. Ct. held that this passive behavior coupled with their key positions amounted to their knowing participation in the violations themselves.

C. Willful participation.

1. **Brown II** (p.56) – Two employees of the Detroit Housing Dept. gave benefits to friends and cronies based on improper and impermissible conditions. Willful participation = (1) voluntary, intentional conduct, plus (2) a specific intent to fail to do something which the law requires to be done. (Note that “flagrant indifference” suffices to meet a willfulness requirement only in the context of corporate liability.) The first employee was a subordinate and wasn’t held liable: she didn’t understand the function of the waiting list; this wasn’t a mala in se offense so that she should’ve known she was breaking the law; and she didn’t actually do the paperwork or submit it to HUD (actus reus). So neither (1) or (2) above were met. But her superior was held liable b/c she was in a position of power and authority and she issued the vouchers.

D. Imposing liability on corporate officers via the responsible share theory: A corporate officer may be found to have had a responsible share in a transaction which led to a violation if (1) she was in a position of power and authority over the transaction/operation out of which the violation arose and (2) she had a legal duty to prevent or correct such violations.

1. **Dotterweich** (p.61) – President/general manager (Dotterweich) of Buffalo Pharmacal was held personally liable for FDA violations for shipping adulterated and misbranded drugs in...
interstate commerce. If someone must be responsible for the purity of the drugs and the accuracy of the representations, then, bet. the public (consumers) and the manufacturer and the shipper, the last two are in the best position to minimize the risk of harm. Dotterweich held responsible b/c he was the supervisor, even though he didn’t know about or personally participate in the wrongdoing. Note that these violations were only misdemeanors.

2. **Park** (p.65) – CEO of huge corp w/ multiple operations and locations (in contrast to the pharmaceutical corp in *Dotterweich*) was held personally liable for FDA violations (rodents in food warehouses). He had lots of notice of the problem (series of letters from the FDA); he delegated authority to fix the problem to subordinates whom he trusted; he thought everything was taken care of; and in the end he was still held liable under the responsible share theory. Authority can be inferred from position/title, or ostensible or effective authority and responsibility. Park failed to fulfill the two duties he had under the Act: a positive duty to seek out and remedy violations when they occur and also a duty to implement measures to ensure that violations won’t occur. He knew that his system of delegation had broken down, so he shouldn’t have continued to rely on it. The only available defense under the Act (which he didn’t have): objective powerlessness to prevent the violations (e.g., sabotage under weird circumstances).

**III. Mail Fraud**

A. **The mail fraud statute, 18 U.S.C. § 1341:** The gist of the offense is the use of the mails to further fraudulent activity. **Elements:** (1) D must have engaged in a scheme to defraud someone of a protected interest; (2) D must have had fraudulent intent; (3) the purpose of D’s scheme must have been private gain; (4) the scheme must have involved the use of interstate mails/wires; and (5) the fraud or deception must have been material.

1. Note that the fraud itself doesn’t have to be criminal, which makes the mail fraud statute a useful device for prosecutors. Also: The fraud doesn’t have to entail something that the fed. govt. can regulate independently, which allows the fed. govt. to expand its jurisdictional hook beyond the usual commerce clause limits.

B. **The wire fraud statute, 18 U.S.C. § 1343:** Analogous to the mail fraud statute; the two statutes are to be construed in the same way (the statutes are *in pari materia*).

C. **Distinction between fraud and acting under false pretenses:** Someone acts under false pretenses when she, intending to defraud, knowingly makes a false representation of a *past* or a *present* fact to induce another to part with money or property. Promises and representations as to the future don’t qualify under most false pretenses statutes. Fraud, a more fluid concept, involves an effort to gain an undue advantage or to bring about harm through some *material* misrepresentation or breach of duty. (There is no bright-line defn. of fraud – depends on the context.)

D. **Intent to defraud, or intent to engage in a scheme to defraud.** What distinguishes intent to defraud from incompetence/inefficiency/negligence? Lack of honesty, misrepresentation. What distinguishes intent to defraud from intent to deceive? Materiality, i.e., does it go to the heart of the bargain. (No real bright-line distinction.)

1. **Hawkey** (p.126) – A sheriff was held liable under mail fraud statute for self-dealing in a charity concert venture. D intentionally engaged in a scheme to defraud: concerts were designed to raise money for charitable purposes; D knowingly diverted these funds for his personal benefit; and D failed to inform the concert promoter, his accountant, the contributors, and the benefactors.

2. **Lustiger** (p.131) – D held liable under mail fraud statute for mailing out colorful brochures with literally true but misleading pictures concerning parcels of property for sale. If a scheme is reasonably calculated to deceive and defraud, and it involves use of the mails,
then it’s fraud; the fact that there’s no actual misrepresentation of a single existing fact
doesn’t matter. Also, the deception needn’t be premised on verbalized words alone. The
arrangement of the words or the circumstances in which they’re used may be deceptive
enough.

3. Note: You just have to prove intent to engage in a scheme to defraud; you don’t have to
prove that the victim of the scheme was actually defrauded or suffered a loss.

E. Materiality: Cts. have traditionally assumed that false or fraudulent representations must be
material. A statement is material if: (a) a reas. person would attach importance to its existence
or nonexistence in determining his choice of action in the transaction in question; or (b) the
maker of the representation has reason to know that its recipient is likely to regard the matter as
important in determining his choice of action, even if a reas. person would not so regard it.
(Rest. 2d of Torts.)

1. Note: Not every lie is fraudulent. Example: A salesperson telling a purchasing agent that he
just played golf with the agent’s boss may be lying, but that lie wouldn’t be considered
fraudulent. Just salesmanship.

F. Protected interests: money, property, and the intangible right of honest services.

1. Hawkey (p.128) – The concert patrons intended that part of their payment would be a
contribution to charity. They could’ve expected their payment to help cover related
business expenses, but the application of their payment to Hawkey’s personal and wholly
unrelated business expenses was so unusual and unprofessional as to be fraudulent.

2. George (p.135) – Ds were charged w/ defrauding Zenith Radio Corp. under mail fraud
statute. A cabinet supplier paid Zenith’s purchasing agent (Yonan) kickbacks, through a
third party, to ensure that Zenith would continue to purchase the suppliers cabinets. Yonan
deprived Zenith of (1) his honest and loyal services, (2) a $300,000 discount, and (3) the
opportunity to bargain with a fact most relevant before it. Intangible rights theory:
intangible rights that you’re entitled to – (1) and (3) – are protected interests under the mail
fraud statute.

3. McNally (p.140) – S. Ct. nullifies intangible rights theory, holding that the intangible right
of the citizenry to good government is not a “property” interest within the meaning of the
mail fraud statute. Ct. was concerned about federalism and didn’t want to set far-reaching
standard for good government for the states (i.e., no conflicts of interest). Money and
property are the only protected interests.

Now, “the intangible right of honest services” is a protected interest, in addition to money
and property. Honest services convictions of public officials typically involve serious
corruption, such as embezzlement of public funds, bribery, or the failure of public decision-
makers to disclose certain conflicts of interest. To get an honest services conviction of a
private individual, you have to establish (1) a fiduciary duty (assumed for the public
official) and (2) that the breach foreseeably created a potential for illicit personal gain or
economic harm to the victim. See Czubinski and deVegter.

5. Carpenter (p.147) – WSJ columnist gave confidential business info belonging to the WSJ
to Wall Street traders prepublication who used the info to out-trade the WSJ’s readership.
S. Ct. held that Ds deprived WSJ of its exclusive right to decide how to use the information
in the “Heard” column before disclosing it to the public, and that this was a protected
property interest. The info was generated in the course of the columnist’s employment for
the WSJ. Impact: harm to WSJ’s reputation and effect on readers who used info in the
column to make investment decisions.

6. Cleveland (p.151) – S. Ct. held that unissued video-poker machine licenses in the hands of
a govt. regulator do not constitute “property” within the meaning of the mail fraud statute.
Ds, licensees, had misrepresented themselves on their license applications. Such licenses are “purely regulatory.” The govt.’s interest doesn’t involve any capital investment, entrepreneurship, risk of harm to its reputation, etc. – in contrast to a business’s interest in a license, or other property. Also, Ct. refused to expand federal criminal jurisdiction so sweepingly in the absence of a clear statement by Congress.

7. **Czubinski** (p.160) – An IRS employee who exceeded his authority and conducted unauthorized searches in taxpayer info database was not held liable for wire fraud b/c no proof that he intended to deprive the IRS of its property, or the IRS and the public of their intangible right to his honest services. This was mere browsing. There was no evidence that he intended to further use the info for any private purposes, besides his one comment at the cocktail party – he didn’t create dossiers, print stuff out, solicit bribes from the taxpayers he looked up, share info about the taxpayers with others, etc. Regarding the honest services charge, he didn’t derive any tangible benefit, and he didn’t seriously breach any fiduciary duty.

8. **deVegter** (p.169) – Two employees of investment banks deprived Fulton County of honest commercial services by providing corrupted financial advice regarding underwriting proposals, causing potential economic harm to the County. They both had fiduciary relationships w/ the County b/c the County relinquished de facto control of the underwriter selection decision to one of them, and the other was vested w/ a position of dominance, authority, trust, and de facto control in recommending an underwriter.

G. **The use of the mails.** The mailing just has to be incident to an essential part of the scheme.

1. **Schmuck** (p.175) – Schmuck was convicted of mail fraud for selling used-cars with rolled-back odometers to dealers, who in turn resold them to retail purchasers. The dealers mailed title-registration applications to the state, and the state mailed them back to the customers. S. Ct. held that the mailing of the applications was part of the execution of the fraudulent scheme b/c D intended the retail purchasers to bear the ultimate loss (as opposed to the dealers) and b/c this was an ongoing scheme involving 150 cars over a period of years.

2. **Maze** (p.178) – D who stole and used roommate’s credit card was not held liable under mail fraud statute. The invoices that the stores and motels mailed to the bank that issued the credit card were not part of the execution of D’s scheme b/c D’s scheme in no way depended on the mailings; they merely determined which of D’s victims would ultimately bear the loss.

3. **Parr** (p.178, n33) – Must show that the mailing would not have occurred but for the fraudulent scheme.

4. **Carpenter** (p.147) – The delivery of the newspapers to the customers was part of the execution of the fraudulent scheme b/c the trades wouldn’t have been profitable if the “Heard” column didn’t affect the mkts. Note that the mailings themselves were entirely innocent – nothing in the column was falsified or manipulated.

5. **Sampson** (p.181) – Ds were convicted of mail fraud for making representations about business services they would supply, collecting advance fees from customers, mailing “lulling letters” to the customers, and then making no effort to perform the services. The assurances in the letters were part of the scheme b/c they lulled the victims into a sense of complacency that allowed the Ds to obtain money from other victims.

H. **Proof of use of the mails/wires:** OK to use circumstantial evidence. Not a major issue. Note that each separate use (mailing, phone call, etc.) in furtherance of the scheme constitutes a separate offense.

I. **Mail and wire fraud affecting a financial institution.** If the fraud affects a financial institution, the person gets fined a maximum of $1mm and/or imprisoned a maximum of 30 years – higher than the ordinary fine/5-year maximum.
1. **Bouyea** (p.184) – D was convicted of bank fraud and wire fraud for causing a subsidiary of a bank to lend him money on the basis of forged and falsified documents. The subsidiary wasn’t a financial institution, but the bank was. Ct. looked at the relationship bet. the bank and the subsidiary and held that the bank was affected b/c the bank had to loan the $150K to the subsidiary so that the subsidiary, in turn, could make the loan to D.

**J. The bank fraud statute (a statute prohibiting a specific fraud), 18 U.S.C. § 1344:**

1. **Doke** (p.187) – Doke and his atty were held liable for bank fraud b/c Doke’s atty secured a loan for Doke and failed to disclose Doke’s involvement to the bank. The Ds caused the bank to violate civil banking regulations, which was enough to constitute fraud; the bank was entitled to make its decision regarding the loan with all material facts on the table. This case could have been brought under either subset of the bank fraud statute.

K. **The computer fraud statute (a statute prohibiting a specific fraud), 18 U.S.C. § 1030:**

1. Note: A protected computer is one that is used by the U.S. govt. or a financial institution, or one that is used in interstate or foreign commerce or communication.

2. **Middleton** (p.192) – A disgruntled ex-employee who sabotaged his former employer’s computer system was held liable for computer fraud under § 1030(a)(5)(A). The statute covers damage to “one or more individuals,” which includes corporations. In the calculation of damages, it’s OK to consider what measures were reasonably necessary to restore and resecure the data, program, system, or info that was damaged. Can look at direct expenditures (e.g., new software) as well as the value of the time of the employees who had to work on fixing the damage.

3. **Czubinski** (p.200) – D was not held liable for computer fraud under § 1030(a)(4) b/c the prosecution couldn’t prove that he intended to defraud or that he obtained something of value when he performed unauthorized searches in the IRS database. Note that the “unless” clause in § 1030(a)(4) is meant to distinguish computer fraud from computer trespass.

L. **Double jeopardy issue?** Cts. use the **Blockburger** test to determine whether two charges are the same. Two charges are not the same if each offense requires proof of an element that the other does not. While mail fraud, wire fraud, and bank fraud each involve a scheme to defraud, mail fraud involves use of interstate mails, wire fraud involves use of interstate wires, and bank fraud must be against a financial institution. So, no double-jeopardy issue w/ charging under these three statutes.

IV. **Securities Fraud**

A. **SA of 1933 and SEA of 1934:** Both contain a general criminal penalty provision that (1) elevates what would otherwise be a civil regulatory violation to a felony, provided that the violation is willful, and (2) defines and penalizes the independent crime of willfully making false and misleading statements in a registration statement or other document.

B. **Knowing and willful participation in fraud.** A knowledge/willfulness requirement can be met by (1) actual knowledge of impropriety and failure to do something about it, or (2) partial knowledge and conscious avoidance (willful blindness) of duty to investigate.

1. **Weiner** (p.204) – Independent public accountants were held liable for securities fraud for falsifying financial information re: their client corp over several years, presumably in order to present the desired image of a healthy, growing corp. Ct. found that the sheer magnitude of the adjustments the corp had to make, plus the length of time over which the three Ds were involved w/ the corp as auditors, plus the fact that they didn’t follow basic standards for auditing, could only mean that (a) the Ds were totally inept, or (b) they were aware to some extent of the false inflation of the corp.’s accounts. Even if they didn’t initially know, their consistent failure to apply GAAS and GAAP after they knew some kind of a major
fraud was afoot provided a basis from which the jury could infer their knowing and willful participation in the fraud. Similar to the Enron and WorldCom cases.

2. **Bilzerian** (p.213) – D was held liable for securities fraud for engaging in fraudulent transactions in the common stock of four companies. He filed a motion *in limine* seeking a ruling permitting him to testify regarding his state of mind, his belief in the lawfulness of his conduct, while prohibiting the prosecution from following-up with questions about his communications with his atty. Ct. held that the atty-client privilege is waived when a D asserts a claim that in fairness requires examination of protected communications (here, the basis of D’s understanding that his actions were legal). Note: D still could have raised his good-faith defense through his lawyer’s closing argument.

C. The SEA’s “no knowledge proviso,” 15 U.S.C. § 78ff(a): “No person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.” This may protect ostensibly innocent corporate officers from going to jail for violating some obscure rule or unpunished administrative action, but it doesn’t insulate them completely from criminal liability for the violation (i.e., they might still have to pay a fine). Harder to assert this after the Administrative Procedure Act.

1. **Lilley** (p.219) – Ds pled guilty to buying and selling shares for the purpose of creating the appearance of trading activity in a stock, violations of SEC Rule 10b-5. When they pled guilty, they essentially admitted that they knew generally that their conduct was manipulative and that securities fraud was illegal. It didn’t matter that they didn’t know specifically that they met the Rule 10b-5 standard. Knowledge that securities fraud is illegal was enough.

D. **Insider trading:** SEA § 10b and Rule 10b-5. SEA § 10b prohibits use of a manipulative or deceptive device in connection with the purchase or sale of securities in violation of SEC rules and regulations. Rule 10b-5, which was promulgated by the SEC pursuant to this provision, proscribes in turn the following manipulative and deceptive devices: (1) to employ a device, scheme, or artifice to defraud; (2) to make any untrue statement of a material fact or omit any such fact necessary to make a statement not misleading; or (3) to engage in a transaction, practice, or course of business that would operate as a fraud or deceit. Insider trading is prosecuted under Rule 10b-5 on the theory that it constitutes a scheme to defraud.

1. Rule: If material misrepresentation, then automatic 10(b)/10b-5 criminal liability. If material omission, then have to show that D had a duty to disclose – by arguing classical theory (*Cady, Roberts* duty), constructive insider theory (footnote 14 in *Dirks*) misappropriation theory, or tipper-tippee theory.

2. **In re Cady, Roberts & Co.** (p.228) – [Classical theory] SEC decided that a corporate insider must abstain from trading in the shares of his corp unless he has first disclosed all material inside information known to him. His duty to the other shareholders of the corp with whom he transacts arises from (1) the existence of a relationship affording access to inside info intended to be available only for a corporate purpose, and (2) the unfairness of allowing a corporate insider to take advantage of that info by trading without disclosure. The theory applies to permanent insiders (corporate officers, directors, executives – those who have permanent responsibilities at the corp) and to temporary fiduciaries (lawyers, accountants, consultants, takeover specialists, investment bankers, etc. – see footnote 14 in *Dirks*).

3. **Chiarella** (p.226) – [Classical theory] An employee of a financial printer prepared documents announcing corporate takeover bids and made strategic trades based on the info he saw prepublication. The names of the corps were blacked out, but he was able to deduce their identities from other info. S. Ct. did *not* hold him liable for insider trading b/c he didn’t have a relationship of trust and confidence with the shareholders of the corporation (the target company) in which he traded stock. The trades were impersonal mkt.
transactions; there was no duty to reveal material facts. (Note: Chiarella today could have been prosecuted under the misappropriation theory. He owed a duty to his employer, which in turn owed a duty to the acquiring company.)

4. O’Hagan (p.233) – [Misappropriation theory] Lawyer who worked for firm that represented client corp re: a potential tender offer made trades on the basis of the confidential tender offer plans. He was held liable for mail fraud, securities fraud, and insider trading, even though he did no work for that client and the firm ceased to represent the client a month before the client announced its tender offer for another company’s stock. The misappropriation theory: D committed fraud “in connection with” a securities transaction, and thereby violated § 10b and Rule 10b-5, when he misappropriated confidential info for securities trading purposes, in breach of a duty owed to the source of the info, his employer. The fraud was consummated when, without disclosure to his firm, he used the info to trade. (Note: Why wasn’t this classical insider trading? Because D’s duty was to the client corp and its shareholders, not to the shareholders of the target company.)

5. Dirks (p.239) – [Tipper-tippee] D, an officer of a broker-dealer firm who specialized in providing investment analysis of insurance company securities to institutional investors, received info from a former officer of Equity Funding re: fraudulent corporate practices. The former officer asked D to investigate the fraud and disclose it. D did investigate, and some employees corroborated the charges. D passed on the info to a WSJ reporter and to his clients, some of whom sold their Equity Funding holdings. S. Ct. held that he was not liable for securities fraud on the theory that the former officer didn’t breach his Cady, Roberts duty to shareholders in disclosing the info to D. The tippers were motivated by a desire to expose the fraud, not personal gain. A tippee is only liable if (1) the tipper is, i.e., if the tipper has breached a duty, and (2) the tippee knows that the tipper passed the info on to him improperly.

6. Chestman (p.245) – [tipper-tippee] The stockbroker (Chestman) of a couple (Susan and Keith Loeb) that was related to the founder of a publicly-traded supermarket chain (Waldbaum) made trades for his own account and for his clients’ discretionary accounts on the basis of info he received improperly. The info related to the pending sale of Waldbaum to A&P. The stockbroker was not held liable for insider trading. “Because Keith owed neither his wife nor the Waldbaum family a fiduciary duty or its functional equivalent, he didn’t defraud them by disclosing news of the pending tender offer to his stockbroker. Absent a predicate act of fraud by Keith, the alleged misappropriator, the stockbroker couldn’t be derivatively liable as Keith’s tippee.”

7. Rule 10b5-2 (p.253) – Addresses the question, considered in Chestman, of when non-business relationships may give rise to a duty of trust and confidence for purposes of the misappropriation theory of insider trading. Section (b)(3) stands Chestman on its head – we now start with a rebuttable presumption that there is a relationship of trust and confidence whenever someone receives material, non-public info from a spouse, mother, etc. Section (b)(1) – agree to maintain info in confidence; (b)(2) – pattern and practice.

8. Teicher (p.254) – Teicher and Frankel, two players in a five-person group in which confidential business info was shared, were held liable for securities fraud, conspiracy, and mail fraud. Ds argued that the prosecution should have had to prove a causal relationship bet. the misappropriated material non-public info and their trading, i.e., that they traded “on the basis of” that info. The ct. rejected this argument, holding that the standard is “knowing possession.” “It strains reason to argue that an arbitrageur, who traded while possessing info he knew to be fraudulently obtained, knew to be material, knew to be non-public – and
who didn’t act in good faith in so doing – did not also trade on the basis of that info. [O]n the facts of this case, no reas. jury could have made such a distinction.”

9. Rule 10b5-1 (p.259) – Address the question of when a person in possession of material nonpublic information trades “on the basis of” the information. Definition in (b) codifies Teicher rule of “knowing possession.” But the affirmative defenses in (c) accommodate some of the concerns of the Teicher defendants.

E. New securities fraud statute from Sarbanes-Oxley, 18 U.S.C. § 1348: Modeled after the mail fraud statute; cts. are likely to draw on mail fraud statute case law. Different from SEC Rule 10b-5: “in connection with any security” covers a lot more than “in connection with the purchase or sale of a security.” Unclear when prosecutors would use § 1348 and when they’d use Rule 10b-5 – perhaps prosecutorial guidelines will be developed.

V. False Statements
A. False statements generally, 18 U.S.C. § 1001: Whoever (1) knowingly and willfully (2) makes false or fraudulent statements (3) that are material (4) in any matter within the jurisdiction of a federal department or agency, except in judicial proceedings, is guilty of violating the statute.

1. United States v. Rodgers (p.292) – D was held liable under § 1001 for making false reports to the FBI and to the Secret Service in order to locate his wife. In light of the statute’s original policy of curtailing the flow of false info to the agencies, which interferes w/ their administrative and regulatory functions, the ct. read the term “jurisdiction” more broadly than did the lower ct., finding that “the phrase ‘within the jurisdiction’ merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body.” The statute applies only to those who lie “knowingly and willfully” to the govt., so it shouldn’t deter citizens who in good faith want to report suspected crimes.

2. United States v. Wright (p.296) – D was held liable under § 1001 for filing falsified reports with the County Health Dept. regarding the water treatment plant where he worked. He argued that there was no direct relationship bet. the reports he submitted and a function of the EPA b/c the EPA had surrendered primary authority for enforcement of Safe Drinking Water Act standards to Oklahoma and b/c he filed the report w/ the state, not the EPA. The ct. rejected his argument, reasoning that (1) a grant of primary authority is not a grant of exclusive authority, (2) the EPA is involved in assuring state compliance w/ nat’l water standards, and (3) the EPA’s funding of Oklahoma’s public water program is conditioned, in part, on the results of its annual evaluations of that program (which are based in small part on water analysis data). All that matters is whether the EPA has the authority to review the reports to enforce the Safe Drinking Water Act – not whether the EPA actually exercises that authority.

3. Steiner Plastics (p.299) – The D corp produced plexiglass cockpit canopies for Grumman Aircraft, which was producing jet planes for the Navy. It engaged in a fraudulent scheme in which it switched inspection approval stamps so that defective canopies would pass inspection. The ct. found that the scheme was designed to deceive both Grumman and the Navy, and therefore was “within the jurisdiction” of the Navy. Also, the ct. found that it didn’t matter whether or not the canopies in question were actually defective b/c such evidence wouldn’t have negated the false statements in the inspection approval stamps, which deprived the Navy of the right to make the approval decisions on its own.

B. Material false statements: A statement is material if it relates to the function of an agency – if it has the “capacity or natural tendency” to influence the course of an agency project or investigation, whether or not it’s likely to influence. Not a stringent standard. (The higher
materiality standard in the securities fraud context—reasonably would influence an investor’s
decision—is the exception rather than the rule.

1. **LeMaster** (p. 303) – FBI was investigating allegations that certain legislators were illegally receiving money in exchange for favorable votes on pending horseracing legislation. Ct. held that D’s lies in an interview were material to the FBI’s investigation, even though the FBI knew beforehand that D had accepted money, b/c FBI needed to make sure there wasn’t an innocent explanation for D’s having accepted the money (improbable but possible).

2. **Shah** (p. 307) – D certified in a govt. contract, “I will not disclose price info before the contract award,” after he had invited a competitor to share bids with him. Ct. held that a promise may amount to a “false, fictitious, or fraudulent” statement, within the meaning of § 1001, if it’s made without any present intention of performance and under circumstances s.t. it plainly, even if implicitly, represents the present existence of an intent to perform. It’s not that he broke a promise; it’s that he made a promise while not intending to keep it. What about insincere predictions? Not unlike false promises. Have to determine whether the prediction is material, whether it induced the other party to enter into the contract.

C. **Exculpatory no’s.** No such thing.

1. **Brogan** (p. 313) – S. Ct. held that there is no exception to liability under § 1001 for a false statement that consists of the mere denial of wrongdoing, the so-called “exculpatory no.” Ginsburg wrote a concurring opinion warning of “the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes.”

D. **Culpable mental state w.r.t. jurisdictional facts:** None required. But cts. have founds that § 1001 isn’t a trap for the innocent b/c there’s still a knowingly-and-willfully requirement w.r.t the false statement or fraud. If the amt. of the fraud is truly minor, try to argue that the govt. should exercise prosecutorial discretion.

1. **Yermian** (p. 320) – D had already lied on his employment application, and he didn’t want to get caught, so he lied again in connection with a security questionnaire. Charged under § 1001, he claimed that, although he knew that he lied, he didn’t realize that he was lying to the Dept. of Defense. He requested a jury instruction requiring govt. to prove that he had actual knowledge that his statements were made in a matter within the jurisdiction of a federal agency. S. Ct. held that § 1001 doesn’t require actual knowledge of jurisdiction but declined to specify whether some lesser mental state was required.

2. Example: Suppose D lied on an employment application, and, years later and without D’s knowledge, D’s employer used the false info from the application in a contract proposal submitted to the govt. Section 1001 violation? Have to argue that at the time D filled out his employment application, what he lied about was not within the authority of any federal agency to act upon in its official capacity.

3. **Green** (p. 324) – D falsified safety test report for a nuclear power plant; the safety tests were required by the Nuclear Regulatory Commission. Ct. held that no mental state (actual or constructive knowledge) is required w.r.t. federal involvement in order to establish a violation of § 1001.

E. **Double jeopardy:** The Double Jeopardy Clause prohibits prosecution for the same offense following conviction, prosecution for the same offense following acquittal, and imposition of multiple punishments for the same offense. Under the **Blockburger** test, two offenses are not the same if each explicitly requires proof of an element that the other does not.

1. **Ramos** (p. 327) – D was convicted for giving a false name, place, and date of birth and using false papers in applying for a passport in violation of § 1001, and for making a false statement with the intent to secure a passport in violation of 18 U.S.C. § 1542. Ct. held that, under the **Blockburger** test, the Double Jeopardy Clause wasn’t violated. Section 1001
requires that the false statement be material; § 1542 doesn’t have a materiality requirement. Also, § 1542 requires that the false statement be made with the intent to secure a passport (i.e., intent to defraud), whereas only an intent to deceive is necessary in § 1001.

F. **Procurement fraud, 18 U.S.C. § 1031:** The Major Fraud Act of 1988 prohibits (1) knowing (2) execution or attempted execution of scheme (3) to defraud the U.S. or to obtain money or property (4) where the value of the prime contract, subcontract, or any constituent part is worth at least $1mm.

1. *Brooks* (p.330) – If a prime contract is worth more than $1mm, then the subcontractor may be held liable for procurement fraud, even if the value of the subcontract by itself is less than $1mm. Suppose prime was worth $800,000, and subs were worth $400,000 — no § 1031 violation. Suppose there were two primes worth $800,000 each, and one sub worth $1mm – § 1031 violation.

2. Note: Primes, subs – what about a supplier to a subcontractor? The language of the statute suggests that the govt. can prosecute pretty far down the line. There’s still a knowingly-with-intent-to-defraud requirement (higher than the mens rea requirement for § 1001), so it’s hard to argue that it’s a trap for the innocent. But govt. could exercise prosecutorial discretion by going after the supplier under the mail fraud statute or § 1001 instead.

3. *Sain* (p.335) – D submitted a series of inflated claims for reimbursement of costs related to changes that the Army made to a contract. Ct. held that each separate false claim he made constituted a separate scheme and therefore a separate count. The claims were separate b/c each claim sought to obtain a separate amt. of money from the govt., there was no overall limit to how much D would have taken, and each claim was submitted weeks apart over an approx. 3-year period.

G. **False claims, 18 U.S.C. § 287:** Whoever (1) knowingly (2) makes false, fictitious, or fraudulent claims (3) to any federal department or agency is guilty of violating § 287.

1. *Maher* (p.337) – D was held liable under § 287 for manipulating the billing statements in his company’s contracts with the Army. The ct. held that (1) three kinds of claims may be submitted in violation of § 287 (“false, fictitious, or fraudulent”), not just fraudulent claims, and (2) the only mens rea requirement for § 287 is knowledge that the claims are false, fictitious, or fraudulent. In the case of a fraudulent claim, the govt. need not prove a specific intent to defraud.

VI. **Perjury and False Declarations**

A. **Perjury generally, 18 U.S.C. § 1621:** Whoever (1) having taken an oath (2) willfully (3) states or subscribes any matter which he doesn’t believe to be true, and which is (4) material, is guilty of perjury.

B. **False declarations before grand jury or court, 18 U.S.C. § 1623:** Whoever (1) having taken an oath (2) in any proceeding before or ancillary to any federal ct. or grand jury (3) knowingly (4) makes any false declaration or uses any written material that includes false information, (5) where the falsehood is material, is guilty of making false declarations before a grand jury or court.

C. **Principals, 18 U.S.C. § 2:** One who aids and abets the commission of a crime is punishable as a principal, and one who willfully causes an act to be done which, if directly performed by her or another, would be a federal crime, is punishable as a principal.

1. *Walser* (p.351) – D sent a back-dated and false document (the SCI-013 form) to Morrow, a claims specialist for the Federal Crop Insurance Corporation, to cover up her prior submission of fraudulent crop insurance claims. At D’s trial for fraud, D subpoenaed Morrow, who testified for D on the basis of this document. D was acquitted, and it wasn’t until after the trial that the govt. discovered that the document was back-dated and false. D
subsequently was held liable under § 1623 and § 2(b) (as well as § 1001) for intentionally causing an innocent party, Morrow, to commit perjury unwittingly. “By falsifying and back-dating the SCI-013, then introducing it at trial through the innocent testimony of Morrow, D knowingly caused a fraudulent document to be entered into evidence during a court proceeding. … Section 2 operates to unite Morrow’s capacity to commit perjury with D’s intent that perjury be committed.”

D. Materiality: The test for materiality is whether the statement has the capacity or natural tendency to influence the outcome of the proceeding (regardless of its actual effect).

1. Bronston (p.344) – In a bankruptcy proceeding for D’s company, a lawyer for a creditor asked, “Do you have any bank accounts in Swiss banks, Mr. Bronston?” The question was ambiguous b/c it could reasonably have been interpreted to refer to D personally or to D’s company, but the S. Ct. assumed D knew what the lawyer was referring to. D’s answer was literally true but not responsive to the question and arguably misleading by negative implication. Ct. reversed D’s perjury conviction, holding that, even if D was being evasive, the burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry and flush out the truth. Ct. avoided reading the statute broadly b/c it didn’t want a rule that would punish earnest witnesses who simply didn’t understand a question fully.

2. DeZarn (p.349) – This case involved facts similar to those in Bronston, except that here the questioner technically misstated something (the year of the Preakness Party). The ct. held D liable for perjury b/c it reasonably could be inferred that D knew what his questioner was referring to, and in light of that D’s answer was in fact false.

E. The two-witness rule w.r.t. perjury: With respect to perjury, the two-witness rule requires that the falsity of a defendant’s statements must be proved by the testimony of two witnesses or the testimony of one witness, plus corroborating evidence. The corroborating evidence may be circumstantial and is sufficient if, together with the direct evidence, it’s inconsistent with the innocence of the defendant. With respect to the false declarations statute, the two-witness rule doesn’t apply; evidence produced by a single witness may establish the falsity of a defendant’s sworn declaration. See § 1623(e).

1. Davis (p.357) – In a grand-jury investigation of a burglary, D, while testifying under oath, denied having any knowledge as to who robbed the Lualualei service station, denied that the main suspect (Gustafson) told him about the burglary, denied that he had told FBI Agent Lui about Gustafson’s involvement in the burglary, and denied that the statement he gave to Lui was the same as the one in evidence. Rejecting D’s argument that there wasn’t enough evidence to impeach his testimony, the ct. held D liable for perjury under 1621. (1) Lui’s testimony regarding his interview with D plus (2) either D’s signed statement from that interview or D’s confusing, contradictory testimony at his own trial were sufficient under the two-witness rule.

F. The recantation defense w.r.t. false declarations: Under the perjury statute, it’s no defense if the witness later corrects or retracts the lie. Under the false declarations statute, recantation is an effective bar to prosecution, IFF (1) the false statement has not substantially affected the proceeding and (2) it has not become manifest that the falsity has been or will be exposed.

1. Fornaro (p.363) – In a bail hearing for an accused drug dealer, D lied when testifying that he knew DeFelice resided at an unspecified location in Stamford, denied that DeFelice lived in the Rye apartment prior to his arrest, and when he stated that he had paid the Oct. 1988 rent for the Rye apartment. On re-cross, after it was obvious that he had lied, D admitted as much. Charged w/ perjury, D argued in his defense that the two preconditions in § 1623(d) were disjunctive and that he met the first one – his lie hadn’t substantially affected the proceeding. The ct. rejected D’s defense, holding (1) that one has
to meet both preconditions in § 1623(d) to get the recantation defense, and (2) that a recantation defense must be raised in a pre-trial motion (i.e., before prosecution for perjury).

G. **Competent tribunals and ancillary proceedings w.r.t. false declarations:** The false declarations statute applies to statements made under oath “in any proceeding before or ancillary to any court or grand jury of the U.S.”

1. **Dunn** (p.369) – D testified under immunity before a grand jury w.r.t. Musgrave’s (his former inmate’s) drug-related offenses. Musgrave was indicted. Months later, D went w/o counsel to Musgrave’s atty’s office and, in the presence of Musgrave’s atty and a notary public, made an oral statement under oath in which he recanted his grand jury testimony implicating Musgrave. At an evidentiary hearing at Musgrave’s motion to dismiss, D adopted the statement he had given in Musgrave’s atty’s office. The S. Ct. held that D was not liable under § 1623 for the inconsistency bet. his two statements – his grand jury testimony and his statement in Musgrave’s atty’s office. The interview didn’t constitute a deposition, and § 1623 doesn’t encompass statements made in contexts less formal than a deposition.

H. **Immunized testimony:** Title 18 U.S.C. § 6002 provides that a witness who pleads the 5th may be compelled to testify; “but no testimony or other info … may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.”

1. **Apfelbaum** (p.373) – D was called to testify before a grand jury w.r.t. a robbery at a car dealership. He pled the 5th and was granted immunity but compelled to testify. In his testimony, he made two series of false statements. The S. Ct. held that he was liable for perjury for the false statements; the immunity extended to offenses related to the robbery, but not to offenses related to the testimony itself.

VII. **Obstruction of Justice**

A. **Influencing or injuring officer or juror generally, 18 U.S.C. § 1503:** For purposes of most white collar prosecutions, the heart of the statute is the omnibus clause, which forbids (1) corruptly (2) endeavoring to influence, obstruct, or impede (3) the due administration of justice.

B. **Obstruction of proceedings before departments, agencies, and committees, 18 U.S.C. § 1505:** The statute forbids (1) corruptly (2) endeavoring to influence, obstruct, or impede (3) the due and proper administration of the law under which (4) any pending proceeding is being had (5) before any federal department or agency, or congressional committee.

C. **Obstruction of criminal investigations, 18 U.S.C. § 1510:** Subsection (a) forbids (1) willfully (2) endeavoring to prevent anyone from communicating info relating to a crime (3) to a criminal investigator (4) by means of bribery.

Subsection (b) forbids (1) an officer of a financial institution (2) from notifying anyone about the existence or contents of a subpoena for institutional records (4) with intent to obstruct a judicial proceeding.

D. **Pending judicial proceedings:**

1. **Simmons** (p.388) – D, a writ server for the Phila. Traffic Court, engaged in an illegal scheme of changing the dates on scofflaw notices for which the statute of limitations had run and then mailing such notices. The FBI secured a subpoena ordering records to be produced for and witnesses to appear for a regularly sitting grand jury. D destroyed documents and instructed witnesses to withhold info from the grand jury. What qualifies as an “administration of justice” under 1503? A regular agency investigation doesn’t qualify – need a connection to the judicial branch. Holding: “[R]ather than require that the grand jury be cognizant of the subpoena or otherwise involved in the investigation, we hold that an
investigation by a law enforcement agency ripens into a pending grand jury investigation for purposes of § 1503 when officials of such agency apply for, and cause to be issued, subpoenas to testify before a sitting grand jury.” The subpoena must be issued “in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before the grand jury.”

2. Note: While cts. are in agreement that § 1503 requires a pending proceeding, there’s a split when the charge is conspiracy to obstruct justice. At least one circuit requires that a proceeding be pending when the conspiracy is formed. Several others recognize that a punishable conspiracy may be found even though no proceeding is pending when the agreement is formed. Vaghela (11th Cir.): Govt. “must demonstrate that the actions the conspirators agreed to take were directly intended to prevent or otherwise obstruct the processes of a specific judicial proceeding in a way that is more than merely ‘speculative.’”

3. Lundwall (p.394) – In a civil class action employment discrimination lawsuit, Lundwall was deposed and requested on the record to produce documents pertaining to Texaco’s minority employees. Lundwall, Ulrich, and others first withheld and then destroyed documents. Ds were charged under § 371 (conspiracy) and § 1503 w/ conspiring to obstruct justice. Holding: § 1503 can be applied to interference w/ discovery during pretrial preparations for a civil action.

E. Endeavoring to influence or impede: “Endeavoring” involves less than “attempting.”

1. Collis (p.400) – D submitted a forged letter pretending to be from his employer to a district ct. in support of leniency at a supervised release violation hearing. After he was sentenced, the judge learned that the letter was a fabrication. D was held liable under § 1503 for obstructing justice, even though judge wasn’t actually swayed by the letter. “The govt. needn’t show that the false statements actually obstructed justice…. D’s letter need only have ‘the natural and probable effect of impeding justice’ to constitute a violation of § 1503.”

2. Griffin (p.405) – D was called to testify before a grand jury investigating the financing of loansharking operations and the possible movement of money from the U.S. to S. America. In his testimony, he answered questions about conversations he had w/ Ebeling by either flatly denying knowledge or relying on an inability to recall. It turned out that the conversations themselves were either fabricated by D to avoid a joint financial venture proposed by Ebeling or engineered by Ebeling to impress his wife. The ct. held D liable under § 1503: (1) His evasive statements in his testimony had the effect of closing off avenues of inquiry, in addition to requiring the grand jury to ascertain the truth by resolving contradictory evidence; his lies impeded the administration of justice. (2) His lies were material. Testimony is material if it’s directed to the primary subject under investigation, if it’s capable of supplying a link to the main issue, or if it’s relevant to any subsidiary issue.

3. Aguilar (p.411) – D, a judge, lied to an FBI agent w.r.t. a conspiracy to influence the outcome of a case. The S. Ct. held that a witness must have knowledge that his false statements would be provided to a grand jury in order to be held liable under 1503. Must know that the questioner is somehow connected to a grand jury s.t. the statements probably would be provided to one. “Corruptly” the hook – a person lacking knowledge of a pending proceeding necessarily lacked evil intent to obstruct.

4. Cintolo (p.416) – D, a criminal defense atty, was held liable under § 1503 (plus conspiracy) for interfering w/ a federal grand jury investigation of the Angiulo gang. D “represented” LaFreniere, a witness before the grand jury, and convinced him to plead the 5th and, if granted immunity, to keep refusing to testify – in other words, to commit contempt. D convinced LaF to do this in order to protect his real client, Angiulo. (If LaF had testified truthfully, he would have gotten no jail time.) Holding: Although D’s acts in fostering the
intimidation of LaF were not in themselves overtly unlawful, D’s acts w/ his corrupt intent were actionable under § 1503. This went beyond zealous representation b/c D lacked good faith and an honest belief that LaF had any residual right, after receiving immunity, to maintain his silence, or that doing so would benefit LaF in any legally cognizable sense.

F. Tampering w/ a witness, victim, or informant, 18 U.S.C. § 1512: Section 1512(b) proscribes (1a) knowingly using intimidation or physical force, (1b) threatening, or (1c) corruptly persuading another person, or attempting to do so, or engaging in misleading conduct towards another person, (2) with the specific intent to – inter alia, influence testimony, destroy evidence, or hinder the communication to law enforcement of info relating to a crime. (See statute for precise language.) No pending proceeding requirement; just need a potential witness. No Aguilar likely-to-affect requirement; instead we focus on D’s intent. Section 1512(c) proscribes intentional harassment (compared to intimidation, no threat).

1. The distinction bet. corrupt persuasion and misleading conduct – Misleading conduct invites reliance on some kind of misrepresentation. With corrupt persuasion, the actor’s intent is to persuade/dissuade the witness is more transparent.

2. Lester (p.426) – Lester and McGill, members of an Oakland gang, were held liable for conspiracy to prevent Brigham from testifying in a federal prosecution of Mitchell, the alleged gang leader. Holding: (1) While § 1512 proscribes witness tampering by means of intimidation, physical force, threats, corrupt persuasion, misleading conduct, or harassment, the omnibus provision of § 1503 covers witness tampering by other means; (2) § 1503 covers non-coercive but nevertheless corrupt witness tampering, incl. the hiding of a witness; (3) this holding is consistent w/ the Second Cir. decision in Hernandez, that Congress intended to remove witnesses entirely from the scope of § 1503, on the grounds that it’s not the witness but the “administration of justice” that needs protection here.

3. Shotts (p.432) – Shotts bribed Montgomery for pre-approved bail bonds for a bail bond business Shotts was associated with. Later, Shotts’ secretary, Kennedy, testified before a grand jury investigating Judge Montgomery for corruption. Kennedy was asked, “Did [Shotts] say anything about the FBI to you?” She answered: “He said just not say anything and I wasn’t going to be bothered.” Holding: (1) The phrase “corruptly persuades” in § 1512(b) isn’t unconstitutionally vague or overbroad; “corruptly” means what it means in § 1503, i.e., motivated by an improper purpose. (3) The jury could reas. have inferred from this testimony that Shotts was attempting w/ an improper motive to persuade her not to talk to the FBI, in violation of § 1512(b)(3).

4. Gabriel (p.437) – Gabriel, a corp. officer of a jet engine repair station (“CRT”), was being investigated by a grand jury for involvement in a fraudulent scheme. He falsely stated in a fax to a Qantas rep., Mealing, that he had previously disclosed to Qantas that a low-pressure turbine (LPT) case was only partially serviceable when it wasn’t serviceable at all. He was charged w/ attempted witness tampering under § 1512(b)(1) on the theory that he intended to mislead Mealing to believe the lie and repeat it to the grand jury. Holding: (1) The “likely to affect” requirement that the S. Ct. in Aguilar incorporated into § 1503 shouldn’t be incorporated into § 1512. Rather, the govt. has to prove only that D misled or corruptly persuaded Mealing w/ intent to interfere w/ Mealing’s potential testimony before the grand jury. The fact that Mealing was in Australia and beyond the grand jury’s subpoena power didn’t rule out the possibility of his testifying.

5. Wilson (p.445) – Outside the courtroom in the middle of a trial, one govt. witness, D, pointed and sneered at three other govt. witnesses, “Your asses belong to Joe [the defendant in the trial]” and “you are a bunch of jokes and should be in jail, too,” as he was led by them. D was held liable under § 1512(c)(1) for three counts of attempting by harassment to dissuade witness testimony. Holding: (1) Both a single act and repeated attacks can
constitute harassment. (2) There was substantial evidence of D’s intent. D knew the
witnesses were in the hallway for the purpose of testifying. He didn’t know that two of
them had already testified. He spoke in a low voice so that the U.S. Marshals couldn’t hear
him. His comments and his sneering face could reas. be interpreted as harassing. Plus, his
intent could be inferred from the way the other witnesses reacted to his remarks.

6. Willard (p.448) – D, whose husband was on trial for sexually molesting their daughter, was
held liable under § 1512(b)(1) for telling the daughter, in the presence of the daughter’s
husband, that D didn’t want her to testify, that God would not like it if she testified, and
that D would have her prosecuted for perjury if she testified against the father. Holding:
The evidence was sufficient for D’s liability under § 1512(b)(1), even though D may not
have actually influenced her daughter’s testimony, b/c the statutory focus is on D’s
endeavor. The fact that both the daughter and the daughter’s husband testified that D
attempted to intimidate, and the fact that the testimony established that D threatened her
daughter w/ criminal prosecution and dire spiritual consequences, were enough.

G. The 5th Amendment privilege: Corps. have no 5th Amendment privilege against self-
incrimination. But what about a custodian of corporate records who arguably would be
incriminated by production of the records? Can the custodian resist a subpoena for corporate
records on the ground that the custodian would be personally incriminated by the content of the
records? A: The privilege is limited…

1. Doe – The S. Ct. elaborated the act of production doctrine, that the custodian’s act of
producing records is itself a representation that the documents produced are those
demanded by the subpoena. A sole proprietor can refuse to produce the proprietorship’s
records on 5th Amendment grounds b/c the act of complying, producing the records,
establishes their authenticity and the proprietor’s possession of them. From other S. Ct.
cases: A sole shareholder can’t do this, and neither can a president who runs a small
corporation that looks like a sole proprietorship.

2. Grosso – The S. Ct. elaborated the required records exception to the 5th Amendment
privilege. One can’t plead the 5th w.r.t. documents that meet certain criteria: (1) the
purpose of the recordkeeping is essentially regulatory, rather than criminal; (2) the records
contain the type of info that the regulated party would ordinarily keep; and (3) the records
have assumed public aspects rendering them analogous to public documents.

3. Spano (In re Grand Jury Subpoena) (p.454) – D, the sole proprietor of Supreme Auto
Sales, was served a subpoena in connection w/ a grand jury investigation of possible
criminal violation of federal odometer tampering laws. Holding: The required records
exception to the 5th Amendment will apply to the act of production by a sole proprietor
even where the act of production could involve compelled testimonial self-incrimination.
Why: (1) the public interest in obtaining the info necessary to the regulatory scheme
outweighs the private interest in non-disclosure; (2) by engaging in the regulated activity,
the individual waives his privilege as to the production of those records which are required
to be kept; and (3) the individual admits little of significance by the act of production b/c of
the public aspects of the documents.

4. In re Grand Jury Proceedings (p.458) – Which documents are “corporate” as opposed to
“personal?” Here, “daytimers,” which are like business calendars/diaries, were deemed to
be documents more corporate than personal in nature. Multi-factor inquiry: who prepared
the document; the nature of its contents; its purpose or use; who possessed it; who had
access to it; whether the corp. required its preparation; and whether its existence was
necessary to or in furtherance of corporate business.

VIII. Bribery of Public Officials
A. **Bribery of public officials and witnesses, 18 U.S.C. § 201:**

Whoever (1) corruptly offers or gives (2) anything of value (3) to a public official (4) w/ intent to influence is guilty of bribery under (b)(1).

Any public official who (1) corruptly seeks or receives (2) anything of value (3) in return for being influenced (or apparently being influenced) in connection w/ any official act is guilty of the crime of bribery under (b)(2).

Whoever (1) offers or gives (2) anything of value (3) to a public official (4) for or because of any official act performed or to be performed is guilty of gratuity under (c)(1)(A).

Any public official who (1) seeks or receives (2) anything of value (3) for or because of any official act performed or to be performed is guilty of the crime of gratuity under (c)(1)(B).

Bribery carries a more serious punishment than gratuity, which is essentially a lesser included offense.

B. **Official acts:**

1. See defn. in § 201(a)(3) – “any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.”

2. *Parker* (p.463) – A clerk to an administrative law judge demanded bribes in return for (forged) approval of Social Security benefits. D argued that she lacked the specific authority to grant or deny benefits. The ct. interpreted “official act” in 201 broadly. D created the appearance of authority, had a work relationship w/ the judge, and was able to carry out the scheme in her place of work, where appeals were pending, by virtue of her access to the govt. database. She violated her position of trust by corrupting the approval process.

3. *Arroyo* (p.466) – A Small Business Administration loan officer deceived a loan applicant into thinking that his application had not been approved and demanded bribes in return for loan approval. The ct. held him liable under § 201(b) for soliciting a bribe; the timing of the loan approval and the demand for cash wasn’t important. What mattered was the fact that this was a corrupt solicitation.

C. **Motive and intent:**

1. *Sun-Diamond Growers of California* (p.469) – A trade association gave gifts to former Secretary of Agriculture Michael Espy while it had an interest in matters before Espy. The S. Ct. held that gratuity requires proof of a nexus bet. the gifts and a specific official act, which is defined in § 201(a)(3). Have to look at the nature and value of the gift and the circumstances in which it was given in order to distinguish bet. benign gifts and unlawful gratuities. Gifts to promote a good working relationship are benign.

2. *Anderson* (p.475) – D, a lobbyist, gave money to a senator in the context of discussions re: postal rate legislation and was held liable for bribery. Even if you’re a lobbyist, and you’re proper registered, you can’t buy votes from federal public officials. The senator was acquitted of bribery but held liable for gratuity. There was no inconsistency; a jury is free to infer that the mind of the giver and the mind of the recipient are different. The same transaction can entail two different crimes.

D. **Thing of value:**

1. *Williams* (p.480) – Subjective value counts. “Corruption of office occurs when the officeholder agrees to misuse his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe.”

2. *Gorman* – Value that’s not readily quantifiable counts. Even though the loans in this case were repaid in full w/ interest, so that the D didn’t retain “anything of value,” the ct. found
that D retained the value of having received substantial unsecured loans on extremely short notice while he was in a precarious financial situation.

E. Public officials:
1. See defn. in § 201(a)(1).
2. Dixson (p.486) – Officers of a private, non-profit corp. administering and expending federal community development (HUD) block grants sought a series of bribes from contractors in connection w/ awards of housing rehabilitation contracts. The S. Ct. held them liable as “public officials” under §§ 201(c)(1), (2). Factors establishing a sufficient connection: Fed. guidelines dictated where and how the fed. funds could be distributed; Ds implemented a fed. program; Ds had primary responsibility for disbursing the funds; Ds were accountable to the govt.; and Ds’ salaries were completely funded by the Housing and Community Development Act. Doesn’t matter if there was no direct contractual bond bet. the Ds and the govt. The basic test is “whether the person occupies a position of public trust w/ official fed. responsibilities.” O’Connor’s dissent – what about federal research grants? Response would be that scientists aren’t carrying out a federal program; the program essentially ends when the scientists receive the funds.

3. Krichman – The S. Ct. held that a baggage porter, although employed by a federally controlled railroad, couldn’t be said to have “acted for or on behalf of the United States” b/c the porter lacked any duties of an official character.
4. Brewster (p.492) – Sen. Brewster was charged under § 201(c)(1) and 201(g) for accepting a bribe in connection w/ pending postal rate legislation. D argued immunity under the Speech or Debate Clause in the Constitution. The S. Ct. held: Under the Clause, evidence of a speech can’t be used to support a criminal charge. But to show that D took or agreed to take money for a promise to act in a certain way – illegal conduct under § 201 – it’s not necessary for the prosecution to inquire into how D spoke, how he debated, how he voted, or anything he did in the chamber or in cmte. The acceptance of the bribe is the violation of the statute; there’s no need for the prosecution to show that D actually performed the illegal promise.

F. Cooperating witnesses: Section 201 also prohibits bribing witnesses before fed. tribunals to influence their testimony or paying gratuities “for or because of” a witness’s sworn testimony.
1. Ware (p.501) – D, in a drug case, argued in his defense that by offering leniency to codefendants and cooperating witnesses in exchange for their testimony against him, the prosecution had violated § 201(c)’s prohibition against offering anything of value to a witness for or because of the witness’s testimony. The S. Ct. held that the word “whoever” in the statute and in this context doesn’t include the U.S. govt. The prosecutorial prerogative to recommend leniency in exchange for testimony is age-old and consistent w/ the Fed. Rules of Crim. Pro., provisions of the U.S. Code, and the Sentencing Guidelines. Moreover, prosecutors are required to disclose plea agreements to defense, so defense has an opty. to ferret out false testimony that an interested witness might give b/c of a govt. promise.

IX. Federal Program Bribery
A. Theft or bribery concerning programs receiving federal funds, 18 U.S.C. § 666: Whoever (1) being an agent of a fed., state, or local agency or organization (2) that benefits in excess of $10,000 under a federal program (3) embezzles, etc., or corruptly solicits bribes (4) in connection w/ any business, transaction, or series of transactions of such entity involving anything of value of $5,000 or more is guilty under the statute.
Whoever (1) corruptly offers or gives (2) anything of value of $5,000 or more (3) to any agent of a fed., state, or local agency or organization (4) that benefits in excess of $10,000 under a federal program (5) w/ intent to influence is guilty under the statute.

B. Connection bet. the bribery activities and a fed. interest required, but not bet. the bribery activities and the fed. funds:
1. *Salinas* (p.507) – The fed. govt. provided funds for physical improvements to a state prison, and paid a per diem fee for each fed. prisoner housed there. A corrections officer (D) accepted bribes to permit a fed. prisoner to have conjugal visits. The S. Ct. held D liable under § 666 (a)(1)(B): (1) The bribery activities don’t have to affect the fed. funds. The “business, transaction, or series of transactions” – here, the visits w/ D’s wife and girlfriend – don’t have to involve a diversion or misappropriation of fed. funds.
2. *DeLaurentis* (p.512) – D was the Supervisor of Detectives, and among his other duties he was assigned to assist the NJ Div. of Alcoholic Beverage Control in the enforcement of the state alcohol laws. He accepted bribes for interceding w/ the town council to permit renewal of the license of a particular problem bar. Meanwhile, D’s police dept. received fed. funds and used them to pay the salary of an additional police officer w/ street patrol duties. Holding: There must be some nexus bet. the bribery activities and a federal interest. Here, there was a nexus b/c D’s corruption affected the police patrol activities that the fed. govt. was financing. Officers, incl. the one whose salary was being paid w/ fed. funds, were dispatched on several occasions to deal w/ problems at this bar.
3. *Copeland* (p.515) – Ds, the manager of a Lockheed plant and a subcontractor, accepted and gave bribes, respectively, for business referrals and subcontract awards. The ct. vacated D’s conviction under § 666, holding that Lockheed wasn’t an organization that received benefits pursuant to a fed. program, as required by § 666(b). Only those contractual relationships that constitute some form of fed. assistance (the inferred meaning of “benefits,” i.e., entailing fed. policy interests) are covered under the statute – not purely commercial contractual relationships like Lockheed’s.

X. The Racketeer Influenced and Corrupt Organizations Act (RICO)

A. Prohibited activities under RICO, 18 U.S.C. § 1962: RICO’s scheme of liability is premised on three discrete types of conduct –
1. 1962(a) – investing in an enterprise with income derived from a pattern of racketeering activity;
2. 1962(b) – acquiring an interest in or maintaining control over an enterprise through a pattern of racketeering activity; and
3. 1962(c) – participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity.
4. 1962(d) – It’s also unlawful to conspire to violate (a), (b), or (c).

B. The defn. of “enterprise,” 18 U.S.C. § 1961(4): The defn. “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” An association of corps. or an association of individuals and corps. may constitute a RICO enterprise.
1. *Turkette* (p.528) – Ds were convicted under § 1962(d) for conspiracy to conduct and participate in the affairs of an enterprise, engaged in interstate commerce, through a pattern of racketeering activities. The enterprise engaged in narcotics trafficking, arson, fraud, and other illegal activities. The appellate court reversed the conviction, holding that the term “enterprise” referred to legitimate enterprises, not illegitimate enterprises. The S. Ct. reversed again, holding that the statute covers legal entities and associations in fact, including a group of 13 individuals who carry out criminal activities together. Such a group
is conceptually distinct from the pattern of activity in which it engages. Also, such a group is not necessarily a conspiracy.

2. Distinction bet. enterprise, pattern of racketeering activity, and conspiracy – An enterprise is a bunch of people who are acting towards a common purpose, a de facto entity. A pattern of racketeering activity is a series of acts. A conspiracy is an agreement bet. two or more people to carry out an unlawful objective. An enterprise doesn’t have to involve an agreement bet. the participants, unlike a conspiracy. A conspiracy may contemplate only a single act, whereas participants in an enterprise must commit more than two acts to be prosecuted under RICO.

3. NOW v. Scheidler (p.533) – NOW sued a coalition of antiabortion groups under § 1962(c) for engaging in a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity. The S. Ct. held that an enterprise for purposes of § 1962(c) doesn’t have to have an economic or profit-seeking motive.

C. The enterprise must be engaged in or its activities must affect interstate or foreign commerce.

1. NOW v. Scheidler (p.533) – The enterprise must be engaged in or have an impact on interstate commerce. If it’s not engaged in interstate commerce, it needn’t have profit-seeking motives to have a detrimental influence on interstate/foreign commerce. The object of the anti-abortion protests here was to shut the clinics down – which could have entailed employees from different states losing their jobs, suppliers losing business, and patients traveling through interstate commerce to visit a clinic no longer being able to do so.

2. Lopez – The S. Ct. struck down the Gun-Free School Zones Act, holding that Congress has the power to regulate commerce in 3 distinct ways. It can (1) regulate the use of the channels of interstate commerce, (2) regulate instrumentalities of commerce, or (3) regulate activities that affect commerce.

3. Morrison – The S. Ct. struck down the Violence Against Women Act, holding that Congress lacks the power under the Commerce Clause to regulate “non-economic violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”

D. Pattern:

1. H.J., Inc. v. Northwestern Bell Telephone (p.540) – Customers of Northwestern Bell Telephone (NBT) sued the company, the Minnesota Public Utilities Commission (MPUC), and others with regards to bribes paid to MPUC officials for approval of higher NBT rates. The S. Ct. defined “pattern” as (1) relatedness and (2) continuity. Can show relatedness by showing the same or similar purposes, results, participants, victims, methods of commission, or other distinguishing characteristics. Can show continuity (a temporal concept) by showing (a) that the racketeering acts themselves included a specific threat of repetition extending indefinitely into the future or (b) that the predicate acts or offenses were part of an ongoing entity’s regular way of doing business. Here, reading what Ps alleged in their complaint, the bribes were related by common participants and a common purpose, to influence the MPUC and obtain approval of unfairly high rates for NBT. The bribes satisfied the continuity requirement in two ways – they occurred over a 6-yr. period and were part of the regular way of conducting business at NBT and MPUC. And, there was no indication that the bribes would stop.


1. Garner (p.558) – The case involved the payment of bribes by private sewer contractors to sewer inspectors of the City of Chicago. Ds argued that their conduct constituted the unlawful receipt of gratuities, not bribery, illegal under state law but not one of the predicate offenses listed in § 1961(1)(A) (defining “racketeering activity”). The ct. held that the references to the state crimes in the defn. of racketeering activity are generic.
Because unlawful receipt of gratuities is included in the fed. bribery statute (§ 201), the ct. inferred that unlawful gratuity is included in the reference to “bribery” in § 1961(1)(A).

2. Doesn’t matter if D was acquitted of the predicate offenses, or of the statute of limitations for the predicate offenses has expired – For state offenses, § 1961(1)(A) says “any act or threat … which is chargeable under State law and punishable by imprisonment for more than one year” – not whether a particular D is chargeable. For federal offenses, § 1961(1)(B) says “any act which is indictable.”

F. Relationship between person and enterprise: Section 1962(c) makes it unlawful for one “employed by or associated with any enterprise … to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity…”

1. Reves v. Ernst & Young (p.565) – The accountant for two companies made the unauthorized decision to treat one company (White Flame) as owned by the other (the Co-op) for accounting purposes, in order to prevent the latter company from being insolvent. The accountant didn’t advise the Co-op of his decision or of its precarious financial position. The Co-op eventually filed for bankruptcy. The bankruptcy trustee sued the accounting firm on behalf of Co-op and some of its creditors, alleging that the accountants had conducted and participated in the conduct of the Co-op’s affairs through a pattern of racketeering activity (tax fraud), in violation of § 1962(c). The issue was whether the accounting firm that employed the accountant participated in the operation or management of the Co-op. The S. Ct. held that to be held liable under § 1962(c), one must have some part in directing the enterprise’s affairs. Not limited to those with a formal position or primary responsibility for the enterprise’s affairs (e.g., an outsider might exert control through bribery). Under this “operation or management” test, the Ct. held that the accounting firm wasn’t liable. The dissent would have construed “conduct” as a long arm meaning mere participation in the affairs of the enterprise, however direct or indirect. Also, even under the majority’s operation and management test, the dissent would have held the accounting firm liable b/c it went beyond traditional auditing – fabricating financial statements and deciding what value to assign to the Co-op’s most important fixed asset.

2. Suppose state prosecutor and criminal defense atty. exchange bribes for favorable treatment in charging decisions and plea negotiations – Liability under § 1962(c)? Yes if you define the enterprise as the state’s atty.’s office; can argue that they played a part in directing the office’s affairs. No if you define the enterprise as an association in fact bet. the prosecutor and the atty., b/c then there would be no distinction bet. the enterprise and the actors conducting its affairs. (The more people in the enterprise there are, the easier it is to make this distinction b/c not everyone participates in each act of each predicate offense.)

3. McCullough v. Suter (p.571) – The Seventh Circuit held that a sole proprietor (convicted of fraud) could be held liable under § 1962(c), so long as the proprietor has people working for him and isn’t a “one man band.” The enterprise must be either formally (as when there’s incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual participating in it. A majority of circuits that have ruled on this point have held that the person and the enterprise must be separate and distinct. In contrast with § 1962(c), §§ 1962(a) and (b) don’t contemplate a relationship bet. the person and the enterprise as essential predicates for liability.

G. Conspiracy to violate RICO: See § 1962(d).

1. Salinas (p.575/507) – D (the prison guard) challenged his § 1962(d) conviction, arguing that he couldn’t be held liable for conspiracy unless he himself committed or agreed to commit the two predicate acts requisite for a substantive RICO offense under §1962(c). The S. Ct. rejected his argument, holding that under §§ 1962(d) and (c) a conspirator need
only adopt the goal of furthering or facilitating an endeavor which, if completed, would satisfy all of the elements of § 1962(c). Don’t need to prove commission of § 1962(c) or the predicate acts required under (c) for a § 1962(d) conviction. Marmolejo accepted numerous bribes. Salinas (D) knew about and agreed to facilitate the scheme; that was enough for D to be convicted of conspiracy.

H. **Forfeiture:** Upon conviction, the RICO statute orders mandatory forfeiture of any interest D has acquired or maintained through the RICO violation (incl. profits, proceeds, and income), and any interest D has in an enterprise that was used in the RICO violation, and any contractual right that afforded D a source of influence over an enterprise used in the RICO violation. See § 1963.

1. *Simmons* (p.578) – Four Ds participated in an enterprise whose purpose was to influence Missouri politics (corruptly) through five different schemes, involving different bills before the Missouri legislature. Holding: (1) Ds were held jointly and severally liable for all of the proceeds of the enterprise, even though they individually may not have been involved in each scheme. Liable, by virtue of membership in the conspiracy, for the foreseeable acts of co-conspirators taken in furtherance of the conspiracy. (2) Ds were held liable for the gross receipts (i.e., govt. doesn’t have to deduct costs, figure out net profits) of the enterprise’s illegal activity (i.e., have to distinguish proceeds from legal activity).

2. *Rubin* (p.584) – D held numerous union offices and was convicted of embezzlement, tax fraud, failure to keep union records, and RICO violations. The ct. modified the forfeiture order so that D had to forfeit his various offices, but he retained the right to seek and reattain such offices. The same would go for forfeiture of investments: nothing prohibits a D from reinvesting funds in the enterprise.

3. *BCCI Holdings* (p.591) – Suppose a RICO enterprise forfeits funds that you think you, as an unrelated party (as spouse, joint-venturer, etc.), have a claim to. Can petition ct. under § 1963(l)(6)(A): (1) you have a legal right, title, or interest in the property; (2) that right renders the forfeiture order invalid b/c the right was vested in you rather than D or was superior to D’s right; and (3) you had that right at the time of the commission of the acts which gave rise to D’s forfeiture. In this case, the bank didn’t exercise its right of set off until after BCCI committed the acts that gave rise to the forfeiture, so Bank couldn’t use (A). And a set off for debts owed is not a purchase of a tangible asset, so Bank couldn’t use (B).

I. **Civil suits: injury to business or property:**

1. *Sedima, S.P.R.L. v. Imrex Co.* (p.614) – Sedima and Imrex, two corps., entered into a joint venture to provide electronic components to another firm. Sedima then sued Imrex under § 1964(c) for allegedly cheating it out of a portion of the proceeds, which they were to split. The S. Ct. held: (1) P need not allege that D has already been criminally convicted of predicate offenses or of a RICO violation. “[R]acketeering activity consists not of acts for which the D has been convicted, but of acts for which he could be.” (2) To prove that the D has committed a predicate act/RICO violation, P has to meet a preponderance standard, not a beyond reas. doubt standard. (3) P need not show a racketeering injury distinct from that caused by the predicate acts themselves. If the statute’s reach is too broad, Congress needs to amend, not the cts.

2. *Libertad v. Welch* (p.619) – A group of women seeking reproductive health services and their health care providers sued anti-abortion groups w.r.t. destructive protest activities. Holding: Ps have to meet standing requirements – injury in fact, causal connection, redressibility, and other prudential considerations (e.g., P must be asserting her own rights and interests, not those of another). The clinics and the clinics’ employees had standing; they met the injury in fact requirement b/c they suffered injury to property and business.
The patients didn’t meet the injury in fact requirement b/c they were still able to make their appointments on other days and they didn’t allege any physical, property, or economic damage. The women’s rights groups didn’t meet the injury in fact requirement.

3. **Holmes v. Securities Investor Protection Corp.** (p.624) – SIPC sued Holmes and many others, alleging that a conspiracy in a stock-manipulation scheme prevented two broker-dealers from meeting their obligations to customers, thus triggering SIPC’s statutory duty to advance funds to reimburse the customers. The S. Ct. held: § 1964(c) requires injury “by reason of” a RICO violation, meaning but-for causation and proximate causation. There might have been but-for causation here, but Ct. was unwilling to find that the stock price manipulation was the proximate cause of the customers’ claims. Other possible causes of the broker-dealers’ failure: other poor business management decisions, embezzlement.

4. **Beck v. Prupis** (p.632) – Corporate officers at Southeastern Insurance Group engaged in a fraudulent scheme, w/o the knowledge of Beck, the CEO. When Beck found out and contacted regulators, they had him fired. Beck sued under §§ 1962(d), 1964(c), contending that the conspiracy caused him injury in the form of the termination of his employment. The S. Ct. held: Determine what “injured by reason of a conspiracy” means by looking at the common law of civil conspiracy. P has to show an overt act caused by the conspiracy that’s “analogous to an act of a tortious character,” and that’s “independently wrongful” under RICO.

5. **PSLRA** – Congress thought civil RICO statute was being abused. For purposes of civil RICO only, Congress removed securities fraud and everything related to securities fraud (e.g., mail fraud w.r.t. fraud in connection with the purchase or sale of a security) from the list of racketeering activities. New rule is that a P can’t bring a civil RICO claim based on securities fraud unless there’s already been a conviction for securities fraud. Why would Congress do this – not the P’s fault that a D hasn’t been prosecuted/convicted!! And — statute of limitations begins to run when conviction becomes final, which could be after years of appeals and years after the s.o.l. of related claims (e.g., contract breach) have expired. Not much sense.

**XI. Currency Reporting Crimes and Money Laundering**

A. **The Bank Secrecy Act**: Title II of the Act is the Currency and Foreign Transactions Reporting Act (CDTRA). CFTRA’s regulatory scheme enables the govt. to monitor large monetary transactions (incl. exports and imports of currency) and the use of foreign financial accounts.

1. **Transporting monetary instruments** – Reports of the movement of currency into and out of the country must be filed w/ the Customs Service – by the person transporting and/or by the financial institution receiving the funds. To establish a violation, have to show (1) that the person knowingly transported or received monetary instruments in excess of $10,000 and (2) that the failure to report was willful. See 31 U.S.C. §§ 5316 & 5322.

2. **Domestic currency transactions** – The currency reporting requirements apply to financial institutions at which a deposit, withdrawal, currency exchange, or other physical transfer of more than $10,000 in currency occurs. To establish a violation, have to show (1) that the bank knowingly received monetary instruments in excess of $10,000 and (2) that the failure to report was willful. See 31 U.S.C. §§ 5313 & 5322.

3. **Structuring** – Illegal to structure transactions to evade the above reporting requirements. See 31 U.S.C. § 5324(3).

4. **Beidler** (p.722) – D, a real estate agent, obtained financing for a retirement community project from Wood. Wood put in $100,000 but said he wanted to conceal his identity as a source of funding for the project. So Beidler took Wood’s cash payment and made 34 deposits to 4 different accounts at 3 different banks. D admitted that he did what he did to
avoid the filing of a CTR, but he said he didn’t know that structuring was unlawful, he just wanted to avoid small-town gossip. D was held liable under 31 U.S.C. § 5324(3) for structuring for the purpose of evading reporting requirements. A jury could infer from the evidence of concealment that D knew structuring was unlawful. Plus, he went way beyond avoiding small town gossip. His story didn’t have a credible ring to it.

B. **Enhanced penalties:** Willful violations of the currency reporting requirements are punishable as felonies. The authorized max. penalties are doubled for willful violations that occur while the actor is violating another law and for violations that are part of a pattern of any illegal activity involving more than $100,000 in a 12-mo. period. 31 U.S.C. § 5322(a),(b).

1. *St. Michael’s Credit Union* (p.730) – SMCU and Janice Sacharczyk (JS), its clerk and treasurer, systematically failed to file Currency Transaction Reports (CTRs) w/ the IRS, in violation of 31 U.S.C. §5313. The issue was whether there was a “pattern of any illegal activity” under the enhanced penalties provision, § 5322(b). Ds argued that the transactions alleged in the indictment were “repeated, isolated events.” Holding: “When the govt. proves that a financial institution has willfully failed to file CTRs for any of its reportable transactions, or that is has filed for only a few out of a vast number, a sufficient relationship has been established bet. those acts to constitute a pattern of illegal activity and thereby trigger the Act’s felony provision.” SMCU’s failure to file any CTRs constituted a pattern.

2. Sophisticated means enhancement in the U.S. Sentencing Guidelines – Harsher sentence if “sophisticated means were used to impede discovery of the existence or extent of the offense.”

C. **Closing another gap in the money laundering statutes,** 26 U.S.C. § 6050I: 6050I requires any person who is engaged in a trade or business to report the receipt of more than $10,000 in cash in one or more related transactions in the course of the trade or business.

1. *Goldberger & Dubin, P.C.* (p.736) – Lawyers at a law firm refused to disclose on a Form 8300 the names of the clients who had made cash fee payments of over $10,000, in violation of § 6050I; they asserted the atty-client privilege. Holding: The law firm had to disclose. The privilege protects only those disclosures that are necessary to obtain informed legal advice that wouldn’t be made w/o the privilege. An atty-client fee arrangement isn’t such a disclosure in the usual case. It can’t be used for the purpose of concealing the client’s ongoing or contemplated fraud. The main point: It’s the duty of the lawyer to counsel the client to comply with the law, not to circumvent it. The Ds here had tried to argue that they didn’t have that responsibility.

2. *Lefcourt* (p.742) – If you intentionally disregard § 6050I, you face a higher penalty – the greater of $25,000 or the amt. of cash received in the unreported transaction (up to a max. of $100,000). Another law firm refused to disclose – the same as in Goldberger. Ds argued that they shouldn’t be liable for the intentional disregard penalty b/c they believed in good faith in the legality of their conduct. Holding: “Intentional disregard” in the penalty provision means conduct that’s willful, a term which in this context requires only that a party act voluntarily in withholding requested info, rather than accidentally or unconsciously. The lawyers were held liable for the heightened penalty; their good-faith defense was irrelevant under this standard. Not mentioned in the opinion: Ds had engaged in lobbying efforts and submitted an amicus brief in Goldberger. So maybe they had a good faith belief that the conduct should be legal, but they couldn’t have actually believed in the legality of their conduct.

3. **Designated reporting transactions** (p.747) – Reportable cash transactions under § 6050I include (A) transactions involving currency (any country) and (B) “designated reporting transactions.” Designated reporting transactions are retail sales in consumer durables, collectibles, or travel/entertainment activities involving payment by cashier’s check, bank
draft, traveler’s check, and/or money order – monetary instruments which individually have face amounts of less than $10,000 but that add up to over $10,000.


1. § 1956(a)(1) – prohibits conducting a financial transaction when the actor knows the transaction involves the proceeds of unlawful activity. In addition to showing such knowledge, govt. must show D (1) intended to promote the carrying on of specified unlawful activity or to commit tax evasion/fraud or (2) knew (i.e., actual knowledge or willful blindness) that the transaction was designed to conceal the nature, location, source, ownership, or control of the proceeds of specified unlawful activity or to avoid currency reporting requirements.

2. Tencer (p.749) – D, a chiropractor, submitted false insurance claims to three insurance companies and collected proceeds for patients whom he and his partner didn’t treat at all or only minimally treated. D deposited checks from his personal and clinic accounts in various bank accounts across the country; he had the banks across the country send the funds by cashier check to a Louisiana address to which D had no connection; he opened another account in Las Vegas and misrepresented himself to bank officials there; he had some banks send funds by cashier check to Las Vegas; and then he tried to withdraw the balance of the Las Vegas account in cash. Holding: There was enough evidence to get D on the § 1956 concealment element; even if he did these things using his own name, he intended to conceal the source and location of the illegal funds. Compare to Dobbs (similar case), in which Dobbs openly used fraudulently obtained funds to pay for business and family expenses, and was not held liable for money laundering.

3. Campbell (p.753) – D, a real estate agent, helped a drug dealer purchase residential real estate with a cash portion of the purchase price – $60,000 – that was not disclosed to the govt. D was charged w/ violating § 1956(a)(1)(B)(i), § 1957(a), and § 1001 (for causing a false statement to be filed w/ HUD). Holding:
   i. (1) Under § 1956(a)(1)(B)(i), govt. need only show D’s knowledge of two separate facts, that the funds involved in the transaction were the proceeds of illegal activity and that the transaction was designed to conceal the nature of the proceeds. D’s motive/purpose isn’t relevant; D’s knowledge of the purchaser’s purpose is. Statute reaches secondary people – helpers in the money laundering.
   ii. (2) If D had actually known the purchaser got his money from drug dealing, then the under the table transfer of $60,000 would have been enough for the jury to conclude that D knew, or was willfully blind to the fact, that the real estate transaction was designed for an illicit purpose. The evidence of the purchaser’s lifestyle, the testimony re: D’s statement that the money “might’ve been drug money,” and the fraudulent nature of the transaction (the under the table payment, the tip, the false statement to HUD) were sufficient to create a question that should’ve gone to the jury re: whether D was willfully blind – to the fact that the purchaser was a drug dealer and to the fact that the purchase was intended, at least in part, to conceal the proceeds of the drug selling operation. Willful blindness can serve as a proxy for knowledge.

4. § 1957 – prohibits knowingly engaging “in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity.” Monetary transactions includes bank deposits and withdrawals – the statute freezes criminals w/ large amounts of tainted money out of legitimate banking channels.

5. Johnson (p.759) – D defrauded investors through a peso scheme. The complaint charged D under § 1956(a)(1)(A)(i) with using the proceeds of the wire fraud to pay off his mortgage
and to purchase a Mercedes – which he did w/ the intent to promote the carrying on of unlawful activity. Holding: (1) Jury could infer this conclusion b/c D used the office in his home to further the fraudulent scheme, and the nice house & car persuaded investors to invest in the scheme by creating the illusion of a successful business. Jury could infer that D purchased w/ this purpose in mind. (2) The funds the investors wired to D were “criminally derived property” under 1956 & 1957 when D received them in his account and they were in his possession and control. The statutes don’t get at transactions that took place before D’s receipt of the funds in his bank account. (3) Govt. didn’t have to show that funds withdrawn from D’s account couldn’t possibly have come from any source other than the unlawful activity. We wouldn’t want to allow Ds to evade by commingling legitimately obtained funds w/ proceeds of crime.

6. Rutgard (p.766) – The Ninth Cir. held that §1957 “doesn’t create a presumption that any transfer of cash in an account tainted by the presence of a small amt. of fraudulent proceeds must be a transfer of these proceeds.” This rule allows the govt. to get D w/ § 1957 on deposits into the account, but not on withdrawals of less than the full balance if the funds are commingled. (If D tried to conceal, can get D w/ § 1956, too.) The Fourth Cir. has held the opposite – has created the presumption.

7. Kennedy (p.769) – D engaged in a Ponzi scheme to defraud precious metals investors. Holding: The ct. clarified Johnson’s point regarding when proceeds become criminally derived property within the meaning of § 1956 – when the underlying crime (from which the proceeds derive) has been completed. In D’s case, the govt. alleged prior mailings to prove the underlying mail fraud crimes, which were completed before the monetary transactions that formed the basis of the money laundering counts. Congress intended the money laundering statutes to punish new conduct that occurs after the completion of certain criminal activity, rather than simply to create an additional punishment for that criminal activity.

XII. Sanctions

A. Considerations in sentencing pre-Guidelines: See Bergman (p.850) and Browder (p.854). Sentencing patterns were erratic, there wasn’t much certainty.

B. The Sentencing Reform Act of 1984 and the Sentencing Guidelines: See discussion of the new policies beginning p.856. Steps in the Guidelines: Determine the base offense level; increase or stay depending on specific offense characteristics; certain adjustments for victim-related factors, defendant-related factors, and specified kinds of conduct that obstruct justice; increase for multiple counts; decrease for acceptance of responsibility; increase for prior criminal history; lastly, determine the applicable sentencing range by looking at a table.

1. Pinnick (p.862) – Under the Guidelines, the charge offense ordinarily determines the base offense level. Once that level is set, the ct. considers real offense circumstances – incl. “relevant conduct,” or other acts “that were part of the same course of conduct or common scheme or plan as the offense of conviction” – that aggravate/mitigate the severity of the crime. In consequence, conduct that D hasn’t been convicted of may influence the severity of the sentence – but sentence can never exceed max. for the offense of conviction. What constitutes related conduct? Here, D pled guilty to cashing counterfeit checks under a false name at a bank. Two previous counterfeit check incidents, that took place 3 mos. before, but that involved a different alias and involved D using checks to open a brokerage acct. and purchase a car, were held to be relevant. But the credit card fraud was held not to be relevant to the offense of conviction (the cashing of the counterfeit checks).

   i. Note: D may contest facts in the pre-sentence report, which is prepared by a probation officer – otherwise, ct. will rely on the report presumptively in deciding
whether D committed acts that constitute relevant conduct for sentencing purposes. Standard of proof at sentencing stage is preponderance of the evidence.

2. **Roggy** (p.868) – D was convicted of mail fraud, adulteration of a raw agricultural commodity, and using a pesticide in a manner contrary to its label. Holding: (1) The Guidelines allow consideration of consequential damages in cases of govt. procurement fraud and product substitution fraud (this case). (2) If the loss that D intended to inflict is greater than the actual loss, then OK to take into consideration the intended loss figure. (3) D didn’t accept responsibility for his actions, so he doesn’t deserve a corresponding reduction in his sentence. He denied using the unapproved pesticide to the FDA investigator; he eventually admitted to switching pesticides, but continued to deny the fraud.

3. **Haversat** (p.881) –

4. **Rioux** (p.888) –

Question: What’s the meaning of 1957(c)? That the person has to know the money is “criminally derived” but doesn’t have to know from what specific criminal offenses?

*Our Legal Heritage* (book on South African legal system), KTL120 .O97 1982.