**there is no general Federal attempt statute (but there is conspiracy - §371)**

**Corporate Criminal Liability**  
**I. Intro**  
A. Hold Corporations Liable:  
B. Pro:  
   1. profit  
   2. competitive edge  
   3. corporate dominance  
C. Con:  
   1. shareholders – but this is an investment risk  
   2. consumers – but have competition – can’t afford to raise rates of products  
   3. ultra vires (the acts aren’t authorized) – need better supervision  

**II. Respondeat Superior Rule**  
- this rule is more beneficial to the government than the MPC – any status of employee can be convicted as long as they are acting within the scope of their authority and on behalf of the corp.  
A. Criminal Acts  
   1. law firm partners \(\rightarrow\) if you share profits, you share liability; there is an incentive here to supervise others, or to organize as an LLC  
   2. “as a GR a corp is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and instructions to to the agent.” (Hilton Hotels)  
B. Criminal Intent  
   1. Knowingly & willfully  
   2. Knowingly:  
      a. Collective knowledge  
      b. Willful blindness (diff than negligence)  
   3. willfully:  
      a. flagrant indifference  

**Personal Liability in an Organizational Setting**  
**I. Intro**  
**II. Direct Participants**  
A. Representative Capacity  
   1. “a corporate officer is subject to prosecution under §1 of the Sherman Act whenever he knowingly participates in effecting …regardless of whether he is acting in a representative capacity.” (Wise)  
   2. Even if someone is acting solely in their capacity as a corporate officer and for the corporation – this alone won’t insulate them from personal liability  
B. To be an aider and abetter, you must have the same purpose/mental state (you may be a facilitator without knowing it)  

**III. Responsible Corporate Officers**  
A. Responsibility
1. bylaws – imposed duty on CEO in Park (rodents) to be responsible for sanitation
2. Can also be an imposed legal duty – as done by the FDA in Park
   a. Note: this was a strict liability instance (food safety) so didn’t need to prove the mental state
3. can be based on omission – fail seek out and prevent or correct violations

B. Knowledge
1. Any constructive knowledge of violation of statutes will result in the personal liability of CEO.

C. Defenses
1. no power
2. objective impossibility

D. Relationship
1. “responsible relationship” to the violation, can be held responsible for the acts of other people. (Jorgensen – meat packing)
   a. Note: criminal law disfavors vicarious liability
2. Also had to show “intent to defraud” for this case

Mail Fraud
I. Intro
A. A scheme to defraud need not contemplate the commission of the independent crime.
B. Statute
   1. 18 U.S.C. §1314
   2. The statute does not define the term “defraud”
      a. provides virtually open-ended liability
   3. “condemns conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair plat and right dealing in the general and business life of members of society”

C. Fraud
   1. need not be something that Congress has jurisdiction no prevent
   2. “Attempting” – refers to the fraud, not to attempting to use the mail
   3. **punishes the misuse of the designated jurisdictional facility (mail or wire)
      → highly useful for prosecutors

II. Schemes to Defraud
A. Intent to Defraud
   1. to act knowingly and with the intent to deceive someone for the purpose of causing some financial loss or to obtain some undeserved gain
      a. NEED: harm (can be unauthorized disclosure (gossip)) or a useful gain.
      b. In Czubinski, there was no harm to the IRS, nor did he benefit by looking at the confidential info
   2. Intent to deceive isn’t always intent to defraud
   3. Materiality:
a. The statutes don’t contain an express requirement, but courts have held that the false or fraudulent representations must be material.

4. Statements:
   a. Even if some are literally true, they must be looked at in the aggregate to see if they are fraudulently misleading and deceptive (Arizona property advertisements – water availability)
   b. “Puffery,” in and of itself, is not enough. But if this is combined with misleading statements, can be taken as part of the aggregate effect.

B. Protected Interests
   1. don’t have to prove (or allege) that the victim was actually defrauded or suffered a loss. → need a “scheme to defraud”
   2. showed that defendants contemplated that the employer (Zenith) would suffer the loss of their honest and loyal services. → jury inferred that he intended to do exactly what he did. (Radio cases – kickbacks)
   3. Property in Carpenter case was intangible
      a. Exclusive use of confidential information
   4. §1341 requires the object of the fraud to be “property in the victim’s hands”
      a. a state of municipal license is not “property”
      b. Distinguish economic interests and regulatory interests
   5. Right to collect taxes – this was property to the Canadian government in the Pasquantino case (import liquor). As soon as it passed the border, the govnt had the right to collect the $$.  
   6. Public sector:
      a. Serious corruption → breach of fiduciary duty
         i. Embezzlement
         ii. bribery
      b. public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public’s best interests (strict duty of loyalty)
      c. Public sector arises when the actor has a duty to the constituents—rather than the governmental entity (Devegter)
      d. Workplace violations are not enough evidence of a breach (also not every act of disloyalty by an employee is fraud)
   7. Private Sector:
      a. the breach of loyalty by a private sector defendant must in each case contravene (by inherently harming) the purpose of the parties’ relationship
      b. TWO REQUIREMENTS (for private sector honest services fraud):
         i. Breach of fiduciary duty
         ii. Reasonable/Foreseeable Economic Harm

III. Use of the Mails
   A. Sufficiency:
      1. “use of the mails need not be an essential element of the scheme” it is sufficient for the mailing to be “incident to an essential part of the scheme.”
2. mailing by final dealers on behalf of the retail customers was found to be enough – because it was part of the ongoing scheme (Schmuck – odometer roll back)
   a. Distinguish: cases with credit card invoices. These mailings were basically post-fraud accounting among the potential victims & the longer-term success of the fraud did not turn on which of the potential victims bore the loss.
   b. The mailing of the title registration forms was an essential step in the successful passage of title to the retail purchasers.

3. Mail Fraud or Mail plus Fraud
   a. Dissent to Schmuch – states that “the mailing must be in furtherance of the fraud.” (“this federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur - nor even by one in which, at some point, a mailing predictably and necessarily occurs.)

B. Mailing
   1. deliberate, planned use of the mails after the victims’ money had been obtained CAN be “for the purpose of executing” the defendants’ scheme - Sampson
   2. Don’t need to prove that someone actually put into mail box – routine is enough
   3. each separate mailing in furtherance of the scheme constitutes a separate offense.

IV. Mail and Wire Fraud Affecting a Financial Institution
A. Interstate Requirement:
   1. must be interstate for wire fraud (but don’t need to know that it will go out of state)
   2. mail fraud does not need to be interstate
B. Subsidiary
   1. can “affect a financial institution”
   2. in Bouyea – the parent gave the money to the sub in order to make the loan. The parent here will also be the one to suffer the loss.
C. Statute §1341
   1. “such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both” (therefore, there’s a different statute of limitations – giving government more time in which to bring the case)

V. Statutes Prohibiting Specific Frauds
A. Bank Fraud
      a. Knowingly executing or attempting to execute a scheme or artifice to defraud a financial institution (intent to deceive); and
      b. Knowingly executing or attempting to execute a scheme or artifice to obtain money, assets, or other property owned by or under the custody or
control of a financial institution through false or fraudulent pretenses, representations or promises.

2. Intent to Deceive
   a. In *Doke* this was the undisclosed liability
      i. “fraudulent actions, such as concealing the identity of a silent partner in violation of banking regulations, contravene §1344”
   b. where there’s an intent to defraud some party (anybody in the world!), and fraud puts bank at risk of loss, that’s sufficient for a violation! *Reaume* case

B. Computer Fraud
   1. Statute: 18 U.S.C §1030
      a. Defines 7 categories of crimes that target harms resulting from accessing protected computers without authorization or in excess of one’s authorization.
   2. “protected computer”
      a. defined in statute as: exclusively for the use of a financial institution or the US gov’t, or …used by or for a financial institution or the US gov’t and the conduct resulting from the offense affects that use by or for the financial institution of the gov’t OR
      b. which is used in interstate or foreign commerce or communication.
   3. “Damage to one or more individuals” - §1030(a)(5)(A)
      a. Individuals:
         i. can be damage to a corporation –
         ii. Congress did not intend to criminalize only if damage to a natural person *Middleton* (ISP sabotaged by former EE)
      b. Damage Calculation:
         i. If what you had before (software) is no longer available, the next best alternative should be included in the damages calculation (even if it is better/costs more.) If you personally want to upgrade this is not included in the damage.
      c. Something of value
         i. In *Czubinski* the IRS agent did not obtain “anything of value”
         ii. “evidence did not show that his end was anything more than to satisfy his curiosity by viewing information …”
         iii. “no evidence suggests that he printed out, recorded or used the info he browsed”
         iv. he did not intend to use or disclose the info
         v. merely viewing info cannot be deemed the same as obtaining something of value for the purposes of this statute.

**Securities Fraud**
I. Intro
   A. The Acts: (Sec. Act of 1933 and Sec Exchange Act of 1934)
1. both contain general criminal penalty provision that elevates what would otherwise be a civil violation to a felony, provided that the violation is willful

B. SEC
1. has no The SEC has no criminal enforcement authority (can refer to the Justice dept)

II. Willfulness
A. Element:
1. does not require specific intent to disregard the law
2. conduct that is deliberate and intentional (vs. accidental or inadvertent)

B. Willful Blindness
1. this counts
   a. “deliberate avoidance of knowledge” Weiner
2. in Weiner (bookkeeping manipulation) an auditor will not be “responsible” for fraud that has gone undetected despite his utilization of generally accepted auditing standards.
   a. However, in that case, “the failure to apply GAAS is relevant to the issue of knowledge and willfulness”
   b. “The defendants here, as auditors, had a duty carefully to investigate and review the information presented”

III. The “No Knowledge” Proviso
A. In the 1934 Act
1. “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”
2. may protect ostensibly innocent business executives from serving a term of imprisonment for violating some obscure rule or unpublicized admin action,
   a. but does not insulate them from criminal liability for the violation itself.

B. Knowledge
1. “proof of ‘no knowledge’ of the rule can only mean proof of an ignorance of the substance of the rule, proof that they did not know that their conduct was contrary to law.” Lilley
   a. Congressional intent: should not be available to persons who were charged with knowing their conduct to be in violation of law, but did not happen to know that it was in violation of a particular rule or regulation of the SEC.
2. In Lilley they plead guilty to fraud but said they didn’t know this also violated Rule 10b-5. Even though they didn’t know about the rule, they still knew what they were doing was wrong, so it isn’t a defense here.
3. (Need to show acting in good faith)

IV. Insider Trading
A. Controversial Subject
1. investor confidence vs. market efficiency
2. it is neither defined nor expressly forbidden by statute or regulation
   a. prosecutors use a general antifraud provision, §10b of SEA 1934 with SEC Rule 10b-5.
   b. Insider trading is prosecuted under his rule on the theory that it constitutes a scheme to defraud.

B. The Evolving Doctrinal Rules
1. Duty to Disclose:
   a. Arises when one party has information that the other party is entitled to know b/c of a fiduciary or other similar relation of trust and confidence between them.
   b. A purchaser of stock who has no duty to a prospective seller because he is neither an insider nor a fiduciary has no obligation to reveal material facts
   c. A duty to disclose does not arise from the mere possession of nonpublic market information.
      i. Chiarella (financial printer), did not have a duty to the shareholders in the stock he traded in. (in 1980)
      ii. (Note: he was hired by the acquiring company but bought stock of the target company…) RELATIONSHIP
          1. with SELLERS(target): not their agent, fiduciary, not a person in whom the sellers placed their trust and confidence.
      iii. Court declined to decide whether he owed a duty to the acquiring corporation that was a customer of his employer.
          1. then tipper/tippee (however, the tipper needs to have an economic motive in disclosing…)
2. Insiders have a duty to disclose
   a. Lawyer in O’Hagan was a “constructive insider” → had a duty to his law firm and its clients (duty to the source of the information)
   b. BUT note: “the govnt could not have prosecuted O’Hagan under the classical theory for O’Hagan was not an “insider” of Pillsbury, the corporation in whose stock he traded”
      i. He worked for the law firm for Grand Met, who wanted to acquire Pillsbury.
      ii. So he was an insider in Grand Met, but not Pillsbury.
3. Classical Theory
   a. Insider
      i. Can be permanent or temporary
   b. Information of his corporation
   c. Trades
      i. Note: need the fraud to be consummated, must use the info to purchase/sell securities, not just gain the confidential info.
   d. Duty to disclose or abstain from trading
      i. duty stems from relationship to corporation as insider
4. Misappropriation Theory
   a. Outsider
i. Misappropriate confidential information for securities trading purposes
b. Duty to source
   i. Don’t need duty to either the acquiring company or the target
   ii. Duty to the person you get the info from (usually ER-EE)
   iii. This is O’Hagan

5. Tipper-tippee
   a. Tippee’s (outsider) liability is derivative - when they receive info improperly
   b. “A tippee assumes a fiduciary duty to the SH of a corp not to trade on material nonpublic info only when:
      i. the insider has breached his fiduciary duty to the SHs by disclosing the info to the tippee and
      ii. the tippee knows or should know that there has been a breach.
   c. In Dirks there wasn’t an economic motive in disclosing (wanted to expose fraud), so no breach of duty…
      i. Dissent: re: personal gain as an element of the crime. (seems ct didn’t want to punish Dirks who helped uncover this scheme, however, the SHs were harmed) dissenting judges say: “duty not addressed to motives, but to actions and consequences on SH. Personal gain is not an element of the breach of this duty.

6. Fiduciary Duty - Chestman
   a. Cannot be imposed unilaterally by entrusting a person with confidential information
   b. Marriage, without more, does not create a fiduciary relationship
      i. Repeated disclosure of business secrets btw family members may substitute for a factual finding or dependence and influence → “inner circle”
   c. See Rule 10b5-2 (new in 2000) re: when nonbusiness relationships give rise to a duty of trust and confidence for these purposes...

7. “knowing possession” standard rather than “casual connection”
   a. policy: knowing possession is simpler; a requirement of a causal connection btw the info and the trade could frustrate attempts to distinguish btw legitimate trades and those conducted in connection with inside information.
   b. Teicher case – arbitrage
   c. See Rule 10b5-1 (2000) about “on the basis of” – defenses for executives that buy/sell as part of an automatic plan
   d. ** This rule does not say you can’t use inside information to cancel that plan

Summary of 3 Theories (Securities Fraud):
1. classical
   insider → duty (disclose or abstain) → shareholders
2. misappropriation
duty (disclose/abstain) → source of information

3. Tipper/tippee (classical theory plus)
   insider → duty → shareholders → plus a financial motive (in using or disclosing)
   outsider → know that the insider has breached their duty; knows for improper purposes
   The outsider’s liability is derivative

False Statements

I. Intro
   A. Statute: 18 U.S.C. §1001
      1. punishes making or using false statements in any matter within the
         jurisdiction of any department or agency of the U.S.
      2. does not contain an oath requirement
         a. punishes unsworn falsification relating to any matter within the
            jurisdiction of a federal dept or agency
      3. Purpose:
         a. To prevent the use of fraud or trickery to subvert governmental processes.

II. Jurisdiction
   A. Power to exercise authority in a particular situation
      1. “within the jurisdiction” merely differentiates the official, authorized
         functions of an agency form matters peripheral to the business of that body…
      2. In Rodgers (reported wife missing to FBI), the FBI and Secret Service had
         authority to investigate
         a. Authorized functions by statute
      3. S. Ct. reversed narrow reading that limited jurisdiction to “the power to
         make final or binding determinations”
      4. Over-broad?
         a. Seems ok here b/c the statements were volunteered
   B. “Direct Relationship”
      1. the false statement need not be made to the federal agency to be within its
         jurisdiction.
      2. A grant of primary authority is not a grant of exclusive authority
         a. In Wright (false EPA reports), the EPA retained authority to enforce
            regulations. Also the Act expressly authorized the EPA to take
            enforcement actions in states having primary enforcement authority.
         b. doesn’t seem to matter if the agency ever exercises its supervisory
            authority
      3. Subcontracts:
         a. Scheme to deceive both another corp and the Navy is within jurisdiction
         b. Steiner Plastics (switch cockpit glass) – the products were directed towards
            the Navy and would ultimately be inspected by the Navy.
            i. Intent was to deceive and
            ii. The false statement (ultimately) received by govnt, with the
                consequent impact on that agency.
III. Department or Agency
   A. History:
      1. U.S. v. Bramblett – not limited to executive branch
      2. Courts made a distinction between “administrative” and “judicial” functions of the court.
         a. Housekeeping matters (lawyer presenting false credentials) were within the jurisdiction
         b. Those made in conjunction with the judicial machinery were not (closing argument to jury)
      3. 1995 – S Ct holds that these terms apply only to executive branch
   B. Exemption from liability if statement made “in a judicial proceeding”
      1. “proceeding” refers generally to legal actions and does not distinguish among different phases of an action
      2. McNeil - omitted info on request for counsel form
         a. §1001(b) carves out an exception to the conduct in §1001(a).
         b. it applies broadly to all submission to a judge or magistrate in a proceeding.
   C. Jurisdiction of the Legislative branch
      1. False statements must be made “in any matter within the jurisdiction of…”
         a. “in a matter” means the matter existed at the time the statement was made
      2. In Pickett (security officer, anthrax) there was no investigation until after the threat was made.
         a. The government’s argument that the §1001 requirement is satisfied by the investigation which the false statement occasioned was rejected

IV. Material False Statements
   A. “False Statement”
      1. Must be false at the time it is made
   B. Future Performance
      1. a promise may amount to a “false, fictitious or fraudulent” statement if it is made without any present intention of performance and under circumstances that it plainly, albeit implicitly, represents the present existence of an intent to perform…
      2. Intent is what is relevant:
         a. Breaking a promise is not the crime
         b. Making it with the intent not to keep it is
         c. Shah case
      3. Predictions
         a. Can still violate the statute if misrepresenting the state of mind
         b. Predicting vs. promising - even if the result is impossible
   C. Materiality
1. Puffing – not a violation if not material
2. if the content has the ability to influence
   a. doesn’t seem to matter if the person is gullible or whether the liar is willful

D. Intent
   1. must show knowingly and willfully

V. “Exculpatory No’s”
A. Statute
   1. the plain language of §1001 admits no exception for an “exculpatory no”
B. Statement
   1. saying no in response to a question is a statement
   2. it’s likewise material because it has the potential to affect the investigation
C. 5th Amendment
   1. have the right to remain silent, not the right to lie
D. Statute of Limitations – “manufactured crimes”
   1. seems to require the investigation to be ongoing
   2. statute makes an exception for the executive branch – must be within the power/authority to investigate → that’s enough to put in jurisdiction

VI. Culpable Mental State
A. “Knowingly and Willfully”
   1. modify the making the false statement
   2. not that the statement will be transmitted to the govnt
      a. Yermain - S. Ct.
      b. Unclear if reasonably foreseeable is required – know that actual knowledge is not.
   3. “No mental state is required with respect to federal involvement in order to establish a violation of §1001” Green (9th Cir)
B. Jurisdiction
   1. needs to be a matter of federal interest when lie made
   2. EX: lie on original ET application, years later you get a promotion and ER submits original app to govnt for security clearance. No violation b/c at time you lied on app, govnt had no interest.

VII. Multiple Punishment
A. Double Jeopardy
   1. offenses are not the same for these purposes if each requires proof of an element that the other does not. – this is the Blockburger test
B. Elements
   1. there are lots of false statement statutes, most overlap with §1001
   2. Ramos case
      a. §1001 (FS) – fallacy in making a material statement; no purpose required
      b. § 1542 (passport) – any false statement (even trivial); with the intent/purpose of securing a passport
3. each have a distinct element, so can be charged with both

VIII. Related Theories of Liability

A. Procurement Fraud

1. Major Fraud Act of 1988
   a. Prohibits knowingly executing or attempting to execute a scheme to defraud the govnt or to fraudulently obtain money or property by making false or fraudulent representations regarding government contracts worth more than $1 Million.
   b. Seven year statute of limitations

2. Jurisdictional Amount
   a. $1 Million refers to the prime contract
   b. “any contractor or supplier involved with a prime contract with the US who commits fraud with the requisite intent is guilty so long as the prime contract, a subcontract, a supply agreement, or any constituent part of such contract is valued at $1 million or more.” – Brooks
   c. NOTE: at least one court (2nd Circ) has read the statute more narrowly – they look at the contract directly at issue.

3. Knowingly
   a. Refers to the execution of the scheme
   b. Not to the jurisdictional components
      i. Doesn’t matter if know what the prime contract value is

4. Multiple Counts
   a. Chronologically distinct – over a period of time

B. False Claims

1. Requires that a claim for money or property must be physically presented to the government.

2. Intent
   a. No specific intent to defraud the government required

3. Knowledge
   a. Of the falsity of the claim

Perjury and False Declarations

I. Intro

A. Statutes:

1. §1621 (perjury) older
   a. applies to a broader range of proceedings
   b. more rigorous proof requirements on the issue of falsity

2. §1623 (false declarations) – enacted in the past 4 decades to fill in some of the gaps and make it easier for prosecutors
   a. provides a limited defense of recantation.
II. Making Material False Statements
   A. Material
      1. not whether statement has any actual effect on the proceeding
      2. but if it has the capacity or tendency to influence the outcome of the proceeding
   B. Literally True
      1. literally true but misleading or unresponsive answers do not constitute federal perjury
      2. “it is the lawyer’s responsibility to recognize evasion and bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination” Bronston
   C. Liability
      1. if you intentionally cause an innocent party to commit perjury you can be held liable as a principal.
         a. §2(b) – if you willfully cause another to do an act which if you did yourself would be an offense - you are punishable as a principal. (innocent agent)

III. The Two-Witness Rule
   A. Requires that the falsity of the defendant’s statements:
      1. be proved by the testimony of two witnesses
      2. or the testimony of one witness, plus corroborating evidence
         a. this corroborating evidence need not be independently sufficient to establish defendant’s guilt
         b. may be circumstantial in nature
      3. Bootstrapping?
         a. The use of a signed statement will satisfy the corroborative evidence requirement even if that statement is written and composed by the same person as the first witness. Davis
      4. False Declarations Statute
         a. If gov't can prove that defendant made two inconsistent declarations under oath, one of which was necessarily false, they don't have to prove which one was false - § 1623
         b. Defense: at the time defendant made each declaration, he believed the declaration was true
   B. Different Statutes:
      1. Perjury
         a. crime is complete when witness makes a false statement under oath
         b. §1621
         c. if witness later corrects or retracts – no defense to a perjury charge
      2. False Declarations
         a. recognizes a limited defense of recantation
         b. §1623
      3. Distinctions:
a. §1623 does not require the 2 witness rule for proving perjury
b. §1623 has a reduced mens rea requiring that one “knowingly” commit perjury, rather than “willfully”
c. §1623 is restricted to testimony before grand juries and courts and is therefore more limited in reach than §1621.
   i. “ancillary” – construed to mean at least as formal as a deposition. (for §1623)
   ii. §1621 is anything that is sworn before govt – includes tax returns

IV. The Recantation Defense
A. Defense Availability
   1. §1623(d):
      a. “if at the time the admission is made, the declaration has not substantially affected the proceeding”
      b. “it has not become manifest that such falsity has been or will be exposed”
   2. Majority of courts find that both of these are required
      a. 2 circuits do not
   3. Read the “or” in the conjunctive rather than disjunctive
      a. So, or = and

B. What constitutes a recantation?
   1. a change to a guilty plea is not...
   2. later statements not in the same proceeding are not...
      a. EX: expert did not conduct tests. In FL trial says he did (false), later, in CA, says he did not (true)

V. Competent Tribunals and Ancillary Proceedings
   - see above in V B3c

VI. Immunized Testimony
A. Government cannot use immunized testimony obtained from you for a criminal charge. Exceptions:
   1. perjury
   2. giving false statements
   3. failing to comply with the order
B. Right to remain silent is not a right to lie
   1. “except a prosecution for...or otherwise failing to comply with the order” – concerned about whether they are truthful pursuant to that particular hearing (that order)
C. can use truthful testimony
   1. use of Witness’ immunized grand jury testimony in a subsequent prosecution of the witness for false statements made at the proceeding is not limited to the false statements.
   2. § 6002 makes no distinction between truthful and untruthful statements made during the course of the immunized testimony.
a. Creates a blanket exemption from the bar against the use of immunized testimony in cases in which the witness is subsequently prosecuted for making false statements.

VII. Perjury by Government Witness
A. Allegedly false testimony does not automatically result in a mistrial.
   1. collateral to the issue
   2. *Martha Stewart* expert testimony (pens)
      a. Not even essential to the case - Where defense attorneys agree on main points of case, even the defense supported what lying expert witness would have testified. Same facts would have been proved.

**Obstruction of Justice**
I. Intro
   A. Statutes:
      1. § 1503 – participants in civil and criminal investigations
      2. § 1505 – in administrative agency and congressional proceedings
      3. §1510 – in federal criminal investigations
   B. Victim and Witness Protection Act of 1982:
      1. altered the traditional role of these statutes and created two new offenses:
         a. tampering with witness, victims and informants 1512 and
         b. retaliating against … § 1513

II. Pending Judicial Proceedings
A. Preserving the judicial procedure
   1. § 1503 - - forbids endeavoring “to influence, obstruct, or impede, the due administration of justice”
B. When (for purposes of this statute) does an investigation become a pending grand jury investigation?
   1. when officials of such agency apply for, and cause to be issued, subpoenas to testify before a sitting grand jury.
C. Awareness by grand jury
   1. they do not have to be aware of the subpoena or be involved in the investigation in some other way at the time of the alleged obstruction of justice
   2. Court unwilling to require burdensome formality. Simply need be issued “in furtherance of actual grand jury investigation.”
D. Civil litigation
   1. §1503 reaches the willful destruction of documents during civil litigation
      a. *Lundwall* – civil pre-trial discovery
E. Type of Request Required
   1. formal request (subpoena) not needed by statute – *Lundwall*
   2. even if not requested at all, just anticipate (perceives) that they will be – destruction will amount to obstruction of justice
F. Intent
   1. “corrupt endeavor to influence/impede”

III. Endeavoring to Influence or Impede
A. “Endeavoring”
   1. any effort to do what the statute forbids, provided that the conduct has “at least a reasonable tendency” to corrupt a legal proceeding.
   2. conduct that falls short of an attempt may violate the statute
B. Impeding Justice
   1. govt doesn’t have to show [false statements] actually obstructed justice
   a. need “natural and probable effect of impeding justice” Collis
C. Nature of Testimony
   1. In Griffin ct could not differentiate a flat refusal to testify from an evasive answer or a falsehood
D. Compare to Perjury
   1. perjury alone does not have a necessarily inherent obstructive effect on the administration of justice
   2. false testimony can amount to contemptuous conduct when the “further element of obstruction to the court in the performance of its duty” is added.
E. Lawyers
   1. no license to act as a lawyer-criminal
   2. Cintolo – court rejects following reasoning: “if counsel’s actions of and by themselves do not amount to a crime, then a factfinder may not criminalize the conduct on the basis of conclusions reaches, no matter how reasonably, about why the actions were performed.
   a. Here,” Cintolo acted as part of a high pressure, no-holds-barred campaign to induce his nominal client to commit a criminal contempt.
   3. ALSO: Even if motives were pure, conduct would still have been improper. Would still have been obstruction of justice.
   4. As long as there is a facially plausible reason for a lawyer giving advice, should they be shielded from any inquiry into why given?
   a. Court says NO!!! Rather, this is completely unacceptable conduct, with likely very improper motives underlying.
   5. Statutory Safe harbor
   a. §1515(c) – nothing in the obstruction of justice chapter of Title 18 prohibits or punishes “the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding”
   b. govt’s burden to prove not within scope of representation – motivation by congress to protect against harassment
F. “Corruptly” → Not sure about this section – was in other notes
   1. “corruptly” = “with an improper purpose” (up until Anderson decided)
   a. Substitution of knowingly/intentionally/willfully will be bring in a number of cases that most would agree should not be tried.
G. Nexus requirement
1. **Aguilar**
   a. Read intent requirement into word “endeavor”
   b. Also read into a requirement of “natural and probable effect”
2. Court finds that must have: (1) knowledge of grand jury proceedings; (2) intent to obstruct; (3) anticipated this particular proceeding

H. Intent requirement:
1. authorities differ
2. 11th circuit said fear of testifying by witness is not a corrupt intent
3. others say fear is not a defense – witness protection programs
4. *Thus, even where substantial/realistic/authenticated belief of danger, not necessarily the case that won’t be found in contempt of court.*

IV. The Victim and Witness Protection Act
A. Noncoercive Witness Tampering
1. Section 1503
   a. §1512 enacted to prohibit specific conduct, leaving the omnibus provision of §1503 to handle more imaginative forms of criminal behavior, including forms of witness tampering, that defy enumeration.
   i. §1512 involves the use of force or coercion
   b. §1503 still criminalizes noncoercive, but nevertheless corrupt, efforts to interfere with a witness
2. **Corrupt Persuasion - § 1512**
   a. §1512(B) requires consciousness of wrongdoing – *Anderson*
      i. “knowingly intimidates or threatens…”
      ii. “knowingly” here means “consciousness of wrongdoing”
         1. need awareness that what you are doing is wrong
   b. “knowingly” also modifies “corruptly persuades” – *Anderson*
      i. corrupt here means dishonest
   c. → so, “knowingly and dishonestly persuade”
3. **Misleading Conduct**
   a. §1512 does not have a “likely to affect requirement” (compare to §1503 – *Aguilar*)
4. **Harassment**
   a. §1512(b)(1) – attempting to dissuade testimony is sufficient for conviction; don’t actually have to dissuade – *Wilson*
      i. the success of an attempt or possibility thereof is irrelevant…
   b. §1512(b)’s protection of a person who has been called to testify at a trial continues throughout the duration of that trial.
   c. In the definitions, “harassment” was left out. Thus, in terms of statutory construction, should default to plain-meaning of the word.
      i. Conduct that is intended to pester/badger or disturb…
      ii. Therefore, jury could conclude that a single act would suffice.
      iii. Not a technical term. You know it when you see it.
iv. There, more of a veiled threat—though able to create a justifiable apprehension.

B. Destruction or Alteration of Records in Federal Investigations
   1. Court in \textit{Andersen} was receptive to arguments against criminalizing requests for orders …relating to matters that may not be part of active investigations.
   2. Congress was not. When enacting the Sarbanes-Oxley Act – broadly prohibit evidence tampering in anticipation of government investigations.

C. Destruction of Corporate Audit Records
   1. §1520 – imposes record retention requirements on accountants who audit corps that are subject to the reporting requirements of the Sec Exch. Act of 1934.
   2. It is a crime to knowingly and willfully violate the record retention requirements.

D. Coercive Witness Tampering
   1. intimidation (\textit{Willard}) vs. harassment – are they in position to do something?

V. The Fifth Amendment Privilege
   A. Privilege
      1. corporations have no Fifth Amendment privilege against self-incrimination (also applies to documents)
      2. custodians of documents can’t resist a subpoena
      3. other variations are not as clear

B. The Enron Investigation
   1. calendar was a mix of person/business \rightarrow court said not protected
   2. contract specified that documents created or maintained while in employment are the property of company – at the time he was still the CEO, so not personal, no privilege

\textbf{Bribery of Public Officials}

I. Intro
   A. Bribery
      1. corruptly attempting to influence a public official in the performance of official acts through the giving of valuable consideration
      2. barter
   B. Gratuity
      1. rewarding a public official on account of an official act, whether or not the payor acts with corrupt intent
      2. payment of additional off-the-book compensation for the performance of an official act

II. Bribery of Public Officials
   A. Official Acts
1. §201(a) definition: “any decision or action on any question, matter, cause, suit proceeding or controversy, which may at any time be pending, or which may be law be brought before any public official, in his official capacity, or in his place of trust or honor.

2. Authority
   a. Parker – encompasses use of governmental computer systems to fraudulently create documents … even when the employee’s scope of authority does not formally encompass the act.
   b. Was in a position of trust. She breached/abused said position with respect to business pending before her office.
   c. Despite lack of authority, there was enough in place to characterize as “official act.”

3. Timing
   a. “official act” can have already taken place and still be a bribe - Arroyo- no congressional intent to limit §210(a) to future acts
   b. Court finds it sufficient to put in the mind of the bribe payer that the quid pro quo by recipient of the bribe is an official act – even though action already taken or that doesn’t have authority to effect such bribe – that’s sufficient.

B. Motive and Intent
   1. in order to establish a violation of §201(c)(1)(A), the government must prove a link between a thing of value conferred upon a public official and a specific “official act” for or because it was given.
      a. Don’t want to criminalize token gifts based on the official position (jerseys to US President)
   2. Bribery – need intent to influence
      a. Has a much longer prison term and possible disqualification from holding future public office
   3. Gratuity – need a causal link
      a. “on account of” something they have done or will do anyway
      b. Gift because who they are or as a reward?
   4. can have both implicated in the same act – given as a bribe, but accepted as a gratuity
   5. Gratuity is a lesser included offense in bribery prosecutions

C. Thing of Value
   1. Actual worth not determinative
      a. …misuse office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe
      b. what matters is recipient’s belief

D. Public Officials
   1. Appointed Officials
      a. Whether the person occupies a position of public trust with official federal responsibilities
         i. Dixson – no contact with federal govnt
b. To be a public official under §201(a) must possess some degree for carrying out a federal program or policy.

c. Dispersing federal funds
   i. Need to have discretion to be a public official (not just handing out SS checks)

2. Elected Officials
   a. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way.
      i. Speech & Debate clause offered as a defense in Brewster (immunity for what is said during sessions),
      ii. however “there is no need for the govnt to show that the alleged illegal bargain was fulfilled; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.”

E. Cooperating Witnesses
   1. statutory interpretation: general words of a statute do not include the government or affect its rights unless the text of the statute expressly includes the government. Ware (govnt offered something of value (here, leniency) to witness for their testimony in violation of §210(c))
   2. Note: plea agreements are an important tool for getting testimony against criminal defendants
      b. Everyday plea agreements are ok (they are also disclosed – prevent corruption)
         i. Problematic when prosecutor steps out of established bounds (spending money for shopping etc) – this is where there may be gratuity/bribery

III. Federal Program Bribery
   A. Statute
      1. § 201 – Bribery of Public Officials (enacted before Dixson)
         a. federal officials are subject
            i. includes “elected and appointed officials and employees thereof”
            ii. Dixon expands to include those that are in a position of public trust and who, in that position are implementing federal program/policy
      2. § 666 – federal program bribery
         a. prohibits payoffs to state and local officials who are agents of an organization or govnt entity that receives more than 10K in federal funds in any one-year period.
         b. Bribe must be for 5k
         c. Applies to anyone that is an agent –
            i. could be in state or local government
         d. needs to be a nexus between the bribe and the federal interest
   B. Federal Funds
1. the bribe does not have to affect the federal funds - Salinas
2. Note for the Salinas case (state housing federal prisoners – bribes for contact visits) Brickey would find not a violation of §201 (low on totem pole, not implementing federal policies)

C. Nexus
   1. need a connection between the bribery activities and a federal interest (DeLaurentis)
      a. don’t have to show the activities actually impacted the funds themselves
   2. Sabri case: §666(a)(2) is constitutional even though it doesn’t require proof of any connection btw bribe and some federal money. Reasoning from case:
      a. Money is fungible
      b. Statue conditions offense on a threshold amount of federal dollars defining the federal interest

D. Commercial Transactions
   1. organizations that are engaged in purely commercial transactions with the federal government are not subject to § 666.
      a. Statute requires some form of “federal assistance”

RICO
I. Intro
   A. “Racketeer Influenced and Corrupt Organizations Act”
      1. designed to strike at the economic base of organized crime
      2. adopted a definition of “racketeering activity” that encompasses many offenses that are the mainstay of white collar prosecutions
      3. RICO has become “a significant weapon against white collar and organized criminals”
   B. Elements:
      1. enterprise
      2. pattern of racketeering activity

II. The Enterprise
   A. Statutory Definition
      1. “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity” - §1961(4)
   B. Entity
      1. “the enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct”
   C. Legitimacy
      1. statute applies to both legitimate and illegitimate enterprises
         a. applied to criminal organizations in Turkette
   D. Commerce
      1. “any enterprise engaged in, or the activities of which affect, interstate or foreign commerce” (c)
a. affects IC – most courts only need de minimis showing

2. Congress has the power to regulate:
   a. Channels
   b. Instrumentalities
   c. activities

E. Motive
   1. does not require an economic motive -NOW

III. Pattern of Racketeering Activity
   A. The Pattern Requirement
      1. requires at least 2 acts of racketeering activity committed within 10 years of each other
      2. NEED: relationship and continuity
         a. Relationship – same or similar: participants, victims, methods, purpose
         b. Continuity – temporal
            i. “close ended” period – needs to be a substantial period of time (what is this – some courts have said must be more than 1 year, which is rather long)
            ii. “open ended” period – threat of continuing \( \rightarrow \) future; indefinitely; regular way of doing business

B. State Predicate Crimes
   1. racketeering activity includes “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year” - §1961(1)(A)
   2. Look to the conduct, not the exact name of the crime
      a. The test for determining whether the charged acts fit into the generic category of the predicate offense is whether the indictment charges a type of activity generally known or characterized in the proscribed category Garner
      b. “any statute that proscribes conduct which could be generically defined as bribery can be the basis for a predicate act.” Garner
   3. Results of State court outcomes
      a. Acquittal – dual sovereignty applies; RICO will honor
      b. Prosecution barred by statute of limitations – barred on basis of procedure, RICO need not respect
         i. Fact that state couldn't get it together shouldn't be a bar to RICO. At time racketeering activity was committed, still within bribery or gratuity — thus, chargeable.

IV. Relationship Between Person and Enterprise
   A. “Operation or management” test
1. “to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs” §1962(c)
   a. → to do so, must participate in the operation or management of the enterprise itself… Reves
2. Conduct
   a. some degree of direction
   b. → manage or direct – leadership role
3. Participate
   a. take part in that direction
   b. → take part in the “conducting” (the operating or managing)
4. Person
   a. Has to be separate from the enterprise
      i. B/c enterprise is merely the vehicle through which unlawful conduct occurs
   b. Outsiders can satisfy
      i. “participate directly or indirectly”
5. Sole Proprietorship
   a. Can be an “enterprise” with which the proprietor can be “associated” McCullough v. Suter
      Note: here “Suter had several people working for him; this made his company an enterprise, and not just a one-man band”
   b. Problem if strictly a one-man show – you cannot associate with yourself (just as you can’t conspire with yourself)
      i. BUT still could fall under §1962(c) if adopted corporate form for his activity – then the corporation would be an enterprise by §1961(4).
B. Note on Relational Elements:
   1. §§ 1962(a) and (b) contain no relational requirements (contrast with (c))
   2. Therefore, an enterprise as a wrongdoer can be named as the defendant.

V. Conspiracy to Violate RICO
A. Statute - §1962(d)
   1. “It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), (c) of this section.
   2. no requirement of some overt or specific act (unlike the general conspiracy provision – which requires that at least one of the conspirators have committed an “act to effect the object of the conspiracy”)
B. Conspiracy
   1. may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. Salinas
      a. *one can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense

VI. Forfeiture
Types:
1. In rem
   a. This is against the property
i. EX: ship carried drugs – ship has committed a wrong
b. Used in civil actions

2. In Personam
a. Against the person
b. Criminal in nature
c. Introduced with RICO to separate RICO criminal-defendant/violator from economic powerbase that facilitates criminal conduct

A. Forfeitable Interests
1. Liability
   a. Joint and several liability
   b. b/c all part of same enterprise
2. Mandatory
   a. Court has no discretion
   b. “upon conviction, criminal shall forfeit…”
   c.
3. Proceeds
   a. = Gross receipts of the illegal activity *Simmons*
   b. net profits and other calculations use by some courts
   c. Note: (if disproportionate) will have to prove what is gains were achieved through the specific wrongful acts
4. Property
   a. Offices/positions held are within the reach of the forfeiture statute
   b. The provision can’t reach rights to seek and retain such offices (future) *Rubin*

B. Pretrial Restraints
1. 3rd parties with an interest in forfeited property can ask the sentencing court for an adjudication of their rights to that property
   a. right to make claims against property if that third part was “at the time [of the transaction] reasonably without cause to believe that the [defendant’s assets were] subject to forfeiture
2. Sixth Amendment
   a. Right to counsel, but not necessarily of your choice
3. Relation-back Provision
   a. “all right, title, and interest in property” obtained by criminals via the illicit means described in the statute “vests in the US upon the commission of the act giving rise to forfeiture.”
   b. So in *Caplin & Drysdale*, the criminal client had no right to give another’s property (here it is the govnt’s b/c of relation back) even though they were trying to exercise a constitutionally protected right (paid attys)

C. Attorneys’ Fees
1. *moffit case*

VII. Civil Liability
NEED to prove: all elements of criminal violation (see below) and injury to 
business or property by reason of the RICO violation
- existence of an enterprise
- IC connection
- a person who committed the RICO violation
- pattern of racketeering activity
- one of the relationships btw activity and enterprise as designated in §1962(a),(b) or (c)
or a conspiracy to violate §1962(a),(b) or (c)

A. Injury to Business or Property
1. defendants do not have to have been convicted on criminal charges
   a. just need acts for which they could have been convicted
2. no distinct “racketeering injury” requirement Sedima
   a. standing for one who has suffered injury to business or property as a 
      result of conducting constituting the violation
3. Standing:
   a. Injury needs to be to business or property
   b. Libertad case – women and rights organization didn’t allege this, so 
      didn’t have standing. (if the women submitted sufficient evidence 
      such as lost wages or travel expenses they could have standing). The 
      clinics that were damaged did have standing.

B. Causation
1. proximate/ legal cause
   a. direct relation between the injury asserted and the conduct
2. “but for” (logical) cause
3. *not derivative – 3rd party injury

Currency Reporting Crimes and Money Laundering
I. Intro
   A. Mechanism for concealing the existence of income of its illegal source or use and
      for making it look legitimate.
   B. Often facilitates the commission of ancillary crimes like tax evasion
II. Currency Reporting Crimes –
    The 2 statutes require the reporting of transactions involving large amounts
    of currency, whether or not the transactions are related to criminal conduct.
    Failure to comply with the requirements is a crime
A. The Bank Secrecy Act
   1. Transporting Monetary Instruments
      a. Reports of the movement of currency into and out of the country must
         be filed with the Customs Service
      b. Threshold jurisdictional amount is $10K
      c. To establish a criminal violation the govnt must establish two culpable
         mental states:
i. “knowingly” transported or received monetary instruments that exceeded the jurisdictional amount

ii. the failure to report was “willful”
   1. connotes an intentional violation of a known legal duty (same as in criminal tax prosecutions)

2. Domestic Currency Transactions
   a. CFRTA also monitors domestic currency transactions involving more than $10K.
   b. The reporting requirements apply to “financial institutions”…
      i. Broad term and includes not only banks but registered securities brokers and dealers, currency dealers etc
   c. Evidence that a defendant has structured currency transactions in a manner indicating a design to conceal the structuring activity itself, alone or in conjunction with other evidence of the defendant’s state of mind, may support a conclusion that the defendant knew structuring was illegal. Beidler

3. Enhanced Penalties
   a. Willful violations a punishable as felonies
   b. The max penalties are doubled for willful violations
      i. that occur while the actor is “violating another law of the US”
      ii. and for violations that are “a part of a pattern of any illegal activity involving more than $100k in a 12-month period.”
   c. “Pattern of illegal activity”
      i. govnt must prove that the transactions were both repeated and related to one another
         1. establish an underlying relationship or linkage among the unreported transactions
         2. could do this by: a common feature among the customers involved, the forms of transfers of currency and/or the purposes for which the funds were used.
      ii. Systematic failure does not need to have the linking of the underlying transactions proven (still need relationship)
      iii. “The necessary connection can be shown by proving that the financial institution chronically and consistently failed to file any CTRs. By showing a consistent failure to report, the govnt has proven an overall relationship among the transactions. There is a pattern of not reporting” St. Michael’s Credit Union

B. Section 6050I

Requires any person who is engaged in a trade or business to report the receipt of more than $10K in cash in one or more related transactions in the course of the T or B. A transaction is reportable if any part of it occurs
in the US. Forbids structuring transactions for the purpose of avoiding the reporting requirements.

1. Attorney-Client Privilege
   a. Attorneys must provide the IRS with the names of clients that paid them cash fees in excess of $10k.
   b. To avoid disclosure clients can pay in some other manner besides cash
   c. “absent special circumstances, identification in Form 8300 is not a disclosure of privileged information” Goldberger & Dubin
   d. Intentional Disregard
      i. Actions were enough: voluntary action & knowing info was required on the form
      ii. “a failure is due to intentional disregard if it is a knowing or willful…failure to include correct information.”
         1. willfulness = voluntary, conscious and intentional
      iii. ➔ just need to act voluntarily in withholding requested information Lefcourt

2. Designated Reporting Transactions
   a. These reporting transactions are retail sales of three categories of goods or services:
      i. Consumer durables (useful life greater than 1 year)
      ii. Collectibles
      iii. Travel or entertainment activity
         ➔ if the retailer receives more than $10K in cash in connection with these categories of sales, the transaction must be reported.
   b. Cashier’s checks, bank drafts, travelers checks and money orders have a face amount of not more than $10k are deemed to be cash. – thus if the aggregate value of such instruments exceeds $10k, the transaction is reportable.

III. Money Laundering
       1. prohibits conducting a financial transaction where the actor knows the transaction involves the proceeds of unlawful activity
       2. requires proof of collateral criminal intent. So, must intend:
          a. to promote “the carrying on of specified unlawful activity” OR
          b. to commit tax evasion or fraud; or must know that the financial transaction is designed to:
             i. “conceal or disguise the nature, location source, ownership or the control of the proceeds of specified unlawful activity” or
             ii. avoid federal or state currency reporting requirements
       3. “specified unlawful activity”
          a. includes most RICO predicate crimes in addition to a lengthy list of other federal offenses
    B. Actual Knowledge
1. statute requires actual subjective knowledge
   a. can have willful blindness

C. Criminally Derived Property
   1. predicate crime of wire fraud not complete until get the money. (then must use these proceeds afterwards in another monetary transaction) *Johnson*
   2. The predicate crimes were completed before the monetary transactions in *Kennedy* (mail fraud here)

⇒ Different statutes for Kennedy/Johnson (also diff chronology)