Federal Criminal Law Outline

I. Introduction:

• Constitution confers no general jurisdiction on the federal government (so it is limited). The source of federal laws is in Art. 1, Sec 8 (counterfeiting, gen welf, commerce clause, and necess/proper)
• Originally there were only direct federal laws—17 total originally (forgery, perjury, etc) There are more than 3000 laws today—many codified in the Federal Criminal Code.
  o (Title 18 of USC) [Most standard fare mail, fraud, etc.]
  o (Title 21 of USC) [Narcotics]
  o Environment—[different titles 42, etc.]
• Dual Sovereignty Rule—two different states (or state and federal) can prosecute for a crime that affects both.
• Dyer Act—crime to transport stolen vehicle in interstates commerce—or to receive or possess.

Federal Offense Has:
(1) substantive coverage dimension
(2) jurisdictional dimension

A note about jurisdiction: “Affecting commerce” is different from “moved in commerce.”—cts haven’t said it has to be economic activity.

II. Violence Against Women Act (1994) (interstate domestic violence):

Statute (18 USC § 2261(c)): Makes it illegal for any person
(1) to “cause a spouse or intimate partner to cross a state line (jurisdiction)
(2) by force, coercion, duress, or fraud,
(3) and in the course or as a result of that conduct
(4) intentionally commit a crime of violence and thereby cause bodily injury to the person’s spouse or intimate partner.”

United States v. Page (6th Cir., 1999; p. 23)
• Man beats girlfriend until she is almost unconscious. Puts her in car and threatens w/ stun gun so she won’t escape and then drives with her into other states preventing her from going to hospital.
• Holding: Physical violence that occurs before the interstate travel satisfies the “in the course…of that conduct” requirement.
• The violence is precisely what gave him the ability to transport her.
• Holding 2: A threat of violence that results in the aggravation of pre-existing injuries is a “crime of violence” causing “bodily injury” for the purposes of VAWA.
• When he forced her to travel under the threat of violence and intentionally prevented her from getting medical tx, he caused aggravation of her injuries.
• The statute is constitutional b/c the violence must be integrally related to the transportation across state lines.
III. Affecting Commerce:

A. Inclusion of the Jurisdictional Element in the Definition of the Crime—The Federal Arson Statute

Federal Arson Statute: (18 U.S.C § 844)
(1) whoever maliciously damages or destroys, or attempts to damage or destroy by means of fire or an explosive
(2) any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce...

Jones v. United States (S Ct 2000, H-O 1, p. 1)
• \( \Delta \) throws Molotov cocktail into home in IN.
• Holding: The federal arson statute does not apply to a private residence.
• The use of utilities isn’t enough of a nexus.
• Russell v. US: if it is a rental property, then it is being “used in interstate commerce.”
• “Used” means “active employment for commercial purposes.”

B. The Perez Doctrine—Affecting Commerce Through a Class of Activities

Perez v. United States (S CT 1971, p. 34)
• \( \Delta \) was loan shark engaged in intrastate extortionate credit transaction.
• Holding: Intrastate loan sharking violates the Title II of the Consumer Protection Act because it is related to organized crime.
• Loan sharking is identified w/ organized crime (which is a problem affecting ISC) and through which organized crime finances its “natl operations.”
• Ct is arguing that loan sharking is in the class of activities affecting ISC (cumulative effect).
• Drugs could essentially be treated the same way.
• Stewart (dissent): A man can now be convicted w/ no connection to ISC. Crime is a natl problem, but that doesn’t mean Congress can make any laws it wants involving crime.
• Other class of activities jurisdiction crimes: Gambling (enterprises w/ 5 or more and threshold level of revenue); Prostitution (travel element—Mann Act).

United States v. Lopez (S Ct 1995; p. 39)
• Student was convicted of having a firearm w/in 1000 feet of a school.
• Holding: A law prohibiting firearm possession in a school zone is an inappropriate Congressional infringement on states’ rights.
• Three categories which can be regulated by Congress:
  o Use of the channels of ISC
  o Instrumentalities of ISC or persons/things in ISC
  o Those activities having a substantial relation to ISC. (aggregate Wickard and Perez)
• Three important things about 18 USC 922(q)(1)(A):
  o The law here contained no jurisdictional element.
  o Carrying a gun is not a commercial or economic activity.
  o No findings by the legislature.
• If allowed, this would give Congress a **general police power**.
• The ties to ISC here were **too indirect** and **too remote**. (Just because guns affect education and education affects the economy)
• **Kennedy (concurring): States as labs of experimentation.**
• At least w/ **Perez**, loan sharking itself is economic.
• **Petite Policy**—if states have jurisdiction and have asserted it, the fed govt will back off.
• Thomas (concurring): Lets reconsider the “subst effects” test and he’s not sure Congress can regulate gun possession at all.
• Souter/Breyer (dissent): Historically, rational basis test has been followed. This test is satisfied here. Judges aren’t always familiar w/ the facts and so Congress is better prepared for this. Ramifications go much farther.

**United States v. Roberston** (S Ct 1995; H-O 1, p. 6)
• Δ pays for operation, equipment, out of state employees to work in AK gold mine. Transports the gold out of state. Convicted of RICO § 1692(a)—investing the proceeds of narcotics in “acquisition of any interest in, establishment or operation of, any enterprise which is engaged in, or activities of which affect interstate or foreign commerce.”
• Holding: There was enough evidence to convict the defendant under the jurisdictional requirements of the statute.
• “Affecting commerce” is **not** the appropriate test b/c that test is only to be used when purely *intrapstate* commerce is alleged to have subst interstate effects.
• **The activities surrounding the operation of the mine showed that the enterprise was “engaged in” interstate commerce.** (Use of instrumentalities of ISC—tractors and people).
• This type of activity falls into the “persons/things” **Lopez** category.

**United States v. Morrison** (S CT 2000, H-O 1, p. 7)
• Woman raped/assaulted on college campus. University did not adequately punish attackers. Woman sues two men and the university under Title IX and the VAWA civil remedies statute.
• **Holding:** The VAWA civil remedies statute is not an appropriate exercise of the Congressional Commerce Clause power.
• Gender motivated crimes are not in any sense economic activity.
• There is **no jurisdictional requirement in this section** at issue.
• This wld allow Congress to take over family law.
• Unlike w/ **Lopez**, however, **there were Congressional findings accompanying the statute.** Thus, this court goes EVEN FARTHER than Lopez.
• Too many steps btwn violent crime ISC effects (**multiple indirect effects**). Too attenuated.
• Souter (dissent): Thinks the standard is fuzzy and invites ad hoc review of statutes; ct isn’t suited to make this decision and Congress is.
• Breyer (dissent): Doesn’t like the econ/non-econ distinction b/c hard to apply.
C. How to reign in statutes as part of debate of fed crim law:

**Hobbs Act:** (18 USC § 1951) A person who in “any way or degree obstructs or otherwise affects commerce commits or the movement of any article or commodity in commerce by robbery or extortion...or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be...” (attempt and conspiracy also)

**United States v. Culbert** (S CT 1978, p. 83)
- Δs get $ from federally insured bank by threatening violence to the bank president.
- **Holding:** The Hobbs Act does not include a requirement of showing of racketeering for one to be convicted under it. (It has replaced an old racketeering statute)
- Plain language—It carefully defines terms and mentions nothing of racketeering.
- Congress taking commerce clause jurisdiction, making element of the crime (obstructs/affects commerce) even where state statutes are available. This way federal resources can be used.
- No evidence Culbert was part of organized crime, but Congress wanted to exercise its full pwr under the commerce clause.
- Jurisdiction: Banks are instruments of comm satisfying the “in any way or degree” requirement.

**Travel Act:** (18 USC § 1952) “Whoever travels in interstate or foreign commerce or uses the facilities of interstate or foreign commerce, including the mail, w/ intent to:
- (1) distribute the proceeds of an unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or
- (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity...”

**Perrin v. United States** (S Ct 1979, p. 88)
- Δs used the facilities of ISC to promote a commercial bribery scheme involving exploitation of geological data from a co in LA. **Bribery occurred over the telephone** (a facility of ISC).
- **Holding:** Commercial bribery constitutes “bribery” under the Travel Act.
- Congress intended to supplement state law w/ more enforcement.
- Language of the act: Definition of bribery has evolved from the common law definition (bribery from public officials). Today “bribery” includes “commercial bribery.”
- So then: **Whoever travels in ISC or uses facilities of ISC to commit bribery (both of public officials and commercial bribery) violates the Travel Act.**
- As long as the phone call was in furtherance of the bribery scheme, this is enough.

IV. Manufactured Jurisdiction

**United States v. Altobella** (7th Cir., 1971; H-O 2, p. 2)
- Δs lure man into hotel room w/ woman and blackmail him w/ pictures. Man didn’t have the $, so **cashed an out-of-state check w/ the front desk and gave the $ to the men.** The men charged w/ violating the Travel Act (which prohibits “interstate and foreign travel or transportation in aid of racketeering enterprises.” The act covers “uses of facilities in ISC...including the mail.”
- **Govt says violation occurred when check was transferred to out-of-state bank by mail.**
- **Holding:** The facts DO NOT constitute a violation of the federal Travel Act.
The purpose of the act was to attack criminals that extend beyond the borders of one state.

**Two principle ingredients in such a crime (Travel Act):**
- Kind of unlawful activity characteristically pursued by organized crime.
- Use of interstate facilities in aid of the criminal enterprise.

Scheme took place in Chicago and the victim was from PA.

See hypo in notes 9/4/01 (2).

Judge Stevens is adamant b/c it **must be a significant use** of ISC.

**United States v. Archer** (2nd Cir., 1973; H-O 2, p. 7)
- Feds and locals wrk together to fabricate a scheme by which to entrap several local officials into committing offenses of the Travel Act. **Two attys were arrested on the basis of telephone calls made interstate, which had been made pursuant to the fabrication of the scheme.**
- **Holding:** NOT sufficient proof of the interstate connection for violation of the Travel Act.
- Any other holding wld permit the govt to convert any local bribery into a fed offense by using undercover agents and sending them outside the country on legit business (the Paris call).
- Phone calls: (1) NJ → NY; (2) Paris → NY; (3) NY → Las Vegas. Ct says none sufficient.
- Phone call (1)—the investigator went for the purposes of getting ISC; (2)—incidental; (3)—under false pretenses and impossible to complete (because Δ had no Las Vegas connection and wasn’t there) and the woman (operator) on the other end had nothing to do w/ it.
- **Rewis** case: Gambling operation case where people crossed state lines to gamble. Ct in that case said this was too incidental and insignificant.
- Judge Friendly was troubled here b/c govt lied to the grand jury, the police, and the cts (pattern of govt deception subverted integrity of judicial and law enforcement systems).
- **Entrapment?** No b/c the govt did not induce someone who was not already predisposed to do the criminal conduct.

**United States v. Wallace** (2nd Cir., 1996; H-O 2; p. 17)
- Δ had scheme where he put stolen checks in bank accounts using false i.d.s and then waited for checks to clear before withdrawing the $. An informant was to do these things for the Δ. W/ cooperation of Citibank (federally insured), he was able to secure fake deposit slips to show to Δ. This was the only fed connection in the case. He was charged w/ conspiracy to commit bank fraud.
- **Holding:** The jurisdiction was **NOT manufactured.**
- Cts have tried to limit **Archer.** If Archer ct has been here, might be diff result though.
- **Wallace on mfg jurisdiction:**
  - Here Δ was **not entrapped** into committing a fed crime as he was “predisposed to defraud banks.”
  - Here Δ’s due process rights weren’t violated b/c the FBI committed no crimes, acted in coop w/ Citibank, and lied to no one but the conspirators. (outrageous—like in Archer)
  - Element of the federal statute was proved b/c the Δ took voluntary action that implicated the federal element. (other way around—missing element)
- **Govt does not have to prove that the Δs KNEW it was federally insured.**
- **Holding 2:** The impossibility of completing the conspiracy does not matter.
- All that is needed is the agreement and an overt act.
V. Drug Enforcement Statutes

- 21 USC § 841 (a): “It shall be unlawful for any person to knowingly or intentionally—
  (1) to manufacture, distribute, or dispense, or possess with intent to manufacture,
  distribute, or dispense, a controlled substance; or
  (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a
  counterfeit substance.”

- 21 USC § 841 (b)—imposes minimum sentences Reasons for mandatory minimum sentences:
  (1) uniformity (it failed here, see below; (2) politics.

- Sentencing Guidelines—The Sentencing commission is only accountable to Congress and
  guidelines are then submitted to Congress. It will become law if Congress doesn’t veto it.

United States v. Chapman (S CT 1991; p. 289)

- LSD on blotter paper. Minimum sentence based on the weight of the drug carried. § 841(b)
- Holding: The weight of the carrier shld be included in determining he sentence.
- Structure of the statute makes clear b/c in other areas where Congress wanted the pure form of
  the drug to be calculated.
- Ordinary meaning of the words ‘mixture” and “substance.” “Mixture or substance” containing
  a detectable quantity of LSD. (This can be a very small amt.)
- The term doesn’t include such carriers as bottles b/c the drug is “easily distinguished from the
  container.” (holds drug but doesn’t mix w/ it).
- Stevens (dissent):
  o Undermines the uniformity that Congress seeks.
  o Absurd and perpetuates inequities.
  o One who sells LSD on sugar cube and one who sells on blotter ppr—if the same amt
    of LSD, neither is a worse criminal.
- United States v. Lopez-Gil: (1992) Δ dissolved cocaine into the sides of two fiberglass
  suitcases. 1st Cir held that the trial ct properly took into account the weight of the suitcases w/o
  the metal parts. Dissenting judge said the suitcases were more like traditional containers, rather
  than ingestible ones.
- N. 1, p. 297: LSD weight (Sentencing guidelines changed but S Ct construes the statute
  to include the carrier. The mandatory minimum is est in the statute so no real change.)

United States v. Smith (6th Cir. 1996; p. 300) §841

- A man was caught w/ 5 grams of crack. Challenged 100:1 ratio for cocaine to crack offenses.
- Holding: The ratio is constitutional.
- Congress adopted b/c they though crack was more dangerous to society--its addictive nature, affordability, increasing prevalence; and leads to violent crime. Also chemical composition—
  crack has quicker highs/lows b/c it goes in bloodstream faster.
- Δs argued a due process argument.
- Reasoning: cts have already said there is a rational basis for distinguishing btw crack and
  cocaine—but not necess for the ratio.
- Cts generally defer to Congress on public policy issues.
- Both the sentencing guidelines and the statute reflect the 100:1 ratio.
- Jones (concurring): Agrees w/ the majority about subst due process, but questions the validity
  of the ratio. Also, impact on black community.
**United States v. Armstrong** (S Ct 1996; H-O 3, p. 12)

- Δs convicted of federal firearms offenses and §§ 841, 846 and conspiracy to do so. They filed a motion for discovery alleging selective prosecution due to their race (black).
- **Holding:** Δ has the burden on selective prosecution. They didn’t meet it.
- Ct gives deference to prosecutors.
- Δs evidence lacked strength—and there is a very high std w/ such arguments.
- Prosecution had evidence of Δs quantity, multiple sales, multiple Δs, firearms, criminal history. Prosecution had a very strong case.
- Standard for bringing race, religion, gender case like this: “Requires some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent.”
- Δs wld have to show that there were white, similarly situated; and that they were not prosecuted, but cld have been. Discovery order required wld have to be: List all cases cocaine/firearms prosecuted (w/ races identified); ID all levels of law enforcement involved; explain the criteria. Burden of proof will be difficult; prosecutors have discretion in bringing cases.
- **Stevens (dissent):** Statistically black community bears disproportionate burden. Thinks judges shld have discretion on this.
- **Yick Wo** (S Ct 1886): Ct invalidated an ordinance that prohibited laundries in wooden buildings b/c it was only applied against Chinese while others were allowed to such laundries.

**21 U.S.C.S. § 860:** see H-O 3a. Violate if distribute, possess w/ intent to distribute, or manufacturing a controlled substance in or on, w/in 1000 ft of (school).

**United States v. Tucker** (6th Cir., 1996; H-O 3 p. 20)

- People convicted of 21 USC 860(a). Δs argued that US v. Lopez said the law cldn’t exist.
- **Holding:** The law is an appropriate exercise of Congressional CC power.
- Again, as in Lopez, there was no jurisdictional requirement here. Isn’t fatal here b/c drug trafficking is inherently ISC. (so homegrown marijuana wld count too)
- Unlike w/ gun in Lopez, the act here “addresses clearly a commercial activity.”

**United States v. Alston** (DC District; 1993; H-O 3, p. 23)

- Police stopped Δ—thought he might be armed and stolen car. Followed Δ for some time before they stopped Δ. Δ had drugs in car and charged w/ 21 USC 860(a) b/c stop occurred 1000 ft of school.
- **Holding:** There does not need to be a showing of intent to distribute in a school zone. (But there has to be intent to distribute).
- The existence of large quantities of drugs near the schools increases the likelihood that a child will come into contact w/ it or be harmed by it.
- **Holding 2:** But where police had time to stop car before school zone, Δ can’t be convicted of violating the statute.
- Don’t want to encourage police to chase into school zones as it wld introduce violence into the school area. Don’t want police to manipulate penalties.
- Ct says “under the narrow facts of this case.” So narrow holding.
- This argument was similar to manufactured jurisdiction.
- Facts don’t suggest they stopped car due to drugs—did they know about drugs?
**United States v. DeLuna** (10th Cir 1993; H-O 3, p. 26)
- Δ convicted of aiding/abetting on 21 USC(a)(1) and 860(a). Δ acted as go btwn for drug deal btwn undercover cop and seller. Deal took place at restaurant w/in 1000 ft of school. Δ appealed claiming the evidence was insufficient to prove he aided/abetted or other wise did an over act w/in 1000 ft of school.
- **Holding:** One can be convicted of such a crime w/o aiding, abetting, or overt act occurring w/in 1000 ft of school.
- Δ willfully associated himself w/ the criminal venture.
- **No knowledge requirement is needed** as long as drug distribution occurs in 1000 ft area.

**United States v. Watson** (9th Cir. 1989; H-O 3, p. 29)
- Δ convicted of distributing marijuana w/in 1000 ft of school.
- **Holding:** If Δ is w/in 1000 ft of school, but is not w/in 1000 ft of the school by way of walking route, he can still be convicted of 21 USC 845a(a). (distributing or manufact.)
- Otherwise, this wld create uncertainty in the statute—it wld violate plain meaning.
- It wld generate needles consuming debate and hamper enforcement.
- Children aren’t known for taking “walking routes.”
- This wldn’t follow Congressional intent of trying to eliminate the “violent and dangerous criminal milieu.”

**United States v. Ucciferri** (11th Cir., 1992; H-O 3, p. 31)
- Δ (convicted of drug trafficking/firearms) argued his case was investigated by state law enforcement, but that case had been brought to fed court just to take advantage of more lenient fed standards regarding search warrants, wire surveillance, and informants.
- **Holding:** A prosecutor can bring a case wherever he/she pleases as long as the Δ has met the requirements of the charge.

**Federal Courts Study Committee Report** (p. 320)
- Mandatory minimums—usually quite high in fed realm (much higher than in state).
- 100:1 ratio (diff kinds of line drawing resulting in stricter punishments in fed ct).
- Sentencing Guidelines
- Parole
- Evidentiary Stnds.
- Constitutional Protections.
- Impact on cts: (p. 320-22) Ct caseload—these crim (drug pros) put strain on fed ct system.
- Impact on prison population.
- Appellate litigation.

**Why so many cases on federal court?** Task forces; conviction rate; guidelines (prosecutorial practices—vary per district; when drug cases come to fed ct depends on district); war on drugs (priority on this).
VI. Continuing Criminal Enterprise (CCE) p. 331:

- **21 USC §848** (p. 334)
  - Begins w/ the penalties; Then Lists more penalties
  - Piggy back statute; \( \Delta \) must violate another law (felony). Increasing penalties.
  - Designed to get at kingpins.

- **In order for someone to violate the CCE:**
  - \( \Delta \) violates another law (felony)
  - Violation must be part of a continuing series of violations
    - Must be in concert w/ 5 other people (series of acts)
    - Must be in position of organizer, supervisor, or “any position as mgr.”
    - Must cause them to obtain substantial income.

**United States v. Church** (11th Cir., 1992; p. 333)

- \( \Delta \) convicted of drug violations and CCE. Evidence he had distributed large amts of marijuana in the past and had headed an enterprise that imported the drug. Profits from enterprise funneled into legit business and violence used to further the enterprise. \( \Delta \) argued govt failed to prove he acted in concert w/ 5 or more people, that he was an organ., supervisor, or mgr, and that he had derived “subst income or resources” from the CCE.

- **Holding:** He acted in concert w/ 5 others.

- **Holding 2:** He acted as supervisor, organizer, mgr w/ respect to these people.

- **No need for govt to show the same relationship was had w/ all 5 people.**
  - (doesn’t have to be the same 5 people—composition can change)

- **No need that the person be the ONLY or DOMINANT supervisor, etc.**

- **No need to prove the conspiracy occurred w/ all 5 people at the same time.**

- **No need that there be direct communication to have such relationships.**

  - Don’t kingpins to get around law by saying they don’t know the small guys in the organization.
  - Congress doesn’t require a defined chain of command or structure b/c this wld make it easier for people to get around it and wldn’t be practical b/c almost impossible to prove.

- **Holding 3:** “Substantial income or resources” deals w/ large amts of drugs and tens of thousands of dollars. This is very vague standard.

  - Purpose of this stnd: Helps distinguish CCE from the predicate offense and helps Congress w/ the purpose behind the statute (eliminate the “small fry”)

**United States v. Baker** (7th Circuit; H-O 4, p. 1)

- \( \Delta \) convicted of two possession crimes and one conspiracy and CCE. \( \Delta \) argued that the conspiracy cld not count as a predicate offense under the CCE.

- **Holding:** The CCE statute requires a “series” of at least two crimes.

  - The “in concert” requirement of the offense means that conspiracy is a “lesser included offense” in the crime, and thus, cannot be used to meet the minimum predicate crime requirement.

  - RICO requires only two to create a ‘pattern.’

  - Dictionaries do not clarify what Congress was thinking when it wrote the statute.


  - Why wld RICO require 2 and yet Congress meant “series” to mean 3?
Rutledge v. United States (S Ct 1996; H-O 4, p. 1996)
- Δ was found guilty of CCE and conspiracy to distribute substances. Sentenced to two life sentences. He claimed he couldn’t be charged for both at the same time.
- **Holding:** It was improper for Δ to be sentenced to concurrent life sentences on the two counts.
- **Conspiracy doesn’t require anything else that isn’t required under CCE** (CCE requires extra, so conspiracy is a lesser included offense.)
- Leg didn’t intend to punish both.
- How do we know when two offenses are the same? **Blockburger test**—If each offense requires proof of an element that the other does not, then they are not the same.
- In Jeffers, ct said that assuming CCE requires proof of an agreement among the persons involved in the CCE, then § 846 is a lesser included offense.
- “In concert” signifies mutual agreement, so this element of CCE requires proof of conspiracy.
- **Hypo:** Can person be charged CCE and possession of a drug at the same time?
  - No. YOU HAVE TO VIEW IT IN THE ABSTRACT.
  - **Blockburger analysis:**
    - CCE statute obviously requires more proof than possession.
    - Possession of a drug requires possession (which CCE can include, but it is not required for CCE [no specific requirement of possession]).

Richardson v. United States (S Ct 1999; p. 338)
- Δ had organized street gang that sold drugs. Jury convicted him of CCE. **Jury instructions:** “they must unanimously agree that the Δ committed at least three fed narcotics offenses,” though they didn’t have to agree as to the particular three.
- **Holding:** Unanimity w/ respect to each individual violation is necessary.
- Statute’s language uses the word “violate(s).” Saying each violation is a separate element is consistent w/ this idea.
- CCE statute’s breadth: Another holding wld allow cover-up of widespread disagreement over the Δ’s actions and cld lead the jurors to make decisions based on testimony about “bad reputations” as opposed to on factual detail.
- Jury unanimity won’t make it difficult to prove.
- Provisions requiring that there be 5 people (doesn’t have to be proven which 5), but this provision is different b/c of the language, breadth, tradition, and other factors.
- Ct suggests subst income doesn’t all have to come from 3 specific transactions.
- Richardson says look at the specific while Blockburger says in the abstract.
- **Dissent:** Statute is designed to reach the top brass of the drug rings—the aim is Iding drug enterprises—not punishing offenders on discrete drug violations. Individual violations will be difficult to prove.
VII. Drug Enforcement & Extraterritorial Jurisdiction:

**United States v. Noriega** (SD Fla 1990; p. 354) §§ 1962(c) and (d)
- Δ indicted w/ intl conspiracy and violations of RICO, conspiracy to import cocaine, etc. Δ never came to US and no overt acts were committed in US in furtherance of the conspiracy.
- **Holding:** The US can exercise jurisdiction over his alleged criminal activity.
- Under intl law, does Congress have the power to proscribe such conduct? In three instances:
  - A man outside of country, who willfully sets into motion things affecting a country, can be tried in that country. (effects in country)
  - Intl law has expanded to require that only intent to affect a country is necessary for jurisdiction. (intent)
  - If co-conspirators did overt acts in the territory. (overt acts)
- Did Congress intend this statute to apply extraterritorially?
  - When statute is silent usu no jurisdiction, (rebuttable assumption) (for drug statutes, presumption there is extraterritorial jurisdiction.)
  - but here it can be inferred from the nature of the crime, it implies importation (and thus the conspiracy and aiding/abetting are OK too).
  - Or explicit statement of such jurisdiction.

**United States v. Larsen** (9th Cir., 1991; H-O 4, p. 10)
- Δ convicted for involvement in an intl marijuana smuggling operation (aiding and abetting). Δ and others concealed profits by creating a partnership, which was used to purchase a shipping vessel to transport marijuana. Δ was capn of the vessel.
- **Holding:** The statute applies extraterritorially. Look at reasons below.
- As long as there is no due process violation, extraterritorial jurisdiction is allowed.
- § 841(a)(1) is silent so ct had to extract “the construction that Congress intended.”
- S Ct has said such can be inferred “from the nature of the offenses and Congress’ other legislative efforts to eliminate the type of crime involved.”
- Ct says you can infer extraterritorial from:
  - Import of the problem.
  - Just b/c some are explicit and some are not, if such can be inferred (as long as conduct was in violation of the law)
- Four other circuits have said this statute has an extraterritorial effect.
- Bowman—it wld be going too far to say that if Congress did not fix locus of the crime, it meant to exclude the high seas.
- Δ argues that § 1903 later did say high seas
  - court says the two statutes are different: § 1903 doesn’t require intent to distribute, and the 2nd circuit held Congress enacted § 1903 to extend the drug distribution/possession laws to situations where it was not possible to show intent to distribute.
  - Leg history also reveals no evidence § 1903 was intended to due high seas stuff.
  - Also, there is an enhanced penalty for things under 841(a)(1)
United States v. Londono-Villa (2nd Cir., 1991; H-O 4, p. 13)

- Δ convicted of conspiring and aiding/abetting import of cocaine into US. (He had accompanied one of the conspirators to a meeting about transfer of drugs. He flew w/ a guy from Panama to Columbia where the other guy wld pick up drugs for transport. Δ remained in Columbia. Δ promised to call Panama about the fact that the drugs were a lwr quantity than expected.
- Holding: The knowing/intent requirement is linked w/ importation to the United States; and thus, conviction must be overturned.
- The fact that Panama is commonly used as a stop off before the US is not enough.

United States v. Noriega (Again—p. 362)

- Δ claims govt invasion of Panama was “shocking to the conscience and in violation of the laws and norms of humanity.” Claims due process violation (under 5th amendment and intl law).
- Ker Frisbee Doctrine is the normal rule, but Toscanino exception (divest jurisdiction as a result of govt’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights.”
- Lujan (2nd Cir, 1975)—limits Toscanino—only where “torture, brutality, and similar outrageous conduct.” But govt’s invasion in Panama alleges no personal rights violation.
- Violations of Intl Law: N lacks standing b/c he isn’t a state. No treaty or otherwise here allowing individual to assert this.
- Supervisory Authority: Cts have supervisory authority to create remedies where it is warranted. Ct says dismissal here seems extreme compared to conduct of govt’s wrong-doing. Conduct not so outrageous as to shock the conscience.

United States v. Al Tabib (4th Circuit; H-O 4, p. 21)

- Δ claims that govt violated Posse Comitatus Act by setting up the sting using a military transport of a car in the sting. Posse Comitatus Act set up to prohibit military intrusions into civilian affairs.
- Military use didn’t substantially affect the Δ, just helped set up the sting. (too attenuated)
- Also, Congress allows military to provide services and equipment to provide counter-drug activities!

VIII. Elements of the §§ 241, 242 offenses:

18 USC § 241 (Conspiracy Against Rights): “If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise and enjoyment of any right or privilege secured to him by the Constitution or laws of the US, or b/c of his having so exercised the same; or if two more persons go in disguise on the highway, or on the premises of another, w/ intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured…”

18 USC § 242 (Deprivation of Rights Under Color of Law): “Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to diff punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, …”
A. Specific Intent:

**United States v. Erlichmann** (2nd Cir., 1977; p. 530)
- Δ convicted of burglarizing F’s office under a “special investigations” unit w/in the white house. *(Watergate)*. Jury instructions: Δ can be convicted if it is shown that the object of the conspiracy and the purpose of the Δ was to carry out a warrantless entry into and search of A’s office. Δ claimed that he didn’t have the specific intent required.
- **Holding:** Good faith defense was rightfully rejected—the Fourth Amendment was clearly violated.
- Δ says no violation b/c he thought he had authorization.
- **Lack of knowledge of the law is no defense;** they acted willfully by entering his office w/o a warrant. This is reckless disregard or specific intent even tho no knowledge of rights violated.
- **As long as they intended to do what they did (break in) and what they did either:**
  - They intended to deprive him of his 4th amendment rights OR
  - They acted in reckless disregard of his fourth amendment rights.
- **Screws:** two things required for specific intent:
  - The constitutional right must be clearly delineated and plainly applicable to the case.
  - Δ must commit the act w/ the particular purpose of depriving the victim of his enjoyment of the interests protected by the federal right.
- **Classic:** Even tho Δs not thinking in constitutional terms, “where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of the Constitutional prohibitions or guarantees.”
- Hypo: Suppose they didn’t succeed and they were charged w/ intent. Specific intent = intent to steal; intent to deprive.

B. Under Color of Law:

**Screws v. United States** (S Ct, 1945; p. 538)
- Δ beat H w/ blackjack and fists claiming the H was reaching for a gun. H’s hands had been handcuffed and he died. Evidence of Δ’s grudge against H.
- **Holding:** The officers acted under color of law.
- State officers were authorized to make the arrest and even tho they acted w/o authority to use excessive force—the were acting under the “pretense of law.”
- Content of the due process protection is that you can be tried by law instead of being beaten.
- Doesn’t matter whether they were acting under state law or fed law.
- **Ct is saying when you are acting as an officer so it is not just perceptions—it is how a person presents himself/herself.**

**United States v. Classic** (S Ct; p. 541) “Misuse of pwr, possessed by virtue of state law and made possible only b/c the wrongdoer is clothed w/ the authority of state law, is action taken ‘under color of law.’”
United States v. Causey: (5th Cir., 1999) §§ 241, 242; Nawlins police officer who recruited a drug dealer and his associate to kill a citizen who had filed a complaint charging the cop w/ police brutality. Δs were under color of law b/c took victim to killing place in patrol car, etc.

United States v. Price (S Ct 1966) § 241—It is enough if Δ is a willing participant in joint activity w/ the State or its agents.

C. Deprivation of “Rights, Privileges, or Immunities Secured or Protected by the Constitution or Laws of the United States.”

United States v. Lanier (S Ct 1997; p. 544)
- Δ sexually assaulted and raped women in his judge’s chambers, using his judicial authority to lure them there and to do these things w/ them.
- Holding: S Ct is not the only ct from which “fair warning” can be devised.
- Holding 2: The facts of the case relied on for the warning do not need to be identical to the case that is being tried.
- Test for fair warning—whether the statute either standing alone or as construed made it reasonably clear at the relevant that Δs conduct criminal.
- For there to be deprivation of a right, you must clearly establish:
  - reasonably clear conduct is criminal—to person of ordinary intelligence; rule of levity—when construe statute, you do so in a light most favorable for the Δ.
  - must be applicable to the facts of the case
  - Δs conduct must deprive of this right
  - Δs conduct must be willful.

IX. Special Uses of §§ 241, 242

A. Excessive Force in the Course of An Arrest

United States v. Schatzle (2nd Cir., 1990; p. 551)
- Secret service agent beats up passing pedestrian who yells at him.
- Holding: The reasonableness stnd is appropriate in determining when excessive force has been used.
- Must look at facts and circumstances of each case—reasonableness is measured proportionally from the facts of the situation.
- § 242—clearly established right is the right to be free from excessive force.

B. Official Corruption or Other Criminality

United States v. Senak (7th Cir., 1973; p. 555)
- Public defender took extra money—“fees”—from indigent clients. Charged w/ § 242 for depriving persons of property w/o due process of law.
- Holding: Δ was acting under color of law when he extracted money as a public defender.
- Holding 2: Δs conduct was a “deprivation” under the constitution.
- Why is this a due process violation? 14th amendment deprivation of property.
• Didn’t do 6th amendment b/c hard to prove he willfully gave inadequate representation.

O’Dell:
• People leave taverns and drunk driving but they cld get out of it right away if they paid a fine. (see p. 559-60). Not a deprivation b/c they could go through the process of being arrested. Like Senak—>probably a deprivation of a property right, but it was rejected here. In Senak they had nowhere else to go.
• **Private individual can be held liable under §§ 241, 242 if they were co-participants w/ officials**

US v. McLean
• What if property was contraband? Is this property not to be deprived of? Or maybe due process violation? Must be a public determination by judiciary possession of contraband is a superior right to govt’s right to illegal property. Had to turn it over for due process. (to decide who got to keep it b/c cops in this case were just taking the stuff and keeping it)

C. Attacks on Federal Witnesses

**United States v. Dinome** (2nd Circuit 1992; p. 560)
• **Gambino family** killed people for copying down license no. of the cars they were exporting. Δ charged w/ § 241—they violated the victims’ rights to be a witness in a federal proceeding.
• Holding: There was enough evidence for a violation of § 241.
• **Right to be a witness attaches at the time one gather knowledge sufficient to create the potential of becoming such a witness.**
• Source of this right is implicit in creation of natl govt.—ct says some rights are implicit. What about state of knowledge? **Don’t have to know the person is a federal witness.**

X. 18 USC § 245: (federally protected activities) (see also p. 563-64)

(b) “Whoever, **whether or not acting under color of law,** by force or threat of force willfully injures, intimidates or interferes w/ or attempts to injure, intimidate or interfere w/

(2) any person b/c of his race, color, religion or national origin or b/s he is or has been—

(B) participating in or enjoying any benefit, service, privilege, prgm, facility or activity provided or administered by any State or subdivision thereof.

**United States v. Bledsoe** (8th Cir. 1984; p. 565)
• Gay black man gets beaten to death by Δ. Δ charged w/ violating § 245(b) under assumption that killing was racially motivated and depriving victim of use of the public park.
• **Holding: Statute is constitutional.**
• US v. Guest—14th Amendment can reach private conduct.
• Also, 13th Amendment would apply here.
• Holding 2: Jury instructions ok b/c court just explained **mixed motives. (As long as race was a substantial factor and purpose was to deprive of use of public facility.**
• Guy here had history of violence against blacks and let the white guy escape.
• If Bledsoe excludes 13th amendment, then public park is an accommodation—affecting commerce? Probably need more than this here.
US v. Morrison (again—H-O 5, p. 1)

- SCt says civil remedy provision is unconstitutional b/c § 5 of the 14th amendment only prohibits state action.
- This case came after both Bledsoe and Baird.
- What does Morrison do to § 245? Look at the statute on p. 563.
- Bledsoe—suggest 13th amendment alternative (w/ racial motivation).
- Can’t be 14th amendment anymore as a basis for civil actions → must be another constitutional privilege that is infringed upon.

US v. Baird (9th Cir., 1996; H-O 5, p. 5)

- White supremacists beat up white and black guys in parking lot of 7-11. 7-11 had video games inside. Charged w/ violating civil rights and forceful interference w/ a person’s enjoyment of a public accommodation.
- Holding: 7-11 was a public accommodation w/in the meaning of the statute b/c video games made the store made the store a place of entertainment.
- Reading comports w/ statutory purpose: “to end segregation of places to which people resort for entertainment.”
- After Morrison, this argument would have to come in the form of the 7-11 affecting ISC.
- Tension btwn civil rights cases and Morrison/Lopez.

XI. The Hobbs Act (18 USC § 1951)

A. Extortion by Force, Violence, or Fear

United States v. Capo (2nd Cir., 1987; p. 196)

- People giving Kodak employees $ and items in exchange for referral to Kodak personnel officer.
- Holding: There was not sufficient evidence of violation of the Act.
- Test: Victim must reasonably believe that Δ had the pwr to harm him and that the Δ wld exploit pwr to the victim’s detriment.
- Δ had only assisted the victims. No fear that non-payment wld adversely affect his/her job chances. Victims were willing participants.
- Here there was no fear of economic loss—only the possibility of gain.

B. Extortion Under Color of Official Right

Evans v. United States (S Ct 1992; p. 202)

- FBI guy poses as a real estate developer and discusses rezoning of land w/ elected member of Atlanta Bd of Commissioners. Agent wanted members elected that wld support rezoning efforts. He gave $8000 to member. Official charged w/ Hobbs Act violation.
- Holding: Passive acceptance of a bribe by a public official is sufficient to form the basis of a Hobbs Act violation and there need not be any action to induce the bribe by the official.
- Extortion—obtaining money or property of another’s w/ consent induced by force, violence, or fear, or under color of official right.”
- “Induced” applies only to the first prong of the “extortion” definition. Two prong definition: (a) induced by force, violence, or fear; or (b) under color of right.
• “Induced” does not necessarily indicate that the transaction must be initiated by the recipient of the bribe—**the coercive element is the public office**.
• Kennedy (concurring): induced must apply to under color of right—K says “inducement” is provided by *quid pro quo* (giving one thing in exchange for another).

**XII. Official Bribery and Gratuities:**

**18 USC § 201**: p. 234-236

(a) (1-3)—gives definitions of public official, person who has been selected to be a public official, and official act.

(b) Whoever—(BRIBERY)

(1) directly or indirectly, corruptly gives, offers, or promises any thing of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, w/ intent—

(A) to influence any official act; or
(B) to influence such public official…to commit or aid in committing … any fraud, or make opportunity for the commission of any fraud, on the United States; or
(C) to induce such public official…to do or omit to do any act in violation of the lawful duty of such official person;

(2) being a public official…directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for;

(A) being influenced in the performance of any official act;
(B) being influenced to commit or aid in committing; or to collude in or allow any fraud or make opportunity for the commission of any fraud on the US; or
(C) being induced to do or omit to do any act in violation of the official duty of such official or person;…

(c) Whoever—GRATUITIES

(1) otherwise than as provided for the proper discharge of official duty—

(A) directly or indirectly give, offers, or promises anything of value to any public official, former public official…for or b/c of any official act performed or to be performed by such public official…
(B) (the opposite—when one receives, etc.)
A. Distinction Btwn Bribery and Gratuities

United States v. Sun-Diamond Growers of CA (S Ct 1999; p. 236)

- Trade ass’n gave “gifts” to Sec. of Agri. Govt argued gifts were made in association w/ the fact that he wld have control over issues they wanted decided in their favor.
- **Holding: Conviction under illegal gratuity statute requires proof of a nexus btwn the gift and a specific “official act” for or b/c of which it was given.**
- “B/c of any official act performed or to be performed” means “for or b/c of some particular official act of whatever identity.”
- Definition of “official act.”
- Result of using govt’s idea is that many trivial things wld be swept under act’s purview.
- Even though narrow interp means that possible legal gifts wld be swept under, the definition of “official act” wld save this problem from occurring.
- If Congress had meant such a broad reading, it new how to make that clear.
- Context: Reading fits w/ other statute’s in this area.
- One can show for or b/c of official act by looking at circumstantial evidence—including patterns, etc. Or sometimes that link is official’s knowledge of this link.
- Maybe here gifts aren’t linked b/c an agriculture secretary always have things affecting farmers in front of him.

Other impt points here:

- **Diff from bribe, b/c bribery requires direct quid pro quo and gratuities don’t.**
- Quid pro quo is intertwined w/ corrupt intent.
- State of mind: *Bribe giver (in bribery) has intent to influence; public official—in return for being influenced.*
- See my notes for why to have a gratuities statute—11/8/01 (3).
- There are other statutes that prohibit unlawful compensation and the link.
- **Creating an impression of intent to be influenced is enough to be bribery—even if there is no actual intent to be influenced.** (see my notes 11/8/01 (3) for hypo)
- **Parties can have different intents**—one guilty of bribery and the other of gratuity. N. 3, p. 246.
- **These crimes are inchoate**—no requirement of specific act being carried out.
- Gratuity is not a lesser included offense of bribery.
- **Speech and Debate Clause** in Constitution (see n. 6, p. 246): Affect on potential § 201 liability:
  - Doesn’t prohibit prosecuting Congressman for briber even if motive is to influence vote on legislative measure.
  - Clause designed to preserve legislative process.
  - Can’t introduce evidence as to how member voted or what he said in legislature b/c of this.
B. Thing of Value

**United States v. Williams** (2nd Cir; 1983; H-O 6, p. 1)
- Senator charged w/ violating § 201(c) and 201(g). Agreed to use position to gain govt K for two fictitious corps, set up by fed investigation, in exchange for stock in company. Stock was worthless.
- **Holding:** The thing of value only has to be believed by the Δ as such—even if not commercially viable.

**United States v. Ware** (6th Cir., 1998; H-O 6, p. 2)
- A plea bargain does not violate federal bribery statutes.
- General words which do not induce the govt or affect its rights shld not be construed to do so where it wld “deprive the sovereign of a recognized right or established prerogative title or interest” or where it wld “create an obvious absurdity.”
- Here absurdity was that FRCP Rule 11(e) allowed plea agreements.
- Also, established prerogative.
- This doesn’t mean § 201 cld NEVER be applied to a fed prosecutor—purchased testimony, e.g..

C. Public Official

**Dixson v. United States** (S CT 1984; H-O 6, p. 6)
- Exec director and coordinator of subgrantee of city were in charge of administering block grants. They used their positions to extract “kickbacks” from contractors seeking to work on funded projects.
- **Holding:** Proper test for “public official” is whether the person occupies a position of public trust w/ official federal responsibilities.
- Levine: similar case says the ct, and this case was more “official” b/c salaries were pd by the grant; and they were personally bestowing the benefits of the fed grants on the Peoria residents.
- **Dissent:** Levine doesn’t really begin to define what the class is and doesn’t imply that the class includes individuals employed by a fed grant recipient or by the subgrantee.
- This was bribery b/c of intent to be influenced in fed Ks. All that matters is perception so that a person could be bribed to vote both yes and no—by two different people.

D. Federal Program Bribery

**18 USC § 666** (The devil statute.) **Theft or bribery concerning prgms receiving fed funds**
Whoever…
(1) being an agent of an org, or of a State, local, or Indian tribal govt, or agency thereof—
(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection w/ any business, transaction, or series of transactions of such organization, govt, or agency involving anything of value of $5,000 or more; or
(2) (opposite—corruptly gives, etc.)
(c) or has to receive more than $10,000 a year in grants from feds.

See p. 253 for definitions of “agent,” “govt agency,” and “in any one yr period.”
Salinas v. United States (S Ct 1997; p. 253)
- Sheriff taking money for conjugal visits. Guy pd over $5,000 for the visits.
- **Holding:** § 666(a)(1)(b) doesn’t require the govt to prove the bribe had any particular influence on federal funds.

United States v. DeLaurentis (3rd Cir., 2000; H-O 6, p. 12)
- COPS prgm received money and Δ accepted bribes from a local bar to permit renewal of license.
- **Holding:** There only must be “some connection btwn the Δ’s bribery and the funds supplied or the prgm.”
  - Here the funds pd salary for an extra officer out on the street—an officer who even had to be called to the bar b/c of the problems the bar caused (fights, etc.)
  - See Zwick case in DeLaurentis for example of when there is NO connection.

Brickey sidebar:
- Nature of transaction having to $5000 or more.
- Govt contracts don’t count under § 666—i.e. if Boeing has K w/ the govt and sub-Ker gives Boeing bribe to wk on the project—no violation of 666 here—though probably violation of other stuff.

XIII. Sentencing and Sentencing Guidelines

- Δ is rabbi. Convicted of Medicaid fraud. He has extensive plea negotiations and ends up w/ one count and sentence of 4 yrs in prison.
- Ct takes says the fact that he is a rabbi and has done good works and is old and does not need to be specially deterred does not matter.
- Criminal behavior is blatant and unmitigated. General deterrence. These things require prison.
- But ct gives only 4 yrs of prison and defines this as “stern.”

United States v. Browder (9th Cir., 1976; H-O 7, p. 14-4)
- Δ pled guilty to stolen securities and transport in ISC. He was sentenced to four ten-yr terms and one five yr term—25 of which were to run consecutively.
- Ct acknowledged that study saying white collar defendants were given more lenient sentences was deplorable, if true, but it doesn’t mean that this guy shld be treated differently from other non-white collar Δs.
- AS a matter of law, the ct can’t review the propriety of the sentence received b/c it was w/in the statutory limits.
New Sentencing Guidelines Enacted

- Designed to reign in judicial discretion and to cure disparate sentencing problem.
- How it wrks:
  1. **Base level** (ex: fraud—level 6)
  2. **Specific Offense Characteristics** (Ex: magnitude of fraud considered)
  3. **Adjustments** (Ex: victim related factors such as role in offense and things that obstruct justice)
  4. **Multiple Counts**
  5. **Acceptance of Responsibility** (Ex: Embezzler repays funds voluntarily; voluntarily resigns from office; voluntarily assists authorities)
  6. **Prior Criminal History**
  7. **Determining the applicable Sentencing Range** (see table in handout #7)

A. **Relevant Conduct**—Charge offense will ordinarily determine the base offense level, but then other things can be taken into account.

**United States v. Pinnick** (DC Cir 1995; H-O 7, p. 14-12)
- Δ guilty to one count of four count indictment. D Ct considered the conduct alleged in the other three counts as “relevant conduct” and used this to impose a stricter sentence.
- Holding: Conduct for which the Δ did not plead guilty can be considered as relevant conduct justifying a stricter sentence.
- They must be part of the same course of conduct, meaning that they must be sufficiently connected or related to each other to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.
- Counts one and two were OK to use in this case b/c similar method and instruments used—fake names and checks.
- Count three is NOT OK b/c it involved credit card fraud and was separately identifiable—of a different nature and at a different time.
- Sentencing can be proof by a preponderance of the evidence.
- Δ has burden of objecting to specific facts in a pre-sentencing report by a parole officer.

**United States v. Watts** (S Ct 1997; p. 710)
- A court can consider conduct for which a Δ was acquitted in sentencing.
- This doesn’t violate double jeopardy b/c sentencing enhancements don’t punish a Δ for crimes of which he was not convicted, but increase his sentence b/c of the manner in which he committed the crime.
- At trial, beyond a reasonable doubt standard and at sentencing, preponderance of the evidence stnd.
B. Departures—in limited circumstances, cts can depart from sentencing guidelines.

- Holding: You can’t downward depart from the sentencing guidelines b/c of assistance to the court or good character. It must be exceptional circumstances.
- Settling the civil suit and pleading guilty isn’t enough.
- Holding: In this case, downward departure for extraordinary family situation was OK, but the departure has to be within reason—this was too much here.
- All but in the rarest of antitrust cases is confinement not had.
- In this case the conspiracy was unusually long and harsh and well planned.

- Δ convicted of mail fraud and travel act for extortion involving deputy sherrifs. D CT considered physical condition and charitable fundraising efforts to impose a downward departure.
- Holding: This is OK b/c it is not an abuse of discretion.
- After Koon, cts cldn’t review sentencing, except under abuse of discretion.

- Δs convicted of criminal tax evasion. They argued downward departure shld be given b/c if they went to prison, their business would fall apart and this wld mean loss of jobs for 12 innocent employees. District Ct categorically rejected employment issues being taken into consideration for departures.
- Holding: This shld not have been categorically rejected.
- This was a post-Koon case as well.