OFFICIAL BRIBERY AND GRATUITIES (21-30)

1. STATUTORY LANGUAGE: 18 USC § 201. Bribery of public officials and witnesses (22)
   A. BRIBERY
   § 201(a)(1): defines public official.. includes person acting for or on behalf of government
   includes person who has been selected to be a public official
   § 201(a)(3) defines official act
   § 201(b): whoever
   directly/indirectly, corruptly gives/offers/promises anything of value to public official(b) (1)
   or offers/promises public official to give anything of value to someone else
   with intent
   to influence any official act (b)(1)(A)
   to influence public official to commit...fraud on U.S. (b)(1)(B)
   to induce ... official to do/omit to do any act in violation of lawful duty (b)(1)(C)
   OR whoever being public official...demands/seekses/receives/accepts/agrees to accept... (b)(2)
   in return for being influenced in performance of official act (b)(2)(A)
   being influenced to commit/aid...fraud...on U.S. (b)(2)(B)
   being induced to/omit to do...in violation of official duty (b)(2)(C)
   OR whoever directly/indirectly, corruptly gives/offers/promises anything of value to someone...
   with intent to influence the testimony under oath/affirmation as witness in official
   proceeding (b)(3) ...or
   with intent to influence such person to absent himself therefrom
   OR directly/indirectly corruptly demands/seekses/receives/accepts...something of value...in
   return for being influenced in testimony under oath... or absenting from
   ➔ fine up to 3x $ of thing of value or under this title, greater; prison up to 15 years; both; may be
disqualified from holding any office of honor, trust, profit under the U.S. (23).
   B. GRATUITY:
   whoever...directly/indirectly gives/offers/promises anything of value to public official
   for or because of any official act performed/to be performed by such official
   OR whoever as public official...demands/seekses/receives/accepts/agrees to accept anything of
   value personally for/because of any official act performed/to be performed
   OR for or because of testimony ➔ something of value...
   OR receives something of value for/because of testimony
   ➔ fine under title; prison up to two years; both. (24)

NOTE: SEE CHART ON 24 OF OUTLINE for compare/contrast bribery and gratuity §§
   basic distinction:
   bribery requires quid pro quo, attempt to influence future behavior
   gratuity: doesn’t require quid pro quo, reward for past or future
   both must be done CORRUPTLY; not de minimis

2. CASE LAW AND APPLICATIONS:
   Distinction bribery and gratuity
   U.S. v. Sun-Diamond (24): government must prove link between thing of value and specific
   official act for which it was given. Distinctions between bribery/gratuity, chart.
   U.S. v. Evans (25): intent of parties might not be the same: only one of them may be guilty
   crime may be inchoate: official may never do the action
   acceptance of bribe not legislative act, so not barred by Art. I, § 6 speech/debate clause (25)
   ➔ What is thing of value? (25)
   look to subjective value to recipient: U.S. v. Williams - expectation of gain
   may be intangible benefits: U.S. v. Sun-Diamond, supra (25) - fund’s for girlfriend to travel
   may be promise of future employment, if quid pro quo (U.S. v. Biaggi) (25)
   off to federal witness for/because of testimony covered, but NOT plea arrangements, U.S. v.
   Singleton (26) - that’s public official acting in official capacity as rep of government
   ➔ Who is “public official”? (26)
• federal officials, employees, or person selected to be such (26)
• person acting for or on behalf of U.S.
• *Dixson v. U.S.* (26): employees of state/local government, private employees, if carrying out federal responsibilities: Does person occupy position of trust with official federal responsibilities?
  • *U.S. v. Strissel*: exec dir of city housing authority who distributed HUD funds
  • *U.S. v. Velazquez*: county deputy in jail that housed federal prisoners
  • *U.S. v. Moody*: real estate appraiser who receives VA fee for appraisals
  • *U.S. v. Kirby*: private grain inspectors licensed by USDA who apply USDA regs
• How to distinguish bribery/extortion from campaign contributions and legitimate fees for service?
  • *U.S. v. Biaggi* (26): mixed purposes: “A valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability.” Sets up factors test (27)

**FEDERAL PROGRAM BRIBERY**: 18 USC § 666: Theft/bribery concerning programs receiving federal funds. Agency/program must receive 10K/year minimum, under federal grant. See 27 in outline.
• *U.S. v. Sabri* (28): § 666 does not require proof of connection between offense and expenditure of federal funds. This is Federal Dist Court decision holding § 666(a)(2) unconstitutional under spending clause. (in 2001)
• *Salinas v. U.S.* (28): not limited to cases in which bribery has demonstrated effect upon federal funds
• Post-*Salinas* cases
  • *U.S. v. Santopietro* (29): does not foreclose inquiry into connection between bribe and federal program being funded
  • *U.S. v. Grossi* (29): $ is fungible, so effect transcends program boundaries
  • *U.S. v. McCormick* (29): found no connection between bribe and federal funds; concluded applying statute would exceed Congress’ authority under spending power, cites *S.D. v. Dole*
  • purpose of § 666: to protect “integrity of federal program funds” - integrity must be construed to provide at least some nexus between federal funds and programs
• Does § 666 include gratuities and bribes? § 666(a)(2): can’t “corruptly” offer/give anything of value “with intent to influence or reward”
  • *U.S. v. Bonito* (30): includes gratuities as well
  • covers a lot of actions other than bribes: embezzling, stealing, fraud, etc. - honest services?
  • higher penalties than for mail fraud
• How to figure the value, to see whether meets 10K test?
  • *U.S. v. Fischer* (30): health care provider in Medicare program received benefits within meaning of bribery statute
  • *U.S. v. Marmolejo* (30): market value? conjugal visits?
• What is scope of government contracts in statute?
  • *U.S. v. Copeland* (30): only “contractual relationships constituting some form of “federal assistance’ and...not ‘organizations engaged in purely commercial transactions with the federal government’ - whatever that means
3. **STATUTORY PROVISION:** 21 USC 841. Prohibited Acts (see book 287-88)
   - Core acts: § 841(a) ➔ unlawfully to knowingly or intentionally
     - manufacture, distribute, dispense, or poss with intent to do those things a controlled substance
     - create, distribute, dispense, or poss with intent to distr/dispense, a counterfeit substance
   - Penalties: set by substance and amount ➔ mandatory minimums, or even mandatory life

4. **CASE LAW AND APPLICATIONS**
   - Grading/mixture/type of substance
     - **U.S. v. Chapman** (31): weight of mixture, here blotter paper (nuts) ➔ absurd results; Congress amended, but still strange cases
     - **U.S. v. Lopez-Gil** (32): suitcase - take off metal and weigh!!
     - **U.S. v. Jennings** (32): reversed sentence calculated on mixture with poisonous chemicals
     - **U.S. v. Rolande-Gabriel**: factors: usability, consumability, readiness for distribution of mixture
   - State mandatory sentences
     - **Harmelin v. Michigan** (32): ok ➔ life without parole for possession of 650 grams of mixture of cocaine; but state court said violated state constitution
   - **Disparity between crack and powder:** **U.S. v. Smith** (32): paradigm for racism, etc. conviction affirmed, not unconstitutional vague; crack enhancements okay; see also Slansky arguments on 306-7 in book
   - **Extraterritorial Jurisdiction:** if acts intended to affect US, US has jurisdiction. see 38 in outline

5. **CONTINUING CRIMINAL ENTERPRISE:** attempt to go after kingpins: Statutory Provision: 21 USC § 848 (33-34)
   - **Elements of Continuing Criminal Enterprise** (34)
     - **U.S. v. Church** (34): Δ acted in concert with 5 or more persons; Δ was organizer/supervisor/manager with regard to those people; Δ derived substantial income/resources from the enterprise
     - need not be only leader; doesn’t have to have same relationship with regard to each of the 5; need not prove conspired with the 5 at same time
     - see 34-35 for more details - this is pretty important case
   - **ORGANIZER/MANAGER/SUPERVISOR** (35)
     - **U.S. v. Jerome** (35): organizer more than supplier or customer
     - BUT **U.S. v. Chalkias**: if organizes/manages customers, might count (35)
     - jury doesn’t have to agree on which five persons manager is associated with (7 circuits; cite **U.S. v. Moorman**)) (35)
     - **U.S. v. Bafia** (35): Court rejected Δ’s claim that to manage 5 persons simultaneously, but POSNER DISSENT: must be 5 underling “slots” - don’t have to be occupied all the time.
     - Circuit Split on whether you can get supplier for aiding and abetting Continuing Criminal Enterprise
   - **What is requisite $ amount?** courts refuse to specify
   - **What is “series of violations”? Assume at least 3:** Supreme Court hasn’t really said.
     - **Richardson v. U.S.** (35): unanimity on each individual violation is necessary. See DISSENT’s concern for consequences of holding (36)
   - **What does it take to = “continuing” series?** **U.S. v. Jones** (36): “span a definite period of time”; cf RICO 46 outline
   - **What is relationship between Continuing Criminal Enterprise and DOUBLE JEOPARDY Clause?** (37)
     - **Boston Mun. Court. v. Lydon** (37): 3 sep guarantees in double jeopardy clause: protection against 2d prosecution for same offense after acquittal; protection against 2d prosecution for same offense after conviction; protection against multiple punishments for same offense
     - **Albernaz v. U.S.** (37): a “veritable Sargasso S. ➔ could not fail to challenge the most intrepid judicial navigator”
     - **What is “same offense”?** (37) ➔ **Blockburger v. U.S.**: two distinct statutory provisions constitute separate offenses as long as ‘each provision requires proof of an additional fact that the other does not’: e.g., **greater offense and lesser included offense = same offense**, because lesser does not require proof of any fact not also required for proof of greater
   - **Continuing Criminal Enterprise and Multiple Punishments:**
     - Supreme Court ➔ double jeopardy prohibits multiple punishments for same offense only when > punishment intended by legislature
     - **Rutledge v. U.S.** (37) where two statutory provisions proscribe the same offense, leg does not intend to impose 2 punishments for that offense. **Presumption** may be overcome. And can’t punish for both C.C.E. and predicate drug conspiracy under § 846 because conspiracy is lesser included offense.
     - **Garrett v. U.S.** (37): C’s intent ➔ Continuing Criminal Enterprise sep from predicate and allow cumulative punishments “could hardly be clearer”; and Riccick - affirms Garrett, in context ONLY of single prosecution
Continuing Criminal Enterprise and Successive Prosecutions (38) - barred after acquittal or conviction
- see 38 on outline - a bit confusing
6. **STATUTORY PROVISION:** 18 USC § 1001. Statement or entries generally.
   - whoever ... in matter within the juris of the exec, leg, or jud branch of the U.S. [subsection a] **knowingly** and **willfully** falsifies/conceals/covers up by any trick/scheme/device a **material fact**
     - makes any materially false/fictitious/fraudulent statement/representation
     - makes or uses any false writing/document **knowing the same to contain** ...any of the above
   → fined, up to 5 years prison, both
   - does not apply to a party to a judicial proceeding, or that party’s counsel, for statements, representations, writings or documents ...to a judge or magistrate in that proceeding. [subsection b]
   - with regard to legislative branch...applies only to:
     - administrative matters...
     - any investigation/review, conducted pursuant to authority of committees of Congress... [c]

7. **CASE LAW AND APPLICATIONS:** Elements of the Offense: false/fraudulent, material, knowing/willful
   - U.S. v. Lutz (63): no implicit requirement that F.S. be made directly to, or even received by, federal dept/agency.
   - Materiality of statement (64)
     - Lutz: material = has natural tendency to influence or is capable of influencing federal agency
     - U.S. v. Gaudin (64): Supreme Court ➔ mixed question of law/fact; judge must submit to jury, BUT MAJ of circuits ➔ matter of law for judge
     - U.S. v. Sarahifard (64): material, as in Lutz, supra: Immaterial whether actual relied on by agency; capacity to influence measured at time statement is made
     - U.S. v. Valdez (64): imposs of influencing agency no defense; test = intrinsic capabilities of false statement itself, rather than poss of actual attainment of its end as measured by collateral circumstances

Within Agency’s Jurisdiction (64)
   - Circuit split: whether violation to ➔ false statements to ➔ state agency for employment benefits (64)
   - U.S. v. DiFonzo (64): after case got started, ➔ was outside agency juris, but where suff nexus between subject matter conviction held. Otherwise ➔ cripple agency’s prelim investigations
   - Knowledge of falsity (64)
     - Bryson v. U.S. (64): Government must prove Δ actually knew statements false at time he made them
     - U.S. v. Brown (64): “in the aggregate, ...implied falsity is a basis for conviction” ??
     - Bronstan v. U.S. (65): perjury statute not meant to cover “technically true”; § 1001 may be broader than perjury, AA
   - Must government prove Δ knew statement within juris of dept/agency of US? NO. Courts don’t require mens rea on jurisdictional element of federal crime: U.S. v. Feola (65)
     - U.S. v. Yermian (65): Δ doesn’t have to no statement made within federal juris; and jury instructions said “knew or should have known.” And also Hildebrandt, infra. See also DISSENT.
     - U.S. v. Montemayor (65): knowledge of juris of federal agency might have evidentiary value
   - Willfulness (65)
     - U.S. v. Hildebrandt (65): not necessary that Δ act with intent to deceive U.S. or have actual knowledge that statement was made in matter within federal agency’s juris
     - Cheek v. U.S. (65) CF Hildebrandt : different standard in prosecution for tax evasion: complexity of law
     - Circuit Split on whether = willful if Δ causes someone else to file false campaign report with FEC (65-6)

LIMITATIONS TO SCOPE OF STATUTE (66)
   - According to agency/agency function
     - U.S. v. Rodgers (66): broad interp of juris of agency: but applies only to those who knowingly and willfully lie - not those innocent, acting in good faith
     - revision: to include jud and leg branches as well as exec (Poindexter) (66-67)
   - According to type of statement (67)
     - Brogan v. U.S. (67): no exception for exculpatory no; let Congress fix it?
     - false/unsworn statements: still covered - U.S. v. Massey (67); but CF U.S. v. Ehrlichman - FBI interview “under extremely informal circumstances which do not sufficiently alert the person interviewed to danger that false statements” ➔ felony conviction
       - no transcript - harder to prove, and harder to defend against
       - U.S. v. Poultre (67): conviction overturned - oral evidence “too fragile to support” verdict

§ 1001 AND OTHER CRIMES: the double jeopardy problem (68)
   - U.S. v. Woodward (68): applies Blockburger; § 1001 and failing to report currency not same crime, but DOES N OT ➔ to all federal statutes that penalize false statements in particular contexts
MULTIPLE COUNTS ON § 1001? It depends.

- U.S. v. Olsowy (68): Where identical F.S.’s made in response to identical questions,” → convict only once
- U.S. v. Salas-Camacho (68): made same F.S. twice, but at diff stages of process - material both times, so could convict of both

PREEMPTION? U.S. v. Tomeny: F.S. to Marine Fisheries - convicted under § 1001; also is misdemeanor F.S. with regard to fishery. Doesn’t preempt § 1001. Where conduct violates more than one statute, government may prosecute under either.
FORFEITURE (51-62)

8. CRIMINAL FORFEITURE: 18 USC 853 (52)(789 in book)
   - § 853(a): Property subject to criminal forfeiture
   - § 853(b): Meaning of term “property”
   - § 853(c): Third party transfers, including bona fide purchaser for value (53)
   - § 853(d): Rebuttable presumption that any prop of person convicted of felony under this act is subject to forfeiture if, shown by PREPONDERANCE OF THE EVIDENCE...
   - § 853(o): Construe liberally to effectuate its remedial purposes
   - § 853(p): Forfeiture of substitute property (53)

9. RICO FORFEITURE: see § 1963(a) (55) (439 in book)
   - U.S. v. Busher (55): § 1963 designed to “totally sep racketeer from enterprise...forfeiture not limited to assets of RICO enterprise...but extends to the convicted person’s entire interest in the enterprise.”
   - U.S. v. Infelise: (55): assets in retirement fund forfeitable if government demonstrates taint

10. CIVIL FORFEITURE: innocent owner defense ➤ 18 USC 983(d) (59)
    - basic comparison of civil and crim forfeiture: 52

11. CASE LAW AND APPLICATIONS: (54)
    The Scope of Forfeiture (53) - What does it mean to facilitate crime?
    - U.S. v. Wilton Manors (54): re: connection of prop to offense; use common sense case by case; “character of prop”
      - U.S. v. Smith (54): state prop laws for guidance; and if land used to conceal crime, nexus is suff
    - U.S. v. Rivera (54): legit business as front for illegal activity: sufficient nexus
    - U.S. v. Rogers (54): collateral for loan to further illegal activity; subject to forfeiture
    - DOJ ALERT (54): prop forfeitable when facilitates money laundering; use proportionality test

Rules for Fungible Prop (54)
   - § 984(a)(1,2): government may forfeit any cash found where forfeitable prop kept, without showing that particular case was itself tainted, subject to two limitations
     - forfeiture action must be commenced within year after offense
     - funds held in interbank account not subj to forfeiture unless institution complicit (55)

Constitutionality of Civil and Criminal Forfeiture (55)
   - overview: AA NOTES on 55

➤ Excessive Punishment?
   - U.S. v. Bajakajian (56): excessive = grossly disproportional; amount v. gravity of offense: DISSENT ➤ separation of powers issues; punitive/remedial distinction in case as well
     - factors lower courts use: culpability, seriousness of actions, ratio of forfeiture to fine
     - One 1995 Toyota Truck (56): forfeiture = 100x fine = constitutionally excessive
     - Yskamp v. DEA (56): Lear Jet not excessive - leased to smugglers, # drugs = highest offense level, instrumentality, remedial?
   - Austin v. U.S. (56): civil forfeiture also subject to limitation of Eighth Amendment - also partial punitive; remedial: removal (deodand), instrumentality, compensation to government, social costs
   - CF U.S. v. Ursery (57) civil fines ➤ punishment for Fifth Amendment purposes

➤ Double Jeopardy and Forfeiture: based on assumption forfeiture = punishment, even civil
   - U.S. v. Ursery (57): civil fines ➤ punishment for double jeopardy purposes. 2-prong test
     - Congressional intent: civ? or Crim?
     - so punitive IN FACT that Congress intent doesn’t matter
       - factors: serves non-punitive goals, even if some punitive aspect? historic treatment? lack of scienter requirement?
     - Hudson v. U.S. (57): repudiated case that had held that double jeopardy barred civil penalties after crim conviction; Hudson ➤ “further retreat from expansive interp of double jeopardy clause,” says text book


RELATION BACK DOCTRINE: § 853(c) (53, 57): prop subject to forfeiture vests in US. at time crime committed
   - overview in outline on 57
   - protections in crim forfeiture for bona fide purchases for value: § 853(c)
   - protection in civil forfeiture for innocent owner: § 983(c, d) (925 in book)
   - discretion in AG to restore prop to victims and protect rights of innocent persons
   - U.S. v. BCCI (58): look to time of vesting of interest; unsecured creditors may have problem. AA NOTE: most courts say general creditor not BFP, but secured creditor is.
• U.S. v. Reckmeyer (58): Congress intended unsecured creditors to recover if dealt at arms’ length. D.P. concerns
• Calero-Toledo v. Pearson Yacht (58): rejected due process claim of owners who leased boat to smugglers: know your customers
• U.S. v. Two Parcels of Prop (59): defines innocent owners
• Bennis v. Michigan (59): upheld forfeiture of car used by H without W’s knowledge/consent
• U.S. v. Lavin (59): third parties can’t recover funds acquired through fraud/embezzlement; government’s interest prior and superior; intent of statute not to protect all third parties, just narrowly defined class

Forfeiture of Attorneys’ Fees (61)
• Caplin & Drysdale v. U.S. (61): can forfeit, doesn’t implicate right to counsel in Sixth Amendment or D.P. See DISSENT
• U.S. v. Monsanto (62): re: pretrial seizure of assets, where Δ needs for attorney: needs probable cause to seize; court left open question of whether court must conduct pretrial adversarial hearing on legality of seizure
  • potential for prosecutorial abuse; leveraging, Alice in Wonderland (62)
• USAM Guidelines: when assets transferred to attorney to pay fees, take into consideration... → uniformity, fairness; prior approval of asst. AG
12. **STATUTORY LANGUAGE**: 18 USC § 1951 (196 in text; 18 outline)

- **subject matter**: “Interference with commerce by threats or violence”
- **whoever**
  - in any way/degree
  - obstructs/delays/affects commerce/movement of goods
  - by robbery or extortion, or attempts to do so
  - or commits or threatens physical violence
  - in furtherance of plan/purpose to do anything in violation of statute

→ fined, imprisoned up to 20 years, or both

- **DFN of robbery**: unlawful taking of personal prop against his will by means of force, threat, violence, fear of injury; immediate or future; applies to person or property, and that of relative, member of family, anyone in his company at time of taking/obtaining

- **DFN OF EXTORTION**: obtaining prop with his consent, induced by wrongful use of actual, threatened force, violence, fear, or under color of official right.

13. **CASE LAW/APPLICATIONS**:

- **Extortion by Force, Violence, Fear**
  - *U.S. v. Capo* (18): statute doesn’t cover commercial bribery; here, no inducement by fear, just unfairly enhanced opportunity; for fear, must look to mind set of victim (cite also *U.S. v. Garcia*, 19)
  - *U.S. v. Collins* (19): upheld convictions where refusal to pay would ⇒ unlevel playing field; loss of opportunity to do business
  - Lindgren TEST: economic loss ⇒ V doesn’t receive fair treatment; V receives less than expected treatment; V suffers loss of status quo
  - Circuit split on fear of losing illicitly obtained opportunity (see 201 in book)
  - *U.S. v. Abelia* (19): enough to exploit V’s fear, A didn’t have to create it
  - *U.S. v. Enmons* (19): Act doesn’t apply to “use of force to achieve legitimate labor ends”, but would cover if threat ⇒ wrongful purpos

- **Extortion under Color of Official Right ⇒ inducement NOT required**
  - *Evans v. U.S.* (19): adopts majority view: passive acceptance of benefit by public official is suff to form basis of violation if official knows that he is being offered payment in exchange for specific requested exercise of his official power.” He doesn’t have to actively induce the offering of benefit. **Minority**: affirmative act of inducement by public official is required to support conviction.
  - *McCormick v. U.S.* (20): re: quid pro quo: Government need only show official received payment to which he is not entitled, knowing it was made in return for official acts. Doesn’t have to deceive payer into believing it’s permissible.
  - **DISSENT**: federalism concerns here. (20)

- **Campaign Contributions**: (20)
  - *U.S. v. Evans*, citing *McCormick* (20): proof of quid pro quo is essential element when payments identified as campaign contributions.

- **What constitutes quid pro quo?** (21)
  - explicit promise
  - implicit: official’s acceptance constitutes implicit promise to use official position to serve interests of bribe giver
  - BUT with campaign contributions ⇒ presumption they are legitimate
  - see *McCormick* factors (21)
  - **Lowenstein Theories**: trustee theory, mandate theory, pluralism (21)

- **Aiding/abetting extortion**
  - *U.S. v. Torcasio* (21): private citizen convicted of aiding and abetting senator’s extortion
MAIL FRAUD

   - whoever
     - devised/intending to devise scheme/artificer
       - to defraud
       - to obtain money/prop
         - by false/fraudulent pretenses/representations/promises
       - [deal in spurious coin/obligation/security, etc.
     - ACTS: mail, causes to be mailed (for purpose of doing above stuff)
     - takes/receives mail
   ➔ prison not more than 20 years and/or fined
   ➔ if violation affects financial institution, fine not more than 1M, prison up to 30, or both
   - Wire, radio or television: § 1343 (127 in book, 8 in outline)
     - DFN OF “scheme/artifice to defraud”: includes ... to deprive another of the intangible right of honest services.” § 1346

15. CASE LAW AND APPLICATIONS
   - broader than common law fraud: Durland (9) ➔ to protect public against all intentional efforts to despoil
   - deprivation of intangible rights: historical shift: now covered by § 1346, after McNalley (9)
   - PROSECUTING PUBLIC FIDUCIARIES:
     - Lopez-Lukis (10): look at overall plan/scheme: elements = participated in scheme/artifice to defraud and used mails; construe broadly
     - Margiotta (10): political chairman owed fiduciary duty to disclose dealings with insurance comm.
     - CRITIQUE OF HONEST SERVICES PROVISION (11)
     - USAM: prosecute conduct “which in its nature is directed at defrauding class of persons/general public, with substantial pattern of conduct” (11)
     - federalism concerns (11)
     - require violation of state/federal law?: McNally, Margiotta ➔ no; 5th cir. ➔ yes (12)
   - rule of lenity as limitation?
   - PROSECUTING PRIVATE FIDUCIARIES: (12)
     - U.S. v. Jain (12): hard to define fiduciary duty, and no harm proven, nor intent to harm
     - see minor cases (13)
     - Coffee: ➔ more restrictive standard in private sector cases (13)
     - some specific statutory schemes to deal with private fiduciaries: e.g., Medicare, health fraud
   - DEFINITION OF PROPERTY:
     - McNally: schemes to defraud of property, + right to honest services under § 1346
     - Carpenter v. U.S. (13): may be intangible property
     - U.S. v. Walters (14): Easterbrook: must be scheme to obtain prop from the victim; “Deprivation is necessary but not sufficient condition...Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement.”
   - USE OF THE MAILS
     - Schmuck v. U.S. (15): must be part of execution of fraud, need not be essential element, may be “incident to essential part of scheme,” may be step in plot, may be routine and innocent per se; may even leave paper trail adverse to interests of Δ. “Relevant question ...whether mailing part of exec of scheme as conceived by perp at the time”
     - ways to attack mailing element: 15-16 ➔ subjective: was the mailing part of scheme as conceived by perp? foreseeable + facilitates scheme (Carpenter)
     - U.S. v. McDougal (16): may even be mailing that became necessary after the fact if “necessary to permit the Δ to retain the fruits of the fraud.” E.g., failure to submit form might ➔ government investigation.
     - for array of cases showing lower court construction of Schmuck: see 16 in outline
   - UNIT OF PROSECUTION: each use = violation (Hadders)(17), but Sentencing Guidelines decreases importance of prosecutor’s discretion to charge a large # of counts
   - MAIL FRAUD AND OTHER CRIMES: see 17 in outline, including gap-filling in new areas of crime
OBSTRUCTION OF JUSTICE (68-71)


2. **CASE LAW AND APPLICATIONS**: (69)

**Intent to Obstruct, Knowledge of Judicial Proceedings, Nexus Requirement**

- **U.S. v. Aguilar** (69): Elements under § 1503: **intent to influence** judicial or grand jury proceedings, **nexus**: act must have relationship in time/causation/logic with judicial proceedings; **natural and probable effect of interfering with due admin of justice**, but doesn’t have to succeed; > just uttering false statements to investigating officer; **endeavor**: makes conduct punishable where Δ acts with intent to obstruct but is foiled in some way. **DISSENT**: shouldn’t endeavor be enough?
  - Court relies on **Pettibone v. U.S.**: “person not sufficiently charged with obstructing or impeding due admin of justice in a court unless it appears that he knew or had notice that justice was being administered in such court” - reads that into Omnibus Clause as well as rest of § 1503.
- **U.S. v. Frankhauser** (69): no violation of 1503 where no evidence Δ knew investigation → grand jury
- **U.S. v. Brenson** (69): conviction upheld where grand juror disclosed info to target of investigation

**Conspiracy to violate § 1503**:

- **U.S. v. Vaghela** (69): need not show jud proc pending, but that Δ’s directly intended to obstruct
- **U.S. v. Messerlian** (70): cause of action would lie even without grand jury because Δ’s found to have taken steps and agreed to prevent future grand jury into specific matter

**NEXUS Requirement** (70)

- **U.S. v. Gabriel** (70): § 1512(b): witness tampering: **no requirement that actions of Δ be “likely to affect” proceeding**. Government must prove only that Δ endeavored corruptly to persuade/mislead someone with intent of influencing his potential testimony before grand jury.
- **U.S. v. Veal** (70): 1512(b): hindering communication to law enforcement officer of info relating to commission of federal offense

**What does it mean to act corruptly?** (70)

- § 1515(a)(6): “corruptly persuades” does not include conduct which would be misleading but for a lack of a state of mind
- § 1515(b): As used in § 1505, “corruptly” means acting with improper purpose, personally or by influencing another, including making a false of misleading statement, or withholding, concealing, altering, or destroying a document of other info
- **U.S. v. Rosso** (70): intentionally lying to grand jury would do it
- **U.S. v. Thompson** (70): “corruptly” means “motivated by an improper purpose” in § 1503
- BUT CF **U.S. v. Poindexter** (70): unconstitutionally vague, fails to provide constitutionally adequate notice as applied to lying to Congress ➔ **dfn in § 1515 added**
- **U.S. v. Frankhauser** (70): “corruptly” in § 1512(b)(2): doesn’t have to be pending proceeding, so actual knowledge of pending proceeding not required; but “Δ must act knowingly and with the intent to impair an object’s availability for use in a particular official proceeding”
- **U.S. v. Farrell** (70): corrupt under § 1512(b)(3) if:
  - attempting to bribe someone to withhold info
  - attempting to persuade someone to provide false info to federal investigators
  - does not include noncoercive attempt to persuade co-conspirator who enjoys Fifth Amendment right not to disclose self-incriminating info about conspiracy to refrain, in accordance with right, from volunteering info to investigators

**Examples of conduct constituting obstruction of justice** (71)

- “a variety limited only by the imagination of the criminally inclined”
- **U.S. v. Collis** (71): forged, fabricated letter ➔ judge in parole violation hearing. Convicted under 1503
- **U.S. v. Cuieto** (71): lawyer went after undercover state investigator, manipulated system to obstruct
- **Bill Clinton?**
17. **Statutes:** 18 USC §§ 1961 (Definitions); 1962 (Prohibited Activities); 1963 (Criminal Penalties) (39-40)

- **racketeering activity:** act/threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, dealing in controlled substances. § 1961(1)
  - chargeable under state law & punishable by prison > one year
  - OR indictable under long list of statutes (see 436-37 in book)
- “**person**” = individual/entity capable of holding legal/beneficial interest in prop § 1961(e)
- “**enterprise**” = indiv, partnership, corp, assoc, other legal entity, and any union or group of individuals associated in fact although not a legal entity
- “**pattern of racketeering activity**” = at least 2 acts of RA within 10 years (excluding period of imprisonment)
- “**unlawful debt**” = gambling, usury (438 in book)

§ 1962. **Prohibited Activities:** (438)

- **(a): using/investing income** derived from pattern of racketeering activity to acquire an enterprise
- **(b): acquiring interest in enterprise** through pattern of racketeering activity
- **(c): conducting affairs of an enterprise** through pattern of racketeering activity
- **(d): conspiring to do (a)-(c)**

§ 1963. **Criminal Penalties:** (439); for RICO FORFEITURES, see § 1963(a) on 439 in book

- fined, prison up to 20 years (or life, if...), both, **and shall forfeit** (see 439 for details)

18. **CASE LAW AND APPLICATIONS:**

- **The Enterprise Element:** (40)
  - **U.S. v. Turkette:** (40): enterprise = legal or crim business; associated in fact; enterprise ≠ pattern of RA; federalism concern; construe statute liberally “to effectuate its remedial purposes”
  - **U.S. v. Bledsoe:** (40): common purpose: also continuing unit, continuity in structure/personality; ascertainable structure ≠ pattern of RA. BUT cf **U.S. v. Perhitz:** (41): org can be inferred from pattern of RA, and **Coonan:** “Common sense suggests that existence of ass-in-fact is oftentimes more readily proven by what it does, rather than by an abstract analysis of its structure.” **Bledsoe:** majority position.
  - **Chang v. Chen:** (41) elaborates on evidence of structure, follows **Bledsoe**
  - **U.S. v. Davidson:** (41): factors to determine whether enterprise exists.
  - **U.S. v. Richardson:** other factors: hierarchy, crimes ➔ protect enterprise; social ties
  - **U.S. v. White:** factors ➔ name of org, geo area, centralized storage; hierarchy
  - **U.S. v. Korando:** (41): “structure and goals sep from predicate acts themselves”, continuity of informal enterprise + differentiation of roles enough ➔ division of labor, continuity over period of years

- **A Legal Entity as Enterprise:** (42)
  - must affect interstate commerce
  - most cases are civil RICO case (see also for foreign RICO, 42)
  - may be combo of organizations: **U.S. v. London**, **U.S. v. Masters** (42)
  - may be government agencies, but federalism concerns: **U.S. v. Thompson** (42)
  - may have ideological, non-economic goal: **NOW v. Scheidler** (42), but still must affect interstate commerce
  - USAM: economic or other identifiable goal

**Who is a RICO Person? Relationship of Person to Enterprise?** (43)

- **U.S. v. Gelb:** (43): under § 1962(c): MAJ ➔ person ≠ enterprise; **U.S. v. Hartley:** MIN - can be the same; this is because of “association” requirement in statute
- **Haroco v. Amer. National Bank/Trust:** (43): under § 1962(a,b): CAN charge same entity as person-enterprise
- **U.S. v. DiCaro:** (43): one person can’t be enterprise; except Posner in **McCullough v. Suter**
- **Fitzgerald v. Chrysler:** can’t have corp=person and corp+employees as enterprise; look to prototype as standard, and how far is case from that. Chrysler’s subs, dealers, etc. not involved in scheme, so ≠ enterprise; Posner. AA NOTE: judges don’t like going after corps this way: could structure to avoid RICO; crowds out docket (civil RICO); no logie ➔ 3x damages just in business context; “not good for America’s position in global economy”
- **Emery v. Amer. Gen. Fin. Inc.:** (44): “firm must be shown to use agents/affiliates in way that bears resemblance to paradigmatic RICO case in which a crim obtains control of legit firm as instrument of criminality”
- **Jaguar v. Royal Oaks:** (44): can bring suit against directors/officers of corp as distinct from corp, as enterprise

**Operation/Management Requirement** (44) - construe liberally

- **Reves v. Ernst & Young:** (44): even outsider must participate in operation/mgmt of enterprise to be liable under § 1962(c); based on meaning of “conduct”; statute doesn’t distinguish between insiders and outsiders; ladder

**Does Reves apply only to outsiders?**

- **U.S. v. Owens:** (44): yes. **U.S. v. Oreo:** “We think Congress intended to reach all who participate in conduct of enterprise, whether they are generals or foot soldiers”
- **U.S. v. Shifman:** (45): “A Δ [outsider] who is plainly integral to carrying out the enterprise’s activities may be held criminally liable under RICO”
- **Handeen v. Lemaire:** (45): role of lawyers - ordinary professional assistance okay; but “We will not shrink
from finding attorney liable when he crosses the line...[into] active participation in directing the
- U.S. Viola (44): taking directions, performing helpful tasks, not enough to bring with scope of § 1962(c)
- U.S. v. Diaz (44): matter for factfinder, whether behavior = participation in operation/management

**Pattern of Racketeering Activity (45)**
- HJ, Inc. v. NW Bell Tele (45): 2 acts at least; within 10 yr period; pattern=arrangement, relationship among; > just sporadic activity; **predicates are related + amount to threat of continued crim activity**
  - related= same/similar purposes, results, participants, Vs, methods, etc. - so “not isolated events”
  - continuity= closed period of repeated conduct over substantial period of time; open period - threat into future, fact-dependent (explicit/implicit threat; part of ongoing entity’s reg way of doing business; part of conducting legit business); **NOT LIMITED** to typical “organized crime”. See Scalia DISSENT (46)
- Col. Nat. Resources v. Tatum (46): not too vague - 2 acts with 10 years - pretty clear shouldn’t do those!

**What meets “continuity” test? (46)**
- U.S. v. Church (46): est of enterprise may est necessary continuity
- U.S. v. Stodola (46): ongoing bribes of public officials...may establish pattern (even if re: only single contract)
- U.S. v. Aulicino: seriousness, nature of crime may influence interp of continuity requirement
- World Faith v. Sawyer: **not sufficient**: predicate acts occurring as part of single, discrete, otherwise lawful tr
- U.S. v. Richardson: series of robberies, 3-1/2 months enough
- Libertad v. Welch (46): randomly timed events against abortion clinics: 3 mo. enough ➔ “inherently diff or impose to determine whether/when will blockade again”
  - closed-end continuity? see 486-87 in book
  - open-ended? Corley v. Rosewood Care Center: (46): factors: specific threat of repetition, predicates = reg way of conducting ongoing legit business; predicates attributed to Δ operating as part of long-term assoc for crim purposes

**What meets “relatedness” prong? (46)**
- U.S. v. Gonzalez (47): violations of multiple statutes resulting from single crim tr enough, despite factual entanglement.
- U.S. v. Walgren (47): vacated RICO conviction where one phone call violated state bribery law & federal extortion law
- U.S. v. Biaggi: (47) NO if predicate acts = bribery + obstruction of justice charge that rested on false denial of bribery

**What is “racketeering activity?” (47)**
- see § 1961(a) and notes on 47 outline
- U.S. v. Garner (47): designations of state law generic - any crime falling within generic label may be RICO predicate
- broad coverage: acts chargeable, punishable, indictable, involving - include open-ended crimes like mail fraud, Hobbs

**Conspiracy as Predicate Offense (47)**
- may be predicate for state offenses under § 1961(1)(A), J.S. v. Licavoli (47); and U.S. v. Weisman
  - Licavoli: where conspiracy = predicate offense, crime that is obj of conspiracy may be other predicate crime
- for other subsections, conspiracy may be predicate offense ONLY if enumerated statute includes conspiracy, can’t file those under general federal conspiracy statute, 18 USC § 371
  - U.S. v. Benevento (47): 2 qualified conspiracies may = the 2 required predicate crimes, provided they are separate

**Predicate Acts That Have Previously Been the Subject of a Criminal Prosecution (48) i.e., double jeopardy concerns**
- U.S. v. Coonan (48): may use predicate offense subject to prior prosecution, even charges for which Δ acquitted in state court
- U.S. v. Pungitore (48): state and federal govts have significantly diff interests, so Coonan okay
- U.S. v. Dixon: (48): Blockburger test for double jeopardy in successive prosecutions (see Drug Offense page)
- U.S. v. Esposito (48): subsequent prosecution of drug offense, after prosecution/acquittal on RICO, NOT barred by D.J.

**RICO CONSPIRACY: § 1962(d) - doesn't require overt act in furtherance; much bigger penalty than reg conspiracy**
- U.S. v. Elliott (48): overview of RICO conspiracy, advantages. See also top of 49 for other viewpoints.
- Salinas v. U.S. (49): see case notes: broadens dfn, easier to prosecute - no overt act, just agreement to further purposes
- U.S. v. Neapolitan (50): seems to narrow a bit from Salinas: “Δ who did not agree to commission of crimes constituting pattern of RA is not in violation of § 1962(d), even though he is somehow affiliated with RICO enterprise.”
- Circuit Split: must Δ conspire to operate/manage enterprise OR simply conspire with someone who is operating?
  - U.S. v. Posada-Rios (50): MAJ: conspiring with is enough; Reves doesn’t apply to RICO conspiracy; MIN: Reves


**Private Civil Remedies (50)**
- Sedima v. Imrex (50): May [ ] bring private action against Δ who has not be convicted on crim charges and where there has not be “racketeering injury”? yes, see 50-51
- see 509 for breadth of claims under civil RICO; see 510 for grounds on which courts have denied relief
- Holmes v. SIPC (51): common law ideas about proximate cause to be applied under RICO
- injury to mere expectancy interests is not sufficient
- Ill. Dept. of Rev. v. Phillips (51): state/local government can use civil treble damages in aid of tax law enforcement
• Local/state govts not suitable Δ’s, but can sue officials in individual capacities (51)