

Federal Crimes

Miller Moreau
Professor Bolitho
Campbell Law School
2021

I. Enforcement Resources

a. Federal

- i. Art. II give the executive power to the President to take care that the laws are faithfully executed.
- ii. Federalization—The growing scope of federal criminal law
- iii. History and Attributes
 1. The U.S. Attorney General was given administrative control over U.S. Attorneys in each judicial district in 1861
 2. Most enforcement agencies fall within the purview of the DoJ (Main Justice). DoJ and AG were created by 5 U.S.C. § 291.
 - a. The DoJ controls ALL prosecutors.
 3. Number of officers in each field:
 - a. Criminal investigations—45,000
 - b. Police response and patrol—28,000
 - c. Immigration—18,000
 - d. Corrections—17,000
 4. Investigative Duties
 - a. FBI—primary investigators of most non-specialized federal violations
 - b. U.S. Marshal Services—protect courts and serve in judicially related functions
 - c. DEA—focus on implementing laws related to controlled substances
 - d. Secret Service—protect the president and investigate counterfeiting
 5. Legal Offices/Positions
 - a. Criminal Division—comprised of highly-specialized attorneys who focus on particular types of cases; controlled by the AG
 - b. U.S. Attorneys—chief prosecutor within his district. The AUSAs are the boots on the ground

b. State

- i. Police Force
 1. Comprised of about 18,000 departments with 700,000 deputies.
- ii. Prosecutors
 1. Most have the power to direct law enforcement activities, but do not enforce it.

c. Joint Efforts

- i. Task Force—Joint operation between federal and state LEOs usually to ferret out a specific type of crime. Deputizes local officers who are working in conjunction with the feds.
- ii. *Assimilated Crimes Act*—When a crime occurs on federal property, the federal prosecutors may utilize the state law within which the federal property is located

II. Selection of Cases for Federal Prosecution

- a. *Literally speaking, the only true limit on prosecutorial discretion occurs when the decision is based on the defendant's membership within a protected class. Otherwise, the decision is absolute.*
- b. Standard for Selection—demanded by Equal Protection—US-As must have a *rational basis* for why they distinguish who they want to charge.
- c. Technically, the US-As have plenary power over which cases to prosecute, but the DoJ influences, directs, and guides the selection by centrally determined missions and policies.
- d. The **primary discretionary decision** is whether to prosecute federally or leave to the state due to the significant overlap
- e. Primary Factors Influencing Selection
 - i. Pragmatic/logistical considerations—allocation of resources
 - ii. Type/relation to central missions and policies
 - iii. Special issues raised by those policies
 - iv. **HOWEVER**, the main *practical* consideration is the strength of the case.
- f. Deciding whether to prosecute state or federally
 - i. **#1 Factor**—which agency did the majority of the investigation?
 1. Cross Designation—process of temporarily appointing a state/federal prosecutor to permit them to try a case under the laws and in the courts of another jurisdiction.
 - ii. **Factor 2**—who has custody of the suspect?
 1. Habeus corpus ad prosequendum—Ability of federal prosecutors to remove a suspect from state custody into federal custody *for the purpose of prosecution*.
 - iii. **Factor 3**—Possibility of Duplicative Prosecution
 1. *See* Petite Policy and Dual Sovereignty
 - iv. **Factor 4**—Collaborative Investigation
 - v. **Factor 5**—Notorious Case?
 1. Many times, the feds will take big cases for higher punishments and fame.
 2. No one has the authority to resolve differences between the states and feds on who will prosecute first
 - vi. **Factor 6**—Caseload and resources—skill, cost, availability
 - vii. **Factor 7**—agency and agent relations
 - viii. **Factor 8**—Legal Advantage
 1. Usually, there is no real difference
 2. Areas that may effectuate an advantage
 - a. Substantive law
 - b. Penalties (higher with feds)
 - c. Procedures
 - d. Rules of Evidence
 - e. How the Constitution affects the investigations (4th Am.)
 - f. Judicial attitudes
 3. Typical Advantages of the Feds
 - a. Duration and reach of subpoenas
 - b. Limited immunity for grand jury witnesses
 - c. Lower standard for warrants
 - d. Availability of preventative detention
 - e. Lower BoP for warrants
 - f. Lower BoP for electronic surveillance

- g. Ability to use uncorroborated accomplice testimony
 - h. Discovery rules
 - i. US-A had more ability to influence sentencing, making pleas more likely
 - ix. **Factor 9**—Influence of policy prerogatives
 - g. Policies Influencing Selection
 - i. Promulgated by the DoJ, prosecution decisions can be directly influence adherence to a central mission
 - ii. Statements of Policy—quasi-legislative issuances by the Criminal Division that give guidance, limits, and advice beyond the governing statute.
 - iii. Principals of Federal Prosecutorial Discretion
 - 1. **The following factors are used when challenging a Fed’s decision to take the case**
 - 2. A determination to prosecute represents a policy judgment that fundamental interests of society require the application of criminal laws to a particular set of facts, while recognizing potential negative externalities regardless of whether a conviction occurs.
 - 3. Generally, a US-A *should* commence prosecution if he believes a violation has occurred and evidence will back it up, unless:
 - a. No substantial federal interest will be served
 - i. Weigh all relevant factors, including:
 - 1. Enforcement priorities
 - 2. Nature and seriousness
 - 3. Deterrent effect
 - 4. Culpability
 - 5. Criminal history
 - 6. Willingness to cooperate
 - 7. Probable sentence
 - 8. Worth the use of resources
 - a. **MUST** be justified on found other than the fact that a lot of resources have already been expended.
 - ii. Also consider, strength of the case and other’s ability and willingness to do so effectively
 - b. The person is subject to effective prosecution in another jurisdiction
 - i. #1 focus is the probable sentence
 - ii. Also consider, strength of the case and other’s ability and willingness to do so effectively
 - c. There is an adequate, non-criminal alternative
- h. Current Federal Priorities
 - i. Anti-terrorism, violent-crime, immigration, opioids, financial fraud, exploitation of children, district specific priorities
- i. Statute of Limitations
 - i. SoL is typically 5 years
 - ii. **18 U.S.C. § 249(b)**
 - 1. May only prosecute if:
 - a. State has no jurisdiction
 - b. State asks for the feds to take it
 - c. The verdict from state court will leave the federal interest unindicated in eradicating bias-motivated violence
 - d. Federal prosecution is in the public interest

- j. Dual Sovereignty
 - i. General Principles
 - 1. *Gamble v. U.S. (2019)*—reaffirmed principles of dual sovereignty and double jeopardy considering state and fed relationship
 - 2. *Bartkus v. IL*—SC upheld a conviction in state court where defendant was already acquitted in federal court. **Hold.** This did not deny due process
 - 3. *Abbate v. U.S.*—extended ^^this rationale to double jeopardy.
 - 4. Fundamental Principles
 - a. Where you violate laws of two separate sovereign entities, you are subject to prosecution under both, otherwise, this would deprive one of its rights to enforce laws.
 - b. Timing between the two does not matter
 - ii. Speedy Trial
 - 1. *U.S. v. Dowdell*
 - a. To find a speedy trial violation, use the factors from *Barker v. Wingo*:
 - i. Length of delay
 - ii. Reason for delay
 - iii. Defendant’s assertion of the right
 - iv. Resulting prejudice to the defendant
 - b. Accrual begins either when the arrest happens or the indictment is made, whichever comes first
 - i. State court accrual has no bearing on the feds
 - c. **Holding**—accrual of speedy trial begins upon arrest/indictment by each sovereign. This period only affects that sovereign.
 - d. **EXCEPTION** *Bartkus*—if one sovereign wholly dominates the prosecution of another, that that the latter retains very little or no control, the case is treated as having been already prosecuted by the controlling party.
 - i. D has BoP to show one was the pawn of the other and that the supposedly independent prosecution was a sham
 - ii. This exception does NOT prevent maximum cooperation between state and feds
 - iii. Petite Policy Approach
 - 1. “After a state prosecution, there should be no federal prosecution for the same act or acts unless the reasons are compelling.”
 - a. Began as a *policy* of AG William Rogers.
 - b. Refers to both (1) restricting successive prosecution and (2) trying all related federal charges in a single trial
 - 2. UNENFORCEABLE AT LAW. For internal guidance only
 - 3. ONLY apply this to the decision on whether to charge
 - 4. Three substantive requirements to pursue dual prosecution
 - a. The matter must involve a substantial federal interest
 - b. Prior prosecution left it *demonstrably unvindicated* AND
 - i. Determined by length of punishment
 - c. The government believes a violation occurred and will be proven by evidence

5. Procedural Requirements
 - a. There is prior Assistant AG approval OR
 - b. Retroactive Asst AG approval, which is allowed if: (1) there are unusual or overriding circumstances justifying retroactive approval AND (2) it would have been approved if done seasonably.
 - i. Otherwise, the DoJ will force the AUSA to dismiss the case
6. Regular Procedural Process
 - a. Get US-A approval → OEO office at DoJ and Deputy Asst AG → If either OEO or Deputy disagree with one another, then the Asst AG steps in.
7. Petite Policy gives D no rights
 - a. *U.S. v. Mitchell*—gov't must be the party who requests dismissal
 - b. *U.S. v. Fletcher*—Petite Policy serves an important function in protecting citizens from any unfairness associated with
 - i. May signal that the court relies on the policy to ensure that it does not have to formulate a standard of its own.

III. Scope of Federal Criminal Laws (FCL)

- a. Two Primary Dimensions of Federal Criminal Law
 - i. Jurisdictional reach
 - ii. Substantive coverage
- b. Criminal laws stem from the enumerated powers because they are necessary and proper for ensuring that the enumerated powers may be effectuated
- c. Categories of FCL
 - i. Direct federal interest
 1. **EX.** Immigration, treason, piracy, etc.
 - ii. Indirect federal interest
 1. The exploitation of this category has led to the broad expansion of FCL
 2. Derived from the (1) commerce clause, (2) taxing power, and (3) postal power.
- d. 4 key features of federal law
 - i. It is optional—there is no police power
 - ii. It is jurisdictionally limited
 - iii. Has innovative laws
 - iv. It is often indirect
- e. Commerce Power
 - i. *U.S. v. Lopez*—Congress cannot extend the power so far as to embrace effects upon interstate commerce so indirect and remote that it would effectually obliterate the distinction between feds and state
 - ii. 3 categories that are ripe for exercise
 1. The channels of IC
 2. Instrumentalities, people, and things in IC
 3. Activities with a substantial relation/effect on IC
 - iii. Transportation in IC
 1. *Champion v. Ames (Lottery Case)* (1903)—allows control of items crossing state lines no matter what
 2. *Hoke v. U.S.* (1913)—allows FCL to touch where a victim is transported across state lines
 3. Basically, if something/one related to criminal activity *can or does* cross state lines, then it is within the jurisdiction
 - a. Can also obtain jurisdiction via communication
 - b. *Sometimes* the item must actually cross state lines
 - iv. Affecting Commerce
 1. Main Issues—(1) how much affect is needed? (2) how does it affect commerce?
 - a. Prevailing View—a *de minimis* effect is all that is needed.
 2. Two Primary Approaches to Obtaining Jurisdiction
 - a. Include a jurisdictional element to the crime
 - b. Class of Activities Approach
 - i. Allows an act to be criminalized even without an interstate element to the crime
 - ii. Allowed when the class itself is interstate by nature
 - iii. Effectively, this removes the “affecting commerce” element from the crime

- iv. *Perez v. U.S.* (1971)
 - 1. Somewhere along the line, the act must, directly or indirectly, have a “**substantial economic effect**”—*Wickard v. Filburn*
 - 2. But, there is no “particular effect” requirement
 - 3. The act must *clearly* fall within the class AND the class must be sufficiently definite
 - a. The court has NO power to say the class is too broad if the entire class is within Congress’s power—*MD v. Wirtz*
 - i. Over-inclusivity/vagueness = *ultra vires*
 - v. **Test for Substantial Effect**
 - 1. The law can only regulate economic activity by its nature. If it does regulate an economic activity, then you can aggregate that class. If not, there must be a jurisdictional hook.
3. Commerce Clause Revolution Early 2000s
- a. *U.S. v. Lopez* (gun case)—to have jurisdiction, the law must substantially affect IC. Here, guns in schools were too tenuously related to the costs of crime in IC. You cannot pile inferences upon inferences to reach IC, because literally everything has some latent affect on commerce. There must be some judicially ascertainable limit on Congressional power, otherwise they would usurp the police power.
 - b. *U.S. v. Morrison*—struck down a civil CoA in Violence Against Women Act because it had no bearing on IC. While Congressional findings are useful, they are not outcome determinative. Preventing violent crime is usually a police power issue.
 - c. Laws like Gun Free School Zones and VAWA are allowed IF they have a jurisdictional element. —*Al-Zubaidy*
4. End of the Revolution(?)
- a. *Gonzalez v. Raich* (2005)—*analogous to Wickard*—When Congress decides that the “**total incidence**” of a practice poses a threat to a national market, it may regulate its practice.
 - i. **i.e.**, allowed to regulate an item if Congress concludes that a failure to do so would undercut the regulation of IC in that commodity (N&P Clause). The conclusion of which only requires a *rational* basis for believing. Here, homegrown weed would be highly likely to work its way into the national market.
 - ii. The Court has no power to excise *trivial* individual exceptions to a broad statutory scheme.
5. Proving Interstate Movement
- a. Can be shown by either (1) a record of the item’s movement OR (2) the use of circumstantial evidence to show a “minimal nexus” of the item and IC
6. Intrastate Production of Child Porn
- a. Suffices as a Class of Activities because there is a rational basis for assuming that child porn crosses state lines.

IV. Sentencing Guidelines

- a. The Guidelines were created by the Sentencing Reform Act of 1984's implementation of the U.S. Sentencing Commission, which abolished the Parole Commission.
 - i. The Act also made sentences subject to appellate review to ensure the proper procedural application of the Guidelines.
- b. History of Application
 - i. *Mistretta*—The Act removed rehabilitation as a permissible justification for imprisonment.
 - ii. Road to *Booker*
 1. *Apprendi* (2000)—any fact that increases the penalty *past the statutory maximum* must be submitted to the jury and proven BRD
 2. *Blakely* (2004)—State guidelines that require the court to find facts by a preponderance of the evidence violated 6A.
 - iii. *U.S. v. Booker* (2005)—Strict application is **unconstitutional** and violates the 6A rights to a jury trial, but they may be used in an advisory fashion.
 1. There were two separate opinions (1) *Stevens*—on the merits of the guidelines and (2) *Breyer*—the proper remedy for a 6A violation.
 - a. Overall Holding—Facts affecting D's sentencing must be (1) found by the jury AND (2) BRD.
 - b. **Opinion 1—On the Merits**
 - i. Increases in judicial power reduce the power of the jury, which stands as the last stalwart between a government and its citizens.
 - ii. Fact-finding duties cannot be removed from the jury.
 - iii. Guidelines are Constitutional, so long as they are NOT mandatory
 - c. **Opinion 2—Proper Remedy**
 - i. Through severability, the majority was able to strike the provisions of the Act that were unconstitutional without destroying the whole bill
 - ii. Two portions were excised, (1) the requirement of judges to sentence within the range AND (2) the requirement for *de novo* review of sentencing errors
 - iii. Effect—Allowed for compelled consideration of the guidelines, but only in an advisory fashion.
 2. **EXCEPTION** *Almendarez-Torres*—The judge *IS* allowed to find facts when they relate to a prior conviction
 - iv. Statutory Factors Considered in Sentencing
 1. Nature and circumstances as well as the D's history
 2. The need for the sentence to:
 - a. Reflect the seriousness and promote respect for the law
 - b. Afford adequate deterrence
 - c. Protect public from future bad acts
 - d. Provide D with educational and vocational training for purpose of corrections
 3. Need to avoid unwarranted disparities in treatment
 4. Need to provide restitution
 - v. If the court grants a variance, they will have to explain via 3553(a) factors.
 1. If the sentence is challenged, the appellate court will presume it is a reasonable sentence.

- vi. *Kimbrough v. U.S.* (2007) (RBG)
 - 1. No approach to the guidelines can be considered mandatory. Therefore, any law directing a minimum punishment **MUST** be followed. However, if there is a fact required to reach a new sentence, then it must be found BRD by the jury.
 - 2. Even where downward departure may be warranted on the basis of social mores, if a statute mandates a sentence, it must be followed.
- vii. **EXCEPTIONS to Mandatory Minimums**
 - 1. Cooperate
 - a. Cooperation that provides substantial assistance to prosecute another *may* lead to this release. **BUT** it is in the sole discretion of the prosecutor
 - 2. Safety-Valve
 - a. Judicial discretion is applied
 - b. Requirements: (1) D cannot have more than 4 criminal history points; (2) no violence or guns involved in any; (3) not a leader of the enterprise; (4) D has debriefed law enforcement; (5) crime did not cause death or serious injury.
 - i. Does **NOT** matter if the gov't already knew the information
- viii. Reversing Sentences
 - 1. *Gall*
 - a. Procedural issues are reviewed *de novo*
 - b. Substantive issues are reviewed for abuse of discretion
 - i. Upward variance—rarely vacated
 - ii. Downward variance—often vacated for substantive unreasonableness

V. Conspiracy

- a. Two Primary Functions— (1) charge group crimes and (2) charge planned crimes
- b. **18 U.S.C. § 371**—General conspiracy statute available for all FCL
 - i. Max sentence = 5 years
 - ii. Covers a “conspiracy to defraud the U.S. AND to commit an offense against the U.S.
 - iii. Conspiracy to defraud the U.S.
 1. Can be a stand-alone crime, whereas conspiracy to commit an offense against the U.S. tags along with another substantive crime
 2. Defraud—cheat, impair, defeat the lawful function of a gov’t entity. There is no need to prove elements of a related offense.
- c. Rationale Behind a Conspiracy Charge
 - i. *Iannelli v. U.S.* (1975) (Powell)
 1. Wharton’s Rule—prohibits prosecution of two conspirators to commit a particular offense when the offense in question can *only* be committed by at least two people.
 - a. **Third Party Exception**—the rule is inapplicable when the conspiracy involves the cooperation of a greater number of people than required for the commission of the offense.
 - b. Purpose—Prevent conspiracy charges where the parties to the agreement are the only participants AND the consequences of the crime rest solely upon the participants and not society at large.
 - c. In order to apply, the crime itself **MUST** contemplate a conspiracy
 - d. The purpose of Wharton’s is **NOT** to prevent double jeopardy
 2. Why punish planning and commission separately?
 - a. It involves separately, socially reprehensible conduct arising from (1) the criminal agreement; (2) concerted action, which makes it less likely one will depart from their conduct; (3) allows attaining of more complex criminal success—more hands make less work; and (4) Due to the nature of a conspiracy, the danger it generates goes beyond the desired end.
 - ii. Prosecutorial Advantage
 1. Areas of advantage include joinder, venue, admitting hearsay, and the SoL
 2. *Krulewitch*—For venue, the crime is committed where ANY conspirator had acted in furtherance of the conspiracy. For HS, the statement of one D *in furtherance of the* conspiracy is imputed upon all others as a party statement **after** conspiracy has been prima facially established [**FRE 801(d)(2)**]. Further, there is no rule preventing the conviction of D on the basis of uncorroborated accomplice testimony.
 3. Joinder—Fed Rule of Crim Pro 8
 - a. If evidence at trial shows multiple conspiracies rather than one large one, joinder of other parties may prejudice a D. This occurs where contemplation of a single conspiracy was the basis for joinder.
 4. **FRE 404(b)**—Prior Bad Acts
 - a. With conspiracy, these prior bad acts may become admissible evidence of the conspiracy.
 5. The indictment is sent back with the jury during deliberations. The D should make a motion for surplusage to remove excess allegations.

- d. Statute of Limitations
 - i. Begins when the conspiracy ends and typically last 5 years
 - ii. Conspiracies can dissolve in 3 ways (1) completion, (2) abandonment, or (3) withdrawal.
- e. Elements of a Conspiracy
 - i. Elements Simplified
 - 1. Agreement
 - 2. Voluntarily and knowingly entered
 - 3. Overt act—ONLY required in § 371
 - ii. Proof of an Agreement
 - 1. *U.S. v. Paret-Ruiz* (2009) (1st Cir.)
 - a. “Agreement”
 - i. It must be for the purpose of committing the underlying crime
 - ii. The D elected to join that conspiracy with the intent of carrying out the underlying crime
 - iii. Can be implied upon a “plausible inference” of membership
 - iv. Negotiations, failed attempts to make a deal, perceived ability, or desires to join are NOT an agreement.
 - v. There is NO such thing as a conspiracy where the only agreeing members are the D and gov’t agents
 - vi. **Bilateral Approach**—there must be a “meeting of the minds” to have a conspiracy. i.e., there must be mutual assent
 - iii. Overt Act
 - 1. Only one is needed, but you probably want to plead multiple
 - 2. Does not need to be illegal, just needs to put them closer to the end goal
- f. Numerous Co-Conspirators
 - i. *U.S. v. Evans* (10th Cir.) (1992)
 - 1. Wagon-Wheel Conspiracy—when the person at the hub deals individually and separately with others who are the spokes. Individual spokes are only involved the larger conspiracy if there is a “rim” connecting them, which may be satisfied by communication.
 - 2. Chain Conspiracy—operates vertically, similar to a business
 - 3. **Multiple Conspiracy Doctrine**
 - a. If it is hard to fit it into either chain or wagon-wheel, then there are likely multiple separate conspiracies.
 - b. Variance—proving something other than what was charged. Where this results in prejudice it will get reversed.
 - 4. Bringing actors under the same umbrella
 - a. NO requirement that they know all of the others or the full extent of the conspiracy
 - b. MUST have a general idea of the scope and objective
 - c. Mere knowledge of others is NOT enough
 - i. However, even where they do not know of the others, they may still be connected *so long as* there is (1) interdependence AND (2) a common shared goal
 - 1. Interdependence is *absolutely* crucial to bringing multiple conspiracies into one.

5. Interdependence
 - a. Present when each alleged confederate depends upon the operation of each link in the chain to achieve the common goal
 - b. The D's conduct must "facilitate the endeavors" of the enterprise or another member
 - c. Where two enterprises deal with the same supplier of central figure, that alone is NOT enough
 - d. The criminal objective must *shared*, not just similar or parallel. Sporadic and inconsequential contact is NOT enough
 - e. Must show they intended to act together for shared, mutual benefit within the scope of the conspiracy charge.
 6. If one crime is disqualified, the verdict must either (1) be set aside if disqualified because it is unconstitutional or not legally sufficient OR (2) can stand if disqualified due to insufficient evidence.
 7. An isolated act that aids the conspiracy, but was for a separate purpose (i.e., b/c you are friends) does NOT bring someone into the ring.
 8. Scope—If the indictment charges a broad conspiracy, then it must actually be that large in its scope.
 - a. Proof of a buyer-seller relationship is insufficient to show a broader agreement. Plus, the two actors have different purposes. Unless, you are viewed as a "major buyer."
- g. Jury Instructions
- i. Establishing Membership
 1. Gov't must show (1) D knew of the main purpose and (2) he voluntarily joined
 - a. Knowledgeable Assent
 - i. *Alone*, a showing of approval, sporadic presence, or small acts that helped by happenstance are NOT enough
 - ii. Knowledge may be implied if facts rise above mere association
 - ii. Overt Acts
 1. One that moves the enterprise one step closer to achieving its goal
 2. Does not have to be inherently illegal
 3. The *purpose of committing the act* must be to aid the conspiracy
 - iii. Charging Multiple Conspiracies
 1. To convict, the government must prove that the D is guilty of every facet of the conspiracy. Even if the D is partially guilty by way of a robbery plan, but not guilty of the laundering scheme, then he is wholly not guilty.
 2. Factors to Find Multiple Conspiracies
 - a. Nature and extent of the agreement
 - b. Not controlling, but consider
 - i. Timing of entry
 - ii. Knowledge of others and their roles
 - c. When overt acts occur
 - d. Presence of sub-groups
 - e. **Most Important**—overall agreement on common goals

- iv. Pinkerton Liability (*See Pinkerton Liability below for cases*)
 - 1. All members of a conspiracy are guilty of related crimes committed by a confederate. No ratification is required if (1) the crime was reasonably foreseeable given the conspiracy's scope AND (2) the purpose was to advance the conspiracy
 - 2. Elements
 - a. Member of the conspiracy
 - b. During membership, another committed X crime
 - c. X crime was in furtherance
 - d. X crime was reasonably foreseeable given the scope of the project
 - i. Foreseeable—reasonably anticipated as a necessary or natural consequence of the conspiracy
- v. Withdrawal (*See Duration below*)
 - 1. WITHDRAWAL IS NOT A TRADITIONAL DEFENSE. It is a means to avoid liability for more charges under Pinkerton. Withdrawal must be pleaded as an affirmative defense to negate liability for the crime. It DOES NOT negate an element.
 - 2. D has the BoP to prove withdrawal
 - 3. Elements
 - a. Complete/non-temporary withdrawal
 - b. D took an affirmative step to withdraw
 - i. Includes an act inconsistent with the ends. Must be communicated to the other *in a manner that would reach them*.
 - 1. Must be communicated either to (1) someone with authority OR (2) intend for it to be further communicated to other members.
 - ii. Merely avoiding contact or doing nothing is insufficient
 - c. The withdrawal occurred before an overt act is committed
 - i. Otherwise, the crime is complete
 - 4. Effect of Withdrawal
 - a. Ends future liability, but D is still liable for the acts occurring during his tenure.
 - b. Begins accrual of the SoL. If time has passed, that is also the burden of D to show.
- vi. Impossibility of Success
 - 1. NOT a defense. The D can be guilty even if success was impossible
 - a. **EX.** Sting operation seizes the cocaine
- h. Duration
 - i. *U.S. v. Jimenez Recio* (2003) (Breyer)
 - 1. There is NO automatic termination rule, even where the objective becomes impossible
 - a. Effect—even after the object is no longer attainable, even if due to gov't frustration of purpose, other people can still join the conspiracy.
 - b. Reasoning—(1) the crime of conspiracy contemplates the criminal agreement, not just the underlying act, the danger is broader in scope. (2) Most circuits limit termination to abandonment, completion, or withdrawal.
 - ii. *Smith v. U.S.* (2013) (Scalia)
 - 1. SoL begins upon withdrawal

2. Where the affirmative defense does not negate an element of the crime, but rather excuses otherwise punishable conduct, the prosecution has NO constitutional duty to prove its nonexistence BRD.
 3. Imprisonment alone does not constitute withdrawal
 4. Passive non-participation does not sever the conspiracy. There must be an affirmative act
- i. Pinkerton Liability
 - i. *U.S. v. Bingham* (2011) (9th Cir.)
 1. The focus of Pinkerton Liability is on both (1) the foreseeability of the act and (2) within the scope of the conspiracy, not just the single criminal act.
 2. **Minor Role EXCEPTION**
 - a. Pinkerton ONLY extends to those who play a substantial role in the conspiracy.
 - b. Minor or marginal roles in a conspiracy do not confer vicarious liability.
EX. Being Escobar's secretary
 3. Merely agreeing to back each other up is NOT enough to show a conspiracy. There must be a desired objective.
 4. **Basically**, to be liable, the D must (1) be in a substantial conspiratorial role AND (2) the actual crime was reasonably foreseeable as a necessary or natural consequence of the conspiracy.
 - ii. When determining the scope of the agreement view it as if that agreement is the Articles of incorporation, then, look at the individual D's agreement to find the scope pertaining to him. Upon a meeting of the minds, an individual's scope may be limited.

VI. Firearms Regulation

- a. Priorities of Operation Triggerlock
 - i. Prosecute violent organizations
 - ii. Illegal gun trafficking
 - iii. Prosecution of prohibited persons
- b. 18 U.S.C. § 922
 - i. § 922(g) Prohibited Persons List
 1. Those convicted of a crime punishable by *more than* one year in prison
 2. Fugitives
 3. Addicts—Regular and repeat users
 4. Judicially adjudicated as mentally defective
 5. Aliens who are
 - a. Illegal OR
 - b. On a nonimmigrant visa
 6. Dishonorable discharge from the military
 7. Prior renunciation of citizenship
 8. Court imposed *domestic, permanent* restraining order
 9. Domestic violence conviction
 - ii. § 922(g) Elements (*after Rehaif*)
 1. D knew he possessed the firearm
 2. The item is actually a firearm
 3. IC
 4. After D obtained criminal status
 5. D knew he held that status
 - a. No requirement that the D knows the law prohibits that class of people from possessing firearms, only that he is actually within the class.
- c. 18 U.S.C. § 924(c) Use of a Firearm in a Crime of Violence/Drug Trafficking
 - i. § 924(c)(1)
 1. First Offense
 - a. Mandatory minimum for using a gun during a crime
 - i. Use/carry/possessed = 5 years
 - ii. Brandished = 7 years
 1. Brandish—display any part for the purpose of intimidation
 - iii. Discharged = 10 years
 2. Second Offense
 - a. Standard = 25 years
 - b. Machinegun = life
 3. Other aspects
 - a. No probation allowed to undercut the jail-time
 - b. No concurrent sentencing
 4. Crime of Violence—924(c)(3)— (1) is a felony and (2) an element of it is violent.
 - ii. § 924(c)(3) Defining “Crime of Violence”
 1. (A) Elemental Prong
 - a. The crime has as an element, the use or threat of physical force against a person or property

2. (B) UNCONSTITUTIONAL (*Davis*) Residual Clause
 - a. “that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”
- iii. § 924(c)(5) Drug Crimes and AP rounds
 1. Standard = 15 years minimum
 2. Causes death:
 - a. Murder = life
 - b. Manslaughter = *see* § 1112
- d. 18 U.S.C. § 924(e) Armed Career Criminal Act
 - i. NOT a crime. Just a sentencing enhancement
 - ii. Requirements to qualify
 1. 3 previous convictions
 - a. Current crimes do NOT count. *Fair Step Act*
 2. Each of which had a potential for more than 1 year in jail.
 3. For:
 - a. *Violent* felonies OR
 - i. A felony is “violent” if it (1) prior had an element of actual or threatened physical force; (2) was for burglary, arson, extortion, or involved explosives.
 1. Originally included a residual clause for “conduct that included a potential risk of serious physical injury,” which was **declared void for vagueness** by *Johnson*.
 - b. Serious drug offenses
 - i. Serious Drug Offense—any offense with a potential for 10 years imprisonment or more, which often varies by state.
 - iii. Result—15-year mandatory minimum
- e. Jury Instructions
 - i. Possession by a Convicted Felon (2 mens rea)
 1. Elements
 - a. Prior conviction with over 1-year possible jail time
 - b. Knowing possession of *this* firearm
 - c. D knew of his prior conviction
 - d. Firearm has crossed state lines
 - ii. Use or Carry during and in relation to violent/drug crime
 1. Elements
 - a. D committed underlying crime
 - b. Knowing use or carry of a gun
 - c. Use or carry was in relation to the underlying crime
 2. “Use or carry”
 - a. “carrying” includes having it in a readily accessible location such as the trunk of a nearby car
 - b. “Use” contemplates active employment. Does NOT need to be employed as a weapon
 3. “During and in relation to”
 - a. The gun had a purpose or effect with respect to the crime charged

- iii. Possession *in Furtherance* of violent/drug crime (*see King below*)
 1. Elements
 - a. D is guilty of underlying crime
 - b. D knowingly possessed the gun
 - c. Possession was in furtherance of the underlying crime
 2. In furtherance—to advance or promote the crime
 - a. Factors
 - i. Location/availability for use
 - ii. Loaded?
 - iii. Type of weapon
 - iv. If possession was legal
 - v. Type of crime
 - vi. Time and circumstances of finding the gun
- iv. Aiding and Abetting
 1. No commission of a crime is actually required, only need to show that he intentionally helped or encouraged someone
 2. Elements
 - a. Underlying crime was committed
 - b. D helped or encouraged another in committing the crime
 - c. D intended to help or encourage
 - i. Must have advance knowledge. i.e., knowledge at a time the D can attempt to alter the plan or withdraw
 - ii. NO requirement he knew of the plan to use the gun *prior* to the crime
 1. He is deemed to have advance knowledge of the gun where he learns of the gun and still has time to withdraw
- v. Possession Offenses/Domestic Violence—§ 922(g)
 1. Requirements
 - a. The prior conviction MUST:
 - i. Have “force” as an element AND—*Castleman*
 - ii. Person committing the crime had a domestic relationship with the victim—*Hayes*
 2. *U.S. v. Hayes* (2009) (Ginsburg)
 - a. NO requirement that an element of the predicate crime be “that the relationship between the aggressor and victim was domestic.” BUT that relationship must be proven BRD
 - b. “Domestic relationship” includes: parent, guardian, child, cohabitant, shared child, or someone similarly situated
 3. *U.S. v. Castleman* (Sotomayor) (2014)
 - a. Force—the slightest offensive touching
 - b. “violence” in the domestic context takes on a broader meaning than in everyday usage. Acts become domestic violence when their repeated use is likely to lead to one spouse’s control over the other.
 - i. Light force is viewed in the context of its scope
 4. *Lewis v. U.S.*
 - a. Cannot collaterally attack the validity of a prior conviction because it is viewed as final

- f. Federal Prosecution of Firearms
 - i. Selection of Cases
 - 1. Felon in possession is not often prosecuted alone because it would foreclose the harsher punishment from state law
 - ii. Interpretive Issues
 - 1. Indirect/Constructive Possession
 - a. Merely living in the same home where another possesses guns is NOT enough
 - b. Video evidence of possession can suffice
 - 2. Punishment in excess of one year
 - a. Determined by the law in which the predicate conviction's proceedings were held
 - iii. Restoration of Rights
 - 1. Unless the restoration specifically states "may not possess, sell, or transport guns, they are no longer a prohibited person
 - 2. Restoration occurs via (1) restoration, (2) expungement, or (3) pardon
 - a. Currently, a pardon is pretty much the only way to get them restored since Congress refuses to fund restoration processes.
- g. Possession *in Furtherance* of Violent or Drug Crimes
 - i. *U.S. v. King* (10th Cir.) (2011)
 - 1. *U.S. v. Poe*—Constructive possession of a firearm exists when an individual knowingly holds the ability to exercise dominion and control over it.
 - a. Can be found via ownership or control over its location
 - b. "knowing" may be established by exclusive control on the location
 - c. Joint control of the location requires the government to show a nexus between the D and the firearm
 - i. BoP—evidence showing plausibility of the inference that D had knowledge of and access to the firearm
 - 2. "Control" is NOT absolutely required
 - a. Only need to show the D had the appreciable ability to access it
 - i. May arise via another person
 - 3. "In furtherance"
 - a. When considering drug-trafficking, there is a presumption that guns are tools of the trade. Thus, while mere presence is not enough, their dual presence is unlikely to be coincidental.
 - b. Requires the gun to promote, advance, or further the crime
 - c. *Trotter* Factors
 - i. Type of drug activity
 - ii. Legal status of the gun
 - iii. Whether it is loaded
 - iv. Proximity to drugs or profits/accessibility
 - v. Time and circumstances of finding it
 - ii. *U.S. v. Penniegraft* (4th Cir.)—Held that where drugs and guns were found in different parts of the house, D WAS in possession in furtherance of a drug crime on the fact that the D had a key to the house
 - iii. Main Issue—Whether the gun was available to be used by the D as a weapon
 - 1. Mere proximity is not enough. Should be quickly accessible and ready for use
 - 2. There needs to be a "specific nexus" that is not based on mere generalizations
- h. Use or Carry of a Firearm

- i. *Watson v. U.S.* (Souter) (2007)
 1. If the D has a gun and trades it for drugs, then he DID use a gun—*Smith*
 2. If the D has drugs and trades it for a gun, he did NOT use a gun because the crime was complete
 3. *Bailey*—Mere possession does not amount to “use,” there must be active employment.
 4. **Ginsburg**— “use” should be confined to use as a weapon
- i. Factors Enhancing Penalties/Sentencing (Brandish, Discharge, Machinegun)
 - i. ***** “element” in this context refers to a material fact of the case that affects the minimums and maximums of sentencing ranges***** *Apprendi*
 - ii. Burdens of Proof
 1. Elements = BRD
 2. Enhancements = preponderance
 - iii. Cases On the Issue
 1. *Alleyene v. U.S.* (Thomas) (2013)
 - a. Reversed *Harris v. U.S.*—Which had held that a fact raising the minimum could be found by the judge by a preponderance of evidence.
 - b. **Holding**—Any fact that, by law, increases the punishment for a crime must be proven to the jury BRD. Any fact **increasing** the **mandatory minimum** MUST be submitted to the jury.
 - i. Must now plead and prove drug quantities to the jury.
 - ii. Simply put, all aggravating sentencing factors must be found by the jury.
 - iii. The legislature CANNOT distinguish between facts of the crime and sentencing factors.
 2. *Rehaif v. United States* (2019) (Breyer)
 - a. **Holding**—In relation to § 922(g) prohibited persons, there are two mens rea requirements. (1) D must have knowingly possessed the gun AND (2) known of his prohibited status.
 - i. This does not run afoul of the disavowal of the mistake of law defense because it is a mistake concerning one’s legal status, knowledge of which is required in order to be of a sufficiently culpable mind. Further, it does not require knowledge of the law, just the status.
 - b. There is a presumption in favor of applying the scienter requirement.
 3. *United States v. Davis* (Gorsuch) (2019)
 - a. § 924(c)(3)(B) is **unconstitutionally vague**.
 - i. § 924(c)(3)(B) criminalizes the use of a gun in crimes of a violent nature.
 - b. **Reasoning**—Under the principles of due process and separation of power, the imposition of criminal punishment cannot depend on a judge’s estimation of the degree of risk posed by a crime’s “imagined ordinary use.
 - c. **Holding**—When determining whether it is a crime of violence, the analysis must be case-specific. You cannot apply the general characteristics and assume they are shared. **i.e.**, You cannot generally state, “robberies are usually dangerous, so this one must have been as well.
 - d. Rule of Lenity—A canon of construction that should be applied to resolve ambiguities in D’s favor.
 - i. Punishment is a legislative prerogative, not judicial

- e. Constitutional Avoidance—A cannon of construction that, when applied, states that the court should try to err on the side of constitutionality when a statute can be read in one way that is constitutional and another that makes it unconstitutional. **HOWEVER**, this can **ONLY** be used to *narrow* the scope of a criminal statute.

VII. Drug Offense Enforcement

- a. **Comprehensive Drug Abuse Prevention and Control Act of 1970**
 - i. First attempt by the Feds to regulate drugs using the commerce power
 - ii. Class of Activities Approach
 1. NO jurisdictional element due to these Congressional findings
 - a. Most drug traffic passes interstate
 - b. Intrastate acts still affect the broad scheme of the law
 - c. Local use increases interstate traffic
 - d. No ability to differentiate between intra and interstate drugs
 - e. Federal involvement is essential to effective control
 - iii. Relevant Statutes
 1. **21 U.S.C. § 856** Crack House Statute
 - a. Cannot run a building for the purpose of the manufacture, distribution, or use of a controlled substance
 2. **21 U.S.C. § 841** Distribution Mandatory Minimums
 - a. 280 grams of crack or 5 kilos of coke
 - i. 1st offense = 10 years min.
 - ii. 2nd offense = 15 years min.
 - iii. If death occurs, min 20 years
 - b. 500 grams of coke or 28 grams of crack
 - i. 1st offense = 5 years min
 - ii. 2nd offense = 10 years min
 - iii. If death occurs, 20 year min
 - c. **§ 841(b)** Sentencing Enhancements for causing Overdose Deaths
 - i. Imposed the 20 year min for overdose deaths resulting from the substance in question.
 - ii. “*Resulting From*”—where the drug distributed by D was not an independently sufficient cause of death, the government must prove it was the **but for** cause of death—*Burrage*
 3. **21 U.S.C. § 846** Specialized Conspiracy Statute
 - a. Same penalty as the underlying crime. No overt act requirement.
 4. **21 U.S.C. § 848** Continued Criminal Enterprise
 5. **21 U.S.C. § 862** Ineligibility for Federal Benefits After Conviction
 - iv. Scheduling—determined by the AG after receiving recommendations from the Sec. of Health, Education, and Welfare
- b. **Core Offenses**
 - i. **§ 841** Distribution
 1. *Neal v. U.S.* (Kennedy) (1996)
 - a. **Issue**—What was the proper method for determining the weight?
 - b. **Holding**—Use the *Chapman Method*: Congress directed the weight to be focused on the market, evidenced by the weight being determined by the “mixture” the substance is contained in, they use the weight of the medium storing the drug since it cannot be easily separated.
 - c. Whenever the Guidelines conflict with the statute, the statute prevails.
- c. Quantities in Conspiracies
 - i. The factual quantity total is found by accounting for the type and its total amount across the entire conspiracy

- d. Safety Valve and Substantial Assistance
 - i. Safety Valve
 - 1. Decided by
 - 2. Requirements
 - a. D has 4 or fewer points on prior criminal history
 - b. D did not engage in violence
 - c. Dis not result in death or serious injury
 - d. D did not play a key conspiratorial role AND
 - e. D provided substantial assistance toward uncovering new leads
 - i. Does NOT matter that the government already had the information
- e. Jury Instructions
 - i. PWI
 - 1. Elements
 - a. Knowingly possessed a drug
 - i. Established by the fact there is a law
 - b. With intent to distribute
 - i. Distribute—intent to deliver or transfer
 - 2. No requirement D knows what drug it is
 - 3. Circumstantial factors
 - a. Quantity
 - b. Street value
 - c. Purity
 - d. Packaging
 - e. Presence/Absence of:
 - i. Weapons
 - ii. Lots of cash
 - iii. Equipment used to sell
 - ii. Distribution
 - 1. Elements
 - a. Knowingly distributed
 - b. D knew it was a controlled substance
 - iii. Conspiracy
 - 1. Elements
 - a. Conspiracy existed
 - b. Knowingly and voluntarily joined
- f. Disparity in Crack and Cocaine
 - i. *Fair Sentencing Act*
 - 1. Reduced the ratio of crack and cocaine to 18:1
 - 2. Retroactively applied the ratio

VIII. Hobbs Act 18 U.S.C. § 1951

- a. Criminalizes 3 forms of conduct (1) robbery, (2) extortion by force, (3) extortion under color of official right.
 - i. Not everything that could feasibly fit within the Act is covered. **i.e.**, does not criminalize union strikes—*Culbert*
- b. Jurisdiction exists if the conduct “affects commerce or the movement of ANY article or commodity in commerce”
- c. **18 U.S.C. § 1951**
 - i. 20 year maximum
 - ii. **Robbery**
 1. Elements
 - a. D took property from the victim
 - b. Knowingly and willfully
 - c. As a result of D’s actions, commerce was obstructed, delayed, or affected.
 - iii. Extortion
 1. Elements
 - a. Is currently a public official
 - i. Candidates for office do not count
 - b. Obtaining property from another
 - i. Property—tangible items or intangible things of value.
 - c. With his consent
 - d. Induced by
 - i. Fear or actual/threatened use of force
 - ii. Under color of official right
 2. Does NOT require an element of deception
- d. Extortion by, Force, Violence, or Fear
 - i. Fear—Anxiety, concern, or worry over expected injury, physical or economic. The fear must be reasonable under the circumstances existing at the time of D’s actions.
 - ii. *U.S. v. Edwards* (5th Cir.) (riverboat gambling case)
 1. **Issue**—Did the payments create the opportunity or did they just give a better chance that an already fair opportunity will result in a better chance.
 - a. If they created the opportunity, then it is likely extortion.
 2. Extortion by fear also includes fear of economic harm
 - a. Must be able to ID the specific harm, not merely a loss of a potential benefit
 3. Bribery v. Extortion
 - a. “There is a difference in purchasing an advocate and buying off a thug”
 - iii. *Sekhar v. U.S.* (Scalia) (2013)
 1. **Issue**—Whether a person attempting to compel another to recommend that his employer approve an investment constitutes “obtaining property from another.”
 2. Obtaining Property
 - a. Requires: (1) Deprivation of another’s right and (2) acquisition by defendant.
 - b. Property **MUST** be transferrable in order to be extorted
 3. Coercion is NOT extortion

4. **Alito (concurring)**
 - a. Black's Law—Extortion extends to every species of valuable right, (Alito) BUT that does not extend to everything *capable of* econ gain.
 - b. Gov't employees have no property right to their internal recommendations. For a right to be someone's sole property, it should be their sole right to possess, sell, or transfer.
- e. Extortion Under Official Right
 - i. *Evans v. U.S.* (Stevens) (1992)
 1. Acceptance of a bribe implicitly shows a promise to use one's official position to serve the interests of the bribe-giver.
 2. **Holding**—There is NO requirement that the public official take some affirmative act of inducement to be guilty under the Hobbs Act.
 - a. Passive acceptance of a benefit IS sufficient IF the official knows he is being offered payment in exchange for a specific requested exercise of his official power.
 - b. Basically, if a public official takes a bribe, it is extortion under color of official right because his status as an official presents an element of coercion.
 3. No requirement that the *quid pro quo* is actually met. The crime is complete upon acceptance of the funds.
 4. **Thomas (dissent)**
 - a. Rule of lenity should lead to attaching "induced" to under color of official right.
 - b. Condemns the majority view that public office alone provides an element of coercion
 - c. This is an egregious extension of federal jurisdiction *by the judiciary*, overall, it *could* be within fed jurisdiction, but this does not fall within the Hobbs Act itself.
 - ii. Campaign Contributions
 1. *McCormick*—Quid pro quo is an essential of Hobbs Act prosecution based upon payments identified as campaign contributions. For a campaign contribution to be extortion there **MUST** be an explicit promise or undertaking. The contribution must control the official's conduct.
- f. Affecting Interstate Commerce (IC)
 - i. Hobbs Act passes constitutional muster because it has a jurisdictional element.
 - ii. *Stirone*—The Hobbs Act is intended to go to the outermost bounds of Congress's IC jurisdiction. The only thing required is a **de minimis** effect.
 - iii. *U.S. v. Jimenez-Torres* (1st Cir.)
 1. IC element may be proven by showing the crime closed or negatively affected a business engaged in IC. Must show (1) business was engaged in IC
 - a. **Depletion of Assets Theory**—If the business involved, in ANY way, engages in IC, then the loss will deplete them of assets they could/would have used to engage in future IC. Provides a seemingly limitless breadth of the IC power.
 - iv. Where is the jurisdictional line?
 1. Robbing of personal assets is NOT Hobbs Act robbery, BUT
 2. If the property taken from the individual involves business assets, and the business engages in IC, then it IS Hobbs Act robbery
 3. *Taylor*—Can charge Hobbs robbery in the robbery of a drug dealer.

IX. Money Laundering

- a. *Bank Secrecy Act of 1970*
 - i. Instituted the reporting requirement for banks on transactions exceeding \$10,000.
- b. *USA Patriot Act* (2001)
 - i. Expanded the predicate list of crimes, placed more precautions on dealings with foreign transactions, and allowed for asset forfeiture by anyone/thing engaged in terrorism.
 - ii. Terrorism—Intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; OR to affect the conduct of a government by mass destruction, assassination, or kidnapping.
- c. Money Laundering(ML)(*see below for law*)—the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises it to make it appear legitimate.
 - i. 3 necessary steps
 1. *Placement*—Inject money into a legal enterprise
 2. *Layering*—layer the infusion of a large amount across multiple transactions to avoid detection and obscure its origins
 3. *Integration*—Bring the clean money out of the account and into the market
 - ii. Primarily, ML considers income from: (1) prostitution; (2) drugs; (3) RICO violations; (4) copyright infringement; (5) gambling; (6) espionage; (7) trading with an enemy; (8) IRS violations; (9) terrorism.
 - iii. Dual Purposes of its Criminalization
 1. Prevent criminals from using the profits they gain to buy real assets
 2. Prevent the funding of terrorism
 - iv. Asset Forfeiture
 1. **18 U.S.C. § 982(a)** Criminal Forfeiture
 - a. The D forfeits all assets *involved in* the offense OR *traceable* to ML.
 2. **18 U.S.C. § 981(a)** Civil Forfeiture
 - a. D forfeits all property *involved in* ML.
- d. Currency Reporting Offenses
 - i. Institutional Offenses
 1. There is an affirmative duty to report:
 - a. Specified types of transactions
 - b. Money crossing international borders in excess of a certain sum
 - c. All personal/business transactions, whether a single transaction or a daily aggregate, *over* \$10,000.
 2. Institutional Liability for Failure to Report
 - a. **31 U.S.C. § 5322**—Failure to report is a felony
 - b. **§§ 5313 and 5316**—Enacts the duty to report
 - c. **§5322**—Criminal Penalty
 - i. If the only crime is the *willful* failure to report, the penalty is a fine up to \$250k and/or 5 years max.
 - ii. If the failure to report is (1) in connection with another crime OR (2) is a pattern of activity involving more than \$100,000 over the course of 12 months, the penalty is up to \$500,000 and/or 10 years max.
 - iii. Either of these can be imputed to an institution via respondeat superior

3. Suspicious Activity Reports (SAR)
 - a. These are secret reports filed when an employee of the bank finds a transaction to be particularly suspicious. The report is secret and cannot be used outside of the investigation of criminal activity. It is NOT evidence to be used at trial.
 - b. There is an affirmative duty for financial institutions to implement procedures to prevent and detect ML.
- ii. Offenses by the Individual
 1. Structuring
 - a. § 5324—Criminalization of Avoiding Reporting Requirements
 - i. Elements
 1. Knowledge of reporting requirements
 2. Action intended to evade those requirements
 - a. No need for D to know it is unlawful, only that his purpose was to evade reporting requirements
 - ii. Can also be guilty if you are using others to make the deposits for you— § 5322(a)(3)
 - iii. Penalty
 1. Standard = 5 year max
 2. Aggravated case (see § 5322) = 10 year max
- e. 18 U.S.C. § 1956 Money Laundering
 - i. This is a tag-along crime and must be in reference to some *specified unlawful activity* (SUA) listed in § 1956(c)(7).
 - ii. ML under § 1956 consists of 4 different offenses
 1. They contemplate financial transactions undertaken:
 - a. With intent to **promote** the carrying on of SUA
 - b. With the intent to evade taxes
 - c. Knowing that the transaction is designed in whole or in part
 - i. To conceal or disguise the nature, location, source, ownership, or the control of the proceeds of SUA
 - ii. To avoid a transaction reporting requirement under State or Federal law
 2. § 1956(h)—Specialized Conspiracy Statute
 3. Elements of § 1956
 - a. D conducted a financial transaction
 - b. It “involved” property that represented proceeds of the SUA
 - i. NO traceability requirement
 - c. D **knew** property involved was the proceeds of *some crime*
 - d. D had the intent to:
 - i. Promote the carrying on of SUA
 - ii. Conceal the true nature of the proceeds
 4. Promote—aids in the execution of crime; even where the thing purchased is illegal
 5. Concealment—See *Corchado* below

iii. The Concealment and Promotion Theories

1. *U.S. v. Corchado* (1st Cir.)

- a. D was charged under the **concealment theory** when the wife made deposits for the criminal husband.
- b. Factors for finding D had “knowledge”
 - i. D knew the family had high expenses and low income
 - ii. Education
 - iii. Inquiries into husband’s earnings
 - iv. Family business had no employees
 - v. ***Basically, you need to show she knew the money was tainted by *some* SUA
- c. There are two mens rea
 - i. Know the money is tainted
 - ii. Know the transaction **was designed**, at least in part, to conceal the true nature of the proceeds
 1. To show concealment, the **MUST** be some measure of deception. Comingling of funds is good evidence. Gov’t must illustrate an intent to *hide* the money
 2. Can be circumstantially proven upon showing either (1) she did it upon her own design OR (2) she knew of her husband’s scheme.
 - iii. Basically, it is **not** ML to spend a criminal spouse’s money, unless you are part of the scheme

iv. Merger Issues

1. **Issue**—Whether the ML statute criminalizes the same conduct as the predicate offense. **i.e.**, Whether considering the receipt of funds at a drug deal as ML criminalizes the same conduct as a distribution charge.
2. **Scalia—Voided by Congress**—Avoid the issues of whether ML criminalizes ALL transactions of the enterprise or just the act of cleaning it by defining proceeds as profits. ML should focus on the *removal* of funds.
3. In 2009, Congress amended the statute to define “proceeds” as **all gross receipts** of the criminal enterprise
 - a. **Current Issue**—When does money exchanged become *proceeds*
 - i. Two methods for determining it:
 1. When the predicate crime is complete
 2. At the time of the transfer
 - a. *Halsted* (4th Cir.)—each transfer is a separate offense
 - b. *Simmons* (4th Cir.)—However, payments made in a Ponzi scheme were not separate offenses
 - c. Basically, ML crime is complete upon the completion of the purpose for each transfer
4. More on “Proceeds”
 - a. The proceeds consist of any money *involved* in the crime. Not just profits
 - i. No requirement to show exactly what SUA the money from
 - ii. The nature or time of the predicate crime is immaterial
 - iii. Acquittal of the predicate crime does not preclude ML conviction
 - iv. For CCE cases, the jury **MUST** agree upon which SUAs make up the enterprise

- f. **18 U.S.C. § 1957** Money Laundering (Money Spending)
 - i. This is a regulatory crime, so there is no need for an intent requirement
 - ii. Elements (NO intent requirement)
 - 1. Knowingly engaging in a **monetary transaction**
 - 2. Using criminally derived property from an SUA
 - 3. Of a value exceeding \$10,000
 - iii. Monetary Transaction—The (1) deposit, withdrawal, transfer, or exchange (2) in or affecting IC or foreign commerce (3) of funds or monetary instruments (4) by, to, or through a financial institution.
 - 1. Financial Institution—One that is federally insured
 - 2. Criminally Derived Property—any property constituting or derived from proceeds obtained from a SUA
 - iv. Is there a traceability
 - 1. *U.S. v. Rutgard* (9th Cir.)
 - a. **Holding**—Where there is tainted money comingled with clean money, the deposit of tainted funds is a violation of **§ 1957**. **However**, when *removing* the money, it is only a crime IF there is less money left in the account than the total of criminal deposits AND the amount withdrawn is over \$10,000.
 - i. Basically, clean money comes out first, then criminal money. If, after clean money has been depleted, an excess of \$10,000 in tainted money is removed, there IS a violation of **§ 1957**.
 - 2. *Moore* (4th Cir.)
 - a. There is NO requirement for the government to trace the money, presume that any money taken out is criminal first.
 - b. *Rejected by* 9th Cir. because the statute does not contemplate funds *involved* in the SUA as § 1956 does, but rather contemplates money “derived from” a SUA.
 - 3. *Lee* (5th Cir.)
 - a. **Proportionality Rule**—Look at the % of clean money and % of tainted money in total. Then apply those percentages to the transfer. If the value of the criminal percentage in the transfer exceeds \$10,000 there is a violation.
- g. Differences in **§ 1956** and **§ 1957**
 - i. The Intent Requirement
 - 1. **§ 1956(a)**—D either has (a) intent to promote or evade taxes OR (b) knowledge that he is concealing it or avoiding reporting requirements
 - 2. **§ 1957**—ONLY requires D to knowingly engage in a monetary transaction with criminally derived property
 - ii. The Transaction
 - 1. **§ 1956**—Financial Transaction—Applies to the transfer of ANY property
 - 2. **§ 1957**—Monetary Transaction—Restricted to money or its equivalents
 - iii. The Value
 - 1. **§ 1956**—No value requirement
 - 2. **§ 1957**—Only applies to transfers of criminal property in excess of \$10,000
 - iv. Comingling Funds
 - 1. **§ 1956**—No tracing requirement for comingled funds
 - 2. **§ 1957**—Depending on the circuit, gov’t may have to trace the funds

X. Mail/Wire Fraud

- a. 18 U.S.C. §§ 1341 and 1343 Mail/Wire Fraud
 - i. Jurisdictional Requirements
 1. Mail—All that needs to occur is for the D to use OR cause another to use the mail *in furtherance* of the scheme.
 2. Wire—Transfer via a wire, phone, or other telecommunication pathway.
 - ii. Elements
 1. D knowingly participated in, devised, or intended to devise a scheme to defraud in order to obtain money or property (that he is not entitled to)
 - a. “Obtain money or property” (*SEE P. 32*)
 2. The scheme included a material misrepresentation or concealment of a material fact
 - a. Material—Has a natural tendency to influence the decision of a RPP
 3. D had the intent to defraud
 - a. Specific intent
 - i. Must have the intent to cheat another out of his property.
 - b. Determined at the time the agreement is made
 4. D used the mail or caused another to use the mail or a wire *in furtherance* of the scheme
 5. **Additional Elements Using § 1346 Honest Services Prong** (*see p. 30-32*)
 - iii. 3 Things that are NOT Required
 1. Central to the scheme
 2. Need not be false information
 3. Mailing was by the D
 - iv. § 1341 Definition of “Fraud”
 1. *Durland v. U.S.* (Brewer) (1896)
 - a. Fraud, whether criminal or civil, must be the misrepresentation of a material existing or past fact, and cannot consist of the mere intention not to carry out a K in the future. **HOWEVER**, making a promise with *absolutely no intention* of paying it back in the future is fraud.
 - i. Having no future intent suffices as a “scheme or artifice to defraud.”
 - b. Purpose of § 1341—To protect the public of intentional efforts to despoil and prevent the post office from being used to carry these schemes into effect.
 - c. Defense—The D had the real intent to pay the money back but was frustrated in that end.
 2. *Neder*—may signal a rollback of *Durland*. **Holding**—Charges of fraud require the use of the mail/wire to be material. Could later lead to a more conservative approach to fraud. But this seems to have been narrowed to the misrepresented fact, not materiality in the use of the mail.
 - v. Penalties
 1. Standard = 20yr max
 2. During a Presidentially declared emergency = 30 year max

- b. **§ 1346**—Further defines “scheme or artifice to defraud” as a scheme to deprive another of the intangible right of honest services.
- i. **Intangible Rights Theory (IRT)**
 1. Only applies to (1) public officials and (2) commercial officers.
 2. After *Skilling*, the IRT contemplated in § 1346 has been narrowed to only apply to kickbacks and bribery, but does NOT criminalize undisclosed self-dealing.
 3. Overall, it is not a crime for public officials to enjoy the accoutrements of making connections with wealthy people who want their ear.
 4. *Skilling v. U.S.* (Ginsburg) (2010)
 - a. **Holding**— § 1346 only applies to kickbacks and bribes.
 - b. NO requirement for the victim to be *directly* deprived of anything of value
 - c. Elements of Honest Services— (1) fiduciary duty is violated (2) by participating in a bribery or kickback scheme
 - d. Kickback—any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind, which is provided, directly or indirectly, to D for the purpose of improperly obtaining or rewarding favorable treatment in connection with SUA. **i.e.**, It is a bribe to be collected from the profit made off the official act.
 - e. **Scalia (concurring in part)**
 - i. Rejects the use of severance to save a full vacating of the law. States that this reading is an overextension of **judicial** power because it effectively creates new crimes. Thus, the whole law should be struck.
 - ii. His primary issue with the **§ 1346** is that it does not provide a criterion of guilt.
 - f. Deus ex machina—an unexpected power or event saving a seemingly hopeless situation
 - g. *Essentially, the Court has construed § 1346 to be a specialized fraud statute for bribes and kickbacks that is applicable to both state and federal defendants.*
 - ii. Operation of IRT outside “honest services”
 1. Without engaging in the IRT definition of “honest services,” the statute can also be used to prosecute fraud in the realm of intellectual property rights since they are intangible rights.
- c. What Does **§ 1346** Official Act Encompass? *McDonnell v. United States* (Roberts) (2016)
- i. **Holding**—*Standing alone*, setting up a meeting, talking to another official, or organizing an event/agreeing to do so, does not fit the definition of “official act” contemplated by the **§ 201** Bribery statute.
 - ii. **18 U.S.C. § 201** Bribery
 1. Makes it a crime for a public official to demand anything of value in return for being influenced in the performance of an official act.
 2. **§ 201(a)(3)**—official act—any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time (a) be pending OR (b) may, by law, be brought before any public official in his official capacity, or in his place of trust or profit.

**(i) Through (iv)
are from § 1341**

- a. Elements of §1341 Mail/Wire Fraud Through § 1346 Bribery
 - i. D knowingly participated in, devised, or intended to devise a scheme to defraud in order to obtain money or property (that he is not entitled to)
 - ii. The scheme included a material misrepresentation or concealment of a material fact
 - 1. Material—Has a natural tendency to influence the decision of a RPP
 - iii. D had the intent to defraud
 - 1. Specific intent
 - a. Must have the intent to cheat another out of his property.
 - 2. Determined at the time the agreement is made
 - iv. D used the mail or caused another to use the mail or a wire *in furtherance* of the scheme
 - v. § 1346 Deprived another of the intangible right to honest services by:
 - 1. Violating a fiduciary duty
 - 2. By participating in a bribery scheme
 - vi. If D were a federal official, he would have violated §201 bribery
 - 1. **Elements of § 201 Bribery**

1. Official act in exchange for anything of value	<p>Two Requirements to be an Official Act: (1) The act is “official.” Gov’t must identify a question, matter, cause, suit, proceeding, or controversy that may be brought in his official capacity. “Question, et. al.” MUST contemplated a formal exercise of gov’t power (2) Must prove D made a <u>decision</u> or took <u>action</u> on that matter OR agreed to do so.</p> <p><i>SEE MORE BELOW</i></p>
2. Agreement	<p>Agreement may be implied and the official need not specify the means to the end. There is NO intent requirement. Basically, it comes down to whether the official agreed to perform an official act at the time of the <i>quid pro quo</i>.</p>
3. On any question, matter, cause, suit, proceeding, or controversy	<p>The matter must be focused and concrete. It must involve: (1) a formal exercise of gov’t power, similar to a suit before a court, (2) concerning something specific and focused that that may be pending or brought by law.</p>
4. Which may, at any time, (a) be pending OR (b) brought, by law before him in his official capacity.	<p>Considers things that can be put on an agenda, tracked for progress, and marked as completed. “Any” conveys that the matter is pending either before the D’s office or another public official. “By law” contemplates the exercise of official duties of the office. D MUST be a public official <u>at the time of agreement</u></p>

2. Two Requirements to be an Official Act
 - a. (1) The act must be “official”—Gov’t must identify a question, matter, cause, suit, proceeding, or controversy that may be brought in his official capacity. “Question, et. al.” MUST contemplated a formal exercise of **gov’t** power
 - b. (2) Must prove D made a decision or took action on that matter OR agreed to do so.
 - i. “Decision/action,” under principles of *noscitur a sociis*, takes on a formal connotation. Thus, the phrases contemplate the exercise of a duty of office.
 - ii. The mere existence of “pending matters” is insufficient to show that setting up a meeting/call is a decision or action, even where the meeting is with interested parties to discuss the matter.
 - iii. **Examples** Of Official Acts: (1) initiation of a project, (2) exertion of pressure on another official, (3) providing advice to another knowing or intending that such advice will form a basis for the other’s official act.
- d. How do we Define Obtaining Property in § 1341? *Kelly v. United States* (Kagan) (2020)
 - i. **Holding**—Because the scheme did not aim to acquire money or property, D could not have violated federal wire fraud laws.
 - ii. Money or Property—Must be transferable in the hands of the defendant.
 1. To be sufficient, the money/property deprived must be the object/purpose of executing the fraud.
 - a. Object—The loss to the victim must be more than a negative externality of the fraud’s purpose. Do not consider incidental byproducts of the act.
 2. *Cleveland*—A scheme to alter regulatory choices is NOT one aimed at taking gov’t property.
 - a. A government license cannot be bought, sold, or transferred. Therefore, it cannot be property
 3. *McNally*—Mail/Wire fraud statutes are limited to property fraud
 4. *Skilling*—§ 1346 IRT honest services fraud is limited to bribery and kickbacks.
 5. A scheme to usurp a public employee’s paid time IS one to take gov’t property. **However**, a scheme to usurp the government’s police power is not property fraud. Negative external costs to that fraud are not considered.
 - iii. Prosecutors cannot use property fraud statutes to set standards of disclosure and good government for state and local officials.