**Introduction and Overview of Federal Law Enforcement**

1. Used to be a split between state and federal spheres, but no longer; federal laws reach almost everything (with a few patchy exceptions). USA’s have near complete autonomy in their districts to set priorities, shape policy
2. “Federal prosecutors can conduct organized crime investigations more quickly, bring more charges, and win more convictions than state and local authorities.” Comparative advantages include:
   1. Accomplice testimony—which is not even admissible in may states unless corroborated by non-accomplice—can be sole basis for conviction in fed cases
   2. Fed Grand Jury.
      1. Stacked in favor of prosecution, basically anyone/thing can be subpoenaed, and with nationwide process service
      2. Can be empaneled any time to investigate any crimes in the district, without specific allegations.
      3. Fed G.J.’s don’t have to abide by no-hearsay rule, as they do in some state courts
      4. Availability of limited use/derivative use immunity
   3. RICO statute
   4. Mandatory minimums/sentencing guidelines
      1. Turn D’s into witnesses
      2. Great discretion as to when/what form of leniency to give , and to decide when a cooperator has really cooperated

**DOJ Guidelines for FBI**

1. Levels of Investigative Activity:
   1. Limited checking of initial leads: info received, some follow-up is warranted.
   2. Preliminary inquiries: possibility of crim activity; no need to do initial step first.
      1. Available investigative techniques: only mail opening and nonconsensual electronic surveillance are prohibited, should be unobtrusive as possible.
      2. Should be completed w/in 80 days of first investigative step; two 90-day extensions available.
   3. Full investigations: may be initiated where facts/circumstances reasonably indicate that fed crime has been, is being, will be committed. Terminated when all leads exhausted, no legit law enforcement interest justifies continuing. 2 types:
      1. General Crimes: focus on individuals.
         1. “Reasonably indicate”: substantially lower than probable cause; may consider statements, activities, nature of potential fed crim violations; need authorization of FBI supervisor that std is met.
         2. Available investigative techniques: any, see below.
      2. Crim. Intelligence Investigations: focus on group/enterprise; goal is to obtain info concerning nature and structure of enterprise (membership, finances, geo. dimensions, past/future activities, goals) w/ view toward detecting, preventing, prosecuting. 2 subtypes:
         1. RICO Investigation: initiated if circumstances *reasonably indicate* 2+ persons are engaged racketeering activity.
            1. Must be authorized by Special Agent in Charge; must notify USA and AG.
            2. Initially authorized for <1 yr, w/ renewals of <1 yr.
            3. Any lawful investigative techniques.
         2. Terrorism Enterprise Investigation: initiated when circumstances *reasonably indicate* 2+ persons are engaged in enterprise for purpose of: (1) furthering political/social goals through force/ violence/fed crime, (2) engaging in terrorism that involves fed crime, (3) committing any offense in 232b(g)(5)(B).
2. Possible techniques (and governing law/reg):
   1. Confidential informants: AG’s Guidelines on Confidential Informants
   2. Undercover activities and ops: AG’s Guidelines on Undercover Ops
   3. Nonconsensual electronic surveillance: USC 2510-2522
   4. Pen registers, trap/trace devices: USC 3121-3127
   5. Access to stored wire/electronic communications: USC 2701-2712
   6. Consensual electronic monitoring: USA policy
   7. Search/seizure: warrant

**Grand Juries**

1. **FRCP rule 6**
   1. 16-23 members, 12 needed to indict. If 12 vote for indictment it cannot be dismissed.
   2. Serves until discharged, not longer than 18 mos w/o court extension of up to 6 add’l mos.
   3. Only the gov’t atty, the court reporter, the witness, and an interpreter when needed may be present during testimony; no one but jurors during deliberations
   4. Record must be kept (in custody of USA), but failure doesn’t invalidate proceeding
   5. **Secrecy rules**: Apply to juror, interpreters, ct reporter, and gov’t attorney. DO NOT apply to witnesses.
      1. Info can be disclosed to gov’t attorneys to do their jobs, to investigators on list, to state/fed law enforcement officials, national security folks.
2. **18 USC § 3331-3334**
   1. Summoning/Term: 18 mths, never > 36 mths; AG can request at any time unless another special grand jury is serving**.**
   2. Duty: Inquire into offenses against crim laws of US alleged to have been committed in its district
   3. May submit report on noncrim misconduct, malfeasance, misfeasance of public officer; or organized crime conditions in the district. Report sealed until after.
3. **Scope of Subpoena Power**
   1. ***US v. R. Enterprises*** (US 1991)
      1. Porno case, subpoenas bus. Records from 3 wholly owned corps, 2 of which have not done business in state.
      2. A G.J. "may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.”
      3. **A GJ subpoena is acceptable as long as there is a reasonable possibility that the information the gov’t seeks will produce information relevant to the general subject of the investigation.** Fishing is ok, but not “arbitrary” fishing.
      4. 4th amendment exclusionary rule has no place in G.J
      5. Subpoenas can only be quashed if movant can prove:
         1. that it is unreasonable or oppressive under FRCP R.17 –or—
         2. that there is no reasonable possibility that the materials sought will provide info relevant to general subject of investigation. (Gov’t might be forced to disclose general subject, but this isn’t taken up in opinion)
4. **Evidence in the Grand Jury**
   1. ***United States v. Calandra*** (US 1974)
      1. Searched property on bookmaking warrant, found nothing but took evidence of loan sharking, took it to G.J.
      2. **Witness cannot refuse to answer questions because information used to form the basis of those questions was illegally obtained**
      3. Indictment can’t be challenged on these grounds either; exclude at trial if appropriate, and sue bad actors if there has been an unlawful search
   2. ***United States v. Williams*** (US 1992)
      1. Prosecutor subpoenaed financials from defendant, presented only the inculpatory documents to the G.J., withheld the potentially exculpatory. D moved to dismiss indictment.
      2. **A district court may not dismiss an otherwise valid indictment because the Government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession**. Courts don’t exercise authority over what G.J., therefore has no power to require them to hear evidence
      3. No duty to present exculpatory evidence to the G.J. It is an investigative, not a truth-adjudicating body.
      4. Criticism: If the G.J. is really so independent, why does the prosecutor keeps its records? AUSA manual requires disclosure. Incentivizes prosecutorial misconduct to get indictment on weak evidence, which in most cases will result in a plea deal even where the evidence is too thin to stand at trial.
5. **Some limits on GJ** 
   1. GJ cannot serve subpoena once indictments have been handed down unless investigation is still going on (can’t be used to facilitate trial prep)
   2. GJ subpoena cannot be used to locate a fugitive
      1. using it in this way makes no sense and it is against DOJ policy
   3. GJ subpoena cannot be used to get evidence for civil proceedings even though many USAOs do both criminal and civil
   4. Venue limitation is not very strong, white collar Δs often get venue changed
   5. GJ subpoena cannot be used to harass or intimidate or coerce into plea
   6. DOJ policy gives media great latitude
6. **Enforcing the Grand Jury’s Authority**
   1. **Secrecy**
      1. ***In re. Sealed Case No. 98-3077*** (DC Cir 1998)
         1. Clintons mad about “sources” quoted as close to Starr leaking GJ testimony
         2. Lays out the Barry Procedure for alleged violations of Rule 6(e):
            1. Party accusing prosecutor of violating GJ secrecy makes prima facie case
            2. Burden shifts to prosecutor to rebut through an in camera, ex parte showing.
            3. Court can request further info if not satisfied that there was no leak, or as to identity of leak
            4. If the court determines that a violation of Rule 6(e)(2) has occurred, it may report this finding to the movants and identify the government agent or attorney responsible for the disclosure.The movants may then participate in determining the appropriate remedy, which, as we have noted, may include equitable relief, contempt sanctions
      2. ***In re. Sealed Case No. 99-3091*** (DC Cir 1999)
         1. Attorney in OIC office leaked to NYT that Clinton was to be indicted.
            1. OIC admitted leak disclosed “sensitive and confidential internal OIC information," but said the information was not protected by Rule 6(e)
         2. Court says that the rule covers individuals, not offices, so IC can’t be held in contempt because an individual in his office leaked, even if it violates the rule.
         3. Court also says that this isn’t enough to establish a PF case for 6(e) violation-disclosed prosecutor’s intentions, but not necessarily “matters before the GJ”
         4. Gleeson thinks this is a shameful opinion, in that is far more concerned with reputations than with the integrity of investigations. But this is what happens with IC investigations—too much politics, no repeat players. A real prosecutor would never throw someone under the bus for a leak the way Starr did.
   2. **Contempt**
      1. **28 USC 1826 civil contempt**: recalcitrant witnesses can be imprisoned for shorter of 18mos or duration of preceding in order to coerce testimony/compliance
      2. **18 USC 401, 402 Court’s power to punish; criminal contempt:** $1000 and/or 6 mos.
      3. ***Simkins v. US*** (2d cir. 1983)
         1. Party held in contempt moves for release on grounds that he will never talk, so further incarceration would have no coercive effect.
         2. “determine whether there remains a realistic possibility that continued confinement might cause the contemnor to testify. The burden is properly placed on the contemnor to demonstrate that no such realistic possibility exists.”
         3. “a district judge has virtually unreviewable discretion both as to the procedure he will use to reach his conclusion, and as to the merits of his conclusion” BUT it must be an individualized determination, and cannot be punitive.
      4. ***US v. Remini*** (2d cir. 1992)
         1. Remini refused to testify even after immunity order, charged with criminal contempt. Raised defense that the prosecutor had threatened to charge him with perjury for true but misleading answers, therefore immunity granted was insufficient to compel testimony.
         2. Court says no, judge granted unqualified statutory immunity, therefore Remini’s refusal to testify was willful noncompliance with order and contempt. Prosecutor’s threats don’t change the immunity that was actually conferred by the court.
         3. “advice of counsel is not a defense to the act of contempt, although it may be considered in mitigation of punishment”
   3. **Perjury and related offenses**
      1. **18 USC 1623-False declarations before court or GJ** **(Perjury)**
         1. **ELEMENTS:** 1) oath 2) proceeding before or ancillary to court or GJ 3) false declaration
         2. Punishable by fine and/or 5 years
         3. Honest belief is a defense.
         4. If a person admits before being caught, before the falsity substantially effects the proceeding, and before the end of the proceeding that the statement is false, it bars prosecution.
      2. ***Bronston v. US*** (US 1973): Dodging a question in a nonresponsive/deceptive way doesn't count—must actually lie. Prosecutors must rely on more carefully worded follow-up questions.
      3. **18 USC 1001-False statements** **(lying to the feds)**
         1. Gap-filler for when person isn’t under oath
         2. **ELEMENTS:** statement, false, falsity must be material, must be to a person who comes under one of the three traditional branches of gov't.
            1. you can still lie to the independent agencies that don't come under the three branches-- congress hasn't fixed this in the statute.
         3. 5 years and/or fine
      4. **18 USC 1503-Influencing or injuring jurors or court officers (Obstruction)**
         1. Use of corruption, threats, threatening communications, or force to influence, intimidate, or impede any grand or petit juror, or officer in or of any court.
         2. **NO materiality requirement**
         3. Ten years, or more if an attempted/successful killing
7. **Immunity**
   1. **18 USC 6001–6003**
      1. § 6002: If a witness takes the 5th the person presiding can order the witness to testify, but info (and derivative info) compelled cannot be used against the witness in a crim. case, except for perjury, false statements, or “otherwise failing to comply with the order”
         1. Note: this is commonly understood to include prosecutions for obstruction, even though that has never been read in to the statute. If Gleeson were a defense att’y, he’d raise this argument.
      2. §6003: The USA (or other gov’t att’y, with DOJ approval) can request such an order by asserting that the witness’s testimony is needed for the public interest, and that the person has, **or is likely** to, take the fifth.
         1. If it's approved by a deputy AG or above it's ministerial and not subject to review
      3. Other privileges still apply (spousal communication, att’y-client, etc.)
   2. ***Kastigar v. US*** (S. Ct. 1972)
      1. Petitioners challenge the constitutionality of the immunity statute, saying that they cannot be compelled to give testimony and still prosecuted; that total transactional immunity must be granted
      2. S. Ct. rejects this, says that the protection must be as broad as the 5th amendment, but no broader. Use and derivative use protection is sufficient.
      3. **Rule:** Parties who implicate themselves d/t immunity order can still be prosecuted for any crimes divulged
         1. **BUT—**the prosecution in such a case bears an affirmative burden of showing that the source of material used to prosecute is independent of the testimony.
      4. **Notes**:
         1. *Kastigar* hearings are very time-intensive, and preview the whole prosecution case, so often the prosecution will ask to have them after the trial. This runs the risk of a mistrial, but also might avoid having the hearing if a plea or acquittal is worked out. Strangely, defense attorneys seem to go along with this.
         2. *Kastigar* protection is really strong, but paradoxically becomes less strong the less you disclose in your testimony. If all your answers are “I don’t recall,” it’s easy for the prosecution to say they didn’t rely on that information.
   3. ***Fisher v. US*** (S. Ct. 1976)
      1. Tax lawyer is served with subpoena for accounting documents belonging to a client; refuses to give them up, asserting client’s 5th amendment privilege.
         1. Merely admitting the documents exist is testimony
         2. Producing the documents is testimony as to their validity, etc.
      2. **HOLDING**: Tax papers are not “testimony” are not protected by 5th amendment
         1. If papers could have been subpoenaed from client, giving them to the lawyer doesn't protect them from disclosure to the gov’t.
         2. The existence of accountant’s papers in a tax case is a “foregone conclusion,” so admitting they exist adds “little or no” value to the prosecution’s case. However incriminating they may be, they don’t amount to “testimony”
         3. Tax documents are not “private papers,” so the court need not reach the issue of constitutionality of orders to produce private papers.
   4. ***US v. Doe*** (S. Ct. 1984)
      1. Petitioner fights subpoena for business records, claiming they are personal papers protected by 5th amendment. Even if docs are not protected, the act of giving them to gov’t in response to a subpoena amounts to testimony, because it admits that what is produced is his, is what the gov’t asked for, is genuine, etc.
      2. HOLDING**:** Business records were voluntarily produced, so 5th amendment doesn't protect them from disclosure
         1. **BUT the act of disclosing them amounts to compelled testimony**. “Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena”
         2. If the gov’t wants these papers, they must get an immunity order for the act of production
      3. In dicta, O’Conner and Stevens rail each other as to whether or not a protection for “private papers” would be available, even though it isn’t on point—they leave us with no idea what protections apply.
   5. ***US v. Hubbell***  (S. Ct. 2000)
      1. Party refuses to produce business records on 5th amendment grounds. I.C. gets immunity order; witness produces reams of documents and testifies about them. IC later sends witness to a new GJ and gets indictment re. frauds disclosed in those records.
      2. HOLDING**:** 
         1. Immunity order protection is coextensive with 5th amendment.
         2. “If the Government could not demonstrate with reasonable particularity a prior awareness that the documents sought existed and were in respondent's possession, the indictment was tainted.”
         3. Gov’t can only make use of documents contents when the existence of those documents is “a foregone conclusion” (whatever that means)
         4. Indictment must be dismissed.
8. **Defense Witness Immunity** 
   1. ***US v. Ebbers*** (2d cir. 2006)
      1. Ebbers contends that he was denied a fair trial because the government granted immunity only to witnesses whose testimony incriminated him and not to witnesses whose testimony would exculpate him but who would have invoked the privilege against self-incrimination.
      2. To decide consider whether ‘‘(1) the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the 5th Amendment; and (2) the witness’ testimony will be material, exculpatory and not cumulative and is not obtainable from any other source.’’
      3. Gov’t will be seriously hampered in future prosecutions by any immunity grants, therefore the prosecution is generally in the best position to make this call, and courts should generally defer to their judgment.
      4. Note: there is a constitutional argument that courts cannot force prosecutors to immunize. This is somewhat of a superfluous case, however, because even though the court says compelled immunity is theoretically possible, it never ever finds in practice that the two-factor test has been met.

**Investigative Techniques**

1. **Contact with persons represented by counsel**
   1. ***U.S. v. Hammad*** (2d. Cir 1988)
      1. **NOTE**: Case says CI wearing a wire to talk to a represented party is OK
      2. Hammad charged with fraud and obstruction. AUSA has informant talk to him post-indictment wearing a wire, knowing he is represented; issued sham subpoena to snitch to give him credo with target
         1. No 5th amendment issue, because it’s non-custodial.
      3. DR 7-104: Communicating w/ One of Adverse Interest: during the course of his representation of a client a lawyer shall not: communicate or cause to another to communicate on the subject of the representation w/ a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
      4. CI wearing a wire is OK…
      5. **BUT**: Exclusion is proper based on (judicially adopted, non-statutory) ethics rule violation because of sham subpoena.
      6. Under DR 7-104, a prosecutor is authorized by law to employ legitimate investigative techniques, and the use of informants will frequently be authorized by law, thus exempt from DR7-104. Since Hammad says that it is authorized by law, it is—this case itself makes it presidential law to use CI's.
      7. The takeaway from this decision is that it is a crazy decision, and was only issued in its current form because the en banc panel wouldn't swallow the fact that it got it wrong. They wrote the opinion in a manner so as to neutralize it going forward, by hanging it on the sham subpoena. All you have to do is to actually take the subpoena to a grand jury, and it’s not a sham.
      8. NOTES:
         1. 6th amendment right to counsel attaches at the beginning of adversarial proceedings (appearance before magistrate, return of grand jury indictment, etc.). Generally investigations are pre-6th amendment, but there is a netherworld where interviews happen (after waiving miranda) rights but before the suspect sees the magistrate and before the 6th amendment attaches--this is shady and not settled.
         2. *Hammad* was not entirely unprecedented, but pretty close. The ethics of not contacting a represented party comes naturally to civil litigators, but it didn't come naturally to criminal litigators until this case.
         3. **This case only matters because it planted a seed (ethics rules limiting investigative techniques) that grew into Dade act.**
         4. *Hammad* also tells us that Hammad was a "party" to something, otherwise the rule doesn't apply. Same in that a grand jury investigation must be a "matter."
   2. ***U.S. v. Ryans*** (10th Cir. 1990)
      1. Pre-indictment, gov’t gets CI to record conversation with target of price-fixing investigation; CI prompts target to disclose content of conversations with attorney
      2. Does DR 7–104 apply here?
         1. Yes to criminal cases, not just civil
         2. No to pre-indictment investigations
      3. **Fails to adopt *Hammad* in the 10th cir; goes with majority of circuits who hold that disciplinary rule does not apply in the context of pre-indictment, pre-custodial investigations.**
      4. No problem with using CI to contact represented parties.
   3. ***Grievance Comm. v. Simmels***(2d Cir. 1995)
      1. Defense att’y contacts represented party who may be a witness or a co-defendant, but is not yet charged
      2. Court greatly narrows *Hammad*:
         1. reads “party” narrowly: not-yet charged individual is not a “party” to the proceeding yet, so rule doesn’t apply. A broader reading would chill good, aggressive defense lawyering
         2. Court says the rule is for conduct of lawyers, not protection of parties.
         3. Using ethics rules as substantive procedural rules could lead to balkanization of investigative rules
      3. If congress or the Supreme court wants to limit the ability of one defense attorney to protect his client for the protection of another potential defendant, they may do so, but this court will not do so via the ethics rules.
   4. ***U.S. v. McDonnell Douglas*** (8th Cir. 1998)
      1. Mo. state ethics rule prohibits contact with employees of represented company being investigated for overbilling on gov’t contracts. This kills the investigation, since the only way to prove it is to talk to employees who either did or didn’t work the billed hours.
      2. In order to get around all the ethics prohibitions that the defense bar has been putting in various state rules, the DOJ promulgates its own rules for investigators, claims these are admin/executive law, entitled to Chevron deference, and thus all the “as otherwise allowed by law” clauses in ethics rules incorporate the “law” the DOJ promulgated.
      3. Court says no, Thornburg memo isn’t law—no statutory authority for DOJ to promulgate such rules.
   5. **Citizens Protection Act** of 1998 (28 USC 530b)
      1. Gov’t lawyers (DOJ and others) are bound by the rules of whatever jurisdiction they are operating in, whether or not they are admitted there.
      2. DOJ had a legislative “fix” ready to go, and had the political will to pass it, but didn’t. One possible reasons is the success of the Holder memo (non-prosecution agreements).
      3. **Note**: the act gives DOJ specific rulemaking authority to implement the act. **Maybe this is the previously lacking rulemaking authority to reissue the Thornburg memo and have an "otherwise authorized by law" exception recognized.**
2. **Nonconsensual Electronic Surveillance**
   1. **NOTE: Order not needed when there is 1-party consent, like a CI wearing a wire or recording a phone conversation** (18 USC § 2511 2(d))
   2. **Pen registers and trap-and-trace**
      1. Under 18 USC §§ 3121-3127
      2. Prohibited except for normal phone company use, FISA, emergency, and law enforcement under this title
      3. Requires gov’t lawyer to show “the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.” § 3123
      4. Judicial order must include:
         1. Identity if known of person whose name is on the phone line/device lease/bill
         2. Identity if know of the subject of the investigation
         3. Information to be captured, geographic limits of trace (if any)
         4. Offense likely to be charged based on tap/trace
      5. Emergency use requires (under § 3125):
         1. A situation involving immediate threat of death or serious injury, or involving organized crime conspiracy
         2. Grounds upon which an order could be obtained
         3. Must apply for order w/i 48 hrs and take down if app isn’t approved
   3. **Phone Taps & Bugs**
      1. **Title III** of the Omnibus Crime Control and Safe Streets Act of 1968 (18 USC 2510-2522)
      2. More intrusive than pen register/trap-and-trace, so higher burden required
      3. All carriers required to have a “backdoor” to allow eavesdropping (§ 2522)
      4. General Prohibition:
         1. § 2511: interception and disclosure of wire/oral/electronic comm. is prohibited. Exceptions:
            1. Phone co. normal course of business; FCC et al. normal monitoring
            2. FISA order
            3. Judicial order
            4. Publicly available electronic communications
            5. Intercepting hackers if (all are met):

owner/operator of protected computer authorizes interception,

person acting under color of law is lawfully engaged in investigation,

person acting under color of law has reasonable grounds to believe contents of computer will be relevant,

inception does not acquire communications other than those transmitted to/from computer trespasser.

* + - 1. § 2512: manufacture, distribution, possession, etc. of interception devices prohibited, unless normal course of business or for gov’t use
      2. § 2513: interception devices may be seized.
      3. § 2515: **intercepted communications cannot be used as evidence** (**NOTE:** this expands 4th amdmt. exclusionary rule. if you search a house and find drugs belonging to someone else, that person can't exclude because they were themselves free from search and seizure. If the first person were improperly tapped, the defendant could exclude.
    1. Authorization:
       1. Adult supervision requirement: application must be approved by short list of high-ranking folks in AG’s office (list at §2516(1))
       2. Can only be used to investigate one of a list of enumerated offenses (§ 2516)
       3. Application must include:
          1. Identity of LEOs making and approving application
          2. Full and complete statement of the facts, including:

details as to the particular offense that has been, is being, or is about to be committed

a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted

a particular description of the type of communications sought to be intercepted

the identity of the person, if known, committing the offense and whose communications are to be intercepted

* + - * 1. F&C statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous
        2. a statement of the period of time for which the interception is required to be maintained.

If the investigation is such that the authorization should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur

* + - * 1. F&C statement of all previous know applications involving same targets/locations/communications, and the judge’s decision
        2. If a renewal, state how long has it has been up
    1. Time limits: Order can’t be for longer than necessary to achieve objectives, and no longer than 30 days, LEO can apply for 30 day extensions. Clock starts sooner of when wire actually goes up or 10 days after order issues
       1. Judge can require periodic status reports
    2. Emergency exceptions
       1. AG, dep. AG, Ass’t AG, can approve is there is either an:
          1. Immediate danger of death or serious injury or
          2. Organized crime conspiracy or
          3. National security conspiracy
       2. There’s no time to get order, but grounds exist, and application is made w/i 48 hours
    3. Intercepted communications must be recorded in a way that prevents tampering. Once the order expires, w/i 48 hrs the tapes are placed under court seal and in the court’s custody.
    4. All applications and orders will be under court seal
    5. Civil remedy for damages available for violations (§ 2520)
    6. Notification requirement: If people have been eavesdropped on but not incriminated, the statute says they must be notified
  1. **18 USC 3504: all illegally obtained evidence is inadmissible in court**
  2. ***US v. Gelbard*,** (1972)
     1. Immunized witnesses refused to testify in GJ, held in contempt. Raised defense that questions were based on illegal wiretaps
     2. Court says witness cannot suppress anything in GJ, but is allowed to raise § 2515 as a defense to contempt.
        1. Prosecutors do not want to have to admit whether there was even a wire (there wasn’t in this case), or who might be on it.
        2. In practice there’s great deference to prosecutors who have facially valid warrants, or where there’s no wire at all. Basically an ex parte hearing where the judge looks at the questions the prosecutor wants to ask, facially looks at the warrant (or absence of warrant), then says "yep; that's good faith" and sends the witness to jail for contempt.
  3. ***US v. Concepcion***, (2nd cir. 2009)
     1. D. seeks suppression of evidence based on faulty wire application, claims that application did not include all statutorily required info
     2. Court says that boilerplate app was “minimally sufficient,” throws out suppression order.
     3. No need to exhaust all other investigative techniques before applying for a wire, but you do need to discuss why they are unlikely to work in this specific case.

1. **Confidential Informants**
   1. **Notes:** 
      1. By far the most relied upon technique in federal investigations, and an area that invests tremendous power in investigative agents. No one else really ever knows what’s going on, including the prosecutors.
      2. On one hand, developing CIs is very personal, and rapport is crucial. You can’t assign someone a best friend, so oversight makes these crucial relationships nonfunctional. On the other hand, without oversight there is tremendous potential for abuse (e.g. DeVeccio).
      3. The guidelines really created CIs, because before people were generally willing to take the time rather than face their peers. After the guidelines, and the Gravano (e.g.) experience, this has changed: now everyone cooperates to some extent.
   2. ***Roviaro v. US*** (S. Ct. 1957)
      1. The court says the gov’t does have a privilege not to disclose the identity of informants. HOWEVER, there are situations in which the privilege must give way:
         1. When disclosure of a communication will not reveal the identity of the informant, the contents are not privileged
         2. Once the identity is disclosed in any capacity to the people who will be upset by it, it no longer serves any purpose and disappears
      2. **Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.**
         1. No bright line: balance the public interest against the defendants right to prepare a defense.
      3. NOTE: this issue rarely comes up in terrorism or enterprise crime, because the FBI values their CI’s too highly—you need to be able to plant seeds that will grow into trees. They would rather not charge a crime than risk burning a CI. It does come up in drug/weapons cases, because there is less humint involved in making these cases, they have a much shorter time horizon, and witnesses are more willing to testify (revealing their own identity).
   3. ***US v. Cuellar*** (9th Cir. 1996)
      1. CW was paid nearly $500k, in fees, partly from keeping a percentage of all the profits of the money laundering operation he was going to testify about. Defendant says that this is outrageous gov’t conduct and gives the witness too much incentive to lie or entrap people.
      2. Court says it’s fine, even if it’s unseemly. The defense is free to impeach with the improper motive at trial.
         1. Unless the gov’ts conduct “is so excessive, flagrant, scandalous, intolerable and offensive as to violate due process,” there is no problem with even very large payments to CWs.
         2. NOTE: Prosecution cannot make fees explicitly contingent on outcome of trial—this creates too much incentive to lie; pretty much any other contingency scheme seems ok
   4. **AG’s guidelines on Confidential Informants** (revised [by Orenstein] in 2006)
      1. General provisions:
         1. Don’t apply to foreign intelligence, unless likely to testify in domestic trial
         2. FBI cannot guarantee immunity for non-approved crimes without prosecutors say-so
         3. Gov’t has duty to keep identity of informant secret
         4. Whenever an exception is needed or a disagreement arises, the AAG for DOJ criminal or nat’l security divisions will resolve it
      2. Within a “reasonable time limit” set by FBI, all CIs must be opened & undergo validation.
      3. **Validation includes**:
         1. Proof of CIs real identity, or agents attempts to discover real identity
         2. Photo when possible
         3. Whether the person as a criminal record, is currently under arrest or investigation, or reasonably believed to have been involved with a crime
         4. The person’s motives for cooperating, including any promises, terms or benefits
         5. Proof that the Instructions were given
         6. Validation must be done annually.
      4. **Instructions**
         1. Info must be truthful
         2. That the gov’t will strive to keep identity secret, but cannot promise it won’t come out
         3. The FBI can’t promise immunity, but will consider (not promise) contacting the prosecutor on behalf of the CI
         4. Specify whether the CI has or has not been authorized to engage in crimes, and if not that they will not be immunized for those crimes
         5. CI is not a gov’t employee and cannot represent themselves as such.
         6. CI must pay taxes on any rewards/payments
         7. Proof that these instructions were given and understood must be documented as often as is prudent, and at least once annually
      5. **Human Resource Review Group (HSRG)**
         1. All senior leadership, media/privileged source, and high level gov’t or union CIs must be approved within 60 days by a HSRG
            1. UNLESS: they are already under the oversight of a prosecutor because they have agreed to testify,
            2. or they are part of a terrorism/national security investigation.
         2. HSRG composed of:
            1. a chairperson who is an FBI Deputy Assistant Director or above
            2. 2 FBI agents and 2 lawyers from FBI office of general counsel designated by the chair
            3. five prosecutors designated by the AAG for the Criminal Div.
            4. One must be Deputy AAG from Crim. Div
            5. Two must be from USAOs and have prosecution experience
            6. One nonvoting designee of the AAG for Nat’l Security
         3. HSRG must make decision in 45 days, during which the CI can be used
         4. Consensus is need to use CI, but if there are disputes, Crim. AAG resolves it and during the appeal the witness can be used
      6. **National Security/ International Terrorism CIs**
         1. Not subject to HSRG review. Fed. Prosecutor may view attorney reports at FBI HQ, and if they are not satisfied re. propriety of continuing CI use, can ask for additional info (but not identity). If still not satisfied, can recommend review to Deputy AG.
      7. **Prisoners, Probationers, Parolees, Supervised release**
         1. Must be approved by DOJ Office of Enforcement Operations before use
         2. Must consult with office to make sure terms of cooperation will not violate release terms
            1. May apply to court for modification of sentence if this is refused or is not feasible, so long as they first consult with prosecutor for that area
         3. FBI must give notice to the prosecutor if a probationer/parolee CI will be working with another probationer in the course of an investigation
         4. Must get OEO approval to use current or former witness protection client
         5. FBI must check with analogous state agency if CI is a state prisoner/parolee
      8. **Fugitives**
         1. FBI can’t have contact w/ current former CI who is a fugitive unless:
            1. Fugitive initiates contact
            2. Contact is part of legitimate effort to arrest fugitive
            3. With approval of prosecutor in charge of whatever jurisdiction put out the warrant
         2. Such contact must be promptly documented and reported to appropriate law enforcement/prosecutorial agencies.
      9. **Prohibitions**
         1. Doing business, exchanging gifts with, or giving taking anything of value from CI
         2. Will not socialize with source beyond what is necessary for operations
      10. **Monetary Payments**
          1. Cannot be contingent on conviction
          2. Must coordinate payments through prosecutor if witness will be testifying (using dispute resolution procedure if necessary)
      11. **Authorization of Otherwise Illegal Activities**
          1. May never authorize the use of violence, except in self defense, or an act to obtain information that would be illegal if an FBI agent did it (e.g. illegal wiretapping, breaking and entering, illegal search, etc.)
          2. Must be authorized in advance and in writing for a specific period not to exceed 90 days (a year in national security). In an emergency the authorization may be oral.
          3. **Can be authorized if (a) the benefits outweigh the risks, and (b) it’s necessary to:**

secure evidence essential for the success of an investigation that is not reasonably available without such activity (including circumstances where the CI must commit crime to maintain credibility) **–OR–**

prevent death, bodily injury, or significant damage to property

* + - * 1. Factors to consider in this determination:

The importance of the investigation

The likelihood that evidence will be obtained

The risk that the CI will misunderstand or exceed authorization

The risk the FBI won’t be able to closely monitor the CI

the risk of violence, physical injury, property damage, or financial loss to the CI and others

the risk that that the FBI will be unable to ensure the CI doesn’t profit from crimes

* + - 1. **Tier I crimes –**require FBI SAC and Chief Federal Prosecutor
         1. anything that involves the significant risk of violence by someone other than CI
         2. substantial risk of financial loss
         3. import/manufacture/distribution/possession of drugs in distribution-quantities
         4. corruption or risk of corrupt conduct
         5. provision of goods, services, expertise that person would otherwise have difficulty obtaining
         6. provision of anything dangerous (guns, drugs, explosives, etc.) that won’t be immediately recovered
      2. **Tier II crimes**–require only FBI SAC approval
         1. All other felonies/misdemeanors

**Plea Bargaining**

1. **Plea agreements as contracts**
   1. ***Ricketts v. Adamson*** (U.S. 1987)
      1. D. pled guilty, testified against co-D’s who win new trial on appeal. CW asks for a better deal to testify again, state says no. CW then says he’ll testify, state says too late, you broke your agreement, retries him and gets death penalty.
      2. **Plea agreement is a contract** to be interpreted as a matter of state contract law
         1. State S. Ct. said that prosecutors’ reading was correct, so it is. If the liquidation clause (return to status quo ante) was valid as a matter of K law, it’s valid.
         2. D. breached, so return to status quo ante— P facing prosecution & death penalty.
      3. **D. can waive 5th amdmt. double jeopardy protection** in plea agreement
         1. Doesn’t matter that double jeopardy waiver wasn’t explicit, or that there was a good-faith disagreement as to contract terms. The bargain, including the liquidation provision was enforced.
      4. Criticism/dissent: no such thing as status quo ante, state has benefitted from cooperation even if it can’t use testimony at trial. Disproportionate penalty, and if it’s a contract, state has a duty to mitigate-so 2 mos. delay and litigation costs shouldn’t justify rescinding and retrying D.
2. **Federal Rules**
   1. **Rule 11:**
      1. Court may not participate in plea bargaining
      2. Gov’t can agree not to bring or to dismiss other charges [11(c)(1)(A)]
      3. Recommend a sentence or range [11(c)(1)(B)] (nonbinding on the court, court must advise D that plea cannot be withdrawn if court doesn’t follow recommendations)
      4. Agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines or sentencing factor does or does not apply [11(c)(1)(C)] (binding on the court if it accepts plea)
      5. Explains when/how a court may reject/accept a plea, and when it can be withdrawn
   2. **Rule 35:**
      1. Gov’t may move to reduce sentence for substantial assistance w/i a year of sentencing, or longer if D didn’t know info at time of sentencing. Court may deviate downward from statutory minimum pursuant to such a motion.
3. **Sentencing Statutes/guidelines**
   1. **Effect on pleas**:
      1. Pre guidelines judges were erratic; lenient judges were lenient, harsh were harsh, wasn’t clear to anyone that cooperating would change this.
      2. Guidelines said that lower sentence can’t be less than 25% of max (for consistency), at the same time, congress passed all kinds of mandatory minimum drug sentences (which trump the guidelines). The committee has to make these proportional, so they bumped them up to the range where the minimums would make sense, all the sudden a kilo of heroine (mandatory minimum of five years) gets you a life sentence.
      3. Now the only way to get out from under terribly harsh guidelines is a 5k1.1 letter (there’s no chance of pulling a harsh/lenient judge) so everyone wants to cooperate, even if you still don’t know what you’ll get for it.
      4. **Note**: Even though *US v. Booker* made the guidelines advisory & judges have discretion to deviate below them, they do, but only just barely—it hasn't made a huge difference in the ability of prosecutors to use 5k1.1 motion to get cooperators
   2. **Factors to consider in imposing a sentence** 18 USC § 3553
      1. nature and circumstances of offense; history and characteristics of D;
      2. need for sentence to reflect seriousness of offense, afford adequate deterrence, and protect public from further crimes of D;
      3. kinds of sentences available;
      4. kinds of sentence and range established under Sentencing Guidelines;
      5. policy of Sentencing Commission;
      6. need for uniformity;
      7. need for restitution.
   3. **Sentencing Guidelines:**
      1. Ch. 5, Pt. A (Sentencing Table): months of imprisonment / criminal history
      2. 1B1.8--Use of Certain Info: when D agrees to cooperate and gives incriminating info pursuant to agreement, this cannot be used against him; sentence D only based on info known to gov’t prior to cooperation.
      3. 5K1.1--Substantial Assistance to Authorities: on motion that D has provided substantial assistance, court may depart from Guidelines, considering:
         1. court’s evaluation of significance and usefulness of D’s assistance;
         2. truthfulness, completeness, reliability of D’s info;
         3. nature and extent of assistance;
         4. any injury suffered, or risk of injury, to D or family, from assistance;
         5. timeliness of assistance.
      4. 5K2.0--Grounds for Departure (Policy Statement): discussion of aggravating and mitigating circumstances; use recommended departures unless factor is present to a degree substantially in excess of that ordinarily involved in that crime.
      5. 6B1.2--Standards for Acceptance of Plea Agreements (Policy Statement): plea agreement that includes dismissing or not pursuing charges does not preclude conduct underlying those charges from being considered under “relevant conduct” provisions of Guidelines.
4. **Prosecutor’s discretion to reward cooperation**
   1. ***Wade v. US*** (US 1992)
      1. Courts can only review prosecutors’ decisions not to make 5k1.1 motions on the basis of unconstitutional motives, like race or religion. Otherwise, statute gives prosecutors complete discretion over when to reward cooperation
      2. Unless movant makes “substantial threshold showing of invidious discrimination,” they get no discovery.
   2. ***US v. Brechner*** (2d Cir. 1996)
      1. D pled guilty to tax evasion, agree to testify re. kickback scheme. Govn’t declined to file 5k1.1 b/c D withheld details about some (not all) kickbacks he’d paid.
      2. Agreement specified terms of cooperation, and D breached obligations under the agreement; lies created serious problems for govn’t at trial, thus providing good faith grounds for refusing to move for downward departure.
5. **The Market for Cooperation**
   1. ***US v. Mezzanatto*** (US 1995)
      1. Defendant minimized his role during plea negotiations after being advised that any statements he made would be used to impeach him later. Because of untruthfulness, negotiations were halted and D was tried. At trial proffer statements were used to impeach testimony by D, who then moved to exclude FRE 410 and FRCrimP 11(e)(6) (discussions involving settlement) grounds.
      2. A proffer that says you promise to tell the truth can be used against you, both in case-in-chief and as impeachment.Rule 403 evidentiary rights (involving settlement discussions) can be waived.
   2. ***US v. Krilich*** (7th Cir. 1998)
      1. D calls witnesses who give testimony dancing around fake hole-in-1 bribe.
      2. Extends Mezzanatto: If a defense witness tells a story inconsistent with what was said in the proffer--even if it is merely suggestive, or inferential; or even if a defendant's lawyer asks a rebuttal question that implies something counter to the proffer statement, the proffer agreement can be enforced and the statements come in.
      3. **Note:** This realizes the worst fears of the dissent in Mezzanatto; it’s basically impossible to defend a case after a proffer session, so you only make a proffer if you are ready to plead guilty.
   3. ***US v. Padilla*** (2d Cir. 1999)
      1. Padilla cooperated, testified, and pled guilty, but then didn’t show up for sentencing. Gov’t tried to withdraw its 5k1.1 motion on this basis.
      2. Court says no, the contract governs, and it’s silent on whether the gov’t may withdraw for this reason, so it can’t. If Padilla rendered substantial assistance, he’s entitled to motion.
      3. Construes silence against the gov’t; indicates 2d circuits discomfort w/ bargaining power of defendants.
6. **Example Proffer, Plea, and Cooperation Agreements**:
   1. Theoretically all of these are bargained-for contracts, but in reality all D’s accept boilerplate language. Likely a mismatch between bargaining power.
   2. **Proffer:** Precedes a cooperation agreement.
      1. Prosecution won’t use statements made during meeting in case-in-chief or at sentencing.
      2. Can still use them to prosecute for perjury, to impeach, to develop other leads/evidence, or as substantive evidence to rebut any evidence on behalf of D at trail
      3. No immunity, does not cover any statement made outside meeting
   3. **Cooperation agreement**:
      1. Prosecutor agrees not to oppose a downward adjustment
      2. Requires D be available for testimony, debriefing, etc.; and to provide truthful and complete info at all times.
      3. Prosecutor will fill 5k1.1 motion for substantial assistance after cooperation
         1. Any leniency will come from judge; agreement sets no specific sentence/range.
      4. D. must allocute to all crimes, not just those gov’t knows about
         1. This info will be factored into sentence (prosecutor can deflect criticism of leniency off on the judge). This might put defendant in a hole, wherein a substantial downward departure only gets them back to zero—requires a tactical choice.
         2. no charges will be brought for heretofore disclosed crimes. Even though disclosing crimes will bump the range, it’s better than facing prosecution for these other crimes on their own, so it's best to put them in.
         3. Gov’t is allowed under 1b1.1 to calculate sentence considering only those crimes known to gov’t before allocution, but witnesses only get this deal if they don’t end up on the stand—prosecutors are too afraid of perception of conferring leniency themselves
      5. Waives statue of limitations for all crimes not time-barred as of the date of the agreement
      6. Waives right against self-incrimination (both rules and Constitutional), allows use of testimony against person if they breach agreement [includes all allocution!]
         1. No longer a status quo ante, it’s nuclear-option breach provisions
      7. Prosecutor has discretion to decide what counts as “substantial assistance.” Only thing that keeps them from abusing this is repeat-players and not wanting to burn sources.
   4. Plea agreement:
      1. Specifies agreed-upon sentence range, calculated under guidelines. (also acknowledges that guidelines are advisory and court might deviate with good cause)
7. Sentencing Accomplice Witnesses: U.S. Sentencing Commission, 2008 Sourcebook (excerpts: Tables N and 24-32C)
   1. Despite what the tables say, about 20% of cases are §5k1.1 cooperation cases; the stats are skewed by a huge volume of immigration cases
8. **Gleeson Notes & Summary:**
   1. Pleas should be recognized as economic exchanges that should be facilitated. They help reduce the load on the courts, and to the extent possible within fairness, they should be encouraged.
   2. There is also some value in rewarding the diminished culpability indicated by someone who cooperates, even above and beyond the value of someone who pleads guilty without cooperating.
   3. As an economic bargain, there are buyers and sellers (prosecutors and defendants) but there are other market participants.
      1. Judges, even though forbidden from directly taking part,can influence bargaining strength of the parties, can also essentially set the price because it’s the judges who impose sentences.
      2. Lawyers (particularly defense lawyers) have reputational concerns in plea negations, and may be unwilling to jeopardize this for a single client.
      3. Jurors have a role, because if they perceive CW deals as being to sweet or unfair, they are prone to nullify
      4. Codefendants affect strategy: the first cooperator is going to get a much better price than the last holdout (who may get no deal).
      5. Public isn’t directly involved, but elected/gov’t officials may need to respond to pressure
   4. Proffers solve information asymmetry in this market transaction: Prosecutor doesn’t know what to offer without knowing what’s at stake, and vice versa.
   5. One indicator that defendants have some iota of bargaining power is that the deals are not usually the worst they could be, they are one step better on our chart.
   6. Bottom line is that nearly everything can be waived, and with every case the court sends down, they add another waiver provision to the boilerplate
      1. Padilla fix says they can with withdraw motion (¶ 9)
      2. Other Padilla (right to be informed of consequences of guilty plea, like deportation) fix is there
      3. Cooperators have right to counsel, but that’s waived in the agreement

**Attorney Client Privilege**

**Corporate Clients**

1. **USA Manual, Ch. 9-28.000, Prosecution Of Business Organizations (Filip Memo)**
   1. A corporation may be held liable as long as one motivation of its agent is to benefit the corporation. See *US v. Potter* (1st Cir). The corp. need not even necessarily profit from its agent's actions for it to be held liable.
   2. The prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals, including:
      1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime
      2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management
         1. The role and conduct of management is the single most important factor.
      3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it
      4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents
      5. the existence and effectiveness of the corporation's pre-existing compliance program
      6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies
      7. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution
      8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
      9. 9. the adequacy of remedies such as civil or regulatory enforcement actions
   3. The Value of Cooperation:
      1. the corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. Cooperation is a potential mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution
      2. A corporation's offer of cooperation or cooperation itself does not automatically entitle it to immunity from prosecution or a favorable resolution of its case. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents.
   4. Waiving privilege:
      1. Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so
      2. Waiving the attorney-client and work product protections is not prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative.
      3. Prosecutors should not ask for such waivers and are directed not to do so.
   5. Obstructing the Investigation:
      1. Prosecutors must weigh whether the corporation has engaged in conduct intended to impede the investigation, such as making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records.
      2. Prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment.
   6. Corporate Compliance Programs
      1. The DOJ encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct.
      2. Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner
      3. The fundamental questions any prosecutor should ask are: Is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? Does the corporation's compliance program work? Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business.
   7. Restitution and Remediation
      1. Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so.
      2. Consider whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct
   8. Collateral Consequences
      1. prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it
   9. Other Civil or Regulatory Alternatives
      1. Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. Consider
         1. the sanctions available under the alternative means of disposition;
         2. the likelihood that an effective sanction will be imposed; and
         3. the effect of non-criminal disposition on federal law enforcement interests.
   10. Selecting Charges
       1. Once a prosecutor has decided to charge a corporation, the prosecutor at least presumptively should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's misconduct and that is likely to result in a sustainable conviction
   11. Plea Agreements with Corporations
       1. Prosecutors should generally seek a plea to the most serious, readily provable offense charged
       2. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.
2. ***US v. Stein*** (2d Cir. 2006)
   1. KPMG, under pressure from the USAO and in an effort to cooperate, refused to pay lawyers for partners who wouldn’t agree to speak to investigators
   2. Economic coercion to secure a waiver of the privilege against self-incrimination, where it is attributable to the government, violates the Fifth Amendment if the pressure is sufficient to deprive the accused of his free choice to admit, to deny, or to refuse to answer (*See Garrity*)
   3. Gov’t also unjustifiably interfered with defendants’ relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment
3. ***US v. Ruehle*** (9th Cir. 2009)
   1. During an internal investigation, company lawyers interviewed defendant. The lawyers disclosed statements made by defendant during those interviews to the government as part of its criminal investigation
      1. Lawyer is representing both Ruhle in the civil suit and the company in the internal investigation to head off the criminal investigation. This was a huge mistake on the part of both the company and the firm.
   2. The lawyer’s allegedly unprofessional conduct in counseling the company to disclose, without obtaining written consent from defendant, while troubling, provided no independent basis for suppression of the statements. Employees should get their *Upjohn* "corporate *Miranda* warning" but in this particular case, Ruhle doesn't get exclusion because he was the CFO, he knew that information was being shared. It's his privilege, he gets the burden of establishing the requisites, and he failed to do so.
4. ***SEC v. Bank of America*** (SDNY 2009)
   1. BOA is accused of material representation in proxy material, paying $5.8B in bonuses associated w/ Merril Lynch merger.
   2. J. Rakoff refused to grant a consent judgment wherein, “the parties were proposing that the management of Bank of America-having allegedly hidden from the Bank's shareholders that as much as $5.8 billion of their money would be given as bonuses to the executives of Merrill who had run that company nearly into bankruptcy-would now settle the legal consequences of their lying by paying the S.E.C. $33 million more of their shareholders' money.”

**Conflicts of Interest**

1. ***Wheat v. US*** (S. Ct. 1988)
   1. Drug conspiracy case, D waives right to conflict-free counsel and wants the same attorney as the other defendants. Judge refuses, D appeals conviction saying he was deprived of right to counsel of his choosing.
   2. UPHELD on appeal. 6th A requires a presumption that D’s can have counsel of their choice, but this presumption can be overcome by actual or potential conflicts. “*While the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers*.”
2. ***In re Grand Jury Subpeona*** (2d Cir 1986)
   1. Lawyer served with GJ subpoena *duces tecum* re. Colombo. The grand jury seeks to determine whether Colombo paid for, or otherwise arranged for, the legal representation of members of his crew. Evidence of such benefactor payments made to Slotnick might establish Colombo as the head of "an enterprise", as that term is defined in the Racketeer Influenced and Corrupt Organizations Act
   2. Colombo states this will inevitably lead to Slotnick’s disqualification as his attorney, and thus absent a showing that the goc’t cannot get this info any other way violates his 6A rights.
   3. HELD: Fee information is not privileged, and there is no constitutional basis for any heightened showing before the GJ issues a subpoena. Colombo is not yet indicted, so his 6A rights have not attached, and it is not inevitable that Slotnick will be disqualified—the prosecutor might not indict, Slotnick might not incriminate Colombo, etc.
3. ***US v. Goldberger & Dubin*** (2d Cir 1991)
   1. IRS summons attorney to appear and identify who paid them more than $10k in cash fees
   2. HELD: IRS Code, pursuant to which attorneys were required to provide IRS w/ names of clients who paid cash fees in excess of $10,000, does not violate 4th, 5th, or 6th.
      1. This reg does not deny them counsel of their choice, and if they don’t want to be disclosed, they can pay in some method other than cash.
4. ***US v. Colo. S. Ct.*** (10th cir 1999)
   1. CO. rule of professional conduct restricting prosecutors from subpoenaing an attorney to compel evidence about past/present client in criminal proceedings was enforceable against Fed. prosecutors.
5. ***US v. Kliti*** (2nd Cir 1998)
   1. Appeal of conviction on grounds of denial of effective assistance of counsel, b/c trial court failed to conduct *Curcio* hearings after it knew of two separate alleged conflicts involving his counsel.
   2. Holding/Reasoning: The fact that D’s counsel temporarily represented a potential witness at a bond hearing did not, in the circumstances, taint D’s representation. But, trial court’s failure to conduct a *Curcio* hearing, after learning that D’s counsel was a witness to a statement that tended to exculpate D, violated D’s 6th right to effective assistance of counsel.
      1. When the trial court knows or reasonably should know of the possibility of a conflict of interest, it has a threshold obligation to determine whether the attorney has an actual conflict, a potential conflict, or no conflict. If a district court ignores a possible conflict and does not conduct this initial inquiry, reversal of a defendant's conviction is automatic
6. ***US v. Locascio*** (2d Cir 1993)
   1. Gotti and Locascio appeal RICO convictions, on numerous grounds, including the disqualification of counsel for both D’s for conflicts of interest.
   2. Proper to disqualify both: Counsel’s loyalty to Gotti could be prejudicial to Locascio, and the other attorney was present during several recordings offered in evidence, so his presence in the courtroom was as an unsworn witness.

**The RICO Statutes**

1. **Notes:** All RICO cases require main justice approval; it’s such a powerful weapon they don’t want anyone screwing it up.
2. **18 USC 1959-1964**
   1. Sec. 1959: Violent Crimes in Aid of Racketeering Activity: lists the fines/terms of imprisonment for murder, kidnapping, maiming, assault, threats, attempt/conspiracy to murder/kidnap, or attempt/conspiracy to maim/assault.
   2. Sec. 1960: Prohibition of Unlicensed Money Transmitting Businesses: punishable by fines, imprisonment.
   3. Sec. 1961: Definitions: i.e., “racketeering activity.”
   4. Sec. 1962: Prohibited Activities: unlawful to use any money gained from racketeering or collection of unlawful debt in activities affecting interstate commerce.
   5. Sec. 1963: Criminal Penalties: fines, imprisonment, and forfeiture, for violations of 1962.
   6. Sec. 1964: Civil Remedies: DCs have jurisdiction to prevent/restrain violations of 1962 by appropriate orders.
3. ***US v. Turkette*** (S. Ct. 1981):
   1. In order to secure a RICO conviction, the P must prove an enterprise, and a pattern of racketeering activity.
   2. the “enterprise” in RICO cases can be a criminal enterprise, not just a legitimate one.
      1. NOTE: When passed, the statue was about protecting legitimate enterprise from infiltration by criminals. This case confirms the enterprise-as-perp, as opposed to the enterprise-as-victim scenario.
   3. NOTE: Prosecutors love this holding: Since the enterprise is an element that must be proven, otherwise unfairly prejudicial other bad acts now get admitted as relevant to prove the required element. You get to drag in all kinds of bad acts not necessarily proven (or provable).
4. ***H.J., Inc., v. Northwestern Bell Telephone Co.*** (S. Ct. 1989)
   1. Civil suit alleging NWB bribed Minn. Pub. Util Comm’n members.
   2. HOLDINGS:
      1. in order to prove a pattern of racketeering activity under RICO, plaintiff or prosecutor must show at least two racketeering predicates that are related and that amount to, or threaten the likelihood of, continued criminal activity
      2. although proof of multiple criminal schemes may be relevant to inquiry into continuity, it is not the only way to show continuity
      3. allegation an organized crime nexus is not required to establish a RICO pattern
   3. “relationship” and “continuity” are two separate elements, although they may overlap
   4. Patten requires more than just repeated incidents; it requires an “arrangement” or “ordered activity.” The predicate acts must amount to or constitute the threat of continued criminal activity.
5. ***Reves v. Ernst & Young*** (S. Ct. 1993)
   1. One must participate in the operation or mgmt of the enterprise itself in order to be subject to 1962 liability. Accountants hired to perform audit of co-op’s records did not “participate in operation of mgmt” of co-op’s affairs, and so not liable under RICO.
6. ***Salinas v. US*** (S. Ct. 1997)
   1. Salinas was proven to have been *not* a part of the predicate acts (by acquittal), and argues he can't then be convicted of the RICO violation. The S.Ct slaps this down, saying that you agreed to further the RICO acts, even if you're not the one who does the acts. It would imply that this makes it a crime just to be a mobster, in so far as once you swear the omerta, you've conspired to commit racketeering. The DOJ doesn't want to push this, so you'll never see this taken to its extremes. Thus, RICO might extend to people who don't commit the crimes, just associate themselves with the "enterprise"
7. ***Boyle v. United States*** (S. Ct.2009)
   1. Boyle says that an "enterprise" must have a structure, but you don't need to prove what that structure is. And, you don't need the jury to be informed to look for it--you don't want to lard up the already confusing jury instructions, but the element is still there.