



Federal Conspiracy Law: A Sketch

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Summary

Zacarias Moussaoui, members of the Colombian drug cartels, members of organized crime, and some of the former Enron executives have at least one thing in common: they all have federal conspiracy convictions. The essence of conspiracy is an agreement of two or more persons to engage in some form of prohibited misconduct. The crime is complete upon agreement, although some statutes require prosecutors to show that at least one of the conspirators has taken some concrete step or committed some overt act in furtherance of the scheme. There are dozens of federal conspiracy statutes. One, 18 U.S.C. 371, outlaws conspiracy to commit some other federal crime. The others outlaw conspiracy to engage in various specific forms of proscribed conduct. General Section 371 conspiracies are punishable by imprisonment for not more than five years; drug trafficking, terrorist, and racketeering conspiracies all carry the same penalties as their underlying substantive offenses, and thus are punished more severely than are Section 371 conspiracies. All are subject to fines of not more than \$250,000 (not more than \$500,000 for organizations), most may serve as the basis for a restitution order, and some for a forfeiture order.

The law makes several exceptions for conspiracy because of its unusual nature. Because many united in crime pose a greater danger than the isolated offender, conspirators may be punished for the conspiracy, any completed substantive offense which is the object of the plot, and any foreseeable other offenses which one of the conspirators commits in furtherance of the scheme. Since conspiracy is an omnipresent crime, it may be prosecuted wherever an overt act is committed in its furtherance. Because conspiracy is a continuing crime, its statute of limitations does not begin to run until the last overt act committed for its benefit. Since conspiracy is a separate crime, it may be prosecuted following conviction for the underlying substantive offense, without offending constitutional double jeopardy principles; because conspiracy is a continuing offense, it may be punished when it straddles enactment of the prohibiting statute, without offending constitutional ex post facto principles. Accused conspirators are likely to be tried together, and the statements of one may often be admitted in evidence against all.

In some respects, conspiracy is similar to attempt, to solicitation, and to aiding and abetting. Unlike aiding and abetting, however, it does not require commission of the underlying offense. Unlike attempt and solicitation, conspiracy does not merge with the substantive offense; a conspirator may be punished for both.

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This is an abridged version of a longer report, CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*, by Charles Doyle.

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Introduction

Terrorists, drug traffickers, mafia members, and corrupt corporate executives have one thing in common: most are conspirators subject to federal prosecution. Federal conspiracy laws rest on belief that criminal schemes are equally or more reprehensible than are the substantive offenses to which they are devoted. Congress and the courts have fashioned federal conspiracy law accordingly. The United States Code contains dozens of criminal conspiracy statutes. One, 18 U.S.C. 371, outlaws conspiracy to commit any other federal crime. The others outlaw conspiracy to commit some specific form of misconduct, ranging from civil rights violations to drug trafficking. Conspiracy is a separate offense under most of these statutes, regardless of whether conspiracy accomplishes its objective. The various conspiracy statutes, however, differ in several other respects. A few, including Section 371, require at least one conspirator to take some affirmative step in furtherance of the scheme. Most have no such overt act requirement. Section 371 has two prongs. One outlaws conspiracy to commit a federal offense; a second, conspiracy to defraud the United States. Conspiracy to commit a federal crime under Section 371 requires that the underlying misconduct be a federal crime. Conspiracy to defraud the United States under Section 371 and in several other instances has no such prerequisite. Section 371 conspiracies are punishable by imprisonment for not more than five years. Elsewhere, conspirators often face more severe penalties.

These differences aside, federal conspiracy statutes share much common ground because Congress decided they should. As the Supreme Court observed in *Salinas*, “When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition. [When] [t]he relevant statutory phrase is ‘to conspire,’ [w]e presume Congress intended to use the term in its conventional sense, and certain well-established principles follow.”

These principles include the fact that regardless of its statutory setting, every conspiracy has at least two elements: (1) an agreement (2) between two or more persons. Members of the conspiracy are also liable for the foreseeable crimes of their fellows committed in furtherance of the common plot. Moreover, statements by one conspirator are admissible evidence against all. Conspiracies are considered continuing offenses for purposes of the statute of limitations and venue. They are also considered separate offenses for purposes of sentencing and of challenges under the Constitution’s *ex post facto* and double jeopardy clauses. This is a brief discussion of the common features of federal conspiracy law that evolved over the years, with passing references to some of the distinctive features of some of the statutory provisions.

Two or More Persons

There are no one-man conspiracies. At common law where husband and wife were considered one, this meant that the two could not be guilty of conspiracy without the participation of some third person. This is no longer the case. In like manner at common law, corporations could not be charged with a crime. This too is no longer the case. A corporation is criminally liable for the crimes, including conspiracy, committed at least in part for its benefit, by its employees and agents. Moreover, a corporation may be criminally liable for intra-corporate conspiracies, as long as at least two of its officers, employees, or agents are parties to the plot. Notwithstanding the two party requirement, no co-conspirator need have been tried or even identified, as long as the government produces evidence from which the conspiracy might be inferred. Even the acquittal

of a co-conspirator is no defense. In fact, a person may conspire for the commission of a crime by a third person though he himself is legally incapable of committing the underlying offense.

Agreement

It is not enough, however, to show that the defendant agreed only with an undercover officer to commit the underlying offense, for there is no agreement on a common purpose in such cases. As has been said, the essence of conspiracy is an agreement, an agreement to commit some act condemned by law either as a separate federal offense or for purposes of the conspiracy statute. The agreement may be evidenced by word or action; that is, the government may prove the existence of the agreement either by direct evidence or by circumstantial evidence from which the agreement may be inferred.

One or Many Overlapping Conspiracies

The task of sifting agreement from mere association becomes more difficult and more important with the suggestion of overlapping conspiracies. Criminal enterprises may involve one or many conspiracies. Some time ago, the Supreme Court noted that “[t]hieves who dispose of their loot to a single receiver – a single ‘fence’ – do not by that fact alone become confederates: They may, but it takes more than knowledge that he is a ‘fence’ to make them such.” Whether it is a fence, or a drug dealer, or a money launderer, when several seemingly independent criminal groups share a common point of contact, the question becomes whether they present one overarching conspiracy or several separate conspiracies with a coincidental overlap. In the analogy suggested by the Court, when separate spokes meet at the common hub they can only function as a wheel if the spokes and hub are enclosed within a rim. When several criminal enterprises overlap, they are one overarching conspiracy or several overlapping conspiracies depending upon whether they share a single unifying purpose and understanding—one common agreement.

In determining whether they are faced with a single conspiracy or a rimless collection of overlapping schemes, the courts have said they will look for “the existence of a common purpose ... (2) interdependence of various elements of the overall play; and (3) overlap among the participants,” and that “interdependence is present if the activities of a defendant charged with conspiracy facilitated the endeavors of other alleged co-conspirators or facilitated the venture as a whole.” If this common agreement exists, it is of no consequence that a particular conspirator joined the plot after its inception, as long as he joined it knowingly and voluntarily. Nor does it matter that a defendant does not know all of the details of the scheme or all of its participants, or that his role is relatively minor.

Overt Acts

Conviction under 18 U.S.C. 371 for conspiracy to commit a substantive offense requires proof that one of the conspirators committed an overt act in furtherance of the conspiracy. In the case of prosecution under other federal conspiracy statutes that have no such requirement, the existence of an overt act may be important for evidentiary and procedural reasons. The overt act need not be the substantive crime which is the object of the conspiracy, an element of that offense, nor

even a crime in its own right. Moreover, a single overt act by any of the conspirators in furtherance of plot will suffice.

Conspiracy to Defraud the United States

Federal law contains several statutes that outlaw defrauding the United States. Two of the most commonly prosecuted are 18 U.S.C. 286, which outlaws conspiracy to defraud the United States through the submission of a false claim, and 18 U.S.C. 371, which in addition to conspiracies to violate federal law, outlaws conspiracies to defraud the United States of property or by obstructing the performance of its agencies. Section 371 has an overt act requirement; section 286 does not. The general principles of federal conspiracy law apply to both.

The elements of conspiracy to defraud the United States under 18 U.S.C. 371 are (1) an agreement of two or more persons; (2) to defraud the United States; and (3) an overt act in furtherance of the conspiracy committed by one of the conspirators. The “fraud covered by the statute reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of the Government” by “deceit, craft or trickery, or at least by means that are dishonest.” The plot must be directed against the United States or some federal entity; a scheme to defraud the recipient of federal funds is not sufficient. The scheme may be designed to deprive the United States of money or property, but it need not be so; a plot calculated to frustrate the functions of an entity of the United States will suffice.

In contrast, a second federal statute, 18 U.S.C. 286, condemns conspiracies to defraud the United States of money or property through submission of a false claim. The elements of a section 286 violation are that “the defendant entered into a conspiracy to obtain payment or allowance of a claim against a department or agency of the United States; (2) the claim was false, fictitious, or fraudulent; (3) the defendant knew or was deliberately ignorant of the claim’s falsity, fictitiousness, or fraudulence; (4) the defendant knew of the conspiracy and intended to join it; and (5) the defendant voluntarily participated in the conspiracy.” Conviction does not require proof of an overt act in furtherance of the conspiracy.

When Does It End

Conspiracy is a crime which begins with a scheme and may continue on until its objective is achieved or abandoned. The liability of individual conspirators continues on from the time they joined the plot until it ends or until they withdraw. The want of an individual’s continued active participation is no defense as long as the underlying conspiracy lives and he has not withdrawn. An individual who claims to have withdrawn bears the burden of establishing either that he took some action to make his departure clear to his co-conspirators or that he disclosed the scheme to the authorities. As a general rule, overt acts of concealment do not extend the life of the conspiracy beyond the date of the accomplishment of its main objectives. On the other hand, the rule does not apply when concealment is one of the main objectives of the conspiracy.

Sanctions

Section 371 felony conspiracies are punishable by imprisonment for not more than five years and a fine of not more than \$250,000 (not more than \$500,000 for organizations). Most drug

trafficking, terrorism, racketeering, and many white collar conspirators face the same penalties as those who committed the underlying substantive offense.

A conspirator's liability for restitution is a matter of circumstance. Most conspiracy statutes do not expressly provide for restitution, but in most instances restitution may be required or permitted under any number of grounds. As a general rule, federal law requires restitution for certain offenses and permits it for others. A sentencing court is generally required to order a defendant to make restitution following conviction for a crime of violence or for a crime against property (including fraud), 18 U.S.C. 366A(a), (c). Those entitled to restitution under Section 3663A include those "directly and proximately harmed" by the crime of conviction and "in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern," 18 U.S.C. 3663A(b).

Otherwise, a court is permitted to order restitution (a) following conviction for an offense prescribed under title 18 of the United States Code or for drug trafficking; (b) as a condition of probation or supervised release; or (c) pursuant to a plea agreement.

The treatment of forfeiture in conspiracy cases is perhaps even more individualistic than restitution in conspiracy cases. The general criminal forfeiture statute, 18 U.S.C. 982, authorizes confiscation for several classes of property as a consequence of a particular conspiracy conviction, for example, 18 U.S.C. 982(a)(2)(calling for the confiscation of proceeds realized from "a violation of, or a conspiracy to – (A) section ... 1341, 1343, 1344 of this title [relating to mail, wire and bank fraud], affecting a financial institution"); 18 U.S.C. 982(a)(8)(calling for the confiscation of proceeds from, and property used to facilitate or promote, "an offense under section ... 1341, or 1343, or of a conspiracy to commit such an offense, if the offense involves telemarketing"). In the case of drug trafficking, forfeiture turns on the fact that it is authorized for any Controlled Substance Act violation, 21 U.S.C. 853, of which conspiracy is one, 21 U.S.C. 846. The same can be said of racketeering conspiracy provisions of 18 U.S.C. 1962(d).

Relation of Conspiracy to Other Crimes

Conspiracy is a completed crime upon agreement, or upon agreement and the commission of an overt act under statutes with an overt act requirement. Conviction does not require commission of the crime that is the object of the conspiracy. On the other hand, conspirators may be prosecuted for conspiracy, for any completed offense which is the object of the conspiracy, as well as for any foreseeable offense committed in furtherance of the conspiracy.

Anyone who "aids, abets, counsels, commands, induces, or procures" the commission of a federal crime by another is punishable as a principal, that is, as though he had committed the offense himself, 18 U.S.C. 2. If the other agrees and an overt act is committed, they are conspirators, each liable for conspiracy and any criminal act committed to accomplish it. If the other commits the offense, they are equally punishable for the basic offense. "Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction." The two are clearly distinct, however, as the Ninth Circuit has noted:

The difference between the classic common law elements of aiding and abetting and a criminal conspiracy underscores this material distinction, although at first blush the two appear similar. Aiding and abetting the commission of a specific crime, we have held,

includes four elements: (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent to commit the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that the principal committed the underlying offense. As *Lopez* emphasized, the accused generally must associate] himself with the venture ... participate[] in it as something he wish[es] to bring about, and [sought by] his action to make it succeed.

By contrast, a classic criminal conspiracy as charged in 18 U.S.C. § 371 is broader. The government need only prove (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime. Indeed, a drug conspiracy does not even require commission of an overt act in furtherance of the conspiracy.

Two distinctions become readily apparent after a more careful comparison. First, the substantive offense which may be the object in a § 371 conspiracy need not be completed. Second, the emphasis in a § 371 conspiracy is on whether one or more overt acts was undertaken. This language necessarily is couched in passive voice for it matters only that a co-conspirator commit the overt act, not necessarily that the accused herself does so. In an aiding and abetting case, not only must the underlying *substantive offense* actually be completed by someone, but the accused must take some action, a *substantial step*, toward associating herself with the criminal venture. *United States v. Hernandez-Orellana*, 539 F.3d 994, 1006-1007 (9th Cir. 2008)(emphasis in the original)(here and hereafter internal quotation marks and citations are omitted unless otherwise indicated).

Conspiracy and attempt are both inchoate offenses, unfinished crimes in a sense. They are forms of introductory misconduct that the law condemns lest they result in some completed form of misconduct. Federal law has no general attempt statute. Congress, however, has outlawed attempt to commit a number of specific federal offenses. Like conspiracy, a conviction for attempt does not require the commission of the underlying offense. Both require an intent to commit the contemplated substantive offense. Like conspiracy, the fact that it may be impossible to commit the target offense is no defense to a charge of attempt to commit it. Unlike conspiracy, attempt can be committed by a single individual. Attempt only becomes a crime when it closely approaches a substantive offense. Conspiracy becomes a crime far sooner. Mere acts of preparation will satisfy the most demanding conspiracy statute, not so with attempt. Conspiracy requires no more than an overt act in furtherance; attempt, a substantial step to completion. Attempt stands closer to its underlying offense than need conspiracy. Moreover, unlike conspiracy, an accused may not be convicted of both attempt and the underlying substantive offense.

An individual may be guilty of both conspiring with others to commit an offense and of attempting to commit the same offense, either himself or through his confederates. In some circumstances, he may be guilty of attempted conspiracy. Congress has outlawed at least one example of an attempt to conspire in the statute which prohibits certain invitations to conspire, that is, solicitation to commit a federal crime of violence, 18 U.S.C. 373.

Section 373 prohibits efforts to induce another to commit a crime of violence “under circumstances strongly corroborative” of intent to see the crime committed. Section 373’s crimes of violence are federal “felon[ies] that [have] as an element the use, attempted use, or threatened use of physical force against property or against the person of another.” As is the case of attempt, solicitation and the substantive crime which is its object merge upon commission of the substantive offense; a defendant cannot be guilty of both. Although the crime of solicitation is

complete upon communication with the requisite intent, renunciation prior to commission of the substantive offense is a defense. The offender's legal incapacity to commit the solicited offense himself, however, is not a defense.

Procedural Attributes

Statute of Limitations

The statute of limitations for most federal crimes is five years, 18 U.S.C. 3282. The five-year limitation applies to the general conspiracy statute, 18 U.S.C. 371, and to the false claims conspiracy statute, 18 U.S.C. 286. Section 371 requires proof of an overt act; section 286 does not. For conspiracy offenses with an overt act requirement like those under Section 371, the statute of limitations begins with completion of the last overt act in furtherance of the conspiracy. For conspiracy offenses with no such requirement like those under section 286, the statute of limitations begins with the abandonment of the conspiracy or the accomplishment of its objectives.

Venue

The presence or absence of an overt act requirement makes a difference for statute of limitations purposes. For venue purposes, it apparently does not. The Supreme Court has observed in passing that "this Court has long held that venue is proper in any district in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense." The lower federal appellate courts are seemingly of the same view, for they have found venue proper for a conspiracy prosecution wherever an overt act occurs—under overt act statutes and non-overt act statutes alike.

Joinder and Severance (One Conspiracy, One Trial)

Three rules of the Federal Rules of Criminal Procedure govern joinder and severance for federal criminal trials. Rule 8 permits the joinder of common criminal charges and defendants. Rule 12 insists that a motion for severance be filed prior to trial. Rule 14 authorizes the court to grant severance for separate trials as a remedy for prejudicial joinder.

The Supreme Court has pointed out that "[t]here is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials play a vital role in the criminal justice system. They promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." In conspiracy cases, a "conspiracy charge combined with substantive counts arising out of that conspiracy is a proper basis for joinder under Rule 8(b)." Moreover, "the preference in a conspiracy trial is that persons charged together should be tried together." In fact, "it will be the rare case, if ever, where a district court should sever the trial of alleged co-conspirators." The Supreme Court has reminded the lower courts that "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." The Court noted that the risk may be more substantial in complex cases with multiple defendants, but that "less drastic measures, such as

limiting instructions, often will suffice to cure any risk of prejudice.” Subsequently lower federal appellate court opinions have emphasized the curative effect of appropriate jury instructions.

Double Jeopardy and Ex Post Facto

Because conspiracy is a continuing offense, it stands as an exception to the usual ex post facto principles. Because it is a separate crime, it also stands as an exception to the usual double jeopardy principles. The ex post facto clauses of the Constitution forbid the application of criminal laws which punish conduct that was innocent when it was committed or punishes more severely criminal conduct than when it was committed. Increasing the penalty for an ongoing conspiracy, however, does not offend ex post facto constraints as long as the conspiracy straddles the date of the legislative penalty enhancement.

The double jeopardy clause of the Fifth Amendment declares that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” This prohibition condemns successive prosecutions, successive punishments, and successive use of charges rejected in acquittal.

For successive prosecution or punishment, the critical factor is the presence or absence of the same offense. Offenses may overlap, but they are not the same crime as long as each requires proof of an element that the other does not. Since conspiracy and its attendant substantive offense are ordinarily separate crimes—one alone requiring agreement and the other alone requiring completion of the substantive offense—the double jeopardy clause poses no impediment to successive prosecution or to successive punishment of the two.

Double jeopardy issues arise most often in a conspiracy context when a case presents the question of whether the activities of the accused conspirators constitute a single conspiracy or several overlapping conspiracies. Multiple conspiracies may be prosecuted sequentially and punished with multiple sanctions; single conspiracies must be tried and punished once. Asked to determine whether they are faced with one or more than one conspiracy, the courts have said they inquire whether: [1] the *locus criminis* [place] of the two alleged conspiracies is the same; [2] there is a significant degree of *temporal overlap* between the two conspiracies charged; [3] there is an overlap of personnel between the two conspiracies (including unindicted as well as indicted co-conspirators); [4] the over acts charged [are related]; [5] the *role played* by the defendant [relates to both]; [6] there was a common goal among the conspirators; [7] the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators; and [8] the participants overlap[ped] in [their] various dealings.

Co-conspirator Declarations

At trial, the law favors the testimony of live witnesses—under oath, subject to cross examination, and in the presence of the accused and the jury—over the presentation of their evidence in writing or through the mouths of others. The hearsay rule is a product of this preference. Exceptions and definitions narrow the rule’s reach. For example, hearsay is usually defined to include only those out-of-court statements which are offered in evidence “to prove the truth of the matter asserted.”

Although often referred to as the exception for co-conspirator declarations, the Federal Rules of Evidence treats the matter within its definition of hearsay. Thus, Rule 801(d)(2)(E) of the Federal Rules provides that an out-of-court “statement is not hearsay if ... (2) The statement is offered

against a party and is ... (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.”

To admit a co-conspirator declaration into evidence under the Rule, a “court must find: (1) the conspiracy existed; (2) the defendant was a member of the conspiracy; and (3) the co-conspirator made the proffered statements in furtherance of the conspiracy.” The court, however, may receive the statement preliminarily subject to the prosecution’s subsequent demonstration of its admissibility by a preponderance of the evidence. As to the first two elements, a co-conspirator’s statement without more is insufficient; there must be “some extrinsic evidence sufficient to delineate the conspiracy and corroborate the declarant’s and the defendant’s roles in it.” As to the third element, “[a] statement is in furtherance of a conspiracy if it is intended to promote the objectives of the conspiracy.” A statement is in furtherance, for instance, if it describes for the benefit of a co-conspirator the status of the scheme, its participants, or its methods. “Bragging,” “mere idle chatter” or “casual conversation about past events,” however, are not considered statements in furtherance of a conspiracy.

Under some circumstances, evidence admissible under the hearsay rule may nevertheless be inadmissible because of Sixth Amendment restrictions. The Sixth Amendment provides, among other things, that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” The provision was inspired in part by reactions to the trial of Sir Walter Raleigh, who argued in vain that he should be allowed to confront the alleged co-conspirator who had accused him of treason. Given its broadest possible construction, the confrontation clause would eliminate any hearsay exceptions or limitations. The Supreme Court in *Crawford v. Washington* explained, however, that the clause has a more precise reach. The clause uses the word “witnesses” to bring within its scope only those who testify or whose accusations are made in a testimonial context. In a testimonial context, the confrontation clause permits use at trial of prior testimonial accusations only if the witness is unavailable and only if the accused had the opportunity to cross examine him when the testimony was taken. The Court elected to “leave for another day any effort to spell out a comprehensive definition of ‘testimonial,’” but has suggested that the term includes “affidavits, depositions, prior testimony, or confessions [,and other] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

Since *Crawford*, the lower federal courts have generally held that the confrontation clause poses no obstacle to the admissibility of the co-conspirator statements at issue in the cases before them, either because the statements were not testimonial; were not offered to establish the truth of the asserted statement; or because the clause does not bar co-conspirator declarations generally.

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