Anti-Money Laundering Laws & Cases in the United States

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Introduction – Corruption

Recently in our country we experienced a tragedy when a large bridge – packed with cars during rush-hour traffic – collapsed without warning into the Mississippi River.[1] Scores of people were killed and injured. It was a clear day – no bad weather. While it is too early to know for sure, the collapse could have been caused by a design flaw or perhaps a more insidious slow deterioration over time. Day after day, iron rusts and the concrete crumbles. Nothing dramatic – just a rotting away at the core. And then suddenly – without any advance warning – a catastrophic collapse.

I bring up this example because rust acts much like corruption of government officials. When government officials are corrupt – when they take bribes, launder money, and dispense favors – they deteriorate their nation from within. There is something rotten at the core. And suddenly – without any advance warning – that deterioration may cause a complete collapse.

The extent of the problem – the extent of the rust, if you will – cannot be overstated. World Bank officials estimate that public officials worldwide receive more than $1 trillion in bribes each year.[2] An article in Foreign Affairs last year eloquently described the devastating effects of corruption:

> *"The true impact of corruption is now widely acknowledged: corruption distorts markets and competition, breeds cynicism among citizens, undermines the rule of law, damages government legitimacy, and corrodes the integrity of the private sector"* [3]

บทนำ-คอร์รัปชัน

เมื่อไม่นานมานี้ในประเทศสหรัฐอเมริกาได้เกิดโศกนาฏกรรมขึ้นเมื่อสะพานอันกว้างใหญ่ซึ่งหนาแน่นไปด้วยรถยนต์ในช่วงเวลาเร่งด่วนได้ถล่มลงในแม่น้ำมิซซิสซิบปี้โดยปราศจากการเตือนภัย ประชาชนจำนวนมากต้องเสียชีวิตและได้รับบาดเจ็บ มันเป็นวันที่สดใสและไม่มีอากาศเลวร้ายใดๆ

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[1] (Levy, P. (2007, August 2). Interstate 35W Bridge Collapsed. Minneapolis Star Tribune p. A1. Web site: http://www.startribune.com/462/story/1338294.html)

[2] (Heineman, B.W & Heimann, F. (2006). The Long War Against Corruption. Foreign Affairs, 85, 115. Retrieved August 8, 2007 from WestLaw database (2006 WLNR 8849584).)

[3] Id.

ในขณะที่ยังคงเร็วเกินไปที่จะรู้ถึงสาเหตุอย่างชัดเจนว่าการถล่มครั้งนี้น่าจะมาจากการออกแบบที่บกพร่อง หรือบางทีอาจมาจากการเสื่อมอายุของวัสดุก่อสร้าง ไม่ว่าจะเป็นสนิมเหล็กหรือการแตกร้าวของคอนกรีตที่เกิดขึ้นวันแล้ววันเล่าอย่างช้าๆ ตามกาลเวลา จึงไม่มีอะไรที่น่าแปลกใจ เพียงแค่แกนกลางหมดสภาพไป และในทันใดนั้น ภัยพิบัติจากสะพานถล่มจึงเกิดขึ้นโดยปราศจากการเตือนล่วงหน้าใดๆ ทั้งสิ้น

ผู้เขียนยกตัวอย่างนี้ขึ้นเพราะการกัดกร่อนของสนิมเหล็กก็เช่นเดียวกันกับการทุจริตหรือฉ้อราษฎรบังหลวงของเจ้าหน้าที่ของรัฐ เมื่อเจ้าหน้าที่ทุจริต รับสินบน ฟอกเงินและเอื้อประโยชน์แก่พวกของเขาก็เท่ากับได้ทำลายภายในชาติของตนเอง ดังนั้น เมื่อแกนกลางถูกกัดกร่อนทำลายจนหมดสภาพไปดังกล่าว ก็อาจเป็นสาเหตุให้ชาติล่มสลายอย่างสมบูรณ์โดยไม่ทันได้เตือนภัยล่วงหน้าแต่ประการใด

อย่างไรก็ตาม ขนาดของปัญหา หรืออีกนัยหนึ่ง คือ วงกว้างของสนิมที่กัดกร่อน มิใช่เรื่องที่พูดเกินความเป็นจริง เจ้าหน้าที่ของธนาคารโลกได้ประเมินไว้ว่า เจ้าหน้าที่ของรัฐทั่วโลกได้รับเงินสินบนในแต่ละปีมากกว่าหนึ่งล้านล้านเหรียญสหรัฐ บทความในวารสารกิจการต่างประเทศ (Foreign Affairs) เมื่อปีที่แล้ว ได้อธิบายถึงผลของความหายนะจากการทุจริตไว้อย่างน่าฟังว่า :

“ผลกระทบที่แท้จริงของการทุจริตในปัจจุบันเป็นที่ยอมรับกันอย่างกว้างขวางว่าการทุจริตนั้นได้เบี่ยงเบนธุรกิจการตลาดและการแข่งขัน การแพร่ขยายพฤติกรรมความเห็นแก่ตัวและการเยาะเย้ยถากถางของประชากรในชาติด้วยกัน มีการบ่อนทำลายหลักนิติธรรมและสร้างความเสียหายต่อความชอบธรรมของรัฐบาล รวมทั้งได้กัดกร่อนทำลายคุณธรรมของภาคเอกชนไปพร้อมๆ กันด้วย”

1. Money Laundering– Overview

Corruption has an unholy companion. While it may take many forms, it is virtually always accompanied by the need to hide money. In some instances, it is the need of the bribed government official to hide the proceeds of his or her corruption. More often, it is the need to hide money which engenders the need to bribe government officials. Perhaps it is a criminal enterprise trying to hide money it received illegally. Or, it is the terrorist organization trying to move and hide funds so as to support its terrorist activities.

But regardless, money laundering – and its companion bribery – strikes at the very heart of our institutions and our governments. The power of hundreds of billions of dollars generated by crimes, particularly narcotic trafficking strikes at the very core of our freedoms. Estimates of money laundering activity worldwide range from $500 billion to $1 trillion, annually.[4] It has been described as the world’s third largest industry.[5] The ability to move monies secretly through financial institutions allows terrorists to create the infrastructure to support and carry out direct attacks upon our citizens. No country is immune and no government is immunized from these crimes. The power of

[4] *Global Programme Against Money Laundering. Retrieved August 9, 2007, from United Nations Office on Drugs and Crime Web site: http://www.unodc.org/unodc/money_laundering.html.*

[5] *Robinson, J (1997). The Laundrymen: Inside Money Laundering, The World’s Third Largest Business. New York: Arcade Publishing.*

money can be turned on legitimate democratic governments, destabilize large governments and overthrow small governments. Criminals and terrorists with vast amounts of monies subvert the democratic process by giving themselves a larger influence in government through the use of either force or corruption. These crimes and terrorist activities displace legitimate economies, industries and businesses. Criminals funnel illegal monies obtained from criminal activities into other businesses to allow them to operate at lower profit margins or at a loss. This forces legitimate businesses and industries into bankruptcy and out of business.

Money laundering is both the vehicle for and the result of crime. Hiding money always conceals something much worse than a simple lust for money. Any crime that involves money will always involve money laundering. Historically, these crimes involving money include piracy, kidnapping, murder, bootlegging, prostitution, gambling, espionage and extortion. But the rise of narcotics trafficking caused such a tsunami of money that it threatened the stability of governments and world financial markets. The movement of assets between countries and through the international banking community was initially an excellent way for criminals to avoid detection by local law enforcement authorities. Borders were seen as opportunities by criminals. Even within the United States, for example, different internal borders were seen by narcotics trafficking cartels and other criminal organizations as insulating them from detection by law enforcement agencies. Internationally, the movement of drugs or monies was seen by these criminals to cause even greater confusion because of the lack of cooperation between nations.

It is the recognition of the profound impact which money laundering and corruption has upon our legal, economic, and social systems, which has led so many nations of the world to recognize the need to declare war on these malignancies. Today, my hope is to talk about the efforts of the United States in this fight against money laundering and corruption. I want to briefly summarize the laws enacted by the U.S. Congress, discuss some specific cases which have been brought under those statutes, and then end with a general discussion of the challenges which law enforcement and an independent judiciary face in enforcing those laws.

2. Money Laundering Laws in the United States

2.1 The Bank Secrecy Act

Money laundering laws in the United States start with the Bank Secrecy Act of 1970.[6] The Bank Secrecy Act is premised on the truism that transparency is an enemy of money laundering or corruption.[7] Bribes cannot take place and money cannot be laundered in the blinding light of public exposure or the slightly less bright light of required disclosure. The theory of the BSA is that throwing light on the money trail will deter most – and punish the rest.

The BSA was enacted in response to large amounts of currency coming into the country. Its initial provisions required that certain financial transactions involving cash be reported to the U.S. Internal Revenue Service. The Bank Secrecy Act (BSA) requires individual identification by way of filing a currency transaction report (CTR) for any person who withdraws or deposits $10,000 or more in cash or purchases a monetary instrument

[6] *Bank Secrecy Act, 12 U.S.C. 1951-59; 31 U.S.C. 5311-22.*

[7] *Levey, S.A. (2004). The U.S. Treasury Department's Role in the International War Against Terrorist Financing and Financial Crime. Electronic Banking Law and Commerce Report, 9, 12.*

for $3,000 or more and makes it a crime to fail to file, to file a false CTR or to cause a financial institution to fail to file a CTR.

The BSA was not a true money laundering statute but it did address the mechanics of a money laundering scheme by imposing criminal penalties for the movement of funds offshore, concealing the placement of the funds in financial institutions, and the unreported holding of foreign bank accounts.

Banks challenged the BSA requirements on the grounds that they violated their customers' rights under the Fourth Amendment of the U.S. Constitution to be free from unreasonable searches and seizures and under the Fifth Amendment to be free from compelled self incrimination. In 1974, in California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974), the United States Supreme Court held BSA requirements constitutional. In another case, United States v. Miller, 425 U.S. 435 (1976), the Supreme Court ruled "that bank customers possess no privacy interests protected by the fourth amendment in records of their affairs maintained by the bank with which they deal."

However, reporting statutes like the BSA are of limited utility. They inevitably lead to a massive chess game between the regulators and the money launderers, in which the creativity of the criminal mind and the complexity of money markets is pitted against regulator's effort to stay ahead of the game. For example, money launderers responded to the BSA by began a process of "structuring" or "smurfing" wherein a cell head in a United States city would employ an army of runners or "smurfs" who would run from bank to bank making deposits or purchasing monetary instruments in amounts just under $10,000 to avoid the BSA reporting requirements.[8] Also, most banks simply ignored the BSA rules.

The requirement of the Bank Secrecy Act requiring banks to report currency transactions of over $10,000, proved to be largely ineffective.[9] This led to the passage of amendments in 1992 – the Annunzio-Wylie Money Laundering Act – requiring banks to file Suspicious Activity Reports (SAR) for any "suspicious transaction."[10] The bank must file a SAR if it knows, or has reason to know, that a transaction involved funds derived from illegal activity including transaction designed to avoid reporting laws.[11]

The Act shifts to the banking community the responsibility of determining which transactions should be reported. "Red flags" that Banks must be aware of include high risk geographic locations, notorious or politically connected customers, inherently suspicious transactions or business lines, and transactions which are unusual for that customer.[12]

The bank cannot notify the subject of the report that a SAR has been filed, and the bank has immunity for filing a SAR in good faith. A bank that fails to comply can be held criminally liable.

2.2 The Money Laundering Control Act of 1986 (MLCA)

Money laundering became a crime unto itself with the Money Laundering Control Act of 1986 (MLCA).[13] This was the first U.S. legislation

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[8] *Welling, S.N. (1989). Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions. Florida Law Review, 41, 287-339 (1989).*

[9] *Welling, supra at note 13, p. 295.*

[10] *Annunzio-Wylie Anti-Money Laundering Act, 12 U.S.C. 1772d, 1831m-1; 18 U.S.C. 474A, 984, 986, and 1960; 31 U.S.C. 5327, 5328.*

[11] *See 31 U.S.C 5318(g)(1); 12 C.F.R 21.11(a).*

[12] *Fagyal, P. (2006), The Anti-Money Laundering Provisions of the Patriot Act, St. Louis University Law Journal, 50, 1361-1395.*

[13] *18 U.S.C. 1956, 1957. (p.7)*

to actually describe money laundering, define it, and prohibit it as a crime.[14] It was hailed as "the most sweeping legislation to date in combating money laundering." The MLCA imposed severe penalties for the conduct of financial transactions designed to launder dirty money.

The two key requirements of the act are the existence of (1) "financial transactions" involving (2) "specified unlawful activities" (SUA). To be a separate money laundering crime, the conduct in question must satisfy both of these elements.

Transactions involving the proceeds of the SUAs were made criminal offenses in and of themselves. The most lucrative of SUAs is narcotics trafficking and is covered by title 18 U.S.C. 1956 and 1957. But these statutes have been used against arms dealers, corrupt public officials, robbers, timber thieves, and extortionists.

The MLCA is divided into two code sections, 18 U.S.C. 1956 and 18 U.S.C. 1957. The more widely used section is 1956, which includes three subdivisions addressing: (1) domestic money laundering and participation in transactions involving criminal proceeds, (2) international money laundering of criminally derived monetary instruments, and (3) the use of government sting operations.[15] The money laundering provisions of 1956 are commonly known as "transaction money laundering," because the prohibited act is the financial transaction itself.[16] The prohibited financial transactions include: (1) transactions conducted with the intent to promote specified unlawful activities, (2) transactions designed to conceal the nature, source, or ownership of proceeds of specified unlawful activities, and (3) transactions designed to evade reporting requirements.[17]

The less frequently used section is 18 U.S.C. 1957, which is simpler, but has a more limited application. Section 1957 contains an offense entitled "engaging in monetary transactions in property derived from specified unlawful activity." In essence, 1957 attempts to punish those individuals or entities who knowingly deal with those engaged in unlawful activity.[18] In contrast to 1956, it does not require that the funds be used for any additional criminal purpose nor that the defendant engaged in the transaction with any specific intent. Thus, it has the potential to criminalize seemingly "innocent" acts or commercial transactions. In enacting 1957, Congress intended to dissuade people from engaging in even ordinary commercial transactions with people suspected to be involved in criminal activity.[19]

2.3 Civil and Criminal Forfeiture

But coupled with these criminal statutes are the Congressional forfeiture statutes, enacted in 1986 and amended in 1988. The civil forfeiture statute is 18 U.S.C. 981, and the criminal forfeiture statute is 18 U.S.C. 982. The guiding principle behind forfeiture is not to allow the criminal to keep the riches of his criminal activity.

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[14] *Adams, T.E.. (2000). Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, And What Are The Courts Doing?. Georgia State University Law Review, 17, 531-573.*

[15] *Mann, T.T. (2007). Money Laundering. American Criminal Law Review, 44, 769-792.*

[16] *Id. at 773.*

[17] *Id.*

[18] *Id. at 774.*

[19] *Madinger, J. & Zalopany, S.A. (1999). Money Laundering; Ratliff, R. (1996), Third-Party Money Laundering. Stanford Law and Policy Review, 7, 173-183.*

Civil Forfeiture	Criminal Forfeiture
18 U.S.C. 981	18 U.S.C 982
action against the property itself	action against the defendant as a person
claimant must prove case by preponderance of the evidence	government must prove case beyond a reasonable doubt
property must be involved in or traceable to the offense	government can substitute legitimate assets if tained assets are unavailable

Civil forfeiture is against the property itself rather than against the criminal. The government may seize property based upon probable cause that the property is subject to forfeiture. The property owner or other interested party (called a "claimant") may contest the forfeiture by establishing that the property is not subject to forfeiture. The claimant must prove his or her case by a preponderance of the evidence.

Under the civil forfeiture provisions of 981, any property involved in a transaction or attempted transaction in violation of 1956 or 1957 or any property traceable to such property is subject to forfeiture. Under this civil forfeiture section, all property involved in a money laundering offense, as well as violations of the Bank Secrecy Act, involving currency reporting, would be subject to forfeiture. An example of the breadth of civil forfeiture is the crime of violating reporting requirements. Money not reported is "involved" and can be forfeited. Monies seized by customs agents at airports and harbors from defendants attempting to transport it out of the country without filing the appropriate forms leads to seizure and forfeiture.

Some advantages to using civil forfeiture proceedings and 18 U.S.C. 981 instead of criminal forfeiture are:

(1) A concurrent criminal cas is not necessary. This is useful if the money launderer is dead, missing, or a fugitive.

(2) The ability to reach property "involved" in money laundering generally, but where specific financial transactions cannot be identified.

(3) The ability to reach property held in the name of a nominee who you can prove was involved in money laundering activity, but where the evidence is insufficient to satisfy the heightened evidentiary standard necessary to obtain a criminal conviction.

Criminal forfeiture, by contrast, is an action against the individual. The government can forfeit all property of a convicted defendant that either facilitated the crime or constitutes the proceeds of the crime. But significantly, unlike civil forfeiture, criminal forfeiture permits the government to forfeit "substitute assets," i.e., legitimate assets, if the tainted assets cannot be reached.[20]

Criminal forfeiture under 18 U.S.C. 982 requires that the government prove its case beyond a reasonable doubt. In other words, the evidence must be sufficient to convict the criminal defendant. This is a significant evidentiary challenge compared to civil forfeiture proceedings,

[20] *21 U.S.C. 853(p).*

where the government must prove his case by a preponderance of the evidence to obtain seized property.

In a criminal forfeiture case, the property is first indicted just as the criminal defendant is. The property is described in a separate forfeiture count in the same indictment that charges the defendant. At the time the property is indicted, it may already be in the government's possession, but often the government must go out and restrain or arrest the property. To gain control in criminal forfeiture proceedings, temporary restraining orders and seizure warrants are used.

Remember that criminal forfeiture proceeding have a significant advantage over civil forfeiture because it allows for substitution of assets. As an example, if $100,000 of tainted funds were still in the bank, the government would obtain a seizure warrant and probably proceed with a civil forfeiture. But if the money cannot be located, then the government would proceed with a criminal forfeiture because once they have an order forfeiting $100,000, they can forfeit substitute assets.[21] Also, substitute asset provisions now allow for forfeiture from a defendant who acts as an intermediary for the money launderer if he conducted three or more separate transactions totaling $100,000 or more in any twelve-month period.

In any plea agreement, the forfeiture count is usually involved and the issue is how much or little of these assets will be forfeited.

2.4 Patriot Act

The Patriot Act was a source of substantial expansion of these laws. It targets the financing of terrorists. Terrorist financing has been described as a form of reverse money laundering, where funds originating from legitimate sources, criminal sources, or both, are covertly transferred to individuals to finance terrorist operations.[22] The Patriot Act expands the scope of money laundering laws to cover a broader range of financial institutions than prior laws.

It also requires financial institutions to implement programs designed to deter and detect instances of money laundering. It expands the list of predicate offenses that give rise to a money laundering charge, including corruption, and it expands the reach of laws to cover more off-shore conduct to combat global terrorism.

One expansion of the Patriot Act was to fill gaps in the Money Laundering Control Act. The Money Laundering Control Act of 1986, creates liability for any individual who conducts a monetary transaction knowing that the funds were derived through specified unlawful activity. One such "specified unlawful activity" is the bribing of a foreign official. The Act was amended in 1992 to include a felony violation of the Foreign Corrupt Practices Act (FCPA) as a predicate offense for the purpose of a money laundering prosecution. See 18 U.S.C. 1956(c)(7)(D).

However, the FCPA does not reach bribes that merely violate foreign laws (and not U.S. laws). The Patriot Act filled that gap by amending 1956(c) of the Money Laundering Control Act to add a predicate offense of bribery that would violate the laws of a foreign nation. Now bribing a foreign official is a crime if it violates the FCPA or if it falls under the Money Laundering Control Act.

These statutes recognize the close link between bribery and the bribe recipient's need to launder the illegal funds paid, and provided law enforcement with an additional enforcement tools.

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[21] *U.S.C. 853(p).*

[22] *Cassella, S.D. (2004). International Money Laundering: From Latin America to Asia, Who Pays? Berkeley J. Int'l L., 22, 116-122.*

2.5 Indirect Ways of Combating Money Laundering

2.5.1 Racketeering Influenced and Corrupt Organizations Act (RICO)

In 1970 the United States Congress passed the Racketeering Influence and Corrupt Organizations Act (RICO).[23] Its primary purpose was to permit prosecution of organized crime leaders,[24] but it has been used in a much broader fashion, including to prosecute and stop the laundering of drug trafficking profits through domestic American businesses. Traffickers pass narcotics monies through businesses and utilize these cash flows as business profits. The narcotics traffickers even pay taxes on these narcotics monies disguised as business profits. As a result of this laundering, the trafficker is then free to spend money openly in our society. Often, suspicions on the part of law enforcement and the internal revenue service are aroused when purchases of luxury items such as boats, planes, and expensive cars are purchased with no identifiable source of income. The trafficker hopes to avoid prosecution by disguising the monies used for these purchases as legitimate profits. RICO laws, which permit prosecution where an individual commits two predicate crimes – including money laundering – over a 10 year period.[25] If convicted, the defendant faces enhanced prison sentences, and must forfeit any ill-gotten gains as well as any business enterprise used as part of the racketeering activity.[26]

2.5.2 Prosecution for Tax Evasion under the Internal Revenue Code

The Internal Revenue Service (IRS) has prosecuted narcotic traffickers for non-declaration of income. The IRS has a long tradition of prosecuting famous criminals like Al Capone for income tax evasion. The dilemma for the criminal is that if they declare the source of their illegal monies, they will be prosecuted for that illegal activity, i.e., narcotics trafficking, piracy, illegal gambling, prostitution, etc. But if they do not declare these illegal monies, then they are subject to prosecution for income tax evasion. Illegal money is of no value to a criminal unless he can enjoy it. While cash supposedly leaves no trail, sooner or later these illegal monies must show up as income. The sums of monies, especially from successful criminal activities is so large that the IRS eventually finds it.

Only so much cash can be transferred and eventually transfers of large sums move through financial institutions. Once a criminal is identified, the lack of a money trail can also be used as proof of his illegal money laundering. Large financial holdings without a legitimate source of income can be convincing evidence. Movement between one transaction system and another is the key to all money laundering schemes. The movement of money from a cash transaction scheme to a business transaction system is where the money launderer is always the most vulnerable. Remember the objective is to have access to “clean” appearing money at the end of the process.

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[23] *18 U.S.C. 1961-1968.*

[24] *According to the “Statement of Finding and Purpose” of RICO: “It is the purpose of [RICO] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.” See Section 1 of Pub. L. 91-452.*

[25] *18 U.S.C. 1962.*

[26] *18 U.S.C. 1963(a).*

2.6 Sentencing For Money Laundering

A violation of the transporting or transfer provisions of the Money Laundering Control Act expose the accused to a maximum of 20 years in prison and a fine of $500,000 or twice the value of the funds laundered.[27] A violation of the transaction-in-criminal-proceeds provisions of the Act expose the accused to a maximum of 10 years in prison and a fine.[28]

Under the U.S. Sentencing Guidelines, money laundering is treated as an offense deserving of long terms of incarceration. The base offense level, which drives the guideline range set by the Sentencing Guidelines, make this point rather clearly. The base offense level of money laundering ranges from 17 to 23, well above bribery (7 to 12); insider trading (8) and blackmail (9) but significantly below serious drug trafficking charges (26 to 38).

There are a few significant cases :

2.6.1 Significant Cases

(1) William Jefferson

In June of 2007 William Jefferson, a U.S. Congressman from Louisiana, was indicted after FBI found $90,000 in cash in his freezer, during the execution of a search warrant.[29] He was indicted on 16 counts, including counts under the Money Laundering Control Act for knowingly engaging in 3 monetary transactions (each for $25,000), knowing that the money was derived from criminal activity. His case has not yet been resolved.

(2) AmSouth Bank of Alabama

In 2004, AmSouth Bank agreed to pay fines of $50 million for civil and criminal violations of the Bank Secrecy Act.[30] Investigators were initially prompted to investigate the Bank when it failed to promptly respond to a Grand Jury Subpoena. When investigators checked, they found the Bank failed to have sufficient anti-laundering controls. Also, the Bank failed to file a Suspicious Activity Reports (SARs) under the Bank Secrecy Act despite numerous red flags in deposits to a certain account.

The Bank was not filing the SARs because there had been no loss to the Bank, the offending party had died, or the suspicious activity had been telephonically reported to law enforcement. None of that excused the SAR filing requirement, however. So the Bank received a $50 million fine.

(3) Riggs Bank

In 2004 and 2005, Riggs Bank agreed to pay substantial fines and penalties for violation of various money laundering statutes. In 2004, Riggs Bank paid a $25 million civil penalty and pled guilty to a criminal charge based upon deficiencies in the Bank's BSA compliance policy with regard to its handling of the deposits of various officials in the countries of Equatorial Guinea and the Kingdom of Saudi Arabia. Specifically, the consent decree indicated that the bank's procedures (1) did not adequately identify the risks created by the customer's notorious dealings.

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[27] *18 U.S.C. 1956(a)(1)-(3).*
[28] *18 U.S.C. 1957(a),(b)(1)-(2).*
[29] *http://topics.nytimes.com/top/reference/timestopics/people/j/william_j_jefferson/index.html?8qa*
[30] *Braverman, P. (2005). Rocked by a Seismic Shift in Banking. Legal Times, 28, 22.*

Less than a year later, Riggs bank settled a separate criminal charge of failing to file SARs with regard to accounts held by Chilean dictator Augusto Pinochet, agreeing to pay a fine of $16 million and to pay restitution of $9 million to the victims of Pinochet.[31]

(4) U.S. v. Kozeny

This case illustrates the expanded reach and interplay of the Foreign Corrupt Practices Act (FCPA) and our money laundering laws. On October 6, 2005, Viktor Kozeny (and others) were arrested on an indictment alleging violations of the FCPA and Money Laundering Control Act. Kozeny, a Czech Entrepreneur dubbed the Pirate of Prague by Fortune Magazine in 1996, is charged with, among other things, paying bribes of over $11 million to Azerbaijan government officials.[32]

Kozeny is a foreign national.[33] There is no allegation that he conducted his bribery on American soil. However, American companies did send him "investment" money, knowing that he would use it for bribes. That was enough of a connection to the United States to trigger the FCPA and the Money Laundering Act.

Since 2005, Kožený was in prison in Bahamas waiting for the court decision whether he will be handed over to the U.S. or to the Czech Republic. The current decision of the Bahamas court from June 23, 2006, is that he will be transferred to the U.S. In 2007, however, he was set free on caution in the Bahamas after paying a $300,000 bail. But his co-conspirators have pled guilty and are expected to testify against him.

(5) American Express Bank International

Recently on August 6, 2007 – American Express Bank International (AEBI) agreed to pay $65 million to settle money laundering charges brought under the Bank Secrecy Act as part of a deferred prosecution agreement.[34] The settlement included the forfeiture of $55 million in laundered funds and a $10 million fine, and was the largest financial sanction imposed upon a U.S. bank for money laundering activities. AEBI is a Miami-based banking division of the global credit card giant American Express. It catered to wealthy Latin American clients. According to a press account, AEBI operated in certain high-risk jurisdictions and business lines without commensurate systems and controls to detect and report money-laundering and other suspicious activity in a timely manner, as well as manage the risks of money laundering, including the potential for illicit drug trafficking-based Black Market Peso Exchange transactions.[35]

The prosecution was based upon a "sting" operation, in which large sums of cash were deposited directly by undercover law enforcement agents who represented they were "working" for Columbian drug traffickers. Beyond the sting operation, investigators also found "numerous" private banking accounts that were controlled by "apparently legitimate South American businesses", but held in the name of offshore shell companies, and used to process "parallel currency exchange market transactions." Such markets were "saturated with drug proceeds", the Department of Justice alleged, and were highly risky for financial institutions.

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[31] *Dash, E. (2005, January 28). Riggs Pleads Guilty in Money-Laundering Case, New York Times, p. C7.*

[32] *Uchitelle, L. (2005, October 7). Three Indicted for Bribery in Oil Scheme in Azerbaijan, New York Times, p. C3.*

[33] *Id.*

[34] *United States Department of Justice Press Release. (2007, August 6). Retrieved August 9, 2007, from Westlaw Data Base, 2007 WL 2235854.*

[35] *Kirchgaessner, S. (2007, August 7). AmexCo Agrees to $65 Million penalties on Anti-Money Laundering Failings. Financial Times USA, p. 13.*

In the last 3 years, 19 financial institutions in South Florida have been hit with sanctions for money laundering.[36] South Florida seems to have become a major center for money-laundering prosecutions.

2.6.2 International Anti-Money Laundering Efforts

Obviously, money-laundering is most often an international crime. A political leader on the take rarely hides his money in his own country. He wants to transfer it to a foreign safe haven. So there needs to be some kind of top-down enforcement at the international level.

The leading international body fighting money laundering is the Financial Action Task Force on Money Laundering (FATF).[37] It was formed in 1989 at the G-7 Summit. Today, FATF has 31 member countries (China is an observer only).[38] FATF's membership encompasses the major financial centers of Europe, Asia, and China.

The FATF created a list of 40 recommendations for countries wishing to prevent money laundering. Among those 40 recommendations is that banks pay special attention to "politically exposed persons." These would be prominent politicians or leaders who are most apt to be bribe-takers.

The 40 recommendations also included language encouraging signatories to consider utilization of "special investigative techniques," where permitted by its domestic legal system, including sting operations, electronic or other forms of surveillance and undercover operations.

3. The Special Challenges of Enforcing Money Laundering Statutes

3.1 Complexity

My impression is that narcotics trafficking cases put tremendous pressure on judges. For example, in Colombia the illegal money was pervasive and many courageous judges were killed. In my country, drug-related cases easily comprise one-half of the criminal cases in both our federal and state courts. The reason for the pressure on the judiciary is that the investigative techniques traditionally employed in criminal cases are now layered with complicated financial tracings and extensive hierarchies of criminals. Traditional investigative techniques, such as interviews, surveillance, informants, searches and seizures, undercover operations, and the like are all still essential in unraveling a money laundering case. But money laundering causes law enforcement to deal with financial institutions, which are fundamentally dedicated to the privacy of the financial affairs of their legitimate clients. The clash between law enforcement's goal of apprehending criminals and financial institutions' goal of protecting the privacy of their clients will continue to plague criminal justice systems all over the world. Legislatures have looked to the courts to apply the laws fairly and to balance the competing goals of apprehension and privacy.

Money laundering poses a number of problems for criminal justice systems the world over, including in the United States. The problems arise on many levels. First, the facts in money laundering cases are complex and these complex facts give rise to numerous evidentiary problems.

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[36] *Bussey, J. (2007, August 8). Banking: In Florida, Dirty Money is Big Business. Miami Herald, p. A1.*
[37] *See Financial Action Task Force, 13 Widener Law Review 169 (2006)*
[38] *Id.*

Second, the laws intended to combat money laundering directly are numerous, and frequently the most effective legal tools work are those which work indirectly to bring money launderers to justice.

In terms of facts and evidence, money laundering cases differ from most criminal prosecutions. In ordinary criminal prosecutions, judges hear testimony and view exhibits about whether there is direct evidence, such as an eyewitness identification of the defendant. Often we listen to evidence that may be circumstantial in nature, that is, evidence from which an inference may be drawn that the defendant committed a crime. For example, in a homicide case in the U.S. system, circumstantial evidence might be blood found on the defendant or testimony by a witness that a man was seen leaving a homicide scene that was approximately the defendant's height and physical build, although the witness could not see his face. If the defendant had placed phone calls to the victim's home a short time before the murder or if there were prior threats or disagreements, many of our jurors might believe that all the circumstantial evidence taken together is enough to support a reasonable inference that the defendant is guilty, although we did not have direct eyewitness identification of him as the killer. These types of evidentiary issues are common issues for judges in ordinary criminal cases.

Money laundering cases, by contrast, are much more complex in terms of both the facts and the ability of prosecutors and judges to obtain all the information and documents necessary to try a case. Our judges and juries must listen to and understand the complex facts involved in money laundering. Offshore bank accounts may be in the name of non-existent corporations or actual corporations. Banking accounts and ledgers may be anonymous or numbered accounts requiring warrants supported by probable cause in order to be obtained. Funds can be wired from one domestic or world financial center to another in seconds. Transactions may involve millions of dollars and may be moved on a daily basis from one bank to another. Located in different time zones, one such center would always be open.

These complex facts translate into evidentiary problems for courts and prosecutors. Obtaining the records and, sometimes, the people or things necessary to try a case requires the cooperation of both the country seeking prosecution and any country where the suspected illegal monies may be deposited. Indictments may be obtained on a cartel member or pirate who is arrested in a cooperating country that allows extradition back to the charging country. But there may be instances where a criminal is living outside the charging country, but is causing great harm to that country while another country is either harboring him or decides it will prosecute him without honoring your request for extradition. The prosecutor must obtain the evidence necessary to convict the criminal.

If, for example, the charges are conspiracy to launder illegal narcotics monies through either real or fictitious businesses, this requires the courts to obtain the funds, or at least the banking records of these businesses through the subpoena process. Obtaining such funds and records is solely dependent upon the cooperation of the other country where the records and funds are located. Such cooperation is not necessarily easy to achieve in part because the banking industry worldwide promises confidentiality to its customers. Whether these banks are in the Cayman Islands, Panama, Switzerland, Austria, Venezuela, United States, or the Philippines, the universal problem is obtaining these records. If the bank is a bank of the charging country, then it may be easier for that country's courts to get compliance with orders issued for bank records. When the bank is outside of the issuing court's territorial boundaries, then we are dependent upon cooperation between the two countries. The judiciary has its orders honored by cooperation, not by mandate once we are involved with international crime.

3.2 Commingling

Money is fungible. Therefore , one of the biggest challenges is showing a link between money that can be proven to be proceeds of illegality and money used in transactions by defendant. Defendants can try to hide illegal proceeds by mixing, or "commingling," those funds with other money obtained from legitimate or unknown sources in a single account. If illegal proceeds are small percentage of money in account, it can be difficult or impossible to prove that later withdrawals or payments from account actually represent illegal proceeds or funds from legitimate / unknown sources.

For cases involving charges of transactions with illegal proceeds more rigorous proof as to the source of the money involved in the transaction is necessary (e.g., 1957). Proving the illegal source of the funds is necessary because the transaction is not itself unlawful activity. In other words, tracing is required.

On the other hand, lesser proof of the source of the funds is necessary in cases involving charges of concealment of illegal proceeds or use of proceeds to promote or facilitate illegal activity (e.g., 1956). For such cases, it is sufficient to show that an account is tainted by deposit of any illegal proceeds. This lower standard is used because the laundering activity itself is unlawful conduct. In other words, tracing is not required for such cases.

Concealment can be present even when individuals who are closely affiliated with the defendant and genuine names are used to conceal the illegal funds. For example, one fact situation involved "transactions between defendant, his life-long friend, defendant's wife, and a corporation wholly owned by defendant's wife." The accounts were in their own names and the names of the entities associated with them. The court rejected defendant's argument that there could be no design to conceal where the checks listed the true remitters or clearly indicated the account from which they came, holding that "using a third party, for example, a business entity or a relative… usually constitutes sufficient proof of a design to conceal." See United States v. Wiley, 57 F.3d 1374, 1377, 1387-88 (5th Cir. 1995). More examples of closely-affiliated individuals and genuine names not defeating a charge of concealment money laundering include:

> *"A case in which the defendant moved funds out of her own accounts into an account she held jointly with her parents. United States v. McGauly, 279 F.3d 62, 70" (1st Cir. 2002).*
>
> *"A case in which the defendant paid her sister rent in cash, using drug proceeds, and her sister laundered funds by using them to pay the mortgage for the house the sister owned, but in which defendant resided. United States v. Miles, 290 F.3d 1341, 1354-56" (11th Cir. 2002).*

3.3 Intent / Knowledge

The requirements for intent and knowledge are more stringent in money laundering charges than in many of the crimes underlying the laundering. For the vast majority of crimes in the United States, the underlying crime often requires only intent to do the act and does not require that defendant know that the act is illegal.

By contrast, money laundering requires:

(1) Proof that defendant knew that the money involved was the proceeds of illegal activity, and

(2) Proof that defendant knew that the underlying activity was illegal

Once this is shown, however, the government need not prove that defendant knew that the additional act of laundering the proceeds was itself illegal.

These challenges have led law enforcement to be creative in their investigative techniques. Indeed, one of the 40 FATF recommendations for countries attempting to combat money laundering is the utilization of the same Special Investigative Techniques which were originally endorsed by protocol of the United Nations for use in combating transnational organized crime, weapons trafficking, and trafficking in women and children. Specifically, the Special Investigative Techniques would include undercover operations (presumably including "sting" operations) and "electronic or other forms of surveillance and undercover operations."

4. Special Investigative Techniques

4.1 Wiretaps

A wiretap involves eavesdropping onto telephone calls and also monitoring e-mails or instant message exchanges. The wiretap laws contain strict requirements for judicial approval. They require advance approval by a federal judge, and are more strict than search warrant requirements.

Before issuing a wiretap, the federal judge must find:

(1) Probable cause to believe that an individual is committing, has committed, or will commit, one of a list of specified crimes;

(2) Probable cause that the communications concerning the at offense will be obtained through the interception;

(3) That normal investigative techniques have been tried and failed, or are unlikely to succeed, or are too dangerous; and

(4) Probable cause that the facilities from which the communications are to be intercepted are being used in connection with the commission of the crime. See 18 U.S.C. 2518(3)(a)-(d).

Federal judges have extensive experience in the use of wiretaps as part of the investigation of international money laundering involving the movement of drug proceeds across international borders. Wiretaps become an integral part of the investigation after other investigative techniques fail.

4.2 Grand Jury Subpoena

Under the U.S Constitution, individuals have the right not to be charged with any felony – that is, an offense punishable by more than a year in prison – unless it has been approved by a Grand Jury. A prosecutor drafts the criminal charge and a majority of the Grand Jurors must agree before it can be officially filed. To bring evidence before the Grand Jury, prosecutors have the power to issue subpoenas compelling witnesses to testify under oath before the Grand Jury or to produce documents.

This is a powerful tool that prosecutors can use against Banks and others to investigate money laundering. The law provides that financial institutions can be barred from revealing to any third person – including a customer – the fact that they received a Grand Jury Subpoena.

Financial institutions are treated differently than normal witnesses who are free to talk and perhaps alert the target of a Grand Jury investigation. This special rule for financial institutions can allow investigators to remain invisible as they trace down the money trail of a laundering scheme.

4.3 Sting Operations

The use of undercover agents (which presumably would include sting operations) is specifically approved by UN protocol as a Special Investigative Technique and is incorporated into the Money Laundering Control Act. It has also been a valuable tool in the hands of law enforcement.

For example, on July 1, 1998, the chief financial officer, president, and vice president of Supermail, Inc., a check cashing company, were

arrested on money laundering charges stemming from a two-year sting operation conducted by the Federal Bureau of Investigation (FBI) and the Los Angeles Police Department.[39] The company was one of the largest check cashing enterprises operating in the western United States and purported to be one of the leading U.S. money transfer agents providing services to Mexico and Latin America.

The three executives, along with six other employees and associates, were arrested after a federal grand jury returned a 67-count indictment charging conspiracy, money laundering, the evasion of currency reporting requirements, and criminal forfeiture. The initial target of the investigation was a company store in Reseda, California. Investigators, working in an undercover capacity, approached the manager, who agreed to launder purported "drug" money in exchange for a cash fee. Specifically, the manager converted large amounts of cash into money orders issued by the company. As larger sums were laundered, the manager sought the assistance of his associates working at other store locations. Soon the company's corporate officers were brought into the operation, and they authorized the issuance of money orders and the wire transfers of large sums of "drug" money to a secret bank account in Miami, while the cash was used to maintain operations at the company stores.

In total, the defendants laundered more than $3 million of "drug" money. The defendants in the case pled guilty to money laundering charges and received sentences ranging from 46 to 72 months in prison.

5. The Role of the Independent Judiciary

The use of Special Investigative Techniques, while critical to a successful campaign against corruption and money laundering, also requires an active and independent judiciary providing necessary oversight. Under federal law, wiretap and pen register warrants are specifically approved in advance by a federal district judge or magistrate judge. Likewise, issues may arise in undercover operations as to whether the law enforcement activities constituted entrapment or otherwise violated the rights of the accused. A federal judge will often be charged with making that difficult decision.

So what should be the role and attitude of the judiciary in the war on corruption and money laundering. At first blush, it may appear that my remarks today assume and, even encourage, an active role for the judiciary in the war on crimes, generally, and corruption and money laundering, specifically. Indeed, the challenges of ferreting out and prosecuting such activities would suggest the appropriateness of such an active role.

However, whenever I begin to feel a bit of a kinship with the prosecutors who appear in my court, I remind myself of the words of Byron White, a former member of the U.S. Supreme Court, when he pronounced firmly that, "[j]udges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions."[40] With now almost 20 years as a judge and more than 12 years as a federal judge, I can say that I have truly come to see the wisdom – no the necessity – of that statement.

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[39] *Rosenzweig, D. (1998, July 2). Valley Firm Accused of Money Laundering. Los Angeles Times, p. 1 (Metro Section).*
[40] *United States v. Leon, 468 U.S. 897, 917 (1984).*

A truly independent judiciary is essential to the criminal justice system for at least three reasons.

First, it ensures that the rights of participants in our legal systems will not be abused. This has been the primary role of the federal judicial system from the founding of our country. Indeed, it was the abuse of search warrants which provided one of the precipitating causes for our War of Independence. This role of the judiciary, as the bulwark which protects the rights of ordinary citizens, continues to be a hallmark of the American legal system

Second, an independent magistrate overseeing criminal investigation will lead to great professionalism on the part of our criminal investigators and our prosecutors. This has come to be an accepted view among prosecutors and investigators in the United States. In recent years, the U.S. Supreme Court has had occasion to re-examine one of the most significant precedent requiring judicial oversight of police investigative techniques – Miranda v. Arizona.[41] Miranda requires that a suspect's confession cannot be used against him at trial unless he was advised of his right to remain silent. In addition, conservative legal scholars have called for reversal of the 1961 decision of Mapp v. Ohio,[42] which requires exclusion of evidence obtained without a warrant in violation of the Fourth Amendment to the U.S. Constitution. When the Miranda and Mapp decisions were issued by the Supreme Court, there was a hailstorm of protest. The view was commonly expressed that they would handcuff the police in their efforts to rein in crime.

However, despite the complaints of conservatives, the Supreme Court, in a 7-2 decision, declined to reverse Miranda. And there has been a surprising lack of support in the law enforcement community for overturning either Mapp or Miranda. I am confident that it is because law enforcement realizes, as I do, that judicial oversight resulting from these decisions has led to increased professionalism in law enforcement, enhanced accuracy in the outcome of criminal investigations, and greater long-term success in the war on crime.

Third, the independent judiciary offers legitimacy to the criminal justice system and our legal institutions. Although we, in the United States judiciary, take pride in our commitment to the Rule of Law, we also recognize that our commitment to that bedrock principle means very little if the public have serious reservations about the legitimacy, even-handedness, and fairness of our criminal justice systems. Knowledge that a truly independent judiciary provides real and meaningful oversight of criminal investigations creates greater respect for our legal system at all levels.

Thus, despite the need for Special Investigative Techniques and extraordinary efforts to ferret out money laundering and corruption, it is critical that the judiciary maintain its independent role to prevent investigative abuses, improve the quality of law enforcement, and lend credibility to law enforcement activities.

[41] *See, e.g., Dickerson v. United States, 530 U.S. 428 (2000).*
[42] *Mapp v. Ohio, 367 U.S. 643 (1961).*