Bulk Cash Smuggling and the Globalization of Crime:
Overcoming Constitutional Challenges to Forfeiture Under 31 U.S.C. § 5332

By
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INTRODUCTION

To law enforcement professionals, the hallmark of the new millennium is the rapid increase in the globalization of crime. Criminals move as freely between countries as tourists do, leaving victims in one place, hiding criminal proceeds in another, and taking up residence in a third. A computer, a cell phone, an internet connection, and a bank account may be all the tools a person needs to perpetrate a transnational fraud scheme, to finance a terrorist attack in one country with money generated in another, or to launder the proceeds of multinational organized crime. To the twenty-first century criminal, political borders mean nothing. Indeed, criminals revel in the limitations imposed on local law enforcement authorities by antiquated concepts of jurisdiction and national sovereignty.

To twenty-first century law enforcement authorities, of course, political borders still mean everything. There is no such thing as international jurisdiction over multinational crime. There are no transnational wiretap orders, or search warrants, or procedures for the confiscation of criminal proceeds. What is a crime in one place may not be a crime in another. What constitutes lawful law enforcement authority in one place may carry no weight in another, or may actually constitute a crime. Everything in law enforcement is based on the laws and legal traditions of individual nation-states, each with its own set of quaint anachronisms, rarely meshing with the laws and traditions of the neighboring state or the state across the globe.

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BULK CASH SMUGGLING

Granted, there are now treaties in place that attempt to ensure a modicum of cooperation between countries on matters of transnational crime, but the process is abysmally slow.1 In the time it takes a prosecutor in Alabama to subpoena bank records in France, the criminal will have moved through several countries, opened and closed numerous bank accounts in the names of as many off-shore corporations, laundered his criminal proceeds in remote bank-secrecy jurisdictions, and retired to a life of leisure under an assumed name. To the criminal who resides in Europe or Asia, uses the internet to steal money from victims in the United States, and launders the proceeds through a Caribbean bank, the efforts of law enforcement authorities to hurdle the legal and political obstacles that current law places in their way must be oddly entertaining—like watching a lead-footed policeman pursuing a sprinting teenage delinquent down alleys and over fences in a revival of West Side Story.

With such advantages, it is no wonder that criminals will commit crimes that span international borders, showing no regard for the requirements of local law. Indeed, criminals are no more likely to allow artificial political boundaries to restrict their movements than are rocks in a landslide.

Of particular concern is the way that criminals have internationalized the process of laundering criminal proceeds. Any criminal, of course, wants to hide the proceeds of his crimes from law enforcement, to avoid paying taxes, and to use the money to finance future criminal acts or enjoy the “good life.” For various reasons that this article explores, many criminals in the United States find it best to do that by sending the money abroad. Moreover, there is strong evidence that a number of criminals commit crimes in the United States in order to raise money to finance terrorism elsewhere. Sending criminal proceeds from one country to another simply to hide them from the authorities is one thing; sending them to a second country so that they can be used to murder innocent citizens is a problem of much greater magnitude.

Once money representing the proceeds of crime—or money intended to be used to finance new criminal activity—moves from one country to another, it is notoriously difficult to track down and recover.2 Thus, curtailing international

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2. For example, federal authorities in the United States have no power to subpoena records from a foreign bank. Instead, the requesting authority must ask the Office of International Affairs in the Department of Justice to initiate a treaty request pursuant to whatever Mutual Legal Assistance Treaty (MLAT) or other bilateral agreement may exist between the United States and the country in which the bank records are located. If, as is often the case, there is no bilateral agreement in place, the United States must invoke the ancient procedure of sending letters rogatory to the foreign government. It is the common experience of federal prosecutors that both the MLAT and letters rogatory options take months or even years to produce the requested records. Section 319 of the USA PATRIOT Act contains a provision, codified at 31 U.S.C. § 5318(k) (2003), that was designed to short-circuit this procedure by authorizing the Attorney General to serve a subpoena directly on a foreign bank if that bank does business in the United States through a correspondent bank account at a domestic bank. But the Department of Justice has been reluctant to use this approach, acceding to
money laundering is a high priority of law enforcement regardless of what the underlying crime that generated the laundered money might have been.

This article deals with one aspect of international money laundering—bulk cash smuggling. As we will see, the success that the United States has experienced in enforcing the currency transaction reporting requirements at domestic financial institutions has forced criminals who want to move their money overseas without creating a paper trail to transport the money physically across the border in bulk form. Recognizing that the older customs reporting requirements were inadequate to deal with this problem, Congress enacted a new statute, 31 U.S.C. § 5332, making bulk cash smuggling a criminal offense, and providing for the forfeiture of all of the smuggled currency. This article focuses on the application and enforcement of the new statute.

I begin by discussing the reasons why criminals prefer to launder their money overseas and the reasons why they resort to bulk cash smuggling to do so. I then trace the history of the currency transaction reporting statutes and describe how the Supreme Court's decision in United States v. Bajakajian effectively nullified the ability of law enforcement to use those statutes to deter money laundering by means of smuggling currency out of the country. Finally, I discuss the new bulk cash smuggling offense itself and set forth the arguments that the government might make to rebut the constitutional challenges that have been raised against it. My conclusion is that by making aggressive use of the new statute, federal law enforcement agencies will be able to reduce the role that bulk cash smuggling plays in international money laundering and the financing of terrorism.

I.

REASONS FOR SMUGGLING CURRENCY

Once upon a time, when Bonnie and Clyde robbed the local bank, they kept the money under a floorboard in the attic, or in the trunk of the car, and spent the cash as they needed it. Some still do that, but most criminals now have more sophisticated ways of handling the proceeds of their crimes: by making investments, acquiring assets, or taking advantage of the international banking system.

the views of the Department of State that by-passing the MLAT process would be injurious to bilateral relations with its treaty partners.


Indeed, given the obstacles that law enforcement faces in trying to follow the proceeds of crime around the world and in trying to recover them, anyone with a significant sum of illegally-derived money to hide would be foolish not to try to get the money out of the United States and into a foreign country.

The question is how to get it there. Criminals have an abiding desire to avoid creating a paper trail that law enforcement is able to follow. Thus, they prefer to deal exclusively in cash. Cash is bulky, however, and no criminal really wants to have to carry $20 million in currency out of the country in a suitcase if he can avoid it. Consequently, carrying the money physically across the border has never been the criminal’s first choice of methods for moving his money to a foreign bank. A better alternative would be to place the money in a local bank, and then to wire it to a foreign bank account, send a check drawn on the local account to the foreign account by mail, or send an ATM card and PIN number corresponding to the local account to a confederate abroad who could then withdraw the money as cash and redeposit it into a foreign bank.

At first, putting money in a local bank entailed little risk that law enforcement would be apprised of the bank customer’s sudden access to large sums of currency. One could always avoid leaving any fingerprints on his money by depositing it in a third party’s name, commingling it with the proceeds of a legitimate business, or simply relying on the absence of records of most cash transactions. In the 1980s, however, the United States began to enforce aggressively the requirement that the identity of any person conducting a currency transaction involving more than $10,000 at a financial institution be recorded on a form filed with the Internal Revenue Service (IRS). The notion, obviously, was to take advantage of the criminal’s need to convert his cash to a more usable form by creating a paper record whenever he conducted a large cash transaction, and sending that record directly to a federal law enforcement agency. When criminals began to find ways to evade the $10,000 reporting requirement by breaking up their cash transactions into smaller amounts, Congress amended the law to make it an offense to structure any transaction involving more than $10,000 for the purpose of evading the reporting requirements.

The success of law enforcement in enforcing the currency transaction reporting requirements at domestic financial institutions has forced criminals to resort to the more obvious but decidedly less convenient method of moving their money to a foreign country without creating a paper trail: bulk cash smuggling. Once money is physically transported out of the United States, it can be deposited into a foreign bank (that might not be subject to any currency reporting requirements), sold on the black market, repatriated to the United States in the form of U.S. dollars at a discount in exchange for foreign currency through money brokers or a change bureau abroad. The criminal is generally willing to accept the discount in exchange for transferring the risk of dealing with the tainted dollars to the money broker, and having the foreign currency to spend or invest as he sees fit. See Money Laundering...
form of a check or wire transfer from a foreign corporation, or invested in prop-
erty in a foreign country.

Federal law did not wholly lack tools for responding to this innovation, of
course. Just as there is a requirement that any domestic currency transaction
involving more than $10,000 be reported to the IRS, there has long been a re-
quirement that any attempt to transport more than $10,000 in currency into or
out of the United States—at the border, at an airport, or by mail or other com-
mion carrier—be reported to the Customs Service.\footnote{See 31 U.S.C. § 5316 (2003) (requiring the filing of a Currency and Monetary Instrument Report or “CMIR”).} Failing to file that form, which is called a Currency and Monetary Instrument Report (CMIR), is a crim-
inal offense, carrying a potential jail sentence and the risk that the unreported
currency may be confiscated under the asset forfeiture laws.\footnote{See 31 U.S.C. § 5317(c) (2003) (providing for the civil or criminal forfeiture of the prop-
erty involved in a CMIR offense).}

Problems existed, however, with this as a law enforcement tool. Unlike the
report filed by the bank on a domestic currency transaction, the Customs report
is filed not by a disinterested financial institution, but by the traveler himself—
that is, the very person with the greatest interest in avoiding the creation of the
paper trail that the form was designed to generate. Thus, compliance with the
reporting requirement among the target group of travelers—criminals, tax evad-
ers, and money launderers—is low.\footnote{There is no way of knowing how many travelers fail to file the CMIR, but the former U.S. Customs Service, now the Bureau of Immigration and Customs Enforcement (ICE), reports hundreds of instances of travelers who did not file the form only to have more than $10,000 discovered in their luggage during routine customs inspections.}

Accordingly, it is up to the courts and to federal law enforcement authori-
ties to force compliance with the reporting requirements, or to discourage at-
ttempts to move unreported money out of the country in the first place, by
imposing severe consequences for failure to comply. Unfortunately, a Supreme
Court decision in the late 1990s, United States v. Bajakajian,\footnote{524 U.S. 321 (1998).} greatly reduced
the government’s ability to impose a significant economic penalty on the cur-
rency smuggler, and thus undermined law enforcement’s effort to achieve an
appreciable level of compliance with the currency reporting laws.

II.

THE SUPREME COURT’S DECISION IN UNITED STATES
v. BAJAKAJIAN

In United States v. Bajakajian, Mr. Hosep Bajakajian, a traveler departing
the United States from the Los Angeles airport, was stopped after a dog trained
to detect the presence of currency by its smell signaled the presence of a large

\textit{dering Crisis: Hearing Before the Subcomm. on Crime of the House Comm. of the Judiciary, 106th
Cong. 31-33, 43-44 (2000) (statements of James K. Robinson, Assistant Attorney General, Criminal
Division, United States Dept. of Justice & Stefan D. Cassella, Assistant Chief, Asset Forfeiture and
Money Laundering Section, United States Dept. of Justice).}
quantity of cash in Bajakajian's luggage. Customs agents informed Bajakajian that he was required to declare whether he was transporting more than $10,000 in currency out of the country, but he denied that he was doing so. When an inspection of the luggage revealed the presence of $357,144 in currency, however, Bajakajian was arrested. Ultimately, he pled guilty to the criminal offense of failure to report the currency on the required customs form.

As part of the criminal case, the government sought to forfeit the $357,144 as property "involved in" the currency reporting offense. The statute provided that the forfeiture of the entire sum was mandatory, but the district court, as well as the Court of Appeals for the Ninth Circuit, held that such forfeiture would violate Bajakajian's rights under the Excessive Fines Clause of the Eighth Amendment. The government appealed and the Supreme Court agreed to hear the case.

The government offered several reasons why the Excessive Fines Clause should not apply to this case at all, or if it did, why the Court should nevertheless allow the forfeiture of the entire $357,144. First, money that a traveler fails to declare on a customs form when taking the money out of the country, the government argued, is akin to goods on which a smuggler fails to pay a customs duty—it is the corpus delicti of the crime. Since the earliest days of the Republic, the government noted, the forfeiture of such smuggled goods has always been upheld without any regard to the value of the goods being forfeited.

Similarly, the government argued that the instrumentalities of an offense have been considered subject to forfeiture, regardless of their value, because they represented the actual means by which the offense was committed. Bajakajian's unreported currency, the government said, was the instrumentality of his offense, because without it there could have been no reporting violation at all.

Finally, the government contended that forfeiture of the undeclared currency in Bajakajian's case served a remedial, non-punitive purpose, because the forfeiture would deter the illicit movement of cash and aid in providing the government with valuable information regarding the flow of money into and out of the United States. Because only punitive forfeitures are considered "fines" subject to the Excessive Fines Clause of the Eighth Amendment, the govern-

12. Id. at 324.
13. Id. at 324-25.
14. Id. at 325.
15. Id.
16. Id. at 326. Note that the forfeiture statute at issue in Bajakajian, 18 U.S.C. § 982(a)(1) (1998), has since been amended. The forfeiture provision for the currency reporting offense for which Bajakajian was convicted is now found at 31 U.S.C. § 5317(c) (2003).
18. See id. at 340.
19. Id. at 333.
20. Id.
21. Id. at 322.
ment said, a forfeiture that served such remedial purposes could not violate the constitutional proscription against the imposition of an excessive fine.23

The Court rejected each of the government’s arguments, however. Even if the forfeiture of the actual means by which a crime is committed—that is the instrumentality of the crime—were permitted without regard to the value of the property, the Court said, the unreported currency in this case would not qualify.24 Bajakajian’s money was not the means by which the crime was committed, the Court said, but was “merely the subject of the crime of failure to report.”25

With respect to the corpus delicti argument, the Court acknowledged that many early cases and statutes authorized the forfeiture of smuggled goods on which a duty was not paid without regard to their value.26 However, Bajakajian was not charged with a smuggling offense, the Court noted; he was charged only with failing to file a report.27 Moreover, the Court found that forfeitures in smuggling cases serve “the remedial purpose of reimbursing the government for the losses accruing from the evasion of customs duties” or taxes.28 In contrast, the forfeiture of Bajakajian’s money would not have any remedial purpose; it would do nothing to provide the government with information regarding the amount of currency leaving the country, nor would it compensate the government for any loss.29

Accordingly, the Court held that the forfeiture of the unreported currency in a case involving a currency reporting violation is subject to the Excessive Fines Clause of the Eighth Amendment.30 “The touchstone of the constitutional inquiry under the Excessive Fines Clause,” the Court said, “is the principle of proportionality.”31 The Court continued, “If the amount of the forfeiture is grossly disproportional to the gravity of the defendant’s offense, it is unconstitutional.”32 Given the relatively insignificant nature of Bajakajian’s reporting vio-

24. Id. at 334 n.9.
25. Id.
26. Id. at 340.
27. Id. at 338 n.13.
28. Id. at 342.
29. Id. at 329. The Supreme Court also repeatedly emphasized that the smuggling cases on which the Government relied were all civil in rem cases, and not cases where the forfeiture was imposed as part of the punishment in a criminal case. Id. at 331-32, 340, 344. In the years since Bajakajian, however, the lower courts have routinely rejected the notion that there is any distinction between civil and criminal forfeiture for Eighth Amendment purposes, and have held that the Bajakajian gross disproportionality test applies equally in civil and criminal cases. See United States v. $273,969.04 United States Currency, 164 F.3d 462 (9th Cir. 1999) (finding civil forfeiture for failure to report the exportation of currency is subject to same excessive fines analysis as the Supreme Court applied in Bajakajian); United States v. $359,500 in United States Currency, 25 F. Supp. 2d 140 (W.D.N.Y. 1998) (same); United States v. Ahmad, 213 F.3d 805 (4th Cir. 2000) (holding that Bajakajian applies equally to criminal forfeitures and to civil forfeitures of non-instrumentalities); United States v. 40 Clark Road, 52 F. Supp. 2d 254 (D. Mass. 1999) (finding that Bajakajian applies to civil forfeiture of facilitating property under the drug statutes).
31. Id. at 334.
32. Id. at 337.
lation, the Court concluded, the forfeiture of the entire $357,144 in unreported funds would be unconstitutionally excessive.\textsuperscript{33}

The Aftermath of Bajakajian

The impact of \textit{Bajakajian} on the government’s efforts to use forfeitures under the currency reporting statute to deter the smuggling of criminal proceeds into or out of the United States was immediate. The Customs Service had no choice but to lower its guidelines for the seizure of unreported currency,\textsuperscript{34} and prosecutors became reluctant to bring any forfeiture cases based on the reporting violation to federal court. While such things cannot be proven with certainty, the circumstantial evidence certainly suggests that the recent upsurge in bulk cash smuggling activity may be tied to the ineffectual nature of the government’s enforcement tools, with \textit{Bajakajian} providing the principal obstacle.\textsuperscript{35}

At the same time, however, there are ways in which the government can work around the constitutional problems that \textit{Bajakajian} created. In \textit{Bajakajian} itself, the Supreme Court suggested that its holding would not apply to reporting violation cases where the unreported currency was derived from a criminal offense or was intended to be used for an unlawful purpose. “Whatever his other vices,” the Court said, “[Bajakajian] does not fit into the class of person for whom the statute was principally designed: He is not a money launderer, drug trafficker, or a tax evader.”\textsuperscript{36} To the contrary, his crime was “the willful failure to report the removal of currency from the United States . . . unrelated to any other illegal activities.”\textsuperscript{37} Accordingly, all courts addressing the Eighth Amendment issue in currency reporting cases have held that \textit{Bajakajian} does not apply if the government is able to demonstrate some nexus between the unreported currency and another criminal offense.\textsuperscript{38}

In addition, the lower courts have held that \textit{Bajakajian} does not apply to traditional smuggling cases where the government is seeking the forfeiture of

\textsuperscript{33} The Court, however, did not venture any opinion as to what amount short of one hundred percent of the unreported money could be forfeited without violating the Eighth Amendment. \textit{See id.} at 337, n.11.


\textsuperscript{35} As discussed below, that belief is what motivated Congress to enact the new bulk cash smuggling statute as part of the USA PATRIOT Act.

\textsuperscript{36} \textit{Bajakajian,} 524 U.S. at 338.

\textsuperscript{37} \textit{Id.} at 337-38.

\textsuperscript{38} \textit{See, e.g., United States v. U.S. Currency in the amount of $898,719.00, 2003 WL 21544283 (W.D. Mo. 2003) (Bajakajian does not bar full forfeiture under § 5317(c) of drug money transported into the United States without filing a CMIR); United States v. $97,253.00, 2000 WL 194683 (E.D.N.Y. 2000) (if the undeclared funds in a CMIR case are drug proceeds there is nothing disproportional about forfeiting the entire amount, either because \textit{Bajakajian} does not apply to the nonpunitive forfeiture of proceeds, or if it does apply, because the court compares the forfeiture to the gravity of the drug offense, not to the gravity of the CMIR violation); \textit{cf United States v. Beras, 183 F.3d 22 (1st Cir. 1999) (criminal forfeiture of entire $138,794 that defendant failed to declare on a CMIR form was unconstitutional under \textit{Bajakajian}; on remand, district court must consider, \textit{inter alia}, whether the money was derived from an illegal source).}
the smuggled goods themselves. In other words, if the crime giving rise to the forfeiture is merely a reporting violation, then any punishment, including forfeiture, for that offense must satisfy the "gross disproportionality" test. However, if the crime is a smuggling offense, it remains entirely proper for the government to confiscate the smuggled goods, regardless of their value, because they represent the *corpus delicti* of the crime.39

Thus, in *United States v. An Antique Platter of Gold*,40 the Second Circuit held that the forfeiture of illegally imported goods pursuant to 18 U.S.C. § 545 is traditionally viewed as nonpunitive, and that therefore *Bajakajian* does not apply. Similarly, in *United States v. $273,969.04 United States Currency*,41 the Ninth Circuit held that traditional customs forfeitures of smuggled goods under 19 U.S.C. § 1497 lie outside the scope of *Bajakajian*'s excessive fines analysis as well. As this article will demonstrate, this distinction between traditional smuggling offenses and the currency reporting offense at issue in *Bajakajian* is one of crucial importance.

III.
THE NEW BULK CASH SMUGGLING STATUTE

In 2001, Congress expressed its displeasure with the *Bajakajian* decision and created a new "bulk cash smuggling" offense, 31 U.S.C. § 5332, that is designed to permit forfeiture of one hundred percent of the smuggled currency in most circumstances, whether or not the government can establish a nexus between the smuggled money and another criminal offense. Enacted as part of the post-September 11 effort to address terrorist financing specifically, and international money laundering generally, in Title III of the USA PATRIOT Act,42 the new law recognizes the central role that bulk cash smuggling plays in the globalization of crime. Most important, it seizes upon the Supreme Court’s distinction between smuggling offenses and currency reporting violations to fill the void that *Bajakajian* created in the government’s ability to deter international money laundering through the enforcement of the domestic money laundering laws.

In a set of "Findings" and "Purposes" that accompanied the enactment of the new statute, Congress found that smuggling currency in the form of "bulk cash" is a favored device of drug traffickers, money launderers, tax evaders and persons financing terrorist operations, and that it "is the equivalent of, and cre-

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39. *See United States v. An Antique Platter of Gold*, 184 F.3d 131, 140 (2d Cir. 1999) (section 545 forfeiture of contraband—for example, illegally imported goods—is traditionally viewed as nonpunitive; therefore *Bajakajian* does not apply); *United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 (9th Cir. 1999) (section 1497 forfeitures lie outside scope of excessive fines analysis; *Bajakajian* does not apply).
40. 184 F.3d 131, 140 (2d Cir. 1999).
41. 164 F.3d 462, 466 (9th Cir. 1999).
ates the same harm as, smuggling goods.”\textsuperscript{43} Moreover, Congress found that “only the confiscation of smuggled bulk cash can effectively break the cycle of criminal activity of which the laundering of bulk cash is a critical part.”\textsuperscript{44} Finally, picking up on the distinction between smuggling offenses and reporting violations in \textit{Bajakajian}, Congress noted that as long as bulk cash smuggling was considered only a currency reporting offense, the penalties could not “adequately provide for the confiscation of smuggled currency.”\textsuperscript{45} In contrast, Congress concluded, “if the smuggling of bulk cash were itself an offense, the cash could be confiscated as the corpus delicti of the smuggling offense.”\textsuperscript{46}

Based on these findings, Congress set forth the purposes of the new statute as follows:

(1) to make the act of smuggling bulk cash itself a criminal offense;
(2) to authorize the forfeiture of any cash or instruments of the smuggling offense; and
(3) to emphasize the seriousness of the act of bulk cash smuggling.\textsuperscript{47}

The Findings and Purposes were summarized in the Committee Report accompanying the money laundering provisions of the PATRIOT Act:

The Committee believes . . . that bulk cash smuggling is an inherently more serious offense than simply failing to file a Customs report. Because the constitutionality of a forfeiture is dependent on the ‘gravity of the offense’ under \textit{[United States v. Bajakajian]}, it is anticipated that the full forfeiture of smuggled money will withstand constitutional scrutiny in most cases. For the confiscation to be reduced at all, the smuggler will have to show that the money was derived from a legitimate source and not intended to be used for any unlawful purpose. Even then, the court’s duty will be to reduce the amount of confiscation to the maximum that would be permitted in accordance with the Eighth Amendment and the aggravating and mitigating factors set forth in the statute.\textsuperscript{48}

In short, Congress found that the clandestine movement of bulk cash across the border is really more like a smuggling offense than like the simple failure to file a currency transaction report. Smuggling currency, after all, does more than deprive the government of information that may be used to create a paper trail. It is an integral part of the recycling of drug proceeds, the financing of terrorism, the evasion of income taxes, and the commission of other crimes that rely on extracting currency from, or injecting foreign funds into, the U.S. economy without using the traditional banking or wire transfer systems. In fact, smuggling currency creates the same type of harm as other forms of smuggling, including the smuggling of firearms, counterfeit goods, adulterated foods and unapproved medicines.

Thus, Congress made it an offense to smuggle currency into or out of the United States with the intent to evade the currency reporting requirements, and expressly provided that all of the smuggled currency would be subject to civil

\textsuperscript{43} \textit{§} 371, 115 Stat. at 337.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
and criminal forfeiture whether the government is able to establish a nexus between the currency and another crime or not.\textsuperscript{49} As in any smuggling offense, the essence of the crime is the concealment of property and the movement of that property across the international border.\textsuperscript{50} It remains entirely legal to take any amount of currency out of the United States. The offense lies in concealing the money—on one's person, in luggage, in exported merchandise, or by other means\textsuperscript{51}—to avoid detection by the customs agents who are charged with deter-
ring the export of currency as part of a clandestine money laundering operation by enforcing the currency reporting laws.

Like goods involved in a traditional smuggling offense, currency involved in a bulk cash smuggling offense is subject to forfeiture as the corpus delicti of the crime. In other words, what Congress has done is to bring forfeiture under the new statute squarely within the scope and framework of the traditional statutes that the Supreme Court recognized and distinguished from the simple reporting offense at issue in \textit{Bajakajian}.\textsuperscript{52} Moreover, like traditional smuggling statutes and unlike the reporting violation in \textit{Bajakajian}, section 5332 would serve a remedial purpose: to deter the ongoing practice of laundering criminal proceeds, evading taxes and financing terrorist activities by moving money out of the United States and into foreign markets and financial institutions without creating records that link the money to the person engaged in its movement abroad. Accordingly, if Mr. Bajakajian were to try to depart from LAX today with $357,000 in currency concealed in the false bottom of his suitcase, he could be prosecuted under section 5332 and one hundred percent of the currency could be forfeited as the corpus delicti of the smuggling offense.\textsuperscript{53}

\textit{Constitutional Challenges to the Bulk Cash Smuggling Statute}

Opponents of the new law have charged that the remedial purpose underlying the traditional customs laws that the Supreme Court recognized in \textit{Bajakajian} was to reimburse the government "for losses accruing from the eva-

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\item[49.] 31 U.S.C. §§ 5332(b)-(c) (2003). The statute contains no provision for a criminal fine because it was assumed that the forfeiture of the currency would serve that function. Thus, in the Eighth Amendment proportionality analysis, there is no "maximum fine" against which the forfeiture can be compared. The only cap on the "fine"—that is, on the forfeiture—is the amount of money being smuggled. \textit{See United States v. $100,348.00 in U.S. Currency}, 2004 WL 67876 (9th Cir. 2004) (using the maximum fine available under the U.S. Sentencing Guidelines as a measure of the gravity of the offense for Eighth Amendment purposes).
\item[50.] § 5332(a)(1), provides in pertinent part as follows:

\begin{quote}
Whoever, with the intent to evade a currency reporting requirement under section 5316, knowingly conceals more than $10,000 in currency . . . and transports or transfers or attempts to transport or transfer such currency . . . from a place within the United States to a place outside of the United States . . . shall be guilty of a currency smuggling offense.
\end{quote}
\item[51.] § 5332(a)(2).
\item[52.] \textit{Bajakajian}, 524 U.S. at 340.
\item[53.] Effective November 1, 2002, the United States Sentencing Commission has set the offense level for violations of section 5332 two levels above the offense level for CMIR offenses to reflect the greater seriousness of the offense. \textit{See U.S.S.G.} § 2S1.3 (2002).
\end{itemize}
BULK CASH SMUGGLING

sion of customs duties," and that the new statute does nothing of the kind.
That is true; however, a statute does not have to provide for the collection or
recovery of lost revenue to be remedial. To the contrary, the Supreme Court has
repeatedly recognized other remedial purposes inherent in the federal asset for-
feiture laws. For example, forfeiture statutes may be used to discourage "unreg-
ulated commerce" in certain types of property, such as firearms; to abate a
nuisance, such as an apartment building being used to sell crack cocaine; to
prevent future use of property for illicit purposes; to remove certain types of
forbidden property from "circulating in the United States;" to ensure that per-
sons do not profit from their illegal acts; and to "encourage property owners to
take care in managing their property and ensure that they will not permit that
property to be used for illegal purposes." Deterring bulk cash smuggling cer-
tainly serves many of the same remedial purposes. Indeed, if it is remedial for
Congress to discourage "unregulated commerce" in lawful property like fire-
arms to ensure that they will not be used for illegal purposes, it is remedial to
discourage the exportation of concealed currency for the purpose of evading the
efforts of law enforcement to determine who is engaged in a practice that has
been clearly linked to drug trafficking, money laundering, terrorist financing, tax
evasion and other serious crimes.

The opponents of the new law might also contend, of course, that the Find-
ings Congress included in the PATRIOT Act suggest that the bulk cash smug-
gling statute was only intended to apply to cases where there is a demonstrable
connection between the currency smuggling offense and some other criminal
activity. Why else, they argue, would Congress have specifically referred to
currency smuggling as an activity in which "drug dealers and other criminals"
are engaged, or suggested that the smuggling of cash is "one of the most reliable
warning signs of drug trafficking, terrorism, money laundering, racketeering, tax
evasion and similar crimes."

This criticism misses the entire point of the new statute. Under Bajakajian,
it was already possible to forfeit one hundred percent of unreported currency if
the government was able to demonstrate a nexus between the currency and an-
other criminal offense. Consequently, there was no need to enact a new stat-
ute to accomplish that goal. Rather, the point was that bulk cash smuggling is
itself an inherently serious offense precisely because it is the method that
criminals use to conceal or disguise the connection between their money and
other criminal activity. To prevent law enforcement authorities from establish-
ing that connection, in other words, is the raison d'etre of bulk cash smuggling.
Requiring the government to prove the nexus between the smuggling offense
and other criminal activity before it could fully enforce the smuggling statute

54. 524 U.S. at 342.
58. See supra note 38 and related text.
would nullify the intent of the statute and reward the criminal for his success in using bulk cash smuggling as a money laundering device.

By recognizing that bulk cash smuggling has become an essential step in the commission and concealment of drug trafficking, money laundering, tax evasion and other crimes, Congress stated the obvious: it is the practice of bulk cash smuggling that must be deterred, whether or not the government can establish the nexus to another offense. Indeed, if the government could establish the nexus to another offense—that is, if the smuggler has done his job poorly—law enforcement could simply arrest the perpetrator or confiscate the property involved in that offense without having to resort to the new statute at all. The concern is with the smuggler who does his job well! The powers of prosecution and confiscation under the new statute were directed at him.

Terrorist financing cases provide an excellent example. If it could be shown that a person was exporting money to Pakistan, for example, to finance terrorist attacks against U.S. citizens, the money could be forfeited under the money laundering statute, 18 U.S.C. §§ 1956(a)(2)(A), 981(a)(1)(A). There would be no need to resort to the bulk cash smuggling statute. However, proving motive and intent is notoriously hard in terrorism cases. If the person has smuggled the currency in violation of the bulk cash smuggling statute, however, the ability to confiscate the smuggled currency in connection with that violation gives law enforcement the opportunity both to cut off a source of terrorist funding and to gain access to witnesses who might be encouraged to reveal the identities of the people involved in the offense. Without the ability to confiscate the money, however, the incentive to cooperate simply is not there.

IV. APPLYING THE EXCESSIVE FINES CLAUSE TO BULK CASH SMUGGLING CASES

While it is evident from the legislative history of section 5332 that Congress intended that the full forfeiture of the smuggled money in a bulk cash smuggling case would “withstand constitutional scrutiny in most cases,” there will be cases where the evidence affirmatively shows that the person engaged in a bulk cash smuggling offense was not engaged in any other criminal endeavor. In those cases, it may be necessary to mitigate the forfeiture to a level somewhat below one hundred percent to avoid any violation of the Excessive Fines Clause of the Eighth Amendment.

When it passed both the House and the Senate in separate bills, section 5332 contained a subsection (d)(1) that provided as follows:

Upon a showing by the property owner by a preponderance of the evidence that the currency or monetary instruments involved in the offense giving rise to the forfeiture were derived from a legitimate source, and were intended for a lawful


60. H.R. REP. No. 107-250, at 53.
purpose, the court shall reduce the forfeiture to the maximum amount that is not
grossly disproportional to the gravity of the offense.\textsuperscript{61}

In short, paragraph (d)(1) would have codified the case law holding that
whenever a challenge to a forfeiture is made under the Eighth Amendment, the
burden is on the defendant to show that the forfeiture of one hundred percent of the
property would be grossly disproportional to the gravity of the offense.\textsuperscript{62} It also
would have made it clear that upon finding that full forfeiture of the property
involved in the offense would constitute an excessive fine, the court's role is to
avoid the constitutional violation by reducing "the forfeiture to the maximum
amount that is not grossly disproportional to the gravity of the offense."\textsuperscript{63}

Subsection (d)(1) was deleted from the final version of § 5332 without ex-
planation, but the case law it would have codified still applies.\textsuperscript{64} Thus, if the
government succeeds in establishing a bulk cash smuggling violation, the
property involved in the offense is subject to forfeiture in its entirety unless the
person opposing the forfeiture establishes that the money came from a lawful
source and was intended for a lawful purpose. Even if the person opposing the


\textsuperscript{62} See United States v. $21,510 in U.S. Currency, 292 F. Supp. 2d 318, 323 n.3 (D.P.R. 2003)
declining to address Eight Amendment issues because the claimant did not make even a threshold
showing of gross disproportionality); United States v. Powell, 2001 WL 51010 (4th Cir. 2001) (fol-
lowing Ahmad, infra this note, regarding the burden of proof on proving excessiveness); United
States v. Ahmad, 213 F.3d 805 (4th Cir. 2000) (holding that the party challenging the constitutional-
ity of the forfeiture has the burden of demonstrating excessiveness); United States v. 6040
Wentworth Avenue, 123 F.3d 685 (8th Cir. 1997) (finding the same standard for criminal forfeiture);
United States v. Alexander, 108 F.3d 853 (8th Cir. 1997) (finding that because defendant has burden
of making \textit{prima facie} showing, he also has burden of establishing the value of the property for-
feited); United States v. 829 Calle de Madero, 100 F.3d 734 (10th Cir. 1996) (finding that after the
Government establishes a nexus between the property and the offense, the burden shifts to claimant
to demonstrate gross disproportionality); United States v. One 1970 36.9' Columbia Sailing Boat, 91
F.3d 1053 (8th Cir. 1996) (holding claimant's failure to make threshold showing of gross dispro-
portionality between the value of the property and the value of the drugs ends the court's Eighth
Amendment inquiry).

\textsuperscript{63} See Bajakajian, 524 U.S. at 349 (Kennedy, J. dissenting) ("The only ground for reducing
the forfeiture, then, is that any higher amount would be unconstitutional"); United States v. U.S.
Currency in the Amount of $119,984.00, 304 F.3d 165, 175 n.7 (2d Cir. 2002) (noting that
\textit{Bajakajian} does not bar forfeiture of some amount less than one hundred percent of the seized
currency but greater than zero when there is no connection to other illegal activity); United States v.
6380 Little Canyon Rd., 59 F.3d 974, 986-87 (9th Cir. 1995) (the court must limit a civil forfeiture
to an appropriate portion of the asset to avoid an Eighth Amendment violation); see also United
course, we are not free to set aside convictions or forfeitures at will. The forfeiture judgment must
stand unless the Constitution commands otherwise.").

\textsuperscript{64} Some have suggested that Congress's last minute deletion of subsection (d) from § 5332
meant that Congress disapproved of the proposed language, even though it had passed both houses
of Congress in separate bills, because it placed too great a limitation on the courts' constitutional
duty to mitigate a forfeiture under \textit{Bajakajian}. Others have suggested that the opposite is true: that
the mitigation language in subsection (d)(1) was inconsistent with the stated objective of the new
statute, which was to authorize forfeiture of one hundred percent of the smuggled currency, even if
the defendant or claimant proved that it came from a lawful source. Both notions underscore the
wisdom of the Supreme Court's recent admonition that speculating on the reasons why Congress did
not do something is a dangerous exercise that should be avoided. See United States v. Craft, 535
U.S. 274 (2002) (holding that Congress's failure to enact a legislative proposal is "dangerous
ground" on which to rest the interpretation of a statute; congressional inaction may only mean that a
proposal intended to clarify existing law was considered unnecessary).
forfeiture makes that showing, Bajakajian only requires that the forfeiture be mitigated to avoid the Eighth Amendment violation. It does not require that the forfeiture be reduced to zero, nor is the court free simply to set aside the forfeiture statute and impose any amount of forfeiture that it sees fit. In enacting the forfeiture statutes, Congress has provided that all of the property involved in the offense is subject to forfeiture—limited only by the constitutional proscriptions embodied in the Excessive Fines Clause. In other words, the congressional mandate that all of the property involved in an offense be forfeited to the United States remains in effect, up to the point where any additional forfeiture would be constitutionally excessive.

Forfeiture statutes are therefore entirely unlike statutes that set forth a maximum civil or criminal fine and give the court the unfettered discretion to impose any fine within the specified range. To the contrary, a forfeiture statute is like a statute imposing a mandatory fine which must be imposed unless doing so would violate the Excessive Fines Clause. Stated differently, a statute such as 31 U.S.C. § 5332(b) or (c) embodies Congress’s intent that all of the property involved in a criminal offense be forfeited to the United States, to the extent that it is constitutional to do so.

The best way to conceptualize the issue is to envision a line on a graph that begins to rise linearly but then begins to curve and flatten as mitigating and aggravating factors representing the limitations imposed by the Eighth Amendment are taken into account. Without these factors, the line would continue to rise linearly, because the amount to be forfeited would always be equal to the amount involved in the reporting offense, as section 5332 provides. But the Eighth Amendment factors—for example, the absence of a connection between the property and another crime and the maximum statutory fine—in effect weigh down the rising line so that it rises more slowly, regardless of how much money was involved in the currency reporting offense. That line represents the maximum amount of forfeiture permissible under the Excessive Fines Clause, and hence the forfeiture that the court is required to impose.

If the court were free to pick a level of forfeiture along the continuum between zero and some maximum level, as it would do when imposing a discretionary fine, it could pick any point on or below the line on the graph to represent the amount of forfeiture to impose. But it is the duty of a court in a forfeiture case to mitigate the forfeiture to the maximum level that would accord with the forfeiture statute without violating the Eighth Amendment, not to pick
Mitigation of Forfeiture Under the Eighth Amendment

any arbitrary point based on considerations not mandated by Eighth Amendment analysis. Thus a court must pick a point on the line corresponding to the maximum allowable forfeiture, just as it would do if the Eighth Amendment factors were negligible and the line rose linearly in relation to the amount of money involved in the offense.

Deferring to the Legislature

Finally, as the Supreme Court has recently emphasized, in responding to any challenge to a statute based on an alleged violation of the Eighth Amendment, a court must take into account, and defer to, the goals the legislature sought to achieve in authorizing the punishment in question.

In Ewing v. California, the Court upheld California's "Three Strikes and You're Out" law, holding that sentencing a repeat offender to twenty-five years to life for a $1,200 grand theft offense does not constitute a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. The sentence, the Court held, was not grossly disproportionate to the gravity of the offense.

Writing for a three-justice plurality, Justice O'Connor said that a court undertaking an Eighth Amendment proportionality review must "accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions." Later in the opinion, Justice O'Connor underscored that proposition, holding that the legislature's judgment in fixing a punishment by statute is "entitled to deference." Because the "Three Strikes" law reflected the

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67. Id. at 34.
68. Id.
California legislature's considered policy judgment that a stiff sentence for repeat offenders was necessary to incapacitate certain criminals and to deter others, its application did not violate the Eighth Amendment.69

The policy judgments that Congress made in enacting the forfeiture provisions for the bulk cash smuggling statute could not be clearer. As already noted, Congress found that bulk cash smuggling is a serious law enforcement problem; that the existing penalties were insufficient in that they did not "adequately provide for the confiscation of smuggled currency;" and that the new statute made the smuggling of the currency an offense so that the currency itself "could be confiscated as the corpus delicti of the smuggling offense."70 Congress included the provisions in section 5332 that authorize the forfeiture of the smuggled currency in order to accomplish those objectives. Accordingly, if a forfeiture order under section 5332 was challenged under the Eighth Amendment by a defendant or claimant arguing that the forfeiture violated the Excessive Fines Clause, a court would be required to find, based on the holding in Ewing v. California, that the clear intent of Congress to authorize forfeiture of the smuggled currency in order to achieve clearly identified policy goals is "entitled to deference."71

V. CONCLUSION

International money laundering is a significant part of the growing globalization of crime. Once money that is derived from a criminal act, or that is intended to be used to commit such an act in the future, leaves the country where it was generated, it becomes extremely difficult to trace or recover. The best way to prevent criminal proceeds from being laundered in the international marketplace, or used to finance terrorism or other acts of wrongdoing abroad, is to make it as difficult as possible for the criminal or terrorist to remove the money from the jurisdiction in which it was generated in the first place.

By aggressively enforcing its domestic currency reporting laws, the United States has succeeded in cutting off the traditional means of injecting criminal proceeds into the global economy by forcing criminals to look for alternatives to placing their currency in the U.S. banking system. Currently, the alternative is to smuggle the criminal proceeds out of the United States in the form of bulk cash, so that it can be sold, deposited, or invested abroad.

69. Interestingly, Justice Thomas, the author of the Bajakajian decision, concurred in the judgment but did not join in the plurality opinion. In his view, Justice Thomas said, "the Cruel and Unusual Punishment Clause of the Eighth Amendment contains no proportionality principle" at all. Ewing, 538 U.S. at 38 (Thomas, J., concurring). In Bajakajian, however, Justice Thomas derived the "grossly disproportional" test for forfeiture cases under the Excessive Fines Clause of the Eighth Amendment from the test the Court had used for criminal cases under the Cruel and Unusual Punishment Clause. See Bajakajian, 524 U.S. at 337 (citing Solem v. Helm, 463 U.S. 277, 288 (1983)) (a criminal sentence violates the Eighth Amendment if it is "grossly disproportionate" to the offense). It is thus no longer clear what the basis is for the application of the "gross disproportionality" test to forfeiture cases.


71. Ewing, 538 U.S. at 34.
The Currency and Monetary Instrument Reports (CMIRs) that travelers are required to file with the Customs Service when taking more than $10,000 in currency out of the United States were intended to deter this form of international money laundering by generating a paper trail that law enforcement authorities could later follow. However, the Supreme Court’s 1998 decision in United States v. Bajakajian left the government without an effective means of enforcing the reporting requirement. In response, Congress made bulk cash smuggling a crime, and provided that the sanctions for violating the statute would include the forfeiture of one hundred percent of the smuggled cash.

That statute is now being tested in the courts and is likely to be subjected to the same constitutional attacks, based on the Excessive Fines Clause of the Eighth Amendment, that were leveled against the CMIR provision. But in enacting the bulk cash smuggling statute, Congress was careful to articulate the policy judgments on which it based the forfeiture sanction, and it was careful to place the forfeiture provision squarely within the exception that Bajakajian created for property representing the corpus delicti of a smuggling offense. Those policy judgments are entitled to deference by the courts.

Consequently, the law enforcement agencies of the United States should aggressively enforce the bulk cash smuggling statute, and the courts should uphold those enforcement efforts against constitutional challenge. Only then will the government have a realistic opportunity to significantly diminish the role that bulk cash smuggling plays in international money laundering and the globalization of crime.
Appendix

Remarks to the Stefan A. Riesenfeld Symposium

Introduction

International money laundering takes many forms, with each permutation presenting its own set of law enforcement problems. We deal, for example, with drug dealers who sell drugs in the United States and then smuggle their proceeds to Latin America so they can launder them on the black market, with foreign criminals who commit crimes in other countries and bring the proceeds here to hide or to invest, and with terrorists who raise money in the United States and use it to finance terrorist activity abroad, or raise money abroad and use it to finance terrorist acts here.

What I propose to do in the brief time allotted is to set out some examples of the various problems that arise in law enforcement with respect to each of these situations, and to discuss some of the tools we have—and that we lack—for dealing with them.

I. Laundering Criminal Proceeds Overseas

A. The Black Market Peso Exchange

Let me start with the way drug dealers launder their money in Latin America. As most people know, most drugs in this country are produced in Latin America, are smuggled into the United States from the South, and are then distributed north, east and west to the major cities. There, the money is collected—almost always in cash. The drug dealer’s problem is what to do with all of the cash.¹

Years ago, drug dealers would simply deposit their money in a bank account, sometimes using “smurfs” to deposit small sums in different banks on different days. But our success in enforcing the currency transaction reporting requirements (for example, by way of Currency Transaction Reports [CTRs], Form 8300’s, and the identification requirements for purchasing money orders)² has, to a large extent, kept large sums of illicit currency out of the U.S. banking system. In short, the bad guys do not want to run the risk of creating a paper trail. So what do they do? Money launderers resort to a number of safeguards, but the most common is to transport and smuggle the money out of the country as currency and sell it on the black market in Latin American countries where there is a demand for United States dollars at prices below the official exchange rate.

In a typical case, the drug dealer does not handle the money himself. He turns it over to a money broker in New York, or Los Angeles or elsewhere and

the broker pays him in local currency in South America. The money then becomes the broker's problem. In order to gain a return, the broker hires couriers to transport it south via interstates, through airports, on buses, or in packages shipped via common carrier. Once the money is out of the United States he sells it to third parties—often legitimate businesspeople—who need dollars and are willing to pay enough to allow the broker to make a profit, while still paying less than the official exchange rate.

B. What Are the Problems for Law Enforcement?

Smuggling bulk cash evades the currency reporting system and it leaves no paper trail for law enforcement to follow. Under the USA PATRIOT Act of 2001, it is now a crime to engage in bulk cash smuggling. Still, this kind of smuggling is difficult to detect, and when it is detected, courts are still reluctant to impose the maximum penalty—forfeiture of the smuggled cash—unless the government can establish a nexus between the cash and another crime. That, of course, is often very hard to do. Also, there is no domestic version of the bulk cash smuggling statute. For example, driving down the highway with $60,000 in cash in a concealed compartment is not a crime, even if you know it was derived from a criminal offense or is intended to be used for an unlawful purpose.

Moreover, just because we catch someone smuggling currency out of the country does not mean that we have probable cause to seize any other assets. For example, if law enforcement agents apprehend someone crossing into Canada with a large quantity of concealed cash, they can arrest him and seize the cash he is carrying, but the arrest for smuggling cash might not, by itself, provide probable cause to seize other funds that the smuggler may have in bank accounts in the United States. If there is no such probable cause, the government would have no means of freezing those accounts before the smuggler moved the rest of his money out of the country.

The biggest problems occur, of course, once the money is out of the United States. If there is a criminal case against the drug dealer or against the money broker, a court can order him to repatriate the money. This, however, presupposes that we have caught the offender and that he will obey the repatriation order. If we locate the money in a foreign bank account, it is likely to be the account of the third party who bought it on the black market. Not only is that

person entitled to assert an "innocent owner" defense under the forfeiture statutes, but if he wins, the government will be required to pay his attorneys fees.

Also, recovering the money from a foreign bank account requires the cooperation of the foreign bank and the foreign government. Some countries will freeze money at our request. Some will even enforce our forfeiture orders. Much more frequently, however, trying to persuade a foreign country to enforce a subpoena, to freeze assets for forfeiture under United States law, or to enforce our forfeiture judgments, is a very frustrating exercise.

This is not necessarily due to a lack of goodwill. Courts and law enforcement professionals in other countries are generally attuned to the harm caused by international money laundering, and are anxious to join forces to combat the problem whenever they are able to do so. The problem is the absence of legal tools and a statutory framework for cooperation in asset forfeiture matters between sovereign states. What is needed is a set of procedures to act as an interface between disparate law enforcement systems, so that the mutual good will among law enforcement professionals can be translated into effective international action against the proceeds of crime.

Countries are not always imbued with good will and the spirit of cooperation, of course. In United States v. Swiss American Bank, the Government convicted a money launderer in Boston, but the bank in Antigua where the money was sent refused to turn the money over to us, claiming the Antiguan government had confiscated it. The Antiguan government claimed to know nothing about it, and the bank represented that all records had been lost in a hurricane. No money was ever recovered.

C. Correspondent Accounts

Our inability to reach money deposited into foreign bank accounts led to the enactment of an innovative provision in the USA PATRIOT Act. Title 18, Section 981(k) says that if criminal proceeds are deposited in an account in a foreign bank, and that bank has a correspondent United States based account at a U.S. bank, the U.S. Government can seize an amount of money equal to the criminal proceeds from the correspondent account. The notion is that the foreign bank will then make itself whole by debiting the customer's foreign account, letting the customer take his objections to the court in the United States that authorized the seizure.

10. See supra, note 2.
11. 191 F.3d 30, 35 (1st Cir. 1999).
12. Id.
Obviously, there are comity problems with this. Some countries object to the notion of the United States exercising self-help in this fashion rather than going through the formal Mutual Legal Assistance Treaty, or "MLAT," process. Some banks also object that there is no guarantee that the courts in the foreign country will allow them to make themselves whole against the customer's account. Nevertheless, this new statute has been used several times, and so far it appears to be serving the purposes for which it was intended.

II. FOREIGN CRIMES

Let me turn next to the cases where a foreign criminal commits an offense abroad and transfers the proceeds to the United States. This could involve, for example, a corrupt public official in Eastern Europe, a person engaged in the slave trade in Africa, or a person defrauding investors in Japan. The United States does not want to be the repository of the world's criminal proceeds. Until the passage of the PATRIOT Act, however, it was not a crime to launder the proceeds of most foreign crimes in the United States.

Money laundering, I should explain, is a crime only if the money being laundered is the proceeds of one of the 250 or so crimes listed in the money laundering statute. Some crimes, in other words, are predicates for money laundering and some are not. Before 2001, only a handful of foreign crimes—basically drug trafficking and bank fraud—were on that list. So it was not a crime to launder, for example, the proceeds of a foreign bribery offense, or a foreign corruption offense.

The PATRIOT Act expanded the list of foreign crimes that are considered to be predicates for money laundering. The list now includes, in addition to drug trafficking, all crimes of violence, public corruption, and other crimes like arms trafficking. The list, however, still does not contain fraud (except for bank fraud) or tax evasion.

A. Tracing Issues

Another issue that arises with respect to both foreign and domestic crimes concerns tracing. Under most federal laws, our ability to recover laundered criminal proceeds—and to prosecute the money launderer—depends on whether we can trace the money to the original criminal offense. For example, if another country asserts that John Doe stole money from innocent victims, and sent the money to the United States, and we find money held by Doe in the United States, there is not much we can do unless we can trace the money to the crime that occurred abroad.

For us to prosecute Doe for money laundering, we have to show that the money he moved into the United States was actual criminal proceeds, or was

otherwise sent here in furtherance of the criminal offense. Similarly, for us to move against the money itself in a civil forfeiture case, or to restrain it pre-trial in a criminal case, we would have to be able to trace it to the foreign offense. In neither case would it be sufficient to show that the money in the United States simply belonged to the person who committed the foreign crime. Strict tracing by a forensic accountant is required. The one case where strict tracing is not required is when a court imposes a money judgment on a defendant as part of his sentence in a criminal case. But such post-conviction remedies are hollow if, as most courts hold, courts lack the pre-trial authority to restrain assets that are not directly traceable to the offense.

This situation improved to some extent in 2000 with the enactment of a statute allowing federal courts to enforce foreign judgments against assets in the United States without requiring strict tracing. But to enforce our own statutes, strict tracing is still required. To make the money laundering and asset forfeiture tools effective against international money launderers, we need the ability to treat electronic funds as fungible property, and the ability to restrain money pre-trial to ensure that it is available to satisfy a forfeiture judgment whether it is directly traceable to the underlying offense or not.

B. Parallel Transactions

A related problem concerns parallel transactions such as those carried out by hawalas and other informal money exchange systems. A typical scenario might be described as follows: a person with the proceeds of slave trafficking in Sudan wants to transfer that money to the United States, so he goes to his local money exchanger and says, "Here's $100,000, send it to Mr. X in New York." The money exchanger then gives the $100,000 to someone in Egypt, who in turn directs his cousin in New Jersey to give another $100,000 to Mr. X in New York.

In this scenario, there is only one transaction over which we have jurisdiction: the New Jersey/New York transaction. But does that transaction involve any criminal proceeds? Or were the proceeds involved in, and only involved in, the Sudan/Egypt transaction? There is a recent case holding that outbound wire transfers cannot be broken up into their constituent parts but rather must be considered a unified transaction for purposes of the money laundering statutes.

16. See United States v. Puche, 350 F.3d 1137 (11th Cir. 2003) (upholding forfeiture of substitute assets in a money laundering case)
18. United States v. Dinero Express, 313 F.3d 803 (2nd Cir. 2002) (holding that the course of conduct—sending money through a money remitter—that begins with a sum of money in one country and ends with a related sum in another country, constitutes a transfer, even though the transaction was accomplished through offsetting debits and credits, so that no single step involved the movement of money across the border).
Whether that can be extended, without remedial legislation, to what I call the left-pocket/right-pocket problem, is not at all clear.¹⁹

III. TERRORIST FINANCING

Let me conclude with a few words about terrorist financing. Obviously, terrorist financing presents all kinds of complicated and serious problems for law enforcement. These include all of the bulk-cash smuggling and tracing problems I have already mentioned. Another problem I want to mention here concerns what I call “reverse money laundering.”²⁰

Traditionally, all of our U.S. money laundering statutes and enforcement efforts have been backward looking. We have been concerned with the source of the money—did it come from drugs or corruption or fraud or trafficking in human misery?—and with what the offender is doing with the money to conceal or disguise his offense.

In terrorism cases, the bad guy is going through the same steps to conceal or disguise his money, but not because it is the proceeds of a crime. Indeed, money used to finance terrorism is often raised as charitable contributions, or is money from someone’s personal wealth, and does not represent criminal proceeds at all. Rather, what the bad guy tries to conceal or disguise is the future use of that money to finance a terrorist act such as blowing up a train in New Jersey, launching a chemical attack on Chicago, or destroying the Golden Gate Bridge.

This kind of money laundering—or reverse money laundering—is forward-looking. The idea is not to hide dirty money to make it clean, but to hide clean money until it can be used to do something evil. It is at least as serious as ordinary money laundering. In fact, it is probably much more serious but it is not illegal under any statute that requires the prosecutor to prove that the money being laundered is the proceeds of a prior criminal act.

We have a few tools that deal with reverse money laundering. One statute makes it a crime to transport any money, clean or dirty, into or out of the United States for the purpose of facilitating another crime.²¹ Others specifically make it an offense to raise money for terrorism.²² But we have no domestic reverse money laundering statute. This is a problem Congress will have to address.

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¹⁹ The name reflects the fact that this problem arises anytime dirty money goes into someone’s left pocket and clean money then comes out of his right pocket.


CONCLUSION

International money laundering is a growing problem with which law enforcement professionals are dealing on a daily basis. The tools enacted in recent legislation have proven useful in countering some money laundering methods, but the practice of laundering money without regard to political borders is evolving quickly and becoming more sophisticated and more complex. New tools are needed to address this threat to the ability of law enforcement to protect our institutions from corruption, from misuse at the hands of organized crime, and from being used as the conduit for financing terrorism. Those of us who deal with these problems day in and day out have identified the need for new legislation. It is up to Congress to enact it into law.