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UNITED STATES MONEY LAUNDERING LAWS: INTERNATIONAL IMPLICATIONS

JAMES D. HARMON, JR.*

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I. INTRODUCTION

With the significant domestic and international economic influence exercised by organized crime, money laundering has become an indispensable element of "the Mob's" activities. According to a conservative estimate of the President's Commission on Organized Crime, organized crime in America netted income in excess of \$67 billion in 1986 alone.¹ It is believed that between \$5 and \$15 billion in illegal drug money earned in the United States moves into international financial channels each year.² Narcotics traffickers may even hold substantial interests in United States government securities, since, in 1985, net purchases of United States equities by Latin American and Caribbean investors totaled \$1.7 billion, a 250% increase over the previous year, while investments in government bonds and notes saw a threefold increase, to \$4.3 billion.³ Drug trafficking and flight capital are equally plausible explanations for this surge, but the proportionate share due to each is unknown.

Without the ability to move and hide its enormous wealth, organized crime would never have become the threat it is today. Drug cartels could operate only at a small fraction of current levels, and with far less flexibility in the absence of money laundering. The confluence of illicit wealth coursing through the stream of legitimate commerce has created an elite class of criminals thought to be untouchable. Interna-

1. WHARTON ECONOMETRIC FORECASTING ASSOCIATES, INC., *THE INCOME OF ORGANIZED CRIME* (1986), reprinted in PRESIDENT'S COMMISSION ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, *THE IMPACT: ORGANIZED CRIME TODAY* 413 (1986). This income caused a \$17 billion reduction in the gross national product, lost tax revenues of \$6 billion, a loss of 394,000 jobs, and a .3 percent increase in consumer prices. *Id.*

2. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, *THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING* 13 (1984) [hereinafter *THE CASH CONNECTION*].

3. Frank, *See No Evil*, FORBES, Oct. 6, 1986, at 40.

tional financier Michele Sindona explained the inevitable outcome of unfettered money laundering:

The real evil of money laundering is its power to allow dirty money—the instrument of crime—to enter the mainstream of economies undisturbed, to consume important sectors of those economies and transform them into *feudi* of an international criminal oligarchy beyond the reach of the law—an oligarchy that is to be brought down by [those] who do not understand money.⁴

Sindona's correct view of the power of the money launderer stood in contrast to United States law, which failed to address the problem until recently.⁵ Now that money laundering has been made a criminal offense, the hidden economic strength of organized crime has become a lasting vulnerability. This is because dirty money is always in motion, often moving through aboveground investments and financial institutions. It is now exposed to unprecedented view by a matrix of new laws which can undo years of illegal profit-making through a single, thoughtful prosecution, thus seriously undermining even the most entrenched criminal organization.

This article will focus on the substantive and procedural ways in which the Money Laundering Control Act of 1986 (as modified by the Anti-Drug Abuse Act of 1988), and other statutes will impact upon international financial transactions and institutions, and upon the money laundering phenomenon.

II. THE MONEY LAUNDERING CONTROL ACT OF 1986

Congress enacted the Money Laundering Control Act of 1986⁶ (the Act) as a direct response to a problem which was clearly out of hand. When President Reagan signed the Act into law on October 27, 1986,

4. N. TOSCHES, *POWER ON EARTH* 89 (1986). Michele Sindona was convicted of causing the collapse of the Franklin National Bank. See *United States v. Sindona*, 636 F.2d 792 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). He was subsequently deposed by the President's Commission on Organized Crime. See *THE CASH CONNECTION*, *supra* note 2, at 7. He eventually died in a prison cell in Italy after taking cyanide. See *Michele Sindona, Jailed Italian Financier Dies of Cyanide Poisoning*, N.Y. Times, Mar. 23, 1986, § 1, at 44, col. 1.

5. See *United States v. \$4,255,625.39*, 551 F. Supp. 314 (S.D. Fla. 1982) for the first use of the term "money laundering" in a reported case. This action sought forfeiture of a portion of over \$400 million in Colombian cocaine money ostensibly laundered in Dade County, Florida during a sixteen-month period in 1981 and 1982. *Id.*

6. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, tit. I, § 1352(a), 100 Stat. 3207 (codified as amended at 18 U.S.C. §§ 1956, 1957 (Supp. IV 1986)). For legislative history, see 1986 U.S. CODE CONG. & ADMIN. NEWS 5393.

the profits of organized crime were brought well within the reach of federal law. The law does nothing less than strike at the profit motive for criminal conduct. It is revolutionary in legal and practical concept because of the ways it seeks to deter, detect and punish those who would launder for criminal purposes, while depriving them of their wealth. Unfortunately, financial institutions are bound to become involved as the Act provokes widespread investigations.

The first major use of the Act is indicative of its effectiveness against drug money launderers. On June 12, 1987, Attorney General Edwin Meese announced criminal charges against 160 people, and the seizure of \$20 million in cash, 2,100 pounds of cocaine and \$1.5 million in other assets.⁷ Those charged had been part of laundering rings operating in New York, Newark, Los Angeles, San Francisco, Chicago and Detroit, which had funneled over \$175 million from the United States to destinations such as Switzerland and Tokyo.⁸ This FBI undercover operation, however, was notable for other reasons. First, the Panamanian government seized traffickers' bank accounts in Panama for the first time, and, second, Colombians were lured to a sailboat off Aruba where they were arrested by the FBI.⁹ Actions such as these presage the international impact and application of the Act.

In the most general terms, the Act: 1) makes criminal those financial transactions which involve the proceeds of crime; 2) raises asset tracing and forfeiture to a level as significant as incarceration of those convicted; 3) addresses those issues on an international scale; and 4) reinforces the importance attached to the currency reporting requirements of the Bank Secrecy Act¹⁰ and the Internal Revenue Code.¹¹ The language of the Act is so intricate and its scope so comprehensive that this article will focus primarily on the law's international aspects. To do this, however, requires some understanding of the integrated mix of criminal, civil, regulatory and private sector measures which the Act focuses on illegal economic gain.

7. Werner, *Scores Arrested in Money Laundering*, N.Y. Times, June 13, 1987, § 1, at 8, col. 1.

8. *Id.*

9. *Id.*

10. Bank Secrecy Act of 1982, Pub. L. No. 97-258, 96 Stat. 995 (codified as amended at 31 U.S.C. §§ 5311-5314, 5316-5324 (1982, Supp. II 1984 & Supp. IV 1986)). Among other things, the Bank Secrecy Act requires that financial institutions report currency transactions in excess of \$10,000 to the Treasury Department. *Id.* § 5316. See also U.S. DEPT. OF JUSTICE, U.S. ATTORNEY'S MANUAL, tits. 9.9-79.200 to 9.9-79.320 (1984) [hereinafter U.S. ATTORNEY'S MANUAL].

11. I.R.C. § 6050I (1984). The Internal Revenue Code imposes reporting requirements for cash transactions over \$10,000 in a trade or business, and for causing another to fail to file this information. *Id.*

In various ways, the Act adopts the primary recommendations of the President's Commission on Organized Crime: a) that money laundering be made a substantive criminal offense;¹² b) that the Right to Financial Privacy Act be amended to facilitate the flow of information from financial institutions to enforcement authorities;¹³ and c) that the new money laundering offenses be given extraterritorial effect.¹⁴ There were several reasons for creating separate money laundering offenses. First was the recognition that money launderers who complied with the reporting requirements of the Bank Secrecy Act operated "with virtual impunity."¹⁵ Second was that the Bank Secrecy Act "as a major law enforcement tool had been rendered a virtual nullity by an industry that didn't seem to care."¹⁶ Third was the desire "to further deter the

12. THE CASH CONNECTION, *supra* note 2, at 61-63, 67-69.

13. *Id.* at 59, 75-76.

14. *Id.* at 69.

15. *Id.* at 61.

16. HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, COMPREHENSIVE MONEY LAUNDERING PREVENTION ACT, H.R. REP. NO. 746, 99th Cong., 2d Sess. 15 (1986) [hereinafter HOUSE REPORT]. Although several congressional committees exhaustively examined the issue of money laundering, the House Banking Committee best described the limitations of the Bank Secrecy Act:

Sixteen years ago, the Committee on Banking, in efforts to wage war on organized crime, drug traffickers, tax evaders, and various other white collar criminals, reported out what is commonly known as the Bank Secrecy Act. At that time, and many times since, this Committee, to ensure compliance with the Act, has encouraged, consulted, and issued directions to the Department of the Treasury (which is charged with implementation of the Act), the banking regulators (who have been delegated certain responsibilities), the banks and other financial institutions.

Unfortunately, the hearings on money laundering beginning with the Bank of Boston hearing in April 1985, have shown that a major law enforcement tool has been rendered a virtual nullity by an industry that didn't seem to care and by a regulatory structure that proved to be ineffective.

The Committee fully agrees with what the Chairman of the Committee, Fernand J. St. Germain, said in his opening statement at the Bank of Boston hearings:

I want the banking industry, the regulators, and the American public to understand that we are going to insist on full enforcement and compliance with the Bank Secrecy Act and we will not tolerate the selective compliance and enforcement that has damaged the effectiveness of the act as a law enforcement weapon. . . . [B]ank officials need not be corrupt or into conspiracies for organized crime; it is enough that bank officials . . . be sloppy and that they operate without controls and without really caring.

Without access to the American financial system, drug dealers are crippled and their activities are laid open to law enforcement agencies. . . . Passage of the legislation, together with other proposed legislative remedies outside the jurisdiction of this Committee, however, would substantially paralyze the international drug trafficker.

growth of money laundering."¹⁷

A. Enhanced Enforcement Capabilities

The Act strengthens the Bank Secrecy Act compliance function of the Department of the Treasury in a number of ways. First, the Treasury Department now has an enforceable summons authority.¹⁸ Second, attempts to evade Bank Secrecy Act reporting requirements can result in imposition of civil penalties.¹⁹ Third, increased maximum civil penalties can range from \$25,000 to \$100,000 for each willful violation of the Bank Secrecy Act, although a new \$500 penalty for each negligent violation provides some additional discretion for the Treasury Department in the imposition of civil penalties.²⁰ Lastly, the criminal penalties for structuring transactions to evade the reporting requirements of the Bank Secrecy Act have been increased.²¹

Id. at 15-16. Non-compliance with Bank Secrecy Act reporting requirements appears to have been widespread. In 1984, financial institutions filed 700,000 currency transaction reports with the Department of Treasury. After the Bank of Boston pleaded guilty to Bank Secrecy Act violations in February 1985, the number of reports filed escalated to well over 3,000,000 in 1986. See *General Accounting Office Findings on the Enforcement of the Bank Secrecy Act, 1986: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Affairs*, 99th Cong., 2d Sess. 17-18 (1986) (statement of Francis A. Keating II, Assistant Secretary of the Treasury, Enforcement Division).

17. SENATE COMM. ON THE JUDICIARY, THE MONEY LAUNDERING CRIMES ACT OF 1986, S. REP. NO. 433, 99th Cong., 2d Sess. 1-2 (1986) [hereinafter SENATE REPORT]. The Senate Judiciary Committee explained the purpose of money laundering legislation as follows:

To create a Federal offense against money laundering; to authorize forfeiture of the profits earned by launderers; to encourage financial institutions to come forward with information about money launderers without fear of civil liability; to provide Federal law enforcement agencies with additional tools to investigate money laundering; and to enhance the penalties under existing law in order to further deter the growth of money laundering. The Committee believes that only through the collective effort of Federal law enforcement agencies, financial institutions and individuals will the Government be successful in its efforts to curb the spread of money laundering, by which criminals have successfully disguised the nature and source of funds from their illegal enterprises.

Id.

18. 31 U.S.C. § 5318(a)(4) (Supp. IV 1986). A Treasury summons is enforceable in any court of the United States in whose jurisdiction:

1. The investigation which gave rise to the summons is being carried on;
2. The person is an inhabitant; or
3. The person summoned carries on business or may be found.

Id. § 5318(e)(2).

19. *Id.* § 5321(a)(4).

20. *Id.* § 5321(a)(6).

21. *Id.* § 5322. The penalty for a willful violation of the Act is a fine of not more than \$500,000, imprisonment for not more than 10 years, or both. *Id.* § 5322(b).

The Act requires federally insured banks to adopt Bank Secrecy Act compliance procedures which are to be examined by bank regulatory agencies.²² The Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve Bank and other agencies have placed ultimate responsibility for Bank Secrecy Act compliance in the hands of boards of directors of federally insured financial institutions.²³ By unusual uniform regulations implementing the Act, corporate boards must approve and adopt Bank Secrecy Act compliance procedures in a manner which is reflected in the corporate minutes.²⁴ Failure to maintain adequate compliance procedures can result in institutional and personal civil penalties of \$1,000 per day, imposed following an agency cease and desist order.²⁵ Through amendments to the Bank Control Act and Savings and Loan Control Act, the Act makes the acquiring party's past record of Bank Secrecy Act violations relevant to approval of bank acquisitions.²⁶

The Act also provides criminal enforcement authorities with additional tools for their trade. Substantive laundering crimes are predicate offenses for purposes of the Racketeer Influenced and Corrupt Organizations statute (RICO)²⁷ and the Travel Act.²⁸ As is already the case with Bank Secrecy Act violations, court-authorized electronic surveillance may be used to gather evidence of possible violations of several of the new offenses.²⁹ This new matrix of investigative aids will change the character of "paper trail" investigations and the consequent nature of proof offered at trial. The combination of RICO, new money laundering offenses, and electronic surveillance is likely to produce more

22. 12 U.S.C. § 1818(s) (Supp. IV 1986).

23. *See id.* § 1818(a), (j).

24. 12 C.F.R. § 563.17-7 (1988). Regulators require federally insured financial institutions to establish procedures reasonably designed to assure and monitor compliance with the Bank Secrecy Act. At a minimum, these procedures must be reduced to writing, be approved by the insured institution's board of directors, and be reflected in the minutes of the institution. Furthermore, the procedures must:

1. Provide for a system of internal controls to insure ongoing compliance;
2. Provide for independent testing for compliance by an insured institutions' board of directors or by an outside party;
3. Provide training for appropriate personnel; and
4. Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance.

Id.

25. 12 U.S.C. §§ 93(b)(1), 1818(i)(2)(i) (1982); *see also* 12 C.F.R. § 21.11(h) (1987).

26. 12 U.S.C. § 1817(j)(1)(D) (Supp. IV 1986).

27. 18 U.S.C. § 1961(1)(B) (Supp. IV 1986) (incorporating 18 U.S.C. §§ 1956 and 1957 into RICO).

28. *Id.* § 1952(b) (incorporating 18 U.S.C. §§ 1956 and 1957 into the Travel Act).

29. *Id.* § 2516(1)(c), (g).

"real time, high tech" intrusion into potential criminal conduct, even in cases where organized crime is not involved, while reducing the role of old-fashioned books and records, and the reconstruction of past events, to mere corroborative evidence.³⁰

Although each of these—the role of corporate boards, enhanced enforcement capabilities, increased information flow and a strengthened Bank Secrecy Act—is significant, the key to the Act is the manner by which money laundering has been made criminal in a substantive sense.³¹

B. Money Laundering as a Substantive Offense

Money laundering is the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises

30. *Id.*

31. The process of money laundering has also been made criminal in the states of California, CAL. PENAL CODE §§ 186.9-186.10 (West 1987), and Arizona, ARIZ. REV. STAT. ANN. § 13-2317 (Supp. 1988).

Money laundering is also the focus of intense international interest. In December 1988, forty-four nations, including the United States, but not Switzerland, became signatories to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which requires signatories to relax their banking secrecy laws and to make money laundering a crime and an extraditable offense. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, *reprinted in* 28 I.L.M. 493 (1989). Likewise, in England, the Drug Trafficking Offenses Act focuses on those who assist another to retain or control the proceeds of drug trafficking. It states in pertinent part:

- (1) [I]f a person enters into or is otherwise concerned in an arrangement whereby:
 - (a) the retention or control by or on behalf of another (call him "A") of A's proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise), or
 - (b) A's proceeds of drug trafficking;
 - (i) are used to secure that funds are placed at A's disposal, or
 - (ii) are used for A's benefit to acquire property by way of investment, knowing or suspecting that A is a person who carries on or has carried on drug trafficking or has benefited from drug trafficking, he is guilty of an offense.

Drug Trafficking Offenses Act, 1986, chs. 24, 32. Legislation making money laundering a crime is about to be introduced in Switzerland, with Italy likely to follow. Financial Times, May 12, 1989, § 1, at 2.

In January 1989, the Basle Committee on Banking Regulations and Supervisory Practices—consisting of the governors of the central banks of the United States, Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and Luxembourg—signed an accord of principles to encourage the implementation of practices to eliminate money laundering. 52 Banking Rep. (BNA) No. 5, at 218 (1989).

that income to make it appear legitimate.³² The Act creates three categories of laundering offenses—the conduct of,³³ or attempt to conduct:³⁴ (a) financial transactions involving the proceeds of specified unlawful activity;³⁵ (b) the international transportation of such proceeds;³⁶ and (c) monetary transactions in property constituting, or

32. *THE CASH CONNECTION*, *supra* note 2, at 7. Michele Sindona described laundering as a two-step process: "Dirty money is money made through crime-drug money. It is illegal gain. It can be hidden, but it cannot be used in the light of day unless its owner can make it appear to be legitimate, tax-paid income. Many people hide dirty money. . . . Most people confuse hiding and laundering." N. TOSCHES, *supra* note 4, at 87.

33. 18 U.S.C. § 1956(c)(2) (Supp. IV 1986). This term includes "initiating, concluding or participating in initiating, or concluding a transaction." *Id.*

34. 18 U.S.C. §§ 1956(a)(1), (2), 1957(a) (Supp. IV 1986), *amended by* the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6471(a), 102 Stat. 4378 (Supp. 1989).

35. Section 1956(a)(1) of the Act states:

- (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

- (A)(i) with the intent to promote the carrying on of specified unlawful activity; or

- (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

- (B) knowing that the transaction is designed in whole or in part—

- (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

- (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(1) (Supp. IV 1986), *amended by* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6471(a), 102 Stat. 4378 (Supp. 1989).

36. Section 1956(a)(2) of the Act states:

- (2) Whoever transports, transmits or transfers or attempts to transport, transmit or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

- (A) with the intent to promote the carrying on of specified unlawful activity; or

- (B) knowing that the monetary instruments or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part—

- (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

- (ii) to avoid a transaction reporting requirement under State or Federal law shall be sentenced to a fine of \$500,000 or twice the value of the monetary instrument or funds involved in the transportation, whichever is greater, or imprisonment for not more than twenty years, or both.

derived from, the proceeds obtained from a criminal offense.³⁷ The proceeds must be generated by "specified unlawful activity," a term of art under the Act.³⁸ The Act, however, fails to provide a definition of the term "proceeds"³⁹ and exempts monetary transactions "necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution."⁴⁰

The Act not only reaches for the proceeds of conduct characteristic of organized crime such as narcotics trafficking, RICO predicates, or certain state offenses, but also encompasses thirty-one additional criminal offenses ranging from espionage to trading with the enemy.⁴¹ In

Id. § 1956(a)(2) (Supp. IV 1986), amended by Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6471(b), 102 Stat. 4378 (Supp. 1989).

37. Section 1957 of the Act provides in pertinent part:

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

Id. § 1957(a) (Supp. IV 1986).

38. 18 U.S.C. § 1956(c)(7) (Supp. IV 1986). See *infra* note 41 for the complete text of the Act.

39. Similarly, the RICO statute, which makes it a crime to use or invest the "income or the proceeds of such income" derived from a pattern of racketeering activity, fails to define the term "proceeds" in an interstate enterprise, 18 U.S.C. § 1962(a) (1982), as does the narcotics forfeiture statute, 21 U.S.C. § 853(a)(1) (Supp. IV 1986), which also uses the term.

Given the expansive legislative intent behind the Act, the concept of proceeds should not be bound by technical accounting terms such as income, profit, capital or the like. Rather, the idea of proceeds should emerge as Sindona's notion of "money made through crime . . . illegal gain," N. TOSCHES, *supra* note 4, at 87, mirroring RICO's purpose "to remove the profits from organized crime by separating the racketeer from his dishonest gains." *Russello v. United States*, 464 U.S. 16, 27-28 (1983).

40. 18 U.S.C. § 1957(f)(1) (Supp. IV 1986), amended by Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6182, 102 Stat. 4354 (Supp. 1989).

41. The broad applicability of the Money Laundering Control Act is evident from the encompassing definition given to the term "specified unlawful activity" under Section 1956(c)(7):

The term "specified unlawful activity" means:

- (A) any act or activity constituting an offense listed in Section 1961(1) of this title except an act which is indictable under the Currency and Foreign Transactions Reporting Act;
- (B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving the manufacture, importation, sale or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);
- (C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);
or
- (D) an offense under section 152 (relating to concealment of assets; false oaths

addition, promotion of tax evasion has recently been added to the

and claims, bribery) section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications) section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1344 (relating to bank fraud), or section 2113 or 2114 (relating to bank and postal robbery and theft) of this title, section 2319 (relating to copyright infringement), section 310 of the Controlled Substances Act (21 U.S.C. 830) (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 1822 of the Mail Order Drug Paraphernalia Control Act (100 Stat. 3207-51; 21 U.S.C. 857) (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, or section 16 (relating to offenses and punishment) of the Trading with the Enemy Act.

18 U.S.C. § 1956(c)(7) (Supp. IV 1986), *amended by* Anti-Drug Abuse Act of 1988, § 6183, 102 Stat. 4354 (Supp. 1989). In connection with subsection (c)(7)(A) above, 18 U.S.C. § 1961(1) (1982) of RICO defines racketeering activity as:

- (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotics or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;
- (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), section 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section

list.⁴²

Thus, in one stroke, the potency of RICO has been doubled since the number of RICO predicate offenses has been effectively doubled. The possible permutations and combinations of RICO predicate offenses are now virtually without limit. Thus, it is accurate to say that what began as a measure to control the drug trade of organized crime has resulted in a law that targets financial crime in ways novel to American jurisprudence.

Although the proceeds of crime historically have been subject to seizure by warrant for use as evidence,⁴³ the Act makes criminal proceeds perpetually illegal. Long after the criminal offense which generated the proceeds has come to an end, those who conduct prohibited financial transactions or international transportation engage in criminal conduct independent of the income-producing original crime. The Act tracks the proceeds one step further, seeking to deprive criminals of the effective use and investment of the fruits of their crimes. The concept is to bar "monetary transactions" in "criminally derived property."⁴⁴ The Act does not limit itself to transactions conducted through

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- 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic);
- (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501 (relating to embezzlement from union funds),
 - (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or
 - (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

18 U.S.C. § 1961(1) (1982).

42. 18 U.S.C. § 1956(c)(7) (Supp. IV 1986), amended by Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6183, 102 Stat. 4354 (Supp. 1989). The main difference from a simple tax evasion offense, 26 I.R.C. §§ 7201-7206, is that the Anti-Drug Abuse Act requires that the money be criminally derived, and the defendant must know the money is criminally derived.

43. See FED. R. CRIM. P. 41(b)(1).

44. Section 1957 of the Act defines these terms as follows:

(f) As used in this section-

- (1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds

financial institutions,⁴⁵ but appears to reach a broad variety of routine commercial transactions which affect commerce.⁴⁶

or a monetary instrument (as defined in section 1956(c)(5) of the title) by, through or to a financial institution (as defined in section 5312 of title 31), but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution;

- (2) the term "criminally derived property" means any property constituting or derived from proceeds obtained from a criminal offense.

18 U.S.C. § 1957(f) (Supp. IV 1986). Similar language is found in 21 U.S.C. § 853(a)(1) (Supp. II 1984) which calls for the forfeiture of "any property constituting, or derived from, any proceeds" of the drug trade.

45. The President's Commission on Organized Crime tailored its recommendations to focus solely on money laundering conducted through financial institutions, as did a bill introduced by Senators D'Amato, Proxmire and others, S. 572, 99th Cong., 1st Sess. (1985), which was identical to the Commission's proposed legislation. Compare *THE CASH CONNECTION*, *supra* note 2, at 67-69 with *Money Laundering Legislation, 1986: Hearings on S. 572, S. 1335, and S. 1385 of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 38-43 (1985) [hereinafter Senate Hearings]; see also SENATE REPORT, supra note 17, at 4-5.*

That Congress more fully exercised its authority to control money laundering underscores a legislative intent that the Money Laundering Control Act should be construed broadly. In *California Bankers Assoc. v. Schultz*, 416 U.S. 21 (1974), which upheld the constitutionality of the Bank Secrecy Act, the Supreme Court traced the outlines of congressional power in this area:

The plenary authority of Congress over both interstate and foreign commerce is not open to dispute, and that body was not limited to any one particular approach to effectuate its concern that negotiable instruments moving in the channels of that commerce were significantly aiding criminal enterprise. . . . Congress could have closed the channels of commerce entirely to negotiable instruments, had it thought that so drastic a solution was warranted; *it could have made the transmission of the proceeds of any criminal activity by negotiable instruments in interstate or foreign commerce a separate criminal offense.*

Id. at 46-47 (emphasis added).

46. The Act defines with some precision the terms "transaction" and "financial transaction" as follows:

- (3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;
- (4) the term "financial transaction" means a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

18 U.S.C. § 1956(c)(3), (4) (Supp. IV 1986).

C. Knowledge and Intent

During the legislative process, debate raged over whether any new substantive money laundering offense should be premised only on "actual knowledge," and not on lesser standards such as "reckless disregard" or "reason to know."⁴⁷ The Act makes no reference to either of these latter two standards of intent, but the Senate report on laundering legislation equates knowledge with "willful blindness" or "conscious avoidance of knowledge,"⁴⁸ a notion common in the criminal law.⁴⁹ Given its close attention to the knowledge issue, Congress certainly intended to adopt the general rule that deliberately closing one's eyes is tantamount to actual knowledge for purposes of all of the laundering offenses.

The *mens rea* element of the new substantive laundering offenses is of special interest to financial institutions. To be held liable for criminally laundering monetary instruments, one must be aware that "the property involved in the transaction represented proceeds from some form, though not necessarily which form" of felonious activity.⁵⁰ In addition, one must intend to promote specified unlawful activity, or to take action knowing that the transaction is designed to conceal information about the proceeds of specified criminal activity, or intend to evade a transaction reporting requirement under state or federal

47. See, e.g., *Tax Evasion, Drug Trafficking And Money Laundering As They Involve Financial Institutions*, 1986: Hearings on H.R. 1367, 1474, 1945, 2785, 3892, 4280, 4573 Before the Subcomm. on Financial Institutions, Supervision, Regulation and Insurance of The Comm. on Banking, Finance and Urban Affairs, 99th Cong., 2d Sess. 1036-1041 (1986) (statement of James D. Harmon, Jr., Executive Director and Chief Counsel, President's Commission on Organized Crime).

48. See SENATE REPORT, *supra* note 17, at 9-10.

49. See, e.g., *United States v. Hanlon*, 548 F.2d 1096, 1101. (2d Cir. 1977) ("It is settled law that a finding of guilty knowledge may not be avoided by a showing that the defendant closed his eyes to what was going on about him. . .").

In clarifying the obligations of financial institutions under the Bank Secrecy Act to report multiple currency transactions aggregating to more than \$10,000, the Treasury Department cited *United States v. Jewell*, 532 F.2d 697 (9th Cir.), *cert. denied* 426 U.S. 951 (1976), in support of its position that knowledge "includes the concept of willful blindness . . . [and] applies to a person who has deliberately avoided positive knowledge. . . ." 52 Fed. Reg. 11436, 11437 (1987).

50. 18 U.S.C. § 1956(a)(1), (c)(1) (Supp. IV 1986). The Department of Justice has proposed that the Act's current language, "which in fact involves," be changed to read "or is believed to involve." *Money Laundering Control Act of 1986 and the Regulations Implementing the Bank Secrecy Act: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 1st Sess. 88, 119 (1987) (testimony of William Weld, Assistant Attorney General) [hereinafter *Committee Hearing*].

law.⁵¹

An example may illustrate the point that one who purposely launders the proceeds of "some form" of a felony may be guilty of money laundering as long as the proceeds are "in fact" from some specified unlawful activity.⁵² A bank teller who has every reason to believe that a series of cash deposits, each slightly less than \$10,000, are the proceeds of an illegal gambling operation, but deliberately closes his eyes to this situation, may create criminal liability for the bank, even if the cash turns out to be drug money.⁵³

The idea that mistaking one type of criminal proceeds for another is no defense is also seen in the international transportation and criminally derived property offenses. Under the former, one must know that the transported funds represent "the proceeds of some form of unlawful activity,"⁵⁴ though not necessarily which specified unlawful activity. The criminally derived property statute deals with the planned obscurity of laundering transactions in a similar way. A person "knowing" that a transaction involves "property constituting, or derived from, proceeds obtained from a criminal offense," which is in fact derived from specified unlawful activity, is said to act with the requisite criminal knowledge.⁵⁵

For financial institutions, there exists an uncertain connection between the idea of "avoidance of knowledge" and their enhanced ability to communicate with enforcement authorities. The Act has broadened,

51. See, e.g., 18 U.S.C. § 1956(a)(1)(A), (B)(i), (ii) (Supp. IV 1986); FLA. STAT. § 655.50 (1984 & Supp. 1989); GA. CODE ANN. § 7-1-910 to 7-1-915 (Supp. 1988).

52. 18 U.S.C. § 1956(a)(1), (c)(1) (Supp. IV 1986).

53. The Act does not change the general rule of corporate criminal liability which generally depends on the *respondeat superior* doctrine, that is, an act of an employee within the scope of his authority in furtherance of corporate interests binds the corporation. See, e.g., *New York Cent. & H.R.R.R. v. United States*, 212 U.S. 481 (1909). In some instances, however, a corporation may be criminally liable for the conduct of its supervisory employees who had either intentionally disregarded the law or acted with plain indifference to its requirements. *United States v. Demauro*, 581 F.2d 50, 54 (2d Cir. 1978); see also *United States v. Bank of New Eng.*, 821 F.2d 844, 856 (1st Cir.), *cert. denied*, 108 S.Ct. 328 (1987) (bank's conviction of Bank Secrecy Act violations based on "flagrant organizational indifference" and "collective knowledge" theories affirmed); *Tippecanoe Beverages, Inc., v. S.A. El Aquila Brewing Co.*, 833 F.2d 633, 637 (7th Cir. 1987) ("[T]he corporation itself cannot be blameworthy in an intelligible moral sense."); *United States v. Ingredient Technology Corp.*, 698 F.2d 88 (2d Cir. 1983) ("While a corporation has no independent state of mind, the acts of individuals on its behalf may be properly chargeable to it.").

54. 18 U.S.C. § 1956(a)(2)(B) (Supp. IV 1986).

55. 18 U.S.C. § 1957(c) (Supp. IV 1986). The Act provides in pertinent part that "in a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity." *Id.*

yet made more specific, permissible disclosure under the Right to Financial Privacy Act,⁵⁶ so that information identifying a customer and account and "the nature of any suspected illegal activity" may be furnished to enforcement authorities without a subpoena, court order or liability for such disclosure.⁵⁷ This liberalization preempts any state disclosure law which is more restrictive.⁵⁸ The Right to Financial Privacy Act, as amended, now states plainly that a financial institution or its employee "shall not be liable to the customer" for disclosure of suspected criminal activity.⁵⁹ In other words, a bank is protected when disclosure authorized by law is made in good faith.

Disclosure, however, is permissive, not mandatory. Thus, the dilemma posed for financial institutions is evident: Where illegal activity is only suspected, can a financial institution ever avoid a charge of willful blindness by not disclosing the suspected illegal activity to enforcement authorities? The quandary for financial institutions is how to avoid crossing the line between unreported suspicion and passive complicity. Liberal, but standardized, disclosure practices and extreme caution should be the watchwords here.

D. The Consequences of Money Laundering

The laundering offenses created by the Act carry both criminal penalties and civil sanctions. The criminal penalties consist of imprisonment, fines and forfeiture which vary with the type of offense, while the civil sanctions are limited to severe monetary penalties and forfeiture.

Specifically, the term of imprisonment for the financial transaction and international transportation offenses is twenty years, the possible fine is \$500,000 or twice the value of the monetary instruments or funds laundered, or both imprisonment and a fine may be imposed.⁶⁰ In addition, the Department of the Treasury⁶¹ may impose a civil penalty of "not more than the greater of - (1) the value of the property, funds or monetary instruments involved in the transaction; or (2) \$10,000" for these offenses.⁶² Engaging in transactions involving criminally derived property subjects a person to ten years imprisonment, a

56. Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (1978) (codified as amended at 12 U.S.C. §§ 3401-3422 (1982 & Supp. IV 1986)).

57. 12 U.S.C. § 3403(c) (1982 & Supp. IV 1986).

58. *Id.*

59. *Id.* Wrongful disclosure, however, may entitle a customer to recover actual and punitive damages and attorneys' fees. See 12 U.S.C. § 3417(a) (1982 & Supp. IV 1986).

60. 18 U.S.C. § 1956(a)(1), (2) (Supp. IV 1986).

61. *Id.* § 1956(e).

62. *Id.* § 1956(b)(1), (2).

fine, or both,⁶³ or an alternative fine of not more than twice the amount involved in the transaction, or \$250,000 plus twice the pecuniary gain from the offense or loss to the victim.⁶⁴ There is, however, no civil penalty provision for the derived property offense. Each of the three substantive laundering offenses can also result in the civil or criminal forfeiture of "[a]ny property, real or personal, involved in a transaction in violation of section 5313(a) or 5324 of title 31 [the Bank Secrecy Act], or of section 1956 or 1957 of this title, or which is traceable to such property."⁶⁵

Cross border enforcement of civil forfeiture provisions is likely to produce even more significant long-term results than prosecution of individual money launderers. The sequel to the first arrests off Aruba for violation of the Act described previously, points to a government strategy in which criminal prosecution will always be complemented by civil forfeiture actions having an international aspect.

At some point, the Aruban launderers crossed paths with a government money laundering sting operation. As described in an indictment returned on March 3, 1989,⁶⁶ government agents determined that they were dealing with a one billion dollar laundering operation (known as "La Mina") of the Medellin Cartel, which is responsible for most of the cocaine imported into the United States, and which is now expanding into the European market through Spain.⁶⁷ The launderers deposited millions of dollars of drug proceeds into domestic banks primarily in New York and Los Angeles, then wired the money to bank accounts in Panama, Uruguay, Colombia, France, the British Commonwealth, Luxembourg, Spain, Germany and Switzerland.⁶⁸ The monies were then used to buy planes and stash houses in the United States, to pay for raw materials in Colombia and Bolivia, to buy gold in Bolivia which was used to launder drug money and to make investments in Luxembourg and other countries.⁶⁹ Among other things, the defendants were charged with a money laundering conspiracy in violation of 18 U.S.C. § 1956.⁷⁰

Three weeks later, the government filed a civil suit which sought to direct nine New York banks to transfer \$433,461,255.64 of laundered

63. 18 U.S.C. § 1957(a), (b)(1), (2) (Supp. IV 1986).

64. 18 U.S.C. § 3623(a)(3), (c)(1) (Supp. IV 1986).

65. 18 U.S.C. §§ 981(a)(1)(A), 982(a) (Supp. IV 1988) (emphasis added); see *United States v. Banco Cafetero*, 797 F.2d 1154 (2d Cir. 1986).

66. See generally *United States v. Escobar-Gaviria*, CR 89-086A (N.D. Ga. 1989).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

funds back to New York from offshore so that they could be forfeited to the government.⁷¹ The government suit sought relief based on the forfeiture provisions of 21 U.S.C. § 881 and 18 U.S.C. § 981, and predicated personal jurisdiction on the Act, 18 U.S.C. § 1956(f), and New York's long-arm statute, New York Civil Practice Laws and Rules Section 302(a)(1).⁷²

This bold attempt to reverse the laundering cycle effectively would enable American courts to reach laundered monies anywhere in the world, using traditional civil concepts of jurisdiction. In the process, banks may be pitted against their own customers who issue contrary instructions or who seek the protection of foreign courts and foreign laws to block any such transfer. American banks with foreign branches may be forced to choose which directions to obey, those of American or foreign courts, or their customers. This case, which relied heavily on wiretaps, is still pending and should be watched very closely.

E. Private Actions

Purely private civil consequences may also flow from money laundering⁷³ since two of the laundering offenses, as well as Bank Secrecy Act violations, are RICO predicate offenses.⁷⁴ Some financial institutions—most likely banks or brokerage firms—will find themselves the targets of civil suits premised upon the theory that unchecked money laundering caused substantial damages to an unsuspecting third party.⁷⁵ Imaginative plaintiffs may yet find new ways to abuse both civil RICO and the Act.

F. Extraterritorial Jurisdiction

The international scope of the Act may quell old controversies over foreign secrecy laws and ignite new ones. The three substantive laundering offenses—financial transactions, international transporta-

71. See generally *United States v. \$433,461,255.64, and Bank of New York, Republic National Bank, American Express Bank, Banco Commerciale Italiana, Bankamerica International, Citibank, Extetbank, Bank of Credit and Commerce, Bancamerica Casa Bancaria, et al.*, 89 Civ. 2091 (S.D.N.Y. 1989).

72. *Id.*

73. See 18 U.S.C. § 1964(c) (1982 & Supp. IV 1986) ("Any person injured in his business or property by reason of [a pattern of racketeering activity] shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.").

74. See 18 U.S.C. § 1961(1) (Supp. IV 1986).

75. See, e.g., *Sedima S.P.R.L. v. Imrex Co.*, 474 U.S. 479, 497 (1985) ("Any recoverable damages occurring by reason of a violation of [RICO] will flow from the commission of the predicate acts."); see also *Grunwald v. Bornfreund*, 668 F. Supp. 128 (E.D.N.Y. 1987).

tion, and criminally derived property transactions—can reach conduct which occurs wholly outside of the United States. The roots of this extraterritorial jurisdiction are found in established principles summarized by Mr. Justice Holmes: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."⁷⁶

Under international law, five general principles are applied to determine whether a nation may validly exercise criminal jurisdiction beyond its borders: 1) the territorial principle, which focuses on the place where the offense is committed; 2) the nationality principle, which looks to the nationality or national character of the person who committed the offense; 3) the protective principle, under which jurisdiction is determined by reference to the national interest injured by the offense; 4) the universality principle, which looks to the custody of the offender; and 5) the passive personality principle, which determines jurisdiction by reference to the nationality or national character of the person injured by the offense.⁷⁷

The Act relies primarily on the first three principles for its global reach. The existence of extraterritorial jurisdiction for the Act's laundering offenses depends on the dollar amount laundered, the locus of the crime, and the nationality of the launderer. First, the criminally derived property or the laundered or transported funds must exceed \$10,000.⁷⁸ Second, criminal money laundering which takes place *wholly outside* of the territorial United States can violate United States law only when the launderer is an American citizen, corporation, subsidiary or partnership.⁷⁹ Where the laundering conduct occurs *in part* in the

76. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); *see also* *United States v. Bowman*, 260 U.S. 94 (1922); *United States v. Pinto-Mejia*, 720 F.2d 248, 260-61 (2d Cir. 1983) (construing the extraterritorial effect of 21 U.S.C. § 955(a) in the absence of a territorial nexus); *accord* *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982), *cert. denied sub nom.* 459 U.S. 1114 (1983); *United States v. Howard-Arias*, 679 F.2d 363, 369 (4th Cir.), *cert. denied*, 459 U.S. 874 (1982).

77. *See Harvard Research on International Law, Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935).

78. 18 U.S.C. § 1956(f)(2) (Supp. IV 1986); 18 U.S.C. § 1957(a) (Supp. IV 1986).

79. 18 U.S.C. §§ 1956(f), 1957(d)(2) (Supp. IV 1986). In particular, the criminally derived property offense is given extraterritorial jurisdiction when committed by a United States person, which is defined as:

[A] national of the United States, a sole proprietorship, partnership, company or association composed principally of national or permanent resident aliens of the United States; and, a corporation organized under the laws of the United States, the District of Columbia, any State, or any territory or possession of the United States, and a foreign subsidiary of such corporation.

United States, and either is done by an alien,⁸⁰ or involves proceeds from drug trafficking which violates the laws of other nations,⁸¹ the law also has an extraterritorial impact. Finally, jurisdiction over the criminally derived property offense is likewise present if committed within the special maritime and territorial jurisdiction of the United States.⁸² The law does not explicitly limit the exercise of extraterritorial jurisdiction to criminal offenses as opposed to conduct which gives rise solely to civil penalties.

The concepts of extraterritorial jurisdiction seem to anticipate and reach a money laundering cycle important to international drug cartels. Currency produced from street drug sales is often shipped in bulk to cash laundering points such as Panama,⁸³ Hong Kong⁸⁴ or Switzerland,⁸⁵ to then enter international financial channels mainly through banks. In such situations, where no United States citizens are involved, jurisdiction may depend upon when the laundering process commenced.

The Act prohibits "initiating"⁸⁶ a "transfer, delivery or other disposition"⁸⁷ of the criminal proceeds. Conceptually, the laundering process in the drug trade begins when money passes from the narcotics buyer to the dealer and when some step is taken thereafter to hide this illegal gain. When viewed in this manner, drug money laundering always begins in the United States. Therefore, the idea of initiating a laundering transaction encompasses a point in time far earlier in the cycle than, for example, when the launderer steps up to the teller's window in Panama.⁸⁸ If laundering is viewed as it is in fact, *i.e.*, more of a continuous process rather than a series of isolated events, then extraterritorial jurisdiction of the Act could ensnare foreigners who never set foot in the United States as long as the process is started in the United States by a co-conspirator. A mere attempt by aliens outside of the United States to initiate or engage in prohibited transactions is also within the law's reach as long as the transactions are "in-

18 U.S.C. § 3077(d)(A), (D), (F) (1982 & Supp. IV 1986).

80. 18 U.S.C. § 1956(f) (Supp. IV 1986).

81. *Id.* § 1956(c)(7)(B).

82. *Id.* § 1957(d). The special maritime and territorial jurisdiction of the United States includes the high seas, certain vessels, aircraft, island, and spaceships, as well as "[a]ny place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States." 18 U.S.C. § 7 (1982 & Supp. IV 1986).

83. *See THE CASH CONNECTION*, *supra* note 2, at 14-15.

84. *Id.* at 15-17.

85. *Id.* at 31-35.

86. 18 U.S.C. § 1956(c)(2) (Supp. IV 1986).

87. *Id.* § 1956(c)(3).

88. *See, e.g., United States v. Milan-Rodriguez*, 759 F.2d 1558 (11th Cir. 1985).

tended to take effect"⁸⁹ in the United States.

When drug money is laundered, the effectiveness of an assertion of extraterritorial jurisdiction should be supported by the protective principle of international law. This principle enables a state "to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens the operation of its governmental functions."⁹⁰ The United States has realized the threat posed by narcotics trafficking in a partially declassified national security directive which states that "the international drug trade is a national security concern because of its ability to destabilize democratic allies through the corruption of police and judicial institutions."⁹¹ This directive implicitly recognizes a collective right of self-defense by all nations against the international *narcotraficante*. This sentiment was echoed by Congress when it linked money laundering itself to United States national security interests: "The Congress finds that international currency transactions, especially in United States currency, that involve proceeds of narcotics trafficking fuel trade in narcotics in the United States and worldwide and consequently are a threat to the national security of the United States."⁹² The mutual interest in avoiding the destabilization of Colombia, for example, makes it likely that the United States will turn to anti-money laundering measures as a primary means to combat the cocaine trade. Other options, including extradition of leaders of cocaine cartels, no longer seem to be available.⁹³

G. Adoption of Foreign Law

The desire to achieve international consensus on the threat from the drug trade is also seen in the Act itself, by attempting to accommodate the sovereign interests of other nations in the financial affairs of

89. *Ford v. United States*, 273 U.S. 593, 623 (1927).

90. *In re Marc Rich & Co.*, 707 F.2d 663, 666 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983) (quoting RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 33 (1965)).

91. Statement of Vice President Bush, *reprinted in Lewis, Bush Discloses Secret Order Citing Drugs as Security Peril*, N.Y. Times, June 8, 1986, § 1, at 1, col. 1. This directive, expressing a national security interest in the stability of other nations, apparently served as the basis for the use of United States army troops in Bolivia to assist in countering narcotics efforts, Taylor, *Bolivia Plan: Legal Doubts; Military—Police Split is Seen to be Eroded*, N.Y. Times, July 16, 1986, at A6, col. 1, and for giving enforcement authorities access to a CIA wiretap in Mexico, Ostrow, *CIA, DEA Reportedly at Odds on Use of Mexico Wiretap Information*, L.A. Times, Nov. 20, 1986, at 19, col. 1.

92. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 4702(a), 102 Stat. 4291 (Supp. 1989).

93. See Riding, *Colombians Grow Weary of Waging the War on Drugs*, N.Y. Times, Feb. 1, 1988, § 1, at A1, col. 4.

their citizens, while addressing the economics of the international drug problem. In two instances, the Act actually adopts the criminal laws of other nations which prohibit the manufacture, importation, sale or distribution of controlled substances. First, the transaction, transportation and criminally derived property offenses prohibit the laundering of the proceeds from drug trafficking committed in violation of the laws of another nation.⁹⁴ Second, foreign nations are able to seek, through the courts of the United States, the civil forfeiture of assets found here which represent the proceeds of drug trafficking conducted in violation of foreign laws.⁹⁵

This international forfeiture mechanism was designed in part to implement the treaty between the United States and Italy on Mutual Assistance on Criminal Matters.⁹⁶ The Italian government was concerned that no vehicle existed by which that nation could recapture the assets of Italian heroin traffickers which were located in the United States.

In some cases, the Act's international forfeiture procedures may reduce federal enforcement interest in offshore financial records by leaving the prosecutorial function to other nations and the forfeiture function to the United States. In this scenario, American financial institutions and business interests would act as mere stakeholders of criminal proceeds found here. The need for bilateral treaties to gain access to offshore records would diminish as a consequence. Nonetheless, by grappling realistically with the global scale of the narcotics problem, the Act will impose on federal district courts the complex

94. 18 U.S.C. §§ 1956(a)(1), (2), (c)(7); § 1957(a), (f)(3) (Supp. IV 1986). The idea that the United States should not become a haven for investments by foreign drug traffickers is a goal of Canada and Switzerland, which have analogous provisions in their laws. *Senate Hearings*, *supra* note 45, at 64 (testimony of Stephen S. Trott, Assistant Attorney General).

95. 18 U.S.C. § 981(a)(1)(B) (Supp. IV 1986).

96. Treaty of Mutual Assistance in Criminal Matters, Nov. 13, 1985, United States-Italy, reprinted in 24 I.L.M. 1539 (1985). Article 18 of the Treaty reads:

Immobilization and Forfeiture of Assets

1. In emergency situations, the Requested State shall have authority to immobilize assets found in that State which are subject to forfeiture.
2. Following such judicial proceedings as would be required under the laws of the Requested State, that State shall have the authority to order the forfeiture to the Requesting State of assets immobilized pursuant to paragraph 1 of this Article.

Thus, as a report by the Senate Judiciary Committee noted, "both countries are to have the authority to seize assets found within their borders and to forfeit such assets for the benefit of the other country based upon a violation of the other country's laws."

SENATE REPORT, *supra* note 17, at 24.

task of interpreting and enforcing the criminal narcotics laws of drug source and transit countries as remote as Nigeria, Pakistan, Thailand and Bolivia.⁹⁷

H. Self-Imposed Restraints

Administrative controls should act as a check on the exercise of extraterritorial jurisdiction. Recognizing the implication of its cross-border powers, the Department of Justice requires high level approval to commence a grand jury investigation or prosecution of laundering offenses:

Due to the potential international sensitivities, as well as proof problems, involved in utilization of this extraterritorial provision, no grand jury investigation may be commenced, indictment returned, or complaint filed without the prior written approval of the Assistant Attorney General in charge of the criminal division when jurisdiction to prosecute this offense exists only because of this extraterritorial provision.⁹⁸

In addition, the Justice Department requires both consultation with the Narcotics and Dangerous Drug Section and its review of written prosecutive memoranda before prosecution is begun.⁹⁹

These layers of review are bound to be seen by prosecutors as cumbersome and by defense counsel as a possible means to undercut the authority of a local United States Attorney. It is the opinion of this author that administrative oversight is the proper method of achieving the complicated function of balancing individual rights with society's interest in law enforcement in a setting which could affect relations between nations. Local prosecutors are rarely in a position to make this judgment¹⁰⁰ and, as noted below, the courts do not appear to be any better suited for the task.

I. Offshore Damage Control

Some American financial institutions labor under misconceptions about the Act which could prove quite damaging. The first of these is

97. FED. R. CRIM. P. 26.1; FED. R. CIV. P. 44.1. In both the criminal and civil context the determination of foreign law is treated as a procedural rather than an evidentiary matter. Courts may consider "any relevant material" to assist them in making such determinations. *Id.*

98. U.S. ATTORNEY'S MANUAL, *supra* note 10, at tit. 9-105.100.

99. U.S. DEPT. OF JUSTICE, HANDBOOK ON THE ANTI-DRUG ABUSE ACT OF 1986 95 (1987) [hereinafter ANTI-DRUG ACT HANDBOOK].

100. See U.S. ATTORNEY'S MANUAL, *supra* note 10, at tit. 9-4.543.

that corporate liability for laundering offenses can be minimized by employing only foreign citizens overseas. According to this logic, since extraterritorial jurisdiction over United States citizens is limited, corporate exposure can be correspondingly limited by employing aliens overseas. As previously seen, however, a realistic view of the drug money laundering process will often include conduct beginning in the United States. Thus, the laundering conduct of a bank employee who is not a United States citizen could render an overseas bank criminally responsible since corporate liability under such circumstances depends solely on *respondeat superior* principles.¹⁰¹ As a result, corporate damage control which depends solely on the foreign nationality of employees in offshore bank operations is likely to be of marginal value as a means of insulating a financial institution from the consequences of the acts of its employees.

It is generally overlooked that the Act gives the Bank Secrecy Act an international, albeit limited, dimension. Although the Bank Secrecy Act's reporting and record-keeping requirements continue to apply only to domestic financial institutions,¹⁰² the Act asserts extraterritorial jurisdiction over those who know that a transaction or transportation seeks "to avoid a transaction reporting requirement under Federal or State law."¹⁰³ This means that where criminal proceeds are involved, a person or bank outside of the United States who acts to cause a domestic financial institution to fail to file the appropriate Bank Secrecy Act reports (or those required by state law) may have committed a substantive laundering offense.

Due to the breadth of the Act, financial institutions should err on the side of interpreting the Act expansively, consistent with its purposes. Domestic financial institutions would be well advised to consider extending boards of directors oversight and somewhat modified compliance functions and policy to offshore operations. Otherwise, a renegade alien employee may trigger corporate liability for a bank which has left itself completely unprotected.

III. PROCEDURAL IMPLICATIONS OF THE ACT: OBTAINING EVIDENCE ABROAD

The extraterritorial jurisdiction of the Act will prove to be only as effective as the means available to collect evidence of the several laundering offenses. The issue arises as to whether the government's evi-

101. See *supra* note 50 and accompanying text.

102. See 31 U.S.C. § 5312(b)(1) (1982).

103. 18 U.S.C. § 1956(a)(1)(B)(ii), (a)(2)(B)(ii) (Supp. IV 1986); see also *supra* note 48 and accompanying text.

dence-gathering powers are co-extensive with its ability to prosecute and to impose civil penalties for laundering conduct which occurs wholly or partially outside of the United States. Put simply, the question is this: Does a grand jury now have extraterritorial jurisdiction to investigate possible violations of the Act?

The answer to this question is of great importance to financial institutions and legitimate businesses. Their concerns extend beyond the unlikely event of criminal prosecution to their more routine position as unknowing stakeholders responding to a subpoena. Overzealous resort to these new laundering laws can make both banks and businesses adversaries of their own customers. On its face, the Act offers no compromise between the needs of law enforcement and the often legitimate interests served by financial privacy. Effective advocacy in this field requires some historical perspective.

A. *Methods of Obtaining Evidence*

Federal courts have the power to compel evidence from abroad, apart from the explicit Congressional assertion of extraterritorial jurisdiction in the Act. Documentary evidence may be obtained from a foreign country through any of four ways: mutual assistance or tax treaties, letters rogatory, grand jury subpoenas *duces tecum*, and so-called consent directives.

Mutual assistance treaties enable prosecutors in the United States to obtain testimony and documentary evidence from a foreign country which is a party to the treaty.¹⁰⁴ Such treaties are in force today between the United States and the following countries: Switzerland,¹⁰⁵ Italy,¹⁰⁶ the Netherlands (including the Netherlands Antilles)¹⁰⁷ and Turkey.¹⁰⁸ Treaties with Canada,¹⁰⁹ the Cayman Islands,¹¹⁰ Colom-

104. *Committee Hearing*, *supra* note 50, at 114 (testimony of William Weld, Assistant Attorney General). Michele Sindona believed that cooperative treaties "have no value at all, because they've been drawn up by people who are incompetent in international banking and monetary matters." N. TOSCHES, *supra* note 4, at 88.

105. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 [hereinafter *Swiss-American Treaty*].

106. Treaty on Mutual Assistance in Criminal Matters, Nov. 13, 1985, United States-Italy, *reprinted in* 24 I.L.M. 1539 (1985).

107. Treaty on Mutual Assistance in Criminal Matters, June 12, 1981, United States-Netherlands, T.I.A.S. No. 10734.

108. Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, United States-Turkey, 32 U.S.T. 3111, T.I.A.S. No. 9891.

109. Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, United States-Canada, *reprinted in* 24 I.L.M. 1092 (1985).

110. Treaty Concerning the Cayman Islands and Mutual Assistance in Criminal Matters, July 3, 1986, United Kingdom-United States, *reprinted in* 26 I.L.M. 537 (1987).

bia,¹¹¹ Morocco,¹¹² and Thailand¹¹³ have been negotiated and signed. Negotiations are underway with Australia, Jamaica, the Bahamas, the United Kingdom, Germany, Israel, Mexico and Panama;¹¹⁴ agreements on the text of the Bahamian and Mexican treaties have already been reached.¹¹⁵ By their terms and practice, the scope and application of these treaties are not as broad as the powers of federal grand juries because they are either limited to seeking evidence of certain specific crimes, or the government is unable to make a sufficient factual showing to invoke their provisions.¹¹⁶

The second method of obtaining documentary evidence from a foreign country is through letters rogatory. A letter rogatory is a formal request by a court of the United States to a foreign court asking the foreign court for assistance in securing real evidence or testimony in that foreign country.¹¹⁷ Apart from bilateral treaties, this has been the long accepted method for obtaining evidence abroad. They are, however, regarded by federal prosecutors as too time consuming,¹¹⁸ and therefore, are used only as a last resort.¹¹⁹

The third method is the issuance of a subpoena *duces tecum* by a federal grand jury.¹²⁰ Typically, such subpoenas have been served on United States-based banks or business enterprises which maintained an office in the foreign country where the subpoenaed records were lo-

111. The treaty was ratified by the United States Senate on December 2, 1981 and signed on January 4, 1982, but it has not been ratified by Colombia. Treaty 97-11, 97th Cong., 1st Sess. (1981).

112. The treaty was ratified by the United States Senate on June 28, 1984 and signed on July 13, 1984, but it has not been ratified by Morocco. Treaty 98-24, 98th Cong., 2d Sess. (1984).

113. The treaty was signed on March 19, 1986, but it has not been ratified by the Senate of Thailand. Treaty 100-18, 100th Cong., 2d Sess. (1988).

114. *Committee Hearing*, *supra* note 50, at 115 (testimony of William Weld, Assistant Attorney General).

115. *Id.*

116. *See, e.g.,* Swiss-American Treaty, *supra* note 105, art. 4.2. Under this article, compulsory measures are available only with respect to offenses in the schedule of offenses which are mutually criminal.

117. Former United States Attorney General Benjamin Civiletti stated that "[l]etters rogatory involve unnecessary formalities, unacceptable delays, unresponsive channels of communication, and ineffective procedures for obtaining evidence in a form for timely use." *In re Grand Jury* 81-2, 550 F. Supp. 25, 29 (W.D. Mich. 1982).

118. *See* Olsen, *Discovery in Federal Criminal Investigations Bank of Nova Scotia Precedent*, 16 N.Y.U. J. INT'L L. & POL. 999, 1002 (1984); *see also* United States v. Reagan, 453 F.2d 165, 171-74 (6th Cir. 1971) for a discussion on the use of letters rogatory.

119. U.S. ATTORNEY'S MANUAL, *supra* note 10, at tit. 9-4.510.

120. FED. R. CRIM. P. 17(c) provides that "[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects therein." *Id.*

cated or on foreign banks doing business in the United States.

The fourth method is the consent directive. In this scenario, the grand jury may compel a witness subpoenaed before the grand jury to execute a written authorization to foreign banks to disclose records of his accounts.¹²¹ Offshore banks then would honor the authorization and provide the records to the grand jury.

B. Department of Justice Guidelines—The Department of the Treasury's Global Reach

Although current Department of Justice guidelines permit the issuance of international grand jury subpoenas only when absolutely necessary,¹²² they are being used with increasing frequency.¹²³ The Justice Department has removed from the United States Attorneys the authority to issue subpoenas seeking evidence from overseas. The Department's Office of International Affairs now has this responsibility and takes into account the following factors in determining whether to authorize the service of a subpoena requiring the production of records located abroad:

1. The availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory;
2. The indispensability of the records to the success of the investigation or prosecution; and
3. The need to protect against the destruction of records located abroad and to protect the United States' ability to prosecute for contempt or obstruction of justice for such destruction.¹²⁴

These four means of gathering evidence—mutual assistance treaties, letters rogatory, subpoenas, and consent directives—may be complemented by a fifth where laundering offenses are at issue. As has been said, the Department of the Treasury has a new authority to summon both testimonial and documentary evidence.¹²⁵ The purpose of this authority was to enhance civil enforcement of the Bank Secrecy

121. *Doe v. United States*, 108 S. Ct. 2341 (1988).

122. U.S. ATTORNEY'S MANUAL, *supra* note 10, at tit. 9-4.543.

123. *See, e.g., In re Marc Rich Co.*, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983); *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

124. U.S. ATTORNEY'S MANUAL, *supra* note 10, at tit. 9-4.543.

125. *See supra* note 18 and accompanying text.

Act.¹²⁶ Congress has said explicitly that the Treasury Department's civil summons power may be given extraterritorial effect:

Under the new section 5318(a)(4) this summons authority may be used against any financial institution, whether foreign or domestic, regulated by the Treasury Department. Concerns have been raised about the application of this authority to obtain records of foreign financial activity through the issuance of a subpoena to a U.S. branch of a predominantly offshore financial institution. The primary concern is that compliance with such a subpoena may force the institution to violate the strict financial privacy laws of other nations, such as the Bahamas or the Cayman Islands, from which records may be sought. It is the Committee's intention that efforts should be made, at least in the first instance, to resolve any conflicts that may arise between U.S. law enforcement interests and foreign secrecy laws through diplomatic efforts. If diplomatic efforts prove to be unsuccessful, however, the Committee expects such conflicts to be resolved by a careful balancing of the competing interests, in accordance with the decision of the U.S. Court of Appeals for the Eleventh Circuit in *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984); see also *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341 (7th Cir. 1982).¹²⁷

Both Congress and the Department of Justice have expressed the view that information developed from a civil summons may be used in a subsequent or collateral proceeding whether or not the Bank Secrecy Act is involved.¹²⁸

Because money laundering and currency reporting violations often go hand-in-hand, evidence of one tends to prove the other. Evidence gathered by the Treasury Department for civil purposes would likely be of value in a laundering investigation or prosecution. Thus, in a little noted aspect of the law, the Act sets up a means around the traditional methods of securing evidence from abroad. This significant new weapon in the government's arsenal should be kept in mind when looking at the manner in which the courts have sought to reconcile the authority of the grand jury with foreign sovereignty.

126. SENATE REPORT, *supra* note 17, at 17.

127. *Id.* at 17-18.

128. See ANTI-DRUG ACT HANDBOOK, *supra* note 99, at 93.

C. Foreign Non-Disclosure Law

Recent case law has dramatically broadened the power of the grand jury to gain access to the records of foreign bank accounts and other foreign entities used by narcotics traffickers, organized crime figures and white collar criminals who launder the proceeds of illegal activities or engage in tax fraud schemes. The following discussion will focus on the evolution of federal law regarding the validity of a grand jury subpoena *duces tecum* in an international context before enactment of the Money Laundering Control Act and in the absence of its declaration of extraterritorial jurisdiction over money laundering offenses.

Subpoenaed records are often protected by bank and commercial secrecy laws of other countries, in much the same way that the Right to Financial Privacy Act protects domestic financial records. Although these non-disclosure laws have been promulgated, on occasion, to thwart the extraterritorial application of United States laws, they are not intended "to foster or encourage criminal activities."¹²⁹ These so-called "blocking statutes"¹³⁰ are also viewed as a means to vindicate national sovereignty.¹³¹ Article 273 of the Swiss Penal Code is an example of such a nondisclosure law.¹³²

At times, blocking statutes come in direct conflict with the broad authority of the grand jury. When a United States-based entity is ordered to comply with a grand jury subpoena *duces tecum* to produce documents located outside the United States, the claim is often made that compliance would subject the entity to criminal or civil sanctions of a foreign secrecy law. Nonetheless, United States courts may resort to the contempt power to compel compliance; while they have not always utilized this power, their willingness to do so has become apparent over the past twenty-five years, even in the area of civil discovery.¹³³

129. See Note, *Compelling Production of Documents in Violation of Foreign Laws: An Examination and Reevaluation of the American Position*, 50 *FORDHAM L. REV.* 877, 879 (1982); see also *In re Grand Jury Proceedings* (United States v. Bank of Nova Scotia), 740 F.2d 817, 829 (11th Cir. 1984), *cert. denied* 469 U.S. 1106 (1985).

130. See *RESTATEMENT (REVISED) FOREIGN RELATIONS LAW OF THE UNITED STATES*, § 437, reporters' note 4 (Tent. Draft No. 6, 1985).

131. See Note, *supra* note 129, at 880.

132. *CODE PENAL SUISSE* [CP] art. 273. Article 273 provides that "[a] person who spies out a manufacturing or business secret to make it accessible to a foreign governmental authority . . . shall be punished with prison, in severe cases with jail. The imprisonment may be combined." *Id.*

133. See generally April & Fried, *Compelling Discovery and Disclosure in Transnational Litigation: A Canadian View*, 16 *N.Y.U. J. INT'L L. & POL.* 961 (1984).

From the reported cases, it is not possible to determine the extent to which foreign courts or governments have actually imposed sanctions following compliance with an order from a court of the United States to produce documents located outside of the country. To the extent, however, that a trend is discernible, it is this: The effect of foreign blocking legislation on the issuance of compliance orders by United States courts decreases in relation to the significance of the United States government's interest perceived to be at stake.

United States courts have utilized three approaches to determine whether or not to enforce a grand jury subpoena which may implicate sanctions under foreign law: 1) international comity; 2) balancing of interests; and 3) paramount interest. Before reviewing these, however, it is important to understand the function of the grand jury.

D. Role of the Grand Jury

The grand jury "is an arm of the Court"¹³⁴ and its powers are very broad.¹³⁵ Its roles include "both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecution."¹³⁶

The grand jury is allowed wide discretion in seeking evidence¹³⁷ for, as the Supreme Court noted, "[a] grand jury's investigation is not fully carried out until every available clue has been run down . . . in every proper way to find if a crime has been committed," although this power is not unlimited.¹³⁸ The exclusionary rule for evidence illegally obtained does not apply to the grand jury,¹³⁹ and not even the President of the United States can circumvent its power.¹⁴⁰ The grand jury's

134. *Levine v. United States*, 362 U.S. 610, 617 (1960).

135. In *Blair v. United States*, 250 U.S. 273 (1919), the United States Supreme Court stated:

[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the possible results of the investigation, or by doubts whether any particular individual will be found properly subject to accusation of crime.

Id. at 282. For a general discussion on the role and the history of the grand jury, see *id.* at 279-83; see also *United States v. Calandra*, 414 U.S. 338, 343 (1974); *Costello v. United States*, 350 U.S. 359 (1956); *Hale v. Henkel*, 201 U.S. 43 (1906).

136. 414 U.S. at 343; see also *United States v. Nixon*, 418 U.S. 683, 709 (1974).

137. See *United States v. Dionisio*, 410 U.S. 1 (1973).

138. See 414 U.S. at 343; see also 410 U.S. at 11-12 (discussing limitations on grand jury subpoena power).

139. See 414 U.S. at 338.

140. See *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); see also *United States v. Leyva*, 513 F.2d 774 (5th Cir. 1975) (one may not refuse to testify before grand juries due

authority to subpoena "is not only historic but essential to its task,"¹⁴¹ and its resort to contempt powers extends even to the production of records found overseas.¹⁴² The grand jury may even direct witnesses to allow offshore banks to release documents relevant to its investigation.¹⁴³

In cases of organized crime or other economically motivated crime, banking or commercial records may provide direct evidence of illegal activity or its motive. Thus, in this context, a subpoena *duces tecum* seeking financial records is almost always essential to complete the investigation. When the subpoenaed documents are located abroad, however, the authority of the grand jury has sometimes given way to the sovereign interests of other nations.

E. International Comity Approach

In the 1962 *Chase Manhattan Bank* case,¹⁴⁴ a grand jury subpoena served on Chase in New York ordered Chase to produce certain banking records "wherever held."¹⁴⁵ Chase resisted compliance for fear that production of the relevant records in its Panamanian branches would subject Chase to a fine under Panamanian law.¹⁴⁶ Moreover, Chase offered expert testimony that, under Panamanian law, American authorities could only gain access to the Panamanian records through the

to fear of personal safety).

141. *Branzburg v. Hayes*, 408 U.S. 665, 668 (1973).

142. *United States v. Ryan*, 402 U.S. 530 (1971). *But see In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir.), *cert. denied*, 108 S. Ct. 451 (1987) (judgment of contempt against bank reversed because "[contempt] sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory.>").

143. *See In re N.D.N.Y. Grand Jury Subpoena No. 86-0351-S*, 811 F.2d 114 (2d Cir. 1987); *In re United States Grand Jury Proceedings*, W. Dist. of La., 767 F.2d 1131 (5th Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984).

144. *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962).

145. *Id.* at 612.

146. *Id.* After the subpoena was served, the Panamanian legislature enacted a non-disclosure law which provided:

The merchant furnishing a copy or reproductions of the contents of his books, correspondence and other documents for use in an action abroad, in compliance with an order of an authority not of the Republic of Panama, shall be penalized with a fine not greater than one hundred balboas.

Id. (quoting I *Codigo de Comercio*, tit. III, art. 89 (Panama 1961)). This violation of Panamanian law would be a misdemeanor under American law, according to testimony by Chase's Panamanian counsel. *Id.* Since Panamanian and United States currencies are directly related, Chase's one hundred balboa fine was equivalent to one hundred dollars.

courts of Panama.¹⁴⁷

In accord with its decision in *First National City Bank v. Internal Revenue Service*,¹⁴⁸ the Second Circuit Court of Appeals upheld the position of Chase, based on principles of international comity: "[J]ust as we would expect and require branches to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries."¹⁴⁹

F. *Balancing of Interests*

The rule of refusing compliance for reasons of simple comity when the subpoena conflicted with foreign law was abandoned by the Second Circuit several years later. In *United States v. First National City Bank*,¹⁵⁰ Citibank was held in contempt for its failure to comply with a subpoena *duces tecum* in a grand jury inquiry into antitrust violations. Citibank had resisted production of some documents located in Frankfurt, claiming that compliance was forbidden by German bank secrecy law and would subject it to civil liability and economic loss in Germany.¹⁵¹ Emphasizing that the risk or absence of foreign criminal liability did not resolve the issue, the connection between jurisdiction and its exercise was explained as follows:

It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has *in personam* jurisdiction of the person in possession or control of the material. . . . Thus, the task before us, as Citibank concedes, is not one of defining power but of developing rules governing the proper exercise of power.¹⁵²

The Restatement (Second) Foreign Relations Law of the United States offered guidance by which to balance the respective national interests of the United States and the Federal Republic of Germany with

147. *Id.*

148. 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) (IRS summons for documents of foreign branch bank). If production would require action by personnel in Panama in violation of the laws of Panama, production should not be ordered. *Id.* at 619.

149. *In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962). The subpoena was left outstanding to insure Chase's compliance with it if the United States government obtained authorization from Panama for disclosure of the documents. *Id.*

150. 396 F.2d 897 (2d Cir. 1968), *aff'g In re First National City Bank*, 285 F. Supp. 845 (S.D.N.Y.).

151. 396 F.2d at 898.

152. *Id.* at 900-01.

the hardship, if any, that Citibank would face in complying.¹⁵³

When two states have jurisdiction to prescribe and enforce rules of law and when the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as:

(a) vital national interests of each of the states; (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person; (c) the extent to which the required conduct is to take place in the territory of the other state; (d) the nationality of the person; and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.¹⁵⁴

The national and individual interests of each nation were weighed against the historic importance of American antitrust laws, the lack of any view expressed by either government, Citibank's lack of good faith, and the absence in German law of criminal sanctions against bankers for disclosure.¹⁵⁵

In finding that the German interest in secrecy was less substantial than the American interest in enforcing its criminal laws,¹⁵⁶ the Second Circuit was decidedly unsympathetic to Citibank's predicament: "[Citibank] must confront the choice . . . of the need to 'surrender to one sovereign or the other the privileges received therefrom' or, alternatively a willingness to accept the consequences."¹⁵⁷

Citibank's civil contempt adjudication and fine of \$2,000 per day were upheld.¹⁵⁸ The notion that United States courts should always defer to foreign secrecy law when there is conflict with the grand jury now finds little adherence in the federal courts which have considered the issue in the past several years. For example, German law also proved unavailing to Deutsche Bank which sought to avoid production

153. *Id.* at 901.

154. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

155. *United States v. First Nat'l City Bank*, 396 F.2d 897, 903-04 (1968). The court observed that "when foreign governments, including Germany, have considered their national interests threatened, they have not hesitated to make known their objections . . . to the issuing court." *Id.* at 904.

156. *Id.* at 905.

157. *Id.* at 905 (citation omitted).

158. *Id.* at 900.

of records located in Germany before a Michigan grand jury investigating possible unlawful conduct in the sale of diesels produced by the Krupp organization.¹⁵⁹

It should be noted, however, that the movement away from international comity as a guiding decisional principle has not been uniform. The District of Columbia Circuit clearly bucked the trend towards expanding the offshore reach of the grand jury in its 1987 decision in *In re Sealed Case*.¹⁶⁰ In that case, a subpoena was served on a United States branch of a foreign bank seeking records located outside of the United States in an investigation of possible violations of the Bank Secrecy Act. In reversing the district court's contempt adjudication, the court relied heavily on "basic principles of international comity." The court emphasized that "[m]ost important to our decision is the fact that these sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory."¹⁶¹

The premise of the opinion, repeated over and over, is that compliance with a grand jury subpoena and consequent disclosure would occur on foreign soil. Yet, it could not be more obvious that any disclosure would only occur before a grand jury sitting in the United States. Thus, the rationale of international comity in *In re Sealed Case* rests upon a faulty premise which should undermine its precedential value in other circuits.

The balancing approach has also been applied to the enforcement of summonses issued by regulatory bodies such as the Internal Revenue Service and the Securities and Exchange Commission.¹⁶² In the in-

159. *In re Grand Jury* 81-2, 550 F. Supp. 24 (W.D. Mich. 1982). The district court had *in personam* jurisdiction over the Deutsche Bank because it had an office in New York. *Id.* at 27. The violation of German law was alleged to be noncompliance with an injunction issued at an *ex parte* hearing by a German court at which the United States was not present. *Id.* at 28. Although the bank argued it would have been exposed to criminal and civil liability, this was disputed by Dr. Otto Walter, an expert on German law, who testified that, except for a possible violation of its contractual obligation, no other provision of German law would impose liability. *Id.* at n.1.

160. 825 F.2d 494 (D.C. Cir.), *cert. denied*, 108 S. Ct. 451 (1987).

161. 825 F.2d at 498. The court did recognize that "[i]f we were asked to act in accord with such a distinct and express grant of power, it would be our duty to do so." *Id.* at 499. One is then left to conclude that if the grand jury were investigating a money laundering offense with their explicit extraterritorial aspect, the subpoena would have been upheld.

162. See, e.g., *United States v. Vetco Inc.*, 644 F.2d 1324 (9th Cir. 1981) (IRS summons); *SEC v. Banca Della Svizzera Italiana*, 2 F.R.D. 111 (S.D.N.Y. 1981) (SEC summons). But cf. *United States v. Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983); *First Nat'l City Bank of New York v. IRS*, 271 F.2d 616 (2d Cir. 1959); *SEC v. Minas de Artemisa*, 150 F.2d 215 (9th Cir. 1945) (utilizing international comity approach).

ternational community, these summonses seem to be more widely accepted than the broad civil discovery which is permitted in the United States because they appear to serve a more pressing national function analogous to that of the grand jury.¹⁶³

G. Paramount Interest

Other decisions point to a progressively enhanced ability of the grand jury to gain access to records of foreign bank accounts through compliance induced by substantial daily fines. The so-called *Bank of Nova Scotia* cases¹⁶⁴ extended the power of the federal grand jury subpoena *duces tecum* further than any of the previous cases because the bank was subjected to criminal prosecution under foreign law, rather than civil penalties, as in earlier cases.¹⁶⁵ Their thrust seems to be that the interest of the United States in criminal law enforcement is always superior to the interest of other nations or the private sector in financial secrecy. In other words, a grand jury inquiry always tips the scales in favor of disclosure since the investigation of criminal conduct is the paramount interest *a fortiori*.

In 1982, the Court of Appeals for the Eleventh Circuit, in *United States v. Bank of Nova Scotia*,¹⁶⁶ (*Nova Scotia I*) held that a Bahamian branch of a Canadian chartered bank was required to comply with a federal grand jury subpoena *duces tecum*, despite the possibility that disclosure might have subjected the bank to Bahamian criminal sanctions for violation of bank secrecy laws.¹⁶⁷ The court relied on the balancing test enunciated in the Restatement (Second) Foreign Relations Law of the United States and concluded that the Bahamian national interest manifested in the secrecy laws was not "sufficient to outweigh the United States' interest in collecting revenues and insuring an unimpeded and efficacious grand jury process."¹⁶⁸ The court also found that no viable alternative means of disclosure was available.¹⁶⁹

163. 644 F.2d at 1339; see also *In re Grand Jury Proceedings* (United States v. Field), 532 F.2d 404, 408 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

164. *In re Grand Jury Proceedings* (United States v. Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985) *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983).

165. See, e.g., *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968); *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962).

166. 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983).

167. 691 F.2d at 1388-89. These sanctions included a fine not to exceed \$15,000 or a term of imprisonment not to exceed two years or both a fine and imprisonment. *Id.* at 1386 n.2.

168. *Id.* at 1391.

169. *Id.* at 1390-91.

One commentator has noted that the *Nova Scotia I* court should have broadened its analysis of the balancing test¹⁷⁰ to focus more on the quandary of the multinational business, instead of solely on each state's national interests with "greater consideration to the 'nature' of the penalty to be imposed by the foreign jurisdiction on the bank upon its compliance with the subpoena."¹⁷¹ Yet, this criticism encourages courts to engage in speculation over probable foreign response to a compliance order.

Whether foreign blocking or secrecy laws will actually produce sanctions should not determine whether jurisdiction is validly asserted. To make the likelihood of sanctions an issue could produce unusual, protracted litigation with a heavy political flavor. For example, the use of the Bahamas as a drug shipment point and the attendant corruption of public officials¹⁷² might have made the imposition of sanctions likely in the *Nova Scotia I* case to protect the drug trade rather than to protect Bahamian sovereignty. The indictment of Panama's *de facto* president, General Manuel Noriega, on drug charges would raise similar concerns if Panamanian bank records were subpoenaed.¹⁷³ Under these circumstances, the speculative reaction of other governments to the purely private dilemma of a bank would implicate political questions not normally subject to scrutiny by federal courts and which are better left to those knowledgeable in foreign policy in accord with the "act of state doctrine."¹⁷⁴

Subsequently, the Bank of Nova Scotia was issued a subpoena by another grand jury investigating a different customer as part of a narcotics trafficking inquiry. In this case, *In re Grand Jury Proceedings*

170. Comment, *In re Grand Jury Proceedings (United States v. Nova Scotia)*, 5 N.Y.L. SCH. J. INT'L & COMP. L. 457, 470 (1984).

171. *Id.* at 469 n.107.

172. See PRESIDENT'S COMMISSION ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL: ORGANIZED CRIME AND COCAINE TRAFFICKING, RECORD OF HEARING IV 241-74 (1984); Brinkley, *Drugs and Graft Main Issue in Bahamas Vote*, N.Y. Times, June 14, 1987, § 1, at 1, col. 5.

173. See Shenon, *Noriega Indicted by U.S. for Links to Illegal Drugs*, N.Y. Times, Feb. 6, 1988, at A1, col.5.

174. See, e.g., *United States v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965) ("for overseas transactions are often caught in a web of extraterritorial activities and foreign law beyond the ken of our federal courts of their competence."); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452-53 (2d Cir. 1987); *Republic of the Phil. v. Marcos*, 818 F.2d 1473, 1481-83 (9th Cir. 1987); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28, 431-33 (1964). But see *United States v. First Nat'l City Bank*, 396 F.2d 897, 901 (2d Cir. 1968) ("the courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs.").

(*United States v. Bank of Nova Scotia*),¹⁷⁶ (*Nova Scotia II*) the grand jury sought records from Bank of Nova Scotia branches in Antigua, the Bahamas and the Cayman Islands through service on the bank's Miami office.¹⁷⁶ The bank was slow in complying, failed to quash the subpoena by asserting that disclosure would violate Bahamian and Cayman Islands secrecy laws, and unsuccessfully sought the permission of a Cayman Islands' court to order the bank not to produce the records, although the denial of this order was never appealed.¹⁷⁷ In the meantime, the Attorney General of the Bahamas issued an order permitting disclosure, but compliance still continued to lag.¹⁷⁸ Even though the Eleventh Circuit gave a passing nod to the Restatement's balancing test,¹⁷⁹ the Bank of Nova Scotia's real problems stemmed from its reported lack of good faith and the recognition that stemming the tide of money laundering is "indispensable to this nation's efforts to stop the narcotics trade."¹⁸⁰ With this unambiguous language, notice was served that foreign blocking laws do not count for much when drug trafficking is under investigation:

In a world where commercial transactions are international in scope, conflicts are inevitable. Courts and legislatures should take every reasonable precaution to avoid placing individuals in the situation [the Bank] finds [it]self. Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is a conflict with the interest of other states.¹⁸¹

Thus, the court upheld the order of civil contempt and the imposition of a \$1,825,000 fine for the bank's failure to comply with the subpoena.¹⁸²

H. Marc Rich and the Long Arm of the Grand Jury

The *Marc Rich* case¹⁸³ demonstrates the global reach of the grand jury in gathering evidence of the new laundering offenses. As far as is

175. 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

176. 740 F.2d at 820.

177. *Id.*

178. *Id.* at 821.

179. *Id.* at 827.

180. *Id.*

181. *Id.* at 828 (quoting *In re Grand Jury Proceedings* (*United States v. Field*), 532 F.2d 404, 410 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976)).

182. *In re Grand Jury Proceedings* (*United States v. Bank of Nova Scotia*), 740 F.2d 817, 819-20 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

183. *In re Marc Rich & Co.*, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215

known, *Marc Rich* represents the first time that a grand jury subpoenaed the records of a foreign corporation which did no legitimate business in the United States. Rather, jurisdiction was predicated wholly upon the right of the grand jury to investigate.¹⁸⁴ The case is most instructive because it explains the relationship between subject matter jurisdiction, *in personam* jurisdiction, and the manner of service on an offshore corporation.

In *Marc Rich*, Marc Rich and Co., A.G. (Marc Rich), a Swiss corporation without an office in the United States, was a corporate target of a grand jury investigation. It was served with a subpoena *duces tecum* by service on Marc Rich and Co. International Ltd. (Marc Rich International), a wholly-owned subsidiary of Marc Rich which did business in New York.¹⁸⁵ The subpoena requested documents of Marc Rich located in Switzerland as part of an investigation into an alleged tax evasion scheme involving the principals of each company whereby Marc Rich International diverted at least \$20 million of its taxable income to Marc Rich.¹⁸⁶

Marc Rich resisted the subpoena on grounds that the district court had no jurisdiction and that Swiss law prohibited production of the documents.¹⁸⁷ The company was held in civil contempt by the district court and fined \$50,000 for each day the documents were not produced.¹⁸⁸

The Second Circuit upheld the subpoena and the fine, basing its jurisdiction on the protective¹⁸⁹ and territorial¹⁹⁰ principles of international criminal jurisdiction. A summary of these principles of subject matter jurisdiction is not too startling: Acts outside the United States

(1983).

184. 707 F.2d at 669. As the court noted: "A federal court's jurisdiction is not determined by its powers to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction." *Id.* (citing *United States v. Germann*, 370 F.2d 1019, 1022-23 (2d Cir.), *vacated on other grounds*, 389 U.S. 329 (1967)).

185. 707 F.2d at 665.

186. *Id.*

187. *Id.*

188. *Id.* at 670.

189. *Id.* at 666. "Under the protective principle, a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens . . . the operation of government functions. . . ." *Id.* (quoting RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 33 (1965)).

190. *Id.* "The territorial principle is applicable when acts outside a jurisdiction are intended to produce and do produce detrimental effects within it." *Id.* (citing *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968)); see *supra* note 76; see also *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

which are intended to and which do cause income tax evasion, or which threaten the government's revenue collecting function, justify punishment for those acts as if they are committed here. After Marc Rich paid \$21 million in contempt fines, both Marc Rich and Marc Rich International pleaded guilty to tax evasion, paid \$150 million in back taxes and interest, and were fined an additional \$780,000.¹⁹¹

In *Marc Rich*, the Second Circuit left behind the international comity and balancing of interests approaches to grand jury subpoenas—a sure reflection of the growing international character of economic crime. The subpoena power of the grand jury was extended to a foreign corporation whose only reported United States contacts consisted of transactions alleged to be criminal. Regarding the conflict between United States and Swiss law, it is worth noting that the court: (1) did not mention the Restatement's balancing test used in the *First National City Bank* and *Chase Manhattan* cases; (2) gave no weight to Switzerland's interest in secrecy; and (3) did not find relevant alternative means of production, i.e., the United States-Switzerland Tax¹⁹² and Mutual Assistance Treaties.¹⁹³ In addition, personal jurisdiction over Marc Rich rested on grounds never before expressed in the criminal law.

When the logic of *Marc Rich* is superimposed over the extraterritorial thrust of the Money Laundering Control Act, the next move in the offshore shell game becomes predictable; a grand jury subpoena served offshore on a foreign corporation having no contacts with the United States for a laundering offense which occurred wholly outside of the United States.¹⁹⁴

I. *In Personam Jurisdiction*

In a sense, *Marc Rich* was a money laundering case because profits of a United States subsidiary were covertly shifted to its Swiss parent corporation, which was apparently insulated from investigation by a foreign blocking statute. This similarity to classic money laundering scenarios makes it likely that the government will rely on its theory of *in personam* jurisdiction in future investigations of the new laundering offenses.

The test of *in personam* jurisdiction was a clear, practical accom-

191. See Lubasch, *Marc Rich's Companies Plead Guilty*, N.Y. Times, Oct. 12, 1984, at D1, col. 3.

192. Convention for the Avoidance of Double Taxation, May 24, 1951, United States-Switzerland, 2 U.S.T. 1751, T.I.A.S. No. 2316.

193. See Swiss-American Treaty, *supra* note 105.

194. For the admissibility of foreign records, see 18 U.S.C. §§ 3491-3494 (1982).

modation to the broad investigative role of the grand jury. Personal jurisdiction over Marc Rich arose from service in the United States,¹⁹⁵ from the company's "contacts with the entire United States,"¹⁹⁶ and from the hypothesis that the putative conspiracy and some conspiratorial acts must have occurred in the United States.¹⁹⁷ These factors combined to make a likely foreign accomplice to a would-be United States-based conspiracy amenable to a grand jury subpoena. A "cart before the horse" approach was rejected with the recognition that it was illogical to say that a corporation could be prosecuted upon a theory of "constructive presence," but that the grand jury could not investigate to see whether a crime had taken place.¹⁹⁸ At least, it is now clear in the Second Circuit that offshore criminal conduct is within the reach of the grand jury provided that the government shows its hand somewhat. As the court stated: "[I]f the government shows that there is a reasonable probability that ultimately it will succeed in establishing the facts necessary for the exercise of jurisdiction, compliance with the grand jury's subpoena may be directed."¹⁹⁹

In dicta, the *Marc Rich* case offers guidelines for finding *in personam* jurisdiction over entities possessing information about illegal conduct which is completely extraterritorial. As was noted in the case: "[I]t may well be that the occurrence of the offense itself is sufficient to support a claim of jurisdiction, provided adequate notice and opportunity to be heard has been given."²⁰⁰ Consistent with *Marc Rich*, the government can be expected to argue that the putative commission of an offshore laundering offense and proper service is all that is needed to establish jurisdiction. Since neither the Federal Rules of Criminal

195. *In re Marc Rich & Co.*, 707 F.2d 663, 667 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983). Service of Marc Rich's officers in the United States was deemed sufficient, since the subpoena was actually accepted by International's attorney. *Id.* at 668 n.1. The manner of service was not challenged. *Id.*

196. 707 F.2d at 667. Minimum contacts normally refers to contacts with the forum state. Resorting to a civil minimum contacts test could complicate analysis of the jurisdiction of the grand jury; see *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *In re Arawak Trust Co.*, 489 F. Supp. 162, 163-64 (E.D.N.Y. 1980).

197. 707 F.2d at 668.

198. *Id.* The court stated:

It would be strange, indeed, if the United States could punish a foreign corporation for violation of its criminal laws upon a theory that the corporation was constructively present in the country at the time the violation occurred . . . but a federal grand jury could not investigate to ascertain the probability that a crime had taken place.

Id. at 666 (citations omitted).

199. *Id.* at 670. The court also held that the facts necessary to establish jurisdiction can be discovered by the documents required in the subpoena itself. *Id.* at 669.

200. *Id.* at 668.

Procedure nor the Federal Rules of Civil Procedure specify the method of service on a foreign corporation, the manner of service outside of the United States is left to the discretion of the district courts,²⁰¹ apparently limited only by the requirements of due process.

Although service may also be effected within the United States, the Department of Justice has placed some restraints on the service of a subpoena *ad testificandum* on an officer of, or attorney for, a foreign bank or corporation "who is temporarily in, or passing through the United States."²⁰² Such a subpoena may only be served with the concurrence of the Office of International Affairs.²⁰³

J. The Strong Arm of the Grand Jury—The Consent Directive

When a person or entity with authority over foreign bank account records is within the grand jury's jurisdiction, the consent directive is likely to become the federal prosecutor's tool of choice to unlock the account's secrets. In *Doe v. United States*,²⁰⁴ the Supreme Court approved the practice of serving a subpoena on the target of a grand jury, and then directing him to release records of his own Bermuda and Cayman Islands bank accounts, notwithstanding the target's assertion of his constitutional privilege against self-incrimination.

The target, who was under investigation for fraudulent manipulation of oil cargoes and tax evasion, was required to sign a consent form which, in part, read as follows:

I, _____, of the State of Texas in the United States of America, do hereby direct any bank or trust company at which I may have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession and control which relate to said bank account to [the] Grand Jury²⁰⁵

The Supreme Court upheld the authority of the grand jury to compel execution of the directive even in the face of the secrecy laws of Bermuda and the Cayman Islands.

The effect of *Doe*, which treats the power of the grand jury as par-

201. *Id.* at 670 (citing FED. R. CIV. P. 83); see also *Harris v. Nelson*, 394 U.S. 286, 299 (1969); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

202. U.S. ATTORNEY'S MANUAL, *supra* note 10, at tit. 9-4.543.

203. *Id.*

204. 108 S. Ct. 2341 (1988).

205. *Id.* at 2344 n.2.

amount, is to avoid confrontation with foreign blocking statutes through disclosure authorized by the person whose confidentiality interests the statutes were intended to protect, *e.g.*, the account holder. This neat sidestep, which equates compulsion with consent, presents a dilemma for offshore and domestic banks. Should they honor a consent directive which was the product of the legitimate coercive power of the grand jury? The problem is compounded for foreign branches of American banks with assets clearly within the reach of the federal courts and their considerable power to impose contempt sanctions. When confronted with this situation, financial institutions would be well advised to maintain a position as a neutral stakeholder, leaving assertion of privacy interests to the account holder with appropriate notice.

All in all, the consent directive practice enlists offshore financial institutions as active participants in enforcement efforts aimed at laundered monies. The logical next step for enforcement authorities is to superimpose the consent directive principle on the law of forfeiture. It would be less than a quantum leap for a grand jury next to order a bank within its jurisdiction to transfer back to the United States laundered monies as evidence of criminal violations under investigation. Once again, banks should keep a low profile to avoid getting caught in the resultant crossfire.

IV. FUTURE CHALLENGES

Some generalizations flow from the preceding analysis. Even before the direct assertion of extraterritorial jurisdiction evident in the Money Laundering Act, federal courts had given the grand jury an almost unlimited ability to gather evidence against those criminals who attempt to use foreign financial institutions as a haven for their illegal profits. The Act furthers this progression by adding the explicit support of the legislative and executive branches to the full exercise of extraterritorial jurisdiction where money laundering offenses are involved.

The potent synergy between the Act's laundering offenses and the government's international evidence-gathering capability creates the need for a different response to the prospect of grand jury subpoenas aimed offshore. Those who wish to express common sense objections to such subpoenas should do so before, *rather than after*, service of the subpoena. Initially, such concerns should be expressed to the United States Attorney. A second level of review may be possible because of the Justice Department's centralized control over the assertion of extraterritorial jurisdiction. Due to their supervisory authority in this area, the Department's Office of International Affairs, Narcotic and Dangerous Drug Section, and possibly, the Assistant Attorney General

in charge of the Criminal Division, should be approached to review the issue.

Future challenges to international subpoenas should not overlook the adequacy of service or the lack of *in personam* jurisdiction evident from the government's inability to establish a reasonable probability that the grand jury will be able to exercise jurisdiction. Those who wish to contest offshore subpoenas should aim at the character and importance of the United States' interest at stake, *in the particular grand jury subpoena*, in order to have more than a remote chance of success. The decision to challenge should take into account the practical costs of noncompliance.

Only in the District of Columbia Circuit does violation of foreign law remain a substantial, though falsely premised, argument for non-compliance.²⁰⁶ Still, an unequivocal declaration by a foreign sovereign that it will impose sanctions in the event of compliance, support from the State Department, or expert testimony on the adverse impact of compliance on the national interests of the United States, might avert a compliance order or contempt judgment. Even after compliance has begun, the actual imposition of foreign sanctions may cause a court to reconsider its original order.²⁰⁷

V. CONCLUSION

The Money Laundering Control Act of 1986 will enable enforcement authorities to undermine the economic base and disrupt the cash flow of organized crime. The law is equally poised to deny access to, and free use of, illegal gains to those who engage in virtually any financially-motivated crime. International financial institutions and businesses will be caught in the middle of the effort to control money laundering.

The meaning of extraterritorial jurisdiction in the context of money laundering should be clearly understood by multinational businesses and financial institutions in judging the impact of the Act. Be-

206. See *In re Sealed Case*, 825 F.2d 494 (D.C. Cir.), *cert. denied*, 108 S. Ct. 451 (1987).

207. Legal sparring over access to individual bank records may be replaced by inter-government conflict. Congress has required the Secretary of the Treasury to negotiate international agreements to insure that foreign financial institutions maintain and provide access to records of large transactions in United States currency. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 4702 (c), 102 Stat. 4291 (Supp. 1989). If, by October 1, 1989, such an agreement is not reached with a particular nation, its financial institutions may be denied access to United States dollar clearing and wire transfer systems, and be prohibited from maintaining accounts with any banks chartered in the United States. *Id.* §§ 4702 (d), (e).

cause the law is transaction oriented, it can follow criminal proceeds throughout the world in much the same way that nations assert jurisdiction over their citizens wherever they may be found. As a result, the concept of extraterritoriality projects the money laundering laws of the United States and aspects of the Bank Secrecy Act into foreign branches of United States banks, businesses, brokerage firms and overseas branches of foreign banks.

The Act now gives federal grand juries a global reach to investigate money laundering through extraterritorial jurisdiction. United States courts will continue to be increasingly active in upholding extraterritorial jurisdiction in the context of criminal conduct, especially when national security is perceived to be at stake. Given the common international interest in avoiding the destabilizing effect of narcotics trafficking, the extraterritorial resort to grand jury subpoenas in drug investigations will probably be met with less resistance from foreign sovereigns than subpoenas served in other contexts.

Although important, the United States' interest in the effective enforcement of its criminal law and in collecting taxes encourages other countries to enact "blocking" legislation as a means of making documents or records available only through less than efficient diplomatic channels. Therefore, in the long term, the United States should continue to pursue mutual assistance treaties (preferably multilateral) to facilitate the process of obtaining evidence from abroad. Such treaties will reduce the need for litigation, increase the efficiency of federal prosecutions, reduce tensions produced by the exercise of extraterritorial jurisdiction, remove the unfair pressure on financial institutions to serve two masters, and recognize the legitimate interests served by financial privacy.

The authority of the grand jury to compel evidence from outside the United States is inherent in jurisdiction. Given the expansive legislative intent behind the Act and the explicit assertion of extraterritorial jurisdiction by Congress,²⁰⁸ grand jury subpoenas which seek evidence of money laundering offenses are especially likely to be given extraterritorial effect. In simple terms, the power to investigate is coextensive with the power to prosecute. The Act does not alter the general rule that the power of the grand jury extends only as far as the court of which it is an arm. Financial institutions in foreign countries should expect an unfavorable response from United States courts when foreign blocking statutes are asserted in response to grand jury subpoenas investigating money laundering violations. Even in the absence of a

208. See *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953); *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

territorial nexus to the offense, subpoenas which seek to investigate offenses which "impact" here are likely to be upheld.

In the meantime, the government should focus its exceptional powers where they belong—on the money launderer and outside of the teller's window. To do otherwise is to avoid tackling organized crime at its most vulnerable point—in the pocketbook at the cash connection.

