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TACKING ON MONEY LAUNDERING CHARGES TO WHITE COLLAR CRIMES: WHAT DID CONGRESS INTEND, AND WHAT ARE THE COURTS DOING?

INTRODUCTION

Money laundering is big business; an estimated $600 billion is laundered every year in the United States alone. In January of 1999, "[f]our Mexican nationals [pleaded guilty] and agreed to testify against fellow defendants indicted in Operation Casablanca, the biggest drug money laundering sting in U.S. history." Customs agents, posing as "money launderers for the Cali cartel," made arrangements with foreign nationals to "wire money from the United States to Mexico" and convert the funds into "readily negotiable and hard-to-trace bank drafts." Pursuant to the two-year investigation, the United States government has filed over 110 indictments and seized over "$60 million in assets." "Now in the news is [what is believed to be] one of the biggest money-laundering operations ever in the United States: Federal investigators said they believe Russian gangsters have funneled up to $10 billion through the Bank of New York, the 15th largest bank in the United States." One theory is that a

1. See H.R. 2905, 106th Cong. § 2 (1999); Scott Sultzer, Money Laundering: The Scope of the Problem and Attempts to Combat It, 93 TENN. L. REV. 143, 148 (1995); see also U.S. Wants CPAs To Help Fight Money Laundering, J. ACCT., May 1, 2000, at 19 (quoting Michel Camdessus, former managing director of the International Monetary Fund, as saying that "the annual global volume of money laundering is at least $600 billion . . . [and] that it could be as much as $1 trillion") (emphasis added).
3. Id.
4. Id.
Russian-born Bank of New York executive and her husband, the former chief delegate to the International Monetary Fund (IMF) for Russia, skimmed money from loans made by the IMF to Russia which were intended to assist the country in democratic reform. Fingers have also been pointed at former Russian President Boris Yeltsin, his daughter, Moscow's mayor, and the country's "favorite tycoon." Needless to say, organized crime and associated money laundering can have both an economic and political effect on the nation and the world. Even so, money laundering was not recognized or prosecuted in the United States as a separate offense until after the passage of the Money Laundering Control Act of 1986. Since its enactment, prosecutors have praised the Money Laundering Control Act, while the defense bar has criticized it. Prosecutors have used the money laundering

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7. See id. at 35-36. "Many investigators and Russia experts now say that the so-called Russian mafia is [so involved] with the Russian state that the two are no longer distinguishable." Id. at 36-37.


statutes to successfully charge leaders of organized crime rings and major drug traffickers. However, prosecutors have also indicted other persons or entities who merely accept or deposit funds for services or goods rendered when those funds were found to have originated from a “specified unlawful activity.” Additionally, prosecutors have used the money laundering statutes as effective bargaining tools in negotiations for plea agreements and cooperation at trials primarily due to the threat of an increased sentence under the United States Sentencing Guidelines for money laundering. Such vigorous use of these statutes has been attacked by the defense bar on grounds of vagueness, double jeopardy, substantive due process, right to

11. See id. In a brief entitled “A Synopsis of Major U.S. Narcotics Money Laundering Prosecutions (Circa 1978-1997),” Parker shares vivid details of numerous money laundering prosecutions involving drug traffickers such as the following: “Operation Polar Cap”—“a lengthy federal investigation into a billion dollar money-laundering [and drug trafficking] ring with direct link[s] to the Colombian Medellin Cartel” resulting in the prosecution of numerous individuals, including Steven Saccone who was “convicted and sentenced to 660 years in prison and ordered to pay a fine of $15,700,000.” Id.


15. See, e.g., United States v. Conley, 37 F.3d 970 (3d Cir. 1994); United States v. Jackson, 933 F.2d 757, 768-69 (7th Cir. 1993); United States v. Hollis, 971 F.2d 1441, 1450-51 (10th Cir. 1992); United States v. Edgemon, 952 F.2d 1208 (10th Cir. 1991); United States v. Skinner, 946 F.2d 176 (2d Cir. 1991).
counsel, and cruel and unusual punishment at the circuit court level with varying degrees of success.

The primary issues in contention are as follows: When Congress enacted the Money Laundering Control Act of 1986, did it intend to target money laundering only as associated with organized crime and drug trafficking, or did it intend for prosecutors to tack on a money laundering charge to a variety of other crimes or unlawful acts? What was the intended effect of the sentencing guidelines when used with regard to a defendant charged with money laundering and a crime other than drug trafficking or organized crime activity?

Section I of this Note defines money laundering and explains why it is essential to the drug trafficking or organized crime industry. Section II gives a broad overview of the federal government’s fight against money laundering, beginning with the Bank Secrecy Act of 1970 through the most current amendments to the Money Laundering Control Act of 1986. Section III discusses Congress’ intent when it enacted the Money Laundering Control Act of 1986, including an in-depth review of the legislative history and a look at the actual effect, via case law, of tacking on money laundering charges to white collar crimes other than those associated with drugs or organized crime. Section IV gives broad summaries of the recent developments in this area of law and discusses the possible implications of such changes or amendments to the issue in question. Finally, Section V provides analysis and summary of the issues discussed herein and suggests future uses of the money laundering statutes.

16. See 2 SARAH WELLING ET AL., FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO 154-155 (1998) (noting that § 1967 as written could apply to lawyers depositing fees they knew had been gained by illicit activity and that Congress subsequently amended the statute to make sure this did not happen). However, it must be noted that the amendment only applies once the Sixth Amendment right to counsel has attached (i.e., at indictment); thus, any activity in violation of the statute prior to this time may still be reached. See id. at 155. The potential for pre-attachment violations is especially important in white collar crime cases because attorneys in these types of cases often become involved prior to indictment. See generally JEROLD H. ISRAEL ET AL., WHITE COLLAR CRIME: LAW AND PRACTICE 675-715 (1986).

I. What is Money Laundering?

Money laundering occurs when one attempts to convert cash derived from illegal activities into "clean" cash by disguising its origin.\textsuperscript{18} Cash received from such illegal activities as drug trafficking typically results in very high volumes of low denomination bills.\textsuperscript{19} For example, "[a] million dollars, composed of an equal mix of [$5, $10 and $20 dollar bills] would consist of 85,715 individual bills weighing 189 pounds .... One hundred billion dollars would weigh approximately nine tons. These bills, if new, unwrinkled, and put in a single stack, would reach more than 600 miles high."\textsuperscript{20} Recognizing the drug trade to be a cash business, the federal government has identified large cash transactions as a prime indicator that a person obtained the funds via some illicit activity.\textsuperscript{21} Thus, ideally, anytime a criminal tries to use illegally obtained cash, the suspicion of the bank official or vendor is aroused; the bank official or vendor then alerts the federal government; the prosecutor investigates; and the criminal is indicted.\textsuperscript{22} Therefore, the criminal must avoid suspicion, and ultimately detection, when using his ill-gotten gains; it is these schemes to avoid detection that are commonly referred to as money laundering.\textsuperscript{23}

Numerous money laundering schemes have originated via the criminal's attempt to avoid detection.\textsuperscript{24} The overall complexity of a given scheme increases with completion of each stage of the money laundering process; therefore, the detection rate decreases as each stage is completed.\textsuperscript{25} The money laundering

\textsuperscript{18} See Carpenter, supra note 9, at 813-14.


\textsuperscript{22} See Parker Congressional Testimony, supra note 10.

\textsuperscript{23} See id.

\textsuperscript{24} See id.

\textsuperscript{25} See Federal Response: Hearings, supra note 12.
process can be segregated into three main stages: placement, layering, and integration.\(^\text{28}\) Placement is just what it sounds like—an attempt by the criminal to place mass amounts of cash into legitimate enterprises.\(^\text{27}\) Originally, it was commonplace for a drug dealer to simply carry suitcases full of cash into a local bank for deposit with no questions asked.\(^\text{28}\) However, as reporting requirements for cash transactions over a certain amount were instituted,\(^\text{29}\) the same criminal would spend his time structuring his deposits at multiple banks to be just below the reporting requirement, thereby avoiding detection.\(^\text{30}\) Once "structuring,"\(^\text{31}\) also known as "smurfing,"\(^\text{32}\) was made criminal, other methods evolved, including: depositing money into non-financial institutions, such as check cashing companies\(^\text{33}\) or casinos,\(^\text{34}\) where no reporting requirements existed;\(^\text{35}\) investing

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28. See Sultzer, supra note 1, at 148 (citing Wire Transfer Laundering, 2 DEPT OF JUSTICE ALERT 14 (Nov. 1992)).
27. See id.
28. See Parker Congressional Testimony, supra note 10 (stating that "some customers of banks were having to use handcarts to assist carrying the boxes full of currency into the banks"); Sultzer, supra note 1, at 154 n.58.
29. Congress enacted the Bank Secrecy Act of 1970, which required any financial institution receiving one or more cash transactions in excess of $5000 (this limit has since been increased to $10,000) to file a Currency Transaction Report with the federal government. See Bank Secrecy Act, 31 U.S.C. §§ 5311-5314, 5316-5324 (1994); discussion infra Section II.A.
32. "The term is derived from a popular children's TV cartoon, and, as applied to money laundering, suggests one who is a runner for a large 'smurfing' ring. Typically, the smurf (or runner) goes to several financial institutions and converts large amounts of drug cash into negotiable instruments (i.e., cashier's checks) for amounts of less than $10,000 in order to avoid the currency reporting requirements of the Bank Secrecy Act." H.R. REP. NO. 99-746, at 18. "This method garnered much publicity when the 'Grandma Mafia' case was exposed in California in 1982 . . . . That case involved a sixty year old grandmother who led a group of middle-aged women in making structured deposits at California banks of $25 million worth of cash earned in the Florida drug trade," Sultzer, supra note 1, at 155 (citation omitted); see also Sarah N. Welling, Smurf's, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions, 41 FLA. L. REV. 287, 288 (1989).
33. See United States v. Levy, 969 F.2d 136 (5th Cir. 1992).
35. See 31 C.F.R. § 103.22(b)-(d) (2000). Included in the list of exemptions are public
in high dollar consumer goods, real estate, or businesses; then selling these items to obtain “clean” cash; and creating shell companies with bank accounts of their own, allowing the cash to be deposited into and later withdrawn from a seemingly valid account.\(^{37}\)

Once the cash has been successfully “placed,” the funds move into the second stage of money laundering known as layering.\(^{38}\) Layering entails creating “layers” of transactions, making it difficult for the funds to be traced to their ultimate end.\(^{39}\) The most popular form of layering is through the use of wire transfers to offshore banks employing bank secrecy laws—i.e., the receiving bank will not identify the source of the incoming funds.\(^{40}\) Once the funds are successfully routed through a bank (or multiple banks) with no reporting requirements, they become extremely difficult to trace.\(^{41}\) A further method of layering involves the use of the funds deposited into a bank secrecy haven as collateral for loans made to a newly-created shell company.\(^{42}\) Once the loan is made, the collateral funds are wired out of the account to another bank with secrecy laws, the criminal defaults on the loan, the shell company shuts down, and it is nearly impossible for authorities to identify either the source or the receiver of the funds.\(^{43}\)

The final step in the money laundering process occurs as the funds are “integrated,” or introduced to the “legitimate financial world”—hence the name “integration.”\(^{44}\) This may manifest itself in the form of bank notes, loans, letters of credit, or any number of recognizable financial instruments.\(^{45}\) By the time the integration stage is reached, most funds will have been run

\(^{36}\) See generally United States v. Sanders, 829 F.2d 1468 (10th Cir. 1987) (discussing money laundering convictions for purchasing two cars with illicit funds, although the convictions were eventually reversed due to the nature of the transaction).


\(^{38}\) See Sultz, supra note 1, at 154.

\(^{39}\) See id.

\(^{40}\) See United States v. Cueva, 847 F.2d 1417 (9th Cir. 1988); United States v. Orozco-Prada, 732 F.2d 1076 (2d Cir. 1984).

\(^{41}\) See Sultz, supra note 1, at 150.

\(^{42}\) See Cueva, 847 F.2d at 1417; Orozco-Prada, 732 F.2d at 1076.

\(^{43}\) See Sultz, supra note 1, at 154.

\(^{44}\) Id.

\(^{45}\) See id.
through multiple bank accounts, both foreign and domestic, through shell companies and tax havens with alias account holders, only to return to the ultimate leader of the crime ring in some recognizable, legitimate, and nearly untraceable form. Needless to say, “money laundering [is] the lifeblood of the drug trade and other criminal organizations”\(^{46}\), thus, it is no surprise that Congress ultimately decided to attack money laundering directly in an attempt to deter drug trafficking and related organized criminal activity.\(^{48}\)

II. OVERVIEW OF THE FEDERAL GOVERNMENT’S FIGHT AGAINST MONEY LAUNDERING

A. Bank Secrecy Act of 1970

Before 1970, money laundering was not strictly controlled or expressly prohibited by either statute or common law because it was viewed as being incidental to the true crime.\(^{49}\) In 1970, Congress enacted the Bank Records and Foreign Transactions Act of 1970, commonly referred to as the Bank Secrecy Act, which required financial institutions to report cash transactions over $10,000 to the federal government.\(^{50}\) Even though the statute as enacted did not recognize money laundering as a separate identifiable criminal act that could be directly prosecuted, this was the government’s first effort to target and deter potential drug traffickers by focusing on the initial stage of money laundering—i.e., placement.\(^{51}\) Ideally, when a person made a deposit or withdrawal of an amount equal to or exceeding the $10,000 requirement, the bank teller would fill out


\(^{47}\) Fenningham, supra note 19, at 891 (quoting from S. REP. NO. 99-433, at 4 (1986)); see also Parker Congressional Testimony, supra note 10.

\(^{48}\) For an excellent overview and thorough examination of all areas of the law that the federal government has attempted to use to combat similar offenses, see WELLING ET AL., supra note 16, § 18.

\(^{49}\) See Carpenter, supra note 9, at 814.

\(^{50}\) See Bank Secrecy Act of 1970, 31 U.S.C. §§ 5311-5314, 5318-5324 (1994). The amount that triggered the reporting requirement was originally $5000, but was increased by amendment. See id.; see also Parker Congressional Testimony, supra note 10 (noting that only the Internal Revenue Service and U.S. Customs Agents were empowered to investigate violations of the Bank Secrecy Act).

\(^{51}\) See Parker Congressional Testimony, supra note 10.
a form called a Currency Transaction Report (CTR) and file this with the federal government. Subsequently, if a person were under suspicion of drug trafficking, for example, the government would have corroborating evidence of their suspicious cash transactions readily available to assist in the ultimate prosecution of the criminal.

The Bank Secrecy Act as originally enacted, however, was more regulatory in nature than criminal in that the only actual prosecution originating under the Act itself was that for failure to file the required forms. Thus, once the criminal figured out that he could structure his transactions to avoid the $10,000 reporting requirement, the effect of the law on the criminal was only an inconvenience, and the banking institutions were the ones being prosecuted for the acts of the criminal over which they had only limited control.

In an attempt to combat this type of structuring activity, the prosecutors began to use the Bank Secrecy Act to indict individuals for structuring. However, acceptance of this approach by the courts proved to be inconsistent. While a majority of the circuits established that the Bank Secrecy Act could reach the actions of the individual customer for “causing a financial institution to fail to file a CTR,” a fair number of

53. See Parker Congressional Testimony, supra note 10 (stating that “the initial BSA prosecutions of narcotics related money laundering involved in large part circumstantial theories of evidence”).
54. See id.
55. See id.
56. See Welling, supra note 32, at 285-98.
57. See Parker Congressional Testimony, supra note 10 (noting that “prosecutors sought to have greater jury appeal by charging not only any financial institution or its employees, but also the ‘customers’ who caused the violations of the BSA”).
59. Parker Congressional Testimony, supra note 10. Parker’s testimony cites to the following supporting cases:
   United States v. Tobon-Bulles, 708 F.2d 1092 (11th Cir. 1983) (defendant and companion together bought two $9,000 cashier’s checks at each of ten banks during a six-hour period; actions by a customer that cause a financial institution to fail to file a CTR are criminal under 18 U.S.C. §§ 2 and 1001);
   United States v. Puerto, 730 F.2d 627 (11th Cir. 1984); United States v. Heyman, 794 F.2d 188 (2nd Cir. 1986) (defendant employee of financial institution convicted of causing institution to fail to file CTR’s, although defendant had no legal duty to file CTR’s himself; liable under 31 U.S.C. 5313); United States v. Cure, 694 F.2d 625 (11th Cir. 1983) (bank customer
circuits explicitly held that the Bank Secrecy Act applied only to financial institutions and not to individual customers.\textsuperscript{59}

\textit{B. 26 U.S.C. § 6050I of the Internal Revenue Code—Form 8300}

In an attempt to further combat under-reporting of income in general as well as money laundering indirectly, Congress passed 26 U.S.C. § 6050I of the Internal Revenue Code in 1984.\textsuperscript{60} This Code section required any person engaged in a trade or business

\begin{itemize}
\item guilty under 18 U.S.C. § 371 of conspiring with bank not to file CTR’s; guilty under 18 U.S.C. §§ 2 and 1001 of causing bank to fail to file CTR’s; multiple transactions at same bank, or different branches of same bank, on same day); United States v. Valdes-Guerra, 758 F.2d 1411 (11th Cir. 1985) (Operation Greenback prosecution); United States v. Giancola, 783 F.2d 1549 (11th Cir. 1986) (same day, different branches of same bank; customer can be proximate cause of a bank’s failure to file a CTR and thus liable); United States v. Thompson, 903 F.2d 1200 (5th Cir. 1989) (actions by a bank officer that cause a financial institution to violate its duty to file a CTR are criminal); United States v. Enstrom, 922 F.2d 857 (5th Cir. 1991) . . . (defendants, who participated in money laundering scheme to disguise drug proceeds are guilty of conspiracy to obstruct the IRS’ tax collecting function and can be prosecuted for criminal conspiracy).
\end{itemize}

\textit{Id.}

59. \textit{See} United States v. Anzalone, 706 F.2d 676, 681-82 (1st Cir. 1985); \textit{see also} Parker Congressional Testimony, \textit{supra} note 10. Parker cited to the following cases “which negated the government’s ability to use the BSA in prosecuting narcotics money launderers”:

United States v. Reins, 794 F.2d 506 (9th Cir. 1986) (bank customer had no duty to report, thus no concealment and could not aid or abet a bank’s failure to report CTRs; no duty on banks to aggregate multiple transactions under $10,000); United States v. Larson, 786 F.2d 244 (8th Cir. 1986) (the BSA imposed no duty to customer to disclose to bank that his multiple currency transactions aggregated over $10,000; thus the customer was not guilty of concealing such information from the government); United States v. Denemark, 779 F.2d 1559 (11th Cir. 1985) (the customer was not guilty of violating the BSA as there was no duty on any financial institution which was involved in only one sub-transaction of what was a multiple transaction in excess of $10,000); United States v. Dela Esprella, 781 F.2d 1432 (9th Cir. 1986) (multiple transactions, each under $10,000 and each at a different bank, do not trigger duty to file a CTR; however, one defendant, a kingpin of an intricate money laundering operation who delivered cash in excess of $10,000 to his couriers, qualified as a ‘financial institution’ and therefore had a duty to file a CTR); United States v. Mastronardo, 840 F.2d 799 (3d Cir. 1988) (pre-1986 statutes and regulations did not afford ‘fair notice’ to bank customer that ‘structuring’ violated the BSA—defendants were charged with engaging in a multimillion dollar bookmaking and money laundering operation).

\textit{Id.}

60. \textit{See} WELLING ET AL., \textit{supra} note 10, at 98-104.
to submit a Form 8300 to the IRS when they encountered any transaction or transactions in aggregate exceeding $10,000 by any customer. This was an attempt by Congress to widen the net and close up an identified loophole for prospective money launderers by requiring reporting by businesses other than traditional banks or financial institutions.

C. Use of the General Drug Conspiracy Statute To Combat Money Laundering

In continued attempts to combat the war on drugs, creative prosecutors began to use proof of money laundering activities to support convictions of large drug trafficking conspiracies. Specifically, some courts allowed the indictment and conviction of individuals when it could be shown that "an agreement to engage in actions that are integral [sic] to the success of a drug venture prohibited by 21 U.S.C. § 841—such as laundering proceeds, or supplying cash or raw materials—violates 21 U.S.C. § 846 as a conspiracy to aid and abet the distribution of controlled substances." One such example was the case of United States v. Orozco-Prada, where the government successfully prosecuted Mr. Orozco (and others) under the traditional drug conspiracy statute for "his role as a money launderer." The prosecutor was able to show that Mr. Orozco directed cash received from drug sales to be deposited into different bank accounts bearing his name, the names of others, or the "names of purported Panamanian 'shell corporations,'" and that he ordered funds wired to other accounts outside the country. The court stated that "[i]mporters, wholesalers, purchasers of cutting materials, and persons who 'wash' money

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61. See S. REP. No. 98-300, at 121 (1983); see also WELLING ET AL., supra note 16, at 98-104.
62. See S. REP. No. 98-300, at 121; see also WELLING ET AL., supra note 16, at 98-104.
63. See Fenningham, supra note 19, at 891, 895-98.
64. Parker Congressional Testimony, supra note 10; see also Fenningham, supra note 19, at 891, 895-98 (stating that "defendants who participated in the narcotics ring of the conspiracy were also ‘washing’ the money derived from such activity and promoting the conspiracy by purchasing more drugs").
65. 732 F.2d 1076 (2d Cir. 1984).
66. See id. at 1078.
67. See id.; Parker Congressional Testimony, supra note 10 (giving details of the Orozco-Prada case).
are all as necessary to the success of the venture as is the retailer, [and] [t]hey can all be held to have agreed with one another in what has been called a 'chain' conspiracy." 68  

The *Orozco-Prada* case began an expanded use of the traditional “aiding and abetting” and “conspiring to aid and abet” theories, which actually originated in the 1940s. 69 However, it is important to note that the theory behind these cases remained true to and confined by the original parameters of the older law—i.e., “[t]o uphold a conspiracy conviction of an otherwise legitimate business [or businessman], . . . knowledge of unlawful use alone [was] not enough. The professional or businessman must [have identified] with the criminal venture, encourage[d] it, and [made] it his own." 70 Accordingly, “in all of the reported cases, the defendants were also active participants in the narcotics aspects of the conspiracies.” 71  

By the mid 1980s, Congress realized that neither the Bank Secrecy Act nor Form 8300 was effective in deterring or even slowing the growth of organized crime and drug trafficking. 72 Even though use of the general drug conspiracy statutes was somewhat successful, proof of the intricate details necessary to

68. *Orozco-Prada*, 732 F. 2d at 1076, 1080 (citing United States v. Barnes, 604 F. 2d 121, 154-55 (2d Cir. 1979)); see also Parker Congressional Testimony, supra note 10 (discussing the *Orozco-Prada* case and the use of the general drug conspiracy statute to combat money laundering).  
69. Strafer, supra note 46, at 150. Strafer cites two cases which provide the foundation of the aiding and abetting law: *United States v. Falcone*, 109 F. 2d 579 (2d Cir. 1940), aff’d, 311 U.S. 205 (1940), and *Direct Sales v. United States*, 310 U.S. 703 (1940). See id. at 150-51. *Falcone* held that “merchants were not guilty of aiding and abetting or conspiring with criminals despite the fact that they sold large quantities of sugar to bootleggers with knowledge of the ultimately illegal uses to which the sugar would be put.” Id. at 150. In that case, Judge Learned Hand made his oft-quoted statement that “[i]t is not enough that [a businessman] does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in the outcome . . . .” Id. at 151. Accordingly, the court made it known what its understanding of “promoting the venture” meant in *Direct Sales* by upholding “the conviction of a pharmaceutical dispenser” who conspired to sell “tremendous amounts of morphine sulphate” to a small town doctor over a long period “even after being warned by the government to stop.” Id.  
70. Id. at 151-52.  
71. Id. at 153. “[T]he *Orozco-Prada* case was] the first Title 21 conspiracy case that involved only money laundering.” Id. Even here, “[t]he court was careful to point out that the defendants’ activities were not limited to simply receiving the illicit proceeds and investing them. [They also] financed and assisted a specific drug transaction.” Id. at 153-54.  
obtain convictions in this manner made this avenue less than favored. Thus, determined to continue its fight against drug traffickers and consistent with its belief that the best way to deter such criminals was to hit the criminal where it hurt—their profits—Congress enacted the Money Laundering Control Act of 1986.

**D. Money Laundering Control Act of 1986**

The Money Laundering Control Act of 1986 (the Act), codified at 18 U.S.C. §§ 1956-1957, “criminalized money laundering and structuring” for the first time. Section 1956 of the Act targets the actual laundering of monetary instruments and is directed at those who seek either to hide the origins of illicit funds or to use the funds to further their criminal enterprise.

Section 1956 generally prohibits three kinds of activity: (1) financial transactions performed with the intent to promote the “specified unlawful activity” where it was known that the

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73. See Elkan Abramowitz, *Money Laundering: The New RICO*, 208 N.Y. L.J. 3 (1992); Fenningham, *supra* note 19, at 896 (citing United States v. Dela Espriella, 781 F.2d 1432, 1436 (9th Cir. 1986) (holding that “since money laundering is itself not a crime, the government must show a sufficient link between a defendant’s money laundering and the underlying drug transaction to demonstrate that [the defendant] was a member of a conspiracy”). See generally Parker Congressional Testimony, *supra* note 10. Parker cited a pre-trial order in *United States v. Awad*, 968 F.2d 1415 (11th Cir. 1992), wherein Judge Hodges stated:

> While it is true that a line of cases has permitted the prosecution of money laundering under the guise of conspiracy to aid and abet narcotics activity, those cases . . . predate the enactment and/or effective date of the money laundering statute or are otherwise factually distinguishable. The Court finds no suggestion in the statutory language or the legislative history of the Act to indicate that Congress intended to permit money laundering (without additional narcotics activity) to be punished under both Title 21 conspiracy law and the [Money Laundering Control] Act.

Ibid. Thus, “[t]he Government [was] put on notice . . . that [the] Court [did] not intend to allow it to prove a conspiracy under 21 U.S.C. § 846 solely by evidence adduced at trial that defendants may have laundered drug proceeds.” *Id.*

74. H.R. Rep. No. 99-855, at 13 (1986); see Strafer, *supra* note 46, at 149, 150-60 (suggesting that Congress’s prime motivation for enacting the Money Laundering Control Act of 1986 “was a series of court decisions narrowly construing the CTR requirements of the BSA”).

75. Carpenter, *supra* note 9, at 813, 816.


transactions were attempts to conceal the proceeds of the "specified unlawful activity" or to avoid reporting requirements (i.e., structuring); 79 (2) attempts to smuggle money elicited from "specified unlawful activities" out of the United States with the intent to promote the "specified unlawful activity," or to conceal the nature of the proceeds of the specified unlawful activity, or to avoid reporting requirements (i.e., structuring); 79 (3) financial transactions conducted with funds "represented [by law enforcement] to be proceeds of unlawful activities" where the transactions were intended to promote the carrying on of the "specified unlawful activity" or to conceal the nature of the proceeds. 80 This last category was added to provide law enforcement the statutory authority to perform sting operations that could result in convictions under the money laundering legislation. 81

Section 1957 of the Act is much broader and is directed at anyone who knowingly accepts funds from a criminal or a money launderer. 82 "Once money is generated by [illicit activity], anyone along the route the money travels who knows it is criminally generated and who puts amounts over $10,000 into a financial institution may be liable." 83

Both sections of the Money Laundering Control Act apply extra-territorially in an attempt by Congress to combat money laundering on an international scale. 84

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78. Id. § 1956(a)(1).
79. Id. § 1956(a)(2).
80. Id. § 1956(a)(3).
81. See Strafer, supra note 46, at 185-87. Strafer cites to the Department of Justice (DOJ) Handbook, noting that "the government stated that section 1956's requirement that the proceeds, in fact, be the product of the specified unlawful activity meant that 'sting' operations could not be used to prosecute substantive counts." Id. at 186 n.106. Thus, as a result of complaints by the DOJ, amendments were enacted and signed into law on November 18, 1988, permitting conviction where the defendants believed the money was the product of specified unlawful activity. See id. at 186; see also Anti-Drug Abuse Act of 1988, Pub. L. No. 100-680, 102 Stat. 4181 (1988).
84. See 18 U.S.C. §§ 1986(c), 1957(d). Supporters of recently proposed legislation argue that loopholes in the extra-territorial reach of the U.S. money laundering laws allow the growing international crime market to flourish. See discussion infra Section IV.D.
III. CONGRESSIONAL INTENT

There are different schools of thought as to what Congress intended when it enacted the Money Laundering Control Act of 1986 and its more recent amendments. Prosecutors and their proponents argue that Congress intended the Act to criminalize not only money laundering activity conducted by persons in or associated with organized crime and drug trafficking, but also those associated with the other “specified unlawful activities” listed in the statute. Others claim that “Congress never even contemplated that anyone would be convicted of money laundering for completely above board transactions,” nor that a separate money laundering charge would be tacked onto other crimes outside the “heartland” of the original purpose of the Act—i.e., to combat organized crime and drug trafficking.

The first canon of statutory interpretation directs us to the plain language of the statute. Some would argue that unless the plain language of the law is vague, all analysis should stop here. Others argue that the true purpose of the law cannot be determined unless the reports, bills, and congressional debate surrounding the enactment of the law are examined—i.e., the intent of Congress must be considered. While no court has dealt directly with the vagueness or clarity of the term “specified unlawful activity,” challenges to the statute as a

86. See Parker Congressional Testimony, supra note 10. Parker stated that he “support[s] the current statutory and regulatory aspects of the Bank Secrecy Act” and the amendments brought about by the Money Laundering Statute of 1988, “which collectively are the lynch pin [sic] to money laundering prosecutions of wealth derived from the underground economy. This economy . . . includes not only drug trafficking, but fraud, tax evasion, computer crime, racketeering and all other crimes motivated by greed . . . .” Id.; see also WELLING ET AL., supra note 16, at 116-17 (stating that while “[m]oney laundering is a crime most often associated with drug trafficking, . . . it is a potential problem associated with any activity that generates large amounts of cash that must be concealed”); Abramowitz, supra note 73, at 3.
87. Laundering Guides Limit 'Mere Deposit' Cases, 3 No. 11 DEPT OF JUSTICE ALERT 6 (Sept. 6-20, 1993).
88. See discussion infra Section III.A.
90. See generally id.
91. See generally id.
whole on grounds of vagueness have not been successful.\footnote{92} However, even if the statute's language seems clear, the intent of Congress must still be examined when the effect of the law as applied by the courts is contrary to the intended purpose.\footnote{93}

The text of the Money Laundering Control Act of 1986, in pertinent part, states that the proceeds or property in question must relate to a "specified unlawful activity."\footnote{94} Subsection (c)(7) of section 1956, as originally enacted in 1986, defined a "specified unlawful activity" as follows:

(A) any act or activity constituting an offense listed in section 1961(1) [RICO offenses] 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 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 511 (relating to securities of States and private entities), section 543 (relating to smuggling goods into the United States), 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 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1201 (relating to kidnaping), section 1203, (relating to hostage taking), section 1344 (relating to bank fraud), or section 2113 or

\footnote{92} See cases cited supra note 14.

\footnote{93} See generally Marshaw, supra note 89, at 827, 832.

Thus, theoretically, as it stood in 1986, "proceeds involving" or "property . . . derived from" any of these specifically listed unlawful acts could support a money laundering charge assuming all other elements were met. For example, whoever conducts a financial transaction which in fact involves proceeds of specified unlawful activity (e.g., 'relating to bank fraud' section 1344), who also intended to promote the bank fraud, or knew that the transaction was designed to conceal the nature of the proceeds or to circumvent reporting requirements, would be guilty of money laundering. Proponents of the plain text argument argue that this wording is not vague, and therefore, there is no need to perform any additional analysis regarding congressional intent. Certainly the courts have tacitly agreed by not allowing the issue to progress.

However, an argument could be made that the true intent of the Act was to combat money laundering only as it relates to drug trafficking and organized crime. Viewed in this manner, the above example should be read with the understanding of the statute's purpose, which would change its application as follows: whoever conducts a financial transaction which in fact involves proceeds of a specified unlawful activity (e.g., bank fraud associated with drug trafficking or organized crime), who also

97. Id. § 1957.
98. Id. §§ 1956, 1957.
99. Id. § 1956(a).
100. See Shaw, supra note 89, at 827, 832.
101. See cases cited supra note 14.
intended to promote the [bank fraud associated with drug trafficking or organized crime], or knew that the transaction was designed to conceal the nature of the proceeds or to circumvent reporting requirements, would be guilty of money laundering.\footnote{See 18 U.S.C. § 1956(a) (1994).}

Indeed, there is some support in the congressional testimony given contemporaneously with the passage of the Act to suggest that this is exactly what Congress intended.\footnote{See infra Section III.A.} To bolster this argument, proponents of the more narrow interpretation of the Act point to what, in their view, is the unintended effect that the use of the statute has on individuals charged with and convicted of money laundering based on offenses not associated with drug trafficking or organized crime (e.g., ordinary bank fraud).\footnote{See id. § 2F1.1. The base level for a fraud offense is six. See id. § 2F1.1. The base level for a money laundering offense is either twenty or twenty-three. See id. § 2S1.1. In order for a fraud offense to even reach the base level for money laundering, the value of the proceeds involved would have to be either $5 million or more than $40 million. See id. §§ 2F1.1, 2S1.1.} The effect is to increase the sentence of such an individual sometimes almost four times beyond what would ordinarily be given for the base offense.\footnote{See Thomas W. Hutchinson et al., Federal Sentencing Law and Practice, §§ 2F1.1, 2S1.1 (1998). The base level for a fraud offense is six. See id. § 2F1.1. The base level for a money laundering offense is either twenty or twenty-three. See id. § 2S1.1. In order for a fraud offense to even reach the base level for money laundering, the value of the proceeds involved would have to be either $5 million or more than $40 million. See id. §§ 2F1.1, 2S1.1.} Thus, one can make the argument that the intent of Congress must be considered to determine whether this was the intended use of the statute. In any case, to ultimately determine the issue, we must look at the intent of Congress when it enacted the Money Laundering Control Act of 1986.

\textbf{A. Legislative History}


\begin{quote}
To strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops and in halting international drug traffic, to improve enforcement of
\end{quote}
Federal drug laws and enhance interdiction of illicit drug shipments, to provide strong Federal leadership in establishing effective drug abuse prevention and education programs, to expand Federal support for drug abuse treatment and rehabilitation efforts, and for other purposes.107

The Anti-Drug Abuse Act was comprised of fifteen titles and forty subtitles.108 Each dealt with drug-related issues and was enacted pursuant to a highly-publicized push by the Reagan Administration to develop some legislative action which would prove to the world and to the voting public that the United States had a plan of action to go on the offensive in the "drug war."109 In fact, the closeness to the election year and the desire of the President himself to have "a law against drugs" indicate that the Anti-Drug Abuse Act, in general, and the Money Laundering Control Act, specifically, were enacted hastily without the full legislative debate and stringent amendment processes which proposed bills are normally subjected to by either the House or the Senate.110 If true, this would lend more
weight to the argument that related reports, bills, and congressional debates should be examined in an attempt to determine if the plain meaning of the statute as enacted really is what was intended.

In researching legislative history of a statute, "the most important documents . . . are the reports of the Congressional committees of each house, and the reports of the conference committees held jointly by the two houses." 111 The Money Laundering Control Act of 1986 evolved from primarily two reports: House Report 5176, titled the Comprehensive Money Laundering Prevention Act, ordered to be printed by the whole House on August 5, 1986, 112 and Senate Report 2683, titled the Money Laundering Crimes Act of 1986, ordered to be printed September 3, 1986. 113 Ultimately, a compromise bill, designated as House Report 5484, was enacted. 114


House Report 99-746 was a product of the combination of several bills and their related amendments which had been reported by the Committee on Banking, Finance, and Urban Affairs to the full House for consideration. 115 At the full Committee markup of one of the supporting bills, H.R. 5176, Chair Fernand J. St. Germain said regarding the purpose behind the proposed legislation:

"This nation faces a multitude of problems, foreign and domestic, but at the moment I can think of none more critical or more tragic than the growing epidemic of drugs.

to assist in "expedit[ing] House consideration" because "this legislation is urgently needed." Id. at 37. Assistant Attorney General John R. Bolton stated in a letter to Senator Strom Thurmond, Chair of the Committee on the Judiciary, that even though the legislative calendar was full, "the money laundering problem is so serious and immediate that on behalf of the Department of Justice I would ask you to take whatever steps are necessary to achieve consideration . . . by the Senate as soon as possible." S. REP. NO. 99-433, at 25.

111. ROBERT C. BERRING, FINDING THE LAW 179 (10th ed. 1985); see also Marshaw, supra note 89, at 827, 832.


All of us in the Congress have a responsibility to do whatever we can do to slow, if not end, this traffic. In H.R. 5176, the Banking, Finance, and Urban Affairs Committee is meeting its responsibility.\textsuperscript{110}

The report further stated that “[p]assage of this legislation . . . would substantially paralyze the international drug trafficker.”\textsuperscript{117} However, in discussing the history of the Committee’s efforts with regard to the Bank Secrecy Act of 1970, the report also stated that Congress was “wag[ing] war on organized crime, drug traffickers, tax evaders, and various other white collar criminals . . . .”\textsuperscript{118}

Throughout House Report No. 99-746, Congress defines the term “money laundering” specifically and in context as primarily related to drug trafficking or organized crime.\textsuperscript{119} Indeed, the terms “drug,” “drug trafficking,” or “organized crime” appear countless times throughout the document. Some specific examples follow:

The President’s Commission on Organized Crime has defined money laundering as the “process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate.” In other words, laundering involves the hiding of the paper trail that connects income or money with a person in order for such person to evade the payment of taxes, avoid prosecution, or obviate any forfeiture of his \textit{illegal drug income or assets}.\textsuperscript{120}

Even when acknowledging that the newly defined crime of money laundering involves “an increasing number of professional individuals such as lawyers, accountants and bankers . . . who are willing to become active participants in money laundering,” the report states this is a result of the fact that “drug dealers have turned over their billions . . . to the

\textsuperscript{116} Id. at 16.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 15.
\textsuperscript{119} See generally id.
\textsuperscript{120} Id. at 16 (emphasis added). “Money laundering is big business. Just how big nobody knows for sure, because drug rings and organized crime families do not prepare annual reports.” Id. “Money laundering is the life blood of the drug traffickers and traditional organized crime.” Id.
experts for a fee to launder their dirty money."\textsuperscript{121} This implies that even when other professionals may be doing the laundering, the money is still coming from drug traffickers (or organized crime).\textsuperscript{122}

Furthermore, a substantial majority of the examples set out by the drafter to explain contextual meaning draw analogies to drug trafficking or organized criminal activity.\textsuperscript{123} To explain the differing methods of laundering money, Congress gave the following example:

[T]here are problems especially for the large drug trafficking network which has to put volumes of cash generated from street sales of drugs into something more negotiable than boxes of ten, twenty and fifty dollar bills. Typically, a drug trafficker needs to exchange small bills for large ones. He does this by a variety of means, such as by purchasing cashier's checks in false names, or depositing cash into dummy accounts and then transferring funds by wire... to foreign sources. To accomplish these ends the drug dealer has to have access to banks and other financial institutions.\textsuperscript{124}

However, again, when discussing the origination of the Bank Secrecy Act, the report speaks in more general terms regarding the need for "detection and investigation of criminal tax and regulatory violations" and "tool[s] for tracking the financial resources associated with these criminal activities."\textsuperscript{125} Even here though, the report states that the reporting requirements found within the Bank Secrecy Act were put into place to deal with "white-collar criminals, which served as the financial underpinning of organized criminal operations in the United States," as well as citizens attempting to evade income taxes, acknowledging again that the focus was on money derived from

\textsuperscript{121} Id. at 16-17; see also WELTING ET AL., supra note 16, at 117.
\textsuperscript{123} See H.R. REP. NO. 99-746; see also S. REP. NO. 99-433, at 14 (using the example of "a person [who] transfers by wiring the proceeds of a drug transaction from a bank in the United States to a bank in a foreign country" to express their intention to impose sanctions extraterritorially).
\textsuperscript{124} H.R. REP. NO. 99-746, at 17.
\textsuperscript{125} Id. at 17-18 (emphasis added).
drug trafficking or organized crime. In support of his belief, the Assistant U.S. Attorney of Miami made the following statement to the Committee:

[These individuals were professional money launderers— they were not drug dealers, although it was obvious the cash they received to launder came from drug dealers. This highlights once again what was noted earlier, i.e., that the laundering of money is itself a specialty within the criminal world, although most is drug-related; and it is a highly complex and sophisticated financial operational network that deceives financial institutions and eludes law enforcement authorities. The Committee bill strikes a blow at these operations, gives banks and other financial institutions the opportunity to help combat these illegal activities, and provides law enforcement agencies additional legal and regulatory tools to fight the drug epidemic that currently pervades all walks of life in our society.]

Additionally, in defending the inclusion of a fifteen-day holding period whereby the government, after seizing the suspected illicit funds, must either obtain a court order or release the funds back to the owner, Congress stated that the holding period was in direct response to "concerns regarding the practicality of the drug traffickers’ ability to instantly transfer funds out of the country." Again, contextual use here implies that illicit funds intended to be addressed by this legislation are those funds which have resulted from drug trafficking (and organized crime).

Likewise, the report discusses the need for "targeted recordkeeping and reporting requirements" based on geographic locations. Because the Committee recognized that "certain cities such as Miami and Los Angeles . . . [were] more prone to be abused by organized crime, especially narcotics trafficking," the Committee supported targeting, because it "would provide law enforcement authorities with additional tools to combat money laundering operations associated with organized crime and drug trafficking."

126. Id. at 18.
127. Id. at 20.
128. Id. at 21.
129. Id. at 25 (emphasis added).
130. Id. (emphasis added).
The House Report further expressed the Committee's concerns that "organized crime and drug traffickers may acquire a financial institution and use it for unlimited money laundering operations." As an example, the Committee cited the then recent prosecution of Jose Antonio Fernandez, a drug ring leader who used his controlling interest in a large bank in Miami, Florida to further his money laundering schemes. To stress their concern regarding this type of activity, the Committee report stated that "[t]he powers granted to the regulators under this bill are extensive and are in response to this Committee's determination to keep the drug dealers, mobsters, and other criminal elements within our society from taking over financial institutions." The final section of House Report 99-746 addressed the suggested development of an "International Information Exchange System," headed by the Secretary of the Treasury and Federal Reserve Board, to "initiate discussions with ... other countries ... to find ways to eliminate the international flow of money derived from drug trafficking and other criminal operations." The report states that

[b]y including [the extraterritorial provision] in the bill, the Committee's intent [was] to send a clear and unmistakable message that it expects [both] United States ... and foreign financial institutions doing business in this country to ... live up to their [legal and moral] responsibility to fully cooperate in this country's efforts to stamp out the illicit trafficking of drugs.

2. Senate Report 99-433

Senate Report 99-433 was developed primarily through amendments to the following bills: S. 571, S. 572, S. 1335, and S. 1385. The stated purpose of the report was as follows:

To create a Federal offense against money laundering; to authorize forfeiture of the profits earned by launderers; to

131. Id. at 32.
132. See id.
133. Id. (emphasis added).
134. Id. at 33 (emphasis added).
135. Id. at 34 (emphasis added).
136. S. REP. NO. 99-433, at 4-5 (1986). The Senate Report was approved as amended by a unanimous vote. See id. at 27.
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.\textsuperscript{137}

Additionally, Senator Joseph Biden, Ranking Minority Member of the Senate Committee on the Judiciary, defined money laundering as the “crucial financial underpinning of organized crime and narcotics trafficking.”\textsuperscript{138}

Senate Report 99-433 was a result of compromise legislation evolving from the many concerns expressed regarding the proposed money laundering bills.\textsuperscript{139} One such concern, expressed by Richard Arcana, from the National Association of District Attorneys, was that the “new substantive offense in the administration’s bill would sweep so broadly as to overlap with State laws illegalizing theft, robbery, and even bad checks.”\textsuperscript{140} Neil Sonnett, from the National Association of Criminal Defense Lawyers, voiced his concern and opposition relating to the what was referred to as the “proposed crime of facilitation” (i.e., to further a specified unlawful activity).\textsuperscript{141} Sonnett warned the proposed legislation was too broad and could reach “offenses totally unrelated to money laundering” which were already covered by existing statutes.\textsuperscript{142} Likewise, Jerry Berman of the

\textsuperscript{137} Id. at 1-2.
\textsuperscript{138} Id. at 4.
\textsuperscript{139} See id. 8-9.
\textsuperscript{140} Id. at 6.
\textsuperscript{141} See id.
\textsuperscript{142} Id. Sonnett also spoke out regarding the scienter standard which, as proposed, only required “reckless disregard” or “reason to know.” See id. He and numerous other members voiced concerns that these weaker standards could “lead to prosecution of people who were not in any way involved in money laundering” and that the standards were “so broad as to encompass the receipt of funds that a person subjectively ‘believed’ might come from crime.” Id. Sonnett also warned of the possible consequences to defense counsel. See id.
American Civil Liberties Union referred to the proposed creation of a Federal crime of facilitation "as a prosecutor's 'wish list'" and urged its rejection.\textsuperscript{143} Others, while recognizing the need for some legislation to combat money laundering, "stressed the need for care" in its drafting.\textsuperscript{144} Indeed, Samuel Buffone, from the American Bar Association, stated that the proposed legislation "goes much further than is necessary [to provide] effective tools to combat money laundering."\textsuperscript{145}

As is typical in the legislative process, some concerns produce changes in the proposed law and others fall by the wayside. However, both the action or the inaction leave telling signs as to what the enacting members intended their final product to import. Here, the Committee specifically addressed Sonnett, Berman, and Buffone's concerns regarding the possibility that the proposed legislation was too broad, allowing it to be used against other crimes outside those intended.\textsuperscript{146} The Committee decided to limit the reach of "the new crime [of money laundering] to transactions that involve the proceeds of specified Federal offenses",\textsuperscript{147} hence, the listing of offenses at section 1956(c)(7).\textsuperscript{148} The Committee also stressed that the legislation as finalized did not create an entirely new federal crime of facilitation or receiving criminal proceeds generally,\textsuperscript{149} which lends support to the argument that Congress intended the statute to be one of limited use.

Further, the Committee stated that the listing of crimes defining "specified unlawful activity" was itself the result of a compromise between the broad reach proposed by the Administration and the more narrow reach proposed by the Organized Crime Commission bill.\textsuperscript{150} Specifically, the Administration wanted the new law to cover the proceeds of "any State or Federal crime," whereas the Commission's bill sought application only to those of the Racketeer Influenced

\textsuperscript{143} See id.
\textsuperscript{144} Id. at 7.
\textsuperscript{145} Id. at 7-8.
\textsuperscript{146} See id.
\textsuperscript{147} Id. at 8.
\textsuperscript{150} See id. at 10.
and Corrupt Organizations [RICO] Act.\textsuperscript{151} The Committee stated that its changes, and ultimately the law as enacted, was an "[attempt] to strike a balance by covering the proceeds of Federal financial offenses and foreign drug offenses as well as RICO predicate offenses."\textsuperscript{152} When addressing the definitional section, 18 U.S.C. § 1956(c)(7), as to the meaning given the term "specified unlawful activity," the Committee stated again that this "does not include every State or Federal crime, but rather those crimes most commonly associated with organized crime, drug trafficking, and financial misconduct."\textsuperscript{153} It further defined "financial misconduct" as including crimes "such as embezzlement, bank bribery, and illegal arms sales."\textsuperscript{154} While such language does suggest a clear intention to apply the new money laundering law to crimes other than drug trafficking or organized crime, the same argument can still be made that the context of the issues surrounding why the law was passed implies that the real intent was prosecution of these other crimes, but only if they were a product of drug trafficking or organized crime.\textsuperscript{155} In any case, it appears definite that the extraterritorial reach of the statute is limited to proceeds from "foreign drug offenses"; in fact, the Senate Report states that section 1956(a)(2) was included "to support recent United States' efforts to obtain international cooperation to halt the flow of drug money, and to prevent the United States from becoming a haven in which foreign drug traffickers can keep or invest their earnings."\textsuperscript{156}

In discussing the intent behind the acceptance of the earlier version of section 1956(a)(3) regarding violations of federal tax codes (sections 7201 and 7206), the Committee stated that inclusion of a specific law to combat money laundering of unreported income (i.e., tax evasion) was important and was

\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.} at 13. The report referred to the organized crime and drug trafficking offenses as including "continuing criminal enterprise offenses covered under 21 U.S.C. section 848 and the RICO predicate offenses listed in 18 U.S.C. section 1961(e), with the ... exception of the Bank Secrecy Act offenses" which were given their own section (i.e., the section on structuring). \textit{Id.} at 13-14.
\textsuperscript{154} \textit{Id.} at 13.
\textsuperscript{155} See discussion \textit{infra} Section III.
\textsuperscript{156} S. Rep. No. 99-433, at 11. The stated intent for inclusion of this section was to make the knowing receipt of proceeds from foreign drug offenses illegal. See \textit{id}.
specific to “unreported income derived from racketeering and drug-related offenses.”157 Here, the Committee made clear that the crime of tax evasion itself was not a “specified unlawful activity.”158 “This was done in order to ensure that the tax evasion involved in the transaction is not run-of-the-mill inflation of deductions or the like, but rather the nonreporting of income derived from racketeering, foreign drug operations, or other heinous crimes.”159

Based on the information obtained from the two primary pieces of legislation—House Report No. 99-746 and Senate Report No. 99-433—as well as review of the broader purpose of the Anti-Drug Abuse Act of 1986, it is clear that at a minimum Congress intended to use the legislation to combat drugs and organized crime.160 However, while the argument that this is all it was intended to fight can be supported by the sheer volume of cites to the use of specific language regarding these crimes, there is also, while significantly less prominent, some evidence suggesting that at least some members really did intend a broader reach.161 However, even assuming that the new money laundering law was intended to reach proceeds from crimes outside of drug trafficking and organized crime, the effect of this use may not have been intended.162 Specifically, the increased sentencing levels associated with money laundering may not have been intended for persons other than those associated with drug trafficking and organized crime.163

B. Effect of Tacking on a Money Laundering Charge to White Collar Crimes Other Than Drug Trafficking or Organized Crime

Tacking on a money laundering charge to a crime other than one associated with drug trafficking or organized crime often results in a sentence almost four times what would ordinarily be

157. Id.
158. See id. at 11-12.
159. Id. at 12.
160. See discussion supra Sections III.A.1-2.
161. See discussion supra Section III.
162. See discussion infra Section III.B.
163. See discussion infra Section III.B.
incurred. In *United States v. Smith*, the Third Circuit refused to allow sentencing of a defendant convicted of both fraud and money laundering under the more harsh sentence for money laundering, stating that this was not the type of money laundering activity the United States Sentencing Commission intended to combat. Indeed, the court concluded that the “Sentencing Commission itself has indicated that the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime.” While the court did not reverse the conviction on the money laundering count, it did vacate the sentence for money laundering and remanded the case to the trial court for sentencing under the lesser fraud guideline.

To fully understand the import of the court’s decision, it is helpful to review the facts of the *Smith* case. David Smith, an employee of GTECH Corporation, a company providing lottery services, and Steven Dandrea, owner and operator of Benchmark, a consulting company in New Jersey, as well as Sambucca Consultants, Inc. and Production Group, Inc., both shell companies, “were convicted on a number of charges arising out of an embezzlement [and] kickback scheme.” Evidence at trial showed that defendant Smith arranged a deal

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164. See Hutchison et al., *supra* note 105, §§ 2F1.1, 2S1.1. The base level for a fraud offense is six. See id. § 2F1.1. The base level for a money laundering offense is either twenty or twenty-three. See id. § 2S1.1. In order for a fraud offense to reach the base level for money laundering, the value of the proceeds involved must be either $5 million or more than $40 million. See id. § 2F1.1; 2S1.1; see also Elkan Abramowitz, *Beyond the Heartland of Money Laundering*, 223 N.Y. L.J. 3 (Mar. 7, 2000) (“Because the statutes have been expansively interpreted to cover essentially any transaction connected with fraud or other economic crime, white collar defendants are vulnerable to prosecution under the money laundering statutes subjecting them to substantially harsher sentences than they would otherwise face.”); Alan Ellis & James H. Feldman, Jr., *Representing the White-Collar Client at Sentencing*, 14-WTR CRIM. JUST. 41, 44 (2000) (“It has become apparent that the high offense levels [for money laundering] provided by the Guidelines were even more severe than the Commission had intended for white-collar offenses.”); Jonathan H. Hecht, *Airing the Dirty Laundry: The Application of the United States Sentencing Guidelines to White Collar Money Laundering Offenses*, 49 AM. U. L. REV. 289, 312 (1999) (“Because the Guidelines are set up to punish drug dealers severely, defendants convicted of economic or white collar crimes are sentenced more drastically than if the offense of money laundering was involved.”)

165. 186 F.3d 290 (3d Cir. 1999).

166. See id. at 300.

167. Id.

168. See id.

169. Id. at 292-93.
with defendant Dandrea for each of his three companies to provide consulting services to assist GTECH in obtaining lottery contracts with New Jersey and Delaware.\textsuperscript{170} However, it was also shown that not only did Dandrea’s companies lack experience in this area, but they performed no real work toward achieving the set goal, and in fact no lottery contract was ever granted to GTECH pursuant to any efforts of Dandrea’s companies.\textsuperscript{171} Despite the lack of progress, however, Smith continued to endorse payments by GTECH to these companies at a fairly high fee.\textsuperscript{172} Indeed, the purpose of the high fee was to allow room for monetary kickbacks to Smith from Benchmark in the form of checks purported to be for Smith’s own contract work for Benchmark.\textsuperscript{173} At trial, the prosecution also pointed to checks written by Benchmark to third-party creditors on behalf of Smith.\textsuperscript{174}

The defendant’s embezzlement and kickback scheme was discovered as part of a federal government investigation into “the conduct of [certain] state officials.”\textsuperscript{175} As a result, both defendants were charged with one count of conspiracy to defraud pursuant to 18 U.S.C. § 371, three counts of interstate transport of stolen property under 18 U.S.C. § 2314, one count of causing unlawful interstate travel with intent to distribute stolen proceeds under 18 U.S.C. § 1952, and fourteen counts of money laundering pursuant to 18 U.S.C. § 1956.\textsuperscript{176} Smith was sentenced to five years and three months imprisonment, and Dandrea received a sentence of two years and six months.\textsuperscript{177} Both defendants appealed their convictions and sentencing based on a number of grounds, the pertinent one herein being that they should have been sentenced under the Sentencing Guidelines for fraud as opposed to money laundering.\textsuperscript{178}

In 1984, Congress passed the Sentencing Reform Act creating a Sentencing Commission responsible for formulating

\textsuperscript{170} See id. at 293.
\textsuperscript{171} See id. at 294.
\textsuperscript{172} See id.
\textsuperscript{173} See id.
\textsuperscript{174} See id.
\textsuperscript{175} Id. at 293.
\textsuperscript{176} See id.
\textsuperscript{177} See id. at 297.
\textsuperscript{178} See id. at 297-300.
guidelines for federal courts to use when sentencing persons convicted of federal offenses. The stated purpose for the Sentencing Guidelines was to promote uniformity in sentencing of "offenders with similar histories, convicted of similar crimes committed under similar circumstances." Each promulgated guideline relating to a specific type of offense "carves out a 'heartland,' a set of typical cases embodying the conduct that each guideline is supposed to cover. "When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm [i.e., one which involves conduct falling out of the "heartland"], the court may consider whether a departure is warranted." In addition, the Commission also provides guidance to courts regarding "factors" which should or should not be considered as determinative in a decision to depart from the suggested sentencing—either upward or downward. Under the United States Sentencing Guidelines, money laundering carries a base offense level of twenty, while a fraud charge begins with a level of six. Thus, when the defendant is charged with both a fraud and a money laundering offense, as were the defendants in Smith, the sentencing judge must determine which sentencing guideline should be applied. As the court in Smith pointed out, if the defendant is sentenced under the money laundering guideline as opposed to the fraud guideline, his

182. Id. at 93 (quoting the U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, intro. cmt. 4(b) (1995)).
183. See HUTCHISON ET AL., supra note 105.
   The Commission lists certain factors that never can be bases for departure (race, sex, national origin, creed, religion, socioeconomic status, ... lack of guidance as a youth, ... drug or alcohol dependence, ... and economic hardship), ... but then states that with the exception of those listed factors, it "does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."
   Koon, 518 U.S. at 93 (quoting the U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A., intro cmt. 4(b) (1995)).
185. See Smith, 186 F.3d at 299.
sentence can be increased eighty-five to ninety-five percent over what it would be if the judge chose the fraud guideline.\(^{186}\)

It is important to note that before the circuit court in *Smith* could even address the issue of sentencing, it had to determine whether the issue was subject to review at the appellate level.\(^{187}\) The Sentencing Guidelines state that the sentencing court’s decision to “depart” is not reviewable if the court “recognized it had authority to [depart]” and the only point of contention was disagreement over the court’s assessment of the facts of the case in determining whether a departure was necessary.\(^{188}\) However, where, as in the *Smith* case, the issue is whether or not the sentencing court chose the correct sentencing guideline initially, this is a question of law affording the appeals court plenary review.\(^{189}\)

In its analysis of the sentencing issue, the circuit court stated that its ruling was based on its interpretation of whether the “conduct being punished [fell] within the particular guideline’s ‘heartland.’”\(^{190}\) Such a “heartland” analysis necessarily requires the court to draw conclusions as to intent and scope of the guidelines as they relate to the particular offenses in question.\(^{191}\) Indeed, courts are to “consider . . . the sentencing guidelines, policy statements and official commentary of the Sentencing Commission,”\(^{192}\) as well as the “intent and scope of the [applicable statutes]” in this analysis.\(^{193}\) However, the *Smith* court stressed that it was concentrating on the sentencing guidelines, rather than the statutes, to determine the “heartland.”\(^{194}\) The court’s basis for this deviation appears to have been a direct response to its disagreement with the broad

\(^{186}\) See id. (citing U.S. Sentencing Commission, *Money Laundering Guidelines Scrutinized*, Jan. 1998, at 2, 8). This comparison necessarily assumes no additions or subtractions for a higher amount of money involved or for recidivism.

\(^{187}\) See id. at 297-98.

\(^{188}\) Id. at 297; see also United States v. Georgiadis, 933 F.2d 1219, 1222 (3d Cir. 1991).

\(^{189}\) See *Smith*, 186 F.3d at 297-98; see also United States v. Eversley, 55 F.3d 870 (3d Cir. 1995).

\(^{190}\) *Smith*, 186 F.3d at 298; see also *Koon*, 518 U.S. at 93-94.

\(^{191}\) *Smith*, 186 F.3d at 300; see also United States v. LeBlanc, 24 F.3d 340, 345 (1st Cir. 1994).

\(^{192}\) *Koon*, 518 U.S. at 92-93 (quoting 18 U.S.C. § 3553(b) (1994)).

\(^{193}\) *Smith*, 186 F.3d at 298.

\(^{194}\) See id.
reach of the money laundering statutes themselves.\textsuperscript{105} With regard to this issue, the court gave the following reason for its approach: "Despite the money laundering statutes' apparent broad reach, the history of U.S.S.G. § 2S1.1 suggests that its heavy penalty structure was addressed to the activity detailed in the statute's legislative history—namely, the money laundering associated with large scale drug trafficking and serious crime."\textsuperscript{106}

To support its holding that simple fraud, as that committed by defendants Smith and Dandrea, was outside the "heartland" of conduct intended to receive the harsher sentencing for money launderers otherwise involved in drugs or organized crime, the court looked to pronouncements published by the United States Sentencing Commission.\textsuperscript{107} In its report to Congress on September 18, 1997, the Commission stated that when the sentencing guideline for money laundering was established, the statutes had only been in effect for six months.\textsuperscript{103} Moreover, statistical information was unavailable to assist in the determination of what would be an appropriate deterrent for the new crime of money laundering.\textsuperscript{109} The Commission stated that it decided to attach a harsh punishment onto convictions under the new law "to punish the activity which had aroused congressional concern: . . . situations in which the 'laundered' funds derived from serious underlying criminal conduct such as a significant drug trafficking operation or organized crime . . ."\textsuperscript{106}

Based on its review of numerous cases in which money laundering charges were tacked onto offenses other than those associated with drug trafficking and organized crime, the Commission noted that because the penalty levels within the guidelines were not tied to the seriousness of the underlying crimes, the result was to increase the sentence of basic offenses exponentially compared to what they ordinarily would have been.\textsuperscript{201} The Commission received numerous complaints from

\textsuperscript{105} See id. at 298.
\textsuperscript{106} Id. at 300.
\textsuperscript{107} See id. at 298.
\textsuperscript{108} See id.
\textsuperscript{109} See id.; \textsc{United States Sentencing Commission, Report to the Congress: Sentencing Policy for Money Laundering Offenses} (Sept. 18, 1997).
\textsuperscript{200} Smith, 186 F.3d at 298.
\textsuperscript{201} See id.
judges who had avoided this disagreeable result by granting numerous departures during the sentencing phase of cases falling into this category.\textsuperscript{202}

As a result, “[t]he Commission . . . responded by proposing amendments to the [G]uidelines in 1995. The changes [were intended] to provide penalties more proportionate to ‘both the seriousness of the underlying criminal conduct,’ and to ‘the nature and seriousness of the laundering conduct itself.’”\textsuperscript{203} However, Congress has not approved these amendments to date.\textsuperscript{204} In fact, upon initial consideration of the Commission’s proposed changes to the Guidelines, Congress stated that its refusal was based on the fear “that the broad changes proposed [would] send a dangerous message that money laundering associated with drug and other serious crimes is not viewed as the grave offense it once was.”\textsuperscript{205} However, in its report, Congress did “recognize that ‘the application of the current guidelines to receipt-and-deposit cases, as well as to certain other cases that do not involve aggravated money laundering activity, may be problematic.’”\textsuperscript{206}

\begin{flushleft}
\textsuperscript{202} See id.; see also Abramowitz, supra note 164 (stating that many courts have departed downward from the money laundering guidelines in money laundering cases not associated with drugs or organized crime, “opt[ing] to sentence the defendant based on the guideline that applies to the underlying offense”); Ellis & Feldman, supra note 164, at 44.

Because the Sentencing Commission obviously did not consider the appropriateness of high offense levels required by the money laundering guidelines where the money laundering was simply incidental to underlying frauds or other white collar crime, many courts have granted departures in such cases, using the offense level for the underlying conduct as a guide.

Id.; see Hecht, supra note 164, at 292 (“The average downward departure rate for non-drug, or white collar, money laundering offenses from 1992 to 1997 was thirty-two percent higher than the overall departure rate for all other crimes.”)

\textsuperscript{203} Smith, 186 F.3d at 288.

\textsuperscript{204} See id. at 299.


\textsuperscript{206} Id. (citing H.R. REP. No. 104-272, at 14-15 (1995), reprinted in 1995 U.S.C.C.A.N. 335, 348-49) (emphasis omitted). In addition, the Justice Department stated that the money laundering statutes “should not be used in cases where the money laundering activity is minimal or incidental to the underlying crime.” Id. (citing DEPARTMENT OF JUSTICE, REPORT FOR THE SENATE AND HOUSE JUDICIARY COMMITTEES ON THE CHARGING AND PLEA PRACTICES OF FEDERAL PROSECUTORS WITH RESPECT TO THE OFFENSE OF MONEY LAUNDERING 14 (June 17, 1996)).
\end{flushleft}
Notwithstanding Congress' refusal to amend the guidelines, the Smith court chose to follow the proportionality approach proposed by the Commission stating that otherwise, the penalty provisions, "[c]oupled with the unexpectedly broad application of the money laundering statutes, . . . compelled severe sentences for 'money laundering conduct so attenuated as to be virtually unrecognizable as the type of conduct for which the original money laundering sentencing guidelines were drafted."\(^{207}\) The court rationalized its decision on the fact that the House Judiciary Committee, by characterizing these "draconian sentences" as "past sentencing anomalies," was suggesting that such cases should be controlled by the courts.\(^{203}\) Thus, having found the money laundering activity of Smith and Dandrea to be based on "minor fraud" and an "incidental by-product of the kickback scheme," the Smith court found this case to be a clear example of such an "anomaly."\(^{203}\) As a result, the court held that because the Sentencing Commission itself indicated that the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with "significant" drug trafficking operations or organized crime, which did not apply to the activities of the defendants, they should be sentenced under the fraud guidelines and not the money laundering guidelines.\(^{210}\)

As a result of the holding in Smith, the effect of a tacked on charge of money laundering on the defendants, outside the stigma attached to being labeled by society as a "money launderer," was nullified.\(^{211}\) Because the primary reason prosecutors utilize the money laundering statute is to capitalize on the effect or threatened effect of an increased sentence, the court's approach in Smith appears to be a clever way to indirectly achieve the outcome the court believed to be warranted—i.e., that the money laundering statutes were never

\(^{207}\) Smith, 186 F.3d at 298.

\(^{208}\) Id. But see Koon v. United States, 518 U.S. 81, 108 (1996). The Supreme Court discusses the fact that "Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance." Id. at 108 (emphasis added). In other words, when attempts are made to carve out an entire new category or standard to be applied going forward, this should be left to the "policymaking authority vested in the Commission." Id.

\(^{209}\) Smith, 186 F.3d at 300.

\(^{210}\) Id.

\(^{211}\) See id.
intended to be tacked onto crimes other than drug trafficking or organized crime.\footnote{See generally Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 418-19 (1992).}

IV. DEVELOPMENTS IN THE LAW

Insight into Congress' true intent may also be gathered by looking at developments in the law since the enactment of the original statute. Often, Congress waits to see how the statutes they have previously enacted are applied by the courts before initiating any changes. Thus, a review of the recent developments in the law is helpful.

A. Annunzio-Wylie Anti-Money Laundering Act of 1992

After the Bank of Commerce & Credit International (BCCI) money laundering scandal in 1989, where Manuel Noriega laundered millions through multiple banks in multiple countries, Congress enacted the Annunzio-Wylie Anti-Money Laundering Act of 1992.\footnote{See Sultzer, supra note 1, at 214.} This Act "provided for the termination of a bank's charter, its insurance, or its license to conduct business in the United States if it is convicted of money laundering."\footnote{See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 4044 (codified as amended in scattered sections of Titles 12, 18, and 31); see also Sultzer, supra note 1, at 214.} Again, the focus was on money laundering related to drug trafficking.\footnote{See Money Laundering Suppression Act, Pub. L. No. 103-325, §§ 401-13, 108 Stat. 2243 (codified in scattered sections of Titles 18 and 31).}

B. Money Laundering Suppression Act of 1994

In 1994, Congress passed the Money Laundering Suppression Act, which primarily focused on combating money laundering through non-bank financial institutions via the assistance of the states.\footnote{See generally Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 418-19 (1992).} This amendment indicated no major changes in Congress's intent to fight, specifically, drug trafficking and
organized crime, or more generally, money laundering offenses.\textsuperscript{217}

\textit{C. Department of Justice Guidelines Regarding Use of Money Laundering Statutes}

In 1997, the Department of Justice issued a number of guidelines to “promote consistency and uniformity in the use of [the money laundering statutes].”\textsuperscript{218} These guidelines require either notice, consultation, or authorization to or from certain governmental departments prior to certain types of legal action by prosecutors under the money laundering statutes.\textsuperscript{219} The authorization requirement is the most controlling and applies only to four specific types of money laundering prosecutions: (1) extraterritorial jurisdiction—cases where the sole jurisdiction to prosecute comes from the extraterritorial provision of the money laundering statutes themselves; (2) tax division authorization—cases where the prosecution is based on tax evasion; (3) prosecutions of attorneys—cases where the proceeds involved relate to fees paid by a defendant to his or her attorney; and (4) prosecution of a financial institution—cases where the financial institution itself is to be named as a defendant or an unindicted co-conspirator.\textsuperscript{220} The Department of Justice made a clear distinction that the use of Section 1956 (a)(1)(A)(ii) (money laundering with intent to engage in conduct violating 26 U.S.C. § 7201 or § 7206—tax crimes), should be limited.\textsuperscript{221} It stated that this section “was not intended to provide a substitute for traditional Title 18 and Title 26 charges related to tax evasion, filing of false returns, including the aiding and abetting thereof, or tax fraud conspiracy.”\textsuperscript{222} Therefore, the Department’s authorization is required prior to indictment.\textsuperscript{223} In addition, the guidelines state that unless the

\begin{itemize}
\item \textsuperscript{217} See id.
\item \textsuperscript{218} U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS MANUAL, § 9-105.100 (1997) [hereinafter U.S. ATTORNEYS MANUAL].
\item \textsuperscript{219} See id.
\item \textsuperscript{220} See id. § 9-105.300. The authorization requirement for prosecutions of financial institutions resulted from the passage of the Annunzio-Wylie Anti-Money Laundering Act. See id. § 9-105.320.
\item \textsuperscript{221} See id. § 9-105.750.
\item \textsuperscript{222} Id.
\item \textsuperscript{223} See id.
\end{itemize}
charge is related to a drug offense, prior review by the Internal Revenue Service Regional Counsel is required.\(^{224}\)

Consultation with the Asset Forfeiture and Money Laundering Section by United States Attorneys is required before filing an indictment or complaint for the following types of money laundering prosecutions: (1) forfeiture of a business; (2) cases filed under Section 1956(b) against a business entity; (3) cases involving financial crimes—i.e., where “the conduct to be charged as ‘specified unlawful activity’... consists primarily of one or more financial or fraud offenses, and in which the financial and money laundering offenses are so closely connected with each other that there is no clear delineation between the underlying financial crime and the money laundering offense”; and (4) receipt and deposit cases—cases in which the basis of the money laundering charge “consists of the deposit of proceeds of [a] specified unlawful activity into a domestic financial institution account... clearly... belonging to the person(s) who committed the specified unlawful activity.”\(^{225}\)

All other prosecutions under the money laundering statutes require only notification after the fact to the Asset Forfeiture and Money Laundering Section.\(^{226}\) The stated basis for the notification requirement is that “in light of the scope of the money laundering statutes, it is essential that the Asset Forfeiture and Money Laundering Section be kept abreast of the way the statutes are being used.”\(^{227}\)

These additions to the Department’s guidelines reflect the Department’s acknowledgment that the scope of the money laundering statutes is broad, and therefore, their use must be monitored.\(^{228}\) In fact, in some cases, like the tax evasion and mere deposit cases, the Department is now advising prosecutors not to pursue a money laundering charge, but instead to rely on the state or federal laws already in place.\(^{229}\) However, it is important to note that the majority of the prosecutions under

\(^{224}\) See id.

\(^{225}\) Id. § 9-105.330.

\(^{226}\) See id. § 9-105.310.

\(^{227}\) Id.

\(^{228}\) See id.

\(^{229}\) See id. § 9-105.330; Laundering Guides Limit ‘Mere Deposit’ Cases, 3 No. 11 DEP’T OF JUSTICE ALERT 6, (Sept. 1993).
the money laundering statutes require no authorization at all. 230 Indeed, only consultation or mere notification after the fact are required for the vast majority of prosecutions under these broad statutes. 231 This is in sharp contrast to even the broadly interpreted and applied RICO statutes which require authorization prior to prosecution under any circumstances. 232

D. Proposed Legislation Not Yet Enacted

The House and Senate have considered numerous bills in recent years regarding money laundering and the federal government's fight against crime. 233 In general, these bills recognize the broad scope courts have given the money laundering statutes, while still insisting that their main focus is on fighting the drug war and organized crime leaders. 234 However, some legislators argue that the current

231. See id.
232. See id. § 9-110.101.
laws are not broad enough and are pushing to add even more offenses to the growing list of specified unlawful activities which can support a charge of money laundering.\textsuperscript{235}

**Conclusion**

Based on the above analysis, it is clear that at the time the Money Laundering Control Act of 1986 was passed, the focus of the President and Congress was on providing proof of their intent to fight drugs and organized crime to the American public and the international community.\textsuperscript{236} Indeed, the fact that the Money Laundering Control Act itself was embedded in the all-encompassing Anti-Drug Abuse Act speaks volumes regarding the main focus of the legislation.\textsuperscript{237} Contrary to this primary focus, however, over the past thirteen years since their enactment, these statutes have been applied to activity...
completely unrelated to either drug trafficking or organized crime.\textsuperscript{238}

The primary incentive for the money laundering statutes to be used against defendants charged with less serious crimes than drug offenses or organized criminal activity lies in the potential for increased sentencing above and beyond what would ordinarily be given for such activity.\textsuperscript{239} Indeed, prosecutors use this potential threat in even minor cases of fraud to ensure a guilty plea by the unsuspecting defendant whose desire is to avoid the possibility that a confused jury would sentence him to twenty years instead of five.\textsuperscript{240} Thus, even assuming the drafters did intend to enact a broad statute to reach money laundering activity related to crimes other than just drug trafficking or organized crime, surely they did not intend this effect on those convicted of minor criminal activity, but only those convicted of more serious criminal activity.\textsuperscript{241} In fact, Congress has admitted as much, but still refuses to change the statute due to resistance by prosecutors and their fear that the underlying message would be misread to imply they were not serious in their fight against drugs and organized crime.\textsuperscript{242}

It seems, however, that there is a simple solution to this dilemma: Utilize the statute to combat money laundering associated with drug trafficking and organized crime; do not use the statute to indict persons convicted of minor bank fraud or other criminal activity with a relatively low base level sentence under the sentencing guidelines. Additionally, the Department of Justice should monitor the discretion of prosecutors to add charges of money laundering by requiring them to have any such charges authorized prior to the indictment. If these

\textsuperscript{238} \textit{See} Hecht, \textit{supra} note 163. Although the legislative intent illustrates that the money laundering statutes were meant to be a weapon to fight the war on drugs, the language of the [Money Laundering Control Act] criminalizes activity not even remotely related to drug trafficking or organized crime. The extraordinarily broad elements of the crime of money laundering have allowed federal prosecutors to bring money laundering actions in almost every instance of economic or white collar activity. \textit{Id} at 238; Higgins, \textit{supra} note 13, at 44-45; \textit{see also} cases cited \textit{supra} note 12.

\textsuperscript{239} \textit{See} discussion \textit{supra} Section III.B.

\textsuperscript{240} \textit{See} discussion \textit{supra} Section III.B.

\textsuperscript{241} \textit{See} discussion \textit{supra} Section III.

\textsuperscript{242} \textit{See} discussion \textit{supra} Section IV.
restrictions were employed, Congress would not have to back away from its strong stance in the war against drugs. At the same time, criminal activity which was never intended to be reached by the money laundering statutes or to be punished by the related harsh sentences of the money laundering sentencing guidelines, would continue to be dealt with under existing state or federal criminal laws.

As to the argument of the prosecutors that you would take away a very effective tool they have aggressively used against criminals of all types, which might not have otherwise been possible, it must be stressed that while these statutes do serve a very important purpose, use of such broad-reaching tools with nearly unfettered discretion by overzealous prosecutors is not in society's best interest.243 At a minimum, the controls that have been put into place to contain the arbitrary use of the similar RICO statutes should also be enacted to control the use of the money laundering statutes.244 Moreover, prosecutors should strive for more consistent application of these statutes among districts.245

Until Congress amends the statutes or the Department of Justice chooses to enact self-limiting guidelines, however, the courts, like the court in United States v. Smith, will be left to make the tough decisions. Will the court allow a defendant who committed only a minor crime to be sentenced via these “draconian sentences” that were “never intended to reach activity other than that associated with drug trafficking or organized crime,”246 or will it follow the Sentencing Commission's own guidelines suggesting this was not their intent? No doubt, there will continue to be a split in the treatment of these issues

243. See generally Gershman, supra note 212, at 407; Podgor, supra note 13, at 1516-20.
244. See Higgins, supra note 13, at 47 (suggesting that there needs to be more guidance to U.S. Attorneys with regard to when to charge money laundering).
245. See id.
at both the district and circuit court levels until the Supreme Court of the United States grants certiorari and ultimately determines—What was Congress’s intent?

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