

Subtle Indiscretions - International Smuggling, Federal Criminal Law, and the Revenue Rule

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Recommended Citation

Bradley R. Wilson, *Subtle Indiscretions - International Smuggling, Federal Criminal Law, and the Revenue Rule*, 89 Cornell L. Rev. 231 (2003)

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NOTE

SUBTLE INDISCRETIONS? INTERNATIONAL SMUGGLING, FEDERAL CRIMINAL LAW, AND THE REVENUE RULE

Bradley R. Wilson†

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INTRODUCTION

Mail fraud has been referred to as the “Colt .45” of the federal prosecutor.¹ Together, mail and wire fraud are among the most fre-

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¹ Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980) (noting that the federal mail fraud statute is cherished by prosecutors because of its “simplicity, adaptability, and comfortable familiarity”).

quently charged federal crimes, and each qualifies as a predicate offense for the Racketeer Influenced and Corrupt Organizations Act (RICO).² When combined with RICO, mail and wire fraud can serve as the jurisdictional link that allows federal prosecutors to charge traditional state-law crimes, enabling them to strike at the heart of criminal enterprises.³ The scope of the mail and wire fraud statutes, therefore, plays a critical role in determining how aggressive the federal government can be when investigating and bringing charges against complex criminal operations.

Recently, questions have arisen concerning the scope of these statutes and their applicability to international smuggling operations. Specifically, three circuit courts have considered whether the federal mail and wire fraud statutes can be invoked against persons smuggling goods into a foreign country in an effort to avoid import duties and to defraud that country's government of the revenues to which it is entitled under its own laws.⁴ At the center of the issue lies the common law "revenue rule," which generally precludes courts from enforcing foreign revenue laws.⁵ The First Circuit relied on this doctrine when it refused to extend the scope of the mail and wire fraud statutes to international smuggling activities and concluded that such criminal prosecutions would be akin to enforcing foreign import duty laws.⁶

Resolution of this issue will have a profound effect on the federal government's ability to fight organized crime in the United States. For example, according to the United States Customs Service, cigarette smuggling operations have "generate[d] billions of dollars of

² 18 U.S.C. § 1961(1)(B) (2000) (listing both mail fraud and wire fraud under the definition of "racketeering activity"). If mail fraud is the federal prosecutor's Colt .45, then RICO is her M-16. In addition to its well-documented venue, joinder and evidentiary advantages, RICO offers several additional advantages, notably its civil forfeiture provision and increased sentencing exposure. See, e.g., JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 601-02 (2001). Similarly, both mail and wire fraud qualify as underlying offenses for the federal money laundering statute. 18 U.S.C. § 1956(c)(7)(A).

³ See O'SULLIVAN, *supra* note 2, at 602.

⁴ See *United States v. Pasquantino*, 336 F.3d 321, 326 (4th Cir. 2003) (en banc) [hereinafter *Pasquantino II*]; *United States v. Trapilo*, 130 F.3d 547, 551 (2d Cir. 1997); *United States v. Boots*, 80 F.3d 580, 587-88 (1st Cir. 1996).

⁵ See, e.g., 1 DICEY AND MORRIS ON THE CONFLICT OF LAWS 97-100, 101-03 (Lawrence Collins et al. eds., 12th ed. 1993); F.A. MANN, STUDIES IN INTERNATIONAL LAW 495-96 (1973). The Fourth Circuit recently debated whether the revenue rule applies only to the enforcement of foreign tax judgments, see *Pasquantino II*, 336 F.3d at 326-28, or more broadly to the mere recognition of foreign tax laws, see *id.* at 338 (Gregory, J., dissenting). Although a majority of the court, sitting en banc, ultimately accepted the narrow formulation, see *id.* at 329 ("[A]ll persuasive authority supports the position that . . . [the revenue rule] pertains to the nonenforcement of foreign tax judgments as opposed to the nonrecognition of foreign revenue laws."), the Fourth Circuit's conclusion is far from unassailable, see *infra* notes 100-03, 109 and accompanying text.

⁶ See *infra* Part II.A (discussing *Boots*, 80 F.3d 580).

profit for criminal organizations around the world.”⁷ Much like their legitimate counterparts, criminal organizations require substantial funding to conduct their illicit activities.⁸ Therefore, permitting the application of the mail and wire fraud statutes to cases of international smuggling would provide the federal government with a powerful weapon against transnational organized criminal entities operating in the United States.

While the roots of the common law “revenue rule” run relatively deep,⁹ the question whether it precludes federal mail and wire fraud liability where the scheme alleged involves defrauding a foreign government of tax revenues or import duties has only recently received attention. Of the trio of circuit courts to consider this issue, only one held that the revenue rule does indeed prevent the government from charging mail or wire fraud in these circumstances.¹⁰ The Second and Fourth Circuits, however, have concluded that the revenue rule is “inapplicable” and therefore wire fraud may be charged where the object of a scheme is to defraud a foreign government of its tax revenues.¹¹

⁷ U.S. Customs Service, *Tobacco Smuggling*, at http://www.cbp.gov/xp/cgov/enforce/ice/investigations/tobacco_smuggling.xml (last visited Aug. 24, 2003); see also *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 129 n.35 (2d Cir. 2001) (“At the time of RICO’s passage, it was well known that organized crime organizations engaged in tax evasion and smuggling.”), *cert. denied*, 537 U.S. 1000 (2002).

⁸ Congress has recognized this connection in the context of international terrorist organizations. The Patriot Act, enacted in response to the tragic events of September 11, 2001, contains numerous provisions targeted at undermining the ability of these organizations to fund their operations. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, § 302(b)(1), 115 Stat. 272, 297 (2001) (indicating that a central objective of the Patriot Act is to “increase the strength of . . . measures to prevent, detect, and prosecute . . . the financing of terrorism”).

⁹ The origin of the revenue rule is traced to the eighteenth century English case of *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775), which states in dicta that “no country ever takes notice of the revenue laws of another.” For an extended discussion of the facts and legal issues in that case, see *Pasquantino II*, 336 F.3d at 328. See also William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 *HOUS. J. INT’L L.* 265, 272–73 (2000) (discussing *Holman*).

¹⁰ See *Boots*, 80 F.3d at 587–88; cf. *R.J. Reynolds*, 268 F.3d at 106 (holding that the revenue rule precluded Canada from bringing a civil RICO suit alleging mail and wire fraud in furtherance of smuggling operations); *Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1365 (S.D. Fla. 2002) (precluding Ecuador from bringing a civil RICO suit under circumstances similar to those found in *R.J. Reynolds*). A panel of the Fourth Circuit subsequently agreed with the *Boots* court, see *United States v. Pasquantino*, 305 F.3d 291, 296–97 (4th Cir. 2002) [hereinafter *Pasquantino I*], but that decision was vacated, see *United States v. Pasquantino*, 2003 U.S. App. LEXIS 585 (2003), and the defendants’ convictions were reinstated following an en banc rehearing, *Pasquantino II*, 336 F.3d 321.

¹¹ *Pasquantino II*, 336 F.3d at 331; *United States v. Trapilo*, 130 F.3d 547, 551–52 (2d Cir. 1997). The indictment in *Trapilo*, which was reinstated by the Second Circuit, charged money laundering conspiracy, naming wire fraud as the specified unlawful activity. 130 F.3d at 549; see 18 U.S.C. § 1956(a)(1)–(2), (h) (2000).

This Note will argue that any decision to bar application of the mail and wire statutes to schemes of this type is based on a misunderstanding of the reasons behind the revenue rule, and thereby operates as an improper restriction on the federal government's ability to counteract the proliferation of international organized criminal entities operating in the United States.¹² Quite simply, none of the policy concerns justifying the creation of the revenue rule—respect for national sovereignty,¹³ proper separation of powers among the branches of government,¹⁴ or questions of judicial competency in dealing with foreign law¹⁵—are triggered when the United States seeks to protect its own national interests by prosecuting these operations pursuant to criminal laws enacted by Congress.¹⁶ Accordingly, this aspect of the common law “plainly ha[s] no place in the federal fraud statutes,”¹⁷ and the judiciary has no authority to restrict the scope of the mail and wire fraud provisions by engrafting onto them the limitation imposed by the revenue rule.

Part I will lay the foundation for considering the question addressed by discussing the elements of the mail and wire fraud statutes and by briefly describing the origins of the revenue rule and its subsequent incorporation into American jurisprudence. To complete this foundation, the Note will then identify and discuss the three prevailing modern justifications for the revenue rule, and provide a brief summary of existing arguments concerning the validity of these justifications in the present context. In Part II, this Note will present the three circuit court cases that have directly considered the issue at hand, summarizing the essential facts and highlighting the critical aspects of the courts' reasoning.

¹² Of course, the federal government has a legitimate interest in prosecuting schemes of this type that are not connected to organized crime: preventing the use of the United States' communication systems to serve criminal agendas. See *infra* notes 123–29 and accompanying text.

¹³ See *infra* Part I.B.1.

¹⁴ See *infra* Part I.B.2.

¹⁵ See *infra* Part I.B.3.

¹⁶ See *infra* Part III.

¹⁷ See *Neder v. United States*, 527 U.S. 1, 25 (1999). In *Neder*, the Supreme Court concluded that the federal fraud statutes were presumed to incorporate the common law understanding of fraud. See *id.* at 21–23 (“[W]e must *presume* that Congress intended to incorporate materiality ‘unless the statute otherwise dictates.’” (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (internal quotation marks omitted))). No such presumption should apply in the present context, however, since it is not at all clear that the revenue rule was incorporated into the common-law understanding of fraud. Cf. *id.* at 23. Further, the proper inquiry is not whether Congress expressly rejected inclusion of the revenue rule into the mail and wire fraud statutes, but rather whether applying the revenue rule to mail and wire fraud prosecutions makes sense in the first place. Cf. *id.* at 25 (noting that certain elements of common law fraud are not implicit in federal fraud statutes because these elements would be incompatible with the statutes Congress enacted).

Finally, Part III will analyze the merits of the question presented. Adopting the approach followed by Judge Calabresi in a related context,¹⁸ this Note will consider each of the traditional justifications for applying the revenue rule in light of the present controversy. Although ample consideration will be given to the arguments previously advanced by various courts of appeals, a substantial component of the analysis will focus on novel approaches to the issues presented. Ultimately, this Note will conclude that none of the traditional justifications for the revenue rule validate its application as a limitation upon the scope of the federal fraud provisions. Therefore, the mail and wire fraud statutes should not be constrained in this manner, and the United States should be free to prosecute schemes to defraud foreign governments of import tax revenues under the U.S. fraud statutes.

I

SETTING THE TABLE: STATUTORY AND COMMON LAW FRAMEWORK

A. Federal Mail and Wire Fraud Statutes

For the purposes of this Note, and in fact for most issues of statutory interpretation in this area, the federal mail fraud¹⁹ and wire fraud statutes²⁰ are interchangeable.²¹ Both statutes are triggered when a particular type of communication is made “for the purpose of executing [a] scheme or artifice [to defraud].”²² Critically, neither statute requires that the fraud actually be successful.²³ The government need only prove that “some actual harm or injury was *contemplated* by the schemer.”²⁴ However, no liability can attach if the scheme contemplated is not in fact a crime.²⁵

¹⁸ See *infra* notes 110–11 and accompanying text.

¹⁹ 18 U.S.C. § 1341 (2000).

²⁰ *Id.* § 1343.

²¹ See, e.g., *United States v. Slevin*, 106 F.3d 1086, 1088 (2d Cir. 1996); cf. *McNally v. United States*, 483 U.S. 350, 374 (1987) (Stevens, J., dissenting).

²² 18 U.S.C. § 1341; *id.* § 1343. Section 1341 is chargeable when the mails are used to execute the fraud, *id.* § 1341, and § 1343 is chargeable when any “wire, radio, or television communication” is used to execute the fraud, *id.* § 1343.

²³ See *id.* §§ 1341, 1343.

²⁴ *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180 (2d Cir. 1970); see 18 U.S.C. § 1341 (applying to anyone who, “having devised or intending to devise any scheme or artifice to defraud,” uses the mails in furtherance of the fraudulent scheme); 18 U.S.C. § 1343 (applying to anyone who, “having devised or intending to devise any scheme or artifice to defraud,” uses “wire, radio, or television communication” in furtherance of the fraudulent scheme); see also *Durland v. United States*, 161 U.S. 306, 315 (1896) (“It is enough if, having devised a scheme to defraud, the defendant with a view of executing it[,] deposits [the communication into the mails].”).

²⁵ See *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000). In *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), the Second Circuit appeared to adopt the contrary position, indicating that legal impossibility was not a defense to wire fraud. See *id.* at 552 (“[W]hat is proscribed [by § 1343] is use of the telecommunication systems of the United States in furtherance of a scheme whereby one *intends* to defraud another of property.

Assuming for the moment that the revenue rule does not apply in this context, an operation to smuggle goods out of the United States to avoid a foreign country's import duties clearly constitutes a scheme to defraud. After all, such an operation, if successful, would deprive the foreign government of tax revenues to which it was entitled.²⁶ Even if the scheme was thwarted prior to completion, the perpetrators would nevertheless be liable, since the statutes criminalize the mere formation of the plan to defraud.²⁷ Of course, defrauding a foreign government of its own tax revenues does not become a crime in the United States until the perpetrator utilizes a mailing or wiring as part of her scheme.²⁸ As a practical matter, however, this second element is easily satisfied.²⁹ In this context, for example, wire fraud liability would be perfected if the government could prove that the defend-

Nothing more is required."). However, the *Pierce* court clarified this aspect of *Trapilo*, affirmatively concluding that legal impossibility may be a valid defense to wire fraud where the scheme involved smuggling liquor into Canada:

If no Canadian duty or tax actually existed, the [defendants] were no more guilty of wire fraud than they would have been had they used the wires in furtherance of a scheme to [surreptitiously] transport liquor down the Hudson River from Yonkers into New York City, by flat-bottomed boat in the dead of night, in the sincere but mistaken belief that New York City imposes a duty on such cross-border shipments.

Pierce, 224 F.3d at 166.

²⁶ Rather than defrauding the target of its property, which might be described as the paradigmatic object in mail or wire fraud cases, these smuggling schemes threaten the foreign government's right to obtain property, arising from that nation's tax laws. See *Pierce*, 224 F.3d at 165-66. Indeed, prosecutors consistently use the federal mail and wire fraud statutes to prosecute schemes designed to deprive a state government of tax revenues. See, e.g., *United States v. DeFiore*, 720 F.2d 757, 761 (2d Cir. 1983); *United States v. Melvin*, 544 F.2d 767, 774 (5th Cir. 1977); *United States v. Brewer*, 528 F.2d 492, 496 (4th Cir. 1975). Aside from the possible application of the revenue rule, there is no valid basis upon which to justify precluding the United States government from criminalizing similar fraudulent schemes targeted at avoiding the tax revenues of foreign governments.

²⁷ See *Pierce*, 224 F.3d at 166 ("If . . . [the import] duty never became payable because no liquor ever actually made its way across the border, the scheme itself would nonetheless be punishable."). Inexplicably, the dissent in *Pasquantino II* cites *Pierce* for the opposite proposition; that no liability could attach until at least one bottle of liquor or carton of cigarettes crossed the relevant border. See *Pasquantino II*, 336 F.3d 321, 342 (4th Cir. 2003) (Gregory, J. dissenting) (citing *Pierce*, 224 F.3d at 165) (arguing that no prosecution would be possible in these circumstances because "the requisite property would never have come into existence"). Setting aside Judge Gregory's complete misapprehension of *Pierce*, his reasoning remains misguided, since mail and wire fraud are inchoate crimes. See *supra* notes 22-24 and accompanying text.

²⁸ Compare 18 U.S.C. § 1343 (requiring use of interstate or foreign commerce), with *id.* § 1341 (requiring only a mailing). No interstate or foreign commerce is required by § 1341 because Congress's power of the post enables it to federalize frauds utilizing only intrastate mailings. U.S. CONST. art. I, § 8, cl. 7 (Congress has the power "[t]o establish [p]ost [o]ffices and post [r]oads.").

²⁹ For an example of the Supreme Court's willingness to stretch the boundaries of the "for the purpose of executing" language in § 1341, see *Schmuck v. United States*, 489 U.S. 705 (1989).

ants had placed interstate telephone calls to order cigarettes, which they later smuggled into Canada.³⁰

B. The Common Law Revenue Rule and Its Justifications

The common law revenue rule's origin is traced to Lord Mansfield's statement in *Holman v. Johnson*³¹ that "no country ever takes notice of the revenue laws of another."³² Although scholars have questioned the wisdom of founding a modern common law rule on two-century-old, isolated dicta,³³ American courts have maintained allegiance to Lord Mansfield's proclamation.³⁴ These courts advance a variety of justifications for continuing allegiance to the rule, including respect for foreign sovereignty,³⁵ separation of powers concerns,³⁶ and the inability of American courts to properly interpret foreign tax codes.³⁷

1. *Respect for National Sovereignty*

American courts frequently justify continued adherence to the revenue rule on the grounds that it precludes foreign nations from extending their sovereignty into the United States.³⁸ The foundation of this reasoning is traced to the statements of Judge Learned Hand,

³⁰ These hypothetical facts are substantially similar to those in *Trapilo*, 130 F.3d at 549.

³¹ 98 Eng. Rep. 1120 (K.B. 1775); see *supra* note 9 and accompanying text.

³² 98 Eng. Rep. at 1121 (dicta); see also *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (K.B. 1779) ("One nation does not take notice of the revenue laws of another." (footnote omitted)).

³³ See, e.g., Kovatch, *supra* note 9, at 287 (calling the revenue rule "an anachronism in American law"); Recent Case, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), 115 HARV. L. REV. 2333, 2337 (2002) (indicating that the revenue rule reflects "an outdated, narrow view of the interplay between national sovereignty and judicial authority").

³⁴ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 483 (1987). *But cf. id.* § 483 reporters' note 2, at 613 ("In an age when . . . instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete.").

³⁵ See, e.g., *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 111-13 (2d Cir. 2001) ("In part, the reluctance of courts to delve into [a foreign sovereign's revenue laws] is based on the 'desire to avoid embarrassing another state by scrutinizing [those] laws.'" (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 437 (1964))), *cert. denied*, 537 U.S. 1000 (2002).

³⁶ See, e.g., *id.* at 113-15 ("When a foreign nation appears . . . in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations that are assigned to . . . the political branches of government.").

³⁷ See, e.g., *id.* at 137 (Calabresi, J., dissenting).

³⁸ See *id.* at 111 (noting that courts have explained that the revenue rule "help[s] nations maintain their mutual respect and security"); see also *Sabbatino*, 376 U.S. at 448 (White, J., dissenting) ("[N]o country has an obligation to further the governmental interests of a foreign sovereign.").

discussing the now repudiated principle that states ought not enforce the revenue laws of sister states:

To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are [entrusted] to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.³⁹

The basic concern behind this particular justification involves the possibility that an American court would be asked to enforce a foreign tax law that offended the United States' sense of sound policy.⁴⁰ According to this argument, if U.S. courts generally enforced foreign sovereigns' revenue laws, then selective refusal where enforcement offended U.S. policy would embarrass the foreign state in question.⁴¹ Therefore, in the interest of promoting amicable foreign relations, no assistance should be given in any case; "[s]afety lies only in universal rejection."⁴²

Of course, permitting mail or wire fraud prosecutions to go forward when the alleged object of the fraud is a foreign government's excise tax on imported goods is not the direct enforcement of foreign tax law; it is instead the enforcement of the criminal law of the United States.⁴³ The relevance of this distinction, however, is disputed.⁴⁴

³⁹ Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring). Although the Supreme Court later held that the Full Faith and Credit Clause requires states to enforce tax judgments rendered by courts of other states, see *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 279 (1935), Judge Hand's concerns remain viable in the present context, see *Her Majesty the Queen ex rel. B.C. v. Gilbertson*, 597 F.2d 1161, 1164 n.8 (9th Cir. 1979) ("[T]here is no provision similar to the [Full Faith and Credit Clause] in the Constitution which would require that the courts of this country extend full faith and credit to the judgments of a foreign country.").

⁴⁰ See *R.J. Reynolds*, 268 F.3d at 113 (advancing a hypothetical situation in which a foreign sovereign requests that an American court assist with the enforcement of an immigration tax, which is selectively applied to members of disfavored religious or ethnic groups).

⁴¹ See *supra* note 35 and accompanying text.

⁴² *Peter Buchanan Ltd. v. McVey*, [1954] 1.R. 89, 107 (Ir. S.C.), quoted in *R.J. Reynolds*, 268 F.3d at 112.

⁴³ See *Pasquantino II*, 336 F.3d 321, 330-31 (4th Cir. 2003); Elizabeth J. Farnam, *Racketeering, RICO and the Revenue Rule in Attorney General of Canada v. R.J. Reynolds: Civil RICO Claims for Foreign Tax Law Violations*, 77 WASH. L. REV. 843, 870-72 (2002).

⁴⁴ Compare 1 DICEY & MORRIS, *supra* note 5, at 103 (contending that "where no question of enforcement arises, foreign revenue laws are applied by the courts if they are relevant to an issue"), and *R.J. Reynolds*, 268 F.3d at 136 (Calabresi, J., dissenting) ("[C]oncern for extra-territoriality . . . has no meaning whatever when what is enforced by imposing damages or penalties is, in fact, a domestic law . . ."), with *United States v. Boots*, 80 F.3d

Those contending that this distinction is of import contend that Congress, in passing the mail and wire fraud statutes, implicitly determined that prosecution for the prohibited behavior “advances *our own* [American] interests, and any collateral effect furthering the governmental interests of a foreign sovereign is, therefore, necessarily incidental.”⁴⁵

2. Separation of Powers

Another justification for modern application of the revenue rule flows from the perceived impropriety of courts addressing issues of foreign relations.⁴⁶ In particular, courts have reasoned that questions surrounding “domestic collection of foreign taxes and the enforcement of United States taxes abroad” are reserved for the executive and legislative branches.⁴⁷ For example, the Second Circuit has reasoned that,

[a]bsent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly sensitive area of intergovernmental relations, the power to affect rights to property wherever located in the world. The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner.⁴⁸

This justification has not escaped criticism either. A cogent example of such criticism can be found in Judge Calabresi’s dissent in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*⁴⁹ After noting that the mail and wire fraud statutes were enacted through the typical legislative process, Calabresi argued that the political branches intentionally “created the cause of action” in question.⁵⁰ Therefore, he concluded, courts permitting prosecutions under these statutes, rather than impermissibly creating policy, are simply giving effect to

580, 587 (1st Cir. 1996) (“[U]pholding defendants’ [wire fraud] conviction would amount functionally to penal enforcement of Canadian customs and tax laws.”). Similarly disputed, yet beyond the scope of this Note, is whether a distinction should be made between cases where a foreign government seeks a civil remedy under United States law and cases where the United States government itself chooses to prosecute a criminal action. Compare *R.J. Reynolds*, 268 F.3d 103 (holding that the revenue rule barred the Canadian government’s civil RICO suit arising out of alleged smuggling operations), with *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997) (permitting a federal prosecution based on allegations of wire fraud in connection with avoidance of Canadian import duties).

⁴⁵ *R.J. Reynolds*, 268 F.3d at 136 (Calabresi, J., dissenting).

⁴⁶ See, e.g., *Boots*, 80 F.3d at 587 (“[F]or our courts effectively to pass on [revenue] laws raises issues of foreign relations which are assigned to and better handled by the legislative and executive branches of government.”).

⁴⁷ *R.J. Reynolds*, 268 F.3d at 115.

⁴⁸ *United States v. First Nat’l City Bank*, 321 F.2d 14, 24 (2d Cir. 1963), *rev’d on other grounds*, 379 U.S. 378 (1965), *quoted in R.J. Reynolds*, 268 F.3d at 115.

⁴⁹ 268 F.3d at 136–37 (Calabresi, J., dissenting).

⁵⁰ See *id.* at 137 (Calabresi, J., dissenting).

the foreign policy appropriately promulgated by the executive and legislative branches.⁵¹

3. *Competency of American Courts to Interpret Foreign Law*

The final prevailing justification for the revenue rule rests on concerns regarding judicial capability, and posits that American courts, naïve as to the laws of other nations, should “avoid interpreting and applying foreign tax laws.”⁵² Proponents of this view assert that courts determining whether a fraud prosecution successfully demonstrated criminal intent to defraud a foreign government of import duties would be required to rule on challenges involving the underlying foreign statutes.⁵³ If a defendant claimed legal impossibility, for example, an American court would have to ascertain whether the alleged scheme—what the defendant intended to do—was in fact a violation of foreign law.⁵⁴ In addition, in any case involving successful prosecutions for mail or wire fraud, the United States Sentencing Guidelines require courts to determine the extent of the loss as a factor in establishing the sentence imposed.⁵⁵

As before, the validity of this justification for the revenue rule is debatable. Once again, Judge Calabresi joins the band of critics, asserting that the argument is “dubious in a global economy, which requires a great amount of interpretation of foreign laws.”⁵⁶ Calabresi declined to address this justification in detail, however, believing himself to be bound by Second Circuit precedent.⁵⁷ The *Trapilo* court’s

⁵¹ See *id.* (Calabresi, J., dissenting).

⁵² *Pasquantino I*, 305 F.3d 291, 297 (4th Cir. 2002), *rev’d en banc*, 336 F.3d 321 (4th Cir. 2003).

⁵³ See *id.* at 298; *United States v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996).

⁵⁴ See *Pasquantino I*, 305 F.3d at 298.

⁵⁵ See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b) (2001). An exception exists where the scheme targets the intangible nonproperty right to honest services. In those instances, § 2C1.7 is used to determine the appropriate sentence. See *id.* app. A, at 459.

⁵⁶ *R.J. Reynolds*, 268 F.3d at 137 n.4 (Calabresi, J., dissenting) (“[F]ederal courts have shown a commendable ability to get their hands around foreign law when fully briefed on the issues.”) (quoting Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 AM. J. COMP. L. 581, 586 (1995)).

⁵⁷ Calabresi contended that an earlier Second Circuit case, *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000), resolved the issue. See *R.J. Reynolds*, 268 F.3d at 137–39 (“Whatever the possible merits of this argument, this Circuit has rejected it.” (footnote omitted)). Setting aside the obvious fact that *Pierce* is not binding outside the Second Circuit, Calabresi’s reading of *Pierce* was strained. Rather than discussing the judicial competency justification underlying the revenue rule, the *Pierce* court merely concluded that in wire fraud prosecutions involving schemes to defraud foreign governments of tax revenues, the United States must prove beyond a reasonable doubt the existence of a foreign law creating a property right. See *Pierce*, 224 F.3d at 166 (“[W]ithout evidence that Canada imposes duty on imported liquor in the first place, the [U.S.] government cannot prove a scheme to defraud . . . because there is no evidence whatsoever of a property right . . .”).

rejection of the judicial competency argument was similarly brief.⁵⁸ Indeed, courts have made little effort to seriously address the concerns raised by the First and Fourth Circuits pertaining to the ability of American courts to interpret and apply foreign law.⁵⁹

II

UNSATISFACTORY ATTEMPTS: RESULTS IN THE CIRCUIT COURTS

None of the circuit courts have offered a satisfactory analysis in considering whether the revenue rule bars mail or wire fraud liability arising from schemes to defraud foreign governments of excise tax revenues. The following cases address, to varying degrees, the three traditional justifications underlying the revenue rule, and more importantly, apply these rationales to the present context. In addition, while many of the arguments raised by the circuit courts prove to be flawed, they implicate, at least tangentially, a majority of the issues that will be explored below.⁶⁰

A. First Circuit: *United States v. Boots*

The First Circuit's decision in *Boots*⁶¹ marked the first time that a circuit court addressed the question of whether wire fraud liability could exist where the object of the fraudulent scheme was a foreign government's tax revenues.⁶² In *Boots*, the United States alleged that the defendants carried out a scheme to smuggle tobacco into Canada through a Native American reservation in Maine, thereby avoiding import taxes at the Canadian border.⁶³ At the time, Canadian law levied taxes and excise duties on imports of tobacco.⁶⁴ The defendants allegedly smuggled approximately 1,850 kilograms of tobacco into Canada over the course of a series of operations without paying any of the required taxes or duties.⁶⁵ The Government's theory at trial was that the defendants' scheme, which involved the use of interstate wire communications,⁶⁶ defrauded Canada and the Province of Nova Scotia of excise duties and tax revenues due at the time the defendants

⁵⁸ See *United States v. Trapilo*, 130 F.3d 547, 552-53 (2d Cir. 1997). Indeed, until *Pierce* it appeared that the Second Circuit might not recognize the legal impossibility defense at all in this context. See *supra* note 25 and accompanying text.

⁵⁹ See *infra* notes 70, 91-93 and accompanying text.

⁶⁰ See *infra* Part III.

⁶¹ 80 F.3d 580 (1st Cir. 1996).

⁶² *Id.* at 586-87.

⁶³ *Id.* at 583.

⁶⁴ *Id.*

⁶⁵ See *id.* at 584.

⁶⁶ At trial, the Government introduced evidence of four interstate telephone conversations between a woman involved in the scheme and an individual working undercover for the Federal Bureau of Investigation (FBI). See *id.*

transported tobacco across the border.⁶⁷ Although the defendants were initially convicted of wire fraud,⁶⁸ the court of appeals reversed, concluding that the revenue rule barred prosecution under the Government's theory because upholding the convictions "would amount functionally to penal enforcement of Canadian customs and tax laws."⁶⁹

In justifying its conclusion, the First Circuit asserted that upholding the Government's theory would require trial courts "to pass on defendants' challenges to [foreign tax] laws and any claims not to have violated or intended to violate them."⁷⁰ The court reasoned that requiring American courts to interpret and apply foreign law would trigger the "concerns underlying the revenue rule."⁷¹ Specifically, the *Boots* court posited that judicial involvement in this area might undermine the "foreign policymaking powers" of the legislative and executive branches.⁷² In further support of its holding, the First Circuit noted that the federal statute which criminalizes smuggling goods into foreign countries does not apply unless the foreign government has a reciprocal law,⁷³ concluding that applying the wire fraud statute in these situations would "threaten[] the reciprocity provision in [the anti-smuggling statute]."⁷⁴ Finally, the court relied on the rule of lenity to incorporate the revenue rule into § 1343, reasoning that such incorporation constituted a more forgiving construction of the statute.⁷⁵

B. Second Circuit: *United States v. Trapilo*

In *Trapilo*,⁷⁶ the Second Circuit squarely rejected the *Boots* rationale,⁷⁷ holding that the revenue rule did not affect the federal wire

⁶⁷ *Id.*

⁶⁸ The defendants were also convicted of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371, and other offenses. *Id.* at 582–83.

⁶⁹ *Id.* at 587 ("The scheme to defraud . . . had as its sole object the violation of Canadian revenue laws.").

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *See id.* at 587–88.

⁷³ *Id.* at 588 (citing 18 U.S.C. § 546 (1994)).

⁷⁴ *Id.*

⁷⁵ *Id.* at 588–89. As this Note will argue in Part III, application of the revenue rule in this context would promote none of the policy reasons supporting its existence. *See Neder v. United States*, 527 U.S. 1, 25 (1999) (refusing to incorporate common law principles that were "clearly . . . inconsistent with the statutes Congress enacted" into the federal fraud statutes). Therefore, the rule of lenity has no relevance to the present discussion, since the revenue rule cannot plausibly be read into the mail or wire fraud statutes. *See Salinas v. United States*, 522 U.S. 52, 66 (1997) ("The rule [of lenity] does not apply when a statute is unambiguous or when invoked to engraft an illogical requirement to its text.").

⁷⁶ 130 F.3d 547 (2d Cir. 1997).

⁷⁷ *Id.* at 547, 548–49, 550–51 (reinstating the indictment after the district court, relying on *Boots*, had granted defendants' motion to dismiss).

fraud provision, because under that statute “[t]he identity and location of the victim . . . [is] irrelevant.”⁷⁸ The indictment alleged that the defendants had engaged in financial transactions to promote a scheme to defraud the Canadian government of tax revenue in violation of the money laundering conspiracy provisions.⁷⁹ The indictment named wire fraud as the specified unlawful activity,⁸⁰ thereby requiring the Second Circuit to address *Boots*. Restricting its analysis to the face of the wire fraud statute, the court summarily dismissed the notion that the common law revenue rule applied; “[t]he statute neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue.”⁸¹ In accordance with this conclusion, the Second Circuit reinstated the indictment, which had been dismissed by the district court.⁸²

Relying on the statutory language “any scheme or artifice to defraud”,⁸³ the court found no ambiguity whatsoever, concluding that all fraudulent schemes fell within the statute’s scope.⁸⁴ In the Second Circuit’s view, the plain language rendered any discussion of the revenue rule irrelevant.⁸⁵ The court argued that “what is proscribed [by the wire fraud statute] is use of the telecommunication systems of the United States in furtherance of a [fraudulent] scheme,” and therefore “[t]he identity and location of the victim . . . are irrelevant.”⁸⁶

C. Fourth Circuit: *United States v. Pasquantino*

The most recent installment of this trio culminated with an en banc review by the Fourth Circuit of *Pasquantino I*.⁸⁷ In *Pasquantino I*, a panel of the Fourth Circuit agreed with the reasoning in *Boots* and

⁷⁸ *Id.* at 552 (“The statute reaches any scheme to defraud . . . whether the scheme seeks to undermine a sovereign’s right to impose taxes, or involves foreign victims and governments.” (citations omitted)).

⁷⁹ *Id.* at 549; see *supra* note 11 and accompanying text.

⁸⁰ See *Trapilo*, 130 F.3d at 549. In order for the federal money laundering statute to apply, the funds “laundered” must have been derived from one of the predicate crimes referenced in the statute. 18 U.S.C. § 1956(c)(7)(A) (2002).

⁸¹ *Trapilo*, 130 F.3d at 551 (“[T]he common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute.”). *But cf.* Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 126–27 (2d Cir. 2001) (concluding that the revenue rule was “well established” when Congress enacted RICO, and that absent an express statement to the contrary courts must presume that Congress intended to incorporate the revenue rule into RICO), *cert. denied*, 537 U.S. 1000 (2002).

⁸² *Trapilo*, 130 F.3d at 550–51.

⁸³ 18 U.S.C. § 1343 (emphasis added); see also 18 U.S.C. § 1341 (emphasis added).

⁸⁴ See *Trapilo*, 130 F.3d at 551.

⁸⁵ See *id.* The court applied the same reasoning in determining that discussion of the rule of lenity was inappropriate. See *id.* at 552 n.8.

⁸⁶ *Id.* at 552.

⁸⁷ 305 F.3d 291 (4th Cir. 2003), *vacated and reh’g en banc granted* by 2003 U.S. App. LEXIS 585 (4th Cir. Jan. 14, 2003); see *Pasquantino II*, 336 F.3d 321 (4th Cir. 2003).

held that the revenue rule precluded the Government's theory of wire fraud.⁸⁸ However, in *Pasquantino II*, the en banc Fourth Circuit reversed the panel's decision and reinstated the defendants' convictions.⁸⁹

The defendants had been convicted of developing a scheme through which they avoided heavy Canadian taxes and duties on alcohol by purchasing liquor in Maryland and smuggling it into Canada through New York.⁹⁰ In reversing the convictions, the panel expressly rejected the *Trapilo* court's reasoning,⁹¹ and observed that "in order to determine whether Canada was deprived of property (tax revenues), a determination must be made into whether Canada's tax laws were in fact broken, or were *intended* to be broken."⁹² This would require American courts to decide, for example, whether Canadian law supported a defendant's claim of legal impossibility, and any such decision, the panel held, would violate the revenue rule.⁹³

Over a two-judge dissent, an en banc Fourth Circuit reversed the panel's decision, holding that the revenue rule did not bar wire fraud prosecutions of this type.⁹⁴ After initially concluding that Congress could not have intended to carve out these schemes from the wire fraud statute because, in the court's view, the revenue rule did not preclude the *recognition* of foreign revenue laws at common law,⁹⁵ the court partially reversed its course, reasoning that the revenue rule does apply where the imposition of liability "would be the functional equivalent of enforcing the revenue laws of [foreign governments]."⁹⁶ However, the majority ultimately determined that since prosecutions of this type "vindicat[e] our government's substantial interest in preventing our nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises," the "functional equivalent" exception was inapplicable.⁹⁷

Envisioning the issue as one with jurisdictional underpinnings, the Fourth Circuit felt obliged to respond to the separation of powers issue.⁹⁸ The court concluded that no separation of powers problem

⁸⁸ 305 F.3d at 296, 298, *rev'd en banc*, 336 F.3d 321 (4th Cir. 2003).

⁸⁹ *See Pasquantino II*, 336 F.3d at 331, 337-38.

⁹⁰ *See Pasquantino I*, 305 F.3d at 292-93. The defendants' scheme satisfied the second element of wire fraud because they frequently made telephone orders to a store in Maryland from Niagara Falls, New York. *See id.* at 293 n.3; *see also* 18 U.S.C. § 1343 (2000).

⁹¹ *See Pasquantino I*, 305 F.3d at 297-98.

⁹² *Id.* at 298.

⁹³ *See id.*

⁹⁴ *Pasquantino II*, 336 F.3d at 331. The court also rejected the argument that accrued tax revenues are not a cognizable property right for purposes of the wire fraud statute. *See id.* at 331-33. This issue, however, is beyond the scope of this Note.

⁹⁵ *See id.* at 330.

⁹⁶ *Id.*; *see supra* note 5.

⁹⁷ *See Pasquantino II*, 336 F.3d at 331.

⁹⁸ *Id.*

existed here because both the legislative (by enacting the wire fraud statute) and the executive (through the United States Attorney's decision to seek an indictment) branches, "the only two branches of our federal government charged by our Constitution with the power to make foreign policy decisions," approved of the prosecution.⁹⁹

Judge Gregory, writing for the dissent, criticized the majority's narrow construction of the revenue rule,¹⁰⁰ relying predominantly on language in two Supreme Court cases—*Banco Nacional de Cuba v. Sabbatino*¹⁰¹ and *Milwaukee County v. M.E. White Co.*¹⁰²—for the proposition that the revenue rule applies to the recognition of foreign tax judgments as well as to the underlying statutes.¹⁰³ The dissent also criticized the majority's conclusion that the evidence presented at trial was sufficient to establish the amount of taxes owed on the liquor brought into Canada,¹⁰⁴ on the grounds that the testimony of a lay witness was not a valid proxy for a legal finding by the district court.¹⁰⁵

III

PROPER RECONCILIATION: REJECTING PREVAILING JUSTIFICATIONS FOR APPLICATION OF THE REVENUE RULE

Recognizing the existence of scholarship questioning the revenue rule or calling for its complete abrogation, this Note will not add to

⁹⁹ *Id.* (citation omitted).

¹⁰⁰ Judge Gregory's initial challenge to the majority's decision is the claim that the court "reads the words 'to recognize' completely out of the *Restatement* section on which it purportedly relies." See *Pasquantino II*, 336 F.3d at 338 (Gregory, J. dissenting). Although Section 483 of the *Restatement* does in fact contain the phrase "to recognize," that phrase modifies the subsequent language "judgments for the collection of taxes, fines, or penalties rendered by the courts of other states." See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 483 (1987). That is, Section 483 applies to the recognition or enforcement of *judgments*, as opposed to the recognition or enforcement of *laws*. Insofar as the present issues involve the propriety of recognizing foreign tax laws, therefore, the majority's conclusion that Section 483 is inapplicable is correct. Of course, as Judge Gregory subsequent reliance on Supreme Court jurisprudence indicates, see *infra* notes 101–03, 109 and accompanying text, the *Restatement of Foreign Relations* is far from the last word on the scope of the revenue rule in the United States.

¹⁰¹ 376 U.S. 398, 413–14 (1964) (stating that the "principle enunciated in federal and state cases" is that courts "need not give effect to the . . . revenue laws of foreign countries" (emphasis added)).

¹⁰² 296 U.S. 268, 274 (1935) ("It has often been said, and in a few cases held, that statutes imposing taxes are not entitled to full faith and credit." (footnotes omitted)).

¹⁰³ See *Pasquantino II*, 336 F.3d at 338 (Gregory, J., dissenting) ("[L]ong before Congress'[s] passage of the wire fraud statute . . . , 'the United States Supreme Court acknowledged the broad scope of the revenue rule.'" (quoting Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 126 (2d Cir. 2001))).

¹⁰⁴ See *id.* at 342 (Gregory, J., dissenting) ("By alleging the existence of foreign revenue laws, the government effectively conceded that the applicability of Canadian law was central to its case.").

¹⁰⁵ See *id.* at 343 ("The district court never determined whether Officer Jonah's calculations were accurate as a matter of Canadian law.").

the criticism of the ancient common law maxim.¹⁰⁶ Rather, this Note will contend that the policies advanced in support of the revenue rule are not promoted by employing it as a bar to federal mail and wire fraud prosecutions, and therefore the revenue rule should not apply to preclude prosecutions for those offenses where the scheme alleged attempts to defraud foreign governments of import duties or excise taxes.

Before proceeding, it is important to note that *none* of the trio of circuit court cases discussed properly addressed or disposed of the precise question presented. That is, while the *Pasquantino II*¹⁰⁷ and *Trapilo*¹⁰⁸ opinions arrived at the correct result, they failed to properly address the policy concerns that support the revenue rule, most noticeably providing no defensible reason for rejecting the judicial competency concerns raised by the First Circuit.¹⁰⁹

Accordingly, this Note will follow the approach taken by Judge Calabresi in his *R.J. Reynolds* dissent,¹¹⁰ addressing each of the three prevailing justifications for applying the revenue rule in this context and rejecting each in turn.¹¹¹ With respect to the third and final justification—concerning the federal judiciary's ability to interpret and apply foreign law—this Note will specifically address (a) the legal impossibility defense and (b) the determination of sentencing exposure under the Federal Sentencing Guidelines. In short, this Note will attempt to complete the task Judge Calabresi initiated in his *R.J. Reynolds* dissent—systematically rejecting each of the three justifications most frequently offered in support of applying the revenue rule in the present context.¹¹²

¹⁰⁶ See William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 176–83 (2002); Kovatch, *supra* note 9.

¹⁰⁷ 336 F.3d 321.

¹⁰⁸ 130 F.3d 547 (2d Cir. 1997).

¹⁰⁹ See *supra* text accompanying notes 70, 91–93. In addition, *Pasquantino II* adds the unnecessary confusion and uncertainty of relying upon a narrowed scope of the revenue rule. See *supra* notes 95–97 and accompanying text. As the dissent in that case pointed out, the Fourth Circuit's decision broke ranks with both the First and Second Circuits, which had previously defined the revenue rule more broadly, see *Pasquantino II*, 336 F.3d at 338–40 (Gregory, J., dissenting), and arguably ignored the express understanding of the Supreme Court, see *supra* notes 101–03 and accompanying text. This Note does not attempt to determine whether the Fourth Circuit's reading of the revenue rule is correct. Instead, this Note attempts to provide a more readily defensible basis for rejecting application of the revenue rule in the present context.

¹¹⁰ 268 F.3d 103, 135–41 (2d Cir. 2001) (Calabresi, J., dissenting), *cert. denied*, 537 U.S. 1000 (2002).

¹¹¹ See *id.* (Calabresi, J., dissenting). Although Judge Calabresi provides a useful framework for analyzing the issues involved, this Note does not express any opinion as to his conclusion that the revenue rule should not operate as a bar to civil RICO suits initiated by foreign governments. See *id.* at 135 (Calabresi, J., dissenting).

¹¹² See *id.* at 135–41 (Calabresi, J., dissenting).

A. Respect for National Sovereignty

A great deal of conceptual difficulty surrounds the notion that a criminal prosecution, initiated by the United States government in federal court and arising from a violation of United States law, may nevertheless constitute an infringement by a foreign government upon the sovereign power of the United States. Indeed, but for the fact that federal prosecutions of this type have the coincidental effect of deterring further crimes against a foreign government, any discussion concerning this justification for the revenue rule would be unnecessary. However, in light of the misguided views expressed by the *Boots* court,¹¹³ this issue warrants some consideration.

Congress enacted the mail and wire fraud provisions to prevent the use of the Nation's postal and wire services to further fraudulent schemes.¹¹⁴ Based on this understanding, the Supreme Court has recognized that the possibility of a prosecution under state law arising from the underlying scheme does not preclude federal indictment pursuant to §§ 1341 or 1343.¹¹⁵ The validity of this result flows from the distinction between the aims of state-law fraud statutes and the federal provisions—the former seek to proscribe the mischievous plot itself, while the latter are targeted at the methods employed to carry it out.¹¹⁶ Properly understood, therefore, the federal mail and wire fraud statutes do not enforce state crimes; instead, they proscribe activities that, while simultaneously implicating state law, threaten specific, Congressionally defined federal interests.¹¹⁷

Ironically, the relationship between the mail and wire fraud statutes and the federal antismuggling statute discussed in *Boots* illustrates this crucial distinction.¹¹⁸ Whereas the antismuggling statute is inap-

¹¹³ See *supra* Part IIA.

¹¹⁴ See, e.g., *Parr v. United States*, 363 U.S. 370, 389–90 (1960) (discussing the mail fraud statute); *United States v. DeFiore*, 720 F.2d 757, 761 (2d Cir. 1983) (discussing the wire fraud statute). Of course, one might assert that the federal fraud statutes are not really about preventing misuse of the mails or wires at all but instead represent a means for expanding the federal government's role as a law enforcement body. See, e.g., O'SULLIVAN, *supra* note 2, at 305–06 (“Some judges and many commentators . . . have expressed discomfort with the virtually limitless scope of these statutes, noting . . . the extent to which they have been used to attack conduct that was previously considered the province of local law enforcement . . .”). While these concerns regarding the federalization of criminal law in the United States may be valid, “[the] aggrandizement of federal jurisdiction . . . has met no substantial resistance in Congress or public opinion, and little in the courts.” Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 745 (1987) (footnotes omitted). So long as Congress and the judiciary continue to recognize implicitly the federal interest in protecting misuse of the mails or wires, there is no plausible reason for carving out an exception in this context.

¹¹⁵ See, e.g., *Parr*, 363 U.S. at 389.

¹¹⁶ See, e.g., *id.* at 389–90.

¹¹⁷ See *id.* at 389.

¹¹⁸ See *supra* text accompanying note 73.

plicable where the adversely affected foreign government's laws do not contain reciprocal prohibitions,¹¹⁹ no such limitation is contained within §§ 1341 or 1343. In the context of international smuggling, these provisions combine to prohibit two entirely discrete activities under federal law: (1) defrauding a foreign government of earned tax revenues¹²⁰ and (2) using the mails or interstate wires in an impermissible manner, specifically for the purpose of defrauding a foreign government.¹²¹ The implications of this distinction are fundamental to understanding the proper role of the revenue rule in this area.

By enacting § 546, Congress expressed its willingness to assist fellow members of the international community in the task of combating transnational smuggling, *provided that* the United States received a quid pro quo. In this context, a reciprocity requirement makes sense. Without obtaining the assistance of foreign authorities in reducing the amount of smuggling into the United States, the antismuggling statute would not promote any federal interest. Section 546 constitutes an open ended offer to foreign nations—help the United States enforce its tax laws, and it will help you enforce your own.¹²²

In contrast, application of §§ 1341 or 1343, in the context of international smuggling activities, serves federal interests regardless of whether the nation defrauded would criminalize similar operations against the United States. Here, as with the paradigmatic prosecution arising from state law fraud, the federal interest entails preventing the misuse of the mails or wires *within the borders* of the United States.¹²³ Unlike § 546, reciprocity is not required to effectuate the congressional objectives embodied in the mail and wire fraud provisions, because the interests that they serve can be achieved without the assistance of foreign governments.

Aside from alleviating the First Circuit's concern that applying the mail and wire fraud statutes in this context would undermine the reciprocity provision of § 546,¹²⁴ an understanding of the distinct congressional objectives embodied in these statutes dispels the notion that attaching mail or wire fraud liability under these circumstances "risks turning federal prosecutors and investigators into de facto crim-

¹¹⁹ 18 U.S.C. § 546 (2000) (prohibiting the smuggling of goods out of the United States in violation of a foreign government's law, if that nation's laws proscribe "violation of the laws of the United States respecting the customs revenue").

¹²⁰ *Id.*

¹²¹ *Id.* §§ 1341, 1343.

¹²² Viewed in this light, it becomes clear that prosecutions under § 546, to borrow the language of the *Boots* court, "amount functionally to penal enforcement of [foreign] customs and tax laws." See *United States v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996). The First Circuit's mistake, however, was in failing to recognize the fundamental differences between the federal interests promoted by § 1343, as compared to § 546.

¹²³ See *supra* note 114 and accompanying text.

¹²⁴ See *Boots*, 80 F.3d at 588.

inal law enforcement agents for foreign tax authorities.”¹²⁵ Just as the principles of federalism do not preclude the United States government from charging mail or wire fraud when the fraud deprives a state of tax revenues,¹²⁶ the revenue rule should not prevent similar prosecutions when the mails or wires of the United States are used improperly to further international fraud. In either instance, the primary interest being promoted is that of the federal government,¹²⁷ and any benefit that inures to another jurisdiction is entirely secondary and coincidental.¹²⁸

Nevertheless, the First Circuit remains concerned that recognizing mail and wire fraud liability in these circumstances creates the risk that foreign governments will use the American criminal justice system to further policies, embedded in their tax laws, that are fundamentally opposed to the prevailing social policies of the United States.¹²⁹ The reality, however, is that the position adopted by the circuits that apply the revenue rule in this context has the perverse effect of preventing the federal government from promoting *its own* policies and interests.¹³⁰ When the United States initiates a criminal proceeding charging the misuse of the mails or wires in connection with a scheme to deprive a foreign government of tax revenues, it has affirmatively indicated that the foreign tax laws evaded are in fact “consonant with [the executive branch’s] own notions of what is proper.”¹³¹

¹²⁵ Kathryn Keneally, *The U.S. Prosecutes Foreign Tax Evasion as a Domestic Crime—With Far-Reaching Consequences*, 88 J. TAX’N 224, 229 (1998), quoted in *Pasquantino I*, 305 F.3d 291, 297 (4th Cir. 2002); vacated and reh’g en banc granted by 2003 U.S. App. LEXIS 585 (4th Cir. Jan 14, 2003).

¹²⁶ See, e.g., *Parr v. United States*, 363 U.S. 370, 389 (1960) (“The fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute”); *United States v. DeFiore*, 720 F.2d 757, 761 (2d Cir. 1983) (“[The] focus [of § 1343] is upon the misuse of the wires, not the regulation of state affairs.”).

¹²⁷ See *Pasquantino II*, 336 F.3d 321, 330–31 (4th Cir. 2003).

¹²⁸ See *United States v. Trapilo*, 130 F.3d 547, 553 (2d Cir. 1997) (“Whether our decision [that the revenue rule does not bar a prosecution in this context] indirectly assists our . . . neighbors in keeping smugglers at bay or assists them in the collection of taxes, is not our [court’s] concern.”); see also *Pasquantino I*, 305 F.3d at 299 (Hamilton, J., dissenting) (“[T]he fact that the property at issue . . . belonged to foreign governments . . . is merely incidental to the application of the federal wire fraud statute.”).

¹²⁹ See *Pasquantino I*, 305 F.3d at 297 (“The revenue rule allows [American] courts to avoid becoming ensnared in the difficult decisions concerning which foreign tax laws we, through criminal prosecutions [in the United States], will help to enforce.” (footnote omitted)); *Boots*, 80 F.3d at 587 (“Foreign customs and tax frauds are intertwined with enforcement of a foreign sovereign’s own laws and policies to raise and collect such revenues—laws with which [the United States] may or may not be in sympathy”).

¹³⁰ See Brief for Appellant at 15–16, *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997) (No. 97-1011) (“[J]udicially barring this prosecution will prevent the executive branch from . . . protecting the integrity of the United States[’] telecommunications . . . systems”).

¹³¹ *Pasquantino I*, 305 F.3d at 297 (quoting *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring)). But see *Pasquantino II*, 336 F.3d at 330–31; *supra* text accompanying notes 43–45.

Indeed, without such a prior determination, the Department of Justice would have no basis for concluding that the manner in which a defendant used the mails or wires was actually improper, or more importantly, that the federal prosecution arising from such activity would be in the United States' interests. Therefore, the exercise of prosecutorial discretion, not an unwarranted expansion of the revenue rule, will ultimately enable the federal judiciary "to avoid becoming ensnared in the difficult decisions concerning which foreign tax laws [they] . . . will help to enforce."¹³²

A different situation arises when the foreign nation itself brings a civil suit under U.S. law to recover damages flowing from tax evasion.¹³³ In that instance, federal prosecutors have played no role in bringing the claim and therefore have made no determination that allowing the suit to go forward would promote the interests of the United States.¹³⁴ This is precisely the situation that the national sovereignty justification for the revenue rule contemplates: placing the judiciary in the position of determining whether the policies underlying a foreign tax law are consistent with those of the United States.¹³⁵ When the case involves criminal charges, however, these concerns are not implicated. This distinction explains recent arguments made by the Department of Justice to the United States Supreme Court, contending that the revenue rule should apply to bar civil RICO claims by foreign governments because the opportunity for prosecutorial discretion does not exist.¹³⁶

¹³² *Pasquantino I*, 305 F.3d at 297 (footnote omitted).

¹³³ There have been several attempts by foreign governments to recover fraudulently withheld tax revenues by utilizing RICO's civil remedy provision. See 18 U.S.C. § 1964(c) (2000) (providing that "[a]ny person injured in his business or property by reason of a violation of section 1962" shall have a claim for treble damages in federal court); see, e.g., *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001) (holding that the revenue rule barred a foreign government's claim under RICO to recover fraudulently withheld tax revenues), *cert. denied*, 537 U.S. 1000 (2002); *Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359 (S.D. Fla. 2002) (same). Although this Note expresses no ultimate opinion on this issue, see *supra* note 111 and accompanying text, there is a compelling argument that the filing of a civil RICO action in federal court by a defrauded foreign nation directly implicates the national sovereignty interests that the revenue rule furthers. See *infra* note 134 and accompanying text.

¹³⁴ See *Philip Morris Cos.*, 188 F. Supp. 2d at 1367 (noting that while "[i]n criminal RICO cases, the United States Attorney makes the decision to bring the case," no such decision is made in the civil context, where "the foreign sovereign plaintiff is seeking to further its own agenda, which may or may not be consistent with that of the United States").

¹³⁵ See *supra* note 129 and accompanying text.

¹³⁶ See Brief for the United States as Amicus Curiae at 13, *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001) (No. 01-1317) ("Courts lack the institutional competence to determine whether enforcement of [a foreign sovereign's] claims would serve the interests of the United States . . .").

B. Separation of Powers

The fear that allowing prosecutions of this type undermines the constitutionally established balance of power among the federal branches is unfounded.¹³⁷ To the contrary, serious constitutional concerns arise when the judiciary intervenes to preclude mail and wire fraud liability in these circumstances, assuming without justification that Congress implicitly contemplated such action, and thereby prohibiting the executive branch from carrying out its fundamental duty to “take [care] that the [laws] be faithfully executed.”¹³⁸

When federal prosecutors pursue wire and mail fraud cases in this context, they properly enforce a congressional mandate to ensure that United States communications systems are not used to facilitate fraudulent activities.¹³⁹ Although commentators consistently question the propriety of equipping prosecutors with such a blunt tool for carrying out this objective,¹⁴⁰ Congress has not been persuaded to alter its course. In fact, Congress has proceeded in precisely the opposite direction, enacting legislation recognizing that the “intangible right of honest services” is a cognizable target of fraudulent schemes under federal law.¹⁴¹ Therefore, absent a demonstration that Congress intended otherwise, there is no justifiable reason to construe §§ 1341 and 1343 narrowly in this situation.¹⁴²

¹³⁷ See *supra* Part I.B.2.

¹³⁸ U.S. CONST. art. II, § 3; see *Pasquantino II*, 336 F.3d 321, 331 (4th Cir. 2003) (“[A] significant separation of powers problem would arise were we to play diplomat from the bench . . . [and] set aside the Defendants’ wire fraud convictions and sentences.”); Brief for Appellant at 15, *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997) (No. 97-1011) (“[J]udicially barring this prosecution will prevent the executive branch from carrying out its constitutional obligation to enforce federal law . . .”).

¹³⁹ See *supra* notes 99, 114 and accompanying text.

¹⁴⁰ See, e.g., O’SULLIVAN, *supra* note 2, at 305–06 (summarizing the arguments traditionally advanced to challenge the breadth of the mail and wire fraud statutes).

¹⁴¹ 18 U.S.C. § 1346 (2000); see O’SULLIVAN, *supra* note 2, at 305 (“Congress . . . has seemingly evidenced its approval of a broad application of [the federal fraud statutes], most recently in enacting § 1346 and in amending § 1341 to cover deliveries by private or commercial interstate carriers.”). Indeed, § 1346 effectively overruled the Supreme Court’s opinion in *McNally v. United States*, 483 U.S. 350 (1987), which had held that application of the mail fraud statute was limited to schemes targeting property rights.

¹⁴² It is entirely possible that by concluding that the revenue rule should apply in this context, the First and Fourth Circuits were in fact expressing their basic disagreement with the broad scope of the mail and wire fraud statutes. Whatever the merits of these statutes as a general matter, however, the Constitution does not recognize this form of judicial nullification. See *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 140 (2d Cir. 2001) (Calabresi, J., dissenting) (“I cannot . . . join an opinion that applies an old and dubious common law rule, in ways that have nothing to do with its roots or rationales, in order to limit an act of Congress that the Supreme Court has repeatedly applied in the broadest possible ways.”).

Contrary to the position taken by the *Boots* court,¹⁴³ the existence of § 546 does not demonstrate a congressional intent to engraft the revenue rule onto the mail and wire fraud statutes. These provisions address two distinct congressional objectives related to international smuggling operations: proscribing illegal exportation and ensuring that the mails and wires of the United States are not utilized in furtherance of such activities.¹⁴⁴ Therefore, the concern expressed in *Boots* is baseless, since the general fraud provisions *can* be employed in these circumstances without undermining the goals embodied in the reciprocity requirement of the antismuggling statute.¹⁴⁵

Equally unconvincing was the First Circuit's apparent reliance on a presumption that Congress incorporated the revenue rule into the mail and wire fraud statutes.¹⁴⁶ Following from this presumption, the *Boots* court's logic proceeded as follows: The revenue rule applies unless Congress says otherwise. Congress did not say otherwise. Therefore, the revenue rule applies. Assuming, *arguendo*, that the court's minor premise was correct,¹⁴⁷ the syllogism fails because the major premise—the court's presumption—assumes the very issue at hand; that the revenue rule has a role to play in this context. While in certain circumstances Congress is presumed to have incorporated elements of the common law into the federal fraud provisions,¹⁴⁸ such incorporation is only appropriate where the element at issue was an established component of the common law meaning of fraud.¹⁴⁹ Thus, a presumption that the revenue rule applies to constrain the scope of the mail and wire fraud statutes would only be appropriate if the rule would have applied to frauds at common law. This determination, of course, can only be made by considering whether common law frauds against foreign governments would implicate the justifica-

¹⁴³ See *United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996) ("Effect . . . cannot be given to section 1343 . . . without threatening the reciprocity provision in section 546 . . ."); see also *Pasquantino I*, 305 F.3d 291, 296 n.8 (4th Cir. 2002) (agreeing with and quoting *Boots*, 80 F.3d at 588), *vacated and reh'g en banc granted by*, 2003 U.S. App. LEXIS 585 (4th Cir. Jan. 14, 2003).

¹⁴⁴ See *supra* text accompanying notes 120–22.

¹⁴⁵ See *supra* text accompanying notes 123–28, 143.

¹⁴⁶ See *Boots*, 80 F.3d at 588 ("If Congress . . . had meant to authorize the courts to enforce this kind of application of the wire fraud statute, we think 'it must speak more clearly than it has.'" (quoting *McNally*, 483 U.S. at 360)).

¹⁴⁷ The *Trapilo* court, at least, would challenge this assertion. See *United States v. Trapilo*, 130 F.3d 547, 551 (2d Cir. 1997) ("[Section 1343] neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue . . .").

¹⁴⁸ See *supra* note 17 and accompanying text.

¹⁴⁹ See *Neder v. United States*, 527 U.S. 1, 22–23 (1999). Although *Boots* was decided prior to the Supreme Court's decision in *Neder*, it is necessary to consider the First Circuit's reasoning in light of the views subsequently expressed by a superior court.

tions underlying the revenue rule. Viewed in this manner, the circularity of the *Boots* court's reasoning becomes clear.

Absent any plausible argument to the contrary, courts must conclude that Congress intended fraudulent schemes seeking to evade foreign excise taxes to fall within the broadly established scope of §§ 1341 and 1343.¹⁵⁰ Indeed, a modification of the *Boots* court's language is appropriate; if Congress meant *not* to authorize judicial enforcement of this application of the mail and wire fraud statutes, "it must speak more clearly than it has."¹⁵¹ Given Congress's continued belief that protecting the United States' communication systems is a goal worth pursuing, it is doubtful that any statutory clarification *restricting* the net cast by the federal fraud statutes is forthcoming.¹⁵²

While the legislative branch's blessing must be implicitly gleaned from the statutes it has enacted, the executive branch unmistakably authorizes the judiciary to try these cases when it initiates prosecution.¹⁵³ Although the *Boots* court conceded that the possibility of prosecutorial discretion alleviates the risk that the judicial branch, by trying a particular criminal case, will be employed to promote agendas adverse to American foreign policy,¹⁵⁴ it remained concerned that "whether conduct is criminal cannot be a determination left solely to prosecutorial discretion."¹⁵⁵ Once again, however, this concern represents an indictment of the mail and wire fraud statutes themselves, rather than a criticism of the application of those statutes in the present context.¹⁵⁶ In short, so long as the federal prosecutor maintains control over the commencement of litigation, there is no risk that the

¹⁵⁰ See O'SULLIVAN, *supra* note 2, at 304–05 (discussing the "infinite malleability" of the federal fraud statutes).

¹⁵¹ See *supra* note 146 and accompanying text.

¹⁵² Cf. 18 U.S.C. § 1346 (2000) (indicating Congress's intention to expand the realm of crimes encompassed by §§ 1341 and 1343, rather than restrict it); O'SULLIVAN, *supra* note 2, at 305 (noting that Congress has "seemingly evidenced its approval of a broad application of these statutes").

¹⁵³ As the Second Circuit properly recognized, "[w]hen the United States prosecutes a criminal action, the United States Attorney acts in the interest of the United States, and his or her conduct is subject to the oversight of the executive branch." Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 123 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002).

¹⁵⁴ See *United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996) ("Prosecutors . . . might of course be expected not to pursue wire fraud prosecutions based on smuggling schemes aimed at blatantly hostile countries . . .").

¹⁵⁵ *Id.*

¹⁵⁶ This criticism of the application of the fraud statutes has been made with particular force in cases where the fraud alleged involves not an affirmative misrepresentation, but rather the breach of a fiduciary duty to disclose information. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 524 (2001) ("[T]he federal mail and wire fraud statutes . . . criminalize, basically, all serious breaches of fiduciary duty. Given the inevitable disagreement about what is and [is not] serious, that means federal fraud statutes criminalize an enormous amount of wrongful but not paradigmatically criminal behavior." (footnote omitted)).

judiciary will proceed in a manner inconsistent with the executive branch's foreign policy goals.¹⁵⁷

C. Judicial Competency

The *Boots* court relied, at least implicitly, on concerns of judicial competency in concluding that the revenue rule should bar prosecutions of international smuggling operations under the federal mail and wire fraud statutes.¹⁵⁸ The court did not, however, engage in any meaningful discussion of precisely why, in its view, American federal courts would be unable to interpret and apply foreign tax laws in this context.¹⁵⁹ On the other hand, the *Pasquantino* and *Trapilo* courts' responses to these concerns were entirely inadequate.¹⁶⁰ Moreover, none of these opinions recognized or discussed the possible significance of the district court's duty, following a conviction, to ascertain the extent of the loss resulting from the fraud when determining the appropriate sentencing range.¹⁶¹

1. *Legal Impossibility*

For all inchoate crimes,¹⁶² liability becomes possible once the defendant formulates the intent to commit a criminal act, regardless of

¹⁵⁷ Cf. *Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1364–65 (S.D. Fla. 2002) (“An adjudication of Ecuador’s [civil RICO] claims would eliminate Ecuador’s incentive to negotiate a tax treaty with the [executive].”). Of course, the fear that “the [executive’s] ability to secure reciprocity of U.S. tax claims in Ecuador could be undermined if the [judiciary] did not adhere to the principal of noninterference,” *id.* at 1365 (citation omitted), is further alleviated in the criminal context because the foreign government does not recover anything following a successful mail or wire fraud prosecution.

¹⁵⁸ See *supra* Part II.A.

¹⁵⁹ Common sense indicates that the difficulties associated with applying foreign tax laws will vary depending on the context. Were a foreign government permitted to seek direct enforcement of its income tax laws in American courts, for example, one familiar with the Internal Revenue Code might imagine that the court would encounter a complex morass of provisions, exemptions, and exceptions, accompanied by potentially limitless evidence regarding financial statements and transactions. In contrast, it is a far less daunting task for an American court to determine whether certain goods are subject to excise tax upon importation into a foreign country. In the latter case, the issue involves a much more contained transaction, isolated in both time and space.

¹⁶⁰ As discussed, the Second Circuit relied on the erroneous contention that legal impossibility was not a valid defense to mail or wire fraud. See *supra* note 25 and accompanying text. In *Pasquantino II*, however, the Fourth Circuit managed to avoid the issue altogether by reaching the antecedent conclusion that the revenue rule applies only to the recognition of judgments. See *supra* notes 95–97 and accompanying text.

¹⁶¹ See *supra* note 55 and accompanying text. The *Pasquantino II* court was faced with a sentencing issue on appeal, concluding that the district court’s finding as to fraud loss, which was based on the lay testimony of a Canadian officer, was not clearly erroneous. See 336 F.3d 321, 336–38 (4th Cir.2003). The court’s analysis on this point, however, does not constitute a response to the contention that an American court is not competent to make such a finding in the first instance.

¹⁶² Both mail and wire fraud are inchoate offenses. See O’SULLIVAN, *supra* note 2, at 304; see, e.g., JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 984 (2d ed. 1999).

whether the act planned is ever carried out successfully.¹⁶³ The defense of legal impossibility, however, is available as an absolute bar to liability in appropriate situations.¹⁶⁴ In order to alleviate the risk of confusion, it seems appropriate at the outset to define what is meant by the term “legal impossibility.” Therefore, for purposes of this Note, legal impossibility refers to situations where the objective the defendant sought to accomplish would not have violated the law, although the defendant himself believed that his intended conduct would constitute a crime.¹⁶⁵ In explaining this principle, the Third Circuit has cited the example that “a hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place.”¹⁶⁶ However, if shooting deer *were* a crime, the hunter would be liable for attempt if he fired at a stuffed deer believing it to be alive.¹⁶⁷

Given this understanding, it becomes clear that the concept of legal impossibility is relevant to this discussion.¹⁶⁸ In *Boots*, for example, the legal impossibility defense would have been available if Canadian law had not in fact imposed any tax on imported tobacco.¹⁶⁹ Indeed, but for the existence of such a tax, no property right would have vested in favor of the Canadian government when the tobacco was transported across its border.¹⁷⁰ In the absence of a property

¹⁶³ The act required to perfect liability depends on the specific inchoate crime. In the case of mail and wire fraud, a mailing or communication in furtherance of the fraudulent scheme is sufficient. See *supra* note 22 and accompanying text.

¹⁶⁴ See *supra* note 25 and accompanying text.

¹⁶⁵ See, e.g., *United States v. Hsu*, 155 F.3d 189, 199 & n.16 (3d Cir. 1998) (referring to these situations as instances of “pure” legal impossibility); Ira P. Robbins, *Attempting the Impossible: The Emerging Consensus*, 23 HARV. J. ON LEGIS. 377, 389 (1986) (same) (citing Fernand N. Dutile & Harold F. Moore, *Mistake and Impossibility: Arranging a Marriage Between Two Difficult Partners*, 74 NW. U. L. REV. 166, 184 (1979)).

¹⁶⁶ *Hsu*, 155 F.3d at 199 n.16.

¹⁶⁷ This example assumes, of course, that the defendant acted with the necessary mental state. See MODEL PENAL CODE § 5.01(1)(a) (1962) (defining “attempt” to include situations where a defendant “engages in conduct that would constitute [a] crime if the attendant circumstances were as he believes them to be”). The *Trapilo* court was clearly referring to this type of situation when it proclaimed that “legal impossibility affords a conspirator no defense.” *United States v. Trapilo*, 130 F.3d 547, 552 n.9 (2d Cir. 1997). Certainly the Second Circuit did not intend to imply that it would uphold convictions for conspiracy to wear plaid, no matter how convinced the conspirators were that the law proscribed such conduct. See *United States v. Pierce*, 224 F.3d 158, 167 (2d Cir. 2000) (“We did not say or suggest in *Trapilo* . . . that a guilty mind without something about which to feel guilty was a crime.”).

¹⁶⁸ Despite what the Second Circuit may have insinuated in *Trapilo*, see *supra* note 26 and accompanying text, it is now clear that all three of the circuits to address the revenue rule issue in this context have concluded that legal impossibility would be a valid defense. See *Pasquantino I*, 305 F.3d 291, 298 (4th Cir. 2002), *vacated and reh'g en banc granted by*, 2003 U.S. App. LEXIS 585 (4th Cir. Jan. 14, 2003); *Pierce*, 224 F.3d at 167; *United States v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996).

¹⁶⁹ For a summary of the facts in *Boots*, see *supra* notes 63–65 and accompanying text.

¹⁷⁰ See *Pasquantino I*, 305 F.3d at 298.

right, there could be no fraud, since nothing of value would have been taken from Canada and nothing to which it had become entitled would have been withheld.¹⁷¹

Therefore, the critical inquiry is whether American courts are competent to rule on prospective defendants' claims that the tax laws they allegedly violated did not exist, did not apply in their case, or were invalid and therefore inapplicable as a general matter.¹⁷² While federal courts frequently apply foreign law in other contexts,¹⁷³ their hesitance to deal with other nations' tax laws is not surprising. Indeed, the perceived complexity of the U.S. tax code prompted the Supreme Court to interpret certain federal criminal tax laws as requiring proof of specific intent, thereby creating an exception to the frequently stated maxim that "ignorance of the law . . . is no defense."¹⁷⁴ However, there is a fundamental difference between allowing an individual who misreads a tax law to escape liability and permitting an entire class of individuals to avoid prosecution because *the judiciary* is unwilling to interpret unfamiliar law.

An examination of federal law indicates that Congress believes the judiciary is capable of interpreting foreign law in criminal cases. Specifically, the federal antismuggling statute proscribes smuggling or attempting to smuggle, in the statutorily defined manner, "any merchandise into the territory of any foreign government in violation of the laws there in force, if under the laws of such foreign government any penalty or forfeiture is provided for violation of the laws of the United States respecting the customs revenue."¹⁷⁵ This provision requires two distinct inquiries into foreign law to perfect liability: (1) does foreign law permit the manner in which the defendant brought merchandise into that country?; and (2) do the foreign country's laws include a reciprocal antismuggling statute? In essence, the first of these inquiries is a codification of the legal impossibility defense; if the foreign nation's law *does* permit the manner in which the defendant brought his merchandise into that country, then no smuggling

¹⁷¹ See *Pierce*, 224 F.3d at 167-68.

¹⁷² See *Pasquantino I*, 305 F.3d at 298 ("[P]rosecuting a defendant for violations of a law, or for attempting to violate that law, requires an inquiry into the applicability and validity of the law.").

¹⁷³ See, e.g., *Challoner v. Day & Zimmermann, Inc.*, 546 F.2d 26 (1977) (holding that under the applicable choice of law rules, the district court should have applied Cambodian law to the plaintiff's tort claim).

¹⁷⁴ *Cheek v. United States*, 498 U.S. 192, 199-201 (1991); see also *id.* at 200 (noting that the "special treatment of criminal tax offenses is largely due to the complexity of the tax laws").

¹⁷⁵ 18 U.S.C. § 546 (2000). The *Boots* court relied in part on § 546 to justify its reversal of wire fraud convictions flowing from a scheme to smuggle tobacco into Canada. See *United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996). For a criticism of the First Circuit's discussion of § 546, see *supra* notes 118-26 and accompanying text.

has occurred, regardless of what the defendant may have believed. By promulgating § 546, Congress explicitly rejected the argument that American courts are incapable of interpreting and applying foreign tax laws. Instead, § 546 *requires* that the judiciary engage in such processes.¹⁷⁶

At least one federal court faced with a § 546 prosecution has successfully run the (alleged) gauntlet of foreign law, thereby validating Congress's confidence in the judiciary's abilities. In *United States v. Miller*,¹⁷⁷ the district court held that a Canadian statute failed to satisfy the reciprocity requirement as a matter of law, and thus dismissed a charge of conspiracy to violate § 546.¹⁷⁸ In the course of its discussion, the court relied heavily on an opinion of the Canadian Supreme Court construing the statutory provision at issue.¹⁷⁹ This enabled the American court to move beyond the face of the foreign statute in ascertaining the statute's proper scope.¹⁸⁰

If the *Miller* court's approach for interpreting Canadian law seems familiar, you've probably gone to law school. After all, the district judge's method of construing statutory law in light of judicial interpretations is utilized on a daily basis in courtrooms across the United States. The reality, of course, is that in the overwhelming majority of these cases the prosecution will rely on expert testimony to prove the existence of foreign laws creating the requisite property rights.¹⁸¹ In those situations, the trial court will only be asked to determine whether a reasonable jury, based on the evidence presented at trial, could find beyond a reasonable doubt that an excise tax existed.¹⁸² While the possibility exists that future defendants might raise claims that superceding foreign law invalidated the excise statute creating the property right,¹⁸³ it seems clear, as a practical matter, that

¹⁷⁶ This Note does not contend that § 546 alone suffices to demonstrate a congressional intent to render the revenue rule inapplicable to the mail and wire fraud statutes. See *Neder v. United States*, 527 U.S. 1, 23 n.7 (1999) (indicating that analogizing to other federal statutes is insufficient to rebut the presumption that Congress intended to incorporate aspects of the common law into the mail and wire fraud statutes). However, § 546 does manifest Congress' belief that American courts are competent to deal with foreign tax laws.

¹⁷⁷ 26 F. Supp. 2d 415 (N.D.N.Y. 1998).

¹⁷⁸ See *id.* at 425–26.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* (citing *Bolduc v. Attorney Gen. of Que.*, [1982] S.C.R. 573).

¹⁸¹ See *infra* note 210 and accompanying text.

¹⁸² See *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000).

¹⁸³ *Cheek* raised a related, but distinguishable, claim involving American tax laws. There, the defendant challenged his conviction for attempting to evade taxes on the ground that he acted with the sincere belief that he was not a "taxpayer" within the meaning of the Internal Revenue Code, and that wages were not "income." See *Cheek v. United States*, 498 U.S. 192, 203 (1991). In reversing the conviction, the Supreme Court concluded that although *Cheek's* reading of the Constitution was objectively "irrational," if he honestly believed that his conduct was lawful, he was not acting willfully as required by the

this contingency is far too tenuous to merit concern. Indeed, even if a non-trivial challenge to the validity of a foreign nation's import tax existed, it would certainly have been raised in and considered by that nation's courts in proceedings to enforce their import laws directly.¹⁸⁴ Concerns that American courts would be incapable of adjudicating such challenges are therefore illusory.¹⁸⁵

Following the Supreme Court's holding in *Cheek*,¹⁸⁶ however, a court might be faced with the argument that while an excise tax did in fact apply to the goods imported, the defendant operated with the good faith belief that no such tax existed or applied.¹⁸⁷ Assuming that a *Cheek*-type defense was even cognizable in this context,¹⁸⁸ international smugglers clearly would be precluded from availing themselves of its protection.¹⁸⁹ Consider the following description of the methods that the defendants in *Pasquantino* employed:

[T]he liquor was loaded into the trunks of cars and driven over the border One car seized as part of the scheme was a 1985 Ford Crown Victoria with industrial-strength shock absorbers controlled by an air valve installed discreetly under the rear bumper. . . .

[The Royal Canadian Mounted Police] found 280 1.75 liter bottles of alcohol in the trunk, weighing about a thousand pounds The car rode about five inches high when empty, but hunkered down into a normal profile when fully loaded¹⁹⁰

The sophisticated, illicit means used by these defendants to "transport" their goods across the border plainly defeat any claim that they

statute. *Id.* at 204–05. A jury instruction to the contrary was therefore improper. *See id.* at 203, 206–07. Critically, however, the Court held that a good faith belief that the tax was unconstitutional and therefore invalid could *not* be a defense. *See id.* at 206.

¹⁸⁴ For example, the defendants in *Pasquantino I* were also indicted in Canada for crimes arising from their smuggling operation. *See* 305 F.3d 291, 293 n.4 (4th Cir. 2002), *vacated and reh'g en banc granted* by 2003 U.S. App. LEXIS 585 (4th Cir. Jan. 14, 2003).

¹⁸⁵ *See supra* notes 177–80 and accompanying text.

¹⁸⁶ 498 U.S. 192.

¹⁸⁷ *See supra* note 183 and accompanying text.

¹⁸⁸ As a threshold matter, a strong argument can be made that *Cheek's* rationale should not apply outside its original context (cases involving the alleged violation of federal criminal tax offenses that expressly require a finding of willfulness). *See Cheek*, 498 U.S. at 199–200 ("Congress has . . . softened the impact of the common[-]law presumption [that everyone knows the law] by making specific intent to violate the law an element of certain federal criminal tax offenses.").

¹⁸⁹ It is important to note, however, that *Cheek* itself foreclosed the possibility of a defense alleging a good-faith belief that a foreign tax law was wholly invalid. *See supra* note 183 and accompanying text. Therefore, the defendants' claim in *Boots* that they operated "with a good faith belief in an aboriginal right to trade tobacco freely with Canada" would have afforded no defense. *See United States v. Boots*, 80 F.3d 580, 584 (1st Cir. 1996), *cert. denied*, 519 U.S. 905 (1996). The defendants in *Boots* conceded an understanding that Canada claimed a right to tax their activities. *Id.*

¹⁹⁰ Andrew Z. Galarneau, *A Dozen Charged as Officials Bust Smuggling Ring*, BUFF. NEWS, May 6, 2000, at B5 (internal quotation marks omitted).

were unaware, in good faith, that an excise tax was due.¹⁹¹ Presented with these facts, it would hardly be difficult for a federal court to reject the defense of good faith ignorance of the law.¹⁹²

2. Sentencing Exposure

In his dissenting opinion in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*,¹⁹³ Judge Calabresi correctly recognized that any sentencing determination flowing from a mail or wire fraud conviction in this context would require an assessment of the monetary loss suffered by the foreign government, as established by foreign law.¹⁹⁴ Although his summary conclusion that this situation did not create tension with the principles supporting the revenue rule is suspect, at least outside the Second Circuit,¹⁹⁵ Calabresi's opinion did raise a valid point that is worthy of discussion.¹⁹⁶ However, as this final section will demonstrate, federal courts are sufficiently competent to deal with foreign tax law for the purposes of determining the appropriate sentence.¹⁹⁷

According to the Federal Sentencing Guidelines,¹⁹⁸ the sentence imposed upon those convicted of either mail or wire fraud is governed, for present purposes, by the offense conduct provision § 2B1.1.¹⁹⁹ Under that provision, the offense level obtained is con-

¹⁹¹ See *Cheek*, 498 U.S. at 202 ("Of course, in deciding whether to credit Cheek's good[faith] belief claim, the jury would be free to consider any admissible evidence from any source showing that Cheek was aware of his duty to file a return and to treat wages as income").

¹⁹² Although the possibility exists that a zealous prosecutor might charge mail or wire fraud in connection with a much more complicated and less clear international smuggling case, the risk of such prosecutorial overreaching would be lessened, in large part, by the probable difficulty of proving fraudulent intent. See, e.g., *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180-82 (2d Cir. 1970) (reasoning that an intent to deceive is not necessarily sufficient to prove an intent to defraud).

¹⁹³ 268 F.3d 103 (2d Cir. 2001), cert. denied, 537 U.S. 1000 (2002).

¹⁹⁴ See *id.* at 138 (Calabresi, J., dissenting).

¹⁹⁵ See *supra* note 57 and accompanying text.

¹⁹⁶ The only case to confront the present issue after Calabresi's opinion was filed did not address the role of the Federal Sentencing Guidelines in its revenue rule analysis. See *Paquantino I*, 305 F.3d 291, 297-98 (4th Cir. 2002), vacated and reh'g en banc granted by 2003 U.S. App. LEXIS 585 (4th Cir. Jan. 14, 2003).

¹⁹⁷ Of course, one might question whether courts defining the scope of substantive liability under federal law should consider the possibility of subsequent sentencing difficulties when making these determinations. Such a discussion is unnecessary for present purposes, however, since this Note ultimately concludes that any apparent difficulties are in fact illusory.

¹⁹⁸ U.S. SENTENCING GUIDELINES MANUAL (2001). For a detailed discussion of how the Guidelines operate, see generally O'SULLIVAN, *supra* note 2, at 384-99, which explains the various elements considered in sentencing.

¹⁹⁹ See U.S. SENTENCING GUIDELINES MANUAL app. A, at 459. While the statutory index indicates that sections 2B1.1 or 2C1.7 may apply to convictions under the mail or wire fraud provisions, section 2C1.7 applies only where the object of the fraud was the intangible right to honest services, see 18 U.S.C. § 1346 (2000), as opposed to the tangible prop-

trolled predominately by the amount of the loss caused by the fraudulent conduct.²⁰⁰ Subject to specific exclusions,²⁰¹ the loss figure which the court should apply is “the greater of actual loss or intended loss.”²⁰² In determining the relevant loss amount, the trial court is permitted to rely on “a reasonable estimate,” and the court’s determination “is entitled to appropriate deference.”²⁰³

As a threshold matter, there is no per se rule precluding the inclusion of financial loss to a foreign government in the total loss amount for § 2B1.1 purposes. When related to crimes against the United States, courts have affirmatively held that such losses should be included in assessing the appropriate offense level.²⁰⁴ In the present context, the misuse of U.S. mails or wires in furtherance of an illegal operation transforms schemes to defraud foreign governments of import duties into crimes against the United States.²⁰⁵ Therefore, a court must account for the losses arising from these schemes when determining the appropriate sentence.

The question remains, however, whether the courts of the United States are competent to determine the extent of these losses. Assuming for a moment that American courts are unable to decipher a particular foreign government’s tax laws in a given case, an alternative path to assessing the appropriate sentence is available. As the application notes to § 2B1.1 explain, when determining the appropriate offense level, the financial *gain* realized by the convicted individual may suffice as a proxy for the loss suffered by the foreign government.²⁰⁶ For example, suppose A successfully smuggles 10,000 cartons of Amer-

erty rights targeted in the international smuggling operations here considered. *See id.* § 2C1.7 cmt. n. 1.

²⁰⁰ The Guidelines provide a table that indicates the degree to which the offense level should be increased, based upon the amount of financial loss attributable to the fraud. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1).

²⁰¹ Notably, the Guidelines do not explicitly list losses to foreign governments in the category of items to be excluded in the determination of loss. *See id.* § 2B1.1, cmt. n.2(D).

²⁰² *See id.* § 2B1.1, cmt. n.2(A), at 71.

²⁰³ *Id.* at § 2B1.1, cmt. n.2(C); *see also* 18 U.S.C. § 3742(e) (noting that when reviewing a sentence imposed by the trial judge, the circuit court “shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court’s application of the guidelines to the facts”).

²⁰⁴ *See, e.g.,* United States v. Chmielewski, 218 F.3d 840, 843 (8th Cir. 2000); *cf.* United States v. Farouil, 124 F.3d 838, 844–45 (7th Cir. 1997) (declining to consider harm to a foreign government in determining the proper sentence where the loss was not related to crimes against the United States).

²⁰⁵ *Cf.* United States v. Chunza-Plazas, 45 F.3d 51, 57–58 (2d. Cir. 1995) (concluding that the district court erred by considering illegal activities conducted in Colombia when determining the appropriate sentence, since the conduct did not involve crimes against the United States).

²⁰⁶ U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n.2(B) (“The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.”).

ican cigarettes into Canada, and avoids paying a substantial import duty under Canadian law. Further assume that A subsequently sells these cartons for \$10 less than the prevailing market rate for imported American cigarettes in Canada, a discount attributable to A's fraudulently obtained savings at the border.²⁰⁷ If the district court sentencing A for wire fraud in connection with this scheme concluded that it could not reasonably determine the loss suffered by the Canadian government, it could instead base A's offense level and sentence on the \$100,000 gain he realized as the direct result of the smuggling operation.²⁰⁸

There is little reason to assume, however, that federal courts will be unable to understand foreign tax laws to the extent necessary to reasonably estimate the loss attributable to the fraudulent operation. Indeed, it is universally recognized that the government need only prove the amount of loss by a preponderance of the evidence.²⁰⁹ In the case of A's hypothetical smuggling operation, there are a number of avenues available to satisfy this standard for the purposes of demonstrating the amount of taxes fraudulently withheld under Canadian law. For example, the United States could introduce evidence demonstrating the average import duty assessed at the Canadian border for comparably sized shipments of American cigarettes. It could also introduce testimony from experts on Canadian tax law.²¹⁰ Nothing in

²⁰⁷ Although a district court engaging in this sort of analysis will be required to make a series of estimations in ascertaining A's gain, the Guidelines require only a "reasonable estimation" of the loss. See *supra* note 203 and accompanying text.

²⁰⁸ For another example of use of gain to determine loss, consider the following example, which is based in large part on the facts of *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106–07 (2d Cir. 2001). Cigarette manufacturer C Corporation produces 10,000 cartons of cigarettes at its plant in the United States, but labels the cigarettes as if it produced them in Canada. C Corporation then sells the cartons to B, a known smuggler, for \$15 less than the average price in Canada. Finally, B smuggles the cigarettes into Canada and sells them on the black market at a price \$10 less than prevailing rate. Following her conviction for wire fraud, B's sentencing exposure could be measured based on the amount of her own financial gain: \$50,000.

²⁰⁹ See, e.g., *United States v. Schild*, 269 F.3d 1198, 1200 (10th Cir. 2001) (citing *United States v. Nichols*, 229 F.3d 975, 979 (10th Cir. 2000)); *United States v. Higgins*, 270 F.3d 1070, 1075–76 (7th Cir. 2001).

²¹⁰ Indeed, the United States government would ordinarily be expected to call a Canadian tax expert at trial in order to prove that the defendant's activities were fraudulent in the first place. This was precisely the path taken by the prosecution in *Pasquantino*. The Fourth Circuit panel summarized:

Canada Customs intelligence officer Gina Jonah testified that there is a Canadian federal excise tax . . . on liquor imported from the United States into Canada. Officer Jonah . . . explained that the equivalent of approximately \$100 in United States currency would be due and owing on a case of liquor that was purchased in the United States and imported into Canada.

305 F.3d 291, 293–94 (4th Cir. 2002) (citation omitted), *vacated and reh'g en banc granted* by 2003 U.S. App. LEXIS 585 (4th Cir. Jan. 14, 2003); see also *United States v. Boots*, 80 F.3d 580, 584 (1st Cir. 1996) (indicating that the United States called an expert on Canadian taxes at trial); cf. *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000) (reversing de-

the notes following section 2B1.1 precludes reliance on either of these forms of evidence; it simply charges that "[t]he estimate of the loss shall be based on available information."²¹¹ Given the substantial leeway that the Guidelines afford trial judges to ascertain the amount of loss in fraud cases, one cannot argue plausibly that interpretation of foreign tax laws presents an insurmountable conceptual obstacle.

CONCLUSION

Whatever the merits of retaining the revenue rule in the modern world,²¹² it is clear that it cannot justifiably be applied to preclude mail and wire fraud prosecutions targeting schemes to deprive foreign governments of earned excise tax revenues. The policies purportedly advanced by the revenue rule in its paradigmatic context are simply not implicated when the federal government initiates criminal prosecutions to enforce the will of Congress and thereby promote the interests of the United States. Moreover, the federal judiciary is wholly capable of interpreting and applying foreign law, to the limited extent necessary, in order to properly administer these prosecutions.

Having repudiated the arguments for applying the revenue rule in this context, one is left with the impression that those courts which have resisted prosecutions of this type are silently protesting the breadth of the federal fraud statutes.²¹³ To the extent that this intuition is valid, it exposes an unfortunate reality. While it certainly can be argued that the mail and wire fraud statutes as presently delineated cast too wide a net, there is no justification for arbitrarily narrowing the scope of these provisions in isolated contexts, purportedly relying on principles of law which in fact bear no defensible relation to the situation at hand.

fendants' convictions because "no evidence [existed] in the record demonstrating the existence of a Canadian duty [on imported liquor]" and noting that "no experts on Canadian law testified [at trial]").

²¹¹ U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n.2(C).

²¹² Compare Kovatch, *supra* note 9, at 287 (calling the revenue rule "an anachronism in American law"), with *Boots*, 80 F.3d at 587 (referring to the revenue rule as "a firmly embedded principle of common law" (citing *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775))).

²¹³ See *supra* notes 100, 127, 141 and accompanying text.