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RIP to IRP*— Money Laundering and Drug Trafficking Controls Score a Knockout Victory Over Bank Secrecy

*Berta Esperanza Hernández***

*Avidity To Punish Is Always Dangerous To Liberty [As it Leads A Nation] To Stretch, Misinterpret, And To Misapply Even The Best of Laws.****

I. Introduction

Privacy laws existed long before criminal elements began exploiting them by using avenues of international trade for drug trafficking and money laundering activities. Indeed, such laws have long served the legitimate purpose of protecting the right of persons and businesses to keep their financial affairs private since "[t]he banking transactions of an individual give a fairly accurate account of his religion, ideology, opinion and interest."[1] An example of "legitimate" bank secrecy law protection was seen in the 1930s and 1940s when such laws helped shield Jews from Nazi persecution.

Secrecy laws have served to shield persons from financial loss in countries plagued by political instability, weak currencies and runaway inflation rates. Secrecy laws have also served to protect wealthy individuals or those who promote unpopular political causes by allowing them to hide their assets to avoid the threat of kidnapping or persecution. Unfortunately, privacy shields are also utilized by tax cheats, drug traffickers and money launderers to penetrate legitimate financial structures and to "launder" dirty money.

In the last decade, global concerns regarding drug trafficking and money laundering[2] have intensified. Currently, it is estimated

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* International Right of Privacy.

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*** *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (Stevens, J., dissenting) *quoting* 2 The Complete Writings of Thomas Paine 588 (P. Foner ed. 1945).

[1] California Bankers Ass'n v. Shultz, 416 U.S. 21, 85 (1974) (Douglas, J., dissenting).

[2] Money laundering is defined as "the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it

that drug profits of $300 billion United States dollars are laundered each year through the international banking system.[3] Sales within the United States alone generate $110 billion in illegal drug proceeds.[4] In response to these figures and the problem they represent, international cooperation has blossomed and nations have joined ranks to curb drug trafficking.[5] Yet, while the elimination of drug trafficking and the money laundering it occasions is a desirable goal, the efforts to date have had the undesirable effect of eroding individuals' right to privacy as bank secrecy protections have yielded to the government's need to obtain information for anti-drug enforcement efforts.[6]

The basic philosophy of bank secrecy regulation requires banks and financial institutions to keep confidential any information concerning their clients' property.[7] The purpose is to protect the privacy of the individual and the privacy interest of the customer.[8] An unfortunate occurrence, however, is that bank secrecy laws often interfere with investigations of economic and other crimes. Notably, the United States has tried to overcome the protection provided by

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appear legitimate." PRESIDENT'S COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS AND MONEY LAUNDERING 13 (1984) [hereinafter THE CASH CONNECTION]. There are three stages to the money laundering process: placement, layering and integration. *See* Paul Meltzer, *Keeping Drug Money From Reaching The Wash Cycle: A Guide To The Bank Secrecy Act*, 108 BANKING L.J. 230, 231 (1991). These stages are described more particularly as:

> Placement is the physical disposal of bulk cash proceeds into a financial institution. Layering is the process of transferring these funds among various accounts through a series of complex financial transactions that are intended, to the greatest extent possible, to separate these funds from their original sources. Finally, integration is the process of shifting the laundered funds to legitimate organizations that have no apparent link to organized crime.

Id.; *see also*, Charles Intriago, INTERNATIONAL MONEY LAUNDERING - A EUROSTUDY SPECIAL REPORT 7-13 (1991) [hereinafter Intriago, EUROSTUDY]. While the origin of the term "money laundering" is uncertain, instances where people sought to conceal and disguise illegal income can be traced to biblical times. *Id.* at 1 (quoting Act 5, Verses 1 through 11 of the Bible).

3 REPORT SUBMITTED BY THE SUBCOMM. OF NARCOTICS, TERRORISM AND INTERNATIONAL OPERATIONS TO THE SENATE FOREIGN RELATIONS COMM., 101st Cong., 2d Sess.

4 *Id.*; *see also* Address by Attorney General Richard Thornborough to the American Bankers Association (October 26, 1989) (noting that the annual gross income from drug sales in the United States is estimated at over $100 billion).

5 *See, e.g.*, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN Doc. EI CONF. 82/15 and rev. l, *adopted by consensus* Dec. 19, 1988; *reprinted in* 28 I.L.M. 493 (1989) [hereinafter UN Drug Convention]; *See also infra* notes 280-296 and accompanying text (explaining purposes of UN Drug Convention and listing member states) and *infra* notes 219-228 and accompanying text (on bilateral mutual legal assistance treaties entered into by United States and various countries); *see generally*, David Stewart, *Internationalizing The War On Drugs: The UN Drug Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances* 18 DEN. J. INT'L L & POL'Y 387 (1992) (tracing international efforts in the war on drugs).

6 *See, e.g.*, UN Drug Convention *supra* note 5.

7 Charles Thelen Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L LAWYER 69 (1988).

8 *Id.*

bank secrecy in anti-trust investigations[9] including investigations of the shipping industry[10] and uranium cartels,[11] Securities and Exchange Commission ("SEC") investigations,[12] and money laundering and drug trafficking investigations.[13] Such investigations have created conflicts with foreign sovereigns, particularly when the United States has asserted the right to investigate extraterritorially.[14] Other sovereigns, in response, have asserted their rights to enforce their country's bank secrecy laws.

Significantly, the United States has a Bank Secrecy Act[15] (BSA) which, in light of the traditional secrecy concepts, is somewhat of a misnomer. Rather than protecting the individual's privacy, the BSA requires financial institutions to keep records concerning their clients' business affairs and to report certain types of transactions to the government.[16] To be sure, the United States recognizes some limited degree of individuals' right to privacy in banking as codified in the Right to Financial Privacy Act (RFPA).[17] In reality, however, the RFPA does not offer much privacy protection. Instead, it simply permits financial institutions to advise their customers that the government has requested financial records so as to afford the customer an opportunity to challenge the government's request. Moreover,

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9 *See infra* note 106 and accompanying text.

10 *See infra* note 108 and accompanying text.

11 *See infra* note 109 and accompanying text.

12 *See infra* notes 121-125 and accompanying text.

13 *See, e.g., infra* note 18 and accompanying text.

14 The United States' aggressive claim of right to exercise extraterritorial jurisdiction reached new heights. In *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992), the Supreme Court upheld a claim of jurisdiction over a citizen and resident of Mexico who was forcibly kidnapped from his home and flown by private plane to Texas where he was arrested for his participation in the kidnapping and murder of a Drug Enforcement Administrator (DEA) agent and the agent's pilot. The respondent's (a doctor) participation was believed to be in prolonging the DEA's agent's life so that others could torture and interrogate him. The District Court (United States v. Caro Quintero, 745 F.Supp. 599 (C.D.C.A. 1990)) concluded that the DEA agents were responsible for the abduction and dismissed the indictment as violative of the Extradition-Treaty between the U.S. and Mexico. The Court of Appeals (946 F.2d 1466 (9th Cir. 1991) (per curiam)) affirmed the finding that jurisdiction was improper because the United States had authorized the kidnapping and Mexico protested the Treaty violation. The Supreme Court reversed the lower court's holding that the kidnapping did not prohibit trial in the United States for violation of United States criminal law. The court noted that when a treaty is not involved, a court properly may exercise jurisdiction even though it is obtained by a forcible abduction. The Court reached this conclusion notwithstanding (a) this state's abduction of and their sovereign state's citizen, (b) which was carried out by violating the other sovereign's territorial integrity, and (c) in a situation in which an extradition treaty was in place.

15 The Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) [hereinafter Bank Secrecy Act] (codified as amended at 12 U.S.C. §§ 1730d, 1829b, 1951-59 (1988) and 31 U.S.C. §§ 321, 5311-24).

16 Title I of the Act, codified at 12 U.S.C. contains record- keeping provisions requiring banks and other financial institutions to retain financial records for up to five years. Title II, codified at 31 U.S.C. contains the reporting requirements.

17 Financial Regulatory and Interest Rate Control Act, Pub. L. No. 95-630, 92 Stat. 3641 (1978) [hereinafter RFPA] (codified at 12 U.S.C. §§ 3401-3402), *see also infra* notes 72-92 and accompanying text (describing purposes and requirements of RFPA).

exceptions with respect to the institution's obligation to notify customers about such requests all but render the limited RFPA protections illusory at best.

With the emergence of international cooperation in the fight against drug trafficking and money laundering, the long embraced principle of bank secrecy, along with the individuals' right to privacy it protected, ceded to the interests of global anti-drug enforcement.[18] Significantly, this author's concern with the erosion of international rights is *not* to seek protection for criminal elements such as drug traffickers and money launderers. Rather, the concern is about the many innocent persons who get caught in the broad net that governments throw to catch the wrongdoers. Because of the evolution of strict regulations that often are stacked in the government's favor and the increased use of indicia checklists to ascertain the wrongfulness of conduct, innocent persons are virtually defenseless and unfairly suffer.

The impact on individual rights is extensive because "dirty" money travels extensively. For example, dirty money passes freely in the Caribbean states of Antigua, Anguilla, the Bahamas, the Cayman Islands, Montserrat, and the Netherlands Antilles.[19] In Europe, dirty money is believed to pass through Andorra, the Channel Islands, Gibraltar, Liechtenstein, Luxembourg and Switzerland.[20] In the Far East, both Hong Kong and Singapore are known to be money laundering sites[21] and in the Middle East, Dubai and the United Arab Emirates are the known locales.[22] In Latin America, the states most known for money laundering are Colombia, Mexico and Panama,[23] although many fear that money laundering is growing in other South American countries. In the United States, the cities targeted for money laundering activity are Atlanta, Houston, Los Angeles, Miami, New York and San Francisco.[24]

To trace money laundering, governments collect and use information from financial institutions on individuals. However, absent global money laundering initiatives, the disclosure of such information by institutions would constitute a violation of the customers' financial privacy rights and would subject the institution and its employees to civil and/or criminal liability.

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[18] *See, e.g.*, UN Drug Convention, *supra* note 5.

[19] National Narcotics Intelligence Consumers Committee Report, April 1988 [hereinafter National Narcotics Report]; *see also*, Staff of Permanent Subcomm. on Investigations of Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess., Crime and Secrecy, The Use of Offshore Banks and Companies 7 (Comm. Print 1983) [hereinafter Staff Subcomm. Report].

[20] Staff Subcomm. Report, *supra* note 19.

[21] Staff Subcomm. Report, *supra* note 19.

[22] National Narcotics Report *supra* note 19.

[23] National Narcotics Report, *supra* note 19.

[24] National Narcotics Report, *supra* note 19.

This Article reviews the evolution of bank secrecy laws and comments on the erosion of rights effected by the domestic and international efforts to curb drug trafficking and money laundering. Part II reviews the evolution of bank secrecy laws in the international sphere and views the origins of the individuals' right to financial privacy. Specifically, Part II focuses on the laws of Switzerland and England to show the bases and proliferation of secrecy protections. Part III provides the background of the status of financial privacy in the United States. The following two parts describe initiatives aimed at eliminating drug trafficking and related money laundering. Part IV presents United States' domestic legislative actions, enforcement efforts, and international initiatives by way of bilateral agreements. Part V discusses both foreign domestic and international efforts.

Part VI presents a hypothetical case study in an effort to show that the pendulum has swung too far in eroding individuals' right of privacy, thus trammeling on the rights of innocent individuals. The hypothetical considers the effects of United States' civil forfeiture provisions — provisions becoming increasingly common in international laws — which give the government broad powers to seize any property that is "traceable proceeds."[25] These provisions also shackle the individual owner of seized property by shifting to that owner the burden of proving that the property was not illegally obtained instead of requiring the government to establish the owner's wrongdoing or culpability.[26] The hypothetical case also shows the

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[25] Comprehensive Drug Abuse Prevention and Control Act 21 U.S.C. § 881(a)(4)(A)(B) (1988). In short, this provision provides that all proceeds "traceable" to a drug transaction shall be forfeited to the United States. *See* United States v. One 1976 Ford F-150, 599 F. Supp. 818 (E.D. Mo. 1984). The analogue sections for such forfeiture under the money laundering statute are 18 U.S.C. § 981(a)(1)(A) (1988) ("any property traceable to . . . property involved in a money laundering transaction") and 18 U.S.C. § 981(a)(l)(B) ("any property . . . derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance . . ."); *see also* United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986) (providing detailed discussion on what constitutes traceable proceeds).

[26] 21 U.S.C. § 881(a)(4)(A)-(C). These provisions provide what is known as the "innocent owner" defense to civil forfeiture under section 881; *see generally, e.g.*, United States v. 6109 Grubb Road, 886 F.2d 618 (3d Cir. 1989) (under section 881 an innocent owner is one who neither knew nor consented to the illegal act); *see also infra* notes 192-194 and accompanying text (explaining the innocent owner exception). Once the government has established probable cause (see *infra* notes 189-190 and accompanying text, describing the probable cause requirement) to believe that property is subject to forfeiture under section 881, the burden then shifts to the claimant to establish his innocent ownership in order to avoid forfeiture. *See* United States v. One 1987 Mercedes 560, SEL, 919 F.2d 327, 331 (5th Cir. 1990) (once government shows probable cause, burden is on claimant to prove that property is not subject to forfeiture). In essence, a showing of probable cause creates a presumption that the property is "guilty" and then the claimant must prove that it is "innocent." *See* United States v. One 1974 Porsche 911-S, 682 F.2d 283, 285 (1st Cir. 1982) (after government establishes probable cause, claimant has burden of proving innocence). It is a fundamental principle of criminal law that a defendant is innocent until proven guilty. *In re* Winship, 397 U.S. 358, 363 (1970) whereas under civil forfeiture laws

dangerous effects of the trend to prove wrongfulness of conduct based on indicia, rather than on actual proof of wrongdoing.

This author concludes that matters have come full circle: from near total bank secrecy and privacy protection to virtual full disclosure. While these latter requirements have been instituted pursuant to well-intended domestic laws and international agreements aimed at the eradication of drug trafficking and money laundering, these efforts have gone too far and have resulted in the curtailment of individuals' privacy rights. Consequently, this author proposes as an alternative, a more balanced approach that can achieve the goal of curbing the nefarious conduct without trammeling individual privacy rights.

II. Bank Secrecy Laws in the International Sphere — The Individual's Right to Financial Privacy

The individual right to privacy, as articulated in myriad international human rights agreements, is an international human right.[27] This right to privacy, as evidenced by the bank secrecy protections extends to financial matters. This part briefly sets out the history of the bank secrecy laws. It explores the evolution of bank secrecy by presenting two examples of bank secrecy jurisdictions — Switzerland, a civil law country and the quintessential secrecy jurisdiction, and England, a common law country.

A. *Switzerland*

In Switzerland, as in other civil law countries, the right to privacy is a fundamental right protected both in criminal and civil law.[28] The sphere of privacy encompasses both the right to intellectual, in-

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property is presumed guilty until proven innocent. David Smith, Prosecution and Defense of Forfeiture Cases P 11.03 (1990); *see also*, Civil Forfeiture of Property for Drug Offenders Under Illinois and Federal Statute: Zero Tolerance, Zero Exceptions, 25 JOHN MARSHALL L. REV. 389, 414 (1992) (labelling result of civil forfeiture "penal" and suggesting that property should be innocent until proven guilty). The corresponding innocent owner exception under the money laundering statute is 18 U.S.C. § 981(a)(2).

[27] *See, e.g.*, The Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/A to 10, at art. 12 (1948) ("no one shall be subject to arbitrary interference in his privacy, family, home or correspondence . . ."); International Covenant on Civil Political Rights, G.A. Res. 2200 (XXI) a, U.N.Doc. a/6316, at art. 17 (1966) ("no one shall be subjected to arbitrary or unlawful interference with his privacy . . ."); European Convention For The Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8 x 1); Council of Europe, Eur. T.S. No. 5, 213 U.N.T.S. 211 (1954)("everyone has the right to respect for his private and family life, his home and his correspondence . . ."); American Convention on Human Rights, art. 11, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/ser 4 V/II 23, Doc. 21, rev. 2 (English ed. 1975) ("no one may be the object of arbitrary or a piece of interference with his private life, his family, his home, or his correspondence . . .").

[28] *See, e.g.*, Pieter Hoets & Sara Zwart, *Swiss Bank Secrecy and The Marcos Affair*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 75 (1988) [hereinafter Hoets & Zwart].

corporeal existence, health, family life and financial affairs[29] and the right to economic privacy of partnerships, associations, and business secrets.[30] With respect to financial affairs, secrecy laws prohibit banks from disclosing information regarding clients' accounts to third parties.[31] Significantly, in Switzerland, where bank secrecy is a cornerstone of the economy,[32] the nature of a banker's relationship to his/her customer is analogous to the private nature of the relationship of a lawyer to a client, a doctor to a patient, or a confessor to a penitent.[33]

The Swiss right of financial privacy is particularly significant because of that country's long history of neutrality.[34] Evidence of the strong Swiss adherence to neutrality spans its 16th Century position in the conflict between France and Austria;[35] its 17th Century status as a religious safe haven;[36] and its stance in the 18th Century during the French Revolution.[37] In the 19th Century, when Europe was plagued by wars, Switzerland's neutrality was recognized as an integral part of European international law. Swiss neutrality was respected during the Italian and German unification and during the two World Wars.[38] In fact, Swiss neutrality during the Second World War was a significant factor in creating a universal willingness to recognize the use of bank secrecy laws to block Nazi attempts to gather financial information about German Jews and was supported world-wide.[39]

Until 1934, custom and usage governed Swiss bank secrecy

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29 Hermine Meyer, *The Banking Secret and Economic Espionage in Switzerland*, 23 GEO. WASH. L. REV. 284, 287 (1955); *see also* Nancy Sipp, *Bank Secrecy Laws in Discovery: Did Minpeco S.A. v. Conticommidity Services, Inc. Adopt an Overly Deferential Approach?* 14 BROOK. J. INT'L L. 443, 457 n.75 (1988).

30 *Id.*

31 Swiss Banking Secrecy laws cover "all actions in the banking domain, including the relationship between client and bank, information given by the client above his financial circumstances, the client's relationship with other banks, if any, and the bank's own transaction, if disclosure would harm a customer." Maurice Aubert, *The Limits of Swiss Banking Secrecy Under Domestic and International Law*, 2 INT'L TAX & BUS. L. 273, 276 (1984).

Secrecy laws are based on an individual's constitutional right to privacy and can be waived by agreement. Klaus Moessle, *The Basic Structure of United States Securities Law Enforcement in International Cases*, 16 CAL. W. INT'L L. J. 1, 21 (1986). *See also*, John Fedders et. al., *Waiver by Conduct - A Possible Response to the Internationalization of the Securities Market*, 6 J. COMP. BUS. & CAP. MKT. L. 1, 30-35 (1983) (an excellent overview of secrecy laws).

32 Sipp, *supra* note 29, at 457.

33 Meyer, *supra* note 29, at 288-89.

34 *See generally* Hoets & Zwart, *supra* note 28, at 75.

35 *See* Hoets & Zwart, *supra* note 28, at 75 n.3.

36 *Id.*

37 *Id.*

38 *Id.*

39 R. BLUM, OFFSHORE HAVEN BANKS, TRUSTS, AND COMPANIES: THE BUSINESS OF CRIME IN THE EUROMARKET 13 (1984); *see also*, Andrew Connick & William Roth, *Subpoenas of Overseas Bank Records: Getting Out of The Middle - A Message to Bank Counsel*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 131 n.4 (1988) [hereinafter Connick].

laws.[40] In this context, a violation of secrecy subjected the wrongdoer to civil liability in tort law.[41] In 1934, coinciding with the collapse of the Banque D'Ecompte Suisse[42] and the commencement of the troubles with the Nazis,[43] Switzerland enacted statutory bank secrecy laws[44] which added criminal sanctions to the already available private civil remedies.[45] Later, in 1937, the Penal Code was enacted which provided criminal penalties for disclosing business secrets.[46]

Article 47 of the Swiss banking code specifically prohibits disclosure of any secrets entrusted to a person in his/her capacity as an officer of a bank.[47] The bankers' obligation to secrecy has two bases. First, it is based on personality rights — fundamental principles which include the invulnerability of privacy.[48] Second, the duties of the banker are grounded on bank law[49] and on agency law principles.[50] Thus banking law, which criminalizes secrecy violations, can result in civil liability under both tort law[51] and banking law[52] as well

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[40] Sipp, *supra* note 29, at 457; "Custom and usage" is defined as:

> [a] usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates. It results from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent.

BLACK'S LAW DICTIONARY (6th ed. 1990).

[41] Meyer, *supra* note 29, at 288.

[42] Walter Meir, *Banking Secrecy in Swiss and International Taxation*, 7 INT'L LAW 17 (1983); *see also*, Sipp, *supra* note 29, at 457; Gregory Raifman, *The Effect Of The U.S.-Swiss Agreement on Swiss Banking Secrecy and Insider Trading*, 15 LAW & POL'Y INT'L BUS. 565, 573 (1983)

[43] *Id.*

[44] Bundesgesetz uber die Banken und Sparkassen, Des of Nov. 8, 1934, as amended by Federal Law of March 11, 1971.

[45] Sipp, *supra* note 29, at 458 n.84. Specifically, Article 47 provides in pertinent part:

> Whoever, in his capacity as officer, executor, employee, agent, liquidator, trustee, bank commissioner or auditor, reveals any secret entrusted to him or which he learned in his capacity and whoever attempts to incite others to violate the professional secret, shall be punished by a maximum of 6 months imprisonment or by a fine not exceeding 50,000 francs.

[46] Sipp, *supra* note 29, at 458.

[47] *See supra* note 45 and accompanying text.

[48] Peter Honegger, *Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C. J. INT'L L. & COM. REG. 1, 2 (1983) [hereinafter Honegger].

[49] *Id.*

[50] Code des Obligations (C.O.) Art. 396(2) (Switz.). The banker's discretion here derives from his contractual obligations. This contractual duty is either express or implied. Honegger, *supra* note 48, at 2.

[51] C.O. Art. 41(1); Article 41 subsection 1 of the Swiss Obligation Code provides "Whoever unlawfully causes damage to another, whether willfully or negligently, shall be liable for damages." *Id.* Therefore, to maintain a cause of action in tort against the bank, the customer must prove:

(a) the damages were sustained by the banker's disclosure;
(b) negligence or willfulness of the banker;
(c) cause in fact and proximate course; and
(d) the illegality of the disclosure, which is imminent absent either a legal

as liability to criminal sanctions.[53] In all cases, Switzerland places a high premium on privacy and confidentiality. Significantly, the client is the master of the secret.[54]

B. England

In England, eleven years before the Swiss enacted Article 47, the Kings Bench Division of the Court of Appeals wrote the trail- blazing decision on the right to financial privacy. In *Tournier v. National Provincial and Union Bank of England*,[55] the court established that a bank owes an implied contractual duty to its customer not to disclose any customer's information to third parties.[56] Aside from its own precedential value within England, *Tournier* established the foundation for many bank secrecy laws around the world.[57] The former British colonies that adopted the common law of England, such as the Bahamas and Canada, inherited and incorporated into their own laws the English law of bank secrecy.[58] Similarly, jurisdictions that remain colonies or protectorates of England such as Hong Kong, the Cayman

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provision or a client's waiver permitting the bank to give information to third parties.

See Honegger, *supra* note 48, at 3.

52 C.O. Art. 97(1). Article 97 subsection 1 of the Swiss Obligation Code states "If the performance of an obligation cannot at all or not duly be effected, the obligor shall compensate for damages arising therefrom, unless he proves that no fault at all is attributable to him." *Id.* Specifically, to bring this action the client must establish:

(a) the damages were sustained by the banker's disclosure;
(b) breach of contract, i.e. disclosure; and
(c) cause in fact and proximate cause.

See Honegger, *supra* note 48, at 3.

53 C.O. Art. 47(1) and (2). Under Swiss law criminal sanctions will be imposed whether the disclosure is intentional or negligent. *Id.* Intentional disclosure is punishable by imprisonment and or a fine not exceeding 50,000 francs. C.O. Art. 47(1). Negligent disclosure is punishable by a fine of up to 30,000 francs. C.O. Art. 47(2). *See also*, Honegger, *supra* note 48, at 3.

54 Honegger, *supra* note 48, at 4.

55 Tournier v. Nat'l Provincial and Union Bank of Eng., [1924] 1. K.B. 461 (C.A.). In *Tournier*, an employee sued his bank for defamation and breach of an implied contract of confidentiality because the bank disclosed that he had failed to honor a check to his bookmaker. *Id.* at 463, 475. As a result of the bank's disclosure, the employee's contract was not renewed. *Id.* at 475. At the trial level, the jury found in favor of the bank, but the court reversed on appeal, finding a confidential relationship between the parties. *Id.* at 461-75.

56 *Id.* at 475. *Tournier* also listed four exceptions to bank secrecy. Banker's have a limited secrecy duty "(a) [w]here disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; [and] (d) where disclosure is made by the express or implied consent of the customer." *Id.* at 473. For a general overview of the English exceptions to secrecy, see Danforth Newcomb, *United States Litigation and Foreign Bank Secrecy: The Origins of Conflict*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 47, 55 (1988) [hereinafter Newcomb].

57 Newcomb, *supra* note 56, at 48.

58 Bank and Trust Companies Regulation (Amendment) Act, No. 3 (1980) (Bahamas); Confidential Relationships (Preservation) Law, No. 16; *see generally* Newcomb, *supra* note 56, at 49, 56-57 (outlining statutory adoption of English bank secrecy laws by British colonies).

Islands, and the Channel Islands, all significant banking centers that are regarded as tax havens,[59] also follow the English law.

Indeed, the Cayman Islands, whose bank secrecy laws stem from the *Tournier* decision, provide a good example of the problem addressed in this article. In 1964, only two banks and no offshore businesses existed in the Cayman Islands. By 1981, however, the Caymans boasted 306 branches of United States and foreign banks, and over 8,000 registered companies.[60] Through its convenient location close to Miami, its well developed bank secrecy laws inherited from England, its tax free status, and its political stability as a British dependency,[61] the Caymans have evolved into one of the prime secrecy havens in the Western world.[62] Much dirty drug money is believed to travel through the Caymans.

Luxembourg is another secrecy jurisdiction that serves to underscore the potential problems and conflicts that exist between bank secrecy laws and the fight against drug trafficking and money laundering.[63] Presently, Luxembourg is thought to rival Switzerland in total bank deposits.[64] At a time when most governments are enacting laws to erode banking and business confidentiality in order to fight international crime, Luxembourg has enacted new provisions forbidding its banks to disclose information to any local and foreign tax authorities, although recent legislation punishes hiding the origin of funds derived from the sale of illegal drugs.[65]

From this review of the history of bank secrecy laws, two things become clear. First, bank secrecy rules are deeply grounded in tradition and are intended to protect individuals' privacy rights in legitimate circumstances, often against oppressive governmental intrusion. Second, criminals have access to these laws and use them as swords to penetrate the legitimate international financial system and as shields against government detection of illegitimate activity. The growing problem of drug trafficking and money laundering has made it necessary for states to pierce these privacy protections in order to curtail crime. Inevitably, these two concerns — governmental action against crime and individuals' traditional right to financial privacy — conflict.

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59 Newcomb, *supra* note 56, at 49.

60 Ethan A. Nadelmann, *Negotiations in Criminal Law Assistance Treaties*, 33 AM. J. COMP. L. 467, 499 (1985).

61 William C. Gilmore, *International Action Against Drug Trafficking: Trends in United Kingdom Law and Practice*, 24 INT'L L. 365, 379-80 (1990).

62 *Id.* at 380.

63 Charles A. Intriago, *Nations Act To Dam Up Illicit Funds: Governments Enact Legislation Designed to Deny A Safe Haven to Dirty Money*, AMERICAN BANKER, July 24, 1989, at 22.

64 *Id.*

65 Bruce A. Zagaris & Marcus Bornheim, *Cooperation In Fight Against Money Laundering In Context of European Community Integration*, 54 BNA's BANKING REP. 119, 121 (1990).

III. The Right to Financial Privacy in the United States

The United States' concept of financial privacy is radically different from that described above. This divergence historically has been the basis of bitter conflicts between the United States and other sovereigns. Subsection A describes the United States' legal protection of privacy which is, in reality, illusory. Thereafter, Subsection B sets forth the history of the clashes over privacy caused by the United States' idiosyncratic views.

A. The United States' Financial Privacy Law

Prior to 1970, a small number of judicial decisions recognized and supported bank secrecy in the United States.[66] However, the enactment of the Bank Secrecy Act[67] led to the demise of any notion of financial privacy.[68] Notwithstanding the patent invasion of privacy effected by the BSA's record-keeping and reporting requirements, the Supreme Court, addressing a Fourth Amendment challenge, upheld the Act's constitutionality.[69] In *California Bankers Association v. Schultz*,[70] the Court concluded that once an individual provides records to a bank, the information belongs to the bank; the individual retains no privacy right or expectation with respect to any such information.[71] Thus, after *Schultz*, the United States' position that banks, a highly regulated government industry, are the owner of their clients' financial information represents the diametric opposite of bank secrecy jurisdictions where the client is the owner of the information.

In response to perceived governmental abuse of the record-keeping and reporting requirements as a means to obtain individuals' financial records, Congress passed the RFPA[72] which provides whatever right to financial privacy that exists in the United States.[73] Congress recognized that financial institutions' customers have the

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66 *See, e.g.*, Sparks v. Union Trust Co., 124 S.E.2d 365 (1962); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284 (1961); Brex v. Smith, 146 A. 34 (1929).

67 12 U.S.C. §§ 1730d, 1829B, 1951-1959. *See* 18 U.S.C. § 6002; 31 U.S.C. §§ 321, 5311-5314, 5316-5322; *see also*, Newcomb, *supra* note 56, at 50 (reviewing the background of the Bank Secrecy Act).

68 To call this legislation a secrecy act is wholly cynical. Rather than aiming at the protection of information, the BSA is a record-keeping and reporting statute. *See infra* notes 129-153 and accompanying text (describing regulations).

69 California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974).

70 *Id.* at 21.

71 *Id.* at 48-49. *See also supra* notes 129-147 and accompanying text (illustrating the use of bank records to detect money laundering).

72 12 U.S.C. §§ 3401-3422 (1988 & Supp. II 1990); *see also infra* notes 72-92 and accompanying text (describing purposes and requirements of RFPA).

73 Government abuse was increased by the Bank Secrecy Act. Two Supreme Court decisions which upheld the constitutionality of the Act also contributed to government abuse. California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974); United States v. Miller, 425 U.S. 435 (1976); *see also* Plombeck, *supra* note 7, at 94 (recognizing that the RFPA was enacted to restore privacy rights in light of the restrictive interpretation of the fourth

right to expect that their financial activities receive a reasonable amount of protection from scrutiny by the federal government. However, the perceived right to privacy provided by the law is illusory. The RFPA simply requires that a financial institution notify its customer prior to providing the information that the government has requested[74] so that the customer has an opportunity to challenge the request.[75]

Ironically, the RFPA, which was supposedly passed in reaction to the erosion of privacy and in order to re-institute privacy protections, sets forth the very procedures that provide the government access to financial records.[76] Under the Act, the government can obtain financial records of the customer of a financial institution in six different ways: (1) pursuant to a written consent of the customer;[77] (2) pursuant to a search warrant;[78] (3) pursuant to an administrative

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amendment by the Supreme Court in upholding the constitutionality of the Bank Secrecy Act).

Even before *Miller* was decided, Congress reacted to the potential for abuse of financial privacy with the passage of the Privacy Act of 1974. Pub. L. No. 93-519, 88 Stat. 1896, 5 U.S.C. § 552a (1988 & Supp. II 1990). Under this Act, the Privacy Protection Study Commission (Commission) was formed to examine the needs of government to acquire information about it's citizens. *Id.* The commission's report, finding the strongest threat to individual privacy coming from the government, recommended that Congress enact privacy legislation which could meet the following objectives:

(1) minimize intrusiveness;
(2) maximize fairness; and
(3) create legitimate and enforceable expectations of confidentiality.

Id.

Notwithstanding the fact that *Miller* found that an individual has no privacy interest in his financial records, the court recognized that Congress could still pass contrary legislation, affording individuals greater rights beyond those granted by the Constitution. Zurcher v. Stanford Dailes, 436 U.S. 547, 567 (1978). Ultimately, Congress responded by enacting the Right to Financial Privacy Act of 1978. 12 U.S.C. §§ 3401-3422.

74 *Id.* § 3403.

75 *Id.* §§ 3405, 3410. When a customer challenges government access to his records, the customer must show some factual basis supporting the allegation that the records are not being sought for a legitimate purpose. *See* H.R. REP. No. 95-138, 95th Cong., 2d Sess. 7, *reprinted in* 1978 U.S.C.C.A.N. 9273, 9325. However, the government has the ultimate burden of proving it has a right to access to the records. *Id.* The RFPA establishes procedures for government authorities which seek information from a financial institution about a customer's financial records and imposes limitations and duties on financial institutions prior to the release of information sought by government agencies. In this context, it merely provides the customer the opportunity to contest access to his or her records. *Id.* The RFPA requires a customer who wants to challenge the government's access to her/his records to file a motion to quash an administrative summons or judicial subpoena or to file an application to enjoin the government from obtaining his records in accordance with a written request within 10 days of service or 14 days of mailing of the subpoena, summons or written request. 12 U.S.C. § 3410(a).

76 12 U.S.C. §§ 3401-3422. For a discussion of the exceptions, *see generally*, Allen, *What To Do When the Government Comes Knocking: Account Holder Subpoenas And Freeze Orders*, 1991 MONEY LAUNDERING ENFORCEMENT UPDATE: COMPLIANCE AND ENFORCEMENT ISSUES COURSE MATERIALS 259.

77 12 U.S.C. § 3404. It is the position of the Department of Justice that any named account holder of joint account may authorize access to the account without the consent of the other holder.

78 *Id.* § 3406. A search warrant issued in accordance with the provisions of Rule 41 of

subpoena;[79] (4) pursuant to a formal written request;[80] (5) pursuant to a judicial subpoena;[81] or (6) pursuant to a grand jury subpoena.[82] Yet, even these meager confidentiality protections do not apply when a financial institution voluntarily opts to report suspected violations of a statute or a regulation reflected in records within its custody.[83] Moreover, the financial institution can notify the government of its suspicions without any liability to the individual upon whose financial privacy the reporting intrudes and regardless

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the Federal Rules of Criminal Procedure can be used to obtain financial records. It is only within three months after the execution of the search warrant that the government must notify the affected customer or customers of the search. *Id.* § 3406(b). However, such customer notice may be delayed, and the bank prohibited from notifying the customer of the search, if a court order is obtained pursuant to 12 U.S.C. § 3409. *Id.* § 3406(c). A delay order is granted for a period of three months and may be extended by application to the same court which issued the original subpoena. *Id.* A delay order may be obtained on the grounds of "reasonable belief," which is a lesser standard than probable cause, that notification would (a) endanger the life or physical safety of any person, or (b) result in flight from prosecution, or (c) result in the destruction of or tampering with evidence, or result in the intimidation of a potential witness, or (e) unduly delay a trial or judicial proceedings, or (f) otherwise seriously jeopardize an investigation or official proceeding. *Id.*

[79] *Id.* § 3405. This is a judicially enforceable demand for records issued by a governmental authority which is authorized by statute to issue such process. *Id.* Pursuant to 21 U.S.C. § 876, the Attorney General can issue administrative subpoenas in any investigation involving controlled substances, and this authority has been re-delegated through the administrator of the Drug Enforcement Administration through its chief counsel to special agents in charge, assistant special agents in charge, and resident agents in charge. Whenever an administrative subpoena is issued it will be served by the responsible agency on the financial institution, and notice thereof must be provided to the customer by personal service of a copy of the subpoena, or by mailing a copy of the subpoena to her/his last known address, and the customer is provided ten days from the date of personal service, or fourteen days from the date of mailing to contest the administrative action. *Id.* No records are to be produced until the applicable time period has expired and the concerned agency provides a certification of compliance with the terms of the act. However, delay orders can be obtained from courts of competent jurisdiction in appropriate circumstances. The records obtained pursuant to administrative subpoena may be transferred by the DEA to other agencies within the Department of Justice, and to state, local or foreign governments, subject to the provisions of the Privacy Act 74, 5 U.S.C. § 552(a).

[80] 12 U.S.C. § 3408. This is a new formal process which is intended to allow governmental authorities not authorized to issue administrative summons or subpoenas the opportunity to request records in a formal manner. *Id.* The customer is entitled to the same time period within which to challenge the request, as provided for an administrative subpoena, but unlike that procedure s/he is not under an obligation to honor the request of access to the records. *Id.*

[81] *Id.* § 3407. These include any formal court order to produce records other than a grand jury subpoena. *Id.* § 3413(i). The most common form of judicial subpoenas are trial subpoenas, issued for financial records of a customer who is not a party to the legal proceeding. The customer is entitled to the period specified within which to challenge the order to produce the records, and a financial institution should not produce records until the applicable time periods have expired, or a delay order is issued and presented. *Id.* § 3407. The concerned agency must present a certification of compliance before the financial institution is required to produce any records. The standard for issuing a judicial subpoena is a showing of reasonable belief that the records sought are relevant to a legitimate law enforcement inquiry.

[82] *Id.* § 3413(i). The provisions of 12 U.S.C. § 3413(i) except from the operation of the Act subpoenas issued by federal grand juries, except for certain provisions concerning the handling of records once they have been obtained. *Id.*

[83] *Id.* § 3403(c).

of whether the activity reported is actually a violation of law.[84]

The reporting in which an institution voluntarily can engage is broad. The information that a financial institution may provide to the government includes the name of the account holder, the account number, the nature of the suspected illegal activity, the dates of the transactions in question, and whatever other information is necessary to enable law enforcement authorities to initiate an investigation of the suspected offense. The only true limitation on financial institutions is that they may not turn over or verbally disclose the contents of customers' financial records.

Significantly, recent amendments to the RFPA *mandate* that, in certain instances, the financial institution *not* reveal to its customers that their records are being reviewed.[85] For example, a financial in-

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[84] *Id.* Specifically, under this section, a financial institution "shall not be liable to the customer" for disclosing suspected criminal activity. *Id.* An institution is given a "good faith defense" for providing voluntary disclosure. *Id.* § 3417(c). The Bank Secrecy Act imposes substantial reporting requirements on financial institutions, including reporting of known or suspected violations. *See, e.g.*, 12 C.F.R. § 21.11. (1992). In that section, the comments to the regulation provide that if "a question exists as to whether to report an incident, OCC recommends that a criminal referral be submitted providing at least the nature of the transaction, relevant account numbers and the identities of those suspected." *Id.*

In 1986, Congress amended the RFPA, 12 USC § 3403(c), to provide a limited safe harbor from civil liability for disclosure of customer-identification information in a criminal referral to law enforcement. *See* S. REP. No. 433, 99th Congress, 2d Sess. 15 (1986); *cf.* Young v. United States, 882 F.2d 637 (2nd Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990) (assuming RFPA exempts "tips" from customer privacy laws). Legislation passed by the House in 1991, H.R. 26, would further amend RFPA Section 3403(c) to provide banks with immunity from civil suit for refusing to do business with a customer after making a "good faith criminal referral on that customer."

Treasury has issued guidelines to all bank regulatory agencies directing them to refer BSA violations for civil or criminal penalties. *See* FHLBB Regulatory Bulletin, 400 RB 8 (Dec. 13, 1988). Also, the 1988 drug bill amended the Right to Financial Privacy Act, 12 U.S.C. § 3412, to authorize federal bank regulatory agencies to disclose RFPA-protected records to the Department of Justice (DOJ) upon supervisory certification that the records may be relevant to a federal criminal law violation and were obtained in the agency's exercise of its regulatory functions. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6186(b), 102 Stat. 4181, 4357-58 (1988) (codified as amended at 12 U.S.C. § 3412(f) (1988)). DOJ may use those records only for criminal investigative or prosecutive purposes. *Id.*

[85] *See, e.g.*, 12 U.S.C. § 3413(i). Thus, the 1986 Money Laundering and Control Act Amendments created exceptions to instances when the institutions may notify its customers regarding a government request for financial information. This amendment mandates that a financial institution delay notifying their customer of a grand jury subpoena or another related court order. *Id.* The purpose behind this provision was to avoid decreasing grand jury secrecy as a result of the customer notice protections of the RFPA. The drafters believed the grand jury to be the single most effective investigative tool in criminal law enforcement. H.R. REP. No. 1383, 95th Cong., 2d Sess. 246, *reprinted in* 1978 U.S.C.C.A.N. 9273, 9376; *see also*, 12 U.S.C. § 3413(l) which exempts the requirement to notify "insiders" of financial institutions and which permits a financial institution or a supervisory agency to provide to law enforcement agencies the financial records of any officer, director, employee, or controlling shareholder of the institution whenever there is reason to believe that such records are relevant to possible criminal activity in which the person might be engaged, involving a financial institution or supervisory agency, including violations of the Bank Secrecy Act. *Id.* The House Committee noted that this amendment

stitution was not initially required to notify its customer that the government was seeking financial records when the information request was pursuant to a court order or a grand jury subpoena.[86] Later, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) amended RFPA and *prohibited* a financial institution from notifying any person named in a grand jury subpoena about the subpoena.[87] Moreover, the RFPA allows the government to seek a court order to delay the ordinarily required notice to the customer. The Act specifically allows delay in notification of the customer if there is a reason to believe that such notice will result in the endangerment of the life of a person, in flight from prosecution, in the destruction or tampering with evidence, in intimidation of potential witnesses, or in otherwise placing the investigation in serious jeopardy.[88]

Finally, there are four statutorily defined situations in which the Act is inapplicable and, consequently, require no disclosure notice and no waiting period prior to disclosure, even though the government neither seeks nor receives a delay order: (1) the litigation exception;[89] (2) the "account identification information exception";[90] (3) the foreign intelligence and secret service protection function exemption;[91] and (4) the emergency access exemption.[92]

was "absolutely necessary . . . [t]o detect money laundering schemes [and] prevent bank fraud and other insider abuse . . ." H.R. REP. No. 716, 100th Cong., 2d Sess. 9 (1988). According to the Committee:

> [T]he RFPA] was never meant to protect those insiders who violate their position of trust and who may also have an account at the institution in which they serve. The Committee has had a strong history of examining insider abuses. Under present law, the individual under investigation often has access to vital bank records and can alter, destroy, or conceal them if notified that some information has been transferred to a law enforcement agency, usually by way of a criminal referral.

Id.

86 12 U.S.C. § 3413(i). This exception was enacted to eliminate dwindling grand jury secrecy as a result of expanded customer notice provisions and challenge rights of the RFPA. H.R. REP. No. 1383, 95th Cong., 2d Sess. 246, *reprinted in* 1978 U.S.C.C.A.N. 9273, 9376.

87 12 U.S.C. § 3420(b)(1) (1988 & Supp. II 1990).

88 *Id.* § 3409(a). These RFPA provisions cover individuals and partnerships of five or less partners. *Id.* § 3401(4).

89 *Id.* § 3413(e). The Act does not apply when financial records are sought through the Federal Rules of Civil or Criminal Procedures, or through other rules in connection with any judicial proceeding to which the Government authority and the customer are a party. *Id.*

90 *Id.* § 3413(g). This section provides that the Act does not require customer notice and a challenge opportunity, nor does it impose restriction of interagency transfers, where only basic account identification information is involved, such as the name and address of the customer, the type of account, and the account number. *Id.* More specific inquiries as to the account number associated with a particular financial transaction or class of transaction, as well as an account associated with a foreign country or subdivision thereof, are also permitted. *Id.*

91 *Id.* § 3414(a). This section permits authorized foreign intelligence investigations and functions as a secret service in protecting the president and certain other federal officials and candidates to be conducted without compliance with the Act. *Id.* A certificate of

As is evident, the position of the United States regarding the extent of an individual's right of privacy and access to customer records in the hands of financial institutions is diametrically opposed to the view of secrecy jurisdictions. Historically, these divergent views with respect to customer records have caused serious conflicts.

B. *History of Clashes Between the United States and Foreign Sovereigns Based Upon Conflicting Views of Privacy*

From the 1960s to approximately 1976, the United States was deferential to other jurisdictions' secrecy laws,[93] based on notions of sovereignty and comity.[94] Since 1976, however, the trend has been away from such deference.[95] Following that period, however, the United States has had a long history of controversies with bank secrecy jurisdictions particularly in investigations and pre-trial proceedings in the United States which seek to assert extraterritorial jurisdiction in order to obtain discovery of information located abroad.[96] Friction between jurisdictions usually occurs when the

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compliance, signed by a supervisory official of a rank designated by the head of the government authority seeking access, will be submitted to the financial institution and those receiving such certificates are prohibited by the Act from revealing to the customer that access to financial records was sought or has been obtained. *Id.* Those provisions of notice are enforceable by court order under 12 U.S.C. § 3418. *Id.* § 3418.

92 *Id.* § 3414(b). This section permits government access to financial records in limited emergency situations where any delay would create imminent danger of physical injury, serious property damage, or flight from prosecution. *Id.* Here, too, a certification of compliance must be executed and delivered to the financial institution, and the government must file in court within five days thereafter a sworn statement by the supervisory official justifying use of the emergency exemption, and unless a delay order is sought and obtained, must then notify the customer as soon as practicable that his/her records were obtained. *Id.*

93 *See infra* notes 94, 110-116 and accompanying text (describing case law during the 1960s and 1970s as demonstrating immense deference to foreign secrecy laws).

94 The Supreme Court clearly articulated the notion of "sovereignty" in the decision of The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812). Writing for the court, Chief Justice Marshall stated: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction." *Id.* at 136. More than eighty years later the court defined "comity":

> Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

95 *See generally* Newcomb, *supra* note 56, at 66-67 (discussing erosion of deference to foreign bank secrecy laws). *See also infra* notes 111-116 and accompanying text (discussing cases requiring production of documents under U.S. law in complete disregard for foreign secrecy laws).

96 The quarrels have been varied and typified primarily in the area of antitrust litigation, particularly shipping industry litigation, uranium cartel litigation and SEC investigations and most recently in money laundering/narcotics investigations. *See generally* James D. Harmon, Jr., *United States Money Laundering Laws: International Implications*, 9 N.Y.L. SCH.

United States uses procedural techniques to obtain information abroad which, based on United States laws, should be readily available to the government but which the foreign concern cannot provide because of its secrecy laws. For example, the United States has used devices known as "compelled waivers"[97] which ignore both international comity and the policy bases for financial confidentiality principles, to obtain evidence extraterritorially in derogation of secrecy protections. Similarly in disregard of foreign laws, foreign banks have been made to provide access to information even when the divulging of that information violates the secrecy laws of another nation.[98] Notwithstanding secrecy laws, persons who fail to provide information will be found in contempt of court.[99]

J. INT'L & COMP. L. 1, 29 (1988) (discussing procedural implications on U.S. law caused by foreign nondisclosure law).

97 A compelled waiver, more commonly known as a consent directive, is a written form which sets forth an individual's consent to the disclosure of her/his foreign bank records. In short, the individual executes a written directive to the foreign bank to divulge information about her/his account to the Department of Justice. The individual's authorization is given under "compelled consent" because if the individual refuses to sign the directive, she/he can be held in contempt.

98 *See, e.g.*, Doe v. United States, 487 U.S. 201 (1988). In this case, the release of bank account information would have violated the laws of the Cayman Islands and Bermuda. In the Cayman Islands, a bank commits a crime if it releases confidential information concerning a customer's account in the absence of customer consent. *Id.* at 203 n.1. Similarly, in Bermuda, the common law provides an implied contract of confidentiality between the banks and its customer except where it is ordered to do so by a Bermuda court or it is given specific written consent by its customer. *Id. Doe* arose from an investigation of petitioner Doe's suspected fraudulent manipulation of oil cargoes and receipt of unreported income. He was ordered to produce records of transactions involving accounts at three banks in the Cayman Islands and Bermuda. *Id.* at 202. When Doe was later subpoenaed to appear before a grand jury he invoked his fifth amendment privilege against self-incrimination when questioned on the existence or location of other records. *Id.* at 203. The U.S. branches of the three foreign banks were then served with subpoenas ordering the release of documents relating to accounts over which Doe has signatory authority. *Id.* Citing bank secrecy laws of the Cayman Islands and Bermuda, the banks refused production. *Id.* The government then filed a motion in the Southern District of Texas for an order requiring that the court compel Doe to sign twelve consent forms authorizing the release of information pertaining to twelve bank accounts. *Id.* The trial court judge denied the motion, but was reversed by the Fifth Circuit on the grounds that because the consent directive "did not have testimonial significance" the compelled execution did not violate Doe's Fifth Amendment privilege against self-incrimination. *Id.* at 205. Accordingly, on remand, the trial judge ordered Doe to sign the release, he refused and was held in contempt and was imprisoned. *Id.* at 205-06. On appeal to the Supreme Court, Justice Blackmun, writing for the majority, held "such a directive as is at issue here does not implicate the [Fifth] Amendment" as it is not testimonial in nature." *Id.* at 206. *See generally* Newcomb, *Waiving Bank Secrecy in the U.S.*, INT'L. FIN. L. REV. 22 (1988) (for an in depth review of the *Doe* case); *see also* Bruce Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters: A United States Perspective*, 22 GEO. WASH. J. INT'L L. & ECON. 465, 539-542 (1989) [hereinafter Zagaris] (analyzing *Doe* and development of consent directives).

99 Recently, in *In Re* Grand Jury Proceedings (Union Bank of Switzerland v. United States of America, 60 U.S.L.W. 3420 (U.S. 1992), the Supreme Court upheld a trial court's contempt ruling based on the bank's failure to produce records to a United States grand jury in Miami of its wholly-owned Panamanian subsidiary. The lower court had imposed sanctions of $10,000 per day. The trial court expressly said that the "one impediment to compliance," violation of Panamanian law, was insufficient to excuse compliance.

Foreign jurisdictions have reacted to the United States' disregard of their secrecy laws by enacting blocking statutes[100] — statutes passed specifically to prohibit disclosure of information to United States authorities. These statutes, unlike the bank secrecy statutes which protect the individual's privacy, protect the sovereignty of the enacting state.[101] Typically, the blocking statutes ensure that offensive foreign disclosure orders (*e.g.*, United States orders to produce), are not honored by prohibiting the disclosure, copying, inspection or removal of documents located in the territory of the enacting state.[102] As of 1986, approximately fifteen states adopted legislation expressly designed to counter the United States' efforts to secure production of documents situated outside of the United States.[103]

The foreign perspective in enacting the blocking statutes is that, based on notions of sovereignty and comity, whatever pre-trial or investigative procedures the United States may adopt for itself may be applied to persons or documents outside the United States only with the permission of that foreign state.[104] However, the United States' perspective, even in light of the sovereign blocking statutes and international comity principles, is that persons who do business in the United States, or otherwise bring themselves within the United States' jurisdiction to prescribe and adjudicate, are subject both to the burdens and benefits of the United States laws.[105] Routinely, the dispute involves the United States' statutory grant of governmental access to customer records in the custody of financial institutions. A brief review of some of the most notorious incidents is instructive.

From the 1940s through the 1970s, blocking statutes evidenced foreign sovereigns' disapproval of United States investigatory tactics. In 1947, Ontario enacted a blocking statute in response to the order of a federal court in New York that directed a Canadian subsidiary of a New York corporation to produce documents in Canada for use by a New York grand jury that was investigating Sherman Act viola-

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100 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 n.4 (1987) [hereinafter RESTATEMENT (THIRD)]. The Restatement is merely the opinion of the American Law Institute (ALI), and is "in no sense an official document of the United States." *Id.* at IX. Section 442 of the Restatement defines blocking statutes as ones which ". . . are designed to take advantage of the foreign government compulsion defense . . . by prohibiting the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities." *Id.* § 442, n.4.

101 *Id.*

102 *See generally* Newcomb, *supra* note 56, at 61 (discussing the rise of blocking statutes as foreign reaction to United States extraterritorial investigatory measures).

103 *SEC Requests for Comments on Waiver by Conduct*, 16 BNA's SEC. REG. & L. REP. 1305, 1307 (1984).

104 *Id.*

105 *See* Hanson v. Denkla, 357 U.S. 235, 253 (1958). One who purposefully avails her/himself of conducting activities within a jurisdiction is subject to the burdens and benefits of that forum's laws. *Id.*

tions.[106] In the 1950s, various blocking statutes were passed to prohibit the removal of documents from foreign jurisdictions when United States federal courts issued orders for the production of documents in relation to the United States Department of Justice investigation of an alleged petroleum cartel.[107] In the next decade, statutes were enacted by foreign sovereigns when the United States Maritime Commission sought to obtain information from shipping lines operating to and from the United States concerning alleged anti-competitive and discriminatory practices of international shipping conferences.[108] In the 1970s, the Department of Justice's attempt to secure information regarding a worldwide uranium producers' cartel resulted in other blocking statutes.[109]

Even though United States courts initially showed some deference to foreign sovereigns' interests, early confrontations were indications that the differing philosophies eventually would cause problems. For example, in one case from 1960, the Second Circuit refused to enforce a subpoena directed to the New York agencies of two Canadian banks to produce records maintained in Canada based upon "fundamental principles of international comity."[110] By 1968, however, the same court, in connection with a grand jury investiga-

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106 RESTATEMENT (THIRD), *supra* note 100, § 442 n.4; *see also In re* Grand Jury Subpoenas Duces Tecum Addressed to Canadian International Paper Co., 72 F. Supp. 1013, 1020 (S.D.N.Y. 1947) (finding that company had to produce records because it was under United States jurisdiction).

107 RESTATEMENT (THIRD), *supra* note 100, § 442 n.4; *see also In re* Investigations of World Arrangements With Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F.R.D. 280, 286-87 (D.D.C. 1952) (ordering that documents located in foreign countries must be made available for inspection).

108 RESTATEMENT (THIRD), *supra* note 100, § 442 n.4; *see, e.g.*, Federal Maritime Shipping Act of May 24, 1965, Art. 11, [1965] Bundesgesetzblatt pt. II 833, 835 (German Blocking Statute), *cited in* RESTATEMENT (THIRD), *supra* note 100, § 442 n.4.

109 RESTATEMENT (THIRD), *supra* note 100, § 442 n.4; *See also In re* Westinghouse Elec. Corp. Uranium Contract Litig., 563 F.2d 992, 999 (10th Cir. 1977) (led Canada to enact a national blocking statute).

110 Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960). The Second Circuit's decision in *Ings* was consistent with an even earlier case in which the court indirectly took a deferential position to foreign law. *See* First Nat'l City Bank v. IRS, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960). In *First National*, the IRS served First National with a summons in order to obtain customer records in its Panamanian branch. *Id.* at 618. The main issue in the case was whether these customer records located in Panama were within control of the bank. While the court found the records to be within the bank's control, it warned that if the production of the records would violate Panamanian law, production would not be ordered. *Id.* at 619; *see also* Newcomb, *supra* note 56, at 65-66 (outlining the initial deference of American courts involving cases where information was sought outside the United States from non-party witnesses).

After the *First National* decision, in 1962, Chase Manhattan Bank was served with a grand jury subpoena ordering the production of bank records "wherever held." *In re* Chase Manhattan Bank, 297 F.2d 611, 612 (2d Cir. 1962). After the summons was served, Panama enacted a nondisclosure statute making it a misdemeanor to produce documents for use in litigation abroad. *Id.* at 612. In accordance with its decision in *First National*, the court concluded that it could not compel production based "[u]pon fundamental principles of international comity." *Id.* (quoting *Ings*, 282 F.2d at 152).

tion of a quinine cartel, upheld a subpoena issued to a New York bank to produce documents relating to transactions of its customers in New York and in Germany.[111] The refusal by the New York bank to produce the documents located abroad resulted in a contempt order[112] in which the court ruled that the importance of enforcing the antitrust laws of the United States was greater than Germany's bank secrecy doctrine.[113] In the 1980s, various federal courts found that the United States' interest trumped foreign sovereigns' interests in confidentiality. For example, one court found that the United States' interest in collecting taxes outweighed Switzerland's interest in preserving business secrets of Swiss subsidiaries of American corporations;[114] another held that the United States' interest in upholding the grand jury powers to investigate crime outweighs the interests of the foreign bank secrecy laws;[115] and a third court held that foreign laws are not dispositive of whether discovery is allowable.[116]

In these cases, United States courts imposed sanctions for non-compliance with production orders notwithstanding the existence of foreign secrecy laws or blocking statutes.[117] Indeed, the United States courts have imposed sanctions even when the non-compliance for the United States court order is based upon a foreign states court order *not* to produce.[118] Not unexpectedly, such an approach by the

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111 United States v. First Nat'l City Bank, 396 F.2d 897, 905 (2d Cir. 1968).

112 *Id.* at 898.

113 *Id.* at 905. In balancing the respective national interests of the United States and the Federal Republic of Germany, the court turned to the RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES which provides that jurisdiction will be exercised in light of such factors as:

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

RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) [hereinafter RESTATEMENT (SECOND)].

The RESTATEMENT (SECOND) has been revised since its application in the *First National* court. In 1987, the ALI published the RESTATEMENT (THIRD). RESTATEMENT (THIRD), *supra* note 100. In section 403 of the RESTATEMENT (THIRD) the ALI incorporated and expanded upon the factors set forth in section 40. RESTATEMENT (THIRD), *supra* note 100, § 403. For a more detailed explanation of the newly revised balancing test of the Restatement, see *infra* note 119.

114 United States v. Vetco, Inc., 644 F.2d 1324, 1331 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981).

115 United States v. Field, 532 F.2d 404, 407-08 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); United States v. Bank of Nova Scotia, 691 F.2d 1384, 1391 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

116 *See* SEC v. Banca della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981) (Swiss corporation traded on inside information on the Philadelphia stock exchange).

117 *See, e.g., In re* Marc Rich & Co., 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983) (subsidiary diverted taxable income to Swiss parent to circumvent U.S. income tax laws).

118 *Id.*

United States generated much ill will from other sovereigns.

United States courts, in an effort to appear to resolve these jurisdictional clashes more fairly, have turned to the Restatement's proposed test: balancing the interest of the two sovereigns.[119] Courts will consider such factors as the nexus of the activity investigated to the territory of the regulating state; the connection(s) between the regulating state and the person principally responsible for the activity; the character or nature of the regulated activity and its importance to the regulating state; the expectations that are affected by the regulations; the importance of a regulation to international political, legal or economic systems; the consistency of the regulations to the international systems; the interest another jurisdiction may have in regulating the activity; and the likelihood of conflict with another state's regulations.[120]

Prior to proceeding to the discussion in Part IV concerning drug trafficking and money laundering issues, it is useful to understand how the United States' perspective of, and approach to, jurisdictional clashes is imbued with a narrow cultural perspective. The United States historically has established "indicia" of unacceptable conduct that often does not, and can not, translate into a foreign sovereign's legal structure. The use of "indicia" has continued and expanded into the drug trafficking and money laundering investigations and is an even greater dilemma in this area because of an apparent global embracing of the indicia notion. Use of such indicia is troubling because, as has been evident in the United States' experience, it is reflective of narrow, insular presumptions rather than fact findings. Moreover, use of indicia creates, rather than resolves, disputes — disputes that could find resolution using an international, rather than an insular, perspective. Two early non-drug examples are instructive. The *Santa Fe* case[121] provides a good example of how indicia stand as apparently insurmountable roadblocks. The *Santa Fe* case arose out of an SEC insider trading investigation that took place after the Switzerland - United States Mutual Legal Assistance Treaty (MLAT) was signed,[122] but before the Swiss insider trading laws

[119] RESTATEMENT (THIRD), *supra* note 100, § 403. Whether a state may prescribe law when seeking documents located in a foreign jurisdiction depends on reasonableness. *Id.* § 403(1). To determine what is reasonable, the court should examine the balancing factors set forth in Section 40 of the RESTATEMENT (SECOND). *Id.* § 403(2) (a)-(h); *see also supra* note 113 (listing balancing factors of the RESTATEMENT (SECOND)). Even if the exercise of jurisdiction is unreasonable, "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction . . ." *Id.* § 403(3).

[120] *Id.* § 403(2).

[121] S & C Certain Unknown Purchasers of the Common Stock of, and Call Options for the Common Stock of Santa Fe International Corporation, [1983-84] [Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99, 424 (S.D.N.Y. 1983).

[122] Treaty between the United States of American and The Swiss Confederation On Mutual Assistance in Criminal Matters, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. No. 8302 (1977) [hereinafter U.S.-Swiss Treaty].

were changed.[123] Thus, at the time of the investigation, insider trading, while considered a dishonorable act, was not a crime in Switzerland.[124]

The problem arose because the MLAT contained a dual criminality provision. Thus, the Swiss court was limited to analyzing the United States' request for information based on the two Swiss legal provisions that could render the investigated conduct a crime: either unfaithfulness to management or fraud. The activity investigated, as presented in the SEC's request, did not meet the requirements of either Swiss provision. The Swiss highest court concluded that use of private information, while morally repugnant and dishonorable, was not a crime. Consequently, Switzerland, although ready and willing, was legally unable to provide the information.

The Swiss court, however, exhibited an unusual desire to cooperate. It gratuitously explained to the United States' investigators that in Switzerland it would have been a crime to *give away* business secrets — as opposed to individually *using* the information. In other words, all the United States had to do, which it did in its second and ultimately successful request for the same information, was to recognize the Swiss perspective rather than try to push the United States view: it simply needed to frame the request as seeking information related to "giving away" rather than "using" business secrets.[125]

A second similar incident also involved Switzerland, but dealt with tax fraud investigations. Swiss law prohibits production of documents in tax evasion investigations. Significantly, production is not barred on secrecy grounds where the investigation is for tax fraud. However, the definition of tax fraud under Swiss law does not include the filing of incomplete or incorrect statements on a return nor does it include a false oral statement to an official. Consequently, for a production request to be successful, it must be tailored not only in terms of the indicia of tax fraud required in the United States, but it must comport to the Swiss notion of tax fraud.[126]

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[123] *See, e.g.*, 20 Sec. Reg. & L. Rep. (BNA) at 878 (June 10, 1988) (on Swiss insider trading laws).

[124] *See e.g.*, Memorandum of Understanding to Establish Mutually Acceptable Means For Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 31, 1982, 22 I.L.M. 1 (1983) (acknowledging insider trading as a violation of United States securities laws but not punishable under Swiss law). In *Santa Fe*, the United States investigated irregular trading prior to the merger of the Santa Fe International Corporation with the Kuwait Petroleum Corporation by reviewing accounts in foreign banks. The SEC wanted the identity of purchasers whose accounts were in foreign banks and requested that Switzerland, under the MLAT, provide the desired information. *Santa Fe*, Fed. Sec. L. Rep. ¶ 99,424.

[125] *See* Exchange Act Release No. 21, 186 [1984 Transfer Binder] Fed. Sec. L. Report (CCH) at 86, 982 ¶¶ 83, 648 (July 30, 1984).

[126] *See* Maurice Aubert, *The Limits of Swiss Banking Secrecy Under Domestic and International Law*, 2 INT'L TAX & BUS. LAW 239, 280 (1984) (on Swiss policy regarding disclosure of tax information).

These examples reveal how understanding different jurisdictions' perspectives on a particular activity can result in mutual cooperation without encountering or engaging in jurisdictional conflicts that, indeed, might be unnecessary. Following such an approach would have avoided the perception of the United States as a jurisdiction that abused power and failed to respect notions of international comity. Judicial decisions enforcing the extraterritorial federal grand jury subpoenas including drug-related as well as non-drug related investigations have, not surprisingly, caused immense concern to the foreign banks and international businesses.[127] The prosecutors' arguments are insular, peremptory and simplistic: if you do business in the United States, you accept any associated risk. This perspective presumes that only the United States position is sound. Following this point of view, prosecutors urge that the foreign secrecy laws simply stand in the way of law enforcement and, therefore, should be ignored. This posture is not only narrow-minded, it violates notions of comity and international law.[128]

Part IV below traces the development of the Bank Secrecy Act, through which the United States broadened its access to information in investigations of economic and other crimes. This Part particularly focuses on drug trafficking and money laundering. Included is a discussion of the indicia regularly used to identify proscribed conduct and verbal actions which result in unwarranted intrusions on individuals' privacy — indicia which, because of the United States' strength in the world of international finance and the genuine desire

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[127] As noted in note 99 *supra*, this was the problem in Union Bank of Switzerland. However, the problem has existed for some time. In *United States v. The Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), Canadian bank's offshore branches possessed records that U.S. prosecutors needed as evidence. The Canadian bank had a branch in the U.S. and a grand jury subpoena was issued to this branch. The branch itself was not involved in the conduct that was the subject of the investigation. The U.S. branch, who was the subpoenaed witness, was only a custodian of records.

The bank secrecy laws of the Bahamas and the Cayman Islands, the places where the desired records were located, if violated, would subject the bank to serious civil and criminal penalties. The U.S. government investigators nevertheless demanded that the bank fully comply with the subpoena. After balancing the equities the court determined that the bank had in bad faith failed to comply with the subpoena and imposed a $25,000.00 per day fine until there was compliance. The bank paid approximately $1,825,000.00 in fines before producing the requested documents.

This approach, however, is not without dispute. In *In re* Sealed Case, 825 F.2d 494 (D.C. Cir. 1987), the Court of Appeals for the District of Columbia came to an opposite conclusion. This court excused a U.S. branch of a worldwide bank from the demand of federal grand jury to turn over customer records held in a foreign branch. The Court of Appeals wrote that the contempt order issued by the District Court represented an inappropriate attempt by an American court to compel a foreign person (the bank) to violate the laws of a different foreign sovereign on that sovereign's own territory. In order to comply with the U.S. court order, the bank would be required to gather the documents in its foreign branch, and smuggle them out of the foreign country in violation of that country's criminal law. In fact, the U.S. court would be ordering a criminal violation.

[128] *See* Houlihan, *A Dilemma Facing International Banks: Whether to Obey Grand Jury Subpoenas of Foreign Bank Secrecy Laws* (unpublished manuscript on file with author).

to eradicate nefarious drug-related conduct, have been embraced internationally to the detriment of individuals' privacy concerns.

IV. Bank Secrecy and Money Laundering — The United States' Approach

The BSA was first enacted in 1970 as part of the fight against white collar fraud and organized crime.[129] It was specifically designed to frustrate the commission of white collar crime by limiting the ability of criminals to conduct certain transactions secretly by creating an easily traceable paper trail. Of particular concern to the United States was that foreign bank accounts, especially those in jurisdictions with bank secrecy laws, were part of schemes to evade taxes, violate securities laws, import illicit drugs and engage in other types of illegal activity.[130] Since its enactment, the BSA's reach has broadened consistently, especially in 1986 when it became clear that banks were not complying with the reporting requirements[131] and in 1988, with the enactment of Anti-Drug Abuse Act.[132] In these ef-

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[129] *See* H.R. REP. No. 975, 91st Cong., 2d Sess. 11-13, *reprinted in* 1970 U.S.C.C.A.N. 4394, 4400. The primary purpose of the BSA is to identify the sources, volumes and movements of money traveling into and out of the country and through domestic financial institutions. *Id.*

[130] The House report provides:

> Secret foreign bank accounts and secret foreign financial institutions have permitted proliferation of 'white collar' crime; have served as the financial underpinning of organized criminal operations in the United States; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock acquisitions, merger and takeovers; have covered conspiracies to steal from U.S. defense and foreign aid funds; and have served as the cleaning agent for 'hot' or illegally obtained monies.

H.R. REP. No. 975, 91st Cong., 2d Sess. 6, *reprinted in* 1970 U.S.C.C.A.N. 4394, 4397.

[131] In 1986, Congress enacted the MLCA of 1986 which amended the BSA. Subtitle H of Title I of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1351-1367, 100 Stat. 3207-18-39 (codified as amended in scattered sections of 12 U.S.C., 18 U.S.C., and 31 U.S.C.); *see* 132 CONG. REC. H6739 (Sept. 11, 1986) (passage in House); 132 CONG. REC. S14302 (Sept. 30, 1980) (passage in Senate); *see also* United States v. Busey, 876 F.2d 1297, 1306 n.17 (. . . MLCA passed to eliminate inefficacy of Bank Records and Foreign Transaction Act); *see also* H.R. REP. No. 746, 99th Cong., 2d Sess. 15 (1986) (noting willful violations of reporting requirements by financial institutions). For example, Congress made it a criminal violation to structure currency transactions to avoid the reporting requirements or to cause a false currency report transaction, 31 U.S.C. § 5324, and obligated banks to report suspected structuring and other BSA violations to regulatory and criminal law enforcement authorities. *See, e.g.*, 12 C.F.R. § 3531 (1992); 12 C.F.R. § 21.11 (b)(5) (1992); Treasury Admin. Rul. 88-1, 53 Fed. Reg. 40063, 40064-66 (Oct. 18, 1988).

[132] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified in scattered sections of 12 U.S.C., 18 U.S.C. and 31 U.S.C.); *see* S.2852, 100th Cong., 2d Sess., 134 CONG. REC. S14115-91 (Oct. 21, 1988). The purpose of the revisions was "to combat drug trafficking, organized and white collar crime, tax evasion and other crimes in which criminals use the nation's financial institutions as a means to conceal or launder funds." H.R. REP. No. 100-716, 100th Cong., 2d Sess. 5 (remarks of Rep. St. Germain, Chairman, Committee on Banking, Finance and Urban Affairs). By enacting the 1988 Anti-Drug Abuse Act, Congress further expanded the scope of the BSA by authorizing the Treasury Department to impose special indemnification and record-keeping requirements

forts, however, the United States has gone so far so as to virtually, if not wholly, obliterate any right of privacy in favor of law enforcement.

This part traces the evolution of the BSA and its amendments in three sections. The first subsection traces the legislative initiatives to the present. The next subsection focuses on key substantive provisions of the BSA and the third concentrates on the United States efforts to conclude bilateral treaties that, effectively, give United States laws extraterritorial effect.

A. BSA — Legislative Initiatives

In order to aid government investigations, the BSA requires the reporting of all domestic transactions involving currency or its equivalent above certain amounts.[133] In addition, currency or monetary instruments taken into or out of the country which are above certain amounts must be reported[134] as well as transactions above certain amounts involving foreign bank accounts.[135]

In 1984, the Commission on Organized Crime recommended further legislative changes after studying the problems of drug trafficking and money laundering.[136] The Commission's 1984 report revealed that the practice of money laundering had grown in the United States and that it had become pervasive. The report exposed the nexus between organized crime and money laundering[137] and found that money laundering depended upon the transfer of funds to foreign bank accounts, often to accounts in countries with strict

in connection with the sale of bank and other similar checks or money orders. *See* 31 U.S.C. § 5325. Specifically, a financial institution cannot issue or sell certain monetary instruments, bank checks, cashier's checks, traveler's checks, or money orders for $3,000 or more in U.S. Currency unless:

> (1) the individual has an account with such financial institution and the financial institution:
>
> > (A) verifies that fact through a signature card or other information maintained by such institution in connection with the account of such individual; and
> >
> > (B) records the method of verification according to a method which the Secretary of the Treasury shall prescribe; or
>
> (2) the individual furnishes the financial institution with such forms of identification as the Secretary of the Treasury may require and the financial institution verifies and records such information in accordance with regulations which such Secretary shall prescribe.

Id. § 3325(a).

133 31 U.S.C. § 5315.

134 *Id.* § 5316.

135 *Id.* § 5313.

136 *See* President's Commission on Organized Crime, Organized Crime and Money Laundering (1984) (Record Of Hearing II, March 14, 1984). This Commission was established by the President in 1983, which, among other things, was responsible for suggesting legislative changes to fight organized crime. *See* S. REP. No. 433, 99th Cong., 2d Sess. 2 (1986). The purpose of the first hearing was not to focus on a specific matter, but to set the agenda for future hearings.

137 *See* The Cash Connection, *supra* note 2.

secrecy laws, which funds would then be retransferred to the United States in the form of a loan or a payment.[138] Finally, the report made clear that BSA enforcement was unsuccessful largely because some of the largest banks in the country had not complied with its reporting requirements.[139]

Stepped up enforcement efforts followed the Commission's report. By August 19, 1986, civil money penalties were assessed against nineteen major banking institutions and one hundred and seventy-seven criminal investigations were in progress.[140] Congress enacted the Money Laundering Control Act of 1986 (MLCA) as part of the comprehensive 1986 Anti-Drug Abuse Act, which amended the Bank Secrecy Act and strengthened it by enhancing reporting and record-keeping requirements, rendering evasions of its provisions more difficult and increasing penalties for any violations.[141]

The expanded reporting and record-keeping requirements address the notion of structured transactions[142] and require financial institutions to report to the Internal Revenue Service any suspicion of customers "structuring" transactions in such a fashion so as to avoid BSA reporting requirements.[143] "Willful blindness" knowledge standards apply to structuring.[144] Thus, financial institutions must develop a system designed to assure compliance with record-

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138 *Id.*

139 H.R. REP. No. 746, 99th Cong., 2d Sess. 15 (1986).

140 *Id.*

141 Subtitle H of Title I of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1351-1367, 100 Stat. 3207-18-39 (codified as amended in scattered sections of 12 U.S.C., 18 U.S.C., and 31 U.S.C.); *see* 132 CONG. REC. H6739 (Sept. 11, 1986) (passage in House); 132 CONG. REC. S14302 (Sept. 30, 1980) (passage in Senate). The U.S. House of Representatives' report on the MLCA shows that the statutes were intended to be far reaching. It provides that "a person who engages in a financial transaction using the proceeds of the designated offense would violate the section if such person knew that the subject of the transaction were the proceeds of any crime." *Id.*

142 Prior to the 1986 amendments to the Act, federal courts were divided on whether structuring transactions to prevent a financial institution from reporting the transactions constituted a violation of the Bank Secrecy Act. *See, e.g.*, United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985) (reporting requirements were not violated when individual purchased a series of checks over a one month period, exceeding $10,000); United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983) (imposed liability on individuals for preventing financial institutions from filing reporting requirements by structuring transactions); *see generally*, Plombeck *supra* note 7, at 84-85 (discussing the prohibition of evasive structuring).

The Money Laundering Act of 1986 amended the Bank Secrecy Act by imposing liability on a person who causes or attempts to cause a financial institution from filing a report or causes the report to contain false information. 31 U.S.C. § 5324(1) & (2). The Bank Secrecy Act was further amended by making it a violation to structure, assist in structuring, attempt to structure or attempt to assist in structuring a transaction to evade reporting requirements, regardless of whether such transaction is in fact reportable under the Bank Secrecy Act. *Id.* § 5324(3).

143 Department of the Treasury, Bank Secrecy Act Administrative Ruling 88-1 (June 22, 1988).

144 *See, e.g.*, United States v. Jewell, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

keeping and reporting requirements that perhaps reaches beyond the strict letter of the legislation.[145] The Anti-Drug Abuse Act of 1988[146] added further record-keeping requirements relating to purchases of money orders, travelers checks, bank checks and cashier checks. Failure to comply with the requirements of the Act subjects the institution to civil fines based on a willful or a gross negligence standard.[147]

The BSA's reporting requirements not only impose an administrative burden on financial institutions,[148] but also are very costly. In 1989, the cost of such reporting was $129 million.[149] But, from a government enforcement perspective, these stricter regulations are successful largely because the enhanced enforcement stepped up reporting. For example, in 1986, a total of 3.7 million reports were filed; for 1989, that figure was 6.5 million reports, and in the first six months of 1990, 4.2 million reports were filed.[150]

These statutory reporting requirements inevitably, and indisputably, erode an individual's financial privacy. Pursuant to the statutory construct, financial institutions are obligated to provide the government information about their customers that plainly reveals such persons' "religion, ideology, opinion and interest."[151] The evasion of privacy rights effected by these reporting requirements is exacerbated by the adoption of "Know Your Customer" requirements.[152] The erosion of privacy is directly proportional to the re-

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145 31 U.S.C. § 1359.

146 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified in scattered sections of 12 U.S.C., 18 U.S.C. and 31 U.S.C.); *see* S.2852, 100th Cong., 2d Sess., 134 CONG. REC. S14115-91 (Oct. 3, 1988); H.R. REP. No. 5210, 100th Cong. 2d Sess. 134 CONG. REC. H11108-71 (Oct. 21, 1988). For example, financial institutions are prohibited from issuing instruments in the amounts of $3,000 or more unless the individual has an account in the institution or the individual gives the institution identification accepted by the secretary of the treasury.

147 *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified in scattered sections of 12 U.S.C., 18 U.S.C., and 31 U.S.C.).

148 Domestic financial institutions are required to file currency transactions reports ("CTR") of each deposit, withdrawal, exchange, etc., involving a transaction in currency or other monetary instrument of more than $10,000. 31 U.S.C. § 5313. Multiple same day transactions also must be reported if these total more than $10,000. 31 C.F.R. § 103.22(a) (1991). This provision includes multiple transactions by one individual made to different accounts, including transactions made by several people to one account on the same day if they total more than $10,000. Reports also must be filed on the physical transportation of currency and monetary instruments in an aggregate amount exceeding $10,000. 31 U.S.C. § 5316(a). Receipt of currency or monetary instruments in excess of $5,000 not otherwise reported also must be reported if physical transportation of such sums is involved. *Id.* Persons who are subject to the jurisdiction of the United States and having a financial interest in a bank, securities or other accounts in a foreign country must report that relationship to the Secretary of the Treasury. *Id.* § 5314.

149 Tom Leander, *The War On Laundering*, AMERICAN BANKER, June 12, 1990, at 4.

150 Louis Gerhardstein, *Reporting of Large Cash Transactions to IRS Surges Sharply*, AMERICAN BANKER, August 27, 1990, at 8.

151 California Bankers Ass'n v. Shultz, 416 U.S. 21, 85 (1974) (Douglas, J., dissenting).

152 The Board of Governors of the Federal Reserve System expects financial institu-

porting requirements: the greater the scope of the reporting requirements, the greater the erosion of privacy.[153]

Efforts to enhance regulations continue — efforts that, if adopted, will further dismantle what little privacy rights remain. On October 31, 1989, the Treasury Department published an advanced notice of proposed rule-making on international fund transfers, which set forth a number of regulatory options, including requiring a report or record of all international wire transfers; requiring financial institutions to apply model "Know Your Customer" policies for foreign originating international payments; and requiring reports of suspicious international wire transfers.[154] A year later, in October

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tions to incorporate the following "know your customer" policy into their business policies:

1. Financial institutions should make a reasonable effort to determine the true identity of all customers requesting the bank's services.
2. Financial institutions should take particular care to identify the ownership of all accounts and of those using safe-custody facilities.
3. Identification should be obtained from all new customers.
4. Evidence of identity should be obtained from customers seeking to conduct significant business transactions.
5. Financial institutions should be aware of any unusual transaction activity or activity that is disproportionate to the customer's known business.

With respect to personal accounts, Banks adhere to the following principles:

No account should be opened without satisfactory identification, such as:
— a passport or registration card
— a driver's license with a photograph issued by the State in which the bank is located

Together with consideration of the customer's residence or place of business. If it is not in the territory served by the bank questions should be raised as to why the customer is opening an account at that location.

Consider the source of funds used to open the account. Large cash deposits should be questioned.

For large accounts, ask the customer for prior bank reference and write a letter to the bank asking about the customer.

When business accounts are opened, Banks should use the following practice:

Business principals should provide evidence of legal status (e.g., sole proprietorship partnership, or incorporation or association) when opening a business account.

Check the name of a commercial enterprise with a reporting agency, or check prior bank references.

For large commercial accounts, obtaining the following information is suggested:
— A financial statement of the business
— A description of the customer's principal line of business
— A list of major suppliers and customers and their geographic locations
— A description of the business's primary trade area, and whether international transactions are expected to be routine
— A description of the business operations, i.e., retail versus wholesale, and the anticipated volume of cash sales.

While the size of financial institutions may vary, it is incumbent upon all institutions to adopt and follow policies and procedures appropriate to their size, location, and type of business.

[153] Significantly, the reporting requirements co-exist with the RFPA's feigned privacy protection: a protection that the financial institution voluntarily give the government private financial information and the government prevent notification to the customer that any request for information has been made.

[154] *See* 54 Fed. Reg. 45, 769 (1989); *see also* Amy G. Rudnick & Julie A. Stanton, *Banks*

1990, the Treasury Department proposed to amend Bank Secrecy Act regulations. These amendments would require banks and transmitters and receivers of funds to maintain detailed records of domestic and international fund transfers which would be retrievable by the originator and beneficiary banks and non-bank financial institutions.[155]

Presently, regulations do not specify what information must be contained in the records. Therefore, the information now kept varies between or among institutions, making it difficult for law enforcement to track money and for banks to retrieve information.[156] The proposed rule, on the other hand, would require the originator's bank to obtain the following information prior to initiating fund transfers: the originator's name and account number; the identity of the originator as a publicly traded corporation, government agency or public utility company; the identity of the person on whose behalf the fund transfer was originated; the amount of the fund transfer; the execution date; the payment instructions; the beneficiary's bank; and the beneficiary's name and account number.[157] If non-account holders initiate fund transfers, the originator's bank also would be required to verify the originator's name and address, and record his or her name, address, social security number, and date of birth.[158]

The two most controversial aspects of the proposal pertain to the request for "on whose behalf" the transaction is being conducted and the requirement that the beneficiary banks obtain missing information from their customer.[159] These requirements certainly increase the onus on financial institutions to delve into their clients' "business" or alternatively, to risk direct responsibility. In all events, the extensive information financial institutions must keep and make available to the government further erode the clients' privacy rights and increase the institution's compliance costs.[160]

Are Concerned Over Treasury's Wire Transfer Proposal, 10 BANKING EXPANSION REP. 1 (1991) [hereinafter Rudnick & Stanton].

155 *See* 55 Fed. Reg. 41,696, 41,699 (1990). The only information currently required for wire transfers is a record of each advice, instruction or request for international fund transfers of over $10,000.00. 31 C.F.R. § 103.25.

156 *See* 55 Fed. Reg. at 41,699. *See also* Rudnick & Stanton, *supra* note 154, at 13.

157 55 Fed. Reg. at 41,699.

158 *Id.*

159 Rudnick & Stanton, *supra* note 154, at 15.

160 Cost figures for implementing the new regulations vary, but based on a survey of 66 banks, the Bankers Association for Foreign Trade, concluded that the proposed wire transfer amendments would impose over $160 million and start up in first year in implementation expenses on the 300 largest banks. Treasury's estimate is of 7.8 million person hours per year to implement the regulations. The Bank Administration Institute concluded that it would cost banks approximately $131 million each year for human power compliance, and an additional $70 million for computer equipment, materials and training. The largest banks themselves estimated that it would cost between $14 million and $20 million in the first year to comply with the regulations. One medium-sized bank estimated that it would cost $7 million to implement, and

More recently, in June 1990, the House of Representatives unanimously passed H.R. 26, the Money Laundering Enforcement Amendments of 1991 — so-called "death penalty" legislation.[161] These amendments require federal regulators to hold hearings to consider revoking any federal charter and/or insurance whenever the bank and two or more of its officers, directors or senior executive officers are convicted of a BSA or an MLCA offense.[162] These new regulations are an additional burden on financial institutions particularly because of the broad scope of criminal corporate liability,[163] the money laundering statutes incorporation of the willful blindness standard of knowledge,[164] and the notions of collective knowledge.[165] The Senate version of the bill[166] allows regulators to revoke a charter regardless of whether any of the institution's officers or directors are convicted. The bill, approved by the Senate Banking Committee,[167] specifies factors for regulators to consider in exercising discretion which somewhat differ from the House bill.[168]

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a smaller bank estimated that it would cost $55,000.00 initially and $106,300.00 annually.

Rudnick & Stanton, *supra* note 154, at 14.

[161] H.R. 26, 102d Cong., 1st Sess. (1991). H.R. 26 requires that regulators consider four factors in exercising discretion:

1) The extent to which senior management was involved in the offense;

2) The extent to which the offense occurred despite the fact that an institution's policies and procedures to prevent money laundering were in existence;

3) The extent of the institution's cooperation with law enforcement officials; and

4) Whether the institution has taken steps to prevent similar money laundering offenses in the future.

These amendments were originally introduced in response to the plea bargain of the Bank of Credit and Commerce International ("BCCI") money laundering case. *Id.*

[162] The first version mandated charter revocation for financial institutions convicted of money laundering, but the bill was modified so that the final bill afforded regulators' discretion to impose administrative sanctions, including charter revocation under specified circumstances. *See generally* Byrne, Overview of 1991 Money Laundering Legislation, 1991 Money Laundering Enforcement Update: Compliance and Enforcement Issues Course Materials 1 [hereinafter Byrne].

[163] *See* New York Cent. and Hudson River RR Co. v. United States, 212 U.S. 481 (1909); United States v. Hilton Hotels Corp. 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

[164] *See* United States v. Jewell, 532 F.2d 692 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

[165] United States v. Bank of New England, N.A., 821 F.2d 844 (1st Cir), *cert. denied*, 484 U.S. 943 (1987). *See generally* Adams, Effective Strategies for Banks Faced with Potential Criminal and Civil Liability in Money Laundering Cases, 1991 Money Laundering Enforcement Update: Compliance and Enforcement Issues Course Materials 330, 336 [hereinafter Adams].

[166] S.543, 102d Cong., 1st Sess., 137 CONG. REC. S17910-01 (Nov. 23, 1991).

[167] *See* Byrne, *supra* note 162, at 1.

[168] S. 543. The Senate requires regulators to consider:

1) The degree to which senior management officials knew of, or were involved in, the money laundering operations;

2) Whether the local community's interest in depository and credit services would be threatened by forfeiture of the institution's charter or insurance;

3) Whether the institution fully cooperated with law enforcement authorities;

Other congressional action may be forthcoming in the area of money laundering. In August of 1991, Senator D'Amato introduced the Money Laundering Improvements Act of 1991.[169] Among other things, this proposed Act enhances the forfeiture provisions.[170]

B. *Key Substantive Provisions of the Anti-Drug Trafficking and Money Laundering Laws*

The Anti-Drug Abuse law was crafted to reach far beyond narcotics traffickers and traditional notions of money laundering.[171] The basic premise is that all persons who do business with a drug trafficker, or any other criminal, do so at some substantial risk if, knowing that they are being paid with the proceeds of crime, use that money in a financial transaction. For example, the money laundering provisions of the Anti-Drug Abuse Act, collectively called the Money Laundering Control Act of 1986 (MCLA), criminalized the deposit and receipt of criminally derived funds even if for legitimate purposes.[172] In addition, forfeiture provisions permit the government to seize "traceable proceeds" of any illegal activity.[173] The broad sweep of the laws exacerbates the erosion of privacy concerns.

Section 1956 of the MCLA makes it a criminal offense to engage in domestic or international financial transactions involving criminally-derived funds with knowledge that the proceeds represent a form of unlawful activity with the intent to promote unlawful activity or with knowledge that the transaction is designed to conceal or disguise the ownership, source or control of the funds or to avoid reporting requirements.[174] This section applies to transactions in fact

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> 4) Whether there will be any losses to the Federal Deposit Insurance Funds or the Resolution Trust Corporation ("RTC"); and
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> 5) Whether the institution at the time of the conviction (a) had a deterrence and compliance program that exceeded federal requirements; (b) adequately monitored officers, agents and employees to insure compliance; and (c) promptly reported suspected violations to law enforcement authorities.

S.543, 102nd Cong., 1st Sess., 137 CONG. REC. S17910-01 (Nov. 23, 1991).

Finally, the Senate version gives Treasury new authority to create "know your customer" requirements similar to the G-7 Task Force recommendation. *See infra* notes 341-362 and accompanying text (on G-7 Task Force).

169 S.1665, 102nd Cong., 2nd Sess., 137 CONG. REC. S12236-43 (Aug. 2, 1991). The act contains three titles. Title 1 sets forth new procedures that extend the ability of the Department of Justice to use civil forfeiture statutes in money laundering cases. Title 2 amends the provisions of the Money Laundering Control Act of 1986. Title 3 amends the BSA and RFPA by way of adopting provisions prepared by the Department of the Treasury. Section 301(b), conforms the United States' enforcement with the recommendations of the Financial Action Task Force on Money Laundering. *Id.*

170 *Id.*

171 The MLCA is broader than the BSA because it outlaws a wide range of financial transactions beyond those covered by the BSA which involve the physical transfer of currency.

172 18 U.S.C. § 1957.

173 18 U.S.C. § 981 (civil forfeiture section); 18 U.S.C. § 982 (criminal forfeiture section); *see also* Plombeck, *supra* note 7, at 81-82 (discussing forfeiture provisions).

174 18 U.S.C. § 1956(a)(1). Section 1956(a)(1) provides that the defendant must

derived from specified unlawful activity (most federal white-collar offenses as well as drug offenses),[175] or any funds which the federal law enforcement agents represent to be so derived.[176] Notably, the section creates extraterritorial jurisdiction when monetary instruments are transported if the proscribed conduct is carried out by a United States citizen or if the activity occurs in part in the United States.[177]

"know" that the proceeds are derived from "some form of unlawful activity," and, in addition, must either:

> (A) [I]nten[d] to promote the carrying on of specified unlawful activity; or
> (B) know[] that the transaction is designed in whole or in part—
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
> (ii) to avoid a transaction reporting requirement under State or Federal law.

Id.

Under the first prong of section 1956(c) the defendant need know only that the proceeds derive from "some form of unlawful activity." *Id.* Under 18 U.S.C. § 1956(c)(1),

> the term 'knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity' means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State or Federal law, regardless of whether or not such activity is 'specified unlawful activity,' within the meaning of section of 1956(c)(7).

In addition to "knowing" that the proceeds represent "some form of unlawful activity," the defendant must fall within the second prong of section 1956(a)(2). Specifically, the defendant must have conducted the prohibited acts "with the intent to promote the carrying on of specified unlawful activity" or with the knowledge that the transaction is designed "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity" or "to avoid a transaction reporting requirement under State or Federal law." 18 U.S.C. §§ 1956(a)(1)(A)(i), (B)(i)-(ii).

Originally, the Senate proposed an "intent to facilitate" standard as opposed to the "intent to promote" standard adopted by the Act. "Intent to promote" is a higher standard. *See* Plombeck, *supra* note 7, at 72. The "knowing" language of the statute is a high scienter standard. According to Congress, negligent involvement will not be punishable. *See* S. REP. No. 433, 99th Cong. 2d Sess. 6, 8 (1986) [hereinafter Senate Judiciary Report]. Congress also rejected a proposal by the Department of Justice that the knowledge requirement include a "reckless disregard" standard. *Id.* at 10. However, "willful blindness" is sufficient. *Id.* at 35; *see also* United States v. Jewell, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976). For a general discussion of the scienter requirements of the Money Laundering act see Plombeck, *supra* note 7, at 71-73.

175 18 U.S.C. § 1956(c)(7).

176 18 U.S.C. § 1956(a)(3)(C), (a)(2)(B) (Supp. II. 1990).

177 18 U.S.C. § 1956(a)(2). Under § 1956(a)(2) it is a crime to:

> transport[] or attempt[] to transport a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States-
> (A) with the intent to promote the carrying on of specified unlawful activity; or
> (B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part -
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
> (ii) to avoid a transaction reporting requirement under State or Federal law . . .

Section 1957 of the MCLA, on the other hand, was designed to permit prosecution of those who provide services to criminal elements and who knowingly accept criminal proceeds as payment, even if they do not know what crimes were involved.[178] This section prohibits knowingly engaging in virtually any financial transaction exceeding $10,000 when the defendant knows that the property is criminally derived and the property is in fact derived from specified unlawful activity.[179] Significantly, section 1957 does not require knowledge that the money came from specified unlawful activity.[180] Rather, the requisite knowledge is that the property involved is derived from crime.[181] Under these circumstances, for example, a banker who knows too much about his/her clients' business may fall within the coverage of section 1957.[182]

Courts have broadly interpreted these MLCA provisions. For example, courts have concluded that the government is not required to trace the transaction's proceeds to a specific predicate offense so long as the available evidence gives rise to an inference that the funds are derived from a specified unlawful activity.[183] Similarly, courts have read the scienter requirements liberally. The legislative history shows that Congress intended to impose a "knowing" standard; Congress expressly rejected the government's efforts to impose a "reason to know" or a "reckless disregard" standard.[184] Nevertheless, the legislative history also reflects Congress's intent to apply the willful blindness standard. This gap has been used to allow the government to avoid having to prove any direct knowledge of

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The knowledge and intent requirements under § 1956(a)(2) are substantially similar to those of § 1956(a)(1).

178 18 U.S.C. § 1957(c)

179 18 U.S.C. § 1957(a). To show a violation of section 1957(a) one must establish that (a) a monetary transaction occurred or was attempted which involved a financial institution and (b) involved criminally derived property in excess of $10,000.00 which (c) affected interstate or foreign commerce and (d) which actually was derived from a specified unlawful activity. *Id.* § 1957(f)(1).

180 *Id.* § 1957(c).

181 *Id.* "Criminally derived property" is defined as "any property constituting, or derived from proceeds obtained from a criminal offense." *Id.* § 1957(f)(2).

182 *See* Mann, "A Lawyer's Guide to the 1986 Money Laundering Statute," 1 White-Collar Crime Rep. 1, 6 (April 1987). Before the Money Laundering Act was amended, the statute could be used to prosecute white-collar criminal defense lawyers who deposited fees in excess of $10,000 received from their clients, assuming the lawyer knew that the funds constituted "criminally derived property." *Id.* One way a lawyer might seek to avoid potential liability would be to agree to a payment schedule of installments of less than $10,000. *Id.* However, this option would sometimes present a problem under 18 U.S.C. § 5324(3) of the Bank Secrecy Act which imposes liability for "structuring transactions" for the purposes of evading reporting requirements. In 1988, Congress amended section 1957 and eliminated attorney fees from the definition of "monetary transactions," thereby preventing defense lawyers from being prosecuted for "knowingly . . . engag[ing] in a monetary transaction in criminally derived property . . ." *Id.*

183 *See* United States v. Blackman, 897 F.2d 309, 316 (8th Cir 1990); United States v. Mainieri, 694 F. Supp. 1394, 1396-97 (S.D. Fla. 1988).

184 *See* Senate Judiciary Report, *supra* note 174.

wrongdoing. Rather, the government can satisfy the scienter requirement by showing that a defendant willfully, consciously and/or deliberately avoided knowledge of certain facts essential to prove a criminal violation.[185]

One of the most radical changes created by the MCLA is found in the civil forfeiture provisions.[186] These provisions provide for the civil forfeiture of property that (a) represents proceeds of illegal narcotic trafficking, and (b) facilitate or assist illegal narcotic trafficking.[187] Thus, the legislation allows the government to seize any property that is "traceable proceeds" of any criminal activity.

The lawsuits pursuant to which seizures are made are in rem — the government sues the property itself — and can be filed ex parte.[188] Venue is located in the district in which the asset is located. The government's initial burden of proof is to establish probable cause[189] that the seized asset was involved in a predicate crime, *i.e.* was involved in, or is traceable to proceeds from, one of the drug offenses. Although this is a question of law to be determined by the district court, it is a rather subjective standard. In making the initial determination concerning the freezing of assets, the court may consider otherwise inadmissible hearsay or the testimony of a witness that is not even identified at the hearing. Further, probable cause is determined as of the time of the trial, not as of the time of the government's seizure. Therefore, evidence developed by the government post-seizure can be introduced in support of its case.[190]

As with other provisions of the MLCA, courts have interpreted the provisions that define the properties subject to forfeiture broadly. For example, a district court interpreted the term "property involved in" violations of the money laundering statutes to include all property that "facilitates" money laundering offenses. In *United States v. All Monies*, the court found probable cause for the forfeiture of an entire bank account, not just proceeds traceable to drug trafficking, because the legitimate money in the account provided cover for the tainted funds, thus "facilitating" money laundering. The court reached this conclusion notwithstanding the fact that the

185 *Jewell*, 532 F.2d at 699, n.3.

186 21 U.S.C. § 881(a)(6)-(7).

187 *Id.*

188 *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974) (on in rem proceedings in a civil forfeiture action). In an in rem proceeding, the property is deemed ". . . [T]he offender, or rather the offense is attached primarily to the [property] . . . ." *Id.* at 684 (quoting The Palmyra, 25 U.S. (12 Wheat) 1, 14 (1827)).

189 Probable cause "is defined as a reasonable grounds for belief of guilt supported by less than prima facie proof but more than mere suspicion." United States v. Route 2, Box 61-C, 727 F. Supp. 1295, 1298 (W. D. Ark. 1990). It is noteworthy that probable cause is a very low threshold requirement for the government to prove and, in essence, any set of objective facts that supports a law enforcement agent's suspicion of a drug connection with the property is likely to support a probable cause determination.

190 United States v. $41,305.00 in Currency, 802 F.2d 1339, 1342-45 (11th Cir. 1986).

account owner was neither a principal nor a conspirator in the underlying criminal activities.[191]

Once the court finds probable cause, the burden shifts to the civil claimant who wishes to challenge the seizure to establish, by a preponderance of the evidence, that the probable cause findings were flawed and that, indeed, the owner of the seized property is an "innocent owner."[192] Proving innocent ownership, however, is an onerous burden. The "innocent owner" defense to the civil forfeiture provisions[193] requires proof by the claimant of one of two things. First, a claimant may show that the property was not used for an illegal purpose (*i.e.*, was not linked to the commission of a predicate crime). In the alternative, the claimant may show that even if there is a nexus between the property and the proscribed act, s/he had no knowledge of, or did not consent to, such use.[194]

Under both civil and criminal forfeiture actions,[195] the concept of relation-back applies. Consequently, forfeiture becomes effective as of the date of the criminality giving rise to the forfeiture rather than as of the date of the seizure. The practical impact of the relation-back theory is that it permits the government to avoid transfers of the forfeitable property to third parties, even if such transfers took place after the underlying activity which gave rise to forfeiture occurred.[196]

The innocent owner provisions do not distinguish among claimants even though claimants have different levels of attenuation with respect to the frozen assets (the "traceable" funds), ranging from institutional lenders to drug traffickers, to some removed third party who simply is a participant in the international financial world and is the accidental recipient of tainted funds.[197] Nevertheless, in interpreting the innocent owner provision, courts[198] have extended to the civil forfeiture theories the requirements set by the United States Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Company.*[199]

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191 United States v. All Monies ($477,048.62) In Account No. 90-3617-3, Israel Discount Bank, 754 F. Supp. 1467 (D. Haw. 1991).

192 *See, e.g.*, 21 U.S.C. § 881(a)(6)-(7) providing ". . . [N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that person to have been committed or omitted without the knowledge or consent of that owner." *Id. See generally*, Dagen, Forfeiture and the Lending Institution, 1991 Money Laundering Enforcement Update: Compliance and Enforcement Issues Course Materials 230 (copy on file with author) [hereinafter Dagen].

193 21 U.S.C. § 881(a)(6); 18 U.S.C. § 981(a)(2).

194 *See* Van Vliet, Forfeitures, 1991 Money Laundering Enforcement Update: Compliance and Enforcement Issues Course Materials 181 (copy on file with author) [hereinafter Van Vliet].

195 18 U.S.C. §§ 981(f), 982 (b)(l)(A) (Supp. II 1990).

196 Thus, the innocent owner defenses are an exception created by Congress to the relation-back theory. *See* Van Vliet, *supra* note 194, at 185.

197 *See generally* Dagen, *supra* note 192, at 232.

198 United States v. 15603 85th Avenue North, 933 F.2d 976, 981 (11th Cir. 1991)

199 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974).

Thus, as under *Calero*, to prevail with an innocent owner defense a claimant must establish: (1) that s/he was not involved in the illegal activities; (2) that s/he was not aware of the wrongful activities; and (3) that s/he did all s/he reasonably could to prevent the prescribed use of his/her property.

Few decisions have interpreted the innocent owner standard. One, *United States of America v. One Single Family Residence Located at 15603 85th Avenue North, et al.*,[200] crystallizes the claimants' dilemma in establishing the innocent owner defense. In *Single Family*, the court noted, essentially, that all entities connected with property subject to forfeiture are wrongdoers.[201] If one is deemed to be a wrongdoer, then any amount of the proceeds which could be traceable to the drug activities would render the entire property subject to forfeiture.[202]

Lenders who under the MLCA, like any other person whose property is seized, may contest forfeiture of their interest in collateral by proving their innocent ownership status, but are still in a difficult position.[203] In *United States v. Miraflores Ave.*,[204] Republic National Bank, the mortgagee, failed to establish innocent ownership and forfeited its $800,000.00 interest in a property based on the bank's "blind indifference" to "suspicious circumstances" of the mortgage loan transaction.[205] It is noteworthy that the Court used the following "facts" to reject the innocent owner defense: (l) the corporate borrower and a stockholder were unknown to the bank and the second guarantor on the note who was a long standing commercial customer had no known connection with the borrower; (2) the borrower was a Panamanian shell corporation which, according to the Court, was a "preferred" vehicle for traffick or laundering that had no known source of repayment or assets other than the collateral; (3) the bank did not inquire into the purpose of the loan, conduct a title search, or assess the corporate shareholders financial standing; (4) irrespective of the collateral's sufficiency to cover the loan, the transaction was unusual in that it loaned two-thirds of the appraised value, was structured as a one-year balloon note, did not contain a repayment schedule or the borrower's undertaking to use

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200 United States v. 15603 85th Ave. North, 933 F.2d 976, 981 (11th Cir. 1991) (court notes that "owner" should be broadly construed to include "any person" with a legal or equitable interest in the seized property).

201 *Id. See* Dagen, *supra* note 192, at 236.

202 If, on the other hand, one is an innocent owner, no amount of the funds are forfeitable. However, someone who contributes legitimate funds with the knowledge that another person was obtaining his/her share of the funds from narcotic trafficking is deemed to satisfy the knowledge requirement. This person "knows" that his/her legitimate funds are being co-mingled with drug proceeds. *15603 85th Ave.*, 933 F.2d at 981.

203 18 U.S.C. § 981(a)(2); 21 U.S.C. § 881(a)(4), (6)-(7).

204 United States v. Miraflores Ave., 731 F. Supp. 1563 (S.D. Fla. 1990), *cert. granted*, 112 S.Ct. 1159 (U.S. Feb. 24, 1992)

205 *Id.* at 1571. *See* Adams, *supra* note 165, at 357-58.

the sale proceeds for repayment (the Court said that "banks are (not) in the business of lending money with the intent to foresale of the property"); (5) the bank quickly approved the transaction outside of normal channels, and its President was intimately involved in the process; (6) the second guarantor used part of the loan proceeds to give a $3,000.00 honeymoon trip to the son of the bank's president; and (7) most of the proceeds were transferred to the borrower's Swiss bank account.[206]

In the Court's view, these "facts" showed Republic's "knowledge". This conclusion wholly disregarded Republic's expert witness testimony that the "facts" were really only indicia of wrongdoing as the circumstances described, and these facts, such as the lender not personally knowing the corporate borrower or inquiring into the purpose of the loan, were not commercially unusual in South Florida.[207] Nevertheless, the government used the indicia to craft its case and the court used the indicia as proven facts that supported its ruling. One is left to wonder what more the bank reasonably could have done to prevent the proscribed use of its property.[208]

These cases show the "Catch-22" situation in which one seeking to show innocent ownership finds him/herself. First, claimants have to prove a negative — lack of knowledge — a requirement seldom seen in the law. Second, this endemically problematic position is exacerbated by the indicia which create a presumption of guilt. In the case of banks, it is virtually impossible to take care of negating every indicia of wrongdoing that the government can raise after the fact, as proof of wrongdoer status. For instance, financial transactions involving various countries and/or their nationals appear to be presumptively suspect. Similarly individuals face the inability to show that the indicia are not, and should not be, proof or presumptions of wrongdoing.

Thus, as developed, the burden on the government appears to be a much watered down version of the contemplated knowledge standard that the legislature imposed. On the other hand, the burden placed on the defense is virtually insurmountable. There clearly

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206 *Miraflores*, 731 F. Supp. at 1572; Adams, *supra* note 165, at 358-59.

207 *Miraflores*, 731 F. Supp. at 1572; The court rejected this testimony but said that such evidence, even if credited, is not determinative if the circumstances as a whole indicate that the bank officer deliberately closed his eyes to facts giving every reason to believe the collateral was criminally derived. Adams, *supra* note 165, at 359-60. Adams noted that *Miraflores* teaches that the lending process must involve more than a simple credit risk analysis. It must include due diligence to establish a good faith belief in the legitimacy of the borrower and its funds, as well as the use of the collateral. The process must be documented, and the institution's officers and employees must be made aware of a strict policy against transactions and proceeds derived from illegal activity and trained to spot "red flags" of such transactions.

208 *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974).

exists a need for legislative balance of the legitimate needs of law enforcement officers to receive information from a financial institution for legitimate investigative purposes with the need to protect customers' right to privacy.

The expanded scope of the law aggravates the conflict. For example, recent enactments mandate that institutions discover the identity of persons having an account in the United States and the identity of each individual who can make a withdrawal from that account.[209] The information that must be obtained as part of record-keeping and reporting requirements includes the taxpayer identification of anyone who opens an account or purchases a certificate of deposit.[210] Moreover, these record-keeping requirements apply not only to banks and thrifts but also to persons who, in the course of business, issue and redeem checks, transfer funds, operate a currency exchange, operate a credit card system, and persons with similar or related functions.[211]

These regulations effectively make financial institutions central to — indeed, quasi-enforcers in — the war against drugs. A bank that takes security for a loan risks the loss of the security and a forfeiture action unless it can establish that it took sufficient steps to entitle it to assert the innocent owner defense.[212] Individuals who use a financial institution to conduct business effectively lose all privacy rights and are subject to the same onerous innocent owner standard.

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209 12 U.S.C. § 1829b.

210 31 C.F.R. § 103.34 (1991).

211 *See, e.g.*, 21 U.S.C. § 881(a)(4), (6)-(7).

212 *See generally* Beiley, *Safeguarding the Bank's Collateral*, 1991 Money Laundering Enforcement Update: Compliance and Enforcement Issues Course Materials 223 [hereinafter Beiley].

Beiley explains that banks must take basic steps to insure that they know their customer well enough to overcome a forfeiture attack in three contexts: First, in the initial screening of the new customer; second, in periodic follow-ups; and third, in examining the customer's banking transactions. *Id.*

Primary in the initial screening of customers, banks must obtain adequate identification. For an individual customer, a bank should require one picture identification and a well recognized non-picture identification. For corporate customers banks should require a certificate of incorporation with all amendments, bylaws, properly executed corporate resolutions and incumbency certificates. *Id.* Moreover, in opening new accounts for any customer Beiley suggests that the information obtained include (1) addresses, past and present residence and place of employment or business, (2) date of birth or of incorporation, and (3) telephone numbers.

In addition, Beiley lists the following factors that banks should consider as relevant in evaluating the potential customer relationship: references; information on other banking relationships; financial statements which would be prepared by an accountant and should be requested in connection with significant transactions; and business activity. *Id.* at 224.

Beiley also suggests that banks keep a look out for customers who have accounts and/or businesses in suspicious foreign jurisdictions. He claims that banks should beware of persons who refuse to provide such information and suggests that such refusal should be deemed as suspicious circumstances. *Id.* at 225.

In addition to the initial screening, banks should review existing accounts on an ongoing basis and look for suspicious activity such as various types of local, national and international wire transfers. *Id.* at 225-26. In addition, monitoring account activity can help

The catch is that nothing exists that creates any comfort or provides any concrete guidance with respect to the sufficiency of the efforts that are taken to avoid wrongdoing, particularly with the use of indicia as incontrovertible proof of wrongdoing.

C. *The International Reach of United States' Anti-Drug Enforcement and Money Laundering Efforts*

The Anti Drug Abuse Act of 1988 made two significant changes in United States law regarding its goal of strengthening international cooperation to curb money laundering.[213] First, the Act orders the Secretary of the Treasury to negotiate with the finance ministers of foreign countries to establish an international currency control agency that: (a) will serve as a central source of information; (b) will collect and analyze cash transactions reports filed by members; and (c) will encourage the adoption of uniform money laundering acts.[214] Second, the Act directs the Secretary of the Treasury to enter into negotiations with financial supervisory agencies of foreign countries that set business in United States currency to reach agreements that will ensure adequate record-keeping of large United States currency transactions[215] and that will establish a system to make those records available to United States law enforcement

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detect suspicious activities, such as check kiting, smurfing, and traditional associated money laundering businesses. *Id.* at 226.

Certain activities related to the filing of CTR's can also present warning signals such as (1) customer's reluctance to proceed with the transaction after being told that a CTR must be filed, or reluctance to provide the necessary information for the CTR; (2) customer frequently making cash purchases of bank checks for amounts under $10,000.00; (3) customer coming to the bank with another customer, each of whom goes to different tellers to transact large currency transactions, each of which is under $10,000.00. *Id.* at 226-27. Another indicator of illegal activity is a customer who buys CD's and immediately uses them as collateral for a loan, or who unexpectedly pays down a large loan. *Id.* at 227. It is noteworthy that any of these actions taken independently are wholly legitimate. Thus, as Beiley suggests, they may be used as examples of indicia, a practice condemned by this author.

Finally, there are certain factors which could be particularly sensitive because there might be warning signals regarding loans, as follows: (1) a loan that has no clear and express purpose other than to "Cash out" property unfree and clear; (2) the name borrowers of foreign shell corporations with no other assets or business, no prior dealings with the bank, no accountant-prepared financial statements, and no source of repayment other than the sale of property; (3) customer insists on quick closing and requests a transfer of the closing funds abroad; (4) the customer seeking credit has no concern for the cost of the loan; and (5) the customer is evasive about the purpose of the loan. *Id.* at 227.

Again, these factors are simply indicia of venal conduct which could be legitimate conduct. What is significant here is that it is the banks that have to be concerned with obtaining all or some of the above information lest they risk being held responsible for the nefarious activity that the commercial transactions are masking. So the bank's role ranges from quasi-enforcer to wrongdoer, a role that can be separated by the asking of a few questions. Significantly, should the government seek to ask those questions it could be deemed an unacceptable invasion of an individual's privacy.

[213] *See infra* notes 214 and 215 and accompanying text.

[214] *See* 12 U.S.C. § 4701(c).

[215] 31 U.S.C. § 5315.

officials.[216]

In fact, the infamous Kerry Amendment provides that if such exchanges are not negotiated, the President is authorized to terminate banking relations with other countries after November of 1990.[217] By mid-1990, the United States was negotiating such treaties with twenty-one unidentified countries.[218] In November of 1990, the United States concluded with Venezuela the sole such agreement.[219] It is significant that these agreements essentially call on foreign governments to adopt the United States' regulations with respect to reporting and record-keeping of transfers in amounts exceeding $10,000. Aside from the Kerry Amendment proposals, the United States successfully concluded bilateral agreements with the United Kingdom;[220] Switzerland;[221] the Cayman Islands;[222] the Bahamas;[223] Belgium;[224] Canada;[225] Mexico;[226] Thailand;[227] and the Netherlands, including Aruba and the Antilles.[228]

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In sum, the United States has made great efforts to fight drug trafficking and money laundering, but has done so at the expense of

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216 *Id.*

217 31 U.S.C. § 5311.

218 Some of these countries included Netherlands (with Aruba and the Antilles), Australia, Bahamas, Bolivia, Canada, Chile, Colombia, Ecuador, Hong Kong, Italy, Mexico, Panama, Paraguay, Peru, Singapore, Spain and Uraguay. Intriago, EUROSTUDY, *supra* note 2, at 62.

219 Agreement between the United States and Venezuela regarding cooperation in the prevention and control of money laundering arising from illicit trafficking in narcotic drugs and psychotropic substances, November 5, 1990, S. Treaty Doc. No. 43, 102d Cong., 1st Sess. (1991) [hereinafter U.S.-Venezuela Agreement].

220 Agreement concerning the Investigating of Drug Trafficking Offenses and the Seizure and Forfeiture of the Proceeds and Instrumentalities of Drug Trafficking, C.M. No. 755 (1989).

221 U.S. - Swiss Treaty, *supra* note 122.

222 Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, S. Treaty Doc. No. 8, 100th Cong., 1st Sess. (1987).

223 Treaty Between the United States of America and the Commonwealth of the Bahamas on Mutual Assistance in Criminal Matters, August 18, 1987, S. Treaty Doc. No. 17, 100th Cong., 2d Sess. (1988).

224 Treaty between the United States of America and the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters, Jan. 28, 1988, S. Treaty Doc. No. 16, 100th Cong., 2d Sess. (1988).

225 Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, S. Treaty Doc. No. 14, 100th Cong., 2d Sess. (1988).

226 Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, Dec. 9, 1987, S. Treaty Doc. No. 13, 100th Cong., 2d Sess. (1988).

227 Treaty Between the Government of the United States of America and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters, Mar. 19, 1986, S. Treaty Doc. No. 18, 100th Cong., 2d Sess. (1988).

228 Treaty on Mutual Legal Assistance with the Kingdom of the Netherlands, June 12, 1981 S. Treaty Doc. No. 16, 97th Cong., 1st Sess. (1987).

individual privacy rights.[229] In effecting its goals, pursuant to the BSA and RFPA, it has placed much of the enforcement responsibility on financial institutions, effectively making them the source of otherwise private financial information. The existing onus will be increased if the pending legislation passes. In this process, banks become quasi-enforcers, collecting for, and reporting to, the government with respect to individual depositors' financial activity. These reporting requirements all but obliterate individuals' privacy rights without regard to the legitimacy of their financial dealings and, significantly, without regard for individuals' legitimate interests in keeping their financial life private — in the name of the war on drugs.

At the outset, the United States was alone in the fight against drug trafficking and money laundering. However, it quickly became evident that effective combat against these activities necessitated international cooperation. Because the fight against drug trafficking and drug-related money laundering offenses is a necessary and appropriate one, and because the United States is a strong, powerful entity in the international finance world, other nations have followed suit and have enacted anti-drug trafficking and money laundering laws which include strong pro-government enforcement provisions such as provisional remedies and asset forfeiture. Moreover, the global initiatives have followed the United States' lead regarding the use of indicia. These international efforts against drug trafficking and money laundering are discussed in the following section.

V. International Efforts Against Drug Trafficking and Money Laundering

With the recent focus on the large and free flow of drug money, it has not only been the United States, but myriad and diverse jurisdictions that have enacted statutes to curb drug trafficking and illegal money laundering.[230] Even strong bank secrecy jurisdictions have enacted such legislation. In addition, the international community has banded together to use their combined strengths to curb the venal activity. Subsection A discusses foreign sovereigns' domestic efforts against drug trafficking and money laundering and subsection B discusses international and regional initiatives.

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229 As one commentator noted, "[m]oney laundering will be the crime of choice in white-collar prosecutions in the 90's." BUREAU OF NATIONAL AFFAIRS CRIMINAL AFFAIRS PRACTICE MANUAL, June 12, 1991.

230 *See* United States Department of State, Bureau of International Narcotics Matters, International Narcotics Control Strategy Report 41, 198 (Mar. 1989) (regarding Bahamas and Costa Rica); *see also* Zagaris & Bornheim, *supra* note 65, at 467, 485 (outlining legislative developments in foreign countries).

A. *Foreign Sovereigns' Domestic Efforts at Fighting Drug Trafficking and Money Laundering*

Significantly, in 1990, Switzerland adopted legislation criminalizing money laundering. The Swiss law covers obstruction of investigations into underlying criminal activity, discovery of criminally derived assets and confiscation of criminally derived assets.[231] This provision has extra-territorial reach. Thus, pursuant to a dual criminality provision, an offender can be punished in Switzerland if s/he committed the principal offense in a jurisdiction where the conduct also was criminal.[232] The new Swiss legislation also penalizes persons who, acting within the scope of their profession, accept third-party funds with the purpose of depositing, investing or transferring the funds without verifying the identity of the beneficial owner.[233] Both crimes can only be committed by natural persons; there is no corporate criminal liability even though the perpetrator may have been acting in the ordinary course of business as an officer or agent of a company.[234]

Swiss law makes money laundering punishable by up to five years in prison and a maximum fine of one million Swiss francs.[235] A banker who fails to meet the due diligence standard established may be imprisoned for up to one year.[236] Moreover, amounts obtained in illegal drug trafficking are forfeitable. Finally, Swiss law makes bank records available to United States officials under certain circumstances.[237] Liechtenstein has prepared forthcoming legislation based on the Swiss model.[238] Beyond the law, Swiss bankers have agreed

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[231] Code Penal art. 305 Bis (Switz.) If the perpetrator was a member of organized crime or a gang member or a professional money launderer, the law provides for enhanced penalties. *Id.* Knowledge may be established directly by showing actual knowledge or constructive knowledge or indirectly by reckless disregard or willful blindness.

[232] Code Penal art. 305 Bis (Switz.).

[233] Code penal art. 305 Ter (Switz).

[234] *See generally* Karp, *Foreign Treaties, Legislation And Other International Developments*, 1991 Money Laundering Enforcement Update: Compliance and Enforcement Issues Course Materials 486. It is believed by the legal profession that the enactment of article 305 Ter would require changes in form B which permitted a professional such as an attorney to open a bank account for a client without disclosing the client's identity to the bank and in effect take responsibility for the client. But by reason of the banker's obligation to know the beneficial owner, the use of form B has been abolished by the Swiss banking authorities. *Id.*

[235] Code Penal art. 305 Bis. These are the maximum penalties under the enhanced penalty provision.

[236] Code Penal art. 305 Ter. In this regard, Swiss law goes beyond American efforts. For a discussion of the Swiss law see Scott E. Mortman, *Putting Starch in European Efforts To Combat Money Laundering*, 60 FORD. L. REV. S429, S441-46 (1992) [hereinafter Mortman].

[237] Peters, *New Swiss Disincentives Against Money Laundering*, INT'L FIN. L.R., August 1990, at 10. Before the new Swiss legislation, money laundering was not illegal to Switzerland. *Id.* However, since 1977, Swiss Banks entered into the agreement of Due Care, imposing, *inter alia*, a duty of due care in the identification of account-holders and depositions. *Id.*

[238] Liechtenstein advised the task force that it already applied a large number of task

to verify voluntarily the identity of beneficial parties to bank transactions.[239] Significantly, although these new laws and voluntary regulations do have an effect on financial privacy, Swiss bank secrecy laws stand intact.

The United Kingdom enacted the Drug Trafficking and Offenses Act under which copies of bank records may be provided to foreign jurisdictions when there is a criminal charge against the account holder.[240] Section 24 of the Act makes it an offense to retain proceeds of drug activity.[241] However, unless suspicion exists that the money is linked to drugs, no duty to report exists.[242] Recently, the case of *Barclays Bank PLC. (Trading As Barclaycard) v. Taylor* clarified that a bank is under no duty to contest an application for an access order sought by police or to inform the client that the application has been made.[243]

The United Kingdom also has adopted asset forfeiture provisions. Originally, availability of forfeiture orders was limited to drug trafficking, but England extended forfeiture to other offenses in the Criminal Justice Act of 1988. The Criminal Justice (International Co-operation) Act of 1990 provides the framework for seizing assets pursuant to foreign forfeiture requests that are predicated on crimes or correspond to crimes under certain United Kingdom statutes.[244]

In December of 1990, the Bank of England and the Building Societies Commission, in collaboration with the British Bankers' Association, The Building Societies Association and the National Drug Intelligence Unit of the New Scotland Yard, issued "Guidance Notes

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force recommendations and will implement the rest in its forthcoming legislation that is based on the Swiss model. *See also* Karp, *supra* note 234, at 492.

239 Swiss Banking Code of Conduct.

240 Drug Trafficking Offenses Act, 1986, ch. 32 (Halsbury's 4th ed. 1989) [hereinafter Drug Trafficking Offenses Act].

241 The Drug Trafficking Offenses Act provides in pertinent part:

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

Drug Trafficking Offenses Act, 1986, chs. 24, 32.

242 Carr, *How To Recognize A Money Launderer*, INT'L FIN. L. REV., August 1989, at 12 [hereinafter Carr].

243 Barclays Bank PLC. (Trading As Barclaycard) v. Taylor, 1 W.L.R. 1066 (1989).

244 Section 14 of the Act makes it an offense if a person conceals, disguises, transfers or removes property that s/he knows or has reason to suspect is derived in whole, or in part, from drug trafficking proceeds. Criminal Justice (International Co-operation) Act, 1990, ch. 4. The Prevention of Terrorism (Temporary Provision) Act of 1989 allows forfeiture of money or property within the defendant's control at the time of and to be used in connection with offenses of giving, soliciting or receiving aid for terroristic acts. Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 5.

for Banks and Building Societies" ("Notes") — a set of rules concerning money laundering.[245] The Notes suggest that covered financial institutions establish policies, procedures and controls to report suspicious transactions and provide numerous indicia of what may constitute these transactions.[246] Among other things, institutions should develop money laundering policies, oversee maintenance of records of transactions, and ensure compliance with laws and cooperation with law enforcement authorities. The Notes also adopt the "Know Your Customer" standard[247] and suggest record-keeping to make information easily available in connection with investigations.[248]

The Cayman Islands, Montserrat, Anguilla, British Virgin Islands, Turks and Caicos, and Bermuda have enacted legislation similar to that enacted in the United Kingdom.[249] The Channel Islands and Isle of Man have enacted legislation which criminalizes drug money laundering and provides for confiscation.[250]

In recent years, France has also enacted a wave of legislation. Money laundering[251] and the international transfer of funds related to drug trafficking[252] were criminalized in France[253] in late 1987 and 1988. In July of 1990, France supplemented these laws by imposing a duty on financial institutions to disclose transactions they reasonably believe are related to drug proceeds.[254] Monaco, based upon its relationship with France, will follow France's action.[255] Other juris-

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245 Guidance Notes for Banks and Building Societies from The Bank of England *reprinted in* Charles A. Intriago, INTERNATIONAL MONEY LAUNDERING: A EURO STUDY SPECIAL REPORT, Appendix D [hereinafter "Notes"].

246 *Id.* Part V. Note 2 provides examples of suspicious transactions and lists eleven examples of "Money Laundering Using Cash Transactions"; fifteen examples of "Money Laundering Using Bank or Building Society Accounts"; five examples of "Money Laundering Using Investment Related Transactions"; seven examples of "Money Laundering by Off-Shore International Activity"; three examples of "Money Laundering Involving Financial Institution Employees and Agents"; and three examples of "Money Laundering by Secured and Unsecured Lending." *Id.*

247 *Id.* Part III. To satisfy the know your customer standard an institution should obtain: (a) name(s) used; (b) "correct" permanent address; (c) date of birth and (d) nationality. The Notes specifically list documents that facilitate knowing the customer including a passport and employer photo i.d. and rejects birth certificates, health cards and credit cards as sole means of identification. *Id.*

248 *Id.* Part IV. The Notes recognize that, pursuant to the Drug Trafficking Offenses Act courts may review past transactions to ascertain an individuals wrongdoing. Thus, the Notes suggest that, when practicable, the following records should be kept: account opening records (Notes, Part III); account ledger records; and records in support of entries in whatever form, *e.g.*, checks, etc.

249 These jurisdictions were preparing detailed responses to the recommendations of the task force "and considering the need for administrative measures in the context of local budget and resource constraints." Karp, *supra* note 234, at 492.

250 Karp, *supra* note 234, at 492.

251 *See* French Public Health Code, art. 627, section 3.

252 *See* French Customs Code, art. 415.

253 *See* Mortman, *supra* note 236, at S452 (on French law).

254 *See* Mortman, *supra* note 236, at S452 (on French law).

255 Karp, *supra* note 234, at 492.

dictions which have enacted money laundering statutes include Ecuador,[256] Costa Rica,[257] Belgium,[258] Canada,[259] and Luxembourg.[260] In 1989, Canada passed money laundering and asset forfeiture legislation that broadly applied to designated drug offenses and to "enterprise crime offenses," the latter including murder, theft, extorsion, various types of fraud, and laundering the proceeds of crime.[261] Luxembourg, an important secrecy jurisdiction, has anti-money laundering legislation that punishes hiding the origin of funds from the sale of illegal drugs.[262]

In addition, anti-money laundering legislation is expected to follow in Hong Kong and Argentina[263] and is being considered in Sweden and Germany.[264] Significantly, in Hong Kong, whose secrecy laws are derived from the *Tournier* decision,[265] client information is highly protected although the city is believed to be a major laundering site. However, in 1989, the Commissioner of Banking issued guidelines to prevent criminal use of the banking system that emphasize the principle "know your client."[266] Mexico, Greece and Hong Kong have passed broad asset forfeiture provisions.[267]

Australia is the second nation, after the United States, that has instituted a requirement that financial institutions file currency transactions reports.[268] It also has forfeiture provisions that apply to in-

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256 *See* Intriago, EUROSTUDY, *supra* note 2, at 44. Ecuador ratified the U.N. Drug Convention on March 23, 1990.

257 *See* Intriago, EUROSTUDY, *supra* note 2, at 44.

258 Charles. A. Intriago, *Nations Act to Dam Up Illicit Funds*, AMERICAN BANKER, July 24, 1989, at 22.

259 Bill C-61, § 420.1 (enacted Sept. 13, 1988). Canada ratified the UN Drug Convention on July 5, 1990.

260 *See*, Kellaway, *Financial Services Come of Age*, FIN. TIMES, Nov. 16, 1990 at Lux. IV, col. 1. *But see* note 65 *supra* and accompanying text explaining that while money laundering may be a crime, Luxembourg laws prohibit disclosure of financial information to enforcement authorities.

261 Bill C-61. In April 1990, the Canadian Superintendent of Financial Institutions issued "Best Practices For Deterring and Detecting Money Laundering" which, among other things, suggests a list of suspicious transactions. Canada signed the UN Drug Convention in December 1988.

262 Loi du 7 juillet 1989 Portant Modification de la loi Modifiee du 19 Feurier 1973 Concernant la Vente de Substances Medicamenteuses et la Lutte Contre la Toxicomanie (Lux) *cited in* Circulaire IML 89/57 Nov. 15, 1989.

263 Intriago, *supra* note 258.

264 Intriago, EUROSTUDY, *supra* note 2, at 23.

265 *See supra* notes 55-59 and accompanying text (explaining *Tournier* decision).

266 Carr, *supra* note 242, at 13.

267 *See* Bruce Zagaris, *International Update: Legislative, Treaty and Enforcement Developments Abroad*, 1991 Money Laundering Enforcement Update: Compliance and Enforcement Issues Course Materials 465, 480 [hereinafter Zagaris, *Update*]. Mexico ratified the UN Drug Convention on April 11, 1990.

268 The Proceeds of Crime (Miscellaneous Amendments) Act 1987, § 81 (1987); Australia has a form entitled "Australian Significant Cash Transaction Report of $10,000 or more" as well as a form entitled "Australian International Currency Transfer Report of $5,000 or more," *reprinted in*, Intriago, EUROSTUDY, *supra* note 2, at Appendix B (27, (3)) [hereinafter Australia, Report Forms, Appendix B]; *see also*, Intriago, *supra* note 258.

dictable offenses.[269] Australia has a detailed "Suspect Transaction Report"[270] which requests the following information: (1) the identity of persons who conducted the transaction,[271] (2) the persons or organizations on whose behalf the transaction was conducted,[272] (3) the details of the transaction,[273] (4) the grounds for suspicion, (5) the details of cash dealer/ place of transaction, and (6) a statement of the cash dealer which includes a statement of what law the officer suspects is being breached. The Cash Transaction Reporting Agency, formalizing use of indicia, issued guidelines which list "narcotics source or transit countries"[274] and secrecy havens that are deemed to facilitate money laundering.[275]

Until recently, under Italian law, money laundering was a crime only if the proceeds could be traced to more traditional organized crime activities like kidnapping, robbery or blackmail.[276] Italy has now taken steps to curtail its money laundering problem by criminalizing the laundering of all illegal proceeds.[277] Money laundering is not an offense in the Netherlands, Austria or Japan.[278] These foreign domestic laws indicate increased individual states' efforts to curb drug trafficking and money laundering. Such efforts, however, although leaving intact secrecy protections, increase reporting and record-keeping requirements and incorporate indicia which do, or may, result in the erosion of individuals' financial privacy.

B. *International and Regional Initiatives Fight Drug Trafficking and Related Money Laundering*

In addition to the efforts of individual sovereigns, there have

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269 Intriago, EUROSTUDY, *supra* note 2.

270 Australia, Report Forms, Appendix B (1), *supra* note 268.

271 This includes name, address, occupation, date of birth, means used to verify identity and transaction conducted.

272 This includes reporting the name of persons or organizations, including the given name; address; occupation/nature of business.

273 The information to be provided includes type of transaction, date of transaction; total amount of cash; total amount of transaction; if foreign currency, the type; if a cheque is involved the name of the drawer, the payee or beneficiary; if another bank is involved the name, branch and country; the details and numbers of all accounts involved in the transaction, including the type of account.

274 The countries listed are Afghanistan, Bolivia, Burma, Colombia, Hong Kong/Mecau, India, Laos, Lebanon, Malaysia, Pakistan, Peru, Philippines, Thailand, Turkey and Venezuela. *See* Intriago, EUROSTUDY, *supra* note 2, at 79.

275 The secrecy havens listed are Bahamas, Bermuda, British Channel Islands, British Virgin Islands, Cayman Island, Cook Islands, Gibraltar, Grenada, Hong Kong, The Isle of Man, Liberia, Liechtenstein, Luxembourg, Nauru, Netherland Antilles, Panama, Switzerland, Tonga, and Vanyatu. Intriago, EUROSTUDY, *supra* note 2, at 79.

276 Bruce Zagaris & Markus Bornheim, *Cooperation In Fight Against Money Laundering In Context of European Community Integration*, 3 BANKING REP. (BNA), at 121 (Jan. 22, 1990).

277 West's European Update, Banking and Financial Services, 1991 WL 11696 at *65, *available in* WESTLAW, Eurupdate Database.

278 Crocker, *Bankers Police Yourselves*, INT'L FIN. L. REV., June 1990, at 10 [hereinafter Summit Report Highlights].

been international and regional efforts, including multilateral and bilateral arrangements[279] aimed at curbing drug trafficking and money laundering. One significant effort is the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (U.N. Drug Convention).[280] As of December 31, 1990, thirty-two nations ratified, acceded to, or approved the Convention.[281] The Convention, which entered into force on November 11, 1990,[282] establishes the offense of money laundering for drug-related offenses and the aiding and abetting of such offenses.[283] It requires that signatories enact laws that criminalize money laundering.[284] The Convention includes asset forfeiture provisions[285] and requires rendering mutual legal assistance for the crimes covered by the Convention.[286]

One significant aspect of the asset forfeiture policy is that it obligates members to undertake cooperative measures. Furthermore, the U.N. Drug Convention encourages each signatory country to adopt measures that will enable it to confiscate proceeds derived from property and instrumentalities related to prescribed drug offenses and obligates the signatory countries to try to conclude bilateral and multilateral treaties in this regard.[287] The U.N. Drug Convention authorizes confiscation of the proceeds derived from treaty offenses or the equivalent in other property.[288] It also authorizes the tracing of proceeds into other property and even places the burden of proof regarding the "lawful origin" of the property on the owner or custodian of the property involved.[289] Significantly, the U.N. Drug Convention specifically provides that "[a] party shall not decline to render mutual legal assistance . . . on the ground of bank secrecy."[290] Rather, legal assistance may be refused only if executing the request "is likely to prejudice [the requested state's] sover-

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279 These agreements are generally referred to as Mutual Legal Assistance Treaties (MLATS) whereby the parties agree to cooperate in the investigations and prosecution of criminal cases. *See generally*, Zagaris, *supra* note 98, at 495-96 (listing MLAT's of various countries). *See also supra* notes 219-228 (listing MLAT's)

280 UN Drug Convention, *supra* note 5.

281 *Nations Which Have Ratified, Acceded To, or Approved the 1988 United Nations Convention Against Illicit Traffic in Narcotics Drugs, Through December 31, 1990*, Money Laundering Alert, *available in* LEXIS, Nexis Library, MLA File.

282 Under UN rules the Convention became effective upon the "deposit of the twentieth instrument of ratification, approval or accession." UN Drug Convention, *supra* note 5, art. 29(2).

283 *Id.* art. 3

284 *Id.* arts. 2, 3.

285 *Id.* art. 5.

286 *Id.* art. 7.

287 *Id.* arts. 5, 7.

288 *Id.* art. 5.

289 *Id.*

290 *Id.* art. 7(5).

eignty, security, order public, or other essential interests."[291] The Convention further provides that "[i]n order to carry out the measures referred to in this article, each party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized."[292] A party cannot fail to act under this article of the convention on "the ground of bank secrecy."[293]

In addition to requiring cooperation in the investigation stage, the U.N. Drug Convention requires signatories to adopt provisional measures — measures necessary to enable the competent authorities to identify, trace, freeze or seize for the purpose of eventual confiscation of proceeds, property, instrumentalities or any items that are used or are intended for use in the commission of any of the offenses within the Convention.[294] In taking provisional measures, the requested state must act in accordance with the provisions of its domestic law and its procedural rules or any binding bilateral or multilateral treaty or agreement entered into by the requesting state.[295] Such measures are essential to asset forfeiture policy because otherwise, criminals would be able to remove a property from their requested state.[296]

On July 25, 1990, the select committee of experts of the Council of Europe prepared the draft version of the Convention on Laundering, Search, Seizure and Confiscation of Proceeds From Crime[297] ("European Laundering Convention") which, upon signature by twelve governments, was adopted by the Council on November 8, 1990.[298] Under the European Laundering Convention, the offense of money laundering consists of facilitating the conversion of proceeds of a crime and covers property used for knowingly and intentionally disguising the illicit origin of the proceeds that can be traced

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291 *Id.* art. 7(15)(b).

292 *Id.* art. 5(3).

293 *Id.*

294 *Id.* art. 7(2)(a)-(g).

295 *Id.* art. 7(4).

296 *See* Zagaris, *Update, supra* note 267, at 484.

297 Council of Europe: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 148 [hereinafter European Laundering Convention]. *See also* Zagaris, *Update, supra* note 267, at 473. In addition to the experts from the sixteen Council of Europe countries, the group of experts consisted of experts from Australia, Canada and the United States, as well as Interpol, the United Nations, the International Association of Penal Law, at the International Penal and Penitentiary Foundation, and the International Society of Social Defense. *Id.* at 472. The United States is contemplating becoming a signatory. However, if it does so without entering reservations, it would have to enact domestic legislation to allow it to comply with some of the terms. *See, e.g., id.* at 473.

298 European Laundering Convention, *supra* note 297. Twelve countries signed it on November 8, 1990, the first day the convention became open for signature: Belgium, Cypress, Denmark, Germany, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. The Convention becomes effective January 1, 1993. *Id.*

thereto.[299] The European Laundering Convention, unlike the UN Drug Convention[300] and the Financial Action Task Force (FATF) Recommendations,[301] does not limit criminal money laundering to drug-related money laundering; rather, the European Convention adopts a very broad scope with respect to subject offenses.[302] Consistent with the growing international consensus on the issue, bank secrecy is not grounds upon which cooperation may be declined: the European Laundering Convention specifically provides that "a party shall not invoke bank secrecy as a ground to refuse any cooperation under this chapter."[303]

The European Laundering Convention provides that when a requesting state has begun criminal or confiscation proceedings, a requested state must take the necessary provisional measures such as freezing or seizing to prevent any dealing in transfer or disposal of property which, at a later stage, may be the subject of or satisfy a request for confiscation.[304] A state that has received a request for confiscation measures concerning instrumentalities or proceeds located in its territory has a duty to take provisional measures to prevent the transfer or disposal of property which might later satisfy the confiscation requirement.[305] The European Laundering Convention provides that the provisional measures will be implemented as permitted by, and in accordance with, the domestic law of the requested state and, to the extent compatible with such law, in accordance with the procedures specified in the request.[306]

The European Community also has made various arrangements with respect to drug trafficking and money laundering.[307] For example, the Council of Ministers[308] has begun to enforce regulations

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299 European Laundering Convention, *supra* note 297, art. 6(1)(a)-(b).

300 UN Drug Convention, *supra* note 5.

301 Financial Action Task Force Report (Feb. 7, 1990). *See infra* notes 341-362 on the efforts of FATF.

302 European Laundering Convention *supra* note 297, art. 6(1). Note that the European Convention, while based on the U.N. Drug Convention, does not limit criminalization of money laundering to drug related matters. The subject offenses include drug trafficking, terrorist offenses, organized crime, violent crimes, offenses involving the sexual exploitation of children and young persons, extorsion, kidnapping, environmental offenses, economic fraud, insider trading and other serious offenses. *See* Council of Europe, Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, point 27 (1990). The Convention, however, allows states to enter reservations restricting cooperation under the Convention to certain offenses or categories of offenses. European Laundering Convention, *supra* note 297, art. 2(2).

303 European Laundering Convention, *supra* note 297, art. 18(7).

304 European Laundering Convention, *supra* note 297, art. 7.

305 *Id.*

306 *Id.*

307 The Member states of the European Community are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.

308 The Council of Ministers is a decision-making body which enacts legislation proposed by the Commission. The Council consists of representatives of the governments of

against money laundering. The Council of Ministers issued resolutions proposing to take steps to amend customs regulations, among other things, to provide for seizure of goods related to drug activity.[309]

On June 10, 1991, the ECOFIN Council of Ministers for the European Community adopted unanimously, a Proposal for a Council Directive on Prevention of the use of the Financial System for the Purpose of Money Laundering to enforce its anti-money laundering policy.[310] The Directive criminalizes money laundering of funds derived from drug trafficking and other criminal offenses.[311] Like the European Laundering Convention, the Directive reaches money laundering derived from other than just drug-related offenses.[312]

The Directive provides that "knowledge" or "intent" regarding a proscribed activity may be inferred from "objective factual circumstances."[313] Jurisdictionally, the Directive criminalizes money laundering even where the activities are generated and the property exists in the territory of another member state or in that of a third country.[314] The coverage of branches with their headquarters outside the EC also provides extraterritorial reach to the Directive and insures its broad applicability.[315]

The Directive, like the United States laws, specifies enhanced "know your customer" and "suspicious transactions" requirements.[316] For example, it requires banks and other credit and financial institutions to obtain identification from customers when they open accounts or when they undertake a transaction of 15,000 European Currency Units or more.[317] And, following the recommendations of the G-7 Financial Action Task Force, the Directive provides for enhanced record-keeping.[318] Finally, the Directive gives assistance in relieving employees of responsibility for breaching restrictions on disclosure of information when they report information concerning suspected money laundering to authorities in good faith.[319]

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the member states. *See* Sydney J. Key, *Mutual Recognition: Integration of the Financial Sector in the European Community*, FED. R. BULL., at 593 (Sept. 1989).

309 Zagaris & Bornheim, *supra* note 276, at 119.

310 Council Directive 91/308, 1991 O.J. (L. 166) 77. The Council reached an agreement on a common position on February 1991. See Zagaris, *Update*, *supra* note 267, at 473.

311 *See* Council Directive 91/308, *supra* note 310, at 79.

312 *Id.*

313 *Id.*

314 *Id.*

315 *Id.*

316 It requires member states to insure that credit and financial institutions examine with special attention any unusual transaction they regard as particularly likely, by its nature, to be related to money laundering. *Id.*

317 *Id.* This is approximately $18,500 United States.

318 Particularly, financial institutions must keep copies of the customer identification records for at least five years after the relationship with a customer terminates. *Id.*

319 *See* Council Directive 911/308, *supra* note 310, at 80.

In sum, the Directive recognizes the EC's adoption of the strictest standards in the world, and commits to continue to work with the FATF to insure application of comparable standards world-wide. The Directive, with the European Laundering Convention,[320] insures broad criminalization of money laundering and a system for cooperation in the regulation of international monetary transactions.[321] A commentator notes that the importance of the EC's foreign policy and its significant position in the G-7, the OECD, the U.N., and other groups, also will greatly enhance anti-money laundering enforcement.[322]

The European Parliament[323] issued a report of the drug problem and urged the Community to review bank secrecy laws to allow banks to provide information and freeze accounts when suspected activity has taken place.[324] Finally, the European Community,[325] as well as some of its member states, participate in the G-7 and G-10 initiatives with respect to drug trafficking and money laundering.[326]

A significant development in the intensified, international efforts to combat drug trafficking and money laundering is the Basle Committee's statement of principles on money laundering. The Basle Concordat is an agreement issued by the Committee on Banking Regulations and Supervisory Practices.[327] This committee is comprised of the central bank governors of the group of ten industrialized countries (G-10).[328] The purpose of the Concordat, issued in 1974, was to agree about the respective roles of the home country and home country supervisors with respect to financial institutions' capitalization and to assure that banking organizations operating in the international markets were supervised institutions.[329] Generally,

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320 European Laundering Convention, *supra* note 297.

321 See Zagaris, *Update*, *supra* note 267 at 475.

322 *Id.*

323 The European Parliament serves a limited legislative purpose. It authorizes the EC budget and approves applications of prospective member states. It can also act as a consultant to the Council on certain matters. The members of the European Parliament are elected by individual citizens of the members states. *See* Key, *supra* note 308.

324 *See* Zagaris & Bornheim, *supra* note 276, at 119-20.

325 In a related EC effort, the European Commission has issued directives with respect to cooperation methods necessary to combat international tax evasion and avoidance. *Id.* at 119. The Commission is the executive branch of the European Community and is responsible for the proposal of legislation to be enacted by the Council. *See* Key, *supra* note 308.

326 *See infra* notes 327-362 and accompanying text.

327 The Basle Committee comprises representatives of the central bank and supervisory authorities of the Group of Ten countries. *OCC Issues Basic Committee Statement of Principles Against Money*, 52 Banking Rep. (BNA) No. 5, at 218 (1989).

328 The group of 10 industrialized countries ("G-10") is comprised of Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom, the United States and Luxembourg. *Id.* As noted earlier, the European Community also participates in the G-10.

329 For the text of the Basle Committee Statement, see INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING 273-277 (Gilmore ed., 1992).

this group's concern pertains to supervisory responsibilities regarding solvency, liquidity and foreign exchange operations.[330] The Concordat is revised sparingly as, for example, it was revised in 1983 so that it would reflect the actual experience of the participating states.[331] The significant aspect of the 1989 statement of principles is that it was the first time this body, primarily focused on capital concerns, incorporated ethical standards of professional conduct and spoke out against money laundering.

The G-10 promoted anti-money laundering principles for four main reasons. First, the Committee wanted to insure that financial institutions would obtain proper identification of all persons conducting international business. Second, the Committee wished to insure that the conduct of the bank's business would be in conformity with the high ethical standards set forth in the principles. Third, the Basle Committee sought assurances that cooperation with law enforcement authorities would take place within the confines of the applicable law. Fourth, the Committee sought that proper staff training be conducted in all matters concerning the statement of principles.[332]

The statement of principles urges that banks undertake to know their customers,[333] to spot suspicious transactions,[334] and to cooperate fully with law enforcement authorities.[335] Specifically, the statement of principles provides that when banks have a good reason to suppose that money held on deposits is derived from criminal activity or that transactions made are themselves criminal in purpose, banks should take appropriate legal measures.[336] For example, banks should deny assistance,[337] sever relations with a customer,[338] and close or freeze accounts connected with suspicious activities.[339] The Basle Committee's work resulted in the establishment of a number of regional supervisory authorities. Recently, groups in the Caribbean, Latin America, Asia, the Middle East, and Africa were established.[340]

Another significant international anti-drug related money laundering enforcement initiative resulted from the efforts of the group of seven (G-7) industrialized democracies.[341] In 1988, the G-7 coun-

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330 *Id.*
331 *Id.*
332 *Id.* at 274.
333 *Id.* at 276.
334 *Id.* at 277.
335 *Id.*
336 *Id.*
337 *Id.*
338 *Id.*
339 *Id.*
340 See Zagaris, *Update, supra* note 267, at 472.
341 The group of seven industrialized democracies (G-7) is comprised of Canada,

tries established a task force on international narcotics trade as part of the effort to stop the production, trafficking and financing of illegal drugs. A priority of the task force was the eradication of drug-related international money laundering operations.[342] The final G-7 report sought to enhance international criminal cooperation on, among other things, drug-money laundering.[343] The report announced the establishment of the FATF,[344] an international institution aimed at combatting drug-related money laundering.

The FATF's April 23, 1990 report recommended the following to combat drug-related money laundering: (1) improvement of national legal systems;[345] (2) enhancement of the role of financial systems;[346] and (3) the strengthening of international cooperation.[347] The report required non-United States financial institutions to take a greater role in guarding against and reporting drug money laundering and other suspicious transactions.[348] According to the report, FATF members unanimously agreed that secrecy laws should not stand in the way of implementing the recommendations.[349] It is noteworthy, in this regard, that some of the participating countries such as Switzerland, Australia and Luxembourg have strong secrecy laws. Further, the report states that each country should take measures to criminalize drug money laundering as required by the United

France, Germany, Italy, Japan, the United Kingdom, and the United States. The European Community also participates.

[342] Intriago, EUROSTUDY, *supra* note 2, at 16.

[343] This final report also addressed terrorism and the environment as areas in which international cooperation was necessary. *Id.*

[344] Aside from the G-7, the original task force members included participation by Austria, Australia, Belgium, Luxembourg, the Netherlands, Spain, Sweden and Switzerland. The task force was to report with respect to what has been done and what needed to be done with respect to money laundering. *Id.*; *See generally* Zagaris, *supra* note 98, at 535.

[345] Recommendations 4-8. Recommendations 1-3 set out the general framework of the report. Financial Action Task Force, *supra* note 301.

[346] Recommendations 9-10, (recommendations pertaining to banks should also apply to other financial institutions), (application should reach "as many organizations as possible that receive large cash payments in the course of their business"). *Id.*; *see also* Recommendations 11-29.

[347] States are encouraged to enter into a network of bilateral or multilateral agreements and arrangements using generally shared legal concepts to provide practical measures to affect the widest possible range of mutual assistance. Countries should implement compulsory measures for mutual assistance in criminal matters, including giving the government authority to take expeditious action in response to a request by foreign countries to identify, freeze, seize, and confiscate proceeds or other property of corresponding value to such proceeds based on money laundering or the crimes underlying the laundering activity. *Id.*

[348] Recommendations 23, 24. An important agreement the G-7 reached was that each government should furnish spontaneously or "upon request" international information relating to suspicious transactions and the persons and corporations involved in those transactions. It suggests that safeguards be established to insure that the exchange of information is consistent with national and international provisions and privacy protections. However, no consensus was reached with regard to whether suspicious activity reporting should be mandatory or permissive. *Id.*

[349] Recommendation 2.

Nations Drug Convention.[350] The FATF went beyond the UN Drug Convention, however, by directing member governments to consider extending the offense of money laundering to any other crime to which a link to narcotics exists.[351] In the alternative, the report recommends extending the offense of money laundering to all offenses that generate a significant amount of proceeds or to certain serious offenses.[352]

Pursuant to the U.N. Drug Convention model, the FATF report also calls for the adoption of forfeiture provisions, including forfeiture from proceeds derived from proscribed activities, provisional measures, and broad investigative measures.[353] The report suggests that financial institutions' regulators operate together with law enforcement authorities to ensure that institutions have adequate money laundering prevention procedures.[354] The report also suggests enhancing the role of the financial system by implementing "know your customer" rules — rules that require financial institutions to identify customers, disallow anonymous accounts and keep financial records.[355] It also suggests development of a system that identifies suspicious transactions[356] while insulating financial institutions and their employees from liability if such transactions are reported.[357] Finally, the recommendations are that such standards apply not only to banking but also to non-banking financial institutions.[358] The report considers the advantages of CTRs and, notwithstanding opposition by most of the group, it suggests that countries establish, or at least consider establishing, such a system.[359] This initial proposal made no recommendation concerning money laundering through international wire transfers.

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350 *Id.*

351 Recommendation 5. The United Kingdom adopted this approach in the Drug Trafficking Offenses Act, which other Commonwealth governments such as Hong Kong have followed. *Id.*

352 *Id.* The United States and Australian laws take this approach.

353 Recommendation 8. The report recommends forfeiture of instrumentalities used in or intended for use in the commission of any money laundering offense, or profert of corresponding value. It also provides for provisional measures and further provides that there should be authority to take expeditious action or response to requests by foreign countries to identify, freeze, seize and confiscate proceeds of other property of corresponding value to such proceeds, based on money laundering or the crimes underlying the laundering activity. *Id.*

354 *See generally* Recommendations 9-40.

355 Recommendations 12, 13, 14. In fact, to comply with the Basle Statement of principles, financial institutions suspecting that funds were derived from criminal activity should be allowed or required to report promptly their suspicions to the competent authorities. *Id. See supra* notes 327-340 for discussions of Basle principles.

356 Recommendations 15, 17, 18, 19, 21, 22.

357 Recommendations 16, 18.

358 Summit Report Highlights, *supra* note 178. The recommendations of the report are non-binding, but are likely to be implemented by the participating countries. *Id.*

359 Recommendations 23, 24. Financial Action Task Force, *supra* note 301, Recommendations 23, 24.

In May, 1991, the FATF issued a second report[360] which found that the majority of participants in the first report substantially implemented the full range of recommendations. This report, expressly incorporating indicia, targeted the following groups as high-risk professions or institutions: (1) organizations whose prime function is to provide a form of financial service but which fall outside the scope of the regulated financial sector;[361] (2) organizations whose primary purpose is to offer some form of gambling activity; (3) organizations whose primary function is to buy and sell high-value items such as precious metals and gem dealers, auction houses, real estate agents, automobile, airplane and boat dealers; and (4) professionals who, in the course of providing professional services, offer client account facilities such as lawyers, accountants, notaries and certain travel agents.[362] The principal problem identified by the second report was still the export of cash to regulatory havens where deposits are accepted, followed by wire transfers back into regulated financial institutions through transactions structured to avoid the reporting threshold.

The task force identified the three most important regulatory havens: Hong Kong, Singapore and the Gulf states. Of these, Hong Kong is reported to have been receptive to initiatives to curb drug-money laundering. On behalf of the individual Gulf states, a representative of the Gulf Cooperation Council participated in one FATF meeting, but did not endorse the recommendations due to political unrest. Singapore is still considered to be a problem although the report indicated that it informally agreed to participate in anti-drug money laundering efforts. Other regulatory havens were reported to be cooperating to varying degrees. For example, the Netherland's endorsement of all the recommendations includes the Netherland Antilles and Aruba for whose compliance the Dutch government agreed to take responsibility.

Two major efforts are presently underway in the Caribbean to curb money laundering. First, is the formation of the Caribbean Financial Action Task Force (CFATF). In a June 1990 Caribbean Drug Money Laundering Conference, leading governments in the region committed themselves to take action against drug money laundering.[363] The governments agreed to consider the forty recommenda-

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[360] The number of participants in the task force increased to include Denmark, Finland, Greece, Ireland, New Zealand, Norway, Portugal, Turkey, Hong Kong and the Gulf Cooperation Council which includes Saudi Arabia, Kuwait, Bahrain, Oman, United Arab Emirates and Qatar. Intriago, EUROSTUDY *supra* note 2, at 17.

[361] For example, *bureaux de change*, check cashers and money transmission services, including those provided throughout correspondent relations outside the formal banking sector. *Id.*

[362] It is noteworthy that the targeted high-risk groups coincide with the indicia articulated by U.S. laws, regulations and judicial opinions. *Id.*

[363] The attenders included representatives of the governments of Aruba, the Baha-

tions of the G-7 FATF, plus twenty-one additional recommendations.

The CFATF recommended that confiscation measures apply to criminal proceeds and to precursor and essential chemicals, equipment and materials used for the illicit manufacture, preparation, distribution and use of narcotic drugs.[364] The CFATF's recommendations, like the FATF recommendations, do not have the effect of law and, therefore, do not obligate member countries to cooperate with each other in executing asset forfeiture requests.[365]

The second Caribbean effort is under the auspices of the Organization of American States (OAS).[366] In November of 1986, the OAS General Assembly approved the Interamerican Program of Action of Rio de Janeiro (Rio Program) against the illicit use and production of narcotic drugs and psychotropic substances and traffick therein.[367] The Rio Program defined national and inter-american measures required to fight drug trafficking.[368] The Rio Program urged the creation of a regional Interamerican Drug Abuse Control Commission (CICAD)[369] whose defined mission is to implement laws and regulations criminalizing money laundering, authorizing confiscation of drug-related money and property, and relaxing bank secrecy laws to facilitate drug investigations.

In 1990, at a meeting held in Ixtapa, regional representatives articulated CICAD's priorities.[370] In the area of money laundering,

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mas, Barbados, Bermuda, British Virgin Islands, Canada, the Cayman Islands, Columbia, Costa Rica, the Dominican Republic, France, Hondura, Jamaica, Mexico, the Netherlands, the Netherlands Antilles, Panama, St. Vincent and the Grenadines, Trinidad and Tobago, the United Kingdom, the United States and Venezuela.

364 *See* Zagaris, *Update*, *supra* note 267, at 481.

365 However, the recommendations do provide that countries should have the authority to seize, freeze and confiscate, at the request of a foreign state, property located in the jurisdiction regardless of whether the owner of the property or any person who committed the offense is present or has been present in the jurisdiction. *Id.*

366 *See* Charter of the Organization of American States, 2 U.S.T. 2394, T.I.A.S. 2361, 119 U.N.T.S. 3 (done at Bogota on April 30, 1948; entered into force on December 31, 1951), establishing the OAS as a regional agency.

367 This is significant because Bolivia, Colombia and Peru, the world's largest producers of cocaine, and the United States, the largest consumer of, and largest spender in, illegal drugs, are all members of the OAS. *See* Intriago, EUROSTUDY, *supra* note 2, at 38.

368 Top priority was aimed at measures designed to reduce demand for drugs, and included a preventive education, treatment and rehabilitation program. The program called for the unification of drug control agencies to plan, implement and coordinate comprehensive national policies and programs. The Rio Program emphasized the need for measures to align relevant legislation among OAS members authorizing forfeiture of assets derived from illicit drug trafficking, while controlling materials essential for manufacture of drugs and psychotropic substances, supporting crop substitution and eradication of illicit production, and the building of an effective system of cooperation among anti-drug agencies and decidual systems of member states. *Id.*

369 La Comición Interamericana Contra El Abuso de las Drogas. CICAD is an autonomous regional organization within the OAS.

370 The articulation of priorities occurred during the Interamerican Meeting of Ministers in Ixtapa, Mexico, where regional representatives approved the program of action of Ixtapa. At that time, the OAS issued a "Declaration and Program of Action" and eighteen

states should take action: (1) to emphasize the need for legislation that defines as a crime all activity related to the laundering of property and proceeds related to illicit drug trafficking and which makes it possible to identify, trace, seize and forfeit such property and proceeds; (2) to recommend that member states encourage banks and financial institutions to cooperate with the competent authorities to prevent the laundering of property and proceeds related to illicit drug trafficking, and to facilitate the identification, tracing, seizure and forfeiture of such property and proceeds; (3) to recommend the member states to develop mechanisms and procedures for bilateral and multilateral cooperation to prevent laundering of property and proceeds related to illicit drug trafficking and facilitate the identification, tracing, seizure and forfeiture of such property and proceeds; and (4) to recommend drafting model regulations in accord with the U.N. Drug Convention, including bank secrecy not getting in the way of law enforcement, as well as reporting requirements.[371]

In November of 1991, a group of experts met to develop model money laundering and asset forfeiture regulations for adoption as agreed upon by members at the Ixtapa meeting.[372] The group of experts is considering recommending a structure in which every country establishes a regulatory government authority with parallel national jurisdiction in order to promote international cooperation. Such national authority would then review requests by financial institutions to operate in its country, establish training programs, secure compliance with record-keeping and reporting requirements and create guidelines for the detection of suspicious transactions.[373]

Following United States jurisprudence on innocent ownership, the draft legislation allows innocent third parties — "claimants" — to assert a property interest in assets governments seek to forfeit.[374] The draft places the onus on the claimant to show: (1) innocence regarding the predicate offense; (2) lack of knowledge about and lack of consent to the illegal use; (3) s/he did all s/he reasonably could expect to prevent illegal use; (4) s/he was not willfully blind to the illegal use; and (5) s/he did not obtain the property from one con-

members, including powerful ones such as Brazil, Canada, Colombia, Mexico, Venezuela, and the United States subscribed to a resolution adopting the declaration. *See* Intriago, EUROSTUDY, *supra* note 2, at 58-9.

371 *See generally* Intriago, EUROSTUDY, *supra* note 2, at 59.

372 Thirteen national experts representing Argentina, Bahamas, Brazil, Canada, Chile, Colombia, Costa Rica, Jamaica, Mexico, Peru, the United States, Uruguay and Venezuela comprised the group. The group is to recommend to the member states that they encourage financial institutions to cooperate with the competent authorities to facilitate the identification, tracing, seizure and forfeiture or illegal proceeds from drug-money laundering.

373 *See* Gimenez, *Interamerican Measures to Combat Money Laundering: The OAS Model Regulations and Draft Mutual Legal Assistance Treaty*, 1991 Money Laundering Enforcement Update: Compliance and Enforcement Issues Course Materials 499, 505.

374 Intriago, EUROSTUDY, *supra* note 2, at 41.

victed of an offense under circumstances from which it reasonably could be inferred that the transfer was for the purpose of avoiding forfeiture.[375]

It is likely that the OAS model will follow the G-7, the CFATF and the U.N. Drug Convention model limiting initiatives to drug-related offenses. Significantly, thirteen OAS member states already ratified the U.N. Drug Convention.[376]

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Similar to the purposes behind United States legislation, the theory behind international agreements, regional efforts and domestic (foreign) legislation is that in order to be effective in the fight against drug trafficking and money laundering, policy must be broad-based. Regulations must enable the governments not only to obtain and to trace financial information but also to freeze, to seize and to confiscate the instrumentalities and profits or benefits received as a result of drug-related activity. The government can then prevent criminals from having the means to commit future crimes and can deprive them of the benefits of their illegal activity, and punish the venal conduct.

The similarity of concepts and principles among the United States initiatives, the U.N. Drug Convention, the FATF and CFATF recommendations, the CICAD initiatives, the Basle principles, the EC directives and the European Laundering Convention, all intended within a period of a few years, reflects the evolution of international theory. The substance of anti-money laundering enforcement laws by inter-governmental organizations and international organizations shows cooperation in information gathering and sharing. It also reveals the trend to criminalize drug-related activity by the enactment of remedies that are far-reaching, extending to provisional freezing and seizure of assets as well as ultimate asset forfeiture.

These initiatives also reflect a shift from zealous protection of privacy to aggressive, pro-active government intervention in all realms of international financial transactions. States willingly have ceded sovereignty prerogatives, such as application of domestic secrecy protections, to cooperate and render assistance in drug-related investigations. States even have agreed to modify domestic laws and

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375 Intriago, EUROSTUDY, *supra* note 2, at 41. Significantly, these provisions go beyond United States law in that they require proof of both lack of knowledge *and* lack of consent whereas the United States requirement is in the disjunctive. *See* 21 U.S.C. § 881(a)(4), (6)(7).

376 The OAS states that have ratified the UN Convention are: the Bahamas, Bolivia, Brazil, Canada, Costa Rica, Chile, Ecuador, Granada, Guatemala, Mexico, Nicaragua, Paraguay and the United States.

procedures to comply with bilateral and multilateral treaties.[377]

It is evident from these efforts that the international community has become united and focused in its effort to curb drug trafficking and related money laundering. In this endeavor the international community has adopted many of the approaches initially employed by the United States and critically denounced by others. These new global approaches, like the methods historically employed by the United States, such as enhanced record-keeping, know your customer standards, and suggested reporting requirements, particularly those related to indicia of "suspicious transactions" are invasive of an individual's hitherto sacrosanct financial privacy rights. Indeed, it is significant that most initiatives expressly provide that bank secrecy laws cede to the need to obtain information to fight the war on drugs. Unlike the United States efforts, however, those initiatives that limit the information-sharing and forfeiture proceedings to drug-related crimes are more focused and, to that extent, are preferable to those of the United States. The initiatives, nevertheless, broad as they are, have the effect of unduly eroding privacy rights.

VI. Enforcement Run Amuck — A Hypothetical Case Study: The Plight of José and Mariá Ciudadanos[378]

To bring to life the problems created for the average citizen by these global efforts to fight drug money laundering, it is illustrative to examine the hypothetical case of José and Mariá Ciudadanos. They are brother and sister and run the family business. Their parents are holocaust survivors who settled in Estado Libre,[379] South America after fleeing Europe during WWII. The family business is a travel agency, specializing in arranging tours of the Holy Land and in making travel arrangements for those who choose to go to the United States for medical treatment (Mayo Clinic and the like). As part of, and as a supplement to, the travel agency business, José and Mariá also operate a money exchange house called a cambio. The cambio operates in the parallel market where the rate of exchange is more beneficial than the official rate set by the Banco Central, the rate used by the government regulated financial institutions.[380]

Within the South American financial community, as a matter of custom and practice, cambios perform quasi-banking functions in-

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[377] *See, e.g.*, UN Drug Convention, *supra* note 5 (states agree to pass domestic legislation criminalizing drug trafficking and related money laundering).

[378] English translation: Joseph and Mary Citizen.

[379] English translation: Free State.

[380] In South America, as a matter of custom practice, the parallel market is generally either tolerated or encouraged by the government. For example, in Chile the parallel market has been instrumental in that country's reduction of its foreign debt. Its legitimacy was confirmed by regulation. Similarly, in other non-drug economies, such as Venezuela and Argentina, the parallel market exists and is not only tolerated by the government but it has been expressly legitimized by law.

cluding the making of overseas payments on behalf of clients. Cambios generally maintain accounts in United States dollars and/or other hard currencies for a myriad of business purposes including trading in foreign currencies and hedging against high inflation rates common in many South American countries. Cambios also sell cheques and traveller's cheques and make foreign remittances.

Cambistas make deposits by instructing a third-country bank to wire funds to a customer's account in the United States. In some instances, cambistas may purchase money and deposit it in a third-country bank account from others who are selling money. This money then is wired either to the cambista's non-trading account and then on to the customer's account or directly to the customer's account. Cambios usually split commissions or co-broker deals with other cambios. All the customer knows is that his/her money has been transferred to his/her bank. Thus, keeping United States dollar accounts is a common occurrence. This practice permits foreign exchange houses to pay the United States dollar remittances they sell, and to issue, as well as to accept, the proceeds of cheques in United States dollars and traveller's cheques that cambios may purchase.

As is the common practice, José and Mariá have accounts in United States Bank which they use not only for their exchange business but also to pay for hotel reservations and other expenses related to the travel agency. They also have personal accounts in United States Bank. They explain that they prefer to keep their money in the United States because of their family history and because of the currency instability and high inflation rates in Estado Libre.

One day, without warning of any impending problem, José and Mariá receive a call from United States Bank apprising them that their funds in their business and personal accounts have been frozen. Apparently, Cambio Sucio,[381] located in another South American country, has wired funds back and forth with Cambio Limpio,[382] another exchange house in Estado Libre, with which their cambio, Cambio José Mariá, does business and co-broker deals. Significantly, José and Mariá were not even aware of the existence of Cambio Sucio.

Simply, the problem arises from the fact that money is fungible — making it the rarest of cases where someone's own cash is deposited in his/her account. Rather, what goes into a person's account is money from another source. Therefore, unless a person individually makes every deposit into an account — a practice that in the business world is at best a fantasy — there is a risk that one's clean money has been commingled with dirty money. Notably, it is virtually impossi-

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[381] English translation: Dirty Exchange House.

[382] English translation: Clean Exchange House.

ble to know the source of a customer's funds or a co-broker's funds. Nevertheless, if the government can trace *any* dirty money into an account, the government can freeze or seize the entire account, regardless of the account owner's innocent owner status or the account owner's complicity in the underlying offense.

José and Mariá, as is common in Latin America and particularly in their business, bought United States dollars in the parallel market and deposited these monies in their bank accounts. This parallel market notion does not exist in the United States. More significant, however, is the fact that irrespective of its legitimacy in Latin America, the parallel market is seen as illegitimate in the United States. In fact, in an investigation in which this author participated, United States government representatives stated that if all cambios went out of business and the parallel market were obliterated it would be seen by United States authorities as a blessed occurrence. The United States' view, which becomes indicia of illegal conduct, is that parallel market funds are inherently suspect.[383]

Shocked, not to mention penniless, as virtually their whole net worth has been frozen, José and Mariá call the United States Counsel, tell their story and seek advice. Most likely, the United States Counsel, at best, will be able to tell them they are between a rock and a hard place.

Certainly, Counsel first will tell them that they have a right to reclaim their funds by showing they are innocent owners. Then, however, she must tell them that the government may seek to stay the innocent owner proceedings for an extended period pending resolution of any parallel criminal investigation. And Counsel also tells them that if the funds can be traced to a drug transaction, no matter how distant to their legitimate transactions, the government can seize the bank account without showing that José and Mariá actually knew the funds were linked with drug proceeds. Further, United States Counsel must tell José and Mariá about indicia — that the United States government is likely to take the position that anyone who deals in the parallel market is not an innocent owner.

When José and Mariá ask when they might have access to their funds, counsel tells them that pending resolution of all proceedings, the funds will remain frozen. Thus, José and Mariá may even lack the funds to retain counsel as their entire net worth is in the frozen accounts. Moreover, José and Mariá will learn that their entire account, and not just the traceable proceeds, are forfeitable if the court deems that the legitimate money provided cover for tainted funds, thus facilitating money laundering. And it does not matter that they were neither principals nor co-conspirators in the alleged criminal

[383] *See* McGuirk & Tannenbaum, *Frozen Money*, 1991 Money Laundering Enforcement Update: Compliance and Enforcement Issues Course Materials 458.

activity.[384]

Counsel must explain that the objective of forfeiture laws is not to give the government the power to freeze and seize money in the hands of criminals.[385] Rather, the goal is much broader and the initiatives extend far beyond drug traffickers and traditional notions of money laundering. Receipt and deposit of criminally derived funds even if for legitimate purposes, so long as these are traceable proceeds, is also criminalized. Apparently, government representatives do not care if all foreign investors withdraw their deposits in United States banks, accepting instead that "a war on flight capital is inevitably part of the government's war on drugs because money launderers, as well as legitimate people, use the 'parallel market' in transferring money to the United States. The fact that there are innocent foreign investors involved is unfortunate; but in a war there are casualties."[386] When José and Mariá ask on what factual evidence their money was frozen, counsel may well have to explain that she does not know. But she further might have to explain that the basis for the government's action could be inadmissible hearsay from an unidentified source that likely will not appear at a hearing.

José and Mariá are victims of a system of justice run amuck. Globally, it appears that the decision is firm — fight drugs at all costs. José and Mariá are but casualties of this war. It is impossible to ascertain how many Josés and Mariás fall prey to this war every day. Their indictment and conviction is made possible courtesy of the erosion of privacy and the use of indicia.

Note the government "got" them by making United States Bank, their safety harbor in business and personal economic security, reveal their business and personal financial practices. The government also prevented United States Bank from letting José and Mariá know that information regarding their financial transactions was requested. The investigation could be wholly based on inadmissible hearsay. Evidence used against account holders can only be indicia of bad acts — use of the parallel market — a practice that is neither illegal nor shady but, rather, is a normal business practice for José and Mariá. This plight is a result of "a mental attitude that has been ingrained in investigative and legal authorities working in the area of drug related offenses which seems to justify any and all actions taken in the name of . . . combatting drug wars."[387]

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384 *See* United States v. All Monies ($477,048.62 in Account No. 90-3617-3), Israel Discount Bank, 754 F. Supp. 1467 (D. Haw. 1991) (court interprets "property involved in" violations of money laundering statutes that is subject to forfeiture pursuant to 18 U.S.C. 981(a)(l)(A) to include all property that "facilitates" money laundering offenses).

385 *See generally* 18 U.S.C. §§ 1956-57.

386 Milne & Lovenzen, *Counseling the Depositor*, 1991 Money Laundering Enforcement Update: Compliance and Enforcement Issues Course Materials 269 n.l.

387 Armstrong, *An Update of Panamanian Legal Efforts Against Drug Offenses*, 1991 Money

This over-zealous enforcement attitude shackles its victims. José and Mariá, without funds, have no real opportunity to mount an adequate defense. Forget for a moment that with no assets they cannot run their business to generate income. Without assets they cannot hire a lawyer. And even if they could, they would have the onus of showing that they are innocent owners, an onus that is impossible to bear when the established rules use indicia which hold that users of the parallel market cannot be innocent owners. In addition, they are saddled with the indicia, believed by the government, the judge and the public, particularly with respect to well-to-do Latin Americans with assets in the United States, that if your account was seized you must have been involved in drug trade. This is justice standing on its head.

So what happens to the Josés and Mariás caught in this broad net? Well, likely they will settle for large sums. At least it will end the ordeal of litigation and return to them some of their assets not to mention peace of mind and personal dignity. Forget the harm to their reputation, both at home and in the United States. But what about the rest of their lives? Certainly, to continue in business will subject them to the cycle starting all over again.

More significantly, how do these actions affect the war on drugs? Other than enrich government coffers so that there can be more fishing expeditions, the answer is not much, if anything at all. "Getting" Josés and Mariás is not going to have an impact on the traffick or consumption of drugs. No evidence exists that the enactment and enforcement of reporting and forfeiture laws has in any way curbed the drug activity at which they are aimed. The purpose of civil forfeiture — "to deter and punish criminal activity"[388] — is in no manner furthered by proceeding civilly in a case where there is doubt as to the criminal culpability of the persons whose accounts are frozen. Rather, these actions have no bearing on the government's purpose of "depriving the wrongdoer and the criminal community of property that has been or will be useful in perpetuating or rewarding illegal activity."[389]

Clearly, anti-drug enforcement efforts in certain circumstances are, at best, misdirected; and at worst, are overly broad. In all events, these dragnet-style investigations and attempts at law enforcement unduly trammel privacy rights without any appropriate basis. The following section details a proposal that will allow the

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388 *See* Vol. II Department of Justice Manual on Asset Forfeitures (hereinafter Dept. of Justice Manual, *Asset Forfeiture*, (Prentice-Hall Law & Business) Vol. 11, B-44 (1990-2 Supp.) (emphasis in original deleted)).

389 *Id.*

legitimate war on drugs to proceed while protecting others that have been caught in the overly-zealous fishing expeditions.

VII. A Proposal for a Balanced Approach

It is indisputable that drug trafficking and drug-related money laundering are venal activities. Consequently, joint international efforts to eradicate such conduct are appropriate. However, current efforts fail to protect adequately individuals' right to privacy, and rather than a system of justice, many, like José and Mariá, are experiencing over-zealous enforcement. The following proposal seeks to strike a balance — protecting individuals' privacy and allowing governments domestically and internationally, to fight undesirable activity.

First, the appropriate scienter standard is "knowledge" as proposed by the G-7. This is a higher standard than has been applied, for example, under the United States forfeiture laws, but yet, allows flexibility because knowledge may be inferred from facts, thereby not shackling the government against astute criminals. But the facts from which enforcement groups may infer wrongdoing must be real facts, not indicia of wrongdoing. A knowledge standard also offers a higher level of protection for an individual than is presently provided under the United States' interpretation of the forfeiture laws which appear to allow an inference of misfeasance based on a light negligence standard — much less than the willful blindness concept that Congress originally had in mind. Moreover, in recognizing that actors in the international financial world are many and diverse, different standards of knowledge should be applicable. A lesser knowledge standard (*i.e.* more liberal allowance of inferential proof), is warranted for direct participants, while a more stringent standard (direct factual basis of knowledge), is appropriate for those whose nexus with the dirty money or its traceable proceeds is more attenuated.

Next, in order to protect against using "indicia" to prove illegal conduct, all international efforts should contain "dual criminality" provisions. Such provisions would be safeguards against overzealous efforts and would protect individuals from inferences of "bad conduct" based on culturally-biased or insular grounds. This requires, of course, that governments be culturally sensitive, rather than arrogant, and look at the legitimacy of acts from which inferences can be drawn accordingly. This is the application of lessons that should have been learned long ago — dating to the early United States experiences such as the *Santa Fe* case and the Swiss tax fraud cases.

Third, Memoranda of Understanding between and among sovereigns should set forth the express goals of their agreements (*i.e.*, deterrence of drug trafficking and drug money laundering). This clarification of goals sets the parameters of cooperative efforts and prevents the abusive use of such agreements as carte blanche to conduct broad-based fishing expeditions or culturally biased inappropriate investigations. These memoranda should require periodic analyses of whether the actions proscribed are effective in furthering the goals of the agreements. If the actions being taken fail to further the stated objective of eradicating drug trafficking and drug money laundering then the approaches should be redesigned. If the governmental actions do not further the goals, their allowance of privacy invasions should cease.

In addition, forfeiture actions and interim remedies should be limited to primary actors or to those against whom direct, admissible evidence of wrongdoing exists. Any proof lacunae in the nexus that must be established between the actor and the proscribed conduct must be established by the government with factual proof and not with innuendo or indicia. In all events, in forfeiture actions the government must bear the burden of proof. It must be the government's obligation to establish that a frozen account holder is not an innocent owner rather than require the person whose funds are frozen to establish the absence of any relationship to the activity that tainted the funds. This would require a change in the United States law and the proposed Caribbean legislation. The government also should have to establish what, if anything, a person realistically could have done to avoid the "traceable proceeds" coming into his or her account.

The roles of banks and financial institutions must be carefully reconsidered. Presently, the "know your customer" and "suspicious transaction" requirements both place too much of a burden on these institutions and, simultaneously, give them too much power. The burden is too great because a bank or financial institution particularly with the use of indicia running rampant, never can know when it will be deemed to know its customer well enough. It also gives the financial institutions too much power because, conjoined with the "suspicious transactions" reporting obligations, the banks and financial institutions become pseudo enforcers. These regulations encourage over-disclosure at the expense of an individual's privacy, particularly when financial institutions seek to protect themselves against liability and can act without any fear of private action by the person whose financial information is disclosed so long as the financial institution acts in good faith.

In this regard, the "suspicious transaction" reporting requirements should be limited to those instances where the suspicions are grounded on facts that provide knowledge of the customer's involvement in the specified targeted activities — that is, drug-related crimes. Indicia should be disallowed as the sole basis for reporting transactions as suspicious. It is absurd and offensive that wrongdoing would be presumed by virtue of the origin of the funds or the nationality of one or more of the transacting parties.

To assist where financial institutions have questions about customers or transactions, an independent advisory board consisting of experts who are representatives of various states and financial institutions should be established. This board could serve as a clearinghouse for indicia and could be used as a buffer between a financial institution and an official government investigating body. When a question arises as to whether the financial institution has taken sufficient steps to satisfy the "know your customer" requirement or has information that triggers the "suspicious transaction" reporting requirement, the factual scenario can be submitted to the board for an opinion, without invading the customer's privacy by divulging his/her identity. The opinion, issued by experts in the field after collective consideration and discussion of the facts, would then provide financial institutions guidance with respect to their ensuing responsibilities without making them the police. Moreover, the opinions of this body would, over time, provide guidance and uniformity in analyzing and developing guidelines regarding acceptable conduct that will be helpful not only to banks but also to customers. Indeed, individuals also ought to have access to the experts to obtain advice regarding appropriate conduct in the international financial system. The clearinghouse can operate at the international level or at a regional level and it can simply become part of the existing international and regional initiatives.

Finally, governments must be made responsible for their actions. First, governments must clearly articulate the nexus of any accountable investigated actions to objectionable conduct. For example, if a particular activity is a business practice in a foreign jurisdiction, the investigating government's subjective view that such conduct is indicia of proscribed conduct should not be elevated to being proof of the proscribed acts. A clear example is the United States view of parallel market money exchanges in South America. While in the United States such conduct might not be acceptable, the United States should not be able to deem the conduct unacceptable regardless of where it takes place — money exchange in a grey market is acceptable and appropriate business conduct in many foreign jurisdictions. Similarly, governments must have "admissible" proof of wrongdoing before they are allowed to proceed with forfeiture actions or take advantage of available provisional remedies. Victims of overzealous government actions should have access to relief. Governments should be liable to individuals for unwarranted intrusions into their privacy.

Implementation of these seven proposals will have a de minimis effect on anti-drug enforcement initiatives while going a long way to protect the right of privacy. Banks will have a source of guidance that will largely eradicate over-reporting instincts. Governments will rightfully bear the burden of showing wrongdoing before proceeding with actions and this will curtail ill-founded fishing expeditions. The Josés and Mariás who travel the international financial world will enjoy a higher level of protection.

VIII. Conclusion

It is apparent from the discussed approaches to the fight against drug trafficking and money laundering that the privacy protection of individuals has come full circle. Initially, states such as Switzerland and the United Kingdom zealously protected individuals' privacy based on bank secrecy rules that articulated the individuals' rights. Privacy rights were protected to such an extent that, based on notions of sovereignty and comity, states would enact blocking statutes to impede access by foreign sovereigns, notably the United States, to "private" information located within their borders. With the war on drugs, this state protection of individuals succumbed to the need for international cooperation with respect to the transfer of information between and among sovereigns that might well include some "private" information. Sovereignty, too, has ceded to information sharing initiatives. The pendulum has swung too far. The blueprint described in part VII provides a more acceptable balance.

The United States and its Western European allies have acted rapidly to criminalize drug-related money laundering. The efforts have included the establishment of instrumentalities to monitor, investigate and eradicate money laundering by way of international and regional agreements. These agreements provide mutual legal assistance, including more efficient and rapid extradition; monitoring of cash movements; enhanced enforcement by providing for the ultimate forfeiture and the interim seizure of assets suspected to be involved in, or are the fruits of, covered transactions. In addition, broad information share is available through record keeping and reporting requirements imposed on banks and their employees, including encouragement to report and protection against liability regarding reporting of "suspicious customer transactions" — transactions that may be so classified depending on the nationality of actors, the type of transaction, or the volume of money, regardless of the tenuous nexus to venal drug trafficking activity. Bank secrecy, and consequently privacy, ceases to be a governmental concern in a money laundering investigation.

Thus, bank secrecy and the right to financial privacy, as well as sovereignty principles, are subordinated to the need to obtain information concerning possible drug money laundering activities. The trend internationally is clearly not to stop at drug-related money laundering, but to criminalize money laundering where it is related to other kinds of serious criminal activity. If this trend continues, financial institutions simply will be another branch of government enforcement agencies, with bankers deputized as pseudo-cops. In the end, the fundamental human right of privacy is hopelessly endangered.

In this context, it should be recalled that the legislative history of the United States legislation is clear: negligent involvement is not, and ought not be, punishable. This is the supposed safety net for innocent individuals whose fungible money accidentally becomes tied to dirty money. However, as the domestic and international laws have evolved, mere indicia of illegality is sufficient evidence for reaching out and invading an individual's privacy.

A gravely disconcerting problem is the nature of the indicia used to focus on, or to point to, the individual's involvement. The use of such indicia by the United States historically has been troublesome[390] because the concepts underlining the nature of illegality in different jurisdictions are not always completely compatible. Yet, notwithstanding the past global disdain for the United States' overreaching approach, rather than eschew notions of guilt by indicia, fellow combatants in the drug war have embraced these notions.

This notion of indicia — that which is or might be wrong, not under fact-finding standards, but under skewed presumptions — is paramount in dealing with international drug trafficking and money laundering problems. In this context, the scienter standard of the United States forfeiture laws, now being incorporated in the international arena, will not protect any legitimate business person from persecution. Regrettably, the use by the United States of its forfeiture laws can easily result in a business person being entangled in a seamless web where the knowledge requirement is met simply because of the surrounding circumstances. This concern is now greater because of the expanded forfeiture provisions in the international sphere where the lessons that may be learned from the problematic United States experience ought to be considered.

Under United States law, once the assets are frozen, it is the onus of the property owner to establish that there indeed is no nexus between the property and the proscribed activity or that s/he is an "innocent owner," *i.e.*, if there is a nexus to the proscribed activity it was without the owner's knowledge or consent. Either way, to free her/his property an owner must establish a negative which is a vir-

390 *See, e.g.*, notes 121-126 and accompanying text (describing the attempted use of indicia by the United States in prosecuting securities and tax violations).

tual impossibility. Some international initiatives are incorporating this approach.

Moreover, a legitimate business person may find him/herself in the unenviable position of having to come forth and disprove a government case which may well be based on hearsay and indicia of wrongdoing. These circumstances can be exacerbated when, as is often the case, the person whose assets were frozen is from a different culture with different customs and ways of conducting business. These simple differences may become absolute proof of wrongdoing. Such circumstances, compounded by the fact that the individual's activity no longer enjoys privacy protection, places the individual in an untenable lose-lose proposition in which s/he can neither prove a negative nor claim the protection of privacy.

This emerging international anti-money laundering scheme has eroded the right to financial privacy beyond acceptable levels. Throughout the globe, exceptions have been imposed on the previously sacred right to financial privacy while embracing indicia of culpability. Pursuant to the requirements to "know your customer" and to evaluate transactions for their "suspicious" nature, professionals in financial institutions must invade their customers' privacy or themselves be subject to punishment.

For example, with respect to the "know your customer" requirement, financial institutions must keep detailed information about customers and their transactions. In the United States and Australia, the information not only must be obtained but it also must be transmitted to financial enforcement agencies who compare the information against computerized information and can then use it as the basis for further investigations. Other countries have proposed more limited types of customer identification requirements. But even Switzerland, historically the leading money laundering center, no longer allows registered intermediaries, such as lawyers and accountants, to accept money on behalf of clients without disclosing the identity or the needs of such clients.

Similarly, professionals and their employees are obligated to report so-called suspicious transactions. Failure to report such transactions may subject the persons to criminal penalties. This requirement eliminates, among other things, the traditional attorney-client-like privilege, whereby bankers and professionals normally did not inquire into transactions and the background of their clients. In this respect, the use of indicia to establish the suspicious nature of the transaction is troublesome, particularly in light of the absence of any evidence that all these intrusive governmental actions are having any impact at all on the drug trade.

It is evident that both at the national and international level, nations have to take steps to curb and eventually eliminate the destructive activities of drug trafficking and money laundering. However, it is apparent also that in so doing at a global scale, states have overstepped appropriate bounds and thus have trammelled the right of privacy. The proposal set forth above provides a balanced approach which permits law enforcement initiatives while protecting individual privacy rights. The importance of both the government interest in drug related interdictions and personal privacy rights warrants such an approach. International efforts must have a global perspective rather than an insular perspective. States must develop understandings of each others cultures and practices in order to deal effectively with each other and, consequently, with international ills. Some of the international efforts take this route and the United States should follow suit; all should remember and protect the precious origins of individual privacy rights.

Postcript

After this Article was typeset for publication, former President Bush quietly signed into law the "death penalty" legislation discussed above at notes 161 through 168 and accompanying text. Surprisingly, this new act, promulgated to supplement all existing anti-money laundering statutes was passed as part of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992).

The death penalty legislation adopted the House version of the bill by providing that a financial institution may lose the ability to do business in the United States only if there is an actual conviction for a money laundering or Bank Secrecy Act violation. The Charters of U.S. banks may be revoked, the deposit insurance of state banks may be revoked, and the state branches and agencies of foreign banks may be terminated. To this end, the law considers five factors similar to the ones suggested by the House bill.