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The Bank Secrecy Act: Privacy, Comity, and the Politics of Contraband

James E. Eldridge

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I. Introduction

The acquisition of profit can be a self-perpetuating process; a successful expansion of a lucrative enterprise should result in increased gain. Ideally, this process can continue ad infinitum and is as relevant for the successful sole-proprietor as it is for the largest corporate entity. Unfortunately, these principles are equally applicable to criminal conduct when the motive for criminal activity is economic
gain. Whether it results from organized behavior or individual actions, the white-collar crimes of tax evasion, money laundering, and securities fraud substantially impact on the U.S. economy. The full extent of the problem is still being evidenced, and its documentation is dependent upon a strong investigative tool.

In 1970 Congress provided federal law enforcement agencies with such a device. The Bank Secrecy Act (BSA) is an effort to alleviate the negative impact nationwide criminal activity has on interstate and foreign trade. The Act, a delegation of commerce clause power, authorizes the Treasury Department to mandate detailed record keeping and reporting requirements for anyone engaged in specified currency transactions with U.S. financial institutions. These requirements result in a paper trail whereby the transactors' identities and behavioral patterns become ascertainable. This investigative scheme is designed to penetrate secret bank accounts of suspected criminals so that potentially inculpatory evidence may be obtained.

The BSA is a controversial act. Its broad provisions are challenged as overreaching and impermissible governmental abridgements of legitimate privacy interests. A second problem area arises from the BSA's preclusion of domestic bank secrecy—criminal financial activity simply moves offshore beyond the jurisdictional reach of U.S. agencies. This has led to extraterritorial applications of the BSA that are controversial and disruptive of U.S. foreign affairs.

This article first discusses these issues and provides an overview of the Bank Secrecy Act. Section II reviews the need for, and the structure of, the BSA. A discussion of the issues posed by BSA's broad provisions follows. The article concludes with a review of the still current issue—is the Bank Secrecy Act constitutional?

II. Overview of the Bank Secrecy Act

A. Background

The concept of banking in secrecy often invokes images of Swiss bank accounts. Indeed, the Swiss model, originally intended to protect Jewish accounts from Nazi confiscation, is the prototype for most modern secrecy law. As a general rule, available bank secrecy is often supplemented by tax laws that impose a zero or low tax rate on foreign funds held in the jurisdiction. The combined effect results in the existence of offshore secrecy havens that provide for the confi-

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1 See infra note 23 and accompanying text.
2 See infra notes 27-53 and accompanying text.
3 See infra notes 62-89 and accompanying text.
dentiality of financial and commercial information. Many of these secrecy havens have statutory prohibitions against disclosure of the identities of account holders. This prohibition often extends to identification of the corporate entity that owns the financial institution. The effect of this secrecy is to inhibit and prevent the discovery of the parties having a real interest in the financial transaction. Thus, financial secrecy precludes effective investigation of suspected criminal behavior. This problem is compounded when the holder of the account is a dummy corporation established by the real party in interest.

Another feature of these havens is the positive influence financial secrecy has on the local economy. The availability of confidentiality attracts large amounts of capital, which has a beneficial impact on local trade and commerce. One example of this ripple effect is the resultant growth of finance-related service industries such as legal counseling and business accounting. Therefore, combined with the investigative obstacles posed by financial secrecy is the favored status of secrecy laws by local governments because of their beneficial economic impact. An example of this attitude is the lack of offshore cooperation that often exists when U.S. criminal investigators attempt to pierce this cloak of secrecy.

Unfortunately, offshore financial secrecy havens, by their nature and economic effect, serve as sanctuaries and depositories for the profits of "white-collar" crime. In the 1980s the problem is becoming increasingly complex due to the economics of illegal narcotics trafficking. The problem is not, however, new. Extensive congressional hearings in 1968 and 1970 documented the close relationship between secrecy havens and criminal activity. Testimony from sev-

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5 Id. at 8.
6 Id.
7 Id. at 9. Despite a lack of complete agreement the following countries are generally considered offshore secrecy havens.
Caribbean and South Atlantic area: Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Costa Rica, Grenada, the Netherlands Antilles, Panama, St. Kitts, St. Vincent, and Turks and Caicos Islands.
European, Middle Eastern and African area: Austria, Bahrain, Channel Islands, Gibraltar, Isle of Man, Liberia, Lichtenstein, Luxembourg, Monaco, the Netherlands, and Switzerland.
Far Eastern and Pacific area: Hong Kong, Nauru, New Hebrides, and Singapore. Id. at 10.
9 Foreign Bank Secrecy: Hearings on S. 3678 and H.R. 15073 Before the Subcomm. on Finan-
eral government agencies revealed the nexus between available secrecy and the crimes of tax evasion, federal securities fraud, and the laundering of "dirty" (illegal) profits into "clean" (legal) money. Each agency reiterated the need for a strong regulatory tool to trace, investigate, and effectively prosecute the criminal activity evidenced by these secret accounts.\textsuperscript{10}

Much of the testimony presented to Congress focused on how secret bank accounts create a significant obstacle to investigations of federal securities law violations. For example, the Securities and Exchange Commission (SEC) traditionally proves security law violations by tracing the distribution of a security's original issuance to its destination in the investing public's hands. Conversely, the proceeds from the distribution are traced back to the promoters. When the distribution of stock or proceeds is channeled through secret bank accounts, however, it is impossible for the SEC to acquire sufficient evidence to establish the identity of those having a beneficial interest in the issue or of those parties sharing in the distribution proceeds.\textsuperscript{11}

Market operators conceal their purchase and sales through brokerage accounts maintained by foreign financial institutions. Numerous Swiss banks maintain accounts with U.S. brokerage houses and execute clients' buy and sell orders while maintaining their confidentiality.\textsuperscript{12} A major concern is how this arrangement violates existing margin requirements, which are considerably lower for financial institutions. The potential exists for the client to buy and sell on the coattails of the institution with no effective way to check or document suspected violations.\textsuperscript{13} U.S.-based operators can also channel their transactions through the foreign institution by establishing dummy corporations which maintain secret accounts.\textsuperscript{14} Thus, by relying on foreign-based market transactions or by channelling the proceeds from illegal domestic-based transactions into secret bank accounts, market participants can avoid detection of registration, anti-fraud, and market manipulation regulations. An added incentive is the ability to evade payment of taxes on the illegal profits.\textsuperscript{15}

\begin{thebibliography}{9}
\bibitem{11} 1968 Hearings, supra note 9, at 9.
\bibitem{12} Id. at 13-14.
\bibitem{13} Id.; see generally 1970 Hearings, supra note 9.
\bibitem{14} See 1968 Hearings, supra note 9, at 15.
\bibitem{15} Id. at 9. The full extent of the problem is difficult to measure due to available secrecy, but it is relevant to note that in 1969 foreign-based purchases of U.S. securities totaled nearly $12.5 billion. This total represented almost 9% of the New York Stock Exchange volume in that year. 1970 Hearings, supra note 9, at 74 (statement of Mr. Homer H. Budge, Chairman, Sec. and Exch. Comm.).
\end{thebibliography}
During the congressional hearings the SEC expressed considerable concern over the effects of this criminal activity on the U.S. stock market's reputation for honesty, integrity, and fairness. These standards are safeguards for the investing public, and their absence poses the risk of significant economic injury to an innocent and relying public. The repercussions of such injury can result in a worsening of market conditions which in turn impacts adversely on the nation's economic well-being. An additional concern is the undesired leverage represented by the estimated hundreds of millions of dollars of illegal profits thought to exist in secret bank accounts. A sudden and undesired influx of this hidden capital would produce destabilizing market conditions and increase concern over the investing public's welfare and the nation's balance of payments problem.

Criminal reliance on offshore secrecy havens, however, is not limited to those who violate existing securities law. Another major problem is the use of bank secrecy for effectuating transnational money laundering. Although the process takes many forms, a typical example was outlined in the congressional hearings. Illegally obtained monies are deposited in a secret bank account in an institution owned by the criminal entity. The laundering begins with an otherwise legitimate borrowing of money from the foreign bank by the original depositor. This money is then lent to an officer of the criminal entity. There are several benefits from this arrangement. The financial institution collects the profits from the original loan contract. The corporation, in paying back the loan, deducts its interest payments on its current tax forms, and the beneficiary of the corporate loan deducts the interest paid the corporate lender. Most significantly, the dirty money resurfaces as clean money ready for legitimate or illegal investment. The inability to pierce both the bank secrecy and the corporate veil hides the identity of the bank's real owners in interest and renders federal law enforcement efforts impotent.

One final problem area is noted. Offshore bank secrecy is also the haven of the tax evader. Even if account secrecy is pierced and the depositor's identity revealed, a successful prosecution will not reach the assets housed in the foreign account. For the Internal Rev-

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16 1970 Hearings, supra note 9, at 79-81 (statement of Mr. Homer H. Budge, Chairman, Sec. and Exch. Comm.).
17 Id. at 247 (statement of Robert M. Morgenthau, New York).
18 1968 Hearings, supra note 9, at 17. Only the lack of criminal imagination limits the use of bank secrecy. Secret bank accounts have been used by diamond smugglers, loan sharks, policy operators, bribers of public officials, international spies, and gamblers. Id.
19 1970 Hearings, supra note 9, at 57-58 (statement of Will Wilson, Assistant Attorney Gen. Dep't of Justice). The financial press recently reported on a large scale money laundering business based in Panama where millions of dollars were laundered for the head of a marijuana smuggling ring. Brannigan, Panama Tangle, Wall St. J., Apr. 17, 1986, at 1, col. I.
N.C.J. Int'l L. & Com. Reg. 11:672

enue Service, it is a no win situation further complicated by the high costs associated with unsuccessful investigation and litigation.\textsuperscript{20}

The conclusion reached by Congress in the early hearings was summarized by Robert Morgenthau, U.S. Attorney, Southern District of New York: "Secret-numbered foreign bank accounts have become an ever increasing widespread and versatile tool for the evasion of our laws and regulations and for the commission of crimes by American citizens and for hiding the fruits of crimes already committed."\textsuperscript{21}

This wave of criminal activity is fostered by the failure of fairly complete criminal investigations to ripen into prosecutions because there has been no disclosure of the real parties in interest; investigators cannot point to any particular individual. Even if identity is revealed, the evidence remains inadmissible hearsay. Most modern secrecy law prohibits the banker from coming forth with the disclosure. Thus, the prosecution lacks the competent and qualified business representative who could state evidence of account information as a business records exception to the hearsay rule.\textsuperscript{22}

In response to the public outcry over this reported criminal activity and as a means of providing federal law investigators with an effective investigative tool, Congress enacted the Bank Secrecy Act (BSA).\textsuperscript{23}

B. The Act's Regulatory Scheme

Prior to the enactment of the BSA, the only currency information reported to the Secretary of the Treasury was unusual transactions. Compliance was voluntary and penalties were not imposed for failure to report. In contrast, the Bank Secrecy Act provides for mandatory recordkeeping and reporting.\textsuperscript{24} This regulatory structure is designed to be used as an investigative tool in the fight against white-collar crime, and its passage is a broad delegation of commerce power to the Treasury Department. Title I of the Act authorizes the Secretary of the Treasury (Secretary) to require financial institutions to record vast amounts of information on financial transactions.\textsuperscript{25} Title II provides regulatory access to the information via required reporting by the financial institutions and expressly authorized governmental interagency exchange of the accessed information.\textsuperscript{26}

\textsuperscript{20} 1970 Hearings, supra note 9, at 278-79 (statement of Anatole Richman, former employee of the Internal Revenue Service with 11 years investigative experience).

\textsuperscript{21} 1968 Hearings, supra note 9, at 11.

\textsuperscript{22} Id. at 11-12.


\textsuperscript{24} 31 C.F.R. § 102 (1972).

\textsuperscript{25} See infra notes 27-40 and accompanying text.

\textsuperscript{26} See infra notes 41-54 and accompanying text.
1. Title I Recordkeeping Requirements

Title I of the BSA, as well as the applicable regulations,\(^\text{27}\) authorizes the Secretary of the Treasury to prescribe recordkeeping regulations for (1) insured banks, or for any person engaged in the business of check redemption, issuance of money orders, or travelers checks (2) for persons operating credit card systems or currency exchanges or (3) for any institution performing similar, related, or substitute functions.\(^\text{28}\) These requirements are designed to provide adequate information to reconstruct a customer’s financial account and trace currency transactions within that account. They derive from a congressional finding that such account information is of substantial usefulness in criminal, tax, and regulatory investigations.\(^\text{29}\) This “high degree of usefulness” standard is also the test for the Secretary’s determination that additional records may be required under Title I.\(^\text{30}\)

Title I requirements are broadly stated in statutory form, and are specified in the Code of Federal Regulations.\(^\text{31}\) Financial institutions are required to record all major currency or extension of credit transactions.\(^\text{32}\) The identity of any person having a financial interest in foreign accounts must also be recorded.\(^\text{33}\) The regulations seek to set up recording systems for tracing all large deposits for up to two years.\(^\text{34}\) Thus, the institutions must copy the front and back of checks in excess of 100 dollars.\(^\text{35}\) Each financial item transaction of more than 10,000 dollars that is remitted or transferred to a person, account, or place outside of the United States must also be recorded.\(^\text{36}\) This requirement includes recordation of checks or drafts in excess of 10,000 dollars drawn or issued by a foreign bank which a domestic bank has paid or presented for payment.\(^\text{37}\) These regulations also extend to certificates of deposit. The name, address, and taxpayer identification number of each purchaser of a certificate must be recorded along with a description of the instrument, including the manner and date of payment.\(^\text{38}\) The regulations impose additional requirements for casinos and brokers and dealers in securities.\(^\text{39}\) Title I records are to be kept for a period of five years.\(^\text{40}\)

\(^{27}\) See generally 31 C.F.R. § 103 (1985).
\(^{28}\) See 12 U.S.C. §§ 1730d, 1829b(b), 1953(a) (1982).
\(^{30}\) Id. § 1953(a).
\(^{31}\) See generally 31 C.F.R. § 103 (1985).
\(^{32}\) Id. § 103.33(a)-(c).
\(^{33}\) Id. § 103.32.
\(^{34}\) Id. § 103.34.
\(^{35}\) Id. § 103.34(b)(3).
\(^{36}\) Id. § 103.34(b)(5)-(6).
\(^{37}\) Id. § 103.34(b)(7).
\(^{38}\) Id. § 103.34(b)(11).
\(^{39}\) Id. § 103.36.
\(^{40}\) Id. § 103.37(c).
2. **Title II Reporting Requirements**

Title II of the Act requires financial institutions to report directly to the Secretary certain domestic and foreign currency transactions.\(^4\) Like the BSA recordkeeping requirements, the reporting provisions are premised on the congressional finding of their usefulness in combating criminal activity\(^4\) and are specified by regulation.\(^4\)

Domestic financial institutions are required to report the payment, receipt, or transfer of currency in excess of 10,000 dollars.\(^4\) Narrowly defined exemptions to the rule are authorized and conditioned on the institution's reasonable conclusion that the amounts involved do not exceed amounts commensurate with the customary conduct of the lawful, domestic business of its client.\(^4\) When a U.S. resident, or a person within and doing business in the United States, transacts with a foreign financial agency, a report is also required.\(^4\)

The report includes: the identity and address of the participants to the transaction, the identity of the real parties in interest, and a description of the transaction.\(^4\) Recently issued regulations have considerably strengthened this statutory provision to enhance investigations of offshore criminal activity. These rules authorize the Secretary to require, at any time, financial institutions located in areas of "unusual financial activity" to file extensive reports of transactions with foreign financial agencies.\(^4\)

The BSA also requires reports on foreign currency transactions conducted by a U.S. person or a foreign person controlled by a U.S. person.\(^5\) The actual or attempted exportation or importation of monetary instruments in excess of 10,000 dollars to or from the United States must also be reported.\(^5\) When a monetary instrument has been transported without the requisite section 5316 report, or if

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\(^5\) Id. § 5311.
\(^7\) 31 C.F.R. § 103.22(a)(1) (1985).
\(^8\) Id. § 103.22(b)-(c).
\(^10\) Id. See 31 C.F.R. § 103.24 (1985).
\(^11\) 50 Fed. Reg. 27,825 (1985) (to be codified at 31 C.F.R. § 103.25). These new rules require extensive reports for checks, drafts, and traveler's checks received or sent by a respondent financial institution for collection or credit to the account of a foreign financial agency. Id. at 27,824.
\(^13\) 31 U.S.C. § 5316(a) (1982), amended by Pub. L. No. 98-473, § 901(c), 98 Stat. 2135 (1985). See 31 C.F.R. § 103.23(a) (1985) (specific administrative guidelines). A person is deemed to have effectuated a transportation when he counsels, commands, or requests that it be done by a financial institution. Id. A U.S. recipient of monetary instruments over $10,000 mailed or shipped from outside the U.S. must file a report stating the amount, date of receipt, and the name of the shipper. Id. at § 103.23(b).
the report contains material omissions or misstatements, the instrument may be seized and is forfeitable to the U.S. government. The Act provides civil and criminal penalties for noncompliance with Title I and II provisions and establishes a reward section for information that leads to the recovery of a civil or criminal fine, or a forfeiture exceeding 5,000 dollars.

These mandatory provisions reveal the sweeping reach of the BSA's regulatory scheme. The investigative reach of the statute, the lack of procedural protection for the clients of financial institutions, and the statutory authorization of interagency informational exchange quickly resulted in challenges to the Act's constitutionality.

III. The Bank Secrecy Act: Issues and Answers

A. Background

Although courts have been reluctant to recognize a privilege of confidentiality arising out of the bank-client relationship, they have found a duty of secrecy based on an implied contract between the two parties. This duty falls short of express constitutional prote-

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52 31 U.S.C. §§ 5321-5322 (1982). All willful violations of any BSA requirement by a domestic financial institution may result in a civil penalty not to exceed $10,000. 31 C.F.R. § 103.47(a) (1985). A failure to report a § 5316 transport of monetary instruments, or a report containing material omissions or misrepresentations may result in a civil penalty up to the amounts of the instruments transported less any amount forfeited. Id. § 103.47(b). Willful violations of Title I recordkeeping requirements can result in a $1,000 fine plus one year's imprisonment. Id. § 103.49(a). Violations committed in furtherance of any violation of federal law punishable by imprisonment for more than one year may increase the fine to $10,000 or imprisonment up to five years, or both. Id.

A willful violation of the Title II reporting requirements may result in a fine up to $250,000 or imprisonment for five years or both. Id. § 103.49(b). Willful violations committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any 12 month period can result in a $500,000 fine and/or imprisonment of up to five years. Id. § 103.49(c).


54 Id. § 5319. See 31 C.F.R. § 103.43 (1985) (specific guidelines). Recently, federal law enforcement officials have announced an interagency agreement whereby the Justice Department, the F.B.I., the Comptroller of the Currency, the Federal Reserve Board, and other governmental agencies will make criminal referrals to other law enforcement agencies without providing notice to the affected customer. Pasztor, Protests by ACLU, Bankers, Congress Stall Plan by Meese to Fight Criminal Money Laundering, Wall St. J., June 12, 1986, at 64, col. 1.

55 See Milovich v. First Nat'l Bank, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969); Peterson
tion despite the fact that bank records have been analogized to private papers entitled to fourth amendment protection from unreasonable search and seizure.\textsuperscript{56} This analogy is derived from the U.S. Supreme Court’s holding in \textit{Katz v. United States}.\textsuperscript{57}

The \textit{Katz} Court held that a subjective and reasonably relied upon privacy expectation can rise to the level of being constitutionally protected if it is determined that society considers such an expectation reasonable and acceptable.\textsuperscript{58} In reaching this conclusion the Court rejected, as determinative of standing under the fourth amendment, a test based on a property interest analysis. This rejection was based on the view that the fourth amendment protects persons as well as areas and effects from unreasonable search and seizure.\textsuperscript{59} Although \textit{Katz} did not directly address the issue of records maintained and possessed by a third party, the Court’s ruling that what a person knowingly exposes to the public is not private and, therefore, not constitutionally protected, speaks to this issue. If the confidentiality of the communication is dependent on a person not disclosing the contents to a third party, then the information is not entitled to fourth amendment protection.\textsuperscript{60} Thus, when a bank customer lacks a possessory interest in the account records, third-party access to the records cannot be challenged on fourth amendment grounds.

The information contained in those records, however, may still be considered the property of the client.\textsuperscript{61} The characterization of information as a property right imposes a duty of confidentiality on the bank to the extent the customer expects the information not to be disclosed other than in the ordinary course of the bank-client relationship. This theory underscores the lack of a possessory interest in the records and reveals that the issue is not one of an actual privacy interest but rather a legitimate expectation of privacy. The bank customer normally expects that his contractual relationship with the bank will control unauthorized disclosure of account information. This reasoning underlies the initial challenges to the constitutionality of the Bank Secrecy Act.

\textsuperscript{56} See, \textit{e.g.

\textsuperscript{57} 389 U.S. 347 (1967).

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.} at 353.

\textsuperscript{60} \textit{Id.} at 351. \textit{See also United States v. White}, 401 U.S. 745, 749-52 (1971).

\textsuperscript{61} \textit{See Milovich}, 224 So. 2d at 759; \textit{Peterson}, 83 Idaho at 578, 367 P.2d at 284.
B. Issues Arising Under the BSA’s Domestic Requirements

1. Constitutional Challenges

In 1972 a diverse group of plaintiffs mounted the first constitutional challenge to the Bank Secrecy Act. The plaintiffs in Stark v. Connally\(^{62}\) were several bank customers, a bank, the California Banker’s Association, and the American Civil Liberties Union (ACLU), suing on behalf of itself and its bank customer members.\(^{63}\) Plaintiffs challenged the Title I and II recordkeeping and reporting provisions on first, fourth, fifth, ninth, tenth, and fourteenth amendment grounds.\(^{64}\)

In considering the Act’s validity, the *Stark* court focused on plaintiffs’ claim that the fourth amendment prohibited governmental access to BSA records. Plaintiffs claimed that account records are equivalent to private papers and, thus, invoke the fourth amendment’s prohibition against unreasonable search and seizure. Reasonableness in this context requires customer notification prior to disclosure. Prior notification protects the privacy expectation by allowing the customer to judicially challenge the requested disclosure. The three-judge court granted injunctive relief to the plaintiffs, but only with respect to the Act’s domestic reporting provisions.\(^{65}\)

The *Stark* court easily concluded that Title I and II foreign recordkeeping and reporting requirements are constitutionally valid. The court based this holding on the fact that these provisions are narrowly drawn instances of proper congressional regulation of foreign commerce.\(^{66}\) Furthermore, the Act’s reliance on procedural safeguards in this area comports with protection envisioned by the fourth amendment.\(^{67}\) The domestic recordkeeping provisions were found to be constitutionally valid pursuant to a balancing test weighing the burden imposed on private interests by recordkeeping against legitimate and controlling governmental interests.\(^{68}\) The *Stark* court noted two countervailing U.S. interests. Expectations of privacy in account information are not reasonable when the holder lacks ownership of the records. Second, the government historically has enjoyed regulatory, supervisory, and investigative access to bank records. Recognizing a customer’s right to privacy in these records would negate this historical acquiescence.\(^{69}\)

By invalidating the BSA’s domestic reporting requirements the *Stark* court shifted from a property interest analysis to an evaluation

\(^{63}\) Id. at 1244.
\(^{64}\) Stark, 347 F. Supp. at 1244.
\(^{65}\) Id. at 1242.
\(^{66}\) Id. at 1245.
\(^{67}\) Id. See 31 U.S.C. § 5317(a) (1982).
\(^{68}\) Stark, 347 F. Supp. at 1248-51.
\(^{69}\) Id.
of the customer's subjective expectation of privacy. Based on *Katz* the expectation of privacy is legitimate and controlling when determined to be reasonable and socially acceptable. The court found reasonable the customer's expectation that the bank would not disclose the account information to third parties without prior customer notification.\(^{70}\) Because the BSA lacks the procedural safeguards necessary to accommodate this reasonable expectation, the domestic reporting provisions were struck down. Furthermore, the court applied an ends/means analysis, finding the reporting requirements to be unreasonable when their investigative usefulness was weighed against the overreaching means used to accomplish that goal.\(^{71}\)

Both parties took a direct appeal to the U.S. Supreme Court.\(^{72}\) In an opinion by Justice Rehnquist, the Court reversed, holding that the Bank Secrecy Act is a constitutionally valid and proper regulatory device.\(^{73}\)

Responding to the substantive due process argument, the Court ruled that the Secretary's regulations do not impose unreasonable requirements on financial institutions.\(^{74}\) Addressing the fourth amendment claim, the Court held that the mere keeping of records did not constitute unreasonable search and seizure within the meaning of the fourth amendment because the records may be accessed only by resort to existing legal process.\(^{75}\) Further, the provisions do not violate the fifth amendment's privilege against self-incrimination because "incorporated banks, like other organizations, have no privilege against compulsory self-incrimination."\(^{76}\) The party inculpated by third party disclosure has not suffered self-incrimination. This same claim as presented by the depositor-plaintiffs was held premature because the plaintiffs had failed to allege that they had engaged in transactions that required reporting. The ACLU’s claim that the recordkeeping provisions violated its members’ first amendment protections was also held unjusticiable because there were no allegations that governmental access had actually violated the fundamental liberties of freedom of speech and association.\(^{77}\)

Thus, the Supreme Court refused to hold that the banks, or the depositor-plaintiffs, had a protectable privacy interest in the bank's

\(^{70}\) See *Katz*, 389 U.S. at 347.

\(^{71}\) *Stark*, 347 F. Supp. at 1250. See *Shapiro v. United States*, 335 U.S. 1, 32-33 (1948). Having invalidated the Act on these grounds, the court declined to address the remaining arguments. *Stark*, 347 F. Supp. at 1251.


\(^{73}\) *California Banker’s*, 416 U.S. at 21.

\(^{74}\) Id. at 48.

\(^{75}\) Id. at 52.

\(^{76}\) Id. at 55.

\(^{77}\) Id. at 73-76.
business records. This view is buttressed by the depositors' lack of standing for failure to allege reportable transactions and by the lack of an unqualified right of privacy for incorporated banks.\textsuperscript{78} The Act's provisions were further validated by the Court's finding that the amount limitations were adequately described, reasonably delimited, and sufficiently related to the proper goal of enhanced investigative powers for federal law enforcement agencies.\textsuperscript{79}

By employing doctrines of standing and ripeness of claims, the Court in \textit{California Banker's} narrowed the constitutional challenges to the BSA to fourth amendment and due process arguments, which were easily dismissed. Two years later, in \textit{Miller v. United States},\textsuperscript{80} the Court reaffirmed its stance by holding that government access to a customer's account records is not an unreasonable search and seizure even if realized through defective legal process and without customer notification.\textsuperscript{81}

In \textit{Miller} the defendant was convicted of operating an illegal still, functioning as a distiller without having posted bond, possessing 175 gallons of untaxed whiskey, and committing income tax evasion.\textsuperscript{82} The convictions were based in part on evidence subpoenaed pursuant to the Bank Secrecy Act. At trial the defendant moved to suppress these bank records on the grounds that they were obtained by means of a defective subpoena duces tecum which resulted in a seizure violative of the fourth amendment. The district court overruled defendant's motions and admitted the evidence.\textsuperscript{83} The Court of Appeals for the Fifth Circuit reversed, holding that a person's fourth amendment rights are violated upon defective legal process.\textsuperscript{84}

The U.S. Supreme Court, in an opinion by Justice Powell, reversed on the grounds that respondent did not have a protectable fourth amendment interest in the subpoenaed documents.\textsuperscript{85} The Court applied a property interest analysis to reach this result: "[o]n their face, the documents subpoenaed here are not respondent's 'private papers' . . . respondent can assert neither ownership or pos-

\textsuperscript{78} Id. at 67-68.
\textsuperscript{79} See generally 31 U.S.C. §§ 5311, 5315(a) (1982) (congressional finding that such reports are useful for investigative purposes).
\textsuperscript{80} 425 U.S. 435 (1976).
\textsuperscript{81} Id. at 440.
\textsuperscript{82} Id. at 436.
\textsuperscript{83} Id. at 438-39.
\textsuperscript{84} United States v. Miller, 500 F.2d 751 (5th Cir. 1974), rev'd, 425 U.S. 435 (1976). The Fifth Circuit relied on Boyd v. United States, 116 U.S. 616 (1886) for the controlling prohibition against "compulsory production of a man's private papers to establish a criminal charge against him." Id. at 622. The Fifth Circuit held that the government had circumvented fourth amendment protection by first requiring a third party bank to copy defendant's record and then obtain agency access via defective legal process. \textit{Miller}, 500 F.2d at 757.
\textsuperscript{85} \textit{Miller}, 425 U.S. at 435, 437 (1976).
session. Instead, these are the business records of the banks.”

Furthermore, the bank records contained information that the customer had voluntarily conveyed to the bank with the knowledge that the information would be disclosed to the bank’s employees in the ordinary course of business. Because the customer had no protectable fourth amendment rights the case was controlled by the general rule that a subpoena issued to a third party, for that party’s records, does not violate the rights of the third party’s client.

In Miller the Supreme Court squarely resolved the fourth amendment privacy issue. One unfortunate result of this decision, and of the Court’s earlier refusal to address the first and fifth amendment challenges, is a continuing tendency to view the issue of the BSA’s constitutionality strictly in terms of privacy interests. This tendency is illustrated by the wave of federal and state financial privacy legislation that followed in the wake of the Court’s rulings.

2. Federal and State Responses

In the midst of a post-Watergate wave of privacy legislation, Congress responded to the Court’s decisions with the Right to Financial Privacy Act of 1978 (RFPA). The Act’s name is misleading to the extent that Congress opted for enumerated procedural safeguards in lieu of creating a substantive and legally enforceable right of financial privacy. The Act enumerates the legal processes available for federal agency access to a customer’s account information. Access is conditioned upon one of the following procedures: Customer authorization, administrative subpoena or summons, search warrant, judicial subpoena, grand jury subpoena, or formal written agency request. The RFPA prohibits disclosure except in conformity with these enumerated procedures. The Act also requires the requesting agency to certify that it is in compliance with specified notification requirements which provide for customer no-

86 Id. at 440.
87 Id. at 442-43. “The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.” Id. Thus, the Miller court added an assumption of risk element to the Katz rule that can establish the legitimacy of certain privacy expectations. See supra notes 57-62 and accompanying text.
88 Miller, 425 U.S. at 444.
89 See supra notes 72-81 and accompanying text.
91 Id. § 3404.
92 Id. § 3405.
93 Id. § 3406.
94 Id. § 3407.
95 Id. § 3420.
96 Id. § 3408.
97 Id. § 3403(a).
98 Id. § 3403(b).
tification prior to disclosure. Delays in notification require approval if the access has been sought via administrative process, judicial subpoena, or formal written request.

Proper notice includes a description of the records sought with a general statement of the inquiry's purpose. The agency must also explain how the customer may judicially challenge the requested disclosure. Challenges are limited, however, to claims that the requested records are not relevant to the stated purpose or that the agency has not substantially complied with RFPA's notification requirements. The relevancy test is broad enough to include information that may be or may lead to admissible evidence. The substantial compliance rule only requires satisfaction of RFPA's essential elements and is intended to deny attempts at blocking disclosure due to hyper-technical violations.

RFPA's principal shortcoming is its failure to provide substantive financial privacy. Furthermore, its application is limited to federal agencies; state and local agencies, organizations, and private individuals are not required to comply. A third limitation is that protection is afforded only to individuals or partnerships of five members or less. These disadvantages reveal that the Act's procedural protections are limited to the legal opportunity to challenge process. The Right to Financial Privacy Act is not a vehicle for assertion of financial privacy interests because these interests are non-existent. Thus, the Act fails to respond to the unresolved issues presented in California Banker's.

On the state level, the response to the Supreme Court's BSA/privacy analysis has been similar—a qualified recognition of financial privacy generally modeled after the congressional model. State level recognition of financial privacy flows from three sources: state constitutions, a common law duty of financial confidentiality, and state financial privacy legislation.

99 Id. § 3409.
100 Id.
101 Id. §§ 3405(2), 3406(b)-(c), 3407(2).
102 Id. § 3410(a).
105 Id. § 3401(4).
107 See supra notes 90-105 and accompanying text.
The California Supreme Court in *Burrows v. Superior Court* held that article 1, section 13 of the California Constitution provides a bank customer financial privacy in the bank’s records of his other account. The court determined that the depositor had a reasonable expectation that the bank would maintain the confidentiality of his account information. A state agency violates this privacy interest when it acquires access to the information without first resorting to legal process. The bank’s proprietary right to the records is not deemed dispositive because the depositor bases his voluntary disclosure of financial information to the bank on the reasonable belief that he waives disclosure only to the extent of facilitating the bank-client business relationship. The customer’s privacy interest is not lessened by bank ownership, and the bank’s voluntary disclosure is not equivalent to customer consent.

One year later the California Supreme Court extended this analysis in *Valley Bank of Nevada v. Superior Court*. Based on its earlier recognition of a constitutionally protected privacy interest, the court held that a customer has standing in a civil action to contest disclosure. The court’s reasoning was grounded in its continued refusal to allow a third party waiver of the customer’s legitimate expectation of privacy. The assumption is that the institution decides disclosure requests on the basis of its own set of reasons instead of those of the client. The effect of *Valley Bank* is a requirement that the bank take reasonable steps to notify the customer prior to disclosure. It is only through notice that the customer can exercise his right to challenge process.

A number of state courts have recognized a common law duty of financial confidentiality. According to the strongest theory, this duty arises from an implied contract between the financial institution and the depositor. The leading authority for this rule is an English case, *Tournier v. National Provincial and Union Bank*. Those few courts that have considered the issue generally accept the *Tournier* line of analysis. Remaining legal theories used to reach the same result

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108 *Burrows*, 13 Cal. 3d at 238, 529 P.2d at 590, 118 Cal. Rptr. at 166.
109 Id. at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.
110 Id. at 245, 529 P.2d at 594-95, 118 Cal. Rptr. at 170-71.
111 Id. at 244, 529 P.2d at 594, 118 Cal. Rptr. at 170.
112 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975).
113 Id. at 658, 542 P.2d at 980, 125 Cal. Rptr. at 556.
114 Id. at 657, 542 P.2d at 979, 125 Cal. Rptr. at 555.
117 See *Milovich*, 224 So. 2d at 759; *Sparks v. Union Trust Co.*, 256 N.C. 478, 124 S.E.2d 365 (1962); *Peterson*, 83 Idaho at 578, 367 P.2d at 284.
include: property law theory, agency theory, and a privilege arising out of the bank-client relationship.

There are five states which lack statutory recognition of financial privacy interests. In those states recognizing privacy, none have substantively fashioned the right. Like the federal model, the more comprehensive state statutes offer procedural safeguards to challenge the process that is required for disclosure. Only one goes further and requires a substantive balancing of the government’s need for access against the customer’s privacy interest. The absence of federal or state legislation affording a substantive right of financial privacy, coupled with the limited parameters afforded by due process, is, in effect, a recognition of the BSA’s broad constitutional basis.

C. Issues Arising Under the Act’s International Requirements

The effectiveness of a domestic statute is measured by that country’s jurisdictional limits. Foreign application is available only at the cost of disrupting international comity or by the expense of diplomatic negotiation. The Bank Secrecy Act’s effectiveness as an investigative tool is revealed by the interesting history of its extraterritorial application.

1. The Need for and the Difficulty of Piercing Offshore Secrecy Havens

Federal agency representatives have been unanimous in praising the effectiveness of the Bank Secrecy Act. One very successful application of the Act was Operation Greenback. This 1980 investigation was implemented by the Treasury Office of Enforce-

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118 See Brex v. Smith, 104 N.J. Eq. 386, 146 A. 34 (N.J. Ch. 1929) (unauthorized disclosure of account information is a violation of the customer’s property interest in that information).
119 See Peterson, 83 Idaho at 578, 367 P.2d at 284 (principal-agent rules govern the relationship between the bank and its client).
120 Although not accepted by the courts, this legal theory has been discussed in several opinions. See, e.g., State v. Hambrick, 65 Wyo. 1, 196 P.2d 661 (1948); State ex rel., G.M. Gustafson Co. v. Crookston Trust Co., 222 Minn. 17, 22 N.W.2d 911 (1946); In re Davies, 68 Kan. 791, 75 P. 1048 (1904).
123 CAL. GOV'T. CODE § 7461(c) (West 1980).
124 See infra notes 189-198 and accompanying text.
125 See generally 1983 Crime and Secrecy Hearings, supra note 8.
ment and Operations, the Internal Revenue Service, U.S. Customs Service, and the Department of Justice. The operation consisted of a thirty month integrated investigation of an unusual currency surplus in the southern Florida Federal Reserve Banks. The task force documented 2,065 million dollars that had been transnationally laundered by seven separate organizations. The operation resulted in the seizure of more than $28 million in currency and 2.5 million dollars in property. Another 1.8 million dollars in appearance bonds was also forfeited to the U.S. Government. As of 1983 there were 140 indictments with forty-four convictions and ninety cases pending trial. The success of Operation Greenback spawned a new wave of criminal investigation—at least twenty similar financial investigative task forces have been established throughout the United States and Puerto Rico. In another area of enforcement, the Reagan administration has recently focused on Title II reporting violations by the financial institutions. Compliance at this level is a prerequisite for effective tracing of criminal activity.

Recent amendments reinforce the Act's effectiveness. The shortcomings of the original BSA were brought to Congress' attention during the 1983 hearings, and were rectified with the passage of the Comprehensive Crime Control Act of 1984. Prior to the enactment of these amendments, Title II of the BSA contained a serious loophole. The original section 5316 did not require a report for the "attempted" transportation of reportable amounts of monetary instruments. U.S. border officials were powerless to detain suspected couriers when efforts fell short of successful transport. Amended section 5316 requires a report when a person or his agent or bailee transports, or attempts to transport, monetary instruments in excess of 10,000 dollars.

126 Id. at 35-36 (statement of Hon. John M. Walker, Jr., Assistant Secretary, Enforcement, Dep't. of Treasury).
127 The Treasury Department fined Crocker National Bank $2,250,000 for failing to report currency transactions totaling $3.98 billion. Langely & Cox, Treasury Fines Crocker Unit for Failing to Report Cash Transactions, Wall St. J., Apr. 4, 1985, at 10, col. 1. First National Bank was fined $500,000 for failing to report $2.5 billion in currency transactions. Id. Recently, the Treasury Department and BankAmerica corporation were reported to be close to an agreement on a fine that could reach $7 million for similar Title II violations. Hil & Tharp, BankAmerica Is Said Near Accord on Fine, Wall St. J., Jan. 3, 1985, at S, col. 4. The same newspaper reported the conviction of a money launderer who was sentenced to 35 years imprisonment and fined a total of $6,495,000. Id. See, e.g., 1983 Crime and Secrecy Hearings, supra note 8, at 33-36 (statement of Hon. John M. Walker, Jr., Assistant Secretary, Enforcement, Dep't of Treasury).
130 Id., amended by Pub. L. No. 98-473, § 901(d), 98 Stat. 2135 (1985). The requisite amount was raised from $5,000 to $10,000 to reduce paperwork. S. REP. No. 225, 98th Cong., 1st Sess. 302 (1983). This higher amount creates its own enforcement problems. A recent appeals court decision overturned a conviction based on reporting violations al-
Under the original BSA, section 5317's warrant requirement was inconsistent with applicable border search and seizure law. The 1984 amendments add a new subsection to 5317 expressly allowing customs officers to perform a warrantless search of a vehicle, aircraft, other conveyance, envelope, container, or person entering or departing from the United States upon a reasonable belief of a section 5316 violation.

One enforcement problem persists despite regulatory amendments. The problem stems from the time period granted to financial institutions for filing Title II reports. Originally, the institutions had forty-five days to file the requested information. This has now been shortened to fifteen days, but even this time span is considered ineffective for tracing and seizing funds which move rapidly through the transnational laundering process.

The criminal activity portending the 1970 enactment of the Bank Secrecy Act continues into the 1980s. This is not, however, an indictment of the Act's effectiveness as a crime fighting tool. The rapid internationalization of the world economy in the past two decades, coupled with the technological advances in communication and transportation, have resulted in an increased availability and reliance upon offshore secrecy laws. The benefits of the modern age have had a transnational effect on the crimes of tax evasion, securities fraud, and money laundering.

In its amended state the Bank Secrecy Act is inherently flawed for extraterritorial application by its jurisdictional limitations. Foreign banks are not subject to its provisions. Increasing reliance on offshore secrecy has significantly lessened the Act's effectiveness against the very problem it is designed to treat, and places U.S. enforcement agencies in the position of having to pierce local secrecy laws to obtain admissible evidence. Yet, because of the economic benefits usually accompanying available secrecy laws, local authorities are reluctant to cooperate with disclosure requests. In the private sector, bank officials are statutorily prohibited from disclosing secret account information.

This lack of cooperation creates obstacles that federal agencies need to overcome.

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132 United States v. Chemaly, 741 F.2d 1346 (11th Cir. 1984).
135 1981 International Narcotics Trafficking, supra note 8, at 343-44 (statement of Roscoe L. Egger, Jr., Comm'r, Internal Revenue Serv.).
136 See generally 1983 Crime and Secrecy Hearings, supra note 8; 1981 Narcotics Trafficking Hearings, supra note 8.
138 See supra notes 4-7 and accompanying text.
2. Various Solutions to the Problem

a. Compulsory Legal Process: Enforcing the Subpoena Duces Tecum

In 1976 the Fifth Circuit Court of Appeals held that a nonresident alien is subject to a grand jury subpoena duces tecum. The court enforced the subpoena although defendant's compliance subjected him to possible criminal prosecution in his resident country. Field, a Canadian citizen, was managing director of a bank located in the Cayman Islands, British West Indies. His testimony was sought by a grand jury investigating criminal tax evasion through reliance on offshore secrecy law. Served with the subpoena in the lobby of the Miami International Airport, Field refused to answer questions concerning his bank or its clients. His silence invoked the fifth amendment's prohibition against compulsory self-incrimination and was grounded on the fact that the requested testimony would violate Cayman Island secrecy law and subject him to possible criminal sanctions.

Affirming the trial court's enforcement order, the appellate court determined that Field misconstrued the scope of the fifth amendment's protection. The constitutional prohibition against self-incrimination extends only to the use of such testimony. The mere fact of testifying is, by itself, not a proper subject for invoking the privilege. "The Fifth Amendment simply is not perintent to the situation where a foreign state makes the act of testifying a criminal offense."

The court applied a balancing test to weigh the merits of defendant's claim that enforcement of the subpoena is precluded by controlling principles of international comity. The test weighs U.S. legal interests against Cayman Island's interest in maintaining financial secrecy. The court found the need for admissible criminal evidence to be a vital U.S. interest outweighing a foreign desire for continued secrecy. The Field court also recognized the continuing U.S. interest in allowing wide investigative discretion for U.S. bank regulators. Absent specific congressional direction to the contrary, the court affirmed the enforcement order.

A recent federal case extended compulsory process beyond U.S.

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140 Field, 532 F.2d at 405.
141 Id. at 406-07. See also Lefkowitz v. Turley, 414 U.S. 70 (1973).
142 Field, 532 F.2d at 407. See also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 39 (1965).
144 Field, 532 F.2d at 408. See Miller, 425 U.S. at 435.
145 Field, 532 F.2d at 409.
jurisdictional limits. The Eleventh Circuit enforced a subpoena issued to a domestic financial institution for production of records housed in its offshore branch offices. As in Field, principles of international comity were not controlling.\textsuperscript{146} A federal grand jury investigating tax evasion and narcotics trafficking issued a subpoena duces tecum to the Miami branch office of the Bank of Nova Scotia (Bank), a Canadian chartered institution with branch offices in forty-five countries. The subpoena named two customers of the Bank and called for the production of their financial records from any of the over 1200 Bank offices. Asserting that production would result in violations of Bahamian and Cayman Island secrecy law, the Bank refused to comply.\textsuperscript{147} During appellate review the Bank offered three arguments against enforcement. It contended that the court lacked a sufficient basis for enforcing the subpoena, that enforcement would violate due process of law, and that the law of foreign affairs precluded compulsory process against a non-resident financial institution.\textsuperscript{148}

The Bank's first argument relied on the Schofield rule which requires the government to show the relevancy of the documents to a proper grand jury investigation. The Bank's reliance on this rule was grounded on the lower court's failure to make this relevancy determination. Therefore, in the Bank's view, enforcement of the subpoena by the court lacked a sufficient basis.\textsuperscript{149} The Eleventh Circuit Court of Appeals reasoned that the Schofield rule was a local rule flowing out of the Third Circuit's inherent power of supervision. In declining a similar role, the court noted that the rule is not a constitutionally mandated precondition for enforcement of the subpoena.\textsuperscript{150}

The due process argument rested on the proposition that local secrecy law bars disclosure and placed the Bank in the role of a disinterested records custodian. Therefore, the Bank claimed that it was entitled to hearing on the merits of the case in order to test the validity of the subpoena's authority.\textsuperscript{151} The Eleventh Circuit disagreed; a prerequisite for the Bank's position is a good faith effort at compliance with the subpoena, and the appellate court noted the

\textsuperscript{147} Nova Scotia, 691 F.2d at 1388.
\textsuperscript{148} Id. at 1385.
\textsuperscript{150} Nova Scotia, 691 F.2d at 1387.
\textsuperscript{151} Id. at 1388. Where a plaintiff has acted in good faith but foreign law blocks compliance, the plaintiff is entitled to hearing on the merits of the case to test the constitutionality of the subpoena's authority. Societe Internationale Pour Participants Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).
lower court's finding that the Bank failed to meet this requirement.\textsuperscript{152}

The Bank's final argument was that the trial court had erroneously applied the \textit{Restatement} balancing test in determining controlling principles of comity. In an attempt to distinguish \textit{Field}, the Bank contended that the U.S. Government should have applied first to the offshore courts for judicial assistance rather than provoke the disrespect of a friendly nation by resorting to compulsory process. Responding to this argument, the Eleventh Circuit reapplied the balancing test and found the need for information regarding the "financial integrity of the republic" to be a vital national interest outweighing a local desire for secrecy.\textsuperscript{153}

The court affirmed the enforcement order which had been stayed for a short period to allow for compliance, and the Bank persisted in its refusal. Only when the stay was lifted and the contempt fine mounted did the Bank produce the documents. Despite the Bank's eventual compliance, the district court fined the institution $1,825,000 for civil contempt.\textsuperscript{154} Both the contempt order and the fine were appealed. The Eleventh Circuit, citing numerous examples of the Bank's lack of good faith, upheld the order and ruled that the district court had not abused its discretion in imposing the fine.\textsuperscript{155}

During this second appellate review, the Bank claimed a good faith effort to comply. In reviewing the record, the Eleventh Circuit noted that the Bank was originally granted a two-month search period which it did not use. In lieu of production, the Bank had attempted to persuade the U.S. Government to resort to the international discovery device of letters rogatory. Coupled with this suggestion were requests that the U.S. Government show the materiality and relevancy of the requested documents to the grand jury investigation. In responding to the Bank's claim, the Eleventh Circuit's analysis is a reiteration of its position in the earlier case: the vital interest in obtaining inculpatory evidence outweighs the Bank's suggested procedural guidelines.\textsuperscript{156} In rejecting the Bank's good faith claim, the court relied heavily on the fact that the required due diligence was only forthcoming when the fine began to

\textsuperscript{152} Nova Scotia, 691 F.2d at 1389.

\textsuperscript{153} Id. at 1391 (quoting \textit{Field}, 532 F.2d at 407-08). Essentially the court was relying on the \textit{Field} analysis: "[t]his court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is a conflict with the interest of other states." \textit{Nova Scotia}, 691 F.2d at 1391.

\textsuperscript{154} Grand Jury Proceedings, United States v. Nova Scotia, 722 F.2d 657 (11th Cir. 1983) ($25,000 per each day in contempt).


\textsuperscript{156} Id. at 825. The grand jury is granted broad discretion in seeking evidence. United States v. Dionsio, 410 U.S. 1 (1973).
accumulate.\textsuperscript{157}

The second issue on appeal was a re-examination of the comity issue as set forth in the amicus curiae briefs of Canada, the United Kingdom, and the Cayman Islands. Canada stressed that the situs of the requested documents controls the applicable jurisdictional law. This position is consistent with a tentative draft of the revised Restatement.\textsuperscript{158} The Eleventh Circuit ruled, however, that the new test is not consistent with current U.S. law. Furthermore, the Bank's pervasive presence in the United States cuts against the logic of the proposed test.\textsuperscript{159} The United Kingdom and the Cayman Islands pointed to the significance of the "gentleman's agreement" that resulted from a diplomatic exchange between the United States and the Cayman Islands during the Bank's initial two-month search period. The agreement sought to establish procedural guidelines to cope with the \textit{Nova Scotia} issues. Amici contended that these procedures were a precondition to enforcement. In rejecting this view, the Eleventh Circuit relied on the lower court's finding that the agreement constituted neither a formal bilateral agreement nor a binding U.S. obligation.\textsuperscript{160}

The United Kingdom also relied upon an existing multilateral agreement to which the United States is a party.\textsuperscript{161} The Single Convention on Narcotic Drugs 1961 requires governmental cooperation between the signatory nations for specified criminal matters. Yet, as the Eleventh Circuit pointed out, this cooperation is conditioned on due regard for each country's constitutional, legal, and administrative systems. Based on this limitation the court concluded that the Restatement balancing test\textsuperscript{162} is applicable to a multilateral assistance treaty that is limited by domestic considerations.\textsuperscript{163} In reaching defendant's final argument the Eleventh Circuit held that the act of state doctrine is not a proper vehicle for limiting the enforcement of a federal grand jury subpoena. That doctrine is designed to prevent judicial disruption of foreign relations. Under the act of state doctrine, courts presiding over civil actions are prohibited from reviewing the validity of a foreign sovereign's internal actions. By its very nature, the doctrine is not suited for challenging, in federal court, the enforceability of a federal grand jury

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\textsuperscript{157} \textit{Nova Scotia}, 740 F.2d at 826. \\
\textsuperscript{158} \textit{Cf. Restatement (Second) of Foreign Relations Law of the United States} §§ 39-40 (1965) (the current test employs a factoral analysis, and the situs of the requested documents is not controlling). \\
\textsuperscript{159} \textit{Nova Scotia}, 740 F.2d at 828 nn. 17 & 18. \\
\textsuperscript{160} \textit{Id.} at 829-30. \\
\textsuperscript{162} \textit{See supra} note 158. \\
\textsuperscript{163} \textit{Nova Scotia}, 740 F.2d at 831.
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The exhaustive review in these extraterritorial cases is in marked contrast to the Supreme Court's review in the initial challenges to the Bank Secrecy Act. This comity review properly reflects a concern for maintaining harmonious foreign relations. The decisions in these cases, however, are controversial and disruptive. Furthermore, they are expensive in terms of delay, litigation costs, and utilization of available resources. As an alternative, federal enforcement agencies prefer, and the Reagan Administration has adopted, one of the suggestions put forth in the Nova Scotia cases. Extraterritorial application of the BSA is now realized by generalized bilateral mutual assistance treaties.

b. Bilateral Mutual Assistance Agreements

A central feature of these bilateral agreements is the stipulation to produce documents per request. Their overall effect allows for investigation and documentation of suspected offshore criminal activity. Investigative reliance on these agreements offers several advantages over compulsory legal process. Innocent transient financial institutions are relieved of an unfair burden, and the use of negotiated procedures effectively resolves issues of comity. These agreements also establish mutual judicial assistance thereby allowing access to offshore information. A prime example of these agreements is the first one negotiated after the BSA's enactment. The U.S.-Swiss mutual assistance treaty (Treaty) was signed in 1973 and seeks to combat organized crime by granting the U.S. Government access to heretofore private Swiss banking records. The Treaty requires Swiss assistance even if the investigated criminal activity is not punishable under Swiss law. The Swiss Central Authority is directed to disclose information normally withheld by secrecy if: the investigation is of a serious crime, the requested information is of substantial importance, and the United States has already made reasonable, but unsuccessful attempts to obtain disclosure. After the Treaty was implemented, it was discovered that it was inadequate for dealing with the complexities of SEC inves-
tigations of insider trading. In 1982 the U.S. and Swiss governments issued a supplemental agreement allowing access to financial information useful in tracing violations connected with corporate takeovers. The combined result of these agreements is an effective medium for tracing and documenting criminal activity through a BSA investigation.

The success of the Swiss experience has led to a renewed interest in the use of bilateral mutual assistance treaties. Preference for this approach is illustrated by the fact that of the eight existing agreements, seven have been concluded by the Reagan Administration. In addition to Switzerland, similar agreements are in force with Canada, Morocco, Italy, the Netherlands, Turkey, the United Kingdom, and the Cayman Islands.

The efficacy of these agreements is severely limited by the fact that only a true multilateral convention will combat the problems associated with the world-wide availability of bank secrecy. Without multilateral assistance, criminal activity will simply shift to the next available secrecy jurisdiction. The United Nations offers a viable forum for negotiating such an agreement, and the Reagan Administration should rechannel its efforts through that forum. The rapid internationalization of U.S. markets provides the incentive for such an agreement if it is presumed that U.S. dollars and businesses seek

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170 Memorandum of Understanding to Establish a Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 24, 1982, United States-Switzerland, reprinted in 22 INT'L LEGAL MATERIALS 1 (1983). This supplemental agreement relies on the procedure established by a private agreement reached by the Swiss Banker’s Association with its members. Id. at 7.


There is little doubt that the treaty has eroded the secrecy formerly associated with the Swiss bank accounts. Putha, Those Famed Swiss Bank Accounts Aren’t Quite as Impenetrable as They Used to Be, Wall St. J., June 20, 1986, at 21, col. 4.


The most recent agreement was with Great Britain. Ingersoll & Truell, U.S., Britain Reach Accord to Help Police World Market in Securities, Commodities, Wall St. J., Sept. 24, 1986, at 12, col. 1.

173 See supra notes 136-38 and accompanying text.
jurisdictions safe from the criminal activity associated with offshore secrecy laws.

IV. The Unresolved Issue: Is the Bank Secrecy Act Constitutional?

Bilateral agreements offer a viable context for extraterritorial application of the Bank Secrecy Act. They convert a domestic statute into an offshore investigative device for criminal behavior having domestic repercussions. This valuable device remains effective as long as it is determined that the BSA is constitutionally valid. The Supreme Court of the United States has not ruled otherwise; nonetheless, its failure to adequately address the first and fifth amendment challenges has produced two issues. First, if such challenges to the Act’s regulatory structure are eventually successful, the Act’s benefits will cease. To leave this question unresolved places at risk the vast resources already expended to ensure the Act’s continued effectiveness. Second, the Court’s failure to fully review the challenges presented in *California Banker’s* has resulted in a tendency to give the holding in that case a rather narrow reading. The Court’s opinion, although drawn from plaintiffs’ privacy arguments, is not limited to an application of fourth amendment law. Rather, the holding in that case is a further recognition by the Court of the plenary power of Congress to regulate interstate and foreign commerce. Indeed, the Court has abdicated judicial review of congressional regulation of commerce.

A. The Privacy Issue Revisited

The U.S. Supreme Court has recognized that organizations of private individuals have standing under the first amendment to challenge governmental abridgement of their fundamental liberties of privacy and freedom of association. These holdings stem from a realization that the first amendment protects the right of people to associate together in striving for legitimate, and possibly controversial, political and socio-economic goals. A recognition of privacy furthers the fundamental liberties of association, speech, and belief by inhibiting governmental access to information on an organization’s constituency and their behavior patterns. In theory, this denial of information furthers the fundamental rights referred to because it precludes any threat of governmental harassment that could possibly be directed at a politically unpopular group.

174 *California Banker’s*, 416 U.S. at 21.
175 *See supra* notes 186-94 and accompanying text.
The BSA is, therefore, prone to first amendment challenges because organizations view its investigative reach as an abridgment of their fundamental right of association. A thorough review of an organization’s financial records reveals not only the constituency of the group, but supplies governmental agencies with a broad range of behavioral patterns of each constituent as well. Compounding the problem is the Act’s failure to require customer notification of a BSA investigation, and the express authorization for interagency exchange of this information.\footnote{See supra notes 27-54 and accompanying text.} Furthermore, the financial institution lacks a sufficient adversarial interest to challenge the requested disclosure. This situation—information about an organization’s membership, along with evidence of each member’s socio-economic behavioral patterns, accessed and exchanged on a governmental level, without notice and an opportunity to challenge process—is exactly the problem the first amendment is designed to reach. Essentially, it is the contention that the Court in \textit{California Banker’s} failed to address.\footnote{416 U.S. 21 at 75-76 (1973).}

This problem, and the ACLU’s argument, are effectively redressed by the customer notice provisions mandated by the Federal Right to Financial Privacy Act of 1978.\footnote{See generally 12 U.S.C. § 3409 (1982) (the RFPA calls for customer notification whenever a federal agency requests financial information of that person’s account; once notified the customer can challenge the request).} As a general rule, similar procedural protection is also found in state financial privacy legislation.\footnote{See supra notes 116-23 and accompanying text.}

Mandatory recordkeeping and reporting requirements have also been successfully challenged under the fifth amendment’s privilege against self-incrimination.\footnote{Marchetti v. United States, 390 U.S. 39 (1968).} This analysis evolves from an earlier Supreme Court case in which a regulatory scheme was upheld against a fifth amendment challenge.\footnote{Shapiro v. United States, 335 U.S. 1 (1947).}

In the earlier case, the defendant’s conviction for making tie-in sales was based on the inculpatory evidence contained in business records required under the 1942 Emergency Price Control Act.\footnote{Id. at 3. See Act of Jan. 30, 1942, ch. 26, 56 Stat. 23.} Defendant argued that a conviction stemming from information he was required to keep is barred by the privilege against self-incrimination. The Court disagreed; the fifth amendment privilege, extendable to private papers, is not applicable to required business records.\footnote{Shapiro, 335 U.S. at 32-34.}

Two decades later this “required records” doctrine was interpreted as establishing three standards to be used in determining if
required records violate the ban against self-incrimination. Required records do not violate the ban if: (1) they are similar to business records customarily kept by individuals and organizations, (2) their subject matter is not fundamentally private, and (3) the activity required to be reported is essentially noncriminal in nature and is a proper subject for governmental regulation.\textsuperscript{185} Applying these three standards to the mandatory recordkeeping and reporting requirements established by section 4403 of the 1954 Tax Code,\textsuperscript{186} the Court held that the required records violated the privilege against self-incrimination. Such records were not customarily kept and contained essentially private information that had the potential to subject the individual to real and substantial hazards of self-incrimination.\textsuperscript{187}

Applying the \textit{Marchetti} analysis to BSA’s required records effectively resolves the fifth amendment challenge in favor of the Act’s constitutionality. The required information has been customarily maintained by financial institutions and the reported financial activity is not, in and of itself, criminal in nature. Nor is it private under the analysis presented in the \textit{California Banker’s} and \textit{Miller} decisions.\textsuperscript{188} Resolution and consequent dismissal of these constitutional challenges clears the way for a proper understanding of the Court’s approach in \textit{California Banker’s}.

\textbf{B. The Commerce Clause Argument}

The Supreme Court has never appeared to doubt the constitutionality of the Bank Secrecy Act. Judicial review of the Act has been strictly limited to the privacy issues derived from the \textit{Katz} line of analysis.\textsuperscript{189} Other than the consideration given to the privacy arguments, the Court’s examination of the BSA’s mandatory provisions is cursory; the Bank Secrecy Act is a valid exercise of Congress’ power to regulate interstate and foreign commerce.\textsuperscript{190} The Court recognizes this power as plenary and limited only by the Constitution itself. That the Court construes this power as broadly as possible is revealed by the lack of discussion of this point in \textit{California Banker’s}.\textsuperscript{191}

The Constitution gives Congress the power to regulate interstate and foreign commerce.\textsuperscript{192} The commerce clause, however, can

\begin{footnotes}
\begin{enumerate}
\item \textsuperscript{185} \textit{Marchetti}, 390 U.S. at 55-57.
\item \textsuperscript{186} I.R.C. § 4403 (1954).
\item \textsuperscript{187} \textit{Marchetti}, 390 U.S. at 53-58. \textit{See also} Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1968) (compulsory registration of Communist Party members barred by the privilege against self-incrimination).
\item \textsuperscript{188} \textit{See supra} notes 75-88 and accompanying text.
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{190} U.S. Const. art. I, § 8, cl. 3.
\item \textsuperscript{191} 416 U.S. 21 (1974).
\item \textsuperscript{192} U.S. Const. art. I, § 8, cl. 3.
\end{enumerate}
\end{footnotes}
also serve as a pretext for congressional regulation of local and individual activity when it can be shown that the lack of the regulation will adversely affect interstate and foreign commerce. This valid exercise of administrative power reaches local and individual activity when Congress has found that these actions contribute to a national problem. Regulation of the national problem, via regulation of local and individual activity, is a sufficiently related means of accomplishing commerce regulation once Congress has determined that the aggregate effect of the targeted activity results in a national problem which adversely impacts on interstate and foreign commerce. Such pretextual use is a proper exercise of commerce clause power and is only limited by the specific prohibitions enumerated in the U.S. Constitution.

Therefore, a proper use of commerce power includes regulations designed to trace local criminal financial activity if Congress has concluded that the aggregate of this activity is a national problem which impacts adversely on interstate and foreign commerce. When the legislative history reveals such a congressional finding, the Court’s inquiry ends. This abdication of judicial review is grounded on the presumption that congressional findings have a rational basis. This rational basis is assured by a process that has been specifically delegated to Congress by the Constitution. The Court considers both the process and the presumption to be beyond challenge.

These precedents control the determination that the Bank Secrecy Act is a sufficiently related means of regulating commerce. The legislative history reveals the necessary congressional finding. "The legislation was directed toward Americans and those doing business in the United States, and the administrative agency selected, the Treasury Department, was given wide flexibility to assure the uninterrupted flow of international commerce and trade." Because Congress has determined that local white-collar crime re-

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193 United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act's requirement for employer maintained records). "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).
196 Perez, 402 U.S. at 146.
198 H.R. REP. No. 975, 91st Cong., 2d Sess. 13 (1970). The Supreme Court's opinion in California Banker's Association v. Schultz acknowledges and applies these controlling principles. We see no reason to reach a different result here. The plenary authority of Congress over both interstate and foreign commerce is not open to dispute, and that body was not limited to any one particular approach to effectuate its concern that negotiable instruments moving in the channels of that commerce were significantly aiding criminal enterprise.
416 U.S. at 46.
results in a national problem that has a negative impact on interstate and foreign commerce, it may, by pretext, regulate that problem pursuant to legislation enacted under the authority of the Commerce Clause.

V. Conclusion

Burgeoning white-collar crime poses a significant threat to the U.S. economy. Its goal is economic gain, and it has the potential to exist within the context of any successful enterprise. This criminal activity is complex, sophisticated, and characterized by stealth. Although countless testimony since the 1960s has documented the existence of this problem, because of available bank secrecy, the full extent of the problem is yet to be revealed. The criminality, however, that has been evidenced clearly suggests that the problem exists on a transnational scale, posing significant risks of economic injury and market destabilization. It is one thing to announce a war against this type of criminal activity. It is an entirely different matter to fashion an effective weapon against it.

Congress realized both of these goals with its enactment of the Bank Secrecy Act. The Act's investigative usefulness stems from the fact that financial activity produces an inevitable paper trail. When the activity is criminal, a reconstruction of this trail allows law enforcement agencies to trace transactions back to the criminal source, thereby yielding the evidence necessary for effective prosecution. BSA's mandatory provisions result in the recordation of this paper trail and ensures agency access via required institutional reporting. That the Act has been successful as a crime-fighting tool can be measured by its resultant preclusion of domestic banking secrecy.

Ironically, this success has cast the problem in a new light. In pursuit of financial secrecy, criminal activity has migrated offshore to avoid the Act's jurisdictional reach. Because modern technology is creating a cohesion of the world's marketplaces, this offshore activity continues to pose substantial risk of domestic economic harm. Thus, it is another indicia of the BSA's success as a strong crime-fighting tool to note the rapid and effective extraterritorial application of its evidentiary provisions.

Because of resort to compulsory process, the initial offshore applications of the Act were considered controversial and disruptive of U.S. foreign affairs. These comity issues have been redressed by a current willingness to apply the Act's provisions within the context of bilateral assistance agreements. The international effectiveness of the Act can be considerably enhanced if it is the subject of a multilateral judicial assistance convention that includes known secrecy jurisdictions.

The BSA has a broad investigative reach that embraces both the
honest citizen and the criminal. Admittedly there is a tension between the need for such a reach and its infringement on expectations of financial privacy. Whether such expectations are legitimate can be gauged to a limited degree by the insistency with which they are asserted. More significantly, legitimacy of these expectations is deductible from the Supreme Court's several, though nebulous, recognitions of privacy as an adjunct of the fundamental right of liberty.199

When a tension exists between governmental need and a citizen's rights the Court must review the competing claims to determine the validity of the goal sought and the relationship of the means to achieve it. When historical acquiescence in allowing regulatory access to a bank's business records is combined with the client's absence of a possessory interest, the ensuing result tends to validate the Bank Secrecy Act's broad, mandatory provisions. Furthermore, the threat that white-collar crime poses to U.S. commerce prompted Congress to respond to that threat with a delegation of commerce power, which is plenary and beyond the scope of judicial review. The historical acquiescence, the customer's lack of a property interest, and the broad delegation of a broadly read constitutional power, produce a fundamental basis for the Bank Secrecy Act. This basis does not deny the fact that expectations of financial privacy exist, or that their rationale is less than persuasive. Nonetheless, the politics of contraband, as constitutionally modified by the presence of procedural safeguards,200 outweigh the claim that these reasonable and socially acceptable privacy expectations should be paramount.

—JAMES E. ELDRIDGE
