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# Strengthening Available Evidence-Gathering Tools in the Fight Against Transnational Money Laundering

*W. Clifton Holmes\**

## I. INTRODUCTION

U.S. and foreign officials have devoted substantial additional resources to the fight against transnational money laundering since September 11, 2001. On that date, nineteen Al Queda terrorists, having spent a total of \$500,000 in the United States planning and preparing for their task,<sup>1</sup> successfully hijacked four commercial planes, and crashed them into the World Trade Center towers, the Pentagon, and a field outside Shanksville, Pennsylvania. The funding of the Al Queda attacks constituted “reverse” money laundering: the provision of legitimate, or “clean” funds for illicit purposes.<sup>2</sup> By contrast, “traditional” money laundering occurs where one disguises illegally-derived income to make such income appear legitimate.<sup>3</sup>

Congress responded rapidly to the terror attacks, passing the U.S.A. Patriot Act (“Patriot Act”) in October 2001.<sup>4</sup> In addition to providing the death penalty for the “attempted wrecking of a mass transportation vehicle,” the Patriot Act contains several anti-money laundering provisions.<sup>5</sup> This article will argue that the Patriot Act’s anti-money laundering scope was excessively narrow in that the Act did not address existing inadequacies under federal law in the area of grand jury investigations of transnational money laundering offenses.

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<sup>1</sup> Adam Cohen, *Who Funds Terror?*, TIME, Oct. 8, 2001, at 70.

<sup>2</sup> Stefan D. Cassella, *Money Laundering Has Gone Global: It’s Time to Update the Federal Laws*, FEDERAL LAWYER, Jan. 2002, at 25.

<sup>3</sup> Andrew J. Camelio & Benjamin Pergament, *Money Laundering*, 35 AM. CRIM. L. REV. 965, 965 (1998).

<sup>4</sup> H.R. 3162, 107<sup>th</sup> Cong. (2001) (enacted).

<sup>5</sup> *Id.*; 18 U.S.C. §§ 5318(h)-(l) (2001).

In order to enhance the efficacy of such investigations, Congress should take three steps: first, Congress should confer to federal courts the authority to compel transnational banks to disclose records subpoenaed pursuant to money laundering investigations in instances where the bank maintains branches on U.S. soil, but the subpoenaed document is located at a branch of the bank outside the United States. Second, Congress should provide stringent penalties for transnational banks that attempt to defy such disclosure orders on the ground that the disclosure order would conflict with a foreign jurisdiction's bank secrecy law. Third, Congress should empower district courts to prevent U.S. residents from suing in foreign courts to enjoin overseas banks from disclosing such U.S. residents' bank records.

This article proceeds in three parts. Part II provides a background to the problem of transnational money laundering and the role of federal grand jury subpoenas in money laundering investigations. Part III assesses existing laws governing the issuance of subpoenas for documents located at the foreign branch of a transnational corporation that maintains one or more bank branches in the United States. Part IV proposes changes to those laws.

## II. BACKGROUND

### A. Transnational Money Laundering: The Scope of the Problem

Governments have grappled with the threat posed by transnational money laundering since long before the September 11th terrorist attacks. Worldwide, the International Monetary Fund estimated in 1996 that as much as \$1 trillion is illegally laundered each year, much of it by organized crime syndicates.<sup>6</sup> Tax violations and narcotics trafficking are two forms of criminal activity that commonly give rise to laundering violations.<sup>7</sup>

Transnational money laundering arises where either the national jurisdiction in which illegal proceeds are laundered differs from the jurisdiction in which the underlying predicate criminal offense took place, or where financial transactions facilitating the laundering span multiple national jurisdictions.<sup>8</sup> Though launderers rely upon a variety of techniques to achieve their purposes, their activities generally occur in three basic stages: 1)

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<sup>6</sup> Andres Rueda, *International Money Laundering Law Enforcement & the USA Patriot Act of 2001*, 10 MICH. ST. J. INT'L L. 141, 141-42 (2001). A sizeable percentage of funds laundered worldwide each year either originate out of crimes committed in the United States, or travel through U.S.-based financial institutions. Scott Sultzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 149 (1995).

<sup>7</sup> Vito Tanzi, *Money Laundering and the International Financial System* (IMF Working Paper No. 96/55, 1996); see also Louise Shelley, MONEY LAUNDERING, ORGANIZED CRIME AND CORRUPTION (2001), at <http://www.respondanet.com/english/index.htm>.

<sup>8</sup> Mariano-Florentino Cuellar, THE TRANSNATIONAL DIMENSION OF CYBER CRIME AND TERRORISM, 96-97 n.6 (2001), at <http://www.hoover.stanford.edu/publications/books/fulltext/cybercrime/91.pdf>.

placement, or the manipulation of illegally obtained money into a less suspicious form; 2) layering, or the execution of a series of transactions such as wire transfers in order to hide the funds' true origins; and 3) integration, or the movement of layered funds into the mainstream financial community.<sup>9</sup> In effecting each stage, launderers use all manner of financial instruments, including securities, bank checks, traveler's checks, money transfers, and credit cards.<sup>10</sup> The launderer's funds may traverse a winding trail that includes banks, non-banking commercial businesses,<sup>11</sup> and even charities.

At least forty nations, so-called "banking havens," maintain a form of bank secrecy statute.<sup>12</sup> It is estimated that between \$2 and \$5 trillion in total assets are maintained in these nations' banking institutions.<sup>13</sup> Typically, secrecy statutes threaten civil or criminal penalties against banks that disclose client account information without a customer's authorization.<sup>14</sup> Launderers find haven state banks attractive because haven states' secrecy statutes offer the prospect that a launderer's transactional records will be shielded from the prying eyes of any government investigator who should come inquiring after such records.<sup>15</sup> The Cook Islands Trust and Banking Corporation, located in the Cook Islands, proclaims that its "[c]lient transaction procedures are strictly maintained to ensure that client communications and information are protected by Cook Islands law providing absolute secrecy and privilege."<sup>16</sup> By contrast, in the United States, depository institutions are required to retain financial records for several years for the express purpose of enabling law enforcement investigators to access them.<sup>17</sup>

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<sup>9</sup> Financial Action Task Force, *Policy Brief: Money Laundering*, (1999), 2, at [http://www1.oecd.org/fatf/pdf/PB9906\\_en.pdf](http://www1.oecd.org/fatf/pdf/PB9906_en.pdf).

<sup>10</sup> See generally *id.*

<sup>11</sup> *Id.*

<sup>12</sup> Rueda, *supra* note 6, at 180.

<sup>13</sup> *Id.*

<sup>14</sup> INTERNATIONAL BANK SECRECY vii (Dennis Campbell ed., 1992).

<sup>15</sup> See Fletcher N. Baldwin, Jr., *Organized Crime and Money Laundering in the Americas*, 14 FLA. J. INT'L L. 41, 45 (2001) ("fiscally tolerant states' . . . are happy to have your money to launder. [These states] are there and willing to accept the money. Indeed, of the thirty-three high and medium profile nations on the Department of State's money laundering chart, where all the good drug dealers like to put their money because it is safe, fourteen are in the Americas or the Caribbean.").

<sup>16</sup> Cook Islands Trust and Banking Corporation, *The Company*, at <http://www.cookislandstrust.com/Company.htm>.

<sup>17</sup> See 12 U.S.C. § 1829(b) (2002); 31 U.S.C. § 5311 (2002).

## B. U.S. Government Efforts to Combat Transnational Money Laundering<sup>18</sup>

### 1. Statutes

So-called "reverse" money laundering is specifically proscribed under 18 U.S.C. § 2339(a) (2003) and 18 U.S.C. § 2339(b) (2003), which outlaw the provision of material support to terrorists. Prosecutors may also charge a reverse laundering suspect under the traditional mail fraud and wire fraud statutes where a suspect raised funds using a "scheme or artifice to defraud."<sup>19</sup> Under Executive Order 13,224, issued by President Bush within two weeks of the September 11th attacks, the Treasury Department is authorized to freeze the assets of parties "determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism," where such parties' assets are located or maintained on American soil.<sup>20</sup> Thus far, the Treasury has used this authority to freeze over \$137 million in assets that allegedly belong to individuals and organizations bearing ties to Al Qaeda.<sup>21</sup>

"Traditional" (i.e., non-reverse) transnational laundering is prohibited under several federal statutes. Under the Money Laundering Control Act ("MLCA"), enacted in 1986,<sup>22</sup> it is unlawful to disguise or process proceeds known to have been derived from an "unlawful activity"<sup>23</sup> so as to conceal the true source of ownership or control of such proceeds; it is also illegal to process such proceeds so as to allow the continuation of the unlawful activity.<sup>24</sup> "Unlawful activities" encompass a wide range of underlying criminal violations under the definition, including narcotics trafficking, extortion, fraud, bribery of a public official, and embezzlement.<sup>25</sup> A money laundering charge may be brought in "any (federal) district in which the financial

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<sup>18</sup> Justice Kennedy has noted that "[b]y its very nature, money laundering is difficult to prove; for if the money launderers have done their job, the money appears to be clean." *United States v. Bajakajian*, 524 U.S. 321, 351 (1998) (Kennedy, J., dissenting).

<sup>19</sup> See 18 U.S.C. § 1341 (2002); 18 U.S.C. § 1343 (2002); see also Prepared Remarks of Attorney General John Ashcroft, October 9, 2002, at <http://www.usdoj.gov/ag/speeches/2002/100902agremarksbifindictment.htm>.

<sup>20</sup> Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (relying upon the International Emergency Economic Powers Act (50 U.S.C. § 1701) and the National Emergencies Act (50 U.S.C. § 1601) as authority for the order).

<sup>21</sup> Press Release, U.S. Department of Treasury, Treasury Designates Al-Aqsa International Foundation as Financier of Terror Charity Linked to Funding of the Hamas Terrorist Organization (May 29, 2003), at <http://www.treas.gov/press/releases/js439.htm>.

<sup>22</sup> Codified as amended at 18 U.S.C. §§ 1956, 1957 (2003) and 31 U.S.C. §§ 5324-5326 (2003).

<sup>23</sup> 18 U.S.C. § 1956(c)(7).

<sup>24</sup> *Id.* at § 1956(a)(1)(B)(ii); 31 U.S.C. §§ 5322, 5324 (making subject to criminal penalties the willful structuring of cash transactions so as to avoid triggering Treasury Department's reporting requirements under 31 U.S.C. § 5313).

<sup>25</sup> 18 U.S.C. § 1956(c)(7).

or monetary transaction is conducted” or, alternatively, in “any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.”<sup>26</sup>

The United States also seeks to detect and deter money laundering via a separate avenue: by imposing several affirmative informational reporting requirements upon U.S. financial institutions.<sup>27</sup> Covered institutions must report all cash transactions exceeding \$10,000.<sup>28</sup> In addition, financial institutions must file suspicious activity reports, indicating any transaction that the bank “knows, suspects, or has reason to suspect” involves illegal proceeds, has no legitimate business purpose, or has no “reasonable explanation.”<sup>29</sup> A bank that fails to comply with these duties can be fined<sup>30</sup> or even subjected to criminal liability.<sup>31</sup> These measures make it easier for government investigators to follow the money trail of suspected launderers, and to alert authorities to potential laundering violations.

The Patriot Act of October 2001 was designed out of an express recognition that “United States anti-money laundering efforts [have been] impeded by outmoded and inadequate statutory provisions that make investigations, prosecutions, and forfeitures . . . difficult, particularly in cases in which money laundering involves foreign persons, foreign banks, or foreign countries.”<sup>32</sup> Accordingly, the Act enhanced existing anti-transnational laundering provisions in several substantive ways.

First, it extended the MLCA’s ambit by adding several offenses to the list of predicate “unlawful activities” that can give rise to a laundering violation. Notably, the Patriot Act added certain offenses that can occur entirely within a foreign jurisdiction—including bribery of a public official and the misappropriation of public funds by or for the benefit of a public official.<sup>33</sup> Thus, an employee of a U.S. bank now commits a *per se* federal money laundering violation where he processes funds known to have been embezzled by a foreign official from a foreign government, if such embezzlement constitutes a felony violation<sup>34</sup> of foreign law. Second, the Patriot Act broadened U.S. criminal jurisdiction over money laundering offenses to

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<sup>26</sup> *Id.* at § 1956(i)(1)(B) (2003).

<sup>27</sup> 31 U.S.C. § 5311 (2003).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See, e.g.,* U.S. v. Banco Popular de Puerto Rico, Case No. 03-CR-17-ALL (D.P.R., Jan. 16, 2003).

<sup>31</sup> *See Manhattan Bank Pleads Guilty to Precedent-Setting Criminal Charges Under the U.S. Bank Secrecy Act*, at [http://www.moneylaundering.com/news\\_marchmarch03.htm](http://www.moneylaundering.com/news_marchmarch03.htm) (Dec. 4, 2002).

<sup>32</sup> H.R. 3162, 107th Cong. (2001) (enacted).

<sup>33</sup> *See* 18 U.S.C. § 1956(c)(7)(B)(iv) (2002).

<sup>34</sup> *Id.* at § 1956(c)(1) (2002).

include money laundering performed abroad by foreign persons through foreign banks.<sup>35</sup> Third, the Patriot Act permits the Secretary of the Treasury to require any "domestic financial institution or nonfinancial trades or businesses" (including institutions as diverse as casinos and credit unions) to maintain records containing information concerning transactions with foreign financial institutions.<sup>36</sup> Fourth, the Patriot Act requires U.S. financial institutions to disclose information regarding so-called "correspondent" or "interbank" accounts that they maintain on behalf of off-shore institutions, and mandates that U.S. institutions shut down such correspondent accounts if the Secretary of the Treasury deems the offshore institution to be one of "primary money laundering concern."<sup>37</sup>

## 2. *Methods of Investigation*

Transnational money laundering investigations frequently require evidence located in a foreign jurisdiction.<sup>38</sup> While the Patriot Act expanded the substantive scope and potential jurisdictional application of U.S. anti-laundering statutes, it did not attempt to enhance the functional efficacy of an investigational tool that federal prosecutors frequently rely upon in attempting to obtain information from foreign banks: the grand jury subpoena. Yet, particularly in light of the Patriot Act's provisions extending U.S. jurisdiction to include money laundering performed abroad by foreign persons through foreign banks,<sup>39</sup> it would seem critical that the government maximize the investigational strength of available tools allowing for the collection of sought-after overseas evidence.

### (a) Cooperative Methods of Investigation

Federal prosecutors seeking foreign bank record information must overcome various legal, cultural, and language barriers that are absent in the domestic context.<sup>40</sup> Investigators can attempt to overcome these barriers via

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<sup>35</sup> *Id.* at § 1956(b)(2) (2002) ("the district courts shall have jurisdiction over any foreign person . . . against whom the action is brought, if . . . (A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States; (B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or (C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States").

<sup>36</sup> 31 U.S.C. § 5318(a) (2003).

<sup>37</sup> *Id.*

<sup>38</sup> UNITED STATES ATTORNEY'S MANUAL § 279 (2002).

<sup>39</sup> 18 U.S.C. § 1956(b)(2) (2002). The language of the statute is cited *supra* note 35.

<sup>40</sup> Befitting the breadth and complexity of the challenge posed by such activities, no fewer than twelve U.S. federal agencies—the FBI, the DEA, the Secret Service, the ATF, the State Department, the Treasury Department, the Internal Revenue Service, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the U.S. Postal Service, the Customs Service, and the Department of Justice—share responsibility for investi-

a variety of cooperative mechanisms. One such mechanism is the multinational treaty. As an example, the 1988 U.N. Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances, to which more than 150 nations are party,<sup>41</sup> states that "[a] Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy."<sup>42</sup> However, most scholars disparage the effectiveness of such provisions.<sup>43</sup> Investigators can also attempt to rely on the provision of bilateral agreements that the United States has concluded with other nation-states, most commonly Mutual Legal Assistance Treaties.<sup>44</sup> At present, the United States maintains such treaties with fifty-six nations.<sup>45</sup>

Prosecutors may also request that a district court issue a letter rogatory, which is a document requesting that a foreign tribunal order an overseas bank branch to release the desired documents.<sup>46</sup> The letter rogatory process, however, presents a investigating prosecutor with the troubling uncertainty that a foreign court may not choose to honor a subpoena request made by a U.S. district court.

The Financial Action Task Force, comprised of the United States and twenty-seven other nations (primarily G-7 and European Union-area states)

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gating and prosecuting money laundering violations. See U.S. Treas. Dept., THE 2001 NATIONAL MONEY LAUNDERING STRATEGY, 52-54 (2001).

<sup>41</sup> Jimmy Gurule, *The 1988 U.N. Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances—A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 FORDHAM INT'L L.J. 74, 79-80 (1998).

<sup>42</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, art. 5(3), 8.

<sup>43</sup> See, e.g., Baldwin, *supra* note 15, at 45 ("Regardless of the treaties and the pressure . . . 'fiscally tolerant states' . . . are happy to have your money to launder. We have conventions in addition to the U.N. Convention. We have directives. We have everything. Nevertheless, these fiscally tolerant states, are there and willing to accept the money.").

Another example of a multinational treaty designed, in part, to enhance evidence sharing, is the Council of Europe Criminal Law Convention on Corruption ("CLCC"). Criminal Law Convention on Corruption, *opened for signature* Jan. 27, 1999, Europ. T.S. no. 173 [hereinafter CLCC]. The CLCC has been signed by thirty-nine members of the Council of Europe, and by three non-Council members, including the U.S. See Council of Europe Treaty Office, at <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>. It contains a provision that states parties shall "adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention." CLCC, at art. 18. However, of the states that appear on the FATF blacklist, only one (Ukraine) has signed the CLCC, and it has not ratified the CLCC.

<sup>44</sup> See CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT'L L. 53, 82-83 (2000).

<sup>45</sup> MITCHELL ABBELL, OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES A-45-A-46 (2001). Only eight of the nations that appear on the FATF 'blacklist' of non-cooperative states maintain Mutual Legal Assistance Treaties with the United States.

<sup>46</sup> Ian M. Comisky, *U.S. is Changing Its Approach to Obtaining Evidence Abroad*, 1 J. INT'L TAX'N 334, 334 (1991).



and founded in 1989, pressures haven states to liberalize their secrecy laws by issuing periodic 'blacklists' naming nation-states that fail to safeguard against money laundering.<sup>47</sup> The G-7 regularly follows up on such blacklists by issuing financial advisories that warn private banks against doing business in target countries.<sup>48</sup>

(b) Coercive Mechanism of Investigation: the Grand Jury Subpoena

Where cooperative methods of obtaining bank records located in a foreign jurisdiction fail, federal prosecutors can secure such records by using a more coercive mechanism: the grand jury subpoena. Where the subpoenaed bank branch is located in a nation whose bank secrecy laws prohibit compelled bank record disclosures, the foreign bank branch may decline to comply with the subpoena. The remainder of this article explores how U.S. courts have handled this conflict, and recommends specific legal rules for resolving disputes as they arise.

(c) Grand Jury Subpoenas Pursuant to Money Laundering Investigations:  
Categorizing Recipient Financial Institutions According to Jurisdictional  
Standing

Table 1, *infra* page 208 categorizes bank branches within the context of their status as potential recipients of grand jury subpoenas requesting customer account information, according to three criteria: 1) the nationality of the branch's parent corporation, as determined by the location in which the branch's parent corporation is incorporated;<sup>49</sup> 2) the presence or absence of a U.S.-based branch; and 3) whether the sought-after information is located in one of the bank's U.S. branches or foreign branches.

Territorial jurisdiction is a widely recognized element of state sovereignty, and it dictates that a nation may prescribe laws affecting business activities occurring on its sovereign soil.<sup>50</sup> It is therefore unquestioned that, with respect to Category 1 bank branches, the United States has the author-

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<sup>47</sup> See FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REVIEW OF NON-COOPERATIVE COUNTRIES OR TERRITORIES, June 20, 2003, at [http://www1.oecd.org/fatf/pdf/NCCT2003\\_en.pdf](http://www1.oecd.org/fatf/pdf/NCCT2003_en.pdf).

<sup>48</sup> Rueda, *supra* note 6, at 151.

<sup>49</sup> In common law nations, a multinational corporation has the 'nationality' of the state in which it incorporates. GUY STESENS, MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL 233-234 (2000). In civil law nations, such a corporation attains the nationality of that nation in which it maintains a principal business center, or headquarters. *Id.* The common law definition of nationality is adopted for purposes of analysis in this article.

<sup>50</sup> *Id.* at 211.

ity to require such branches<sup>51</sup> to maintain bank records for potential disclosure to law enforcement authorities.<sup>52</sup>

Conventional hornbooks do not make any analytical distinction between Category 2 and 3 financial institutions depicted in Table 1.<sup>53</sup> Yet recognizing such a distinction is necessary if the basis for U.S. authority for obtaining overseas documents is to be properly understood and—as argued for here—extended.

The critical distinction between Category 2 financial institutions and Category 3 financial institutions in Table 1 is the nationality of the subpoenaed entity. Category 3 includes overseas subpoenaed bank branches whose parent company is a corporation based outside of the United States that separately maintains U.S. bank branches. Category 2 branches are those that are located overseas, but whose parent company is a U.S.-national corporation. Both the Restatement Second and Third of Foreign Relations Law suggest that, where resolving conflicts of evidence-gathering law between U.S. law and the law of a subpoenaed bank branch's jurisdiction, U.S. courts should exercise greater caution in compelling subpoena compliance on the part of a entity based outside the United States than when dealing with a U.S.-national entity.<sup>54</sup> Perhaps surprisingly, then, courts have been no less willing, and indeed, perhaps more willing, to compel subpoena compliance where the subpoenaed entity is incorporated in a foreign jurisdiction.

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<sup>51</sup> 31 U.S.C. § 5311 (2002).

<sup>52</sup> See, e.g., *U.S. v. Nelson*, 486 F. Supp. 464, 483 (W.D. Mich. 1980) (holding that a grand jury subpoena of bank records does not violate any common law privacy or secrecy privilege, since the U.S. Bank Secrecy Act expressly disavows U.S. account-holders of any expectation of privacy).

<sup>53</sup> See generally Brian H. Redmond, *Discovery of, or compelled access to, records of foreign bank accounts, in federal criminal proceeding or investigation*, 87 A.L.R. FED. 676 (2002).

<sup>54</sup> See RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT SECOND] § 40 (1965) (indicating that a court should consider “the nationality of the person [subpoenaed]”); RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT THIRD] (1987) § 403 (indicating that a court should consider “the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect”).

TABLE 1: MULTINATIONAL FINANCIAL INSTITUTIONS,  
CATEGORIZED ACCORDING TO THE EASE WITH WHICH U.S.  
PROSECUTORS CAN OBTAIN BANK RECORD EVIDENCE FROM SUCH  
INSTITUTIONS

	<u>Category 1</u>	<u>Category 2</u>	<u>Category 3</u>
<u>Geographic Scope of Parent Corporation</u>	Multinational, with U.S. branch	Multinational, with U.S. branch	Multinational, with U.S. branch
<u>Nationality of Parent Corporation</u>	U.S. or Foreign <sup>55</sup> nation	U.S.	Foreign nation
<u>Location of Sought-After Bank Records</u>	U.S.	Foreign bank branch	Foreign bank Branch
<u>Applicable Statutory Provisions</u>	12 U.S.C. § 1829(b) (2002); 31 U.S.C. § 5311 (2003); 31 C.F.R. § 103 (2003).	None: differing circuit court precedent	
<u>Potential Penalties for Failure to Disclose Subpoenaed Records</u>	Civil penalties: Fines of up to \$10,000	Varied: e.g., contempt of court, per-day fines for failure to comply.	

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<sup>55</sup> According to Federal Reserve statistics, a total reported 565 bank branches located on American soil are subsidiaries of parent companies incorporated in another nation. See STRUCTURE DATA FOR U.S. OFFICES OF FOREIGN BANKS, at <http://www.federalreserve.gov/releases/iba/20020630/struca.pdf>. Bank deposits at these branches currently account for 15.9% of all deposits at U.S.-based banks, up from 1.7% in 1973. See Board of Governors of the Federal Reserve System Statistics, at <http://www.federalreserve.gov/>.

<b><u>Sample Cases</u></b>	<i>E.g., United States v. BCCI Holdings (Lux.), S.A.</i> , 961 F. Supp. 287 (D.D.C. 1997)	<i>E.g., In re Grand Jury Subpoena dated August 9, 2000</i> , 218 F. Supp. 2d 544 (S.D. N.Y. 2002)	<i>E.g., In re Sealed Case</i> , 825 F.2d 494 (D.C. Cir. 1987)
<b><u>Courts Tend to Favor</u></b>	U.S. investigators	Mixed: foreign bank branch, U.S. investigators	Mixed: foreign bank branch, U.S. investigators

### III. EXISTING FEDERAL LAW: SUBPOENAS ISSUED TO TRANSNATIONAL CORPORATIONS FOR FINANCIAL DOCUMENTS

The federal circuits have split over the question of whether a district court may permissibly order the production of customer documents subpoenaed from a Category 2 or Category 3 bank branch, where the subpoenaed documents are located in a nation whose laws prohibit disclosure of the records.<sup>56</sup> In assessing this question, courts do not consider whether a subpoena is issued pursuant to a money laundering investigation or another type of white-collar federal criminal investigation that could require overseas financial documents (e.g., anti-trust investigations) in determining whether to require compliance with the subpoena.<sup>57</sup> However, prospectively, this article will argue that Congress and the courts should indeed distinguish money laundering investigations from other forms of criminal investigation in fashioning rules pertaining to compelled subpoena compliance.

In the most recent appellate decision on the issue of whether a district court may permissibly order a financial institution that maintains a U.S. branch to produce subpoenaed business records, where such records are located overseas in a nation whose laws prohibit disclosure of the records, the

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<sup>56</sup> See *In re Grand Jury Subpoena Directed to Marc Rich & Co. A.G.*, 707 F.2d 663, 670 (2d Cir. 1983) (compelling disclosure where the overseas corporation was the target of the grand jury investigation), *cert. denied*, 463 U.S. 1215 (1983); *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817, 832-833 (11th Cir. 1983) (compelling disclosure where the corporation was not the target of the grand jury investigation); *but see In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987) (declining to compel disclosure where the corporation was not the target of the grand jury investigation).

<sup>57</sup> See, e.g., *Application of Chase Manhattan Bank*, 297 F.2d 611, 611-612 (2d Cir. 1962) (failing to discuss even the type of investigation at issue); *but see In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384, 1391 (11th Cir. 1982) (discussing the relative importance to American society of deterring narcotics violations).

Court of Appeals for the District of Columbia took the rare step of addressing Congress directly, pleading for clarifying action.<sup>58</sup> The court stated

We have no doubt that Congress could empower courts to issue contempt orders in any of these cases . . . . If we were asked to act in accord with such a distinct and express grant of power, it would be our duty to do so. Indeed, any such measures would be a welcome improvement over the difficulties and uncertainties that now pervade this area of the law.<sup>59</sup>

Congress should promptly remedy its failure to “empower courts to issue contempt orders” against Category 2 and Category 3 financial institutions where subpoenas have been issued pursuant to money laundering investigations.

#### A. Category 2 Financial Institutions

As mentioned above, existing federal law in the area of subpoenas for foreign bank records does not distinguish between subpoenas issued pursuant to money laundering investigations and other types of federal criminal investigations. Among appellate decisions that have confronted the question of whether a Category 2 financial institution need comply with a subpoena for a bank record located overseas, most involve grand jury requests for information pursuant to tax investigations.<sup>60</sup>

The oldest Category 2 appellate decision is *First Nat'l City Bank v. Internal Revenue Service*, where the Second Circuit reversed the district court's dismissal of a summons issued by the IRS on Citibank at its New York headquarters.<sup>61</sup> The summons sought documents held at Citibank's Panama City branch.<sup>62</sup> Three years later, the Second Circuit reached a different result in *Application of Chase Manhattan Bank*. There, the court upheld the district court's modification of a subpoena *duces tecum* after Chase Manhattan resisted producing records relating to four individuals and one corporation “wherever [such records were then] held” by Chase Manhattan; certain such records were located in Panama, where violation of a Panamanian secrecy statute “would be ‘equivalent to a misdemeanor’ under [U.S.] criminal law.”<sup>63</sup> Six years later, without explicitly overruling *Chase Manhattan*, the Second Circuit upheld the district court's finding of First National City Bank in contempt upon its refusal to comply with a U.S.

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<sup>58</sup> *In re Sealed Case*, 825 F.2d at 499.

<sup>59</sup> *Id.*

<sup>60</sup> See *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1284 (9th Cir. 1981); *First National City Bank v. Internal Revenue Service*, 271 F.2d 616, 618 (2d Cir. 1959).

<sup>61</sup> *First Nat'l City Bank v. Internal Revenue Service*, 271 F.2d 616, 620 (2d Cir. 1959).

<sup>62</sup> *Id.*

<sup>63</sup> *Application of Chase Manhattan Bank*, 297 F.2d 611, 612 (2d Cir. 1962).

subpoena in *U.S. v. First Nat'l City Bank*, where the production required by such subpoena would have required First National City Bank to violate German law.<sup>64</sup>

It has been noted that the *Citibank II* court, in ruling for the United States, facially professed to have engaged in the five-part balancing test recommended under the Restatement (Second) of Foreign Relations Law ("Restatement Second") for the resolution of overseas-record subpoena conflicts.<sup>65</sup> The Restatement Second encouraged courts to consider a cumbersome laundry list of factors in resolving such conflicts: (a) the 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 [being asked to disclose documents]; (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.<sup>66</sup>

In fact, the *Citibank II* court gave consideration to only two factors—the vital national interests of the nation-states, and the potential hardship posed to the bank<sup>67</sup>—of the five set out in the Restatement Second. While certain scholars have strained to attach importance to the Restatement Second as a guidepost of judicial decision-making in this area,<sup>68</sup> in reality, over the past thirty-five years, neither circuit courts nor district courts have followed the Restatement Second guidelines with any degree of genuine fealty.<sup>69</sup> In the face of court decisions effectively scaling back the number of factors to be considered by a district court, the more recently-enacted Restatement (Third) of Foreign Relations Law's ("Restatement Third") contribution to this area of law was to add more factors to the Restatement Second's laundry list of factors.<sup>70</sup> Fortunately, district courts have tended

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<sup>64</sup> *U.S. v. First Nat'l City Bank*, 396 F.2d 897, 898 (2d Cir. 1968) ("Citibank II").

<sup>65</sup> C. Todd Jones, *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454, 490 (1992).

<sup>66</sup> RESTATEMENT SECOND, *supra* note 54, at § 40.

<sup>67</sup> *Citibank II*, 396 F.2d at 902.

<sup>68</sup> See Jones, *supra* note 65, at 490-498.

<sup>69</sup> See, e.g., *In re Grand Jury Proceedings*, 532 F.2d 404, 408 (5th Cir. 1976) (referencing the Restatement Second but considering only the "vital national interests" at stake); *Garpeg, Ltd. v. U.S.*, 583 F. Supp. 789, 795 (S.D.N.Y. 1984) (stating "[t]he first two factors [of the Restatement] are of critical importance, the last three appear to be less important").

<sup>70</sup> RESTATEMENT THIRD, *supra* note 54, at § 403 ("(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is

to politely decline to avail themselves of the 'help' of following the entirety of the Restatements' 'roadmaps,'<sup>71</sup> even though the U.S. Supreme Court tepidly endorsed the Restatement Third's suggested approach in a footnote to a 1987 decision.<sup>72</sup>

Most recently, the Ninth Circuit has upheld the enforcement of a U.S. Category 2 subpoena,<sup>73</sup> while the Seventh Circuit declined to compel compliance pursuant to a tax investigation, in the face of conflict with a Greek statute.<sup>74</sup> Two subsequent Category 2 district court cases, both from the Southern District of New York, have compelled compliance on the part of the subpoenaed bank pursuant to tax and foreign bribery investigations.<sup>75</sup>

### B. Category 3 Financial Institutions

Courts have been no less willing, and perhaps have been even more willing, to compel subpoena compliance where the subpoenaed entity's parent corporation is incorporated in a foreign jurisdiction. One observer has suggested that the United States is less willing to act aggressively with respect to Category 2 institutions than with respect to Category 3 institutions due to the comparatively greater political clout that large U.S.-based banks possess.<sup>76</sup>

In at least five instances, the Second and Eleventh Circuits have upheld the compelled compliance of Category 3 institutions with U.S. subpoenas seeking foreign bank records.<sup>77</sup> In the most recent Category 3 appellate decision, however, the Court of Appeals for the District of Columbia staked out a differing position.

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generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state").

<sup>71</sup> See Garpeg, 583 F. Supp. 789, at 795-797; *In re Grand Jury Subpoena* dated August 9, 2000, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 115-117 (S.D.N.Y. 1981).

<sup>72</sup> *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 544 n.28 (1987) (suggesting that the Third Restatement's stipulated factors should "guide a comity analysis" by the district court).

<sup>73</sup> *U.S. v. Vetco, Inc.*, 691 F.2d 1281, 1291 (9th Cir. 1981).

<sup>74</sup> *First National Bank of Chicago*, 699 F.2d 341, 347 (7th Cir. 1983).

<sup>75</sup> *Garpeg*, 583 F. Supp. 789; *In re Grand Jury Subpoena* dated August 9, 2000, 218 F. Supp.2d 544.

<sup>76</sup> See Money Laundering Alert, *U.S. Justice Department Has "Blind Spot" When Big U.S. Institutions Launder, Says MLA* (Jan. 29, 2003), at [http://www.moneylaundering.com/news\\_march03.htm](http://www.moneylaundering.com/news_march03.htm).

<sup>77</sup> *Marc Rich & Co.*, 707 F.2d 663, 670; *In re Grand Jury Proceedings (Bank of Nova Scotia) ("Nova Scotia I")*, 740 F.2d 817, 832-833 (11th Cir. 1983); *In re Grand Jury Proceedings (Bank of Nova Scotia) ("Nova Scotia III")*, 691 F.2d 1384, 1391 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); *U.S. v. Davis*, 767 F.2d 1025, 1035-1036 (2d Cir. 1985).

The *In re Sealed Case* court limited its holding to the specific facts of that case.<sup>78</sup> There, a bank owned by "Country X"<sup>79</sup> and possessing U.S. branches, was asked to produce bank records located in "Country Y," the laws of which prohibited disclosure of the type demanded by the government subpoena. The district court ordered compliance, and the D.C. Circuit reversed. Though the case presented the unusual proposition that a federal court might order another nation-state ("Country X") to violate the laws of a separate nation-state ("Country Y"), the court expressed its central rationale in far more general terms. Lambasting Category 3 subpoenas generally, the court stated, "[m]ost important to our decision is the fact that these sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory."<sup>80</sup> Significantly, the court expressed a general unwillingness to compel a foreign "person" to violate the laws of other nations; the scope of its reasoning was not limited so as to protect only corporations owned by foreign nation-states. Accordingly, the court issued its plea to Congress for clarifying action.<sup>81</sup>

The *Sealed Case* decision is also notable in that the court threw up its hands at the prospect of having to determine under a balancing test whether U.S. interests in pursuing money laundering investigations outweighed the privacy interests ostensibly protected by another nation's secrecy statutes. The court framed the issue appropriately, stating:

[We] are obliged to undertake the unseemly task of picking and choosing when to order parties to violate foreign laws. It is conceivable that we might even be forced to base our determination in part on a subjective evaluation of the content of those laws; an American court might well find it wholly inappropriate to defer to a foreign sovereign where the laws in question promote, for example, torture or slavery or terrorism.<sup>82</sup>

Whether consciously or unconsciously, the *Sealed Case* court thus raised, in a single statement, the considerations expressed as four unwieldy separate factors under the Restatement Third: to what extent are transnational money laundering transgressions violative not just of U.S. domestic law, but also customary international law?

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<sup>78</sup> *In re Sealed Case*, 825 F.2d at 498.

<sup>79</sup> The D.C. Court of Appeals' term (the Court of Appeals did not identify the countries involved by their actual names); see *In re Sealed Case*, 825 F.2d at 495.

<sup>80</sup> *Id.* at 498 (emphasis added).

<sup>81</sup> See discussion *supra* surrounding note 58.

<sup>82</sup> *In re Sealed Case*, 825 F.2d at 499.



Torture, slavery and terrorism, cited by the *Sealed Case* court, have been recognized to violate customary principles of international law.<sup>83</sup> The *Sealed Case* court thus properly emphasized that Congress bears an affirmative duty to signal to the courts whether it views potential money laundering investigations to bear such a degree of domestic and international importance that the pursuit of such investigations should trump bank secrecy statutes. As shall be re-examined subsequently, a strong case can be made that the prohibition against money laundering has risen to the level of a customary principle of international law. It will be argued that this emerging principle strengthens the rationale for a Congressional declaration that money laundering subpoenas should always trump secrecy interests.

### C. Category 3 Case Application: The Bank of Nova Scotia Decisions

Title 9, Section 279 of the *U.S. Attorney's Manual* contains a subsection titled "Bank of Nova Scotia Subpoenas."<sup>84</sup> The subsection informs prosecutors that "The United States has obtained bank or business records located abroad by serving subpoenas on branches of the bank or business located in the United States, even where production of the records would violate the foreign country's secrecy laws."<sup>85</sup>

The Bank of Nova Scotia is a Canadian banking corporation headquartered in Toronto which, as of 1982, had over 1,200 branches, offices and agencies in forty-five countries.<sup>86</sup> One of its branches was located in Miami, Florida.<sup>87</sup> On September 23, 1981, the Bank of Nova Scotia was presented with a subpoena duces tecum requiring from the bank's Nassau, Bahamas branch the production of records pertaining to a Bank of Nova Scotia customer who was being investigated for suspected narcotics violations.<sup>88</sup> The Bank declined to produce the documents it found in its Bahamian office, citing a potential conflict with Bahamian secrecy laws.<sup>89</sup> The district court held the Bank in civil contempt, and on appeal, the Eleventh Circuit upheld the district court's remedy.<sup>90</sup>

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<sup>83</sup> See, e.g., RESTATEMENT THIRD § 404 cmt. a (1987); Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. Res. 46, 39 U.N. GAOR Supp. No. 51, at 197, *entered into force* June 26, 1987.

<sup>84</sup> U.S. ATTORNEY'S MANUAL § 279 (2002).

<sup>85</sup> *Id.*

<sup>86</sup> *Nova Scotia I*, 691 F.2d at 1385.

<sup>87</sup> *Id.* at 1386.

<sup>88</sup> *Id.* Though it is not clear from the language employed by the court whether the customer under investigation stood to be charged with a money laundering offense in connection with his suspected narcotics violations, given the government's interest in reviewing the customer's bank records, it can be inferred that the government potentially stood to recover information concerning money laundering violations incident to narcotics transactions.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1391.

In 1983, lightning struck the Bank of Nova Scotia a second and third time, as it was subpoenaed, in separate instances, for bank records located in its Bahama, Grand Cayman, and Antigua offices.<sup>91</sup> It again resisted on the ground that complying with such subpoenas might place the bank in violation of Bahamian and Cayman law.<sup>92</sup> In the third instance, the district court fined the bank \$1.825 million for its recalcitrance.<sup>93</sup> As in the first Nova Scotia appeal, the Eleventh Circuit upheld the district court's penalty assessments in the third Nova Scotia case;<sup>94</sup> in the second Nova Scotia appeal, the court remanded the matter to the district court on account of insufficient information in the briefs presented to that court.<sup>95</sup>

The first of the three Nova Scotia cases is notable because it proposed a unique solution to the problem of potentially trampling on the rights and interests of other nations: "the various federal courts remain open to the legislative and executive branches of our government if matters such as this [disputes arising out of a grand jury subpoena] prove to have international repercussions."<sup>96</sup> The court thus placed the burden on the U.S. legislative and executive branches to voice, and weigh, the interests of the Bahamian government, on the theory that, were Bahamian interests to stand to be sufficiently impeded, Bahamian officials could be expected to communicate their displeasure to the American legislative and executive branches; these branches could then weigh the international significance of such complaints and communicate accordingly with the U.S. judiciary. In resolving the tensions between U.S. law enforcement and foreign national law and the interests of Bahamian bank secrecy, the Eleventh Circuit thus framed solicitude toward Bahamian interests—traditionally known as a consideration of international comity<sup>97</sup>—as a concern to be expressed by U.S. political bodies, not one to be weighed by U.S. judicial bodies. This approach thus stands in direct contrast to that advocated in the Restatements Second and Third.

Decrying that the "notion of [bank] secrecy" has been "misconceived" by the United States and other non-haven nation-states, two Bahamian bank scholars summarized, from the Bahamian perspective, the aftermath of the second of the three Nova Scotia decisions:

[F]acing significant sanctions . . . the [Bank of Nova Scotia] capitulated and disclosed the information. No action was taken against the bank in the Bahamas. The decision of the United States court was staggering. It was an

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<sup>91</sup> *Nova Scotia III*, 740 F.2d 817, 820; *In re Grand Jury Proceedings Bank of Nova Scotia* ("Nova Scotia II"), 722 F.2d 657, 658 (11th Cir. 1983).

<sup>92</sup> *Id.*

<sup>93</sup> *Nova Scotia III*, 740 F.2d at 819.

<sup>94</sup> *Id.* at 833.

<sup>95</sup> *Nova Scotia II*, 722 F.2d at 659.

<sup>96</sup> *Nova Scotia I*, 691 F.2d at 1388.

<sup>97</sup> See Stessens, *supra* note 49, at 250-259.

affront to the comity of nations and showed a disregard for the sovereignty of an independent nation and the established rules of procedure.<sup>98</sup>

Presumably, the “established rules of procedure” to which the authors referred was for the district court to have issued a letter rogatory for review and approval by the Supreme Court of the Bahamas; such procedure is stipulated under Bahamian statute.<sup>99</sup> However, the Eleventh Circuit may have had another “established procedure” in mind in fashioning its decision: by 1984, it had become widely known that the Bahamian prime minister had accepted bribes from notorious Columbian drug cartel leader Carlos Lehder.<sup>100</sup> The Eleventh Circuit’s actions ensured that the efficacy of an American law enforcement effort would not be left to an uncertain outcome in the hands of the Bahamian Supreme Court.

#### IV. RECOMMENDATIONS

The Category 2 and Category 3 jurisdictional distinction reveals an enormous paradox: historically, federal courts have expressed equal, if not greater, reservations in compelling compliance among Category 2 banks than among Category 3 banks. Congress should use the logic employed by the majority of circuits with respect to Category 3 banks and apply far-reaching enforcement regulations to both Category 2 and Category 3 institutions.

##### A. Congress Should Authorize Courts to Compel Category 2 and Category 3 Transnational Banks to Disclose Customer Records Subpoenaed Pursuant to Money Laundering Investigations Where Such Records are Located at a Non-U.S. Bank Branch

The Restatements Second and Third and the Supreme Court—via its tepid advocacy of the use of the Restatements’ guidelines—err by urging courts to attempt to engage in a case-by-case, nation-state by nation-state ‘balancing’ test, weighing U.S. interests in investigating money laundering against the interests that other nation-states ostensibly have in promoting bank secrecy. As widely documented by the FATF ‘blacklist,’ the grossly deficient—and in some instances, blatantly corrupt—domestic money laundering enforcement efforts of certain bank haven nation-states render the comity claims of such states unworthy of the respect of American courts.

In the end, whether a district court compels a bank that maintains a U.S. branch to disclose records pertaining to one of its customers pursuant

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<sup>98</sup> See Michael L. Paton & Lennox Paton, *The Bahamas*, in INTERNATIONAL BANK SECRECY, *supra* note 14, at 70-71.

<sup>99</sup> *Id.*

<sup>100</sup> Madelyn J. Daley, *Effectiveness of U.S. and International Efforts to Combat International Money Laundering*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 175, 199 (2000).

to a money laundering investigation should not depend in part upon such extra-judicial facts as the identity of the owner of the bank,<sup>101</sup> or upon whether a court has reason to believe that senior officials in a foreign jurisdiction are apt to accept bribes.<sup>102</sup> A clear rule is in order—one that recognizes the paramount international importance of stamping out transnational money laundering activity.

Congress should grant prosecutors an additional unambiguous tool in the fight against laundering and simultaneously take the following three steps: 1) guide the seven circuits currently silent on the question of Category 2 and 3 subpoena enforcement; 2) resolve the existing split between the Seventh and D.C. Circuits and the Second, Ninth, and Eleventh Circuits; and 3) express explicit disapproval of the Supreme Court's suggestion in *Societe Nationale Industrielle Aerospatiale* that the Restatement Third's stipulated factors should "guide a [district court's] comity analysis."<sup>103</sup> Congress should authorize courts to compel Category 2 and Category 3 transnational banks to disclose customer records subpoenaed pursuant to money laundering investigations where such records are located at a non-U.S. bank branch.

### *1. The Criminalization of Money Laundering as a Principle of Customary International Law*

Congress bears the ability to delineate, under U.S. statute, its belief that a proscribed form of behavior rises to the level of a violation of international law.<sup>104</sup> It has been argued that the imperative of stamping out such activity represents a recognized principle of customary international law.<sup>105</sup> That the proscription against transnational laundering can be argued to have emerged as a customary principle of international law gives Congress just cause to act immediately by affirmatively declaring that U.S. law enforcement efforts to detect money laundering serve the interests of all nations, and that all subpoenas issued pursuant to such investigations need trump bank secrecy laws that have the effect of protecting criminals.

Customary international law is "evidence of a general practice accepted as law,"<sup>106</sup> and is evidenced through two elements: 1) state practice,

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<sup>101</sup> *In re Sealed Case*, 825 F.2d at 499.

<sup>102</sup> See discussion *infra* surrounding note 100.

<sup>103</sup> *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 at 544 n.28.

<sup>104</sup> Under the Constitution, Congress has authority to "define and punish offenses against the Law of Nations." U.S. CONST. art. 1, § 8, cl. 10; see e.g. 18 U.S.C. § 1651 (2003) (proscribing "Piracy under law of nations") (emphasis added) (stating "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life").

<sup>105</sup> See Matthew B. Comstock, *Gatt and GATS: A Public Morals Attack on Money Laundering*, 15 NW. J. INT'L L. & BUS. 139, 172 (1994).

<sup>106</sup> Statute of the International Court of Justice, 59 Stat. 1055, Jun. 29, 1949, art.38(1)(b).

and 2) opinio juris, or “because [the custom] is believed to be binding.”<sup>107</sup> The overwhelming majority of states proscribe money laundering, even those that maintain restrictive secrecy statutes.<sup>108</sup> Indeed, the extent of the international consensus regarding the criminality of money laundering activity is thus to be contrasted, for example, with the extensive dichotomy that exists with respect to states’ treatment of monopolistic and trust-forming behavior by corporations.<sup>109</sup> Moreover, the fact that the vast majority of nations do not appear on the Financial Action Task Force On Money Laundering’s blacklist of nations that are “non-cooperative” in the fight against money laundering is persuasive evidence of the existence of a customary prohibition against transnational laundering. To rise to the level of a customary principle of international law, a practice need only be undertaken by a majority of nation-states, though the extent of such majority that is required is open to some dispute.<sup>110</sup> In the end, the fact that haven states maintain secrecy statutes at all, can for the most part be chalked up to a type of cognitive dissonance driven by economic self-interest, rather than an express disavowal of a shared sense among all nations that transnational laundering must be attacked vigorously.

Among other conventions, the customary prohibition against transnational laundering has been reflected in the anti-laundering provisions of the Basel Committee on Banking Regulations and Supervisory Practices (1988), the Council on Europe Convention on Laundering, Search, Seizure and Confiscation from Proceeds of Crime (1990), the European Union Council Directive 91/308/EEC On Prevention of the Use of Financial System for the Purpose of Money Laundering (1991), and the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art. 5 (1988).

## 2. Additional Considerations

Under the above-described proposal, Congress would be forcing private banks, in many instances, to “pick their poison”: to face sanction in the U.S. for resisting a subpoena, or in a foreign jurisdiction, for complying with the subpoena. However, as the Nova Scotia-Bahamian example indicates, many foreign courts may be unwilling to defy the will of a federally-authorized money laundering investigation. Moreover, bank haven nation-states “need” the goodwill of the United States more than is the case vice versa. Where foreign jurisdictions impose sanctions on financial institu-

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<sup>107</sup> J.L. BRIERLY, *THE LAW OF NATIONS* 52 (1963).

<sup>108</sup> See Financial Action Task Force on Money Laundering, *Annual Review of Non-Cooperative Territories* (2003), 2-4, at [http://www1.oecd.org/fatf/pdf/NCCT2003\\_en.pdf](http://www1.oecd.org/fatf/pdf/NCCT2003_en.pdf).

<sup>109</sup> Chad Stockel, *Sherman’s March on Japan: U.S. v. Nippon and the Extraterritorial Reach of Criminal Antitrust Law*, 9 *TRANSNAT’L L. & CONTEMP. PROBS.* 399, 416 (1999).

<sup>110</sup> PETER MALANCZUK, *AKEHURT’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 27 (7th ed. 1997).

tions for complying with subpoenas, the executive branch can respond with retaliatory measures against such obstructionist nation-states. "On-shore" financial centers will not win in a war against the race to the bottom among off-shore haven states by simply hoping that such states see it in their best interests to relax privacy regulations whenever asked; in fact, experience has dictated that the converse is frequently the case. Credible threats must be issued to deter acts that would be violative of customary international law.

A rule stipulating that district courts should be instructed to compel compliance with federal subpoenas seeking overseas bank records from Category 2 and Category 3 corporations would also have the advantage of removing the inefficiencies and roulette-style uncertainty<sup>111</sup> that accompany the submission of letters rogatory to foreign judiciary bodies. The Cayman Court of Appeal has held that disclosure of bank records may only be mandatory if the foreign investigating body requesting the records has already filed charges against the target of the grand jury investigation.<sup>112</sup> Such a requirement would obviously thwart the entire pre-charging investigational function of the grand jury.

Foreign governments and banks might view federal grand jury subpoenas pursuant to money laundering investigations with skepticism if they could not be assured that the subpoena was at least motivated by a reasonable suspicion that transnational laundering has occurred. For this reason, Congress should attach to legislation providing for district courts' ability to compel subpoena compliance by Category 2 and 3 institutions a provision stipulating that requests for all such subpoenas need first be vetted by a national body, similar in nature to the current Foreign Intelligence Surveillance Court. That court screens Justice Department applications for search warrants seeking foreign intelligence information. A similar body created for the purpose of vetting Category 2 and Category 3 subpoenas pursuant to money laundering investigations could determine both that reasonable suspicion exists that transnational laundering has occurred, and that the criminal activity that the subpoena is intended to uncover is indeed transnational money laundering, and not a different violation, such as a monopolistic action by a software company. Additionally, to diffuse concerns that laundering subpoenas might be issued where the predicate offense giving rise to the laundering activity is a non-serious one, Congress could stipulate that the suspected predicate offense need be a felony, involving, for example, narcotics or racketeering activity.

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<sup>111</sup> Even the English High Court has declined to compel compliance on the part of a Category 3 bank where such bank was subpoenaed by a New York grand jury, arguing that "in practice there is no secrecy in regard to matters entrusted to grand jurors." See Michael L. Paton & Lennox Paton, *The Bahamas*, in *INTERNATIONAL BANK SECRECY*, *supra* note 14, at 69.

<sup>112</sup> *Id.* at 70.

More radically, to achieve a similar end, Congress could attach to a subpoena-trumps-secrecy law a stipulation to the effect that prosecutors would not be permitted to use any information gathered from the disclosure of a subpoenaed Category 2 or 3 bank record to try a defendant for certain non-laundering white collar offenses (such as anti-trust violations) that are not proscribed by the vast majority of nations as a general principle of law. However, such a provision would substantially constrain federal investigators, and could prove difficult to police.

### 3. *Counterproposals and Arguments in Favor of Bank Secrecy*

The *Chase Manhattan* court raised a counterproposal to the proposal advanced above, that senior U.S. executive officials should be made to negotiate with foreign officials to secure the release of sought-after bank documents whenever federal prosecutors request such documents.<sup>113</sup> However, such practice would prove redundant: existing federal procedures already ensure that requests for compelled subpoena compliance by Category 2 and 3 banks need be approved by senior Justice Department officials.<sup>114</sup> Thus, this counter-proposal would waste high-level executive resources.

Defenders of bank secrecy statutes typically offer three philosophical arguments in favor of such statutes. First, it has been stated that bank secrecy statutes can protect investors against confiscation of their assets by the government of their resident jurisdiction.<sup>115</sup> Second, it is argued that such statutes protect a confidential relationship between client and financial adviser.<sup>116</sup> Third, proponents argue that secrecy statutes promote privacy as a fundamental right, similar to one's fundamental right to privacy in one's home.<sup>117</sup>

Though each of these justifications appear frail when balanced against the magnitude of the need for investigators to access foreign bank records in order to detect laundering violations and the extent of the harm produced by laundering activities, the justifications each individually lack merit. The argument that bank secrecy statutes can help protect against asset confiscation is inapposite because confiscatory exception language could be crafted for any U.S. subpoena that might issue. The notion that the confidentiality of the relationship between client and financial adviser merits protection is exposed as a functionally baseless ideal when it is considered that financial advisers can render advice of equal quality and value to clients with or without financial secrecy. Last, the argument that financial privacy is akin to the privacy one should be allowed to enjoy in one's own home loses its

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<sup>113</sup> Application of Chase Manhattan Bank, 297 F.2d at 613.

<sup>114</sup> See U.S. ATTORNEY'S MANUAL §§ 9-105.100, 9-79.200 (2002).

<sup>115</sup> *Id.* at vii-ix.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

value when it is considered that one's right to privacy in the home is clearly circumscribed by the requirement that citizens not commit criminal acts in private. Financial privacy should be made subject to selective "piercing" via government search warrants and other investigatory tools where the federal government has a reasonable suspicion to suspect transnational money laundering activity.

**B. Adjusting the Respective Penalties and Incentives that Apply to Transnational Institutions that Receive Financial Document Subpoenas**

District courts should attain the authority to both a) impose stiffer penalties on Category 2 and Category 3 corporations that defy compelled-disclosure court orders, and b) offer rewards to overseas corporations that comply with such orders.

Financial institutions faced with U.S. grand jury subpoenas currently respond to such subpoenas by taking into account the various incentives that they face: 1) potentially angering or losing the business of the subpoenaed customer (and possibly losing other secrecy-minded customers as a result); 2) the threat of sanctions in a foreign jurisdiction; 3) the threat of sanctions imposed by a U.S. court. Concomitant with the enactment of a Category 2/Category 3 rule as described above, Congress should allow for district courts to prescribe substantial penalties upon recalcitrant subpoenaed parties. The \$25,000 per day penalty assessed by the court in the third Nova Scotia dispute<sup>118</sup> could serve as a baseline for an appropriately serious penalty that Congress could expressly authorize.

The ultimate threatened sanction could be a bar against engaging in commerce in any form in the United States, and from engaging in trade with any U.S.-based entity.<sup>119</sup> Financial institutions should be put in the position of having to choose between the laws and the goodwill of the United States, and that of foreign nation-states. Faced with such a choice, multinational financial institutions may actually perceive an incentive to lobby permissive bank haven nation-states to improve their money laundering enforcement efforts, and to improve their degree of cooperation with on-shore financial center investigations.

The United States could further incentivize bank responsiveness to subpoena requests by offering to pay complying institutions a per-page fee, per requested bank record produced. Such a provision would recognize that subpoenaed entities can, and do, frequently assume costs in complying with

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<sup>118</sup> Nova Scotia III, 740 F.2d at 820.

<sup>119</sup> The United States has imposed such a bar in the past upon foreign national banks that have themselves committed money laundering violations. See Money Laundering Alert Monthly Newsletter at <http://www.moneylaundering.com>.



government subpoenas.<sup>120</sup> The United States would further improve the efficacy of money laundering investigations by offering moderate reward payments to complying financial institutions, in the event that the information rendered by such institutions ultimately leads to a conviction of the grand jury target. The Drug Enforcement Agency frequently gives reward money to informants,<sup>121</sup> and the role played by financial institutions in money laundering investigations is analogous. The Patriot Act even allows the Secretary of State to confer rewards on behalf of individuals who assist in terrorist investigations.<sup>122</sup>

It could be argued that such rewards could provide financial institutions with an incentive to manufacture bank records implicating particular customers. However, any such fear could be alleviated by the appointment, by the court, of an independent auditor to review records produced by financial institutions. Additionally, criminal defendants would have the opportunity to produce their own copies of any subpoenaed records, and would thereby have the option of disputing bank record copies.

If Congress were to allow for moderate rewards, perhaps \$50,000 per conviction, it would also be unlikely that banks would have a sufficient incentive to take the unwanted step of lobbying bank haven nation-states against liberalizing their bank secrecy laws—the better to have an opportunity to potentially collect rewards from American investigating authorities. The goal of the rewards would be to provide a greater incentive to banks to cooperate in individual investigational sequences, without creating any systemic, perverse behavioral incentives for banks. At the same time, it should be noted that a properly-fashioned reward system could have the effect of inducing transnational banks to report suspected money laundering activities to American authorities where such activity appeared likely based upon specific individuals' or corporations' patterns of transactions. Such an outcome would be a welcome one. Thus, the only systemic behavioral incentive that a properly-fashioned reward system might create would be for transnational banks to violate the bank secrecy laws of haven nation-states, and such behavior could hardly be considered perverse. Just as the United States does not respect legal regimes that tolerate or encourage the production of narcotics for export into the country, it should take every measure possible to ensure the destruction of laws that directly facilitate the export of newly-cleaned dirty money into the hands of organized criminals and terrorists.

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<sup>120</sup> See, e.g., *Nova Scotia III*, 740 F.2d at 822 ("In late November, 1983, Mr. Nicol, the assistant chief inspector for the Bank, was ordered to go to the Bahamas and 'insure that [an] effective search had been carried out of the Bank's records in the Bahamas.'").

<sup>121</sup> See *U.S. v. Musquiz*, 45 F.3d 927, 931 (5th Cir. 1995); *U.S. v. Leja*, 568 F.2d 493, 496 (6th Cir. 1977).

<sup>122</sup> See U.S.A. Patriot Act, H.R. 3162 107<sup>th</sup> Cong. (2001); available at <http://www.epic.org/privacy/terrorism/hr3162.html>.

If a subpoenaed transnational bank were, in the end, to be proven to have been complicit with a grand jury-targeted person in the commission of a money laundering investigation, the conferment of a reward to such a bank would be troublesome. However, it is to be presumed that the United States would be no more likely to detect a money laundering violation of any sort absent a reward inducement, and also that a reward provision would not preclude the U.S. government from prosecuting bank entities proven to be complicit in money laundering activity.

In the end, the creation of a reward-granting system involves a complex set of system-wide calculations regarding the costs and benefits of introducing such a form of incentive. Clearly, it would not be worthwhile to the United States to offer rewards if it could expect, or hope, that transnational banks would comply with subpoenas absent the offer of such a reward. Of course, even a discussion by U.S. lawmakers of the possibility of creating a reward system could make transnational banks less likely to comply with subpoenas absent such rewards, the better to enhance the chances that a reward system would be created. For this reason, Congress would be wise to first enact legislation permitting Category 2/Category 3 subpoena compulsion—conjoined with stiff penalty provisions—and observe banks' behavior for a period of time, prior to enacting any reward provision.

**C. District Courts Should Attain Authority to Declare Injunctions to Prevent U.S. Residents from Suing to Enjoin Overseas Banks from Disclosing Customer Records**

The Patriot Act gave the Secretary of the Treasury and the Attorney General the joint power to issue subpoenas or summonses to foreign banks whose sole tie to the United States is a correspondent account maintained with a U.S. bank.<sup>123</sup> However, the United States' ability to make full use of this provision could be jeopardized in certain instances, due to the existence of a loophole in existing federal law.

Only one circuit has weighed the interests of international comity, or foreign state sovereignty, in resolving the issue of whether an American citizen can be enjoined from suing a transnational bank in a foreign jurisdiction to prevent the bank from disclosing customer records sited in the foreign jurisdiction, where the records are sought pursuant to a criminal investigation.<sup>124</sup> In *U.S. v. Davis*, the Second Circuit held that a U.S. citizen could be enjoined from continuing an action in Cayman courts to prevent

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<sup>123</sup> 31 U.S.C. § 5318 (2002).

<sup>124</sup> *U.S. v. Davis*, 767 F.2d at 1038. In 1988, the U.S. Supreme Court denied a petitioner's Fifth Amendment claim that signing a consent directive authorized a grand jury access to petitioner's foreign bank records, but it explicitly did not assess any questions of international comity. *Doe v. U.S.*, 487 U.S. 201, 218 (1988).

disclosure of a bank record.<sup>125</sup> But the court noted that "because an order enjoining a litigant from continuing a foreign action is facially obstructive, international comity demands that this extraordinary remedy be used only after other means of redressing the injury sought to be avoided have been explored."<sup>126</sup> This holding is to be contrasted with that of the district court in *Garpeg*, where the court declined to grant a compelled waiver to force the bank record holder to give up its bank secrecy rights under Hong Kong statute.<sup>127</sup>

Though federal statute provides that the United States will be notified when an individual initiates such a suit in foreign court,<sup>128</sup> this provision does not by any means enjoin a U.S. citizen from initiating such a proceeding. It is imperative that Congress introduce legislation stipulating that, pursuant to money laundering investigations, courts should treat the *Davis* opinion outcome as the norm. At the same time, such statute (again, speaking solely to money laundering investigations) should expressly reject the sentiment and the logic of the *Davis* court's statement that "international comity demands that this extraordinary remedy [enjoinment] be used only after other means of redressing the injury sought to be avoided have been explored." The statute should instead expressly authorize such remedy at all points in time during which the grand jury target is subject to investigation. Federal requests for enjoinder could be screened by the same special tribunal proposed *supra*.

## V. CONCLUSION

The federal circuits have split over the question of whether a district court may permissibly order a company incorporated in another nation to produce subpoenaed business records, where such records are located overseas in a nation whose laws prohibit disclosure of the records. Somewhat surprisingly, in such cases, the courts have been at least as willing to compel compliance by foreign-incorporated transnational banks as compared with U.S.-incorporated transnational banks.

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<sup>125</sup> U.S. v. *Davis*, 767 F.2d at 1038

<sup>126</sup> *Id.*

<sup>127</sup> *Garpeg*, 583 F. Supp. at 799. In *Garpeg*, the transgression being investigated was a potential tax violation. Other courts, while not confronted directly with the question of whether a grand jury target may be enjoined from engaging in legal action overseas, have issued rulings to similar effect. See, e.g., *In re* N.D.N.Y. Grand Jury Subpoena #86-0351-S, 811 F.2d 114, 117-118 (2d Cir. 1987) (Invalidating a consent directive signed by a grand jury target where the consent was compelled and would be forwarded to the subpoenaed bank without the qualifying statement "executed under protest," stating "While we have noted that enforcement of this directive does not rise to a constitutional violation, it nevertheless offends basic precepts of honest behavior by invoking the district court's imprimatur on a document that would be misleading.").

<sup>128</sup> 18 U.S.C. §§ 3506(a)-(b) (2002).

The Patriot Act's provisions extended the ambit of U.S. anti-money laundering law in several important and substantive ways. In order that the Patriot Act's provisions should have maximum effect, however, Congress should immediately enact three additional statutory provisions: 1) it should confer to federal courts the authority to compel transnational banks to disclose bank records subpoenaed pursuant to money laundering investigations, in instances where the subpoenaed document is located at a non-U.S. branch of the bank, but the bank separately maintains branches on U.S. soil; 2) it should provide for penalties for banks that defy such disclosure orders on claim of a conflicting secrecy statute, and supply rewards for complying banks; and 3) Congress should expressly authorize injunctions to prevent U.S. resident targets of grand jury money laundering investigations from suing in foreign courts to prevent banks from disclosing overseas records held in the target's name.

The above three provisions would arm federal prosecutors with effective tools to which they could resort where cooperative evidence-gathering mechanisms fail during the course of a transnational money laundering investigation. Scholars who argue against coercive evidence-gathering mechanisms out of a concern for foreign-state sovereignty<sup>129</sup> ignore the dual realities that cooperative methods do not always succeed, and that the threat to international security and stability posed by transnational money laundering is enormous and growing. The widespread existing international consensus against transnational laundering dictates that secrecy statutes need be pierced wherever and whenever laundering is reasonably suspected.

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<sup>129</sup> See, e.g. Stessens, *supra* note 49, at 238.

