

1986

## Congress and the Transnational Crime Problem

S. Cass Weiland

---

### Recommended Citation

S. Cass Weiland, *Congress and the Transnational Crime Problem*, 20 INT'L L. 1025 (1986)  
<https://scholar.smu.edu/til/vol20/iss3/19>

This Current Developments is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# **Congress and the Transnational Crime Problem**

## **I. Introduction**

### **A. CONGRESSIONAL ACTION**

In recent years, federal criminal prosecutions, like so much contemporary civil litigation, have become increasingly complex and frequently dependent upon evidence gathered outside the United States. For many observers, sophisticated criminal activity, including drug trafficking and fraud schemes, seems to inevitably involve offshore elements. Moreover, an increasingly diverse segment of society is being victimized by these types of crimes. These developments have not been overlooked by the Justice Department nor by other federal investigative agencies which have been required to dispatch attorneys and investigators with increasing frequency to various foreign locales, particularly so-called "offshore tax havens." Nor has Congress been able to ignore the phenomenon as victims exert constituent pressure for legislative action.

Putting aside for the moment the potentially serious diplomatic ramifications of having large numbers of non-diplomat executive and legislative branch employees dealing with foreign government and business people, it gradually became clear to Congress that statutory and policy changes were necessary in order to accommodate the demands of the American public to prosecute criminal activity in the United States regardless of its origins. Developments in 1985 have, if anything, tended to increase the clamor for government action. As this article shows, however, there are definite limits to the continual extensions of U.S. criminal law and policy and Congress is probably already reaching those limits.

---

\*Of Counsel, Jackson, Walker, Winstead, Cantwell & Miller in Dallas, Texas; Former Trial Attorney, Department of Justice and Chief Counsel, Senate Permanent Subcommittee on Investigations.

In 1983-84, the 98th Congress finally responded to the demand for action in several important ways. It provided the Executive Branch with additional tools in the tax area, in the ticklish area of foreign evidence admissibility, and in linking investigatory information disclosures to trade concessions. In 1985-1986, Congress continued to demonstrate its willingness to take action in this area although its accomplishments have been far less substantive.

## B. THE INTERNATIONAL CRIMINAL PROBLEM

Before addressing these statutory developments and discussing additional needed improvements, a note about the extent of the international criminal problem will provide context for the remainder of the article. Even a casual observer cannot help but notice the gradually rising level of government interest which has been engendered by transnational crime. For some, the furor over the federal prosecution of the Marc Rich company and its principals epitomizes the equally important but competing issues involved: the U.S. interest in revenue collection versus an unrelenting Swiss sovereignty interest. In *Marc Rich*,<sup>1</sup> a federal grand jury in Manhattan issued a subpoena to a U.S. subsidiary of a Swiss company in connection with a tax fraud investigation. The recipient of the subpoena argued that it could not produce the records since it was not in possession of them and because Swiss law would not permit it. District Judge Leonard Sand ruled against the company, levied a daily fine of \$50,000 and froze \$55 million in Rich assets in the United States. Ultimately, the Swiss government ordered the seizure of the records in Switzerland and its spokesman reacted furiously to what was considered high handed activity by the federal prosecutors.<sup>2</sup> The case touched off a chorus of criticism from a variety of European and Caribbean jurisdictions, many of which had already been swept up in other cases involving the same type of controversy.

A somewhat contemporaneous series of events developed in Miami where a Canadian bank was held in contempt for failing to comply with a subpoena served on its Miami agent requesting records of an offshore company which were believed to be held by the bank's Bahamas branch.<sup>3</sup>

1. *In re Grand Jury Subpoena: Marc Rich and Co., A.G.*, 707 F.2d 663 (2d Cir. 1983) (affirming district court contempt holding).

2. See, e.g., *War Breaks Out Over a Rich Man's Tax Return*, THE ECONOMIST, Sept. 24, 1983, at 83; *Marc Rich's \$48 Million Audit*, NEWSWEEK, Oct. 3, 1983, at 74; *Switzerland Enters Marc Rich Case to Halt U.S. from Obtaining Subpoenaed Papers*, Wall St. J., Aug. 15, 1983, at 3.

3. *In re Grand Jury Proceedings United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 103 S. Ct. 3086 (1982).

The bank refused to produce the records based on a fifth amendment objection and its own potential criminal liability in the Bahamas for disclosure of confidential information. The district court ruled against the bank and fined it \$25,000 per day. On appeal, the Court upheld a \$1.8 million fine against the bank. Thereafter further litigation ensued involving the same bank but a different grand jury subpoena. In *In re Grand Jury Proceedings: United States v. Bank of Nova Scotia* (BNS II),<sup>4</sup> the district court ordered the bank to comply with the subpoena requiring the production of bank records located in the Bahamas and the Cayman Islands. The bank claimed protection based upon foreign secrecy laws but was again held in contempt. On appeal, the Eleventh Circuit decided that the district court should hear further argument based on foreign relations issues and matters of comity. After another hearing the district court again ruled against the bank and was affirmed.<sup>5</sup> In *BNS II* the British, Canadian, Bahamian, and Caymanian governments were all involved either directly or as *amicus curiae*.

Other developments, primarily in the civil area, have led foreign jurisdictions to enact so-called "blocking" laws, which are designed to prevent the disclosure of business records, particularly in conjunction with U.S. antitrust and patent suits. Foreign blocking laws arose in some cases as a specific response to liberal American discovery procedures which had become of great concern to business and government leaders throughout Western Europe but particularly in France, Britain, Luxembourg, Liechtenstein, and West Germany.<sup>6</sup> Their reaction is understandable given that their jurisprudence does not allow for the burden, cost and downright harassment caused by American discovery. Moreover, some European governments have officially supported alleged antitrust violations committed by European companies which are the subject of U.S. litigation; hence, the governments often see themselves as stakeholders as well as protectors of national sovereignty.

Finally, a spate of cases has developed involving foreign tax shelters and these have begun to stack up in the Tax Court. One senior IRS official estimates that at least one-third of the 60,000 cases backlogged in the Tax Court involve allegedly illegal or improper tax shelters. Many of these have an offshore aspect. And 40-50 percent of the 300 criminal investi-

4. 722 F.2d 657 (11th Cir. 1983).

5. *Id.*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 778 (1985).

6. An excellent recent discussion of the ramifications of the French blocking statute on U.S. civil litigation is found in *Graco v. Kremlin, Inc.*, 101 F.R.D. 503, 508-516 (N.D. Ill. 1984). "The Blocking Statute obviously is a manifestation of French displeasure with American pretrial discovery procedures, which are significantly broader than the procedures accepted in other countries." *Id.* at 508; and see Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585 (1981).

gations the IRS had under way in 1985 involved offshore entities.<sup>7</sup> A ready example is derived from public reports regarding a large Washington, D.C. tax haven promoter which indicated that a key element in his allegedly illegal scheme was the use of a Cayman Island company through which commodities and government securities trades were supposedly made.<sup>8</sup> The use of futures trading as a tax dodge is not new of course. Congress moved to eliminate some of the abuses of "tax straddles" in 1981. But in 1982 the Senate Permanent Subcommittee on Investigations heard testimony from a convicted commodity investment broker to the effect that unscrupulous promoters were still capitalizing on commodity loopholes coupled with offshore secrecy laws to reap huge illegal benefits.<sup>9</sup>

Senior officials in the Justice Department have also pointed to the link between fraudulent tax shelters and bank secrecy jurisdictions.<sup>10</sup> Ironically, Congressional efforts to stem shelter abuses may have prompted some offshore movement. The Tax Reform Act of 1976 and the Revenue Act of 1978 enacted "at risk" rules so that tax losses could no longer be

---

7. Remarks of Richard C. Wassenaar, Asst. Commissioner (Crim. Investigation), IRS, at Washington Tax Conference, San Antonio, Texas (May 2, 1985).

8. Wall St. J., October 29, 1984, at 1, 20.

9. *Commodity Investment Fraud, Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs*, 97th Cong., 2d Sess. (1982), testimony of Kenneth Levin, at 25-26.

CHAIRMAN ROTH. Mr. Levin, in your testimony, you alluded to some cases where the schemes were going undetected because neither the victim . . . nor the operator had any financial reason to want to expose the situation. I assume you are talking about some kind of tax shelter.

MR. LEVIN. That is correct. There are tax shelters in different areas. Some are more specifically involved with commodities.

CHAIRMAN ROTH. Would you please explain how they would operate?

MR. LEVIN. I will give you a brief summary of how some of them do operate.

A client (is interested) in investing in . . . an off shore business outside of the United States. A grantor's trust is set up in the United States for the investors . . . . The funds are then invested in an offshore partnership that does not have to file with the Internal Revenue Service in the United States. The only filing that is necessary is the grantor's trust that files an addendum along with their 1041 or 1040. The money is then invested in the commodities markets in an offshore brokerage firm, because the laws are different in trading than the laws that are traded here in the United States, and to give you an example, if, in fact, you Senator, open up a brokerage account in Merrill Lynch and buy ounces on a futures contract, when that gold is purchased, they must ticket your account number to that stamped purchase price immediately in the order room. Well, in Europe, they do not have to put your name to that purchase price for days, weeks, or months. The laxity of laws overseas in commodities makes it very easy for investors to trade their money in the market, or I should say, the promoters trade their money in the market purposely losing it, but the system that they use is this: the investors lose their money and the investors have no idea what is going on.

10. *See, Abusive Tax Shelters, Hearings before the Subcommittee on Oversight of the House Ways and Means Committee*, 97th Cong., 2d Sess. (1982)(testimony of Glenn L. Archer, Jr., Assistant Attorney General, Tax Division).

claimed for funds not invested. But as Assistant Attorney General for the Tax Division Glenn Archer has testified:

Enactment of these limitations on artificial tax benefits has had one ironic effect. The irony is that the fraudulent part of many tax shelters currently marketed represents an effort on the part of the promoter to circumvent the at risk rules, frequently by means of offshore entities.<sup>11</sup>

Indeed, evidence elicited in several IRS/Department of Justice tax shelter prosecutions demonstrates the tremendous amounts of offshore activity which is typical. For example, several cases have involved Belize and a single prosecution in 1982 featured activity in the Cayman Islands, Switzerland, Costa Rica, Honduras, Guatemala and Panama.<sup>12</sup>

While all of this has been transpiring, Congress has been watching. Through a series of hearings and reports, both Houses have observed the evolution of these "transnational" cases and the resultant impact on U.S. foreign relations, but until 1984 very little legislation had resulted.<sup>13</sup> This

---

11. *Id.*

12. Information derived from interviews with IRS and Justice Department personnel.

13. Congressional hearings and reports involving offshore entities, bank secrecy and related issues include:

*IRS: Taxing the Heroin Barons, volume II, Hearings Before the Senate Comm. on the Judiciary, Subcomm. to Investigate Juvenile Delinquency, 94th Cong., 2d Sess. (1976).*

*Oversight Hearings into the Operations of the IRS (Operation Tradewinds, Project Haven, and Narcotics Traffickers Tax Program), Hearings Before the House Comm. on Government Operations, Subcommittee on Commerce, Consumer and Monetary Affairs, 94th Cong., 1st Sess. (1975).*

*Foreign and Corporate Bribes, Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976).*

*Internal Revenue Service and Treasury Department Enforcement of the Foreign Bank Account Reporting Requirement of the Bank Secrecy Act, second report together with additional views, House Comm. on Government Operations, H.R. REP. NO 246, 95th Cong., 1st Sess. (1977).*

*International Banking Operations, Hearings Before the House Comm. on Banking, Finance and Urban Affairs Subcomm. on Financial Institutions, Supervision, Regulation and Insurance, 95th Cong., 1st Sess. (1977).*

*Currency Transaction and Transportation Reporting Requirements of the Bank Secrecy Act, Hearings Before the House Comm. on Government Operations, Subcomm. on Commerce, Consumer and Monetary Affairs, 95th Cong., 1st Sess. (1977).*

*Investigation of Narcotics Trafficking Proceeds (Chicago, Illinois), Hearings Before House Select Comm. on Narcotics Abuse and Control, 95th Cong., 1st Sess. (1978).*

*Offshore Tax Havens, Hearings Before House Comm. on Ways and Means, Subcomm. on Oversight, 96th Cong., 1st Sess. (1979).*

*Edge Corporation Branching; Foreign Bank Takeovers; and International Banking Facilities, Hearings Before Senate Comm. on Banking, Housing and Urban Affairs, 96th Cong., 1st Sess. (1979).*

*The Operations of U.S. Banks in the International Capital Markets, Hearings Before House Comm. on Banking, Finance and Urban Affairs, 96th Cong., 1st Sess. (1979).*

*Patterns of Currency Transactions and Their Relationship to Narcotics Traffic, Hearings*

article will explore the effect of Congressional and Executive Branch inaction in terms of the costs to the public as well as the difficulties

---

*Before House Comm. on Banking, Finance and Urban Affairs, Subcomm. on General Oversight and Renegotiation, 96th Cong., 1st Sess. (1979).*

*Illegal Narcotics Profits, Hearings Before Senate Comm. on Governmental Affairs, Permanent Subcomm. on Investigations, 96th Cong., 1st & 2d Sess. (1979); report together with additional views, S. REP. NO. 887, 96th Cong. 2d Sess. (1980).*

*Currency and Foreign Transactions Reporting Act Amendments, Report to accompany H.R. 5961, House Comm. on Ways and Means, 96th Cong., 2d Sess. (1980). Banks and Narcotics Money Flow in South Florida, Hearings on S. 2236 (to amend the Currency and Foreign Transactions Reporting Act), Senate Comm. on Banking, Housing and Urban Affairs, 96th Cong., 2d Sess. (1980).*

*Income Tax Treaties, Hearings Before the House Comm. on Ways and Means, Subcomm. on Oversight, 96th Cong., 2d Sess. (1980).*

*Oversight Hearings on the Currency and Foreign Transactions Reporting Act, Hearings Before the House Comm. on Banking, Finance and Urban Affairs, Subcomm. on General Oversight and Renegotiation, 96th Cong., 2d Sess. (1980).*

*Home Health Care Fraud and Abuse, Hearings Before the Senate Comm. on Governmental Affairs, Permanent Subcomm. on Investigations, 97th Cong., 1st Sess. (1981); Report, S. REP. NO. 210, 97th Cong., 1st Sess. (1981).*

*Disclosure of IRS Information to Assist with the Enforcement of Criminal Law, Hearings on S. 732 (to amend the disclosure provisions of the Tax Reform Act of 1976) Before the Senate Comm. on Finance, Subcomm. on Oversight of the IRS, 97th Cong., 1st Sess. (1981).*

*International Narcotics Trafficking, Hearings Before the Senate Comm. on Governmental Affairs, Permanent Subcomm. on Investigations, 97th Cong., 1st Sess. (1981).*

*Commodity Investment Fraud Hearings Before the Senate Comm. on Governmental Affairs, Permanent Subcomm. on Investigations, 97th Cong., 2d Sess (1982); Report with additional views, S. REP. NO. 495, 97th Cong., 2d Sess. (1982).*

*Improper Use of Foreign Addresses to Evade U.S. Taxes, Hearings Before the House Comm. on Government Operations, Subcomm. on Commerce, Consumer and Monetary Affairs, 97th Cong., 2d Sess. (1982).*

*To Investigate the Enforcement and Effectiveness of the Bank Secrecy Act, Hearings Before the House Comm. on Banking, Finance and Urban Affairs, 97th Cong., 2d Sess. (1982).*

*SEC and Citicorp, Hearings Before the House Comm. on Energy and Commerce, Subcomm. on Oversight and Investigations, 97th Cong., 2d Sess. (1982).*

*Crime and Secrecy: The Use of Offshore Banks and Companies, Hearings Before the Senate Comm. on Governmental Affairs, Permanent Subcomm. on Investigations, 98th Cong., 1st Sess. (1983); PERMANENT SUBCOMM. ON INVESTIGATIONS, 98TH CONG., 1ST SESS., STAFF STUDY OF THE CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES (Comm. Print. 1983).*

*SEC and Citicorp, Hearings Before the House Comm. on Banking, Finance, and Urban Affairs, 98th Cong., 1st Sess. (1983).*

*Tax Evasion through the Netherlands Antilles and Other Tax Haven Countries, Hearings Before the House Comm. on Government Operations, Subcomm. on General Oversight and Renegotiation, 98th Cong., 2d Sess. (1984).*

*Oversight Hearings into the Bank Secrecy Act, Hearings Before the House Finance Comm. on Banking, Finance and Urban Affairs, Subcomm. on General Oversight and Renegotiation, 98th Cong., 2d Sess. (1984).*

involved in trying to find government remedies. It is useful first to review some of the practical as well as legal problems encountered in waging war on crime involving offshore jurisdictions.

## **II. Impediments to Transnational Evidence Gathering**

### **A. COSTS/GEOGRAPHY**

Numerous factors inhibit the efficient, much less successful, prosecution of a case involving internationalized crime. Not the least of these are the costs which must be incurred and the geography which must be traversed. The details surrounding these problems are fairly apparent, but consider for example, the cost of foreign travel, the necessity of obtaining interpreters and foreign law enforcement assistance, and other logistical considerations which further complicate the process.

Issues dealing with foreign customs may be more difficult than many seasoned international travelers might imagine. For example, the Senate Permanent Subcommittee on Investigations in one of its publications on the subject reported the consternation with which various Caribbean jurisdictions greet the arrival of U.S. law enforcement personnel.<sup>14</sup> Many U.S. law enforcement personnel have actually embarked on investigatory missions without advising the State Department, much less the foreign government, and simply arrive in the country on the basis of their civilian U.S. passport expecting to interview members of the local citizenry.<sup>15</sup> This type of activity is particularly fraught with risks in certain jurisdictions, such as Switzerland and Panama, where U.S. law enforcement officials would no doubt be arrested if they were to attempt to conduct an interview with, say, a local banker. In practice, even civil litigants have been detained by Swiss police after failing to adhere to Swiss law by attempting to conduct depositions without proper clearance and Swiss judicial participation.

### **B. SECRECY/BLOCKING LAWS**

In addition to the sometimes severe practical restrictions upon gathering evidence to prosecute international crime, there remain enormous legal

---

14. *Permanent Subcomm. on Investigations Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess., STAFF STUDY OF THE CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES 3 (1983) [hereinafter cited as *Crime and Secrecy*, Staff Study].

15. The Comprehensive Report of the Senate Permanent Subcommittee on Investigations, CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES, 99th Cong., 1st Sess. (1985) was issued in August/September 1985 as a follow-up to hearings and a previous Staff Study. The Report chronicles problems generated by the presence of U.S. investigators abroad, such as one incident involving St. Vincent. *Id.* at 111.



obstacles. Much has been written about the development of international secrecy and blocking laws around the world and the apparently willing participation of foreign banks and companies in facilitating U.S.-based crime. In *Crime and Secrecy: The Use of Offshore Banks and Companies*, the staff of the Senate Permanent Subcommittee on Investigations said:

For the United States, its institutions, and its people, the use of the international banking and business system for criminal purposes is an increasing problem. It undermines the integrity of American banks and other institutions of commerce. It threatens the integrity of our tax system and deprives the Treasury of badly needed revenue. It feeds the coffers of criminal enterprises. It corrupts public and private morals. And, despite some major prosecutorial successes in recent years, the problem is a source of great frustration for U.S. law enforcement authorities and for Congress.<sup>16</sup>

Obviously, there is nothing evil *per se* about bank and commercial secrecy. Indeed, the most famous secrecy jurisdiction, Switzerland, enacted strong criminal sanctions for revealing bank information in 1934 as a means of protecting persons involved in slipping funds out of Nazi Germany. British common law secrecy also had a regulatory origin. In *Tournier v. National Provincial and Union Bank of England*, the court established a contractual relationship between the bank and its customer, Tournier, about whom his banker was saying terrible things.<sup>17</sup> But the occasionally praiseworthy effects of offshore secrecy do little to succor the victims of criminals who capitalize on the anonymity afforded by such laws.

On the other hand, foreign governments like to point to the United States itself as a secrecy jurisdiction given the protection enjoyed by U.S. account holders and taxpayers through the Right to Financial Privacy Act of 1978<sup>18</sup> and the Tax Reform Act of 1976.<sup>19</sup> As currently enacted, the Financial Privacy Act is sufficiently restrictive to prevent banks from notifying law enforcement personnel unless the suspicious activity amounts to a crime, although Congress and the Administration moved to loosen these restrictions in 1985. But financial and corporate information found in the United States has always been subject to grand jury subpoenas, IRS summonses or foreign criminal investigatory requests. Most foreign secrecy jurisdictions have no really parallel domestic vehicles for obtaining like information. Hence, although American institutions do provide substantial investor secrecy via legislation and custom, that secrecy tends to yield quickly to law enforcement's actual or perceived needs. Generally, the same cannot be said for the tax havens which American prosecutors

16. *Crime and Secrecy*, Staff Study, *supra* note 14, at 3.

17. *Tournier v. National Provincial and Union Bank of England* (1922).

18. 12 U.S.C. § 3400 *et seq.* (1982).

19. See especially 26 U.S.C.A. § 6103 (West Supp. 1985).

view as moving toward greater rather than lesser accommodation of criminals.

Indeed, in recent years numerous foreign jurisdictions actually have taken steps to shore up their respective secrecy and blocking laws. Both categories have been troublesome to U.S. criminal and civil litigators. In cases where the U.S. government is not a party the discovery situation is frequently hopeless. For example, in 1960 France enacted a statute which denied "the legality of injunctions issued by American courts concerning persons or documents located in territory not under the jurisdiction of the United States."<sup>20</sup>

By 1981 France had perfected its blocking scheme to the point of prohibiting the *requesting* of information which could be used in later foreign proceedings.<sup>21</sup> Many jurisdictions have followed suit and one estimate places the number of foreign blocking laws at twenty-six.<sup>22</sup>

The situation with respect to simple secrecy laws is even more dramatic. Consider that a "tax haven" can most readily be defined as a no or low tax jurisdiction providing some depositor confidentiality. There are literally dozens of these havens with secrecy laws which insulate information from routine U.S. law enforcement inquiries under the premise of protecting the legitimate privacy interests of depositors.

### C. PAST LEGISLATIVE INACTION

Until recently Congress has done little if anything to combat the problems engendered by transnational crime. One who commits mail fraud, wire fraud, or who engages in labor racketeering, arson for profit, bankruptcy fraud, securities fraud, etc. through the use of offshore facilities which are shrouded with secrecy protection is penalized to no greater extent than one who perpetrates his crime in the more or less open environment of the fifty states. Yet he is subject to far less risk of detection and society pays a far greater price for investigation and prosecution.

Moreover, the Statute of Limitations,<sup>23</sup> and the Speedy Trial Act<sup>24</sup> did not, until 1984, include any specific provision for delay stemming from the need to acquire offshore records or testimony. Thus, by utilizing offshore entities, the perpetrator could frustrate the prosecutor by increasing the

20. Quoted in International Law Association, Report of the 51st Session, 1964, at 404.

21. Commercial Documents Act of 1968-80, and Decree No. 81-550 of 12 May 1981, concerning the transmission of Documents or Information of an Economic Commercial or Technical Nature to Foreign Individuals or Legal Persons.

22. *Crime and Secrecy*, Staff Study, *supra* n. 14 at 13, citing speech by John M. Fedders, Director, Division of Enforcement, Securities and Exchange Commission.

23. 18 U.S.C. § 3281 *et seq.*

24. 18 U.S.C. § 3161 *et seq.*

likelihood that the Statute of Limitations would run before indictment and then, assuming a grand jury indicts, demanding a speedy trial while the prosecutor is attempting to obtain the offshore records he needs for trial.

Most commentators would probably agree that the thrust of Congressional initiatives from the 1960s into the 1980s has been toward providing criminal defendants with much more procedural protection, including additional discovery and freer access to the courts. Certainly the legacy of the Warren Court was one emphasizing, defining and, perhaps, inventing defendants' rights. Many of those legislatively and judicially mandated protections were doubtless necessary. Their result, however, has been to shield further the international criminal; his reliance upon domestic protections coupled with offshore secrecy has made the pursuit of such violators arduous and their identification and conviction often impossible.

### III. Legislative Remedies:

#### The 98th Congress (1983-84)

Whether by design or accident, the 98th Congress did come to grips with some aspects of the "offshore crime problem." For many, the Congressional action was long overdue and not particularly impressive; in fact, however, the measures which did pass represent a virtual tidal wave of accomplishment for a Congress which has not even been able to pass appropriations bills for years. Whatever the cause for legislative movement, it seems clear that much of the newly expressed interest in secrecy jurisdictions sprang from an overwhelming suspicion (if not empirical evidence) that substantial tax revenues are being lost through evaders' use of tax havens. As suggested above, recent Congressional investigation has tended to confirm that the offshore secrecy havens have attracted not only narcotics money and fraud proceeds but also the siphoned income of doctors, lawyers, tax protesters, and others.<sup>25</sup> In fact, the increasing prevalence of tax haven bank accounts by otherwise average Americans has led many to conclude that the problem is far more serious than previously believed.<sup>26</sup>

25. See hearings cited in *supra* n. 13.

26. The Commissioner of the IRS told Congress in 1983:

We are concerned as you are with the growing number of seemingly law-abiding persons of moderate means who are using offshore banking facilities and other offshore entities as a means of tax evasion. We believe many such people are learning of these tax havens through the efforts of unscrupulous individuals who are marketing tax dollars using offshore banking facilities, and other connections.

There is a known trend toward the brokering of banks, that is, for a price you can create or buy your own bank for the expressed purpose of evading or certainly avoiding tax liability.

*Crime and Secrecy: The Use of Offshore Banks and Companies: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 98th Cong., 1st Sess. (1983), at 16. [hereinafter cited as *Crime and Secrecy, Hearings.*]*

A. CARIBBEAN BASIN INITIATIVE<sup>27</sup>

Whether the Reagan Administration shared the view that the offshore havens were attracting more and more "average" Americans or was primarily concerned with more traditional criminal use of the offshore havens is not clear. The Administration did, however, propose as an important element of its Caribbean Basin Initiative (CBI) a provision which potentially could have a major effect on the use of the havens by U.S. citizens. The CBI includes an enticement for Caribbean jurisdictions which seek to attract large scale tourist business in the form of U.S. business conventions. The trade-off involves a commitment on the part of the foreign jurisdiction to enter into an exchange of information agreement with the United States. Thereafter, members of American groups wishing to hold conventions in that offshore jurisdiction are entitled to receive convention tax deduction treatment for their indulgence.<sup>28</sup>

---

27. See Sharp & Steele, *The Caribbean Basin Exchange of Information Draft Agreement—A Technical Analysis*, 19 INT'L LAW. 949 (1985).

28. The actual language of the CBI provision (Pub. L. No. 98-7) reads:

C. AUTHORITY TO CONCLUDE EXCHANGE OF INFORMATION AGREEMENTS—

(i) IN GENERAL—The Secretary is authorized to negotiate and conclude an agreement for the exchange of information with any beneficiary country. Except as provided in clause (ii), an exchange of information (not limited to information concerning nationals or residents of the United States or the beneficiary country) as may be necessary or appropriate to carry out and enforce the tax laws of the United States and the beneficiary country (whether criminal or civil proceedings), including information which may otherwise be subject to nondisclosure provisions of the local law of the beneficiary country such as provisions respecting bank secrecy and bearer shares. The exchange of information agreement shall be terminable by either country on reasonable notice and shall provide that information received by either country will be disclosed only to persons or authorities (including courts and administrative bodies) involved in the administration and oversight of, or in the determination of appeals in respect of, taxes of the United States or the beneficiary country and will be used by such persons or authorities only for such purposes.

(ii) NONDISCLOSURE OF QUALIFIED CONFIDENTIAL INFORMATION SOUGHT FOR CIVIL TAX PURPOSES—An exchange of information agreement need not provide for the exchange of qualified confidential information which is sought only for civil tax purposes if—

(I) the Secretary of Treasury, after making all reasonable efforts to negotiate an agreement which included the exchange of such information, determines that such an agreement cannot be negotiated but that the agreement which was negotiated will significantly assist in the administration and enforcement of the tax laws of the United States, and

(II) the President determines that the agreement as negotiated is in the national security interest of the United States.

(iii) QUALIFIED CONFIDENTIAL INFORMATION DEFINED—For purposes of this subparagraph, the term 'qualified confidential information' means information which is subject to the nondisclosure provisions of any local law of the beneficiary country regarding bank secrecy or ownership of bearer shares.

(iv) CIVIL TAX PURPOSES—For purpose of this subparagraph, the determination of whether information is sought only for civil tax purposes shall be made by the

Unfortunately for both U.S. law enforcement and business communities, there has been little movement in the Caribbean toward information sharing agreements—at least on the sweeping scale called for by the CBI. A partial exception is the Cayman Islands' July 1984 decision to enter into an agreement with the United States to exchange narcotics-related information only. This agreement, however, is insufficient to trigger the beneficial aspects of the CBI absent some Congressional amendment. The CBI definitely requires the exchange of tax information. Indeed, it requires that the foreign jurisdiction comply with U.S. demands in a civil tax case as well, although this provision can be waived. In any case, in approving the CBI provision relating to disclosure of information Congress sent a strong message that it is concerned with the impact of foreign secrecy provisions on U.S. law enforcement and heralded the possibility of additional action.<sup>29</sup>

## B. FOREIGN SALES CORPORATIONS

Congressional interest in exchange of information agreements and, ultimately, the prosecution of international crime has also manifested itself in provisions of the Deficit Reduction Act of 1984,<sup>30</sup> which created a new entity labeled the Foreign Sales Corporation (FSC).<sup>31</sup> FSCs are designed to replace Domestic International Sales Corporations (DISCs) as the principal U.S. export incentive mechanism. Historically DISCs have served as the domestic export subsidiaries of United States firms. Among the fundamental requirements for the new FSCs is that they can be organized in a United States possession other than Puerto Rico or in a foreign country, but that country must have an exchange of tax information agreement with the United States.<sup>32</sup> Under this legislation the specific exchange of information agreement can resemble that called for in the Caribbean Basin Initiative (§ 927(e)(3)(A)) or any agreement (but probably resem-

---

requesting party.

D. COORDINATION with Section 6103—Any exchange of information agreement negotiated under subparagraph (C) shall be treated as an income tax convention for purposes of section 6103 (k)(4).

\* \* \*

(b) EFFECTIVE DATE: The amendment made by subsection (a) shall apply to conventions, seminars, or other meetings which begin after June 30, 1983.

29. Just what type of further action remains to be seen. On May 1, 1984 Congressman Fortney Stark (D-Cal) introduced H.R. 5558 to amend the CBI to provide that even designation of countries as CBI beneficiaries would be predicated on an exchange of information agreement.

30. The Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494.

31. See Block, Gilbert & Kuenster, *Transition from DISC to a Foreign Sales Corporation*, 19 INT'L LAW. 343 (1985).

32. See 26 U.S.C. § 922(a)(1)(A)(1984).

bling a traditional income tax treaty) which the Secretary of Treasury certifies is adequate.<sup>33</sup>

American frustration with foreign secrecy havens was apparently so well understood by the summer of 1984 when the Senate/House conferees adopted the Deficit Reduction Act that the Conference Report was quite cryptic with respect to the question of exchange of information agreements:

The [conference] agreement requires tax records (including invoices) to be kept in an office in a country which is either a party to an exchange of information agreement with the United States or an income tax treaty partner, which the Treasury certifies as having an acceptable exchange of information program under the treaty. The conferees intend that a foreign country, to qualify for this treatment, not be a country that has a statute (or other stated policy) which denies the IRS access to the home office of the FSC for audit purposes. Therefore, the conferees intend that the Treasury assure itself of access to the home office of a FSC before certifying a treaty partner or before entering into an exchange of information agreement.<sup>34</sup>

### C. WITHHOLDING TAX ON INTEREST PAID TO FOREIGN PERSONS

With some amount of notoriety, the 98th Congress decided to repeal the withholding tax on interest paid to nonresident aliens and foreign corporations. This move was taken with the full and complete support of the Reagan Administration and had broad bipartisan support.<sup>35</sup>

Essentially, this legislation will eventually phase out the so-called "Antilles window" which has allowed foreign corporations and others to incorporate in the Netherlands Antilles for the purpose of receiving reduced withholding tax treatment. This loophole, of course, produced extensive venue shopping and began to receive strong criticism from various quarters during 1983-84. As a partial compromise Congress decided only to repeal the tax on interest paid on obligations issued after the date of enactment.

Some Members of Congress were concerned that the repeal of the thirty percent withholding tax would tend to attract unsavory characters for the sale of Treasury and general U.S. corporate debt instruments. Representative Doug Barnard, Jr. (D-Ga.), urged the Treasury Department to "impose on the sale of the debt stringent procedures that will identify their beneficial owners and require them to prove their foreign status."<sup>36</sup> Discretion to require proof of the foreign status of beneficial owners was

33. 26 U.S.C. § 927(c)(3)(B) (1984). See discussion in 59 TAXES INT'L, 3-0 (Sept. 1984).

34. COMM. OF CONFERENCE, DEFICIT REDUCTION ACT OF 1984, H. REP. NO. 9861, 98th Cong., 2d Sess. 976 (1984). [hereinafter cited as COMM. ON CONFERENCE].

35. The legislation is codified in Section 127 of the Tax Reform Act of 1984, which is Part A of the Deficit Reduction Act of 1984; see 26 U.S.C. § 871(i)(1984).

36. CONG. REC. H8045 (daily ed. July 31, 1984).

vested with the Secretary after Congress itself declined to extend 1982 registration of securities requirements pertaining to certain obligations subject to the repeal of the 30 percent tax on the theory that: (1) they will be sold under procedures reasonably designed to prevent sale or resale to U.S. persons; (2) the interest will be payable outside the U.S. only; and (3) because U.S. holders will be subject to tax penalties.<sup>37</sup>

In any case, the legislation authorizes the Secretary of Treasury to reimpose the withholding tax for interest paid to persons in countries that do not exchange information with the United States. Technically, this involves the removal of an exemption for interest paid.<sup>38</sup>

#### D. FOREIGN EVIDENCE ADMISSIBILITY

Although Congressional tax and trade related efforts to have an impact on offshore crime generally and U.S. tax evasion specifically probably received greater attention, a little noticed amendment to the 1984 crime bill will doubtless have substantial influence on criminal litigators. Chapter XII of the Comprehensive Crime Control Act of 1984<sup>39</sup> includes Part K on Foreign Evidence. This provision essentially provides evidentiary treatment for foreign records of regularly conducted activity equivalent to that provided for U.S. business records.<sup>40</sup>

This legislation also allows for a three year suspension of the statute of limitation in cases where the U.S. government has officially requested evidence of an offense in a foreign country.<sup>41</sup> The foreign evidence amendment also provides for a one year delay in the Speedy Trial Act rules in cases where an official request for foreign evidence is pending after in-

37. COMM. ON CONFERENCE, *supra* note 34, at 937.

38. 26 U.S.C. § 87(i)(5) provides:

(5) SECRETARY MAY PROVIDE SUBSECTION NOT TO APPLY IN CASES OF INADEQUATE INFORMATION EXCHANGE—

(A) IN GENERAL—If the Secretary determines that the exchange of information between the United States and a foreign country is inadequate to prevent evasion of the United States income tax by United States persons, the Secretary may provide in writing (and publish a statement) that the provisions of this subsection shall not apply to payments of interest to any person within such foreign country (or payments addressed to, or for the account of, persons within such foreign country) during the period—

(i) beginning on the date specified by the Secretary and

(ii) ending on the date the Secretary determines that the exchange of information between the United States and the foreign country is adequate to prevent the evasion of the United States income tax by United States persons.

(B) EXCEPTION FOR CERTAIN OBLIGATIONS—Subparagraph (A) shall not apply to the payment of interest on any obligation which is issued on or before the date of the publication of the Secretary's determination under such subparagraph.

39. Passed as part of H.J. Res. 648, P.L. 98-73, Oct. 12, 1984.

40. 18 U.S.C. § 505 (1984). See FED. R. EVID. 803(6).

41. 18 U.S.C. § 3292 (1984).

dictment.<sup>42</sup> These suspension or tolling provisions are reasonable and long overdue. They were first introduced by Senator William Roth (R-Del.), a moderate Republican, who chairs the Permanent Subcommittee on Investigations, and were immediately supported by the Department of Justice. After the legislation passed the Senate as part of the Omnibus Crime Control Act of 1984 early in the year it was introduced by liberal Democratic Congressman John Conyers (D-Mich.) in the House and passed separately with certain minor alterations as H.R. 5919.<sup>43</sup>

The foreign evidence admissibility legislation will eliminate to some extent the necessity of taking foreign depositions to authenticate documents—a tedious, costly, and time consuming process.<sup>44</sup> As Senator Roth explained at the time this legislation was first adopted by the Senate:

The Permanent Subcommittee on Investigations which I chair has been probing the criminal use of offshore havens for 2 years. We have found that billions of dollars annually are channeled to offshore jurisdictions that do not cooperate with U.S. law enforcement efforts. Unfortunately, an ever expanding range of American citizens appear to be utilizing those havens. Their activity and international crime generally will continue to grow unless there is a change in the law. These straightforward changes in domestic procedural and evidentiary law are the least we can do to relieve complexity, reduce the cost, and shorten the time needed to bring these criminals to justice.<sup>45</sup>

#### E. BANK SECRECY ACT AMENDMENTS

Recent prosecutions have shown that one of the more effective tools available to assist in efforts to combat narcotics trafficking has been the Bank Secrecy Act.<sup>46</sup> The Bank Secrecy Act, formally entitled the Currency and Foreign Transactions Reporting Act, was intended to provide law enforcement agencies with recordkeeping and reporting tools to investigate the financial aspects of a wide variety of illegal activities including drug trafficking. Under this 1970 Act, a bank or other financial institution is required to file a Currency Transaction Report (CTR or Form 4789) with the IRS for each deposit, withdrawal or exchange of currency

42. 18 U.S.C. § 3161(h) (1984).

43. See HOUSE JUDICIARY COMM. REPORT ON ADMISSIBILITY OF FOREIGN BUSINESS RECORDS, REP. NO. 907, 98th Cong., 2d Sess. (1984).

44. See generally, *Crime and Secrecy*, Hearings, *supra* note 22, prepared testimony of D. Lowell Jensen, Assistant Attorney General, describing litigation of *U.S. v. Carver and Lemire* (also called *Interconex*) at 210-233; and Weiland, *The Use of Offshore Institutions to Facilitate Criminal Activity in the U.S.*, 16 N.Y.U.J. INT'L L. & POL., 115, 113-34 (1984). Just how costly this type of litigation can be is demonstrated by the district court's decision in *Interconex* to award the government \$200,000 in costs of prosecution. Crim. No. 81-00342 (D.C. 1981), *aff'd sub nom.* *United States v. Lemire*, 702 F.2d 1327 (D.C. Cir. 1983).

45. CONG. REC. S561 (daily ed. Jan. 31, 1984).

46. 31 U.S.C. § 1051 et seq.



or monetary instruments in excess of \$10,000. A related requirement involves the filing of a Currency and Monetary Instrument Report (CMIR) or Form 4790 with the Customs Service when carrying currency or monetary instruments valued at \$5,000 or more into or out of the United States. These twin reporting requirements by banks and travelers complement each other as noted by a Senate Subcommittee in 1983:

If banks were not required to report large currency transactions, there would be little need for criminals to smuggle money into or out of the country. Currency simply could be taken into a bank and the funds transferred abroad to a secret bank account without disclosing the identities of the persons arranging the transfer or receiving the funds. Conversely, without reports on the import or export of currency, the requirement that banks report large currency transactions would be relatively ineffectual. Criminals could easily travel to a nearby foreign country and convert their currency into a more compact and more profitable form of wealth.<sup>47</sup>

In recognition of the utility of the Bank Secrecy Act, Congress increased the penalties for violations from \$1,000 and one year in jail to \$50,000 and a possible five year imprisonment. The 1984 legislation, which was included in the crime package passed at the end of the session, also increased the reporting threshold for CMIRs from \$5,000 to \$10,000, added a provision which was intended to clarify the warrantless search authority of Customs Service officials for outbound travelers, and increased the possible rewards payable to informants for information leading to a recovery under the Act.<sup>48</sup> Despite some objection in the House, the legislation also made violations of the Act predicate offenses for the Racketeer Influenced and Corrupt Organization statute (RICO)<sup>49</sup> and the wiretapping statute.<sup>50</sup>

Since 1980, the Treasury Department, in cooperation with the Justice Department has been involved in Operation Greenback. This task force approach was originally designed to investigate the huge cash surplus in the Federal Reserve Bank in Florida which was believed to have developed as a result of drug marketing activity in the area. Most Federal Reserve Banks have a deficit of currency; Florida was an exception. By 1980, Florida had a peak of \$5.8 billion in excess currency.<sup>51</sup> The investigation gradually spread to other judicial districts, such as the Western and Southern Districts of Texas (San Antonio and Houston/Corpus Christi/Browns-

---

47. *Crime and Secrecy*, Staff Study, *supra* note 14 at 114-15; see also discussion in *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering* (Interim Report of the President's Commission on Organized Crime, October 1984).

48. H.J. Res. 648, 98th Cong. 2d Sess., § 901(g) (1984).

49. *Id.* amending 18 U.S.C. § 1961(1).

50. *Id.* at § 1203(c), amending 18 U.S.C. § 2516(1)(g).

51. *Crime and Secrecy*, Hearings, *supra* note 22, prepared testimony of John M. Walker, Jr., Assistant Secretary (Enforcement and Operations), Department of Treasury, at 285.

ville). In the meantime, Operation Greenback documented over \$2 billion in U.S. currency which had been laundered through international transactions by just seven organizations.<sup>52</sup> Hence, Greenback and similar programs have aptly demonstrated the effectiveness of having and enforcing reporting requirements.<sup>53</sup> Indeed, although the IRS has no direct prosecutive role in violations of Title 31, it has generated some 450 prosecution recommendations in the past several years and gives every indication of an interest in pursuing that program further.<sup>54</sup>

#### F. INTERNAL REVENUE CODE, SECTION 6050I

The Service's excellent results from Operation Greenback have led it to enthusiastically enforce reporting requirements like those found in 31 U.S.C. § 1051 *et seq.* Recognizing this, Congress added Section 6050I to Title 26 as part of the Tax Reform Act of 1984. Section 6050I requires *all* businesses receiving \$10,000 or more in a currency transaction after December 31, 1984 to file a Form 8300 with the Internal Revenue Service. According to the Chief of the Service's Criminal Investigation Division, Richard Wassenaar, of the first 300 such forms filed, many were from lawyers claiming the attorney/client privilege against disclosing the identity of the one making the currency payment.<sup>55</sup> Substantial litigation will no doubt be required before the absolute requirements of Section 6050I are established, particularly since the bar is so directly affected.

### IV. Legislative Remedies: The 99th Congress (1985-86)

As if content with its efforts in 1983-84, the 99th Congress got off to a slow start and produced little of substance in 1985. But its inaction probably stemmed not so much from lack of interest, but from its obvious preoccupation with the debt and tax reform. Even more likely, as discussed elsewhere in this article, Congress may have simply run out of substantive ideas on the subject.

---

52. *Id.* at 286.

53. In early 1985 the 1st National Bank of Boston pleaded guilty to failing to report large currency transactions. Wall St. J., Mar. 7, 1985, at 1. Some commentators believe the Bank of Boston's revelations are merely the "tip of the iceberg." Wall St. J., Mar. 13, 1985, at 1, quoting Sen. Alfonse D'Amato (R-NY). Other prosecutions including that of the Crocker Bank have followed. See *More Americans Using Illegal Tax Havens*, Houston Chron., Sept. 1, 1985, at 22.

54. Remarks of Richard C. Wassenaar, Asst. Commissioner (Criminal Investigations), IRS, at Washington Tax Conf., San Antonio, Texas (May 2, 1985). See also *IRS Uses More Undercover Work to Go after Suspect Tax Shelters*, Wall St. J., Apr. 19, 1985, at 25.

55. *Id.*

# A. DEPARTMENT OF STATE AUTHORIZATION ACT

There has been some legislation in the 99th Congress which was designed to have an effect on international criminal activity in one form or another. For example, the Department of State Authorization Act<sup>56</sup>, included a provision which directed the Department of State to cooperate with U.S. law enforcement agencies in establishing a "comprehensive information system on all drug arrests of foreign nationals in the United States." The idea behind this provision is that U.S. embassies abroad should be made aware of which foreign nationals should be denied U.S. visas. For years the State Department has claimed unfamiliarity with the traffickers' names and faces while law enforcement agencies have complained bitterly about the State Department's unwillingness to assist in excluding these people. The State Department legislation also provides that the newly created National Drug Enforcement Policy Board shall "agree on uniform guidelines which would permit the sharing of information on foreign drug traffickers" and within six months report to the House and Senate on steps being taken to implement this idea.

In many ways, the State Department legislation epitomizes the dilemma now facing Congress in attempting to combat transnational crime. Knowledgeable Members and staff know that the State Department and the Immigration and Naturalization Service face an impossible task in excluding foreign drug traffickers, not to mention con artists, terrorists, and spies. Yet a "solution" is concocted which Members and their aides tout to their concerned constituents as a remedy for the problem. Thus, Congress has assumed the information exists, and mandated that a system for information exchange be designed within a very short time (since it only allows six months before a report must be made). It has thus reacted to citizen pressure to do something and presented itself with an excellent future opportunity to criticize the respective agencies for having either failed to implement the policy on time or having implemented it inadequately since, in later years, there is no doubt that drug traffickers and others will still be shown to have obtained visas.

The State Department legislation also includes a provision to create a United States International Narcotics Control Commission which will "monitor and promote international compliance with Narcotics treaties, including eradication and other relevant issues and to monitor and encourage U.S. government and private programs seeking to expand international cooperation against drug abuse and narcotics trafficking."

---

56. H.R. 2068, P.L. 99-93 (August 16, 1985).

## B. DEPARTMENT OF DEFENSE AUTHORIZATION ACT

The Department of Defense Authorization Act also contains provisions which are designed to affect the transnational crime problem. Section 1421 of the Act would require a Coast Guard person to serve on all U.S. Naval vessels patrolling "drug interdiction areas." This provision is designed to supplement earlier legislation which exempted U.S. military participation in the narcotics interdiction area from the Posse Comitatus Act.<sup>57</sup>

Not surprisingly, the Department of Defense legislation also includes two sections requiring more reports. Section 1422 required the Defense Department to report in December 1985 on its drug interdiction efforts and Section 1424 requires a study of the use of E-2 military aircraft for drug interdiction.

The 99th Congress has also passed the International Security and Development Cooperation Act of 1985.<sup>58</sup> Section 605 of that Act amends the Mansfield Amendment to a previous foreign aid bill to allow officers and employees of the United States to be present "during direct police arrest actions with respect to narcotic control efforts in a foreign country." In July 1986, U.S. troops were sent to Bolivia under these auspices. Section 619 of the foreign aid bill also addressed the so-called Cuban drug trafficking problem by recommending U.N. and OAS action and made certain findings on "drug trafficking and the problem of total confidentiality of certain foreign bank accounts." These were:

- Several banks in Latin America and the Caribbean are used by narcotics traffickers as depositories for money obtained in providing illicit drugs to the United States and other countries of the region;
- Offshore banks which offer total confidentiality provide a service which assists the operations of the illicit drug traffickers; and
- Cooperation in gaining access to the bank accounts of such narcotics traffickers would materially assist United States authorities in controlling the activities of such traffickers.<sup>59</sup>

Based on these findings, Congress expressed as its policy: (1) that the President negotiate treaties with all countries providing confidentiality (giving high priority to Caribbean countries), and (2) again directed the President to include reports on the results of such treaty actions in his annual International Narcotics Control Strategy Report.<sup>60</sup> In this section

57. The Posse Comitatus Act, 18 U.S.C. § 1385 (1982).

58. P.L. 99-83 (Aug. 8, 1985).

59. Sec. 619 of International Security and Development Cooperation Act of 1985.

60. In this respect Congress need provide little additional urging to the Executive Branch. Numerous agencies have conscientiously sought to further bilateral and even multilateral

Congress also "reaffirmed its intention to obtain maximum cooperation on the part of all governments for the purpose of halting international drug trafficking, and constantly to evaluate the cooperation of those governments receiving assistance from the United States."

### C. MONEY LAUNDERING ACT

During the summer of 1985, the Administration introduced, through Senator Strom Thurmond (R-SC) S. 1335, the Money Laundering and Related Crimes Act of 1985. This novel bill is designed to plug various loopholes faced by investigators and prosecutors in attempting to combat international narcotics trafficking. The bill creates a new offense which penalizes one who conducts a transaction involving either monetary instruments or the wire transfer of funds, which affects interstate or foreign commerce or which is conducted through a financial institution which is engaged in interstate commerce. The government would have to show that the person acted with the intent to promote or carry on unlawful activity or that the person knew or acted in reckless disregard of the fact that the monetary instruments or funds represented the proceeds of some unlawful activity. The punishment for violations would be up to twenty years imprisonment and a fine of up to \$250,000 or twice the value of the monetary instruments or wire transferred funds. The bill also contains a forfeiture provision allowing for government-initiated civil or criminal actions. There is no private right of action.

Seldom have recent legislative efforts been so obviously designed to have extraterritorial application. In fact, S. 1335 states specifically that the Act is to be applied in an extraterritorial manner if the government can prove the defendant had actual (as opposed to acting with reckless disregard) knowledge of the unlawful activity which generated the funds. Thus the "international" scienter standard differs somewhat from the domestic standard. In any case, it makes it clear that the U.S. government could indict a foreign bank president or employee if it could prove that he had actual knowledge that the funds were derived from some unlawful activity in the United States. The extraterritorial provision is limited to transactions involving more than \$10,000.

The bill amends the Right to Financial Privacy Act of 1978,<sup>61</sup> by making it clear that financial records may be transferred among different agencies of the government if there is reason to believe that the records may be relevant to a matter within another agency's jurisdiction. The bill also

---

arrangements for some time. See *U.S. Seeks Treaties Against Money Crimes*, Wall St. J., Oct. 31, 1985, at 32.

61. 12 U.S.C. § 3412(a).

makes it clear that a banker may make certain disclosures to government agents with impunity. S. 1335 includes a provision which amends the Right to Financial Privacy Act by preempting any state and local laws which are more restrictive.

Finally, the bill would grant the Treasury Department new summons authority to enforce the provisions of the Act by requiring the production of books, papers and records from financial institutions which operate or conduct business in the United States. The bill even precludes the possibility of the government paying banks for reproduction costs in connection with providing materials pursuant to summonses, thus defusing a somewhat volatile issue in the past. S. 1335 amends the Bank Secrecy Act,<sup>62</sup> to increase its penalties from \$10,000 per violation to a new penalty of not more than the amount of a transaction up to \$1 million or \$25,000, whichever is greater. As is frequently the case with recently enacted criminal legislation, the new money laundering statute would become a predicate offense under the RICO statute.<sup>63</sup> Violations of the Bank Secrecy Act are already RICO predicate offenses as discussed previously.

## V. Conclusion

Recently Congressional action in this area reflects a continuing interest in joint Treasury-Justice operations and illustrates the relative inability of Congress to cope with the broader question of transnational crime. In fact, the amendments to the Bank Secrecy Act, as helpful as they may prove to be, vividly illustrate the limited ability of Congress to have an impact. New reporting requirements and penalties are obviously oriented towards domestic U.S. business activities. It is not feasible to require offshore commercial banks or any other entity in a tax haven to report currency transactions to the Treasury, although some prosecution-oriented government employees would like nothing better.

In the meantime, as policymakers search for remedies, the public can count on the situation deteriorating further. Put simply, those wishing to apply the brakes to international crime must cope with the following dynamics:

- (1) an unchecked, ever increasing demand for narcotics in the United States and Western Europe which in turn creates vast hordes of currency in need of deposit or investment;
- (2) high tax rates in the world's most important democracies which tend to encourage citizens to funnel income offshore;

---

62. 13 U.S.C. § 5318.

63. 18 U.S.C. § 1961.

(3) increasingly innovative fraud schemes, particularly during inflationary periods, which contribute to the pool of dirty money seeking safe refuge;

(4) limited development potential for certain thus far underdeveloped secrecy havens which leads them to forsake trade and agricultural economic development options in favor of more immediate revenue sources based on registration and license fees for banks, trusts, trading and insurance companies, and ships.

Arrayed against these elements is a U.S. government which has been uncoordinated. As the discussion above indicates, the so-called "offshore crime problem" is fraught with foreign policy implications, yet the State Department has never been particularly concerned if the subject is "crime." Its focus is distinctly political and most would-be Caribbean tax havens such as St. Vincent, Montserrat and the Turks and Caicos are rarely even visited by State Department personnel.<sup>64</sup> Conversely, traditional State Department attitudes may have had beneficial long-term effects in the case of established havens such as the Bahamas, Panama, and Switzerland where heavy-handed U.S. enforcement techniques have not been well received. Hence, experience has shown the State Department on the one hand to be naive about the potential for international crime, but, on the other hand, justifiably concerned about the collateral effects of taking a myopic, undiplomatic approach to dealing with such strategically key jurisdictions as Panama and Hong Kong.

Long-term resolutions to most of the problems which have emerged in this area do not appear to be at hand. Because of the nature of the problem, Congress is hard pressed to have any additional significant influence. Its actions in 1985 primarily consisted of calling for reports and urging meetings and international accommodation. Congress is now clearly to the point of grasping at straws, and in its search for remedies it has been willing to disperse new authority to various Executive Branch agencies. In so doing it has created new problems relating to inter-agency management of the Executive Branch. Certainly recent legislation reinforces the absolute necessity for coordination: for example, given the new powers accorded the Secretary of Treasury in 1984 and 1985, he would be well advised to communicate with his counterparts at State and Justice before acting in this area.

At the same time the Justice Department should follow through on its promise to rein in its Assistant U.S. Attorneys and agents who can foment

---

64. When the Turks and Caicos went through a crucial two year period of development as a haven in 1983-84, the senior American official on the scene was a U.S. Air Force Captain in charge of a tracking station at Grand Turk.

an international crisis overnight with a grand jury subpoena. And the State Department ought to educate itself about just how severe the transnational crime problem has become.

Finally, Congress, the Executive Branch and even the courts must realize that a whole new area of jurisprudence is developing before their eyes and a strategic, enlightened view of how the various parts should fit together is long overdue.



