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UNITED STATES LITIGATION AND FOREIGN BANK SECRECY: THE ORIGINS OF CONFLICT

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I. INTRODUCTION

In recent years, public attention has focused on conflicts between American discovery efforts and foreign financial privacy law. One need only recall the attempts to trace the funds in the Iran-Contra investigation, follow the efforts to locate Ferdinand Marcos's assets, or remember the bruising battle between the United States and Switzerland over Marc Rich Company's tax liability to see the nature of this problem.

Much of the frustration arises from the mistaken belief that American and foreign concepts of financial privacy differ so greatly that foreign law inevitably conflicts with the United States' attempts at discovery and investigation. In fact, the two concepts have many similarities. When a conflict arises, it is usually between United States procedural techniques and foreign concerns about sovereignty, not a conflict between American and foreign principles of bank secrecy. As United States government agencies have begun to realize, the conflict can be largely avoided through an understanding of the similarities between United States and foreign principles of financial privacy, and the problems certain United States discovery methods cause abroad. The best evidence of the better understanding of the nature of the conflict can be found in recent multinational and bilateral arrangements under which the United States and other nations harmonize their techniques for financial investigations.

II. CUSTOMARY SOURCES OF BANK SECRECY IN THE UNITED STATES AND ABROAD

A review of the origins of the major foreign bank secrecy provisions and a comparison of those origins with American concepts shows that United States and foreign bank secrecy have a common basis. In both the United States and major bank secrecy countries, financial pri-

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Vacy derives from the need for confidential communications between customers and bankers, much like the confidential communications between doctors and patients.

To fairly compare American and foreign bank secrecy, one should study foreign bank secrecy in both common law and civil law countries. Among civil law countries, Switzerland is the quintessential bank secrecy jurisdiction. English common law has been a second major source of bank secrecy, particularly as it has been applied in former British colonies that are now prominent in international commerce. To complete the comparison, one must examine the somewhat fragmentary record that constitutes United States bank secrecy to see its sources and origins.

A. Switzerland

Article 47 of the Swiss Banking Code prohibits divulging secrets entrusted to a person in his capacity as an officer, employee or representative of a bank, the banking commission or an auditing company. Enacted in 1934, Article 47 was supplemented and revised in 1971 without changing its basic character. Although a banker's obligation of secrecy arose in private law and grew from the very beginnings of the banking industry in Europe in the sixteenth century, until 1934 there was no federal statute on the subject. As part of a general revision of Swiss banking law in 1934, the Swiss government for the first time incorporated in the federal statutes a provision for bank secrecy, a violation of which was punishable as a crime.

The bankers' duty of confidentiality in Switzerland is similar to those of other professionals with an obligation of secrecy such as clergymen, lawyers and physicians. The similarity rests on the need for the professional and his client to be able to communicate in confidence if the relationship is to be effective and, in the end, beneficial for society. Like United States law, Swiss law affords a high degree of protec-

2. See PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, SENATE COMM. ON GOVERNMENTAL AFFAIRS, 98TH CONG., 1ST SESS., CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES, 24 (Comm. Print 1983) [hereinafter CRIME AND SECRECY].
4. Id.
7. Id. at 290.
tion to communications between doctors and patients, and between clergy and lay persons. In an interesting parallel to United States law, bankers in certain Swiss cantons do not have the same high level of legal protection for their communications as doctors or the clergy.

The Swiss Bankers Association perhaps best summarized the origins of Swiss bank secrecy:

The principle of financial confidentiality was incorporated in ancient law and was confirmed in medieval times by the civil codes of German principalities and of the cities in northern Italy. As trade expanded and feudal privileges crumbled under the increasing struggle for individual rights, confidence in the discretion of bankers became indispensable for the protection of private property and the correct conduct of commerce. By the middle of the 19th century, virtually all the governments of Western Europe had validated banking secrecy, and comparable legislation has since been enacted in every country concerned with an orderly banking system. Where Swiss law differs from almost every other is in its protection of banking secrecy by criminal law.

B. England

Eleven years before the Swiss enacted their federal criminal sanctions against violating bank secrecy, three judges in the Kings Bench Division of the Court of Appeal wrote the seminal decision in the English law of financial privacy, *Tournier v. National Provincial and Union Bank of England* This decision formed the foundation for another great branch of the bank secrecy laws around the world. Its importance has even been recognized by the United States Senate Permanent Subcommittee on Investigations in that body's report on bank secrecy jurisdictions. Many former British colonies, such as the Bahamas and Canada, have adopted the common law of England and, along with it, notions of bank secrecy found in English law. In addition, several banking centers which are regarded as tax havens continue to be direct colonies or protectorates of Great Britain, notably Hong Kong, the Cayman Islands, and the Channel Islands.

9. *Id.*
In *Tournier*, an employee's contract was not renewed when his bank disclosed that he had failed to honor a check payable to a bookmaker. Tournier sued the bank for defamation and breach of an implied contract of confidentiality. The jury, after being instructed by the court on the laws of England with respect to a banker's duty, found in favor of the defendant. On appeal, the court reversed and remanded for a new trial, concluding that the lower court's instructions regarding a banker's duty of confidentiality had been incorrect.

The leading opinion by Justice Bankes analyzed the nature of a banker's duty to his customer, and concluded that the duty arises from a confidential relationship between the parties. Justice Bankes found that such a banker-customer relationship may be very similar to a doctor-patient or lawyer-client relationship.

The English, like the Swiss, incorporated into their formal structure of legal authority a pre-existing customary relationship between a banker and his customer. This relationship was based upon the need for confidentiality if the banking relationship was to operate effectively and in a socially beneficial way.

**C. United States**

A review of the background of the current federal statute clearly demonstrates the sources of United States financial privacy law. To see that history in perspective, however, one should look back to 1970, when the first round of legislative activity was an indirect attack on existing United States bank secrecy law. Although there were a few cases before 1970 which supported bank secrecy, a debate over the nature of financial privacy in the United States opened with the enactment of federal legislation in 1970. Rather than requiring that banks keep customer records confidential, the new legislation imposed recordkeeping and reporting requirements on bankers for transactions which would not otherwise create records. The act, which was primarily designed to facilitate investigation into criminal activity, was some-

15. Id. at 475.
16. Id. at 463.
17. Id. at 461-75.
18. Id. at 475.
19. Id. at 461.
22. Id. § 1829b(f).
what ironically entitled the Bank Secrecy Act. Its stated purpose was "to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." This statute has recently given rise to the expanded federal requirements for currency transaction reporting, and is a key element in the United States government's efforts to detect so-called "money laundering."

The California Supreme Court concluded in Burrows v. Superior Court that disclosure of records maintained by a bank concerning a customer's account was restricted under the California Constitution, which bars unreasonable searches and seizures of houses, papers, and effects. Thus, on the basis of the depositor's expectation of privacy in his banking records, which was violated by an unreasonable governmental intrusion, the California Supreme Court suppressed documents voluntarily turned over to the police by a California bank. One factor relied on by the court in deciding that a depositor had a reasonable expectation of privacy in such records was the complicated nature of the banking process. The court noted that in order to reasonably conduct banking affairs, the customer has to assume that information he supplies to the bank will remain confidential.

In its decision, the California Supreme Court did not decide the issue of whether the request that the bank voluntarily turn over the records violated the Fourth Amendment to the United States Constitution. In discussing that issue, however, the court cited the Fifth Circuit's decision in United States v. Miller, which concluded that a depositor's rights in the privacy of his bank records were consistent with the Supreme Court's decision in California Bankers Association v. Shultz.

Two years later, Miller was reversed by the United States Supreme Court. Writing for the majority, Justice Lewis Powell reviewed the recently enacted Bank Secrecy Act and the Court's earlier decision.
in *California Bankers Association v. Shultz*, concluding that "we perceive no legitimate 'expectation of privacy' [in the bank records that were subject to the subpoena]." The opinion stressed that by turning over his documents and information to a financial institution, a depositor lacked any legitimate expectation of privacy in that information. Powell cited earlier cases in which the Supreme Court had concluded that where information of a confidential nature is disclosed to a third party, the expectation of confidentiality is lost. Interestingly, in discussing these cases, the Court felt it was necessary to exclude from its consideration so-called "evidentiary privileges," such as the privilege protecting communications between an attorney and his client.

The California Supreme Court and the United States Supreme Court reached opposite sociological conclusions about bank customers' expectations of confidentiality in these cases. The important point is that both courts examined the customary nature of the relationship between banks and customers. This same analysis was used by the *Tournier* court and also forms the basis of Article 47 of the Swiss Banking Code.

The United States Supreme Court's decision in *Miller* was followed by a limited legislative overruling of Justice Powell's conclusion as to the expectation of privacy that a United States customer holds with respect to bank records. Congress established limited statutory financial privacy six months after the *Miller* decision was announced by enacting the Third Party Recordkeepers Act as an amendment to the Internal Revenue Code. This new statute limited the authority of the Internal Revenue Service to issue an administrative summons for bank records without notifying the depositor and offering him an opportunity to contest the summons. In 1978, Congress adopted the Right to Financial Privacy Act, which made similar confidentiality provisions applicable to administrative subpoenas issued by federal

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33. 425 U.S. at 442.
34. *Id.* at 442-43.
35. *Id.* at 443.
36. *Id.* at 443 n.4.
38. This provision reaffirmed the long standing protection of privacy in banking established by the Swiss Civil Code, the Code of Obligations, and the Penal Code. Meyer, *supra* note 3, at 24-27.
40. *Id.* § 7609(b).
agencies, with certain limited exceptions.\textsuperscript{42}

In effect, Congress determined that the depositors' expectations were similar to the expectations of patients speaking to their doctors or clients writing to their lawyers.\textsuperscript{43} Accordingly, Congress concluded that such information should be protected from unwarranted invasions by investigative authorities.\textsuperscript{44}

This brief review of the history of the enactment of limited financial privacy statutes indicates that the origins of financial privacy in the United States, Switzerland and England are similar. In each country, the law followed the custom and practice of the industry in adopting the provisions for financial privacy, as the law was based on the confidentiality a bank's customer expects as a matter of custom and usage. This is true whether it is statutory law, as in Switzerland and the United States, or common law, as in England. The source of law in each case was the banking profession's custom of holding the information derived from transactions of bank customers confidential.

III. SIMILARITIES BETWEEN AMERICAN AND FOREIGN BANK SECRECY EXCEPTIONS

An examination of the major foreign secrecy provisions suggests that they have many of the same limitations and exceptions found in financial privacy laws in the United States. Three areas of recurring conflict exist between bank secrecy and the efforts to access bank information: criminal investigations, customer consent, and tax investigations. A comparison of United States and foreign law on these three points shows clear similarities.

A. United States Exceptions to Secrecy

American case law on bank secrecy and financial privacy was largely scattered and poorly developed prior to the Supreme Court decisions and the enactment of federal legislation described in the previous sections. A selective review of those cases suggests that American concepts of financial privacy and bank secrecy are, in some cases, more restrictive than those of foreign jurisdictions.

\textsuperscript{42} Id. § 3402.
\textsuperscript{43} See generally H.R. REP. No. 1383, 95th Cong., 2d Sess. 34 (1978) (the fourth amendment does not prevent legislative establishment of unconstitutional privacy rights).
\textsuperscript{44} Id.
1. Criminal Investigations

In an early case, a New Jersey court restrained a prosecutor's investigation into the records of a bank depositor, citing the authority of various fourth amendment cases with respect to unreasonable searches and seizures. The court concluded that until the prosecutor had sufficient evidence to impanel a grand jury and issue a subpoena, it was improper for a bank to permit the inspection of the bank records of various policemen suspected of corruption. This case is notable not only as an early statement of American bank secrecy law, but also for the narrow scope the court permitted for criminal investigation.

2. Customer Consent

In 1961, the Idaho Supreme Court upheld an action for breach of an implied contract against a bank for disclosing account information without the customer's approval. The court concluded that unless disclosure is authorized by law or the customer, the bank must be held liable for breach of its implied contract of confidentiality. Having reached this conclusion, the court held that there was an action against the bank on an implied contract theory if the bank disclosed information regarding an account without the customer's consent. This case addressed the nearly universal exception to bank secrecy of customer consent, an exception which has become particularly significant in recent cross-border disputes over American efforts to penetrate foreign bank secrecy. The two federal statutes, the Right to Financial Privacy Act and the Third Party Recordkeepers

46. Id. at 391, 146 A. at 36.
48. Id.
49. Id. at 586, 367 P.2d at 289.
50. The opinion also considered the seminal article by Samuel D. Warren & Lewis D. Brandeis on the right to privacy. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). The article discusses the nature of the common law protection against unwarranted invasions of privacy and concludes that one might analyze the matter as an issue of implied contract as later bank secrecy cases do. The article went on to describe a separate analysis of a new right to privacy. It did not address protection of financial information or consider the banker's duty to hold customer information in confidence. Seventy years later, Professor Prosser attempted to classify and describe the various elements of the privacy right. Prosser, Privacy, 48 Cal. L. Rev. 383 (1960). In doing so he cited, but did not discuss at length, Brex v. Smith, 104 N.J. Eq. 386, 146 A. 34 (1929), the early New Jersey bank secrecy case. Prosser, supra, at 390.
Act, are premised on the idea that customers may consent to disclosure. Without such consent, investigators must show that the inquiry is appropriate.51

3. Tax Investigations

The third major area of conflict in bank secrecy is tax investigations. This area is the most frequent ground for conflict in cases where the United States attacks foreign bank secrecy. Even on this issue, there are American decisions which uphold bank secrecy against tax investigations despite the constitutional underpinning of the United States' income tax.52 In 1936, a federal court of appeals upheld the issuance of an injunction against the Internal Revenue Service's examination of bank records concerning the customer's tax liability, absent an allegation of fraud, concealment or wrongdoing of any kind by the taxpayer.53 The court said, "we regard the searches here asserted as a violation of the natural law of privacy in one's own affairs which exists in liberty, loving peoples and nations . . . ."54 As was previously noted, the first federal statutory protection, the Third Party Recordkeepers Act, reflects a similar concern through its restriction on Internal Revenue Service access to bank records.55

In summary, cases on financial privacy in the United States have restricted access to bank information in all three areas of comparison: criminal investigations, customer consent and tax investigations.

B. English Exceptions to Secrecy

The leading English case, Tournier,56 lists four significant exceptions which have generally been followed in British Commonwealth jurisdictions, either as a matter of case law or in statutes enacted after the Tournier decision.

According to Tournier, the banker's obligation of secrecy is qualified: "(a) [w]here disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; [and] (d) where disclosure is made by the express or implied consent of the customer."57

52. U.S. Const. amend. XVI.
54. Id. at 849.
57. Id. at 473.
A number of British colonies, or former colonies, adopted statutory bank secrecy. In doing so, they adopted the exceptions, or slightly modified the exceptions, found in the *Tournier* case. From the United States' perspective, the two most notable jurisdictions are the Bahamas and the Cayman Islands. In each, the statutory schemes closely follow the exceptions in the *Tournier* decision.

In the Bahamas, the original act was adopted in October 1965 and amended in 1980. The 1965 version was a comprehensive statute regulating banking and trust companies within the Bahamas. Section 10 prohibited the disclosure of any information relating to any bank customer except “for the purpose of the performance of [a banker's] duties or the exercise of his functions under this Act or when lawfully required to do so by any court of competent jurisdiction within the Colony or under the provisions of any law of the Colony.” While the 1980 amendment repealed Section 10 and substituted a more elaborate statement of duties, it was not substantially different with respect to the exceptions to the secrecy rules. Under the amendments there were essentially five exceptions: 1) for the purpose of performing duties or functions under the Act; 2) for the purpose of performing within the scope of a banker's employment; 3) as lawfully required by courts in the Bahamas or under the provisions of Bahamian law; 4) pursuant to the rights and duties between a bank and its customer at common law; and 5) as part of a normal business general credit rating with respect to a customer. The notable omission of an exception for tax matters arises from the lack of an income tax in the Bahamas.

The Cayman Islands adopted the Confidential Relationships (Preservation) Law in 1976. That statute excluded from its scope: 1) information obtained in the normal course of business with the consent, express or implied, of the customer; 2) information furnished to constables investigating offenses committed within the Cayman Islands; 3) information furnished to constables authorized by the government investigating crimes committed outside the Cayman Islands which, if committed on the Islands, would have been an offense; and 4)

59. Id.
60. Bank and Trust Companies Regulation Act, No. 64 (Bahamas 1965) (amended 1980).
61. Id. § 10(1).
62. Bank and Trust Companies Regulation (Amendment) Act, No. 3 (Bahamas 1980).
63. Id. § 2.
information furnished to the Financial Secretary or his inspector. The statute also provided that nothing in it was in derogation of the Tournier decision, which was declared to be applicable to the Cayman Islands. The statute specifically prohibited a bank from giving a credit reference regarding a customer without first receiving the customer's authorization.

The Cayman Islands statute was amended in 1979. In the amended version of the statute, the prohibition on credit references was repealed, a procedure for obtaining court authorization for the disclosure of information was added, and the exceptions were restated and reorganized. Under the amendment there were six stated exceptions when disclosure could be made: 1) to a professional with the consent, express or implied, of the customer; 2) to a constable investigating an offense within the Islands; 3) to a constable investigating an offense outside the Islands; 4) to the Financial Secretary or his inspector; 5) to a bank to the extent necessary to protect the bank's interests against its customer or a third party; and 6) to professional persons, with the approval of the Financial Secretary, to protect that person or any other persons against crime.

Thus, an examination of two jurisdictions which follow Tournier demonstrates that bank secrecy, based on English common-law principles, has a number of exceptions which parallel the exceptions developed in United States common law. In fact, at least two United States cases which considered the Tournier decision criticized it for containing too many exceptions. In a decision just one year after Tournier, the New York State Supreme Court cited Tournier in dictum, but noted that the English Court of Appeal had sustained a claim for an implied agreement on the part of the bank to keep depositors' affairs a secret "but coupled it with serious qualifications." In 1979, the Maryland Court of Special Appeals gave a more careful consideration to the Tournier decision and other American cases on the banker's duty of confidentiality. The court rejected the Tournier "fourfold classification

66. Id. § 3(2).
69. Id. § 4(5).
71. Id.
72. Id.
of qualifications to the implied contractual obligation of confidentiality owed by a bank to its depositors . . . because we believe that [Tournier confers] upon a bank entirely too much discretion.78

C. Swiss Exceptions to Secrecy

Perhaps even more than common-law bank secrecy, Swiss bank secrecy presents the appearance of legal impenetrability for many Americans. Once again, however, an examination of the legal authority for Swiss bank secrecy shows no such situation exists, or has existed, since the adoption of the Swiss law. The most extensive and scholarly discussion of the exceptions under Swiss bank secrecy is found in an article by Maurice Aubert, one of the leading authorities on Swiss secrecy.79 Professor Aubert points out that Swiss bank secrecy is no impediment to creditors seeking information or attachment, to heirs seeking the estates of the decedent, or in criminal proceedings for crimes recognized in Switzerland.77 In certain Swiss cantons, bankers and other professionals are excluded from testifying in civil trials, but in other cantons, the privilege is not recognized. In a few cantons, the judge has discretion to order bank secrecy lifted depending on the nature of the trial and the importance of the issues.78 Swiss policy regarding disclosure of tax information is surprising to many Americans. Under Swiss law, bank secrecy may be invoked against fiscal and tax authorities calling for the production of certain information. If, however, the taxpayer submits false, forged or inexact financial documents with the intention of avoiding the payment of tax, he is guilty of tax fraud under Swiss law. In those circumstances, bank secrecy is not a shield.79

Although these exceptions to Swiss bank secrecy have been elaborately and carefully delineated in Professor Aubert’s article, they are not new to the scholarship on Swiss bank secrecy. They have been dis-

77. Id. at 278-81. Swiss law, in fact, places bank secrecy on a lower plane with respect to the right to refuse to furnish evidence than many other professions. In a criminal proceeding, a clergyman, lawyer, notary public, doctor, pharmacist, mid-wife, and those who assist such professionals may refuse to give evidence. Bankers, however, are not included in this list of persons. Schweizerisches Strafgesetzbuch [StGB] art. 77 (Switz.); Systematische Sammlung des Bundesrechts [SR] art. 312 (Switz.).
78. Meyer, supra note 6, at 292.
79. Aubert, supra note 76, at 280; see also X. and Y-Bank v. Swiss Federal Tax Administration, 76-1 U.S. Tax Cas. (CCH) ¶ 9452 (1976).
cussed in several American articles. Moreover, the Swiss bankers themselves have publicized the exceptions. In a number of articles and publications, prominent Swiss bankers, the Swiss Banking Association, and academics writing under the sponsorship of Swiss banks have all noted the various exceptions to Swiss bank secrecy, including the availability of information in Switzerland to foreign authorities in certain circumstances.

From this survey, it can be seen that American notions of the proper exceptions to bank secrecy are surprisingly similar to the exceptions found in jurisdictions following the *Tournier* precedent and in the Swiss law of bank secrecy. In both the United States and abroad, criminal proceedings, customer consent, and, at least in limited instances, tax fraud, are proper bases for requiring a banker to disclose information about his customer's transactions. This conclusion suggests that when American proceedings seek financial information from abroad, the inquiry should be met with relative sympathy and ease of execution.

In the history of American cross-border subpoenas for bank information, the opposite has been the case. American litigation is frequently frustrated or made more difficult by foreign financial privacy. Foreign participants or witnesses in United States matters are often amazed and dismayed to find the American attitudes toward financial privacy are at odds with the procedures familiar to those living abroad. This conflict can only be understood if one looks briefly at the history of foreign reaction to American discovery efforts and the development of American legal reaction to foreign restrictions on these efforts. From an understanding of those reactions, a better appreciation of the current trend in United States law can be gained.

IV. REACTION ABROAD TO UNITED STATES DISCOVERY TECHNIQUES

A detailed history of United States methods of gaining access to information outside the territorial limits of the United States is be-


beyond the scope of this article. It is useful, however, to briefly survey some of the most salient examples of that history in order to see the consequences of the United States' coercive techniques for penetrating foreign bank secrecy.

Early on, the United States courts recognized and encouraged the use of letters rogatory as a procedure for gaining access to information located outside the territorial jurisdiction of American courts. From the earliest days of the federal judicial system, letters rogatory were used to obtain documents and witness testimony located in other nations. The significant feature of letters rogatory is, of course, that they are transmitted from judicial or other authorities in the United States to governmental authorities in foreign nations. Inherent in such a system is a recognition that the request will be limited by the practices, procedures and concepts acceptable to the foreign authority. This limitation insures that no conflict will arise between United States inquiries and foreign privacy laws.

A. Early Conflicts

The first chronic conflict between American methods of investigating litigation facts and foreign notions of the proper scope of such investigations can be found in the enforcement of the United States' antitrust laws. Particularly in the early 1960s, American notions of antitrust jurisdiction, including the so-called "Effects Doctrine," were in conflict with commercial interests and jurisprudence of a number of our major trading partners. This conflict was clearly seen in the struggle between the American investigators seeking information and the foreign witnesses who would not provide the information sought. The American technique often was to impanel a grand jury and issue subpoenas to those who had a presence in the United States and control over information outside the United States. There was significant litigation over the scope of these investigations. United States courts were generally sympathetic to the investigator's concerns and therefore enforced the investigative subpoenas to obtain information concerning activities outside the United States.

Foreign reaction predictably came in the form of legal constraints and impediments to such investigations. Most importantly, several

85. *See supra* notes 81-82 and accompanying text.
86. *See supra* notes 81-84.
governments enacted statutes, referred to as "blocking statutes," that prohibited the transfer of information to the United States pursuant to the investigative techniques that were thought to be offensive.\footnote{87} Blocking statutes have a different purpose than financial privacy or secrecy provisions, and therefore raise a significantly different type of problem under international law. Secrecy and privacy statutes are essentially designed to protect the interests of the customer.\footnote{88} Blocking statutes, on the other hand, protect the interests of national sovereignty, and prohibit techniques of investigation or certain actions by foreign governments in the territory of the nation adopting the blocking statute.\footnote{89} Because interests protected by such statutes are not individual but national, their impact is often not within the control of the individual who is the subject of the investigation and may not be waived by him.\footnote{90}

**B. The Rise of Blocking Statutes**

Two United States antitrust investigations, which had profound international ramifications, precipitated two waves of foreign reaction directed specifically at frustrating United States investigative techniques. The first investigation, which involved the shipping industry,\footnote{91} led to blocking laws in England and the Netherlands, two nations that had significant economic and sovereign interests that were affected by the United States' shipping investigations.\footnote{92} The second investigation was the *Uranium Cartel Litigation*.\footnote{93} Like the shipping investigation, the efforts by those engaged in American litigation to obtain information outside the United States generated significant litigation and disputes over the propriety of such efforts.\footnote{94} This investigation led to a number of blocking statutes which addressed the techniques used in the investigation and prohibited the

\footnote{87} See infra notes 89-97 and accompanying text.  
\footnote{88} See supra section II.  
\footnote{90} Id.  
\footnote{91} *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298 (D.D.C. 1960); see Fedders & Wade, supra note 89, at 36. In 1948, the Canadian Provinces of Quebec and Ontario enacted limited blocking statutes in response to *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).  
\footnote{92} See, e.g., *Shipping Contracts and Commercial Documents Act*, 1964, ch. 87.  
\footnote{93} *In re Westinghouse Elec. Corp. Uranium Contract Litig.*, 563 F.2d 992 (10th Cir. 1977).  
disclosure of documents pursuant to those techniques.  

Since the late 1970s, when foreign statutes were enacted in reaction to the uranium investigation, other United States investigations using similar techniques have generated reactions in the form of blocking statutes. For example, Canada, which previously had local blocking statutes, recently adopted a national blocking statute. Canada adopted this statute in response to American treatment of Canadian-based multinational banks in United States investigations into money laundering activities in the Caribbean. Many of the major Organization for Economic Cooperation and Development (OECD) nations have adopted blocking statutes designed specifically to protect their sovereignty against intrusive investigative techniques. All of these reactions can be viewed as national efforts to frustrate American discovery and investigative methods.

These reactions are but one-half of the equation because at the same time that these statutory reactions were developing abroad, American law evolved in response to the problems that arose in obtaining information from foreign nations.

V. THE EVOLUTION OF AMERICAN FOREIGN DISCOVERY TECHNIQUES

As the range and frequency of American litigation with international aspects increased, parties recognized that discovery techniques based on notions of international comity were insufficient to assure the broad-ranging discovery traditional in American cases. Initially, techniques developed for obtaining information, other than through letters rogatory and similar efforts, centered on requiring parties already engaged in American litigation to furnish the courts and their adversaries with information located outside the United States to which they had access.

A. Discovery and Sanctions Against Litigants

A case which clearly illustrates the above method is Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. [Further text]


97. Id.
Rogers,98 the most recent United States Supreme Court pronouncement on these issues. In Rogers, a Swiss holding company sought recovery of property held by the Alien Property Custodian under the Trading with the Enemy Act.99 As part of the discovery in the case, the district court ordered the plaintiff to produce records held in its Swiss bank.100 The plaintiff refused to do so on the grounds of Swiss bank secrecy.101 The district court, after concluding that the plaintiff had made a good faith effort to obtain the records but nevertheless had failed, dismissed the plaintiff's complaint with prejudice.102

The Supreme Court carefully reviewed the finding of the district court regarding the plaintiff's efforts to obtain the documents from Switzerland. The Court also reviewed the plaintiff's partial success in obtaining the documents through a combination of permissions by the Swiss government and waivers by those in Switzerland who had an interest to protect under Article 47 of the Swiss banking law.103 Writing for the Court, Justice Harlan concluded that those efforts were sufficient to assert a claim when balanced against the constitutional rights of the claimants.104 Accordingly, the district court's sanction of dismissing the complaint was too drastic. The Supreme Court reversed and remanded the case to the district court for further proceedings.105

This opinion established a number of doctrines concerning efforts to obtain documents through the use of the American discovery process.106 Most importantly, the person with control over the documents was required to make a good faith effort to remove the foreign impediment to producing them.107 In addition, the Court made careful distinctions between its power to require that documents be produced despite foreign law, and the propriety of imposing sanctions when foreign law prohibited such production.108 Finally, the Court gave great weight to the criminal nature of the penalty in Swiss law for violating bank secrecy. The Court suggested that where the penalty was criminal, United States courts would give extra weight to the impediment of foreign law.109

99. Id. at 198-99.
100. Id.
101. Id. at 199-200.
102. Id. at 202-03.
103. Id. at 203.
104. Id. at 212.
105. Id. at 213.
106. Id. at 197.
107. Id. at 208-09.
108. Id. at 205-06.
109. Id. at 211.
In following years, particularly for a party to the litigation, courts were unsympathetic to problems foreign law imposed where the issue was whether discovery would be permitted rather than whether sanctions would be imposed.\textsuperscript{110} As the courts were repeatedly confronted with the difficult choice between enforcing United States discovery requests or following international comity, they developed additional factors to be considered in discovery disputes. In addition to the good faith efforts to comply and the clear violations of foreign law found in the \textit{Rogers} case, the courts looked at whether: a) the parties seeking the documents were doing so in a civil or criminal context;\textsuperscript{111} b) there were substantially equivalent alternative means available for the production of the documents or examination of witnesses overseas;\textsuperscript{112} and c) the foreign government had a substantial interest in the case.\textsuperscript{113} A number of courts concluded that the proper list of factors was found in Section 40 of the Restatement (Second) Foreign Relations Law of the United States, which provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.\textsuperscript{114}

Following the \textit{Rogers} reasoning, a number of courts distinguished between ordering discovery despite foreign objections and imposing sanctions for non-compliance. Perhaps the high water mark for the ap-

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1332.
\item \textit{Id.} at 1333.
\item Restatement (Second) Foreign Relations Law of the United States § 40 (1965).
\end{enumerate}
\end{footnotesize}
plication of sanctions is found in the *Marc Rich* case.\textsuperscript{118} In *Marc Rich*, as part of an investigation into alleged income tax violations by Mr. Rich and his affiliates, the United States government sought information from companies owned either directly or indirectly by Mr. Rich and others associated with him. Much of the information that the government sought was in Switzerland, and the bar of Swiss secrecy was offered as an excuse for not producing the information. After a convoluted history that included the Swiss government’s seizure of some documents and various acts of bad faith on the part of Mr. Rich, a United States district court imposed a $50,000 per day contempt fine which was upheld by the Second Circuit.\textsuperscript{119} While it is not apparent from the opinion, this imposition of sanctions is significant because it arose after the United States had entered into a judicial assistance treaty and a tax treaty with the Swiss under which so-called “tax fraud” was properly the subject of international exchanges.\textsuperscript{117} The Swiss government’s role in the *Marc Rich* case, both before the United States courts and in Switzerland, was significant and, in fact, very similar to its activities in the *Rogers* case.\textsuperscript{118}

The *Marc Rich* case may reflect the changing American view of the balance between foreign secrecy laws and American discovery. At the time of the *Rogers* case, the last court to consider the matter, the United States Supreme Court, found the sanctions inappropriately severe.\textsuperscript{119} In the *Marc Rich* case, the last court to consider the matter, the Second Circuit, affirmed the full sanctions imposed below.\textsuperscript{120}

\subsection*{B. Non-Party Witnesses}

It is not a large step from ordering parties to obtain information beyond the territorial reaches of the court to ordering non-parties within the court’s jurisdiction to provide such information. Over the years, American courts have looked with greater skepticism on efforts to obtain information outside the United States from non-party wit-

\begin{itemize}
  \item \textsuperscript{115} *In re Marc Rich & Co.*, 707 F.2d 663 (2d Cir.), cert. denied, 463 U.S. 1215 (1983).
  \item \textsuperscript{116} 707 F.2d at 670.
  \item \textsuperscript{118} *In re Marc Rich & Co.*, 736 F.2d 864 (2d Cir. 1984).
  \item \textsuperscript{119} Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 197 (1958).
  \item \textsuperscript{120} 736 F.2d at 864.
\end{itemize}
nesses. In doing so, the courts have generally considered factors similar to those considered when the discovery is sought from a party, such as the availability of alternative means, the importance of the information sought, the certainty with which the foreign impediments are asserted and proved, and the consequences of breaching the foreign legal impediments in relation to the nature of the dispute being considered in the United States. Shortly after the Rogers decision was announced, the First National City Bank of New York was served with an Internal Revenue Service summons for customer records in its Panamanian branch. The district court modified the summons, and the court of appeals reversed and remanded the decision to the district court for further consideration. The issue was whether the records were within the control of the bank. The Second Circuit Court of Appeals concluded that they were clearly within such control where the head office sought records from a branch. The court noted, however, that if production of the records violated the laws of Panama, it should not be ordered.

The Second Circuit went a step further in 1960. In Ings v. Ferguson, the court limited a subpoena served on the New York branch of a Canadian bank to records found in New York. The court concluded that ample opportunities existed for the parties seeking the records from the non-party witness to obtain them through letters rogatory from the Canadian headquarters of the bank.

In another Second Circuit case, a federal grand jury sitting in New York served a subpoena on the Chase Manhattan Bank for customer records located in its Panamanian branch. The bank produced the records located in New York. During the pendency of the litigation, in apparent response to the First National City Bank of New York case, Panama adopted a statute making it a misdemeanor to produce records for use in an action abroad. Judge Leonard Moore, writing

121. See infra notes 121-51 and accompanying text.
122. See supra note 107 and accompanying text.
123. 357 U.S. at 197.
125. 271 F.2d at 618.
126. Id. at 619.
127. 282 F.2d 149 (2d Cir. 1960).
128. Id. at 153.
129. In re Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962).
130. Id. at 612.
132. 297 F.2d at 613.
for the Second Circuit, concluded that in light of the recently adopted Panamanian statute, records from Panama could not be required to be produced. The court also said that having officials at the bank’s headquarters in New York order the Panamanian records delivered to New York for production “would be nothing more than an attempt to circumvent the Panamanian law.” The court noted:

Such a maneuver scarcely reflects the kind of respect which we should accord to the laws of a friendly foreign sovereign state. Just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries.

The court concluded its opinion by quoting from the Ings v. Ferguson decision: “[U]pon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor, or at the least, an unnecessary circumvention of its procedures.”

By 1976, this strong deference to foreign law when subpoenas were addressed to non-party witnesses had eroded. In that year, federal authorities conducting an investigation into various tax crimes, served Anthony Field, a banker working in the Cayman Islands, with a grand jury subpoena while he was at an airport in Miami, Florida. Mr. Field asserted that he could not respond to the grand jury’s inquiries about the bank customer’s transaction without violating the bank secrecy laws of the Cayman Islands, the place of his employment and residence. The Fifth Circuit upheld the grand jury subpoena and ordered that Mr. Field comply with the inquiry. The court pointed out that a nonresident alien could not be compelled to come to the United States, but if he was in the United States he could be compelled to testify.

Six years later, after the United States had made expensive and only partially successful efforts to pierce Caribbean bank secrecy provi-

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133. Id.
134. Id.
135. Id.
136. Id.
138. 532 F.2d at 406.
139. Id. at 405.
140. Id. at 409-10.
sions through the courts of the islands, the United States government returned to the service of grand jury subpoenas upon branches of banks present in the United States as a means of obtaining records located in foreign bank secrecy jurisdictions. In the first of these cases to be extensively litigated, the Eleventh Circuit, relying heavily on the Field case, extended the doctrines of Field to information located outside the United States. The court also rejected the bank's argument that the United States ought first to apply for judicial assistance through the courts of the Cayman Islands, on the ground that this method was not a substantially equivalent means of obtaining the production of records because of the costs in time and money, and the uncertain likelihood of success.

In 1983, the Seventh Circuit in United States v. First National Bank of Chicago reached a different result in a case in which the Internal Revenue Service sought the records of a Greek branch of a United States bank in violation of Greek bank secrecy. The court remanded the matter to the district court for further findings about the bank's good faith efforts to obtain waivers. The Seventh Circuit noted that its ruling was different in result from the Eleventh Circuit's decision.

In In re Grand Jury Proceedings (United States v. Bank of Nova Scotia), the Eleventh Circuit upheld the imposition of coercive sanctions against a bank for failing to produce records from the Bahamas and the Cayman Islands, despite a foreign court order not to do so. While the facts in that case are confused by the bank's sloppy search for records, the court nevertheless concluded, after considering the balancing suggested by Section 40 of the Restatement (Second) Foreign Relations Law, that the investigative interests of a grand jury outweighed the interests of international comity so as to permit the enforcement of the subpoenas and the imposition of sanctions despite foreign court orders blocking disclosure.

This conflict between the Seventh and Eleventh Circuits as to sanctions against non-party witnesses seems to have been reaffirmed

143. 740 F.2d at 832.
144. Id.
145. 699 F.2d 341 (7th Cir. 1983).
146. Id. at 347.
147. Id. at 346-47.
148. 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985).
149. 740 F.2d at 827.
by the recent district court decision in *Laker Airways Ltd. v. Pan Am. World Airways.*150 The court refused to enforce a subpoena on a non-party witness for documents in London and cited with approval the earlier Second Circuit decisions.151 The court said that these decisions "continue to reflect the law applicable to non-parties."152 *Laker Airways* and the other cases discussed suggest that, at least in the Second and Seventh Circuits, non-party witnesses may stand a somewhat better chance of avoiding coercive sanctions than parties do in the Eleventh Circuit.

C. Securities and Exchange Commission Cases

The Securities and Exchange Commission (SEC) has repeatedly found its enforcement efforts frustrated by foreign secrecy laws. In response to this frustration, its Enforcement Division has used the coercive power of the federal courts against banks to obtain access to customer information. In an early example, a federal district judge threatened to seize the United States branch of a Swiss bank if the SEC's agent was not permitted to inventory certain customer assets held at the bank in Switzerland.153 After the threat, an accommodation was worked out with the SEC.154

In a later case, *SEC v. Banco Della Svizzera Italiana,*155 the SEC used similar techniques to obtain access to information in an insider trading investigation. The Swiss bank acquiesced shortly after a federal district judge informally indicated that he would require the bank to disclose customer information and impose severe contempt sanctions if the bank did not comply.156

The most creative application of these techniques by the Enforcement Division may be found in the so-called *Santa Fe* case.157 The Enforcement Division named as "nominal defendants" a number of United States and Swiss banks, in order to obtain the identities of the banks' Swiss customers who allegedly violated insider trading rules.

As part of its efforts to obtain access to Swiss information during the *Santa Fe* investigation, the SEC Enforcement Division began a se-

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151. Id. at 326 (citing with approval Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); First Nat'l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960)).
152. Id.
154. Id.
156. Id. at 119.
ries of discussions with Swiss government and banking authorities resulting in a Memorandum of Understanding between the United States and Switzerland.\textsuperscript{158} Under this Memorandum of Understanding, the Enforcement Division and the Swiss bankers reached an accommodation as to the appropriate techniques of investigation for transactions conducted in United States financial markets from Switzerland when insider trading is suspected.\textsuperscript{159} This transition from the confrontational techniques of Banco Della Svizzera Italiana and Santa Fe to the accommodations of the international agreement was the first of two categorical solutions the SEC proposed to resolve its conflicts with bank secrecy. The second was to propose a general waiver of bank secrecy.

\textbf{D. Waivers of Secrecy}

One means of obtaining information under most bank secrecy laws is procuring the consent of the bank customer. Most bank secrecy statutes and cases explicitly recognize that customer consent, either express or implied, is an exception to the banker’s obligations of confidentiality. The earliest American cases recognized that obtaining waivers of bank secrecy was an appropriate technique for reconciling the differences between American discovery and foreign privacy laws. For example, in Rogers,\textsuperscript{160} it was one of the techniques used by the Swiss plaintiff to partially comply with the discovery demands.\textsuperscript{161} United States litigants were quick to see the advantages of customer consent, and, in a number of instances, such waivers were obtained on a voluntary basis. In other cases, parties subject to the court's jurisdiction were ordered to execute waivers of the foreign secrecy provisions.\textsuperscript{162} The propriety of this technique for compelling waivers of foreign secrecy was rarely examined by United States courts, and when it was addressed, the courts only considered whether such compelled waivers constituted a violation of the American constitutional precepts against self-incrimination.\textsuperscript{163} For a bank, the primary advantage of a compelled waiver is to focus the coercive force of the American court on the customer of the bank rather than on the bank itself. Courts in

\begin{footnotesize}
\begin{itemize}
\item 159 Id.
\item 161. Id.
\item 163. 767 F.2d at 1025; 732 F.2d at 814.
\end{itemize}
\end{footnotesize}
secrecy jurisdictions recognize the legitimacy of requiring a party, who voluntarily enters into litigation in the United States, to furnish the United States courts with all relevant information. On occasion they have lifted bank secrecy to ensure that result.\textsuperscript{164} In circumstances where the party did not voluntarily submit to the court's jurisdiction, however, they found a compelled waiver to be a travesty of justice since these courts do not consider a compelled waiver to constitute a true waiver within the meaning of the secrecy jurisdiction legislation.\textsuperscript{165}

The SEC, in an attempt to extrapolate from its experiences in \textit{Banco Della Svizzera Italiana, Santa Fe}, and the decisions on waiver of foreign secrecy provisions, proposed a concept referred to as "waiver by conduct."\textsuperscript{166} Under this concept, if a foreigner chose to trade in securities listed on an American exchange, that conduct would be deemed to be a waiver of any foreign bank secrecy to the extent necessary to permit investigations by the SEC of any violations arising out of such trading.\textsuperscript{167} When the Enforcement Division of the SEC proposed this change of regulations, it engendered substantial protest from securities regulators, bankers and foreign governments.\textsuperscript{168} One objection asserted was that this procedure represented another unilateral attempt by the United States to impose its views as to discovery and investigation on the world without consulting the governments involved in imposing the original restrictions.\textsuperscript{169} Apparently responding to the protests, the SEC did not pursue its "waiver by conduct" proposal, but built upon its Swiss experience by negotiating a series of bilateral executive agreements.

The SEC experience of first obtaining information through coercive means against banks, then proposing "waiver by conduct," and ultimately negotiating bilateral agreements, generally reflects the United States' experience. With increased sophistication and experience, the SEC found coercive means less effective than international agreements.

\textbf{E. Effects of Increased Sophistication}

The SEC's example of entering into bilateral Memoranda of Understanding is the simplest example of a complex process by which

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\item 165. \textit{In re ABC}, No. 269 (Cayman Is. 1984).
\item 167. \textit{Id.}
\item 169. \textit{Id.} at 292-93 (comments by Swiss Bankers Association).
\end{itemize}
American investigative and litigation techniques have evolved and developed to accommodate both free-wheeling United States discovery and foreign financial privacy. The sequence of evolution can be seen in a number of examples. First, there is a confrontation over the apparently irreconcilable differences between American desires for information and foreign strictures on privacy. This can be seen in cases where parties subject to American jurisdiction were confronted with conflicting demands of foreign secrecy and United States discovery. These conflicting demands arose in the shipping cartel cases, the atomic energy cases, the various Swiss criminal investigations, and the recent money laundering cases, primarily in the Eleventh Circuit. In each case, an investigator, whose central focus was not on the gathering of information from abroad but was instead on putting together a case, one element of which included foreign discovery, turned to familiar coercive techniques when faced with an obstinate refusal to provide information. Coercive efforts, while often successful in the end, were costly and diverted the investigator from the primary goal. As these litigations became more frequent, the United States government began to develop and centralize its expertise in foreign discovery. First, the Justice Department created the Office of International Affairs. Thereafter, the SEC created an Office of International Counsel, and finally, the Internal Revenue Service created a special division of the General Counsel's Office. In each instance, the result has been to centralize within the bureaucracy the otherwise disparate foreign discovery requests.

The effect of this centralization can clearly be seen in the SEC's progression from the coercion of Banco Della Svizzera Italiana and Santa Fe, to the unilateral "waiver by conduct," to a series of bilateral agreements.

The Justice Department has followed a similar course by developing a series of judicial assistance treaties. The first, with the Swiss, was

174. Fedders & Wade, supra note 89, at 9; CRIME & SECRECY, supra note 2, at 127.
negotiated and ratified over a period of time.¹⁷⁶ Now the United States also has treaties with Canada and the Cayman Islands.¹⁷⁷

With respect to civil discovery, the United States is a signatory to the Hague Convention. Although the issue of whether the convention is the exclusive means of foreign discovery is unresolved (there are a number of countries that have taken a reservation with respect to pre-trial discovery techniques), the Hague Convention presents an important means for mediating between American demands for discovery and foreign privacy concepts.¹⁷⁸ Finally, in efforts to revise our tax treaties and as part of the Caribbean Basin Initiative, the United States has entered into a number of agreements to facilitate the obtaining of income tax information from foreign secrecy jurisdictions, such as Bermuda.¹⁷⁹

These treaty arrangements offer the greatest promise for an effective resolution of the conflicts between American notions of inquiry and foreign privacy provisions. While conflicts have often arisen through inadvertence or non-substantive differences, such as sloppy searches or a party's bad faith, there are some fundamental cultural differences, particularly with respect to the nature of judicial versus party fact-gathering, which cannot be bridged except through negotiated resolution in advance of specific cases.

VI. CONCLUSION

American inquiries into information protected by foreign secrecy laws have produced a history of conflict and coercion. There has been only limited recognition of the fundamental similarities between American and foreign notions of financial privacy and the proper exceptions imposed on that confidence. When United States bank secrecy is examined, one can readily see the similarities between American and for-

eign notions of the doctrine. Moreover, an examination of the exceptions to the doctrine suggests that American financial privacy concepts are not so far from foreign concepts as is often believed. A history of American discovery and investigative cases about foreign bank secrecy suggests, however, that the similarities are rarely appreciated. Problems inherent in specific cases, such as misunderstandings or lack of sophistication, often trigger conflicts that widen the gulf between the United States and other countries on these issues. Recent efforts, particularly the federal government's attempts to enter into bilateral and multilateral arrangements, arose primarily from the recognition of the similarities between the United States and other financial centers. This recognition should allow us to meet the need for more efficient, less confrontational methods to exchange information, a need intensified by the increasingly world-wide market for goods and services. While the opportunities for misunderstanding are still substantial, the proliferation of arrangements for the exchange of civil and criminal information should significantly reduce the frequency of misunderstandings and confrontations.