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John L. O'Donnell Jr.

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The Secrets of Foreign Bankers and the Federal Investigation: Tottering Balances

John L. O'Donnell, Jr.*

Bank secrecy laws of foreign countries are periodically thrust into national headlines in the United States.¹ In the 1970s, the U.S. Internal Revenue Service's "Project Haven" focused national attention on the use of Caribbean banks for anonymous deposits.² Recently, secret bank accounts returned to the headlines in connection with the Congressional hearings on dealings with Iran and Nicaraguan Contras.³

Bank secrecy is not part of American jurisprudence,⁴ nor is it considered part of the "right of privacy"⁵ protected by the Constitution. The concept of privacy in one's financial matters is so foreign to American courts that one court of appeals has referred to the Swiss government, popularly identified with bank secrecy laws, as "*notorious* for protecting the privacy of financial transactions."⁶

Whenever federal investigations lead to the doors of foreign banks, or even U.S. banks doing business abroad, conflicts arise between the investigator's need for information in the United States and the foreign banker's obligations under foreign law. There are several precedents from the courts of appeals,⁷ but surprisingly, none from the U.S.

* The author is a member of the firm of DeWolf, Ward & Morris, P.A., in Orlando, Florida. He received his B.A. from the University of Toronto and his J.D., with honors, from the University of Florida. Mr. O'Donnell was co-counsel for Anthony Field in *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

¹ See, e.g., *United States v. Payner*, 447 U.S. 727 (1980) and *United States v. Baskes* 433 F. Supp. 799 (N.D. Ill. 1977), discussing the publicity surrounding the Project Haven and Operation Tradewinds investigations, which concerned the use of Caribbean offshore banks, in the mid-1970s. The publicity surrounding the recent "Iran-Contra" hearings was extensive. For one brief sample which includes a synopsis of the affair, see *Iran-Contra Panels Find Fault, But Not in the System*, N.Y. Times, Nov. 22, 1987, § 4, at 4 [hereinafter *Iran-Contra Panels Find Fault*].

² See *Payner*, 447 U.S. at 727; *Baskes*, 433 F. Supp. at 799.

³ See *Iran-Contra Panels Find Fault*, *supra* note 1, at 4.

⁴ See, e.g., *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974); *United States v. Miller*, 425 U.S. 21 (1976); *Payner*, 447 U.S. at 727; *United States v. First Nat'l City Bank*, 396 F. 2d 897 (2d Cir. 1962) [hereinafter *Citibank III*] (in which one of the depositors in the American-owned foreign bank was itself an American corporation).

⁵ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁶ *Field*, 532 F. 2d at 408 (emphasis added).

⁷ E.g., *First Nat'l City Bank v. I.R.S.*, 271 F.2d 616 (2d Cir. 1959) [hereinafter *Citibank I*]; *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *Citibank III*, 396 F.2d 897;

Supreme Court dealing with the recurring and substantial questions these cases raise.

The privacy of financial transactions is much more respected in other nations than in the United States. A report from the House Committee on Banking and Currency⁸ is frequently cited⁹ for its view of bank secrecy laws:

Secret foreign bank accounts and secret foreign institutions have permitted a proliferation of "white collar" crimes; have served as a financial underpinning of organized criminal operation in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold [sic]; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; have served as an essential ingredient in frauds including schemes to defraud the United States; have served as an ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock acquisitions mergers and takeovers; have covered conspiracy to steal from the U.S. defense and foreign aid funds; and have served as a cleansing agent for "hot" or illegally obtained monies. . . .

The debilitating effects of the use of these secret institutions on Americans and the American economy are vast. It has been estimated that hundreds of millions in tax revenues have been lost.¹⁰

While forbidden gold ownership and Vietnam are no longer with us, nearly all other elements of this index of crime and greed are in the headlines today.¹¹

Confronted with different political philosophies providing greater respect for privacy in financial dealings, U.S. courts have exhibited everything from disdain¹² to deference.¹³ Different courts have reached differ-

Field, 532 F.2d at 404; *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir.), *modified* 691 F.2d 1281 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981); *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1986) [hereinafter *Bank of Nova Scotia I*]; *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) [hereinafter *Bank of Nova Scotia II*]; *In re Sealed Case*, 825 F.2d 494 (D.C. Cir.), *cert. denied sub nom.*, *Roe v. United States*, 108 S.Ct. 451 (1987).

⁸ H.R. REP. NO. 975, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4394 [hereinafter HOUSE REPORT].

⁹ *See, e.g., California Bankers Ass'n*, 416 U.S. at 21; *Field*, 532 F.2d at 404.

¹⁰ HOUSE REPORT, *supra* note 8, at 4397.

¹¹ The use of foreign bank accounts to launder illegal drug money is currently being aggressively pursued by The Department of Justice. *See In re Sealed Case*, 825 F.2d at 494; *Bank of Nova Scotia II*, 740 F.2d at 817. Illegal diversion of defense funds is one of the issues which surfaced in the "Iran-Contra" hearings. *See Iran-Contra Panels Find Fault*, *supra* note 1, at 4. A criminal antitrust investigation was the focus of the grand jury in *Citibank III*, 396 F.2d at 897. Tax evasion, of course, is always with us. *See, e.g., Citibank I*, 271 F.2d at 616; *Field*, 532 F.2d at 404.

¹² *See, e.g., Field* 532 F.2d at 404, *Bank of Nova Scotia I*, 691 F.2d at 1384, *Bank of Nova Scotia II*, 740 F.2d at 817.

ent conclusions with respect to the protection given those who refuse to disclose.¹⁴ Occasionally, the courts reach conclusions in cases involving financial transactions which seem diametrically opposed to now well-settled principles of American jurisprudence, elevating protection of principle over prosecution.¹⁵ For example, the court in *United States v. Field* ("*Field*")¹⁶ was able to conclude:

We regret that our decision requires Mr. Field to violate the legal commands of the Cayman Islands, his country of residence. . . . Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interests of other states.¹⁷

In the context of entirely domestic prosecutions, such a ruling, sanctioning a government investigation in violation of law, would be unconscionable.¹⁸ The heart of our constitutionally circumscribed criminal procedures is that, in spite of society's overwhelming interest in ferreting out and prosecuting criminal behavior, individual investigations must give way to protection of higher principles.¹⁹

Why the difference and what does it mean to foreign bankers faced with an order from a court of the United States to provide evidence contrary to the laws of their own countries? The answers are found in the balancing of interests which teeter back and forth in judicial opinions addressing the issue. The outcome of each case depends upon the nature of the secrecy law involved, the request being made, and even the identity of the institution or individual. The answers involve issues of not only criminal law but foreign policy as well. So far, the answers to individual cases have been neither uniform, nor, in some cases, satisfying.

I. REASONS FOR CONFLICT

The United States has an overwhelming interest in the enforcement

¹³ See, e.g., *Application of Chase Manhattan Bank*, 297 F.2d at 611; *In re Sealed Case*, 825 F.2d at 494.

¹⁴ Compare *Field*, 532 F.2d at 404 [and] *Bank of Nova Scotia I*, 69 F.2d at 1384 [and] *Bank of Nova Scotia II*, 740 F.2d at 817 with *Citibank I*, 271 F.2d at 616 [and] *Application of Chase Manhattan Bank*, 297 F.2d at 611 [and] *In re Sealed Case*, 825 F.2d at 494.

¹⁵ See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974) (privileges recognize transcendent public good); *Mapp v. Ohio*, 367 U.S. 643 (1961) (right to remain free from unlawful searches and seizure no longer an empty promise); *McNabb v. United States*, 318 U.S. 332 (1943) (stating that "effective administration of criminal justice hardly requires disregard of fair procedures imposed by law").

¹⁶ 532 F.2d 404.

¹⁷ *Id.* at 410.

¹⁸ See *McNabb*, 318 U.S. at 332; *Mapp*, 367 U.S. at 643. But see *Payner*, 447 U.S. at 727.

¹⁹ See *McNabb*, 318 U.S. at 332; *Mapp*, 367 U.S. at 643.

of its criminal laws,²⁰ and the ability of prosecutors to uncover evidence of criminal conduct, particularly through grand jury proceedings, is essential to the enforcement effort.²¹ Whether popular or not,²² the laws criminalizing specific conduct reflect the judgment of a representative legislature that the conduct is inimical to the very fabric of society.²³ The range of illegal activity benefiting from secrecy laws is well documented in the report of the House Committee.²⁴

Nonetheless, the bank secrecy laws of other nations also reflect the judgments of other representative legislatures that disclosure of financial information is inimical to their societies.²⁵ Foreign governments have filed *amici curiae* briefs in support of their sovereign right to prohibit disclosure contrary to their laws,²⁶ which are generally criminal statutes,²⁷ or have applied to the executive department, which is the prosecuting authority,²⁸ to protest sanctions imposed for compliance with their laws.²⁹

Bank secrecy laws provide shelter for both legal and illegal activities which people prefer to shield from public scrutiny. As with most things, it was perhaps only a matter of time before the unscrupulous saw the illegal gains available from secreting assets abroad.³⁰

²⁰ See, e.g., *Field*, 532 F.2d at 424; *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d at 817.

²¹ See *Field*, 532 F.2d at 404; *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d at 817.

²² Many of the criminal laws cited in the HOUSE REPORT, *supra* note 8—antitrust, tax, securities, and gold ownership (at the time illegal)—are frequently viewed as “merely” economic regulation and as such are occasionally viewed with less dignity than those statutes dealing with *malum in se* topics like murder. See *Field*, 532 F.2d at 404; *Vetco*, 644 F.2d at 1324.

²³ See *Citibank III*, 396 F.2d 897. The Second Circuit declared, “These [antitrust] laws have long been considered cornerstones of this nation’s economic policies, have been vigorously enforced and the subject of frequent interpretation by our Supreme Court.” *Id.* at 903.

²⁴ HOUSE REPORT, *supra* note 8, at 4404.

²⁵ The foreign states most frequently involved in bank secrecy are Switzerland, the Bahamas, and the Cayman Islands. Each country has a representative government. See *id.* at 4404.

²⁶ See, e.g., *Bank of Nova Scotia II*, 740 F.2d at 817.

²⁷ See, e.g., *Field*, 532 F.2d at 404; *Application of Chase Manhattan Bank*, 297 F.2d at 611. But see *Citibank III*, 396 F.2d at 897 (involving questions of civil liability under German law). In *Citibank III*, the court noted the possibility that non-criminal penalties, such as charter revocation, could be as compelling as criminal penalties. *Id.* at 902.

²⁸ See, e.g., *In re Sealed Case*, 825 F.2d at 494.

²⁹ See *id.* Some courts have cited the fact that the executive department is seeking enforcement of disclosure orders over foreign objection, in support of decisions minimizing any foreign policy impact of compelled disclosure. See, e.g., *Citibank III*, 396 F.2d at 904; *Vetco*, 691 F.2d at 1289 n.9, *Bank of Nova Scotia II*, 740 F.2d at 823 n. 23. In *United States v. First National City Bank*, 379 U.S. 378, 384 (1965) [hereinafter *Citibank II*], the Supreme Court made similar comments. *Citibank II* involved “attachment” of a foreign account, rather than disclosure of foreign information.

³⁰ In the United States this metamorphosis is generally seen in the use of the tax laws. A deduction or exclusion intended to promote particular economic activity becomes a “loophole” and then is pushed beyond its limits to become evasion. It is this very activity which frequently gives rise

The dilemma is clear: courts committed to the rule of law must order acts in violation of foreign law, or thwart enforcement of domestic law, effectively surrendering sovereignty to the foreign nation.³¹ Inordinate deference to foreign law would be an invitation to expanded nefarious use of foreign banks, resulting in a hemorrhage of revenue,³² or a haven for the profits of illegal activities³³ which could either conceal criminal conduct or make the possibility of detection and punishment worth the risk. Obdurate insensitivity to the laws of foreign sovereigns, and the difficult situation in which the bankers in the middle³⁴ find themselves, would give rise to charges of arrogance³⁵ and scorn for solemn pronouncements on the sanctity of the "rule of law."³⁶

Inevitably, these competing interests collided in the late 1950s when the U.S. government began³⁷ to seek information located in foreign banks. The initial efforts were directed at U.S. banking institutions with foreign branches.³⁸ After some success in obtaining disclosure in those circumstances,³⁹ foreign banks with branches in the United States⁴⁰ and officers of foreign banks visiting in the United States⁴¹ became targets of subpoenas to provide information, the disclosure of which is a criminal act in their country of operations or residence.⁴²

The basic conflict has come before the courts in a variety of investigations,⁴³ against a patchwork of foreign laws,⁴⁴ involving a cross-section

to an investigation resulting in the conflict between foreign secrecy laws and federal criminal investigations. See, e.g., *Veico*, 691 F.2d at 1324.

³¹ See *In re Sealed Case*, 824 F.2d at 494; *Field*, 532 F.2d at 404; *Bank of Nova Scotia II*, 740 F.2d at 817.

³² See HOUSE REPORT, *supra* note 8, at 4397-8.

³³ See *Bank of Nova Scotia II*, 740 F.2d at 827-8 (discussing the use of offshore banks in connection with the narcotics trade, and citing the foreign appellate court's view that such use was not the intent of the laws of the foreign nation). See *infra* note 264.

³⁴ Rarely are the bankers themselves the target of the investigation. Normally, they are only the "stakeholder" of the information sought by the investigation. See, e.g., *Bank of Nova Scotia I*, 691 F.2d at 1388; *In re Sealed Case*, 824 F.2d at 494.

³⁵ See *Bank of Nova Scotia I*, 691 F.2d at 1388.

³⁶ Cf. *In re Sealed Case*, 824 F.2d at 494.

³⁷ The decision in *Citibank I* in 1959 was apparently the seminal case in which federal criminal investigators sought disclosure of information in foreign banks protected by secrecy laws.

It is probably not coincidental that the beginning of these investigations corresponds with the post-World War II era, in which the advances in telecommunications and travel made private international transactions much more feasible for Americans.

³⁸ See *Citibank I*, 271 F.2d at 616; *Application of Chase Manhattan Bank*, 297 F.2d at 611; *Citibank III*, 396 F.2d at 897.

³⁹ See *Citibank I*, 271 F.2d at 616; *Citibank III*, 396 F.2d at 897.

⁴⁰ See *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d at 817; *In re Sealed Case*, 824 F.2d at 494.

⁴¹ See *Field*, 532 F.2d at 404; *In re Sealed Case*, 824 F.2d at 494.

⁴² See, e.g., *Field*, 532 F.2d at 404; *In re Sealed Case*, 824 F.2d at 494.

⁴³ See *Citibank I*, 271 F.2d at 616; *Field*, 532 F.2d at 404 (tax cases); *Citibank III*, 396 F.2d at

of the banking community.⁴⁵ The method by which these cases reach the appellate courts is a primer in grand jury procedure.

II. ANATOMY OF CONFLICT

The conflict between investigator and banker begins when an investigation leads to the doors of a foreign bank and there is some basis for jurisdiction over the bank to subject it to a summons⁴⁶ or a grand jury subpoena.⁴⁷

A. The Players

Obviously, American banking institutions are located in the United States, but can documents maintained in their foreign branches, which are subject to foreign secrecy laws, be reached through the American parent institution? This was the first issue resolved by the courts dealing with this conflict. In *First National City Bank v. IRS* ("*Citibank I*"),⁴⁸ the Second Circuit ruled that the American parent bank had actual, practical control over its Panamanian branch records and was required to produce them.⁴⁹ The court in *Citibank I* rejected the bank's argument that 12 U.S.C. Section 604⁵⁰ made its branch bank independent and thereby negated any presumption of control over the branch's records.⁵¹ Thus, investigators crossed the first hurdle to obtaining access to secret bank documents by establishing their right to require domestic banks to bring those records to the United States.

More recently, foreign banks with branches or operations in the

897 (antitrust case); *Bank of Nova Scotia II*, 740 F.2d at 817 (narcotics case); *In re Sealed Case*, 824 F.2d at 494 (money laundering case).

⁴⁴ Compare *Citibank I*, 271 F.2d at 616 (interpreting "competent authority" language) with *Citibank III*, 396 F.2d at 897 (bank secrecy in nature of privilege) [and] *Vetco*, 691 F.2d at 128 (court order provides defense) [and] *Field*, 532 F.2d at 404 (criminal penalties).

⁴⁵ See, e.g., *Application of Chase Manhattan Bank*, 297 F.2d at 611 (U.S. bank); *Bank of Nova Scotia I*, 691 F.2d at 1384 (foreign bank); *Field*, 532 F.2d at 404 (individual).

⁴⁶ Some of the cases involve summonses issued by the IRS pursuant to 26 U.S.C. § 7602 (1982). See *Citibank I*, 271 F.2d at 616; *Vetco*, 644 F.2d at 1324. This article, though, will focus on grand jury proceedings, discussing the summons procedure only incidentally.

⁴⁷ Subpoenas to appear before a grand jury are governed by FED. R. CRIM. P. 17.

⁴⁸ 271 F.2d 616.

⁴⁹ See *id.* at 618-19. The ruling was based upon the presumption that a corporation is in the possession and control of its own books and records, and on the ability of the American bank to have branch records sent to its home office.

⁵⁰ Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

12 U.S.C. § 604 (1982).

⁵¹ See *Citibank I*, 271 F.2d at 618-19.

United States have been the object of federal subpoenas.⁵² The courts have concluded that they, too, are subject to subpoenas for records held in foreign branches by virtue of their presence in the United States.⁵³ This conclusion appears *a priori* in the decisions, without any analysis of the significant difference between the situation of foreign banks in the United States and American banks with branches abroad.⁵⁴

The difference is that the foreign bank offices in the United States are themselves *branches*.⁵⁵ The rationale in *Citibank I* was that the *home* office had the power to require a branch to send its records and was therefore presumed to have control over the records of the branch. Authority for the opposite proposition—that a branch can require the home office to forward records—is scant, however.⁵⁶ Nonetheless, foreign banks with branches in the United States have faced the same compelled disclosure as domestic institutions with branches abroad.⁵⁷

The final potential player in this conflict is the individual foreign bank officer who is found in the United States, either for business⁵⁸ or pleasure.⁵⁹ The officer, even without any documents, has been considered a valuable witness in at least two cases.⁶⁰

The non-resident alien bank official presents the most complex is-

⁵² See *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d at 817; *In re Sealed Case*, 825 F.2d at 494.

⁵³ See, e.g., *Bank of Nova Scotia I*, 691 F.2d at 1384. Even if not present in the United States, alien corporations doing business in the United States are subject to subpoena powers. See *In re Grand Jury Subpoenas*, 72 F. Supp. 1013 (S.D.N.Y. 1947). The possibility that an alien bank, not present in the United States, may nonetheless be doing business in the United States and be subject to a subpoena was argued by the government, but not decided, in *Field*, 532 F.2d at 404.

⁵⁴ See, e.g., *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d at 817; *In re Sealed Case*, 825 F.2d at 494.

⁵⁵ See, e.g., *Bank of Nova Scotia I*, 691 F.2d at 1384.

⁵⁶ See *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (the control by an American branch of documents held by the foreign parent was questioned, but not decided, because the subpoena was modified to exclude production of the foreign documents); *Bank of Nova Scotia I*, 691 F.2d at 1384 (the issue was also raised in the district court, but was resolved against the bank without discussion when the court of appeals affirmed the contempt order for the bank's failure to produce the foreign records).

⁵⁷ See *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d at 817.

⁵⁸ See *In re Sealed Case*, 825 F.2d at 494 (foreign bank officer was working in an American branch of the bank when he was served with a grand jury subpoena).

⁵⁹ See *Field*, 532 F.2d at 404 (foreign bank officer was served in the lobby of Miami International Airport).

⁶⁰ In *Field*, 532 F.2d at 404, the bank officer was asked questions such as: "Mr. Field, are there any United States corporations managed by Castle Bank & Trust (Cayman) Ltd.?" and "To the best of your knowledge, Sir, do any of the trusts which are managed by Castle (Cayman), do any of these trusts manage any assets located in the United States; by assets I mean stocks, bonds, typical assets including real property?" Appellant's Brief at 13, *Field* (No. 76-1739).

In *In re Sealed Case*, the court noted that by vacating the contempt order against the foreign bank while sustaining the order against the individual banker, it left the grand jury with a potential source for at least some of the information it sought. *Id.* at 499.

sues in these cases,⁶¹ including the collateral issue of the manner in which the U.S. government learned of his presence in the United States in order to effect service.⁶² Oddly, this is the only issue arising in the criminal investigations involving foreign secrecy laws to receive review in the U.S. Supreme Court.⁶³

The individual foreign bank official faces the most personal penalties—jail in the United States for contempt or jail in the foreign country for violating the secrecy law.⁶⁴ Yet, it is this witness who has received the least consideration by the appellate courts.⁶⁵

B. *The Procedures*

The conflict normally begins in these cases with a grand jury subpoena.⁶⁶ These subpoenas are governed by Rule 17 of the Federal Rules of Criminal Procedure.⁶⁷

Except for nationals or residents of the United States,⁶⁸ those indi-

⁶¹ The non-resident alien can raise questions not only about issues of international comity, but also about issues of the scope of the fifth amendment protection against self-incrimination. See *infra* notes 70-73 and accompanying text. In *Field*, 532 F.2d at 404, the non-resident banker also raised issues concerning the jurisdiction of the court to subpoena a non-resident alien under FED. R. CRIM. P. 17.

⁶² In *Field*, 532 F.2d at 404, Field, a foreign banker served in the Miami airport, argued that permitting service on aliens in such cases would encourage invasion of expected privacy by wire tap, mail interception or monitoring of ticketing information in order to determine when a non-resident alien might be in the United States, in order to serve him with a subpoena. *Field*, 532 F.2d at 404.

⁶³ See *Payner*, 447 U.S. at 727; see *infra* notes 83-91 and accompanying text.

⁶⁴ See *infra* note 101 and accompanying text (concerning the penalties attached to bank secrecy laws).

⁶⁵ In the only two cases to directly consider claims by foreign bankers in bank secrecy cases, the contempt citations were upheld. *Field*, 532 F.2d at 404; *In re Sealed Case*, 825 F.2d at 494.

⁶⁶ See, e.g., *Application of Chase Manhattan Bank*, 297 F.2d at 611; *Field*, 532 F.2d at 404; *In re Sealed Case*, 825 F.2d at 494. Occasionally, it is an IRS summons which initiates the conflict. E.g., *Citibank I*, 271 F.2d at 616.

⁶⁷ FED. R. CRIM. P. 17(e)-(g) provides:

Rule 17. Subpoena

* * * *

(e) Place of Service

(1) In the United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

(2) Abroad. A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in 28 U.S.C. § 1783.

* * * *

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued, if it was issued by a United States magistrate.

⁶⁸ FED. R. CRIM. P. 17 (e)(2) provides that "[a] subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in 28 U.S.C. § 1783."

28 U.S.C. § 1783 provides:

viduals served in foreign countries may not be compelled to appear before a grand jury.⁶⁹ Anyone within the United States, however, is subject to the jurisdiction of the federal district courts for the purpose of issuance of grand jury subpoenas.⁷⁰ Pursuant to the Federal Rules of Criminal Procedure, a subpoena to appear before a grand jury may be served anywhere in the United States.⁷¹ Thus, a potential banking witness must be in the United States before there can be any effort to compel disclosure of protected information.⁷²

With institutions, a contempt citation is issued upon the bank's refusal to provide the information.⁷³ The citation is accompanied with a daily fine, which can be substantial.⁷⁴ The purpose of the fine is to coerce compliance with the subpoena.⁷⁵

Individual witnesses, because of the fifth amendment privilege against self-incrimination, which is inapplicable to institutions,⁷⁶ are immunized⁷⁷ against prosecution upon their initial refusal to answer questions by invoking their fifth amendment privilege.⁷⁸ Upon continued

A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, or a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

28 U.S.C. § 1783 (a)(1982).

These provisions reflect the obligation of citizens to respond to orders of the federal courts. *Blackmer v. United States*, 284 U.S. 421 (1932).

⁶⁹ See *Blackmer*, 284 U.S. 421; *Webber v. United States*, 395 F.2d 397 (10th Cir. 1968); *Marino v. U.S. Marshal*, 326 F.2d 5 (9th Cir. 1963); *Gilliards v. United States*, 182 F.2d 962 (D.C. Cir. 1950).

⁷⁰ See *Field*, 532 F.2d at 404; *United States v. Germann*, 370 F.2d 1019, 1022-23 (2nd Cir. 1967).

⁷¹ FED. R. CRIM. P. 17(e)(1) states: "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States."

⁷² In *Field*, 532 F.2d at 404, the court rejected a claim that the witness must be a resident of the United States. *Field* had argued that the subpoena directed to "Tony Field, A/K/A Anthony Field, Manager Castle Bank and Trust, Ltd. Georgetown, Cayman Islands" was a subpoena "directed to a witness in a foreign country" under FED. R. CRIM. P. 17(e)(2), and could not be served in the United States. *Field*, 532 F.2d at 409-10.

⁷³ See, e.g., *In re Sealed Case*, 825 F.2d at 494; *Bank of Nova Scotia II*, 740 F.2d at 817.

⁷⁴ See *Bank of Nova Scotia II*, 740 F.2d at 818 (a fine of \$25,000 per day for each day of non-compliance had accumulated to \$1,825,000); *In re Sealed Case*, 825 F.2d at 496 (the fine against the institution was \$50,000 per day).

⁷⁵ See *supra* note 74.

⁷⁶ See, e.g., *Hale v. Henkel*, 201 U.S. 43 (1906); *United States v. White*, 322 U.S. 694 (1944).

⁷⁷ 18 U.S.C. §§ 6002, 6003 (1982).

⁷⁸ See *Field*, 532 F.2d at 404; *In re Sealed Case*, 825 F.2d at 494.

refusal to answer, the witness is ordered jailed.⁷⁹

These contempt orders are appealable upon an expedited basis requiring disposition within thirty days.⁸⁰ Because the issues involved in these cases are generally substantial, courts have extended the thirty day statutory period to allow full consideration,⁸¹ particularly if the contempt order has been stayed pending appeal.⁸²

The only secrecy related case decided by the U.S. Supreme Court involved a question of the procedures used by the U.S. government in dealing with foreign banks. In *United States v. Payner*,⁸³ a depositor of an off-shore bank who was convicted of filing a false tax return⁸⁴ challenged the methods used by the U.S. government to obtain the information. These methods challenged in lower court cases,⁸⁵ centered around the taking, opening and searching of a locked briefcase belonging to a foreign banker from the apartment of a woman who had been paid to entertain the gentleman at dinner while IRS agents opened the briefcase and photographed the documents.⁸⁶ Subsequently, the same woman traveled to the foreign bank and stole a rolodex from the banker's office.⁸⁷

Offended by these actions, which were undertaken with the approval of government officials, in reliance on Supreme Court cases denying standing to defendants to challenge illegal searches of the property of others,⁸⁸ the district court reversed the conviction, relying upon its supervisory power, and the court of appeals affirmed.⁸⁹

The Supreme Court reversed, and reinstated the conviction, holding that the supervisory powers of the appellate courts could not be used as a substitute for the standing requirements of the fourth amendment.⁹⁰ The

⁷⁹ See *supra* note 78. The term of confinement is limited to the life of the term of the grand jury, including extensions, but in no event in excess of eighteen months. 28 U.S.C. § 1826(c)(2)(1982). These contempt citations are civil contempts.

⁸⁰ 28 U.S.C. § 1826(b)(1982).

⁸¹ See *Field*, 532 F.2d at 404; *In re Sealed Case*, 825 F.2d at 494.

⁸² See *supra* note 81.

⁸³ 447 U.S. 727 (1980).

⁸⁴ The taxpayer in *Payner* had falsely stated that he had no accounts in foreign banks. *Id.* at 728.

⁸⁵ See *Baskes*, 433 F. Supp. at 799. It was claimed that in connection with Project Haven, agents of the United States engaged in theft, warrantless seizure of property, unauthorized copying of documents, prostitution, subornation of foreign officials, and violation of foreign laws, in order to obtain evidence. The government's methods in Project Haven provoked an investigation in 1975 by a subcommittee of the Committee on Government Operations of the U.S. House of Representatives. See *Payner*, 447 U.S. at 733 n.5.

⁸⁶ *Payner*, 447 U.S. at 729-30, 738-41.

⁸⁷ *Id.* at 741.

⁸⁸ *Id.* at 730-31.

⁸⁹ *Id.*

⁹⁰ *Id.* at 737.

dissenting justice objected that the Court's opinion effectively sanctioned criminal conduct by government agents in pursuit of crime.⁹¹ Thus, the issues reached the appellate courts.

C. *The Issues*

There are three principal issues in these cases: (1) the nature of the foreign banking law;⁹² (2) the proper application of principles of international comity,⁹³ and (3) the scope of fifth amendment protection against self-incrimination.⁹⁴

Bank secrecy laws are no more uniform than the cases dealing with them, and tend to evolve as they are interpreted by U.S. courts. For example, in 1959 when the Second Circuit decided *Citibank I*,⁹⁵ it concluded that Panamanian law⁹⁶ did not preclude production of the records because it did not limit the exception for review by "a competent authority" to Panamanian authority.⁹⁷ The Second Circuit concluded that disclosure of the records to the "competent authority" of the U.S. Treasury Department would not be a violation of Panamanian law.⁹⁸ By 1962, however, when the Second Circuit considered *Application of Chase Manhattan Bank*,⁹⁹ Panama had a new law which specifically prohibited examination of business records by foreign authorities.¹⁰⁰

⁹¹ *Id.* at 738 (Marshall, Brennan, and Blackmun J.J., dissenting).

⁹² *Citibank I*, 271 F.2d at 616; *Application of Chase Manhattan Bank*, 297 F.2d at 611; *Citibank III*, 396 F.2d at 897; *Field*, 532 F.2d at 404.

⁹³ See, e.g., *Citibank I*, 271 F.2d at 616; *Application of Chase Manhattan Bank*, 297 F.2d at 611; *Field*, 532 F.2d at 404; *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d at 817.

⁹⁴ *Field*, 532 F.2d at 404; *In re Sealed Case*, 825 F.2d at 494.

⁹⁵ 271 F.2d 616.

⁹⁶ The Panamanian Constitution provides in pertinent part: "Correspondence and other private documents are inviolable and may not be seized or examined except by provision of a competent authority and by means of legal formalities." PAN. CONST. art. 29.

⁹⁷ *Id.*

⁹⁸ *Citibank I*, 271 F.2d at 619-20.

⁹⁹ 297 F.2d 611.

¹⁰⁰ Law No. 17, Republic of Panama (1961), provided in pertinent part:

Article 89

The merchant furnishing a copy or reproductions of the contents of his books, correspondence and other documents for use in an action abroad, in compliance with an order of an authority not of the Republic of Panama, shall be penalized with a fine not greater than one hundred balboas (B/100.00).

* * * *

Article 93

The account books, correspondence and other documents which the merchant must keep shall be maintained in his establishment in order that they may be examined by the authority competent therefor. It is forbidden to remove them outside of the country. Violation of this prohibition shall be penalized with a fine not greater than one hundred balboas (B/100.00).

Moreover, while most foreign bank secrecy laws carry the teeth of criminal sanctions,¹⁰¹ not all do.¹⁰² The absence of attendant criminal liability in the foreign country has been a factor when enforcing subpoenas for foreign records.¹⁰³ Even when there are no criminal barriers to production, however, at least one court has indicated a willingness still to consider relieving the bank of the burden of production of protected documents.¹⁰⁴

The universal issue in these cases is that of the proper application of the principle of international comity. "Comity" has been defined as "a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws."¹⁰⁵

Aside from procedural irregularities,¹⁰⁶ international comity princi-

The timing of the new law was indeed a "happy coincidence," for it was signed on January 30, 1961 — just in time to furnish a copy to the district court on the return day of the order to show cause, February 2, 1961. *Application of Chase Manhattan Bank*, 297 F.2d at 612. Such "coincidences" have probably contributed to the occasional impatience shown foreign secrecy laws by some of the courts of the United States.

For a similar provision limiting the definition of "competent authority" to authorities within the foreign nation, see *Bank of Nova Scotia I*, 691 F.2d at 1386 (citing § 10, Banks and Trusts Companies Regulations Act of 1965, 1965 Bah. Acts No. 64, as amended by the Banks and Trust Companies Regulation (Amendment) Act, 1980, 1980 Bah. Acts No. 3, which permits disclosure by order of "any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas").

¹⁰¹ See, e.g., *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962) (Panama, fine equivalent to \$100.00); *Field*, 532 F.2d 404 (5th Cir. 1976) (Cayman Islands, fine of 1,000 pounds or imprisonment up to a year or both); *Vetco*, 644 F.2d 1324 (9th Cir. 1981) (Switzerland, imprisonment, and "in grave cases . . . imprisonment in a penitentiary"); *Bank of Nova Scotia I*, 691 F.2d 817 (11th Cir. 1982) (Bahamas, fine of \$15,000.00 or imprisonment up to two years or both). The Bahamian law equates violation of the banking act with the commonly accepted definition of a felony in the United States.

¹⁰² See *Citibank III*, 396 F.2d 897 (2d Cir. 1962) (involving the law of Germany which was concededly not statutory, but in the nature of a privilege).

¹⁰³ See *id.*

¹⁰⁴ In *Citibank III*, although not faced with the question directly, the court said:

We would be reluctant to hold, however, that the mere absence of criminal sanctions abroad necessarily mandates obedience to a subpoena. . . . The vital national interests of a foreign nation, especially in matters relating to economic affairs, can be expressed in ways other than through the criminal law. . . . Equally important is the fact that a sharp dichotomy between criminal and civil penalties is an imprecise means of measuring the hardship for requiring compliance with a subpoena. . . . It would be a gross fiction to contend that if the Bundesbank [the central bank of Germany] were to revoke the license of Citibank for a violation of bank secrecy the impact would be less catastrophic than having to pay an insignificant fine because the revocation is theoretically not "equivalent to a misdemeanor" or criminal sanction.

396 F.2d at 902.

¹⁰⁵ *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972), quoted in *Bank of Nova Scotia I*, 691 F.2d at 1390.

¹⁰⁶ In *Field*, 532 F.2d at 409, the witness argued that subpoenas to foreign bankers found in the

ples are the only basis upon which an institution can avoid enforcement of a subpoena when compliance is a violation of foreign law.¹⁰⁷ The argument is equally available to individual witnesses, in addition to their fifth amendment claims.¹⁰⁸

Application of these principles, by definition, requires balancing of the interests of the United States, the foreign nation and the individual. The generally accepted scale¹⁰⁹ for this balancing test is the *Restatement*.¹¹⁰ Of the five factors listed by the *Restatement*, the courts have consistently considered each in bank secrecy cases.

The national interests of the United States in the reported cases, particularly recently, have centered upon the extremely important effort to stem narcotics traffic,¹¹¹ as well as the economic crimes of antitrust

United States were irregular under FED. R. CRIM P. 17, and that issuance of subpoenas in blank by the clerk was contrary to *Fuentes v. Shevin*, 407 U.S. 67 (1972). In *Bank of Nova Scotia I*, 691 F.2d at 1387, the court rejected the bank's contention that the government be required to demonstrate the relevancy of the documents sought to the grand jury proceeding before production could be compelled, and declined to follow *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3d Cir. 1973), on subsequent appeal, 507 F.2d 963 (3d Cir. 1975), cert. denied, 421 U.S. 1015 (1975). Cf. *Payner*, 447 U.S. at 727, concerning the procedures used by government agents to obtain evidence during the Project Haven investigation of the use of secret bank accounts, discussed *supra* at notes 90-99 and accompanying text.

¹⁰⁷ See, e.g., *Application of Chase Manhattan Bank*, 297 F.2d at 612; *In re Sealed Case*, 825 F.2d at 494. Institutions have no fifth Amendment privilege against self-incrimination. See *Hale v. Henkel*, 201 U.S. at 51; *United States v. White*, 322 U.S. at 699. One argument, which has been rejected, states that the imposition of sanctions for failing to comply with a subpoena when compliance is prohibited by foreign law offends due process under *Société Internationale Power Participations Industrielles v. Rogers*, 357 U.S. 197 (1958). *Bank of Nova Scotia I*, 691 F.2d at 1388-89.

¹⁰⁸ *Field*, 532 F.2d at 404; *In re Sealed Case*, 825 F.2d at 494.

¹⁰⁹ See, e.g., *Citibank III*, 396 F.2d at 902; *Field*, 532 F.2d at 407; *Bank of Nova Scotia II*, 740 F.2d at 827; *In re Sealed Case*, 825 F.2d at 494.

¹¹⁰ RESTATEMENT (Second) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 40 (1965) [hereinafter RESTATEMENT]. The RESTATEMENT provides:

§ 40. Limitations on Exercise of Enforcement Jurisdiction

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.

Id.

¹¹¹ See *Bank of Nova Scotia I*, 691 F.2d at 1386; *Bank of Nova Scotia II*, 740 F.2d at 817; Cf. *In re Sealed Case*, 825 F.2d at 494 (involving money laundering, presumably of money obtained from illegal narcotics trafficking in the United States).

violations¹¹² and tax fraud schemes.¹¹³ The courts have noted the significant interest of the foreign countries, which have occasionally intervened.¹¹⁴ The Cayman Islands, for example, considers preservation of bank secrecy vital to the expansion of the country's principal industry — banking and off-shore finance.¹¹⁵ The potential hardships upon the witnesses in these cases have varied from minimal fines in the foreign nation,¹¹⁶ to substantial fines and imprisonment.¹¹⁷

The third factor of the *Restatement* analysis, requiring consideration of the extent to which the required action is to take place in the foreign country, has been a highly relevant factor to one court,¹¹⁸ and a very insignificant factor to another.¹¹⁹ The courts have paid more attention to the nationality of the person or institution involved when the witness in jeopardy has been an alien,¹²⁰ or an American institution.¹²¹ The courts have also considered that American depositors, who are the targets of the investigations, would have no expectation of privacy in totally domestic banking relationships.¹²²

The last *Restatement* factor, the effectiveness of enforcement, is rarely discussed in the terms employed by the *Restatement*, but is closely related to the national interest factor, and with that first factor has been the predominant feature of the more recent decisions. The banks involved in these cases are not themselves the targets of the investigations,¹²³ and therefore punishment of the banks and bankers for failure to produce banking documents will have no direct impact on the narcotics, tax or antitrust enforcement efforts. Certainly, however, the government and the courts realize that if they can break down the barrier of bank secrecy in these types of cases, they not only achieve access to vital evi-

¹¹² See *Citibank III*, 396 F.2d at 897.

¹¹³ See *FIELD*, 532 F.2d at 404; *Vetco*, 691 F.2d at 1281. Practically all investigations implicating secret foreign bank accounts include criminal tax claims as well, since the "secret" funds obtained illegally were likely not reported as income. See *Bank of Nova Scotia I*, 691 F.2d at 1384.

¹¹⁴ See *Bank of Nova Scotia II*, 740 F.2d at 817; *In re Sealed Case*, 825 F.2d at 494.

¹¹⁵ See *Bank of Nova Scotia II*, 740 F.2d at 827.

¹¹⁶ See *Application of Chase Manhattan Bank*, 297 F.2d at 612, where the penalty for violation of the foreign laws was equivalent to a \$100 fine.

¹¹⁷ See, *supra* note 101 (for a discussion of various foreign laws).

¹¹⁸ See *In re Sealed Case*, 825 F.2d at 498. In that case, the fact that the bank would be required to violate a foreign nation's law on that nation's soil was very significant to the court's refusal to enforce the subpoena.

¹¹⁹ See *Bank of Nova Scotia I*, 691 F.2d at 1390. In that case, the court noted that the fact that subpoenaed documents were located in the foreign country was irrelevant, for disclosure was going to be made in the United States, and therefore the affront to the foreign sovereign would occur no matter where the information was originally located.

¹²⁰ See *In re Sealed Case*, 825 F.2d at 497-98; *Field*, 532 F.2d at 407.

¹²¹ See *Citibank III*, 396 F.2d at 905; *Citibank I*, 271 F.2d at 618.

¹²² *Bank of Nova Scotia II*, 740 F.2d at 828.

¹²³ See, e.g., *In re Sealed Case*, 825 F.2d at 498; *Bank of Nova Scotia I*, 691 F.2d at 1390.

dence of past crimes,¹²⁴ but also impose a higher risk of discovery on those who would use secret accounts for illegal purposes. By forcing would-be wrongdoers to abandon secret accounts as a method of operation, the government increases the chances of crime detection, and possibly even prevention. To that extent, enforcement of subpoenas against foreign bankers has a significant potential "to achieve compliance with the rule prescribed by" the United States.¹²⁵

Nonetheless, the ultimate issue for the courts in these cases is whether the potential enforcement benefits outweigh the damage to the rule of law done by a court ordering violations of law.¹²⁶ In other purely domestic contexts, the courts of the United States have been vehement in their refusal to sanction illegal activities undertaken against defendants for crime detection and prevention, even when the court is involved only indirectly.¹²⁷ To some extent, the federal courts may well have developed a double standard for dealing with bank secrecy cases.¹²⁸

Just as success against domestic banks with foreign branches emboldened the government to expand subpoena power to foreign banks, so too has success of claims that domestic criminal investigations eclipse the demands of foreign law, caused the government to alter its position in these cases. In *United States v. First National City Bank* ("*Citibank III*"), the government argued that to be excused from compliance with the subpoena, the bank had to show it would suffer criminal liability in the foreign country.¹²⁹ In recent years, however, the government has conceded criminality in the foreign jurisdiction, arguing instead that it just does not matter.¹³⁰

The final issue is the scope of the fifth amendment privilege against self-incrimination in cases involving individual bankers.¹³¹ Can the government compel testimony from an individual by the grant of immunity from U.S. prosecution when that testimony may be the basis of prosecution by a foreign nation?

It is settled that the constitutional protection of the fifth amendment extends to aliens legally in the United States, especially when a U.S. court has asserted jurisdiction over that alien by serving him with a grand jury subpoena.¹³² In bank secrecy cases, the government's applica-

¹²⁴ See *Field*, 532 F.2d at 409; HOUSE REPORT, *supra* note 8, at 4397.

¹²⁵ RESTATEMENT *supra* note 110.

¹²⁶ See *In re Sealed Case*, 825 F.2d at 499.

¹²⁷ See, e.g., *McNabb v. United States*, 318 U.S. 332, 341-47 (1943).

¹²⁸ See *infra* notes 281-289 and accompanying text.

¹²⁹ 396 F.2d at 901-902.

¹³⁰ See, e.g., *In re Sealed Case*, 825 F.2d at 498; *Field*, 532 F.2d at 406.

¹³¹ See *In re Sealed Case*, 825 F.2d at 497-98; *Field*, 532 F.2d at 406-7.

¹³² See, *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

tion for immunity from prosecution for the foreign banker is a concession to the applicability of the privilege against self-incrimination to the banker's situation before the grand jury.¹³³

Neither the problem of privilege nor the possibility of dual prosecution are unique to foreign secrecy cases. U.S. courts have dealt with each problem at length in different contexts.

Testimonial privileges have been claimed in many contexts in the United States.¹³⁴ The U.S. Supreme Court has accepted that even criminal investigations must yield to a properly invoked privilege.¹³⁵

Moreover, it is unlikely that any country has as much experience in handling the question of multiple prosecution by different jurisdictions as does the United States, with its federal and state governments. Ostensibly, the Supreme Court settled the question of the threat of prosecution by a "foreign" jurisdiction in *Murphy v. Waterfront Commission* ("Murphy").¹³⁶ In *Murphy*, the Court held that before a witness may be compelled to give incriminating testimony about himself under a grant of immunity, the immunity must be as broad as the threat of prosecution.¹³⁷ A witness may not constitutionally be compelled to testify in a state court proceeding unless he is provided immunity from at least the use of his testimony in a prosecution by another state or by the federal government.¹³⁸

Indeed, U.S. courts have even considered the question when the compelled testimony is incriminating under foreign laws. In fact, lower federal courts have held that the threat of foreign prosecution triggers fifth amendment protection and prohibits compulsion of the testimony from the witness.¹³⁹

The Supreme Court considered, but did not decide, this issue in *Zicarelli v. New Jersey Investigation Commission*.¹⁴⁰ In that case, the Court recognized that a substantial risk of prosecution in a foreign jurisdiction squarely presents the question of a witness' right to invoke the constitutional protection against self-incrimination, but found it unnecessary to define the scope of the protection, ruling in that case that there was no

¹³³ See *Field*, 532 F.2d 404.

¹³⁴ The most generally recognized privileges are those of attorney/client and priest/penitent. Executive privilege has been claimed by the President of the United States, and has been recognized in its proper place by the Supreme Court. See *United States v. Nixon*, 418 U.S. 683 (1974). There is no banker/depositor privilege recognized in the United States. See *United States v. Miller*, 425 U.S. 21 (1976).

¹³⁵ See, e.g., *Nixon*, 418 U.S. at 683.

¹³⁶ 378 U.S. 52 (1964).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972).

¹⁴⁰ 406 U.S. 472 (1972).

real and substantial risk of foreign prosecution for the witness.¹⁴¹ This substantial question of the scope of fifth amendment protection has been considered twice by federal courts in the context of foreign secrecy provisions,¹⁴² but has been side-stepped on both occasions.¹⁴³

III. RESOLUTION OF CONFLICT

For thirty years, the federal courts have been called upon to resolve the conflict between federal investigations and foreign secrecy laws. Half of the cases have been decided before 1970,¹⁴⁴ half have come after.¹⁴⁵ There is significance to this date. It was in 1970 that the House Committee on Banking and Currency issued its report,¹⁴⁶ which was so heavily relied upon by the court in *Field*.¹⁴⁷ It was the year in which Congress began to act to curb the abuses cited, with passage of the Bank Secrecy Act of 1970,¹⁴⁸ and the Currency and Foreign Transactions Reporting Act of 1970,¹⁴⁹ requiring taxpayers to disclose any interest in foreign accounts.¹⁵⁰

Undoubtedly, these changes in the landscape of American law played a significant role in the changing decisions after 1970; for before the new legislation, the courts showed a willingness to relieve banking institutions of the burden of subpoenas requiring violation of foreign law in deference to the foreign nations.¹⁵¹ After the 1970 change in perspective, the courts had uniformly refused to modify these subpoenas,¹⁵² until

¹⁴¹ *Id.*

¹⁴² *Field*, 532 F.2d at 404; *In re Sealed Case*, 825 F.2d at 494.

¹⁴³ See *supra* note 142. See also *infra* notes 218-222, 234-236, and accompanying text.

¹⁴⁴ *Application of Chase Manhattan Bank*, 297 F.2d at 611; *Citibank III*, 396 F.2d at 897; *Citibank I*, 271 F.2d at 616. Cf. *Ings v. Ferguson*, 262 F.2d at 149 (a civil case involving issues of compelled production of bank documents in violation of foreign law).

¹⁴⁵ *In re Sealed Case*, 825 F.2d at 494; *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d at 817; *Vetco*, 644 F.2d at 1324; *Field*, 532 F.2d at 404. The five modern cases have developed a bit of a family aura: Judge Fay, the trial judge in *Field*, was on the panel which decided *Bank of Nova Scotia I*, and wrote for the court in *Bank of Nova Scotia II*. Judge Morgan, who wrote the opinion in *Field*, was also on the *Bank of Nova Scotia I* panel. Finally, Judge Bork, a member of the panel for *In re Sealed Case*, signed the Brief in Opposition to the Petition for Certiorari as Solicitor General of the United States in *Field*.

¹⁴⁶ HOUSE REPORT, *supra* note 8.

¹⁴⁷ 532 F.2d at 408-9.

¹⁴⁸ Bank Secrecy Act of 1970, Pub. L. No. 91-508, title I (1970).

¹⁴⁹ Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, title II (1970).

¹⁵⁰ *Id.* It was the failure to report a foreign account for which the taxpayer was convicted in *United States v. Payner*, 447 U.S. 727 (1980).

¹⁵¹ See *Application of Chase Manhattan Bank*, 297 F.2d at 611; *Ings v. Ferguson*, 282 F.2d at 149.

¹⁵² See *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d at 817; *Vetco*, 644 F.2d at 1324 (an IRS summons); *Field*, 532 F.2d at 404.

the decision in *In re Sealed Case*.¹⁵³

The tone of the decisions changed as well. In *Ings v. Ferguson*,¹⁵⁴ the court proclaimed: "Upon 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 law of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures."¹⁵⁵ Even in connection with underlying criminal proceedings, the court in *Application of Chase Manhattan Bank*,¹⁵⁶ observed of the government's attempted circumvention of foreign law:

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.¹⁵⁷

Twenty years later, however, the Eleventh Circuit abandoned any deference to foreign statutes, ruling: "[T]his court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states."¹⁵⁸

In the final analysis, there is nothing left but for the courts to resolve these inevitable conflicts. In resolving the three principal issues of the scope of the foreign law,¹⁵⁹ the appropriate role of comity,¹⁶⁰ and the applicability of the fifth amendment protection against self-incrimination,¹⁶¹ the courts have developed a methodology which relies heavily on the good faith of the witness and close scrutiny of the foreign law. In the difficult cases, the courts rely ultimately on simply choosing whether U.S. criminal laws or foreign banking laws will have primacy in federal investigations.

A. Good Faith

"Good faith" has been a part of every case, even when the courts have declined to compel production of the subpoenaed documents.¹⁶² In

¹⁵³ 825 F.2d at 494.

¹⁵⁴ 282 F.2d at 149.

¹⁵⁵ *Id.* at 152.

¹⁵⁶ 297 F.2d 611.

¹⁵⁷ *Id.* at 613.

¹⁵⁸ *Bank of Nova Scotia I*, 691 F.2d at 1391 (citing *Field*, 532 F.2d at 404).

¹⁵⁹ See *Vetco*, 644 F.2d at 1324; *Citibank III*, 396 F.2d at 897; *Citibank I*, 271 F.2d at 616.

¹⁶⁰ See *In re Sealed Case*, 825 F.2d at 494; *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d 817; *Field*, 532 F.2d at 404.

¹⁶¹ See *In re Sealed Case*, 825 F.2d 494; *Field*, 532 F.2d 404.

¹⁶² See, e.g., *Application of Chase Manhattan Bank*, 297 F.2d at 611 (bank produced records in its New York office while objecting to production of Panamanian records).

these cases, the element of good faith has been an essential ingredient to a successful challenge to sanctions imposed for failure to comply with the subpoena.¹⁶³ While good faith is no guarantee of relief,¹⁶⁴ "bad faith" has been a sure precursor to enforcement of sanctions.¹⁶⁵

As a minimum, good faith requires that the witness, bank or individual be willing to supply information clearly outside the reach of foreign law.¹⁶⁶ This includes documents which may be located in domestic branches,¹⁶⁷ and information which has been obtained outside of the banking relationship.¹⁶⁸ Good faith also requires¹⁶⁹ the witness to endeavor to gather the information requested, and may require use of the means available under the foreign act to attempt to comply with the subpoena.¹⁷⁰

Of the half-dozen appellate cases¹⁷¹ dealing directly with the conflict between grand jury investigations and foreign secrecy laws, *United States v. Bank of Nova Scotia* ("*Bank of Nova Scotia II*")¹⁷² is the paradigm of bad faith. Indeed, while the discussion of comity, balancing, foreign laws, and alternatives to compelled production are both thorough and informative in *Bank of Nova Scotia II*, the case involved virtually none of those issues by the time it reached the appellate court.

Although the bank initially pleaded the impossibility of complying with the subpoena because of secrecy laws in the Bahamas and Cayman Islands,¹⁷³ the government of each country had authorized release of the documents in question within days of the commencement of the sanctions.¹⁷⁴ Upon authorization by the government of the Cayman Islands

¹⁶³ See *id.* The subpoena, though modified, was left outstanding "to insure that Chase complied with its duty of actively cooperating with the Government" if the Government asked the Panamanian authorities to authorize the Panama branch to produce the documents." *Id.* at 613.

¹⁶⁴ See, e.g., *Field*, 532 F.2d at 404.

¹⁶⁵ See, e.g., *Bank of Nova Scotia II*, 740 F.2d at 817; *Vetco*, 644 F.2d at 1324.

¹⁶⁶ Cf. *Citibank III*, 396 F.2d at 900 (the district court premised a lack of good faith on the bank's failure to make inquiries into the nature or extent of foreign records and failure to produce records clearly not covered by the claimed privilege).

¹⁶⁷ See *Application of Chase Manhattan Bank*, 297 F.2d at 611.

¹⁶⁸ Cf. *In re Sealed Case*, 825 F.2d at 495 (the individual witness testified about his personal relationships with various targets of the grand jury, but not about his banking relationships).

¹⁶⁹ Cf. *Bank of Nova Scotia II*, 740 F.2d at 817; *Citibank III*, 396 F.2d at 897 (the bank's failure to search its records was viewed as a lack of good faith).

¹⁷⁰ Cf. *Bank of Nova Scotia II*, 740 F.2d at 820 (the court made note of the fact that the bank had not appealed the adverse ruling on its application for release of the records).

¹⁷¹ *In re Sealed Case*, 825 F.2d at 494; *Bank of Nova Scotia I*, 691 F.2d at 1384; *Bank of Nova Scotia II*, 740 F.2d at 817; *Field*, 532 F.2d at 404; *Application of Chase Manhattan Bank*, 297 F.2d at 611; *Citibank III*, 396 F.2d at 897.

¹⁷² 740 F.2d 817.

¹⁷³ *Id.* at 820.

¹⁷⁴ Sanctions had been stayed until November 14, 1983. On November 11, the Attorney General of the Bahamas issued an order authorizing production of the Bahamian documents. The Governor of the Cayman Islands authorized disclosure of those documents on November 17. *Id.* at 821.

three days after the sanctions began, the bank delivered the documents located in that country. Of the \$1,825,000 fine, though, \$1,725,000 was assessed for the bank's failure to produce the documents from the Bahamas,¹⁷⁵ the production of which had been authorized before the sanctions took effect.¹⁷⁶ The bank "was just sloppy in its search,"¹⁷⁷ which it had not begun until well after the subpoena was initially issued.¹⁷⁸

While the documents in the Caymans were subject to the secrecy law at the time sanctions were imposed,¹⁷⁹ the Eleventh Circuit noted that during the pendency of the proceedings the bank had applied to the Grand Court of the Cayman Islands for permission to release the documents, but did not appeal the denial of its petition.¹⁸⁰ Moreover, the court in the Cayman Islands had granted leave to reapply, but there is no indication that the bank had done so until the sanctions were about to take effect.¹⁸¹

The lack of good faith and the strong implication of purposeful delay on the part of the bank¹⁸² were more significant factors in *Bank of Nova Scotia II* than the international issues.

B. Close Scrutiny

Questions of good faith go hand in glove with close scrutiny of the foreign secrecy laws. For instance, in *Citibank III*,¹⁸³ extensive expert testimony made it clear that the German secrecy doctrine applied only to material entrusted to a bank within the framework of any confidential relationship of bank and customer, but not to records that were the bank's own work product.¹⁸⁴ Nonetheless, the bank had failed to produce even its own records that were within the terms of the subpoena.¹⁸⁵

Additionally, close analysis of the German law in *Citibank III* disclosed that bank secrecy was neither statutory nor were violations criminal.¹⁸⁶ It was most akin to common law concepts of a privilege,¹⁸⁷ but

¹⁷⁵ *Id.*

¹⁷⁶ The bank conceded the validity of the contempt order as it applied to the refusal to produce the Bahamian documents. *Id.* at 820 n.2, and at 826 n.14.

¹⁷⁷ *Id.* at 832.

¹⁷⁸ The subpoena was served March 4, 1983. *Id.* at 820. It was not until November 24 that a bank official went to the Bahamas to insure that an effective search had been conducted. *Id.* at 822.

¹⁷⁹ *Id.* at 826.

¹⁸⁰ *Id.* at 820.

¹⁸¹ The original petition was denied May 31. A second petition was denied November 11, but the contempt order had been entered on October 21, and stayed by the Court of Appeals until November 14. *Id.* at 820-21.

¹⁸² *Id.* at 826.

¹⁸³ 396 F.2d at 897.

¹⁸⁴ *Id.* at 900, 905.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 899-900, 903-04.

unlike traditional privileges of physicians, attorneys and accountants, which Germany backed with criminal penalties for breach,¹⁸⁸ there was no corresponding penalty for breach of bank confidences.¹⁸⁹ Moreover, it appeared that German law provided the bank with a defense to any civil action if the bank acted under compulsion of a court order.¹⁹⁰ Perhaps most important to the Second Circuit in enforcing the subpoena was that, in spite of being privileged to refuse to testify in civil proceedings, German bankers could not refuse to obey a court order to provide evidence in a criminal proceeding in Germany.¹⁹¹

Similar scrutiny of Swiss law in *United States v. Vetco, Inc.* ("Vetco")¹⁹² revealed that Switzerland distinguished between public and private interests in keeping information secret.¹⁹³ A representative of the Swiss Federal Attorney testified that the matters involved in *Vetco* did not concern a totally Swiss interest in confidentiality and that there might be a defense to a Swiss criminal charge where production was pursuant to an order of a U.S. court.¹⁹⁴

C. Hard Cases

The remaining cases of the *genre* are not as easily analyzed and represent the truly difficult choices which the courts must make when confronted with intractable conflict.

In *United States v. Bank of Nova Scotia* ("*Bank of Nova Scotia I*"),¹⁹⁵ a tax and narcotics investigation,¹⁹⁶ the bank had presented an affidavit that compliance with the subpoena could expose the bank to prosecution under the Bahamian bank secrecy law, but that the U.S. government could obtain an order of judicial assistance from the Supreme Court of the Bahamas allowing disclosure if the subject of the grand jury investigation were a crime under Bahamian law and not criminal solely under U.S. tax laws.¹⁹⁷

The U.S. Government, however, declined to seek the assistance of

¹⁸⁷ *See id.*

¹⁸⁸ *Id.* at 903.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 900 n.6.

¹⁹¹ *Id.* at 903-04.

¹⁹² 644 F.2d 1324, *as amended*, 691 F.2d 1281 (9th Cir. 1981). This case involved IRS summonses, rather than grand jury subpoenas, and *Vetco*, an American corporation, was the taxpayer and target of the investigation. While there are significant differences from the grand jury cases, *Vetco* is nonetheless instructive both for its handling of the conflict and its exposition of Swiss law.

¹⁹³ *Bank of Nova Scotia I*, 691 F.2d at 1289.

¹⁹⁴ *Id.*

¹⁹⁵ 691 F.2d at 1384.

¹⁹⁶ *Id.* at 1386.

¹⁹⁷ *Id.* at 1387.

the Bahamian court.¹⁹⁸ The Eleventh Circuit concurred with that decision, ruling that applying for judicial assistance was not a substantially equivalent means for obtaining production because of the cost in time and money and the uncertain likelihood of success in light of the tax aspects of the investigation.¹⁹⁹

The Eleventh Circuit also rejected the bank's argument that the decision in *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers* ("Societe Internationale"),²⁰⁰ prohibited the imposition of sanctions when compliance with a court order was interdicted by foreign laws. In accordance with the Ninth Circuit in *Vetco, Inc.*,²⁰¹ the court in *Bank of Nova Scotia I* refused to read *Societe Internationale* so broadly.²⁰² The court noted that the U.S. Supreme Court had left open the possibility of sanctions other than dismissal in that civil case in which the foreign plaintiff, in good faith,²⁰³ was enjoined from disclosing Swiss records by the Swiss government.²⁰⁴

Finally, balancing the interests of the two nations involved, the Eleventh Circuit expressed frustration that a statute that was "hardly a blanket guarantee of privacy"²⁰⁵ would require a U.S. court to afford greater protection to depositors than a Bahamian tribunal.²⁰⁶ The court resolved the conflict by giving primacy to U.S. criminal laws, and exhibited impatience with the foreign law in concluding: "Absent direction from the Legislative and Executive branches of our federal government, we are not willing to emasculate the grand jury process whenever a foreign nation attempts to block our criminal justice process."²⁰⁷ Obviously, more than just the passage of twenty years separated the Eleventh Circuit from the earlier opinion of the Second Circuit: "The Government . . . has a real interest in civil and criminal cases in obtaining evidence wherever located. However, we also have an obligation to respect the laws of other sovereign states even though they may differ in eco-

¹⁹⁸ *Id.* at 1390.

¹⁹⁹ *Id.* at 1390-91. The court did not compare the cost of applying for judicial assistance to obtain the records under Bahamian law with the sum of \$8000, which the IRS spent to steal the foreign bank records in *United States v. Payner*, 447 U.S. at 727.

²⁰⁰ 357 U.S. 197 (1958).

²⁰¹ 691 F.2d at 1287-88.

²⁰² 691 F.2d at 1388-89.

²⁰³ The Eleventh Circuit noted the district court's finding that the bank had not acted in good faith, but did not elaborate on the basis for that finding. *Id.* at 1389. If the lack of good faith had been as egregious as that in *Bank of Nova Scotia II*, discussed at *supra* notes 172-182 and accompanying text, the court of appeals presumably would have been more scathing in its comments.

²⁰⁴ *Id.* at 1389.

²⁰⁵ *Id.* at 1391 (citing *Payner* 447 U.S. at 727).

²⁰⁶ *Id.* at 1391.

²⁰⁷ *Id.*

nomic and legal philosophy from our own.”²⁰⁸

Because of the very personal punishment of imprisonment, the cases involving individual foreign bankers are the most difficult of the bank secrecy cases. Even in *Field*,²⁰⁹ the court expressed its regret that its decision required Mr. Field to violate the legal commands of the Cayman Islands.²¹⁰

Field, a Canadian citizen, was the managing director of Castle Bank and Trust Company (Cayman), Ltd. and resided in the Cayman Islands with his family.²¹¹ There was no suggestion that he had any contacts with the United States other than his presence at the Miami airport when he was served.²¹² By affidavit, an expert on Cayman law asserted that not only would Field be subject to criminal punishment for answering the questions before the grand jury, but also if he refused to answer the Cayman authorities concerning whether or not he had testified.²¹³ The government did not contest this evidence,²¹⁴ the district court found that there was “a reasonable probability that Mr. Field [was] going to be exposed to some criminal charges and some criminal punishment for violating the Cayman Bank Secrecy Act.”²¹⁵ The court of appeals left these findings undisturbed.

Nevertheless, the Fifth Circuit required Field to testify. The court rejected his comity argument, in large part relying upon the fact that the director of banking in the Cayman Islands would be able to obtain information from Field in Cayman investigations.²¹⁶ In the words of the court, “[W]e find it difficult to understand how the bank’s customers’ rights of privacy would be significantly infringed simply because the investigating body is a foreign tribunal.”²¹⁷

The Fifth Circuit also rejected the foreign banker’s fifth amendment claim.²¹⁸ In their opinion, the fact that the testimony constituted a “verbal act” crime, rather than a recitation of evidence of a crime placed it outside the scope of the fifth amendment protection against self-incrimination.²¹⁹

²⁰⁸ *Application of Chase Manhattan Bank*, 297 F.2d at 613.

²⁰⁹ 532 F.2d 404.

²¹⁰ *Id.* at 410.

²¹¹ *Id.* at 405-06.

²¹² *Id.* at 405.

²¹³ *Id.* at 406.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 408.

²¹⁷ *Id.*

²¹⁸ *Id.* at 406-07.

²¹⁹ *Id.* For the D.C. Circuit’s view, see *In re Sealed Case*, 825 F.2d 494 (1987), discussed *infra* at notes 223-248. The D.C. Circuit, in ruling on the individual banker’s fifth amendment claim, assumed that the compelled “verbal act” crime was within the amendment’s protection, but con-

In spite of the Court's recognition that under *Zicarelli v. New Jersey Investigation Commission*,²²⁰ a substantial risk of prosecution in a foreign country squarely presents the question of a witness's right to invoke the privilege against self-incrimination,²²¹ and in spite of the Court's finding that Field faced such a substantial risk, certiorari was denied in *Field*.²²²

The most recent case, *In re Sealed Case*,²²³ combines all the elements of thirty years of the jurisprudence of conflict between federal criminal investigations and foreign secrecy laws. There were individual and institutional witnesses, as well as foreign government intervention,²²⁴ good faith, the fifth amendment, and international comity.

The grand jury investigating a money laundering scheme²²⁵ sought records in Country Y which has a secrecy law.²²⁶ The foreign bank, owned by the government of Country X, had a branch in Country Y and an agency in the United States.²²⁷ The manager of the U.S. agency, the individual witness, was a citizen of Country X and had been assistant manager of the Country Y branch.²²⁸ Additionally, he was a personal friend and business associate of several of the targets of the investigation.²²⁹ The manager testified about his personal dealings with these individuals, and the bank produced subpoenaed documents for customers from whom it had obtained releases.²³⁰ Both the individual and the bank, however, refused to disclose any other information on the ground that to do so would subject them to criminal prosecution in Country Y for violation of the bank secrecy law.²³¹ Following a grant of immunity to the manager, the district court held both in contempt for their contin-

cluded that he could be compelled to testify, not because the testimony was outside the scope of the amendment, but because he would be subject to foreign prosecution only if he voluntarily traveled to the foreign country. *In re Sealed Case*, 825 F.2d at 497. Mr. Field, of course, with his job and family in the Cayman Islands, realistically had no such alternative. To this extent, *Field* and *In Re Sealed Case* are in apparent conflict on the scope of the fifth amendment's protection.

²²⁰ 406 U.S. 472 (1972).

²²¹ *Id.* at 478.

²²² 429 U.S. 940. A factor in the denial of certiorari may have been that, during the pendency of the petition, the grand jury to which Field had been subpoenaed had been discharged and consequently, the contempt sanction which had been appealed was no longer viable. Brief for the United States in Opposition at 3, n.1, *id.* (No. 76-1739).

²²³ 825 F.2d 494 (D.C. Cir.), *cert. denied sub nom., Roe v. United States*, — U.S. —, 108 S. Ct. 451 (1987).

²²⁴ Country X, the country whose government owned the bank involved, delivered a *note verbale* to the Department of State, requesting that no compulsion be ordered against its bank. *Id.* at 496.

²²⁵ *Id.* at 495.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

ued refusal to testify, ordering the manager to be sent to prison and fining the bank \$50,000 per day.²³²

Although the fifth amendment claim of the manager in *In re Sealed Case* was indistinguishable from the one in *Field*,²³³ the District of Columbia Circuit, without reference to the earlier case,²³⁴ decided the issue on an entirely different basis.²³⁵ Rather than concluding that the fifth amendment was not implicated in cases of "verbal act" crimes as had the Fifth Circuit, this circuit ruled that the fear of foreign prosecution of the manager was not real and substantial because he could be prosecuted only if he voluntarily returned to Country Y.²³⁶

In contrast, the court became the first in twenty-five years to decline to enforce the subpoena against the bank for comity reasons,²³⁷ distinguishing *Bank of Nova Scotia I* and *Bank of Nova Scotia II*. The court distinguished the second case by virtue of the extensive evidence indicating that the bank there had not acted in good faith.²³⁸ The District of Columbia Circuit's effort to distinguish *Bank of Nova Scotia I*, however, is not very satisfying.

For instance, while *Bank of Nova Scotia I* did involve a dispute over a U.S. agency's ability to obtain the documents from the foreign banks,²³⁹ the issue was resolved against the agency in the district court.²⁴⁰ Moreover, the Eleventh Circuit regarded the question of production of the documents from the foreign country as irrelevant in considering the comity argument, since disclosure was to occur in the United States and the insult to the Bahamas was the same whether the court

²³² *Id.* at 496.

²³³ Compare *id.* ("The manager based his refusal to testify on fifth amendment grounds, claiming that the act of testifying would subject him to criminal sanctions in Country Y.") with *Field*, 532 F.2d at 406 (Field contended "that since the act of testifying subjects him to foreign prosecution, requiring his testimony would be compelling Field to be a witness against himself.").

²³⁴ The court characterized the issues in the case as ones of first impression, which was true for that court of appeals, but was not the case throughout all the federal appellate courts. *In re Sealed Case*, 825 F.2d at 496 n. 1.

²³⁵ The court of appeals declined to follow the district court, which found that there was no "real and substantial" danger of foreign prosecution because of the grand jury secrecy provisions of FED. R. CRIM. P. 6. Some earlier decisions relied upon this provision to avoid fifth amendment claims relating to foreign prosecution. See, e.g., *In re Tierney*, 465 F.2d 806 (5th Cir. 1972). The fact that many grand jury proceedings are not secret, for many reasons including authorized release of grand jury testimony for use in the criminal proceedings, has led the courts to reject this rule as the ultimate safeguard of a fundamental right. See *United States v. Flanagan*, 691 F.2d 116 (2d Cir. 1982).

²³⁶ *In re Sealed Case*, 825 F.2d at 497. See the discussion in *supra* note 219, concerning comparison with the decision in *Field*.

²³⁷ The last successful challenge to a subpoena for documents protected from disclosure by foreign law had been in 1962. *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962).

²³⁸ *In re Sealed Case*, 825 F.2d at 498.

²³⁹ Compare *id.* with *Bank of Nova Scotia I*, 691 F.2d at 1387.

²⁴⁰ *Bank of Nova Scotia I*, 691 F.2d at 1387.

required violation of Bahamian law by Bahamian entities in the United States or in the Bahamas.²⁴¹

The analysis by the District of Columbia Circuit was quite different. Proceeding from the proposition that "[it] causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question,"²⁴² the court declared, "[m]ost important to our decision is the fact that these sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory."²⁴³ The court noted that balancing foreign law against domestic interests can involve subjective evaluation of the foreign acts,²⁴⁴ bringing courts near the Act of State Doctrine.²⁴⁵ Concluding its opinion, the court echoed the sentiments of the earliest cases from the Second Circuit: "Though we recognize that the grand jury's investigation may nonetheless be hampered, perhaps significantly, we are unable to uphold the contempt order against the bank."²⁴⁶

While the decision in *In re Sealed Case* has been hailed as a landmark return to an era of more civil application of the principles of international comity,²⁴⁷ it is most disconcerting that protection for the bank was gained at the expense of its manager,²⁴⁸ who was, after all, ordered by the same court, in the same opinion, to violate the same law, the violation of which by the bank the court found too distasteful to compel.

IV. AVOIDING CONFLICT

According to the *Field* court, "[c]ourts and legislatures should take every reasonable precaution to avoid placing individuals in the situation Mr. Field finds himself."²⁴⁹ There are currently laws and procedures which help to avoid even more conflict than actually occurs.

Domestically, the Currency and Foreign Transactions Reporting Act of 1970²⁵⁰ and the regulations implementing it²⁵¹ have helped avoid

²⁴¹ *Id.* at 1390.

²⁴² *In re Sealed Case*, 825 F.2d at 498.

²⁴³ *Id.*

²⁴⁴ *Id.* at 499.

²⁴⁵ *Id.* (citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). The Act of State Doctrine cautions courts against sitting in judgment on the acts of foreign governments done within the foreign state. *Id.*

²⁴⁶ Compare 825 F.2d at 499 with *Application of Chase Manhattan Bank*, 297 F.2d at 613.

²⁴⁷ See *Florida Bar News*, Sept. 1, 1987, at 10.

²⁴⁸ As the court in *In re Sealed Case* said, "It is therefore also relevant to our conclusion that the grand jury is not left empty-handed by today's decision. The manager will be available and able to testify as to many of the facts that the grand jury may wish to ascertain." 825 F.2d at 499.

²⁴⁹ *Field*, 532 F.2d at 410.

²⁵⁰ P.L. 91-508 (1970).

conflict. The purpose of the Act was "to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."²⁵² By requiring individuals and institutions subject to the jurisdiction of the United States to report foreign transactions and authority over foreign accounts,²⁵³ the Act provides domestic sources for uncovering criminal use of foreign accounts.

Treaties²⁵⁴ and agreements²⁵⁵ between the United States and foreign nations providing for assistance in obtaining necessary evidence of criminal conduct are also in place and provide an alternative to compelled violation of foreign law.²⁵⁶ The impatience of U.S. courts with foreign responses to requests for judicial assistance²⁵⁷ overlooks the fact that the U.S. Judicial Assistance Act²⁵⁸ also prohibits disclosure of privileged material in response to a request for assistance.²⁵⁹ U.S. courts ought not to expect more from foreign courts than they themselves are willing to provide.

While foreign nations tend to exclude such assistance in matters relating solely to violation of U.S. tax laws,²⁶⁰ only one of the grand jury cases in which evidence was compelled in the last thirty years was such a case.²⁶¹ Thus, these agreements can avoid much of the conflict.

The laws of foreign nations, as well, currently provide alternatives

²⁵¹ 31 C.F.R. § 103.24 (1987).

²⁵² P.L. 91-508, § 202 (1970).

²⁵³ 31 U.S.C. § 5314 (formerly 31 U.S.C. §§ 1121 & 1122). See *Bank of Nova Scotia II*, 740 F.2d at 828.

²⁵⁴ E.g., Convention on Double Taxation of Income, Sept. 27, 1951, United States-Switzerland, 2 U.S.T. 1751, T.I.A.S. No. 2316. For a discussion of this treaty's application to disclosure, see *United States v. Vetco, Inc.*, 691 F.2d at 1285-86.

²⁵⁵ For a discussion of the proposed Gentlemen's Agreement between the United States and the Cayman Islands, see *Bank of Nova Scotia II*, 740 F.2d at 829-30.

²⁵⁶ Cf., *Ings v. Ferguson*, a civil case, 282 F.2d at 153 (the court stated, "The zeal of the Trustee . . . should not be the basis for permitting him to avoid following the prescribed process for seeking information in a foreign country.").

²⁵⁷ See *Bank of Nova Scotia II*, 740 F.2d 817.

²⁵⁸ 28 U.S.C. § 1782(a) (1982).

²⁵⁹ *Id.*

²⁶⁰ See, e.g., *United States v. Vetco, Inc.*, 691 F.2d 1281 (Swiss law); *Bank of Nova Scotia I*, 691 F.2d 1384 (Bahamian law).

²⁶¹ *Field*, 532 F.2d 404. In *Bank of Nova Scotia I*, 691 F.2d 1384, the investigation involved narcotics as well as tax. The case of *Vetco*, 691 F.2d 1281, was a summons proceeding, rather than a grand jury case. It is an unresolved question, from the reported cases, whether foreign governments would honor requests for information in mixed cases such as *Bank of Nova Scotia I*. In that case, the government never tried to obtain the information by judicial assistance of the Bahamian court. 691 F.2d at 1390. In *Bank of Nova Scotia II*, the court reported that the Governor of the Cayman Islands had informed U.S. officials: "[I]t is only fair to say that I do foresee difficulty [in] the type of case which is clearly criminal but also has tax prosecution possibilities." *Bank of Nova Scotia II*, 740 F.2d at 830. Again, though, since the United States never tried the procedure, it is impossible to say

for those faced with compelled disclosure. In the first place, foreign statutes generally permit disclosure with the consent of the customer.²⁶² Additionally, the bank can apply for permission to disclose the information in accordance with local law.²⁶³ Foreign courts, faced with conflicting demands on their citizens and residents, are equally constrained with U.S. courts to give good faith consideration to the factors which illuminate the principle of international comity.²⁶⁴

Some additional changes in law and procedure could avoid even more conflicts. The record-keeping financial regulations initiated in 1970 apply only to domestic banks.²⁶⁵ There is no reason that Congress could not extend these recording provisions to the branches and agencies of foreign banks within the United States to the extent of their American operations.²⁶⁶ Such a law would provide additional domestic documentation of foreign transactions without imposing upon the prerogatives of foreign sovereigns.²⁶⁷

The investigators and the courts could also modify their procedures. The refusal of investigating authorities to attempt alternative methods of obtaining the records involved in these cases is a thrown gauntlet.²⁶⁸ It results in some brilliant displays of raw power, which may have a pro-

what the response of the Cayman authorities may have been to such a request. It is instructive, however, that the Cayman government *did* ultimately authorize disclosure of the records. *Id.* at 821.

²⁶² See, e.g., *Vetco*, 691 F.2d 1281 (Swiss law); *Bank of Nova Scotia I*, 691 F.2d 1384 (Bahamian law); *In re Sealed Case*, 825 F.2d 494 ("Country Y" law).

²⁶³ See, e.g., *Bank of Nova Scotia II*.

²⁶⁴ Presumably, foreign courts will engage in the same balancing exercise as their U.S. counterparts, weighing the interests of their country and residents against those of the other country, in this case the United States. See, e.g., *Bank of Nova Scotia II*, 740 F.2d at 827-28. The court in *Bank of Nova Scotia II* cites the following from *United States v. Carver*, (Jamaica Ct. App. 1982):

It would appear that the policy of the legislature is that Confidentiality Laws of the Cayman Islands should not be used as a blanket device to encourage or foster criminal activities. . . . [T]here is nothing in the statute to suggest that it is the public policy of the Cayman Islands to permit a person to launder the proceeds of crime in the Cayman Islands, secure from detection and punishment.

Bank of Nova Scotia II, 740 F. 2d at 820. The Court of Appeals in Jamaica is the appellate court for the Cayman Islands. *Id.*

²⁶⁵ See *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974).

²⁶⁶ The most likely source of objections to the extension of reporting requirements to domestic offices of foreign banks may be the foreign governments involved. If they do object, it will only emphasize the importance those countries place on their secrecy laws. The resolution of any such objections will allow the legislature to consider the problems of resolving these facts.

²⁶⁷ The domestic agencies and branches of foreign institutions have been willing to provide records which are located within the United States in response to subpoenas. See, e.g., *Ings v. Ferguson*, 282 F.2d at 151.

²⁶⁸ The Department of Justice has taken the position that "it would 'violate good sense and reason' to forego the use of the subpoena power in these circumstances." *Bank of Nova Scotia II*, 740 F.2d at 830 (quoting Deputy Assistant Attorney General Roger Olsen).

phylactic effect on Americans considering use of foreign accounts,²⁶⁹ but harms the courts' role as protectors of the rule of law when they order violations of law.²⁷⁰

These confrontational tactics are contrary to the admonition by the court in *Field* to "take every reasonable precaution"²⁷¹ to avoid these conflicts. Executive branches ought to be similarly bound, and the courts could enforce the use of reasonable efforts to avoid conflict by requiring that the investigators make use of available alternatives before imposing sanctions and compelling illegal acts.²⁷² Putting non-resident aliens in jail or compelling violation of foreign laws ought to be done as a last resort, not simply taken as the path of least resistance.

The courts could avoid conflicts by requiring a showing of the importance and relevance of the evidence sought. This suggestion has been fiercely resisted in the Eleventh Circuit as an unwarranted restriction on the powers of grand juries.²⁷³ Nonetheless, the courts ought to recognize orders compelling violation of foreign laws for the drastic remedies that they are,²⁷⁴ and make some accommodation in these limited cases to assure that the remedy is appropriate.²⁷⁵ It is difficult to understand how the courts can decide that subpoenaed documents are vital to the national interests of the United States with no showing of the relevance of the documents to the investigation.

Courts have taken the novel approach of requiring the American

²⁶⁹ Undoubtedly, the Department of Justice wants to send a message that there is no such thing as a "secret" bank account. The question, though, is whether the message would be any less clear if it were equally well publicized that foreign countries would cooperate with criminal investigations in the United States.

²⁷⁰ See *Application of Chase Manhattan Bank*, 297 F.2d at 613; *In re Sealed Case*, 825 F.2d at 498.

²⁷¹ But see *Bank of Nova Scotia I*, 691 F.2d at 1391:

The Judicial assistance procedure does not afford due deference to the United States' interests. In essence, the Bank asks the court to require the Courts of the Bahamas to be allowed to do something unlawful under United States law. We conclude such a procedure to be contrary to the interests of our nation and outweigh the interests of the Bahamas.

²⁷² See *id.*

²⁷³ Cf. *Application of Chase Manhattan Bank*, 297 F.2d at 613: "[W]e also have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own." (emphasis added); *Bank of Nova Scotia I*, 691 F.2d at 1388: "This court is cognizant that international friction has been provoked by enforcement of subpoenas such as the one in question."

²⁷⁴ *Field*, 532 F.2d at 410.

²⁷⁵ The concerns expressed by the Eleventh Circuit in *Bank of Nova Scotia I*, 691 F.2d at 1388, were centered on eroding the useful and necessary grand jury process with preliminary showings and "mini-trials." But given the friction caused and the limited number of these cases, an exception to the general rule would be appropriate. The showing of relevance could be *in camera* and *ex parte*, as it is when documents are claimed to be within the attorney/client privilege, in order to protect the secrecy of the proceedings and the identity of the targets of the investigation. This was a concern of the court in *Bank of Nova Scotia II*, 740 F.2d at 829.

depositor to consent to the disclosure of the information in foreign accounts, relieving the foreign entities of the potential conflict.²⁷⁶ Such compelled consents have been held to be outside the scope of fifth amendment protection, or else the defendant has been protected from self-incrimination by an order prohibiting use of the consent as any type of admission by the defendant.²⁷⁷

Finally, American courts could stay sanctions²⁷⁸ to permit the foreign party to seek relief from the inconsistent commands in its own country. Foreign courts are likely to be as reluctant as our own to grant relief before there is a "real and substantial" danger of punishment of the party by the United States. A stay could be conditioned upon expeditious prosecution of an action seeking permission to disclose the subpoenaed information. A decision from the foreign authority on this point when its national faces serious consequences²⁷⁹ would allow both sovereigns to apply the principle of international comity to a live dispute, and would give American courts a much better perspective on the extent of the foreign nation's interest in its secrecy laws.

All these alternatives focus on the courts exercising their coercive powers against their own citizens and residents first in order to assist the grand jury process. To paraphrase the Eleventh Circuit, it is incongruous to suggest that a U.S. court can compel from a foreign entity what it cannot compel from its own citizens simply because it is a foreign entity.²⁸⁰

V. CONCLUSION

The decisions in the "hard cases," *Application of Chase Manhattan Bank, Field, Bank of Nova Scotia I*, and *In re Sealed Case*, cannot be explained except as necessary exercises in conflict resolution. In *Applica-*

²⁷⁶ See *United States v. Lehder*, 827 F.2d 682 (11th Cir. 1987); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), cert. denied, 469 U.S. 932 (1984); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *United States v. Browne*, 624 F. Supp. 245 (N.D.N.Y. 1985). But see *In re Grand Jury Proceedings*, 814 F.2d 791 (1st Cir. 1987). The decision in *Davis* also notes that the United States obtained Swiss bank records in that fraud prosecution pursuant to the Treaty Between the United States and Switzerland for Mutual Assistance in Criminal Matters, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. No. 8302.

²⁷⁷ See cases cited *supra* note 275.

²⁷⁸ See, e.g., *Field*, 532 F.2d at 404; *In re Sealed Case*, 825 F.2d at 494.

²⁷⁹ In *Bank of Nova Scotia II*, 740 F.2d 817, the Cayman courts did not provide relief where both applications were filed before the sanctions began. After the sanctions were enforced, however, and the bank still refused to comply in favor of obeying Cayman law, the Governor of the Cayman Islands authorized the release of the documents, limiting the sanctions on the bank to \$100,000 for this portion of the case. *Id.* at 821 n.5.

²⁸⁰ *Bank of Nova Scotia I*, 691 F.2d at 1391: "It is incongruous to suggest that a United States Court afford greater protection to the customer's right of privacy than would a Bahamian court simply because this is a foreign tribunal."

tion of *Chase Manhattan Bank*, and in the bank's appeal in *In re Sealed Case*, primacy was given to the principle that U.S. courts ought not compel violation of civilized foreign laws. In the other cases, enforcement of U.S. criminal statutes were the primary concern.

Stripped of nice legal distinctions, the individual witnesses in *Field* and *In re Sealed Case* were compelled by U.S. courts to commit crimes against countries in which they had substantial interests and relationships. Can it be that the United States cannot compel a witness to detail past acts, but can compel him to commit a "verbal act" crime?

Strangely, the closest purely domestic analogy to bank secrecy is grand jury secrecy.²⁸¹ If a state court were to subpoena a federal prosecutor to testify in violation of Rule 6 of the Federal Rules of Criminal Procedure, can there be any doubt that the proceeding would be stopped, even though the prosecutor would not be relating details of past crimes?

Similarly, would not the federal courts be sorely offended if a foreign nation were to compel disclosure of grand jury proceedings in violation of a rule of court, not even a statute of the nation, because that rule itself permitted disclosure to appropriate authorities in the United States?²⁸² Yet, that is the basis upon which the Eleventh Circuit has consistently rested its decisions to compel violation of foreign laws.²⁸³

Finally, is it any answer, from the courts of a nation that has recognized a right to travel as a significant aspect of personal liberty,²⁸⁴ to tell a witness that he may avoid *accountability* for his criminal act simply by never traveling to a country in which he has significant family and property interests, particularly when the criminal act is being compelled by threat of imprisonment in this country for up to a year and a half?²⁸⁵

If the highest principle of criminal procedure in the United States were the rooting out and prosecution of crime, then entering contempt orders in all cases such as these would be not only appropriate, but unavoidable.²⁸⁶ That is not the highest principle of criminal procedure in this country, though, as each of the cases discussed demonstrates, not in their conclusions, but in their tacit recognition that it is necessary that they at least consider interests other than criminal prosecution.

Moreover, even above consideration of international interests, comes consideration of the interest of the individual. There is no dispute in the courts of the United States that a properly invoked privilege makes the information unavailable to federal investigators, no matter how signif-

²⁸¹ FED. R. CRIM. P. 6(e).

²⁸² FED. R. CRIM. P. 6(e). See also *United States v. Davis*, 767 F.2d 1025.

²⁸³ See *Field*, 532 F.2d at 408; *Bank of Nova Scotia I*, 691 F.2d at 1391.

²⁸⁴ See, e.g., *Califano v. Aznavorian*, 439 U.S. 170 (1978), and cases cited therein.

²⁸⁵ 28 U.S.C. § 1826 (1970).

²⁸⁶ Cf. *In re Sealed Case*, 825 F.2d at 499.

icant the information or the investigation may be.²⁸⁷

Those compelled to appear for investigations implicating foreign secrecy laws ought to be entitled to the same consideration given witnesses in purely domestic inquiries. If an applicable privilege is properly invoked, the inquiry should cease, without penalty to the witness invoking the privilege. It ought not matter that the privilege arises from the U.S. Constitution, a U.S. statute, common law, or a foreign statute which binds the witness.

The courts have steadfastly resisted novel privileges, for each new privilege is a potential barrier to significant evidence of serious criminal conduct.²⁸⁸ Those who conduct their daily lives in a particular forum are aware of the rules governing that conduct and are bound to obey them and order their affairs accordingly. But those who regularly live by a different set of sovereign commands ought not be subject to punishment because they find themselves momentarily within the authority of a different state. As the court observed in *In re Sealed Case*, “[t]he [government] may be able to devise alternative means of addressing this problem, but the bank [or individual] cannot.”²⁸⁹

This is not to say that every incantation of “foreign secrecy” should repel the federal investigator. On the contrary, it is entirely appropriate that the investigator press hard, and that the courts subject the claim of privilege to close scrutiny, just as they do with a claim of a domestic privilege.

If conflict cannot be avoided between investigator and foreign banker, then in the United States, the conflict ought to be resolved in favor of the good faith invocation of an applicable privilege.

²⁸⁷ See *United States v. Nixon*, 418 U.S. 683 (1974).

²⁸⁸ See *id.*

²⁸⁹ 825 F.2d at 498.