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# The Money Laundering Control Act of 1986: Tainted Money and the Criminal Defense Lawyer

Congress views organized crime, drug trafficking, and racketeering as types of criminal activity that threaten the welfare of the nation.<sup>1</sup> Several federal statutes have been enacted in response to the criminal activity.<sup>2</sup> As efforts to control these activities intensify, other legitimate activities are affected. The Money Laundering Control Act of 1986 [hereinafer the Control Act] illustrates this problem.<sup>3</sup> The Control Act is an attempt to control criminal activity by monitoring money derived from crime.<sup>4</sup> One provision of the Control Act is broad enough, however, to reach criminal defense lawyers performing constitutionally protected functions.<sup>5</sup>

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1. See generally Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) (purpose of Act is to encourage cooperation among foreign governments to aid in eradicating foreign drug crops and to halt international drug trafficking by improving enforcement of drug laws and enhancing interdiction of drug shipments); *United States v. Forsythe*, 429 F. Supp 715, 720 (W.D. Pa. 1977) (purpose behind Racketeering Influenced and Corrupt Organizations (RICO) legislation is to enhance the means of preventing money and power derived from syndicated gambling, loan sharking, theft and fencing of property, narcotics trafficking, and other forms of exploitation from corrupting business and democratic processes).

2. See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.).

3. Money Laundering Control Act of 1986, Pub. L. No. 99-570, §§ 1351-1367, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) (to be codified at 18 U.S.C. §§ 981, 1956, 1957; 31 U.S.C. § 5324).

4. See 18 U.S.C.A. §§ 1956, 1957 (West Supp. 1987); 31 U.S.C.A. § 5324 (West Supp. 1987). See generally 132 CONG. REC. S9626 (daily ed. July 24, 1986) (statement by Senator Thurmond). The purpose of money laundering bill is to increase the authority of enforcement officials to prosecute members of organized criminal groups and drug traffickers who reap profits from illegal activity. *Id.*

5. See 18 U.S.C.A. § 1957(a) (West Supp. 1987). ("Whoever" may be broad enough to include defense attorneys). See *infra* text accompanying notes 96-134 (discussing possible constitutional infirmities of 18 U.S.C. § 1957 (1987)).

Money laundering is a technique of converting large amounts of cash derived from illegal activities into a disguised form that is spendable or consumable.<sup>6</sup> Money laundering has become a lucrative and sophisticated business and is a widespread problem within the United States.<sup>7</sup> Until 1970, money laundering activities were neither controlled nor prohibited by statute or common law because money laundering was viewed as being only incidental to true criminal activities.<sup>8</sup> In an effort to detect money laundering activity, Congress enacted the Bank Secrecy Act of 1970.<sup>9</sup> More recently, Congress has strengthened the Bank Secrecy Act by enacting the Money Laundering Control Act of 1986.<sup>10</sup>

The Bank Secrecy Act requires financial institutions to file reports with the federal government any time a person conducts a large cash transaction.<sup>11</sup> This reporting requirement has had only marginal effect in controlling money laundering, however, because the statute only applies to financial institutions. Individuals have been able to circum-

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6. See generally Comment, *Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Islands Example*, 20 TEX. INT'L L.J. 133, 136-37 (1985). A common method of money laundering was to channel cash through businesses created to give legitimacy to illegal profits. The Internal Revenue Service has established controls to detect such businesses, however, and the money launderer has had to develop new techniques. *Id.* at 737.

7. See *Money Laundering*, Bus. Wk., Mar. 18, 1985, at 74, 76. Money launderers typically earn a three percent commission. One money launderer washed \$240 million through a Miami bank in eight months. *Id.*

8. See, e.g., *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 38 (1974). See H.R. REP. NO. 975, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4394, 4396, which states in part:

Criminals deal in money—cash or its equivalent. The deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity. The money in many of these transactions may represent anything from the proceeds of a lottery racket to money for the bribery of public officials.

*Id.*

9. Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 31 U.S.C.A. §§ 5311-5323 (West 1983)).

10. Money Laundering Control Act of 1986, Pub. L. No. 99-570, §§ 1351-1367, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) (to be codified at 18 U.S.C. §§ 981, 1956, 1957; 31 U.S.C. § 5324).

11. 31 U.S.C.A. § 5313 (West 1983); 31 C.F.R. § 103.22 (1986) (transactions involving more than \$10,000 in currency require a report to be filed); see *infra* text accompanying notes 28-43. A new provision of the Internal Revenue Code, added by the Tax Reform Act of 1984, provides in part:

RETURNS RELATING TO CASH RECEIVED IN TRADE OR BUSINESS

(a) CASH RECEIPTS OF MORE THAN \$10,000. Any person -

(1) who is engaged in a trade or business, and

(2) who, in the course of such trade or business, received more than \$10,000 in cash in 1 transaction (or 2 or more related transactions), shall make the return described in subsection (b) with respect to such transaction . . .

26 U.S.C.A. § 6050I (West Supp. 1987).

vent the law by structuring their transactions so that financial institutions would not be required to file a report.<sup>12</sup> The transactions would go undetected and the individual would escape liability.

Because reporting requirements of the Bank Secrecy Act explicitly apply only to financial institutions,<sup>13</sup> and not to individuals, government attorneys and courts alike struggled to find other theories of liability to use against individuals. Federal appellate courts were unable to agree on a single theory of criminal liability for individuals.<sup>14</sup> Three federal courts of appeals upheld criminal convictions of individuals who structured transactions to evade reporting requirements, while two other federal courts of appeals ruled that individuals who structure transactions had committed no crime.<sup>15</sup>

To alleviate the inconsistency in the courts, Congress passed the Control Act.<sup>16</sup> The Control Act creates several substantive money laundering offenses.<sup>17</sup> Most significantly, the new statute attempts to fill the gaps left by the Bank Secrecy Act relating to individuals by imposing a reporting duty upon the individual customer of a financial institution.<sup>18</sup> Under the Control Act, transactions structured to avoid filing requirements of the Bank Secrecy Act are now criminal.<sup>19</sup> While

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12. Individuals typically "structure" transactions by engaging in cash transactions of less than \$10,000 at several financial institutions to avoid the reporting requirements of the Bank Secrecy Act. *See, e.g.*, *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986) (purchase of cashier's checks in amounts under \$10,000 to avoid the reporting requirements of the Bank Secrecy Act).

13. The Bank Secrecy Act provides in pertinent part: "[t]he institution and any other participant in the transaction that the Secretary shall prescribe shall file a report on the transaction." 31 U.S.C.A. § 5313 (West 1983). *See infra* text accompanying notes 38-43 (discussing the failure to mention individuals in the regulations). *See* 31 U.S.C.A. § 5312(a)(2)(A)-(U) (West 1983 & Supp. 1987) (definition of financial institution). *See also* 31 C.F.R. § 103.110 (1986) (including casinos as financial institutions).

14. *Compare* *United States v. Cook*, 745 F.2d 1311, 1315 (10th Cir. 1984) and *United States v. Puerto*, 730 F.2d 627, 633 (11th Cir. 1984) and *United States v. Tobon-Builles*, 706 F.2d 1092, 1101 (11th Cir. 1983) and *United States v. Thompson*, 603 F.2d 1200, 1203-04 (5th Cir. 1979) (individuals held criminally liable for money laundering activities) with *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986) and *United States v. Anzalone*, 766 F.2d 676, 682 (1st Cir. 1985) (individuals not held criminally liable).

15. *See infra* text accompanying notes 44-71.

16. Money Laundering Control Act of 1986, Pub. L. No. 99-570, §§ 1351, 1352, 1354, 1366, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) (to be codified at 18 U.S.C. §§ 981, 1956, 1957; 31 U.S.C. § 5324).

17. *See, e.g.*, 18 U.S.C.A. §§ 1956, 1957 (West Supp. 1987) (creating a criminal offense for knowingly engaging in a money laundering transaction and a criminal offense for knowingly engaging in a transaction in criminally derived property).

18. *See* 31 U.S.C.A. § 5324 (West Supp. 1987). A person is prohibited under the new law from causing a financial institution to not file a report, or to file a report that contains a material omission. *Id.*

19. *See id.*

the Control Act addresses the problem of individual money launderers, the new legislation may be too broad.<sup>20</sup>

The Control Act may exceed the intended purpose of the legislation.<sup>21</sup> Criminal defense lawyers may be subject to prosecution under the Control Act, thus restricting the sixth amendment right of the accused to retain counsel of choice.<sup>22</sup> In addition, the new laws threaten the independence of the criminal defense bar, upsetting the balance achieved under an adversarial system.<sup>23</sup>

Initially, this comment will outline the requirements imposed by the Bank Secrecy Act, focusing on the reporting requirements for domestic currency transactions and the penalties for failure to report.<sup>24</sup> Next, this comment will review the efforts made by courts to extend application of the Bank Secrecy Act to individuals.<sup>25</sup> This comment will then analyze the new legislation on money laundering.<sup>26</sup> Finally, this comment will consider possible problems created by the new legislation, concluding that the Control Act be amended to accommodate both the interest in prohibiting money laundering and the sixth amendment rights of the accused.<sup>27</sup>

#### THE BANK SECRECY ACT

The problem of money laundering was first addressed by Congress with the enactment of the Bank Secrecy Act in 1970.<sup>28</sup> At the time of enactment, Congress was concerned primarily with the improprieties involving foreign banks and foreign currency transactions.<sup>29</sup> The

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20. See *infra* text accompanying notes 98-139 (discussing potential constitutional problems of the Control Act).

21. See generally 132 CONG. REC. S9626 (daily ed. July 24, 1986) (statement by Senator Thurmond) (purpose of money laundering bill is to increase the authority of enforcement officials to prosecute members of organized criminal groups and drug traffickers who reap profits from illegal activity).

22. See *infra* text accompanying notes 110-24.

23. See *infra* text accompanying notes 125-39.

24. See *infra* text accompanying notes 28-43.

25. See *infra* text accompanying notes 44-71.

26. See *infra* text accompanying notes 72-97.

27. See *infra* text accompanying notes 98-142.

28. Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 31 U.S.C. §§ 5311-5323 (1983)).

29. See H.R. REP. NO. 975, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4394, 4397. The report states in pertinent part:

Secret bank accounts and secret foreign financial institutions have permitted proliferation of "white collar" crime; have served as the financial underpinning of organized criminal operations in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and

stated purpose of the Bank Secrecy Act is “to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.”<sup>30</sup>

### A. Domestic Reporting Requirements

The domestic reporting provisions of the Bank Secrecy Act require that reports on monetary transactions be filed by domestic financial institutions as designated by regulations prescribed by the Secretary of Treasury [hereinafter the Secretary].<sup>31</sup> The Secretary has issued regulations requiring reports of transactions in currency of more than \$10,000.<sup>32</sup> Financial institutions that are subject to the reporting requirements include banks, brokers, and casinos.<sup>33</sup> Penalties are provided for failure to comply with these provisions.

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exchanges; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the 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 conspiracies to steal from the U.S. defense and foreign aid funds; and have served as the cleansing agent for “hot” or illegally obtained monies.

*Id.*

30. 31 U.S.C.A. § 5311 (West 1983). *See also* California Bankers Ass’n v Shultz, 416 U.S. 21, 38 (1974) (in passing the Bank Secrecy Act, Congress recognized the usefulness of transaction reports in investigating criminal activity).

31. 31 U.S.C.A. § 5313(a) (West 1983). Records are also required in connection with foreign financial agency transactions and foreign currency transactions. *Id.* §§ 5314-5315 (West 1983). In addition, reports are required to be filed with the Secretary of Treasury when a person knowingly imports or exports a monetary instrument with a value of more than \$10,000. *Id.* § 5316(a)(1) (West Supp. 1987). The Bank Secrecy Act has no legal effect without implementing regulations by the Secretary of Treasury. *Id.* §§ 5313-5315 (West 1983). *See generally* California Bankers Ass’n v. Shultz, 416 U.S. 21 (1974). The *Shultz* court upheld the constitutionality of the Bank Secrecy Act. The fourth amendment right to be free of unlawful search and seizure is not violated by the Act’s reporting requirements because the financial institution records are not being searched or seized. Also, the records of the depositor are not being examined by the government since the bank is not an agent of the state. *Id.* at 52-67. In addition, the *Shultz* court held that the Bank Secrecy Act does not violate the fifth amendment right to due process and protection against self-incrimination as applied to financial institutions. Banks, as corporations, do not enjoy fifth amendment rights and do not have standing to assert those rights on behalf of their customers. *Id.* at 71-75. Prior to the Bank Secrecy Act, financial institutions provided reports of the large currency transactions of their customers pursuant to regulations promulgated by the Secretary of Treasury. 31 C.F.R. § 102.1 (1949) (repealed 1972). This regulation was promulgated under authority given the Secretary of Treasury by the Energy Act, 40 Stat. 411 (1933) and the First War Powers Act, 55 Stat. 839 (1941).

32. 31 C.F.R. § 103.22 (1986). Reports are not required for transactions with the Federal Reserve Banks or Federal Home Loan banks. Moreover, reports are not required for transactions between domestic banks, or between nonbank financial institutions and commercial banks. *Id.* § 103.22(b)(1) (1986). “Currency” is defined as the coin and currency of the United States or any other country. *Id.* § 103.11(c) (1986). “Transactions in currency” means the physical transfer of currency from one person to another. *Id.* § 103.11(e).

33. 31 C.F.R. § 103.11(e) (1986). The regulations also define “financial institution” to

## B. Penalties

The Bank Secrecy Act provides both civil and criminal penalties for failure to report currency transactions.<sup>34</sup> A financial institution may also be liable for negligence if requirements are not followed.<sup>35</sup> In addition, the currency involved in certain transactions that violate the Bank Secrecy Act is subject to forfeiture.<sup>36</sup> Rewards are available for information leading to a criminal fine, civil penalty, or forfeiture.<sup>37</sup>

## C. Persons Subject to the Bank Secrecy Act

The Bank Secrecy Act did not limit the reporting requirements and applicable penalties for failure to report exclusively to financial institutions.<sup>38</sup> Rather, the Bank Secrecy Act authorized the Secretary to require both an institution and any other participant in the transaction to file a Currency Transaction Report (CTR).<sup>39</sup> The regulations, however, do not require that any other participant, other

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include "persons or entities doing business within the United States as a . . . dealer in securities, a currency exchange, a transmitter of funds, . . . one engaged in selling travelers checks, money orders or similar instruments." *Id.* Financial institutions are not required to file reports in connection with certain legitimate cash transactions. *Id.* § 103.22(e).

34. See 31 U.S.C.A. §§ 5321-5322 (West Supp. 1987). The greater of \$25,000, or the amount involved in the transaction, may be imposed as a civil money penalty for violation of the reporting requirements. *Id.* § 5321(a)(1). Civil penalties may be imposed on any domestic financial institution, partner, director, officer, or employee of a domestic financial institution for willful violation of any provision of the Bank Secrecy Act or the regulations issued pursuant to the Bank Secrecy Act. *Id.* § 5321 (West 1983 & Supp. 1987). For financial institutions failing to comply with the Bank Secrecy Act, each day of noncompliance is a separate offense. *Id.* Criminal penalties for reporting violations include a fine of up to \$250,000, 10 years imprisonment, or both. *Id.* § 5322 (West Supp. 1987).

35. The penalty for negligence is limited to \$500. *Id.* § 5321(a)(6) (West Supp. 1987).

36. *Id.* § 5317 (West 1983 & Supp. 1987). A forfeiture penalty may also apply when no report is filed for transporting a monetary instrument into or out of the United States. *Id.* Forfeiture penalties may also apply when a financial institution does not file a report for a transaction that requires a report. 18 U.S.C.A. § 981(a)(1)(C) (West Supp. 1987). If the report, however, was not filed due to an error on the part of the financial institution, forfeiture does not apply. *Id.*

37. 31 U.S.C. § 5323 (West Supp. 1987). Authorized rewards will be the lesser of \$150,000 and 25% of the fine, penalty, or forfeiture. *Id.* § 5323(b).

38. *Id.* § 5313(a) (West 1983). The statute provides in pertinent part that "the institution and any other participant in the transaction . . . shall file a report on the transaction . . ." *Id.* (emphasis added). The section grants authority to determine who shall be required to file under the Act. *Id.* See *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986) (only financial institutions are required to file).

39. 31 U.S.C.A. § 5313(a) (West 1983) *Cf. id.* 31 U.S.C.A. § 5324 (West Supp. 1987) (causing a financial institution not to file a report is criminal under the Control Act).

than the financial institution, file a CTR.<sup>40</sup> The failure to include individuals in the regulations has never been explained.<sup>41</sup> The omission of reference to individuals in the regulations has impeded government attempts to hold individuals criminally liable for currency transactions structured to avoid the reporting requirements.<sup>42</sup> Some courts, however, have held individuals engaged in money laundering activities criminally liable despite the absence of an explicit provision.<sup>43</sup>

## CRIMINAL LIABILITY UNDER THE BANK SECRECY ACT

### A. Upholding Convictions of Individuals

Before enactment of the Control Act, courts advanced two basic theories to impose criminal liability on individuals for domestic money laundering transactions.<sup>44</sup> Under one theory, a defendant was charged as a principal with causing the financial institution to not

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40. See 31 C.F.R. § 103.22 (1986); see also *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986) (statement by the court that the Secretary has not designated that individuals file reports).

41. See generally *United States v. Anzalone*, 766 F.2d 676, 681-82 (1st Cir. 1985) (noting the lack of any reference to individuals and citing a discussion of the Comptroller General of the United States criticizing the Secretary for not using full power given under the Act).

42. See *Anzalone*, 766 F.2d at 682 (reversing conviction of defendant charged with structuring transactions to avoid reporting requirements).

43. See, e.g., *United States v. Cook*, 745 F.2d 1311, 1315-16 (10th Cir. 1984) (defendant, an individual, was held to have violated the Bank Secrecy Act by willingly and knowingly causing a bank not to file a required report); *United States v. Puerto*, 730 F.2d 627, 633 (11th Cir. 1984) (defendants held liable for the bank's failure to file required reports); *United States v. Tobon-Builles*, 706 F.2d 1092, 1100 (11th Cir. 1983) (the lack of any duty on the part of defendant to report transactions over \$10,000 does not reduce the liability of the defendant for willfully causing the bank to fail to file a report); *United States v. Thompson*, 603 F.2d 1200, 1202 (5th Cir. 1979) (chairman of the board of a bank held to have unlawfully caused the bank not to file a currency transaction report).

44. See, e.g., *United States v. Cook* 745 F.2d 1311, 1315 (10th Cir. 1984) (violation of the Bank Secrecy Act as a principal under 18 U.S.C. § 2(b)); *United States v. Tobon-Builles*, 706 F.2d 1092, 1096 (11th Cir. 1983) (concealment of a material fact from a regulatory agency). Other theories have been advanced in specific factual situations. See *United States v. Goldberg*, 756 F.2d 949, 954 (2d Cir. 1985) (defendants who conspired to transfer large amounts of currency out of the United States were found to be a "financial institution" under the Bank Secrecy Act); *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984) (currency exchange business of defendant in Columbia that deposited money in an American bank was found to be a "domestic financial institution"); *United States v. Richter*, 610 F. Supp. 480, 486 (N.D. Ill. 1985) (defendant charged with conspiracy to defraud the United States under 18 U.S.C. § 371, for transactions structured to avoid reporting requirements of the Bank Secrecy Act); *United States v. Dela Espriella*, 781 F.2d 1432, 1436 (9th Cir. 1986) (defendant who conceded that laundering activities facilitated movement of drug profits out of the United States was found to be a "financial institution" subject to the Bank Secrecy Act).



report the transaction required under the Bank Secrecy Act.<sup>45</sup> Under the other theory, defendants were prosecuted for concealing a material fact from the government by way of trick, scheme, or device.<sup>46</sup>

The first theory relied on a statute under which a person is punished as a principal for willfully causing an agent or instrumentality to perform an act which is an indispensable element of an offense against the United States.<sup>47</sup> The person causing the intermediary to commit the act legally adopts the act of the intermediary and the capacity of the intermediary to commit the crime.<sup>48</sup> Some federal courts of appeal reasoned that the individual caused the financial institution to not file a required report by deliberately structuring currency transactions to avoid the reporting requirements.<sup>49</sup> The individual was therefore guilty of violating the Bank Secrecy Act as a principal.

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45. See generally *United States v. Cook*, 745 F.2d 1311, 1315-16 (10th Cir. 1984) (holding individual criminally liable as a principal to the crime of causing a bank to not file a transaction report by splitting transactions into sums less than \$10,000).

46. See generally *United States v. Tobon-Builles*, 706 F.2d 1092, 1101 (11th Cir. 1983) (upholding conviction of defendants under a concealment theory for buying a series of cashier's checks in amounts less than \$10,000 to avoid the reporting requirements).

47. 18 U.S.C.A. § 2(b) (West 1969). The statute provides that: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." *Id.*

48. See *Cook*, 745 F.2d at 1315.

49. See, e.g., *United States v. Thompson*, 603 F.2d 1200, 1202 (5th Cir. 1979). In *Thompson*, the defendant was Chairman of the Board of a bank. The bank was required to file currency transaction reports (CTR's) under the Bank Secrecy Act. The defendant structured a \$45,000 loan for a bank customer as five, \$9,000 loans in an attempt to circumvent the reporting requirements of the Bank Secrecy Act. The court upheld the conviction of defendant Thompson for a violation of the Bank Secrecy Act. *Id.* at 1202. *United States v. Puerto*, 730 F.2d 627, 633 (11th Cir. 1984). In *Puerto*, the defendant conspired with bank employees to exchange cash for cashier's checks made out to fictitious persons. The bank employees were told to prepare CTR's using fictitious names. The employees, however, chose not to file any CTR's. The court rejected an argument by Puerto that he was not responsible for the nonfiling of the CTR's and found Puerto guilty of filing inaccurate reports. *Id.* at 633. Puerto was held accountable as a principal for the bank's failure to file. The court in *Puerto* also applied the concealment theory as well as a conspiracy theory in upholding the defendant's conviction. *Id.* at 633. *United States v. Cook*, 745 F.2d 1311, 1315 (10th Cir. 1984). The defendant in *Cook*, in an apparent attempt to avoid taxation on the appreciation in value of a sum of money he controlled as a trustee, withdrew approximately \$95,000 from a financial institution and deposited the money in his personal checking account. Later, the defendant withdrew sums under \$10,000 from the checking account to avoid the Bank Secrecy Act's reporting requirements until a total of \$90,000 in cash was withdrawn. The defendant attempted to deposit the \$90,000 into a new account under a false name and social security number. The financial institution, however, refused to accept the large sum of cash from the defendant. Instead, the financial institution demanded a cashier's check from a larger bank. As a result, the defendant purchased a cashier's check using a false name and caused an inaccurate CTR to be filed. The court found Cook guilty as a principal of violating the Bank Secrecy Act. As a principal, Cook willfully caused the bank not to file an accurate report. *Id.* at 1315.

Under the second theory, defendants were charged with concealing a material fact from a regulatory agency.<sup>50</sup> Concealment required the showing of two elements.<sup>51</sup> First, the defendant must have knowingly and willfully concealed a material fact.<sup>52</sup> Second, the defendant must have been under a duty to disclose the material fact at the time it was concealed.<sup>53</sup> Some federal courts held that conducting transactions under \$10,000 to avoid the reporting requirements amounted to a knowing and willing concealment of a material fact.<sup>54</sup> In addition, courts created a duty for individuals.<sup>55</sup> This duty was derived from the duty of the financial institution to report currency transactions under the Bank Secrecy Act.<sup>56</sup> Individuals were obligated to disclose the true nature of their transaction to the bank so that the bank could fulfill the duty of filing accurate reports. Under both theories,

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50. See, e.g., *United States v. Tobon-Builles*, 706 F.2d 1092, 1101 (11th Cir. 1983) (defendant was convicted of concealing a material fact from the government for causing a bank not to file a required report by purchasing cashier's checks for amounts under \$10,000). The purpose of prohibiting the concealment of a material fact is to prevent the use of deceptive practices intended to frustrate or impede the authorized functions of the government. *United States v. Shanks*, 608 F.2d 73, 75 (2d Cir. 1979).

51. See 18 U.S.C.A. § 1001 (West 1976) The statute provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device, a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

*Id.*

52. See, e.g., *United States v. Diogo*, 320 F.2d 898, 902 (2d Cir. 1963) (defendants were prosecuted for making false representations concerning allegedly sham marriages).

53. See, e.g., *United States v. Irwin*, 654 F.2d 671, 678 (10th Cir. 1981) (conviction for making false statement in a grant application to the Economic Development Administration reversed for failure to prove defendant had a duty to disclose the facts at the time of alleged concealment).

54. See, e.g., *United States v. Tobon-Builles*, 706 F.2d 1092, 1096 (11th Cir. 1983) (upholding conviction of defendant charged with causing a bank not to file a report).

55. See *id.* at 1101. In *Tobon-Builles*, the defendant and an accomplice engaged in 21 transactions involving 11 different financial institutions. The transactions were for cash purchases of cashier's checks which totaled \$185,200. Each individual transaction, however, was less than the \$10,000 that would have triggered the requirement to file a report under the Bank Secrecy Act. The court held that as a principal under 18 U.S.C. § 2(b), *Tobon-Builles* had a duty under the Bank Secrecy Act to inform the banks of the structured transactions. The court went on to hold that the criminal intent of *Tobon-Builles* as a principal under § 2(b) of Title 18 to cause a concealment, together with the duty and failure of the financial institution to file a required CTR, constituted the elements of concealment under 18 U.S.C. § 1001. The court reasoned that to allow *Tobon-Builles* to escape liability would amount to condoning deceptive schemes designed to deprive the Department of Treasury of valuable information contained in the CTR's. The court concluded that the actions of *Tobon-Builles* were the type of deceptive activity that section 1001 was intended to prevent. *Tobon-Builles*, 706 F.2d at 1101.

56. See *Tobon-Builles*, 706 F.2d at 1101.

the government was forced to resort to a creative use of existing law. Other appellate courts, however, rejected the use of these theories.<sup>57</sup>

### B. Reversing Convictions of Individuals

Some appellate courts rejected the theories of individual liability on constitutional grounds.<sup>58</sup> The courts relied first on the settled maxim of strict construction:<sup>59</sup> criminal laws are to be given their plain meaning.<sup>60</sup> In applying this principle, the courts concluded that the Bank Secrecy Act could not reach individuals.<sup>61</sup> The plain meaning of the Bank Secrecy Act requires reports for transactions over \$10,000 to be filed by financial institutions.<sup>62</sup> Thus, an individual who con-

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57. See *United States v. Anzalone*, 766 F.2d 676, 682 (1st Cir. 1985) (reporting requirements of Bank Secrecy Act imposed no duty upon individuals to apprise the bank of structured transactions); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986) (reporting requirements of Bank Secrecy Act imposed no duty upon individuals to apprise the bank of structured transactions).

58. See *Anzalone*, 766 F.2d at 682 (subjecting defendant to criminal liability would violate fifth amendment due process); see also *Varbel*, 780 F.2d at 762 (subjecting defendant to criminal liability would violate fifth amendment due process). In *Anzalone*, the defendant purchased several cashier's checks in amounts under \$10,000 and was convicted at the trial level for concealing a material fact. *Anzalone*, 766 F.2d at 682. See *supra* text accompanying notes 50-56 (discussing concealment of material fact). The appellate court reversed the conviction. *Anzalone*, 766 F.2d at 682. The court concluded that the defendant had no duty to report personal transactions because neither the Bank Secrecy Act nor the regulations of the Secretary required disclosure of currency transactions for individuals. *Id.* In *Varbel*, the defendant was an attorney suspected of engaging in laundering activities. The defendant was approached in a "sting" operation by an FBI agent and a government informant. Varbel and a fellow attorney also charged in the indictment advised the FBI agent to set up an off-shore bank to launder his supposed proceeds from selling cocaine. The FBI agent was introduced to an official of a firm representing off-shore banks. This official eventually transferred cashier's checks to the off-shore bank set up to launder the supposed drug money. The official purchased cashier's checks in amounts less than \$10,000 to avoid the reporting requirements of the Bank Secrecy Act. The appellate court reversed the conviction of concealment of a material fact because such a charge depends on finding a duty for the individual to disclose the structured transaction. The court found that the Bank Secrecy Act imposed no such duty. *Varbel*, 780 F.2d at 762.

59. See, e.g., *Varbel*, 780 F.2d at 761. The court in *Varbel* noted that when the "language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *Id.* (quoting *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929)). The rationale for this rule is two-fold. First, by giving the law plain meaning it is more likely that a majority of citizens will have been warned of and will have understood the law. Second, defining criminal activity is the function of the legislature and not the judiciary. *United States v. Bass*, 404 U.S. 336, 348 (1971).

60. See *Varbel*, 780 F.2d at 761.

61. See, e.g., *id.* 780 F.2d at 761-62 (reversing conviction of individual defendant under the Bank Secrecy Act).

62. 31 C.F.R. § 103.22 (1986). See *supra* note 32 and accompanying text. See also *Varbel*, 780 F.2d at 762.

ducts a transaction in an amount less than \$10,000 cannot be said to have committed a crime.<sup>63</sup>

A second theory used in rejecting criminal liability for individuals relied on the Due Process Clause.<sup>64</sup> The Due Process Clause of the fifth and fourteenth amendments of the United States Constitution requires all criminal laws to define the prohibited activity with sufficient clarity so that the ordinary person will understand exactly what conduct is illegal.<sup>65</sup> A law is unconstitutionally vague if the law forces persons to guess as to the meaning.<sup>66</sup> Some courts determined that persons accused of structuring transactions to avoid reporting requirements had not been given adequate notice that structured transactions were proscribed.<sup>67</sup> Nothing in the statute, regulations, or legislative history indicated that individuals were obliged to report structured transactions.<sup>68</sup>

A third reason used by courts to reject criminal liability for individuals was based on the separation of powers doctrine.<sup>69</sup> Some courts reasoned that construing the Bank Secrecy Act in a manner broad enough to encompass individuals risked upsetting the balance of governmental powers.<sup>70</sup> Imposing liability upon individuals essentially represented a function reserved for the legislature—defining criminal activity.<sup>71</sup>

The direct split among appellate courts on the issue of individual liability under the Bank Secrecy Act made the inadequacy of the legislation evident. The constitutional issues raised by some courts

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63. See *Varbel*, 780 F.2d at 762. (conviction of individual was reversed upon finding no duty to report the structured nature of transactions).

64. See, e.g., *United States v. Anzalone*, 766 F.2d 676, 682 (1st Cir. 1985) (using a constitutional analysis to reverse the conviction of an individual defendant). See also U.S. CONST. amend. V. "No person shall . . . be deprived of life, liberty, or property, without due process of law." *Id.*

65. See, e.g., *Connolly v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (the void-for-vagueness doctrine under the fourteenth amendment invalidates any criminal statute that is so unclear that reasonable persons would differ as to the meaning).

66. See *Smith v. Goguen*, 415 U.S. 566, 572 (1974) (legislatures are required to set forth penal laws in clear language so that enforcement of such laws will not become arbitrary or discriminatory).

67. See, e.g., *United States v. Anzalone*, 766 F.2d 676, 682 (1st Cir. 1985) (the regulations as written would not have served to put the reasonable individual on notice that they were charged with a reporting duty).

68. See *id.*

69. See, e.g., *id.* at 682 n.13 (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1978) for the proposition that the separation of powers doctrine is fundamental to our constitutional system). In interpreting a statute the judiciary is not to encroach upon rulemaking authority of the legislative branch.

70. See, e.g., *id.* at 682 n.13.

71. See *id.*

forced Congress to recognize the limitations of the Bank Secrecy Act and to enact legislation aimed specifically at individual money launderers.

### THE MONEY LAUNDERING CONTROL ACT OF 1986

The Money Laundering Control Act of 1986 increases the ability of the government to prosecute money launderers. The new legislation creates two substantive money laundering offenses, and also prohibits splitting currency transactions into amounts less than \$10,000 to avoid reporting requirements.<sup>72</sup> The Control Act provides civil and criminal forfeiture for violation of the new substantive crimes.<sup>73</sup>

#### A. New Substantive Crimes

The Control Act creates a substantive crime of money laundering.<sup>74</sup> A person may not knowingly conduct financial transactions with proceeds of an unlawful activity or transport certain funds into or out of the United States.<sup>75</sup> Funds made with the intent of promoting

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72. See 18 U.S.C.A. §§ 1956, 1957 (West Supp. 1987). Section 1956 provides: Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—  
(A) with the intent to promote the carrying on of specified unlawful activity; or  
(B) knowing that the transaction is designed in whole or in part  
(i) to conceal or disguise the nature, the location, the ownership, or the control of the proceeds of specified unlawful activity; or  
(ii) to avoid a transaction reporting requirement under State or Federal law . . . .

*Id.* Section 1957 provides: “[W]hoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than \$10,000 and is derived from specified unlawful activity shall be punished . . . .” *Id.* See 31 U.S.C. § 5324 (West Supp. 1987). Section 5324 provides that no person shall be permitted to cause a financial institution to not file a required currency transaction report, or to file an inaccurate report. Structuring a transaction is also prohibited. *Id.*

73. See 18 U.S.C.A. §§ 981(a)(1)(C), 982 (West Supp. 1987). Any property gained in violation of the money laundering offense or structuring offense is subject to forfeiture in civil or criminal proceedings. *Id.* The Control Act also changes existing law in four ways: (1) The Right to Financial Privacy Act of 1978 is amended, 12 U.S.C.A. §§ 3403(c), 3413(i) (West Supp. 1987); (2) summons power is granted to the Secretary of Treasury, 31 U.S.C.A. § 5318 (West Supp. 1987); (3) Bank Secrecy Act compliance provisions are enacted, 12 U.S.C.A. §§ 1818, 1464(d), 1730, 1786, 1817(j), 1730(q) (West Supp. 1987); and (4) civil and criminal penalties for violation of the Bank Secrecy Act are increased, 31 U.S.C.A. § 5321(a)(1) (West Supp. 1987).

74. Compare 18 U.S.C.A. § 1956 (West Supp. 1987) (creating a substantive money laundering offense) with 31 U.S.C.A. §§ 5311-5323 (West 1983), amended by 31 U.S.C.A. §§ 5311-5324 (West Supp. 1987) (no substantive money laundering offenses existed under the Bank Secrecy Act before being amended by the Control Act).

75. 18 U.S.C.A. § 1956(a)(2)(B) (West Supp. 1987).

an unlawful activity or those designed to conceal unlawful proceeds are prohibited.<sup>76</sup> A transaction or transportation of funds designed to evade the transaction reporting requirements of the Bank Secrecy Act is also prohibited.<sup>77</sup>

To be guilty of money laundering, the defendant must have knowledge that the property involved in a transaction was derived from an unlawful activity.<sup>78</sup> The defendant need not know the exact origin of the proceeds.<sup>79</sup> For the purposes of the Control Act, unlawful activity means a felony under state or federal law.<sup>80</sup> The penalties for the money laundering offense provide a fine of \$500,000 or twice the value of the funds involved, whichever is greater, imprisonment of up to twenty years, or both.<sup>81</sup> In addition, any property involved in a prohibited transaction may be forfeited to the United States government.<sup>82</sup>

A second related offense prohibits anyone from knowingly engaging in a transaction that involves criminally derived property valued at more than \$10,000.<sup>83</sup> The penalties provided for this offense include jail sentences of up to ten years, applicable fines under Title 18 of the United States Code, or both.<sup>84</sup> Any property involved in a

76. *Id.* § 1956(a).

77. *Id.* See *supra* text accompanying notes 28-43 (for discussion of the Bank Secrecy Act).

78. 18 U.S.C.A. § 1956(a)(1) (West Supp. 1987) (requiring that the defendant know that the property in a transaction represents illegal proceeds).

79. *Id.*

80. See *id.* § 1956(c)(7) (definition of unlawful activity). Transaction is defined to include a purchase, sale, loan, pledge, gift, transfer, delivery, deposit, withdrawal, account transfer, currency exchange, credit extension, purchase or sale of stock, bond, certificate of deposit, or any other monetary deposit; any payment, transfer, or delivery by, through, or to a financial institution. *Id.* § 1956(c)(3). Financial transaction means an exchange involving the movement of funds or that involves one or more monetary instruments. *Id.* § 1956(c)(4). The transaction or financial institution through which the transaction is conducted must affect interstate or foreign commerce. *Id.* § 1956(c)(4).

81. *Id.* § 1956(a)(1).

82. *Id.* §§ 981-982. Property forfeited under this provision is deemed to vest in the United States upon commission of the act giving rise to forfeiture. *Id.* § 981(f) (West Supp. 1987). An exemption to forfeiture applies to property of third party owners or lienholders who did not have knowledge that the property was criminally derived. *Id.* § 981(a)(2) (West Supp. 1987).

83. *Id.* § 1957 (West Supp. 1987). The statute provides in pertinent part: "Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished . . ." *Id.* Criminally derived property is defined as proceeds, or the property derived from such proceeds, obtained from a criminal offense. *Id.* § 1957(f)(2). Compare *id.* § 1957 (proscribing transactions in which a party to the transaction has knowledge that the money is tainted) with *id.* § 1956 (West Supp. 1987) (concerning transactions entered into for the purpose of concealing illegal proceeds).

84. *Id.* § 1957(b)(1) (West Supp. 1987). See *infra* text accompanying notes 98-139 (discussing the constitutional infirmities of 18 U.S.C. § 1957).

transaction that is prohibited by this section is also subject to forfeiture.<sup>85</sup>

### B. Changes in Reporting Requirements

Penalties for violating the reporting requirements under the Bank Secrecy Act are no longer reserved exclusively for financial institutions.<sup>86</sup> Under the Control Act, individuals, in their status as customers, may be charged with causing a financial institution not to file a report.<sup>87</sup> The structuring of currency transactions to cause a report to not be filed or to cause the filing of an inaccurate report is now criminal.<sup>88</sup> The new section appears to alleviate the prosecuting difficulties experienced in the recent cases of *United States v. Anzalone*<sup>89</sup> and *United States v. Varbel*.<sup>90</sup> In both *Anzalone* and *Varbel* the courts reversed convictions of defendants charged with structuring transactions.<sup>91</sup> The reversals were based on an absence of clear and sufficient legislative notice that the conduct constituted a crime.<sup>92</sup> The Control Act sets out explicit language making structuring of transactions criminal.<sup>93</sup>

In addition, under Title 31 of the United States Code and corresponding federal regulations, civil penalties for willful violations of Bank Secrecy Act reporting requirements may be imposed.<sup>94</sup> The Control Act increases the civil penalty from \$10,000 to \$25,000.<sup>95</sup> The new legislation also strengthens the Bank Secrecy Act by creating a civil penalty for negligence.<sup>96</sup> Any financial institution that negligently violates a Bank Secrecy Act provision may now be fined up to \$500.<sup>97</sup>

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85. 18 U.S.C.A. §§ 981-982 (West Supp. 1987).

86. 31 U.S.C.A. § 5324 (West Supp. 1987). The statute prohibits any person from causing a financial institution to not file a required report or to file a report containing an omission or material misstatement. The structuring of any transaction is also prohibited. *Id.*

87. *Id.* § 5324. See *supra* text accompanying notes 44-71 (discussion of cases illustrating different money laundering schemes used to avoid triggering reporting requirements).

88. 31 U.S.C.A. § 5324 (West Supp. 1987).

89. 766 F.2d 676, 682 (1st Cir. 1985).

90. 780 F.2d 758, 762 (9th Cir. 1986).

91. See *supra* notes 57-64 (discussing the *Anzalone* and *Varbel* decisions).

92. See *Anzalone*, 766 F.2d at 682; *Varbel*, 780 F.2d at 762.

93. See 31 U.S.C.A. § 5324 (West Supp. 1987).

94. See 31 U.S.C.A. § 5321 (West 1983 & Supp. 1987); 31 C.F.R. § 103.47 (1985). Before enactment of the Control Act, a willful violator was subject to a civil penalty of up to \$10,000. 31 C.F.R. § 103.47 (1986). The Control Act increases the penalty to \$25,000 or the amount involved in the violative transaction. 31 U.S.C.A. § 5321(a)(1) (West Supp. 1987).

95. 31 U.S.C.A. § 5321(a)(1) (West Supp. 1987).

96. *Id.* § 5321(a)(6) (authorizing the Secretary of Treasury to impose a negligence penalty).

97. *Id.*

## POTENTIAL PROBLEMS WITH THE CONTROL ACT

By enacting the Control Act, Congress increased the authority of law enforcement agencies to combat money laundering.<sup>98</sup> Some provisions of the Control Act, however, contain broad language that could impact other legitimate activities.<sup>99</sup> What is perhaps most controversial is the ramification the Control Act has on criminal defense lawyers.

Under 18 U.S.C. § 1957,<sup>100</sup> the government may be able to prosecute defense attorneys who knowingly accept tainted money from their clients. The threat of a felony conviction may cause defense attorneys to be reluctant to take certain cases, implicating the sixth amendment rights of the accused.<sup>101</sup> To convict a defense attorney under the new offense, the government must show that the attorney was engaged in some form of monetary transaction;<sup>102</sup> that the attorney knew the property involved was obtained from a criminal offense;<sup>103</sup> that the property was in fact derived from an unlawful activity;<sup>104</sup> and that the property involved in the transaction has a value of more than \$10,000.<sup>105</sup>

By accepting payment for services, a defense attorney meets the first element of engaging in a monetary transaction.<sup>106</sup> In addition, defense lawyers will seldom be completely without knowledge of the

98. See generally Money Laundering Control Act of 1986, Pub. L. No. 99-570, §§ 1351-1367, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) (to be codified at 18 U.S.C. §§ 981, 1956, 1957; 31 U.S.C. § 5324).

99. See, e.g., Cox, *More Laws Won't Hamper Drug-Money Launderers*, WALL ST. J., Oct. 7, 1986, at 34, col. 3 (the new regulations represent bureaucratic technicalities that will have the effect of limiting civil liberties without significantly attacking drug trafficking); *Money Laundering*, Bus. Wk., Mar. 18, 1985, at 74, 78 (quoting criticism of the notion that the bank industry should have to serve a policing function for the government). Regulations viewed as burdensome are: (1) negligence penalties enacted by the Control Act, 31 U.S.C.A. § 5321(a)(6) (West Supp. 1987); (2) increase of civil and criminal penalties for not following reporting requirements, 31 U.S.C.A. § 5321(a)(1) (West Supp. 1987); and (3) enactment of stricter measures for guaranteeing bank compliance with the Bank Secrecy Act, 12 U.S.C.A. § 1818 (West Supp. 1987).

100. The pertinent language of section 1957 provides: "Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished . . ." 18 U.S.C.A. § 1957 (West Supp. 1987).

101. See *infra* text accompanying notes 110-39 (discussing constitutional problems with the Control Act).

102. See 18 U.S.C.A. § 1957(f)(1) (West Supp. 1987) (definition of monetary transaction).

103. See *id.* § 1957(a) (providing a knowledge element).

104. See *supra* note 80 and accompanying text (list of unlawful activities).

105. See 18 U.S.C.A. § 1957(a) (West Supp. 1987).

106. See *id.*



guilt or innocence of a client. By virtue of the attorney-client relationship, the attorney has access to the confidences of the client.<sup>107</sup> As a result, the attorney may have knowledge that the attorney fees came from an illegal source. In addition, fees for complex drug cases often run over the \$10,000 statutory limit.<sup>108</sup> Theoretically, a criminal defense attorney would violate section 1957 and would face serious criminal sanctions.<sup>109</sup>

The threat of criminal sanctions under the Control Act seriously implicates the constitutional rights of the defendant. A criminal

107. See *id.* See also FED. R. EVID. 501 (provision for privileges under the Federal Rules of Evidence); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (purpose of attorney-client privilege is to foster frank communication between the attorney and client). The defense attorney can also arguably be shown to have known of the illegal origin of the fee by nature of the charges against the defendant. In the analogous situation of fee forfeiture, the court in *United States v. Bassett* recognized that an attorney will seldom be without knowledge that an attorney fee might be tainted. *United States v. Bassett*, 632 F. Supp. 1308, 1309 (D. Md. 1986). See also *United States v. Rogers*, 602 F. Supp. 1332, 1347 (D. Colo. 1985) (a person with knowledge of the nature of an indictment is reasonably on notice that the property transferred might be subject to forfeiture); *In re Grand Jury Subpoena Dated Jan. 2, 1985*, 605 F. Supp. 839, 849-50 n.14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (1985) (the indictment gives notice to the attorney that the defendant's assets are subject to forfeiture).

108. WALL ST. J., Dec. 12, 1986, at 39, col. 4. An established lawyer in Miami for a drug case receives fees of \$10,000 at a minimum. Complex cases often exceed \$100,000. *Id.* Attorney fees for representing Carlos Lehder, the alleged Colombian drug kingpin, are predicted by some to be as high as \$3 million. WALL ST. J., Feb. 10, 1987, at 41, col. 4.

109. See 18 U.S.C.A. § 1957(b)(1) (West Supp. 1987) (penalties for violating § 1957). In addition to these penalties the attorney fee could be seized pursuant to the forfeiture provisions of the Control Act. 18 U.S.C.A. §§ 981, 982 (West Supp. 1987). These provisions state that any property directly or indirectly obtained in violation of a substantive offense is subject to forfeiture. Attorney fees could qualify as forfeitable property under the definition of the statute. *Id.* Moreover, under the Control Act, courts may allow prosecutors to seek pretrial restraining orders to stall payment of legal fees until the outcome of trial is known. *Id.* This is done to prevent the transfer of property connected with a violative transaction. *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979) (restraining order enjoining defendant from transferring assets potentially subject to forfeiture under RICO statutes is not a pre-determination of guilt and does not violate right to counsel or due process of law). *Contra United States v. Bassett*, 632 F. Supp. 1308, 1317 (D. Md. 1986) (to allow attorney fees to be forfeited under RICO forfeiture provisions would be a violation of the sixth amendment); see *supra* note 106 (discussing *United States v. Bassett*). Cf. 18 U.S.C.A. § 1963 (West Supp. 1987) (forfeiture provisions under RICO); 21 U.S.C.A. § 853 (West Supp. 1987) (forfeiture provisions under Comprehensive Crime Control Act). The theory used in granting restraining orders involves use of a statutory relation back doctrine. In a key section of the forfeiture provision under the new Control Act, any property connected with a violative transaction vests in the United States upon commission of the act that gave rise to the forfeiture. 18 U.S.C.A. § 981(f) (West Supp. 1987). Consequently, even though assets may be legitimately transferred before conviction, such assets are deemed property of the government upon conviction. To this degree, some courts have enjoined any transfers until the outcome of the trial. See, e.g., *Bello*, 470 F. Supp. at 724-25. Note, however, that under both RICO and the Comprehensive Crime Control Act there exist provisions specifically allowing for pretrial restraining orders. See 18 U.S.C.A. § 1963(e) (West Supp. 1987); 21 U.S.C.A. § 853(e) (West Supp. 1987). Although the Control Act contains a forfeiture provision in which property is deemed to vest at the time of the offense giving rise to forfeiture, no restraining order provision appears. See 18 U.S.C.A. § 981, 982 (West Supp. 1987).

defense attorney may be unwilling to represent certain criminal defendants because of the criminal penalties. This chills the sixth amendment right of the defendant to retain counsel of choice. In addition, empowering government attorneys with a means of prosecuting defense lawyers upsets the adversarial process.

#### A. Chilling Sixth Amendment Rights

The sixth amendment guarantees a criminal defendant the right to counsel.<sup>110</sup> Implicit within this guarantee is the right to retain counsel of choice.<sup>111</sup> Provided the defendant has the resources to pay, the government generally cannot disturb the choice of the defendant.<sup>112</sup> The broad language of the Control Act could potentially restrict the ability of an individual to select counsel.<sup>113</sup> In view of serious criminal penalties under the Control Act, criminal defense attorneys may be reluctant to represent clients charged with certain crimes. To illustrate this point it is useful to consider an analogous situation involving

110. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to have Assistance of Counsel for his defense." U.S. CONST. amend. VI. See also *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (right to counsel in felony proceedings incorporated through the fourteenth amendment to apply to states).

111. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (defendant should be afforded fair opportunity to retain counsel of choice); *United States v. Phillips*, 699 F.2d 798, 801 (6th Cir. 1983), *rev'd on other grounds*, 733 F.2d 422 (6th Cir. 1984) (right to counsel of choice is an "essential component of the Sixth Amendment"); *United States v. Cunningham*, 672 F.2d 1064, 1070 (2d Cir. 1982) (right to counsel of one's choice is a right of "constitutional dimension"); *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979) ("courts are afforded little leeway in interfering with [choice of counsel]"); *United States v. Burton*, 584 F.2d 485, 488-89 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) ("[a]n accused who is financially able to retain counsel must not be deprived of the opportunity to do so"); *United States v. Sheiner*, 410 F.2d 337, 342 (2d Cir. 1969) (the defendant's choice of retained counsel "should not unnecessarily be obstructed by the court").

112. Cf. *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982) (recognizing that the right to counsel of choice is not absolute and must be balanced against judicial efficiency).

113. See generally Chambers, *Criminal Lawyers in Study Say New Laws Inhibited Case Choices*, N.Y. TIMES, Nov. 21, 1985, at A20, col. 1. When surveyed, many criminal defense lawyers said they may refuse to accept certain cases because of federal laws allowing the Government to seize the defendant's assets, including attorney fees already transferred. The forfeiture provisions referred to in the survey are part of RICO and the Comprehensive Crime Control Act. *Id.* See 21 U.S.C.A. § 1963 (West Supp. 1987) (forfeiture provisions under RICO); 18 U.S.C.A. § 853(a) (West Supp. 1987) (forfeiture provisions under Comprehensive Crime Control Act). See *supra* note 109 and accompanying text (discussing forfeiture under the Control Act). A plausible argument can be made in connection with the survey reported in the *New York Times* that if criminal defense lawyers are reluctant to take cases because of the possibility of fee forfeiture, they would likewise be reluctant in the face of criminal sanctions. See Chambers, *Criminal Lawyers Say New Laws Inhibited Case Choices*, N.Y. TIMES, Nov. 21, 1985, at A20, col. 1.

attorney fee forfeiture under the Comprehensive Crime Control Act.<sup>114</sup>

The defendants in *United States v. Bassett* were charged with conducting a continuing criminal enterprise in connection with possessing and distributing heroin.<sup>115</sup> In conjunction with this charge, the government sought forfeiture of the legal fees paid by the defendants to their retained counsel.<sup>116</sup> The defendants challenged the forfeiture and asked the court to exempt the legal fees.<sup>117</sup> Invoking a sixth amendment analysis, the court granted defendants' motion.<sup>118</sup>

The *Bassett* court recognized the practical effect a forfeiture provision would have if applied to legal fees.<sup>119</sup> The provision would impede the ability of defendants to hire counsel of their choice.<sup>120</sup> Although forfeiture of an asset does not technically occur until conviction, the practical effect is felt by defendants at the time of seeking counsel.<sup>121</sup> The *Bassett* court agreed with the hypothesis that private defense attorneys would naturally hesitate before accepting a case in which a fee legitimately earned would likely be forfeited to the government.<sup>122</sup>

The same conclusion must be drawn with respect to the Control Act. If defense lawyers are reluctant to take cases subject to fee forfeiture, they will also be reluctant in the face of serious criminal penalties.<sup>123</sup> The threat of a felony charge under the Control Act will

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114. See *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986). See also 21 U.S.C.A. § 853 (West Supp. 1987) (criminal forfeiture provision under the Comprehensive Crime Control Act).

115. See *Bassett*, 632 F. Supp. at 1309. See 21 U.S.C.A. § 848 (West 1981 and Supp. 1987) (continuing criminal enterprise offense).

116. See *Bassett*, 632 F. Supp. at 1309 (the government argued that 21 U.S.C. § 853(c) should be interpreted so that the forfeiture penalty would apply to attorney fees).

117. See *id.* at 1309.

118. See *id.* at 1318. Cf. *United States v. Lewis*, 759 F.2d 1316, 1326-27 (8th Cir. 1985) (restraining order precluding transfer of assets of defendant and severely hampering ability of defendant to pay chosen counsel did not violate right to counsel of choice, when appointed counsel provided sufficient representation). The law in the area of attorney fee forfeiture is unsettled. See generally *The Forfeiture of Attorney Fees in Criminal Cases: A Call For Immediate Remedial Action*, 41 REC. A. BAR N.Y. CITY 469 (1986) (proposing that forfeiture provisions not apply to attorneys actively representing criminal defendants); Brickey, *Forfeiture of Attorney Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 540-42 (1986) (forfeiture provisions appropriately apply to attorney fees and do not jeopardize the rights of defendants under the sixth amendment).

119. See *Bassett*, 632 F. Supp. at 1316 (the impact would be felt *prior* to conviction).

120. See *id.*

121. See *id.*

122. See *id.* at 1317 (quoting *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985)). The guarantee of right to counsel would be eliminated if forfeiture applied to attorney fees. *Id.*

123. 18 U.S.C.A. § 1957(b)(1) (West Supp. 1987) (penalties consist of a fine under 18 U.S.C., 10 years imprisonment, or both).

impair the constitutional right of the criminal defendant to select counsel, just as the threat of fee forfeiture was held to do in *Bassett*.<sup>124</sup>

### B. Balance of Adversarial Process

In addition to chilling the accused's ability to retain counsel, criminal sanctions under the Control Act may upset the balance of the adversarial system. The court in *United States v. Rogers* stressed the importance of a balanced adversarial system.<sup>125</sup> The defendants in *Rogers* were prosecuted under the Racketeer Influenced and Corrupt Organizations statutes (RICO).<sup>126</sup> Government attorneys sought the forfeiture of legal fees paid to defense counsel.<sup>127</sup> The government moved for a restraining order enjoining defendants from transferring any assets potentially subject to forfeiture.<sup>128</sup> The *Rogers* court did not grant the restraining order, and concluded that attorney fees transferred at arms length between client and attorney could not be forfeited.<sup>129</sup>

The court in *Rogers* relied in part on a due process theory.<sup>130</sup> Once the government blocks transfer of funds, the defendant is disadvantaged in preparing a defense.<sup>131</sup> An attorney may be reluctant to

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124. See *Bassett*, 632 F. Supp. at 1315.

125. *United States v. Rogers*, 602 F. Supp. 1332, 1349-50 (D. Colo. 1985).

126. Defendants were indicted for mail fraud, racketeering, fraudulent interstate transactions, aiding the filing of false tax returns, conspiring to obstruct justice, and perjury. *Id.* at 1334. See 18 U.S.C.A. § 1961-1968 (West 1985 & Supp. 1987). RICO was enacted to attack organized crime activities and to prevent proceeds of organized crime from infiltrating legitimate businesses. *United States v. Forsythe*, 429 F. Supp. 715, 720 (W.D. Pa. 1977), *rev'd on other grounds*, 560 F.2d 1127 (3d Cir. 1977). Forfeiture provisions contained in the RICO statutes are similar to those of the Control Act. Compare 18 U.S.C.A. § 1963(a) (West Supp. 1987) (subjecting to forfeiture any property interest connected with violation of RICO) with 18 U.S.C.A. §§ 981, 982 (West Supp. 1987) (subjecting to forfeiture the amount of money represented in the illegal transaction).

127. See *Rogers*, 602 F. Supp. at 1334.

128. See *id.* Under RICO, 18 U.S.C. § 1963(e) provides that a restraining order may be entered by the court upon a showing that the government is likely to prevail on the issue of forfeiture and that there is a need to preserve the property. 18 U.S.C.A. § 1963(e) (West Supp. 1987). See also 21 U.S.C.A. § 853(e) (West Supp. 1987) (similar provision under the Comprehensive Crime Control Act). The Control Act does not contain a similar provision relating to restraining orders. See 18 U.S.C.A. §§ 981, 982 (West Supp. 1987).

129. See *Rogers*, 602 F. Supp. at 1346 (neither the indictment nor the motion for injunction provided sufficient information to indicate probability of forfeiture conviction).

130. *Id.* at 1349-50. The *Rogers* court denied the restraining order for other reasons. First the court analyzed the intent of the legislature and concluded that attorney fees were not meant to be forfeited under the statute because the transfer of fees was not part of a scheme to avoid forfeiture. *Id.* at 1347. Second, hearings conducted to discover fee arrangements would violate the attorney-client privilege. *Id.* at 1349.

131. See *id.* at 1349.

represent a particular defendant due to the threat of fee forfeiture.<sup>132</sup> In this way, the government is able to interfere with the manner in which the defendant wishes to conduct the defense.<sup>133</sup> The *Rogers* court thus determined that fee forfeiture is inconsistent with the premise of an adversarial system.<sup>134</sup>

Under the Control Act, the government enjoys a more direct tactical advantage. Rather than deterring defense lawyers by attaching forfeiture charges to the indictment of the client, the government can now send an indictment directly to the attorney.<sup>135</sup> This tactic promises a more serious threat to the adversary system than does fee forfeiture. The government theoretically possesses the authority under the new law to send their most formidable competition to jail.<sup>136</sup>

Further, the attorney can only be charged under the new law if attorney fees exceed \$10,000.<sup>137</sup> This statutory limit indicates that 18 U.S.C. § 1957 will apply in complex criminal cases.<sup>138</sup> A defendant charged with a serious offense will likely prefer the representation of a lawyer with expertise in complex criminal litigation. If an expert defense lawyer is deterred from accepting a case because of the threat of criminal sanctions under the Control Act, the government achieves an unfair advantage. While private defense attorneys hesitate to take on complex cases, the government stands ready with sufficient resources to mount a thorough prosecution.<sup>139</sup>

132. See *id.* See also *supra* text accompanying notes 110-13 (constitutional right to counsel of choice).

133. See generally *Faretta v. California*, 422 U.S. 806, 834 (1975) (the Court stressed the importance of individual will in deciding how best to conduct a defense).

134. See *Rogers*, 602 F. Supp. at 1349-50. See also *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981). The *Perini* court recognized that the cornerstone of the adversary system is the right of the defendant to counsel of choice and the ability to develop a relationship of trust and confidence with counsel. *Id.* See generally Goodpaster, *The Adversary System Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. OF L. & SOC. CHANGE 59, 68-72 (1986). Four purposes for the adversarial system are proposed: (1) truth-finding, (2) fair decisionmaking, (3) enforcing rights, and (4) producing publicly acceptable conclusions that project substantive legal norms. *Id.*

135. See 18 U.S.C.A. § 1957(a) (West Supp. 1987) ("Whoever" may include defense attorneys).

136. See *id.* § 1957(b) (penalties include applicable fines under 18 U.S.C., 10 years imprisonment, or both).

137. See *id.* § 1957(a).

138. See *United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985) (defending RICO charges depends on vast resources and expertise, which often cannot be provided without the assistance of private counsel). See generally WALL ST. J., Dec. 12, 1986, at 39, col. 4 (established private defense lawyers charge over \$10,000 for complex drug cases).

139. See generally Krieger & Van Dusen, *The Lawyer, the Client and the New Law*, 22 AM. CRIM. L. REV. 737, 739-40 (1984) (arguing that an appointed public defender cannot serve as an adequate replacement for private defense counsel because public defenders lack the

## PROPOSAL

The policy behind 18 U.S.C. § 1957 is legitimate: people should not be allowed to live off the proceeds of crime.<sup>140</sup> In addition, a third party is under a duty not to accept money known to be tainted.<sup>141</sup> Further, the criminal defense bar cannot claim immunity from operation of the law. Sixth amendment concerns complicate the issue, however, when criminal defense lawyers are involved. A balance should thus be struck that accommodates both the policy behind 18 U.S.C. § 1957 and the sixth amendment concerns.

One solution is to amend 18 U.S.C. § 1957 by adding an exception to the general application of the statute. The penalty for violating section 1957 should be reduced from a felony to a misdemeanor specifically for criminal defense attorneys.<sup>142</sup> This change will decrease the potential for chilling the accused's right to counsel of choice.<sup>143</sup> Second, defense attorneys who are actively representing a criminal defendant should not be subject to liability under section 1957 if the attorney fee transferred was earned in exchange for actual services rendered. While not materially altering the Control Act, these changes would serve to hold intact the sixth amendment rights of the accused while not undermining the policy reasons behind section 1957.

## CONCLUSION

This comment has discussed the problem of money laundering and the steps taken by Congress through the Bank Secrecy Act and the newly enacted Money Laundering Act to detect and control money

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resources required for elaborate criminal litigation); Tarlow, *RICO Report*, *THE CHAMPION*, June 1985, at 39, 41 (arguing that public defenders are not a realistic alternative in the context of complex criminal cases).

140. See *WALL ST. J.*, Dec. 2, 1986, at 39, col. 4 (quoting one United States Justice Department official as saying: "[Attorneys] have no right to knowingly live off the fruits of illegal activities any more than any other citizen does.>").

141. See 18 U.S.C.A. § 1957(a) (West Supp. 1987).

142. See 18 U.S.C.A. § 1957(b) (West Supp. 1987) (penalties include applicable fines under 18 U.S.C., imprisonment up to 10 years, or both).

143. See *supra* text accompanying notes 106-24 (right to counsel of choice). Although this change may still deter some attorneys from accepting certain cases, a less drastic penalty should lessen the potential for hesitancy. In addition, conviction for a misdemeanor may not be grounds for disbarment in some jurisdictions. See *MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(5)* (1979) (prohibiting lawyers from engaging in illegal conduct involving moral turpitude). See generally Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice* 43 *CORNELL L.Q.* 489 (1958) (discussing moral turpitude and the distinction between felony convictions and misdemeanor convictions as grounds for disbarment).

laundering. The provisions of the original act, the Bank Secrecy Act, were circumvented by individuals who structured their transactions to avoid the reporting requirements. Several federal courts of appeal upheld the convictions of individuals engaged in these structured transactions by finding a duty on the part of individuals to inform financial institutions of their activity. The First and Ninth Circuit Courts of Appeal, however, held that any criminal prosecution of individuals under the Bank Secrecy Act violated the due process clause of the fifth amendment.

Congress recognized the limitations of the Bank Secrecy Act in controlling money laundering and the need for additional statutory authority for prosecuting individuals. Congress responded by enacting legislation that creates a substantive crime of money laundering. Although the new legislation should prove effective in curbing money laundering activities, some of the language contained in the laws is overly broad. Criminal defense attorneys could be subject to prosecution under the new law for accepting attorney fees from their clients. This comment suggests the applicable provision be amended to accommodate both the public interest in controlling money laundering activities as well as the sixth amendment rights of the accused.

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