UNITED STATES FOREIGN POLICY: EFFORTS TO PENETRATE BANK SECRECY IN SWITZERLAND FROM 1940 TO 1975

JAMES T. KELLY*

Swiss bankers have traditionally interpreted their pledge of secrecy very broadly. While this interpretation has helped their business to grow, it has not always acted completely in their favor. There have been repeated attacks from abroad against the so-called "gnomes of Zurich," and over the past forty years, a variety of industrialized and emerging nations have sought to penetrate Swiss bank secrecy. These nations have ranged from Nazi Germany to Israel, and from the United Kingdom to various Latin American nations. In this respect, any American charges that Swiss bank secrecy is an ingenious arrangement designed by the Swiss to facilitate the avoidance of American laws is nothing new to the Swiss. The issue is an important one for Swiss-American relations, however, because it has generated friction which spoils the friendship that has traditionally existed between the two democracies.

This article is organized to discuss the United States' efforts, over the past thirty-five years, to penetrate Swiss bank secrecy.

I. AN OVERVIEW

The first assault on Swiss bank secrecy came at the end of World War II, when American policy was devoted to preventing a German economic recovery and a Nazi resurgence. As the United States sought to track down German funds believed to be hidden in the neutral countries, it clashed with the Swiss over bank secrecy for the first time.

The second attempt also had its origin in World War II, when

* Attorney-Advisor, Office of Hearings, Interstate Commerce Commission; B.A., Georgetown University, J.D., University of Pennsylvania; Member, Florida Bar, Maryland Bar.

Work on this article was initiated while the author was enrolled in the United States Foreign Affairs Law seminar at the University of Pennsylvania Law School. The author wishes to express his appreciation to Covey T. Oliver, Ferdinand Wakeman Hubbell Professor of Law, at the University of Pennsylvania Law School, for his suggestions and guidance in the preparation of this article.

the United States government seized and vested in itself title to all enemy property located within its territory. The single largest such seizure, constituting 20% of all enemy assets vested during the war, involved a corporation which the United States said was German-owned, but which the shareholders insisted was Swiss-owned. Litigation concerning Swiss bank secrecy stalled the case at the discovery stage for twenty years.

The final round, lasting from 1965 to the present, originated from American officials' concern with the extensive abuse of Swiss bank secrecy by American criminals to evade American laws. The scope of this problem will be discussed, and the various remedial steps analyzed.

To appreciate the basis for the American position, one must realize that the confidentiality of a bank customer's records is much more narrowly defined under the American system than under the Swiss laws. While American bankers do recognize that such records are protected from disclosure to private party outsiders, they cooperate extensively with government officials requesting information about a depositor.

> Banks have regularly afforded government agents informal access to customer records without notifying the customer to whom the records pertain. Even when legal process is directed to the bank, protection for customers is inadequate, for banks regularly comply without notifying them. Banks have little incentive to protect the privacy interests of their customers through engaging in litigation to contest the validity of a subpoena, but they do have an incentive to cooperate with the Government, which heavily regulates the banking industry.[1]

Officials accustomed to such deference at home were simply unprepared for a much tougher policy against disclosure in Switzerland.

A. The Scope of Bank Secrecy

The Swiss banker's obligation of secrecy has its roots in the private law of the sixteenth century. The obligation was first recognized as customary law which arose from the Swiss views on the importance of protecting personal freedom. Later develop-

1. *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 193 (1974) (footnotes omitted). *See* Bailin, *Banks Ordinarily Cooperate with IRS in Tax Examination of Customers*, 14 J. TAXATION 220 (1961). *But see* United States v. Miller, 500 F.2d 751, 756-58 (5th Cir. 1974), 96 S. Ct. 1619 (1976).

ments stressed the banker's duty of loyalty and the customer's right to personal privacy. Confidentiality exists as an implied contract between banker and customer, and does not depend upon an express agreement. The right to invoke banking secrecy is granted both to Swiss nationals and foreigners, and the latter category includes customers and banks operating within Switzerland.[2]

The concept of the banking secret was first codified in 1934, after the Nazis took power in Germany.[3] At that time, the Gestapo was attempting to gain access to information from Swiss banks on the financial affairs of German Jews and other "enemies of the state," to determine if they had violated German law by removing funds from Germany. The Swiss government acted in order to guarantee depositors protection against such threats. Article 47(b) of the Banking Law of 1934 reads:

> Anyone who in his capacity as an officer or employee of a bank, or as an auditor or his employee, or as a member of the Banking Commission or as an officer or employee of its bureau intentionally violates his duty to observe silence or his professional rule of secrecy or anyone who induces or attempts to induce a person to commit any such offense, shall be liable to a fine of up to 20,000 francs or imprisonment for up to six months, or both.
>
> If the offender acted with negligence, he shall be liable to a fine up to 10,000 francs.[4]

In addition to the criminal penalty, the breach of banking secrecy may also lead to a suit for damages under article 97 of the Code of Obligations.[5]

Banking secrecy in Switzerland covers all information of a business or personal nature, of which the bank gains knowledge in connection with business transactions and consultations with customers. The customer remains the "master of the secret" and upon his request, the bank is obliged to produce all information relating to his transactions. Without such a customer request,

2. *See* Mueller, *The Swiss Banking Secret—From a Legal View*, 18 INT'L & COMP. L.Q. 360 (1969) [hereinafter cited as Mueller].

3. *Id.* at 361.

4. Federal Law of November 8, 1934, Regarding Banks and Savings Institutions, based on Art. 31 Constitution of the Swiss Confederation (Bundesuer fassung der Schweizerischen Eidgen ossen schaft, Constitution de la Confederation Suisse).

5. Swiss Code of Obligations, art. 97. (Schweizerische Obligationenrecht (OR), Code des Obligations (CO)).

however, the bank is prohibited from disclosing information to third parties, whether private individuals or government officials.[6]

Narrow exceptions to banking secrecy do exist under Swiss law. In this respect, banking secrecy differs from the absolute professional secrecy granted by law to Swiss attorneys, clergymen, and physicians. While Article 47(b) of the Banking Law sets a criminal penalty for the breach of banking secrecy, it does not identify the cases in which a bank has a right or duty to give information. Those cases are defined by other statutory provisions, and by court decisions under the various cantonal and federal procedural rules.

> Although banking secrecy is a personal right of the individual enforceable under private contract law, overriding principles of public law may oblige the bank to disclose information under circumstances where the interests of the public outweigh those of the person. . . . The Swiss public interest has provided exceptions to the bankers' obligation of secrecy in cases involving heirs, family law, debt collection and bankruptcy, international money transfers, and criminal conduct.[7]

The most important of the exceptions, for American purposes, has been criminal conduct.

B. Preliminary Observations

Three comments seem in order. First, Switzerland is the most important of the world's banking secrecy jurisdictions, but it is far from being the only one. Other nations having similar secrecy requirements include the Bahamas, Curacao, Hong Kong, Lichtenstein, Luxembourg, Panama and West Germany. Many of these jurisdictions have patterned their banking codes to some extent upon the Swiss prototype, in the hopes of building a solid banking industry. While they may have copied the banking secrecy laws, they cannot match Switzerland's long-standing political neutrality, government stability, sound currency or efficient investment management.

Second, bank secrecy protects every Swiss account. "Coded" or "numbered" accounts are an internal device used by the banks to protect customers from indiscretions by members of their staff.[8]

---

6. Mueller, *supra* note 2, at 363.

7. Note, *Secret Foreign Bank Accounts*, 6 TEXAS INT'L L.F. 105, 119 (1970) (footnotes omitted).

8. 213 The Economist 1276 (1964).

Numbered accounts insure that only a few of the bank's officers know the true identity of a customer; no anonymity exists between the banker and the depositor, only secrecy with respect to outsiders. The numbered account is legally irrelevant if the bank is required by Swiss law to reveal information under court order.[9] One estimate indicates that such accounts require a minimum opening deposit of $25,000 and that they represent no more than three or four percent of the total number of Swiss accounts and less than 10% of the deposit volume.[10] For the remainder of this article, the author will ignore the distinction between numbered and regular accounts.

Third, Swiss banks exercise a far wider range of services than do American banks. In addition to performing such standard functions as accepting deposits and making loans, they act as stockbrokers, underwriters, and mutual fund managers, and may even own controlling interests in industrial companies. When Swiss banks serve as financial intermediaries for their customers, they do so via "omnibus accounts" registered in the bank's name only. Bank secrecy thus conceals the identity of the real party in interest for whom the bank is acting.

II. UNITED STATES' EFFORTS TO PENETRATE SWISS BANK SECRECY IN 1945-1946

A. Background of American Policy

American foreign policy towards Switzerland during World War II combined the economic warfare tactics used against all the European neutrals (as an indirect method of striking at Germany) with a New Deal politician's distrust for Swiss corporate and banking law. Not surprisingly, Swiss-American relations were severely strained during the period.

The economic warfare policy had two objectives. The first was to eliminate all trade between the European neutrals and the Axis, in order to deny the Axis strategic materials. The second was to prevent Axis flight capital and looted property from finding a "safe haven" in the neutral countries from which a German economic recovery might spring.

Since the Swiss economy was heavily dependent upon interna-

9. Mueller, *supra* note 2, at 362.
10. U.S. NEWS & WORLD REP'T, Feb. 21, 1972, at 61.

tional trade, the American policy struck it particularly hard. As the war progressed, Switzerland became increasingly dependent upon various strategic supplies such as petroleum, food items and industrial raw materials which could only be obtained from overseas. The United States exploited its control over these supplies to negotiate a series of wartime concessions with the European neutrals.

The United States supplemented its economic blockade by blacklisting[11] firms in neutral countries suspected of aiding the Axis, and by twin domestic programs of "foreign funds control" and "alien property custody." More than 1,800 Swiss firms were blacklisted, while $1.2 billion of Swiss assets within the United States were frozen, effective July, 1941, five months before the United States became a belligerent.

The second objective of American policy was directed at preventing a German economic recovery following the impending military defeat. Many individuals within the Roosevelt Administration felt that Germany's military defeat in World War II would be viewed within Germany as a temporary setback, and that a third attempt at world domination was inevitable.[12]

Destroying the German economy required simultaneous action along a number of lines. The major areas of American concern were the Axis economic penetration of Latin America, the

11. A blacklisted firm was prevented from obtaining export licenses, funds, passport visas, and the use of communications facilities. At its peak, the American blacklist contained over 15,400 names. It remained in effect against Swiss firms from July 17, 1941, until November 30, 1946.

12. The Morgenthau Plan, formulated by Roosevelt's Secretary of the Treasury and adopted as official American policy, called for creation of an agricultural Germany. The Ruhr was to be destroyed as an industrial area and then administered as an international zone. German schools and media were to be shut down until "appropriate programs" were formulated. There was to be no German national government, only local governments which would deal with the military occupation commission. German world trade would be regulated for twenty years by the United Nations.

The Morgenthau Plan was never implemented. It was abandoned when it became evident that the biggest threat to world peace was not a conquered Germany, but rather the growing Cold War between Soviet and American blocs.

Like Morgenthau, Senator Harley M. Kilgore believed that a defeated Germany was still a major threat to world peace. As Chairman of the Sub-Committee on War Mobilization of the Senate's Military Affairs Committee (the Kilgore Committee), he repeatedly dramatized this point. Within two months of Germany's unconditional surrender, Kilgore reported that the German cartelists ("the co-conspirators of the German Army and the Nazi Party") could form the economic basis for renewed warfare if they were permitted to survive.

question of German cartels, combines, and technology, and the tracking down and frustration of German efforts to hide funds abroad for another attempt at world conquest. It was the third of these areas which created the Swiss-American tensions in 1945 and 1946, when America's "Safehaven Program" clashed with Switzerland's bank secrecy laws.

The Safehaven Program was a combined effort by the State Department, the Treasury Department and the Foreign Economic Administration to forestall German attempts to hide assets outside Germany in neutral European countries.[13] The program was designed to deny to Germany the economic power arising from the organized looting of occupied countries, the flight of German capital in anticipation of defeat and the German capital investment already located abroad when the war began.

Safehaven received an international endorsement from the 1944 United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire. Resolution VI of that Conference[14] observed that the German transfer of assets abroad jeopardized the United Nations' efforts to permanently maintain peaceful international relations. It called upon the forty-four signatory governments to urge the neutrals to prevent such concealment and to facilitate the return of such property to proper authorities.

It should be clear that Allied economic warfare tactics dealt harshly with the European neutrals, and that a certain amount of Swiss-American ill-will could arise from these policies alone. Unfortunately, the trend was further influenced by the inflexible financial attitudes of certain New Deal politicians, most notably, Roosevelt's Secretary of the Treasury, Henry J. Morgenthau, Jr. One writer comments:

> Many [in Washington] looked on the Swiss corporate structure, with its holding companies, lack of antitrust laws, and complete freedom from government regulation with distaste, or even considered it immoral. From this general bias came a feeling . . . that Nazis . . . were using Swiss banks to cover up their global operations. . . . Switzerland and its banks . . . had a good image and could cover nicely for the more unsavory Nazi one. . . . There was a certain amount of

13. Clayton, *Security Against Renewed German Aggression*, 13 DEP'T STATE BULL. 21, 27-33 (1945).

14. United Nations Monetary and Financial Conference, Final Act and Related Documents (U.S. Dep't of State Pub. 2187, Conference Series 55, 1944).

> this going on—but it never approached the extent which Treasury officials darkly imagined. . . . The Nazis were always almost pathologically suspicious of their own people's dealings through Swiss banks or Swiss fronts, and permitted it to take place only under limited circumstances.[15]

B. The Bern Agreements, February 1945

After the adoption of Bretton Woods Resolution VI, six months of diplomatic follow-up by the United States legation in Bern produced only limited response from the Swiss government. The State Department then instituted more positive action and disclosed a series of bilateral economic negotiations between the Allies and the individual European neutrals. The first of these talks were held with Spain and Sweden. In January, 1945, Secretary of State Edward Stettinius, Jr., announced that Lauchlin Currie, Administrative Assistant to President Roosevelt, would lead a Special Mission to Switzerland to re-evaluate the Allied-Swiss economic relationship.

The Currie mission had three objectives: to halt Swiss trade with Germany, to eliminate German coal shipments by rail through Switzerland to German-controlled factories in northern Italy, and to obtain Swiss acceptance of Bretton Woods Resolution VI. Before arriving in Switzerland, the American delegation held preliminary talks with British and French officials in London and Paris. The results of these talks enabled the three nations, acting on behalf of all the Allies, to present a unified bargaining position to the Swiss.[16]

Negotiations were conducted in Bern in February and March, 1945. Since the Allies held the clearly superior bargaining position, it is not surprising that virtually all of their objectives were achieved. However, the seeming ease with which bank secrecy fell to the demands under Resolution VI deserves comment.

The initial reaction of the Swiss government and press to the American economic warfare policies was one of displeasure and alarm. There was concern that the United States was disregarding the Swiss economic and material survival needs, in order to defeat

---

15. T. FEHRENBACH, THE SWISS BANKS 74 (1966) [hereinafter cited as FEHRENBACH].

16. Dingle M. Foote, Parliamentary Secretary to the British Ministry of Economic Warfare, and Emil Guionin, of the French Ministry of Finance, were the other Allied representatives.

Germany. The Swiss were relieved by a compromise which permitted them to retain their neutrality and to continue a limited non-strategic materials trade with Germany.

> [A] number of influential Swiss bankers proposed that the Confederation would have to make some concessions. The Swiss were aware that the United States was now not just a distant great power, but the dominant power in Europe. In this sense, the United States had replaced the Germans. In banks and in the Nationalrat it was agreed that the banking secret could be breached in some respects due to the unusual circumstances. Public—and not just banking—opinion in Switzerland was strongly against any breaking of bank secrecy. But public opinion was also behind the American purpose, which was the final destruction of the Nazi empire.[17]

A major Swiss concession on bank secrecy was offered on February 17, 1945. The Swiss Federal Council drafted a decree which blocked all German holdings in Switzerland, pending an examination of individual accounts, in order to determine whether the Allied accusations had any foundation in fact. Article IX of the decree partially rescinded the bank secrecy law by permitting the Swiss Clearing Office, a quasi-governmental agency which had supervised all Swiss-German wartime trade, to receive from Swiss banks information necessary to determine the rightful owners of property.[18]

Swiss Clearing Office officials were not allowed to enter a Swiss bank unless the bank's officials first reported that German assets were held. The burden of proof was placed upon a suspected account-holder to disprove any German taint, and mandatory disclosure by bank officers was enforced by a maximum penalty of a 10,000 franc fine and one year in prison. The decree froze all assets belonging to persons domiciled in Germany or their representatives in Switzerland, including those of Swiss holding companies. It impounded all German bank balances, halted all shipments of German gold into Switzerland, and began a census of all German assets in Switzerland.

The compromise seemed reasonable to both sides in view of the emergency wartime circumstances. Chief American negotiator Currie wrote two months later:

---

17. FEHRENBACH, *supra* note 15, at 82.
18. N.Y. Times, Feb. 18, 1945, at 16, col. 3.

> We had good reason to believe that Switzerland had become the favorite safe haven for Nazi financial resources. This arose partly from proximity, partly from the world-wide ramifications of Swiss financial and industrial enterprises, and partly from the Swiss bank secrecy laws, which gave peculiar and unique protection to the cloaking of financial interests.
>
> In this . . . the Nazis made grave miscalculations. The Swiss government has definitely decided . . . that . . . it will . . . not permit its facilities to be used as a cloak for post-war Nazi financial operations.
>
> We feel we can rely upon the honest and very efficient Swiss Government Administration to insure that the job will be well done and that few German assets will escape disclosure.[19]

C. Relations Deteriorate, April 1945-March 1946

Currie's optimism was not widely shared in Washington. American policy towards Switzerland between April, 1945, and March, 1946, was marked by an unfortunate series of undiplomatic insults, intensified economic warfare, and renewed demands for the disclosure and liquidation of German external assets. Mutual understanding was further weakened by press coverage in both nations which failed to educate public opinion concerning the two governments' respective positions, and which often proved to be inflammatory.

Soon after the German surrender, Allied investigating teams, staffed in part by American Treasury agents, began to scour Germany for evidence of the German side of Safehaven transactions. When the Swiss Clearing Office announced in the autumn of 1945 that its census of German assets totaled $250 million, the Allied investigators in Germany suggested that the true amount was $750 million. The Swiss requested to view the Allies' evidence to aid their investigation, but were told that all sources were confidential. There was even an oblique request that Allied investigators be permitted to enter Switzerland. In Washington, the Kilgore Committee charged the Swiss with violating the Bern Agreements. The accusation was based upon captured German correspondence, the accuracy of which was soon challenged, but angry and immediate

19. Currie, *Tumbling the Nazi Financial Redoubt*, N.Y. Times, Apr. 29, 1945, § 6 (Magazine), at 10.

Swiss denials indicated that severe damage to goodwill had resulted.[20]

Economic warfare against Switzerland intensified after the German surrender. Longstanding tactics such as the blockade, blacklist, and freezing and vesting of Swiss assets in the United States remained in force. In addition, new tools were employed. A State Department policy bluntly subordinated the supply needs of European neutrals to the requirements of the liberated nations.[21] And when in December, 1945, the United States removed the freeze on trade in Europe in order to stimulate economic recovery, the European neutrals were excluded "to assure that camouflaged enemy assets were not released."[22]

Renewed demands for the disclosure and liquidation of German external assets came indirectly from the United States via international channels. The Potsdam Conference agreed that the Allied Control Council for Germany (the military occupation government) should dispose of German external assets not already under Allied control.[23] On September 20, 1945, the Council proclaimed that all property belonging to German residents but situated outside of Germany was frozen. This was followed on October 30, 1945, by Control Council Law No. 5, which purported to vest in the Council's German External Property Commission all rights to the property frozen by the earlier proclamation.[24] At issue was the power of a military occupation government to dispose of property of private citizens as well as of the conquered Nazi regime, and the source of its jurisdiction over property outside the territory actually occupied.

> [T]hough not intended as such, [these laws were] a direct attack on both Swiss domestic law and Swiss sovereignty. . . . Swiss jurists informed the Nationalrat to stand fast. They said that no international tribunal would uphold the provisions of [these laws] . . . . [B]oth British and American jurists gave exactly the same opinion to their governments. It was no accident that the Swiss demanded, and the Allies

20. N.Y. Times, Nov. 15, 1945, at 1, col. 7; *id.*, Nov. 17, 1945, at 2, col. 2.

21. Lovitt, *Survey of Economic Policy Toward the European Neutrals*, 13 DEP'T STATE BULL. 777, 780 (1945).

22. U.S. Treasury Department Press Release No. V-155 (Dec. 7, 1945).

23. Mann, *German External Assets*, 24 BRIT. Y.B. INT'L L. 239 (1947).

24. *Id.* at 239-40, n.4 & n.5.

refused, to place the matter before the newly-formed World Court.[25]

Still another demand for Swiss disclosure arose from the January, 1946 Paris Reparations Agreement of the Western Allies.[26] Article 6(b) of that Agreement called again for the liquidation of German assets held in neutral countries. Britain, France and the United States were authorized to negotiate with the neutrals on the matter. After discussions with Spain and Portugal, the Allies turned to Switzerland.

D. The Washington Accord, March-May 1946

The governments of France, the United Kingdom, the United States and Switzerland negotiated the question of German external assets once again from March 18 to May 26, 1946. The leading figures during the talks were Randolph Paul, Special Assistant to President Truman, for the Allies, and Walter Stucki, Chief of Foreign Affairs, Swiss Federal Political Department.[27]

The Allies requested the Swiss to liquidate the German holdings in Switzerland which had been frozen since the Bern Agreements, in order to turn the proceeds over to the Inter-Allied Reparations Agency. The Allies' aim was to remove the threat of German economic recovery, while financing the repair of German-caused war damage. The Allies exercised considerable economic leverage to support their position.

The Swiss were quite willing to restore all looted property to its original owners, but argued that blocked German assets in Switzerland should be used in satisfaction of Swiss citizens' claims against Germany. The value of such claims far exceeded the amount available. The Swiss wanted an end to Allied economic warfare, and the opportunity to participate in the European financial recovery. Side disputes arose involving the scope of the assets, such as whether pre-Nazi assets of private German citizens and life savings of German refugees smuggled out of Germany before the war should be included with Nazi flight capital in the census.

---

25. FEHRENBACH, *supra* note 15, at 86.

26. Draft Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparations Agency and on the Restitution of Monetary Gold, art. 6, 14 DEP'T STATE BULL. 114, 117 (1946).

27. Paul had previously served as General Counsel for the Treasury Department. F.W. McCombe, Counselor for the British Embassy in Washington, and Paul Chargueraud of the French Foreign Office were the other major participants.

Initial negotiation progressed slowly, and nearly collapsed several times. The delegates created three subcommittees to deal, respectively, with looted property and gold, claims against Germany, and liquidation and disposition procedures. The Swiss recognized that their claim for debts due from wartime trade with Germany was morally weak since such trade had helped Germany to wage the war, and they agreed to absorb these losses internally. The Allies compromised their claims as well. If the Swiss would vigorously pursue German assets in Switzerland, the proceeds so recovered would be divided, part to the claims of Swiss citizens for pre-war trade with Germany, and the balance to the Allies for the rehabilitation of the devastated countries.

> James Byrnes, the new Secretary of State, became concerned about the steady souring of Swiss-American relations during 1945 and 1946. . . .
>
> The U.S. was damaging its relations with a friendly power over an issue which in practical terms was no longer relevant and from which it stood to get not one red cent. . . . A surprisingly bitter underground power struggle between the State and Treasury officialdom was waged through Washington corridors. It resulted in standoff and compromise. Because of this, the U.S. modified its position toward Dr. Stucki during March.[28]

Stucki returned to Switzerland to confer with his government. Although there was strong sentiment in Switzerland against any compromise, general terms were arranged; informal agreement was reached on May 21, 1946, and letters of understanding were exchanged on May 25, 1946.[29]

There were four main provisions to the Washington Accord. First, German holdings in Switzerland subject to repatriation (including refugee assets) were to be identified and liquidated by the Swiss Clearing Office. The Allies agreed to make known all available background information and to suggest avenues of inquiry. Doubtful or controversial cases were subject to preliminary administrative review by a three-member Swiss Authority of Review and, if necessary, to arbitration.

Second, liquidation proceeds were to be divided equally between the Allies and the Swiss. The Allied share would then be turned over to the Inter-Allied Reparations Agency for the rehabil-

28. FEHRENBACH, *supra* note 15, at 91-92.
29. 14 DEP'T STATE BULL. 1121 (1946).

itation of countries devastated or depleted by Germany during the war.

Third, Switzerland agreed to make available $58.1 million in gold, in restitution for gold alleged to have been wrongfully taken by Germany from occupied countries during the war and transferred to Switzerland. Gold so received would be placed in the gold pool established by the Paris Reparations Agreement, to be divided *pro rata* among the countries from which gold was looted.

Fourth, the Allies agreed to discontinue their blacklists against Swiss firms, and the United States agreed to release Swiss assets in the United States, by determining the necessary procedures without delay.

The Swiss parliament ratified the Washington Accord in June, 1946. Unfreezing Swiss assets within the United States took somewhat longer. On November 30, 1946, a certification agreement was negotiated between the two governments which permitted the return of $1.2 billion in Swiss funds which had been frozen since July, 1941.[30] As was the case with the Bern Agreements a year earlier, the Washington Accord was viewed by both governments as a practical solution to an otherwise-insoluble problem. The Swiss had negotiated from an inferior bargaining position, and yet had preserved their sovereignty, neutrality and even most of their bank secrecy.

> No Swiss government agency or official was allowed to enter a Swiss bank unless the banker reported that German assets were held. The census was voluntary. The German assets transferred or liquidated consisted for the most part of German-held companies where the ownership could be traced. Where a firm had "protective coloring" the Swiss followed their own law. If cantonal law said a company was Swiss, it was Swiss.[31]

The Accord was discharged, with respect to German assets in Switzerland owned by residents of the Federal Republic of Germany (West Germany), in August, 1952. This involved a lump-sum payment of 121 million Swiss francs to the Allies. In addition, the Swiss promised to give "sympathetic consideration" to asset claims

30. Once the Treasury Department unfroze the assets, individual claimants still had to be certified by the Swiss Clearing Office.

31. FEHRENBACH, *supra* note 15, at 93.

on behalf of the victims of Nazi persecution, in the event that such assets were found in Switzerland.[32]

III. THE INTERHANDEL CASE, 1925-1965

A. Origin of the Problem, 1925-1945

According to various estimates, between one-third and one-half of world trade was subject to some degree of cartel control during the era between World Wars I and II.[33] Many business managers viewed Switzerland as the ideal headquarters for such cartels, given its established neutrality, and freedom from financial restriction.

German corporations with international business found Switzerland attractive during the 1920s for these traditional reasons, as well as for additional motives. The Weimar Republic was proving unable to control the galloping inflation that was making the German mark a worthless currency. It was likewise unsuccessful in maintaining civil order in the face of Communist and Nazi party growth. Finally, strong anti-German feelings throughout the world made it prudent for German cartels to mask their foreign dealings via Swiss incorporation.

1. *The growth of I.G. Farben.* When Edward Greutert opened his private bank in 1920 in Basel, Switzerland, it was the first to be capitalized exclusively with foreign money.[34] Five years later, Hermann Schmitz of Frankfurt, Germany, merged the six largest German chemical and dye companies into a new corpora-

32. 27 DEP'T STATE BULL. 363 (1952).

33. P. ELLSWORTH, THE INTERNATIONAL ECONOMY 136-37 (3d ed. 1966).

34. Greutert was a Swiss citizen who had worked before World War I for Metallgesellschaft A.G. (Metall A.G.) in Germany. The original capitalization for his bank was provided by Metall A.G. Upon his death, the bank carried the name of his successor, Hans Sturzenegger.

Schmitz had been Greutert's co-worker for Metall A.G., and subsequently became a Privy Councilor to Hitler. In 1947-48 at Nuremburg, he and 23 other Farben officials were tried as war criminals. They were charged with following corporate policies to plan the aggressive German war effort and to use concentration camp labor in meeting industrial production quotas. Schmitz was acquitted on the major charges, but convicted of "plundering other industries," and given a four year prison term. *See generally* J. DUBOIS, THE DEVIL'S CHEMISTS (1952) [hereinafter cited as DUBOIS].

One theme of this article is that most "Swiss" banks causing friction between the United States and Switzerland are foreign-owned banks, incorporated in Switzerland to exploit Swiss law. *See* text associated with footnotes 73-79, *infra.*

tion called Internationale Gesellschaft Farbenindustrie A.G., or I.G. Farben.

Farben grew steadily by acquiring or merging with other German firms and foreign corporations. By 1929, it produced all German dyes, chemicals, photographic supplies, nitrogen, pharmaceuticals, rayons and synthetics. By 1939, it had become the largest chemical corporation in the world.

Schmitz steered Farben's business through the private Swiss bank of Greutert and Cie., and eventually purchased a controlling interest in the bank. He then proceeded to mask Farben ownership and interests in various international businesses by establishing a number of dummy Swiss corporations and accounts in the Greutert bank. He used these to buy and sell control of each other in a complex circle of options, pledges and loans, all of which were protected by Swiss bank secrecy from the scrutiny of outsiders.

Max Ilgner, a Farben director and Schmitz nephew, organized a New York holding company in 1929, named American I.G. Chemical Corp. This company owned Farben's American businesses, including Winthrop Chemical Co., Ozalid Corp., General Aniline Works and Agfa-Ansco Corp. In 1931, Ilgner formed a second New York corporation called Chemnyco to handle Farben's patent arrangements with American firms. The Justice Department began to investigate Chemnyco in 1937 for alleged antitrust violations.

To forestall this investigation, Schmitz instituted a number of changes in the American I.G. Chemical Corp. It became General Aniline and Film Corp. (GAF), a Delaware corporation. He also sold Farben's GAF stock. In 1928, Schmitz had organized a Swiss holding company, named Internationale Gesellschaft fur Chemische Unternehmungen A.G., or I.G. Chemie, whose sole purpose was to hold, in Basel, controlling interest in Farben enterprises abroad. The beneficial ownership of I.G. Chemie stock was blended into the Greutert-Sturzenegger Circle, discussed above, and I.G. Chemie eventually came into control of 89% of the stock of GAF.[35]

---

35. While Schmitz had indeed sold Farben's stock in GAF, a memorandum captured after the war indicated that an option existed for Farben, through Schmitz, to repurchase GAF from I.G. Chemie at any time. Chemie also agreed never to sell to anyone but Farben. *See* DUBOIS, *supra* note 34, at 43.

The material in subsection A. paraphrases FEHRENBACH, *supra* note 15, at 215-26.

The exact chain of title by which I.G. Chemie claimed control of GAF could not be traced without access to the Greutert bank records. In the public mind, however, several factors linked GAF with I.G. Farben. First, GAF officers appeared to be Farben-dominated; a majority of the GAF board of directors were Farben officers, and some were Schmitz relatives. Second, Farben pledged that holders of I.G. Chemie stock would receive dividends equal to those payable on Farben shares. In return, Farben retained an option to buy all I.G. Chemie stock on call, at book value. Third, the absence of fair market value consideration on many Farben-I.G.Chemie-GAF transfers suggested that they were not made by arms-length bargaining, but were merely shifts from one Farben pocket to another.

As World War II approached, it became even more necessary for German firms to divest or cloak their assets abroad. Farben wanted to prevent its physical assets, patents and technology from falling into enemy hands. To accomplish this result, Schmitz resigned as Chairman of I.G. Chemie, and one-third of the GAF common stock held by I.G. Chemie was returned to GAF. Ownership of I.G. Chemie stock by German nationals was reduced from 28% to 15%, and the dividend guarantee was cancelled. Farben-owned patents, used by GAF on license, were sold outright to GAF.

2. *The United States seizure of GAF.* Farben was never directly tied to GAF as a stockholder of record. The ties were indirect, at most, although virtually everyone conceded that I.G. Chemie, the Swiss holding company which controlled GAF, was initially "Farben-organized." But that fact was not at issue. The question was whether Farben's ownership of I.G. Chemie had *terminated* or had merely been *concealed*. The United States government believed the latter to be the case, and soon after it entered the war, seized GAF as enemy property.

The government's seizure and vesting of GAF was influenced by factors apart from the merits of the case, however. GAF became, quite by accident, the key to a struggle for control of economic warfare policy among President Roosevelt's cabinet officers. The in-fighting dominated policy formulation from mid-1940 to mid-1942, and involved the Secretaries of State and Treasury, and the Attorney General, who together formed a committee to supervise or eliminate undesirable influences in foreign-owned or foreign-dominated businesses within the United States.

The first phase of the battle matched Treasury Secretary Morgenthau against Secretary of State Cordell Hull over the development and scope of American economic warfare policies. An April, 1941 compromise permitted the freezing of foreign funds within the United States, to be accomplished on an *ad hoc* basis keeping pace with the German conquest of Europe. This program was expanded in June, 1941, to freeze funds of all European belligerents, and again in July, 1941, to regulate foreign trade as well as funds and to regulate neutrals as well as belligerents. Management of the foreign funds control program was lodged in the Treasury, which quickly evolved the program into an economic warfare board. It began licensing or direct management of foreign-dominated firms operating within the United States.

This triggered round two of the struggle over the administration of economic warfare policy. Attorney General Francis Biddle argued that property management (as distinct from funds control) should be supervised by the Justice Department's Alien Property Custodian, as had been done during World War I. He felt that any other disposition would be inefficient. Morgenthau contended that his Foreign Funds Control staff had developed an expertise in the field, and that the task required cooperation with banks which Treasury could best provide. Further, he felt that Biddle's choice as Alien Property Custodian, Leo Crowley, would abuse his position to reward political hacks with high-paying jobs, instead of entrusting the vested companies to professional managers.

The Treasury-Justice battle was waged from January to March, 1942, with the GAF case as its focal point. Treasury agents had investigated GAF after the Pearl Harbor attack and had concluded that it was cloaking subversive activities. Morgenthau believed that a strenuous purge of GAF by the Treasury might enable it to defeat Justice's arguments, and thus permit Treasury to control other large alien businesses for the war's duration. In the words of Morgenthau's biographer:

> His "back to the wall," Morgenthau, as he told his staff, "decided to fight [any compromise or full transfer of control to Justice]." He did so in a series of reports to the White House about various successful ventures of Foreign Funds Control. The most critical of those reports described the Treasury's investigation of the General Aniline & Film Corporation. For weeks to come, the struggle for control over alien properties focused on the problems of that company. . . .

> Morgenthau [told his staff that] . . . if the Treasury succeeded in handling General Aniline, the Department might then retain control over other large alien businesses. . . .[36]

Morgenthau was granted authority to proceed with his plans to purge the GAF management, but Roosevelt soon thereafter transferred control of alien property to the Justice Department.

B. Litigation, 1945-1959

After the war, the Swiss holding company, I.G. Chemie, attempted to further cleanse itself of any German taint by changing its name into French. It became Societe Internationale pour Participations Industrielles et Commerciales S.A., or Societe Internationale. The German equivalent of this new name was International Industrie und Handelsbeteiligungen A.G., or Interhandel. The names I.G. Chemie, Societe Internationale, and Interhandel all describe the same organization. The author will refer to it by the latter name for the remainder of this article.

Interhandel sought to recover its seized assets from the United States government, claiming that it was neither an enemy nor the ally of an enemy, but merely a corporation organized in a neutral country. After first exhausting its administrative remedies without success, Interhandel brought its case in the courts.

1. *United States courts.* Interhandel sued the Attorney General in October, 1948, under section 9(a) of the Trading with the Enemy Act.[37] The case was heard in the U.S. District Court for the District of Columbia.

The Attorney General relied on an affirmative defense to defeat Interhandel's claims. He contended that Interhandel was part of a conspiracy with the private bank of Sturzenegger and Cie., formerly Greutert and Cie., to disguise Farben's worldwide holdings, and he asserted that discovery of the true identity of Interhandel's shareholders would prove Farben control.

The Attorney General requested pre-trial discovery of relevant documents in the "possession, custody, or control" of Interhandel, pursuant to Federal Rule of Civil Procedure 34(b).

---

36. 3 J. BLUM, FROM THE MORGENTHAU DIARIES: YEARS OF WAR, 1941-1945, at 5-8 (1967).

37. Trading with the Enemy Act of 1917, 50 U.S.C., App. § 9(a) (1946), *amending* Act of Oct. 6, 1917, 40 Stat. 411 (1917).

Interhandel responded that the documents of its alleged subsidiary, the private bank of Sturzenegger and Cie., were not in its possession, custody, or control, and thus that discovery was impossible. The Attorney General then argued that he would be hampered or prevented from establishing his conspiracy defense if a member of the alleged conspiracy were permitted to deny the court access to its records.

In July, 1949, the district court ordered Interhandel to produce the designated documents of the Sturzenegger bank for inspection and copying in Switzerland.[38] Two weeks before the discovery was to be made in June, 1950, the Swiss Federal Attorney ruled that submission of these documents to the planned discovery would violate Swiss laws on economic espionage and banking secrecy,[39] and he took "constructive possession" of the documents, prohibiting the Sturzenegger bank from allowing the Americans to examine them. His decision was affirmed by a vote of the Swiss Nationalrat. Although numerous I.G. Chemie documents were examined by United States officials in Switzerland, the Sturzenegger papers were not produced.

In October, 1950, the Attorney General moved for dismissal of Interhandel's complaint under Federal Rule 37(b)(2)(iii), alleging that the plaintiff had "refused" to permit discovery. The district court submitted the case to a special master to determine whether Interhandel lacked good faith in its failure to comply with the original discovery order.[40]

The special master's final report was submitted to the court in July, 1952. He found that Interhandel had sustained its burden of proof in demonstrating good faith efforts to obtain production of the Sturzenegger documents; that there was no evidence of collusion between the plaintiff and the Swiss government; that there was substantial legal basis for the seizure under Swiss law; and that obtaining consent waivers from those bank customers whose records were involved was not a practical alternative solution. The Attorney General filed exceptions to the master's report and argued

38. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Clark, 9 F.R.D. 263 (D.D.C. 1949).

39. The Banking Law is discussed in the text associated with footnotes 2-7, *supra*. The Economic Espionage Act, Swiss Penal Code, article 273 (1942) (Schweizerisches Strasgesetzbuch (StGB), Code pénal Suisse (C.PÉN.)), makes it a crime to reveal a "business secret" to a "foreign official" or his agent.

40. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. McGrath, 90 F. Supp. 1011 (D.D.C. 1950).

that Interhandel's suit should still be dismissed, regardless of its good faith efforts.

In February, 1953, the district court held that Interhandel's suit would be dismissed with prejudice for failure to comply with the court's July, 1949, discovery order, unless the Sturzenegger documents were produced within three months.[41] The court did not dispute the special master's finding that Interhandel had acted in good faith, but it stressed that an opposite holding would have placed a foreign plaintiff in a more favorable position than an American citizen suing in the federal courts.

For several months, Interhandel petitioned the Swiss government to ease its prohibition to permit disclosure of those documents which would not violate Swiss law. When it became evident that full production was impossible, the district court entered its final

41. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. McGranery, 111 F. Supp. 435 (D.D.C. 1953); *noted in* 2 AM. J. COMP. L. 536 (1953); 66 HARV. L. REV. 1316 (1953); 62 YALE L.J. 1248 (1953).

Dismissal with prejudice means that the case may be appealed, but not reopened.

In the meantime, minority shareholders of Interhandel who were United States citizens, and who claimed to represent more than one-third of the voting stock and more than one-half the ownership equity of GAF, had commenced a parallel action. They claimed the right to intervene in Interhandel's suit under Federal Rule of Civil Procedure 24(a). Their theory was that the Attorney General could retain only that interest in the seized assets proportional to enemy stock ownership and that, since the corporation was enemy-controlled, the dominant shareholders would not adequately protect their interest.

The district court denied their motion to intervene and the court of appeals affirmed. Kaufmann v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A., 188 F.2d 1017 (D.C. Cir. 1951). The Supreme Court reversed by a 5-3 vote, holding that the severable rights of non-enemy stockholders of a neutral corporation to their proportionate interest in seized corporate assets must be fully protected, even if the corporation is enemy-dominated. Kaufmann v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A., 343 U.S. 156 (1952).

The *Kaufmann* majority was strongly criticized in the dissenting opinion and by law review commentators. The majority was accused of disregarding the corporate law principle that a shareholder has no present interest in the specific corporate assets, that any pre-liquidation return of assets to shareholders would be harmful to corporate creditors (which here included the war claims fund), and that the proper remedy for such shareholders should be limited to individual suits for money damages against the Attorney General. *Noted in* 40 CALIF. L. REV. 558 (1952); 52 COLUM. L. REV. 799 (1952); 51 MICH. L. REV. 651 (1953); 27 ST. JOHN'S L. REV. 139 (1952); 22 U. CIN. L. REV. 276 (1953); 62 YALE L.J. 1210 (1953).

The *McGrannery* court held that the dismissal order would not apply to the claims of the *Kaufmann* intervenors, since they never had possession, custody, or control of the Sturzenegger documents.

dismissal in November, 1953.[42] The court of appeals affirmed, but allowed six more months of grace.[43] The Swiss government proposed a compromise whereby a neutral expert investigator would examine the Sturzenegger records with the consent of all the parties to the case. The district court rejected the proposal, and denied Interhandel's motion to vacate the dismissal. The court of appeals re-affirmed.[44]

Interhandel had been in default of the production order for seven years before the district court's dismissal became final. The original discovery order called for the examination of some 700 jackets, 140 account books, and 2,500 original documents.[45] In seven years, over 190,000 documents had been offered by Interhandel, but none of the crucial Sturzenegger papers were included. The State Department conceded to the Swiss government that Interhandel had exhausted its domestic remedies.

However, in June, 1958, the United States Supreme Court reversed the lower courts by unanimous vote. It held that, despite the effect of Swiss law, the Sturzenegger papers *were* within Interhandel's "control" under the meaning of Federal Rule of Civil Procedure 34. However, it found the Rule 37 dismissal of Interhandel's suit to be an unconstitutional denial of due process, because Interhandel's non-compliance had been due to its *inability* to produce the documents, and not due to *wilfulness* or *bad faith.* The case was remanded with instructions to require additional evidence of good faith, explore plans for fuller compliance, or proceed to trial on the merits.[46]

2. *International litigation.* After the district court's dismissal became final, but before the Supreme Court had agreed to review the case, the Swiss government interceded on Interhandel's behalf with diplomatic efforts. On August 9, 1956, the Swiss govern-

42. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Brownell, 15 F.R.D. 83 (D.D.C. 1953).

43. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Brownell, 225 F.2d 532 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 937 (1956).

44. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Brownell, 243 F.2d 254 (D.C. Cir.), *cert. granted,* 355 U.S. 812 (1957), *rev'd,* 357 U.S. 197 (1958).

45. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Clark, 9 F.R.D. 263, 266 (D.D.C. 1949).

46. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958); *noted in* 46 CALIF. L. REV. 836 (1958); 107 U. PA. L. REV. 103 (1958).

ment delivered a note to the State Department, charging the United States with violation of the Washington Accord of May 25, 1946, because of its failure to release Swiss assets within the United States. The note requested the United States to submit the Interhandel controversy to arbitration or conciliation, in conformity with the provisions of the United States-Swiss Treaty of Arbitration and Conciliation of February 16, 1931.[47]

The United States rejected the Swiss request in a note and memorandum dated January 11, 1957.[48] The State Department relied on its unilateral interpretation of the 1931 and 1946 treaties, and asserted that the subject matter of the difference was within the domestic jurisdiction of the United States. It would seem that conflicting interpretations placed on the two treaties by the two governments would have made the matter a question of "treaty interpretation" and thus beyond the exclusive domestic jurisdiction of one of the parties. However, the United States argued that, insofar as the 1931 and 1946 treaties dealt with the issue at all, they confirmed the domestic jurisdiction of the United States in the Interhandel controversy, and thus gave rise to no obligation to submit the matter to arbitration.

Thus rebuffed diplomatically, Switzerland sued the United States in the International Court of Justice at The Hague, in October, 1957. Switzerland claimed the compulsory jurisdiction of the Court,[49] and prayed for restoration to Interhandel of GAF's assets or, in the alternative, submission of the dispute to arbitration.

The United States responded with several preliminary objections to the jurisdiction of the International Court. The most important of these stated that Interhandel had not exhausted local remedies available to it in the United States courts and that American acceptance of the International Court's jurisdiction was subject

47. Arbitration and Conciliation Treaty with Switzerland, Feb. 16, 1931, 47 Stat. 1983 (1931), T.S. No. 844 (effective May 23, 1932).

48. 36 DEP'T STATE BULL. 350 (1957).

49. Article 36(2) of the Statute of the International Court of Justice provides in part:

> The States parties to the present Statute may at any time declare that they recognize as compulsory . . . the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.

to an automatic reservation (the Connally Amendment)[50] which excluded matters within the United States' domestic jurisdiction.

In March, 1959, the International Court rendered judgment on the preliminary objections. By a nine-judge majority, it held the Swiss application inadmissible for failure to exhaust domestic remedies.[51] The Court found it unnecessary to adjudicate the validity of the Connally Amendment.

C. Settlement, 1961-1965

After eleven years in the courts, the Interhandel case was no closer to resolution than it had been in 1948. The Interhandel shareholders and the Swiss government were apparently prepared to litigate indefinitely for the return of their assets, but two factors compelled the United States to seek a settlement.

The first was the business performance of GAF. The firm's daily operations were run with only minimal intrusion from the Justice Department, but pressure was mounting to get the Attorney General out of the dye and chemical business. GAF's 1963 sales of $179 million ranked it as the 273d largest industrial corporation in the United States. Impressive as that seems at first glance, a closer look at the then rapidly-expanding chemical industry shows that GAF was operating well below its full potential.[52] In large

---

50. Declaration of the United States of America of August 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598. The Declaration reads in part:

> [T]his declaration shall not apply to . . . (b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America.

The United States' reliance on the Connally Amendment in the Interhandel case is strengthened by the fact that it has always claimed the right to invoke unilaterally such a domestic jurisdiction reservation and by the fact that the Swiss government itself recognized this claim in its ratification message on the Treaty of Feb. 16, 1931. *See* Jacoby, *Towards the Rule of Law?*, 52 AM. J. INT'L L. 107, 111 (1958).

The United States has been criticized for setting up its own laws as an excuse for failure to fulfill its international obligations. *See* Recent Decision, *Federal and International Proceedings—United States Acceptance of International Court of Justice Compulsory Jurisdiction*, 58 MICH. L. REV. 467 (1960); Briggs, *Towards the Rule of Law? United States Refusal to Submit to Arbitration of Conciliation the Interhandel Case*, 51 AM. J. INT'L L. 517 (1957).

51. Interhandel Case (Preliminary), [1959] I.C.J. 6.

52. While GAF's sales rose 155% and its net income rose 6% from 1946 to 1962, the comparable figures for Dow Chemical, a competitor, were 703% and 409%. NEWSWEEK, Sept. 24, 1962, at 70. In 1962, a leading GAF product earned 3% return on sales, while Eastman Kodak, a competitor, earned 13.3%. NEWSWEEK, Mar. 18, 1963, at 79.

part, this was the result of management practices designed to conserve assets for eventual sale or liquidation, thus forfeiting growth opportunities.

The second factor was GAF's role as an embarrassing political issue. A succession of Attorneys General had packed the GAF Board of Directors with patronage appointees.

> The government [had] installed seven different chief executives during its regime and scores of directors, with a heavy preponderance of professional politicians and politically-oriented businessmen. . . . [I]t seemed . . . clear that the Attorney General was bestowing directorships on the party faithful much as the Queen doles out Birthday Honors.[53]

During the Kennedy Administration, even selection of GAF's accounting firm and advertising agency was influenced by cronyism.[54]

In addition, the court case was costing the United States millions, with no prospect for clear-cut victory.[55] In October 1962, the Congress approved amendments to the War Claims Act of 1948, and the Trading with the Enemy Act permitting the Attorney General to sell GAF stock to the highest bidder among American investment banking and underwriting firms, with the successful bidder then required to offer the stock at public sale, and the

---

53. Ross, *General Aniline Goes Private*, FORTUNE, Sept. 1963, at 127, 129.

54. *Id.* at 144. Ross further states:

> For twenty years, until it was dismissed in 1961, Arthur Anderson & Co. had checked the [GAF] books. . . . [Now] one of the nation's leading accountants was replaced by an obscure New York firm, Wright, Long & Co.
>
> It did not escape Republican notice that Wright Long's chief qualification appeared to be Carmine Bellino's association with it. Bellino . . . had been largely responsible for developing [the Senate Rackets Committee] case against Teamster leader Dave Beck and, in the process, helping to elevate Robert Kennedy to national prominence. . . .
>
> In November, 1960, Reach, McClinton & Co. won the [GAF advertising] account in a competition against nine other firms. The following April, after the Kennedy Administration took over, it cancelled Reach, McClinton's contract. The company then hired Lennen & Newell, one of the competitors the preceeding autumn. One of Lennen & Newell's vice-presidents, K. LeMoyne Billings, is a close friend of President Kennedy's. Having been attacked for this rather personal choice, the Attorney General now argues that Billings' devotion to the Kennedy Administration has persuaded him that Lennen & Newell would put forth especially strenuous efforts on behalf of General Aniline.

Id.

55. In a March, 1963 press conference, President Kennedy remarked that Interhandel was the type of case only lawyers could enjoy. One of those lawyers might have been John J. Wilson, who had represented Interhandel in the United States courts since 1941, and was reported to have received nearly $1 million in legal fees.

proceeds to be held in escrow until final resolution of the Interhandel suit.[56] Interhandel advised that any attempt to sell the stock would prompt it to test the constitutionality of the new legislation.

Over great opposition within the Treasury and Justice Departments, Attorney General Robert Kennedy offered to settle. The Interhandel shareholders voted to accept the offer in March, 1963, and the proposal was approved by the district court.[57] A formula was devised to re-capitalize the GAF stock, and bidding procedures were devised.

In March, 1965, a 225-member underwriting syndicate submitted the winning bid of $329.1 million, or $29.47 per share. The stock was subsequently offered for resale to the public at $30.60 per share. The sale price was divided among the parties: $1.5 million for expenses, $17.5 million to the United States for back taxes, $120.9 million to the Interhandel shareholders, and $189.2 million to the United States for its war claims fund.[58]

IV. UNITED STATES EFFORTS TO PENETRATE BANK SECRECY SINCE 1965

The most striking difference between the American attempts to probe bank secrecy during the World War II era and the efforts of the past decade is the reversed roles of the Swiss and United States governments. In 1945, the United States held all the bargaining power: it had frozen Swiss funds, blacklisted Swiss firms, refused to trade goods necessary to Swiss survival and vested GAF assets. Until Switzerland disclosed the bank secrets concerning the Safehaven Program and Interhandel, the United States could afford to sit passively.

With the realization that American citizens had been able to violate, evade or avoid American laws through the device of Swiss bank accounts, the United States found itself in the role of supplicant. This problem is widespread. One estimate indicates that 20,000 to 30,000 Americans have Swiss bank accounts with an aggregate value of between $100 and $200 million.[59] As Ameri-

56. *See* Pub. L. No. 87-846, 76 Stat. 1107, *amending* 50 U.S.C., App. § 9(a) (1946).

57. Unreported opinion. *See* N.Y. Times, Apr. 19, 1964, § III, at 1, col. 6.

58. The Interhandel share was further divided among the *Kaufmann* intervenors and parties known only to their Swiss bankers. *See* note 41, *supra.*

59. Comment, *Swiss Banks and Their American Clients: A Fading Romance,* 3 CALIF. W. INT'L L.J. 37 n.2 (1972).

can officials realized that they desperately needed assistance from the Swiss, demands gave way to requests, and confrontation turned into cooperation.

It is curious that American interest in Swiss bank secrecy should peak during the late 1960s. Part of the reason lies in the prosperity which that decade brought. A growing American upper middle class, increasing financial sophistication, a prolonged bull market in securities, and relatively low-cost jet travel between North America and Europe all contributed to an increase in white collar crime which, by 1968, was simply too onerous to ignore. Another reason is more subtle, however. That reason is politics. When the Democrats lost the 1968 presidential election to the Republicans, they wanted to leave their successors a thorny issue which would prove too embarrassing for the Republicans to ignore. The bank secrecy question was most opportune, since the Republicans had campaigned, in part, on the crime issue. In 1968, during the waning hours of the Johnson Administration, the pressure to act on the bank secrecy question came from the Justice Department. The chief protagonists were Robert M. Morgenthau, U.S. Attorney for the Southern District of New York, and Fred M. Vinson, Jr., Assistant Attorney General, in charge of the Criminal Division. Both men are the sons of the individuals most responsible for the hard-line American policy against Swiss bank secrecy during the 1940s, Treasury Secretary Henry Morgenthau, and his successor, Fred M. Vinson, Sr. In most respects, the sons outperformed their fathers.

A. The Discovery of the Bank Secrecy Crime Problem

Various American criminal prosecutions have established that bank secrecy laws have furnished protection for a variety of illegal activities. The most important of these are the avoidance of American securities laws, evasion of American taxes and financing of other crimes.

1. *Avoidance of securities laws.* Swiss banks provide a wide range of investment and brokerage services for their customers. To deal in American securities, they maintain "omnibus accounts" at American brokerage houses, and trade for their customers in the bank's name. Inspection of the broker's records by American officials will indicate only trades under the bank's account. Thus, bank secrecy conceals the identity of the real party in interest. During the bull market of the 1960s, this system was abused by

American investors to violate margin requirements, manipulate market prices, and retain short-swing insider trading profits.

The Federal Reserve Board exempts such omnibus accounts from the general margin requirements of the Securities Exchange Act of 1934.[60] The exception permits brokers and dealers, including foreign banks, to extend large amounts of credit to each other, and its misuse permits American investors to trade or purchase securities on insufficiently collateralized credit. Bank secrecy shields corporate insiders from the various disclosure requirements of the 1934 Securities and Exchange Act, such as the short-swing insider trading report required by section 16(a), and the report of takeover bids and tender offers involving the acquisition of more than five percent of a corporation's stock required by section 13(d).

A 1968 government estimate stated that about eight percent of all New York Stock Exchange transactions had been conducted by foreign banks.[61] Another was more specific:

> Swiss purchases of U.S. securities, virtually all of which were originated by Swiss banks acting for clients, amounted to $232 million in 1967, about 32% of all the American markets' foreign intake. [In 1968], the figure climbed to $811 million, 37% of the total.[62]

A few examples will illustrate the dangers.

The American promoters of Gulf Coast Leaseholds, Inc. acquired a large quantity of worthless, unregistered over-the-counter stock in 1954. They then sold this stock to Liechtenstein-based trusts, which they controlled, and created a market in Gulf Coast shares. When the price rose to $16 a share, the promoters took their profits and deposited them in the Swiss bank accounts of the Liechtenstein trusts, while the stock value declined to less than one dollar per share. By this market manipulation, one of the promoters realized a profit of $4 million on an original investment of under $21.[63]

The Arzi Bank of Zurich, Switzerland, and the New York

60. Margin requirements are established under section 7 of the Securities Exchange Act of 1934, 48 Stat. 886, *as amended* 15 U.S.C. § 78g (1970). *See* 12 C.F.R. § 207.5 (1970).

61. TIME, Dec. 20, 1968, at 75.

62. BUS. WEEK, Nov. 8, 1969, at 120.

63. *See* United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

City brokerage firm of Coggeshall and Hicks pleaded guilty[64] in 1968 and 1969, respectively, to margin violations. The employees and customers of Coggeshall and Hicks had traded $20 million in securities during the period of 1964 to 1968 through accounts at the Arzi Bank and Arzi's omnibus account, at only 10-20% margin. The scheme yielded over $225,000 in commissions to the brokerage firm, in addition to the profits on the trades.[65]

In a bull market, when "hot issues" of new securities often sell at market prices above their offering prices, the underwriter sometimes does not distribute them to the general public, but instead reserves them for favored customers. A 1969 indictment charged the President of First Hanover Corp., a New York underwriter, with issuing a misleading prospectus on three such new issues. He had failed to disclose that significant amounts of these new issues were purchased by a dummy Panamanian corporation, of which the accused was a 48% owner, via Swiss bank accounts. By this device, he realized a 300% increase over the purchase price of the stock.[66]

A 1970 indictment charged a conspiracy between the Weisscredit Bank of Chiasso, Switzerland, the First Vice President of Shearson, Hammill and Co., a New York City brokerage firm. The conspiracy had permitted the American customers of Shearson, Hammill to purchase securities through Weisscredit's omnibus account by posting as little as 20% margin. The Federal Reserve Board required payment of 70-80% cash on such purchases at the time, and thus over $3 million of illegal credit was extended.[67]

2. *Income tax evasion.* A variety of income tax evasion schemes has been employed by Americans with Swiss accounts.

The simplest device is "skimming". Unreported cash receipts are deposited in Swiss bank accounts by individuals such as self-

64. The guilty plea of the Arzi Bank is noteworthy for several reasons. By voluntarily placing itself under an American court's jurisdiction, it became the first Swiss bank to admit to criminal acts. Why? By pleading guilty and paying a $2,500 fine, Arzi negotiated the return of over $1 million in securities held for it by various brokerage houses in New York, which were seized by the government as "fruits of the crime." N.Y. Times, Nov. 30, 1968, at 59, col. 7; *id.*, Dec. 20, 1968, at 71, col. 7. The Swiss Bankers Association stated that its members observe American margin requirements, and noted that Arzi was not an Association member. N.Y. Times, Dec. 12, 1968, at 78, col. 2.

65. *See* authorities cited in footnote 64, *supra.*

66. N.Y. Times, July 29, 1969, at 45, col. 1.

67. N.Y. Times, Jan. 15, 1970, at 61, col. 4.

employed professionals, retailers, or gambling casino operators whose cash receipts are free from withholding tax. Businesses with income from foreign sources have used double invoice systems to divert part of their receipts into Swiss accounts. Others have "loaned" money to a foreign corporation and then claimed a bad debt deduction when the latter defaulted on the "loan". In reality, the lender owned the borrowing company and his "loan" was simply a payment into his own Swiss account. Some firms have established business trusts abroad to receive the commissions for services they have performed, and then channeled receipts from the trusts into Swiss accounts.

Once cash receipts are deposited in a Swiss account, other possibilities arise. Income from interest, dividends from securities, and trading profits from such an account are not reported to the Internal Revenue Service. Some taxpayers have even claimed an interest deduction on foreign-source "loans" which are actually withdrawals from their own accounts. These and other possibilities for abuse seem endless.

3. *Other criminal activities.* Various responsible spokesmen for the United States government have observed that Swiss bank secrecy furnishes protection for white collar crimes by thwarting the efforts of investigators and prosecutors. The most complete airing of these charges occurred at the December, 1969 hearings on H.R. 15073 before the Committee on Banking and Currency of the U.S. House of Representatives.[68]

Various witnesses at these 1969 hearings alleged that black market currency dealings,[69] bribes and kickbacks to government and military officials,[70] laundering of stolen money and securities,[71] and financing of illegal narcotics traffic[72] have all been hidden from American investigators by Swiss bank secrecy. More recently, the Defense Department charged that Swiss accounts have

68. *Hearings on H.R. 15073 Before the Committee on Banking and Currency*, 91st Cong., 1st Sess. (1969).

69. Statement by Lane Dwinell, Agency for International Development, *id.* at 122-28.

70. Statement by Frank A. Bartimo, Assistant General Counsel, Manpower & Reserve Affairs, Department of Defense, *id.*, at 128-35.

71. Statement by Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice, *Hearings on the Legal and Economic Impact of Foreign Banking Procedures on the United States Before the House Committee on Banking and Currency*, 90th Cong., 2d Sess. at 7-10 (1968).

72. Statement by Robert M. Morgenthau, U.S. Attorney for the Southern District of New York, *id.*, at 45.

concealed payments to American military personnel who had supplied intelligence information to foreign governments.[73]

One of the largest of such criminal cases was concluded in October, 1969, when Francis Rosenbaum and Andrew Stone pleaded guilty to defrauding the United States Navy of $4.6 million on a defense contract. The two were officers of Chromcraft Corporation of St. Louis which was the successful bidder on a $50 million contract with the Navy to manufacture a rocket launcher. Chromcraft sub-contracted parts of the work to dummy Swiss corporations which ostensibly were performing work overseas. These Swiss corporations established by the defendants submitted fraudulent bills for materials to Chromcraft, which, in turn, charged the Navy. Payments by the Navy eventually filtered into the defendants' Swiss bank accounts.[74]

4. *Scope of the problem.* These allegations by United States officials concerning the abuses of bank secrecy are serious. Two striking features of the problem have not been widely discussed, yet are vital to a balanced perspective.

First, the bank secrecy abuses are generally confined to the fringes of the Swiss banking system. Most of the flow of American dollars to Swiss banks is openly deposited and withdrawn for legitimate ends.[75] Since 1952, member banks of the Swiss Bankers Association have observed the Federal Reserve Board's margin requirements when buying American securities for American customers. Since 1957, no Swiss bank has knowingly permitted itself to become involved in an American corporate proxy battle.[76] Most banks insist that they accept deposits only from persons whose true identity and business backgrounds are known, and must satisfy themselves that the money they take is not stolen.

The Swiss Bankers Association has repeatedly observed that most of the bad publicity about "Swiss banks" is generated by foreign-owned banks and the handful of small Swiss-owned banks which are not Association members.

> There are tiny banks, many of them owned by non-Swiss, that probably will take money with no questions asked. . . .

---

73. Wash. Post, Dec. 25, 1969, at A-8, col. 1.

74. N.Y. Times, Nov. 30, 1969, at 62, col. 1; *id.*, Dec. 4, 1969, at 40, col. 5; Wash. Post, Feb. 11, 1970, at A-8, col. 1.

75. U.S. NEWS & WORLD REP'T, Dec. 23, 1968, at 73.

76. Comment, *Swiss Banking Secrecy*, 5 COLUM. J. TRANSNAT'L L. 128, 135 (1966).

> But the . . . Big Five commercial banks, the cantonal banks . . . [and] the private banks—are a different breed altogether. They are decidedly . . . so big and so successful that they do not have to shave corners.[77]

More than fifty such small institutions have sprung up since 1950. This proliferation results from the permissive attitude of the Swiss towards the establishment of new banks. Unlike the United States, there is no requirement in Switzerland that a need for a new bank be shown.[78]

Given the importance of the banking industry to the Swiss economy, it is not surprising that criticism from abroad has stung the Swiss. In cases where crimes are prosecutable under both Swiss and United States law, the Swiss bankers and government have moved decisively to assist American investigators. The most publicized example of this cooperation was the 1972 case against Clifford and Edith Irving over the "Howard Hughes hoax."[79]

The second, and more neglected, aspect of the bank secrecy issue is the manner in which an American "national problem" has been extrapolated from a purely New York City phenomenon.

Publicity about bank secrecy abuse has originated largely from New York. Apart from an occasional congressional story in the Washington newspapers, coverage has been restricted to the *New York Times* and *Wall Street Journal.* Legal periodical literature reflects a New York bias as well, with the bulk of commentary since 1965 supplied by publications from such law schools as Albany, Brooklyn, Columbia, Fordham, New York University, Syracuse and Yale.[80] Some of this is attributable to New York's

---

77. BUS. WEEK, Apr. 17, 1971, at 80.

78. Comment, *Secret Foreign Bank Accounts,* 6 TEXAS INT'L L.F. 105, 124 (1970).

79. BUS. WEEK, Feb. 5, 1972, at 25-27. Edith Irving opened a Swiss account in the name of H.R. Hughes, into which three checks worth $650,000 were deposited for Clifford Irving's alleged work on the AUTOBIOGRAPHY OF HOWARD HUGHES. Edith withdrew the money in cash almost as soon as the checks had cleared, then deposited over $440,000 in a second bank across the street, under the name of Hanna Rosenkranz, and finally, invested a portion of the money in American securities. When the victim, McGraw-Hill Publishing Co., filed a memorandum of possible fraud with the Zurich District Attorney, the banks released their evidence to the Swiss investigating officials, who ultimately impounded the cash and securities. Evasion of American taxes is not a Swiss criminal offense (*see* text associated with footnote 117, *infra*), but Edith Irving was charged with fraud and the illegal use of an altered passport, both of which are Swiss crimes.

80. *See* note 76 *supra,* and notes 108-09, 112, 123 & 124 *infra.*

role as a leading financial, business, and banking center, but more of it stems from New York politicians who have long found it advantageous at election time to be "against" Swiss banks.

In 1957, State Attorney General Louis Lefkowitz accused three trusts administered through Swiss banks, of defrauding the American public of $6 million, but complained bitterly that he was powerless to halt the fraud.[81] New York's large Jewish population has been particularly sensitive to questions concerning Nazi Germany. Thus, it was front page news in 1964 when U.S. Senator Kenneth Keating accused his election challenger, Robert Kennedy, of turning over $60 million to a "huge Nazi cartel" by settling the Interhandel case. Kennedy called the charge a smear and observed that Keating had introduced legislation to facilitate the sale.[82] In the 1970 state attorney general election, Lefkowitz's challenger alleged that his failure to curb Swiss bank account transactions had cost the state $250 million in lost revenues.[83] But by far the major source of pressure for criminal prosecutions, publicity, and legislative reform has been Robert Morgenthau, a twice-unsuccessful candidate for the New York governorship, who was U.S. Attorney for the Southern District of New York between 1961 and 1969. In his own words:

> [A]n intensive investigation [on the illegal use of secret accounts] was conducted by my office when I was United States Attorney. . . . During the course of that investigation . . . more than 75 persons were indicted, and dozens of cases were referred to the Internal Revenue Service for criminal investigation. For each case we prosecuted, however, there were roughly six cases where we had specific information that a crime had been committed, but we were unable to prosecute either because we lacked the resources to complete the investigation, or because the evidence we had was inadmissible in court.[84]

Bank secrecy prosecutions have been brought subsequently in other jurisdictions, but most have been isolated cases which fell into a prosecutor's lap when a disenchanted co-conspirator con-

81. N.Y. Times, Apr. 24, 1957, at 1, col. 4.

82. N.Y. Times, Sept. 21, 1964, at 1, col. 3; *id.*, Sept. 22, 1964, at 1, col. 5; *id.*, Sept. 23, 1964, at 35, col. 1.

83. N.Y. Times, Nov. 1, 1970, at 74, col. 3.

84. Address by Robert M. Morgenthau to the American Management Association, May 27, 1970, 36 VITAL SPEECHES 553, 554 (1970).

fessed. Morgenthau's investigations are, to date, the most systematic and complete.

Mr. Morgenthau's uncommon tenacity in prosecuting bank secrecy crimes is interesting in view of his father's earlier involvement with the issue at the Treasury Department in the 1940s. Yet these two men share more than blood; they share the New Deal Democrat's suspicion and hostility for businessmen, and most especially, for "business crimes" such as tax crimes. The father's views are recorded by his biographer:

> Morgenthau . . . considered the [high income tax] rates of the 1930s eminently just, and the toleration of tax avoidance, a crime against society. . . . In this spirit, Morgenthau spurred the prosecution of criminal charges of tax evasion . . . against [his predecessor as Secretary of the Treasury, Andrew] Mellon in March 1934 . . . . Morgenthau said "I consider that Mr. Mellon is not on trial but Democracy and the privileged rich and I want to see who will win." In court, Mellon won. . . . Things the courts approved outraged the Secretary's personal sense of justice.[85]
>
> Morgenthau was determined to use federal authority to insure honest business behavior. . . . He was solicitous of small business, suspicious of big business, and especially wary of the motives of the giant institutions of American finance.[86]

The son's views differ in style, but not in content:

> It would be unfortunate . . . if the . . . war on crime were to be viewed as solely a war on the crimes of the poor and underprivileged. . . . [I]t is a deplorable fact that in the past we have tended to treat more sympathetically the businessman guilty of tax fraud or the broker guilty of stock fraud than the poor man guilty of auto theft or hijacking a truck. . . . [T]he vitality of our country rests in substantial part upon the willingness of free men freely to contribute their proportionate share to the national revenue.[87]

In large measure, the American posture towards Swiss bank secrecy is an outgrowth of these attitudes concerning white collar crimes. It is important to recognize that the success of American

85. 1 J. BLUM, FROM THE MORGENTHAU DIARIES: YEARS OF CRISIS, 1928-1938, at 324-25 (1959).

86. 2 J. BLUM, FROM THE MORGENTHAU DIARIES: YEARS OF URGENCY, 1938-1941, at 4 (1965).

87. Address by Robert M. Morgenthau, *supra* note 84, at 557.

foreign policy efforts has been inversely proportional to the "righteousness" displayed by American representatives abroad. The statements above by Secretary Morgenthau offer no hope of compromise, and as a result, American-Swiss relations were poor at the end of World War II. The milder rhetoric of the younger Morgenthau has led to much better results.

B. Unilateral Action: The 1970 Bank Secrecy Act

By 1968, the role of bank secrecy in thwarting American law enforcement had become obvious. Preliminary bilateral discussions between the United States and Switzerland had started, but did not seem promising, and therefore, domestic action was commenced.

1. *Legislative history.* The House of Representatives Committee on Banking and Currency convened to study the problem and to explore unilateral domestic solutions. Two days of investigative hearings were held in December, 1968. Committee Chairman Wright Patman[88] initially hoped for legislation which would prohibit the use of accounts in bank secrecy jurisdictions by Americans unless complete disclosure was first made. Witnesses from the Justice Department and the Securities and Exchange Commission convinced him of the impracticality of that approach, and of the need for domestic banks to keep more extensive records of customer transactions to combat the problem. However, further action was postponed.

Substantial action was commenced in the next Congress when, on December 3, 1969, Chairman Patman introduced bank secrecy legislation drafted by his Committee staff in cooperation with Treasury and Justice Department officials. His Committee conducted extensive and well-publicized hearings on the proposed legislation (H.R. 15073), taking six days of testimony in December, 1969, and February and March, 1970. On March 28, 1970, the Committee reported the Patman bill to the full House with approval recommended unanimously. After a brief and unevent-

88. It is beyond the scope of this paper to discuss at any length Rep. Wright Patman's enormous influence in shaping the banking laws. It is worthy of note that he has been a lifetime foe of banking power concentration. Patman, until his recent death at age eighty-two, was *the* most senior member of the House of Representatives, having served continuously for forty-seven years since 1929. He chaired the Banking and Currency Committee from 1963 to 1974.

ful floor debate, the bill gained House approval on May 25, 1970, by yet another unanimous vote.[89]

Senator William Proxmire introduced similar legislation of his own (S. 3678) on April 6, 1970. Proxmire's bill transcended Patman's in only two respects: first, trading in American securities by foreign banks would be halted unless such banks disclosed the identity of the account holder for whose benefit they were trading, or certified that they were not trading for American citizens; and second, Americans with foreign bank accounts were required to grant their foreign bankers the necessary waiver to permit disclosure of their identity.

Proxmire's bill was referred to the Senate Committee on Banking and Currency, and four days of hearings were conducted in June, 1970, before the Subcommittee on Financial Institutions. Those hearings were perfunctory,[90] as supporters of the bill simply read prepared statements into the record and responded to occasional questions from Senators Proxmire and Wallace Bennett. Opponents, who objected to the burdensome recordkeeping and reporting features of the bill, rather than its purpose, waived the opportunity to testify, and submitted their prepared statements for inclusion in the record. The Subcommittee recommended the bill to the full Committee on July 29, 1970. On August 4, 1970, the Committee reported the bill to the Senate, recommending approval, and the full Senate approved the Proxmire bill on September 18, 1970, by an unrecorded vote.

A joint House-Senate Conference Committee met October 5, 1970, and adopted the Patman version of the legislation which President Nixon signed into law on October 26, 1970.

2. *Provisions.* The 1970 Bank Secrecy Act[91] was designed to make impossible the anonymous movement of large sums of money between American banks and banks in secrecy jurisdictions, including Switzerland. Its basic premise is that if recording and reporting requirements are imposed on domestic banks, and if

89. *See* H.R. REP. No. 975, 91st Cong., 2d Sess. (1970); 116 CONG. REC. 16949-73 (1970).

90. The Senate's inattention to the Bank Secrecy Act may be partially excused by the large number of extraordinarily important issues pending in 1970. Among them were the Carswell nomination to the U.S. Supreme Court, the introduction of American combat troops from Vietnam into Cambodia, and appropriations debates over the Safeguard Anti-Ballistic Missile and Supersonic Transport.

91. 12 U.S.C. §§ 1829b, 1730d, 1951-59; 31 U.S.C. §§ 1051-1122 (1970).

American citizens are unable to use domestic banks as conduits to move money secretly out of the country, then American investigators and prosecutors will no longer need to seek information protected by foreign secrecy laws. The statute contains three main subdivisions.[92]

Title I deals with financial recordkeeping. All instruments and documents passing through domestic financial institutions must be recorded by such institutions according to regulations prescribed by the Secretary of the Treasury. The institutions must maintain records indicating each account holder's identity and that of persons authorized to act on behalf of the account. They must microfilm or photocopy all checks received for deposit or collection, or presented for payment. Domestic transactions, regardless of amount, are subject to these requirements. The institutions must retain these records for a prescribed period, not to exceed six years. The Secretary may gain access by subpeona to such records as he needs, and may exempt parties from these requirements by regulation. Compliance with the regulations is enforced by injunction and civil or criminal penalties.

Title II is the Currency and Foreign Transactions Reporting Act. The first of its three chapters requires reports of domestic currency transactions to be filed with the Secretary by both the financial institution and the individual involved. The intent is to call attention to the deposit or withdrawal of large amounts of currency under unusual circumstances which may betray criminal activity. The Secretary is to delineate the breadth of reporting required.

The second chapter requires reports of currency imports and exports in amounts over $5,000 to be filed with the Secretary by the financial institutions and the individual. This does not impose any limit on the exporting of dollars, but it does require disclosure in order to combat tax evasion and the hiding of assets abroad. The regulations are to be drawn so as not to unreasonably burden persons legitimately engaging in international currency transactions.

92. Various Senate floor amendments which added titles relating to credit cards and consumer credit reporting are irrelevant to the present discussion. The Act's record-keeping requirements merely formalized the established procedure of most banks, which had voluntarily retained such records in the past. Domestic currency transaction reporting by bank customers had been required by earlier Treasury regulations.

Under the third chapter the Secretary may require detailed records and reports from those individuals who transact business or maintain relationships with a foreign financial agency. Access to an individual's records may be gained only by subpeona. Compliance is assured by provisions similar to those of Title I.

Title III amends section 7 of the Securities Exchange Act of 1934. Margin requirements in securities transactions are hereby applied to American borrowers, without regard to the location of the lender's place of business or where the transaction occurred. Under the prior law, only lenders were bound to comply with the margin requirements,[93] and borrowers trading on overextended credit risked no liability. The intent of this provision is to protect the stability of American securities markets by regulating more closely the amount of foreign credit that can be extended to Americans.

3. *Opposition to the Act.* The lopsided congressional vote in favor of the 1970 Bank Secrecy Act gives no hint of any disagreement. In fact, however, the Act's opponents operated behind the scenes, and strongly influenced the regulations subsequently issued by the Treasury.

In December, 1969, it appeared that the Nixon Administration and Chairman Patman shared a common view on the nature of the remedial action needed to combat the bank secrecy problem. The input of Justice and Treasury officials in drafting H.R. 15073 has been mentioned above. Various Justice Department spokesmen endorsed H.R. 15073 during the Decmber 4, 1969 testimony before the Patman Committee. The Administration's position changed, however, after consultation with the American Bankers Association and a number of major banks. Subsequent Treasury Department witnesses informed the Committee that the bill was too burdensome on the banks, interfered with international commerce, and that alternatives were necessary.[94]

93. In *Metro-Goldwyn Mayer, Inc. v. Transamerica Corp.*, 303 F. Supp. 1354, 1357-58 (S.D.N.Y. 1969), foreign banks were held to be exempt from the margin requirements of section 7 of the Securities Exchange Act of 1934 by virtue of section 30(b) of the same act.

94. M. MINTZ & J. COHEN, AMERICA, INC. 272-77 (1971). One of the first casualties of this Treasury-Justice conflict was Robert Morgenthau, a Democratic appointee who had remained in office nearly a year into the Nixon Administration. The summary manner in which his resignation was secured caused some observers to suggest that he was dismissed for his aggressiveness on bank secrecy. Representative Charles A. Vanik urged the House of Representatives to subpoena all Morgenthau's files on bank secrecy so that they would not "disappear." N.Y.

> The Treasury want[ed] Swiss co-operation in maintaining the international balance of payments and monetary stability. The State Department [was] intent on preserving good relations because the Swiss [had] been helpful in American intelligence gathering activities, while the banks, and their allies, the brokerage houses, [had] a financial stake in unhampered commerce with the Swiss.[95]

The Treasury proposed an alternative, multi-phased attack on foreign bank secrecy. American taxpayers would indicate on their annual returns the existence of any foreign bank or brokerage accounts.[96] The Secretary would require domestic banks to keep records only of certain specific foreign transactions. A change in the Internal Revenue Code would call for a rebuttable presumption that foreign transactions by American taxpayers involved taxable income, in the absence of contrary proof. Domestic financial recordkeeping would be discretionary, with the Secretary to determine its need.

The Justice Department pressured the Treasury to withdraw its opposition to H.R. 15073. In March, 1970, Assistant Secretary of the Treasury Eugene Rossides did endorse similar legislation, but offered amendments to the recordkeeping program which the Committee rejected.

Banking industry opponents were more successful in formu-

Times, Dec. 19, 1969, at 49, col. 7. Patman suggested that Morgenthau was fired because Nixon wished to protect the Wall Street banking establishment from criminal prosecutions. *Id.*, Jan. 16, 1970, at 20, col. 5.

In all fairness to the Nixon Administration, this was simply not the case. Morgenthau had long overstayed his welcome in a Republican Administration, on the allegation that he was conducting "important ongoing investigations" and the glib observation that "the customs and principles of 'the old politics' are no longer relevant." M. MINTZ & J. COHEN, AMERICA, INC. 276 (1971).

At the time of his resignation, seventy-nine of ninety-three U.S. Attorneys from the Johnson Administration had been replaced by Nixon appointees, and most of the remainder had offered their resignations and were holding office only until successors were appointed. Morgenthau's father also experienced difficulty in relinquishing appointive office in July, 1945. *See* 3 J. BLUM, FROM THE MORGENTHAU DIARIES: YEARS OF WAR, 1941-1945, at 464-69 (1967).

95. Sheehan, Brokers Decline to Query Clients, N.Y. Times, Dec. 1, 1969, at 42, col. 4.

96. The Treasury implemented this change immediately. Since 1970, IRS Form 1040 has asked:

> Did you, at any time during the taxable year, have any interest in or signature or other authority over a bank, securities, or other financial account in a foreign country (except in a U.S. military banking facility operated by a U.S. financial institution)?

An affirmative response requires the taxpayer to file IRS Form 4683.

lating the regulations after the Act was passed. The Treasury established a task force to determine the type of records that should be maintained in order to balance law enforcement needs with the Act's burden on the banks and the public. The task force consulted extensively with representatives of financial institutions, trade associations and federal agencies affected by the Act. Proposed regulations were published in the Federal Register in June, 1971.[97] These regulations were to take effect in August, 1971, but industry opposition caused the Treasury to postpone the effective date until November, 1971,[98] and then January, 1972.[99] Further discussions and delays ensued, and the Secretary did not issue final regulations until April, 1972.[100]

The lengthy opportunity to be heard resulted in regulations which are much more narrowly drawn than the Act. For example, Title I recordkeeping exempted from the mandatory copying requirement all checks drawn for less than $100.[101] This exemption eliminated 90% of all personal checks from the microfilming requirement. Banks, securities brokers and dealers, and currency transporters were exempted from the Title II reporting requirements.[102] Individual customers and routine interbank transfers were exempted from the domestic reporting requirement.[103]

The banking industry was still dissatisfied with the Act and regulations, partially because of the unreasonably burdensome recordkeeping cost they were forced to absorb. Available figures indicate that the Bank of America spent $392,000 in 1971, including start-up costs, to comply with the Title I microfilming requirements. The industry-wide cost of compliance was estimated at $6 million a year.[104] The figures cause one to pause over Chairman Patman's remark that "microfilming costs should be borne willingly by the banking community as a part of its civic responsibility to combat crime."[105]

---

97. Proposed Treas. Reg. §§ 103.11-103.49, 36 Fed. Reg. 11208-211 (1971).

98. Treasury News Release, 7 CCH 1971 STAND. FED. TAX REP. ¶ 6712.

99. N.Y. Times, Oct. 16, 1971, at 41, col. 4.

100. 31 C.F.R. Part 103, 37 Fed. Reg. 6912-15 (1972). However, even the final regulations were soon amended. *See* 31 C.F.R. § 103.34(b)(3), *as amended,* 37 Fed. Reg. 23114 (1972), 38 Fed. Reg. 2174 (1973) (effective Jan. 17, 1973).

101. 31 C.F.R. § 103.34(b)(3).

102. 31 C.F.R. § 103.23(c).

103. 31 C.F.R. § 103.22.

104. California Bankers Ass'n v. Shultz, 416 U.S. 21, 50 n.22, 80 (1974).

105. Additional Views of the Hon. Wright Patman, H.R. REP. No. 975, 91st Cong., 2d Sess. 31 (1970).

4. *Constitutional challenge.* A court test of the Act followed soon after the final regulations were implemented. Various plaintiffs, including individual bank customers, a bank, the California Bankers Association, and the American Civil Liberties Union applied for a temporary restraining order, prohibiting the Secretary of the Treasury from enforcing the Act and regulations. The suit was filed in June, 1972, in the U.S. District Court for the Northern District of California.

The plaintiffs' major contentions were that records maintenance and reporting by the banks under federal compulsion violated their fourth amendment guarantee against "unreasonable search and seizure" and that the requirements imposed on the banks by the Treasury were unreasonably burdensome, thus depriving the banks of due process of law. Additional constitutional issues, such as freedom from compulsory self-incrimination and freedom of association, were also raised.

In September, 1972, a three-judge district court panel unanimously upheld the constitutionality of the recordkeeping requirement of Title I and the regulations, and of those Title II provisions and regulations requiring reports on currency import and export and relationships with foreign financial institutions. However, by a 2-1 vote, the court found that the domestic reporting requirement of Title II violated the fourth amendment, and enforcement of Title II was thus enjoined.[106]

Three separate appeals were taken directly to the United States Supreme Court. In April, 1974, the Court by 6-3 vote sustained all sections of the Act and regulations against constitutional challenge.[107]

The Court held that: (1) because there was ample nexus between the evil to be overcome and the recordkeeping provision specified, and because the costs imposed on the banks were not unreasonable, Title I recordkeeping provisions did not deprive the bank plaintiff of due process; (2) mere records maintenance by the bank,without any requirement of disclosure to the government except via legal process did not constitute an illegal search and seizure; (3) records maintenance did not violate the right against

106. Stark v. Connally, 347 F. Supp. 1242 (N.D. Cal. 1972).

107. California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974), *noted in* 8 AKRON L. REV. 181 (1974); 92 BANKING L.J. 347 (1975); 2 HASTINGS CONST. L.Q. 203 (1975); 20 N.Y.L.F. 416 (1974); 14 WASHBURN L.J. 134 (1975).

self-incrimination of the depositor plaintiff or the bank; (4) the Title II reporting requirements were reasonable, were within the Congress' power to enact, and did not abridge any fourth amendment rights.

Several issues were left unresolved by the Court which might form the basis for future constitutional tests of the Act. The individual depositor plaintiff lacked standing to challenge the Title II reporting provisions. He had merely alleged an intent to engage in future foreign currency transactions. He had neither engaged in such transactions in the past, nor alleged that the information required by the Secretary would tend to incriminate him. The ACLU contention that the reporting requirements violated its first amendment associational interests was held to be too speculative and hypothetical since it had not alleged that it regularly engaged in large domestic currency transactions, maintained foreign bank accounts, or exported and imported currency. The Court did not discuss the constitutionality of the records and reports which the Act authorizes the Secretary to require of individuals. At least one commentator has suggested that the Court's holding is limited in scope to the present regulations and not to the Act's maximum potential.[108]

Extensive law review commentary[109] predating the Court's decision has suggested that the Act does violate an implicit constitutional right to financial privacy. Some congressional concern as well has focused on the privacy issue and at times, two different committees have dealt with the question.[110] However, no definitive action has been forthcoming.

---

108. Note, *The Recent Swiss-American Treaty to Render Mutual Assistance in Criminal Law Enforcement (An Application of the Bank Secrecy Act): Panacea or Placebo?*, 7 N.Y.U.J. INT'L L. & POL. 103, 136 (1974).

109. *See* Note, *The Bank Secrecy Act—Conflict Between Government Access to Bank Records and the Right of Privacy*, 37 ALBANY L. REV. 566 (1973); Recent Decision, *Constitutional Law—Bank Secrecy Act—Provisions of the Act which Require the Reporting of Domestic Financial Transactions Violate the Fourth Amendment's Prohibition Clause Against Unreasonable Search and Seizure*, 42 GEO. WASH. L. REV. 162 (1973); Recent Decision, *Constitutional Law—Bank Secrecy Act Requiring Financial Institutions to Report All Domestic Transactions over $10,000 to the Government Held Violative of the Customer's Right to Privacy*, 24 SYRACUSE L. REV. 823 (1973); Note, *The 1970 Bank Secrecy Act and the Right of Privacy*, 14 W&M L. REV. 929 (1973); Note, *Government Access to Bank Records*, 83 YALE L.J. 1439 (1973).

110. *Hearings to Amend the Bank Secrecy Act Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs,*

C. *Bilateral Action, 1968-1975*

While the 1970 Bank Secrecy Act is partially a result of slowly-progressing bilateral discussion between the United States and Swiss governments, the persistence of both governments in continuing the discussion of bank secrecy has finally yielded two concrete measures. Unannounced talks began in the last days of the Johnson Administration, at the request of the United States. Assistant Attorney General Vinson met in Bern with representatives of the Swiss Foreign Ministry and the Ministry of Justice and Police. He also met separately with a dozen leading Swiss bankers.[111]

1. *The Swiss Federal Supreme Court reinterprets the 1951 Double Taxation Convention.* By longstanding policy, the Swiss Federal Tax Administration has consistently denied the requests of the United States Internal Revenue Service (IRS) for information concerning the Swiss banking activities of American citizens. The Swiss bankers were forbidden by article 47(b) of the Banking Law of 1934 from supplying Swiss tax authorities with information on their customers' holdings, and banking information unavailable to Swiss authorities was similarly unavailable to foreign tax authorities. As early as May, 1935, the Federal Tax Administration informed the IRS that "the only persons from whom we could ask information are the owners of the accounts in question."[112]

That policy remained unchanged after the United States and Switzerland signed the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, on May 24, 1951.[113] In relevant part, article 16 of the Double Taxation Convention states:

92d Cong., 2d Sess. (1972). After the *California Bankers Ass'n* decision, Senators Ervin and Mathias proposed privacy amendments to the Act. N.Y. Times, Apr. 4, 1974, at 71, col. 7. The House of Representatives Task Force on Privacy, chaired by Barry M. Goldwater, Jr., also reviewed the Act and recommended limiting its application.

111. N.Y. Times, Dec. 11, 1968, at 20, col. 3. The November, 1968 approach is in marked contrast to that of December, 1944, when a Swiss Bankers Association delegation came to Washington to discuss foreign funds control. The Treasury Department officers refused to meet with them, because they were not government officials. FEHRENBACH, *supra* note 15, at 81.

112. Note, *The "Secret" Swiss Account: End of an Era*, 36 BROOKLYN L. REV. 384, 389 n.41 (1971).

113. Convention with the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, May 24, 1951, [1952] 2 U.S.T. 1751, T.I.A.S. No. 2316 (effective Sept. 27, 1951).

> (1) The competent authorities of the contracting States shall exchange such information [being information available under the respective taxation laws of the contracting States] as is necessary . . . for the prevention of fraud or the like in relation to the taxes which are the subject of the present Convention . . . .
>
> (3) [I]n no case shall the provisions of this Article be construed so as to impose upon either of the contracting States the obligation to carry out administrative measures at variance with the regulations and practices of either contracting State . . . which would be contrary to its . . . public policy or to supply particulars which are not procurable under its own legislation. . . .[114]

The Swiss government's inability to compel disclosure of banking secrets is based on Swiss tax law and the distinction which Swiss law draws between criminal and administrative offenses, as well as on article 47(b). It is Swiss tax law, not the bank secrecy law, which holds that Swiss tax authorities may receive information from a bank only with the consent of the taxpayer concerned.[115] This legislation reflects the belief that a confidential relationship should exist between the citizen and the government with regard to tax matters. Moreover, there is little practical need for tax evidence to be furnished by third parties, in view of the alternative provisions in the law which prevent any large-scale tax evasion.[116]

Like most nations, Switzerland will assist other countries in civil and criminal matters, but not in matters of administrative law. Military, political, and fiscal prosecutions are considered to be administrative. Securities and foreign exchange violations and tax evasion are fiscal offenses, and thus the Swiss have refused legal assistance to other nations in these areas.[117] Switzerland takes the view that the internal legislation of each country should provide effective measures against tax evasion.

The Swiss Federal Supreme Court has recently reconsidered

---

114. *Id.*, art. 16.

115. Mueller, *supra* note 2, at 371, 373.

116. Among these preventive measures are a high withholding tax rate (30% on capital income and bank account interest), an extensive system of cooperation between the Federal Tax Administration and the cantonal tax authorities, the access which tax authorities have to information on the tax returns of other Swiss taxpayers, and the possible remedy of assessing tax on an implied income basis. Mueller, *supra* note 2, at 371.

117. *Id.* at 375.

this internal Swiss law and the 1951 Double Taxation Convention. In October, 1969, the IRS began its first successful assault on the abuse of bank secrecy to evade American tax laws. It invoked article 16(1) of the 1951 Double Taxation Convention, which provides for the exchange of information necessary to prevent "fraud or the like," and requested that the Federal Tax Administration obtain a Swiss court order requiring production of information from the records of a Swiss bank on the dealings between the bank and "X", an American citizen residing in the United States, who was suspected of defrauding the American tax authorities.

An independent Federal Tax Administration investigation confirmed the IRS' suspicions, and the Federal Tax Administration then informed the interested parties that it was going to send the requested information to the IRS. A Swiss trial court rejected the objections of X and his Swiss bank, and an appeal was taken by X to the Swiss Federal Supreme Court, which on December 23, 1970, sustained the Federal Tax Administration.[118]

X argued unsuccessfully that there was no basis under Swiss federal or cantonal law for the investigation, that no action for tax fraud was pending in the United States against him, and that Swiss banking secrecy forbade transmission of such information. The Court found it unnecessary for X to be under tax fraud indictment in the United States as a precondition to supplying information, stating "[i]t is essential only that there be a suspicion, substantiated by facts, that fraud or the like has been committed or . . . is planned."[119] It also found that the Federal Tax Administration had conducted an independent investigation which was adequate "[to] substantiate to a sufficient degree the suspicion of tax fraud or the like,"[120] and thus disprove that the case involved "simple tax evasion," the administrative offense excepted by article 16(3).

118. X v. The Federal Tax Administration, 71-1 U.S. TAX CAS. 86,566 (Swiss Fed. Sup. Ct. 1970).

119. *Id.* at 86,569.

120. *Id.* Under American revenue law, "evasion" and "fraud" are synonymous terms which connote conduct which is criminal and which also forms the basis for the imposition of the civil fraud penalty. American law distinguishes between tax avoidance and tax evasion. Tax avoidance is legal and involves a taxpayer's arranging his affairs to minimize the tax legally due. Tax evasion involves the failure to pay the tax legally due and is a crime.

The Swiss ascribe to "evasion" a connotation of "lesser", and to "fraud" a connotation of "greater" culpability. Tax evasion in Switzerland is only a civil offense. Only aggravated cases are considered to be tax fraud, and thus criminal, cases.

The Court then turned to the issue of whether the Federal Tax Administration could have obtained the information in question from the banks if a fraud had been committed under Swiss tax law. Inquiring as to when a bank must furnish information concerning possible tax fraud committed by a customer with respect to the assessment of a Swiss income tax, the Court found that cantonal tax law varies and Swiss federal law is silent. The Court then considered whether the 1951 Double Taxation Convention had undertaken a federal obligation to furnish banking information in certain cases, or whether it had simply obliged Switzerland to exchange that information which could be obtained under the applicable cantonal law. If such a federal obligation had been established by article 16, then it would take precedence over any divergent cantonal law.

Examination of the text and notes of the 1951 Double Taxation Convention gave the Court no hint as to whether such a federal obligation had been intended by the parties. Thus, the Court undertook its own analysis of the question.

If the Swiss commitment under the 1951 Double Taxation Convention were only to furnish bank information available under applicable cantonal laws, then American taxpayers, in choosing their Swiss banks, would make the obvious geographical choices. The Court was certain that the United States negotiators to the 1951 Double Taxation Convention must have been interested in the availability of banking information from Zurich, Basel, and Geneva, the three major international banking centers in Switzerland. In these three cantons, tax fraud is a criminal offense, prosecutions are governed by the respective cantonal codes of criminal procedure, and banks must give full evidence in such criminal prosecutions. Since the American negotiators might in good faith have understood the law of these major banking cantons to be the prevailing Swiss law, and thus have assumed that the Swiss had agreed to exchange information in tax fraud cases, the Court held that banking information in tax fraud cases was information available under the taxation laws of Switzerland, despite any contrary position expressed in the tax legislation of the less internationally-important cantons. Finally, the Court found that if the statute of limitations had expired in either the United States or Switzerland, the requirement that the act be punishable in both countries would be lacking, and the information could not be produced. Unfortunately for X, the statute had not run.

The decision in *X v. Federal Tax Administration*[121] reversed Swiss policy of nineteen years' standing under the 1951 Double Taxation Convention. The veil of bank secrecy has been lifted in Switzerland only by court order, and the effect of this case is to interpret the Convention so as to create narrow conditions under which such court orders will issue in the future.

Successful use of this holding by the IRS will require that several conditions be met. The IRS must first establish a case that tax fraud was committed or planned. It must then request the Federal Tax Administration for a Swiss court order compelling the bank to disclose its information. An independent Federal Tax Administration investigation must confirm the IRS charge that the case constitutes "fraud or the like" within the meaning of the Swiss tax law and the 1951 Double Taxation Convention. Any turnover order must be preceded by notice to the parties and the opportunity to be heard on the merits of the case. Finally, the statute of limitations must not have expired in either country.

2. *The Swiss-American Treaty for Mutual Assistance in Criminal Matters of May 25, 1973.* The two governments have recently negotiated a complicated treaty for mutual legal assistance which, when ratified, will partially meet American policy goals while preserving the fundamental right to financial privacy in Switzerland.[122] In the past, American requests for judicial assistance from Swiss courts had been by letters rogatory, transmitted via diplomatic channels. Extensive uniform assistance in this manner was not possible as a consequence of the Swiss cantonal law system and a general hesitancy to depart from traditional Swiss law on financial privacy.[123]

Discussion for this treaty began slowly and proceeded intermittently over a four and one-half year period from November, 1968 to May, 1973. After the Vinson visit to Bern, formal talks were held in Washington in April, 1969, and in Bern in June and July, 1969. The United States was represented by officials from the Justice, State, and Treasury Departments and the Securities and

121. 71-1 U.S. TAX. CAS. 86,566 (Swiss Fed. Sup. Ct. 1970).

122. Treaty with the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973 [reproduced in 12 INT'L LEGAL MATERIALS 916 (1973)] [hereinafter cited as Treaty]. *Noted in* 15 HARV. INT'L L.J. 349 (1974), 7 N.Y.U.J. INT'L L. & POL. 103 (1974), 7 VAND. J. TRANSNAT'L L. 469 (1974).

123. Comment, *Secret Swiss Bank Accounts: Uses, Abuses, and Attempts at Control*, 39 FORDHAM L. REV. 500, 508 (1971).

Exchange Commission. Assistant Attorney General Will Wilson, of the Justice Department's Criminal Division, led the delegation. These discussions focused on several proposals for a draft treaty which had been prepared by the Justice Department.

The American negotiators initially requested Swiss help in locating the bank deposits of all American tax evaders and organized crime figures. The Swiss, while willing in principle to assist, were understandably reluctant to compromise their views on fiscal privacy in matters they did not consider crimes (such as tax evasion), simply to correct an American problem. The Swiss Bankers Association had previously endorsed the efforts of the Swiss government to cooperate with other nations in the international fight against crime, but insisted that such help be confined to those crimes common to both Switzerland and the country seeking aid.[124] The major compromise came when the United States dropped its request for information on "tax evaders" and the Swiss agreed to define "organized crime with international repercussions" as a common crime. Drafting efforts continued in Bern and Washington during 1970.

Although the parties agreed to a draft of the legal assistance agreement as early as August 17, 1970, the Treaty was not formally signed until May 25, 1973. During the period since the signing, the treaty has been creeping slowly through the Swiss ratification process, while the State Department has recently submitted the Treaty to the United State Senate for advice and consent.[125]

Several factors account for the delays in both the negotiation and ratification stages. Preliminary talks were slowed by the fundamental and substantial differences between the legal systems of the two nations. There was considerable time spent in search of a common basis upon which a judicial assistance treaty could be built. Inexperience also intensified and prolonged the negotiations. This Treaty is the first United States treaty to deal with criminal matters, and while the Swiss have negotiated such treaties in the past with other civil law European nations, this was their

124. Note, *Secret Foreign Bank Accounts*, 6 TEXAS INT'L L.F. 105, 130 n.132 (1970).

125. The "hurry-up-and-wait" pattern seems quite curious in view of the initial urgency with which the United States viewed the need for the Treaty. The two year delay between signature and ratification, while not uncommon, causes one to wonder about the necessity of two weeks of day and night bargaining in Bern in June and July, 1969. *See* N.Y. Times, July 8, 1969, at 24, col. 1.

first encounter with an Anglo-American criminal system. At least one report has suggested that the delay stemmed from the Swiss desire to finesse a "package deal" whereby the Swiss would approve the Treaty in return for an American repeal of the 1971 import surcharge of 10% and the exclusion of foreign-produced equipment from the investment tax credit.[126]

Delays since May, 1973, are largely attributable to the Swiss ratification process. The original talks were conducted in English, and time was consumed in translating the complicated text of the treaty into French, Italian and German, the three official Swiss languages. One report indicated that the Swiss Bankers Association was "fighting a rear guard action" over the enabling legislation which would give domestic effect to the treaty.[127] The United States has delayed only because the State Department desired to keep pace with the Swiss.

It is now possible that the Treaty could take effect in 1977.[128] The Swiss Nationalrat ratified the Treaty in November, 1974, and the Standerat ratified it in June, 1975. The Swiss domestic enabling legislation passed in October, 1975 and took effect in January, 1976. The two governments exchanged notes of mutual understanding with respect to the taking of oaths in Switzerland in December, 1975. The State Department forwarded the Treaty to the Senate in February, 1976, where it was given consideration by the Foreign Relations Committee. No floor opposition to its passage is expected.

The Treaty calls for compulsory mutual assistance with respect to the investigation and prosecution of thirty-five enumerated crimes, most of which have nothing to do with white collar offenses or bank secrecy. Yet, as has been indicated, the controversy during the negotiations centered on the issues of organized crime and access to Swiss bank information by American prosecutors and tax officials.

Articles 6 through 8 of the Treaty deal specifically with

126. N.Y. Times, Oct. 17, 1971, at 11, col. 1. The import surcharge was lifted in January, 1972, for reasons unrelated to the Treaty.

127. N.Y. Times, Apr. 10, 1974, at 61, col. 1. The intricacies of Swiss treaty ratification are explained in Looper, *The Treaty Power in Switzerland,* 7 AM. J. COMP. L. 178, 181 (1958).

128. Article 41(2) of the Treaty provides that it will take effect 180 days after ratifications are exchanged, and will apply retroactively to the date of signing.

organized crime.[129] The requesting state must have probable cause to believe that a person is involved in organized criminal activitity and must be unable to prosecute the suspect without the requested information. The requested state reserves the right to satisfy itself that both conditions have been fulfilled. Thus, if the Justice Department can persuade the Swiss Ministry of Justice and Police that both conditions exist, then the Ministry will request a court order to examine the individual's Swiss bank records for turnover to the United States, even if tax evasion is the only offense involved.

Article 5(1) permits the requested state to maintain strict control over the uses to which the requesting state may put any information obtained pursuant to a specific request. Use in proceedings relating to another offense or investigation in the requesting state is forbidden. The Treaty describes with clarity those areas to which it does not apply[130] and those areas in which mutual assistance is discretionary.[131] A strong arbitration clause insures successful operation of the Treaty if disputes arise.[132]

The benefits arising from the Treaty are considerable. Under Swiss constitutional law, treaties concluded by the Confederation have the status of federal law and take precedence over conflicting cantonal law.[133] Thus, for the first time, the Treaty will make available meaningful judicial assistance to the United States from

---

129. The Treaty defines "organized criminal groups" as: an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner: (a) . . . commits or threatens to commit acts of violence . . . and (b) . . . either: (1) strives to obtain influence in politics or commerce . . . or (2) associates itself . . . with . . . similar associations or groups. . . .
Treaty, *supra* note 123, art. 6(3).

130. The Treaty specifically excludes involuntary extraditions, enforcement of criminal judgments rendered in the other state, political offenses, various military offenses, antitrust or cartel violations, and custom or tax violations that are not committed in the furtherance of organized criminal purposes. *See id.*, art. 2.

131. The Treaty allows the requested state to refuse assistance if its sovereignty, national security, or similar interests would be compromised, or if the subject of the request is not involved in organized crime and has been acquitted or convicted in the requesting state for a substantially similar offense. *See id.*, art. 3.

132. *Id.*, art. 39(2)-(7).

133. Note, *Treaty with Switzerland Affects Banking Secrecy Law—Provisions Against Organized Crime Set New Precedent*, 15 HARV. INT'L L.J. 349, 352 n.12 (1974).

Switzerland, while eliminating at little cost to either, a major source of friction between the two nations. It is unlikely that the United States will frequently be called upon to render criminal assistance to Switzerland. At the same time, the Swiss have conceded very little. An exception to bank secrecy laws has always been recognized to compel a banker to produce evidence or testify upon judicial request.[134] By making compulsory measures available under the Treaty, the Swiss have modified their domestic law only with respect to tax evasion by organized criminals.

Critics of the Treaty have raised a number of objections. First, a bilateral Swiss-American treaty does little to plug the loopholes which frustrate American criminal investigations in the world's many remaining bank secrecy jurisdictions. Second, the lengthy negotiation and ratification process has given ample warning to those organized criminals potentially affected by the Treaty to move their funds out of Switzerland. Third, the United States has failed to gain Swiss assistance in the detection of those tax and securities law violators who are not "organized criminals".

On balance, however, these criticisms seem harsh. The Swiss concessions, however small, can benefit United States law enforcement. The slow treaty-making process is understandable in view of the parties' inexperience with so many variables, and perhaps the instant Treaty will serve as a model to expedite future negotiations with other nations. Finally, Switzerland is unquestionably the most important of the world's bank secrecy jurisdictions. To the extent that the Treaty will block access by organized crime to Swiss bank secrecy, it is a major foreign policy accomplishment.

V. CONCLUSION

In the last thirty-five years, American policy towards Swiss bank secrecy has generated input from a variety of executive departments, independent regulatory agencies, the Congress and federal courts. The only common denominator during the period has been ideological, with the source of the policy coming from New Deal Democrats and their successors.

An early proponent of compelling broad Swiss disclosures was Henry Morgenthau whose department exercised sweeping powers during the Roosevelt years, due largely to his close personal friend-

134. Mueller, *supra* note 2, at 361, 362-63, 366.

ship with Franklin Roosevelt. Bank secrecy policy under his direction was marked by inter-departmental bickering at home, moralistic preaching abroad, and economic warfare tactics against a neutral nation which remained in effect eighteen months after the real wartime enemy had surrendered. Swiss-American relations suffered from this approach, and the hoped-for results were minimal. Policy moderation returned only during the Truman Administration, as the State Department emerged, replacing the Treasury as the dominant force in shaping economic foreign policy.

Post-1965 efforts to penetrate bank secrecy have differed markedly, with the major tie to the past being the Morgenthau name. American policy makers have meticulously documented their case "against" Swiss bank secrecy before proceeding, and inter-agency cooperation has been uniform. Negotiations with the Swiss, while hard-fought, have been courteous. It is unclear whether this turnabout in American attitude reflects learning from past errors, or simply realignment of bargaining positions to favor the Swiss. In either case, with the Treaty ratification pending in 1976, it appears that the United States will have available the tools necessary to prevent Swiss bank secrecy from frustrating American law enforcement efforts on a large scale.