

Big Brother Isn't Just Watching You, He's Also Wasting Your Tax Payer Dollars: An Analysis of the Anti-Money Laundering Provisions of the USA Patriot Act

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I. INTRODUCTION

September 11, 2001 is hardly a day that needs explanation for its importance in American history. However, its aftermath did more than just damage a general feeling of safety and ignite public debate on the country's place in the world. In an attempt to prevent such a tragedy from occurring again, Congress wanted to act quickly in getting a law on the books. The result was Public Law 107-56, or "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001"¹ ("USA Patriot Act" or "Patriot Act"), which was signed into law by President George W. Bush on October 26, 2001.² The Patriot Act provided a broad range of provisions, including terms which should ease information-sharing between intelligence agencies, increase the ability of law enforcement to wire tap and monitor electronic mail, and a variety of new requirements for preventing money laundering.³ Congress created a variety of amendments to the Bank Secrecy Act of 1970⁴ ("BSA") that would apply directly to domestic banks and their duty to prevent money laundering. This Note will describe the BSA and other attempts by the federal government to regulate bank record-keeping, as well as the new legislation and what this means for banks as well as other monetary institutions. This Note will show that while stopping money laundering is an important step in the war against terrorism, it will not be achieved through the Patriot Act

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1. 115 Stat. 272.

2. Bill Summary & Status for the 107th Congress, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@L&summ2=m&> (last visited Mar. 6, 2004). The Act was sent to the President after it had passed through the House with a vote of 357-66 and the Senate with a vote of 98-1. *Id.*

3. See generally 115 Stat. 272.

4. 31 U.S.C. § 5318 (2000).

and, rather, this legislation will put an unnecessary burden on financial institutions and Americans, as well as provide a false sense of security.

II. BACKGROUND

A. *Money Laundering and Terrorism*

Money laundering is, at its most basic form, the cleaning-up of money that has been “generated by criminal activit[ies].”⁵ “Money laundering is driven by criminal activities. It conceals the true source of funds so that they can be used freely. It is the support service that allows criminals to enjoy the fruits of their crimes. It allows crime to pay and often, pay well.”⁶ Americans tend to associate this sort of activity with the mafia. However, with the advent of laws like RICO, the American mafia has dwindled in size and the federal government has had to turn its sights to the new offenders.⁷ Today, money laundering is usually perpetrated by large drug cartels, foreign organized crime, and terrorists.⁸

So what is the purpose of this money laundering as far as terrorists are concerned? “Terrorist groups need to launder funds, but parallel to this are the claims that such groups are active in widespread organized criminal activity . . . sometimes in league with more recognized criminal group[s].”⁹ Estimates vary on the amount of money that is laundered every year; it could be anywhere from \$200 billion¹⁰ to \$1 trillion.¹¹ Since September 11th, it has been estimated by the Department of Treasury that the United States and other countries have frozen \$80 million in terrorist assets.¹² In general, the rise of the Internet and other technology, as well as deregulation and lack of global regulation for money laundering, has led to its

5. PETER LILLEY, *DIRTY DEALING: THE UNTOLD TRUTH ABOUT GLOBAL MONEY LAUNDERING* 1 (2000).

6. *Id.* at viii.

7. *Id.* at 3.

8. *Id.* at 2.

9. *Id.*

10. *Id.* at 3.

11. Robert S. Pasley, *Privacy Rights v. Anti-Money Laundering Enforcement*, 6 N.C. BANKING INST. 147, 158 (2002). It should be noted that Pasley is an employee of the Officer of the Comptroller of the Currency, which may explain his tremendous support for the BSA and its Patriot Act amendments and his disdain for those with privacy arguments.

12. *Hearing on “The Financial War on Terrorism and the Administration’s Implementation of the Anti-Money Laundering Provisions of the USA Patriot Act” Before the Senate Comm. on Banking, Housing and Urban Affairs* 107th Cong. (2002) (statement of the Honorable Kenneth W. Dam, Deputy Secretary Department of the Treasury), available at 2002 WL 25098494 [hereinafter *Dam Testimony*].

proliferation.¹³ Terrorists groups have become major players in the world of money laundering.¹⁴ "Terrorism—virtually every week brings news from some outpost of the globe concerning the latest terrorist outrage. All of these groups need money—and the ability to use it—to support their infrastructures and buy weapons and equipment."¹⁵ However, there are some differences between traditional money laundering and terrorist money laundering. As Deputy Secretary of the Treasury, Kenneth Dam, testified, "terrorist financing could be described as 'reverse money laundering'. . . . Proceeds of legitimate economic activity are used for illicit purposes. The money can come from almost anywhere."¹⁶ Under this explanation of money laundering, it would seem that anyone transferring legitimate funds could be funneling money across the globe to aid in a diabolical plot.

While the United States remains one of the few countries with stringent anti-money laundering laws, it was only criminalized in 1986, in large part due to organized crime investigations.¹⁷ Prior to the Money Laundering Control Act of 1986,¹⁸ the federal government pressed for other legislation when it realized that its banking institutions may be at risk for money laundering.¹⁹ While casinos, restaurants, pawn shops, and other businesses can easily be money laundering fronts, our nation's domestic banks can also have this problem. In fact, the Financial Action Task Force on Money Laundering ("FATF"), which was created by the G-7 Summit in 1989 and consisted of twenty six nations,²⁰ realized that "the primary mechanism for laundering the proceeds of crime was the banking system. . . . What is now becoming clear is that it may be perfectly possible to launder money successfully by utilizing the banking system in a secondary manner or only in passing."²¹ It is amidst this backdrop that Americans learned that the September 11th hijackers had utilized the stock market to generate revenue for their activities and had bank accounts (set-up under phony social security numbers that were never checked) in American banks.²² While Congress had

13. See generally Pasley, *supra* note 11.

14. See LILLEY, *supra* note 5, at 3-10.

15. *Id.* at 9.

16. *Dam Testimony*, *supra* note 12.

17. GUY STESSENS, MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL 99 (2000).

18. 31 U.S.C. § 5324(a)(3) (2000).

19. STESSENS, *supra* note 17, at 97-99.

20. LILLEY, *supra* note 5, at 55.

21. *Id.* at 62-63.

22. *19 Terrorists Obtained Social Security Cards*, WASH. POST, Nov. 2, 2001, at A19 [hereinafter *19 Terrorists*].

instituted the Bank Secrecy Act in 1970, many banks did not closely follow this legislation.²³ In the decades that followed, the government tightened up legislation regarding money laundering and attempted to create more rigorous “know your customer” regulations, which failed.²⁴ Then came September 11, 2001, and everything changed.

B. *Bank Secrecy Act of 1970*

The Bank Secrecy Act has three primary components.²⁵ First, it requires all domestic banks to keep certain records of customer transactions and to obtain an identification number (typically, a social security number) from anyone opening an account.²⁶ Title II of the BSA gives the Secretary of the Treasury the power to specify reporting duties.²⁷ It also requires banks to set up internal departments and compliance officers for the Act.²⁸ Since the implementation of the BSA, but prior to the amendments in the Patriot Act, the Secretary has imposed three reporting duties.²⁹

American financial institutions should file Currency Transaction Reports, or CTRs (31 U.S.C. § 5313), every time they carry out a transaction above US\$10,000. . . . Second, every person who physically transports, mails or ships currency or other monetary instruments in excess of US\$10,000 to a place outside the United States, or into the United States from anywhere outside, is required to file a Currency and Monetary Instruments Report (CMIR) with the US Customs Services. . . . A third reporting requirement concerns all persons subject to American jurisdiction and with a financial interest in, or with signatory or other authority over, bank accounts, securities, or other financial accounts in foreign jurisdiction with an aggregate value greater than US\$10,000 who are required to file an annual report with [sic] Department of Treasury.³⁰

The purpose of these reporting requirements was to give the federal government something more to go on than income tax returns and to prevent internal and international money laundering.³¹ The BSA carried with it criminal and civil penalties for any institution

23. STESENS, *supra* note 17, at 98.

24. *See id.* (discussing amendments to the Bank Secrecy Act).

25. *Id.* at 98.

26. *See id.* at 97-98.

27. 31 U.S.C. § 5318.

28. *Id.*

29. STESENS, *supra* note 17, at 97.

30. *Id.* at 97-98.

31. *Id.* at 99.

which knowingly did not comply with these duties.³² Cases have found that “willful blindness” of banks can constitute a violation of anti-money laundering provisions.³³ However, the BSA was generally unimportant throughout the 1970s, as financial institutions did not follow it.³⁴ In the 1980s, the Treasury Department and the IRS began prosecuting financial institutions for violations of the Act.³⁵ So, while banks have generally become more accommodating to the provisions of the BSA, it is somewhat questionable how preventative these reporting duties are.³⁶ People who wished to avoid reporting can simply break down their transactions into multiples of less than \$10,000.³⁷ And the Financial Crimes Enforcement Network (“FinCEN”),³⁸ which receives all the bank reports, cannot handle the amount of reports it collects.³⁹ FinCEN is then authorized to share these reports with law enforcement agencies worldwide.⁴⁰ In 1997, FinCEN collected over twelve million reports.⁴¹ The bank is required to keep a copy of these reports on file for no less than five years and must provide FinCEN with a copy upon request.⁴² Given this problem, there has been a shift in legislation, with a greater focus on customer identification and reporting of suspicious activity. Since its original passage, the BSA has been amended on more than one occasion: The Comprehensive Crime Control Act of 1984; The Money

32. 31 U.S.C. § 5318. While the BSA does have penalties for non-compliance, there were very few instances of an institution being fined. STESENS, *supra* note 17, at 99. The provisions were tightened in the Patriot Act as a means of enforcing the law.

33. See STESENS, *supra* note 17, at 100.

34. *Id.* at 98.

35. *Id.*

36. *Id.* at 99.

37. *Id.* The process of breaking down transactions to smaller denominations as a way of avoiding a report is referred to as “smurfing”. *Id.* Banks generally train staff to look out for such behavior and fill out a Suspicious Activity Report if they believe that a customer is “smurfing”. *Id.*

38. *Id.* FinCEN receives all Suspicious Activity Reports (“SAR”). *Id.* “The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.” 31 U.S.C. § 5318(g)(1).

39. See Kathleen Day & Robert O’Harrow, Jr., *Agencies Seek Better Ways to Spot Terrorist Funds*, WASH. POST, Oct. 25, 2001, at A18. FinCEN was not created until 1990, it was given regulatory powers in 1994, and under the Patriot Act, it was elevated to bureau status. *Progress Since 9/11: The Effectiveness of the U.S. Anti-Terrorist Financing Efforts: Hearing Before the House Subcomm. on Oversight and Investigations of the Comm. on Fin. Serv.*, 108th Cong. 166 (2003) (statement of James F. Sloan, Director, Fin. Crimes Enforcement Network) [hereinafter Statement of James F. Sloan].

40. Statement of James F. Sloan, *supra* note 39.

41. STESENS, *supra* note 17, at 99.

42. *Id.* at 98.

Laundering Control Act of 1986; and The Anti-Drug Abuse Act of 1988, to name just a few.⁴³

The BSA now requires banks to file Suspicious Activity Reports (“SARs”).⁴⁴ “Suspicious” activity means that there is a transaction of at least \$5,000 and the bank has reason to suspect that its derivation is illegal and/or the purpose of the transaction is to evade reporting.⁴⁵ Furthermore, banks are prohibited from telling their customers if such a report has been filed on them, and the financial institution has immunity from civil litigation by its customers.⁴⁶ Whether or not these reports are useful is questionable.

Lawrence Lindsey, now head of the Bush administration’s National Economic Council, frequently has pointed out that more than 100,000 reports are collected on innocent bank customers for every one conviction of money laundering. “That ratio of 99,999-to-1 is something we normally would not tolerate as a reasonable balance”⁴⁷

No discussion of American banking and money laundering would be complete without mentioning private banking. Private banking was born in Europe and it “managed, with absolute privacy, the assets . . . and investments of select clients, most of whom possessed political, business, and social status.”⁴⁸ The Swiss began the practice of numbered account—they would keep their clients funds as liquid assets or they would invest them, creating so much revenue for the bank that at one point, “Swiss banks charged negative interest on deposit accounts.”⁴⁹ Why would someone want such a secret account? There are a variety of reasons, “includ[ing] concealment of assets, tax avoidance. . . estate planning concerns, avoidance of foreign exchange

43. Pasley, *supra* note 11, at 199.

44. *Id.* at 204.

45. *Id.* at 204 n.324.

46. 31 U.S.C. § 5318(g).

47. John Berlau, *Postal Service has Its Eye on You*, INSIGHT, reprinted in 147 CONG. REC. E1219 (June 27, 2001). The article reports that window clerks of the US Post Office have been filling out SARs since 1997. *Id.* In training postal workers on when to fill out a SAR for a money order purchase, “examples given are red flags such as a sleazy-looking customer offering the postal clerk a bribe. But the video also encourages reports to be filed on what appear to be perfectly legal money-order purchases.” *Id.* at 1220. The report also states that the training manual for SARs given to postal clerks says, “it is better to report many legitimate transactions that seem suspicious than let one illegal one slip through.” *Id.* at 1219. It is this attitude that made opponents to “know your customer” provisions so nervous.

48. *Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities: Hearing Before the Senate Subcomm. on Investigations*, 106th Cong. (1999) (statement of Antonio Giraldi) [hereinafter *Private Banking and Money Laundering*], available at http://govt-aff.senate.gov/111099_giraldi.htm.

49. *Id.*

controls, fear of currency devaluation, fear of confiscation resulting from political upheaval, [and] concealment of ill-gotten gains.⁵⁰ While this all may be interesting, how does it apply to American financial institutions? U.S. banks came to realize the profitability of such private banking institutions.⁵¹ In order to gain valuable accounts, American banks had to meet or exceed the services that were provided by their foreign competitors.⁵² There was a problem with this, though. The United States regulations prevented such secrecy.⁵³ In response, American banks moved their private banking branches offshore.⁵⁴ Relationship managers (“RMs”) would be in charge of a client with a private bank account.⁵⁵ It is easy to see from Antonio Giraldi’s testimony before the Senate Subcommittee on Investigations how domestic financial institutions played a role in money laundering for a variety of illegal activities.⁵⁶ These private bank departments are subject to the BSA and to due diligence standards—RMs are supposed to ascertain the origin of a client’s money if they have a reason to believe that it might be illegal.⁵⁷ “RMs were told that it was not their responsibility to determine whether or not an IPB client had complied with the laws . . . of his/her home country.”⁵⁸ Furthermore, due diligence standards would be worked out with senior management and no information about the clients would be shared with the domestic office.⁵⁹ In other words, in an attempt to compete with Europe, American banks were opening themselves up for massive money laundering. In the last five to ten years, the Federal Reserve, Office of the Comptroller of Currency, and FinCEN have made large steps in forcing compliance with the BSA.⁶⁰ The new provisions of the Patriot Act should make that easier.

50. *Id.* “Although IPB provides entirely legal and valuable services for its legitimate clients, IPB’s increasing accessibility to the criminal elite and vulnerability to their illegal money-laundering objectives have cast a dark shadow on the industry.” *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *See id.* (detailing how RMs deal with clients in the private banking industry).

56. *Id.* Giraldi discusses a variety of methods that RMs were instructed to use by trust officers. “RMs often posed as tourists and were encouraged to travel on tourist visas when visiting foreign clients abroad [They] and their clients were encouraged to speak in ‘code’ during business-related telephone conversations, and RMs carried account statements that had been reduced in size to avoid being recognized by foreign customs officials” *Id.*

57. *See id.*

58. *Id.*

59. *Id.*

60. *See Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities: Hearing Before the Permanent Subcomm. on Investigations of the*

C. "Know Your Customer" Provisions

In December 1998, the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency, and the Federal Reserve Bank jointly proposed a "Know Your Customer" ("KYC") rule that would have formalized bank practices regarding customers.⁶¹ "The regulations would have required banks to verify their customers' identities, know where their money comes from and determine their normal pattern of transactions."⁶² It also would have expanded the banks' duty to file reports of suspicious activities with FinCEN.⁶³ The FDIC stated when it introduced the proposal that, "[i]t is intended to detect patterns of illegal activity often characterized by large cash deposits and withdrawals that are outside the normal and expected activity," and that the rules "should not affect, in any way, the vast majority of individual customers" who have a regular pattern of deposits.⁶⁴ Many banks do keep an eye on

Senate Comm. on Governmental Affairs, 106th Cong. 92-96 (1999) (testimony of Ralph E. Sharpe, Deputy Comptroller of the Currency) [hereinafter *Sharpe Testimony*]. "The OCC recently developed and will soon test expanded-scope BSA/anti-money-laundering exam procedures for private banking. These procedures specifically address employee compensation programs, account-opening standards, risk management reports, and suspicious activity monitoring of private banking activities." *Id.* at 93; see also *Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 106th Cong. 97-100 (1999) (statement of Richard A. Small, Assistant Director, Federal Reserve System Division of Banking Supervision and Regulation).

61. See Melissa Wahl, *Bank Reporting Plan Draws Fire: Critics Say Customers' Privacy at Risk*, CHI. TRIB., Jan. 12, 1999, at 1 [hereinafter Wahl, *Bank Reporting*]. Lately, banks have been utilizing SARs to catch people who may be "check kiting," a practice where a customer is "depositing and drawing checks between accounts at two or more banks to take advantage of the time it takes one bank to collect from the other." *Id.* In such circumstances, the bank can file a report, and while the government's investigation is pending, the account will be frozen and the customer still cannot be told about the report or the investigation. *Id.*; see generally Editorial, *Invading Our Financial Privacy*, ST. PETERSBURG TIMES, June 16, 1999, at 16A. "Know Your Customer' regulations would have required banks to develop financial profiles for each customer to better track his or her banking practices." *Id.* According to this editorial, "[O]nly one criminal case results from every 25,000 suspicious activity reports filed." *Id.*

62. *U.S. Won't Require Banks to Monitor Customers*, L.A. TIMES, Mar. 24, 1999, at C3. Throughout the 1990s, there appeared to be many examples of massive money laundering through American banks. "A 1995 scandal—involving Raul Salinas de Gortari, the brother of Mexico's president at the time, who was found to have laundered some \$100 million through private banking accounts at Citibank—was but one major example." Bill Berkeley, *A Glimpse Into a Recess of International Finance*, N.Y. TIMES, Nov. 12, 2002, at C1.

63. *U.S. Won't Require Banks to Monitor Customers*, *supra* note 62.

64. Rob Wells, *Proposal to Turn More Bankers into Big Brother Killed*, CHI. SUN TIMES, Mar. 24, 1999, at 69.

very large transactions, but they are not required to verify sources of income.⁶⁵ American consumers seemed perplexed by this proposal, in particular because the Bank Secrecy Act prohibits banks from telling its customers if a report is being filed about them.⁶⁶ As such rules were being discussed by the Fed and the FDIC, the “enormous public outcry” made it clear that such regulations were not popular with the general public.⁶⁷ The FDIC received over 332,000 comments about the proposal and all but thirty were opposed to it.⁶⁸ In March 1999, the FDIC dropped the proposal,⁶⁹ but the damage was done. Some members of Congress began to question the validity of the Bank Secrecy Act itself. On February 3, 1999, Representative Ron Paul of Texas, an outspoken opponent of “KYC” provisions and the BSA in general, introduced H.R. 518, the Bank Secrecy Sunset Act, which had a variety of co-sponsors.⁷⁰ The bill’s summary is as follows:

Bank Secrecy Sunset Act - Amends Federal law to repeal after one year provisions governing: (1) mandatory records and reports on monetary instruments transactions; and (2) mandatory financial recordkeeping by financial institutions other than insured banks.

Terminates the effectiveness of any regulation prescribed by the Secretary of the Treasury or any provision of Federal law that has the effect of requiring a depository institution or any other private entity to: (1) monitor customer accounts; or (2) obtain information concerning any person in connection with a financial transaction (including the source of funds involved in the transaction).⁷¹

The Bill was referred to the House Committee on Banking and Financial Services and from there, it was referred to the Subcommittee on Financial Institutions and Consumer Credit.⁷²

65. See Wahl, *Bank Reporting*, *supra* note 61, at 1.

66. *Id.*

67. Melissa Wahl, *Bank-Customer Rule Clings to Life Prognosis Uncertain*, *Fed Says; Pull Plug, Other Agencies Say*, CHIC. TRIB., Mar. 10, 1999, at 3 [hereinafter Wahl, *Bank-Customer Rule*]. The article reports that Fed representatives were shocked by the level of public outcry. *Id.* “We certainly didn’t anticipate the level or nature of public concern. It’s been a helpful chapter for us regulators or supervisors to understand the concerns consumers have about privacy,” [Donna] Tanoue said.” *Id.*

68. *Id.*

69. Wahl, *Bank Reporting*, *supra* note 61, at 1.

70. Bank Secrecy Sunset Act, H.R. 518, 106th Cong. (1999).

71. Bill Summary & Status for the 106th Congress: H.R. 518, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR00518:@@L&summ2=m&> (last visited Feb. 19, 2004). Rep. Paul also introduced a variety of other bills on this day, all of which were intended to protect financial privacy. *Id.*

72. See *id.* The Congressional website describes the status of a bill—sending Paul’s bill to committee was the last major action taken. *Id.*

That was the last it was seen. That was not necessarily the end of the problem with money laundering in the federal banking system as far as Congressional review is concerned. In 1999, the Senate Permanent Subcommittee on Investigations held hearings on the topic. "The panel found that as much as half of the estimated \$1 trillion in criminal proceeds laundered worldwide each year went through American financial institutions, much of it through private banks where 'a corporate culture of secrecy and lax controls' was the rule."⁷³ Of course, what follows had a rather dramatic effect on the attitudes of senators and congressmen where financial privacy is concerned.

D. *September 11th and the USA Patriot Act*

When George W. Bush came to office in early 2001, he quickly set to work undoing some of the reporting requirements that the Clinton administration had put in place.⁷⁴ In August, amidst a rash of relaxation of regulations, the Treasury Department began looking into easing some of the reporting rules from the BSA.⁷⁵ "Among other things, officials have said they are considering ways to lower the number of currency transaction reports banks must file on cash deposits exceeding \$10,000, perhaps by granting more waivers for regular customers not considered money-laundering risks."⁷⁶ In fact, while Treasury Secretary Paul O'Neill was in agreement with his predecessor, Lawrence Summers, that "money laundering is a bad thing,"⁷⁷ he was rather concerned by the lack of empirical evidence that there was any success in such broad reporting measures, particularly when the department was spending between \$700 million and \$1 billion dollars annually.⁷⁸ There appeared to be a desire by the new administration to ease reporting regulations for banks;⁷⁹ some opined that this was because of how few convictions there were for money laundering, while others suggested it was due to banking lobbyist groups who heavily supported Bush in the election.⁸⁰ At the same time, law enforcement officials fought this change, stating that they relied heavily on SARs in their

73. Berkeley, *supra* note 62.

74. See John Harwood & Kathy Chen, *Quiet Revolution: Under President Bush, Regulatory Rollback Has a Major Impact*, WALL ST. J., Aug. 3, 2001, at A1.

75. *Id.*

76. *Id.*

77. Jacob M. Schlesinger, *Treasury's O'Neill Quietly Challenges Clinton-Era Policies*, WALL ST. J., June 21, 2001, at A20.

78. *Id.*

79. *Id.*

80. David S. Cloud & Jacob M. Schlesinger, *Treasury Seeks to Ease Costliness Of Antilaundrying Rules on Banks*, WALL ST. J., June 7, 2001, at A4.

investigations of drug trafficking and money laundering.⁸¹ The Treasury department countered that, in 2000, there were 156,931 SARs filed and such a large number, many of which were baseless, could hardly be helpful to the federal government.⁸²

In Congress, it came to the attention of Representative Ron Paul, a Republican from Texas, that the postal service filed SARs every time someone bought a money order for over \$3,000.⁸³ Indeed, the Postal Service had implemented many reporting regulations in order to comply with the BSA.⁸⁴ What seemed to trouble Paul the most about these provisions was the vague way that such rules were taught to postal employees.⁸⁵ Many on the right and left side of the aisle were concerned by the Orwellian fashion that the BSA had taken on. It appeared at the time that there could be a loosening on the grip of financial institutions and what they were required to report.

Then came September 11, 2001. In the wake of the hijackings and the massive destruction that ensued, investigators learned that some of the terrorists had fake social security numbers and had opened bank accounts.⁸⁶ It has been estimated that the entire plot took less than \$500,000 to finance and that a great deal of that money was sent in the form of wire transfers from Dubai, Saudi Arabia, which totaled \$110,000.⁸⁷ The transfers went through Citibank in New York, and, due to the large number of electronic transfers that go through a bank of that size every day, there was never an SAR filed.⁸⁸ Mohamed Atta, one of the chief architects of the plot, had a bank account with SunTrust, which received a \$70,000 wire transfer.⁸⁹ Again, no SAR was filed.⁹⁰

In tracing \$500,000 flowing into U.S. bank accounts used by Mohamed Atta and other suspected members of the hijacking teams, the FBI has documented numerous large cash

81. *Id.*

82. *Id.*

83. 147 CONG. REC. E1219 (daily ed. June 27, 2001) (statement of Rep. Paul). Paul remarked that the Post Office's reporting manual recommended filing SARs even if it was probably a legitimate transaction. *Id.* "This policy turns the presumption of innocence, which has been recognized as one of the bulwarks of liberty since medieval times, on its head." *Id.*

84. *See* Berlau, *supra* note 47.

85. *Id.*

86. *19 Terrorists, supra* note 22.

87. Day & O'Harrow, *supra* note 39. One Citibank official remarked of the transactions, "There was absolutely nothing that set these accounts apart until someone told us the account holders were on the planes . . ." *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

withdrawals and a long trail of hotels, rental cars, and airplane trips that largely dispel any notion of an austere plot, a senior government official said. Previous reports have said the attacks cost no more than \$200,000.

Some of the money used to prepare the attack has already been linked to accounts in the Middle East⁹¹

Of course, it is questionable whether the filing of an SAR following these transactions would have made a difference.⁹² "FinCEN receives 150,000 SARs a year on a variety of suspected crimes, but getting and storing the information is a slow process. Half of the SARs the government receives are on magnetic tapes that take about three days to get into a data bank."⁹³ And if a bank does not have electronic capabilities and has to send a paper copy, it takes at least nine days to process.⁹⁴

In an attempt to assuage Americans' fears that their country had been blind to so many signs, Congress rapidly began working on H.R. 3162,⁹⁵ which would later become known as the USA Patriot Act. A large portion of the Act dealt with law enforcement agencies' ability to share information with one another,⁹⁶ their ability to receive a wiretap without a warrant,⁹⁷ immigration, and the detention of foreign citizens.⁹⁸ While the Senate Judiciary Committee was hearing a great deal of debate on its proposed measures,⁹⁹ the Banking Committee was quietly working together to form stringent anti-money laundering rules.¹⁰⁰ A good deal of these rules affected foreign banks and the ability of American law enforcement to subpoena

91. Dan Eggen & Bob Woodward, *U.S. Develops Picture of Overseas Plot: Hijackers Spent \$500,000; at Least 4 Trained in Afghan Camps*, WASH. POST, September 29, 2001, at A1. Interestingly, there are speculations that the Treasury Department will include hotels, travel agents and car rentals in its new provisions on SARs. Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Travel Agencies, 68 Fed. Reg. 8571 (proposed Feb. 24, 2003) (to be codified at 31 C.F.R. pt. 103). "The term 'financial institution' is defined to include a 'travel agency.'" *Id.* While FinCEN is not concerned with travel agencies that dispense traveler's checks because they already fell under the BSA, the department is concerned that money-launderers could utilize travel agency's policies on paying for tickets in cash. *Id.* As such, travel agencies will now be required to file SARs. *Id.*

92. See Day & O'Harrow, *supra* note 87.

93. *Id.*

94. *Id.*

95. See *supra* note 1.

96. § 203(b)(1), 115 Stat. at 280.

97. § 206, 115 Stat. at 282.

98. § 412, 115 Stat. at 350 (codified at 8 U.S.C. § 1126(a)).

99. 147 CONG. REC. S10990 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

100. *Id.*

account information.¹⁰¹ However, a substantial portion of the legislation would amend the BSA;¹⁰² it became clear that there would be no repeal of the act. If anything, it would cast an even broader net than it had before, as securities brokers and other financial service agencies, which had not fallen under the BSA previously, now had reporting duties.¹⁰³ As Senator Carl Levin said when presenting the money laundering provisions of the Act, "Osama bin Laden has boasted that his . . . recruits know the 'cracks' in 'Western financial systems' like they know the 'lines in their [own] hands.' Enactment of this bill will help seal the cracks that allow terrorists and other criminals to use our financial systems against us."¹⁰⁴ Many others shared this opinion, and while there was some concern about the wiretapping and detention provisions of the Act, no one spoke out against the money laundering provisions, despite earlier opposition.¹⁰⁵

101. § 302, 115 Stat. at 296 (codified at 31 U.S.C. § 5311).

102. § 358, 115 Stat. at 326. The Senate Committee on Banking, Housing and Urban Affairs worked on Title III before it was presented to Congress. Senator Sarbanes remarked:

Title III represents the most significant anti-money-laundering legislation in many, many years – certainly since money laundering was first made a crime in 1986. The Senate Committee on Banking Housing, and Urban Affairs . . . marked up and unanimously approved the key anti-money-laundering provisions on October 4. Those provisions were approved unanimously, 21-0. Those were approved as Title III of S. 1510, the Uniting and Strengthening America Act on October 11 by a vote of 96-1. H.R. 3004, the Financial Antiterrorism Act, which contained many of the same provisions and added important additional provisions, passed the House of Representatives by a vote of 412-1 on October 17. Title III of this conference report represents a skillful melding of the two bills and is a result of the strong contribution made by the House Financial Services Committee . . .

See *supra* note 99, at S11039 (statement of Sen. Sarbanes).

103. See § 302, 115 Stat. at 296 (codified at 31 U.S.C. § 5311).

104. See 147 CONG. REC. S11034 (statement of Sen. Levin). Levin further remarked, "To reiterate, the antiterrorism bill we have before us today would be very incomplete—only half of a toolbox—without a strong anti-money-laundering title to prevent foreign terrorists and other criminals from using our financial institutions against us." *Id.* at S11038. Levin continued to explain the goal of the bill: "The intention of this bill is to impose anti-money-laundering requirements across the board that reach virtually all U.S. financial institutions." *Id.*

105. This is something that I gathered from reading a great deal of the pre-vote debate. It is available in the *Congressional Record*, Volume 147 for October 25, 2001. While certain members of the Senate spoke out about their concerns regarding detentions and increased wire-tapping capabilities, no one in the Senate complained about the anti-money laundering provisions. In the House of Representative, Ron Paul of Texas has been the loudest voice of dissent regarding the BSA and its amendments.

Title III of the Patriot Act is called the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001.¹⁰⁶ The Act lays out a variety of objectives, including a grant of broad discretion to the Secretary of the Treasury,¹⁰⁷ and an assurance "that all appropriate elements of the financial services industry are subject to appropriate requirements to report potential money laundering transactions."¹⁰⁸ Subtitle A of the Act deals with international anti-money laundering measures. Generally, this portion requires domestic banks to close any accounts it may have with foreign shell banks,¹⁰⁹ necessitates due diligence by banks that have correspondent accounts with foreigners, and establishes long-arm jurisdiction over foreign money launderers.¹¹⁰ Furthermore, Section 326 requires the Secretary of Treasury to implement rules for banks regarding the verification of the identity of people seeking to open a bank account and the maintenance of records regarding personal information of customers.¹¹¹ Title III also gives the Secretary authorization to decide what financial institutions would be subjected to these regulations.¹¹²

Subtitle B of the Act addresses the amendments to the BSA.¹¹³ First and foremost, the amendments clarify that financial institutions will not be liable for disclosures of information made under regulations of the government.¹¹⁴ Further, financial institutions and their employees are not permitted to notify the

106. See 115 Stat. at 296. The introduction of Title III states, "money launderers subvert legitimate financial mechanisms and banking relationships by using them as protective covering for the movement of criminal proceeds and the financing of crime and terrorism, and by so doing, can threaten the safety of United States citizens and undermine the integrity of United States financial institutions." *Id.* Regarding the specific amendments to the BSA, Congress found that, "adequate records maintained by insured depository institutions have a high degree of usefulness in criminal, tax, and regulatory investigations . . . and that, given the threat posed to the security of the Nation . . . such records may also have a high degree of usefulness in the conduct of intelligence or counterintelligence activities." § 5319(a)(1)(A), 115 Stat. at 326.

107. § 302(b)(5), 115 Stat. at 297 (codified at 31 U.S.C. § 5311).

108. *Id.* § 302(b)(11), 115 Stat. at 298.

109. *Id.* § 311(a), 115 Stat. at 298-99.

110. *Id.*

111. *Id.* § 326, 115 Stat. at 317. "[T]he Secretary of the Treasury shall prescribe regulations setting forth the minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with the opening of an account at a financial institution." *Id.*

112. *Id.* § 327, 115 Stat. at 318.

113. *Id.* § 358(b), 115 Stat. at 326.

114. *Id.* § 626(3), 115 Stat. at 328. "SAFE HARBOR. - . . . any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or other information pursuant to this section in good-faith reliance upon a certification of a governmental agency . . . shall not be liable to any person for such disclosure under this subchapter . . ." *Id.*

customer of any report.¹¹⁵ Perhaps one of the more radical changes to the BSA involved brokers and commodities traders:

The Secretary, after consultation with the Securities and Exchange Commission and the Board of Governors of the Federal Reserve System, shall publish proposed regulations . . . requiring brokers and dealers . . . registered with the [SEC] . . . to submit suspicious activity reports under section 5318(g) of title 31 The Secretary . . . may prescribe regulations requiring futures commission merchants, commodity trading advisors, and commodity pool operators . . . to submit suspicious activity reports¹¹⁶

Moreover, the Act also requires that any business that engages in the transmission of funds may be included in the definition of "financial institution."¹¹⁷ Lastly, the Act provides that FinCEN will be responsible for creating a database of all of these records, which will be accessible by other government agencies, and there can be civil and criminal penalties for violations of the Act by financial institutions.¹¹⁸ As far as non-financial businesses are concerned, any trade or business that receives more than \$10,000 in currency for a transaction has to report that transaction and the name and address of the individual to FinCEN.¹¹⁹

Obviously, Title III of the Patriot Act is sweeping and its regulations caused some confusion in the industry, given the fact that it delegates a great deal of responsibility to the Secretary of Treasury.

Financial-industry participants familiar with the legislation say that it was thrown together quickly without a great deal of deliberation among industry representatives, treasury officials and lobbyists. As a result, the details of the original Oct. 26 legislation were vague, particularly about what sort of firms will have to comply.¹²⁰

Many in the industry were uncertain of how to comply with the new provisions.¹²¹ Did traders and brokerage firms now have to adopt

115. *Id.* at 321. The section states, "the financial institution, director, officer, employee, or agent may not notify any person involved in the transaction that the transaction has been reported[.]" *Id.*

116. *Id.* § 356(a), (b), 115 Stat. at 324.

117. *Id.* § 358, 115 Stat. at 324.

118. *Id.* § 361, 115 Stat. at 330.

119. *Id.* § 356, 115 Stat. at 333. "Any person who is engaged in a trade or business and who, in the course of such trade or business, receives more than \$10,000 in coins or currency . . . shall file a report . . . with respect to such transaction . . . with [FinCEN]. . . ." *Id.* at 333-34.

120. Glenn R. Simpson & Jathon Sapsford, *New Money-Laundering Rules to Cut Broad Swath in Finance*, WALL ST. J., Apr. 23, 2002, at A1.

121. *Id.*

internal codes and have compliance officers, as banks did under the BSA?¹²² They would have to wait a few months to find out when the Secretary started outlining the new requirements. "Since 1992, the Treasury Department has had the authority to issue such rules, but never did. The new law essentially flipped the old statute, now *requiring* the Treasury Department to take action instead of merely allowing it."¹²³

In the meantime, the Senate seemed to think that public sentiment about "KYC" provisions had changed, and given the climate of the country after September 11th, they may have been right. Senator Paul Sarbanes remarked when participating in the introduction of Title III, "I need not bring to the attention of my colleagues the fact that public support across the country for anti-money laundering legislation is extremely strong."¹²⁴ In the House of Representatives, Rep. Paul was still opposed to such measures:

In the name of patriotism, the Congress did some very unpatriotic things. . . . 'Know Your Customer' type banking regulations, resisted by most Americans for years, have now been put in place in an expanded fashion. Not only will the regulations affect banks, thrifts and credit unions, but all businesses will be required to file suspicious transaction reports if cash is used with a total of the transaction reaching \$10,000. Retail stores will be required to spy on all their customers and send reports to the U.S. Government. Financial service consultants are convinced that this new regulation will affect literally millions of law-abiding American citizens. The odds that this additional paperwork will catch a terrorist are remote. The sad part is that these regulations have been sought by Federal law enforcement agencies for years. The 9-11 attacks have served as an opportunity to get them by Congress and the American people.¹²⁵

After the Act was passed, the Treasury Department set out to provide new guidelines for so-called "financial institutions." The Department decided that the BSA and its amendments would apply

122. The answer is yes. See Will Leitch, *Patriot Act a Beastly Burden for Small B/Ds*, REGISTERED REPRESENTATIVE, Nov. 1, 2003, available at 2003 WL 9313381.

123. Glenn Kessler, *New Law Expands War on Money Laundering*, WASH. POST, Apr. 24, 2002, at E1. "Companies will have to train employees to detect money laundering and establish policies and procedures to carry out the law's requirements." *Id.*

124. 147 CONG. REC. S11039 (daily ed. Oct. 25, 2001) (statement of Sen. Sarbanes).

125. 147 CONG. REC. H8652 (daily ed. Nov. 29, 2001) (statement of Rep. Paul). Interestingly, Rep. Paul was one of only 3 Republicans who voted against the Patriot Act. *Final Vote Results for Roll Call 398*, Oct. 24, 2001, available at <http://clerk.house.gov/evs/2001/roll398.xml> (last visited Mar. 6, 2004).

to credit card operators, mutual funds, and money-transfer firms.¹²⁶ These organizations would now have to set up money laundering programs and train employees about compliance with the law.¹²⁷ As for credit card providers, they would be “encouraged to determine whether a foreign bank seeking to issue a U.S. credit card has adequate anti-money-laundering controls, and perhaps even deny credit cards to institutions that pose a risk to the system.”¹²⁸

In October 2002, Under Secretary for Enforcement of the Department of Treasury, Jimmy Gurule, testified before the Senate Finance Committee to discuss what was being done. He stated that:

We have undertaken our regulatory expansion under the authorities of the USA Patriot Act in full consultation with the private financial sectors that we are regulating. This outreach has assisted and informed our regulatory strategy with respect to each financial sector¹²⁹

So what does all of this mean for the financial industry? Aside from filing SARs with the federal government, securities and brokerage firms, credit card companies, and mutual fund operators will have to follow the same steps that banks do. “The regulations required the firms to implement comprehensive money-laundering compliance programs. Among the provisions, companies were required to designate a special compliance officer, train employees to detect money laundering, commission independent audits, and establish policies and procedures to identify risks and minimize opportunities for abuse.”¹³⁰ This could lead to problems, particularly for smaller businesses. “Lawyers who specialize in financial-services regulations note that the [A]ct’s record-keeping provisions are so extensive and cumbersome that even large, established financial-

126. See Simpson & Sapsford, *supra* note 120. More recently, FinCEN has been trying to apply the Patriot Act to real estate brokers. See Ray A. Smith, *Battle Brews over Money-Laundering Rules*, WALL ST. J., Sept. 17, 2003, at C12. FinCEN believes that the real estate industry could be subject to money laundering because it deals with high-price commodities. *Id.* The industry countered that the cost of implementing such compliance would trickle down to consumers. *Id.*

127. *Id.*

128. Kessler, *supra* note 123.

129. *The Financial War on Terrorism Before the U.S. Senate Finance Committee*, 109th Cong. (2002) (statement of Jimmy Gurule, Under Secretary for Enforcement, U.S. Dept. of the Treasury), available at 2002 WL 100237866. Gurule goes on to state that “after prolonged discussion with the insurance industry, we decided to regulate life and annuity insurance products . . . but we decided against regulating other forms of insurance . . .” *Id.* However, it would appear that the real reason the insurance industry won a reprieve was due to lobbying and the help of Representative Michael Oxley. See Simpson & Sapsford, *supra* note 120.

130. Yochi J. Dreazen, *Legislation Aimed at Stopping Terrorism Could Have a Devastating Impact on an Innocent Bystander: PayPal*, WALL ST. J., Oct. 21, 2002, at R9.

services institutions are having trouble complying with them. The challenges of complying will be even greater for a small and still-growing company"¹³¹ Many sectors of the industry are particularly concerned about the civil and criminal liability. "The filing noted that even unwittingly breaking the new law could lead to a lawsuit, large fine, or government prosecution, and said more regulation was likely 'Complying with such regulation could be expensive or require us to change the way we operate our business.'"¹³²

In late November 2002, Treasury Secretary Paul O'Neill resigned.¹³³ O'Neill's resignation had nothing to do with the Patriot Act—it was more related to President Bush's desire to shake up his economic team in the face of a large deficit.¹³⁴ As such, the President nominated John Snow to succeed O'Neill.¹³⁵ Snow was a self-proclaimed "deficit hawk."¹³⁶ In early February 2003, Congress accepted Snow as the new Secretary of the Treasury.¹³⁷ Last year, the Congress implemented the President's plan to create a Department of Homeland Security.¹³⁸ While the Secret Service and the Customs Service were transferred to the new department from the Treasury, it was decided that the Treasury would still be in charge of terrorist-financing regulations and investigations.¹³⁹ As such, Secretary Snow created the Executive Office for Terrorist Financing and Financial Crimes.¹⁴⁰ "In addition to helping devise U.S. strategies against terrorism, the office will work with the financial-services industry to locate terror-related accounts and groups."¹⁴¹ This was in no small part due to the financial service industry's desire to continue working

131. *Id.*

132. *Id.*

133. Keith B. Richburg & Anthony Faiola, *O'Neill's Departure Elicits Applause: Treasury Chief Irked South Americans*, WASH. POST, Dec. 7, 2002, at A09.

134. See generally Mike Allen, *Bush Nominates Snow as Treasury Secretary*, WASH. POST, Dec. 10, 2002, at A1 (describing some of the reasons that O'Neill was encouraged to leave the Treasury Department). O'Neill was also unpopular amongst many foreign nations for remarks that he made. Richburg & Faiola, *supra* note 133.

135. See Bob Davis, *New Treasury Secretary Snow Calls Self 'Serious Deficit Hawk'*, WALL ST. J., Feb. 5, 2003, at A6.

136. *Id.*

137. *Id.*

138. Glenn R. Simpson, *New Treasury Office to Focus on Terror Financing*, WALL ST. J., Mar. 3, 2003, at A14.

139. *Id.*

140. *Id.*

141. *Id.*

with the Department of Treasury.¹⁴² The new office will be in charge of FinCEN, as well as other units, which are in charge of foreign assets control.¹⁴³

Other than an explosion in the compliance departments of financial institutions, there is some general confusion about what the new rules are, and with an increase in paper work, what exactly the new law has accomplished. It would certainly appear that it is finally enforcing the BSA, and it is doing so through serious civil and criminal penalties. In January 2003, Banco Popular de Puerto Rico was prosecuted for lax enforcement of anti-money laundering provisions.¹⁴⁴ "The admission by Puerto Rico's largest bank came as part of a deferred prosecution—a severe measure against a financial company—under which the Justice Department can bring a criminal case against the bank should it break the law during the next 12 months."¹⁴⁵ Banco Popular admitted that it had failed to file Suspicious Activity Reports ("SARs").¹⁴⁶ The bank was assessed a fine of nearly \$22 million by FinCEN.¹⁴⁷ In December, the New York State Banking Department fined Western Union for what it claimed was widespread violations of the Patriot Act.¹⁴⁸ Western Union settled the

142. See *id.* "I think having Treasury continue to work with the financial industry on the Patriot Act is extremely important," said American Bankers Association senior counsel John Byrne." *Id.*

143. *Id.*

144. Paul Beckett, *Banco Popular to Pay Millions in U.S. Fines: Anti-Money Laundering Drive Reveals Puerto Rican Institution Didn't Report Suspicious Activity*, WALL ST. J., Jan. 17, 2003, at C1.

145. *Id.*

146. *Id.*; see *supra* notes 46-51. Since banks are required under federal law to file SARs, and given the number of SARs that a bank could file on a daily basis, it seems to me that catching Banco Popular's complete non-compliance could not have been that difficult.

147. See Beckett, *supra* note 143.

148. Bloomberg News, *First Data to Pay \$8 Million in Money-Laundering Case*, N.Y. TIMES, Dec. 20, 2002, at C4.

The First Data Corporation agreed yesterday to pay \$8 million to settle charges by the New York State Banking Department that its Western Union unit violated the federal Bank Secrecy Act by failing to report potential money launderers. The agency said that First Data had violated laws that require it to tell the government when a customer sends or receives more than \$10,000 in a single day. First Data, which has about 2,900 Western Union outlets in New York, cited a "cumbersome" compliance system.

Id.; see also Robert F. Worth, *Bank Failed to Question Huge Deposits*, N.Y. TIMES, Nov. 28, 2002, at C1. A small New York based bank, Broadway National Bank, was charged with three felony counts of violating federal money laundering laws. *Id.* The bank had committed a variety of egregious violations. "[T]he bank failed to report hundreds of bulk cash deposits totaling more than \$46 million and thousands of transfers structured to avoid federal disclosure laws. . . ." *Id.* One particular customer of the bank, a money launderer for a Columbian drug cartel, would drop cash off in duffel

fine without having to admit wrongdoing.¹⁴⁹ More financial institutions can probably expect problems in the future under due diligence standards. While it seems that no harm can come from actually enforcing the BSA and its amendments under the Patriot Act, it is still unknown whether terrorism will be abated by cracking down on money laundering at domestic institutions.

According to the most recent statistics from Celent Communications, a financial research group, banks, brokerage firms, and other financial institutions spent over \$11 billion in 2002 to strengthen their internal controls, but criminals are still laundering billions of dollars through the U.S. system.¹⁵⁰ Indeed, financial institutions are having problems keeping up with the new law and regulations; while Suspicious Activity Reports increased 35%, no institutions have been able to install a centralized customer-identification system.¹⁵¹

III. ANALYSIS

A. *Why Should Financial Privacy Matter to Americans?*

To some degree, Americans give up their financial privacy on a daily basis.¹⁵² Financial institutions are in a position of subtle power

bags at the teller window – one amount totaled \$600,000, but employees were never instructed to file SARs on such transactions. *Id.* Given the lax attitude of the bank, it was sought out by many criminals seeking to avoid disclosure. *Id.* This is an extreme case of money laundering through a bank. For instance, the 9/11 hijackers did not engage in such suspicious activity with their banks. It is entirely possible that had SARs been filled out on the hijackers, they might have been overlooked. *See* Day & O'Harrow, *supra* note 88.

149. Beckett, *supra* note 144.

150. Mara Der Hovanesian & David Fairlamb, *Still Drowning in Dirty Money; The Patriot Act Was Supposed to Make Money Laundering Harder to Do. It Hasn't*, BUSINESS WEEK, Dec. 1, 2003, at 102. The article also reports that two years after the passage of the Patriot Act, 3,200 banks, 6,000 brokerages, and 4,400 insurance companies are still not complying with the minimal screening procedures for new customers. *Id.*

151. *Id.* According to Bob Malloy, Deloitte & Touche's director of Operational Risk Management, "Brokerage firms are still struggling to comply, insurance companies don't have the right systems, and many of the largest universal banks created through mergers' still have divisions that can't communicate with each other." *Id.*

152. *See generally* Matthew N. Kleiman, Comment, *The Right to Financial Privacy versus Computerized Law Enforcement: A New Fight in an Old Battle*, 86 NW. U.L. REV. 1169 (1992). While Kleiman's commentary on the development of FinCEN and its impact on privacy rights was written over ten years ago, he foresaw a chilling effect of such technology and government supervisions:

As America moves closer to a cashless society where all financial transactions are conducted by computer recordkeeping, society inches closer to fulfilling Orwell's chilling vision of a nation where the "powers that be" can monitor the who, what, where and how of every individual's life. Yet we

over consumers. "The quiet erosion of privacy by consumer profiling may be an issue that is ignored at our peril."¹⁵³ Do we even have a right to financial privacy? Perhaps, if Americans were more aware of what is shared and with whom, the answer to that question would be a resounding yes. After all, when the Fed was trying to pass KYC provisions, 300,000 irate Americans called or e-mailed their distaste for such regulations.¹⁵⁴ "The most basic information deficiency is individuals' ignorance of data collection and surveillance practices. The free market theory presupposes that consumers make informed choices when they decide with whom to share certain information. The reality . . . does not approach this ideal assumption."¹⁵⁵ Since September 11th, our privacy rights have changed. "The USA PATRIOT Act did not destroy the edifice of U.S. privacy law, but it did significantly weaken the structure and limit the coverage of many key statutes. The Act limits safeguards created by fifteen statutes."¹⁵⁶

Why would we want to part with these privacy rights? After all, we can criminalize money laundering and the activities that go along with it. "[C]onsider a more searing example of the failure of substantive criminal law alone to prevent harm. It is a crime to crash a plane into a skyscraper, but that does not prevent it from happening."¹⁵⁷ One cannot underestimate the intense feeling of

need not turn to science fiction to imagine the abuses that indiscriminate access to personal information can spawn. From "communist" witch-hunting to political blackmail, America's history is rife with examples of improper intrusion by the government into the personal lives of individuals.

Id. at 1176-77. While Kleiman's analysis may be a little overstated, there is something to be said for being suspicious of the power the government has to invade our privacy. And, indeed, we are becoming a cashless society and the ability to learn so much about our lives through our financial history is one of the reasons the government is interested in obtaining it.

153. Janet Dean Gertz, Comment, *The Purloined Personality: Consumer Profiling in Financial Services*, 39 SAN DIEGO L. REV. 943, 950 (2002).

154. Wahl, *Bank-Customer Rule*, *supra* note 67.

155. Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 892 (2002).

156. Marc Rotenberg, *Privacy and Secrecy After September 11*, 86 MINN. L. REV. 1115, 1118 (2002). Rotenberg discusses the difference between privacy and secrecy and he opines that privacy is one of the cornerstones of our society. "We should understand that in the battle to protect privacy lies also the struggle to maintain Constitutional democracy, to safeguard the rights of citizens, and to hold government accountable. Privacy remains today as fundamental a measure of democratic society as it was when democracy was born." *Id.* at 1133.

157. Dale Carpenter, *Keeping Secrets*, 86 MINN. L. REV. 1097, 1097 (2002). Carpenter hits the nail on the head with his assessment of our desire to know the unknowable. "How much better it would be to know in advance the hijackers' plans. But that would require monitoring them and the often innocent people associating with them. For every such investigation that uncovers and thwarts an attack, there

victimization—the hijackers lived amongst us for months, learned how to fly in our country, and utilized our own banks and economy to generate the revenue needed to murder us. The agencies that are responsible for protecting our country were powerless to defend us. “Access to advance information about others adds a layer of protection mere criminal prohibition does not provide, but that is a benefit with an attendant cost.”¹⁵⁸ It is amidst this backdrop that Congress is able to press forward with laws that may or may not protect us but will certainly infringe on our privacy. “The Washington buzz words ‘information sharing’ are often put forth as the solution to 21st century problems, but this has significant privacy implications that must be addressed.”¹⁵⁹ Phyllis Schlafly, President of the Eagle Forum, addressed the Senate Committee of Banking, Housing and Urban Affairs last September regarding the harms of “information sharing” of financial information. Perhaps the most important aspect that she pointed out was a financial institution’s ability to make money off of sharing a customer’s private financial information.

The checks you write and receive, the invoices you pay, and the investments you make reveal as much about you as a personal diary. Where I shop, how often I travel, when I visit my doctor, how I save for retirement are all actions known to financial institutions, which connect the dots of my life and create a valuable personal profile. This compilation of personal information is bad enough, but the sharing of it without my consent is even worse.¹⁶⁰

will . . . be many that discover nothing more than that Mohammed is cheating on his wife.” *Id.* at 1097-98.

158. *Id.* at 1098. The author goes on to say that “quite aside from the constitutional constraints they face on such surveillance and inquiry, the federal and state governments *have* limited their own powers to pry into citizens’ lives. Why? Because, it turns out, they must answer democratically to a polity concerned about more than order.” *Id.* Yet, out of fear and panic, Americans seem ready to give up their privacy since 9/11. *See id.*

159. *Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 107th Cong. (2002) (statement of Phyllis Schlafly, President, Eagle Forum), available at 2002 WL 100237422.

160. *Id.* Schlafly goes on in her testimony to discuss the threats to financial privacy under the Patriot Act:

The Bush Administration’s proposed regulations announced on July 17 to implement the USA Patriot Act’s Anti-Money Laundering provisions call for identity verification, but they are even more intrusive than Know Your Customer. On that same day . . . the Treasury Department entered into an agreement with the Social Security Administration (SSA) to develop and implement a system by which financial institutions may access a database to verify the authenticity of Social Security numbers provided by customers at account opening.

Many Americans would be uncomfortable with this idea. Yet this is the basis of information sharing systems that allows not only the federal government, but also others, to watch our lives. Customers of banks and other financial institutions may not realize how much their financial information can tell others about them.¹⁶¹ It is this realization that may show individuals that they might not want their financial affairs to be easily accessible. “[C]ourts have acknowledged that the contractual relationship between a financial institution and its customers creates an ‘implicit’ duty for those institutions to keep their customers’ account information confidential.”¹⁶² The other side of the coin is the desire for safety—since 9/11, Americans seem more willing to give up freedoms in an exchange for protection from the danger of terrorism.¹⁶³ Yet, it is important to remember that statutes, including the Patriot Act, can be manipulated to serve other purposes.¹⁶⁴ The question is: are the provisions of the Patriot Act really capable of nabbing terrorists like the 9/11 hijackers? Do these provisions really do what they purport to do? Is there a better way?

B. *Confusion and Difficulty for Financial Institutions*

Given the enormous fines that can and have been placed on financial institutions¹⁶⁵ that do not comply with the regulatory framework, there has been a scramble by such organizations to learn the ins-and-outs of the new law and to comply with the Act.¹⁶⁶ While

Id. (internal quotations omitted).

161. See Gertz, *supra* note 153, at 953 (discussing consumer profiling).

162. Brandon McKelvey, Comment, *Financial Institutions’ Duty of Confidentiality to Keep Customer’s Personal Information Secure from the Threat of Identity Theft*, 34 U.C. DAVIS L. REV. 1077, 1100 (2001).

163. See Rotenberg, *supra* note 157, at 1115. “Polls indicate increased public support for new forms of surveillance.” *Id.* Rotenberg cites a Washington Post/ABC News poll from September 29, 2001, which shows a high level of support for a variety of government surveillance. *Id.* at 1115 n.1.

164. See Michael Isikoff, *Show Me the Money; Patriot Act Helps the Feds in Cases with No Tie to Terror*, NEWSWEEK, Dec. 1, 2003, at 36. During an investigation into Michael Galardi, a Las Vegas strip-club owner, the FBI used the money laundering provisions of the Patriot Act to quickly obtain financial records. *Id.* “Law-enforcement agencies can submit the name of any suspect to the Treasury Department, which then orders financial institutions across the country to search their records for any matches.” *Id.* If it turns out that the individual has an account, then the institution will be served a subpoena. *Id.* And remember—the institution may not tell the individual that the government has accessed his records. As the article goes on to report: “The Feds might have gotten the same records even without the new law—but only if they had hard evidence that a suspect was doing business at a particular bank.” *Id.* Was Michael Galardi a money launderer? According to the strictest reading of the Patriot Act, he was. But his actual crime was bribery. *Id.*

165. See *supra* notes 145-150.

166. *Progress Since 9/11: The Effectiveness of the U.S. Anti-Terrorism Efforts: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on*

the Treasury Department has improved its ability to direct banks and other agencies on how to comply, there is still a great deal of confusion and need for guidance.¹⁶⁷ John Byrne, Senior Counsel and Compliance Manager for the American Bankers Association testified before the House Financial Services Committee in March 2003.¹⁶⁸ "This need is particularly obvious in the area of 'terrorist financing.' This crime is difficult to discern as it often appears as a normal transaction."¹⁶⁹ So how can bank staff learn to spot a terrorist, especially when "[w]e have learned from many government experts that the financing of terrorist activities often can occur in fairly low dollar amounts and with basic financial products?"¹⁷⁰ How can a bank teller spot a terrorist who is making transactions in small dollar amounts? Is it any wonder that there is only one prosecution for wrongdoing for every 25,000 SARs reported?¹⁷¹ Aside from racial profiling, it seems that it would be virtually impossible to spot.

And one must not forget the increase in paperwork that will be generated under the new provisions.¹⁷² This is not necessarily a concern for financial institutions, although it will cost them an enormous amount of money to comply with the laws; but it is a concern for FinCEN, which has to go through all of the SARs and CTRs.¹⁷³ As mentioned before, in 1997, FinCEN received more than twelve million reports from domestic financial institutions.¹⁷⁴ Prior to September 11th, FinCEN had only 184 employees.¹⁷⁵ While their

Financial Services, 108th Congress, (2003) (statement of John J. Byrne, Senior Counsel and Compliance Manager of the American Bankers Ass'n), available at 2003 WL 11716151.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. See Editorial, *supra* note 61 (arguing that the Bank Secrecy Act has not accomplished its intended goal).

172. See STESENS, *supra* note 17, at 99 (Stessens' book was written before the Patriot Act, but he was skeptical at the time of FinCEN's ability to handle all the reports they receive). "The usefulness of these reporting duties for the government as such is at any rate doubtful as FinCEN is currently overwhelmed by the sheer volume of reports that are made . . ." *Id.*

173. See, e.g., *id.* (describing FinCEN's "permanent backlog in investigations").

174. *Id.*

175. Fletcher N. Baldwin, Jr., *Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT'L L. 3, 34 (2002). "Our financial crimes enforcement network, which is in Tysons Corner, D.C., on September 10, 2001 had employed for the entire United States, all the banks, all bank records, all computers, everything under our Bank Secrecy Act, a total of 184 persons." *Id.* FinCEN did increase in size and budget after September 11th, but not by a great deal. "In FY 2003, FinCEN is requesting \$52,289,000 and 254 full-time equivalents (FTE). This request includes \$1 million and 8 FTE to begin to meet the challenges of the USA PATRIOT Act." *FY 2003*

budget has been increased since the attacks and implementation, one can only imagine the backlog of reports. Let's consider the numbers pre-9/11. If there were twelve million reports and 184 employees at FinCEN, that means that over the course of the year, each employee would have to review 65,217 reports.¹⁷⁶ If every employee works five days a week for fifty weeks of the year, they have 250 days to review their batch of reports. That computes to 260 reports per day, which is quite a bit of work. Even if one were to suppose that the increase in FinCEN's budget now allowed them an additional 100 employees, we cannot possibly guess how many reports will be generated this year, now that banks are actively increasing their compliance departments and are fearful of not living up to due diligence standards. With this in mind, the Department of Treasury has created a twenty-four hour hotline for bank personnel to call if they witness particularly suspicious activity by a customer.¹⁷⁷ This may unload some of the burden for FinCEN, but it may not catch terrorists either.¹⁷⁸

I also question the idea that it is a bank's job to investigate crimes, or in this case, money that might be related to crime. Does a bank owe me due process of law? No, the government does. It has been argued that some people would prefer that their bank invade their privacy rather than the federal government.¹⁷⁹ My response to this is that it is neither the bank's job to investigate your life, nor should it be. A bank, which is attempting to avoid liability, is obliged to overstep its bounds.

Another important problem that is raised under the new regulations is identity theft. As you may recall from earlier in this Note, the hijackers opened bank accounts in the United States with

Appropriations: Hearing Before the Subcomm. On Treasury and General Government of the S. Comm. On Appropriations, 107th Cong. (April 17, 2002) (statement of James F. Sloan, Director of Financial Crimes Enforcement Network, U.S. Dep't of Treas.), available at 2002 WL 25101157 [hereinafter Sloan Statement of April 17, 2002].

176. This is simple math that I did with a calculator. While FinCEN does have several computer databases and programs to aid in analyzing reports, I wanted to make the point that the new provisions simply add to an enormous stack of papers that may not help anyone prior to a terrorist attack. While it is understandable that we as a country felt victimized and Congress wanted to fix what it perceived to be an institutional problem, these laws are providing a false sense of security.

177. Sloan Statement of April 17, 2002, *supra* note 175.

178. Interview with Katherine Villano, Community Banking Compliance Assistant, Hudson United Bank, Mahwah, N.J. (Oct. 2, 2002). I was given the idea for this Note from an old friend, Katherine Villano, who worked in the compliance department of a national bank. While I was researching this topic, I commented that I thought the new laws were a bad idea. She disagreed with me and stated that in her department, the new laws had enabled the bank to catch a variety of criminals (for example, drug dealers, and strangely enough, a child pornographer). *Id.* They did not, however, uncover anyone who was related to any terrorist organization. *Id.*

179. *Id.*

phony social security numbers that were never checked by bank staff.¹⁸⁰ The new provisions are meant to enforce the rule that all financial institutions obtain and verify a social security number when an individual wishes to open an account.¹⁸¹ Terrorists, however, are not morons. There is no reason that a terrorist, or anyone else who wishes to conceal his or her true identity and intent, could not obtain a valid social security number.¹⁸² This could lead to even greater problems with identity theft.¹⁸³ It seems apparent that requiring banks to check social security numbers would not solve the problem, and might actually make things worse.

So what is to be done if the ideas of regulators are either burdensome on our right to privacy or simply not feasible? I am not suggesting that all of the ideas in the Patriot Act that combat money laundering are without merit. A large portion of the Act deals with foreign banks and measures that may help investigators identify and hinder terrorist money laundering.¹⁸⁴ These provisions are tremendously important for tracking the flow of money across the globe. Enforcing the BSA against private banking segments of financial institutions is also inherent in stopping money laundering. The culture of secrecy would be attractive to terrorists and their wealthy contributors.¹⁸⁵ Of course, in some situations, SARs would make sense—but only when the transaction is actually suspicious. Case in point—the Broadway National Bank should have filed numerous SARs on their customer who deposited enormous sums of cash from a duffel bag.¹⁸⁶ However, with the legislation as it stands now, financial institutions may be filing unnecessary reports for fear that if they do not, it could lead to prosecution down the road for “willful blindness” or a lack of due diligence. In other words, it is easy

180. *19 Terrorists*, *supra* note 22.

181. *See* International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, § 326, 115 Stat. 296, 317 (outlining requirements for accountholder verification and identification).

182. *See generally* McKelvey, *supra* note 162, at 1082-88. McKelvey describes a variety of ways in which a person could commit identity theft and gain access to legitimate social security numbers. *See id.* “One common way identity thieves obtain personal information is by changing the address on someone’s account to receive that individual’s personal information. Equipped with another individual’s information, the thief can use the information to defraud financial institutions by opening accounts . . .” *Id.* at 1082-83.

183. *See generally id.* “Identity theft occurs when someone uses another individual’s personal information for fraudulent purposes. A financial institution[s] collection and use of personal information directly connects them with the growing problem of identity theft.” *Id.* at 1082.

184. *See generally* §§ 301-377, 115 Stat. at 296-342 (providing for international money laundering abatement).

185. *See Private Banking and Money Laundering*, *supra* note 48.

186. *See* Worth, *supra* note 148.

to fill out some paperwork and ship it off to FinCEN if something even remotely out of the ordinary occurs.

Another important aspect that really ought to be the focus of FinCEN and other agencies is Informal Value Transfer Systems ("IVTS").¹⁸⁷ In FinCEN's Fifth Suspicious Activity Report Review,¹⁸⁸ the agency admitted that IVTS are one of the major ways that terrorists could receive funding.¹⁸⁹ "IVTS is used to describe money or value transfer systems that operate informally to transfer money. In the past, some of those informal networks were labeled by various terms including 'alternative remittance systems' and 'underground banking.'¹⁹⁰ IVTS go by many different names, depending on the region they are from.¹⁹¹ "Hawala" of the Middle East and "Black Market Peso Exchange" of South America are two of the most notorious IVTS.¹⁹² "Under the USA Patriot Act, hawalas and informal value transfer systems are required to register as a money services business or MSB, thereby subjecting them to existing money laundering and terrorist financing regulations"¹⁹³

It would appear that given the broad reach of IVTS, they are very attractive to terrorists and ought to be closely monitored. In fact, the government has not gone far enough in regulating these hawalas. "There is no location today where the general public can go to determine whether a money transfer business has registered with the government as they are required to do under the Bank Secrecy Act."¹⁹⁴ Why should there be a list? "[A] financial institution trying to

187. See Statement of James F. Sloan, *supra* note 39.

188. BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW—TRENDS TIPS & ISSUES, ISSUE 5 (2003), available at <http://www.fincen.gov/sarreviewissue5.pdf>.

189. *Id.* at 18.

190. Statement of James F. Sloan, *supra* note 187, at 17.

191. *Id.* at 17-18.

192. See *id.* at 18. "[I]t is difficult to accurately measure the total volume of financial activity associated with the system. However, it is estimated that, at a minimum, tens of billions of dollars flow through hawalas and other [IVTS] on an annual basis." Statement of James F. Sloan, *supra* note 39. Across the world, hawalas are either illegal or simply unregulated, which makes the United States' task even more difficult. *Id.* "While the majority of IVTS activity is legitimate in purpose, some of these systems have been used to facilitate the financing of terrorism. The very features that make [them] attractive to legitimate customers – efficiency, convenience, trust, speed, anonymity, and the lack of a paper trail – also appeal to terrorists and terrorist organizations" *Id.* at 18.

193. *Id.* IVTS will also have to fill out SARs and are prohibited from transmitting money that the owner knows are proceeds from a crime. *Id.* at 22.

194. *An Assessment of the Tools Needed to Fight the Financing of Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002)(statement of Jonathan M. Winer, Member, Council on Foreign Relations, Alstan & Bird, LLP), available at http://www.senate.gov/~judiciary/print_testimony.cfm?id=5198wit_id=1424.

do due diligence or determine whether a transaction is suspicious, as well as law enforcement officials, can have an easy means of checking whether a particular money service business . . . has registered and is in compliance with the most basic requirements of U.S. law.¹⁹⁵

Another interesting, and controversial, possibility for regulation are Islamic charities. While I am reticent to suggest singling out Islamic charities, the fact does remain that several charities have been used to funnel money to terrorists, particularly the 9/11 hijackers.¹⁹⁶ "The financial resources of some charities that have been linked to terrorist finance have been very large, and there remains more to do to protect the United States from abuses involving charities."¹⁹⁷

It has been suggested that charities across the board ought to be treated as financial institutions for the purposes of coverage under the BSA.¹⁹⁸ There are many problems with this theory. First, it would waste very valuable resources for charities, which already operate with limited funds. Second, it is overly inclusive—there is little concern that a food bank like America's Second Harvest in Chicago would be laundering money. Third, there could be difficulty with subjecting religious non-profits, like Catholic Charities, to banking regulations. However, it is an idea that ought to be considered, so long as it is even-handed and not entirely focused on Arabs or the Islamic religion. For instance, it is plausible that when Timothy McVeigh bombed the federal building in Oklahoma City, he could have received money from a "charity" with similar view points.

Another suggestion by Winer during his congressional testimony bears repeating. "We need to develop international standards for regulating and tracking gold and other precious metals and jewels that are used in for transnational terrorist finance."¹⁹⁹ While the U.S. government has seriously hindered money laundering through gold and jewels by drug cartels and organized crime, it has not given thought to how terrorist organizations might be affected.²⁰⁰ However, "Dubai, used by the September 11 terrorists to handle their money,

195. *Id.* Winer goes on to suggest that "we also need state and local, as well as federal law enforcement making more well publicized cases against hawaladers." *Id.*

196. *Id.* "I am tremendously concerned that funds from some of these charities have been used to purchase interests in otherwise legitimate U.S. businesses. Charity fraud is not limited to Islamic charities. . . ." *Id.* Winer's views on charities are radical. He goes on to say that: "I would urge consideration of whether the Administration should use its existing authorities to treat charities as financial institutions for the purposes of the Bank Secrecy Act . . ." *Id.*

197. *Id.* (explaining that charity fraud is not limited to Islamic charities).

198. *Id.*

199. *Id.*

200. *Id.*

has the biggest gold market in the world. The U.S. should take a lead in developing and implementing global regulatory regimes for tracking and regulating gold . . . and gemstones subject to abuse, especially across borders²⁰¹

IV. CONCLUSION

September 11th was a tragedy. It is tempting in the face of such an event to have 20/20 hindsight. It is possible that the hijackers could have been caught beforehand. But that is impossible to know. Here is what we do know—they used our banks to receive money that was used to murder over 3,000 people.²⁰² Such a violation makes individuals feel victimized. It is important to remember that while the Congress may have had the best intentions where the Patriot Act is concerned, it is unlikely that they fully understand the ramifications of the amendments to the BSA. It is unlikely that these amendments could catch a terrorist. And while it might make it slightly more difficult for that terrorist to transfer his or her money, it will not stop him or her. What these provisions do is further burden the federal agencies that are supposed to stop money laundering, overwhelm financial institutions, and provide a false sense of security.

Meanwhile, we are all potentially being watched. “[W]e must oppose the fatalism that has captured the minds and hearts of too many Americans. We should reject the premise that after September 11 we can no longer afford the privacy of freedom that we previously enjoyed.”²⁰³ This is not the first time our nation has faced substantial difficulty. “The United States has survived world war, presidential assassination, domestic riots, and economic depression. We have had nuclear weapons targeted on the nation’s capital by foreign adversaries for much of the twentieth century.”²⁰⁴ Despite tremendously frightening times in our past, we have not forsaken our personal freedoms. “[N]one of these developments has required a permanent sacrifice in the structure of liberty established by the Constitution or by law, or specifically, a sacrifice of the individual’s

201. *Id.*

202. Baldwin, *supra* note 175, at 34. It bears noting that one-third of those killed on September 11th were from foreign countries—The United Kingdom, Canada, Pakistan, India, Mexico, Australia and Japan. *Id.* These countries, and many others, obviously have an interest in curbing money laundering. However, it is the United States’ enormous structure of financial institutions, free-market economy and previous problems with the drug trade and Italian organized crime that has led us to the forefront of legislation in this area.

203. Rotenberg, *supra* note 156, at 1135.

204. *Id.*

freedom to limit the oversight of government."²⁰⁵ While we are in the midst of hard times, and indeed, there will be more ahead, we must not lose sight of our individuality and uniqueness as a nation, where our citizens can come and go freely without having to produce papers. "Benjamin Franklin rightly cautioned that those who would sacrifice 'essential liberty for temporary security' will have neither liberty nor security."²⁰⁶ While Congress was well intentioned in its efforts to curb money laundering and prevent the use of our financial institutions by terrorists, the provisions will ultimately fail to achieve their goal. "The balance that must be achieved is between the authority created for government and the means of oversight to ensure that these new powers are not misused."²⁰⁷ Americans need to be cautioned before they toss their financial privacy by the wayside and let Big Brother see the picture that our financial records paint of us.

205. *Id.* There are those who state that at times of war, citizens must sacrifice their personal liberty for the good of the country. Rotenberg addresses this concern:

[W]e should not simply restate the observation that during times of national crisis, the authority of the government is necessarily expanded and the rights of citizens are necessarily diminished. It is descriptively correct to say that Japanese Americans were interned during World War II. It is also normatively fair to say that the internment was wrong and should not have occurred. Those who cite the internment of the Japanese during the Second World War, the prosecution of pacifists during the First World War, and arguably even the suspension of habeas corpus during the Civil War in support of new restrictions on the rights of citizens should not go unchallenged. Many injustices occur in times of crisis, and the fact of prior injustice should not justify the commission of new injustice.

Id. at 1134.

206. *Id.* (quoting THE OXFORD DICTIONARY OF POLITICAL QUOTATIONS 141 (Anthony Jay ed., 1996)).

207. *Id.*