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AFTER THE FALL: THE CRIMINAL LAW ENFORCEMENT RESPONSE TO THE S&L CRISIS

*BRUCE A. GREEN**

"The faults of the burglar are the qualities of the financier."—George Bernard Shaw.[1]

INTRODUCTION

IN analyzing why so many financial institutions failed in the 1980s, most commentators outside government have placed little weight on the role of criminal conduct by bank officers and directors.[2] That is certainly true of Professors Carl Felsenfeld and Lawrence White, both contributors to this symposium.[3] These commentators and others attribute the widespread collapse of savings and loan institutions to a variety of external factors, including the rise of market interest rates beginning in the 1960s, the inflation of 1980, governmental regulatory failure, the decline of the real estate market in the 1980s, and the legal restrictions on the ability of savings and loan institutions to protect themselves against these events by diversifying their portfolios.[4]

Many federal officials, however, disagree. Regulators,[5] legislators[6] and

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1. G.B. Shaw, Major Barbara 35 (Penguin ed. 1957).

2. *See, e.g.*, Pratt, *The Thrift Crisis: Discussion and Evaluation of its Causes and the Proposed Reforms*, 9 Ann. Rev. of Banking L. 359, 359-60 (1990) (citing four reasons for trouble of thrift institutions other than criminal conduct of bank officers and directors); Note, *The Southwest Plan and FIRREA: What Have We Learned?*, 9 Ann. Rev. of Banking L. 501, 502-512 (1990) (discussing combination of deregulation and market factors as causes of thrift crisis); Thomas, *Fraud Was Only a Small Factor in S&L Losses, Consultant Asserts*, Wall St. J., July 20, 1990, at A2, col. 1 (most losses resulted from decline in real estate values and high thrift interest rates).

3. *See* Felsenfeld, *The Savings and Loan Crisis—Yet Another Analysis*, in Annual Survey of Financial Institutions and Regulations, 59 Fordham L. Rev. S7 (1991); White, *The S&L Debacle*, in Annual Survey of Financial Institutions and Regulations, 59 Fordham L. Rev. S57 (1991).

4. *See* Felsenfeld, *supra* note 3, at S7; Scott, *Never Again: The S&L Bailout Bill*, 45 Bus. Law. 1883, 1885-89 (1990); White, *supra* note 3, at S57.

5. *See, e.g.*, 136 Cong. Rec. S9478 (daily ed. July 11, 1990)(statement of Sen.

executive branch officials[7] have professed repeatedly and emphatically their belief that criminal misconduct by insiders played a crucial role in many thrift failures.[8] Accordingly, Congress has adopted various provisions designed to facilitate the investigation and prosecution of individuals who committed crimes against financial institutions and to deter similar wrongdoing in the future. Two legislative packages contain these provisions: the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), which was adopted in 1989,[9] and the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, which President Bush signed into law as part of the Crime Control Act ("Crime Control Act").[10] Drawing upon the expanded investigative resources and new procedural devices that this recent legislation affords, the Department of Justice is now giving special attention to the investigation and prosecution of banking crimes,[11] particularly crimes connected with failed savings and loan institutions.

This Article examines the legislative response to the savings and loan crisis from the perspective of criminal law enforcement. By way of background, it briefly describes how federal law dealt with banking crimes prior to the savings and loan crisis. The Article then looks at Congress's belief that criminal conduct caused the savings and loan crisis and suggests reasons for skepticism about Congress's view. Finally, the Article

Heinz)("the Resolution Trust Corporation reports that 'more than 60 percent of insolvent S&L's were victimized by serious criminal activity' ").

6. *See, e.g.*, *id.* at S9484 (statement of Sen. Wirth)("There is no question . . . that fraud and other crimes played a significant role in the S&L crisis."); *id.* at S9489 (statement of Sen. Grassley)("It is no secret that fraud and other criminal conduct . . . have been major factors contributing to the massive financial mess facing the Nation's thrifts."); *id.* at S9498 (statement of Sen. Dole)("greed of . . . dishonest thrift insiders . . . was one of the primary causes of the collapse").

7. *See, e.g.*, *id.* at S9481 (statement of Sen. Leahy)("According to the Attorney General, 25 to 30 percent of all S&L failures can be attributed to criminal activity by the institution's officers and directors."); D. Thornburgh, Remarks to the 42nd Fordham Law Alumni Annual Luncheon, *White-Collar Crime: Cause and Effect* 4 (Mar. 2, 1991) [hereinafter Thornburgh Speech] (referring to "the criminal collapse of so many of our savings and loan institutions")(on file at *Fordham Law Review*).

8. There has been disagreement in government, however, about the percentage of thrift failures that were caused by criminal misconduct. *See 72nd Report by the Comm. on Government Operations, Combating Fraud, Abuse, and Misconduct in the Nation's Financial Institutions: Current Federal Efforts are Inadequate*, H.R. Rep. No. 1088, 100th Cong., 2d Sess. 45-56 (1988) [hereinafter *Combating Fraud, Abuse, and Misconduct*].

9. Pub. L. No. 101-73, 103 Stat. 183 (1989) [hereinafter FIRREA] (to be codified at various sections of 12, 15 and 18 U.S.C.).

10. *See* Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1991) [hereinafter Crime Control Act] (to be codified at various sections of 18 U.S.C.). For discussions of the criminal provisions enacted in the wake of the S&L crisis, see Arkin & Massaro, *Thrift 'Crime': A Target for the Prosecutor's Posse, Part I—Legal Exposure*, N.Y.L.J., Nov. 13, 1990, at 1, col. 1; Arkin & Massaro, *Defending Thrift 'Crime,' Part II: Potential Problems and Responses*, N.Y.L.J., Nov. 14, 1990, at 2, col. 5; Baird, *Criminal Investigative Powers Under FIRREA*, 26 Rev. of Banking & Fin. Serv. 19 (Sept. 12, 1990); Glancz, Jordan & Matheson, *New Bank Fraud Law May Frighten Off the Competent*, Am. Banker, Jan. 29, 1991, at 4, col. 1.

11. *See infra* notes 94-120 and accompanying text.

explores several provocative aspects of Congress's response to the perceived problem of rampant criminal wrongdoing at financial institutions.

I. THE VIEW OF FEDERAL BANKING CRIMES PRIOR TO THE S & L CRISIS

Federal criminal legislation has long favored financial institutions. Like carrier pigeons,[12] wild unbranded horses[13] and other endangered species, banks[14] are the subject of federal criminal provisions punishing those who cause them harm. Banks enjoy greater protection under federal criminal statutes than do any other commercial enterprises.[15] Among the most important criminal provisions applying to banks are those that proscribe wrongdoing by insiders: bank officers, directors, employees and agents.[16]

The contemporary criminal provisions originated in the National Banking Act of 1863,[17] legislation mainly comprised of civil provisions intended to preserve the integrity of the nation's currency during the Civil War.[18] The National Banking Act contained only one criminal enactment,[19] addressing Congress's concern that misconduct by insiders

12. *See* 18 U.S.C. § 45 (1988).

13. *See* 18 U.S.C. § 47(a) (1988).

14. Because federal criminal legislation dealing with financial institutions often fails to distinguish between savings and loans, commercial banks and other financial institutions, this Article uses the terms "bank" to refer to financial institutions generally.

15. Statutes of general applicability that prohibit activities such as mail and wire fraud or extortion may protect other enterprises, but the bank statutes are among the few that protect commercial enterprises in particular. Likewise, although many criminal provisions, such as securities fraud statutes, are directed at practices within an industry, they are not intended to protect the industry itself, but to protect consumers and others from members of the industry.

16. *See generally* J. Villa, Banking Crimes §§ 3.01-3.05, at 3-1 to 3-64 (1990)(comprehensive discussion of misapplication, embezzlement and false entries); Arkin, *A Brief Look at Banking-Related Crimes*, N.Y.L.J., Feb. 14, 1991, at 3, col. 1 (examining Title 18 statutes as they apply to financial institutions).

17. 12 Stat. 665, 675, Feb. 25, 1863. Congress repealed this Act the following year and incorporated virtually all its provisions into the National Banking Act of 1864. This was true of the criminal provision in particular, which became Section 55 of the National Banking Act, ch. 106, 13 Stat. 99, 116 (1864). For a discussion of the legislative history of the 1864 Act's criminal provision, see Morse, *Bank Insiders and the Willful Misapplication Statute: Toward More Effective Protection from Self-Dealing*, 92 Banking L.J. 715, 737-40 (1975).

The nineteenth-century criminal provision, as subsequently amended, is currently codified at 18 U.S.C. §§ 656 (misapplication and embezzlement from federally insured banks); 657 (misapplication and embezzlement from federally insured savings and loan associations and other financial institutions); 1005 (false entries in the books of a federally insured bank); and 1006 (false entries in books of federally insured savings and loan associations and other financial institutions) (1988).

18. *See* J. Villa, *supra* note 16, § 3.01[1], at 3-4 n.6.

19. 12 Stat. 665, 675 (Feb. 25, 1863). This was, to my knowledge, the first federal criminal provision to be incorporated into a comprehensive legislative package regulating business practices. *Cf.* Morse, *supra* note 17, at 737 ("[T]he National Bank Act was one of the first pieces of legislation to provide an extensive set of purely regulatory controls over a field of business activity."). The use of federal criminal provisions in connection

substantially threatened the well-being of banks[20]—a concern that Congress has since voiced repeatedly.[21] This criminal statute proscribed the misapplication and embezzlement of bank funds[22] as well as the making of false entries in a bank's records.[23] Although these crimes were labelled misdemeanors, they initially carried a penalty hefty by today's standards: no fewer than five years, and as many as ten years, imprisonment. Congress later reduced the penalty to a maximum of five years' imprisonment.[24]

Federal courts have had relatively free rein in determining the scope of the crime of misapplication. Although the misapplication statute did reach much conduct that constituted a crime under state law as well,[25] "misapplication" was a new crime; it never existed under state common law. Therefore, prior judicial understandings have not constrained the courts' interpretation of the statute. Nor have expressions of legislative intent circumscribed the courts, since the 1863 Congress gave no indication of what it meant by "misapplication."

Although Congress apparently did not intend the federal misapplica-

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with the regulation of business practices has been said to have originated with the Interstate Commerce Act of 1887. *See* H. First, Business Crime 1-2 (1990) (Section 10 of the Interstate Commerce Act, which made wilful violation of Act a misdemeanor, was the "first important 'business crime' "). It may be that such recognition is owed, instead, to the National Bank Act.

20. The banking interest in the United States is an important one; it has grown with the business of the country, and has been largely instrumental in developing the national resources and in increasing the national wealth. Banks of issue, badly and dishonestly as many of them have been managed, and disastrous as have been the failures which bad management and dishonesty have produced, have still been of unquestionable advantage to the people.

Annual Report of the Comptroller of the Currency on the National Bank Act, 1864, *reprinted in* 2 Documentary History of.Banking & Currency in the United States 331 (H. Krooss ed. 1983).

21. *See* J. Villa, *supra* note 16, § 3.01[1], at 3-4 to 3-6.

22. *See supra* note 17.

23. *Id.*

24. *See* 18 U.S.C. §§ 656, 657, 1005, 1006 (1988)(revised in 1948 to provide for maximum five years' imprisonment).

25. To a large extent, the import of the federal banking crimes is not to criminalize conduct that would otherwise have been lawful, but rather to extend the federal government's investigative and prosecutorial authority to particular criminal conduct over which the state authorities would otherwise have enjoyed exclusive jurisdiction. Consequently, since 1863, state and federal authorities have had concurrent jurisdiction to prosecute a variety of wrongdoing by bank insiders. *See generally* J. Villa, *supra* note 16, § 1.01, 1-1 to 1-4 (discussion of concurrent jurisdiction of state and federal authorities in criminal matters). In addition, states continued to exercise sole authority over other wrongful conduct directed at banks both by insiders and outsiders. *See, e.g.*, Williams v. United States, 458 U.S. 279, 290 (1982)(18 U.S.C. § 1014, proscribing false statements to a bank, does not reach writing a check on insufficient funds); Comment on Legislation, *Bad Check Laws*, 44 Harv. L. Rev. 451 (1931)(reviewing state laws on issuance of checks drawn on insufficient funds). As a matter of investigative and prosecutorial discretion, federal authorities have traditionally declined to proceed in many individual cases that would come within the reach of the federal statutes. *See* J. Villa, *supra* note 16, § 1.01, at 1-3 n.5.

tion statute to reach "maladministration" of a bank's affairs,[26] federal courts have availed themselves of the license to interpret that statute broadly. This loose interpretation has obscured the line between maladministration and misapplication. As currently interpreted, misapplication does not require any taking of funds by the bank insider, nor does it require any actual or intended loss to the bank. It simply requires a deceitful handling of bank funds.[27] Bank officers have been convicted of misapplication for authorizing loans that were forbidden by civil statutes[28] or regulations,[29] by bank internal policies,[30] or by instructions from the bank's board of directors.[31] It is no defense that the bank officer or the borrower intended to return or did in fact return the bank's money,[32] that the officer sought to promote the bank's interests,[33] or even that the bank profited from the officer's acts.[34]

Because courts have read the 1863 statute to reach a wide variety of misconduct, there has been little need for Congress to adopt new criminal statutes for the protection of banks. Nevertheless, in the twentieth century, in keeping with Congress's general expansion of federal criminal jurisdiction—an expansion that some have criticized recently[35]—Congress modestly extended the protection that federal criminal law affords financial institutions. It did so out of a concern identical to the one underlying the 1863 statute—namely, that the wrongdoing of insiders could topple banks. In 1913, for example, Congress enacted a criminal statute forbidding bribery of bank officials.[36] This provision, which was intended to promote disinterested decisionmaking by bank directors, officers and employees, has been amended on a number of occasions over

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26. *See* United States v. Britton, 107 U.S. 655, 668 (1882).

27. *See* United States v. Walker, 871 F.2d 1298, 1307 (6th Cir. 1989).

28. *See* United States v. Castiglia, 894 F.2d 533 (2d Cir.)(violation of 12 U.S.C. § 375a), *cert. denied*, 111 S. Ct. 68 (1990).

29. *See, e.g.*, United States v. Cordell, 912 F.2d 769, 777 (5th Cir. 1990)(evidence of violation of Regulation J allowed to show responsibility for shifting funds); United States v. McElroy, 910 F.2d 1016, 1023-24 (2d Cir. 1990) (evidence of violation of Federal Reserve Board Regulation U is admissible).

30. *See, e.g.*, United States v. Clark, 765 F.2d 297, 303 (2d Cir. 1985)(violation of bank's internally imposed lending limit); United States v. Angelos, 763 F.2d 859, 861 (7th Cir. 1985) (loan made by bank officer without necessary approval by board of directors).

31. *Cf.* United States v. Bonnett, 877 F.2d 1450, 1454-58 (10th Cir. 1989)(conviction under bank fraud statute, 18 U.S.C. § 1344, where scheme led to circumvention of lending limit set by bank's board of directors).

32. *See* United States v. Sindona, 636 F.2d 792, 800-01 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981); United States v. Beran, 546 F.2d 1316, 1321-22 (8th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977); United States v. Fortunato, 402 F.2d 79, 80-81 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969).

33. *See Sindona*, 636 F.2d at 800-01.

34. *See* United States v. Landers, 576 F.2d 94, 96 (5th Cir. 1978).

35. *See, e.g.*, Miner, *The Consequences of Federalizing Criminal Law*, 4 Crim. Just. 16 (1989) (discussing negative implications of federalizing criminal law).

36. *See* Federal Reserve Act of 1913, Pub. L. No. 63-43, ch. 6, § 22, 38 Stat. 251, 272. The statute prohibited bank officers, directors and employees from receiving "any fee, commission, gift, or other consideration for or in connection with any transaction or business of the bank" apart from a salary or fees paid by the bank itself. *Id.*

the past seventy-five years both to broaden its reach and to narrow it.[37]

In the 1970s, failures of commercial banks, attributed to self-dealing by insiders,[38] led to calls for further expansion of federal criminal provisions protecting financial institutions.[39] The call continued to sound throughout the early 1980s, as congressional committees conducted additional examinations of the problem of criminal misconduct by bank insiders.[40] In 1984, responding in part to the need for an effective way to deal with bank fraud,[41] Congress enacted a bank fraud statute[42] that applied to both insiders and others. Although its ostensible purpose was to plug some loopholes in the existing law,[43] the statute reaches little misconduct that was not already forbidden by either one of the other banking crime statutes or some other federal criminal statute of general applicability, such as mail or wire fraud. The misapplication and false entry provisions, along with the mail and wire fraud provisions, continue to be the ones federal prosecutors most often employ to address crimes by bank insiders. Notwithstanding its limited impact, the bank fraud statute amply reflected Congress's growing concern about the gravity of misconduct by bank insiders.[44]

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37. Initially, Congress amended the statute to limit its scope to situations in which the bank insider received a gift in exchange for a benefit that the customer would not otherwise have received—in other words, to cases where there was a quid pro quo. *See* Pub. L. No. 65-218, ch. 177, § 5(c), 40 Stat. 967, 971 (1918). This limitation was preserved over the course of several subsequent amendments. *See* J. Villa, *supra* note 16, § 5.02, at 5-7 to 5-9. In 1984, however, Congress significantly expanded the bank bribery statute to eliminate the quid pro quo requirement and to encompass those who make as well as receive payments; moreover, the potential penalty was increased from one to five years. *See id.* at 5-10 to 5-11. For the legislative history of the 1985 amendment, see H.R. Rep. No. 335, 99th Cong., 2d Sess. 1, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1782. Thereafter, the bank bribery statute was narrowed again in response to concerns raised by banks that the Office of the Comptroller of the Currency recognized as legitimate. *See* J. Villa, *supra* note 16, §§ 5.02-5.03, at 5-10 to 5-17.

38. *See* Le Maistre, *A Bank Director's Responsibility Is to Curb Abuses by Insiders*, Am. Banker, Aug. 15, 1974, at 4; Morse, *supra* note 17, at 715 & n.1.

39. *See* Morse, *supra* note 17, at 715-16.

40. *See* Note, *Insider Abuse and Criminal Misconduct in Financial Institutions: A Crisis?*, 64 Notre Dame L. Rev. 222, 223 n.5 (1989).

Recent federal criminal legislation has also focused on wrongdoing by bank customers. For example, in 1970, Congress amended a statute prohibiting false statements to various federal agencies to proscribe the making of false statements to federally insured banks, savings and loan associations and credit unions. Pub. L. No. 91-468, 84 Stat. 994, 1017 (1970)(codified as amended at 18 U.S.C. § 1014 (1988)); Pub. L. No. 91-609, 84 Stat. 1770, 1815 (1970)(codified as amended at 18 U.S.C. § 1014 (1988)).

41. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 377-78, *reprinted in* 1983 U.S. Code Cong. & Admin. News 3182, 3517-19; *see also* J. Villa, *supra* note 16, § 7.01[1], at 7-2 (acknowledging that federal prosecutors were hampered by "antiquated" statutes).

42. *See* Pub. L. No. 98-473, § 1108(a), 98 Stat. 1837, 2147 (codified at 18 U.S.C. § 1344 (1988)).

43. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 377-78, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3517-19; The Department of Justice Manual § 9-40.410, at 9-1071 (Supp. 1989-2).

44. Congress further demonstrated its concern in 1986 by providing for forfeiture of the proceeds of bank crimes—thereby treating funds obtained by bank fraud or embezzle-

Prior to 1987, the other branches of the federal government did not appear to share Congress's concern. For example, this concern apparently did not influence federal courts when they sentenced those convicted of banking crimes. A district judge prior to 1987 had unfettered discretion to impose any sentence up to the maximum permitted by statute. The sentences meted out to defendants who committed banking crimes, however, were generally lenient, including, in many cases, probation.[45] Light sentences were the norm for a variety of reasons: these were typically first offenses by white-collar defendants; the crimes themselves were non-violent; the banks were not considered to be particularly vulnerable victims but were thought of, instead, as the paradigmatic "deep pockets"; and, in some cases, the crimes seemed somewhat technical or in any event scarcely detrimental to the bank.[46]

This began to change in 1987, however, with the adoption of the Federal Sentencing Guidelines,[47] which the United States Sentencing Commission designed to narrow a sentencing judge's discretion significantly. The Guidelines mandate more severe sentences than courts had typically imposed in white collar cases; in the case of banking crimes, in particular, the sentences mandated by the Guidelines tend to be harsher.[48] The primary factor determining the judge's range of sentencing options under the Guidelines is the amount of money involved in the crime[49]—apparently without regard to whether that money was actually lost by the bank.[50]

Similarly, federal prosecutors considered banking crimes unworthy of particular attention prior to 1987,[51] when the Attorney General announced that financial institution fraud, along with defense procurement fraud, would be a top white-collar crime priority for the Department of Justice.[52] Even then, prosecutors in some districts gave short shrift to

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ment like the proceeds of narcotics dealing and racketeering. *See* Subtitle H of Title I of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 3207-35 to 3207-39 (codified at 18 U.S.C. §§ 981 (civil forfeiture) & 982 (criminal forfeiture) (1988)). *See generally* J. Villa, *supra* note 16, §§ 8.11-8.12, at 8-69 to 8-81 (outlining effects of new legislation's increased scope).

45. *See generally Combating Fraud, Abuse, and Misconduct, supra* note 8, at 35-39 (discussing lack of stringent sanctions and deterrence).

46. *See generally id.* (discussing prototypical white-collar criminal and general misconception that defrauding a financial institution has only minor ramifications).

47. 18 U.S.C. §§ 3551-3581 and 28 U.S.C. §§ 991-998 (1988).

48. Whether the Guidelines mandate sentences that are sufficiently harsh in the case of banking crimes is, of course, the subject of conflicting judgments. *See Combating Fraud, Abuse, and Misconduct, supra* note 8, at 39-41.

49. *See* Jeffress, *The Federal Sentencing Guidelines and Banking Offenses*, 108 Banking L.J. 60, 62-65 (1991).

50. *See infra* notes 136-137 and accompanying text.

51. As one commentator has noted, "Before FIRREA, a bank fraud case might have been given to the most junior prosecutor in the office." Baird, *supra* note 10, at 21.

52. *See Combating Fraud, Abuse, and Misconduct, supra* note 8, at 144 (citing Memorandum of Attorney General Meese (Feb. 24, 1987)).

crimes against financial institutions.[53] A House committee attributed prosecutors' lack of interest in bank fraud cases largely to the complexity of these cases, explaining:

> These cas[]es are "paper" cases, which are not as sen[s]ational as a bank robbery, kidnapping, or an espionage case, but which, owing to the complexity of the criminal schemes devised, can be rather convoluted and therefore difficult to organize and try before a jury, taking a long time with no guarantee of success.[54]

The initial reluctance of some United States Attorneys to devote significant resources to these cases until recently may also have reflected a view that banking crimes have a less serious social impact than other crimes, such as narcotics violations. This apparently was the belief of Henry K. Oncken, whose decision to devote his office's resources mainly to narcotics offenses, rather than banking offenses, caused him to be replaced in late 1990 as the United States Attorney for the Southern District of Texas, where many thrifts failed.[55]

Since 1988, the attention given to crimes against financial institutions has increased dramatically. The increasing focus on banks emanates from Congress's determination that criminal wrongdoing caused the savings and loan crisis. It is to that determination that this Article now turns.

II. The Contribution of Criminal Conduct to the S&L Crisis: The View from Congress

Prior to 1988, most people, within and without government, believed that criminal wrongdoing was a comparatively minor factor in the failure of savings and loan institutions.[56] As the number of bank failures has increased, however, the view within government, at least, has shifted. While acknowledging the predominant view,[57] since 1988 federal regulators and legislators have increasingly held corrupt insiders responsible for bringing down financial institutions.[58] Government estimates of the number of savings and loan failures caused by insider wrongdoing have ranged over the past three years from "twenty five to thirty percent" of

53. *See Combating Fraud, Abuse, and Misconduct*, *supra* note 8, at 144-46.

54. *Id.* at 144.

55. *See* Taylor, *S&L Bar in Houston Braces for the Attack*, Nat'l L.J., Jan. 28, 1991, at 8, col. 1.

56. *See, e.g.*, Office of the Comptroller of the Currency, *An Evaluation of the Factors Contributing to the Failures of National Banks*, 7 Q.J. 1, 1-4 (1988) [hereinafter OCC Evaluation] (discussing major factors associated with bank failure); *Adequacy of Federal Efforts to Combat Fraud, Abuse, and Misconduct in Federally Insured Financial Institutions: Hearing Before a Subcomm. of the Comm. on Government Operations*, 100th Cong., 1st Sess. 941 (1987)("[T]here is still no consensus on the degree to which criminality 'causes' bank failures.").

57. *See* H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 1, 464, *reprinted in* 1989 U.S. Code Cong. & Admin. News 86, 260 [hereinafter *FIRREA House Report*].

58. *See id.*; *Combating Fraud, Abuse, and Misconduct*, *supra* note 8, at 41.

the failed thrifts[59] to "at least one-third"[60] to forty percent[61] to sixty percent[62] to a hundred percent in the cases of "large failed thrifts."[63] Congressmen have described insider wrongdoing, less precisely, as an "epidemic of fraud"[64] and as an "orgy of fraud and lawbreaking,"[65] the cost of which has been pegged at billions of dollars.[66]

It is difficult for someone outside government to assess the view, expounded within the federal government in general and most strenuously within Congress, that criminal wrongdoing by bank officers and directors has *caused*—not simply coincided with—the widescale failure of savings and loan institutions. Criminal law enforcement authorities have yet to prosecute most of the instances of possible wrongdoing at failed savings and loan institutions; indeed, they have yet to investigate many. Rules regarding the secrecy of grand jury investigations,[67] as well as the entirely appropriate desire to protect the confidentiality of ongoing investigations, have discouraged the Department of Justice from revealing any meaningful information to the public about cases other than the few that have already been prosecuted.

Despite the lack of publicly available information, one might be skeptical of the congressional view that criminal wrongdoing by insiders was a major cause of savings and loan failures. The reasons for skepticism extend beyond those offered by various commentators who have attributed the savings and loan crisis almost entirely to other causes.[68]

First, the Department of Justice has denied members of Congress, as well as the general public, detailed information about the savings and loan investigations.[69] Bank regulatory agencies have been operating in a similar vacuum.[70] Because information provided by the Department of Justice has been largely conclusory, Congress can scarcely make an in-

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59. *See supra* note 8.

60. *FIRREA House Report*, *supra* note 57, at 464, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 260.

61. *See id.* at 300, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 92 (citing regulators).

62. 136 Cong. Rec. S9478 (daily ed. July 11, 1990)(statement of Sen. Heinz)(citing report of the Resolution Trust Corporation); *see also id.* at S9481 (statement of Sen. Leahy)(citing Bill Seidman, Chairman of the Federal Deposit Insurance Corporation).

63. *Id.* at S9477 (statement of Sen. Riegle)("When the GAO studied a sample of large failed thrifts, 100 percent of those thrifts evidenced fraud or insider abuse.").

64. *Id.* at S9478 (statement of Sen. Heinz)(quoting Attorney General Thornburgh).

65. *Id.* at S9481 (statement of Sen. Leahy).

66. *Id.* at S9483 (statement of Sen. Bryan).

67. *See* Fed. R. Crim. P. 6.

68. *See supra* note 4.

69. *See Hearing of the Financial Institutions Supervision, Regulation and Insurance Subcomm. of the House Banking Comm.*, 101st Cong., 2d Sess. (June 28, 1990)(LEXIS, Nexis library, Fednews file)(statement of Rep. Annunzio)("The Justice Department has attempted to limit the information that Congress receives about its saving and loan investigation at every turn.").

70. *See Combating Fraud, Abuse, and Misconduct*, *supra* note 8, at 21.

dependent, informed judgment about the impact of criminal misconduct on the savings and loan crisis.

Second, the investigations by regulators and prosecutors are at too early a stage to permit government officials who are privy to the ongoing investigations to reach a definite conclusion about the prevalence and impact of criminal conduct. At the outset of an investigation of possible bank fraud or misapplication—the principal crimes alleged to have brought down savings and loan institutions—one cannot ascertain with any degree of confidence that a crime has in fact occurred. The relevant financial transactions are often so complicated that enormous effort is required to determine precisely what transpired.[71] Even then, investigators must often determine whether the bank officers or directors who participated in the particular transactions were acting with criminal intent or were merely inept.[72] These investigations differ greatly from investigations of crimes such as bank robbery, where a crime has clearly occurred and the investigation focuses simply on identifying who committed it. Having completed only a few investigations,[73] which may not form a representative sample, federal regulatory agencies and the Department of Justice are hardly in a position to generalize about the extent to which savings and loan institutions fell victim to criminal conduct, as distinguished from imprudent conduct.

In addition, in calculating the amount of criminal conduct that occurred at failed savings and loan institutions, Congress may have included conduct that was not in fact criminal. Congress has often failed to distinguish fraudulent criminal conduct from abuses by insiders that may amount to mismanagement but are not criminal. Although members of Congress[74] and government reports[75] occasionally recognize this distinction, mismanagement has more often been equated with criminal

71. Attorney General Thornburgh commented at a Senate Judiciary Committee hearing:

> these investigations most often involve complicated paper trails leading to highly sophisticated schemes which disguise illegality under the veneer of legitimate business and financial transactions. *They typically involve extraordinarily complex transactions which must be thoroughly investigated before even a threshold determination that a crime may have been committed can be made.* Thousands of documents must be examined, hundreds of witnesses must be interviewed and reinterviewed. Time-consuming grand jury investigation is almost always necessary to obtain essential documentary evidence and witness testimony. Complex and protracted multi-week criminal trials requiring prosecutors and investigators to expend literally thousands of hours and infinite patience are standard procedure. The FBI estimates that as long as four years can be consumed in just one of these matters.

Hearing of the Senate Judiciary Comm., 101st Cong., 2d Sess. (July 24, 1990)(LEXIS, Nexis library, Fednews file)(emphasis added).

72. *See* 136 Cong. Rec. S9490 (daily ed. July 11, 1990)(statement of Sen. Domenici).

73. *See infra* note 104.

74. *See, e.g.*, 136 Cong. Rec. S9490 (daily ed. July 11, 1990)(statement of Sen. Domenici)("Sorting out the S&L crisis is complicated. It involves investigating these institutions and their management practices to see whether laws were broken. In some cases, it was just bad judgment. In some cases it was fraud."); *id.* at S9510 (daily ed. July

misconduct.[76] For example, one Senator supporting the Crime Control Act professed to be "deeply disturbed" by the administration's "refus[al] to throw the book at those who stole from taxpayers by making risky and sometimes fraudulent investments with the backing of federally insured deposits in thrift institutions."[77] His comment, referring to "risky" and "fraudulent" loans in the same breath, overlooked that it is not a crime simply to make a risky investment—even one that leads to a bank's financial ruin. Thus, when members of Congress assert that criminal wrongdoing was responsible for causing many or most of the bank failures, they may be confusing criminal conduct with risky conduct that merely amounted to mismanagement.

Members of Congress have also failed to recognize that not all criminal conduct by bank insiders led to financial loss, or even caused a substantial threat of loss, to the bank. Legislators have assumed that insofar as insiders committed crimes at the failed savings and loan institutions, those crimes essentially amounted to the theft of bank funds.[78] Consequently, bank insiders who committed fraud have been described, variously, as "swindlers,"[79] "con artists,"[80] "wheeler-dealers,"[81] "crooks"[82] and "thieves";[83] they have been compared, sometimes unfavorably, to bank robbers.[84] The legislative assumption overlooks that many of the

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11, 1990)(statement of Sen. Leahy)("[I]t[']s clear that fraud, and not just poor business judgment, is a major cause of this crisis.").

75. For example, a 1984 report of the House Committee on Government Operations made a pointed distinction between "criminal misconduct" by officers, directors and other insiders of financial institutions, on the one hand, and "insider abuse" on the other. *See Federal Response to Criminal Misconduct and Insider Abuse in the Nation's Financial Institutions*, 57th Report by the Comm. on Government Operations, H.R. Rep. No. 1137, 98th Cong., 2d Sess. 32-33 (1984). It noted that "insider abuse," involving self-interested acts by insiders that were contrary to the interests of their financial institutions and that violated civil banking laws and regulations, was not necesssarily in violation of criminal banking laws as well. *See id.*; *see also* OCC Evaluation, *supra* note 56, at 2 (identifying insider abuse as "self-dealing, undue dependence on the bank for income or services by a board member or shareholder, inappropriate transactions with affiliates, or unauthorized transactions by management officials."). Four years later, however, a report of the same House Committee used "misconduct" interchangeably with "abuse." *See Combating Fraud, Abuse, and Misconduct, supra* note 8, at 9.

76. *See, e.g.*, 136 Cong. Rec. S9477 (daily ed. July 11, 1990)(statement of Sen. Riegle)(citing GAO conclusion that all of large failed thrifts examined in study "evidenced fraud or insider abuse" to justify proposed legislation dealing with financial institution crime).

77. *Id.* at S9510 (statement of Sen. Conrad).

78. *See, e.g.*, *id.* at S9481 (statement of Sen. Leahy)(referring to "the orgy of fraud and lawbreaking").

79. *Id.* at S9482 (statement of Sen. Leahy).

80. *Id.*

81. *Id.*

82. *Id.* at S9488 (statement of Sen. Sanford).

83. *Id.* at S9491 (statement of Sen. Levin).

84. *See, e.g.*, *id.* at S9483 (statement of Sen. Biden)("If we are going to put somebody in jail for robbing a bank, we should throw the key away for some of the people who have bilked the savings and loans."); *id.* at S9486 (statement of Sen. Roth)("[T]he mask and gun no longer fit the stereotypical image of a bank robber in today's world of high-tech-

crimes committed by bank officers and directors may have had no significant impact on the bank's financial well-being. Indeed, because of the breadth of the federal banking crime statutes, some of the crimes may have entailed no financial loss to the bank at all.[85] Therefore, even if one assumes that crime was rampant at the failed savings and loan institutions, it hardly follows that crime precipitated the failures. Indeed, in several of the recently reported cases, the charged defendant engaged in relatively insignificant conduct—conduct that, in a less charged atmosphere, might well have gone unprosecuted.[86]

Even in those instances in which failed savings and loan institutions lost money because of criminal conduct by their officers or directors, one cannot automatically deduce that the crime caused the failure. Although there are too few reported criminal cases in which convictions have been obtained to justify any broad generalizations, even the cases involving serious wrongdoing cast doubt on the notion that crime was the cause of the savings and loan crisis. The reported cases suggest that crimes were committed at savings and loan institutions that were already doomed to fail, and that while the crimes may have "hastened the demise"[87] of some of those institutions, those crimes were far from the root cause of their failure.[88] In some cases the wrongdoers were trying to recover their investments in a failing institution or saw an opportunity to profit from the institution's misfortune; in other cases the bank officers may even have been engaged in an ultimately unsuccessful, and misdirected, effort "to stave off the evil day."[89]

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nology finance. More likely, today's bank robber is an insider who leaves no smoking gun but a bewildering trail of paperwork. . . . [T]he American taxpayer has become the ultimate victim of the modern bank robbery."); *id.* at S9490 (statement of Sen. Shelby)("it is the largest bank heist in history"); *Combating Fraud, Abuse, and Misconduct, supra* note 8, at 39 (" 'You know there are people who are more concerned about the guy who comes into a bank with a gun, because he presents an imminent and immediate danger that you can recognize. But I think sometimes the subtlety of someone taking advantage of a position of responsibility is a greater threat.' ")(quoting Rep. Martinez); Thornburgh Speech, *supra* note 7, at 4 (Attorney General noting that "President Bush properly called [those responsible for the S&L crisis] the 'charlatans, chiselers and cheats' "); *see also* 136 Cong. Rec. S9478 (daily ed. July 11, 1990)(statement of Sen. Heinz)(FIRREA was "designed to maximize the recovery of funds from those who looted federally insured S&L's and to ensure that those crooks were put in jail.").

85. *See supra* note 46 and accompanying text.

86. *See, e.g.*, United States v. Cordell, 912 F.2d 769, 771-72 (5th Cir. 1990)(former bank president convicted of intentionally misapplying bank funds of $5,400); United States v. Brown, 912 F.2d 1040, 1043 (9th Cir. 1990)(reversing aiding and abetting convictions that were based on "mere participation in a single deed with no knowledge whatever of the scope, or even the fact, of the charged conspiracy").

87. United States v. Rapp, 871 F.2d 957, 959 (11th Cir.), *cert. denied*, 110 S. Ct. 233 (1989).

88. *See, e.g.*, United States v. Best, 913 F.2d 1179, 1180 (7th Cir. 1990)(S&L in perilous condition prior to commission of criminal acts by officer), *vacated* and *reh'g granted*, 924 F.2d 646 (7th Cir. 1991); *Brown*, 912 F.2d at 1045 (officer's wrongdoing "contributed" to demise of S&L).

89. *Best*, 913 F.2d at 1180; *see* United States v. Cauble, 706 F.2d 1322, 1354-55 (5th

One last reason to believe that Congress has overstated the impact of criminal conduct on the savings and loan failures is that Congress has so obvious a motive for shifting the blame to bank officers and directors. Particularly as the 1990 elections approached, legislators facing reelection—almost all of our Representatives and almost one-third of our Senators—had an interest in convincing the public that something other than either bad legislation or inattention from federal legislators caused the savings and loan crisis.[90] Although members of Congress claimed to be voicing their constituents' outrage at those criminals who caused the savings and loan failures,[91] they seem to have designed their comments largely to shape opinion; their constituents may not necessarily have shared the view that the root cause of the savings and loan crisis was criminal wrongdoing or believed that their outrage as taxpayers should be vented at bank officers and directors. Congress's political, albeit nonpartisan, concern for its incumbent members understandably would prompt generally inflated rhetoric about crime at savings and loan institutions,[92] and, in particular, an overstated view of the impact of criminal wrongdoing.

Whether or not Congress believed its own avowed views, and there is reason to believe that it did not,[93] Congress had to act on those views, if

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Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); United States v. Franklin, 608 F.2d 241, 244 (6th Cir. 1979); United States v. Krepps, 605 F.2d 101, 108 (3d Cir. 1979).

90. *See* Thornburgh Speech, *supra* note 7, at 3.

91. *See, e.g.*, 136 Cong. Rec. S9481 (daily ed. July 11, 1990)(statement of Sen. Leahy)("Certainly I hear, from Vermonters, as my colleagues hear from their constituents when they go home, about their concerns on what happened to cause the S&L fiasco and what will happen to fix it. How did so much money get stolen?"); *id.* at S9486 (statement of Sen. Roth)(A "fundamental purpose[]" of the proposed legislation is "to augment the resources of the Department of Justice by engaging the private sector in vindicating the justified outrage by the American people over the savings and loan scandal."); *id.* at S9489 (statement of Sen. Cohen)("The American people are justifiably outraged that they are being asked to pay for a scandal that they had no part in creating, while those individuals who do bear responsibility are not being vigorously pursued and prosecuted."); *id.* at S9478 (statement of Sen. Heinz)("it is high time that Congress declares savings and loan crooks public enemy No. 1"); *see also id.* at S9491 (statement of Sen. Shelby)("It is time that the nightly news showed footage of savings and loan executives going off to jail."). In addition to Congress, the Attorney General has implied that the entire cost of the S&L bailout, "now estimated at as much as $500 billion," is due to crime. Thornburgh Speech, *supra* note 7, at 2.

92. Sometimes, the legislative exaggeration was by way of understatement, rather than overstatement. For example, speaking in support of the Crime Control Act, Senator Leahy commented:

> We are very careful in the State of Vermont about how we spend our money, very careful how we invest it. Our banks are run very carefully and very honestly. I am proud to say that no savings and loan fraud happened in our State. I doubt it ever could.

Id. at S9481 (statement of Sen. Leahy). Three weeks after these remarks were made, the Court of Appeals affirmed the convictions of insiders at two Vermont banks—the Chief Executive Officer of Marble Bank and the President of First Twin State Bank—on charges of conspiracy, misapplication, and giving and receiving bribes. *See* United States v. McElroy, 910 F.2d 1016, 1019 (2d Cir. 1990).

93. Sections 2551 and 2552 of the Comprehensive Thrift Act establish a National

only to appear credible. It did so in 1989 and again in 1990 by adopting a variety of criminal provisions that, taken together, were designed to promote one of the most basic aims of criminal sanctions: to obtain retribution,[94] or, as one Senator put it, "to get a pound of flesh from those who committed fraud."[95] Congress's design seems to have been to ensure that retribution was visited on S&L directors and officers, not on legislators. While it might have been prudent in 1990 to focus on the regulation and supervision of financial institutions,[96] spotlighting crime and punishment was the politically expedient thing for Congress.[97] It is against the background of Congress's questionable premises as well as its questionable motivations that the bank-crimes legislation of 1989 and 1990 ought to be assessed.

Commission on Financial Institutions Reform, Recovery, and Enforcement, which is directed to examine and identify the origin and causes of the problems in the savings and loan industry. *See* Crime Control Act, *supra* note 10, § 2552(1), 104 Stat. at 4889. The statute lists a number of possible causes for the Commission to consider, of which "unprecedented fraud and abuse by persons in or connected with savings and loan associations" is the sixth of seven. *See id.*

94. *See, e.g.*, 136 Cong. Rec. S9488 (daily ed. July 11, 1990)(statement of Sen. Sanford)("The American people have made it very clear that if they are being asked to foot the bill for the S&L crisis, at the very minimum the Government owes them swift and tough action to put those responsible in jail."). *But see id.* at S9491 (statement of Sen. Shelby)(legislation "creates a new, strong deterrent to white collar crime by authorizing life imprisonment for 'S&L kingpins' ").

95. *Id.* at S9490 (statement of Sen. Domenici).

Senator Domenici's allusion to Shakespeare's *The Merchant of Venice*, Act IV, scene 1, seems somewhat ironic: it was the moneylender, Shylock, who sought a "pound of flesh" from his debtor, Antonio, *see* W. Shakespeare, The Merchant of Venice, Act IV, sc. 1, l. 99, while today it is the moneylenders from whom the pound of flesh is sought. Moreover, Shylock's demand for a pound of Antonio's flesh was thought to be inconsistent with Christian justice, which is embodied in Portia's soliloquy about the "quality of mercy," and ultimately resulted in calamitous consequences for Shylock. Whether Congress's efforts at retribution will be similarly discredited or will have similarly dire consequences remains to be seen.

96. This problem is now beginning to draw particular attention in the federal government. *See, e.g.*, *Administration Presents Its Plan For Broad Overhaul of Banking*, N.Y. Times, Feb. 6, 1991, at A1, col. 1 (describing Administration's proposal to allow commercial and investment banks to merge, to eliminate barriers to interstate banking, and to permit industrial companies to own banks).

97. For example, Senator Grassley, speaking in support of the Comprehensive Bank and Thrift Fraud Act of 1990, stated:

> Congress must ensure that sufficient financial resources are provided to honor its full faith and credit pledge to depositors.
>
> Even more important, Congress must cooperate with the administration to ensure that the Nation's financial institutions are properly regulated and supervised in order to provide their depositors with the guarantee that their hard-earned savings are wisely invested.
>
> While this amendment does not address this issue directly, it does get to the heart of the issue which most gripes my constituents. That is that thrift directors and officers—the culprits who misused depositors' trust and who abused Federal guarantees—are prosecuted swiftly and to the fullest extent of the law.

136 Cong. Rec. S9488-89 (daily ed. July 11, 1990).

III. S&L Prosecutions and Retributive Justice

A. *The Ascendancy of Banking Crimes on the Prosecutorial Agenda*

Congress invoked its emphatic rhetoric about the impact of criminal conduct on the financial health of banks to justify both the criminal provisions of FIRREA[98] and the banking provisions of the Crime Control Act.[99] In general, Congress intended these provisions to facilitate the investigation, prosecution and punishment of banking crimes. Among the most important provisions of both FIRREA and the Crime Control Act are those that expand the resources available for the investigation and prosecution of banking crimes.

In 1989, Congress authorized an additional $65 million to be spent in each of the next three years for investigations and prosecutions of financial institutions, over and above whatever other sums were otherwise available for that purpose.[100] Congress also authorized the Criminal Division of the Department of Justice to establish a regional office in the Northern District of Texas—"the epicenter of the thrift crisis"[101]—to prosecute banking crimes.[102] The Department of Justice initially resisted both exercises of congressional largesse; it wanted only $50 million a year for banking crime prosecutions and opposed the creation of a regional office.[103] As it turned out, in the year following the $65 million appropriation, the Department of Justice could not spend the money fast enough and, to the extent that new FBI agents and federal prosecutors were hired, their impact was not immediately felt.[104] Although the FBI and

98. *See, e.g.*, 135 Cong. Rec. S1513 (daily ed. Feb. 22, 1989)(statement of Sen. Riegle); *id.* at S4287 (daily ed. Apr. 19, 1989)(statement of Sen. Leahy); *id.* at S4293 (daily ed. Apr. 19, 1989)(statement of Sen. Heflin); *id.* at S4294 (daily ed. Apr. 19, 1989)(statement of Sen. Grassley); *id.* at S10,206 (daily ed. Aug. 4, 1989)(statement of Sen. Dixon); *id.* at H5312 (daily ed. Aug. 4, 1989)(statement of Rep. Cardin).

99. *See id.* at S9877 (daily ed. Aug. 3, 1989)(statement of Sen. Riegle).

100. *See* FIRREA, *supra* note 9, § 966(a)(1), 103 Stat. at 506. This provision also authorized the expenditure of $10 million a year from 1990 to 1992 "for purposes of civil proceedings involving financial institutions." *Id.* § 966(a)(2), 103 Stat. at 506.

101. *Hearing of the Financial Institutions Supervision, Regulation and Insurance Subcomm. of the House Banking Comm.*, 101st Cong., 2d Sess. (June 28, 1990)(LEXIS, Nexis library, Fednews file)(statement of Rep. Annunzio).

102. *See* FIRREA, *supra* note 9, § 965(a), 103 Stat. at 506. This provision also called on the Comptroller General to study and report on whether additional regional offices should be established. *See id.* § 965(b), 103 Stat. at 506.

Two years before Congress adopted this provision, a Dallas-based Bank Fraud Task Force had been formed to investigate and prosecute crimes in the savings and loan industry in northern Texas. *See* Collins, *Prosecution Perspective: Dallas Bank Fraud Task Force*, in ABA National Institute, White Collar Crime 1989: Representing Corporations, Financial Institutions and Their Directors, Officers and Employees 1, 3 (1989).

103. *See* Press Conference with Sen. Dixon, et al., *re* Introduction of S&L Strike Force Legislation, June 7, 1990 [hereinafter Press Conference] (LEXIS, Nexis library, Fednews file).

104. *See* Baird, *supra* note 10, at 21 (citing *Oversight Hearing on Prosecuting Fraud in the Thrift Industry: Impact of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 before the Subcomm. on Criminal Justice of the House Judiciary Comm.* (May 11, 1990)).

the Department of Justice devoted enormous attention to savings and loan cases, the number of completed prosecutions paled in comparison to the number of major frauds said to have been committed.[105]

That the funds allocated by Congress did not bring immediate results should not be surprising.[106] Because of their complexity, savings and loan cases require hundreds if not thousands of hours of investigation and preparation.[107] Even now, too few FBI agents are well-trained in investigating these sophisticated financial crimes.[108] Nevertheless, by mid-1990, some members of Congress expressed a substantial degree of dissatisfaction with the extent of the Justice Department's efforts.[109] Congressional Democrats in particular, viewing this as a potential campaign issue, complained that the machinery to investigate savings and loan crimes had "virtually ground to a halt,"[110] that the administration had not addressed the problem "in any realistic way,"[111] and that the President was "being kinder and gentler to the S&L crooks."[112]

Congress responded in the Crime Control Act by providing almost

105. Cases involving financial institutions have reportedly inundated federal investigators and prosecutors. As of February 1990, the FBI reportedly had more than 7,000 pending cases involving embezzlement or fraud at banks and S&Ls, of which approximately 3,000 were considered major, and of which more than 900 involved losses of greater than $1 million. Moreover, the FBI had received more than 20,000 additional referrals involving criminal conduct at financial institutions that the agency had been unable to address; of those cases, more than 1,000 involved losses of greater than $100,000, and more than 200 involved losses of greater than $1 million. *See* 136 Cong. Rec. S9484 (daily ed. July 11, 1990) (statement of Sen. Wirth). By way of comparison, the Department of Justice reported that from October 1, 1988 to August 29, 1990, in savings and loan cases involving fraud or loss of $100,000 or more, 274 indictments were filed, involving 403 defendants, of whom 316 have been convicted and 13 acquitted so far. *See* Justice Department Release, "How Prosecutions Have Fared In S&L Area During Past Two Years," 4 White-Collar Crime Rptr. 17, 17 (Sept. 6, 1990) [hereinafter *How Prosecutions Have Fared*]; *cf. Thornburgh on the Record*, 77 A.B.A. J. 54, 57 (Jan. 1991)(in January 1991 interview, the Attorney General stated that the Justice Department had obtained 328 indictments and 355 convictions, with 77% of those convicted sentenced to prison).

106. *Cf.* Thornburgh Speech, *supra* note 7, at 3 ("simply hiring more police" will not be effective in combatting white-collar crime).

107. *See supra* note 71; *Thornburgh on the Record*, *supra* note 105, at 57; Thornburgh Speech, *supra* note 7, at 3-4.

108. *See* 136 Cong. Rec. S9490-91 (daily ed. July 11, 1990)(statement of Sen. Shelby); Thornburgh Speech, *supra* note 7, at 3-4.

109. *See, e.g.*, 136 Cong. Rec. S9491 (daily ed. July 11, 1990)(statement of Sen. Shelby)(accusing Justice Department of ignoring its responsibilities); *id.* at S9510 (statement of Sen. Conrad)(Bush Administration not moving quickly or diligently enough); Press Conference, *supra* note 103 (statement of Sen. Dixon)(investigations moving too slowly in the hands of U.S. Attorneys and the FBI).

The Administration, on the other hand, has pointed the finger back at Congress, which it blamed for delaying appropriations for additional prosecutors and investigators. *See Thornburgh on the Record*, *supra* note 105, at 57.

110. Press Conference, *supra* note 103 (statement of Sen. Dixon).

111. *Id.*

112. Press Conference with Rep. Schumer, et al., *re* Response to Presidential Announcement About S&L Prosecutions, June 22, 1990 (LEXIS, Nexis library, Fednews file).

three times as much money for investigations and prosecutions. For the years 1991 through 1993, Congress authorized expenditures of $162.5 million, most of which is to be spent by the FBI and the United States Attorneys' offices.[113] In addition, Congress adopted what it called "structural reforms" to facilitate savings and loan prosecutions, including the establishment of a Financial Institutions Fraud Unit in the Attorney General's office[114] and authorization for the Attorney General to establish additional fraud task forces for financial institutions.[115]

In addition to giving federal investigators and prosecutors more money to carry out their work, Congress gave them more time. One provision in FIRREA doubled the statute of limitations for bank crimes from five to ten years,[116] thereby affording federal prosecutors five additional years in which to bring indictments in cases not already time-barred.

Taken together, the new provisions awarding more time and money are designed to impel a shift—from selective to plenary enforcement—in the Justice Department's approach to the enforcement of banking crime provisions. The traditional approach of selective enforcement, which is characteristic of prosecutions of business crimes, and particularly tax crimes,[117] is designed to obtain maximum deterrence for expenditures of investigative and prosecutorial resources. The Government does not press charges every time it has evidence that a business crime has been committed. Instead, it brings a limited number of prosecutions to engender public concern about the possibility of discovery and prosecution and thereby discourage other people from committing similar crimes in the future.[118]

Even the most optimistic legislators recognize how time-consuming and costly it would be to pursue every possible savings and loan investi-

113. *See* Crime Control Act, *supra* note 10, § 2559(a), 104 Stat. at 4893 (to be codified at 18 U.S.C. § 966(a)). Congress also provided additional funds for the federal judiciary. *See id.* § 2559(c), 104 Stat. at 4893 (to be codified at 18 U.S.C. § 967).

114. *See id.* §§ 2536-2537, 104 Stat. at 4883-84.

115. *See id.* § 2539, 104 Stat. at 4884.

116. *See* FIRREA, *supra* note 9, § 961(l), 103 Stat. at 501 (to be codified at 18 U.S.C. § 3293). In addition, the Crime Control Act extends the statute of limitations from five to ten years for RICO prosecutions involving bank fraud, *see* Crime Control Act, *supra* note 10, § 2505, 104 Stat. at 4862 (to be codified at 18 U.S.C. § 3293), as well as for civil actions brought by the Attorney General pursuant to § 951 of FIRREA to obtain civil penalties for bank crimes. *See id.* § 2533, 104 Stat. at 4882 (to be codified at 12 U.S.C. § 1833a).

117. *See generally* Rothblatt, *Income Tax Evasion: Dealing With the IRS Special Agents and Prosecutor*, 10 Crim. L. Bull. 437 (1974)(suggesting guidelines for attorneys advising clients under IRS investigation); Tilzer, *What the IRS Looks for in Determining Whether to Prosecute a Taxpayer for Criminal Tax Fraud*, 4 Tax'n for L. 52, 52 (1975)("The Service itself has stated that its objective in criminal prosecution of tax fraud cases is to get the 'maximum deterrent value from the few cases prosecuted' . . . .").

118. *See generally* Department of Justice, The Investigation of White-Collar Crime: A Manual for Law Enforcement Agencies 62 (1977)(discussing impact of publicity as a deterrent); C. Miller, Economic Crime: A Prosecutor's Hornbook 1-2 (1974)(publicity of prosecution results in a "beneficial fallout quite apart from the prosecution").

gation.[119] The more realistic members of Congress have recognized the impossibility of prosecuting every case.[120] Nevertheless, that is the evident goal. The shift from a selective to a plenary enforcement policy raises questions as to the wise allocation of resources. A policy of prosecuting every case will not deter future wrongdoing any better than a policy of prosecuting half or one-third of the cases.[121] Nor, despite the view expressed by some members of Congress,[122] is plenary enforcement likely to reap returns that justify its costs:[123] more money will be spent in investigating and prosecuting these cases than will be recovered in restitutionary fines and awards.[124] At best, the Government will obtain the maximum in retribution. In part, the question is, will taxpayers be paying too much for their pound of flesh?

More important, however, is whether plenary enforcement of banking crimes comes at too great a cost to the prosecution of other types of criminal wrongdoing. For the Department of Justice to successfully bring indictments prior to the tolling of the ten-year statute of limitations

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119. Senator Domenici stated:

> It takes a great deal of investigative work to sift through piles and piles of documents. It takes a keen mind to follow the audit trail and discover what went wrong in each S&L. It takes a lot of legal talent to distinguish the incompetent from the fraudulent, the unlucky from the unlawful.

136 Cong. Rec. S9490 (daily ed. July 11, 1990). And Senator Shelby commented, "These criminals left a paper trail but one so complex, so labyrinthine that it requires a dedicated, large, sophisticated, highly trained work force." *Id.*

120. *See* 136 Cong. Rec. S9489 (daily ed. July 11, 1990)(statement of Sen. Grassley)("Let's be candid: Not even an army of Dick Tracys will catch every S&L crook. These cases are exceedingly complex, time consuming, and most difficult to prove—as intricate and delicate as any case the Government might bring.").

121. *See* C. Miller, *supra* note 118, at 6.

122. *See, e.g.*, 136 Cong. Rec. S9488 (daily ed. July 11, 1990)(statement of Sen. Heflin)("I am convinced that by providing more funds to hire more agents and prosecutors over the next 3 years—$162.5 million—the American public will reap a return on this investment.").

123. According to a Department of Justice release in September 1990, over the course of almost two years of prosecuting savings and loan cases, courts imposed fines and ordered restitution totalling just under $205 million. *See How Prosecutions Have Fared*, *supra* note 105, at 17. No information was provided as to how much of that was collected, but it can be assumed that a substantial amount was not. *See infra* note 124.

124. Attorney General Thornburgh has acknowledged that trying to recover the money lost by savings and loan institutions is "like trying to wring blood from a stone," because much of the money went into assets that have greatly declined in value. *Thornburgh on the Record*, *supra* note 105, at 57. For example, one of the Justice Department's most recent successes, which Attorney General Thornburgh said represented a major blow "to the savings and loan crooks," *Guilty Plea Set in Case on S. & L.*, N.Y. Times, Dec. 22, 1990, at 35, col. 6, involved the agreement of Edwin T. McBirney 3d, the chairman of the Sunbelt Savings Association, to plead guilty to four counts of a 17-count indictment. Although McBirney's fraudulent conduct was said to have created losses of $3 billion, he reportedly is not wealthy enough to be able to pay his $8.5 million in fines in full. *See id. See generally* Farnham, *The New White Collar Crime: S&L Felons*, Fortune, Nov. 5, 1990, at 90, 90-91 (reporting that the first 331 individuals convicted of S&L crimes caused $3.5 billion in direct losses, were fined a total of $4.3 million and were ordered to make restitution of $208 million, but generally have not made the ordered payments, because most are bankrupt).

in all cases involving criminal conduct at failed thrifts, it must take away many of the most experienced agents and prosecutors from other important cases, including other white-collar cases,[125] and organized crime and narcotics cases. Pursuant to the funding provisions of FIRREA and the Crime Control Act,[126] new, untrained investigators and prosecutors will replace them only partially. This will leave a substantial shortage of experienced agents and prosecutors to pursue other cases of comparable importance and complexity over the next few years. Is it wise to choose even more selectively from among cases such as tax evasion and defense procurement fraud, which involve direct financial harm to the government, in order to prosecute virtually every case of savings and loan fraud, which involves only an indirect cost to the public? To my mind, the answer to this question is sufficiently unclear that, at the very least, it should have been discussed in Congress. It wasn't.

B. *The Enhancement of Penalties for Banking Crimes*

Given Congress's view about the gravity of banking crimes, it is not surprising that the recent legislation enhances the potential sentences that courts may impose upon defendants convicted of these crimes. In 1989, assets traceable to violations of banking crime statutes were made subject to both criminal and civil forfeiture.[127] In addition, Congress increased the potential sentences for banking crimes previously punishable by no more than five years' imprisonment[128]—and, in some cases, by no more than two years' imprisonment[129]—to twenty years' imprisonment.[130] The following year, Congress amended the same banking crime statutes to make banking crimes punishable by up to thirty years' imprisonment.[131] Thirty years' imprisonment, to put it in perspective, is five years more than the maximum sentence for armed bank robbery,[132] and ten years more than the maximum sentence for racketeering.[133]

125. The Attorney General has noted, however, that in *all* white collar crime cases, the quality of investigators is "far more important" than the quantity. Thornburgh Speech, *supra* note 7, at 3.

126. *See* Crime Control Act, *supra* note 10, § 2559, 104 Stat. at 4893 (to be codified at 18 U.S.C. § 966(a)); FIRREA, *supra* note 9, § 966, 103 Stat. at 506.

127. *See* FIRREA, *supra* note 9, § 963, 103 Stat. at 504 (to be codified at 18 U.S.C. §§ 981-982). Congress also made bank fraud a predicate offense under the federal racketeering statute ("RICO"), 18 U.S.C. § 1961(1), which carries a potential sentence of twenty years imprisonment. *See* FIRREA, *supra* note 9, § 968, 103 Stat. at 506 (to be codified at 18 U.S.C. § 1961(1)).

128. In 1984, Congress increased the maximum penalty for bank bribery from one to five years imprisonment. *See* 18 U.S.C. § 215 (1988). As a consequence, the potential sentence for bank bribery increased thirty-fold in a period of six years.

129. *See* 18 U.S.C. §§ 1007, 1014 (1948).

130. *See* FIRREA, *supra* note 9, § 961, 103 Stat. at 499 (to be codified at 18 U.S.C. § 215(a)).

131. *See* Crime Control Act, *supra* note 10, § 2504, 104 Stat. at 4861 (to be codified at 18 U.S.C. § 215(a)).

132. *See* 18 U.S.C. § 2113(d) (1988).

133. *See* 18 U.S.C. § 1963(a) (1988).

Increasing the maximum penalties for banking violations does not guarantee that the sentencing judge will in fact impose higher sentences; at most, it expands her discretion.[134] Moreover, in most prosecutions for banking crimes, it will matter little whether the maximum sentence permitted under a criminal statute is five years, twenty years or thirty years. The prosecution can almost always obtain an indictment on multiple counts, guaranteeing that, if the defendant is convicted, the sentencing judge will have authority to impose a substantial sentence.

As noted earlier,[135] the Federal Sentencing Guidelines are of the greatest significance in determining the severity of the sentence actually imposed on a defendant convicted of banking crimes. Recognizing this, Congress has instructed the United States Sentencing Commission to adopt guidelines guaranteeing lengthy periods of incarceration for defendants convicted of banking violations "that substantially jeopardize[] the safety and soundness of a federally insured financial institution"[136] or from which the defendant derived more than $1 million in gross receipts.[137]

Additionally, in 1990 Congress adopted a new criminal provision patterned on the "drug kingpin statute"[138] to deal with the most serious offenders. The new law makes it a crime to operate a "continuing financial crimes enterprise."[139] In essence, the statute applies to anyone who organizes, manages or supervises at least four other individuals in carrying out a series of banking violations in which $5 million or more in gross receipts is amassed within a two-year period. The penalty for so-called "S&L kingpins" ranges from ten years' to life imprisonment.[140]

What was Congress's purpose in raising the potential sentences for banking crimes? To some extent, it sought to deter people from committing these crimes in the future.[141] To a larger extent, however, members

134. *See* Hayes, *Texan Gets Five Years in Big S.&L. Collapse*, N.Y. Times, Apr. 3, 1991, at D7, cols. 1-2. In April 1991, a district judge in Dallas sentenced Don R. Dixon, owner of the Vernon Savings and Loan Association, to three five-year prison terms to be served concurrently for "defrauding regulators, illegally spending depositors' money and other misdeeds as the owner of Vernon." *Id.* at D1, col. 5. Mr. Dixon is eligible for parole in December 1992. *Id.* The judge could have sentenced Mr. Dixon to 120 years' imprisonment. *See id.* Federal officials were clearly surprised by the sentence. *See id.*; *cf.* United States v. Gilliland, 312 U.S. 86, 95 (1941)(noting that increased maximum penalties under the National Industrial Recovery Act "gave a range for judicial sentences according to the circumstances and gravity of particular violations").

135. *See supra* notes 47-49 and accompanying text.

136. *See* FIRREA, *supra* note 9, § 961(m), 103 Stat. at 501 (to be codified at 28 U.S.C. § 994).

137. *See* Crime Control Act, *supra* note 10, § 2507(a), 104 Stat. at 4862 (to be codified at 28 U.S.C. § 994).

138. *See* Pub. L. No. 91-513, Title II, § 408, 84 Stat. 1236, 1268 (1970) (codified at 21 U.S.C. § 848 (1988)).

139. Crime Control Act, *supra* note 10, § 2510(a), 104 Stat. at 4863 (to be codified at 18 U.S.C. ch. 11).

140. *See id.*

141. *See, e.g.*, 136 Cong. Rec. S9488 (daily ed. July 11, 1990)(statement of Sen. Heflin)(proposed legislation will "send a signal to those in the future who may be tempted to

of Congress saw these provisions as an important part of the legislative effort toward retributive justice. They believed, or at least professed to believe, that the enhanced statutory penalties, the amendments to the Sentencing Guidelines and the kingpin provision would lead to stiffer sentences in the cases of those who were responsible for the S&L crisis.[142] In truth, however, these provisions can make no direct contribution toward that effort because, under the ex post facto clause of the Constitution,[143] a law that increases the punishment for a crime cannot be applied to someone who committed the crime before the enactment of the new law.[144] Thus, the harsher sentencing scheme will not apply to those who

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[defraud savings and loan institutions], that the full weight of the U.S. Government will be brought to bear on those criminals"); *id.* at S9488 (statement of Sen. Sanford)(proposed measures are necessary to "ensure that such a debacle can never repeat itself"); *id.* at S9491 (statement of Sen. Shelby)(proposed legislation "creates a new, strong deterrent to white collar crime by authorizing life imprisonment for 'S&L kingpins' "); *cf. id.* at S9510 (statement of Sen. Leahy)(legislation "stiffens penalties for S&L-related fraud, insuring that these white collar criminals will never have another chance to bilk the American public as they have in the past").

142. For example, referring to an amendment to the Senate bill that, among other things, "[c]reat[ed] an S&L kingpin statute" and "[r]equir[ed] the U.S. Sentencing Commission to impose stiff, mandatory minimum penalties for major S&L violators," Senator Biden stated:

> Unfortunately, the S&L violators that we have nabbed are spending little time behind bars. According to a recent study, in 1989 the average S&L offender received a sentence of just 1.9 years in prison, in comparison, the average bank robber was sentenced to a prison term of 9.4 years.
>
> The white-collar criminals who are responsible for this massive rip off must be brought to justice.
>
> And that's exactly what this amendment does.

136 Cong. Rec. S9483 (daily ed. July 11, 1990)(statement of Sen. Biden); *see also id.* at S9488 (statement of Sen. Heflin)("This important amendment to the crime bill will make it easier to apprehend and prosecute those accused of defrauding savings and loan institutions, and easier to seize embezzled savings and loan assets."); *id.* (statement of Sen. Sanford)("[T]he amendment makes certain that once these crooks are discovered, they pay for their wheeling and dealing. The maximum prison term for bank fraud would be raised to 30 years, fitting the punishment for the serious nature of the crimes of these S&L high fliers."); *id.* at S9490 (statement of Sen. Shelby)("We tell [the public] that we stiffened the sentences and penalties in FIRREA. But what good does it do if we do not impose them on anyone?").

143. U.S. Const. art. I, § 9.

144. The Supreme Court has stated that ex post facto laws forbidden by the Constitution include "[e]very law that aggravates a crime, or makes it greater than it was, when committed" and "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); *see also* Miller v. Florida, 482 U.S. 423, 431-32 (1987) (more severe sentencing guidelines enacted after commission of crime could not be constitutionally applied to defendant); Weaver v. Graham, 450 U.S. 24, 28 (1981) ("The *ex post facto* prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' ")(footnote omitted)(quoting Cummings v. Missouri, 4 Wall. 277, 325-26 (1867)). *See generally* W. LaFave & A. Scott, Criminal Law § 2.4 (1986) (explaining federal courts' interpretation of the ex post facto clause). The U.S. Department of Justice has itself taken the position that the ex post facto clause bars applying the Federal Sentencing Guidelines to defendants convicted of crimes that

committed crimes against the savings and loan institutions whose failure prompted FIRREA and the Crime Control Act. Those individuals will be subject to the criminal law as it existed prior to 1989. At best, the enactment of these provisions may subtly influence sentencing judges to increase the severity of their sentences in savings and loan cases. These provisions will directly affect only those who commit banking crimes in the coming years.

In future cases to which the new sentencing provisions do apply, these provisions will often result in unreasonably harsh sentences. As a general matter, most people probably would not agree with Congress that bank embezzlers deserve harsher punishments than bank robbers.[145] Although the premise for such serious treatment of banking crimes is that federal taxpayers may have to make up money lost by a federally insured bank, even criminal conduct that results in direct losses to the government is not treated so severely.[146]

The unfairness of the newly enhanced sentences may be felt most acutely in cases in which no money is lost at all. As discussed earlier,[147] a bank officer may be convicted of misapplication simply for authorizing a loan in a deceptive manner, even if he correctly believes that the loan will be repaid. Similarly, a bank customer who obtains a loan through the use of deception may be convicted of a banking violation even if he fully intends to, and does, repay the loan.[148] As a consequence, in cases involving millions of dollars in loans that are repaid, individuals may be sentenced to a lengthy period of incarceration, even if the bank suffered no loss. Like the wisdom of plenary prosecution, Congress never addressed the fairness of the enhanced sentences, but it should have.

IV. Delegations of Prosecutorial Power

Along with providing substantial financial resources for investigating bank crimes, Congress provided substantial procedural tools to federal investigators. Some of the procedural options now extended to bank fraud investigations had previously been employed in investigations of other crimes that are considered serious. For example, the Crime Control Act amended the federal wire-tapping statute to add several banking

antedate the adoption of the Guidelines. U.S. Dep't of Justice, Prosecutors Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984, at 68-69 (1987).

145. A National Law Journal/Lexis Poll conducted between July 7 and 9, 1989 revealed that most people in this country believed that bank embezzlers should be sentenced far less harshly than bank robbers in instances where each took the same amount of money. *See* Nat'l L.J., Aug. 7, 1989, at S15, cols. 3-4.

146. *See, e.g.,* 18 U.S.C. § 1031 (1988)(Major Fraud Act of 1988)(punishable by fine, imprisonment of up to ten years, or both); 26 U.S.C. § 7201 (1988)(income tax evasion)(punishable by fine, imprisonment of up to five years, or both); *see also* Federal Sentencing Guideline Manual §§ 2F1.1, 2T1.1 (1987)(sentencing guidelines provisions for violations of fraud and tax evasion statutes).

147. *See supra* notes 28-34 and accompanying text.

148. *See supra* note 32 and accompanying text.

crimes[149] to the list of crimes that the government may investigate through the use of wire taps.[150] Other procedural provisions, however, are far more innovative. The most provocative provisions of FIRREA and the Crime Control Act are those that radically redistribute responsibility for investigating and prosecuting banking crimes between criminal authorities, civil authorities and private individuals.

Broadly speaking, the traditional model of federal criminal law enforcement drew distinct boundaries between criminal authorities, civil authorities and private individuals. In many white-collar cases, the conduct of an individual or corporation may run afoul of both criminal and civil provisions. As a consequence, a federal prosecutor, a civil litigator in the government or a private party may bring an action to enforce these statutory provisions.[151] For example, antitrust and securities laws bring questionable conduct within the purview not only of federal prosecutors but also of civil authorities such as the SEC, the FTC, or the civil division of the Justice Department.[152] These laws also allow aggrieved private parties to bring private causes of action.[153] Nevertheless, civil and criminal prosecutors do not work as a team, sharing information freely back and forth. Although civil authorities may provide evidence to prosecutors,[154] prosecutors are traditionally barred from disclosing to civil authorities information gathered in the course of a grand jury investiga-

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149. *See* Crime Control Act, *supra* note 10, § 2531, 104 Stat. at 4879 (to be codified at 18 U.S.C. § 2516). In general, the "banking law violations" to which the Crime Control Act and FIRREA relate include violations of 18 U.S.C. §§ 215, 656, 657, 1005, 1006, 1007, 1014, and 1344; conspiracies to violate any of those provisions; and mail fraud or wire fraud violations under §§ 1341 and 1343 "affecting a financial institution." *See* FIRREA, *supra* note 9, § 964(a), 103 Stat. at 505 (to be codified at 18 U.S.C. § 215).

150. *See* 18 U.S.C. § 2516 (1988).

The Crime Control Act also authorized federal banking agencies to request the assistance of foreign banking authorities in carrying out their investigations, as well as to lend assistance to foreign banking authorities that are investigating violations of banking laws or currency transaction requirements. *See* Crime Control Act, *supra* note 10, § 2532, 104 Stat. at 4880 (to be codified at 12 U.S.C. § 1818).

151. *See, e.g.*, United States v. Kordel, 397 U.S. 1, 11-13 (1970)(upholding criminal prosecution based on conduct that was the subject of a prior civil proceeding by FDA); White v. Mapco Gas Prod., 116 F.R.D. 498, 499 (E.D. Ark. 1987)(simultaneous grand jury investigation and private civil antitrust action).

152. For examples of such statutes, see Securities Act of 1933, 15 U.S.C. §§ 77k, 77l, 77q(a) (1988); Securities Act of 1934, 15 U.S.C. §§ 78g, 78i, 78j(b), 78m(d), 78m(e), 78n(a), 78n(d), 78n(e) (1988); Clayton Act, 15 U.S.C. §§ 21, 25 (1988).

153. *See* 15 U.S.C. §§ 15(a), 77k(a), 77l, 78i (1988).

154. *See, e.g.*, SEC v. Dresser Indus., 628 F.2d 1368, 1380 (D.C. Cir.)(en banc)(SEC permitted to enforce subpoena duces tecum issued pursuant to criminal investigation), *cert. denied*, 449 U.S. 993 (1980). *See generally* Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 Am. Crim. L. Rev. 651, 701-09 (1977)(discussing related judicial proceedings against subjects of "economic crime investigations"); Note, *Commingled Civil and Criminal Proceedings: A Peek at Constitutional Limitations and a Poke at the SEC*, 34 Geo. Wash. L. Rev. 527, 527 (1966)(SEC has power to use fruits of its investigation in both civil and criminal proceedings).

tion.[155] The unique evidence-gathering procedures available to criminal prosecutors are not intended to be used in civil investigations by the government.[156] Moreover, it is especially difficult for private parties to share in evidence gathered by criminal investigators. When it comes to investigations of banking crimes, however, much has now changed.

A. *Delegation of Prosecutorial Power to Civil Authorities*

FIRREA and the Crime Control Act break down the boundaries between criminal prosecutors and civil authorities. FIRREA authorizes the Attorney General to bring civil proceedings against individuals who are believed to have committed banking crimes and provides for civil penalties of $1 million or more.[157] In conducting civil investigations, FIRREA authorizes the Department of Justice to take testimony and obtain evidence by subpoena.[158] More importantly, the civil division at-

155. The Supreme Court has interpreted the federal grand-jury secrecy provision, Fed. R. Crim. P. 6(e), to bar prosecutors from disclosing matters occurring before the grand jury to civil parties, including civil government authorities, in the absence of a judicial finding of a "particularized need" for the information. *See* United States v. Baggot, 463 U.S. 476, 479-80 (1983); United States v. Sells Eng'g, Inc., 463 U.S. 418, 434-35 (1983).

156. The Court in *Sells* noted three dangers of disclosing grand jury materials to government attorneys for civil use: first, such disclosure would "render[] considerably more concrete the threat to the willingness of witnesses to come forward and to testify fully and candidly"; second, "[i]f prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely"; and third, "use of grand jury materials by Government agencies in civil or administrative settings threatens to subvert the limitations applied outside the grand jury context on the Government's powers of discovery and investigation." *Sells*, 463 U.S. at 432-33.

The Court cited then-Acting Deputy Attorney General Richard Thornburgh for the proposition that "it would be a bad idea to allow agency personnel to use grand jury materials for civil purposes." *Id.* at 439. In Thornburgh's words, " 'The cleanest example I can think of where a 6(e) order [a court order for disclosure of grand jury materials] is clearly required is where a criminal fraud investigation before a grand jury fails to produce enough legally admissible evidence to prove beyond a reasonable doubt that criminal fraud ensued.' " *Id.* (quoting *Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 67 (1977)). In the 1977 hearings, Thornburgh also stated that Rule 6(e) "will not permit the Department of Justice to take advantage of or to make disclosures to investigative agents or experts in order to aid other federal agencies in conducting their own civil or criminal investigations." *Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 67 (1977).

157. *See* FIRREA, *supra* note 9, § 951, 103 Stat. at 498 (to be codified at 12 U.S.C. § 1833a). The amount of the civil penalty ordinarily will not exceed $1 million. *See id.* § 951(b)(1), 103 Stat. at 498 (to be codified at 12 U.S.C. § 1833a(b)(1)). Where the violation created gain to the defendant or loss to a bank or other individual or entity, however, the penalty may be the amount of such gain or loss. *See id.* § 951(b)(3), 103 Stat. at 498 (to be codified at 12 U.S.C. § 1833a(b)(3)). The statute also creates an enhanced penalty in the case of continuing violations. *See id.* § 951(b)(2), 103 Stat. at 498 (to be codified at 12 U.S.C. § 1833a(b)(2)).

158. *See id.* § 951(f), 103 Stat. at 498-99 (to be codified at 12 U.S.C. § 1833a(f)).

torneys in the Department of Justice may receive freely from criminal investigators any grand jury information concerning a banking law violation.[159] The result is that civil attorneys for the government and criminal prosecutors may work in tandem in developing evidence.

At first glance, one might question why civil proceedings are needed at all, given the enforcement philosophy of plenary criminal prosecution implicit in the recent legislation. If the policy was instead to prosecute banking crimes selectively, then civil proceedings would have an important place in the prosecutorial scheme, as they presently do in cases involving tax, securities and antitrust violations.[160] For example, even when it believes a securities violation has occurred, the SEC may exercise its discretion and decline to refer the case to the prosecutors; or the prosecutors, in the exercise of their discretion, may decline to initiate criminal charges.[161] A case not considered serious enough to warrant criminal proceedings may become the subject of a civil lawsuit brought not to inflict punishment, but to obtain restitution. With banking crimes, however, a criminal prosecution is expected to be brought in every case in which the government can prove a crime. Because precisely the same elements must be proven in a civil as in a criminal case,[162] when would civil proceedings ever be necessary?

The apparent answer is troubling. A civil proceeding is likely to be brought against an individual when the evidence of a banking crime is not considered compelling enough to prove guilt beyond a reasonable doubt or when a criminal prosecution has already ended in an acquittal.[163] Because the burden of proof in a civil proceeding is much lower—guilt must be established only by a preponderance of the evidence[164]—an individual may be successfully tried in a civil proceeding for banking violations when he cannot be convicted in a criminal prosecution. The civil proceeding in such a case is basically a criminal proceeding stripped of such constitutional protections as the presumption of innocence and the requirement of proof beyond a reasonable doubt.[165] The case will be brought by government lawyers who are effectively indistinguishable

159. *See id.* § 964, 103 Stat. at 505 (to be codified at 18 U.S.C. § 215).

160. *See supra* notes 149-152 and accompanying text.

161. *See* O. Obermaier & R. Morvillo, White Collar Crime: Business and Regulatory Offenses § 12.04, at 12-34 to 12-35 (1990).

162. By contrast, in securities cases the prosecution must prove willfulness in addition to all the other elements of a securities law violation. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976).

163. Civil proceedings may also be brought against entities "for whom the only realistic penalty is monetary." Baird, *supra* note 10, at 24. It is unlikely that a civil proceeding would be brought after a successful criminal prosecution, because the imposition of a substantial monetary penalty would likely violate the due process clause. *See* United States v. Halper, 109 S. Ct. 1892, 1901-02 (1989); Baird, *supra* note 10, at 24.

164. *See* FIRREA, *supra* note 9, § 951(e), 103 Stat. at 498 (to be codified at 12 U.S.C. § 1833a(e)).

165. In addition, the double jeopardy clause does not apply to civil cases. *See* Helvering v. Mitchell, 303 U.S. 391, 398-99 (1938).

from criminal prosecutors. It will be based on all the evidence gathered in a criminal investigation—an opportunity available to government attorneys in no other type of civil case.[166] And, most significantly, it may culminate in a fine of up to $1 million without regard to the amounts the defendant gained or the bank lost. An onerous financial "penalty" that has no relation to the victim's loss or the wrongdoer's gain is not remedial, but, under any conventional understanding, purely punitive. The imposition of punitive fines on the basis of a civil verdict may violate not only societal notions of fairness, but also constitutional norms.[167]

B. *Delegations of Prosecutorial Power to Private Parties*

The recent legislation also breaks down traditional barriers between government lawyers and private parties by giving private individuals a financial stake in the outcome of both criminal and civil proceedings brought by the Government.[168] FIRREA allows federal banking agencies to provide a reward of up to $100,000 to individuals whose information about banking violations leads to the recovery of a criminal fine, a civil penalty, restitution or the forfeiture of assets.[169] This is one of two principal provisions designed to encourage private individuals to disclose information to government authorities about banking crimes. The other is a "whistleblower" provision that protects bank employees from adverse employer action in retaliation for having provided information to government authorities about banking violations.[170] Unlike the

166. *See* Baird, *supra* note 10, at 24.

167. *See* United States v. Halper, 109 S. Ct. 1892, 1903-04 (1989)(imposition of penalties under the False Claims Act was punitive, and therefore violated the double jeopardy right of a defendant who had previously been convicted of related criminal offenses); *see also* United States v. Ward, 448 U.S. 242, 248-51 (1980)(accepting notion that statutory civil penalties may be so punitive in nature as to violate constitutional norms); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167 (1963)(civil sanction of citizenship deprivation is punitive in nature); Baird, *supra* note 10, at 24 (discussing FIRREA's "revolutionary authorization of civil penalties" for certain criminal violations).

168. *See* FIRREA, *supra* note 9, § 933, 103 Stat. at 495 (to be codified at 12 U.S.C. § 1831k); *see also* Baird, *supra* note 10, at 21-22 (noting that FIRREA provides for rewards for information leading to recovery of more than $50,000 in criminal and civil penalties).

169. *See* FIRREA, *supra* note 9, § 933(b), 103 Stat. at 496 (to be codified at 12 U.S.C. § 1831k(b)). In addition to the $100,000 cap, the reward may not exceed 25% of the amount recovered. *See id.* As originally enacted, this provision permitted an award only when assets in excess of $50,000 were recovered, but Congress eliminated this limitation in 1990. *See* Crime Control Act, *supra* note 10, § 2586, 104 Stat. at 4903 (to be codified at 18 U.S.C. § 1831k(a)).

Congress had previously instituted similar rewards in securities cases and other kinds of cases. *See, e.g.*, Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 3a(2)(e), 102 Stat. 4677, 4679 (to be codified at 15 U.S.C. § 78u-1(e))(amending section 21 of the Securities Exchange Act of 1934). *See generally* Baird, *supra* note 10, at 21-22 (discussing similar power given to SEC, FBI and IRS by other statutory provisions).

170. *See* FIRREA, *supra* note 9, § 932, 103 Stat. at 494 (to be codified at 12 U.S.C. § 1831j).

whistleblower protection, the offer of a financial award creates a substantial risk that, when the informants are also government witnesses at trial, their stake in the outcome of the case will influence, or at least appear to influence, their testimony.[171]

The Crime Control Act goes even further in this direction in a subtitle called the Financial Institutions Anti-Fraud Enforcement Act of 1990,[172] which provides additional financial incentives to informants. This subtitle establishes a procedure by which informants may file with the Attorney General a sworn declaration describing facts amounting to a banking violation.[173] If the prosecution obtains a criminal conviction because of a declaration, which both the informant and the Government must keep confidential,[174] the Act entitles the informant to a reward of between $5,000 and $100,000 to be paid out of a newly established fund.[175] This provision increases the risk of biased or even perjured testimony by informants, because the extent of the informant's cooperation at trial is one of the factors that the Attorney General considers in determining the amount of the award.[176] Thus, the pay-out will depend not only on whether a conviction is obtained, but also on how helpful the Attorney General perceives the informant's contribution at trial to be.

Furthermore, when the government acquires funds or assets in either a criminal or a civil proceeding as a result of the informant's declaration, the Crime Control Act entitles the informant to a portion of the amounts recovered totalling up to 30% of the first $1 million recovered, 20% of the next $4 million, and 10% of the next $5 million.[177] For example, an

171. In some jurisdictions, the rules of professional ethics forbid lawyers from acquiescing in the payment of compensation to witnesses contingent on the content of their testimony or the outcome of the case. *See* Model Code of Professional Responsibility DR 7-109(C) (1980). This provision has not been applied to prosecutors, however. Courts have permitted prosecutors to provide both financial compensation to informants and other powerful inducements to cooperating witnesses, including immunity from prosecution. *See* Giglio v. United States, 405 U.S. 150, 152-53 (1972); United States v. Gonzales, 927 F.2d 139, 142-45 (3d Cir. 1991); United States v. Nixon, 881 F.2d 1305, 1309-11 (5th Cir. 1989); United States v. Waterman, 732 F.2d 1527, 1531 (8th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985). Although commentators have questioned the propriety of such inducements, *see* M. Freedman, Lawyers' Ethics in an Adversary System 89-90 (1975), courts view them as a practical necessity and reason that, as long as inducements to prosecution witnesses are disclosed and may be made the subject of cross-examination, they do not inexorably undermine the truth-seeking process. *See Giglio*, 405 U.S. at 154-55. The rewards established by Congress here differ from the inducements usually provided to informants because they are contingent on the outcome of criminal cases, whereas the traditional inducements are usually contingent only upon truthful testimony and cooperation with the prosecution.

172. *See* Crime Control Act, *supra* note 10, §§ 2560-2594, 104 Stat. at 4893-906.

173. *See id.* §§ 2561-2562, 104 Stat. at 4894.

174. *See id.* § 2563, 104 Stat. at 4894-4895.

175. *See id.* §§ 2565(c), 2569, 104 Stat. at 4896-4898. This provision precludes double awards for providing the same or substantially the same information. *See id.* § 2565(e), 104 Stat. at 4897.

176. *See id.* § 2565(c)(2)(E), 104 Stat. at 4896.

177. *See id.* § 2565(d), 104 Stat. at 4896-4897.

informant whose declaration led to the recovery of $10 million would be entitled to between $850,000 and $1.6 million, the amount to be determined by the Attorney General based on the usefulness of the declarant's information.[178] This contrasts with federal statutes, such as RICO, that allow private parties to bring suits as surrogates of the Government, that is, as private attorneys general.[179] In the case of banking crimes, the potential pay-off to informants is so great that federal prosecutors may appear to be acting as surrogates for private parties, even though the Government still gets the lion's share of the recovery.

Two provisions of the Crime Control Act that permit prosecutions by private parties on behalf of the Attorney General further erode the barrier between government lawyers and private parties. The first provision authorizes the Attorney General to retain private attorneys on a contingent fee basis to investigate and prosecute civil actions for banking violations.[180] Although the Act does not address whether a private attorney retained to bring a civil action would be considered an "attorney for the government," with free access to grand jury information, nothing suggests that she would not be.[181]

The second provision allows an informant to bring a civil action as a private contractor on behalf of the Attorney General when the Attorney General declines to act on the informant's declaration.[182] Given the quasi-criminal characteristics of civil actions for banking violations—*i.e.*, the punitive nature of the fines and the unique nature of the investigative powers afforded to the plaintiff's attorney—the prospect of a private prosecutor, serving for a contingent fee at the direction of a private party, is deeply disturbing.

In criminal cases, there is a requirement that the prosecutor be disinterested[183]—a requirement that would be violated by appointing counsel for an interested party to act as a criminal prosecutor[184] or by the payment of a criminal prosecutor on a contingency basis.[185] The nominally

178. *See id.* § 2565(d)(1)(A)(ii), 104 Stat. at 4896 ("[T]he Attorney General may consider . . . the usefulness of the information provided."). The Act provides comparable financial incentives to informants who provide new information about the assets of banking crime violators against whom the Government has already obtained a final judgment or settlement. *See id.* §§ 2576-2585, 104 Stat. at 4899-903. This does not, however, raise a significant risk that defendants will be tried and convicted based on biased, and possibly perjurious, testimony.

179. *See* 18 U.S.C. § 1964(c) (1988).

180. *See* Crime Control Act, *supra* note 10, § 2588, 104 Stat. at 4905.

181. If a private attorney acting on behalf of the Attorney General does not automatically share in the grand jury's evidence, the attorney might still obtain a court order under Fed. R. Crim. P. 6(e)(3)(A)(i) authorizing the disclosure of grand jury information.

182. *See* Crime Control Act, *supra* note 10, § 2567, 104 Stat. at 4898.

183. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 803-08 (1987).

184. *See id.*

185. *Cf.* Connally v. Georgia, 429 U.S. 245, 250-51 (1977)(justice of the peace who received a $5 fee for each search warrant issued was not "neutral and detached," as required to satisfy the fourth amendment).

civil actions for banking violations are so much like criminal actions that the use of interested prosecutors seems to violate customary notions of fairness, if not due process.[186]

V. THE EXPANSION OF INVESTIGATIVE SECRECY

A. *Grand Jury Secrecy Provisions of FIRREA*

FIRREA contains provisions designed to protect the integrity of grand jury investigations of banking crimes. Ostensibly, Congress designed these provisions to prevent the grand jury's suspects and targets from learning about, and interfering with, the grand jury's efforts. Prior to the adoption of these provisions, many banks had notified customers voluntarily of grand jury subpoenas.[187] Only in the rare case in which disclosure would jeopardize an investigation could a prosecutor obtain a court order directing the bank to delay giving notice.[188] FIRREA eliminates the need for such a court order, however, when the grand jury is investigating banking crimes.

FIRREA provides that when a bank receives a subpoena in connection with the grand jury's investigation of a specified banking crime, neither the bank nor its directors, officers, employees or agents may notify the person named in the subpoena of the existence or contents of the subpoena or the information furnished by the bank in response to the sub-

186. There is a risk, for example, that where a disinterested government lawyer would agree to settle a case, a private attorney paid on a contingent fee basis or an attorney for an interested party would forge ahead to promote the attorney's or the private client's own interest. This raises a spectre of unfairness that is not present in actions under RICO or securities law, for example, in which the private plaintiff is said to be acting as a "private attorney general." In such an action, the private party is seeking to redress injuries to itself as well as to the public; the private party has a cause of action whether or not the government proceeds in its own right. Under the Crime Control Act, in contrast, the private action takes the place of a government lawsuit and may not be brought if the government itself decides to proceed. *See* Crime Control Act, *supra* note 10, §§ 2588-2592, 104 Stat. at 4905-06. Thus, only in cases involving banking crimes would the government's decision not to bring an action potentially result in harsher treatment of a defendant.

187. *FIRREA House Report*, *supra* note 57, at 471, *reprinted in* 1989 U.S. Code Cong. & Admin. News, at 267.

188. Prior to 1986, some courts issued such orders pursuant to their inherent authority, but others did not. *See* J. Villa, *supra* note 16, § 9.08[10], at 9-51 n.35 (citing cases). In 1986, Congress authorized courts to issue such orders based on the following specific findings: the government agency seeking the records must have jurisdiction over the investigation; the records sought must be "relevant to a legitimate law enforcement inquiry"; and notice would result in "endangering life or physical safety of any person[,] flight from prosecution[,] destruction of or tampering with evidence[,] intimidation of potential witnesses[] or otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding." 12 U.S.C. § 3409(a) (1988). *See generally* Bloch, *Gagging Bankers: Grand Jury Nondisclosure Statutes and the First Amendment*, 107 Banking L.J. 441, 446 (1990)("after 1986, federal prosecutors could obtain an ex parte order postponing customer notification 90 days if they showed a judge, 'with reasonable specificity,' that the bank records sought were relevant"); L. Fischer, The Law of Financial Privacy § 2.04[7], at 2-47 (1983)(same); J. Villa, *supra* note 16, § 9.06[1], at 9-31 to 9-32 (same).

poena.[189] This prohibition is enforced by criminal sanctions.[190] A new criminal obstruction-of-justice provision makes it a crime, punishable by up to a year in prison, for a bank officer to reveal to a bank customer or to anyone else named in the subpoena that the bank has received a grand jury subpoena in connection with an investigation of specified banking crimes.[191] Moreover, if the officer makes such disclosure "with the intent to obstruct a judicial proceeding," a court may sentence the officer to a maximum of five years' imprisonment.[192]

The new nondisclosure provisions raise a number of questions. One commentator[193] has questioned the constitutionality of these provisions in light of the Supreme Court's 1990 decision in *Butterworth v. Smith*.[194] In that case, the Court invoked the first amendment to strike down a state law forbidding grand jury witnesses from disclosing the content of their testimony.[195]

Questions also arise as to whether the nondisclosure provisions, as drafted, are an appropriate way of foreclosing banks and bank officials from notifying suspects of grand jury subpoenas issued in the course of investigations of banking crimes. One of the most glaring statutory infirmities is that these provisions do not require prosecutors to give banks fair notice of which subpoenas are and are not issued in connection with banking crime investigations.[196] If a bank official notifies a customer because he reasonably believes that the particular subpoena was issued in connection with the grand jury's investigation of crimes other than banking crimes, that official has nevertheless committed a crime.[197] Also troublesome is that, in certain circumstances, compliance with these provisions may require bank officials to lie to their customers. Suppose, for example, that a customer asks a bank officer point blank whether the grand jury has subpoenaed the bank for the customer's records. If the bank has been subpoenaed in connection with an investigation of banking crimes, the officer cannot respond truthfully by answering in the affirmative. Moreover, if the bank usually gives notice of grand jury subpoenas in cases not involving banking crimes, then an evasive answer may be

189. *See* FIRREA, *supra* note 9, § 943, 103 Stat. at 497-98 (to be codified at 12 U.S.C. § 1290(c)); J. Villa, *supra* note 16, § 9.09, at 9-60.

190. *See* FIRREA, *supra* note 9, § 962(c), 103 Stat. at 502-03 (to be codified at 18 U.S.C. § 212).

191. *See id.*

192. *Id.*

193. *See* Bloch, *supra* note 188, at 448.

194. 110 S. Ct. 1376 (1990).

195. *See id.* at 1383.

196. For example, grand jury subpoenas that refer only to the mail fraud statute, 18 U.S.C. § 1341 (1988), or to the conspiracy statute, 18 U.S.C. § 371 (1988), may or may not relate to an investigation of banking crimes, and a bank official would have no way of knowing from the face of the subpoena.

197. The misdemeanor provision has no intent requirement; it is a strict liability offense. *See* FIRREA, *supra* note 9, § 962(c), 103 Stat. at 502 (to be codified at 18 U.S.C. § 1510(b)(2)).

understood as an affirmation. This would apparently violate the misdemeanor provision, which forbids notifying customers indirectly as well as directly. The bank's only option, then, might be to lie by denying the receipt of a subpoena.

Rather than looking at the nondisclosure provisions from the perspective of constitutional analysis or statutory construction, this Article explores two questions relating to the prudence and necessity of Congress's efforts. First, is it in fact important to preserve the secrecy of grand jury investigations of banking crimes and will silencing the banks and their officials meaningfully promote this aim? Second, is it appropriate to burden banks with an obligation of secrecy that is not placed on any other class of grand jury witnesses, thereby singling out banks to play a special role in aid of criminal law enforcement?

B. *The Need for Investigative Secrecy and the Feasibility of Preserving It*

The requirement that banks keep grand jury subpoenas secret during investigations of banking crimes[198] reflects a view that investigative secrecy is needed in these cases and that silencing bank officials will promote grand jury secrecy. Ordinarily, prosecutors seek orders directing banks not to disclose their receipt of grand jury subpoenas in order to keep secret the very fact that an investigation is underway. By taking this and other special steps to preserve the secrecy of their investigations, the prosecutors hope to prevent particular suspects from either fleeing the jurisdiction or obstructing an investigation by, for example, threatening potential witnesses or destroying or falsifying documents.[199] Thus, prosecutors have typically sought nondisclosure orders in racketeering and narcotics cases—cases involving particularly unscrupulous or violent individuals—rather than in cases involving business crimes.

The grand jury secrecy provisions of FIRREA do not serve the usual purposes of nondisclosure orders. Maintaining the secrecy of on-going investigations would be impossible in the case of the banking crimes with which Congress was concerned in 1989—the crimes that supposedly caused the failure of savings and loan institutions. Federal prosecutors and agents obviously will be scrutinizing every failed thrift; Congress has mandated that they do so. Furthermore, there is little likelihood that potential defendants will obstruct banking crime investigations.[200] On

198. White-collar defendants are less likely to employ violence, and are therefore less likely to have effective ways of obstructing the government's access to witnesses. They are also more likely to have a defensible case in the absence of obstruction, and thus for them the risk that unlawful acts of obstruction will be discovered outweighs the potential benefits of obstruction.

199. *See* 12 U.S.C. § 3409 (1988); J. Villa, *supra* note 16, § 9.06[1], at 9-31.

200. Recognizing that defendants in bank fraud cases are unlikely to flee or obstruct justice, courts have generally permitted their release on bail pending trial, even over the prosecution's strong protest. *See, e.g., Judge Allows Bail for a Banker Charged in a Virginia Fraud Case*, N.Y. Times, Feb. 17, 1991, at 36, col. 1 (defendant facing up to 425

the contrary, if Congress were to legislate on the basis of a presumption that particular types of grand jury investigations are prone to obstruction, the presumption would be far more appropriate in narcotics, racketeering or obstruction-of-justice investigations, and particularly inappropriate in banking crime cases. It was therefore specious for the House Report to justify the nondisclosure provisions on the basis that they spared prosecutors from "expending precious resources to obtain non-disclosure notices" in bank-crime cases.[201] In banking crime cases, prosecutors would rarely be able to establish that disclosure would seriously jeopardize or unduly delay the grand jury's investigation, the standard under prior law for obtaining a nondisclosure order.[202] The only way to explain these nondisclosure provisions, then, is to posit that they are designed to serve a far different purpose than traditional nondisclosure orders: these provisions are not so much intended to keep the grand jury's targets in the dark as they are to keep the targets' lawyers in the dark. The way in which important bank-crime cases are typically defended gives a basis for understanding the nondisclosure provisions. Anticipating that they would be placed under investigation, many bank officials will have hired lawyers well before the grand jury ever began its inquiry.[203] The initial goal of these white-collar defense lawyers, as Kenneth Mann describes in his book *Defending White-Collar Crime*,[204] is to forestall an indictment, often by limiting the government's access to information.[205] To this end, it is important to know how far the government has progressed in order to keep one step ahead of it.[206]

Even if the nondisclosure provisions do not keep secret that a grand jury investigation is underway, they do keep secret the pace at which the particular grand jury is progressing. By doing so, the nondisclosure provisions do not meaningfully protect against flight or obstruction of justice. They do, however, impede the efforts that defense lawyers might lawfully undertake in the pre-indictment stage of a banking crime case to keep abreast of the prosecutor's investigation.[207] The nondisclosure pro-

years imprisonment and $20 million in fines on 83 counts of conspiracy, fraud, misapplication and making false statements, was released on $150,000 bail over the prosecution's objection).

201. *See FIRREA House Report*, *supra* note 57, at 471, *reprinted in* 1989 U.S. Code Cong. & Admin. News, at 267.

202. *See* 12 U.S.C. § 3409 (1988).

203. *See, e.g.*, *S&L Bar in Houston Braces for the Attack*, Nat'l L.J., Jan. 28, 1991, at 8, col. 1 (two attorneys have been advising former thrift executives "for at least three years . . . in anticipation of criminal prosecutions").

204. K. Mann, Defending White-Collar Crime (1985).

205. *See id.* at 6.

206. *See id.* at 85-89.

207. At times, the investigative efforts described by Professor Mann veer toward, and possibly over, the line of what is ethical and lawful. *See, e.g.*, Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C.L. Rev. 687, 690-704 (1991)(discussing problems posed under ethical codes and criminal obstruction-of-justice provisions by a white-collar defense attorney's efforts to convince an unrepresented witness to assert the fifth amendment privilege in the grand jury).

visions impinge particularly on the legitimate efforts of defense counsel in cases in which a bank and an officer or customer named in the grand jury subpoena are targets of the investigation.[208] In such a case, the bank's lawyer would ordinarily want to discuss the subpoena with the lawyer for the customer or officer named in it, and might even want to enter into a joint defense agreement.[209] The bank's lawyer apparently cannot do so, however, without violating the new nondisclosure provisions. As this example illustrates, these provisions promote grand jury investigations primarily by impeding generally lawful efforts by criminal defense lawyers prior to indictment.

C. *The Bank's Role in Assisting Criminal Investigations*

Banks are unquestionably an important source of evidence concerning banking crimes. A bank that is the victim of a possible crime will possess the documents that reflect the banking transactions that are at the heart of the criminal investigation. Other banks may have documents reflecting the complicated flow of funds that often characterizes criminal activity directed at banks by white-collar defendants. It does not necessarily follow, however, that Congress should obligate banks to assist law enforcement authorities to a degree far greater than other potential witnesses. The nondisclosure provisions are simply one example, and certainly not the most dramatic, of how, over the past two decades, Congress and federal regulators have gradually turned banks into quasi-deputies to federal law enforcement officials.[210] Federal legislation and administrative regulations now require banks to facilitate criminal investigations by taking a variety of affirmative measures that go well beyond simply responding to lawful process. The result has been an alteration of banks' traditional relationship with their customers and, especially, a

208. *See* Carberry, *Production of Documents by Financial Institution Pursuant to a Federal Grand Jury Subpoena, printed in* American Bankers Association & American Bar Association Section of Criminal Justice, Money Laundering Enforcement Update: Legislative, Regulatory, Enforcement Developments and Policy Implications 506, 513 (Sept. 24-25, 1990) [hereinafter *Money Laundering Enforcement Update*]. Mr. Carberry teaches White Collar Crime as a member of the adjunct faculty of Fordham University School of Law and is a partner in the New York office of Jones, Day, Reavis & Pogue.

209. *Cf.* United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989)(attorney-client privilege protects statements that a represented party makes to another party's lawyer pursuant to "a joint defense effort or strategy [that] has been decided upon and undertaken by the parties and their respective counsel").

210. *Cf. Large Bank Training to Detect Suspicious Transactions, printed in Money Laundering Enforcement Update, supra* note 208, at 635 (outline for a "Suspicious Transaction Training Program"); Loeser, *Developing Internal Systems for Reporting Possibly Suspicious Activity—Reporting Requirements Within an Institution, printed in Money Laundering Enforcement Update, supra* note 208, at 641, 645 (discussion of how to establish good compliance procedures and practices in a multi-bank holding company system).

The traditional view within government has been that imposing investigatory burdens on banks is fair, both because banks are profitable enough to sustain those burdens financially and because banks receive a reciprocal benefit in the form of depository insurance. *Cf.* L. Fischer, *supra* note 188, § 4.01, at 4-2 to 4-3.

limitation on the traditional obligation of banks to preserve the confidentiality of their customers' records.[211]

Prior to 1970, banks had an obligation to assist law enforcement authorities not substantially different from that of other businesses. Banks recorded their transactions almost exclusively for internal purposes; for example, records of cancelled checks were kept to protect against losses or false claims.[212] Bank customers could reasonably assume that records of their transactions, which might reveal substantial detail about their private lives, would be kept confidential.[213] Banks generally would not disclose customer records to the government on their own initiative[214] or

211. The obligation of bank secrecy has been traced as far back as the Rules of Banco Ambrosiano Milano of 1593. *See* Huhs, *To Disclose or Not to Disclose Customer Records,* 108 Banking L.J. 30, 30 n.3 (1991). In this country, courts have found a bank's duty to maintain the confidentiality of its customers' records to be an implicit term of its contract with its customers. *See, e.g.,* Milohnich v. First Nat'l Bank, 224 So. 2d 759, 762 (Fla. Dist. Ct. App. 1969)(cause of action for "violation of an implied duty on the part of a national bank not to disclose information negligently, wilfully or maliciously or intentionally to third parties, concerning the depositor's account"); Brex v. Smith, 104 N.J. Eq. 386, 390, 146 A. 34, 36 (1929)(bank obligation to withhold customer records absent court order); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 588, 367 P.2d 284, 290 (1961)(breach of implied contract for bank to disclose information about depositor account). *See generally* Huhs, *supra,* at 31-36 (citing cases that have found implied duty of confidentiality); 10 Am. Jur. 2d *Banks* § 332 (1963)("[I]t is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons . . . any information relating to the customer acquired through the keeping of his account . . . unless compelled to do so by court order."). *But see* Barnett Bank v. Hooper, 498 So. 2d 923, 925 (Fla. 1986)("[W]here a bank becomes involved in a transaction with a customer with whom it has established a relationship of trust and confidence, and it is a transaction from which the bank is likely to benefit at the customer's expense, the bank may be found to have assumed a duty to disclose facts material to the transaction, peculiarly within its knowledge, and not otherwise available to the customer," even if the material facts relate to another depositor's account.) Courts have also found that an obligation of confidentiality may arise out of a fiduciary relationship between a bank and its customer. *See, e.g.,* Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21, 23-24 (Colo. Ct. App. 1981)(fiduciary relationship between borrower and lender "where there is a repose of trust by the customer along with an acceptance or invitation of such trust on the part of the lending institution"); Huhs, *supra,* at 36-37, 46-49 (discussing fiduciary relationship).

212. *See Hearings on H.R. 15073 Before the House Comm. on Banking and Currency,* 91st Cong., 1st and 2d Sess. 72-74, 320-21, 340 (1969-1970). Prior to the advent of photocopying, the information recorded concerning checks was limited. *See* R. Chorley, Law of Banking 112-14 (4th ed. 1960); A. Fiske, The Modern Bank 79 (1904); *see also* United States v. First Nat'l Bank, 67 F. Supp. 616, 619 (S.D. Ala. 1946)(bank wished to withhold records of parties not under investigation).

213. *See generally* Burrows v. Superior Court, 13 Cal. 3d 238, 247, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1975)(bank records reveal virtual biography of depositors; permitting access by law enforcement officials on mere request opens the door to unlimited abuses of police power).

214. The principal exception was that, pursuant to federal regulations first adopted in 1949 and subsequently amended, *see* 31 C.F.R. § 103.22 (1990), the Secretary of the Treasury required financial institutions to report unusually large currency transactions. *See* California Bankers Ass'n v. Shultz, 416 U.S. 21, 37-38 & n.12 (1974).

even upon informal request.[215] A federal prosecutor seeking to obtain internal bank records might do so by the use of grand jury subpoenas or court orders,[216] but might find that the bank had not in fact kept the kind of records that he sought.[217] Moreover, when the prosecution did use judicial process successfully to obtain customer records, banks could advise the customer of the government's action, and typically did so.[218] Although challenges to grand jury subpoenas were rarely undertaken and would almost invariably fail, disclosure to the customer at least provided notice of the government's intrusion into the customer's affairs. This disclosure reaffirmed that, to the extent the law allowed, the customer and the bank still enjoyed a relationship of trust and confidence. In essence, the law prior to 1970 permitted a bank, like any other commercial enterprise, to further its own commercial interests by protecting the confidentiality of its relations with its customers.

In 1970, however, Congress enacted the Bank Secrecy Act,[219] thereby significantly altering the relationship between banks and their customers. Recognizing that bank records may assist criminal investigators, prosecutors and, to a lesser extent, civil agencies of government, Congress authorized the Secretary of the Treasury to direct financial institutions to create and preserve a variety of records.[220] Moreover, Congress authorized the Secretary to enact regulations requiring financial institutions to report certain transactions in currency,[221] thereby imposing a financial burden that banks would not customarily have borne for their own purposes.[222] Since the mid-1970s, when the Supreme Court rebuffed chal-

215. Nevertheless, some banks did allow inspections of records on an informal basis. *See Shultz*, 416 U.S. at 96 (Marshall, J., dissenting).

216. *See* H.R. Rep. No. 975, 91st Cong., 2d Sess. 10 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4394, 4395; S. Rep. No. 1139, 91st Cong., 2d Sess. 5 (1970).

217. *See* H.R. Rep. No. 975, 91st Cong., 2d Sess. 10, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4394, 4395-96.

218. *See FIRREA House Report*, *supra* note 57, at 471, *reprinted in* 1989 U.S. Code Cong. & Admin. News, at 267; *cf.* Chapman, *Compliance Without Risk: Processing Requests for Bank Customer Information*, 1 Banking L. Rev. 21, 22 (1989) (financial institutions notify customers about subpoenas even if not required to do so by state law).

219. Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified at 12 U.S.C. §§ 1730d, 1829b, 1951-1959 (1988) and 31 U.S.C. §§ 1051-1062 (recodified at §§ 5311-5312), 1081-1083 (recodified at § 5313), 1101-1105 (recodified at §§ 5316-5318, 5321), 1121-1122 (recodified at § 5314) (1988)).

220. *See* 12 U.S.C. §§ 1829b(a)(2), 1951 (1988); 31 U.S.C. § 5311 (1988). *See generally* California Bankers Ass'n v. Shultz, 416 U.S. 21, 27-30 (1974)(failure of some larger banks to retain records seriously impairs enforcement of federal criminal, tax and regulatory laws); *id.* at 80-81 n.1 (Douglas, J., dissenting)(proponents of the Bank Secrecy Act argued effectiveness of financial record-keeping in attacking criminal activity).

221. *See* 31 U.S.C. § 5313(a) (1988) (formerly codified at 31 U.S.C. § 1081 (1976)). This reporting requirement differs from those imposed on many other regulated industries in that its purpose was to promote investigations of the business's customers, not to facilitate oversight of the business making the report.

222. Although Congress granted the Secretary of the Treasury broad authority, it intended to limit the financial burden on banks by requiring the creation and preservation of only those records that were ordinarily kept by most banks voluntarily. *See* H.R. Rep. No. 975, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin.

lenges to the Bank Secrecy Act brought in turn by a bank[223] and by a bank customer,[224] the banks' record-keeping and reporting requirements have become more onerous.[225]

In addition, statutes enacted in the 1980s have further expanded the banks' law enforcement role. Although not specifically directed at financial institutions, these statutes have prompted banks to increase voluntary disclosures of information about their customers to criminal investigators.[226] The increased disclosure requirements have trans-

News 4394, 4396. For the most part, the recordkeeping initially mandated by the Secretary was consistent with that intent. *See* 31 C.F.R. § 103.33 (1972)(requiring records of transfers of more than $10,000 to or from United States). On the other hand, the reporting requirement initially adopted by the Secretary, which called for financial institutions to report transactions involving more than $10,000 in currency, *see* 31 C.F.R. § 103.22 (1972), clearly added to the bank's financial burden.

223. *See Schultz*, 416 U.S. at 25. The Court found that the recordkeeping and reporting requirements were a reasonable exercise of congressional commerce power, and that the interest of banks and their customers in the privacy of bank records was not constitutionally protected. *See id.* at 77. The Court's ruling came over the strong dissenting opinions of three Justices, who viewed the recordkeeping and reporting requirements as unwarranted intrusions on privacy. *See id.* at 79-91 (Douglas, J., dissenting); *id.* at 91-93 (Brennan, J., dissenting); *id.* at 93-99 (Marshall, J., dissenting). As Justice Douglas put it, this country's banks were being saddled with "an estimated bill of over $6 million a year to spy on their customers." *Id.* at 86 (Douglas, J., dissenting).

224. *See* United States v. Miller, 425 U.S. 435 (1976).

225. *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; 31 C.F.R. § 103.33(b) (1990).

Although the public reacted strongly against the Supreme Court's rulings in the mid-1970's, and Congress responded by enacting the Right to Financial Privacy Act to protect the privacy of financial records, *see* 12 U.S.C. § 3401 (1978), the limits that the Act placed on the disclosure of financial records to the federal government did not generally apply in the criminal context. *See generally* L. Fischer, *supra* note 188, § 2.01, at 2-7 (Justice Department lobbied intensively for changes to facilitate investigation and prosecution of crime). The reporting requirements of the Bank Secrecy Act went unchanged, *see* 12 U.S.C. § 3413(d) (1978), and Congress specifically permitted banks to take the initiative to notify the government of possible statutory and regulatory violations. *See id.* § 3403(c). Moreover, although customers were generally guaranteed notice before their financial records could be obtained, the government was permitted to dispense with notice before obtaining bank records pursuant to a grand jury subpoena. *See id.* § 3413(i). *See generally* L. Fischer, *supra* note 188, § 2.03[4], at 2-19 (ironically, bank customers are awarded certain procedural protections of confidentiality *after* disclosure of information to grand jury).

226. In 1984, Congress amended the provisions for forfeiture of proceeds from racketeering and narcotics dealing to provide for the forfeiture of tainted property transferred to third parties, unless the third party can prove by a preponderance of the evidence that it was a bona fide purchaser and that it was reasonably without cause to be aware of the crimes that gave rise to the forfeiture. *See* 18 U.S.C. § 1963(c) (1988); 21 U.S.C. § 881(a)(6) (1988); United States v. Banco Cafetero Panama, 797 F.2d 1154, 1162 (2d Cir. 1986). In 1986, the Money Laundering Control Act made it a crime to engage in certain financial transactions involving the proceeds of specified crimes. *See* 18 U.S.C. §§ 1956-57 (1988). The government has made it clear that, to avoid forfeitures and criminal liability under the money-laundering statutes, financial institutions must monitor their customers' activity more closely and increase their voluntary reports of suspicious transactions. *See* Letter from Gerald L. Hilsher, Deputy Asst. Sec'y of the Treasury, to Richard Ketchum, Director of Office of Market Regulation, Securities and Exchange Commission (Aug. 12, 1988), *printed in Money Laundering Enforcement Update, supra*

formed the traditional bank-customer relationship, which had once been viewed as a fiduciary or quasi-fiduciary relationship, into almost an adversarial one. Banks, acting as agents of the prosecution, are now called upon to monitor their customers' activity for criminal wrongdoing.[227] For potential customers who value the traditional relationship, that transformation may make this nation's banks a considerably less attractive alternative to banks in countries that have preserved their tradition of bank secrecy.

So far, there has been little public debate about the wisdom of what some refer to as the "deputization" of banks—a development of which FIRREA's nondisclosure provisions are just one small part. Banks themselves, wanting to appear to be "good corporate citizens," have been reluctant to seriously challenge this development. Their reluctance is gradually being eroded, however. For example, a recent proposal by the Treasury Department to require monitoring of, and disclosure of various information about, international wire transfers has met considerable resistance based on the cost that this obligation would impose on smaller financial institutions and the marginal utility of this information to law enforcement officials.[228] It is beyond the scope of this Article to do more than raise this important question: given the ill-health of this country's financial institutions, does it make sense to keep adding to the banks' obligation to assist law enforcement officials in ways that impose a considerable cost on banks—a cost measured both in administrative expenses and in lost customers?

CONCLUSION

The banking crime legislation that has followed in the wake of the savings and loan crisis proceeds from Congress's conclusion that criminal conduct was a principal cause of the crisis. This conclusion was, at best, premature. But even were Congress clearly right, its response

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note 208, at 301-303. While banks had previously been expected to report crimes when the bank was the victim, *see* J. Villa, *supra* note 16, § 2.01, at 2-3, the new laws, together with new regulations following in their wake, cause financial institutions to probe their customers' possible involvement in crimes unrelated to the bank. *See* 12 C.F.R. § 21.11 (1990).

227. Some banks initially reacted against this role change by failing to file the required Currency Transaction Reports, but since the well-publicized prosecution of the Bank of New England in the mid-1980's, *see* United States v. Bank of New Eng., N.A., 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987), banks have generally followed the filing requirements.

228. *See, e.g.*, Letter from Randy Erdmann, Citizens State Bank, to Amy Rudnick, Director, Office of Financial Enforcement, Department of the Treasury (Nov. 10, 1989)(funds transferred from foreign banks that lack required information must be returned); Letter of Ada R. Harris, First National Bank of Lucedale, to Amy Rudnick (Nov. 9, 1989)(information obtained is redundant and does not justify added burden on bank); Letter from M. M. Pouliot, Eastern Heights State Bank, to Amy Rudnick (Nov. 6, 1989)("useless currency reporting" would burden overseas employees of U.S. companies); Letter from Joseph C. Stennett, Jr., Copiah Bank, N.A., to Amy Rudnick (Nov. 10, 1989)(lack of resources to determine required information).

would still be troubling. In the short term, the recent legislation will drain enormous resources from other enterprises, such as the investigation and prosecution of other serious crimes, to enable federal authorities to attempt to prosecute every case in which a banking crime was committed. The harsh sentences now mandated for those convicted of banking crimes will have no impact on those who committed crimes against failed savings and loan institutions. And the well-being of the financial institutions that this legislation is supposed to protect is undermined by the sweeping obligation it imposes on banks to promote the secrecy of grand jury investigations, an obligation that comes at the expense of the legitimate interests of bank customers and officials who the grand jury may investigate, as well as at the expense of the bank itself.

The long-term impact of this legislation, however, may prove to be the most dramatic. The legislation breaks down long-standing boundaries between federal criminal prosecutors, who wield enormous investigative power, and civil authorities and private parties, who have not been permitted to share in the prosecutorial power. This innovation is presently limited to banking crime cases, but, as we know, Congress often legislates one step at a time. If Congress were to extend the recent changes to all federal business crimes, the impact on federal investigations and prosecutions—and on the defense of white-collar defendants—would be enormous. It remains to be seen whether the banking crime legislation signals the beginning of a revolution in federal criminal law enforcement or whether, once the rhetoric dies down and there is an opportunity for deeper consideration, aspects of the recent legislation will come to be recognized as excessive.