CONUNDRUM IN THE CAYMANS:

How Substantial Assistance May Conflict with Principles of International Law and Constitutional Due Process[*]

BY

JUSTIN A. THORNTON

&

MARK H. ALLENBAUGH

LAW OFFICES OF JUSTIN THORNTON
1615 L Street, NW
Suite 1200
Washington, DC 20036
(202) 778-0559
(202) 530-0625 Fax
jat@thorntonlaw.com

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> *[N]o nation will suffer the laws of another to interfere with her own to the injury of her citizens.*
>
> -*Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

Introduction

The nearly impenetrable barrier surrounding the highly secretive world of international private banking has been severely, and perhaps irreparably, weakened recently by a highly publicized United States Government criminal investigation and prosecution. Although the case of *United States v. Mathewson*[i] may mark a coup for U.S. law enforcement in its efforts to combat international tax fraud and money laundering, it also marks what appears to be a disconcerting direction in U.S. foreign relations law and constitutional due process.

In the first section of this article, the history of *United States v. Mathewson* is reviewed. The second and third sections discuss the implications that the *Mathewson* case may have on foreign relations law and constitutional due process. The fourth section of this article argues

that, from a sentencing perspective, the *Mathewson* case exemplifies how Section 5K1.1 of the Federal Sentencing Guidelines may be used to encourage Americans to steal information from foreign countries for the prosecutorial benefit of the U.S. Government. This paper concludes that the *Mathewson* case sets a dangerous precedent for both U.S. foreign and domestic policy. Indeed, rather than discourage international crimes, the *Mathewson* case may actually encourage the commission of such offenses.

I. Guardian Bank & Trust: A Coup in the Caymans

John M. Mathewson, former owner of the now-defunct Guardian Bank & Trust Ltd. (hereinafter "Guardian Bank") located in the Cayman Islands, was sentenced on Monday, August 2, 1999, in the United States District Court for the District of New Jersey.[ii] Mathewson earlier pled guilty in March of 1997 to several counts of bank fraud, tax evasion, and money laundering.[iii] As part of his plea negotiations, and much to the delight and surprise of the U.S. Attorneys prosecuting the case, Mathewson agreed to turn over computer tapes (hereinafter "the tapes") that listed the names and account information of nearly 2,000 of the bank's depositors.[iv]

The United States Government has used and continues to use this information to investigate and prosecute American citizens for tax evasion, estimating that it may recover nearly $300 million in unpaid taxes.[v] In light of this significant amount, John J. Carney, an Assistant United States Attorney who helped prosecute the Mathewson case, believes that Mathewson "is the most important cooperator for the government in the history of tax-haven prosecutions."[vi] Indeed, Mathewson has been described as "one of the most valuable police informers in the history of financial crime."[vii] According to Carney, "[b]ecause of Mr. Mathewson's cooperation, we have learned more about offshore banking than we would have in years of

conventional investigation."[viii] Accordingly, Robert Jordan, Assistant Special Agent in Charge of the FBI's Newark office, stated that "[t]his case has shown that the [offshore banking] system is capable of being penetrated, and if it can be penetrated once, it can be penetrated again."[ix]

As expected, the Caymanian Government is not pleased with this significant breach of its banking secrecy laws, especially in light of the fact that it has taken substantial and affirmative steps toward policing itself better, and Guardian Bank in particular.[x] In fact, in 1995, the Caymanian Government took control of Guardian Bank stating that the bank was "carrying on business detrimental to the public interest."[xi] It was soon after the government gained control of the bank, however, that Mathewson fled the Cayman Islands with the computer tapes and turned them over to U.S. authorities.[xii]

Once the Caymanian authorities discovered that Mathewson had fled with the tapes, they demanded their immediate return.[xiii] The Caymanian Government viewed Mathewson's possession of the tapes as "a serious theft" and as likely to significantly damage, if not destroy, the Cayman Islands' reputation for banking secrecy.[xiv] Indeed, Christopher D. Johnson, one of the official liquidators of Guardian Bank, filed a formal, written complaint with the Royal Cayman Island Police stating his belief that "these events will be potentially very damaging to the wider public profile of this jurisdiction and the reputation of the banking industry."[xv]

Given the potential for such a substantial and adverse impact on the Cayman Islands' economy, Johnson's petition for the return of the stolen tapes was fully authorized by the Grand Court of the Cayman Islands.[xvi] Nevertheless, in spite of their best efforts, the Caymanian Government was ultimately unsuccessful in obtaining the tapes' return.[xvii] The litigious fight between the Cayman Islands and the U.S. over these tapes has, of course, sparked tension.[xviii]

Although the Cayman Islands may have received the "short end of the stick," Mathewson did very well for himself by stealing the tapes. Though Mathewson could have received up to 20 years imprisonment and a $600 million fine for money laundering,[xix] in exchange for the tapes, he received a sentence of only six months of home detention, five years probation, and a $30,000 fine.[xx] So, in addition to being the most valuable informer in the history of financial crimes, Mathewson also appears to be the recipient of one of the largest downward departures in the history of the Guidelines.

II. Anti-Money Laundering and Anti-Tax Evasion Efforts

A. The U.S. Effort

Money laundering and tax evasion are enormous international enterprises. According to a recent White House report, "[s]ome estimates place the amount of money laundered internationally at between $300 billion and $500 billion annually. In addition to proceeds from criminal activities like drug trafficking, substantial amounts of money are being transferred abroad to avoid U.S. taxes."[xxi] As a result, the White House has proposed the following strategy in its overall effort to combat international financial crime:

> *Goal 4: Counter International Financial Crime*
>
> Objective 1: Combat money laundering by denying criminals access to financial institutions and by strengthening enforcement efforts to reduce inbound and outbound movement of criminal proceeds.
>
> Objective 2: Seize the assets of international criminals through aggressive use of forfeiture laws.
>
> Objective 3: Enhance bilateral and multilateral cooperation against all financial crime by working with foreign governments to establish or update enforcement tools and implement multilateral anti-money laundering standards.

> Objective 4: Target offshore centers of international fraud, counterfeiting, electronic access device schemes and other financial crimes.[xxii]

One situation, for example, that lately has received a considerable amount of attention from the U.S. Internal Revenue Service is tax shelters involving foreign trusts allegedly used to evade Subpart F income.[xxiii] "In such cases, U.S. taxpayers establish multiple foreign trusts and use various loan and gift devices to shuttle money through the trusts, with the funds ultimately returning to the taxpayer in purportedly nontaxable transactions."[xxiv] In light of the fact that many investors have been making use of "hybrid" controlled foreign corporations to evade recognition of Subpart F income, the Internal Revenue Service recently changed the Revenue Code to require income recognition for such financial transfers.[xxv]

Another recent initiative complementing the U.S. effort to fight money laundering and tax evasion offenses is the proposed Cyberspace Electronic Security Act.[xxvi] The CESA will make it easier for the U.S. Government to investigate and obtain information from computer encrypted data, including bank data, by enabling "investigators to get a sealed warrant signed by a judge permitting them to enter private property, search through computers for passwords and install devices that override encryption programs."[xxvii] In addition, the Federal Communications Commission recently adopted rules requiring telecommunications carriers to comply with the Communications Assistance for Law Enforcement Act of 1994.[xxviii] These rules will make it possible for federal authorities to more easily tap into all forms of wireless communication.[xxix]

B. <u>The United Nations' Effort</u>

Similar to the U.S. anti-money laundering and anti-tax evasion initiatives, the U.N.'s Office of Drug Control and Crime Prevention has developed a "Global Programme Against Money Laundering." The "Programme" functions as an international research and technical

assistance agency that aims "to increase the effectiveness of international action against money laundering through comprehensive technical cooperation services offered to Governments." [xxx] Specifically, "[r]esearch is being conducted on key issues such as: bank secrecy, offshore centers and money laundering, the impact of public policies on money laundering strategies of criminal organizations, reversed onus of proof in confiscation matters, etc. "[xxxi] Ultimately, the purpose of the research is to provide information about money laundering and other financial crimes so as to encourage "cooperation with other international, regional and national organizations and institutions."[xxxii] Notably, the Cayman Islands recently has applied for certification under this program. According to a recent report:

> The Cayman Islands has agreed to a United Nations review of its financial systems, which the islanders hope will dispel notions the Caribbean banking powerhouse is a haven for drug lords and crooks with bags of cash. Finance Minister George McCarthy said the Caymans will seek certification under the Offshore Initiative launched in March by the U.N. Global Program Against Money Laundering - the first offshore centre to do so. The review of the British Caribbean territory's banking laws and financial systems is to begin next month and will put the Caymans on a global "white list" of centres with strong anti-money laundering controls.[xxxiii]

As of this writing, it is unknown whether the Mathewson prosecution will have any adverse consequences for the Cayman Islands' application for certification under this program.

C. Mutual Legal Assistance Treaties

In addition to the broad U.S. and U.N. initiatives just outlined, there also exist treaties narrowly tailored to the law enforcement needs of particular countries. Such treaties, known as Mutual Legal Assistance Treaties ("MLATs"), are often used as formal devices between nations to assure their mutual assistance in investigating, prosecuting, and suppressing criminal offenses that may take place across their borders.[xxxiv] There are currently 21 such MLATs between the

U.S. and other countries, with 19 awaiting Senate approval.[xxxv] "MLATs provide a number of advantages to government investigators gathering secret foreign bank information. After they enter into force, processing a request for evidence merely requires contacting the treaty-specified representative in the other jurisdiction."[xxxvi] According to the IRS, pursuant to a request under an MLAT, the requested authorities may:

> A. Supply official records.
>
> B. Locate persons.
>
> C. Provide service of process.
>
> D. Execute search and seizures of property.
>
> E. Arrange for the appearance of witnesses or experts before the relevant judicial authority.
>
> F. Secure extraditions.
>
> G. Transfer accused persons needed in the United States.
>
> H. Exchange relevant information relating to the laws, regulations, and international practices in criminal matters of the Contracting State.[xxxvii]

MLATs thus provide a convenient mechanism for nations to cooperate with one another when investigating transnational financial crimes.

1. The Cayman Islands' MLAT

On July 3, 1986, the U.S. entered into an MLAT with the Cayman Islands (hereinafter "Treaty"), which became effective on March 19, 1990.[xxxviii] According to the Treaty, "[t]he Parties shall provide mutual assistance . . . for the investigation, prosecution, and suppression of criminal offenses of the nature and in the circumstances set out [herein]."[xxxix] However, "[t]he

assistance afforded by this Treaty shall not extend to: (a) any matter which relates directly or indirectly to the regulation, including the imposition, calculation, and collection, of taxes."[xl]

There are, nonetheless, two income-tax-related exceptions that do not preclude the Treaty's application: (1) where there has been a willful or dishonest act to obtain "money, property or value securities from other persons by means of false or fraudulent pretenses . . . regarding or affecting benefits available in connection with the laws and regulations relating to income or other taxes,"[xli] and (2) where there has been the willful or dishonest "making [of] false statements . . . to government tax authorities . . . with respect to any tax matter arising from the unlawful proceeds of any criminal offense . . . or [a willful and dishonest failure] to make a report to government tax authorities as required by law."[xlii] Given that "[t]he Central Authority of the Requested Party may deny assistance where (a) the request is not made in conformity with the provisions of this Treaty," the Cayman Islands appears to have a strong argument that the U.S. violated the Treaty by not complying with, or by otherwise utilizing, its procedures to obtain the tapes.[xliii]

D. Foreign Relations Law

The Restatement (Second) of Foreign Relations Law of the United States holds that "[w]here two states have jurisdiction to prescribe and enforce rules of law [that may] require inconsistent conduct upon the part of a person, each state is required by international law to consider . . . moderating the exercise of its enforcement jurisdiction."[xliv] Though Restatement (Second) was revised by Restatement (Third) of Foreign Relations Law of the United States, the same sentiment remains: "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[xlv]

To determine whether an exercise of otherwise valid jurisdiction would be unreasonable, Restatement (Third) enumerates the following non-exclusive factors for the exercising state to consider: (1) “the extent to which the activity takes place within the [state’s] territory,” (2) “the connections, such as nationality, residence, or economic activity, between the regulating state and the person [under investigation],” (3) “the character [and importance] of the activity to be regulated,” (4) “the existence of justified expectations that might be protected or hurt by the regulation,” (5) “the importance of the regulation to the international political, legal, or economic system,” and (6) “the likelihood of conflict with regulation by another state.”[xlvi] After considering the above points, even if exercising jurisdiction still appears reasonable, where the laws of the two states are still in conflict, “each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction.” [xlvii] After evaluating the relative interests, “a state should defer to the other state if that state’s interest is clearly greater.”[xlviii] What is more, Restatement (Third) specifically notes that “in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, **the presence of substantial foreign elements will ordinarily weigh against application of criminal law**.”[xlix]

Given the enormous economic interest the Caymanians have in their bank secrecy laws, coupled with the fact that the Mathewson case concerns U.S. regulatory statutes and involves substantial foreign elements, the Restatement strongly suggests that the U.S should not have exercised jurisdiction by exploiting the information on the tapes, which were obtained in contravention of Caymanian bank secrecy laws. [l]

III. Due Process Rights of American Citizens: Are the Tapes the “Fruit of a Poisonous Tree?”

A. Private Searches and Government Agency

In light of the fact that the tapes were stolen in direct contravention of the Cayman Islands' bank secrecy laws, and are now being used by the U.S. Government to investigate and prosecute U.S. citizens, has the Fourth Amendment's guarantee to be free from unreasonable searches and seizures been violated?[li] Although Fourth Amendment protection is only invoked by Government action,[lii] in the instant case, Mathewson arguably may have acted as, at least, a *de facto* Government agent. The fact that Judge Lechner recognized Mathewson's assistance to the U.S. Government by reducing Mathewson's sentence by an order of magnitude, coupled with the suspiciously long period of time between Mathewson's plea and sentencing,[liii] may indicate the presence of at least some Government influence on Mathewson to obtain those tapes.[liv] Wherever there are "clear indices of the Government's encouragement, endorsement, and participation" in an otherwise private search, Fourth Amendment protection applies.[lv] Thus, if it can be shown that, indeed, the U.S. Government encouraged, endorsed, and participated in Mathewson's seizure of the tapes, then all prosecutions stemming from the use of those tapes may be tainted by the "fruit of a poisonous tree" doctrine.[lvi]

B. Government Expansions of Private Searches

Alternatively, Fourth Amendment protection may have been implicated by the U.S. Government's determined effort to break the encryption code that safeguarded the data on the tapes, despite objections from the Cayman Islands.[lvii] In the celebrated 1984 murder trial of socialite Claus von Bulow, one of the central issues turned on the admissibility of a "little black bag" that allegedly contained evidence implicating von Bulow in the murder of his wealthy wife.[lviii] The black bag was found by the von Bulow children in a search of a bathroom and subsequently turned over to police authorities. The police then conducted chemical tests on the

contents of the bag discovering the damaging evidence that formed “a significant part of the state’s case.”[lix]

Counsel for von Bulow argued that the search by the children was illegal, and therefore, the bag should have been excluded from evidence. The Rhode Island Supreme Court disagreed holding that the children’s search was a private search, and therefore the Fourth Amendment was not implicated. The Rhode Island Supreme Court, however, agreed that the chemical test was a government expansion of a private search thereby implicating Fourth Amendment protection as to the information gleaned from the test results. Quoting the U.S. Supreme Court, the Rhode Island Supreme Court stated that “‘the government may not exceed the scope of the private search unless it has the right to make an independent search.’”[lx] Accordingly, because “the state’s subsequent chemical analysis of certain contents of the black bag was a significant expansion of the private search and . . . there were no exceptions to the warrant requirement, [von Bulow’s] conviction must be reversed.”[lxi] Likewise, as it appears that the U.S. Government neither obtained search warrants to break the encrypted foreign bank data, nor had an independent right to search the bank records, any information the Government gleaned from those tapes may be the product of an unlawful government expansion of Mathewson’s private search.

C. Legitimate Expectations of Privacy in Foreign Bank Accounts

To be sure, the U.S. Supreme Court held in *United States v. Miller* [lxii] that American citizens hold no Fourth Amendment-protected privacy interest in their bank records. This holding was later expanded in *United States v. Payner*[lxiii] where the U.S. Supreme Court held that American citizens also lack a privacy interest in their foreign bank accounts insofar as they are required to report the existence of such accounts to the U.S. Government. Nevertheless, as

argued below, the holding in *Payner* is prefaced upon a fact-specific analysis that is distinguishable from the Mathewson case. Consequently, any persons prosecuted as a result of the U.S. Government's use of the Mathewson tapes may still retain Fourth Amendment protection.

In *Payner*, the U.S. Internal Revenue Service (IRS) was engaged in "Operation Trade Winds," an investigation into Bahamian banks believed to be used by Americans to evade taxes. As part of the operation, the IRS hired a private investigator to act as an informant to learn what he could about Castle Bank, a Bahamian bank, and its depositors. The investigator discovered that Castle Bank's president would be travelling to the city of Miami and thus arranged, as a diversionary tactic, for the president to have dinner with an associate.

While the bank president was at dinner, the private investigator, with the consent of the IRS, broke into the apartment where the bank president was staying and stole a briefcase containing information about the banks' accounts and delivered it to the IRS who copied the briefcase's contents. The IRS then used the information to prosecute Payner for tax evasion.

At his trial, Payner successfully argued that because the Government illegally obtained the briefcase, any evidence purporting to show he evaded taxes should be excluded. "Although the search did not impinge upon the respondent's Fourth Amendment rights, the District Court believed that the Due Process Clause of the Fifth Amendment and the inherent supervisory power of the federal courts required it to exclude evidence tainted by the Government's 'knowing and purposeful bad faith hostility to any person's fundamental constitutional rights.'"[lxiv] On appeal, the Sixth Circuit Court of Appeals agreed with the District Court's use of its supervisory powers, but did not weigh in on the due process rationale. The U.S. Supreme Court reversed both the District Court and Circuit Court of Appeals. The Court agreed that Payner did not have

Fourth Amendment protection as to the stolen bank documents, but was concerned that such use of the District Courts' supervisory powers to exclude such evidence was too indiscriminate.

In its Fourth Amendment analysis, i.e., whether Payner had a legitimate expectation of privacy in his Bahamian bank records, the Court noted that the relevant Bahamian statute governing bank secrecy "is hardly a blanket guarantee of privacy. Its application is limited; it is hedged with exceptions; and we have been directed to no authority construing its terms."[lxv] The Bahamian bank secrecy statute provides, in relevant part, as follows:

> Except for the purpose of the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court of competent jurisdiction within the Colony or under the provisions of any law, no person shall disclose any information relating to the affairs of . . . the customer of a bank which he has acquired in the performance of his duties or the exercise of his functions under this Act.[lxvi]

Unlike the Bahamian bank secrecy statute, the Cayman Confidential Relationships Law is indeed a blanket guarantee of privacy with respect to U.S. tax investigations.[lxvii] The Cayman Confidential Relationships Law applies to "**all confidential information** with respect to business of a professional nature which arises in or is brought into the [Cayman] Islands and to all persons coming into possession of such information at any time thereafter whether they be within the jurisdiction or thereout."[lxviii] The only exception to this law is for the investigation of certain offenses that violate *Cayman Islands law*.[lxix]

As tax evasion is not a violation of Cayman Islands law,[lxx] this exception cannot apply. As a result, by the Court's analysis in *Payner*, Americans with accounts in Cayman Islands banks do have a legitimate expectation of privacy and thus should be afforded Fourth Amendment protection.[lxxi] Further, unlike the bank records in *Payner*, which were merely stored in a briefcase and thus minimally protected, the records for Guardian Bank were

encrypted by software so sophisticated that it took the U.S. Government 18 months to decode. Consequently, just as the Government's subsequent chemical test was found to have been a Fourth Amendment violation in *von Bulow*, so too should the Government's subsequent decryption of the Mathewson tapes be found a violation of the Fourth Amendment rights of those named on the tapes.

IV. Substantial Assistance

As noted above, Mathewson's ultimate sentence was reduced by an incredible, if not unprecedented, amount for his cooperation with U.S. federal authorities.[lxxii] Indeed, without the enormous credit he received for assisting the U.S. government, he likely would have received the statutory maximum prison term and a massive fine.[lxxiii] Given the enormous amount of monies laundered and taxes evaded, coupled with the sophisticated means Mathewson utilized to conceal the asset transfers, it is therefore not unreasonable to speculate that had Mathewson been sentenced by another judge, or in another district, he may not have received such a substantial downward departure for his cooperation, assuming he would have received one at all.[lxxiv]

In any event, *Mathewson* clearly sets a dangerous precedent by providing an incentive for Americans to steal information on behalf of the U.S. Government in exchange for a lenient sentence. As the Petitioners in *Johnson* stated in their brief:

> The ability of any defendant to provide substantial assistance to the Government, and so improve the prospects of a favorable disposition of his or her case, turns largely on the quality of the evidence that defendant can provide. This Court should not establish a rule of law that encourages targets of grand jury investigations, indicted defendants, or those engaged in unlawful activity who wish to insure against the day they will face criminal charges, to obtain evidence useful in plea negations by committing crimes in other countries. **A decision permitting the Government to retain and exploit the information on the Tape**

> **would . . . encourag[e] sophisticated criminals to commit larceny and other offenses in foreign jurisdictions** in anticipation of the day they are indicted in the United States.[lxxv]

Furthermore, it is even questionable whether the assistance provided by some criminals is really as substantial as some downward departures otherwise indicate. According to a recent law review article, "[t]he assumed link between the role and the value of the defendant's information is not all that clear. Defendants at the highest levels of a conspiracy may actually have little useful information for the government. They can insulate themselves from much of the illegal activity and may only have information about more culpable players outside the country or otherwise so well insulated that their cooperation is of no practical value."[lxxvi] Indeed, even though Mathewson surrendered the tapes in exchange for an extraordinarily lenient sentence, the tapes themselves were useless to the U.S. Government. It was not until the federal authorities spent 18 months deciphering the encrypted data that the tapes acquired any practical value.[lxxvii] As a result, the "practical value" of Mathewson's cooperation was minimal at best.[lxxviii] Without the subsequent efforts of the U.S. Government in deciphering the code protecting the tapes, the tapes would have remained useless.[lxxix] One is therefore left wondering: Was Mathewson's assistance so substantial as to warrant such a significant downward departure? If not, then Mathewson was rewarded not for his assistance, but for his theft.

Conclusion

The zealous investigation of international financial crimes by U.S. law enforcement authorities may infringe on the sovereign rights of foreign nations and the due-process rights of American citizens. Given the importance of bank secrecy to the Cayman Islands' economy, it appears that the U.S. Government's use of the Mathewson tapes was likely too hasty, for now the

very foundation upon which a foreign economy rests may have been irreparably damaged. As Circuit Judge Leonard Moore stated, "[u]pon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at least, an *unnecessary circumvention of its procedures*."[lxxx]

The existing Cayman Islands MLAT provides methods for obtaining evidence for U.S. tax fraud investigations. Indeed, the Cayman Islands has provided, and continues to provide, assistance to U.S. authorities with respect to investigations of financial crimes. Consequently, the use of the stolen tapes constitutes an unnecessary circumvention of the Treaty's procedures.

In light of the proposed Cyberspace Electronic Security Act, coupled with the Communications Assistance for Law Enforcement Act of 1994, investigations that result in decoding encrypted data from both foreign **and** domestic financial institutions, will likely increase. It is unfortunate, therefore, that both Mutual Legal Assistance Treaties, and the Fourth Amendment, appear to be losing their significance and their ability to protect legitimate bank depositors from U.S. Government investigations of alleged international financial crimes. With the added carrot of "substantial assistance" dangling in front of sophisticated white-collar criminals, many nations, and their respective financial institutions, are now well-advised to be wary of such Americans abroad.

[**] Mr. Thornton is a white collar criminal defense attorney in Washington, D.C. with extensive experience in all phases of federal criminal litigation. As a Department of Justice trial attorney for ten years, Mr. Thornton successfully prosecuted throughout the United States more than 75 complex criminal fraud cases. He is a recipient of the U.S. Department of Justice Tax Division's Outstanding Attorney Award and the IRS Assistant Commissioner's Award for his successful prosecution of tax crimes. In private practice since 1987, Justin Thornton now represents individuals and businesses under investigation or prosecution for white collar criminal offenses, including tax fraud and related matters. Mr. Thornton co-chairs the Tax Enforcement Subcommittee of the American Bar Association's White Collar Crime Committee, and also serves as an advisor to the U.S. Sentencing Commission. He is a graduate of the University of North Carolina at Chapel Hill (B.A. 1971) and the University of South Carolina School of Law (J.D. 1977).

[***] Mr. Allenbaugh is a third-year law student at American University's Washington College of Law where he is a published member of the Law Review and serves as its Associate Articles Editor. Mr. Allenbaugh also serves on a part-time basis as a law clerk with the Law Offices of Justin Thornton, and teaches business and professional ethics at the George Washington University. An alumnus of the University of Southern California in Los Angeles (B.A. 1993), he also holds an M.A. (1995) from The Ohio University and is pursuing a Ph.D. in Philosophy from the University of Maryland.

[i] *See* U.S. Dep't of Justice, *Former Chairman of Cayman Island Bank Sentenced for Nationwide, Multi-Million Dollar Off-Shore Banking Scheme*, News Release, Aug. 2, 1999 [hereinafter "*DOJ Press Release*"], *available at* < http://www.usdoj.gov/usao/nj>.

[ii] *See id*.

[iii] Mathewson was charged in the District of New Jersey with three counts of money laundering, in the Eastern District of New York with four counts of aiding and abetting the evasion of income tax, and in the Southern District of Florida with one count of conspiracy to commit wire fraud. *See id*. He was convicted on all counts in the District of New Jersey.

[iv] *See* Michael Allen, *Murky World of Offshore Banking Emerges in U.S. Tax-Fraud Probe*, DOW JONES BUS. NEWS, Aug. 3, 1999.

[v] *See id.* ("Court papers show Guardian's clientele ran the gamut from hard-core criminals needing to launder money to doctors, businessmen, and even a New York-area golf pro.").

[vi] William Kleinknecht, *Probe Cracks Tax Shelter in the Caymans: Investigations Grow as FBI Pores Over List of Depositors Provided by Arrested Banker*, STAR-LEDGER (NEWWARK, N.J.), Aug. 3, 1999.

[vii] Adam Jones, *Sting Set to Topple Cayman Tax Haven*, TIMES LONDON, Aug. 6, 1999.

[viii] Kleinknecht, *supra* note vi.

[ix] *Id.*

[x] *See Secretive Caymans Rally behind Beleaguered Bankers*, ASSOC. PRESS, Aug. 8, 1999 [hereinafter *Secretive Caymans*] (reporting that the Mathewson case "rattles Caymanians, who take great pride in their zero direct taxation, a lack of exchange controls, and bankers who . . . make the Swiss look like blabbermouths") (internal quotations and citation omitted).

[xi] Jones, *supra* note vii.

[xii] *See DOJ Press Release, supra* note i.

[xiii] *See* Johnson v. United States, 971 F. Supp. 862 (D.N.J. 1997) (rejecting petition of liquidators for return of computer tapes containing operating records of an "Unnamed Financial Institution, formerly a bank and trust company organized under the laws of the Cayman Islands, with offices in George Town, Grand Cayman"). It is clear from the facts and nature of the dispute that this case concerns John Mathewson's theft of Guardian Bank's computer records. *See DOJ Press Release*, *supra* note i.

[xiv] *Id.*

[xv] *Johnson*, 971 F. Supp. at 865 (reproducing Johnson's formal complaint).

[xvi] *Id.* (noting that "the Grand Court of the Cayman Islands authorized Petitioners, by an order, filed 5 September 1996, to seek recovery of the Tape through legal process in courts of the United States.").

[xvii] *See infra* text accompanying note xli (discussing Judge Lechner's decision to deny Caymanian motion for return of tapes).

[xviii] *See, e.g.*, Cayman Islands Bankers Association, Press Release, Aug. 3, 1999 (stating that Guardian Bank's criminal problems were not indicative of the Caymanian banking industry and that the Cayman Islands' Government had already taken affirmative steps to shut-down Guardian Bank); Government Information Service, Cayman Islands Government, Press Release, *Guardian Bank Case Underscores Cayman's Intolerance to Fraudulent Bank Activity*, Aug. 3, 1999 (noting the enactment of the "cutting-edge" 1996 Proceeds of Criminal Conduct Law and that "Cayman's confidentiality legislation is similar to what is found in major financial centres."). Evidently, there has been tension between the U.S. and the Cayman Islands since the mid-1980s regarding U.S. investigations of Cayman Islands banks. S*ee* Ellen C. Auwater, Note, *Compelled Waiver of Bank Secrecy in the Cayman Islands: Solution to Int'l Tax Evasion or Threat to Sovereignty of Nations?*, 9 FORDHAM INT'L L. J. 680, 684 (1986) (stating that United States Government unilateral tax-fraud investigations "has created friction" between United States and Cayman Islands).

[xix] As Mathewson was convicted and sentenced for money laundering, tax evasion, and wire fraud, the "Grouping" provisions of the Federal Sentencing Guidelines--USSG §3D1.3(a)--would require that Mathewson be sentenced under the Money Laundering Guidelines (USSG §2S1.1), as they are more severe than either the Tax Evasion (USSG §2T) or Fraud Guidelines (USSG §2F).

The statute governing money laundering convictions is 18 U.S.C. § 1956. It provides as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . . with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [providing criminal sanctions for tax evasion] . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

The Base Offense Level under §2S1.1 is 23. Mathewson, however, would have likely received a 13-level increase insofar as he assisted in laundering more than $100 million. *See* Allen, *supra* note iv. Further, Mathewson would have received an additional 4-level enhancement for being "an organizer or leader of a criminal activity that . . . was . . . extensive." USSG §3B1.1(a). Thus, his total Offense Level, had he been sentenced under USSG §2S1.1, would have been 40. Subtracting three levels for acceptance of responsibility (*see* USSG §3E1.1(b)), Mathewson's final Offense Level for purposes of sentencing would have been 37. Accordingly, but for the downward departure for substantial assistance, he may have been sentenced from 210 to 240 months imprisonment (the statutory maximum term). Furthermore, if the entire amount of tax alleged to have been evaded as a result of Mathewson's criminal activity, i.e., $300 million, is considered "property involved in the transaction" for purposes of sentencing, then 18 U.S.C. §1956 allows a fine of up to twice the value of such property. In other words, Mathewson could have been fined up to $600 million. To be sure, such a massive fine is permissible under the Guidelines. *See* USSG §5E1.2(c)(4) (providing that where a statute authorizes a maximum fine greater than $250,000, "the court may impose a fine up to the maximum authorized by the statute.").

[xx] *See DOJ Press Release, supra* note i.

[xxi] THE WHITE HOUSE, INTERNATIONAL CRIME CONTROL STRATEGY, pt. II (May, 1998).

[xxii] *Id.*; *see also* Bruce Zagaris, *International Tax Enforcement in the Next Millenium: Harmful to Your Client's Health, but a Boon to the Enforcement Practice?*, ABA, SEC. OF TAXATION, CIVIL AND CRIM. PENALTIES COMM., INT'L ENFORCEMENT SUBCOMM. 7 (1999) (noting that in 1995, Internal Revenue Service's Criminal Investigation Division's International Strategy was formally implemented with goals of *inter alia* "facilitating the acquisition of information obtained in host countries to support domestic investigations; [and] assisting foreign governments in establishing money laundering, tax, and forfeiture statutes").

[xxiii] On August 9, 1999, the IRS amended Subpart F of the Internal Revenue Code to fix a loophole in the taxation of income derived from certain hybrid controlled foreign corporation ("CFC") transactions. Now, when an

interest payment is made from one CFC to its hybrid branch in a different jurisdiction, subpart F income arises, though it did not under the previous iteration of the Code. *See* 64 FED. REG. 43072 (Aug. 9, 1999). Subpart F of the Internal Revenue Code concerns the taxation of income derived from CFCs. *See* 26 U.S.C. §§ 951-964.

[xxiv] Cono R. Namorato & Scott D. Michel, *International Criminal Tax Cases*, 50 U. MIAMI L. REV. 617, 623 (1996).

[xxv] *See supra* note xxiii.

[xxvi] *See* Robert O'Harrow, Jr., *Justice Dept. Pushes for Power to Unlock PC Security Systems*, WASH. POST, Aug. 20, 1999 (discussing nature and rationale for act).

[xxvii] *Id.*

[xxviii] *See* Federal Communications Comm'n, *FCC Adopts CALEA Technical Standards*, Press Release, Aug. 27, 1999.

[xxix] *See id.*

[xxx] UNITED NATIONS' OFFICE OF DRUG CONTROL AND CRIME PREVENTION, GLOBAL PROGRAMME AGAINST MONEY LAUNDERING, *available at* <www.un.org>.

[xxxi] *Id.*

[xxxii] *Id.*

[xxxiii] Jane Sutton, *Caymans Agree to U.N. Review of Bank System*, TORONTO STAR, May 25, 1999.

[xxxiv] *See* Bernard S. Bailor & Justin A. Thornton, *Obtaining Evidence from the United States of America*, 3 INT'L ASS'N OF PROSECUTORS § 2 (1998). In the absence of a treaty, letters rogatory offer an alternative method for obtaining evidence from foreign jurisdictions. *See id.* at § 2(C). Letters rogatory are "requests made[] by a foreign or international tribunal or upon the application of any interested person . . . directing[ing] that the testimony or [a] statement be given." 28 U.S.C. § 1781(a).

[xxxv] *See* James P. Rubin, U.S. Dept. of State, Off. of the Spokesman, Press Statement, *U.S. and Greece Sign Mutual Legal Assistance Treaty*, May 26, 1999.

[xxxvi] *See* C. Todd Jones, *Compulsion over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454, 476 (1992).

[xxxvii] INTERNAL REVENUE MANUAL HNDBK. 9.13, TREATIES, MUTUAL ASSISTANCE LAWS, SIMULTANEOUS INVESTIGATION PROGRAMS, AND AGREEMENTS Ch. 2 § 2(3) (Oct. 19, 1998).

[xxxviii] *See* THE AMERICAN SOC. OF INT'L LAW, UNITED KINGDOM-UNITED STATES: TREATY CONCERNING THE CAYMAN ISLANDS AND MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (DONE AT GRAND CAYMAN, JULY 3, 1986), 26 ILM 536 (1987).

[xxxix] *Id.* at 537, Art. 1, § 1.

[xl] *Id.* at 538, Art. 3, § 1.

[xli] *Id.* at 546, Art. 19, § 3(d).

[xlii] *Id.* at 546, Art. 19, § 3(e). Thus, the Treaty offers a legitimate method for U.S. authorities to obtain information from the Cayman Islands regarding American tax offenses. Nevertheless, Judge Lechner stated in *Johnson* that "the Cayman [Treaty] does not provide for assistance to United States law enforcement officials regarding tax offenses. Accordingly, there is no alternative method available to the Government to seek the

information contained on the Tape." Johnson v. United States, 971 F. Supp. 862, 874 (D.N.J. 1997). From the analysis given here, however, it seems clear that the Treaty is indeed an available method for U.S. law enforcement officials to obtain evidence regarding tax offenses. What is more, the Cayman Islands has previously provided U.S. law enforcement officials with the proceeds of illegally derived funds. *See infra* note lxix. Even if Judge Lechner's reading of the Treaty is correct, however, is it really the case that the only alternative for U.S. investigators is to resort to the exploitation of illegal methods in order to obtain evidence located abroad? Prior to the Treaty, after all, the issuance of a letter rogatory was always an available and legitimate mechanism for obtaining evidence from a foreign jurisdiction. *See* Bailor & Thornton, *supra* note xxxiv (discussing letters rogatory). It is therefore unclear why Judge Lechner never considered the issuance of letters rogatory as an option.

[xliii] *Id.* at 538, Art. 3, § 2.

[xliv] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1962).

[xlv] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1986).

[xlvi] *Id.* at § 403(2)(a-h).

[xlvii] *Id.* at § 403(3).

[xlviii] *Id.*

[xlix] *Id.* at § 403 cmt. f (emphasis added).

[l] *See* Johnson v. United States, 971 F. Supp. 862, 871 (D.N.J. 1997) ("The Cayman Confidential Relationships Law makes it a crime to divulge confidential information. A person guilty of divulging confidential information is liable for a fine of five thousand dollars and to imprisonment for two years." (Citations and internal quotes omitted)).

[li] The Fourth Amendment holds, in part, that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated." U.S. CONST. amend. IV.

[lii] *See* Burdeau v. McDowell, 256 U.S. 465 (1921) (holding that private searches do not violate the Fourth Amendment).

[liii] *See infra* note lxxix (discussing unusual period of time between Mathewson's plea and sentencing).

[liv] *See Secretive Caymans*, *supra* note x ("Mathewson could have received a five-year prison term [if sentenced only for tax evasion], but he got probation by providing what U.S. District Judge Alfred J. Lechner called 'unparalleled' cooperation."); *see also supra* note xix and accompanying text (stating that Mathewson could have received up to twenty years imprisonment and $60 million fine if sentenced according to the Money Laundering Guidelines). Interestingly, Judge Lechner himself was the one who denied the Cayman Islands' request for return of the tapes. *See Johnson*, 971 F. Supp. at 874.

[lv] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

[lvi] The "fruit of the poisonous tree" doctrine was first coined by the U.S. Supreme Court as a rule precluding the direct or indirect use of illegally obtained evidence in a criminal prosecution. *See* Nardone v. United States, 308 U.S. 338 (1939). This rule serves as a remedy to government violations of the Fourth Amendment to the U.S. Constitution.

[lvii] According to a news report, it took U.S. authorities "a year and a half to crack the code." Allen, *supra* note iv. *See supra* notes xiii - xv and accompanying text (discussing Caymanian effort to obtain tapes from U.S. authorities).

[lviii] *See* State v. von Bulow, 475 A.2d 995 (R.I. 1984).

[lix] *Id.* at 1013.

[lx] *Id.* at 1018 (quoting Walter v. United States, 447 U.S. 649, 657 (1980)).

[lxi] *Id.*

[lxii] 425 U.S. 435 (1976).

[lxiii] 447 U.S. 727 (1980) (6-3 majority).

[lxiv] *Payner*, 447 U.S. at 730-31 (quoting United States v. Payner, 434 F. Supp. 113, 129 (D.C. Ohio 1977)).

[lxv] *Payner*, 447 U.S. at 732 n.4.

[lxvi] Banks Act, Bah. Islands Rev. Laws, § 19, ch. 96 (1965), as added, 1965 Bah. Acts, No. 65.

[lxvii] Though "[t]he Caymans' Confidential Relationships Law. . . recognizes that people have the right to conduct private business in private[,]. . that confidentiality is by no means absolute. Scotland Yard is deputized to act as the Caymans police and can execute search warrants involving bank records. Under a 1990 treaty with the United States, the Caymans also provides bank account information to the U.S. Justice Department, **if U.S. authorities submit a request providing evidence of a crime**." *See* Sutton, *supra* note xxxiii (emphasis added).

[lxviii] Cayman Confidential Relationships Law, § 3(1) (emphasis added).

[lxix] *See id.*, § 3(2). In 1989, the Cayman Islands made it illegal to launder drug money through their banks. In 1997, this law was expanded by "The Proceeds of Criminal Conduct Act. . . to cover proceeds of any crime and allowed the government to seize ill-gotten assets. It also made it a criminal offence for financial service providers to fail to report suspicions that a client may be involved in crime. Since the law took effect, the Caymans has confiscated $15 million in illegal profits stashed there by U.S. miscreants, and sent it back to the United States." *See* Sutton, *supra* note xxxiii.

[lxx] Indeed, it is an impossible crime as there are no Cayman Islands income taxes.

[lxxi] Of course, the Cayman Islands MLAT does allow for cooperation during the investigation of tax fraud offenses, but it was not yet in existence at the time of *Payner*. *See supra* note xlii and accompanying text (discussing Cayman Islands MLAT's provisions for investigations of tax fraud offenses).

[lxxii] According to the most recent data available from the United States Sentencing Commission, for fiscal year 1998, 225 money laundering cases received a downward departure for substantial assistance. *See* UNITED STATES SENTENCING COMMISSION, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 61 [hereinafter SENTENCING STATISTICS]. The median sentence was 18 months, the median decrease in months from the Guideline minimum was 21, and the median percent decrease from the Guideline minimum was 58.6. *See id.* In contrast, assuming that the minimum Guideline sentencing range for Mathewson was 210 months (s*ee supra* note xix (stating that Mathewson could have been sentenced from 210 to 240 months imprisonment under Money Laundering Guidelines)), because Mathewson was sentenced to zero months imprisonment, he received a decrease of 210 months from the Guideline minimum, or exactly *10 times* the median downward departure for substantial assistance in money laundering cases. Additionally, Mathewson also received a *100%* decrease from the Guideline minimum.

[lxxiii] *See supra* note xix and accompanying text (stating that Mathewson could have received up to 20 years imprisonment and $600 million fine).

[lxxiv] *See* Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 606-607 (1999) (reviewing United States Sentencing Commission data indicating that "[d]ifferent districts handle cooperators in different ways" and presence of "wide variations in whether a given activity will result in a motion from the prosecutor for a downward departure" such that "similarly situated cooperators can receive very different benefits"). Indeed, as Mathewson was indicted in the U.S. District Court for New Jersey, in the U.S. District Court for the Southern District of Florida, and in the U.S. District Court for the Eastern District of New York, a comparison of the

rates of downward departures for substantial assistance in these districts is telling. In the District of New Jersey, 26.3% of the sentences comprised downward departures for substantial assistance. Similarly, in the Eastern District of New York, 21.1% of the sentences comprised substantial assistance departures. In the Southern District of Florida, however, only 12.1% of the sentences comprised downward departures for substantial assistance. *See* SENTENCING STATISTICS, *supra* note lxxii at 53. For the 48 contiguous states, the rate of substantial assistance departures ranged from a low of 6.7% (Western District of Kentucky and District of South Dakota), to a high of 43.6% (Western District of North Carolina). *See id.* at 53-54. Mathewson was therefore very lucky to have been sentenced in an offender-friendly district.

[lxxv] Johnson v. United States, 971 F. Supp. 862 (D.N.J. 1997), Petitioners' Reply Br., filed Dec. 23, 1996, at 7.

[lxxvi] *See* Weinstein, *supra* note lxxiv, at 613.

[lxxvii] According to a news report, it took U.S. authorities "a year and a half to crack the code." Allen, *supra* note iv.

[lxxviii] To be sure, Mathewson did assist the government by detailing the transactional operations of Guardian Bank. *See* William Kleinknecht & Fredrick Kunkle, *U.S. Unlocks a Treasure of Offshore Bank Scams Arrested Banker's Records Offer Rare Details of Cash Laundering*, STAR-LEDGER (NEWWARK, N.J.), Aug. 22, 1999. Nevertheless, without the information on the tapes, the Government would have been unable to investigate and prosecute those who are named on the tapes, which is, after all, the ultimate purpose of such departures. *See* USSG §5K1.1 (stating downward departures for substantial assistance may be granted for assisting the Government in "the *investigation* or *prosecution* of another person who has committed an offense.").

[lxxix] It is therefore interesting to note that although Mathewson turned over the tapes to federal authorities in or around June of 1996, and pled guilty in March of 1997, he was not sentenced until August of 1999. Such a long lapse of time between a plea and a sentencing is certainly unusual. Given that the U.S. Government needed 18 months to decipher the tapes' data, it indeed appears that the mere act of handing over the tapes was of little value to U.S. authorities. Mathewson's sentencing thus may have been postponed until the Government knew what was on the tapes; only then did Mathewson qualify for a substantial assistance departure. Consequently, and quite ironically, Mathewson owes a debt of gratitude to those U.S. officials who were able to "crack the code." Had the tapes remained undecipherable, Mathewson may now be locked away in a federal prison for a long period of time.

[lxxx] *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960) (emphasis added).