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Is There a Right of Privacy in Bank Records: Different Answers to the Same Question: California vs. Federal Law

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IS THERE A RIGHT OF PRIVACY IN BANK RECORDS? DIFFERENT ANSWERS TO THE SAME QUESTION: CALIFORNIA vs. FEDERAL LAW

The California Supreme Court has recently taken positions independent from those of the United States Supreme Court on several issues of constitutional protection of individual rights.[1] In particular, the California court in construing the state constitution has interpreted article I, section 1[2] and article I, section 13[3]—which has language essentially the same as that of the fourth amendment to the United States Constitution[4]—as guaranteeing rights which the Supreme Court does not find guaranteed by the fourth amendment.[5] Although it is often stated that

1. *See, e.g.*, People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (making extrajudicial confession inadmissible at trial for impeachment purposes). *But cf.* Harris v. New York, 401 U.S. 222 (1971). *See* People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976) (requiring a warrant for the arrest of a suspect in his home). *But cf.* United States v. Santana, 96 S. Ct. 2406 (1976). *See* People v. Krivda, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973). This decision was in response to a United States Supreme Court request for clarification, 409 U.S. 33 (1972), as to the state supreme court's bases for holding unconstitutional a warrantless, though non-trespassory, search of an individual's trash. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971). On remand the California Supreme Court certified that it based its decision on both the California and United States Constitutions. 8 Cal. 3d at 624, 504 P.2d at 457, 105 Cal. Rptr. at 521. For an extensive list of issues on which the California Supreme Court has relied on the state constitution, see Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 277-80 nn.16-18 (1973).

2. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

CAL. CONST. art. I, § 1. By voter initiative of November 5, 1974 the word "people" replaced the former "men," and the word "privacy" was added. Referring to the reasonable expectation of privacy in one's bank records as a constitutionally protected inalienable right, the California Supreme Court stated:

> Although the [1974] amendment [of article I, section 1] is new and its scope as yet is neither carefully defined nor analyzed by the courts, we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life.

Valley Bank v. Superior Court, 15 Cal. 3d 652, 656, 542 P.2d 977, 979, 125 Cal. Rptr. 553, 555 (1975) (unanimous decision).

3. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated . . . ." CAL. CONST. art. I, § 13.

4. "The 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.

5. California's rationale for its independent stance has been fully laid out in the landmark case of People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr.

the purpose of the fourth amendment is to protect the individual's right of privacy against unreasonable intrusion by government officials,[6] California and the United States Supreme Court do not agree on the constitutional protection to be accorded an individual's privacy in bank records.

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315 (1975). The California court cited Supreme Court cases upholding state constitutions as independent of the United States Constitution, Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965), and upholding a state's right to impose standards for search and seizure which are higher than the minimum standards established by the Federal Constitution. Cooper v. California, 386 U.S. 58 (1967). *Brisendine* was a search and seizure case involving lawful custodial transportation, as were the Supreme Court cases of United States v. Robinson, 414 U.S. 218 (1973) and Gustafson v. Florida, 414 U.S. 260 (1973), which had recently been decided.

In both *Robinson* and *Gustafson*, the defendants were arrested for traffic violations and were searched before being transported to the police station; both searches revealed narcotics which the defendants sought to suppress. The Supreme Court held that a full body search incident to a lawful arrest is an exception to the warrant requirement embodied in the fourth amendment and is a reasonable search even when the officer making the search is not looking for weapons and is not concerned for his own safety. 414 U.S. at 236. Such a search is justified because an arrestee has no significant fourth amendment interest in personal privacy. *Id.* at 237 (Powell, J., concurring in *Robinson*).

In *Brisendine*, the defendant and his companions were discovered camping in a restricted area, a citable offense, and were escorted through rough terrain back to the officers' car, where they had left their citation book. Prior to this custodial transportation out of the area, the officers conducted a weapons search of the knapsacks of the campers; in a compartment of the defendant's pack the officers found marijuana in a frosted plastic bottle with a cap on it, and restricted pills wrapped in tin foil and enclosed in envelopes. The California Supreme Court noted that "traditionally" any warrantless search incident to arrest or custodial transportation is authorized only (1) to uncover evidence of crime where there is probable cause to suspect such evidence will be found; or (2) to find weapons which could be used to injure the arresting officer or to escape. 13 Cal. 3d at 539, 531 P.2d at 1105-06, 119 Cal. Rptr. at 321-22, *citing* Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 364 (1964); United States v. Rabinowitz, 339 U.S. 56 (1950); Agnello v. United States, 269 U.S. 20 (1925). The California court held that under the circumstances the officers had the right to pat down the defendant's pack for weapons, 13 Cal. 3d at 541, 531 P.2d at 1107, 119 Cal. Rptr. at 323, and, since the pack was too rigid for a pat-down to disclose whether there were weapons, they had the right to look for weapons in the interior of the pack. *Id.* at 543, 531 P.2d at 1108, 119 Cal. Rptr. at 324. But since there could have been no weapons in the opaque bottle and the envelopes, the officers went beyond the scope of their authority in finding and seizing the narcotics. *Id.* at 544, 531 P.2d at 1109, 119 Cal. Rptr. at 325. The California high court refused to find *Robinson* and *Gustafson* dispositive, holding that in those cases the United States Supreme Court had once again merely set a minimum standard to satisfy the fourth amendment's requirements, whereas article I, section 13 of the California Constitution requires a more exacting standard. *Id.* at 545, 531 P.2d at 1110, 119 Cal. Rptr. at 326. *See* 64 CALIF. L. REV. 442 (1976); 16 SANTA CLARA LAW. 426 (1976).

6. *See, e.g.*, United States v. Ortiz, 422 U.S. 891, 895 (1975); Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Schmerber v. California, 384 U.S. 757, 767 (1966); Boyd v. United States, 116 U.S. 616 (1886).

The 1975-76 Supreme Court term produced a series of cases[7] which narrow the scope of the fourth amendment, by limiting the areas in which privacy is protected or by limiting the availability of the exclusionary rule of evidence which makes evidence inadmissible at trial when it was obtained in violation of a defendant's fourth amendment rights.[8] One of these cases was *United States v. Miller*,[9] in which the

The right of privacy is also said to be included in the right of personal security guaranteed by the first, fourth, and fifth amendments. Stanford v. Texas, 379 U.S. 476, 484-85 (1965). The first, third, fourth, fifth, and ninth amendments create zones of privacy. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding invalid a state penal statute which forbade dissemination of contraceptive information). The civil right of privacy, the right to be left alone, was held in Melvin v. Reid, 112 Cal. App. 285, 291, 297 P. 91, 93 (1931), to be guaranteed by article I, section 1 of the California Constitution before it was amended to expressly include the right of privacy. *See* note 2 *supra*. Privacy has also been said to be a natural right. Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905). *See* Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833 (1974) (discussion of the constitutional bases of *Griswold*).

Privacy limitations of the type described in this Comment are apparently restricted to criminal and quasi-criminal trials, where the litigant is exposed to liability imposed pursuant to a statute that is penal in nature. The Supreme Court, while narrowing the right of privacy of the criminally accused, has expanded the personal privacy right recognized in *Griswold*. The Court has broadened the privacy right of a woman to seek abortion, Roe v. Wade, 410 U.S. 113 (1973), to have an abortion without her husband's consent, Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976) and in the case of a minor, to have an abortion without parental consent. *Id.*

7. South Dakota v. Opperman, 96 S. Ct. 3092 (1976) (fourth amendment permits police inventory of lawfully impounded locked car in owner's absence); United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976) (probable cause or reasonable suspicion not required for selective stop and questioning at permanent border checkpoints); Stone v. Powell, 96 S. Ct. 3037 (1976) (limitation of federal habeas corpus right); United States v. Janis, 96 S. Ct. 3021 (1976) (use in federal civil tax proceeding of evidence seized illegally but in good faith by state criminal law enforcement officer not forbidden by fourth amendment exclusionary rule); Andreson v. Maryland, 96 S. Ct. 2737 (1976) (search warrant for documents relating to specified alleged crime not made fatally general by addition of general phrase referring only to particularized description); United States v. Santana, 96 S. Ct. 2406 (1976) (doorway of home is public place allowing warrantless arrest); United States v. Miller, 96 S. Ct. 1619 (1976) (depositor has no fourth amendment right in his bank records); Fisher v. United States, 96 S. Ct. 1569 (1976) (taxpayer's fifth amendment privilege not violated by subpoena of records in hands of taxpayer's attorney); United States v. Watson, 423 U.S. 411 (1976) (warrantless arrest in public place with probable cause, despite fact officers had time to obtain warrant but failed to do so, not violation of fourth amendment; defendant's consent to search his car, given while in custody on public street, was voluntary).

8. The history of the fourth amendment exclusionary rule in the United States began with Boyd v. United States, 116 U.S. 616 (1886), where the Supreme Court said that the use of incriminating evidence obtained by compelled production was unconstitutional under the fourth and fifth amendments. *Id.* at 638. *See* note 70 *infra*. Almost thirty years later, the Court declared in Weeks v. United States, 232 U.S. 383 (1914), that if evidence seized in violation of the fourth amendment rights of an accused can be used

Supreme Court held that a depositor has no fourth amendment right in his bank records.[10] The facts and reasoning of *Miller* arise from the Bank Secrecy Act of 1970[11] and the Supreme Court case which upheld the Act, *California Bankers Association v. Shultz*.[12]

In contrast, the California Supreme Court held in *Burrows v. Superior Court*[13] that a bank depositor does have a constitutionally protected right of privacy in his bank records.[14] The *Burrows* doctrine has subsequently been developed judicially.[15]

against him, then the protection of the amendment is of no value. *Id.* at 393. Since it is the duty of federal courts and federal officials to enforce the fourth amendment, *id.* at 391-92, such evidence must be inadmissible because its use would involve "a denial of the constitutional rights of the accused." *Id.* at 398.

The exclusionary rule originally applied only to federal courts. The Court specifically declined to extend the rule to the states in Wolf v. Colorado, 338 U.S. 25 (1949), reasoning that it should not "brush aside" the majority of state practices which rejected the rule, *id.* at 31-32, and that the fourth amendment could be enforced by means other than the exclusion of evidence. *Id.* at 30.

This position was weakened by the decision in Elkins v. United States, 364 U.S. 206 (1960), in which the Court declared unconstitutional the practice of federal officials of using evidence obtained by the illegal actions of state officers (the so-called "silver platter" doctrine). A year later the Supreme Court held in Mapp v. Ohio, 367 U.S. 643 (1961), that the due process clause of the fourteenth amendment extends the fourth amendment exclusionary rule to the states. In overruling *Wolf*, the Court particularly mentioned the case which had established the exclusionary rule for California, 367 U.S. at 651, *citing* People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). In *Cahan*, the California Supreme Court concluded that the exclusionary rule was a necessary remedy, since other means had been unsuccessful in securing compliance with constitutional requirements. 44 Cal. 2d at 445, 282 P.2d at 911. For the Supreme Court's summary of the history of the rule, see Mapp v. Ohio, 367 U.S. at 646-55. *See also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

9. 96 S. Ct. 1619 (1976).

10. *Id.* at 1626.

11. 12 U.S.C. §§ 1730d, 1829b, 1951-59 (1970); 31 U.S.C. §§ 1051-62, 1081-83, 1101-05, 1121-22 (1970) (originally enacted as Act of Oct. 26, 1970, Pub. L. No. 91-508, 84 Stat. 1116).

12. 416 U.S. 21 (1974).

13. 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). *See generally* Note, 64 CALIF. L. REV. 470 (1976).

14. 13 Cal. 3d at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.

15. Valley Bank v. Superior Court, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975) (standards for civil discovery of bank records); Carlson v. Superior Court, 58 Cal. App. 3d 13, 129 Cal. Rptr. 650 (1976) (conflict between *Miller* and *Burrows* noted; state appellate court is bound by *Burrows*); People v. Superior Court, 55 Cal. App. 3d 759, 127 Cal. Rptr. 672 (1976) (exception to privacy right where customer defrauds bank); People v. Johnson, 53 Cal. App. 3d 394, 125 Cal. Rptr. 72 (1975) (exception to privacy right where customer defrauds bank); People v. McKunes, 51 Cal. App. 3d 487, 124 Cal. Rptr. 126 (1975) (*Burrows* privacy right applies to telephone subscriber's records); People v. Mahoney, 47 Cal. App. 3d 699, 122 Cal. Rptr. 174 (1975) (*Burrows* privacy right applies to telephone subscriber's records; exception for customer's fraud applies as well).

In addition to this decisional law recognizing a right of privacy in bank records, California recently enacted the Right to Financial Privacy Act,[16] which codifies the doctrines of *Burrows* and its progeny, and establishes procedures for obtaining financial records pursuant to legal process or under other judicial supervision. The new law balances the governmental interest in effective law enforcement and the individual interest in privacy, while relieving financial institutions from many of the burdens of maintaining this balance. Similar legislation[17] has been introduced in Congress in an attempt to mitigate the effects of the Bank Secrecy Act and *California Bankers.*

I. THE SUPREME COURT'S LIMITATION ON THE RIGHT OF PRIVACY

In *United States v. Miller,* the Supreme Court held that a bank customer has no protected fourth amendment interest in his bank records and therefore cannot challenge the validity of subpoenas of such records.[18] The case was an outgrowth of *California Bankers Association v. Shultz,*[19] in which the Supreme Court upheld the constitutionality of the provisions of the Bank Secrecy Act of 1970,[20] and the regulations promulgated pursuant to the Act.[21]

The Bank Secrecy Act of 1970 was passed after extensive hearings concerning the concealment of criminal acts through the use of secret bank accounts.[22] The Congressional purpose of the Act was

> to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States

16. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5738 (adding sections 7460-93 to the Government Code).

17. S. 1343, 94th Cong., 1st Sess. (1975); S. 2200, 93d Cong., 1st Sess. (1973); S. 3814 and S. 3828, 92d Cong., 2d Sess. (1972).

18. 96 S. Ct. at 1622.

19. 416 U.S. 21 (1974).

20. 12 U.S.C. §§ 1730d, 1829b, 1951-59 (1970); 31 U.S.C. §§ 1051-62, 1081-83, 1101-05, 1121-22 (1970) (originally enacted as Act of Oct. 26, 1970, Pub. L. No. 91-508, 84 Stat. 1116).

21. 31 C.F.R. § 103 *et seq.* (1976).

22. 416 U.S. at 25, 26 & n.1, 28-29. *See generally* S. REP. No. 1139, 91st Cong., 2d Sess. (1970); H.R. REP. No. 975, 91st Cong., 2d Sess. (1970); *Hearings on Foreign Bank Secrecy and Bank Records (H.R. 15073) Before the House Comm. on Banking and Currency,* 91st Cong., 1st & 2d Sess. (1969-70); *Hearings on Foreign Bank Secrecy (S. 3678 and H.R. 15073) Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency,* 91st Cong., 2d Sess. (1970). Congress found that records kept by financial institutions "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." 12 U.S.C. §§ 1829b(a)(1), 1951(a) (1970); 31 U.S.C. § 1051(a) (1970).

where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.[23]

Title I authorizes the Secretary of the Treasury (the Secretary) to prescribe regulations to enforce provisions of the Act[24] which require insured banks to make and maintain records of the identities of bank customers and those authorized to make withdrawals,[25] and to record each instrument drawn on such a bank and received by it.[26] Uninsured banking institutions[27] and institutions insured under the National Housing Act[28] are subject to the same regulations as insured banks. In addition, uninsured banking institutions may be required to report ownership, control, management, and any changes therein[29] and to maintain procedures to assure compliance with the Act.[30] The regulations, but not the Act, permit access to the required records only

23. 12 U.S.C. § 1951 (1970) (uninsured banks, institutions and persons carrying out certain banking functions). Similar language is found in 12 U.S.C. § 1829b(a) (1970) (insured banks) and in 31 U.S.C. § 1051 (1970) (financial institutions as defined in *id.* § 1052).

Enforcement of the Act is achieved by injunctions as well as by civil and criminal penalties for violations of the provisions of the Act or the regulations promulgated thereunder. *See* 12 U.S.C. § 1954 (1970); 31 U.S.C. § 1057 (1970) (injunctions). 12 U.S.C. § 1953(a)(2) (1970) (separate civil or criminal violation of recordkeeping requirements for each day and each separate place where violation occurs or continues); *id.* § 1955 (civil penalty up to $1000 per violator). 31 U.S.C. § 1056 (1970) (civil penalty up to $1000 per violator of reporting requirements); *id.* § 1103 (civil penalty up to amount of reportable transaction for failure to file or for misstatement in foreign report). 12 U.S.C. § 1956 (1970) (misdemeanor, fine up to $1000); *id.* § 1957 (felony with imprisonment up to five years, fine up to $10,000 for violation in furtherance of felony violation of other federal law). 31 U.S.C. § 1058 (1970) (misdemeanor, fine up to $1000 for violation of reporting requirements); *id.* § 1059 (felony with imprisonment up to five years, fine up to $500,000 for violation in furtherance of other felony violation of federal law or as part of pattern of violations exceeding $100,000 in twelve-month period).

24. 12 U.S.C. §§ 1730d, 1829b(b), 1958 (1970); 31 U.S.C. §§ 1053, 1055 (1970).

25. 12 U.S.C. § 1829b(c)-(e) (1970).

26. *Id.* § 1892b(d). The regulations require the copying of checks over $100 which are payable by the bank, with exceptions for certain types of checks drawn on accounts expected to average at least 100 checks per month. 31 C.F.R. § 103.34(b)(3) (1976). Copies must also be made of unsecured loans over $5000 and of communications regarding foreign transfers over $10,000. *Id.* § 103.33.

The period of retention of each type of record is to be prescribed by the Secretary. 12 U.S.C. § 1829b(g) (1970). Retention periods for various types of transaction records have been suggested in a publication of the Bank Administration Institute. *See* C. COEN, THE BANK SECRECY ACT AND RETENTION OF BANK RECORDS (1974).

27. 12 U.S.C. § 1953(a)(1) (1970).

28. *Id.* § 1730d.

29. *Id.* § 1952.

30. *Id.* § 1953(a)(2).

through legal process.[31] Title II, the Currency and Foreign Transactions Reporting Act,[32] provides for the reporting of certain domestic and foreign transactions. It requires the domestic financial institution and one or more of the individual parties involved[33] to report domestic transactions[34] over $10,000.[35] The Secretary may make such information available in confidence to heads of other federal departments and agencies upon written request stating the particular information and the purpose for which it is desired.[36]

In foreign transactions, reports[37] of imports and exports of monetary instruments over $5000 must state the amount and type of instrument used,[38] the origin, destination and route of transportation,[39] the legal capacity of the person filing the report,[40] and the identity of the principal if the person reporting is an agent.[41] The penalty for failure to file the report as required may be forfeiture of the instrument,[42] subject to remission by the Secretary.[43] Similar reports are required for transactions or relationships with a foreign financial agency.[44] Individuals are required by the regulations to report foreign transactions and interests in foreign accounts on their annual federal income tax reports.[45]

The constitutionality of the Bank Secrecy Act was challenged in a federal district court[46] in California. The plaintiffs[47] relied principally on the fourth amendment, but challenged the Act on first, fifth, ninth,

31. 31 C.F.R. § 103.51 (1976). *See* 416 U.S. at 34.

32. 31 U.S.C. §§ 1051-62, 1081-83, 1101-05, 1121-22 (1970).

33. *Id.* § 1082.

34. *Id.* § 1081.

35. 31 C.F.R. § 103.22 (1976).

36. 31 U.S.C. § 1061 (1970); 31 C.F.R. § 103.43 (1976). It is questionable whether this provision is consistent with the "existing legal process" referred to in the text accompanying note 31 *supra*. *See* note 53 *infra* and accompanying text.

37. Certain classes of persons are exempted from the reporting requirement. 31 C.F.R. § 103.23(c) (1976).

38. 31 U.S.C. § 1101(b)(4) (1970).

39. *Id.* § 1101(b)(2).

40. *Id.* § 1101(b)(1).

41. *Id.* § 1101(b)(3).

42. *Id.* § 1102.

43. *Id.* § 1104.

44. *Id.* § 1121.

45. 31 C.F.R. § 103.24 (1976).

46. Stark v. Connally, 347 F. Supp. 1242 (N.D. Cal. 1972). *See* 40 BROOKLYN L. REV. 460 (1973) (discusses rationale of Bank Secrecy Act); 42 GEO. WASH. L. REV. 162 (1973) (discusses additional cases involving recordkeeping and reporting requirements).

47. The California Bankers Association, one of its member banks, several named individual bank customers, and the American Civil Liberties Union on behalf of itself and its members as bank depositors.

tenth, and fourteenth amendment grounds as well.[48] A three-judge district court upheld the recordkeeping provisions and the reporting requirements for foreign transactions; however, it enjoined enforcement of the reporting requirements for domestic transactions as repugnant to the fourth amendment on its face since the Act could be administered so as to compel disclosure of all the details of a bank customer's financial affairs.[49] The Government argued that since civil and criminal penalties may arise only under the regulations which implement the Act, the Act and the regulations as actually issued by the Secretary of the Treasury must be tested together, and that when so tested, they are valid under the fourth amendment.[50] Although the Act was challenged and on appeal was decided by the Supreme Court on various constitutional grounds,[51] the discussion here focuses on the issues which are pertinent to *Miller*—search and seizure and privacy.

The Supreme Court upheld the constitutionality of the Bank Secrecy Act as implemented by the regulations.[52] The recordkeeping provisions, considered apart from the reporting requirements, do not violate the fourth amendment, as there is no illegal search and seizure, and governmental access to the records is to be controlled by existing legal

48. 347 F. Supp. at 1244; *see also* 416 U.S. at 41.

49. 347 F. Supp. at 1251.

50. 416 U.S. at 44.

51. At the outset, Justice Rehnquist for the majority rejected the plaintiff banks' contention that the recordkeeping requirements violated their fifth amendment right to due process by imposing unreasonable burdens on them and by making them agents of the government in surveillance of its citizens. The Court reasoned that the requirements of the Act are well within Congress' plenary authority over interstate and foreign commerce. *Id.* at 46-47, 50.

The plaintiff banks' contention that the recordkeeping requirements denied them due process since the purpose of the Act was to regulate not banks but their depositors—banks being mere bystanders in transactions between drawer and drawee—was also rejected; the Court found that a bank is a party to any negotiable instrument and incurs obligations to the payee, and that it is therefore not neutral in such a transaction. *Id.* at 47-49. *See* note 55 *infra.*

52. Justice Powell, joined by Justice Blackmun, concurred in the Court's opinion, but separately emphasized that the Bank Secrecy Act was upheld only because the regulations limited the scope of the Act's disclosure requirements. 416 U.S. at 78-79 (Powell, J., concurring). *See* note 109 *infra* and accompanying text.

Justices Douglas, Brennan and Marshall separately dissented. Justice Douglas objected that the Act and implementing regulations require disclosure beyond what would satisfy the Congressional purpose of crime prevention, 416 U.S. at 85 (Douglas, J., dissenting), and that the recordkeeping and reporting requirements without a hearing of probable cause are searches and seizures in violation of the fourth amendment. *Id.* at 90. Justice Marshall agreed, finding that the Act and regulations enable the government to force banks to act as governmental agents in seizing the records of customers. *Id.* at 94-95. Justice Brennan thought that Congress had given the Secretary of the Treasury impermissibly broad authority to exercise legislative functions. *Id.* at 93.

process.[53] The argument that a bank, compelled to keep records, is acting as an agent of the government and thus seizes its customers' records was rejected on the ground that the bank is a party to the transaction and is under compulsion only to keep and to produce its own records,[54] which many banks had been keeping voluntarily in their own interest.[55]

The Supreme Court also rejected challenges to the constitutionality of the reporting provisions of the Act and regulations. As to the foreign reporting requirements, the Supreme Court affirmed the district court's decision. Citing the sixty-year history of individual and corporate income tax reporting laws, the Court pointed out that reporting requirements do not per se violate the fourth amendment.[56] Justice Rehnquist emphasized the plenary power of Congress to regulate foreign commerce[57] and held the foreign reporting provisions to be sufficiently specific in their effect as to be consistent with the fourth amendment.[58]

However, the Supreme Court reversed the lower court on the constitutionality of the domestic reporting provisions, holding that, as the Act is not self-executing, its constitutionality can be determined only by testing it together with the regulations which implement it.[59] The regulations require reports of domestic transactions only by the financial institutions involved.[60] Corporations—although they, like individuals, are protected by the fourth amendment from unlawful intrusion—do not have the same right of privacy as do individuals.[61] The Court did not address itself to the question of whether a bank must notify those of its custom-

53. 416 U.S. at 52.

54. *Id.* at 52-53. The Court foreshadowed its ruling in *Miller*:

> That the bank in making the records required by the Secretary acts under the compulsion of the regulation is clear, but it is equally clear that in doing so it neither searches nor seizes records in which the depositor has a Fourth Amendment right.

Id. at 54.

55. *Id.* at 52-53.

The ACLU had challenged the recordkeeping requirements on the additional ground that they violated the first amendment right of association of its members by compelling disclosure of their identities, but the Court dismissed this claim as premature since no subpoena or summons had been issued. *Id.* at 55-56.

56. *Id.* at 59-60.

57. *Id.* at 59.

58. *Id.* at 63.

59. *Id.* at 64.

60. *Id.* at 65. *See* 31 C.F.R. § 103.22 (1976).

61. 416 U.S. at 65. The Court held that the depositor plaintiffs lacked standing to object to the reporting requirements because they did not allege having engaged in the types of transactions that were to be reported. *Id.* at 68.

ers whose transactions must be reported, noting only that no constitutional right of the banks was violated by the failure of the regulations to require such notice.[62]

In response to the plaintiff banks' contentions that the recordkeeping requirements undercut a depositor's right to effective challenge of a third-party summons, the Supreme Court held such a claim premature since a depositor's challenge to compelled production of his own bank records must wait until such process issues.[63] *Miller* addresses the question that was thus reserved in *California Bankers*.[64]

A. United States v. Miller

Mitchell Miller was tried for conspiracy to defraud the United States of whiskey tax revenues.[65] The evidence leading to his conviction consisted in part of copies, maintained by two banks in compliance with the Bank Secrecy Act, of checks which were evidence of his overt acts in furtherance of the conspiracy. These copied checks had been produced in response to grand jury subpoenas duces tecum and were introduced by the Government at trial.[66]

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62. *Id.* at 70. The Court also held the depositor plaintiffs' fifth amendment self-incrimination claims to be premature for the same reasons as their fourth amendment claims. *Id.* at 72, 75. *See* note 61 *supra*. Furthermore, since the depositors could not assert these claims at the time of the appeal, neither could the bank plaintiffs assert them vicariously for their depositors. 416 U.S. at 71-72.

63. *Id.* at 51-52.

64. When *Miller* addressed the issue of a depositor's right to challenge a third-party summons to his bank, the Supreme Court held that the depositor has no protectable fourth amendment interest in his records. *See* notes 81-92 *infra* and accompanying text.

65. Miller was also accused and convicted of possessing a 7500-gallon unregistered still, carrying on the business of a distiller without giving bond and with intent to defraud the government of whiskey tax, and possessing 175 gallons of whiskey upon which no taxes had been paid. 96 S. Ct. at 1621. The evidence supporting Miller's conviction for these other crimes was not considered by the Supreme Court, and is therefore not discussed in this Comment.

66. The subpoenas, ordering the two bank presidents to appear on January 24, 1973, were presented by agents of the Alcohol, Tobacco and Firearms Unit (ATF) of the Treasury Department. Without notifying their depositor, the bank presidents showed Miller's records to an ATF agent, whom they also provided with photocopies. The bank presidents were then told they need not appear in person before the grand jury. On February 12, 1973, nineteen days after the return date on the subpoenas, the grand jury met and indicted Miller and four others for conspiracy. The record did not show whether the grand jury had considered the bank records, which were, however, introduced at trial as evidence of overt acts in furtherance of a conspiracy to defraud the government. United States v. Miller, 500 F.2d 751, 756-57 (5th Cir. 1974), *rev'd*, 96 S. Ct. 1619 (1976).

Miller sought suppression of the bank records at his trial on the ground that the subpoenas were defective, since (1) they were issued by the United States Attorney rather than by a court; (2) no return was made to a court; and (3) the subpoenas were returnable on a date when the grand jury was not in session. The trial court denied the motion to suppress, and Miller was convicted.

The Fifth Circuit Court of Appeals reversed,[67] finding that a purported grand jury subpoena, issued not by a court or by the grand jury but by the United States Attorney's office, for a date when no grand jury was in session, was not sufficient legal process to compel such broad disclosure of Miller's financial records to the government.[68] The appeals court also held that because the rights which were threatened by improper disclosure were those of a bank depositor and not a bank official, the defect was not cured by the fact that bank officials had not objected to the subpoenas but had cooperated fully.[69]

The appeals court relied on the 1886 case of *Boyd v. United States*,[70] in which the Supreme Court held that "a compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the Fourth Amendment"[71] and is therefore forbidden. In reversing Miller's conviction, the Fifth Circuit held that the government may not circumvent the fourth amendment protection mandated in *Boyd* by first requiring a third party bank to copy all of its depositors' personal checks and then, with defective process, calling upon the bank to allow inspection and reproduction of those copies.[72]

The appeals court noted that the recordkeeping and reporting requirements of the Bank Secrecy Act had been constitutionally upheld by the Supreme Court in *California Bankers Association v. Shultz*.[73] There,

67. United States v. Miller, 500 F.2d 751 (5th Cir. 1974), *rev'd*, 96 S. Ct. 1619 (1976). *See* 36 LA. L. REV. 834 (1976).

68. 500 F.2d at 757-58.

69. *Id.* at 758.

70. 116 U.S. 616 (1886). In *Boyd* appellants challenged an 1874 law, under which the government sought forfeiture of allegedly fraudulently imported goods, because the law provided that in customs revenue cases the court on motion of the United States Attorney could order production of the defendant's papers, and that refusal to produce would be taken as confession of the government's allegations. The Supreme Court held the law unconstitutional as repugnant to the fourth and fifth amendments. It found that the privilege against self-incrimination is violated by compelled production of self-incriminatory papers, and that such compulsion amounted to a search and seizure. *Id.* at 634-35.

71. *Id.* at 622.

72. 500 F.2d at 757.

73. *Id.* at 756. *See* notes 46-64 *supra* and accompanying text.

Justice Rehnquist declared that the Act was saved from unconstitutionality in part because both its legislative history and the regulations promulgated pursuant to it "make specific reference to the fact that access to the records is to be controlled by existing legal process."[74] Relying on this passage, the Fifth Circuit Court of Appeals concluded that, because of the defective subpoenas, the requirements of *Boyd* and *California Bankers* made the bank records inadmissible against Miller at trial; the court therefore ordered a new trial,[75] and the United States appealed.[76] The Supreme Court reversed,[77] holding that there had been no intrusion into any area in which Miller had a protected fourth amendment interest.[78]

Miller's contention before the Supreme Court encompassed much of the reasoning of the court of appeals: if the government can require banks to keep records of depositors' transactions (as *California Bankers* holds it can) and then obtain them without legal process, the government—in not complying with the legal requirements applicable if it proceeded against the depositor directly—can circumvent the fourth amendment.[79] The Court, however, rephrased the issue to be "whether the compulsion embodied in the Bank Secrecy Act . . . creates a Fourth Amendment interest where none existed before."[80] Miller and the court of appeals assumed that there was a fourth amendment right of privacy in bank records which the government sought to violate; the Supreme Court assumed and determined there has never been such a right.

The Supreme Court's analysis of privacy in bank records relies on the rule formulated in *Hoffa v. United States*,[81] and *Katz v. United States*,[82]

74. 416 U.S. at 52.
75. 500 F.2d at 758.
76. United States v. Miller, 421 U.S. 1010 (1975).
77. 96 S. Ct. at 1621.
78. *Id.* at 1622.
79. *Id.* at 1623.
80. *Id.*
81. 385 U.S. 293 (1966). Hoffa sought suppression of evidence that he had tried to bribe jurors in a previous trial. This evidence had been obtained through an informant who was a union associate of Hoffa and who spent considerable time in Hoffa's hotel suite during the first trial discussing the bribery attempts with Hoffa and others. The Supreme Court held that a hotel room is a constitutionally protected area where an individual may rely on an expectation of privacy. *Id.* at 301. Nevertheless, the informant's evidence did not breach the security of Hoffa's hotel room; rather, Hoffa had voluntarily imparted otherwise private information in the misplaced confidence that the informant would not repeat the conversations to the government. *Id.* at 302.
82. 389 U.S. 347 (1967), *overruling* Olmstead v. United States, 277 U.S. 438 (1927). Katz was convicted with evidence obtained by attaching a listening device to the outside of a glass-walled public telephone booth. Although the device did not physically penetrate the booth and although Katz was otherwise visible, though not audible from

that, in order to claim the protection of the fourth amendment, the individual must have a reasonable expectation of privacy.[83] Thus, when an individual exposes his affairs to the public, he loses any privacy interest.[84] Even if he conveys information to a third party on the assumption that it will be used only for a limited purpose and that his confidence will not be betrayed, there is no fourth amendment violation when the government nevertheless receives this information.[85] On this basis, the Court holds that a depositor, in communicating his financial affairs to the bank, relinquishes his right of privacy in that information and has no reasonable expectation of privacy.[86] Quoting the Congressional purpose as stated in the Act,[87] the Court attributes to Congress the assumption that there is no legitimate expectation of privacy in bank records.[88]

Thus the Court found that Miller's subpoenaed records were not private papers protected by *Boyd* from compelled production, but were business records of the banks maintained pursuant to the requirements of the Bank Secrecy Act.[89] Such recordkeeping requirements are constitutionally permissible because the bank itself is a party to the transactions of which the records were copied.[90] Even if the checks were not copied, they are not private papers but negotiable instruments used in commercial transactions, and the deposit slips and financial statements contain only information voluntarily conveyed to the bank and its employees in the ordinary course of business.[91]

By this process of reasoning the Court dismissed Miller's contention that the acquisition of his bank records by defective subpoenas was a violation of his fourth amendment rights.[92]

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outside, the Supreme Court held that such warrantless wiretaps were an unauthorized intrusion into an area protected by the fourth amendment when the individual had *a justifiable expectation of privacy*. The Court said that "the Fourth Amendment protects people, not places." 389 U.S. at 351.

83. 389 U.S. at 353.

84. *Id.* at 351.

85. 385 U.S. at 302. Presumably this language is not intended to depreciate the privilege of confidentiality heretofore recognized between attorney and client, physician and patient, penitent and confessor. *Cf.* Fisher v. United States, 96 S. Ct. 1569, 1577 (1976) (attorney-client privilege). This issue is specifically left unaddressed in *Miller*, 96 S. Ct. at 1624 n.4.

86. 96 S. Ct. at 1623-24.

87. *See* text accompanying note 23 *supra.*

88. *See* text accompanying notes 46-64 *supra.*

89. 96 S. Ct. at 1623.

90. 416 U.S. at 52.

91. 96 S. Ct. at 1624.

92. *Id.* at 1626.

B. *The Miller Holding Was Unnecessary*

The Supreme Court now appears to have an unarticulated rule under which the government has an absolute right to know the contents of an individual's bank records. In *California Bankers* this rule was based on the question of who had standing to claim a privacy right.[93] Justice Marshall in a dissent to that opinion declared that the recordkeeping required by the Bank Secrecy Act was a seizure within the meaning of the fourth amendment and therefore unlawful in the absence of probable cause and a warrant.[94] In a dissent to *Miller*, he asserted that the Court has done nothing new but has merely compounded its erroneous *California Bankers* holding that a depositor lacks standing to object to the search which the recordkeeping requirements of the Act constitute, while once the records have been made he lacks standing to object to their being given to the government.[95] The *Miller* ruling eliminates a step in the Court's analysis of the government's right to bank records; the basis of the rule has shifted from lack of standing to assert a fourth amendment right[96] to absence of a fourth amendment right itself.[97]

The Supreme Court's implied grant to the government of an absolute right to disclosure is redundant in *Miller*, as Justice Marshall asserts; it was also redundant in *California Bankers*. Bank records have long been subject to legal process.[98] This rule was never challenged in *Miller*; the respondent claimed, rather, that his records had been seized by means of a defective subpoena and thus without legal process.[99]

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93. 416 U.S. at 51.

94. *Id.* at 94-95.

95. 96 S. Ct. at 1630, *quoting* 416 U.S. at 97 (Marshall, J., dissenting).

96. 416 U.S. at 53, 68.

97. 96 S. Ct. at 1621.

98. Under the Internal Revenue Act of 1954, the Internal Revenue Service may compel production of taxpayers' records from anyone possessing them. INT. REV. CODE OF 1954, § 7602. The Supreme Court has upheld the constitutionality of an Internal Revenue summons to a third-party bank. Donaldson v. United States, 400 U.S. 517 (1971), *citing* United States v. Shlom, 420 F.2d 263, 266 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970); United States v. First Nat'l Bank, 274 F. Supp. 283, 284 (E.D. Ky. 1967), *aff'd sub nom.* Justice v. United States, 390 U.S. 199 (1968); First Nat'l Bank v. United States, 267 U.S. 576 (1925), *aff'g* 295 F. 142, 143 (S.D. Ala. 1924). *Cf.* De Masters v. Arend, 313 F.2d 79 (9th Cir.), *petition for cert. dismissed*, 375 U.S. 936 (1963) (holding that a bank but not its taxpayer-depositor could challenge an administrative subpoena).

That a bank depositor's records can be acquired by legal process is implied in Valley Bank v. Superior Court, 15 Cal. 3d at 657, 542 P.2d at 979, 125 Cal. Rptr. at 555; Burrows v. Superior Court, 13 Cal. 3d at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.

99. 96 S. Ct. at 1623 n.2.

The fourth amendment does not prevent all searches and seizures; it merely requires that searches and seizures be reasonable in order to minimize unnecessary intrusion into an individual's privacy.[100] The reasonableness of the government's invasion of the individual's privacy is to be determined under the supervision of a neutral and detached magistrate.[101] Therefore the government does not need a Supreme Court holding that a bank depositor has no fourth amendment right in his bank records in order to obtain such records for its investigations and prosecutions; all it needs is a subpoena.

Furthermore, under the facts of this case, if the Supreme Court wanted to validate the procedure used by the Alcohol, Tobacco and Firearms agents and the United States Attorney, it had no need to go so far as to deprive bank depositors of all fourth amendment protection. Instead, the Court could have found that the subpoenas as issued were not defective.[102] In its brief[103] the Government argued that blank subpoenas issued by the clerk of the court and filled in by an administrative agency—here the United States Attorney's office—are customary and are authorized by the Federal Rules of Criminal Procedure.[104] The Government also argued that it is neither customary nor convenient for either the court or the grand jury to waste its time preparing and reviewing subpoenas. Finally, the Government contended that there is no authority requiring a grand jury to be in session when the subpoenas are returnable, and that in fact, government counsel have a right to take time to inspect the produced documents before making a presentation to the grand jury.[105]

The Supreme Court has said that it decides cases on grounds other than constitutional ones if possible.[106] Therefore, in *Miller*, the Court

100. Terry v. Ohio, 392 U.S. 1, 9 (1968); Elkins v. United States, 364 U.S. 206, 222 (1960).

101. Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

102. In its Supreme Court petition the Government contended that the court of appeals had erred in (1) finding the bank customer had a fourth amendment interest in the records subpoenaed, (2) holding that the subpoenas were defective, and (3) finding that suppression was the customer's appropriate remedy if there was a violation of his constitutional rights. The Court decided the constitutional question and therefore did not reach the latter two contentions. 96 S. Ct. at 1622.

103. Brief for Petitioner, United States v. Miller, 96 S. Ct. 1619 (1976).

104. FED. R. CRIM. P. 17(a).

105. Brief for Petitioner at 38-40, United States v. Miller, 96 S. Ct. 1619 (1976).

106. Mayor v. Educational Equality League, 15 U.S. 605, 643 (1974) (White, J., dissenting); Ashwander v. TVA, 297 U.S. 429, 444 (1968) (Brandeis, J., concurring); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring).

should have dealt with the narrower issue of the sufficiency of the subpoenas before deciding whether a depositor has a fourth amendment right. The Court noted that the requirements of judicial scrutiny for a subpoena duces tecum are no more stringent than those for an ordinary subpoena, and are less strict than those for a search warrant.[107] The Court thus implied that had it considered the question, it would have ruled that the subpoenas used to obtain Miller's records were sufficient legal process to comply with the demands of *California Bankers*.[108]

C. *The Consequences of Miller Are Undesirable*

As a result of *Miller*, which holds that the depositor has no privacy right in his bank records, the government need not validate its seizure of a depositor's records unless the bank which holds them objects. This conclusion is nowhere explicit; it follows from the Court's holding. The Court has stripped the bank customer of any means of protecting his financial affairs from public scrutiny.[109] One consequence of *Miller* is that an individual who wants to maintain the privacy of his financial affairs must deal entirely in cash because otherwise he abandons his fourth amendment right by divulging these affairs to third persons. This is surely an unrealistic condition for the nation's high Court to impose in the twentieth century.

A second consequence is that if a person does confide his affairs to a bank, thus giving up any personal right to protect his privacy, he cannot rely on his bank to protect his privacy interest. Even a bank which desires to protect its customers' privacy can at most demand a valid subpoena or warrant from investigating authorities and notify its depositor of the investigation. But since banks are heavily regulated

107. 96 S. Ct. at 1625 & n.8, *quoting* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946); *also citing* United States v. Dionisio, 410 U.S. 1, 9-12 (1973).

108. 416 U.S. at 52.

109. Justice Powell in writing for the majority has thus implicitly repudiated the concern he expressed in his concurring opinion in *California Bankers*. He stated:

> A significant extension of the regulations' reporting requirements . . . would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the [Bank Secrecy] Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. 416 U.S. at 78-79 (Powell, J., concurring) (citation omitted).

by the federal government, it may well be in a bank's own interest not to protest compelled production on behalf of one of its depositors but to cooperate with the authorities.[110] Thus the bank patron has no standing to protect his financial affairs from intrusion,[111] nor can he rely on the bank to whom he entrusts confidential information for this protection. There is no means by which he can prevent or limit the government's inquiry into what he does with his money, to whom he gives it, for what purpose, and under what circumstances.

Finally, as Justice Powell suggested in *California Bankers*, the potential for abuse is acute.[112] The government, or an individual government agent acting on his own, can obtain personal information about a depositor for any purpose as long as the bank does not protest the demanded production as burdensome. Without judicial supervision, the intimate areas of an individual's affairs which his financial records reveal may be subject to unlimited intrusions.

These undesirable consequences of *Miller* demonstrate the need for an alternate solution to the issue of financial privacy. The Supreme Court of California has considered and resolved this problem in a manner which may be more rational than that of the United States Supreme Court.

II. CALIFORNIA'S INDEPENDENT POSITION ON THE CONSTITUTIONAL RIGHT OF PRIVACY

Justice Brennan, dissenting in *United States v. Miller*, noted

> the emerging trend among high state courts of relying upon state constitutional protections of individual liberties—protections pervading counterpart provisions of the United States Constitution, but increasingly being ignored by decisions of this Court.[113]

Justice Brennan quoted extensively from *Burrows v. Superior Court*,[114] a recent California Supreme Court decision, observing that it provided a striking illustration of this trend. In *Burrows*, the unanimous state

110. Brief for Respondent at 14, United States v. Miller, 96 S. Ct. 1619 (1976). Miller's case exemplifies this process: the two bank presidents cooperated with investigators and were then relieved of the duty to appear in person before the grand jury.

111. 96 S. Ct. at 1625.

112. 416 U.S. at 78 (Powell, J., concurring). That there is potential for abuse in the subpoena system used in *Miller* was conceded by the Government. Brief for Petitioner at 40, United States v. Miller, 96 S. Ct. 1619 (1976).

113. 96 S. Ct. at 1629 (footnote omitted).

114. 96 S. Ct. at 1627-29, *quoting* Burrows v. Superior Court, 13 Cal. 3d 238, 243-48, 529 P.2d 590, 593-96, 118 Cal. Rptr. 166, 169-72 (1974).

court relied on the California Constitution rather than conform to the United States Supreme Court's interpretation of the Federal Constitution.[115]

A. Burrows v. Superior Court

Burrows, an attorney, was suspected of misappropriating a client's funds. After a search of Burrows' office and car revealed checkstubs, a sheriff's detective requested copies of Burrows' financial records from his bank without presenting a subpoena for them. The bank voluntarily[116] supplied photocopies of Burrows' bank statements. The trial court

115. One may speculate whether the California court would have been unanimous in *Burrows* and in Valley Bank v. Superior Court, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975) if the Supreme Court had previously handed down its decision in *Miller*. *Burrows* was shortly preceded by United States v. Miller, 500 F.2d 751 (5th Cir. 1974), and the Supreme Court had not yet granted certiorari.

In spite of the federal (*see* note 5 *supra*) and state authority for not relying solely on United States Supreme Court interpretations of the Federal Constitution, California Justices Richardson and Clark have consistently criticized the majority for its lack of deference to the Supreme Court. *See, e.g.*, People v. Ramey, 16 Cal. 3d 263, 277, 545 P.2d 1333, 1351, 127 Cal. Rptr. 629, 637 (1976) (Clark, J., dissenting); People v. Disbrow, 16 Cal. 3d 101, 117-21, 545 P.2d 272, 282-85, 127 Cal. Rptr. 360, 370-73 (1976) (Richardson, J., dissenting); People v. Norman, 14 Cal. 3d 929, 940, 538 P.2d 237, 245, 123 Cal. Rptr. 109, 117 (1975) (Richardson, J., concurring); *id.* at 940-42, 538 P.2d at 245-47, 123 Cal. Rptr. at 117-19 (Clark, J., dissenting).

The position of these dissenting justices has been made somewhat anomalous by the *Burrows-Miller* conflict. On the one hand, they believe California should defer to Supreme Court interpretations of the fourth amendment in interpreting article I, section 13 of the state constitution, but on the other hand they were part of the unanimous *Burrows* court that held that the state constitution protects a bank depositor's right of privacy. It will be noted that the *Burrows* opinion rested solely on article I, section 13, as section 1 had not yet been amended to make privacy an inalienable right, and section 24 had not yet been added. Justices Richardson and Clark impliedly approved the Fifth Circuit's reasoning and holding in *Miller* which the United States Supreme Court later repudiated. Although the two justices could have dissented on the facts or the law in *Burrows*, they did not do so. As a result, they voted their consciences, free from the inhibiting precedents of the Supreme Court. The Supreme Court has subsequently left them unable to defer to its precedents without reversing their stand on privacy in financial records.

116. In *Miller*, Justice Powell distinguishes *Burrows* on the ground that in *Burrows* the depositor's bank records had been furnished voluntarily to the government by the bank. 96 S. Ct. at 1625 n.7. But by the Court's own terms this distinction is irrelevant; the Court expressly did not reach the question of whether the subpoenas to Miller's banks were defective, holding at the threshhold that the depositor had no protectable fourth amendment rights in his bank records in any case. *Id.* at 1626. From the Supreme Court's point of view both *Miller* and *Burrows* present the same issue: whether a bank depositor has in his bank records a right of privacy protected by the fourth amendment so as to require legal process in order for the government to obtain them. Since the relevant language in the California and United States Constitutions is the same, and since the issues in the two cases are identical although the constitutional conclusions reached in the two cases are contrary, Justice Powell's distinction is illusory.

denied his motion to suppress, finding that the search and seizure of the photocopied bank records was reasonable.[117]

The California Supreme Court's analysis of a bank depositor's right of privacy differed in most respects from that in *Miller*. Most importantly, the California court at the threshold found it indisputable that a bank customer has a reasonable expectation of privacy regarding information contained in such documents as checks which he transmits to the bank in the course of his business operations.[118] The court noted too that the prosecution had conceded the reasonableness of the customer's expectation of privacy, and that several bank representatives had testified that they deemed such information confidential. Thus, a bank customer was held to have a reasonable expectation that information he gives to the bank will be used only for internal banking purposes, and that this confidentiality will be breached only pursuant to legal process.[119]

In finding this reasonable expectation of privacy and the consequent requirement of legal process to intrude on that privacy, California is now in direct conflict with the Supreme Court.[120] In *Miller*, the Supreme Court found no right of privacy in bank records, and consequently found it unnecessary to reach the question of whether the subpoenas in that case were defective.[121]

Additionally, the *Burrows* court—citing the Fifth Circuit *Miller* decision—held that the right of privacy belongs to the depositor.[122] The fact that the records sought by the government are in the possession of

117. 13 Cal. 3d at 242, 529 P.2d at 592, 118 Cal. Rptr. at 168.

118. It is noteworthy that California appears to regard a depositor's communications to his bank as private, even when they are made in the course of his business operations. *Id.* at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169. In this respect the California court goes even further than does Justice Brennan, who concurred in the result in the recent case of Fisher v. United States, 96 S. Ct. 1569, 1582 (1976) (Brennan, J., concurring), only because business papers, not private papers, were involved.

119. 13 Cal. 3d at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169. The right of confidentiality is now codified by the California Right to Financial Privacy Act. *See* text accompanying notes 152-78 *infra*.

Other jurisdictions as well hold that a bank impliedly agrees not to divulge confidential information without the customer's consent unless compelled by court order. Valley Bank v. Superior Court, 15 Cal. 3d 652, 657, 542 P.2d 977, 979, 125 Cal. Rptr. 553, 555 (1975), *citing* First Nat'l Bank v. Brown, 181 N.W.2d 178, 183 (Iowa 1970); Milohnich v. First Nat'l Bank, 224 So. 2d 759, 761 (Fla. App. 1969).

120. *See* note 115 *supra*.

121. 96 S. Ct. at 1622.

122. 13 Cal. 3d at 245, 529 P.2d at 594, 118 Cal. Rptr. at 170, *citing* United States v. Miller, 500 F.2d 751, 758 (5th Cir. 1974).

the bank and not the depositor is not determinative.[123] Quoting from *Katz v. United States*,[124] in which the Supreme Court found that "the premise that property interests control the right of the government to search and seize has been discredited,"[125] the California court held that the mere fact that the bank purports to own the records—which it may use for a limited purpose—does not diminish the depositor's expectation of privacy.[126] That the bank copies documents or records information in different form for its own purposes is likewise irrelevant.[127] The California court distinguished a group of federal cases[128] which held, as the Supreme Court subsequently did in *Miller*, that a depositor has no proprietary interest in the records of his account maintained by a bank and no standing to resist their compelled production. The court noted that even those federal cases involved judicial supervision of the seizures,[129] a condition which *Miller* does not require.

Since the protected right was the depositor's and not the bank's, the California court deemed it irrelevant that Burrows' bank responded voluntarily to a mere request for his records.[130] But the court also expressed its approval of the Fifth Circuit's conclusion in *Miller* that production of bank records could not be compelled by a defective subpoena and that the defect was not removed by the bank's voluntary compliance.[131]

Thus, the California Supreme Court held that any bank records obtained by the prosecution with neither legal process nor the consent of the depositor are the fruit of a search and seizure illegal under article I, section 13 of the California Constitution. Therefore, the exclusionary rule was applicable to suppress the evidence so seized.[132]

Describing the scope of personal information found in bank records,

123. 13 Cal. 3d at 244, 529 P.2d at 594, 118 Cal. Rptr. at 170.

124. 389 U.S. 347 (1967).

125. *Id.* at 353, *quoting* Warden v. Hayden, 387 U.S. 294, 304 (1967).

126. 13 Cal. 3d at 244, 529 P.2d at 594, 118 Cal. Rptr. at 170.

127. *Id.*

128. United States v. Gross, 416 F.2d 1205, 1212-13 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970) (bank records are not property of customer who has no standing to assert fourth or fifth amendment right); Harris v. United States, 413 F.2d 316, 318-19 (9th Cir. 1969) (customer's motion to quash subpoena duces tecum for bank records denied for lack of standing; communications between bank and customer not privileged); Galbraith v. United States, 387 F.2d 617, 618 (10th Cir. 1968) (customer's motion to quash subpoena duces tecum denied for lack of standing).

129. 13 Cal. 3d at 244, 529 P.2d at 594, 118 Cal. Rptr. at 170.

130. *Id.* at 245, 529 P.2d at 594, 118 Cal. Rptr. at 170.

131. *Id., citing* United States v. Miller, 500 F.2d 751 (5th Cir. 1974), *rev'd*, 96 S. Ct. 1619 (1976).

132. 13 Cal. 3d at 245, 529 P.2d at 594-95, 118 Cal. Rptr. at 170-71.

and the undesirable consequences of abusive intrusion, Justice Mosk stated:

> For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography. While we are concerned in the present case only with bank statements, the logical extension of the contention that the bank's ownership of records permits free access to them by any police officer extends far beyond such statements to checks, savings, bonds, loan applications, loan guarantees, and all papers which the customer has supplied to the bank to facilitate the conduct of his financial affairs upon the reasonable assumption that the information would remain confidential. To permit a police officer access to these records merely upon his request, without any judicial control as to relevancy or other traditional requirements of legal process, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuses of police power.[133]

The California court has thus predicted the probable implications of the Supreme Court's stand in *United States v. Miller*.[134] First, the Supreme Court apparently assumes that disclosure of one's financial affairs to a bank *is* entirely volitional, since it does not directly address the question. When Justice Powell writes for the Court that "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government,"[135] he implies that a person has the option not to use banks and thus to avoid communicating private information to them. The California Supreme Court is more clear-sighted than this and recognizes the necessity in contemporary society of relying on banking services. It is dismaying to note the lack of intellectual honesty on the part of the Supreme Court which permits it to ignore such a commonly-acknowledged aspect of modern American life, in order to make it easier for the government to obtain information about its citizens.

Second, the California court has pointed out the number and variety of transactions for which a customer provides personal information to a

133. *Id.* at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.
134. 96 S. Ct. 1619 (1976). *See* text accompanying notes 110-11 *supra.*
135. *Id.* at 1624, United States v. White, 401 U.S. 745, 751-52 (1971).

bank;[136] there is nothing in *Miller* to prevent the records of all these transactions from being searched and seized. If such information is not protected by the fourth amendment, then, as Justice Mosk warns in *Burrows*, there is no neutral judicial supervision of the search and seizure of the records, and no means for the depositor to resist the intrusion. In short, Justice Mosk is probably forecasting all too accurately the degree to which the government's curiosity about its citizens is to be satisfied and police power abused on the federal level.

There is a further consequence unaddressed by either court. If the bank customer has no protectable fourth amendment right of privacy nor any proprietary right in his records, it may be questioned whether he has any right in them whatever. There would thus appear to be no legal obstacle, as far as federal courts are concerned, to the bank's giving its customers' records to anyone who asks for them, or indeed selling them to entrepreneurs. Presumably the Supreme Court did not contemplate these uses of bank records, but it appears that *Miller* and *California Bankers* may allow for such abuses.

B. The Progeny of Burrows

The import of *Burrows* has been refined by several subsequent decisions. Two appellate cases[137] relied upon an exception in *Burrows* to the bank customer's right of privacy. As noted, *Burrows* held that it is the depositor who has the right of privacy, and that the bank is merely a neutral entity with no significant interest in the customer's privacy or the invasion thereof[138] by the government. The exception, expressed in dictum in *Burrows*, is that where the bank is not neutral, but is itself a victim of the defendant's wrongdoing, the depositor's right of privacy will not prevail.[139]

In *People v. Johnson*,[140] defendant wrote a check on a closed bank account; he was charged with writing a check on insufficient funds with

136. *See* text accompanying note 133 *supra*.

137. People v. Superior Court, 55 Cal. App. 3d 759, 127 Cal. Rptr. 672 (1976) (bad checks); People v. Johnson, 53 Cal. App. 3d 394, 125 Cal. Rptr. 725 (1975) (bad check). A third case, People v. Mahoney, 47 Cal. App. 3d 699, 122 Cal. Rptr. 174 (1975), applies the exception in *Burrows* to the records of a telephone subscriber who evaded payment of long distance tolls by the use of an electronic device.

138. *See* notes 122-27 *supra* and accompanying text. The court ignored any possible interest the bank might have in *protecting* the depositor's privacy.

139. 13 Cal. 3d at 245, 529 P.2d at 594, 118 Cal. Rptr. at 170. The sentence enunciating the exception was added by modification of the original opinion. Burrows v. Superior Court, 13 Cal. 3d 732a (advance sheets) (1975).

140. 53 Cal. App. 3d 394, 125 Cal. Rptr. 725 (1975).

intent to defraud the bank and the payee. In an informal telephone conversation, the district attorney's investigator was told by the bank that defendant's account had been closed for a year. The defendant sought suppression of the bank's evidence, claiming that the warrant subsequently obtained by the investigator for the account records was invalid because it was the fruit of an illegal search pursuant to an informal request and was thus forbidden by *Burrows*.[141] In *People v. Superior Court*,[142] the defendant had written several checks with insufficient funds and the bank had not honored them. Without a warrant the bank had given defendant's records to the prosecution as evidence.[143] Even though the bank had suffered no actual monetary loss, it was nevertheless a potential victim of defendant's attempt to defraud it and was, therefore, not neutral. In short, the bank's neutrality does not depend on the successful completion of a crime.[144]

Thus, the California appellate courts which have dealt with the question[145] have interpreted *Burrows* as holding that the customer can

141. *Id.* at 396, 125 Cal. Rptr. at 727.

142. 55 Cal. App. 3d 759, 127 Cal. Rptr. 672 (1976).

143. In People v. Mahoney, 47 Cal. App. 3d 699, 122 Cal. Rptr. 174 (1975), the telephone company was informed that defendant manufactured, sold, and was himself using a "blue box," a device which would emit electronically produced tones to signal the company's switching equipment to make long distance connections, thus enabling the caller to use the company's long distance system without paying tolls. The company investigated thoroughly and then without a warrant turned the results of its investigation over to the district attorney. The exception in *Burrows* was held to apply to a telephone subscriber's records as well as to those of a bank depositor.

144. 55 Cal. App. 3d at 772, 127 Cal. Rptr. at 681.

145. An appellate case subsequent to *Mahoney*, People v. McKunes, 51 Cal. App. 3d 487, 124 Cal. Rptr. 126 (1975), explored more thoroughly the right of privacy in a telephone subscriber's records. The defendant was accused of distributing property stolen from his employer, an aircraft manufacturer. Evidence of his guilt was obtained by searching the telephone company's records of calls made by an informant—the purported receiver of the stolen goods—for records of calls made by the informant to defendant. All the informant's records had been voluntarily furnished to agents by the telephone company.

The court held that the principle of *Burrows* applies to subscriber records maintained by a telephone company. The user has a reasonable expectation of privacy in his calls, and justifiably expects that records of his calls are to be used by the phone company only for billing purposes. This expectation corresponds to a bank depositor's reasonable expectation that his financial records are private and are to be used for a limited purpose by the bank. Thus, a telephone subscriber's records are obtainable only with a warrant. *Id.* at 492, 124 Cal. Rptr. at 128-29. The court suggests that the illegal search may have violated the privacy right of other patrons and of the informant himself on calls not related to the investigation. *Id.* at 491-92, 124 Cal. Rptr. at 128.

This case suggests yet another issue on which California differs from federal constitutional interpretation. Rather than the defendant, it was the informant who had a right of privacy violated by the search. Under federal decisions, the defendant would,

claim a right of privacy in his records only when the bank is truly a neutral entity—in effect a mere depository for the customer's funds—with no interest in consenting to the government's search or seizure of its records relating to the defendant. However, it appears that where the bank is a victim of the depositor's activity, it does have an interest in aiding the prosecution of its wrongdoer. Then the prosecution may legitimately obtain without a warrant evidence of defendant's crime if the victimized bank[146] offers it or is willing to provide it.

The California Supreme Court further elaborated the depositor's right of privacy in his bank records in *Valley Bank v. Superior Court.*[147] In

therefore, not have standing to claim the protection of the exclusionary rule. Alderman v. United States, 394 U.S. 165, 171-76 (1969). However, in California a defendant has standing to claim application of the exclusionary rule where the privacy of another is violated. Kaplan v. Superior Court, 6 Cal. 3d 150, 161, 491 P.2d 1, 8, 98 Cal. Rptr. 649, 656 (1971) ("vicarious exclusionary rule"). Such a result demonstrates that California takes seriously the exclusionary rule's goal of deterrence of governmental violations of the constitutional rights of individuals; the government is not to be permitted to convict a defendant by violating the rights of a third person.

146. There is no privilege of confidential communication between bank and depositor. Valley Bank v. Superior Court, 15 Cal. 3d 652, 656, 542 P.2d 977, 978, 125 Cal. Rptr. 553, 554 (1975). Nor do the opinions in *Burrows* or the appellate cases here discussed mention such a privilege. Nevertheless, the appellate court analyses of the *Burrows* exception to the bank customer's right of privacy suggest an analogy with statutory exceptions to the evidentiary privileges between attorney and client (CAL. EVID. CODE § 958 (West 1968)), spouses (CAL. EVID. CODE § 985 (West Supp. 1976)), physician and patient (CAL. EVID. CODE § 1001 (West 1968)), and psychotherapist and patient (*id.* § 1020). The statutory sections represent two types of situations which are suggested by the *Burrows* exception: (1) A duty created by the relationship which gave rise to the privilege has been breached. *Cf.* CAL. EVID. CODE § 958 (West 1968): "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." *Cf. id.* §§ 1001, 1020. Analogous to this is a customer's attempt to defraud his bank by writing checks on insufficient funds or to defraud the phone company by using a "blue box" to avoid paying for long distance calls; the customer has thus breached his duty as depositor or subscriber and consequently has no right to insist that disclosure of his records be protected by judicial process. (2) A crime has been committed by one party to the privileged relationship against the other. *Cf.* CAL. EVID. CODE § 985 (West Supp. 1976):

> There is no privilege under this article in a criminal proceeding in which one spouse is charged with:
>
> (a) A crime committed at any time against the person or property of the other spouse or of a child of either.
>
> (b) A crime committed at any time against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse. . . .

An analogy arises where the defrauding customer has committed a crime against the bank or phone company. In People v. Johnson, 53 Cal. App. 3d 394, 125 Cal. Rptr. 725 (1975), the crime was committed against the third-party payee as well as against the bank.

147. 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975).

that case, a unanimous[148] court dealt with the issue of the circumstances under which a civil litigant can compel discovery of a bank customer's confidential records. The bank sued the real party in interest to collect on a promissory note in a real estate transaction. The defense was fraud, and the real party in interest attempted to compel the bank to produce the records of the other parties to the transaction, in order to prove the fraud; the bank resisted.[149]

Noting that the present statutory and discovery schemes do not adequately protect a bank customer's confidentiality, the court held that compelled discovery must be conditioned on balancing the right of discovery by civil litigants against the customer's right of privacy.[150] The court further held that before the bank produces a customer's records it must (1) take reasonable steps to locate the customer; (2) inform the customer of discovery proceedings; and (3) allow the customer reasonable opportunity to object and to seek appropriate protective orders.[151]

The California Supreme Court's procedure for protecting the privacy right of bank depositors while accommodating those who have a right to information contained in the depositors' records appears to be a practical resolution of conflicting interests. It should recommend itself to the federal courts as a model of how to preserve individual rights to privacy without denying the rights of society to have access to important records.

III. Financial Privacy Legislation

California's Supreme Court and appellate court provisions for privacy in bank records have been reinforced and amplified by legislation. The state recently enacted the California Right to Financial Privacy Act

148. Richardson, J., wrote the opinion for the court. Mosk, J., did not participate, but Molinari, J., was assigned by the Chairman of the Judicial Council.

149. 15 Cal. 3d at 654-55, 542 P.2d at 977-78, 125 Cal. Rptr. at 553-54.

150. 15 Cal. 3d at 657, 542 P.2d at 979, 125 Cal. Rptr. at 555.

151. *Id.* at 658, 542 P.2d at 980, 125 Cal. Rptr. at 556.

In a recent case, Carlson v. Superior Court, 58 Cal. App. 3d 13, 129 Cal. Rptr. 650 (1976), the court noted the conflicting holdings of *Miller* and *Burrows* and observed that, as a state intermediate appellate court, it was bound by the *Burrows* rule. *Id.* at 20, 129 Cal. Rptr. at 654. The district attorney subpoenaed the defendant's bank records and, without the depositor's knowledge or consent, his banks delivered copies of his records to the district attorney before the date on which the bank officials had been ordered to appear and produce. The court held that the evidence must be suppressed because the legal process requirements of *Burrows* had not been met; when the banks turned over the records and the district attorney received them out of court, the defendant was deprived of an opportunity to have a judicial determination of the district attorney's right to the documents. *Id.* at 21, 129 Cal. Rptr. at 655. *Cf.* Bowser v. First Nat'l Bank, 590 F. Supp. 834 (D. Md. 1975) (taxpayer entitled to litigate validity of IRS subpoena of bank records).

(Financial Privacy Act)[152] which allows access to financial records only pursuant to legal process and provides civil and criminal penalties for willful violation of any of the prescribed procedures. Similar legislation has unsuccessfully been introduced in Congress periodically since passage of the Bank Secrecy Act in 1970.[153] The provisions of the Financial Privacy Act will be compared with the provisions of proposed federal legislation.[154]

The California Right to Financial Privacy Act codifies the holdings of *Burrows, Johnson,* and *People v. Superior Court*[155] and provides procedures to protect the customer of a financial institution without unduly hampering law enforcement agencies in the investigation and prevention of crime.[156] The Act explicitly recognizes a right of confidentiality within the bank-customer relationship.[157]

The Financial Privacy Act limits access by state and local agencies making civil or criminal investigations of a bank customer.[158] The Act

152. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5738 (adding sections 7460-93 to the Government Code).

153. *See* S. 1343, 94th Cong., 1st Sess. (1975); S. 2200, 93d Cong., 1st Sess. (1973); S. 3814 and S. 3828, 92d Cong., 2d Sess. (1972).

Administrative summons and subpoenas *are* required for Internal Revenue Service examination of bank records. Tax Reform Act of 1976, Pub. L. No. 94-455 § 1205, 90 Stat. 1699 (to be codified as INT. REV. CODE OF 1954, § 7609).

154. S. 1343, 94th Cong., 1st Sess. (1975) [hereinafter cited as S. 1343]. This was the most recent reintroduction by Sen. Alan Cranston of the Right to Financial Privacy Act of 1973.

155. 55 Cal. App. 3d 759, 127 Cal. Rptr. 672 (1976).

156. The statutory declaration of policy provides:

> The purpose of this [Act] is to clarify and protect the confidential relationship between financial institutions and their customers and to balance a citizen's right of privacy with the governmental interest in obtaining information for specific purposes and by specified procedures as set forth in this [Act].

California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5738 (adding section 7461(c) to the Government Code). S. 1343, § 2(b) is similar, but further provides that customers have the same right of protection against unwarranted disclosure as if the records were in their possession. *Cf. id.* § 4(b).

157. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5738 (adding sections 7461(b), (c) to the Government Code).

158. In order to maintain consistency with prior discussion in this Comment, the term "bank" is used in discussing the California Right to Financial Privacy Act. The statute, however, refers to "financial institutions," which are defined therein as including state and national banks, savings and loan associations, and credit unions, as well as trust companies and industrial loan companies. *Id.* (adding section 7465(a) to the Government Code). A "person" includes any natural or artificial person, *id.* (adding section 7465(c) to the Government Code), and a "customer" is any person involved in a transactional, service, or fiduciary relationship with the financial institution. *Id.* (adding section 7465(d) to the Government Code). The federal bill does not refer to the fiduciary relationship between a financial institution and its customers. S. 1343, § 3(d).

provides that information contained in financial records[159] can be obtained only if (1) the records are described with particularity, (2) they are consistent with the scope of the investigation, and (3) the customer has authorized their disclosure.[160] They may also be disclosed in response to an administrative subpoena or summons,[161] a search war-

159. "Records" include any original or copy of records pertaining to bank customers. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5738 (adding section 7465(b) to the Government Code).

160. *Id.* at 5739 (adding section 7470 to the Government Code). To be valid, a customer's authorization must (1) be for a stated period (S. 1343, § 6(a)(1) limits this period to one year), (2) specify the agency which is to receive the information and, if applicable, the statutory purpose of the disclosure, and (3) identify the records to be disclosed. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5740 (adding section 7473(a) to the Government Code). No financial institution may require such an authorization as a condition of doing business. *Id.* (adding section 7473(b) to the Government Code). Any governmental agency seeking such authorization must notify the customer that his authorization, except where required by statute, is revocable at any time. *Id.* (adding section 7473(c) to the Government Code). When the records are examined, the customer must be notified within thirty days of the specific records which were examined and of his right to be informed, on request, of the reason for the examination. *Id.* (adding section 7473(d) to the Government Code).

161. *Id.* (adding section 7474 to the Government Code). Disclosure may be made pursuant to an administrative subpoena or summons only if (1) such process is served on the customer, (2) it identifies the issuing agency and the statutory purpose to be served, and (3) the customer has not moved to quash within ten days of service. *Id.* (adding section 7474(a) to the Government Code). Such a motion is to have priority on the court calendar and is to be heard within ten days of being filed. *Id.* at 5741 (adding section 7474(d) to the Government Code). These requirements imply that the California legislature has accepted the *Burrows* assumption that a customer has a protectable proprietary interest in his financial records, even though they are in the possession of the bank. *See* notes 122-27 *supra* and accompanying text; *cf.* S. 1343, §§ 2(b), 4(b), which provide a customer with the same protection as if his records were in his possession.

The provisions of this section balance the requirements of effective law enforcement against the privacy of a bank customer. An exception to the requirement of service and the availability of a motion to quash is made where there is reason to infer that a law has been or is about to be violated. Upon petition of the Attorney General or the Commissioner of Corporations in such case, a court may waive or shorten the service and ten-day period. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5741 (adding section 7474(b)(1) to the Government Code). When such a petition is granted, the petitioning agency must notify the customer of the examination within a judicially specified period. *Id.* (adding section 7474(b)(3) to the Government Code). Except when such petition is granted and the court finds that such notice would impede the investigation, a financial institution is not precluded from notifying its customer of the receipt of an administrative summons or subpoena. *Id.* (adding section 7474(c) to the Government Code). The records so obtained may not be disclosed to a local law enforcement agency which has not independently been authorized to receive such information. *Id.* (adding section 7474(b)(4) to the Government Code).

rant,[162] or a judicial subpoena or subpoena duces tecum.[163]

Disclosure pursuant to such procedures is controlled by detailed provisions of the Financial Privacy Act.[164] The federal proposal differs most from the California Right to Financial Privacy Act in providing the customer with an absolute right to service of process or to notification that his bank has been served; the bank may then comply only if ordered to do so by the customer, or by a court after the customer has had an opportunity to challenge the subpoena or summons.[165] In contrast, the California law permits a court to waive service and prior notice in cases of statutory violation, but still provides for subsequent notification to the customer of an examination of his records.[166]

A number of provisions relieve financial institutions of unreasonable burdens of complying with the Financial Privacy Act. They are not liable if they disclose records in response to customer authorization or legal process which is facially valid,[167] or if they refuse disclosure where

162. *Id.* (adding section 7475 to the Government Code). Disclosure pursuant to a search warrant may be had as soon as the warrant is served on the financial institution. *Id. See also* CAL. PENAL CODE §§ 1523 *et seq.* (West 1972) (search warrants). Provisions for notifying the customer that the bank has received the search warrant are similar to those pertaining to an administrative subpoena or summons. *See* note 161 *supra.*

S. 1343, § 8 requires service on the customer as well as on the bank.

163. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5742 (adding section 7476 to the Government Code). The financial institution may disclose a customer's records pursuant to a judicial subpoena or subpoena duces tecum only if (1) such process is served on both the bank and its customer and (2) the customer has not notified the bank within ten days of service that he has moved to quash the subpoena, except that the ten-day period may be shortened. *Id.* (adding section 7476(a) to the Government Code), which encompasses the provisions of CAL. CODE CIV. PRO. §§ 1985 *et seq.* (West Supp. 1977) (subpoenas and subpoenas duces tecum). Provision is also made for acquisition of records by a grand jury pursuant to a judicial subpoena or subpoena duces tecum, California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5742 (adding section 7476(b) to the Government Code), in accordance with CAL. PENAL CODE § 939.2 (West 1972) (subpoenas for witnesses).

164. *See* notes 160-63 *supra.*

165. S. 1343, § 7. Law enforcement personnel have strongly objected to these provisions on the ground that the criminally motivated bank customer will make his records unavailable if given notice of an investigation. *See Hearings on S. 2200 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs,* 93d Cong., 2d Sess. 143-45 (1974). Other sections of S. 1343 also differ from the California law by omitting provisions for access to records without the customer's consent or a court order. *Compare* S. 1343, § 11 *with* California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5742 (adding section 7480 to the Government Code). *See* notes 171-75 *infra.*

166. *See* note 161 *supra.*

167. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5,

they believe in good faith that the authorization or legal process does not comply with statutory requirements.[168] On their own initiative, though not in response to a request, financial institutions may disclose a customer's records where there is suspected violation of a law.[169] They may also make disclosures in the normal course of business where they have no reason to expect that the information disclosed will be used in an investigation of the customer.[170]

The statute provides exceptions to the requirement of customer consent or legal process. A bank may disseminate financial information which is not identifiable with a particular customer.[171] When a law enforcement agency certifies in writing to a bank that a crime report involving check fraud or a similar offense has been filed, the agency may request and receive from the bank a statement of certain information concerning the customer's account activity.[172] Law enforcement and tax agencies may in any case request and receive the account numbers of a bank customer.[173] Financial supervisory agencies may exam-

[1976] Cal. Stat. 5739 (adding section 7470(b) to the Government Code). The bank must maintain a record of all such disclosures for five years, and any such record shall be available for customer inspection within five days of his request. *Id.* (adding section 7470(c) to the Government Code). These provisions are not included in S. 1343.

168. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5740 (adding section 7471(d) to the Government Code). This provision does not appear in S. 1343.

169. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5740 (adding section 7471(c) to the Government Code). This provision codifies and expands the exception stated in *Burrows*, which permits a bank to consent to disclosure of a customer's records without legal process when the customer is suspected of defrauding the bank itself. *See* note 139 *supra.*

170. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5740 (adding sections 7471(a), (b) to the Government Code). The Act does not preclude financial institutions from freely exchanging information as needed for credit transactions, collections, and the like, in the normal course of banking business. The exemption does not appear in S. 1343

171. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5742 (adding section 7480(a) to the Government Code).

172. *Id.* (adding section 7480(b) to the Government Code). Information may be supplied no more than thirty days prior to and following the date of the alleged fraudulent act. Upon request the bank must provide a statement of the customer's account specifying (1) the number of items dishonored, (2) the number of paid items which created overdrafts, (3) the dollar volume of overdrafts and dishonored items, (4) dates and amounts of deposits, withdrawals, and running balances, (5) a copy of the customer's signature and addresses used, and (6) opening and closing dates of the account. This subsection codifies the procedure approved in *Johnson* and People v. Superior Court, 55 Cal. App. 3d 759, 127 Cal. Rptr. 672 (1976); *see* notes 137-44 *supra* and accompanying text.

173. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5742 (adding section 7480(c) to the Government Code). The tax

ine records which relate solely to their supervisory functions.[174] Certain statutorily required tax records may be disclosed to state taxing authorities.[175]

Finally, the Financial Privacy Act provides criminal and civil penalties and remedies for violation of the statute. Willful violation, or the inducement of violation by another, is a misdemeanor.[176] A customer aggrieved by a violation is afforded civil and injunctive relief as well as costs and reasonable attorneys' fees if the action is successful.[177] Evidence obtained in violation of the Act is inadmissible, except in a proceeding to enforce the provisions of the Act.[178]

In sum, the new California Right to Financial Privacy Act appears to be a carefully written law which codifies recent state supreme court and appellate court decisions in bank privacy cases. Both judicial and statutory law in California now balance the individual's interest in personal privacy against the government's interest in discovering crime. The legislature appears to have sought to avoid both the incapacitation of law enforcement agencies investigating white collar crime, and the imposition of heavy administrative burdens on banks. At the same time, the banking customer now has the benefit of definite procedures to protect his records from uncontrolled disclosure. Proposed federal legislation appears to be more concerned with countering the intrusive aspects of the Bank Secrecy Act and *California Bankers* by giving the customer an absolute right to prior notice and carefully defined legal process; in consequence the Congressional bill provides less flexibility than does the California law for the exigencies of effective law enforcement under judicial supervision.

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agencies referred to are the Franchise Tax Board and the State Board of Equalization.

174. *Id.* (adding section 7480(d) to the Government Code).

175. *Id.* at 5743 (adding sections 7480(e)-(g) to the Government Code).

176. *Id.* (adding sections 7485(a), (b) to the Government Code). The crime carries a maximum fine of $5000, or imprisonment of not more than one year, or both. There is a civil penalty for filing a frivolous motion to quash. *Id.* (adding section 7485(c) to the Government Code).

S. 1343 has more explicit civil penalties than the California law. In addition to costs and attorneys' fees, an aggrieved customer may recover $100 for each violation as well as actual and punitive damages. S. 1343, § 14(a).

A suit to enforce provisions of S. 1343 may be brought in federal court without regard to the amount in controversy. *Id.* § 13.

177. California Right to Financial Privacy Act of Sept. 28, 1976, ch. 1320, § 5, [1976] Cal. Stat. 5743 (adding sections 7486-87 to the Government Code). There is a three-year statute of limitations. *Id.* (adding section 7488 to the Government Code).

178. *Id.* at 5744 (adding section 7489 to the Government Code).

IV. CONCLUSION

California has quite properly taken the opposite position from that of the United States regarding the existence of an individual right of privacy in bank records. Although the United States Supreme Court purports to "balance" the individual interest in privacy against the social interest in law enforcement, in *Miller*, the Court unnecessarily deprives a bank customer of all privacy in his bank records, apparently to facilitate government investigation of his financial affairs. In going out of its way to depreciate yet further the protection which the fourth amendment gives to an individual's right of privacy, the Court rather speciously ignores modern economic realities: a person cannot feasibly avoid dealing with banking institutions in order to retain his right of privacy, nor can he necessarily rely on his bank to protect his confidentiality at the cost of displeasing the very government which so heavily regulates banks. It would be more consistent with the dignity of the Court to say clearly and directly what it means: that under the present federal constitutional and statutory scheme, a person who reveals his affairs to a financial institution in order to avail himself of its services reveals his affairs to the whole world, and if he wants his private affairs to be protected by the fourth amendment, he had better keep his money in his mattress.

Congress should recognize what the Court is doing, and if it disapproves it should legislate greater protection for the bank customer. The unsuccessfully proposed Right to Financial Privacy Act of 1973, although a gesture toward individual protection, does not balance interests any more effectively than the Supreme Court has done; the Act's provisions are such a strong reaction against the intrusions authorized by the Bank Secrecy Act that they would make a depositor's records virtually immune from discovery.

The California judiciary and legislature adopted a more pragmatic approach to the mutually competing demands of law enforcement, judicial supervision, civil discovery, banking practice, and individual privacy. The cases and the new California Right to Financial Privacy Act accommodate these demands by recognizing explicitly that disclosure to the government is a search and seizure imposed on the individual. California law therefore requires procedures to protect the individual's constitutional right of privacy, and provides civil and criminal penalties and remedies for the disregard of these procedures. The forthright California approach should recommend itself to the federal courts, agencies, and Congress as a model of the true balancing of legitimate interests.

Carol Stein Boyk