Bank Recordkeeping and the Customer's Expectation of Confidentiality

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NOTES

BANK RECORDKEEPING AND THE CUSTOMER'S EXPECTATION OF CONFIDENTIALITY

When a customer writes a check, applies for a loan, or transfers money to an account, he communicates with his bank. For most customers, doing business with a bank is not an entirely volitional act; maintaining a bank account is essential for anyone who wishes to transact business in contemporary society. But whenever a customer communicates with his bank, he also inescapably reveals much data about himself—his whereabouts, associations, needs, values, and tastes. His bank records have been said to provide his "current biography." At one time a customer could exercise some control over who had access to his bank records, since many banks did not photocopy or retain them over long periods or for purposes other than internal bank use. In 1970, however, Congress passed the Bank Secrecy Act, which required banks to record a customer's checks and identity, and which provided for disclosure of the records to the Government when needed in criminal, tax, or regulatory investigations or proceedings.

1. For purposes of this article, a "customer" will be defined as any individual who patronizes and utilizes the services of a bank. The term "bank" refers to a commercial bank, the deposits of which are insured under 12 U.S.C. § 1813(h) (1970). "Bank records" will refer to checking account records held by commercial banks.


3. See, e.g., Hearings on S. 1343 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 49-52 (1976) [hereinafter cited as 1976 Senate Hearings].

4. 12 U.S.C. §§ 1730d, 1829b, 1951-59, & 31 U.S.C. §§ 1051-62, 1081-83, 1101-05, 1121-22 (1970). Section 1829b(d) is the domestic recordkeeping provision most frequently applicable to personal checking accounts at commercial banks. The recordkeeping regulations are set out at 31 C.F.R. §§ 103.31-.37 (1976). Checks for less than $100 are exempt from the current regulations. 31 C.F.R. §§ 103.34(b)(3), (4)
tory recordkeeping under the Bank Secrecy Act made customer records more accessible to the Government at a time of acute public concern over governmental intrusion into individual privacy.

The customer's communications to his bank, like the client's communications to his attorney and the patient's communications to his physician, have often been characterized as "confidential." They are not legally privileged or immune from production upon showing of probable cause, but the customer does expect his bank to honor in good faith the trust which their relationship entails by not disclosing information in its possession concerning his financial affairs. The bank's duty toward its customers' records has usually been expressed in terms of preserving "confidentiality," while the customers' expectations have been described in terms of a right of "privacy," but the terms are not conceptually synonymous. In passing the Privacy Act of 1974, Congress adopted the distinction in terminology between these two words which appeared in a 1972 National Academy of Sciences project. The term "privacy," according to this study, involves the social policy of what information should be collected at all and how much should be retained within a single system, whereas "confidentiality" concerns the maintenance of controls to prevent the unauthorized release of information which has been collected. Thus bank records would properly be described as "confidential" instead of "private," since the customer is concerned not with the right of

(1976). However, the Secretary of the Treasury has broad authority under the Act to alter the regulations. See 12 U.S.C. § 1829b(b) (1970); 31 C.F.R. §§ 103.21, 103.31 (1976). Furthermore, the copying machines which many banks use cannot discriminate as to the dollar amounts of checks which are copied—the result being that all checks are photocopied, although the regulations do not require it.

5. See Rosenblatt v. Northwest Airlines, Inc., 54 F.R.D. 21 (S.D.N.Y. 1971); 10 AM. JUR. 2d Banks § 332 (1963); 5A MICHE Complete BANKING & BANKING ch. 9 § 1 (1973). BLACK'S LAW DICTIONARY 370 (7th ed. 1973) states that a confidential relation "is not confined to any specific association of parties. It appears when the circumstances make it certain that the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed." Cf. 8 J. WIGMORE, EVIDENCE § 2286, at 528 (McNaughton rev. 1961): "[T]he mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege."

6. 5 U.S.C. § 552a (Supp. 1974). Both the American Civil Liberties Union and a select committee appointed by the Secretary of Health, Education and Welfare recommended that the Act's code of fair information practice be extended to all automated personal data systems, but because of time considerations and complex legislative drafting problems, the Act as passed applied only to governmental information exchange. S. REP. No. 1183, 93d Cong., 2d Sess. 36-37 (1974). See also 1975 House Surveillance Hearings, supra note 2, at 277-81.


the bank to collect the information necessary to process the items in his account, but with the release of information once collected.

Until recently, the few American courts which have dealt with the bank-customer relationship have recognized both the bank's duty of confidentiality and the customer's right of privacy, but neither has been codified. Nonetheless, in recent cases in which courts have protected the customer's interest, privacy rather than confidentiality has been the frame of reference. Bank records have never been accorded explicit constitutional protection from unreasonable search and seizure, but it has long been recognized that the fourth amendment protects personal papers and records as well as the individual himself. After the Supreme Court held in Katz v. United States that the applicability of the fourth amendment should be governed by the individual's expectation of privacy, several courts reasoned that the customer's bank records were entitled to fourth amendment protection and that his right to receive notice of his bank's intention to release his records and his standing to contest an order served on his bank were constitutionally protected under the fourth amendment.

More often than not, however, courts have declined to protect bank records from government access since the passage of the Bank Secrecy Act. The Supreme Court affirmed the constitutionality of the Secrecy Act as applied to the bank in California Bankers Association v. Schultz, and in United States v. Miller it held that the recordkeeping requirements of the Act violated no fourth amendment rights of the customer. Although the records in Miller were obtained from two banks through the issuance of allegedly defective subpoenas duces tecum and without notice to the customer, the Court upheld

16. Id. at 440.
the district court's overruling of the customer's motion to suppress the subpoenas. It reasoned that because the customer had no expectation of privacy in the records, he lacked standing under the fourth amendment to contest their production.\(^{17}\) This rejection in *Miller* of the constitutional dimension of the customer's interest is particularly ominous because the retention of duplicate copies of customer records by banks has increased the storehouse of information on the customer and has multiplied the opportunity to abuse his rights if the confidential relationship is not honored.\(^{18}\)

Even before *Miller* was decided, however, members of both houses of Congress had realized that the recordkeeping requirements of the Bank Secrecy Act were being enforced in a manner which Congress had never intended.\(^{19}\) The Secrecy Act had put the bank in the awkward position of acting simultaneously as an agent for the Government and also for its own customers. In the latter capacity it owed its customers at least an equitable duty of confidentiality, which was compromised by its duty under the Act to record its customers' financial affairs. Furthermore, the cost of the recordkeeping to the bank was disproportionate to its usefulness in crime detection,\(^{20}\) and the bank was forced to pass on this expense to its customers in higher service charges.

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17. *Id.* at 440-43.


20. See, e.g., 1974 Senate Hearings, supra note 10, at 17, 23. As one spokesman from the banking industry has stated, "[W]e are asked to assume that the Congress intentionally ordered banks to keep records of all 200 million accounts comprising at least 50 billion separate items in order to obtain information on, at most, less than one-half of 1 percent of bank accounts." *Id.* at 17.

The low cost of recordkeeping was cited as a justification of the requirement, H.R. REP. No. 975, 91st Cong., 2d Sess. 10 (1970), but in practice it has been quite costly for banks to honor or contest government access. See 1976 Senate Hearings, supra note 3, at 51-52, 113-16; note 35 infra.
A possible corrective to this current impasse between enforcing the Bank Secrecy Act and preserving individual rights after Miller may be found in proposed federal financial privacy legislation. Bills which have been introduced in both houses of Congress would not only recognize the confidentiality of bank records; they would also provide for notice and standing for the customer to contest a court order or subpoena served on his bank, and would permit government access to the records only upon compliance with certain specified procedures. In each of these respects the proposed legislation represents a significant departure from the traditional legal approach to the bank's relationship with its customer, yet it seeks to preserve the confidential nature of the relationship which law and banking custom have tacitly recognized. This article will first review the legal ramifications of bank-customer confidentiality both before and after Miller. It then will show how the attempt to protect the customer's interest, whether constitutionally or statutorily, could create an unprecedented right of privacy for bank records.

I. Defining Rights and Duties

Banks have generally been considered to have a legal duty not to reveal information about a customer to private parties without the customer's express or implied consent. Commercial banks have rigidly adhered to this standard of confidentiality by imposing internal restrictions on information-gathering and dissemination by employees. In the very rare instances in which the customer requests his bank to supply data about him to a third party, the bank is subject to a duty of good faith and fairness to the customer. To determine whether a particular request from a third party is reasonable, the bank must carefully weigh its duty of confidentiality to the customer against its legal and regulatory obligations to furnish data to government agencies. In making such a determination, the bank should consider the legitimacy of the request, the relation of the third party to the customer, the purposes for which the data are to be used, the nature of the record or other data sought, and the potential effects of disclosure on the customer. The bank should also consider the implications of disclosure for its own business interests and the public interest. If the bank determines that the request is reasonable, it may disclose the data subject to any restrictions imposed by law or its own policies.

21. See, e.g., H.R. 214, H.R. 414, H.R. 550, H.R. 1005, H.R. 2752, H.R. 7483, S. 1343, 94th Cong., 1st Sess. (1975). Similar bills had been introduced in earlier years: S. 2200, 93d Cong., 1st Sess. (1973); S. 3814, S. 3828, 92d Cong., 2d Sess. (1972). In the ensuing discussion of proposed federal legislation, only H.R. 214 and S. 1343 will be referred to, since these bills are under active current consideration and are typical of the legislation which has been proposed.

22. See Annot., 92 A.L.R.2d 900, 903-07 (1963); Note, supra note 13, at 1463-64. Implied consent is typically found when the customer lists the bank as a credit reference. Exceptions to this rule also occur when the bank must disclose data in its own business interests or when "public duty" demands disclosure. See United States v. Cleveland Trust Co., 474 F.2d 1234, 1235 (6th Cir. 1973); Tournier v. National Provincial & Union Bank, [1924] 1 K.B. 461, 473, 481. Cf. First Nat'l Bank v. Brown, 181 N.W.2d 178, 183 (Iowa 1970) (duty of bank not to divulge customer's affairs runs only to matters known only to bank and customer).

this country in which a bank has released confidential information to a nongovernmental third party without the customer's consent, it has been held liable, although there has been no uniform theory on which liability has been based.24 Where the party seeking the information is a government official or agent, however, the bank's duty has been less clear. Bank records are subject to production in response to valid legal process,25 and a bank may be forced to disclose its record of accounts when ordered to do so by the Internal Revenue Service (IRS) or some other government agency.26 If the request is informal, the bank may challenge it and may refuse to relinquish the records until the requesting party obtains a legal order for their release.27 If the requesting party fails to obtain a legal order, the customer may, depending on the circumstances, seek an injunction to prevent the release of his records28 or move to suppress evidence which was obtained through an

24. Milohnich v. First Nat'l Bank, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969) (implied contract); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1976) (bank is customer's agent when discharging its obligation as customer's debtor, and agent's misuse of principal's confidential information constitutes breach of implied contract). Another line of cases suggests that the customer could maintain an action for invasion of privacy. See Zimmermann v. Wilson, 81 F.2d 847 (3d Cir. 1936), rev'd on other grounds after remand, 105 F.2d 583 (3d Cir. 1939); Brex v. Smith, 104 N.J. Eq. 386, 146 A. 34 (Ch. 1929); Sewall v. Catlin, 3 Wend. 292 (Sup. Ct. N.Y. 1829). However, of these cases, only Sewall involved the bank's release of information to a private party. See generally 22 U. Fla. L. Rev. 482 (1970). Cf. W. Prosser, Law of Torts § 117, at 809 (4th ed. 1971). Although Prosser cites both Brex and Zimmermann, he also states that intrusion does not occur unless the object intruded upon is, and is entitled to be, private. Prosser also states that the inspection of records which must be kept by law constitutes no invasion of privacy.


28. See Zimmermann v. Wilson, 81 F.2d 847 (3d Cir. 1936); Bowser v. First Nat'l Bank, 390 F. Supp. 834 (D. Md. 1975); Brex v. Smith, 104 N.J. Eq. 386, 146 A. 34 (Ch. 1929). But see Garrett v. United States, 511 F.2d 1037 (9th Cir. 1975) (customer's standing to intervene is permissive only); Frey v. Dixon, 58 A.2d 86 (Ch. N.J. 1948) (injunctive relief improper where appropriate remedy at law exists).
unauthorized examination. Arguably, he may also hold his bank liable for releasing his records when not legally required to do so.³⁰

Legal access to bank records may be obtained in several ways. A number of government agencies are empowered to issue administrative subpoenas or summonses without prior judicial clearance.³¹ If the subpoena or summons is contested in court, the agency need not meet a probable cause standard in order to prevail; relevance or materiality to the inquiry is sufficient.³² A grand jury can subpoena bank records by court order when it suspects that a law has been violated, and a court can subpoena bank records as part of the discovery process in a pending case, or to obtain evidence for trial.³³ Access may also be obtained through the issuance of a search warrant, which must meet a probable cause standard under the fourth amendment.³⁴

If the governmental request is accompanied by a summons or subpoena to the bank, both the bank and its customer are placed in a difficult position. The bank may contest the order in court, but this is an expensive, time-consuming process,³⁵ and in contesting the validity of the order, the bank is not entitled to assert its customer's expectation that his bank records will

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31. This discussion of legal access must necessarily be generalized, since there are approximately 100 kinds of administrative summonses and subpoenas alone. Federal agencies which are authorized to issue administrative summonses and subpoenas include the Internal Revenue Service, 26 U.S.C. § 7608 (1970); the Securities and Exchange Commission, 15 U.S.C. §§ 77uuu, 78u, 79r, 80a-41, 80b-9 (1970); the Federal Bureau of Investigation, 18 U.S.C. § 3052 (1970); and the National Labor Relations Board, 219 U.S.C. §§ 161, 185, 209 (1970). "Pocket" summonses or subpoenas are most commonly used by IRS agents to obtain quick access to bank records without prior judicial authorization. The authority of the IRS to subpoena records of an unnamed "John Doe" customer was sustained in United States v. Bisceglia, 420 U.S. 141, 150 (1975).
34. See U.S. Const. amend. IV. However, search warrants are rarely used to provide access to bank records, due to the probable cause requirement and the unsuitability of a search warrant in a civil proceeding. See, e.g., 1975 House Surveillance Hearings, supra note 2, at 499, 535, 633-37.
35. The average cost to the bank, according to one estimate, ranges from $225 to $350 per request. See 1975 House Surveillance Hearings, supra note 2, at 499-500, 535-37.
remain confidential or "private." As a practical matter, the customer's ability to contest the order depends on his having notice that his records are being sought. He usually has such notice, but it is not required by law, and if he receives none, he loses any opportunity to challenge the order. Thus the bank's duty to maintain the confidentiality of its customer's records has never been unqualified, and the ability of both bank and customer to defend their confidential relationship against unjustified government intrusion can be a complex legal task.

Even when the customer has notice that his bank has been ordered to permit the inspection of his records, the grounds upon which he can contest the order are limited. If the order to the bank is in the form of a summons or subpoena, as is usually the case, the fourth amendment requires only that the disclosure sought not be unreasonable; otherwise, the subpoena has been characterized as a figurative or constructive search and seizure, which is not covered by the fourth amendment because no actual physical search by the government has occurred. Using this reasoning, courts have determined that an administrative subpoena of records by the IRS, pursuant to its statutory authority, does not violate the fourth amendment, and that one may not assert a fourth amendment expectation of privacy to bar production of records which have been subpoenaed by a grand jury. However, courts have also indicated that constitutional defenses, including those provided by the fourth amendment, are available against subpoenas duces tecum which are unreasonable because of overbreadth or irrelevance.

37. See California Bankers Ass'n v. Schultz, 416 U.S. 21, 70 & n.29. See also 1975 House Surveillance Hearings, supra note 2, at 477-78, 490-91, 528-29, 664; BANKER'S GUIDE, supra note 27, at 6. After the passage of the Secrecy Act, some courts denied the customer standing altogether, on the ground that he did not own or possess the records. See cases cited in note 43 infra.
41. See, e.g., Hale v. Henkel, 201 U.S. 43, 76-77 (1906); United States v. Reno, 522 F.2d 572, 575-76 (10th Cir. 1975); United States v. Malnik, 489 F.2d 682, 686 n.4
Assuming that a fourth amendment defense to an onerous subpoena is available, the customer may still be unable to use it. To establish standing he must show that his rights have been infringed and that he has a possessory or proprietary interest in the records. Since the copies of his records which the bank must maintain under the Secrecy Act are owned and possessed by the bank rather than the customer, a number of courts have denied the customer standing to contest their production. Because the bank has no assertable privacy interest in its customer's records and the customer may lack standing to contest the production of records he neither owns nor possesses, the customer's expectation that the bank will not release his records without his notification or consent has been largely unprotected since the passage of the Secrecy Act.

II. FASHIONING AND DENYING A PRIVACY RIGHT

The legal blurring of privacy and confidentiality principles arose from an effort to give the customer the protection which he has expected but to which he has never been unequivocally entitled under federal law. This protection would consist of a requirement that the bank only release his records in response to a formal government order in the form of a subpoena, summons or search warrant, and that the customer be afforded notice and standing to contest the order in court. If the customer's expectation of confidentiality were encompassed within a constitutional right of privacy, notice would be required under both the fourth and fourteenth amendments, and the customer would be constitutionally entitled to standing.

in *Katz v. United States*, \(^{46}\) which suggested that property interests would no longer be the exclusive test of fourth amendment standing and that the fourth amendment protects people as well as areas from unreasonable searches and seizures. *Katz* also declared, however, that "[w]hat a person knowingly exposes to the public" is not private and therefore is not entitled to constitutional protection. \(^{47}\) Thus, a communication whose confidentiality is dependent upon a person not revealing its content to a third party ordinarily lacks fourth amendment protection. Because cancelled checks are not considered to be confidential communications, \(^{48}\) the customer would not have standing to contest an order for their production based on his expectation of privacy in the documents themselves.

However, the information which is contained in bank records—including where and how a person spends his money—could itself be considered property. This information is held by the bank, but the customer expects that his bank will not use or convey it, other than in the course of its contractual relationship, without giving the customer notice of its release. \(^{49}\) This expectation has formed the essence of the confidential bank-customer relationship at common law. The information is not truly "private," since the customer realizes and, in fact, expects his bank to release it under certain circumstances. \(^{50}\) But in order to retain some control over the manner of its release, apart from ownership or possession, the customer has asserted, first in *California Bankers* \(^{61}\) and later in *Miller*, \(^{52}\) that he possessed an expectation of privacy in the information contained in his bank records which would give him standing under the fourth amendment to contest its production.

In *California Bankers*, the customer plaintiffs challenged the constitutionality of the recordkeeping requirements of the Secrecy Act on numerous

\(^{46}\) 389 U.S. 347 (1967).

\(^{47}\) Id. at 351.

\(^{48}\) United States v. Judson, 322 F.2d 460, 463 (9th Cir. 1963).


\(^{50}\) See entry 22 supra.


theories, one being that the customers had a fourth amendment interest in
the information contained in bank records which the Secrecy Act's record-
keeping requirements had violated. The Supreme Court denied standing to
the customers under the particular circumstances of the case but empha-
sized that the legislative history of the Act and the regulations promulgated
thereunder provided that access to bank records be controlled by "existing
legal process." A majority of the Justices also expressed concern that
the recordkeeping requirements might at some point infringe upon individual
privacy rights.

The Fifth Circuit Court of Appeals, in United States v. Miller, relied on
the "existing legal process" language in the Secrecy Act and in California
Bankers to sustain defendant Miller's motion to suppress evidence in his
trial on criminal conspiracy and tax fraud charges. The prosecution had
obtained Miller's bank records through the issuance of allegedly defective
administrative subpoenas duces tecum during the grand jury investi-
gation into these charges. The records, which were released by two of his
banks without notification to Miller, helped to establish at least three of the
overt acts crucial to his subsequent conviction. Reversing the district
court's ruling on Miller's motion, the court of appeals held that obtaining
evidence through a faulty subpoena constituted an "unlawful invasion of
Miller's privacy" and that he was entitled to a new trial, untainted by the
improperly acquired evidence.

In Burrows v. Superior Court, a customer was given standing under a
provision of the California constitution, identical in wording to the fourth
amendment of the Federal Constitution, to suppress evidence which had been
obtained from his bank records after his bank had voluntarily acceded to

53. 416 U.S. 21, 53-55 (1974). The plaintiffs argued that under the broad wording
of the regulations, the Secretary of the Treasury could order the immediate reporting of
any records made or kept under the Act. But the Court held that since the Secretary
did not in fact require such reporting, the customers' claim was without merit, that is,
they had suffered no injury in fact which would give them standing under U.S. Const.
art. III, § 2.
54. 416 U.S. at 27, 52, 54 & n.24, 68-69 & n.28.
55. Id. at 78-79 (Powell & Blackmun, JJ., concurring), 82, 85-86 (Douglas, J., dis-
senting), 93 (Brennan, J., dissenting), 95-97 (Marshall, J., dissenting).
56. 500 F.2d 751 (5th Cir. 1974).
57. Id. at 757-58 & nn.5 & 6. The subpoenas were issued by the U.S. Attorney
rather than a court and were returnable on a date when the grand jury was not in ses-
sion. No return was made to a court.
58. Id. at 753, 756.
59. Id. at 756.
60. Id. at 758.
an informal government request to inspect them. The court stated that it would be unrealistic to insist that the customer be bound by the bank's consent to the inspection, and it further declared that judicial interpretations of the extent of constitutional protection for individual privacy should be expanded to counter the ability of government, using sophisticated machines, to "intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds."\(^{63}\)

Following \textit{Burrows} and the appellate court's decision in \textit{Miller}, several courts recognized customers' expectations of privacy to give them standing to contest orders for production of their bank records. Among these decisions, the most notable victory for the customer was in \textit{Valley Bank v. Superior Court}, in which the California Supreme Court held that notice to the customer was required by the California constitution\(^{64}\). It should be noted, however, that the cases which acknowledged the customer's expectation of privacy did not result in the barring of all government access to bank records. Instead, their effect was to protect the confidentiality of these records by granting notice and standing to the customer in the absence of statute\(^{65}\).

When \textit{Miller} was appealed, the Supreme Court rejected the argument that the customer had an expectation of privacy in his bank records\(^{66}\). Although Miller's bank records had been obtained in connection with a grand jury investigation, the Court did not base its decision on the general inapplicability of fourth amendment considerations to grand jury subpoenas. Instead, the six-to-two majority emphasized that the records were not confidential communications between Miller and his banks, but rather that they were negotiable instruments containing information which Miller had voluntarily communicated. Thus Miller lacked a legitimate expectation of privacy in their contents and assumed the risk that his banks would convey the information to the Government\(^{67}\). The banks' failure to notify Miller was characterized as a "neglect without legal consequences."\(^{68}\) \textit{Burrows} was distinguished on the basis that the bank in that case had provided records to the police

\(^{63}\) 13 Cal. 3d at 248, 529 P.2d at 596, 118 Cal. Rptr. at 172.
\(^{64}\) 13 Cal. 3d 652, 658, 542 P.2d 977, 980, 125 Cal. Rptr. 553, 556 (1975).
\(^{66}\) 425 U.S. 435, 442-43.
\(^{67}\) \textit{Id.} The Court made no distinction between the copies of checks, which are "negotiable" in the original, and the copies of deposit slips and at least one loan application which the Government obtained in \textit{Miller}, which are not negotiable.
\(^{68}\) \textit{Id.} at 443 n.5.
The *Miller* opinion rejected the idea that the bank had any legal obligation to notify its customers of a governmental request for records, and it indicated that customers would lack standing to contest a formal order even if they did receive notice. The Court's treatment of *Burrows* indicated that customers might retain standing to contest an informal request, but since the lack of a right of privacy was expressed in terms of the nonconfidential nature of the records themselves, the customers' right to hold the bank liable for any breach of the confidential relationship was jeopardized. And although *Miller* involved only a fourth amendment claim, the Court's rejection of financial privacy as a constitutional right and of notice as a legal requirement indicated that customers who claimed standing on first or fifth amendment grounds would fare no better.

### III. Protecting Confidentiality Through Federal Legislation

Between the passage of the Secrecy Act and the Supreme Court's decision in *Miller*, customers became more concerned about the lack of protection for their bank records. The Secrecy Act facilitated government access to bank records without specifying the legal process for obtaining them, and the number of government requests for records increased dramatically following

69. *Id.* at 445 & n.7. *But see id.* at 447-55 (Brennan, J., dissenting, would have followed *Burrows*).

70. *See notes 22-24 & accompanying text supra.* Given the Court's reliance on the fact that bank records are not "confidential," one could argue after *Miller* that banks owe their customers no duty of confidentiality which could be breached, regardless of whether the access to the records was obtained through "existing legal process" or otherwise.

71. Standing to contest a subpoena of bank records on first amendment grounds would presumably depend on the discretion of the court and would be permissive only. *See 425 U.S. at 444-45 n.6.* *See also 1976 Senate Hearings, supra* note 3, at 108, 168.

In *Fisher v. United States*, 425 U.S. 391 (1976), the Court held that a taxpayer could not exercise his fifth amendment privilege to bar the production of documents possessed by his accountant and relating to the preparation of his tax return. *Fisher* indicated that the fifth amendment's prohibition against compulsory self-incrimination would not apply where the taxpayer himself was not required to give self-incriminating testimony to authenticate the documents, *id.* at 396-401. Applying this reasoning to *Miller*'s facts, it seems clear that Miller could not have successfully claimed a fifth amendment privilege, not only because the records were not in his possession, but because the subpoenas were directed to his banks, and they, not he, authenticated the records which were released. *Cf. Gannet v. First Nat'l Bank*, 45 U.S.L.W. 2342 (3d Cir. Dec. 27, 1976) (bank records kept in accordance with Bank Secrecy Act are not protected by attorney-client privilege). *But see note 106 infra.*

its passage. Because of the cost to banks and the absence of a statutory duty to notify their customers, banks rarely contested either formal or informal government requests.\textsuperscript{73} The proposed financial privacy legislation\textsuperscript{74} came about as a congressional antidote to abuses of customers' expectations of confidentiality, and it has received broad bipartisan support\textsuperscript{75} which has gained new momentum since \textit{Miller} was handed down. Thus one possible result of \textit{Miller} may be to encourage the passage of curative legislation which has been four years in the making.\textsuperscript{76}

Both financial privacy bills would alter the customer's rights by specifying what procedures must be followed by the government to gain access to his records and by giving him standing to contest their production. Four basic methods of access are proposed: customer consent, administrative summons or subpoena coupled with consent or court order, judicial subpoena, and search warrant.\textsuperscript{77} The customer could authorize disclosure of his records for a period of one year or less by giving his bank a signed, dated statement identifying the records which could be examined and specifying who could see them and for what purpose. He could revoke his consent at any time, and it could not be required as a condition of doing business with a bank.\textsuperscript{78} If access were sought by administrative subpoena or summons, the government would have to give the customer advance notice in person or by certified mail; the customer would then have 10 days under the Senate bill and 18 days under the House bill to move to quash.\textsuperscript{79} An administrative summons or subpoena would also have to specify the name of the customer and, if applicable, the statutory purpose for which the information is sought.\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{73} See, e.g., 1976 Senate Hearings, supra note 3, at 101, 116; 1975 House Surveillance Hearings, supra note 2, at 189, 193, 490-95, 529-33, 642; \textit{Banker's Guide}, supra note 27, at 4-7. In effect, the bank's decision to contest was based on the likelihood of economic injury to the bank, not to the customer.
\item \textsuperscript{74} H.R. 214, 94th Cong., 2d Sess. (1976) [Committee Print] [hereinafter cited as H.R. 214]; S. 1343, 94th Cong., 1st Sess. (1975) [hereinafter cited as S. 1343]. \textit{See} note 21 supra.
\item \textsuperscript{75} The proposed legislation has been approved by the American Bar Association, the American Bankers Association, the California Bankers Association, and the American Civil Liberties Union. \textit{See} 1976 Senate Hearings, supra note 3, at 37, 39, 46, 160; 1975 House Surveillance Hearings, supra note 2, at 65-66; 1974 Senate Hearings, supra note 10, at 175-76.
\item \textsuperscript{76} In its Supreme Court brief, the Government argued that the customer's rights should be legislatively rather than judicially determined. \textit{Brief for Petitioner} at 31 \& n.21, United States v. \textit{Miller}, 425 U.S. 435 (1976).
\item \textsuperscript{77} H.R. 214 \S 2(a); S. 1343 \S 4(a).
\item \textsuperscript{78} H.R. 214 \S 4; S. 1343 \S 6.
\item \textsuperscript{79} H.R. 214 \S\S 2(a)(2), 5; S. 1343 \S\S 4(a)(2), 7(a)(1), 9(b).
\item \textsuperscript{80} H.R. 214 \S 5; S. 1343 \S 7(a)(2). These provisions are designed to restrict the use of the "John Doe" summons.
\end{itemize}
A bank could no longer release customer records pursuant to an administrative summons or subpoena without either the customer’s authorization or a court order,\(^8\) and free interagency exchange of information on a particular customer without his notification and approval would be prohibited,\(^8\) absent statutory authorization.

The two bills treat judicial subpoenas and standing somewhat differently. Both adhere to the traditional standards of good cause and relevance as preconditions for the issuance of judicial subpoenas.\(^8\) But the Senate bill requires that the customer always be given prior notice of a judicial subpoena,\(^8\) whereas the House bill provides a procedure for delaying notice to the customer if the court determines that advance notification would seriously jeopardize an ongoing criminal investigation.\(^8\) Both bills grant customers standing to contest government access to their bank records, a right which Miller denied them. The Senate bill would give the customer the same rights which he would have if the records were in his possession,\(^8\) thereby arguably allowing him to exercise a fifth amendment privilege to bar their production if the records were sought through subpoena.\(^8\) By contrast, the House bill would limit the customer’s right to “standing to move to quash or to seek other relief.”\(^8\) Both bills include a provision for injunctive relief;\(^8\) the House bill also provides for recovery of both actual and punitive damages.\(^8\)

The major difference between the two bills, other than their different approaches to judicial subpoenas and customer standing, lies in their scope of coverage. Both bills cover records held by “financial institutions,” a term which includes savings and loan associations and credit unions as well as banks,\(^9\) but the House bill covers telephone and postal records as well.

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81. H.R. 214 §§ 3(a), 5(3), 7(a)(3), (4); S. 1343 §§ 4, 7(b), 9(b).
82. H.R. 214 § 9; S. 1343 § 10. Thus, for example, information obtained by the IRS for use in a civil tax proceeding could not be transferred to another government agency such as the FBI.
83. H.R. 214 § 7(a)(1); S. 1343 § 9(a)(1).
84. S. 1343 §§ 9(a)(2), 9(b).
85. H.R. 214 §§ 7(a)(2), 3(b), (c), (d). For example, delay of notification of issuance may be obtained if the subpoena is issued in connection with bribery of public officials or witnesses, obstruction of state or local law enforcement, kidnapping, espionage, or sabotage. For a more complete list of crimes covered, see Id. § 7(c).
86. S. 1343 § 4(b).
87. See Andresen v. Maryland, 427 U.S. 463 (1976). See also note 71 supra and note 106 infra.
88. H.R. 214 § 2(b).
89. Id. § 12(b); S. 1343 § 16.
90. H.R. 214 § 12(a).
91. H.R. 214 § 1(a); S. 1343 § 3(a). The bills would cover bank credit cards such as Master Charge, but not nonbank cards such as American Express. See H.R. 214 § 1(a)(4); S. 1343 § 3(a)(4).
whereas the Senate bill is concerned only with financial privacy. The Senate
bill refers to the confidential nature of bank records and the bank-customer
relationship, while the House bill does not refer to confidentiality at all
and mentions "privacy" only in its title. The latter is essentially a federal
bill, while the former would apply to records sought at the local and state
level, as well as the federal. The Senate bill, unlike the House bill, would
expressly amend the Secrecy Act by forbidding the Secretary of the Treasury
from requiring the maintenance or transmittal of customer records except as
required by a supervisory agency or by the Internal Revenue Code.

There is ample reason for passage of a right to financial privacy act at
this time. Miller has settled the question of whether the customer's rights
will be judicially protected in the absence of a statute. The Supreme Court,
in sustaining the Secrecy Act as "within the legislative authority of Congress,"
has nevertheless acknowledged the power of Congress to change its mind. The State of Maryland has recently enacted legislation similar to the proposed
Senate bill. Precedent for passage of a federal financial privacy act can be
found in existing federal legislation, and legislation which has recently been
introduced in the Senate would extend financial privacy safeguards to holders
of all credit card accounts. Probably the most persuasive indicator of
congressional willingness to give the customer notice and standing is included
in a section of the Tax Reform Act, which was passed by the House of
Representatives on December 4, 1975 and by the Senate on August 6,
1976. This section would grant a taxpayer notice and standing to con-
test any third-party IRS administrative summons and would significantly
limit the power of the IRS to issue a "John Doe" summons by requiring that

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92. S. 1343 § 2. Section 2(a)(2) states that "the confidential relationships between
financial institutions and their customers [are] built on trust and must be preserved and
protected . . . ."
93. Compare H.R. 214 § 2(a), with S. 1343 § 4(a).
94. S. 1343 § 12.
hearings on S. 1343, Miller was interpreted as the Court's way of throwing the gauntlet
to Congress to amend the Secrecy Act. See 1976 Senate Hearings, supra note 3, at 2,
39, 157-60.
96. See note 10 supra.
97. A telephone company and its employees are prohibited from divulging the exist-
ence or contents of telephone communications except upon lawful authority under 47
statutory limitations and penalties upon the release of certain types of consumer informa-
a prior court proceeding establish reasonable cause for its issuance.\textsuperscript{100} Since the IRS is the government agency which most frequently seeks access to bank records, and since both Congress and the courts have given the IRS broad authority to examine customer records to determine tax liability,\textsuperscript{101} it would be anomalous to deny the customer similar rights as against investigatory agencies which have been denied the power to issue an administrative summons and which have been required to justify their access by applying for a court order.\textsuperscript{102}

IV. VESTIGES OF PRIVACY

Until the proposed legislation has been enacted and interpreted, it will be difficult to discern its full impact on the customer. Analysis is further complicated by the \textit{Miller} decision, since its full meaning is still not altogether clear. However, financial privacy legislation has encountered formidable opposition from law enforcement officials\textsuperscript{103} which could hinder its passage. This opposition also indicates that in attempting to remedy the excessive enforcement of the domestic recordkeeping requirements of the Secrecy Act, Congress may be contemplating legislation which tips the balance too far toward the customer's expectation of confidentiality as against the public's need for certain kinds of financial information concerning customers.

An interesting question which has been raised but not clearly answered by the hearings on the proposed legislation is the extent to which it would permit the customer to assert a right of privacy in his bank records. The


\textsuperscript{102} A distinction has been made between authority to inspect bank records under the Internal Revenue Code to determine tax liability and under the Bank Secrecy Act to determine expenditures rather than income. As one spokesman for Bank Secrecy Act reform has stated: "No legitimate revenue-collecting purpose can be served . . . when the Government asks for reports which may . . . cover the minutia and detail of any individual's disbursements: from what one spends at the local liquor store or at the club to what contributions or membership fees one chooses to give to political or social organizations. It is all revealed in the checks one writes." 1972 Senate Hearings, supra note 2, at 265. See also 1976 Senate Hearings, supra note 3, at 38-43; 1975 House Surveillance Hearings, supra note 2, at 202-05, 487-90, 529, 634-47, 663-68.

House bill seems to have eliminated any prospect of the customer's asserting such a right by restricting his rights to notice and standing to intervene, with even the notice provision being a qualified one. The Senate bill, however, would give the customer the same rights which he would have if the records were in his possession, and those rights are formidable. Possessory rights, for example, would permit him to challenge a government request for the records on the fourth amendment ground of unreasonableness. While this fourth amendment interest would not bar government access altogether, it could encourage litigation on the question of reasonable access in the absence of a search warrant and thereby defeat a basic purpose of the legislation, which is to resolve the meaning of existing legal process.

It could also be argued that the Senate bill, by treating bank records "as if" they were in the customer's possession, would grant the customer proprietary rights in the records which would make them truly inaccessible to the government in an ongoing criminal investigation. This interpretation of the proposed Senate bill would have a practical effect similar to the constitutional right of privacy argument which the Court recently rejected in Miller, in that

104. See note 85 supra.
105. Compare, e.g., H.R. 214 § 7, with S. 1343 § 9. Although the Senate bill states that judicial subpoenas will only be issued for "good cause," this term is not further defined. If the proposed legislation gave the customer the equivalent of possessory rights in the records, he would have standing under the fourth amendment to challenge any request other than by search warrant on the ground that good cause was lacking, and the criteria for access would still require case-by-case definition.
106. An extremely troublesome consequence of granting the customer possessory rights lies in the fifth amendment area. The Supreme Court has indicated that no fifth amendment privilege is violated by the production of documents used and held by an accountant for the preparation of a taxpayer's return. Fisher v. United States, 425 U.S. 391, 396-401 (1976). In Andresen v. Maryland, 427 U.S. 463 (1976), the Court held that the seizure of an attorney's business records pursuant to lawful search warrant did not violate his fifth amendment privilege against compulsory self-incrimination, since he had not been compelled either to commit the records to writing or to authenticate them at trial. Id. at 473. In Andresen, however, the Court indicated in dictum that it might not have reached the same result if the records had been sought by subpoena, since the "very act of production may constitute a compulsory authentication of incriminating information. Id. Applying this reasoning to the bank records context in light of the wording of the Senate bill, it would seem possible for a customer to exercise a fifth amendment privilege in response to a subpoena, if not a search warrant, and thus bar production. The creation of such a right would shield bank records from government access and would make them truly "private" rather than "confidential," in that customers would be able to bar government access to the information, unless the government could meet the probable cause requirement to secure a search warrant. Such a result would run counter to the fundamental philosophy of the fifth amendment, which "adheres basically to the person, not to information that may incriminate him." Couch v. United States, 409 U.S. 322, 328 (1973). See Andresen v. Maryland, 427 U.S. 463, 471-73 (1976); Johnson v. United States, 228 U.S. 457, 458 (1913).
it would ignore the government's need for the information instead of attempting to regulate government access while preserving the customer's standing to contest a governmental order.

Moreover, it is presently unclear whether either financial privacy bill would apply to grand jury subpoenas. As has previously been noted, no general right of privacy exists in a grand jury proceeding,\textsuperscript{107} and grand jury subpoenas are not subject to mandatory prior judicial review.\textsuperscript{108} However, if the proposed legislation were construed to apply to grand jury subpoenas, the grand jury would have to persuade a neutral magistrate that it had good cause to examine the bank records before a subpoena could be issued. The type of subpoena that was upheld in \textit{Miller} would not be permissible because it was authorized by the prosecutor's office rather than a neutral magistrate.\textsuperscript{109} Since under the Senate bill the requirement of prior notice to the customer could not be waived for any legitimate law enforcement purpose,\textsuperscript{110} some needed information relating to ongoing criminal activity would undoubtedly be lost.\textsuperscript{111} The customer would have more protection before the grand jury than he has been able to claim in the past, and the grand jury's traditionally broad investigatory powers would be correspondingly limited. This expansion of the customer's rights at the pretrial stage would be a mixed blessing, for the grand jury's broad authority has long been considered fundamental to the functioning of the American system of justice.\textsuperscript{112}

\textsuperscript{107} See notes 33, 38 & 40 supra.

\textsuperscript{108} In \textit{Annenberg v. Roberts}, 2 A.2d 612, 619 (Pa. 1938), the court drew a distinction between the effect of an unlawful nonjudicial subpoena duces tecum and a judicial subpoena duces tecum, holding that the former was subject to more stringent constitutional requirements than the latter because a defendant who is summoned before a nonjudicial body lacks the right to have legal counsel present to preserve his constitutional rights. This argument was raised but rejected in \textit{Miller}. \textit{See Brief for Respondent at 8-9, United States v. Miller, 425 U.S. 435 (1976)}. \textit{But see United States v. Miller, 425 U.S. 435, 445-46 (1976); Brief for Petitioner at 36-43, United States v. Miller, 425 U.S. 435 (1976). See also 1975 House Surveillance Hearings, supra note 2, at 502, 539; 1974 Senate Hearings, supra note 10, at 187.}

\textsuperscript{109} \textit{Compare Brief for Petitioner at 36-43, United States v. Miller, 425 U.S. 435 (1976), with S. 1343 § 9.}

\textsuperscript{110} See S. 1343 §§ 4(a)(3), 5(b), 8.

\textsuperscript{111} This loss of information could occur in a number of ways, but the two examples which have received the most attention are: (1) where the customer uses the notice to conceal or destroy information, or to flee the jurisdiction, \textit{see, e.g., 1974 Senate Hearings, supra note 10, at 137-38}; and (2) where the customer, having notice, claims a fifth amendment privilege against authenticating the information, \textit{see note 106 supra}. It should be noted, however, that corporations do not have, and therefore could not assert, the constitutional privilege, although they are covered as "customers" by S. 1343.

It should be remembered that the theory that the customer had an expectation of privacy in his bank records was not developed or accepted as a reason to bar all government access to bank records. Instead, it was a means of granting the customer notice and standing to contest an order for their production in the absence of a statute, since the customer could assert no possessory or proprietary interest in the copies which the Secrecy Act required the bank to keep. The courts which recognized the customer's expectation of privacy between the passage of the Secrecy Act and the Supreme Court's Miller decision did so in order to give the customer a remedy where he otherwise would have had none. The expectation of privacy rationale was used to balance the interest of the customer against that of the government by giving the customer the right to receive notice, the right to intervene and to obtain injunctive relief, or standing to move to quash or modify an overly broad subpoena or to move to suppress improperly obtained evidence.

To the extent that the proposed legislation, particularly the Senate bill, could render the records inaccessible rather than accessible under prescribed conditions, it would upset the balance between individual and public interests which both Congress and the courts have attempted to achieve.

One possible response to this criticism of the wording of the Senate bill would be to assert that Miller disposed of the customer's privacy interest in the records entirely. The constitutional basis for the enactment of the Senate bill, however, is at least partly found in the commerce clause, and Congress possesses the authority to afford the customer more protection than is constitutionally required. While the interpretation of the legislation will ult-

113. See notes 45-65 and accompanying text supra.
117. See United States v. Miller, 500 F.2d 751, 756 (5th Cir. 1974), rev'd, 425 U.S. 435 (1976); Burrows v. Superior Court, 13 Cal. 3d 238, 247-48, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974). While Miller did not overrule Burrows, it seems clear that federal officials consider the right of privacy which was asserted in Burrows to be a state rule of privilege which does not apply where a federal question has been raised. See Gannett v. First Nat'l Bank, 45 U.S.L.W. 2342, 2343 (3d Cir. Dec. 27, 1976); 1975 House Surveillance Hearings, supra note 2, at 495, 530.

However, unless specific findings are incorporated into the legislative history of a
mately rest with the courts, Congress could eliminate confusion before a financial privacy act is passed. By clearly defining the customer's rights in terms of notice and standing, Congress could eliminate past misconceptions as to whether bank records are "secret" and whether the bank's relationship with its customer is a privileged one. Likewise, by addressing the customer's rights in terms of "confidentiality" rather than "privacy," Congress could eliminate the unintended confusion in terminology which decisions such as *Miller* have perpetuated.

V. CONCLUSION

The impetus to protect the customer's expectation that the information in his bank records will remain confidential has paralleled the growth of mandatory bank recordkeeping. When Congress passed the Bank Secrecy Act, it declared that the Act involved no constitutional issues and posed no threat to individual liberties. Its conclusions were based on the "creditable" record of the banking industry in protecting its relationship with its customers. In practice, however, the Secrecy Act has compromised the confidential bank-customer relationship. The Act has compelled banks to act as the government's recordkeepers, and the courts, in upholding the constitutionality of the Act, have deprived the customer of any protected interest in documents of his own making. After the combined efforts of banks and customers to attack the constitutionality of the Act failed in *California Bankers*, and the customer's expectation of privacy was rejected in *Miller*, the best remaining opportunity to protect the customer's expectations would seem to be through federal financial privacy legislation.

The proposed legislation, however, has not fully defined the dimensions of the rights which it would provide the customer. Given the different construction of standing in the two bills, it is presently unclear whether the passage of financial privacy legislation would give the customer only notice and standing to contest government access to bank records, or whether it would also give him possessory rights which could enable him to block their use by the government altogether. It is also unclear whether any privacy interest which the customer might acquire through the legislation could be financial privacy act to support the assertion that the recordkeeping requirements of the Secrecy Act burden interstate commerce, its constitutionality is at least debatable. See, e.g., *Perez v. United States*, 402 U.S. 146, 157-58 (1971) (Stewart, J., dissenting); 1976 *Senate Hearings*, supra note 10, at 144-45 (congressional power to legislate under the commerce clause should be tempered with restraint where principles of federalism are involved).

asserted at the investigatory or pretrial discovery stage. Since the customer's expectation of privacy was a theory which was developed in order to give him standing to contest government access to copies of his bank records despite his lack of ownership or possession, it would appear that the proposed legislation is directed toward the balancing of existing rights rather than the creation of new ones. The legislative history of any financial privacy act which Congress passes should reflect this balance.

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