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## Government Compensation for the Costs of Producing Subpoenaed Documents: A Proposal for Legislative Reform

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## GOVERNMENT COMPENSATION FOR THE COSTS OF PRODUCING SUBPOENAED DOCUMENTS: A PROPOSAL FOR LEGISLATIVE REFORM

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Federal prosecutors and grand juries, pursuant to Federal Rule of Criminal Procedure 17(c)<sup>1</sup> (Rule 17(c)), and federal agencies, pursuant to relevant statutory law,<sup>2</sup> have broad authority to compel the production of documents through the use of the subpoena duces tecum.<sup>3</sup> Enforcement officials routinely use this order to obtain documents as evidence of suspected violations of criminal and regulatory law. Although the suspected wrongdoer may possess the requested documents, third parties not suspected of wrongdoing often possess the documents by virtue of commercial or other dealings with the target of the investigation. In the latter situation, the subpoena is addressed to the third party who is required to comply under threat of contempt. This third party custodian may incur substantial expenses in locating, retrieving, reproducing, and transporting the documents to the entity that has issued the subpoena.<sup>4</sup> As an innocent third party<sup>5</sup> to a criminal

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1. "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c).

2. See, e.g., 15 U.S.C. § 49 (1976) (authorizing the Federal Trade Commission to issue subpoenas); 15 U.S.C. § 78u(b) (1976) (authorizing the Securities and Exchange Commission to issue subpoenas); 26 U.S.C. § 7602 (1976) (authorizing the Internal Revenue Service to issue summonses).

3. See, e.g., *United States v. Calandra*, 414 U.S. 338, 344 (1974) ("the grand jury's investigative power must be broad if its public responsibility is adequately to be discharged"); *United States v. Covington Trust & Banking Co.*, 431 F. Supp. 352, 355 (E.D. Ky. 1977) (holding that the statutory power of the IRS to examine records and witnesses to ascertain tax liability is similar in nature to the inquisitorial power of a grand jury and should be liberally construed).

A subpoena duces tecum is a legally enforceable order which directs a named person to produce specified tangible objects, usually documents, at a certain time and place, usually a judicial or administrative forum. The subpoena is addressed to the person, referred to as the custodian, who has possession of the documents. FED. R. CIV. P. 45.

4. See, e.g., *United States v. Columbia Broadcasting Systems*, 666 F.2d 364 (9th Cir.) (\$2.3 million in discovery costs incurred by third party custodian in antitrust case), *cert. denied*, 102 S. Ct. 2929 (1982).

5. Exactly what constitutes an "innocent" third party is beyond the scope of this Note. Generally this issue is easily resolved. A custodian of documents with no interest in the outcome of the proceeding is a third party and presumably innocent of any wrongdoing. A more difficult situation arises when the custodian is not a target of the investigation or party to the proceeding but is still interested in the outcome. See *United States v. IBM*, 62 F.R.D. 526, 529 (S.D.N.Y.

or regulatory proceeding, the third party custodian may legitimately question who should bear the costs of producing the subpoenaed documents.<sup>6</sup>

Current statutory and case law provide for the compensation of select categories of persons and entities that provide evidence to the federal government. This compensation scheme is inequitable insofar as it treats similarly situated persons and entities dissimilarly. This Note advocates the adoption of a blanket statutory provision to compensate all third party custodians<sup>7</sup> for incurred costs in producing documents in compliance with a subpoena duces tecum issued on behalf of a federal authority.<sup>8</sup> Part I describes the current federal reimbursement scheme. Part II examines the inequities that the current statutory scheme imposes upon similarly situated entities and argues for the adoption of a blanket reimbursement statute.

## I. THE CURRENT REIMBURSEMENT SCHEME

A party that complies with compulsory process is not guaranteed reimbursement from the federal government in the absence of an ex-

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1974) (holding that a third party custodian must bear the expenses of production because it will be affected, as a competitor of the defendant in an antitrust case, by the final disposition of the case). *But see* United States v. Columbia Broadcasting System, 666 F.2d 364, 372 (9th Cir.) (holding that an interest in the outcome of a case does not necessarily preclude a third party from recovering its expenses), *cert. denied*, 102 S. Ct. 2929 (1982).

6. This Note contemplates that the subpoena duces tecum is enforceable as issued. Because such a subpoena orders the recipient to produce documents, it is a "seizure" under the fourth amendment and is not enforceable unless "reasonable." *See* United States v. Morton Salt Co., 338 U.S. 632, 651-54 (1950). Furthermore, the district court may quash an unreasonable or oppressive subpoena upon the recipient's motion under Rule 17(c) or FED. R. CIV. P. 45(b). Generally, for a subpoena to survive an objection of unreasonableness (or "overbreadth"), it must request only those objects that are relevant to the investigation, *In re* United Shoe Machinery Corp., 73 F. Supp. 207, 211 (D. Mass. 1947), specifically describe the objects that are sought, *Hale v. Henkel*, 201 U.S. 43, 77 (1906), and not place an oppressive burden of compliance upon the recipient, *United States v. United States District Court*, 238 F.2d 713, 723 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957). A subpoena that satisfies all of these conditions will nonetheless impose certain costs upon the recipient who must produce the requested documents.

7. Both the federal statutory law that provides for compensation and the decisional law that addresses the issue of reimbursement distinguish between "third party" and "target" custodians. *See* 12 U.S.C. §§ 3413(h), 3415 (Supp. V 1981) (providing that the government shall pay a fee to financial institutions providing financial reports pertaining to a customer); 26 U.S.C. § 7610(b) (2) (1976) (providing that the IRS will not compensate the person summoned if he is the person with respect to whose liability the summons is issued); *In re* Grand Jury Proceedings, 636 F.2d 81, 84 (5th Cir. 1981) (holding that Congress did not intend a bank that is itself a target of a grand jury investigation to be reimbursed for its costs under 12 U.S.C. § 3415).

8. Not all subpoenas are issued on behalf of the government. Parties adverse to the government in a criminal or civil proceeding can avail themselves of compulsory process under Rule 17(c) and FED. R. CIV. P. 45(b) to obtain documents from the government. *See, e.g.,* United States v. Meyer, 398 F.2d 66 (9th Cir. 1968) (holding defendant in condemnation proceeding entitled to discovery of documents prepared by government real estate appraisers); *Mackey v. United States*, 351 F.2d 794, 795 (D.C. Cir. 1965) (stating that government may be required

press statutory provision.<sup>9</sup> Citizens owe a duty to the government to provide enforcement officials with evidence of wrongdoing upon request; thus the government is not constitutionally required to reimburse the providers of such information for the costs associated with compliance.<sup>10</sup> Consequently, the federal enforcement authority that causes a subpoena duces tecum to be issued to a private custodian effectively deputizes that custodian to aid it in the fulfillment of its official responsibilities.

### A. *The Case Law: Decisions in Search of a Rule*

Notwithstanding the absence of a constitutional requirement to compensate those who provide federal officials with evidence, equitable considerations have sometimes persuaded courts to grant reimbursement where deemed appropriate. Federal law on the subject of reimbursing custodians, however, is inconsistent and lacks consistency. Federal courts, in coming to conflicting decision,<sup>11</sup> have noted that

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to produce documents it possessed that are necessary to defendant's case).

Under Rule 45(b), any civil party may seek enforcement of a subpoena duces tecum, whether or not the government is a party, *see infra* note 27.

9. *Cf. Hurtado v. United States*, 410 U.S. 578, 589 (1973) (recognizing that giving testimony in court or in front of a grand jury is a public duty, for which compensation is not required under the takings clause of the fifth amendment). Lower courts have read the Supreme Court decision in *Hurtado* to indicate that the government is under no constitutional obligation to reimburse custodians for their costs of production and that a court will not order compensation absent an express statutory directive. *See In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum*, 555 F.2d 1306, 1309 (5th Cir. 1977) (noting that as *Hurtado* rejects any assertion that a potential witness has a "right" to reimbursement for the expenses of testifying, the same must be true for a custodian of documents). *See also In re Grand Jury Subpoena Duces Tecum*, 436 F. Supp. 46, 51 (D. Md. 1977) (denying reimbursement to third party custodians in light of *Hurtado*); *cf. SEC v. OKC Corp.*, 474 F. Supp. 1031, 1036-37 (N.D. Tex 1979) (reimbursement denied to custodians who were also targets of an investigation).

The reasoning of *Hurtado's* fifth amendment holding does not obviously extend to subpoena duces tecum cases. *Hurtado* rested upon the premise that a subpoena ad testificandum did not constitute a "taking" under the fifth amendment. Compulsory production of documents appears to be a more traditional taking for fifth amendment purposes. A subpoena duces tecum, however, does not technically disturb the custodian's possessory interest in the documents. *See* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 274 (1982). The subpoena merely requires custodians to present the documents for inspection. Nevertheless, a takings issue may arise if the custodian requires continuous possession of the documents at its place of business to carry out its operations.

10. *See supra* note 9.

11. Reimbursement has been both granted and denied in similar situations. *Compare In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum*, 555 F.2d 1306 (5th Cir. 1977); *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129 (3d Cir. 1976); *In re Grand Jury Subpoena Duces Tecum*, 436 F. Supp. 46 (D. Md. 1977); *United States v. Covington Trust & Banking Co.*, 431 F. Supp. 352 (E.D. Ky. 1977); *United States v. Bremicker*, 365 F. Supp. 701 (D. Minn. 1973) and *United States v. Jones*, 351 Supp. 132 (M.D. Ala. 1972) (all denying reimbursement

precedent is sparse<sup>12</sup> and that the case law that does exist is ambiguous<sup>13</sup> and in "hopeless disarray"<sup>14</sup> — typically reflecting a case by case adjudication of particular facts and circumstances. Although those courts granting reimbursement base these decisions upon their discretionary authority and general principles of equity,<sup>15</sup> there is authority that holds that reimbursement is unavailable.<sup>16</sup>

Those courts denying reimbursement generally base their decisions either on the principle that reimbursement is unavailable unless expressly authorized or on the rationale that expenses associated with complying with a government subpoena are part of the "cost of doing business."<sup>17</sup> Although the cost of doing business rationale is rarely explained, the underlying theory appears to be that, because third party custodians (primarily banks)<sup>18</sup> must store records of the financial transactions between themselves and their customers, and because the government is likely to desire access to these records, such custodians should occasionally expect to be subpoenaed for such records. This rationale does not, however, provide a satisfactory answer to the question of who should bear the costs of producing documents for enforcement authorities.

### *B. The Statutory Law: Unprincipled Discrimination Between Categories of Custodians*

Congress has responded to the custodian's plight by providing for reimbursement under certain circumstances. The current statutory scheme, however, is not comprehensive; some custodians are eligible for government compensation under more than one statute, yet others are not covered by any provision.

to third party custodian banks) *with* *United States v. Davey*, 426 F.2d 842 (2d Cir. 1970); *FTC v. Winters Nat'l Bank & Trust Co.*, 509 F. Supp. 1228 (S.D. Ohio 1981) *and* *United States v. Farmers & Merchants Bank*, 397 F. Supp. 418 (C.D. Cal. 1975) (all granting reimbursement).

12. *E.g.*, *FTC v. Winters Nat'l Bank & Trust Co.*, 509 F. Supp. 1228, 1230 (S.D. Ohio 1981).

13. *Id.* at 1235.

14. *United States v. Farmers & Merchants Bank*, 397 F. Supp. 418, 419 (C.D. Cal. 1975).

15. In *United States v. Davey*, 426 F.2d 842 (2d Cir. 1970), a case that predates the adoption of Internal Revenue Code § 7610 (guaranteeing compensation of custodians that produce documents in response to an IRS summons), the court determined that the only issue before it was the proper amount of reimbursement that the government owed to petitioner, a supplier of consumer credit information. A right to reimbursement was assumed without citation to a single authority for such a right.

16. *See supra* note 11.

17. *See United States v. Covington Trust & Banking Co.*, 431 F. Supp. 352, 356 (E.D. Ky. 1977); *United States v. Bremicker*, 365 F. Supp. 701, 703 (D. Minn. 1973); *United States v. Jones*, 351 F. Supp. 132, 134 (M.D. Ala. 1972).

18. Banks now are statutorily entitled to reimbursement. *See infra* notes 19-22 and accompanying text.

1. *Mandatory compensation of custodians under the Federal Right to Financial Privacy Act and the Internal Revenue Code*— Certain custodians of documents sought by the government are entitled to mandatory compensation under two federal statutes applying to both regulatory and criminal proceedings. First, section 3145 of the recently enacted Federal Right to Financial Privacy Act<sup>19</sup> provides for government compensation to “financial institutions”<sup>20</sup> that produce documents pursuant to legal process.<sup>21</sup> Second, the Internal Revenue Code has recently been amended to assure the compensation of all custodians who produce documents in compliance with a summons issued by the Internal Revenue Service.<sup>22</sup> Thus, the identity of the issuing authority determines the availability of compensation under the Code, and the nature of the custodian’s business determines eligibility under the Right to Financial Privacy Act.

2. *Discretionary Reimbursement Under Federal Rule of Civil Procedure 45(b)*— In sharp contrast to the explicit compensation provi-

19. 12 U.S.C. § 3415 (Supp. V 1981) provides in part:

[A] Government authority shall pay to the financial institution assembling or providing financial records pertaining to a customer and in accordance with procedures established by this chapter a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required or requested to be produced.

20. *Id.* Under 12 U.S.C. § 3401 (Supp. V 1981) the Act applies to banks, savings banks, and card issuers as defined by § 103 of the Consumer Credit Protection Act 15 U.S.C. § 1602(n) (1976), industrial loan companies, trust companies, savings and loan companies, building and loan or homestead associations (including cooperative banks), credit unions, and consumer finance institutions. The Act thus covers only institutions in the business of providing loans and other forms of credit to customers. It does not apply to such related commercial institutions as securities brokerage firms, accounting and consulting firms, and real estate brokers, all of which may possess many documents that could become relevant to a federal investigation or judicial proceeding.

21. The Act applies to document requests that take the form of judicial subpoenas, administrative subpoenas and summonses, search warrants, and formal written requests, 12 U.S.C. §§ 3405-3407 (Supp. V 1981).

22. 26 U.S.C. § 7610 (1976) provides in part:

Fees and Costs for Witnesses

(a) In general — The Secretary shall by regulations establish the rates and conditions under which payment may be made of —

(1) . . .

(2) reimbursement for such costs that are reasonably necessary which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required to be produced by summons.

(b) Exceptions — No payment may be made under paragraph (2) of subsection (a) if —

(1) the person with respect to whose liability the summons is issued has a proprietary interest in the books, papers, records, or other data required to be produced, or

(2) the person summoned is the person with respect to whose liability the summons is issued or an officer, employee, agent, accountant, or attorney or such person who, at the time the summons is served, is acting as such.

sions of the Right to Financial Privacy Act and the Internal Revenue Code, Rule 17(c), which governs the issuance of subpoenas in federal criminal proceedings, is silent on the issue of compensation.<sup>23</sup> The recipient of a subpoena issued by a federal prosecutor or grand jury is limited to a motion to quash or modify as the sole means of protection against an unreasonable or otherwise oppressive subpoena.<sup>24</sup>

Some courts have nonetheless read into Rule 17(c) an authority to award costs to custodians, relying on analogy to Federal Rule of Civil Procedure 45(b) (Rule 45(b)) and the Advisory Committee Note to Rule 17(c).<sup>25</sup> Rule 45(b) empowers district courts with the discretion to condition enforcement of a subpoena duces tecum upon reimbursement of the custodian by the party on whose behalf the subpoena is issued.<sup>26</sup> This Rule, however, applies solely to civil proceedings between private parties, and not to criminal actions brought by the federal government.<sup>27</sup> Given the expenses incurred in complying with a Rule 17(c) subpoena, several courts have read into the Rule an implied discretionary authority to shift those expenses from the custodian to the government.<sup>28</sup>

23. See *supra* note 1.

24. *Id.*

25. The Advisory Committee Note to Rule 17(c) states that the Rule is "substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure."

26. The Rule provides:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive or (2) *condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.*

FED. R. CIV. P. 45(b) (emphasis added).

27. Subpoenas issued in criminal proceedings are governed by Rule 17(c) of the Federal Rules of Criminal Procedure, see *supra* note 1. Lower courts disagree as to Rule 45(b)'s applicability to federal administrative proceedings. Compare *United States v. Friedman*, 532 F.2d 928, 936 (3d Cir. 1976) (holding Rule 45(b) inapplicable to such proceedings) with *In re Grand Jury Subpoena Duces Tecum*, 436 F. Supp. 46, 47-48 & n.8 (D. Md. 1977) (specifically rejecting the holding in *Friedman*, and relying on FED. R. CIV. P. 81(a)(3)).

28. *In re Grand Jury Investigation*, 459 F. Supp. 1335, 1339 (E.D. Pa. 1978). *But cf. In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum*, 555 F.2d 1306 (5th Cir. 1977) (holding that Rule 17(c) implicitly authorizes the district court to order reimbursement but nonetheless denying reimbursement to a custodian in a criminal proceeding).

The Fifth Circuit's interpretation of Rule 17(c) in *In re Grand Jury No. 76-3* is problematic. The court stated:

As a general rule, a witness or the recipient of a subpoena duces tecum is required to bear the costs of compliance. Since some costs can be anticipated in complying with any subpoena duces tecum, Rule 17(c)'s provision that the court may quash a subpoena "if compliance would be unreasonable or oppressive" must be read to mean that *in the main run of cases* the cost of compliance will be assumed as part of the public duty of providing evidence.

Although such a reading of Rule 17(c) may ease the custodian's plight, it does not eliminate it. First, under Rule 45(b), the advancement of costs by the requesting party to the custodian rests within the sound discretion of the district court.<sup>29</sup> Rule 45(b) fails to provide any guidelines regarding the exercise of this discretion.<sup>30</sup> Although courts have been solicitous of third party custodians seeking reimbursement in the civil setting, such a result is not required whenever a custodian requests relief.<sup>31</sup> Second, very few courts have accepted this joint reading of Rules 17(c) and 45(b). Such a reading is questionable in light of the silence of Rule 17(c) with regard to the issue of reallocating production costs<sup>32</sup> and can be explained only by an unspoken concern on the part of the courts that custodians in criminal proceedings have an equitable claim to reimbursement, just as they do in civil proceedings.

3. *Analogous Federal Law: Mandatory Compensation of Witnesses Under the Witness Fee Statute*— In contrast to the incomplete coverage provided to custodians of documents, Congress has provided for compensation of all persons who give *testimony* in compliance with a subpoena ad testificandum issued under federal authority. The Witness Fee Statute<sup>33</sup> establishes a schedule for the mandatory compensation

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555 F.2d at 1308 (emphasis added).

Rule 17(c), however, provides no explicit authority for shifting costs to the government *in any cases*. The court infers judicial authority to shift costs under Rule 17(c) only by analogy to Rule 45(b). The opinion, however, apparently allows compensation under Rule 17(c) only when the subpoena is unreasonable or oppressive. This interpretation provides the custodian no greater protection than it already receives under Rule 17(c) because the custodian always can move to have the district court quash an unreasonable subpoena under the Rule. Moreover, if Rule 17(c) is to be interpreted as conferring discretionary reimbursement authority by analogy to Rule 45(b), courts should observe the conditions for awarding costs under Rule 45(b). The conditions for quashing or modifying a subpoena under Rule 45(b), on the one hand, and those for shifting the costs of production, on the other, are expressly disjunctive. The district court can quash only unreasonable or oppressive subpoenas under Rule 45(b)(1). By implication, the district court may impose the less drastic remedy of shifting costs under Rule 45(b)(2) when enforcement of the subpoena would impose expenses on the custodian that, although not rising to the level of oppression, nonetheless should be incurred by the party requesting the subpoena. The Fifth Circuit's reading of Rules 17(c) and 45(b) in *In re Grand Jury No. 76-3*, however, would impose the higher threshold conditions of oppression and unreasonableness upon a custodian's motion merely to shift costs to the government, conditions properly reserved for the more severe remedies of modification or quashing of the subpoena.

29. See *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1033 & n.123 (D.C. Cir. 1978) (holding that the court has discretion to ensure that custodians will not be forced to bear the costs of production), *cert. denied*, 439 U.S. 1071 (1979).

30. The Advisory Committee Note to Rule 45(b) similarly lacks guidelines.

31. Compare *Wright v. Jeep Corp.*, 547 F. Supp. 871 (E.D. Mich. 1982) and *Oscar Gruss & Son v. Geon Indus.*, 89 F.R.D. 32, 37 (S.D.N.Y. 1980) (ordering party seeking the documents to reimburse custodian) with *Blank v. Talley Indus.*, 54 F.R.D. 627 (S.D.N.Y. 1972) (denying reimbursement).

32. See *supra* note 1. See also *In re Grand Jury Subpoena Duces Tecum*, 436 F. Supp. 46, 48 (D. Md. 1977) (noting that the provisions of Rule 17(c) "strongly distinguish the civil or administrative subpoena from the criminal subpoena").

33. 28 U.S.C. § 1821 (Supp. V 1981).

of persons who are "in attendance at any court of the United States."<sup>34</sup> A supplementary provision guarantees compensation of witnesses who appear before federal agencies.<sup>35</sup>

## II. INEQUITIES OF THE CURRENT REIMBURSEMENT SCHEME

The protective sweep of the existing statutory reimbursement scheme does not extend to a readily identifiable class of informants: third party custodians not qualifying as financial institutions under section 3402 of the Right to Financial Privacy Act that are subpoenaed in criminal proceedings or by agencies other than the Internal Revenue Service.

This disparate treatment of different classes of custodians is ameliorated somewhat by the joint reading of Rules 17(c) and 45(b)<sup>36</sup> and by the equitable considerations that have led some courts to order reimbursement.<sup>37</sup> The former, however, is not widely accepted and the later is largely undermined by those courts barring reimbursement absent express statutory authority and those courts applying the cost of doing business rationale.<sup>38</sup> Although the cost of doing business rationale does not extend to custodians who do not store large volumes of records as a normal incident of their business,<sup>39</sup> there are a number of business enterprises not qualifying as "financial institutions" under the Right

34. *Id.* at § 1821(a)(1). Although § 1821 does not specifically cover witnesses who testify before a grand jury, the practice in the Eastern District of Michigan, and probably in the other federal districts, is to reimburse such witnesses in accordance with the provision's terms. Letter from United States Attorney, Eastern District of Michigan (January 13, 1983) (on file with the *Journal of Law Reform*).

Without expressly deciding the issue, one district court has assumed that compensation is available to a grand jury witness under § 1821: "[T]he witness was in attendance four days, and clearly would be entitled to one-hundred-twenty dollars had he not been incarcerated. Thus, this motion poses only a narrow legal question: whether a prisoner serving a sentence is entitled to witness fees." *In re Witness Fees for Prisoner*, 533 F. Supp. 401 (E.D. Pa. 1982).

35. 5 U.S.C. § 503(a) (1976) provides in part: "A witness is entitled to the fees and allowances allowed by statute for witnesses in the courts of the United States when . . . he is subpoenaed to and appears at a hearing before an agency authorized by law to hold hearings and subpoena witnesses to attend the hearings." *Id.*

The Third Circuit has expressly held that § 503(a) (and, by implication, § 1821) does not extend to cover the costs of producing documents pursuant to a subpoena duces tecum. *See United States v. Friedman*, 532 F.2d 928 (3d Cir. 1976).

36. *See supra* notes 28-29 and accompanying text.

37. *See supra* notes 11 & 16 and accompanying text.

38. *See supra* notes 9 & 17 and accompanying text.

39. The Third Circuit has recognized such a distinction when applying the cost of doing business doctrine:

A manufacturer, who may only have dealt with a taxpayer quite casually and occasionally, for example, might not be required, as a part of the cost of doing business, to make an unreimbursed record search. A bank, however, whose business is the facilitation of financial transactions, and which keeps records of all customer dealings as a matter of course, if not law, may be required to do so.

*United States v. Friedman*, 532 F.2d 928, 937 (3d Cir. 1976) (footnotes omitted).

to Financial Privacy Act that do store large volumes of financial records in the normal course of their business.<sup>40</sup> Courts determined to adhere to the general principle that compensation from the government is unavailable unless expressly authorized by statute<sup>41</sup> may resort to the cost of doing business doctrine, now securely established by judicial precedent, to justify a denial of compensation to these nonbank custodians.<sup>42</sup> Given this obstacle, and the even greater difficulties of squeezing reimbursement out of Rule 17(c) in criminal cases, the current reimbursement scheme is clearly inadequate to protect the interests of those custodians that do not come within the protection of the mandatory compensation provisions of the Right to Financial Privacy Act and the Internal Revenue Code.

*A. The Preferential Protection Provided by the Right to Financial Privacy Act and the Internal Revenue Code*

The disparate treatment created by the Federal Right to Financial Privacy Act and the Internal Revenue Code is indefensible as a matter of policy. The enforcement of federal law through investigative and adjudicative activities is a fundamentally public interest. The custodian of documents, free from any allegation of wrongdoing, is situated so as to be of particular aid to the government in the fulfillment of these goals, but otherwise has no greater interest in the enforcement of federal laws than does any other citizen. Thus, the custodian should not be required to bear a disproportionate share of the expenses attributable to the achievement of these public goals. Furthermore, the government, through its taxing power, can more equitably allocate the costs of this public activity among those who benefit from it.<sup>43</sup>

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40. See *supra* note 20. In addition to the commercial institutions listed in note 20, other business entities not covered by the Right to Financial Privacy Act likely to retain documents relevant to a federal criminal or regulatory investigation or proceeding include purchasers and suppliers of the target entity, travel agents and common carriers that have provided services to the target and its agents, and affiliated but separately incorporated firms. Furthermore, individuals, by virtue of business or personal relationships with the target, may possess documents sought by the enforcement authority.

41. See *supra* notes 9-11 and accompanying text.

42. See *Blank v. Talley Indus.*, 54 F.R.D. 627 (S.D.N.Y. 1972) (holding brokerage firm's cost of producing documents for benefit of class action plaintiffs constitute overhead expenses necessary to respond to legitimate court orders involving customers for brokers).

43. Two arguments could be advanced against the position that the government should be obligated to pay for services it receives from custodians of subpoenaed documents. First, the production of documents arguably is a necessary cost of conducting a regulated business, similar to reporting requirements imposed by federal securities laws upon corporations that issue stock for public sale or the testing and disclosure requirements imposed by the Food and Drug Act upon drug manufacturers. Second, the custodian arguably is in better position to allocate the costs of its business to its customers than is the government.

In response to the first contention, not all custodians are entities such as banks or securities

Notwithstanding such considerations, Congress has chosen to compensate only particular categories of custodians among all those who are similarly situated with respect to the services that they provide to the government and the benefits that accrue to the government from these services. The legislative histories of neither the Right to Financial Privacy Act<sup>44</sup> nor the Tax Reform Act of 1976<sup>45</sup> provide any explanation for the favorable status accorded by those statutes to financial institutions and recipients of IRS summonses. These mandatory compensation provisions in all likelihood are a congressional response to those judicial decisions holding custodian banks not entitled to reimbursement from the government.<sup>46</sup> Many of those cases involved summonses issued by the Internal Revenue Service.<sup>47</sup>

As a class of business enterprises, banks are among the most com-

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brokerage firms that properly can be regarded as highly "regulated." Custodians occasionally may be private individuals, or firms that conduct a business that Congress has not identified as a proper object of regulation in furtherance of the public interest. Moreover, the occasional and sporadic production of documents by a custodian pursuant to a subpoena is significantly dissimilar to the continuing reporting requirements imposed upon regulated industries. The latter are imposed upon the industry as a whole to ensure that all members operate in a manner consonant with the public interest. In contrast, the compulsory obligation imposed by a subpoena falls erratically on select members of the industry, not as a result of business decisions or activities of the recipient custodian, but as a result of the government's investigation or action against a party associated with the custodian. The government action is intended to ensure that a client of the custodian, not the custodian itself, did not violate the public interest. Thus, the imposition of the costs of production upon the recipient of a third party subpoena cannot be justified on the grounds that regulated industries must bear costs of providing the government with information to facilitate the regulatory process.

In response to the second contention, although the custodian that is a business entity may increase prices to allocate costs of production among its customers, these customers, like the custodian itself, have no greater interest in federal law enforcement than does the general public. Because the general public benefits from these enforcement activities, the costs of those activities are properly imposed upon the public.

44. The Right to Financial Privacy Act of 1978, Title XI of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (codified at 12 U.S.C. § 3401-22 (Supp. V 1981)) was enacted largely as a congressional response to the Supreme Court decision in *United States v. Miller*, 425 U.S. 435 (1976) (holding that a customer of a bank had no standing under the fourth amendment to object to a subpoena issued to the bank requesting financial records of the customer), H. REP. NO. 1383, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9306. The Act requires the government to notify a customer of a financial institution when his records are being subpoenaed, 12 U.S.C. § 3405(2) (Supp. V 1981), and provides him with standing to challenge the subpoena in federal district court, 12 U.S.C. § 3410(a) (Supp. V 1981). The compensation provision of § 3415 appears almost as an afterthought in the legislative record; its presence is not explained by the House Report, H. REP. NO. 1383, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9273.

45. The voluminous legislative history of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976) contains only a passing reference to the provision that became § 7610. Senate Amendment No. 25 added the compensation provision, adopted without discussion by the conference committee, H. CONF. REP. NO. 1515, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 4118. The legislative history of the Tax Reform Act does not disclose the reasons for adoption of the compensation provision.

46. See *supra* note 11.

47. *Id.*

mon recipients of third party subpoenas. Prior to the enactment of the Right to Financial Privacy Act, the banking industry was clearly paying a disproportionate share of the costs of producing documents for use by the federal government. The Act was a justifiable response to this state of affairs insofar as banks have no greater interest than the general public in the enforcement of criminal or regulatory law.

The proper subject of concern in determining the scope of an equitable compensation policy, however, is the individual entity that complies with the subpoena, not aggregate classes of custodians that may be more or less burdened as a group. Many custodians not qualifying as "financial institutions" under the Act are also likely to incur substantial expenses in complying with a subpoena *duces tecum*. The fact that banks — as a class of custodians or as individual entities — are more likely to incur the costs of producing documents for the benefit of federal enforcement officials than are other entities does not justify a policy of compensation for banks to the exclusion of other custodians. Compliance with a subpoena *duces tecum* will impose costs upon a third party custodian regardless of the nature of its business. A fair policy would compensate banks and all other custodians for their production costs. Such a rule satisfies principles of horizontal equity.<sup>48</sup>

Likewise, no reasonable basis exists for the contrasting policies of congressional largesse towards those who aid the tax collector and parsimony towards those who help the regulatory agency or the prosecutor. Both groups of custodians provide documents essential to the achievement of enforcement goals. The special preferences granted to financial institutions and recipients of IRS summonses reflect the difficulties that result when the issue of compensation is addressed in a piecemeal way.<sup>49</sup>

### *B. Disparate Treatment of Witnesses and Custodians*

Under the Witness Fee Statute, all witnesses appearing before federal courts and agencies are entitled to compensation for their expenses and time.<sup>50</sup> The disparate treatment of witnesses and custodians of documents cannot be justified as a matter of policy. From the govern-

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48. Pursuant to the principle of horizontal equity, the government should afford similar treatment to entities that are similarly situated with respect to the government. *Cf. Kampel v. Commissioner*, 634 F.2d 708, 715 & n.14 (2d Cir. 1980) (*dicta*) (stating that an employee and a partner of a commercial firm are not similarly situated so as to incur similar tax liability under principles of horizontal equity).

49. Judging from reported cases and common experience, banks are among the most frequent recipients of third party subpoenas and the IRS is the most frequent issuer of them in the domain of federal law. This concentration of costs and the lobbying activities that ensued, most likely explain congressional action to protect this class of custodians.

50. See *supra* notes 33-35 and accompanying text.

ment's perspective, there is no distinction that justifies generosity towards the witness but not towards the custodian. The government looks to both to provide essential components of the evidentiary record.<sup>51</sup> From the perspective of persons forced to produce evidence, costs are not a function of the form of the evidence demanded by the subpoena: the burden of collecting, reproducing, and transporting documents can be just as onerous and disruptive of one's normal activities as the giving of testimony.<sup>52</sup>

### C. *The Need for a Blanket Compensation Provision*

Although Congress is not constitutionally obligated to reimburse custodians who provide documents, a blanket compensation scheme should be provided as a matter of policy. Enactment of section 3415 of the Right to Financial Privacy Act and section 7610 of the Internal Revenue Code evinces Congress's perceived obligation to pay for the services that are exacted from private citizens by the federal government.<sup>53</sup> This statutory scheme has been shown to violate principles of horizontal equity insofar as it provides for unequal treatment of similarly situated entities.<sup>54</sup> Fairness requires that Congress compensate all third party custodians on equal terms.

A blanket compensation provision should provide for mandatory payment for all subpoenaed documents. Delegating the compensation decision to judicial discretion, presumably to be exercised in light of the facts and circumstances of particular cases, is not a satisfactory solution to the problem of third party subpoenas. Third party custodians are similarly situated vis-à-vis the government which requests documen-

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51. The government's need for documentary as opposed to testimonial evidence will often turn upon the nature of the case. Investigation of particular federal crimes, such as tax evasion and embezzlement, are likely to focus upon written evidence; others, such as extortion, will look more to testimony. Still others, such as an investigation of a price fixing scheme, might require testimony to establish the inception of the conspiracy, and documentary evidence to prove its operation and effects. Thus, from the government's perspective both forms of evidence are essential to enforcement activities and no justification exists for treating the witness and custodian differently.

52. See *supra* note 4.

53. The legislative history of the Witness Fee Statute evinces the government's obligation to provide witnesses just compensation for performance of their public duty:

The mere statement of the fact that the present fee for witnesses is \$2 per day, subsistence is \$4 per day, and the mileage is 5 cents per mile points up the present inadequacy of such amounts to fairly compensate the individual either for his time or expenses incident to his service as a witness. It is unreasonable to expect and require witnesses to attend court at a personal financial loss.

S. REP. NO. 187, 81st Cong., 1st Sess. 1, *reprinted in* 1949 U.S. CODE CONG. SERV. 1231, 1232. By the same reasoning, it is unfair to expect a third party custodian to produce documents for the benefit of the government at a personal financial loss.

54. See *supra* notes 43-49 and accompanying text.

tary evidence.<sup>55</sup> In addition, neither the differences between the particular enforcement activities for which the subpoenaed material is sought,<sup>56</sup> nor the particular public goal that the enforcement activity seeks to achieve,<sup>57</sup> nor the costs that arise from compliance with the subpoena<sup>58</sup> are factors worthy of consideration in deciding whether to compensate. Judicial discretion in an area where a per se rule would fairly allocate the burdens between the government and those it presses into its service encourages necessary litigation and squanders judicial resources.

Congress should extend the protection currently afforded to favored groups to all entities compelled to supply documents to federal officials and grand juries. The statute that presently compensates banks would be an acceptable model for such a blanket compensation provision.<sup>59</sup>

### CONCLUSION

The current federal means of compensating third parties who provide documents to the government in response to subpoenas is inadequate. Existing statutes do not apply to all custodians of documents. Discretionary compensation by courts is inadequate, because not all federal courts recognize their power to compensate custodians, and

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55. *Id.*

56. Notwithstanding the fact that certain enforcement activities may be of more pressing import to the public interest than others, the government is responsible for the achievement of those public concerns that the legislature elevates to the level of public law. It is the public treasury and not private pocketbooks that must finance the enforcement of those laws, regardless of the priority of the particular laws on the public agenda. Thus, if Congress declares that the unregistered entry of aliens into this country from its southern border should be completely foreclosed, but does not conclude that the public interest justifies the expenditure of sufficient resources to ensure the accomplishment of this goal, the government should not impose the duty to enforce the law upon the landowners along the border simply because they are conveniently situated to do so. By the same reasoning, the government that commands the production of evidence should pay for its production.

57. See text accompanying note 49.

58. None of the mandatory compensation statutes establish minimum levels of expenses that a custodian must incur before the government will award compensation, see *supra* notes 19, 22 & 33. Nonetheless, some courts denying reimbursement have occasionally remarked that the costs of production are small in relation to the assets of the custodian, see, e.g., *In re Grand Jury Subpoena Duces Tecum*, 436 F. Supp. 46, 51 (D. Md. 1977). Obviously, the burden of a particular expense will depend upon the financial resources of the custodian. A fair compensation policy, however, should simply award compensation as a measure of the costs actually incurred, just as the mandatory compensation statutes currently do, and should not allow the courts to tinker with intractable considerations of how much money expended for production is "reasonable" in light of the custodian's apparent ability to shoulder these costs.

59. The statute could provide as follows:

A government authority shall compensate any custodian of documents for such costs as are reasonably necessary and which have been directly incurred in searching for, reproducing, or transporting documents required or requested to be produced by the authority. This section will not apply when the custodian of the documents is the entity or person with respect to whose potential liability the documents are sought.

some courts do not extend compensation to all custodians as a matter of policy.

Congressional legislation requiring the compensation of all third party custodians of subpoenaed documents would be more fair. Such legislation would treat all custodians similarly, and would equitably spread the costs of Government litigation among all taxpayers. Statutory compensation of all custodians would prevent the waste of judicial resources and would abrogate the special treatment presently afforded certain influential groups of custodians.

—*Norman Gross*