University of Michigan Journal of Law Reform

Volume 13

1979

# The Right to Financial Privacy Act of 1978-The Congressional Response to *United States v. Miller*: A Procedural Right to Challenge Government Access to Financial Records

Nancy M. Kirschner

# THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978—THE CONGRESSIONAL RESPONSE TO *UNITED STATES v. MILLER*: A PROCEDURAL RIGHT TO CHALLENGE GOVERNMENT ACCESS TO FINANCIAL RECORDS

Nancy M. Kirschner*

The question of whether customer records maintained by a financial institution should be legally protected has been vigorously discussed, analyzed, and debated by legislators, judges, bankers, law enforcement officials, educators, and privacy advocates since 1973.[1] Interaction with one's bank is "not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account."[2] Thus, financial records are, in the words of Justice Douglas, a "virtual biography." That is, a person is defined by the checks he writes; banking transactions can indicate a person's "religion, ideology, opinions, and interest."[3]

Such a biography, however, may be a dangerously inaccurate reflection of an individual's life. One commentator cautions that the information in an individual's checking account may actually be a distorted mirror of his life. He stated, for example, that

> the amount of money that passes through my liquor store in my personal checks is no true reflection of the amount of liquor I consume (because I often cash checks there) nor is a check payable to a particular publisher evidence of my reading tastes (I buy gift subscriptions for others and sub-

* Attorney at Law, San Francisco, California. Member of the California Bar. B.A., 1970, Washington University, M.U.P., 1975, New York University; J.D., 1979, Rutgers University—Newark.

[1] *The Safe Banking Act of 1977, H.R. 9086, Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking Finance and Urban Affairs,* 95th Cong., 1st Sess., pt. 3, 1449 (1977) (statement of Congressman St. Germain) [hereinafter cited as *1977 House Hearings on the Safe Banking Act*].

[2] Burrows v. Superior Court, 13 Cal. 3d 238, 247, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974).

[3] California Bankers Ass'n v. Schultz, 416 U.S. 21, 85 (1974) (Douglas, J., dissenting).

scribe to publications for professional not personal reasons).[4]

It was not surprising that in 1977 the congressionally created Privacy Protection Study Commission (PPSC) stated that in the last ten years significant changes in technology and development in social and economic systems have changed the relationships between an individual, his financial institution, and the federal government. Nor was it surprising to learn that the collection of information about individuals enhances the government's authority and creates a danger of governmental abuse against which the Constitution seeks to protect citizens.[5]

Most Americans already knew that modern economic relationships are built on sophisticated systems involving third party payments[6] and that records kept in connection with these third party payments contained unprecedented detail about an individual. They were also aware that systems are automated so that the most current detail on the individual is both readily available and easily retrievable. What surprised many Americans was that the government freely avails itself of this information without notifying the person whose record it uses. Worse still, they learned that the United States Supreme Court ruled in *United States v. Miller*[7] that these records were the property of the financial institution and, thus, beyond the individual's control.

The transactional records which a checking account creates today are ones which formerly would have been kept in the exclusive possession of the individual. These records would have existed a century ago in the form of receipts or—at most—ledger entries. As long as the records remained in an individual's possession, the law recognized his right to control their use or disclosure, and the government in particular was restricted in its ability to gain access to them, even to facilitate a criminal prosecution.[8]

Prior to computer banking, the bank returned cancelled checks

---

[4] *Electronic Funds Transfer and Financial Privacy, S.2096, S.2293, S.1460, Hearings Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 2d Sess. 289 (1978) (statement of Robert Ellis Smith) [hereinafter cited as *1978 Senate Hearings on S.2096, S. 1460*].

[5] PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 3-4 (1977) [hereinafter cited as PERSONAL PRIVACY REPORT].

[6] The most typical example of third party payment is the personal check. The payor draws a check on his bank to pay the payee and the bank pays on presentment.

[7] United States v. Miller, 425 U.S. 435 (1976). For a brief discussion of *Miller*, see notes 52-59 and accompanying text *infra*.

[8] The Fourth Amendment of the United States Constitution states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ."

to the customer and retained only a record of the amounts. The monthly statement showed both the amounts and the dates. Once the banks returned the checks they had no way of knowing to whom those checks were paid or from where the deposits came. The bank's sole interest was in seeing that their books were balanced. Thus, the customer had in his possession the only copy of his cancelled checks and law enforcement authorities needed a search warrant to get them.

The Bank Secrecy Act[9] and the Supreme Court's ruling in *United States v. Miller*[10] changed this state of affairs. The Bank Secrecy Act, passed in 1970, was a well-intentioned effort to curb white collar crime, federal tax evasion, and the practice of "skimming."[11] It requires the institution to copy and to keep records of customer transactions. Under the Act, bankers are liable for not reporting unusual cash transactions. To protect themselves, bankers began to record and maintain records of all types of customer transactions.

In *Miller,* the Court ruled in favor of law enforcement needs in the banking area by holding that a bank customer has no standing to contest government access to his bank records.[12] This decision came only two years after the California Supreme Court had ruled in *Burrows v. Superior Court*[13] that financial records were protected by the California Constitution, which is identical in wording to the Fourth Amendment of the United States Constitution, and that a bank customer has a legitimate expectation of confidentiality in those records.

Efforts to enact financial privacy legislation began in 1973 after *Miller* held that the Bank Secrecy Act is constitutional. Support for reform was sparked by frightening accounts of governmental abuse of personal financial information made possible by the compulsory record-keeping requirements of the Act. Daily reports of Watergate, "black bag jobs," electronic surveillance, and "enemies lists" broadened public awareness of the problem and made such legislation politically feasible. Congressman Fortney Stark,[14] a former banker, led the fight for financial privacy legislation. According to Stark, the Bank Secrecy Act created a tremen-

---

[9] 12 U.S.C. §§ 1829(b), 1951-55 (1976); 31 U.S.C. §§ 1051-1122 (1976).

[10] 425 U.S. 435 (1976).

[11] "Skimming" is the practice of getting cash out of the gambling casinos and into secret foreign bank accounts, thereby avoiding taxes.

[12] 425 U.S. 435 (1976).

[13] 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

[14] Congressman Fortney H. Stark was the unsuccessful depositor plaintiff in California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974). For a discussion of *Schultz,* see notes 45-51 and accompanying text *infra.*

dous threat to privacy, particularly in light of the fact that bankers and their customers have developed a tradition of confidentiality which customers expect their bankers to honor.[15] With institutions maintaining such records the individual loses control over who might see or use them.[16]

In 1978, Congress passed the Right to Financial Privacy Act of 1978 as Title XI of the Financial Institutions Regulatory and Interest Control Act of 1978.[17] The Act creates a new concept for the protection of citizens from certain governmental investigations which are not part of a legitimate law enforcement inquiry. In effect, the Act tries to balance the needs of government against the need for individual privacy. "A delicate balance must be struck because the claims on both sides are legitimate."[18]

The right to financial privacy goes to the heart of the tension between an individual's right to conduct his business without governmental intrusion and the government's legitimate need for information in law enforcement. After enactment of the Bank Secrecy Act, the issue was addressed in two forums—in the courts and in Congress.

Balancing these needs is a difficult task at best. Indeed, it may not be possible to achieve such a balance at all. Unfortunately, Title XI does not meet the challenge. It appears to remedy the consequences of *Miller* but, in fact, does not. This article will review the factors leading to the *Miller* decision and the legislative response to that decision. Part I will examine the bank customer's expectation of privacy and the way *Miller* affects this expectation. Part II will discuss the congressional response to *Miller* and the competing interests which led to the Right to Financial Privacy Act. The Act itself will be discussed in detail in Part III. Part IV will evaluate the Act, and offer recommendations for reform. The article concludes that the Act, by adopting a purely procedural approach, fails to provide adequate protection to bank customers.

---

[15] *1977 House Hearings on the Safe Banking Act, supra* note 1, at 1462 (statement of Congressman Stark).

[16] *Id.*

[17] Pub. L. No. 95-630, §§ 1100-1122, 92 Stat. 3697-3710 (1978) (codified at 12 U.S.C.A. §§ 3401-3422).

[18] H.R. REP. No. 95-1383, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9375 [hereinafter cited as *Title XI: Right to Financial Privacy—Legislative History*].

## I. GOVERNMENT ACCESS TO BANK RECORDS: A CUSTOMER HAS NO LEGITIMATE EXPECTATION OF CONFIDENTIALITY

### A. *Bank Records and the Customer's Expectation of Confidentiality*

The customer's communications with his bank have often been characterized as "confidential."[19] Commercial bankers respect this confidentiality and impose strict internal restrictions on information gathering and dissemination by their employees. Customers expect the bank to honor in good faith the trust entailed by their relationship by refusing to disclose information concerning their financial affairs. There has, however, never developed a "banker-customer privilege" similar to the attorney-client or doctor-patient privilege. Bankers have never been legally privileged or immune from production of customer records. While bank records may be "confidential," they cannot be described as truly "private." The customer is concerned with the release of information, not with the right of the bank to collect transactional information.

The few courts that have dealt with the bank-customer relationship have recognized a bank's duty of confidentiality. Several courts found an implied contract which limited the bank from disseminating information relating to a depositor's account except either upon the express or implied consent of the depositor or in response to a valid court order or administrative summons.[20]

As a result, bank records, though never accorded explicit constitutional protection, were analogized to "private papers" protected by the Fourth Amendment.[21] The rationale for finding such a Fourth Amendment right had its origins in *Katz v. United States.*[22] *Katz* 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 unrea-

---

[19] *Right to Financial Privacy Act, S. 1343, Hearings Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 2d Sess. (1976) (statements of A. A. Milligan, Harold R. Arthur, and Lucille M. Creamer) [hereinafter cited as *1976 Senate Hearings on S.1343*]. *See also* LeValley & Lancy, *The IRS Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers,* 89 BANKING L. J. 979 (1972); PERSONAL PRIVACY REPORT, *supra* note 5, at 101.

[20] *See* Milohnich v. First Nat'l Bank, 224 So.2d 759 (Fla. Dist. Ct. App. 1969); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961).

[21] *See, e.g.,* Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975); Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974); Milohnich v. First Nat'l Bank, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961).

[22] 389 U.S. 347 (1967).

sonable searches and seizures.

*Katz*, however, did not address third party records and the alternate holding of the case was that what a person knowingly exposes to the public is not private and therefore is not entitled constitutional protection.[23] Thus, a communication the confidentiality of which is dependent upon a person not revealing its content to a third party ordinarily lacks Fourth Amendment protection.[24] Cancelled checks are not considered to be confidential communications and a bank customer would therefore lack standing to contest an order to the bank for their production.

The information contained in bank records, however, including where and how a person spends his money, could be considered the property of the customer. The courts which found a duty of confidentiality implied such a property right.[25] According to this interpretation, the information was held by the bank but the customer expected that the bank would not use it or convey it, other than in the course of its contractual relationship, without giving the customer notice of its release. Thus, the information was not truly "private" since the customer realized and in fact expected his bank to release it under certain circumstances. The customer, however, expected that he, not the bank, controlled the decision of to whom such records should be released.

### B. *The Bank Secrecy Act*[26]

In the late 1960's Congress became concerned with the unreported flow of currency into secret foreign bank accounts. Government investigators maintained that access to information contained in bank records was absolutely essential for effective law enforcement.[27] Voluntary record maintenance by banks, however, was frequently inadequate to provide the evidence sought by law enforcement officials. Thus, in 1970, Congress enacted the Bank Secrecy Act[28] authorizing the Secretary of the Treasury to pre-

---

[23] *Id.* at 351.

[24] *See* United States v. White, 401 U.S. 745, 749-52 (1971); Katz v. United States, 389 U.S. 347, 351 (1967). For a discussion of how this principle relates to the *Miller* decision see *United States v. Miller: Without a Right of Informational Privacy, Who Will Watch the Watchers?*, 10 J. MAR. J. PRACT. & PROC. 629, 637, 642-45 (1977). *See generally* Comment, *Government Access to Bank Records in the Aftermath of United States v. Miller and the Tax Reform Act of 1976*, 14 HOUS. L. REV. 636 (1977).

[25] *See* Milohnich v. First Nat'l Bank, 224 So.2d 759 (Fla. Dist. Ct. App. 1969); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961).

[26] 12 U.S.C. §§ 1829(b), 1951-55 (1976); 31 U.S.C. §§ 1051-1122 (1976).

[27] *1976 Senate Hearings on S.1343*, *supra* note 19, at 118 (statement of Richard L. Thornburgh), 127 (statement of Robert B. Fiske, Jr.), & 128 (statement of Samuel K. Skinner).

[28] 12 U.S.C. §§ 1829(b), 1951-55 (1976); 31 U.S.C. §§ 1051-1122 (1976); 31 U.S.C. §§

scribe regulations where he determines that the maintenance of appropriate types of records and other evidence by banks has a high degree of usefulness in criminal, tax, or regulatory investigations and proceedings.[29] The regulations[30] enacted imposed sweeping record-keeping and reporting requirements on domestic banks. Banks were required to report major currency transactions and extensions of credit;[31] to copy all checks (both front and back) in excess of $100.00;[32] to keep copies for five years;[33] to set up systems for tracing all large deposits for two years;[34] and to collect signature cards, social security numbers, and names and addresses of each account holder.[35]

The Bank Secrecy Act brought vigorous opposition. Bankers objected to being put in an impossible position between the legitimate needs of the government and the customer's desire for confidentiality.[36] They also charged that the costs of the recording requirements outweighed the law enforcement benefits and that the regulations were unduly burdensome.[37]

To many, the very idea of compulsory record-keeping threatened privacy, but Congress insisted that access to the records would be controlled by existing legal process.[38] Floor debate prior to enactment of the Act reveals that House members were under the clear impression that government access to bank records would be limited to enforceable subpoenas.[39] Even the Supreme Court, in upholding the record-keeping requirements of the Bank

---

1051-1122 (1976).

[29] 31 U.S.C. § 1053 (1976).

[30] Financial Recordkeeping & Reporting of Currency and Foreign Transactions, 31 CFR Part 103 (1978).

[31] *Id.* Operationally it was too expensive for banks to distinguish checks, and they routinely microfilmed all checks. *See generally 1976 Senate Hearings of S. 1343, supra* note 19, for information on the way banks operated under the Bank Secrecy Act.

[32] 31 CFR § 103.34(b)(3) (1978).

[33] 31 CFR § 103.36(c) (1978).

[34] 31 CFR § 103.34 (1978).

[35] *Id.*

[36] *See 1976 Senate Hearings on S. 1343, supra* note 19 (statements of A. A. Milligan & Lucile M. Creamer).

[37] *Id.*

[38] The Senate Banking Committee Report on the Bank Secrecy Act states: "Access by law enforcement officials to bank records required to be kept under this title would of course be only pursuant to a subpoena or other lawful process as is presently the case. The legislation in no way authorizes unlimited fishing expeditions on the part of law enforcement officials." S. REP. No. 91-1139, 91st Cong., 2d Sess. 5 (1970). Similar language appears in the House Report: "It should be borne in mind that records to be maintained pursuant to regulations of the Secretary of the Treasury will not be made automatically available for law enforcement purposes. They can only be obtained through existing legal process." H.R. REP. No. 91-975, 91st Cong., 2d Sess. 10 (1970).

[39] *See, e.g.*, 116 CONG. REC. 16963-64 (1970).

Secrecy Act, indicated that the Act was to be controlled by "existing legal process."[40]

### C. *Challenges to the Government's Right of Access to Financial Records*

The government's right of access to an individual's financial records was challenged in *California Bankers Association v. Schultz,*[41] *United States v. Miller,*[42] and *Burrows v. Superior Court*[43] in which the customer plaintiffs asserted that they possessed an expectation of privacy in the information contained in the records which would give them standing under the Fourth Amendment to contest production of those records. Two courts, the Court of Appeals for the Fifth Circuit and the California Supreme Court, reasoned that the information in bank records made them confidential communications and that a customer therefore had a right to receive notice of his bank's intention to release the records and that he had standing to contest an order served on the bank. The United States Supreme Court rejected this theory in *United States v. Miller*[44] and adopted a traditional possession analysis. The Court held in *Miller* that a customer has no protectible interest in records held by a third party and thus no standing to contest their release.

The first of the decisions concerning a depositor's right to contest release of his financial records by the bank arose in *California Bankers Association v. Schultz.*[45] The Court upheld the constitutionality of the Bank Secrecy Act, stating that the maintenance of detailed records pursuant to the Act did not violate a depositor's Fourth Amendment rights.

In *Schultz,*[46] several individual bank customers, a bank, the California Bankers Association, and the American Civil Liberties Union (ACLU) brought an action against the Secretary of the Treasury claiming that the Bank Secrecy Act and the regulations enforcing the Act were violative of the Fourth Amendment guarantee against unreasonable search and seizure. Plaintiffs contended that when a bank maintains records under statutory and regulatory compulsion it acts as a government agency and thereby effects a "seizure" of customer records. The Court re-

---

[40] California Bankers Ass'n v. Schultz, 416 U.S. 21, 52 (1974).
[41] 416 U.S. 21 (1974).
[42] 500 F.2d 751 (5th Cir. 1974), *rev'd,* 425 U.S. 435 (1976).
[43] 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).
[44] 425 U.S. 435 (1976). *See also* Fisher v. United States, 425 U.S. 391 (1976).
[45] 416 U.S. 21 (1974).
[46] *Id.*

jected the plaintiffs' argument, ruling that the mere maintenance by the bank of records which can only be disclosed pursuant to "existing legal process" is not an illegal search and seizure; the bank, it held, is a party to the transaction and not a neutral agent.[47] The Court dismissed as "premature" the plaintiff depositor's claim that the Act's record-keeping requirements undermined his right to challenge a third party summons[48] of his bank records.[49]

One commentator recognized that the issue presented in *California Bankers* was the point at which government seizure of records occurs.[50] Under the Bank Secrecy Act, government access to bank records involves a two-step procedure: first, the government requires the bank to copy customer checks, deposit slips, and other documents and, second, it orders the bank to hand over those records. *California Bankers* held that seizure does not occur at the record-keeping phase because the government has not yet acquired the records. When the government actually obtains the records, the customer's Fourth Amendment challenge to the third party summons is misplaced because the records are seized from the bank rather than from the customer himself. In dissent, Justice Marshall said of the majority's decision: "[T]he majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late."[51]

The Court's decision left the "seizure" question undecided. The Court of Appeals for the Fifth Circuit reached this question in *United States v. Miller*[52] when a bank customer challenged the government's right of access to his bank records. Mitchell Miller was indicted for various federal offenses in connection with the operation of a still. Prior to the indictment, agents from the Treasury presented grand jury subpoenas which were issued in blank by a clerk of the district court and completed by the United States Attorney's Office to the presidents of two banks where Miller maintained accounts. The banks did not advise Miller that the subpoenas had been served but ordered their employees to make the records available and to provide copies of any documents the agents desired. The documents supplied included all checks, deposit slips, two financial statements, and three

---

[47] *Id. But see* 416 U.S. at 95-96 (Marshall, J., dissenting).

[48] A third party summons is a summons issued to a party other than the subject for production of the subject's records.

[49] 416 U.S. 21, 56 (1974).

[50] *See* Comment, *supra* note 24, at 640-41.

[51] 416 U.S. 21, 97 (1974) (Marshall, J., dissenting).

[52] 500 F.2d 751 (5th Cir. 1974).

monthly statements. Subsequent to the indictment, Miller made a pre-trial motion to suppress the checks and bank records. He alleged that the grand jury subpoenas served on the banks were defective[53] and that the evidence was illegally seized in violation of the Fourth Amendment.[54]

The district court denied the motion. The records were introduced and they helped to establish three overt acts against Miller. On appeal, the Fifth Circuit Court of Appeals ruled that Miller was entitled to a new trial on the ground that the use of a defective subpoena to obtain copies of his bank records constituted an illegal search and seizure.[56] The court held that the government could not circumvent *Boyd v. United States*[56] by "first requiring a third party bank to copy all depositor's personal checks and then, with an improper invocation of legal process, call upon the bank to allow inspection and reproduction of these copies."[57] The court distinguished *California Bankers* on the ground that the Supreme Court, far from "proclaiming open season on personal bank records," had relied on the fact that access to the records was to be controlled by "existing legal process."[58] The subpoenas were thus defective and did not constitute adequate legal process. Since the rights of the depositor were threatened by the improper disclosure, the fact that bank officials cooperated voluntarily was deemed irrelevant.[59]

In *Burrows v. Superior Court*,[60] the plaintiff, an attorney, was suspected of misappropriating a client's funds. The police obtained a warrant to search his office. After seizing a number of documents, including check stubs, one of the detectives obtained copies of Burrows' financial statements from plaintiff's bank. The petitioner's motion to suppress those statements was denied and

---

[53] The subpoenas had been issued by the United States Attorney rather than a court, no return was made to a court, and the subpoenas were returnable on a date when the grand jury was not in session. *Id.* at 756-57.

[54] *Id.* at 756.

[55] *Id.* at 758.

[56] 116 U.S. 161 (1886). In *Boyd*, glass importers were convicted of violating the customs revenue laws by filing false invoices. Thirty-five cases of plate glass were seized and confiscated. On appeal claimants maintained the invoice upon which the forfeiture judgment was based violated the Fourth and Fifth Amendments. The United States Supreme Court agreed and ruled that the seizure or compulsory production of a man's private papers to be used against him is equivalent to compelling him to be a witness against himself. Thus, when the object of the search and seizure of a man's personal papers is to compel him to be a witness against himself, the search and seizure itself violates the Constitution.

[57] 500 F.2d 751, 757 (5th Cir. 1974).

[58] *Id.*

[59] *Id.* at 758.

[60] 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

he appealed. The California Supreme Court found a right of privacy protected by Article 1, § 13 of the California Constitution and held that a depositor had a "reasonable expectation that the bank would maintain the confidentiality of [his bank records]."[61] The court ruled that the police violated his (the depositor's) rights by obtaining these records without legal process.[62] The fact that the bank had a proprietary right to the records was not dispositive since disclosure by the depositor to the bank was made for the limited purpose of facilitating the conduct of his financial affairs. Thus, his expectation of privacy was not diminished by the bank's retention of a record of such disclosures and the bank's voluntary relinquishment of depositor's records did not constitute a valid consent by the depositor.[63] In a widely cited passage the California Court commented:

> [f]or all practical purposes the disclosures by individuals . . . [is] not entirely volitional since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. . . . To permit a police officer access to these records merely upon his request without any judicial control as to relevancy or other traditional requirement of legal process and to allow the evidence to be used in any subsequent legal prosecution against a defendant opens the door to a vast and unlimited range of very real abuses of police power.[64]

The following year the California Supreme Court extended *Burrows* in *Valley Bank of Nevada v. Superior Court,*[65] holding that a customer's expectation of privacy in his bank records gave him standing in a civil case to contest orders for their production.[66] The Court reasoned that the California Constitution protected a bank customer's right of privacy and that protection of his right should not be left to the election of third persons who may have their own personal reasons for permitting or resisting disclosure of confidential information received from others.[67] Therefore, the Court held that before confidential customer infor-

[61] *Id.* at 243, 529 P.2d 593, 118 Cal. Rptr. 169.

[62] *Id.* at 245, 529 P.2d 594-95, 118 Cal. Rptr. 170-71. The California Court also stated that "a bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to his bank will be utilized by the bank only for internal banking purposes." *Id.* at 593.

[63] *Id.* at 244-45, 529 P.2d at 594, 118 Cal. Rptr. at 170.

[64] *Id.* at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

[65] 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975).

[66] *Id.* at 657-58, 542 P.2d at 979-80, 125 Cal. Rptr. at 555-56.

[67] *Id.* at 656-57, 542 P.2d at 979, 125 Cal. Rptr. at 555.

mation may be disclosed, the bank must take reasonable steps to notify its customers of the pendency and nature of the proceedings and to afford the customer a fair opportunity to assert his own interest.[68] The result of this decision was not to bar access to bank records; rather, it gave the bank customer a proprietary interest in his bank records so that he could protect the confidentiality of those records.

The United States Supreme Court reversed the judgment of the Fifth Circuit Court of Appeals in *United States v. Miller*[69] and held that a bank customer had no legitimate expectation of privacy in the contents of checks and deposit slips. The Court reasoned that checks are not confidential communications but merely negotiable instruments containing information which Miller had voluntarily supplied the bank.[70] The Fourth Amendment, the Court stated, does not prohibit a third party from obtaining information and turning it over to the government. "The depositor takes the risk . . . that the information will be conveyed . . . to the government. . . ."[71]

Thus, the mere fact that the Bank Secrecy Act requires banks to maintain detailed financial records of customer transactions does not create a protectible interest in those records. The Court found that "unlike the claimant in *Boyd,* respondent could assert neither ownership nor possession [in the documents,[72] for] the records are the business records of the bank."[73]

Under the *Miller* doctrine the bank had no legal obligation to notify the customer of the government's request for information, and, even if Miller had been notified, he would not have had standing to contest their production. As one writer has explained, "the Court's general conclusion that the defendant had no due process rights whatever to object to his bank's disclosure of bank records remained true even in view of [*California Bankers*]."[74] The Court found that a bank customer had no reasonable expectation of privacy as a matter of law and therefore as a matter of law was not entitled to a vindication of rights he did not possess.[75] Thus, *Miller* put to rest any uncertainty concerning the government's access to bank records.

---

[68] *Id.* at 658, 542 P.2d at 980, 125 Cal. Rptr. at 556.
[69] 425 U.S. 435 (1976).
[70] *Id.* at 443.
[71] *Id.*
[72] *Id.* at 442-43.
[73] *Id.*
[74] *See* Comment, *A Bank Customer Has No Reasonable Expectation of Privacy of Bank Records: United States v. Miller,* 14 SAN DIEGO L. REV. 414, 432 (1977).
[75] *Id.*

## II. The Congressional Response to Miller: Procedural Right to Challenge Government Access

*Miller* states in effect that the government is not bound by the strictures of the Fourth and Fifth Amendments when it wants to acquire financial records held by a third party. By denying standing to a customer whose records had been seized, the Court denied the customer the right to enforce compliance with legal process.[76] John Shattuck, speaking on behalf of the ACLU, said, "[W]hile [the Court] does not approve informal access[77] to bank records, it refuses to recognize the only effective remedy to curb such access—[the] opportunity for the customer to protect his . . . own rights."[78]

Even before *Miller*, members of both houses of Congress recognized that the record-keeping requirements of the Bank Secrecy Act were being enforced in a manner Congress never intended.[79] Prompted by the availability of records maintained pursuant to the Act, the number of requests for records increased dramatically. Informal access became a matter of course.[80] In fact, Internal Revenue Service (IRS) investigators were encouraged to meet with and get to know banking officials to facilitate their investigations.[81] Bankers were under considerable pressure to comply with the informal requests. Banking officials either failed to recognize they had a right to refuse compliance or were unwilling to fight access on behalf of a customer in the courts.[82]

---

[76] Personal Privacy Report, *supra* note 5, at 20.

[77] Informal access is access without authorization by subpoena, warrant, or other judicial supervision.

[78] *1977 House Hearings on the Safe Banking Act, supra* note 1, at 22 (statement of John Shattuck).

[79] *See generally Bank Failures, Regulatory Reform, Financial Privacy Hearings on H.R. 8024 Before the Subcomm. on Financial Institutions, Supervision Regulation and Insurance of the House Comm. on Banking, Currency and Housing*, 94th Cong., 1st Sess. at 526-28 (statement of Congressman Edward Koch), & 543 (statement of Congressman Fortney H. Stark) (1975) [hereinafter cited as *1975 House Hearings on Bank Failures, Regulatory Reform, Financial Privacy*]; *1976 Senate Hearings on S.1343, supra* note 19, at 39-42 (statement of Congressman Fortney H. Stark).

[80] *Id.*

[81] Int. Rev. Man. § 937(12), MT 9300-49 (2/19/75); *1976 Senate Hearings on S.1343, supra* note 19, at 165 (statement of Hope Eastman); interview with Harold J. Mortimer, Vice President, First National State Bancorporation, Newark, New Jersey, April 3, 1979 [hereinafter cited as Mortimer Interview].

[82] *1976 Senate Hearings on S.1343, supra* note 19, at 165. *See also* Mortimer Interview, *supra* note 82. *See generally 1976 Senate Hearings on S.1343, supra* note 19, at 44-112.

### A. *Foundation for Financial Privacy Legislation*

The Treasury Regulations[83] implementing the Bank Secrecy Act became effective in 1972, just as publicity was being given to the government's abuses of personal privacy through domestic surveillance, electronic eavesdropping, the existence of "enemies lists," and manipulation of income tax investigations. Civil libertarians feared that individuals targeted for investigation for illegitimate reasons, such as political dissidence, might face additional exposure because of access to financial records.

Congress responded to public concern for financial privacy legislation in several ways. Between 1973 and 1978 no fewer than five separate House and Senate subcommittees held hearings on the issue.[84] In 1974, pursuant to section 5 of the Privacy Act,[85] Congress created the Privacy Protection Study Commission (PPSC) to study the possibility of extending the principles of the Privacy Act to private institutions. The Commission was directed to study data banks, automatic data processing programs, and information systems of governmental, regional, and private organizations in order to determine the standards and procedures in force for personal protection of private information. The Commission's 650 page report, *Personal Privacy in an Informational Society,* was submitted to the President and Congress on July 12, 1977. On the basis of the study, the Commission was asked to report on such legislative recommendations as the Commission might determine to be necessary to "protect the privacy of individuals while meeting the legitimate needs of government and society for information."[86]

Coincidentally, *Miller* was decided as the Commission was conducting its initial hearings. Commissioners later said that *Miller* underscored the lack of meaningful safeguards for the individual when government seeks access to records about him.[87] The impli-

---

[83] 31 CFR Part 103 (1978).

[84] Hearings were held in the 1975 House Subcommittee on Financial Institutions Supervision, Regulation and Insurance, 94th Cong., 1st Sess. on H.R. 8024, pts. 1, 2, 3 (1975); the 1976 House Subcommittee of the Committee on Government Operations House of Representatives, 94th Cong., 2d Sess. (1976); the 1976 Senate Subcommittee on Financial Institutions of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 94th Cong., 2d Sess. on S.1343 (1976); the 1977 House Subcommittee on Financial Institutions Supervision, Regulation and Insurance, House of Representatives, 95th Cong., 1st Sess., pt. 3 (1977); and the 1978 Senate Subcommittee on Financial Institutions, United States Senate, 95th Cong. 2d Sess. (1978).

[85] 5 U.S.C. §§ 551-576 (1976). The Act limits the use and misuse of personal information by the government.

[86] PERSONAL PRIVACY REPORT, *supra* note 5, at xv.

[87] FINANCIAL PRIVACY 1979, A CAPITAL REPORTS, INC. COMPLIANCE HANDBOOK, Washington Credit Letter Privacy Report (ed.), Commentary by Milton W. Schober, Stephen M.

cations of *Miller* "crystallized their thinking"[88] on the urgent need for strong federal legislation to limit disclosures of information.

The law as it existed in 1977 gave the individual no leverage to protect his privacy. The Commission urged strong corrective federal legislation which would give a "legally enforceable expectation of confidentiality" in customer records.[89] This expectation of privacy would have two complementary but distinct elements: (1) an enforceable duty of the record-keeper which preserves the record-keeper's ability to protect itself from improper actions by the individual but otherwise restricts its discretion to disclose a record about him voluntarily; and (2) a legal interest of the individual in his record which he can assert to protect himself against improper or unreasonable demands for disclosure by the government.[90] At no time did the Commission recommend giving the individual complete unilateral control of his financial records.

Another major congressional reaction to the government access question was the passage of the Tax Reform Act of 1976,[91] which raised tax returns to confidential status for the first time. In the case of a third party summons, that Act gave taxpayers or other persons to whom the summoned records pertain the right to receive notice of the summons from the Internal Revenue Service (IRS) within three days of issuance. It also gave standing to challenge enforcement of the summons.[92] The Act provided for reimbursement to the banks for the costs of searching, preparing, reproducing, and transporting customer records and for the cost of retaining counsel to review the sufficiency of their response to the IRS request for customer records.[93]

There is no evidence that the notice and standing requirements of the Tax Reform Act of 1976 have impeded either federal tax collection or law enforcement efforts. Furthermore, bankers maintained that the reimbursement requirement of the 1976 Act had several positive effects.[94] First, it substantially decreased the

---

Szekely, Capitol Reports, Inc., Washington, D.C. at 7 (1979) [hereinafter cited as FINANCIAL PRIVACY HANDBOOK] (on file with the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM).

[88] *Id.*

[89] PERSONAL PRIVACY REPORT, *supra* note 5, at 20.

[90] *Id.*

[91] I.R.C. §§ 7609-7610.

[92] *Id.* § 7609.

[93] *Id.* § 7610. Richard Fischer, counsel for Crocker National Bank in California, testified before a House subcommittee that "where they [IRS] were serving 150 to 200 summonses a month, they are now serving 25." *1977 House Hearings on the Safe Banking Act, supra* note 1, at 1514.

[94] *1977 House Hearings on the Safe Banking Act, supra* note 1, at 1488-1502 (statement of Richard Fischer).

number of requests for customer records.[95] Second, after the effective date of the statute, IRS summonses were drafted more precisely and were much narrower in scope. "The difference is," said one commentator, that "someone is responsible for determining how much value those records actually have in a particular investigation."[96]

### *B. Impetus for Federal Financial Privacy Legislation: The Recommendations of the Privacy Protection Study Commission*

While the Tax Reform Act of 1976 addressed the privacy concerns of bank customers in regard to IRS summonses, it left customers unprotected from all other government agencies. The findings of the PPSC confirmed the fears of those who had suspected widespread government abuse of customer financial records. Not only was the customer often not notified of an investigation into his financial affairs, but even when he was, he was unable to challenge access. Furthermore, once a government agency obtained information from a third party record about an individual, there was virtually no control of its circulation within the government. After the PPSC study was released, Senator Mathias said at the 1977 hearing, "Without such Congressional action what recourse is there for someone who wants to keep his financial records private? Is he to abandon the bank in favor of a stuffed mattress?"[97]

The Commission's approach to the government access issue had four objectives: first, to fill the constitutional void that *Miller* laid bare without unduly encumbering legitimate government access to third party records about individuals; second, to provide a strong safeguard for the individual in those record-keeping situations where they are demonstrably needed, *i.e.*, where constitutional protections for individual liberty and autonomy have been circumvented by changes in the character and technology of personal data record-keeping; third, to keep third party record-keepers from being induced to hand over to the government voluntarily that which the government could otherwise obtain only through compulsory legal process; and fourth, to avoid a course of action that would delay and thus increase the cost of government access without affording the individual any new substantive protections.

---

[95] *Id.*
[96] *Id.*
[97] *Id.* at 1513-14.

California law[98] was the model for the Commission's recommendations. It recognizes an individual's legitimate expectation of privacy and thus provides a protectible interest[99] in his bank records. The Commission recognized that two issues had to be addressed if federal legislation was to be as effective as the California law: first, "voluntary" disclosure of information by third party record-keepers had to be limited by creation of a duty not to disclose information about an individual except in certain explicit circumstances; and second, the individual had to be provided with a legally recognized interest that he could assert in order to protect records about himself when government sought to acquire them from a third party.[100]

The Commission recommended creation of a "reasonable cause" standard, a somewhat lower standard than the California requirement of "probable cause."[101] The government agency requesting the record would have to establish reasonable cause to believe the record was relevant to prosecution of a violation of law. The Commission said that "[w]hile appreciating the efficiency arguments of law enforcement agencies, [it did] not believe that convenience alone should control policy judgments when individual rights are at issue."[102]

### C. *Legislative Debate on Financial Privacy*

The concept of a financial privacy act was introduced in 1973.[103]

---

[98] California Governmental Access to Financial Records, Cal. Gov't Code §§ 7460-7490 (Deering) (1976). The Commission read this statute as interpreted by the California Supreme Court in *Burrows* and *Valley Bank* to mean that government must show that probable cause exists to compel production of bank records and that government may not request and receive an individual's records without employing legal process unless the customer consents. *Personal Privacy Report, supra* note 5, at 350-51 & 356-63. *See 1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 593-612 (statement of privacy protection study commission submitted by Carole A. Parsons).

[99] *See* note 240 and accompanying text *infra.*

[100] The Personal Privacy Report stated:

> [W]ithout such a protectible interest in his records, an individual given notice, standing, and the right to challenge a government request for his records would have little basis for any real challenge, other than to snipe at the facial validity of a summons or subpoena and to question government's adherence to the proper procedural path. A grant of such procedural defense would not really recognize the privacy interest of the individual . . . procedure alone gives the individual no tool to protect himself.

*Personal Privacy Report, supra* note 5, at 352.

[101] *Id.* at 363.

[102] *Id.* at 391.

[103] *1975 House Hearings on Bank Failures, Regulatory Reform, Financial Privacy, supra* note 79, at 543 (statement of Congressman Fortney H. Stark) & 526 (statement of Congressman Edward Koch). For a history of the legislation, see *1978 Senate Hearings on S.2096, S.1460, supra* note 4.

Early advocates pushed for repeal of the Bank Secrecy Act and adoption of strong federal legislation which would "establish a policy without ambiguity that one's bank records are simply an extension of one's personal papers protected by the Fourth Amendment."[104] That is, the advocates urged that bank records should not be released without a showing of probable cause to believe a crime had been committed.[105]

As the debate matured, the bills were revised and re-revised to make the legislation politically more acceptable. Some bills exempted grand jury process while others exempted state and local officials. Some provided procedural safeguards while others recognized a legally protected expectation of confidentiality. Bills were introduced which included all third party records. Others covered only bank records. The debate was heated and the lines of support were sharply drawn.

Federal bank supervisory agencies generally supported the principle of an individual's right to financial privacy as long as that right did not inhibit the agencies' supervisory and enforcement functions.[106] Civil libertarians and bankers also endorsed legislation to prohibit disclosure of customer financial records.[107]

Civil libertarians believed that the *Miller* decision seriously threatened First, Fourth, and Fifth Amendment rights.[108] They urged passage of a statute that would guarantee the customer the same interest in bank records as if those records were in his sole possession.[109] Such a statute would (1) prohibit informal access by federal, state, and local government agencies; (2) provide a customer with timely notice of the proposed inspection; (3) provide a mechanism for judicial review of government requests for financial records at which the customer would have full standing to contest the relevancy, constitutionality, and legality of access; and (4) create criminal and civil remedies, including damages and return of all copies of improperly obtained bank records so as to deter and punish violations of law.

In contrast to the civil libertarians, bankers did not advocate a Fourth Amendment right in customer bank records. Their

---

[104] *Id.*

[105] Senator Cranston acknowledged that this was the toughest position one could take on the issue. *1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 317.

[106] *See, e.g.*, letter of George A. Le Maiste, Chairman, Federal Deposit Insurance Corporation, *reprinted in 1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 415.

[107] *See 1976 Senate Hearings on S.1343, supra* note 19 (statement of Hope Eastman); *1977 House Hearings on the Safe Banking Act, supra* note 1 (statement of John Shattuck); *1978 Senate Hearings on S.2096, S.1460, supra* note 4 (statements of Robert Ellis Smith & Jeremiah S. Gutman).

[108] *Id.*

[109] *Id.*

major concern was that under present law bankers were caught between the legitimate needs of government seeking information pertaining to illegal or criminal activities and the equally legitimate interest of bank customers who wanted them to protect customer privacy.[110] Bankers endorsed legislation which would establish procedural safeguards and would shift liability for improper disclosure and the costs of compliance from the financial institution to the government.[111]

The strongest opposition to any financial privacy legislation came from state and federal law enforcement agencies. Financial records had become a precious tool for all law enforcement officers. State and local officials were successful in having state agencies exempted from many of the legislative proposals. They argued that a uniform national policy would not only violate federalism but would also be counterproductive because there were significant differences between federal and state criminal justice systems.[112] Only a state legislature, they claimed, was in a position to design procedures for disclosure which would "fit" with the investigatory and subpoena powers available to law enforcement officials in a particular state.[113]

Prior to 1977, federal law enforcement officials steadfastly opposed any financial privacy legislation. Officials of the Departments of Justice and the Treasury maintained that there was no privacy interest, constitutional or otherwise, of sufficient scope to support any restrictions on governmental access to financial records.[114]

The law enforcement officials believed the procedural safeguards of notice and standing to contest access would give criminals sufficient time to flee or to destroy evidence.[115] Of greatest concern to the Justice Department were provisions dealing with restrictions on access of federal grand juries to financial records. They attacked provisions which would give customers notice

[110] *1976 Senate Hearings on S.1343, supra* note 19 (statements of A.A. Milligan & Lucille Creamer); *1977 House Hearings on the Safe Banking Act, supra* note 1 (statement of Richard Fischer & Morris F. Miller); *1978 Senate Hearings on S.2096, S.1460, supra* note 4 (statement of American Bankers Association).

[111] *Id.*

[112] *See, e.g., 1976 Senate Hearings on S.1343, supra* note 19 (statement of Peter Zimroth); *1978 Senate Hearings on S.2096, S.1460, supra* note 4 (statement of Thomas D. Rath).

[113] *Id.*

[114] As one federal official stated: "[T]he privacy interest . . . is far outweighed by the critical need of the government for such records in the legitimate pursuit of white collar and organized crime and official corruption." *1976 Senate Hearings on S.1343, supra* note 19, at 118 (statement of Richard L. Thornburgh).

[115] *See, e.g., 1976 Senate Hearings on S.1343, supra* note 19 (statements of Richard L. Thornburgh, Robert B. Fiske, Jr., & Samuel K. Skinner).

and standing to challenge the grand jury's access to third party records and which would place restrictions on the use of financial records "for any purpose other than the specific statutory purpose for which the information was originally obtained."[116]

Testifying on behalf of the 94 U.S. Attorneys, Samuel K. Skinner, U.S. Attorney for the Northern District of Illinois, said that, if enacted, the Act would seriously hamper the government's ability to detect and prosecute white collar crime and other crimes involving concealment of financial transactions.[117] The U.S. Attorneys had four objections: (1) the Act would unduly delay investigations; (2) it would destroy secrecy and the ability of the U.S. Attorney's office to get witnesses to cooperate; (3) disclosure would permit subornation of perjury; and (4) it would create the risk of privacy which would be counterproductive to the privacy interests of grand jury witnesses.[118]

Until 1977 the Departments of Justice and the Treasury were successful in keeping financial privacy legislation in the congressional subcommittees. But, in June 1977, Congressman John Cavanaugh, junior member of the House Committee on Banking, Finance and Urban Affairs, introduced a bill with both Democratic and Republican co-sponsors.[119] The bill conformed very closely to the Privacy Protection Study Commission's report, and was based on the same two key principles: that the customer be given prior notice of the government's attempt to gain access to bank records and that the customer be given the opportunity to contest government access in court.[120] Cavanaugh was successful in having the bill added to the massive bank regulatory bill pending in the Banking Committee's Financial Institution's Subcommittee.[121]

The Cavanaugh bill was substantially different from previous privacy bills. The legislation went through an evolutionary process to address the objections of law enforcement officials. In the beginning the subcommittee members believed that there was a constitutional right to financial privacy and that any intrusion should be based on the standard of probable cause that a crime had been committed.[122] The bill allowed an intrusion with a stan-

[116] *Id.*

[117] *1976 Senate Hearings on S.1343, supra* note 19 (statement of Samuel K. Skinner).

[118] *Id.*

[119] *Title XI: The Right to Financial Privacy—Legislative History, supra* note 18, at 9306.

[120] *Id.*

[121] *Id.*

[122] *See, e.g., 1976 Senate Hearings on S.1343, supra* note 19, at 39-44 (statement of Congressman Fortney H. Stark); *1975 House Hearings on Bank Failures, Regulatory Reform, Financial Privacy, supra* note 79, at 564 (statement of Congressman Edward Koch).

dard for seeking information "relevant to a legitimate law enforcement inquiry"[123]—a standard substantially below the probable cause standard.

While spokesmen for the Justice Department still warned that notice and standing would impede investigations, they took no position on the Cavanaugh bill. When it was clear that there was solid bipartisan support for the Financial Privacy bill, the Justice and Treasury Departments introduced their own proposal which gave customers a well-defined statutory right of privacy. Yet substantial differences between the Justice-Treasury draft bill and the Cavanaugh bill blocked any compromise between the House subcommittee and the Administration.[124]

As the legislative history reveals however, when it became apparent that the Financial Institutions Regulatory and Interest Control Act of 1978 had a good chance of passage, the Departments of Justice and of the Treasury lobbied intensively in an eleventh hour effort to make substantial changes.[125] These changes were embraced in the so-called Cavanaugh-LaFalce substitute bill. The substitute was offered to the full House committee and was rewritten in the course of a morning's work.[126] Controversy over the substitute focused on three areas: (1) whether the title should apply to grand jury process; (2) which party should be required to go to court first to challenge the release of financial records; and (3) when notification should be provided to the party whose financial records are being sought.[127]

The compromise amendments tightened and clarified the proposal. Cavanaugh's bill as finally reported out of the full committee provided for "prior notification" to the customer of the expected release of records and standing to challenge the release in court.[128] At the urging of the Justice Department, a "healthy set of exceptions" to the prior notification requirement was carved out.[129]

The compromises that were worked out substantially weakened the protections the Privacy Commission considered essential. A customer was not given a protectible interest in his financial records; instead, he was given a procedural right to challenge their

[123] 12 U.S.C.A. § 3401(7) (1978).

[124] Officials of the Departments of Justice and of the Treasury threatened to recommend presidential veto if their proposal was not adopted. FINANCIAL PRIVACY HANDBOOK, *supra* note 87, at 12.

[125] *Id.*

[126] *Title XI: The Right to Financial Privacy—Legislative History*, *supra* note 18, at 9374.

[127] *Id.*

[128] *Id.*

[129] *Id.*

release on the grounds that the records sought were not relevant to a legitimate law enforcement inquiry or that there had not been substantial compliance with the provisions of the Act. The customer had the burden of going forward; the government had the burden of proof. Congressman McKinney argued that the average citizen would now be faced with "a condition of taking on the whole U.S. Government. . . ."[130]

While the committee recognized that grand jury practices needed reform, they were persuaded that "the Banking Committee was not the place to do it."[131] Grand jury procedures were completely exempted from the notice and standing provisions of the final Act.

The Right to Financial Privacy Act,[132] Title XI of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, was enacted in the last days of the 1978 congressional session. The Act was signed on November 10, 1978, and became effective March 10, 1979.

Subsequent to passage, but prior to the Act's effective date, Congress voted to repeal the summary notification provision.[133] That provision would have required every creditor and financial institution to give all past and present customers with both active and dormant accounts a one-time summary notification of customer rights.[134] Not until the new Act was passed did the financial industry estimate that the cost of such compliance would approach one billion dollars. The estimates showed that some 75 million households would receive an average of twelve separate notices under the Act "at a time when [a customer] would have little or no use for it."[135] Congress reevaluated the provision and found that since the Act required a government agency to give notice when it seeks access to specific records, an individual would not be damaged by repeal of the summary notice provision.[136]

---

[130] H.R. REP. No. 95-1383, 95th Cong., 2d Sess. 237, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9367 [hereinafter cited as H.R. REP. No. 95-1383].

[131] *Title XI: The Right to Financial Privacy—Legislative History, supra* note 18, at 9376.

[132] 12 U.S.C.A. §§ 3401-3422 (1978).

[133] House—S.37 Repeal of Section 1104(d) of Pub. L. No. 95-630, 96th Cong., 1st Sess., 125 CONG. REC. H902, 906-07 (daily ed. February 27, 1979).

[134] 12 U.S.C.A. § 3404(d) (1978).

[135] House—S.37 Repeal of Section 1104(d) of Pub. L. No. 95-630, 96th Cong., 1st Sess., 125 CONG. REC. H902, 904 (daily ed. February 27, 1979).

[136] *Id.*

## III. THE RIGHT TO FINANCIAL PRIVACY ACT

### A. *Overview of the Act's Provisions*

The Act prohibits federal agencies from obtaining access from a financial institution to records concerning customers except through procedures set forth in the law. The term "financial institutions" includes all banking-type institutions as well as credit card issuers and consumer finance agencies.[137] "Customers" are limited to individuals or partnerships of five or fewer individuals.[138] Corporations, associations, larger partnerships, or other entities are not covered. "Financial records" means any original, copy of, or "information known to be derived from" a record pertaining to a customer's relationship with a financial institution.[139] Financial records or information not identifiable with a particular customer are excepted, as is basic account information.[140] The "information known to be derived from" language was inserted to prevent conscious circumvention of the Act.[141]

Under the Act, federal authorities may obtain access to a customer's financial records only in connection with a "legitimate law enforcement inquiry."[142] This is a new concept which is broadly defined as "a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute or any regulation, rule or order issued pursuant thereto."[143] The statute as passed differs substantially from prior proposals which contemplated a much stronger showing as a prerequisite to obtaining the records of the financial institution. The "legitimate law enforcement inquiry" concept "seeks to afford protection against obtaining individuals' financial records for improper purposes, without interposing a barrier to effective law enforcement."[144]

### B. *Procedures for Access*

Access to financial records is prohibited unless either permitted by one of the exceptions to the Act, *e.g.*, grand jury subpoena or

---

[137] 12 U.S.C.A. § 3401(1) (1978).

[138] 12 U.S.C.A. § 3401(4)-(5) (1978).

[139] 12 U.S.C.A. § 3401(2) (1978).

[140] 12 U.S.C.A. § 3413(g) (1978).

[141] The definition of financial records applies not only to written records but to oral disclosures of information known to have come from financial records. FINANCIAL PRIVACY HANDBOOK, *supra* note 87, at 19.

[142] 12 U.S.C.A. §§ 3405(1), 3407(1), 3408(3), 3409(a)(2) (1978).

[143] 12 U.S.C.A. § 3401(7) (1978).

[144] Givens, *The Law on the Right to Financial Privacy*, 181 N.Y.L.J. 2 (1979).

procedures;[145] customer authorization,[146] administrative summons or subpoena,[147] search warrant under the Federal Rules of Criminal Procedure,[148] judicial subpoena,[149] or "formal written requests," where no administrative summons or subpoena authority reasonably appears available.[150]

Under the customer authorization provision, customers may authorize access to identified records by giving written approval for a period of no more than three months. Such authorization is revocable at any time before the records are disclosed.[151] The financial institution is required to keep records of the agencies to which customer authorization is granted.[152] The Act does not specify who is required to give the financial institution the authorization, *i.e.*, whether the customer himself must give written authorization to the institution or whether government officials may simply submit proof of authorization.

Current law governing search warrants is not changed, but the government must notify the customer of the search within ninety days after execution of the warrant unless a court ordered delay is obtained pursuant to the federal statute.[153] Judicial and administrative summonses and subpoenas are judicially enforceable government demands for records authorized by some other provision of law.[154] Grand jury subpoenas are excepted.[155] The "formal written request"[156] is a new procedure which has been severely criticized. It is designed to allow governmental authorities which do not have authority to issue administrative summonses or subpoenas, *e.g.*, the FBI and the U.S. Attorney, to request records formally. This provision is intended to replace the former practice of informal access with a procedure which includes notice and challenge rights. Unlike the administrative process, a formal written request is a noncoercive form of process and the financial institution may refuse compliance.

Before records are obtained, a supervisory official of the government authority must certify to the financial institution that the authority has complied with all applicable provisions of the

---

145 12 U.S.C.A. § 3420 (1978).
146 12 U.S.C.A. § 3404 (1978).
147 12 U.S.C.A. § 3405 (1978).
148 12 U.S.C.A. § 3406 (1978).
149 12 U.S.C.A. § 3407 (1978).
150 12 U.S.C.A. § 3408 (1978).
151 12 U.S.C.A. § 3404(a)(2) (1978).
152 12 U.S.C.A. § 3404(c) (1978).
153 12 U.S.C.A. § 3406 (1978).
154 12 U.S.C.A. §§ 3405, 3407 (1978).
155 12 U.S.C.A. § 3420 (1978).
156 12 U.S.C.A. § 3408 (1978).

Act.[157] Financial institutions and their employees are absolved from civil liability for any improper disclosure if such disclosure was based on good faith reliance of the certificate.[158] The three forms of process, administrative, judicial subpoena, and formal written request, require that unless a delay of notice order is obtained, the government agency seeking the record must notify the customer and give him the following: (1) a description of the records being sought; (2) a statement of the general purpose of the inquiry; and (3) an explanation of the procedure by which a customer may challenge access in court.[159] The government must provide the customer with a copy of the process, a blank motion, and affidavit forms for filing in court.[160] The appropriate court in which a customer challenge may be filed must be listed in the notice.[161] Venue is governed by 28 U.S.C. § 1391(e) for administrative process and formal written requests and by 12 U.S.C. § 3410(a) for judicial subpoenas.[162]

### C. *Customer Challenges*

Within ten days of service or fourteen days following mailing (not receipt) of customer notice, the customer may file a motion seeking to prevent access.[163] To prevail, a customer must show that there is reason to believe that the records sought are not relevant to any "legitimate law enforcement inquiry" or that there has not been "substantial compliance" with the Act. The mere filing of a customer challenge action precludes governmental access to financial records until the matter is finally adjudicated.[164]

If the court finds that the required showing has been made, the government bears the burden of proving it is entitled to access.[165] It must show merely that there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry within the jurisdiction of the investigating agency.[166] The test for relevance is broad and encompasses anything that might be used as evidence or might lead to evidence. Put simply, the govern-

---

[157] 12 U.S.C.A. § 3403(b) (1978).
[158] 12 U.S.C.A. § 3417(c) (1978).
[159] 12 U.S.C.A. §§ 3405(2), 3406(b)-(c), 3407(2) (1978).
[160] *Id.*
[161] *Id.*
[162] 12 U.S.C.A. § 3416 (1978). *See also* 28 U.S.C. § 1391(e) (1976); 12 U.S.C.A. § 3410(a) (1978).
[163] 12 U.S.C.A. § 3410(a) (1978).
[164] 12 U.S.C.A. § 3410(c) (1978).
[165] 12 U.S.C.A. § 3410(b)-(c) (1978).
[166] *Id.*

ment need show only that the investigation is not "conducted solely for the purposes of political harassment or intimidation or otherwise in bad faith."[167] The "substantial compliance" language is intended to insure that minor technical violations of the Act are not the basis for denial of access.[168]

The government's showing may be submitted solely to the court and not the customer if reasons are given which make such *in camera* review appropriate.[169] Factors meriting *in camera* review might include the same circumstances that justify the delay of notice, namely, danger to life or safety of any person; flight from prosecution; destruction of or tampering with evidence; and intimidation of potential witnesses or otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding.[170] Justice Department officials and subcommittee members agreed that the phrase "seriously jeopardize an investigation or trial" is to be read narrowly and that it refers to circumstances which might reveal the identity of the target of the investigation (if the target was not the customer), the identity of an informant, or which might result in improper discovery by the defendant.

The Act recognizes the need to expedite customer challenges: all challenge proceedings are to be decided within seven calendar days of the filing of the agency's response.[171] Denials of challenges are not final orders and no interlocutory appeals are permitted.[172] Subsequent appeals from a challenge ruling may be brought as part of an appeal.[173] Because of the restriction on interlocutory appeals, the agency must notify the customer of a final order on any legal proceedings brought against him based on the records or it must advise him that no legal proceeding against him is contemplated.[174] The effect of an appeal after access is already accomplished, however, is unclear.

The judicial remedies set forth in the Act are expressly stated to be exclusive,[175] and a customer is limited to challenges based on relevance and the agency's lack of substantial compliance with the procedural requirements of the Act.[176] The customer is prohib-

---

[167] *See* 124 CONG. REC. H11,737 (daily ed. Oct. 5, 1978) (statement of Representative Edward Pattison).

[168] H.R. REP. No. 95-1383, *supra* note 130, at 9355 (Section-by-Section Analysis).

[169] 12 U.S.C.A. § 3410(b) (1978).

[170] 12 U.S.C.A. § 3409(a)(3) (1978).

[171] 12 U.S.C.A. § 3410(b) (1978).

[172] 12 U.S.C.A. § 3410(d) (1978).

[173] *Id.*

[174] *Id.*

[175] 12 U.S.C.A. § 3410(e) (1978).

[176] 12 U.S.C.A. § 3410(e)-(f). *See also* 12 U.S.C.A. § 3410(a) (1978).

ited from asserting any defenses of the financial institution.[177] For example, the customer may not object to access on the grounds that the request is overbroad, vague, or unduly burdensome.[178]

### D. *Duties of the Financial Institution*

Financial institutions are obligated to assemble the records requested even during the pendency of the customer challenge proceedings.[179] They are permitted reimbursement for the costs incurred in complying with the government's requests for the records.[180] The Board of Governors of the Federal Reserve System is to establish a fee schedule to cover "reasonably necessary costs which have been directly incurred in searching for, reproducing or transporting. . ." the data required.[181]

### E. *Use and Transfer of Information*

The Act sets new restrictions upon the transfer of financial records between federal departments and agencies.[182] Financial records may be transferred only after an official of the transferring agency certifies in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry of a receiving agency.[183] Within fourteen days after any transfer, the customer must be notified unless in connection with the original access or at the time of the transfer the government has obtained a court-ordered delay pursuant to 12 U.S.C. § 3409.[184] These transfer restrictions apply to any *inter*-agency transfer; departmental transfers (*e.g.*, FBI to the U.S. Attorney, within the Justice Department) are permitted without post-notification.[185] Subsequent *use* of the information, however, is governed by the statute.[186] Notification to the customer that copies of or information contained in his financial records are furnished to other governmental agencies is required for transfers between federal departments; it does not restrict transfers to or from state and local officials.[187]

---

[177] 12 U.S.C.A. § 3410(f) (1978).
[178] 12 U.S.C.A. § 3410(e)-(f) (1978). *See also* 12 U.S.C.A. § 3410(a) (1978).
[179] 12 U.S.C.A. § 3411 (1978).
[180] 12 U.S.C.A. § 3415 (1978).
[181] *Id.*
[182] 12 U.S.C.A. § 3412 (1978).
[183] 12 U.S.C.A. § 3412(a) (1978).
[184] 12 U.S.C.A. § 3412(b) (1978).
[185] 12 U.S.C.A. § 3412(a) (1978).
[186] 12 U.S.C.A. § 3413(h)(4) (1978).
[187] 12 U.S.C.A. §§ 3412(a), 3401(3) (1978).

### F. *Exceptions*

The legislative history accompanying the Act reports that "any fears of unnecessary governmental restriction should be put to rest by the healthy set of exceptions that have been carved out in the Act."[188] Indeed, some critics charged that the exceptions render the Act nearly nugatory.[189] There are both exceptions[190] and exemptions.[191] Some of the exemptions are standing procedures, and financial institutions are expected to be aware of them and honor them. In other cases, government officials must present a compliance certificate to the institution certifying that the information is being sought in compliance with the law.

1. *Grand Jury Exception*—The single most important exception is the exception for federal grand jury subpoenas.[192] Section 3420 requires that financial records obtained by grand jury subpoena shall be "returned and actually presented" to the grand jury.[193] The records must be destroyed or returned to the financial institution if not used in connection with the return of an indictment, a criminal prosecution, or a purpose permitted by Rule 6(e) of the Federal Rules of Criminal Procedure,[194] governing secrecy and disclosure in grand jury proceedings. Financial records subpoenaed by a grand jury must be kept separate from other grand jury materials and used only in connection with obtaining an indictment, prosecution of the indicted offense, or a purpose authorized by Rule 6(e) of the Federal Rules of Criminal Procedure.[195]

2. *Litigation Exception*—The Act does not apply when records are sought through the Federal Rules of Criminal or Civil Procedure, or in connection with any judicial or administrative proceeding to which the customer and the government authority are parties.[196] Thus, even when the customer is a plaintiff against

---

[188] *Title XI: The Right to Financial Privacy Act—Legislative History, supra* note 18, at 9375.

[189] *See 1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 581 (statement of Jeremiah S. Gutman), 587 (statement of David Linowes), & 613 (statement of Robert Ellis Smith). *See also* Palmer & Palmer, *Complying with the Right to Financial Privacy Act of 1978*, 96 BANKING L. J. at 196-98 (1979).

[190] Exceptions are instances where the normal procedures controlling government access are either wholly or partially inapplicable. *See* 12 U.S.C.A. §§ 3413, 3414, 3420 (1978).

[191] Exemptions are instances where the Act's provisions controlling government access do not apply. For example, the Securities and Exchange Commission is exempt from the provisions of the Act for a period of two years. *See* 12 U.S.C.A. § 3422 (1978).

[192] 12 U.S.C.A. § 3420 (1978).

[193] 12 U.S.C.A. § 3420(1) (1978).

[194] 12 U.S.C.A. § 3420(4) (1978).

[195] 12 U.S.C.A. § 3420(2) (1978).

[196] 12 U.S.C.A. § 3413(e)-(f) (1978).

the government, financial records in the possession of federal agencies may be obtained without prior notice.

*3. Account Identification Information Exception*—In certain specified instances, government officials are allowed, without notice to the indvidual, to obtain and transfer basic account identification information for a specific customer or an ascertainable group of customers.[197] More specific inquiries are permitted as to an account number associated with a particular financial transaction, *e.g.*, a check forgery or a class of transactions, as well as of accounts associated with a foreign country.[198]

*4. Foreign Intelligence and Secret Service Protective Function Exception*—The notification provisions of the Act do not apply to those government authorities authorized to conduct foreign intelligence or Secret Service activities.[199] These officials are only required to certify to the financial institution that they have complied with the applicable provisions of the Act,[200] and the financial institution is prohibited from disclosing to the customer that such an investigation is being conducted.[201] The Act requires government investigators to compile an annual tabulation of the occasions in which this exception was used.[202]

*5. Emergency Access Exception*—Government access to financial records is not restricted by the Act in narrowly defined emergency situations where delay would create imminent danger of physical injury, serious property damage, or flight from prosecution.[203] Such records may be obtained only upon presentation of a certificate of compliance.[204] Within five days of access, the government must file in court a statement by the supervisory official justifying use of the emergency access provision.[205] Unless a court order delaying notice is obtained, the agency must notify the customer of the access as soon as is practicable.[206]

*6. Disclosures by Financial Institutions*—Institutions are permitted to notify the government of possible violations of law.[207] They may not turn over records but may give sufficient account identification information, dates of transactions in question, and

---

197 12 U.S.C.A. § 3413(g) (1978).
198 FINANCIAL PRIVACY HANDBOOK, *supra* note 87, at 50-51.
199 12 U.S.C.A. § 3414(a)(1) (1978).
200 12 U.S.C.A. § 3414(a)(2) (1978).
201 12 U.S.C.A. § 3414(a)(3) (1978).
202 12 U.S.C.A. § 3414(a)(4) (1978).
203 12 U.S.C.A. § 3414(b)(1) (1978).
204 12 U.S.C.A. § 3414(b)(2) (1978).
205 12 U.S.C.A. § 3414(b)(3) (1978).
206 12 U.S.C.A. § 3409(c) (1978).
207 12 U.S.C.A. §§ 3403(c), 3413(h)(5) (1978).

such other information as to enable government officials to investigate the suspected offense.[208]

7. *Where a Financial Institution Is a Target*—Where the institution is a target of an investigation, the government is allowed access to financial records without notice to the customer whose record is requested.[209] Such a customer record may not be used against the customer unless the regular access provisions of the Act are first employed.[210] The government must serve a certificate of compliance on the institution before records may be obtained through this exception.[211]

8. *Bank Supervisory Agency Exception*—The following agencies are listed as "supervisory agencies": the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board, the National Credit Union Administration, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Securities and Exchange Commission, the Secretary of the Treasury (with respect to the Bank Secrecy Act), and any state banking or securities agency or department.[212] These agencies have free access to financial records when they are performing supervisory functions[213] and they are permitted to exchange examination reports and other information with each other.[214]

9. *General Accounting Office (GAO) Exception*—The GAO is excepted under 12 U.S.C. § 3413(j).

10. *Internal Revenue Service (IRS) Exception*—Administrative summonses issued by the IRS are also excepted.[215] These summonses are covered by IRC § 7609.

11. *Required Report Exception*—Financial information required to be reported by statute or regulation (*e.g.*, Bank Secrecy Act compulsory reporting requirements) is excepted and may not be withheld by the financial institution.[216]

12. *Financial Records Pertinent to Federally Insured Guaranteed Loans Exception*—The Act excepts agencies which administer federal loan programs from the notice and challenge provisions where customers are recipients of government loans and the

---

[208] 12 U.S.C.A. § 3413(g) (1978).
[209] 12 U.S.C.A. § 3413(h)(1)(A) (1978).
[210] 12 U.S.C.A. § 3402 (1978). *See also* 12 U.S.C.A. §§ 3413(h)(1)(A), (h)(4) (1978).
[211] 12 U.S.C.A. § 3413(h)(2) (1978).
[212] 12 U.S.C.A. § 3401(6) (1978).
[213] 12 U.S.C.A. § 3413(b) (1978).
[214] 12 U.S.C.A. § 3412(d) (1978).
[215] 12 U.S.C.A. § 3413(c) (1978).
[216] 12 U.S.C.A. § 3413(d) (1978).

records pertain to the administration of those loans.[217] Before obtaining such customer records, the government agency must certify compliance to the bank[218] and the bank must keep a record of all instances in which such access was granted.[219]

*13. Securities and Exchange Commission (SEC) Exemption*—The SEC is expressly exempted from the Act until November 10, 1980.[220]

### *G. Remedies*

Government agencies and financial institutions are liable to customers for damages sustained due to violations of the Act.[221] Recovery is one hundred dollars minimum damages for each violation regardless of the volume of records involved.[222] That means that if a financial institution improperly discloses customer records on two occasions, the institution is liable for a minimum of two hundred dollars even if each violation involved several hundred documents. In addition to the minimum damages, the Act provides for actual damages,[223] punitive damages,[224] and reasonable attorney's fees[225] for the successful customer plaintiff. Injunctive relief is also authorized.[226]

Financial institutions and their employees and agents are absolved from liability for acting upon the good faith reliance of a government certificate of compliance.[227] There is no liability of individual government officials for damages, but the Civil Service Commission is authorized to determine whether disciplinary proceedings are warranted for willful violations of the Act, and the administrative authority is required to take the corrective action recommended by the Civil Service Commission.[228]

### *H. Reporting Requirements*

The Act establishes various reporting requirements. The Director of the Administrative Office of the United States Courts is

[217] 12 U.S.C.A. § 3413(h)(1)(B) (1978).
[218] 12 U.S.C.A. § 3413(h)(2) (1978).
[219] 12 U.S.C.A. § 3413(h)(6) (1978).
[220] 12 U.S.C.A. § 3422 (1978).
[221] 12 U.S.C.A. § 3417(a) (1978).
[222] 12 U.S.C.A. § 3417(a)(1) (1978).
[223] 12 U.S.C.A. § 3417(a)(2) (1978).
[224] 12 U.S.C.A. § 3417(a)(3) (1978).
[225] 12 U.S.C.A. § 3417(a)(4) (1978).
[226] 12 U.S.C.A. § 3418 (1978).
[227] 12 U.S.C.A. § 3417(c) (1978).
[228] 12 U.S.C.A. § 3417(b)-(d) (1978).

required to file an annual report of the number of applications for delays and customer challenges made in the preceding year.[229] The report, which must be filed with the appropriate congressional committees, must include the identity of the government authority requesting a delay of notice, the number of notice delays sought, and the number granted.[230] In addition, the government authority that requests access under the Act must report to Congress the number of requests for access made during the preceding year.[231]

## IV. EVALUATION AND RECOMMENDATIONS FOR REFORM OF THE ACT

In evaluating the Act, it is important to keep in mind why it was enacted. Advocates of financial privacy legislation sought to achieve several objectives: to fill the void created by *United States v. Miller*[232] without unduly encumbering legitimate government access to third party records about individuals; to provide strong safeguards for the individual in a record-keeping situation where the constitutional protection for individual liberty and autonomy have been circumvented by changes in the character and technology of financial data record-keeping; to create a system which would provide a "paper trail" to identify by whom, why, and by what authority an individual's records have been examined; to keep third party record-keepers from being induced to voluntarily furnish the government what it could otherwise obtain only through compulsory legal process; and to avoid a course of action that would delay and thus increase the cost of government access without affording the individual any new substantive protections.[233] Unfortunately, the Act does not meet these objectives.

As the legislative history reveals, Title XI is a decidedly pro-government statute which fails to give customers adequate privacy protection.[234] What is required is a better balance between the three separate interests affected by the Act, namely, those of the customer, those of the financial institution, and those of gov-

[229] 12 U.S.C.A. § 3421(a) (1978).

[230] *Id.*

[231] 12 U.S.C.A. § 3421(b) (1978).

[232] 425 U.S. 435 (1976). For a discussion of *Miller*, see notes 69-75 and accompanying text *supra*.

[233] *1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 602 (statement of Privacy Protection Study Commission submitted by Carole W. Parsons on "The Recommendations of the Privacy Protection Study Commission"), & 149 (joint statement of Congressmen Ned Pattison and Barry M. Goldwater).

[234] *See* notes 119-31 and accompanying text *supra*.

ernment law enforcement officials.

The 1978 Act is really a modified version of the Justice-Treasury proposal. New substantive rights advocated by the Privacy Protection Study Commission were replaced by a procedural right to challenge the relevancy of the records sought to the law enforcement "inquiry," and the government's "substantial" compliance in seeking access. Some Congressmen charged that the compromise was one-sided.[235] Commentators in the financial industry and advocates of personal privacy called the Act a decidedly pro-government statute.[236]

Thus, it is not surprising that the Act fails to give customers adequate protection. Nor is it surprising that the provisions which affect the financial institutions subject those institutions to civil liability and impose additional record-keeping requirements on them. Such compromises were required by the Department of Justice and the Treasury. Without them, say supporters, the Act would not have been passed.[237]

If the fundamental purpose of the Act is to permit customers to challenge the government's access when their records are sought for improper or illegitimate reasons, the critical question is whether this can be accomplished in the face of the procedures established to protect those legitimate investigations.[238] The former chairperson of the PPSC warned Congress that rejection of the PPSC's recommendations and adoption of the Justice proposal would seriously threaten individual privacy.[239] The Act as passed does not insure the customer with the Commission's recommended "legal expectation of confidentiality" in his financial records.[240] A citizen whose privacy has been violated by improper access to his records has no inherent right of privacy on which to base a cause of action.[241] By failing to create a private right of action for the individual whose financial records are sought by the

---

[235] H.R. Rep. No. 95-1383, *supra* note 130, at 9366-67 (additional remarks of Congressman Stewart B. McKinney).

[236] *See generally 1978 Senate Hearings on S.2096, S.1460, supra* note 4 (additional statements).

[237] *See* notes 119-31 and accompanying text *supra.*

[238] Givens, *supra* note 144, at 2.

[239] *1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 588 (additional statement of David L. Linowes).

[240] In the 1977 House hearings on the Safe Banking Act, Senator Charles Mathias advocated the individual be given a proprietary right in personal records held by a third party. The Commission has called this proprietary right an individual's "protectible interest" in his personal records. *1977 House Hearings on the Safe Banking Act, supra* note 1, at 1515.

[241] *See generally 1978 Senate Hearings on S.2096, S.1460, supra* note 4 (comments by David L. Linowes, Carole W. Parsons, & Jeremiah S. Gutman on the compromise version of the S.2096 financial privacy bill).

government, the bill fails to incorporate the essential element of the legal mechanism which the Commission believed essential.[242] Without this right of action no citizen can be certain that his personal privacy interests will be fairly weighed against the government's need for information about him.[243] Unquestionably, the failure to insure a legal expectation of confidentiality in an individual's financial records is the most serious defect of the Act.

Moreover, the limited protection afforded individual customers under the Act is denied other bank customers. Protection is limited to individuals and partnerships of five or fewer individuals who utilized or are utilizing a financial service.[244] Earlier versions of the legislation protected all customers, *i.e.*, individuals, partnerships, corporations, trusts, and other legal entities.[245] It is unreasonable to cut off the rights provided by Title XI on the basis of the number of individuals in a partnership or on the form which a group of individuals chooses for its business.[246] Clearly, the definition of "customer"[247] should be broadened to include all customers. Furthermore, the term should likewise apply to any person "who has applied" to utilize a financial service.

Several other safeguards the PPSC believed essential were amended out of the Act and some provisions which the PPSC warned were dangerous to privacy protection were incorporated into the compromise bill.[248] Specifically, the three provisions of

---

[242] *Id.*

[243] *1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 593-94 (statement submitted by Carole W. Parsons).

[244] 12 U.S.C.A. § 3401(4)-(5) (1978).

[245] Letter of Leland S. Prussia, Vice Chairman and Cashier, Bank of America, to Congressman Harold J. Johnson, re: H.R. 13471—The Financial Institutions and Regulatory Act of 1978, dated September 12, 1978, attachment A, at 4 [hereinafter cited as *Prussia letter*] (letter on file with the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM).

[246] *Id.*

[247] A "customer" is defined by the Act as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name." 12 U.S.C.A. § 3401(5) (1978).

[248] Specifically, the Privacy Protection Study Commission was concerned about the following provisions:

> [G]rand jury subpoena, whose use as an investigative tool has been extended considerably over the years, is exempt totally from the Justice Department's bill. That is, there is no requirement for notice, no standard for issuance, no opportunity to challenge its validity, and no procedure for reporting the number or nature or these subpoenas.
>
> The standard under which government agencies are authorized to issue an administrative subpoena or summons, or court subpoena—"relevant to a legitimate law enforcement purpose"—is not sufficiently well-defined to inform the record subject of the nature of his alleged misconduct. There is no requirement that the records in question be described in the subpoena or summons.
>
> The Act enables government agencies that do not have statutory ability to issue

Title XI which drew the strongest criticism from the PPSC and civil libertarians[249] were: (1) the exception of grand jury subpoenas;[250] (2) the institutionalization of informal access through the formal written request;[251] and (3) the customer challenge provisions.[252]

The exemption of the grand jury from the Act[253] is perhaps the most serious omission. From the outset, the question of whether to make grand jury process subject to the notice and standing requirements stirred great controversy. Law enforcement officials who fought vehemently for the grand jury exclusion argued throughout the hearings that the grand jury is the single most effective investigative tool in criminal law enforcement and that nothing should impede grand jury investigations. They maintained that grand jury practices were subject to judicial oversight

---

> administrative subpoenas or summonses to acquire this authority by internally promulgated regulations. This broad grant of authority to administrators could be a subversion of the subpoena or summons requirement. If Congress considers that an agency should have powers of compulsory process, it would grant those powers. [T]he standard of relevance to a legitimate law enforcement purpose—loose as it is—would not even be reviewable by an independent judicial body prior to its issuance.
>
> The criteria for delaying notice to a bank customer that his records are being subpoenaed include a catch-all type of provision—"otherwise jeopardizing an investigation or official proceeding"—that could virtually negate the requirement of notice.
>
> The right of the record subject to challenge a summons or subpoena is severely limited. It requires the customer to present *factual* evidence that the records being sought are not being sought to obtain information relevant to a legitimate law enforcement purpose. It is almost impossible to prove a negative and particularly hard when the standard is so vague. Furthermore, placing this burden on the customer flies in the face of the more traditional practice of making the State establish its case first. This practice grew up early in our history from an understanding that the resources of the State substantially outweighed those of an individual, and that the consequences to an individual of criminal prosecution made it necessary to weight the protections of the judicial system in his favor.
>
> The provision permitting the government agency to respond *in camera* to a successful showing by a bank customer that the subpoena is invalid, makes it impossible for the customer to learn the basis for denial of his claim. Here again, the individual cannot assert his position adequately in the absence of critical information—most likely information about himself.
>
> Finally, [the PPSC was] concerned about the exemption of foreign intelligence agencies from subpoena, notice, or other procedures, particularly because there are no internal procedures required to determine the validity of requests, and no requirements on record keepers to so much as to verify the identity of the requestor or the validity of the request.

*1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 588-90 (statement of David L. Linowes).

[249] *1978 Senate Hearings on S.2096, S.1460, supra* note 4 (additional statements).

[250] 12 U.S.C.A. § 3420 (1978).

[251] 12 U.S.C.A. § 3408 (1978).

[252] 12 U.S.C.A. § 3410 (1978).

[253] 12 U.S.C.A. § 3420 (1978).

and, even if the system is in need of reform, a banking act was not the place to reform it.[254]

Yet, by exempting grand jury process, the Act "pretend[s] the grand jury is something other than it really is."[255] The grand jury today is not an independent investigatory body subject to judicial scrutiny but, rather a mere investigative auxilliary of the prosecutor. Historically, the grand jury's broad powers to investigate alleged criminal conduct were justified only because they were balanced by the traditional requirements of strict secrecy. Today, secrecy with respect to recorded information has been eroded to the point that government attorneys and investigators have ready access to it. In essence, the grand jury subpoena may be little more than an investigative tool used to circumvent the stringent requirements of a search warrant.[256] Financial institutions are currently required to deliver documents to government prosecutors without notice to customers either before of after delivery. Unjustifiable invasions of privacy are just as likely or unlikely in the context of a grand jury investigation as in any other law enforcement investigation.

Nor are the arguments for exemption persuasive. If grand juries are in need of reform, and especially if grand jury process is being abused, it does not follow that grand jury process should be exempt from the basic safeguards of the Act. "Grand jury efforts will not be unduly curtailed by requiring them to utilize one of the procedures for access provided by Title XI."[257]

A second area of controversy concerns the new "non-coercive" administrative procedure, the formal written request.[258] Critics warned that this procedure provides access to all government agencies who did not formerly have such power and gives all government agencies an investigative arm.[259] One banker has estimated the Act opens access to approximately 140 administrative

[254] *See 1976 Senate Hearings on S.1343, supra* note 19 (statement of Richard L. Thornburgh); *1977 House Hearings on the Safe Banking Act, supra* note 1 (statement of Russell T. Baker); *1978 Senate Hearings on S.2096, S.1460, supra* note 4 (statement of Benjamin R. Civiletti).

[255] *1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 585 (statement of Jeremiah S. Gutman).

[256] *1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 590 (statement of David L. Linowes). *See also* United States v. Miller, 425 U.S. 435 (1976). The record shows that bank records obtained by Treasury agents may never have been presented to the grand jury which was the only body with a legitimate right to see them.

[257] *Prussia letter, supra* note 245, attachment A, at 5. Title XI is codified at 12 U.S.C.A. § 3408 (1978).

[258] 12 U.S.C.A. § 3405 (1978). *See* note 248 and accompanying text *supra.*

[259] *1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 582 (statement of Jeremiah S. Gutman), 588 (statement of David L. Linowes), & 637-38 (statement of James Brown).

agencies.[260] The new procedure gives those agencies which do not presently have statutory authority to issue administrative subpoenas or summonses the authority to acquire this power. Agencies may now promulgate rules governing the issuance of administrative summonses.[261] Until Title XI, Congress specifically failed to give many agencies the powers of compulsory process. The Act eliminates the distinction between those with and those without such power, and gives investigatory power to all federal agencies. If Congress deemed some agencies not sufficiently significant to be given subpoena power, the Act's broad delegation of such authority is indefensible.[262]

Law enforcement officials have defended the procedure, saying it both provides privacy protection and does not violate the Fourth Amendment.[263] They maintain that it is subject to the notice requirements and standing grants, and that it is "non-coercive," in the sense that an institution may refuse to honor the request.[264] In practice, however, the ability of the institution to decline to comply may be of limited value as privacy protection. The statute[265] puts the financial institution in a difficult position. Before it can comply, the institution must determine that: (1) there is no administrative subpoena or summons authority available; (2) the request is authorized by regulations (and each agency has its own internal regulations); and (3) there is reason to believe the records sought are relevant to a law enforcement inquiry. If it does comply and the agency did not have the required authority, the financial institution may be liable to the customer for improper release of records. If a bank officer does not comply, there may be serious conflicts within the institution because the institution may be subject to regulation by the very agency seeking records of its customers. Institutions can be expected to comply regularly since compliance is the least challengeable way for an institution to insulate itself from liability.

The new form of access vests too much authority in administrative agencies. Agencies should not be permitted to determine whether or not they need subpoena power. Each agency which

[260] Lecture to the Banking Law Seminar by Harold J. Mortimer, Vice-President, First National State Bankcorporation, at Rutgers Law School, Newark, New Jersey, April 3, 1979.

[261] 12 U.S.C.A. § 3408(2) (1978).

[262] *1978 Senate Hearings on S.2096, S.1460, supra* note 4 (statements of David L. Linowes & Jeremiah S. Gutman).

[263] *See generally 1976 Senate Hearings on S.1343, supra* note 19 (statements of Richard L. Thornburgh, Robert B. Fiske, Jr., & Samuel K. Skinner).

[264] *Id.*

[265] 12 U.S.C.A. § 3408 (1978).

wants such power should first be required to show the purposes for which the information is sought. The broad authorization of section 3408 should be repealed and Congress should decide on a case-by-case basis which of the government authorities do, in fact, need such power.

The customer challenge provisions[266] will probably generate the greatest dissatisfaction to individuals. Customers who are notified that their records are being sought are likely to believe that their privacy has been invaded. If they decide to challenge access, they will find themselves forced into the difficult task of trying to prove a negative. They will find that the grounds which they may raise are limited to "relevancy" and "substantial compliance." Moreover, if they are successful in making the required prima facie showing, they will find limited opportunity to obtain information about the inquiry because of the time constraints (seven days for challenge proceedings and the provision for an *in camera* hearing).

The challenge procedure itself is also defective. A customer must challenge government access by going to court.[267] Earlier versions of the Act gave the customers the same right as if the records were in his possession.[268] At that point the government could go to court to demonstrate the reasonable relationship of the record being sought to the law enforcement activity. The Act now requires a customer challenging the government to file a motion to quash the subpoena or summons or to file an application to enjoin the government from obtaining financial records pursuant to a formal written request within fourteen days of the mailing of the notice.[269] The motion must state why the records are not relevant to a legitimate law enforcement inquiry or in what way the government has failed to comply with the statute.[270] Moreover, the customer must pay filing fees to challenge access.[271] Finally, the customer must make a prima facie showing that the investigation is not undertaken for legitimate law enforcement purposes or that the government has not substantially complied with provisions of the Act.[272]

It is unreasonable to require the customer to object by legal action while the government is entitled to seek records by infor-

---

[266] 12 U.S.C.A. § 3410 (1978).

[267] 12 U.S.C.A. § 3410(a) (1978). *See also* 12 U.S.C.A. § 3410(e) (1978).

[268] *1976 Senate Hearings on S.1343, supra* note 19, at 9, 108, & 168.

[269] 12 U.S.C.A. § 3408(4)(B) (1978).

[270] 12 U.S.C.A. § 3410(a) (1978).

[271] The fee recently went from $15.00 to $60.00. Legislation has been introduced to reduce the fee to $5.00. 125 CON. REC. H8645-46 (daily ed. Sept. 27, 1979).

[272] U.S.C.A. § 3410(c) (1978).

mal procedure rather than judicial subpoena.[273] The Act should be amended so that the customer may simply file written objections to the agency's access to his financial records. The burden would then be shifted to the government which would have to demonstrate a legitimate need for information.

To challenge access, the customer has only two options. The first is to attack the stated objective of the inquiry on its face.[274] That, however, will be almost impossible since "legitimate law enforcement inquiry" is broadly defined. The agency can reply that the objective is to find out whether or not a particular type of transaction occurred and that it should not be compelled to take the customer's word that it did not. The statute does not require probable cause or reasonable suspicion that the records will show a violation of law; mere relevance is all that need be shown.[275] Furthermore, 12 U.S.C. § 3410(b), which permits the government to respond to a successful showing *in camera*, makes it impossible for the customer to learn the basis for denial of his claim or to assert his position adequately. The statute should be amended to require the government to make a showing that an adversarial proceeding would be dangerous to an individual, or to show similar compelling reasons.

The other approach for a customer who believes that a request for records has an illegitimate objective is to charge "discriminatory selectivity," *i.e.*, that political, religious, or other constitutionally protected activities led to the investigation, or that the agency is discriminating on invidious grounds such as an ethnic basis. The customer will have difficulty supporting charges of selective discrimination in light of the seven day time limit on challenges after the agency response is submitted. A customer might ask the court to find the agency response inadequate, in which case the agency would have to elect to give more information or allow the court to decide on the basis of the original response.

Former federal prosecutor Richard Givens believes some of the tensions in the Act could be resolved by providing the customer with a greater opportunity to acquire more information to challenge access.[276] Givens has suggested that since the difficulties which confront a customer attempting to block access are formidable, increased attention should be given to false statements

---

[273] *1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 583 (statement of Jeremiah S. Gutman).

[274] 12 U.S.C.A. § 3410(a)(2) (1978).

[275] 12 U.S.C.A. §§ 3405(1), 3407(1), 3408(1), 3409(a)(2) (1978).

[276] Givens, *supra* note 144, at 2.

made by investigatory authorities in connection with access, as both to initial assertions concerning the legitimacy and nature of the investigation and to responses to customer challenges.[277] He suggests three possible remedies: (1) criminal prosecution of officials involved where unlawful intent can be shown; (2) civil suits for damages against the agency based on an inference that use of false statements violates the Act (suits against individual officials are prohibited); and (3) efforts to suppress the fruits of access where false statements were utilized.[278] These "illegal fruits" cases can be analogized to searches based on false affidavits filed in support of search warrants.[279]

The Act suffers from other weaknesses. State and local officials are not covered—only federal law enforcement authorities are subject to the Act.[280] There is no reason to believe inclusion of all law enforcement officials in the Act will violate the principles of federalism. The failure to include state and local authorities not only creates a tremendous opportunity for abuse, but it inhibits the growth of uniform rules for regulating government access to financial information.

Presently, the Act permits state and local law enforcement officials to be used as "sub-agents" of federal agencies.[281] Federal officials can ask state authorities to obtain customer records which are protected by the notice and standing requirements of the Act. Those same records could be transferred by state officials to federal investigators so as to avoid compliance with the Act. Although this would appear to be a clear violation of the Act, there is no statutory prohibition against the practice. While the Act's definition of a financial record ("information known to be derived from")[282] suggests such transfers would be illegal, this is not enough. Language should be added to explicitly prohibit intergovernmental transfers of protected information. Furthermore, criminal sanctions should be available as an alternate or addi-

---

[277] *Id.*

[278] *Id.*

[279] *See, e.g.*, Franks v. Delaware, 438 U.S. 154 (1978), in which the Court ruled that where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in support of a warrant, the defendant is entitled to a hearing. If at the hearing the defendant is able to establish the alleged perjury or reckless disregard by a preponderance of the evidence and, with the false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the evidence must be excluded as fruits of an illegal search.

[280] 12 U.S.C.A. § 3401(3) (1978). *See also* 12 U.S.C.A. § 3402 (1978).

[281] "[S]tate and local officials may act as tipsters and advise federal officials where to look for information but federal agencies must still use the procedures to obtain the information." FINANCIAL PRIVACY HANDBOOK, *supra* note 87, at 21.

[282] 12 U.S.C.A. § 3401(2) (1978).

tional means to assure compliance.[283]

Other criticisms of the Act include the delay of notice provision[284] and the emergency access provision.[285] The broad language in the former permits delayed notification for reasons that "would otherwise seriously jeopardize an investigation or proceeding or unduly delay a trial."[286] Critics contend that this provision could virtually negate the notice requirement.[287] On the other hand, the emergency access provision is tied to a vague standard, namely, "if the government authority determines."[288]

Two of the Act's exceptions create different privacy threats. Those are the intelligence exception and the SEC exception. The intelligence exception is especially anachronistic in the post-Watergate period. There is also no reason to except the SEC from the notice and challenge provisions of the Act. The SEC is simply another investigatory agency and should be subject to the Act's provisions.

The Act as it applies to financial institutions fails to take them out of that middle position between the legitimate needs of the government and the customer's desire for confidentiality. Since the government is not required to deliver a copy of the subpoena or summons to the financial institution—a certificate of compliance is all that is required[289]—the bank is unaware of what the government has told the customer concerning the nature of the investigation and the identity of the records.[290]

Even if the institution would not be liable if it acted on the good faith reliance of the certificate, the goodwill of the bank which is so important to the banking business might be damaged. Bankers traditionally have respected customer confidentiality and point out that information once disclosed is no longer confidential. Moreover, the bank is never advised that a customer has challenged access.

Title XI also puts unreasonable burdens on the financial institution. The responsibility for record-keeping and customer notifi-

---

[283] Givens, *supra* note 144, at 2.

[284] 12 U.S.C.A. § 3409 (1978).

[285] 12 U.S.C.A. § 3414(b) (1978).

[286] 12 U.S.C.A. § 3409(a)(3)(E) (1978).

[287] *1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 589 (additional statement of David L. Linowes).

[288] 12 U.S.C.A. § 3414(b)(1) (1978).

[289] 12 U.S.C.A. § 3411 (1978). *See also* 12 U.S.C.A. § 3403(b) (1978).

[290] In contrast, the California Government Access to Financial Records Act, CAL. GOV'T CODE §§ 7460-7490 (Deering 1976), recognizing the danger that the financial institution could give the government too much information, requires law enforcement officials to serve the bank with a copy of the subpoena or summons. See *id.* § 7470.

cation is on the bank.[291] These record-keeping and notification responsibilities should be on the government entity seeking the information, not the financial institution. If the institution must keep an examination record, the statute should be amended to limit such retention to a reasonable period of time.

The Act also requires the financial institution to assemble the records being sought by a federal agency.[292] Financial institutions must assemble the records upon receipt of the request from the government.[293] Time and money may be lost assembling documents which have been successfully challenged.

Another potential hazard is the provision which allows financial institutions to report information which they believe may be relevant to a possible violation of law.[294] James Brown, a leading consumer advocate, believes this provision compromises the financial institution's functional role as agent to the customer.[295] It undermines the individual's expectation of privacy in his dealings with his bank. It also places the financial institution in the difficult role of discerning what may be illegal conduct, a task for which it is unsuited and incompetent. Finally, the express authorization might even encourage such reporting.

Title XI falls far short of its intended purpose. This legislation arose because legislators rightfully perceived a need to curb government access to personal financial information, access without notice to the customer and access that was not part of an appropriate law enforcement investigation. Unfortunately, the Act is not an easy tool to be used by bank customers who perceive a threat to their privacy. It is a complex obstacle course which the individual must run in order to avoid government access to private information.

## CONCLUSION

Customers consider their financial records private and they expect their banks and other creditors to keep financial information confidential. *United States v. Miller*[296] held that this was not a legitimate expectation and that a customer has no standing to

---

[291] 12 U.S.C.A. §§ 3404(c), 3405, 3406, 3407, 3408 (1978). Although several of the cited sections suggest that the government is responsible for notification, the reality of the situation is that the bank takes on this burden since it is the bank which may be held liable in a suit by an unnotified customer.

[292] 12 U.S.C.A. § 3411 (1978).

[293] *Id.*

[294] *1978 Senate Hearings on S.2096, S.1460, supra* note 4, at 637 (additional statement of James L. Brown).

[295] *Id.*

[296] 425 U.S. 435 (1976).

assert a protectible interest in the information contained in financial records. The congressional response was the compromise Right to Financial Privacy Act of 1978.[297] Congress rejected the PPSC's recommendations for a new substantive right in financial records and adopted procedural safeguards in an effort to meld privacy interests with law enforcement needs. By providing procedural safeguards and nothing more, the Act superficially appears to provide privacy protection. Unfortunately, the Act fails to give adequate protection.

Perhaps law enforcement would be inhibited if customers were given a legal expectation of confidentiality in their records. The price of such law enforcement efforts, however, is high. If the government did not require banks to keep detailed personal data on each customer, private information would not be in the possession of the third party record-keeper and customer privacy would be protected. If law enforcement officials were limited by law as to when they could use discretion, there would be fewer opportunities for abuse of authority. If legislators simplified or deleted the record-keeping requirements and limited law enforcement authorities to the traditional tools of search warrants and probable cause, both law enforcement and privacy needs would be met.

It is unlikely at present that either suggestion will be adopted. As Congressman St. Germain said during the House of Representatives hearings, the 1978 Right to Financial Privacy Act is "an elemental response" to the problem.[298] Unfortunately, the contours of that problem are not yet clear.

---

[297] 12 U.S.C.A. §§ 3401-3422 (1978).

[298] *1977 House Hearings on the Safe Banking Act, supra* note 1, at 1449 (statement of Congressman Fernand J. St. Germain).