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# No Expectation of Privacy in Bank Records - United States v. Miller

Nancy J. Nicol

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## NO EXPECTATION OF PRIVACY IN BANK RECORDS—*UNITED STATES V. MILLER*

Whether an individual reasonably can expect that records kept incidental to his personal banking transactions will be protected from uncontrolled government inspection has become a question of constitutional proportions. In *United States v. Miller*,<sup>1</sup> the Supreme Court held that a bank depositor has no Fourth Amendment interest in the records that his bank is required to keep in compliance with the Bank Secrecy Act of 1970.<sup>2</sup> In *Miller*, respondent was indicted for various federal offenses in connection with the operation of a still.<sup>3</sup> Prior to the indictment, Treasury Department agents had served subpoenas upon the presidents of two Georgia banks at which respondent maintained accounts. The banks permitted the agents to inspect the records of respondent's accounts and supplied the agents with copies of checks, deposit slips, and financial statements. Subsequent to the indictment, Miller made a pretrial motion to suppress evidence consisting of copies of his checks and bank records. Miller alleged that the grand jury subpoenas that had been served upon the two banks were defective,<sup>4</sup> and therefore the evidence was seized illegally in violation of the Fourth Amendment.

The district court denied the motion and the government introduced several copies of Miller's checks and deposit slips as evidence. Consequently, Miller was convicted, and he appealed.<sup>5</sup> The court of appeals

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1. 96 S.Ct. 1619 (1976).

2. 12 U.S.C. §§1829b, 1959, 31 U.S.C. §§1051-1122 (1970). Section 1829b of the Act provides:

Each insured bank shall make, to the extent that the regulations of the Secretary so require,

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

31 C.F.R. 103.34(b) (1976) establishes regulations that require each bank to retain the original or a copy of each check, draft or money order in excess of \$100.00 drawn on the bank or issued and payable to it.

3. The facts of the case are set forth in the Brief for Petitioner at 3-10, *United States v. Miller*, 96 S.Ct. 1619 (1976).

4. Respondent claimed that "the subpoenas were defective because they were issued by the U.S. 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 1622.

5. Miller was convicted of possession of an unregistered still, carrying on the business of a distiller without giving bond and with intent to defraud the government of whiskey

ruled that Miller was entitled to a new trial on the ground that the use of a defective subpoena in obtaining copies of his bank records constituted an unlawful invasion of his privacy.<sup>6</sup> The court acknowledged that the Supreme Court had recognized the constitutionality of the Bank Secrecy Act's record-keeping requirements in *California Bankers Association v. Schultz*,<sup>7</sup> but emphasized the safeguard which *California Bankers* provided for depositors. The safeguard was that depositors would be afforded the adequate protection of "existing legal process" from improper government access to their records.<sup>8</sup> The appellate court found that the depositor had the necessary constitutional standing to challenge a defective subpoena which did not constitute sufficient legal process.

The Supreme Court, in a 7-2 decision,<sup>9</sup> did not consider it necessary to determine the validity of the subpoena. The Court held that Miller did not have standing to allege an illegal search and seizure of the

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tax, possession of 175 gallons of whiskey upon which no taxes had been paid, and conspiracy to defraud the United States of tax revenues. Brief for Petitioner at 9, *United States v. Miller*, 96 S.Ct. 1619 (1976).

6. *United States v. Miller*, 500 F.2d 751, 756 (5th Cir. 1974), *rev'd*, 96 S.Ct. 1619 (1976).

7. 416 U.S. 21 (1974). Many provisions of the Bank Secrecy Act concerning recordkeeping and reporting of domestic and foreign bank records were challenged in this case. The Court held in connection with the recordkeeping requirements that:

a. The Act does not violate the due process of the banks since there is a sufficient nexus between the evil Congress sought to correct and the recordkeeping procedure. Also, the Court found that the cost of such recordkeeping did not place an unreasonable burden on the banks.

b. The Act does not violate the Fourth Amendment rights of depositors since the mere maintenance of records constitutes no illegal search or seizure.

c. The Act does not violate the Fifth Amendment right of banks (a corporation has no constitutional privilege against self-incrimination) or depositors (individual incriminated by evidence obtained from a third party has not had his Fifth Amendment rights violated).

d. The American Civil Liberties Union's claim that the recordkeeping requirement violates the First Amendment rights of its members is premature because the government has not sought disclosure of any of its members' records.

The Court, however, reserved the question of whether the recordkeeping requirements undercut a depositor's right to effectively challenge a third-party summons, declaring that "Claims of depositors against the compulsion by lawful process of bank records involving the depositor's own transactions must wait such process issues." *Id.* at 51-52.

See *The Bank Secrecy Act and Expectation of Privacy*, 43 U. Mo. K.C. L. Rev. 237 (1974) in which the author discusses the questions concerning privacy left unanswered by this decision.

8. 500 F.2d at 758.

9. Justice Powell presented the opinion of the Court. Justice Brennan and Justice Marshall dissented. 96 S.Ct. at 1626 (Brennan, J., dissenting). *Id.* at 1629 (Marshall, J., dissenting).

documents in violation of the Fourth Amendment.<sup>10</sup> This Note will analyze the Court's reasoning and will discuss the impact this decision will have on an individual's attempt to preserve privacy in his banking records.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. . . ." Under the Fourth Amendment, the books and records of both individuals<sup>11</sup> and corporations<sup>12</sup> are protected from orders for production if such orders can, in each case, be classified as "unreasonable."<sup>13</sup> The subpoenaed party may bring a motion before the court requesting that the subpoena be quashed or modified if compliance with it would be unreasonable or oppressive.<sup>14</sup> If the motion is denied and evidence against the subpoenaed party is discovered in his books and records, he may, in any resulting criminal

10. *Id.* at 1623.

11. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court held that the compulsory production of a person's private books and papers was an unreasonable search and seizure within the meaning of the Fourth Amendment. In *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956) the court held that the compelled production of one's books and records through a subpoena for use in a criminal proceeding is as much within the guaranty of the Fourth Amendment as is reaching them by means of a warrant.

12. In *Hale v. Henkel*, 201 U.S. 43 (1906), a subpoena requiring production of all correspondence, contracts and reports between one party and six other companies was described as too broad and thus constituted an unreasonable search and seizure. In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the Court held that the rights of a corporation against unlawful searches and seizures are to be protected.

13. The definition of "reasonableness" differs for individuals and corporations. See J. G. COOK, *CONSTITUTIONAL RIGHTS OF THE ACCUSED—PRE-TRIAL RIGHTS* 196 (1972), in which the author explains the difference:

What would be an unreasonable search and seizure in the case of an individual who could claim the privilege against self-incrimination would not necessarily be unreasonable in the case of a subpoena directed at a corporation, for neither a corporate officer nor a custodian of corporate papers, ordered to produce corporate papers, is protected by the Fifth Amendment.

In *See v. Seattle*, 387 U.S. 541 (1967), the Court gave a definition of reasonableness for a corporation:

It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.

*Id.* at 544.

14. FED. R. CRIM. P. 17(c) states:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

proceeding, move to suppress the evidence by alleging an illegal search or seizure.<sup>15</sup>

Responding to the motion to suppress in *Miller*, the Court held that the subpoenaed records were the property of the bank, not the depositor,<sup>16</sup> and subsequently concluded that respondent's Fourth Amendment rights were not violated.<sup>17</sup> The Court previously has held that in order for a person to have standing to allege an illegal search or seizure, the search or seizure must have been directed against him.<sup>18</sup> The defendant

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15. FED. R. CRIM. P. 41(e) states:

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. . . . If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.

See *Weeks v. United States*, 232 U.S. 383 (1914), wherein the Court held that evidence seized in violation of the Fourth Amendment must be excluded from a criminal trial.

A denial of a motion to quash a subpoena is not an appealable order. If the defendant complies with the subpoena, he can still object to the introduction of the subpoenaed material at a subsequent criminal trial. See *United States v. Ryan*, 402 U.S. 530 (1971).

16. 96 S.Ct. at 1623. The Court stated that:

The documents subpoenaed here are not respondent's private papers. Unlike the claimant in *Boyd*, respondent can assert neither ownership nor possession. Instead, these are the business records of the bank.

17. The Court reasoned that the depositor takes a risk that the information he voluntarily conveys to his bank could be relayed to the government. 96 S.Ct. at 1624. The Fourth Amendment does not protect information obtained from a third party. In *Hoffa v. United States*, 385 U.S. 293 (1966), the Court held that the use of testimony of a government informer did not violate the Fourth Amendment rights of a defendant who was convicted of attempting to bribe jurors. The Court commented that the Fourth Amendment does not protect a defendant's misplaced belief that a person to whom he voluntarily confides his crime will not reveal it. In *Lopez v. United States*, 373 U.S. 427 (1963), the Court held that the use of an electronic device to enable a government agent to overhear conversation does not violate the Fourth Amendment when the device has not been planted by an unlawful physical invasion of a constitutionally protected area.

18. See, e.g., *Jones v. United States*, 362 U.S. 257 (1960), in which the Court held in discussing whether defendant had standing to challenge the search warrant issued incident to his arrest that:

In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

*Id.* at 261.

See also *Alderman v. United States*, 394 U.S. 165 (1967), in which the Court noted that:

The established principle of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.

is not considered to be the aggrieved victim of an illegal search and seizure directed against a third person. Therefore, no matter how damaging the evidence obtained from that person may be to the defendant, he has no standing to bring a motion to suppress it. The Supreme Court applied this principle in *Donaldson v. United States*<sup>19</sup> in which it refused to permit defendant to challenge an Internal Revenue Service summons served upon his former employer, which requested production of defendant's employment and wage records. The Court held that the defendant did not have the standing required to challenge a summons directed to a third party seeking documents and records in which the defendant had no proprietary interest.<sup>20</sup>

The use of a proprietary interest test would be a simple way in which to dispose of an individual's challenge to the seizure of records not in his possession. However, the obvious impediment to that manner of disposition is that the definition of standing has been broadened by the recognition "that the principal object of the Fourth Amendment is the protection of privacy rather than property."<sup>21</sup> In *Katz v. United States*,<sup>22</sup> the Supreme Court permitted the defendant to challenge evidence obtained when government agents attached an electronic device to the outside of a public telephone booth. In recognizing a violation of the defendant's Fourth Amendment interests, the Court held that the government had violated the privacy upon which the defendant justifiably had relied.<sup>23</sup> The Court emphasized that "the Fourth Amendment pro-

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*Id.* at 172.

For a general discussion of the history of standing in connection with the Fourth Amendment, see Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. REV. 1 (1975). See also White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970), in which the authors discuss the inadequacies of the present law of standing and suggest an alternative test.

19. 400 U.S. 517 (1971).

20. *Id.* at 523.

21. *Warden v. Hayden*, 387 U.S. 294, 304 (1967), cited in *United States v. Miller*, 96 S.Ct. 1619, 1623 (1976). In *Warden*, the Court rejected the distinction between the seizure of items of evidential value only (which previously could not be seized) and seizure of instrumentalities, fruits or contraband. In its discussion of the history of the Fourth Amendment, the Court stated:

We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.

*Id.* at 304.

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

23. *Id.* at 353. The Court further held that the government's use of an electronic listening device to record the defendant's conversations "constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.*

pects people, not places. What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>24</sup>

Subsequent decisions relied on *Katz* in dealing with evidentiary challenges brought under the Fourth Amendment. These opinions utilized the test of whether the defendant had a reasonable expectation of privacy regarding the seized items when a possessory interest could not be asserted.<sup>25</sup> In *Mancusi v. DeForte*,<sup>26</sup> the Supreme Court found that a union official, DeForte, had standing to challenge the warrantless seizure of union records from an office he shared with other union officials. In analyzing the facts of that case, the Court acknowledged that the documents were not DeForte's personal papers and the premises were not his private office. Nevertheless, the Court considered the circumstances that surrounded the working arrangement. They concluded that DeForte reasonably could have expected that only the union officials and their guests would enter the office and that the records would not be disturbed without their permission.<sup>27</sup>

24. *Id.* at 351-52.

25. In *Combs v. United States*, 408 U.S. 224 (1972), the Court remanded the case to the district court to consider whether defendant had standing to challenge an allegedly invalid warrant used to seize evidence from his father's farm. The Court stated that the lower court must determine whether defendant had an interest in connection with the searched premises that would give rise to a "reasonable expectation of freedom from government intrusion" upon the premises.

In *Cardwell v. Lewis*, 417 U.S. 583 (1974), the Court held in a plurality opinion that no expectation of privacy was violated in the taking of exterior paint samples from defendant's vehicle which was parked in a public lot.

Illinois courts have adopted the "reasonable expectation of privacy" test for determining standing. See *People v. Fleming*, 36 Ill.App.3d 612, 345 N.E.2d 10 (1st Dist. 1975); *People v. Pohlmann*, 13 Ill.App.3d 779, 300 N.E.2d 302 (4th Dist. 1973).

In *People v. Krivda*, 5 Cal.3d 357, 486 P.2d 1262, 96 Cal.Rptr. 62 (1970), *vacated and remanded*, 409 U.S. 33 (1972), *aff'd on same grounds*, 8 Cal.3d 572, 504 P.2d 457, 105 Cal.Rptr. 521 (1973), the court held that when defendants placed contraband in trash barrels and subsequently placed barrels adjacent to the street for pickup by rubbish collector they did not abandon the trash but retained a reasonable expectation of privacy in it. An Illinois appellate court has recently determined that *Krivda* is not persuasive authority and found no expectation of privacy in curbside trash. *People v. Huddleston*, 38 Ill.App.3d 277, 347 N.E. 2d 76 (3d Dist. 1976).

26. 392 U.S. 364 (1968). In relying upon its decision in *Katz*, the Court stated:

The Court's recent decision in *Katz* . . . makes it clear that the capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.

*Id.* at 368.

27. The fact that another union member could have voluntarily provided the government with copies of the documents or that the government could have subpoenaed the

The Supreme Court has continued to employ the reasonable expectation of privacy test in determining whether a defendant has standing to allege an illegal search or seizure.<sup>28</sup> However, the use of the test did not necessarily result in a finding favorable to the individual. In *Couch v. United States*,<sup>29</sup> the Court denied standing to an individual who attempted to challenge an Internal Revenue Service summons which had been served upon her accountant. The Court held that there was not a sufficient expectation of privacy in regard to the business and tax records delivered to an accountant for use in the preparation of tax returns. The Court reasoned that far from expecting the records delivered to the accountant to be kept confidential, the taxpayer should realize, if not expect, that much of the information conveyed will be disclosed on the tax return.<sup>30</sup> Further, the Court emphasized that the accountant is granted the discretion to determine what parts of the information will be included or omitted on the return. Therefore, the client's expectation of privacy in any portion of the records is not a reasonable one.

In apparent consistency with its prior decisions, the Court in *Miller* stated that it was necessary to examine the legitimacy of the depositor's expectation of privacy in the contents of the subpoenaed bank records. The Court observed that the records were voluntarily conveyed to the bank and exposed to bank employees in the ordinary course of business.<sup>31</sup> For these reasons alone, the Court concluded that the depositor had no expectation of privacy in the records. Therefore, finding that the defendant had no protected Fourth Amendment interest, the Court referred to the general rule that the "issuance of a subpoena to a third party to obtain the records of that party does not violate the Fourth Amendment rights of a defendant."<sup>32</sup>

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records properly did not alter the fact that there was an illegal search and seizure and that the evidence had to be suppressed. "It is, of course, immaterial that the State might have been able to obtain the same papers by means which did not violate the Fourth Amendment." *Id.* at 372 n.12.

28. See note 25 and accompanying text *supra*.

29. 409 U.S. 322 (1973).

30. *Id.* at 335.

31. In the absence of a statute to the contrary, confidential communications between a person and a bank are not privileged information. WIGMORE, EVIDENCE §2286 (McNaughton rev. 1961).

32. 96 S.Ct. at 1624. Prior to *Miller*, most federal courts used this rule to conclude that a depositor could not challenge the subpoena or summons of his bank account records because they belonged to a third party. See *United States v. Nat'l Bank*, 454 F.2d 1249 (7th Cir. 1972) (the customer has neither a proprietary nor custodial interest in bank records); *United States v. Gross*, 416 F.2d 1205 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970) (customer has no standing because records are not his property); *Harris v. United States*, 413 F.2d 316 (9th Cir. 1969) (customers have no rights in the records of their bank);

Although *Miller* and *Mancusi* were based on similar facts, the holdings which resulted are quite different. The Court in *Miller* found that a bank depositor did not have any expectation of privacy in his personal banking records. In contrast, the Court in *Mancusi* held that a union official had a reasonable expectation of privacy in professional union documents, sufficient to support a grant of standing under the Fourth Amendment. However, in both situations the documents had been "voluntarily" placed on the business premises and were "exposed" to various people for business and professional reasons. The Court in *Miller* appeared to find these elements to be dispositive of the question of respondent's standing. The Court in *Mancusi* looked beyond these factors to the actual business arrangement and concluded that a reasonable expectation of privacy could be recognized. The major difference between the two cases appears to be the willingness of the Court to analyze closely the actual reasonable expectation of the individual within the particular setting.

The Supreme Court in *Miller* supported its conclusion by asserting that in enacting the Bank Secrecy Act, Congress intended that an individual would have no expectation of privacy in his banking records.<sup>33</sup> Examination of the Act reveals that this claim is not well supported. The Court cited the purpose of the Act which is to require that the records be maintained on the grounds that "they have a high degree of usefulness in criminal tax, and regulatory investigations and proceedings."<sup>34</sup> However, legislative history of the Act as reflected in the Report of the House Committee on Banking and Currency indicates that Congress did recognize the confidentiality of banking records. The report stated:

It should be borne in mind that records to be maintained pursuant to the 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.<sup>35</sup>

In holding the recordkeeping provisions of the Act constitutional in *California Bankers Association*, the Supreme Court noted this legisla-

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Galbraith v. United States, 387 F.2d 617 (10th Cir. 1968) (customer has no standing to challenge the seizure of his bank records since records are the property of the bank); *In re Cole*, 342 F.2d 5 (2d Cir. 1965), cert. denied, 381 U.S. 950 (1965) (customer has no standing because records are the property of the bank). But see *Brex v. Smith*, 104 N.J.Eq. 386, 146 A. 34 (1929) (customer has a property right in the information contained in his account) and note 39 *infra*.

33. 96 S.Ct. at 1624.

34. *Id.*

35. HOUSE COMM. ON BANKING AND CURRENCY, BANK RECORDS AND FOREIGN TRANSACTIONS, H.R. Doc. No. 91-975, 91st Cong., 2d Sess., 2 (1970).

tive intent and repeated the statement that access to the records would be governed by existing legal process.<sup>36</sup> Neither Congress nor the Court defined what was meant by "existing legal process." The court of appeals interpreted the language as granting standing to the depositor to allege an unconstitutional seizure of bank records.<sup>37</sup> The Supreme Court disagreed and denied the depositor standing.

It is unfortunate that the Court did not analyze the question of expectation of privacy in bank records more carefully since customers and bank officials often do assume the existence of a confidential relationship between customer and bank.<sup>38</sup> Additionally, some courts have held that if a bank divulges information concerning a depositor's account, it can be held liable for breach of an implied contract.<sup>39</sup> Justice Brennan,

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36. 416 U.S. at 54. The Court held:

We see nothing in the Act which violates the fourth amendment rights of any of these plaintiffs. Neither the provisions of Title I nor the implementing regulations require that any information contained in the records be disclosed to the government; both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process.

37. 500 F.2d at 757. The court of appeals noted that the government cannot first require a third party bank to copy all of a depositor's checks, and then, with an improper invocation of legal process, call upon the bank to allow inspection and reproduction of these copies. It stated that:

In upholding the Bank Secrecy Act the divided California Bankers Court determined that the government could take the first of those steps without exceeding constitutional limits. The Court, however, did not choose to abandon 90 years of precedent by proclaiming open season on personal bank records. Indeed, in rejecting the fourth amendment claims of the bank depositor plaintiffs, the California Bankers majority, in an opinion by Justice Rehnquist, relied heavily upon the proposition that *depositors* have adequate legal protection from improper government access to their records. (emphasis added)

*Id.* at 757.

38. In *Burrows v. Superior Court*, 13 Cal.3d 238, 243, 529 P.2d 590, 593, 118 Cal.Rptr. 166, 169 (1974), the court commented, "Representatives of several banks testified at the suppression hearing that information in their possession regarding a customer's account is deemed by them to be confidential." See also Note, *Government Access to Bank Records*, 83 YALE L. J. 1439 (1974), in which the author maintains expectation of privacy is supported by customary norms, practices and legal constraints; and Statement of Harold R. Arthur, Vice President, Wells Fargo Bank, *Hearings on S. 2200 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 93rd Cong., 2d Sess., 178 (1974).

39. In *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961), the court held that it is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or depositor, the bank must be held liable for breach of the implied contract. In *Milohnich v. First Nat'l Bank*, 224 So.2d 759 (3d D.C.A. Fla. 1969), the court held that a depositor has asserted a

dissenting in *Miller*,<sup>40</sup> noted approvingly that an expectation of privacy had been found in *Burrows v. Superior Court*.<sup>41</sup> In *Burrows*, a bank voluntarily relinquished copies of an accused's bank records without any subpoena. The *Burrows* court argued that disclosure of one's financial affairs to a bank is not entirely volitional since "it is almost impossible to participate in the economic life of contemporary society without maintaining a bank account."<sup>42</sup> The *Burrows* decision also correctly pointed out that information revealed in one's banking records is quite extensive and personal. Reflecting these concerns, Justice Powell observed in *California Bankers Association* that a significant extension of the reporting requirements of the regulations established pursuant to the Bank Secrecy Act would pose substantial constitutional problems for him.<sup>43</sup> Justice Powell stated:

Financial transactions can reveal much about a person's activities, associations and beliefs. At some point, government intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process.<sup>44</sup>

Unfortunately, Justice Powell's concern for the expectation of privacy in financial transactions nowhere is evident in his majority opinion in *Miller*.

As a consequence of *Miller*, depositors have no secured protection from unlimited government intrusion into their banking records. If a bank raises no objections, the government can examine the private records of a depositor without the issuance of any legal process what-

cause of action in alleging a breach of an implied contractual obligation to keep the customer's account secret. See Comment, *Banks and Banking: Florida Adopts a Duty of Secrecy*, 22 U. FLA. L. REV. 482 (1969).

40. 96 S.Ct. 1619, 1626 (Brennan, J., dissenting).

41. 13 Cal.3d 238, 529 P.2d 590, 118 Cal.Rptr. 166 (1975). This case was decided under art. I, §13 of the California Constitution, the wording of which is practically identical to the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated."

42. 13 Cal.3d at 247, 529 P.2d at 596, 118 Cal.Rptr. at 172 (1975).

43. 416 U.S. at 78 (Powell, J., concurring).

44. *Id.* at 79. The implementing regulations of the Bank Secrecy Act require that a bank "file a report on each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involved a transaction of currency of more than \$10,000.00." 31 C.F.R. §102.22 (1975). In *California Bankers Ass'n*, Justice Powell was concerned that an extension of this reporting requirement would intrude upon areas of privacy. The regulations also require the bank's recordkeeping. By denying a depositor standing to challenge a subpoena, the Court is granting the government almost unlimited access to these records.

soever.<sup>45</sup> Although a bank may afford the depositor some limited protection by refusing to permit indiscriminate examination of accounts, the government conceded that banks often permit law enforcement officials to inspect their records without the issuance of a summons or subpoena.<sup>46</sup> As the California Supreme Court warned:

To permit a police officer access to these records merely upon his request, without any judicial control as to relevancy or other traditional requirements of legal process, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuse of police power.<sup>47</sup>

*Miller* has left the depositor with two alternatives to pursue to protect the privacy of his records. The depositor may assert that a search of his records without a subpoena violates his state constitutional rights as the depositor successfully argued in *Burrows v. Superior Court*.<sup>48</sup> The depositor may also support the passage of pending legislation prohibiting a bank from disclosing financial information unless the customer has authorized the disclosure or the bank has been served with a lawful

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45. See Costner & Grimmer, *Search and Seizure of Bank Records and Reports*, 92 BANKING L.J. 347 (1975) in which the authors state, "as government lawyers themselves note in the *California Bankers Association* case, banking institutions frequently comply voluntarily with requests by officials for access to files containing account-holders' transactions." *Id.* at 349. See also Statement of Cecil Poole, *Hearings on S. 2200 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 93rd Cong., 2d Sess., 185 (1974). (Mr. Poole, former U.S. Attorney in California and former member of the District Attorney's Office of San Francisco testified that he never had any difficulty getting bank records without any kind of subpoena process); and Statement of Jack Anderson, Columnist: Accompanied by Joe Spear, *Hearings on S. 3814 and S. 3828 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 92nd Cong., 2d Sess., 135 (1972). (Mr. Anderson produced copies of F.B.I. memos showing that the bank records of Jane Fonda, Benjamin Spock, and Floyd McKissick were made available to the F.B.I. without any subpoena).

46. 416 U.S. at 96.

47. 13 Cal.3d at 247, 529 P.2d at 596, 118 Cal.Rptr. at 172 (1975).

48. Justice Brennan in his dissent noted a trend of state courts relying on state constitutional protections rather than the federal counterpart. His explanation is that these liberties are being ignored in recent Supreme Court decisions. 96 S.Ct. 1626, 1629. See Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421 (1974), in which the author concludes that:

By lowering the level of constitutional protections the Burger Court has invited the states to adopt standards higher than those of federal law. As a result, it is to be expected that the tendency of state courts to evade the Burger Court by basing rulings in favor of the rights of the accused on grounds of state law will increase.

*Id.* at 450.

subpoena.<sup>49</sup> It realistically may be expected that the existence of these two courses of action will be small comfort to the interested depositor. *Miller* should remain a disturbing decision to any depositor who, with all due respect to the Supreme Court, does consider his personal banking transactions to be a part of his private affairs.

*Nancy J. Nicol*

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49. S. 3349, 94th Cong., 2d Sess. (1976) and H.R. 13,757, 94th Cong., 2d Sess. (1976) both provide for service of a subpoena upon the bank and the customer. Both bills are in committee at present.

SB 2010 and SB 2011 of the Illinois Legislature also require a subpoena. At present, Governor Walker has exercised his amendatory veto power on the two bills in order to clarify the language in the bill. The bill will become law if both houses of the legislature accept the change by majority vote. See 122 Chicago Daily Law Bulletin 1 (1976).