The Right to Financial Privacy Act of 1978

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THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

The Bank Secrecy Act\(^1\) requires financial institutions to maintain certain records that have a "high degree of usefulness in criminal, tax, and regulatory proceedings,"\(^2\) but it contains no procedures whereby the government can secure this information.\(^3\) Although an individual's private papers generally are protected from compulsory production,\(^4\) such protection was denied to records maintained pursuant to the Bank Secrecy Act in United States v. Miller.\(^5\) After Miller, a government authority could request a


2. 12 U.S.C. § 1829b(a) (1976). The purpose of the Bank Secrecy Act is to aid government agencies and departments in obtaining the evidence needed to prosecute white collar crimes. Although it is primarily concerned with the illegal use of secret foreign bank accounts, the Bank Secrecy Act applies to domestic activities such as tax evasion, securities manipulation, organized crime, and other illegal businesses like gambling, drug trafficking, and loan sharking. Amend the Bank Secrecy Act: Hearings on S. 3814 and S. 3828 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. 1 (1972) [hereinafter cited as Amend the Bank Secrecy Act Hearings].

Among the records that must be maintained by financial institutions are copies of both sides of any check in excess of $100.00 that is deposited into or withdrawn from an individual's bank account. These records must be maintained for a minimum of five years. 31 C.F.R. §§ 103.34, 103.36 (1978). The exclusion of checks for less than $100.00 from the requirements of the Bank Secrecy Act is only a cosmetic exemption. It is more expensive for banks to go through checks and exclude those for less than $100.00 than to microfilm all of them. Banks, therefore, choose the latter procedure. The Safe Banking Act of 1977: Hearings on H.R. 9086 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 1st Ses. 1592 (1977) (statement of Morris F. Miller) [hereinafter cited as The Safe Banking Act of 1977 Hearings].

3. Legislative history, however, suggested that access to bank records under the Bank Secrecy Act would be regulated. The Senate Banking Committee's report stated:

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 into a bank's records on the part of law enforcement officials.


4. In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court held that the fourth and fifth amendments protect an individual's private papers from compulsory production to the government. This proposition has been reaffirmed continually by the Supreme Court in dicta. See, e.g., Bellis v. United States, 417 U.S. 85, 87-88 (1974); United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950).

5. 425 U.S. 435 (1976). The Supreme Court in Miller expressly stated that a depositor possesses no fourth amendment interest in his bank records and, therefore, lacks standing to challenge a subpoena requesting their production. These records belong to the bank. Thus, the depositor does not have any constitutional protection that Boyd made applicable to private papers since he or she cannot assert either ownership or possession. Id. at 440. The Court further stated that a depositor has no "reasonable expectation" of privacy in his financial records because they only contain information that he or she voluntarily conveyed to the bank, and
bank to produce an individual's records without any legal process, or notice to the individual, or a showing of cause.\(^6\)

In response to both the impact of the *Miller* decision\(^7\) and a report prepared by the Privacy Protection Study Commission,\(^8\) Congress recently passed

thereby exposed to its employees. *Id.* at 442. The defendant argued that the element of compulsion embodied in the Bank Secrecy Act created a fourth amendment interest in his financial records. *Id.* at 441. The Court responded that a "lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act..." *Id.* at 442.

This concept of a "reasonable expectation of privacy" in determining fourth amendment rights was established in *Katz* v. United States, 389 U.S. 347 (1967). The quoted phrase itself comes from Justice Harlan's concurring opinion in which he set forth two requirements for protection from intrusion under the fourth amendment. "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. Any activity that is exposed to the public, however, is not protected by the fourth amendment. *Id.* at 351. See also *Kitch*, *Katz* v. United States: The Limits of the Fourth Amendment, 1968 *Sup. Ct. Rev.* 133; *Note, From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. Rev. 968 (1968).

For cases applying Katz's "reasonable expectation of privacy" theory see *United States v. Mara*, 410 U.S. 19, 21 (1973) (no reasonable expectation of privacy in one's handwriting since it is repeatedly shown to the public); *United States v. Dionisio*, 410 U.S. 1, 14-15 (1973) (no reasonable expectation of privacy in the tone of one's voice since it is constantly exposed to the public); *Couch v. United States*, 409 U.S. 322, 335 (1973) (no reasonable expectation of privacy in financial records given to an accountant for preparation of income tax returns since disclosure of much of that information will be required on the returns); *United States v. White*, 401 U.S. 745, 751-53 (1971) (no reasonable expectation of privacy in conversations discussing illegal activities with an associate who turns out to be a police informer since that is a risk anyone dealing in illegal activities must assume); *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (a reasonable expectation of privacy about himself or herself as an individual walks down the street); *Mancusi v. De Forte*, 392 U.S. 364, 368 (1968) (a reasonable expectation of privacy in union records kept in a private office at union headquarters).

6. *The Safe Banking Act of 1977 Hearings*, supra note 2, at 1462 (statement of Fortney H. Stark, Jr.). The government would only have to resort to legal procedures if the bank refused its request for the records. *Amend the Bank Secrecy Act Hearings*, supra note 2, at 64 (statement of Eugene T. Rossides). The problem with this process is that the entire burden is placed on the financial institution since it alone would decide whether or not the government gained access to an individual's financial records. *Id.* at 46. The bank customer had no voice in this decision and after *Miller*, he or she had no standing to challenge the methods by which the government obtained the financial records. Thus, the party with the greatest interest in insuring that the government's demands were proper had no part in determining or challenging the validity of these demands. Furthermore, if the bank decided to challenge the government's request for an individual's financial records, the bank had no standing to assert the individual's privacy interests. See *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974); *United States v. Continental Bank & Trust Co.*, 503 F.2d 45 (10th Cir. 1974).

7. After *Miller*, the government could informally obtain access to an individual's financial records. See note 6 and accompanying text supra. This is an important right for the government since financial records reveal more than an individual's financial affairs. These records virtually provide a current biography which reveals "much about a person's activities, associations, and beliefs." *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). See also *The Safe Banking Act of 1977 Hearings*, supra note 2, at 1467 (statement of Fortney J. Stark, Jr.), which recounts a segment of a documentary television show where the cancelled
the Right to Financial Privacy Act of 1978. This legislation is significant because it recognizes a legal right to privacy in financial records for the checks of a member of the Commission on Privacy Protection were examined by a private investigator 3,000 miles away. The investigator, without any other information, was able to discern everything about this individual’s personal and family life.


The Miller Court, however, stated that there is no reasonable expectation of privacy in financial records because an individual voluntarily exposes this information to the public. 425 U.S. at 442. This statement totally ignores the fact that today most financial transactions are performed through checks and credit cards. Since “cash only” transactions are impractical and ultimately unreasonable, individuals are forced to deal with financial institutions and the implications of the Bank Secrecy Act. Role of the Internal Revenue Service in Law Enforcement Activities: Hearings Before the Subcomm. on Administration of the Internal Revenue Code of the Senate Comm. on Finance, 94th Cong., 1st & 2d Sess. 98 (1975-1976). The impact of the Miller decision upon an individual’s financial affairs becomes more overwhelming as we move towards the complete computerization of banking through the Electronic Funds Transfer System. For a discussion of the rights and responsibilities of consumers, financial institutions, and government agencies and departments under this system, see EFT IN THE UNITED STATES, POLICY RECOMMENDATIONS AND THE PUBLIC INTEREST—THE FINAL REPORT OF THE NATIONAL COMMISSION ON ELECTRONIC FUND TRANSFERS (1977).

8. Congress created the Privacy Protection Study Commission in the Privacy Act of 1974, 5 U.S.C. § 552 (1976). Its purpose was to study all the information systems of governmental, regional, and private organizations in order to determine the standards and procedures in force for the protection of personal information. On the basis of this study, the Commission was to make any legislative recommendations that it considered to be necessary in order to protect the privacy of individuals while still meeting the legitimate informational needs of government and society. See PERSONAL PRIVACY IN AN INFORMATION SOCIETY—THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION XV (1977) [hereinafter cited as PRIVACY PROTECTION STUDY].

The Privacy Commission emphasized the need to provide the individual with a “legally recognized interest he can assert to protect records about himself when government agencies seek to acquire them” from a financial institution. PRIVACY PROTECTION STUDY, supra at 352. The checking account has emerged as “an economic and social diary.” Id. at 101. Congress, therefore, must recognize that an individual’s financial records are to some extent his private records and create a protectible interest “that reflects a legitimate expectation of confidentiality in those records.” Id. at 352.

first time. It also is important because it establishes procedures regulating
the disclosure of financial information to government agencies and depart-
ments. 10

This Note will discuss major provisions of the Right to Financial Privacy
Act of 1978 (hereinafter referred to as the Act). It first will analyze the pro-
cedures established to govern access to financial records. Particular emphasis
will be placed upon the provisions allowing access to financial records by
search warrant, formal written request, and in emergency situations because
these procedures are presently inadequate. Recommendations for improve-
ment also will be made. Another major focus of this Note will be upon the
customer challenge provision of the Act, since this provision is of vital im-
portance to a customer seeking to retain the confidentiality of his financial
records.

GOVERNMENT ACCESS TO RECORDS

Under the Act, no government authority can acquire an individual's finan-
cial records that are kept by a financial institution unless the records are
reasonably described. 11 The government authority also must follow one of
five prescribed procedures: customer authorization, administrative or judicial
subpoena, search warrant, or formal written request. 12 These are significant
because they regulate the manner in which financial records can be ob-
tained 13 and force the government to leave a paper trail of its investiga-
tions. 14 Thus, by prohibiting informal and undocumented access to an indi-

U.S.C.A. § 3401 (Supp. 1978)). The Act was passed on November 10, 1978 and became effec-
tive on March 12, 1979.

10. See H.R. REP. No. 1383, 95th Cong., 2d Sess. 6 (1978) [hereinafter cited as H.R. REP.
No. 1383].

financial records, therefore, is insufficient to meet this requirement. H.R. REP. No. 1383, supra
note 10, at 49-50. The requirement that the request must be reasonably described is rooted in
the fourth amendment protection against unreasonable search and seizure. The Supreme Court
in Oklahoma Press Publish. Co. v. Walling, 327 U.S. 186, 208-09 (1946) stated:

[T]he Fourth [Amendment], if applicable [to a request for records], at the most
guards against abuse only by way of too much indefiniteness or breadth in the
things required to be 'particularly described' . . . . The gist of the protection is in
the requirement . . . that the disclosure sought shall not be unreasonable. . . .
[T]he requirement of reasonableness . . . comes down to [whether] specification of
the documents to be produced [is] adequate, but not excessive, for the purposes of
the relevant inquiry.

See also notes 101 and 102 and accompanying text infra.


13. Before the Act was passed, the government did not have to use certain procedures to
request financial records. Therefore, informal requests were usually honored by financial institu-
tions. See note 6 and accompanying text supra. Under the Act, however, financial institutions
are prohibited from releasing financial records unless one of the prescribed procedures are
followed. See note 12 and accompanying text supra.

14. Prior to the Act, a government authority could informally obtain an individual's financial
records. A written request was not required. See note 6 supra. Usually a government agent
would visit a bank and orally request the records. See Surveillance: Hearings Before the Sub-
FINANCIAL PRIVACY ACT

individual's records, the Act's procedures promote effective oversight of government activity.

Customer Authorization

A customer may authorize disclosure of his or her records by furnishing a signed and dated consent statement to both the financial institution and the government authority requesting the disclosure. Customer authorizations probably will be used infrequently, however, since an individual involved in illegal activities is not likely to consent to an investigation. Hence, it will probably be one of the least utilized provisions of the Act.

Administrative or Judicial Subpoena

Another method by which a government authority may obtain financial records is pursuant to an administrative or judicial subpoena. Administrative subpoenas are issued by authorized agencies to enable them to carry out their duties. Under these circumstances, it would be difficult for an individual to discover how his financial records were obtained by government investigators. Also, financial information could be freely transferred between agencies. See Safe Banking Act of 1977 Hearings, supra note 2, at 1563 (statement of Dept. of Justice). Without any written documents, the identity of the agency that originally requested the records could be completely lost during these transfers. The Act, however, requires every request to be in writing. See note 55 infra. This enables an individual to discover what records were investigated, by what agency, and for what purpose. The Act also requires that any request to transfer information between agencies be in writing. 12 U.S.C.A. § 3412(a) (Supp. 1978). Thus, these provisions force the government to leave a paper trail of an investigation that can be traced by the bank customer.

15. 12 U.S.C.A. § 3404(a) (Supp. 1978). The consent statement also:
   (1) authorizes such disclosure for a period not in excess of three months;
   (2) states that the customer may revoke such authorization at any time before the financial records are disclosed;
   (3) identifies the financial records which are authorized to be disclosed;
   (4) specifies the purposes for which, and the Government authority to which, such records may be disclosed; and
   (5) states the customer's rights under this chapter.

16. Oversight Hearings into the Operations of the IRS: Hearings Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. of Government Operations, 94th Cong., 2d Sess. 120 (1976) (statement of Richard L. Thornburgh) [hereinafter cited as Oversight Hearings into the Operations of the IRS]. In fact, it has often been the subject's refusal which has forced government investigators to obtain records from a financial institution. Amend the Bank Secrecy Act Hearings, supra note 2, at 89 (statement of Eugene T. Rossides).


18. The general congressional authority for an administrative subpoena is found in the Administrative Procedure Act, 5 U.S.C. § 555(c) (1976). The authority of a particular agency to issue an administrative subpoena, however, is created by specific statutes. See, e.g., 15 U.S.C. § 77 uu(a) (1976) (authority for the Securities and Exchange Commission to issue subpoenas);
out their investigative duties. Agencies, however, have no power to enforce administrative subpoenas and compliance must be secured through a court order. In contrast, judicial subpoenas, issued under the seal of the court, are used as part of the discovery process in a pending court case or to procure evidence for trial.

Before the subpoena is issued, the government must demonstrate that the subpoena is authorized by law and sought pursuant to a legitimate law enforcement inquiry. A copy of the subpoena together with notice of the right to challenge it must be served upon the customer. This requirement can be met by mailing the notice to the customer's last known address on or before the date on which the subpoena is served on the financial institution. Grand jury subpoenas are exempted from these provisions.

Search Warrant

Search warrants issued pursuant to the Federal Rules of Criminal Procedure also may be used by a government authority to obtain financial records. A search warrant will be issued if the government can convince a

I.R.C. § 7602 (authority for the Internal Revenue Service to issue subpoenas). Usually these statutes allow the agencies to delegate the subpoena power. Typically each agency adopts its own regulations specifying which employees have the authority to issue an administrative subpoena. Those delegated with subpoena power can include regional directors, bureau heads, the general counsel, or anyone conducting an investigation.

B. Mezines, J. Stein, J. Gruff, 3 ADMINISTRATIVE LAW § 20.02, at 20-18 to 20-25 [hereinafter cited as B. Mezines].

19. B. Mezines, supra note 18, § 20.01, at 20-11.

20. Id. § 21.01, at 21-3.


23. Id. Before the passage of the Right to Financial Privacy Act of 1978, a government agency which subpoenaed an individual's records from a financial institution was not required to give notice to the individual. Amend the Bank Secrecy Act Hearings, supra note 2, at 46 (statement of Eugene T. Rossides). Some banks, however, had their own policy of contacting the customer when a subpoena for his records was received. See The Safe Banking Act of 1977 Hearings, supra note 2, at 1478-79 (statement of L. Richard Fischer). Congress began to recognize the potential for abuse that resulted when the customer was not given notice of a government request for his financial records. The Tax Reform Act of 1976, therefore, created a special procedure for third-party summons which included giving notice of the summons to the bank customer. I.R.C. § 7609(a).

24. 12 U.S.C.A. § 3413(i) (Supp. 1978). But cf. 12 U.S.C.A. § 3420 (Supp. 1978) (prescribes some standards for handling financial information once a grand jury has acquired it). The grand jury is considered to be the single most effective legislative tool in criminal law enforcement investigations. H.R. REP. NO. 1383, supra note 10, at 246. Its authority is derived from the constitution and its procedures are defined by 200 years of legal precedent. Id. The grand jury may be in need of reform, but the Banking Committee was not considered the place to do it. Id. For a discussion of the present grand jury system and the need for reform, see Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977); Reform of the Grand Jury System: Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. (1976).


neutral and detached magistrate that there is probable cause to believe that
grounds for issuance of the warrant exist. In bank record cases, this
means there is probable cause to believe that a crime was committed and
that the records maintained by the financial institution contain evidence of this crime.

Upon procuring the search warrant, the government authority can serve it
on the financial institution and immediately receive the records. Notice of
this warrant must be sent to the bank customer, but only after his or her
records are released. This notice, therefore, only informs an individual
that a government intrusion into his financial records has already occurred.
The Privacy Commission, in contrast, had recommended that an individual
be notified when "his records are being sought." The Commission advocated
pre-release notice as a means to avoid clandestine government access
to financial records. Proponents of post-release notice, however, success-
fully argued that notice to the customer before his or her records are re-
leased is unnecessary due to the high probable cause standard and the tradi-
tional ex parte nature of search warrant proceedings.

The argument for post-release notice was misdirected. Notice of a pending
search warrant generally is withheld in order to insure that a suspect re-
ceives no warnings prior to carrying out an illegal activity and to prevent
him or her from tampering with evidence. When the records sought are

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10, 14 (1948); Gonzales v. Beto, 425 F.2d 963, 968 (5th Cir. 1970); United States v. Kemp, 421
F. Supp. 563, 568 (W.D. Pa. 1976). Probable cause for the issuance of a search warrant is a
reasonable ground for belief of guilt. This has been construed as demanding more than mere
suspicion but requiring less evidence than would be necessary for conviction. Brinegar v.
United States, 338 U.S. 160, 175 (1949); Rosencranz v. United States, 356 F.2d 310, 314 (1st
Cir. 1966); United States v. Davis, 346 F. Supp. 435, 440 (S.D. Ill. 1972); United States v.

Persons in whose name a safety deposit box was registered applied for return of money seized
from the box by the FBI pursuant to a search warrant. The court held that when a search
warrant is directed to a third party, protection from an unreasonable search and seizure is
provided when there is a finding of probable cause as to two factors—the commission of a crime
and the location of evidence.

29. 12 U.S.C.A. § 3406(b) (Supp. 1978). The government authority has 90 days after receiv-
ing the search warrant to mail a copy of it to the bank customer. Id.

30. PRIVACY PROTECTION STUDY, supra note 8, at 351 (emphasis added).

31. Id. at 352.

32. H.R. REP. No. 1383, supra note 10, at 220; Right to Financial Privacy Act Hearings,
supra note 7, at 21 (statement of Robert E. Barnett).

33. Surveillance Hearings, supra note 14, at 714-16 (statement of Harvard Civil Rights–
Civil Liberties Research Committee). It would be absurd to give an individual notice that his
phone is being wiretapped because he would no longer use that phone. Conversations concern-
ing illegal activities, therefore, would avoid detection. It would be equally absurd to give an
individual notice that his home or office is going to be searched because he would destroy or
falsify any incriminating evidence. Id. at 716.
in the custody of a financial institution, however, there is no corresponding opportunity for a customer to destroy or falsify them,\textsuperscript{34} or alter his or her behavior to avoid detection.\textsuperscript{35} Therefore, even when a search warrant is used to obtain financial information, the customer should be notified before the government receives his or her records from the financial institution.\textsuperscript{36}

Pre-release notice would alert the customer that records are being seized so that protective legal measures could be taken.\textsuperscript{37} Under the Act, however, a government authority does not have to give notice to an individual until ninety days after obtaining the financial records.\textsuperscript{38} By the time the customer receives knowledge that he or she is being investigated, the investigation could be completed. The customer, therefore, would have no opportunity to defend his or her privacy interests.

Notice should be delayed until after the records are released only if there is reason to believe that it will result in endangering the life of anyone involved in the investigation, intimidation of a potential witness, or flight from prosecution. This would parallel the delay of notice provision presently applicable when the government obtains financial records through a sub-

\textsuperscript{34} Id. at 716. The customer does not have access to the original microfilms maintained by the bank.

\textsuperscript{35} The only way behavior could be altered to avoid detection is by conducting all one’s business transactions in cash. Given the substantial dependence of society on financial institutions, see note 7 supra, and the fact that financial records are maintained in order to aid the prosecution of major white collar crimes, see note 2 supra, it is unlikely that any significant illegal activities can avoid detection. Organized crime syndicates are not likely to run their entire gambling, prostitution, drug trafficking, or loan sharking operations on a cash only basis.

\textsuperscript{36} The Harvard Civil Rights–Civil Liberties Research Committee recommended giving the customer notice prior to the probable cause hearing and standing to participate in it. Surveillance Hearings, supra note 14, at 715. The committee thought the customer’s input would help to assure the presence of ‘that concrete adverseness . . . upon which the court so largely depends for illumination. . . .’ Id. at 717, citing Baker v. Carr, 369 U.S. 186, 204 (1962). The participation of the customer in the search warrant proceeding, however, would turn the probable cause hearing into an adversary hearing. This is a concept which is not supported anywhere in the history of search warrants. If search warrants are an accepted means by which the government may obtain financial records, the traditional procedures surrounding their issuance must be followed. Notice should be sent to the customer after the search warrant has been procured by the government, but before the bank releases the financial records.

\textsuperscript{37} Unfortunately, the legal measures that are currently available to the customer appear to be somewhat limited. The present Act lacks an explicit customer challenge provision for search warrants. See note 132 and accompanying text infra. Also, under existing case law, the customer probably does not have standing to make a motion to return and suppress any seized records. See notes 135-36 and accompanying text infra. It is possible, however, that an individual has an implied right to challenge a search warrant under the Act. See note 138 and accompanying text infra. Without pre-release notice, this implied right theory will never be tested. Also, if standing to challenge a search warrant is either judicially or statutorily extended to a customer, pre-release notice of a search warrant will be an absolute necessity. See note 140 and accompanying text infra.

\textsuperscript{38} See note 29 supra.
poena or formal written request. Since Congress instead chose to delay notice of a search warrant until after an individual's records are released, the burden of protecting financial privacy still rests with the judiciary. Therefore, courts confronted with a request for a search warrant must closely examine whether the requested records are reasonably described and whether there is probable cause to believe grounds exist for the issuance of the warrant.

**Formal Written Request**

The final method by which a government authority can gain access to financial records is simply to make a formal written request to the financial institution. This procedure can be used only if no subpoena appears reasonably available and there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry. In addition, such a request must be authorized under the regulations promulgated by the issuing agency or department. Notice of the request and the right to challenge it must be served upon the customer, or mailed to his or her last known address, on or before the date the request was made to the financial institution.

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39. See 12 U.S.C.A. § 3409(a)(3) (Supp. 1978). The court may delay notice to the customer for 90 days if the presiding judge or magistrate finds that there is reason to believe notice will result in:

1. endangering the life or physical safety of any person;
2. flight from prosecution;
3. destruction of or tampering with evidence;
4. intimidation of potential witnesses; or
5. otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the circumstances in the preceding subparagraphs.

*Id.*

The fifth reason to delay notice is especially significant. Investigations often involve exploring many leads until the right trail is found. This process can involve the issuance of several hundred subpoenas. Government agencies and departments were concerned about the cumulative effect of delay if they had to give notice and the opportunity existed to challenge each subpoena issued. Under this provision, however, a government authority will be able to delay notice on each subpoena for 90 days if it can show the interconnection of all subpoenas and that delay of each would cumulatively jeopardize an investigation or unduly delay an ongoing proceeding. *The Safe Banking Act of 1977 Hearings, supra* note 2, at 1534-36 (statement of Russell T. Baker).

40. See notes 101, 102, and accompanying text infra.

41. See notes 27, 28, and accompanying text supra.


43. *Id.*

44. *Id.* The regulations to be issued by each agency regarding the use of the formal written request should specify the level of employee permitted to make such a request, the circumstances in which it may be used, the form it must take, and the information it must contain. H.R. Rep. No. 1383, *supra* note 10, at 52. These regulations, therefore, will be similar to those issued by agencies regarding the use of an administrative subpoena. See note 18 *supra*.

The original proposed financial privacy bills did not contain formal written request provisions. Since many government agencies and departments do not have administrative subpoena power, these investigative bodies opposed the early bills. Under this original legislation, these agencies and departments would have had to secure a judicial subpoena or a search warrant before acquiring financial records. Consequently, these government authorities predicted that less effective law enforcement would result if the original financial privacy bills were passed. The formal written request provision was designed to accommodate these government authorities. The formal written request, however, has other perhaps unintended consequences. During the congressional debate, this provision was defended as merely codifying and formalizing past practices. Thus, there is some question regarding the congressional intent behind this legislation. If Congress actually intended to reverse *Miller* by legally recognizing a privacy interest in records maintained by a financial institution, it should have created procedural barriers to government access to those records.

The formal written request operates like an administrative subpoena since it can be issued without judicial intervention. Enactment of the formal written request, therefore, runs afoul of the exclusive power of the judiciary.

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46. *See Amend the Bank Secrecy Act Hearings*, supra note 2, at 3-20.
47. *Id.* at 45-46. *See also Oversight Hearings into the Operations of the IRS*, supra note 16, at 121 (statement of Richard Thornburgh).
48. The government thought that these bills would seriously impair investigations and shield law offenders. *Id.* at 42. The government also feared that these bills would eliminate the use "of financial records as investigative leads and sources of evidence" and thereby give "organized crime and white collar workers an unrestricted forum for financial manipulations and concealment of funds." *Amend the Bank Secrecy Act Hearings*, supra note 2, at 111 (statement of William S. Lynch).
49. Bringing an investigation into court to apply for a judicial subpoena was considered too cumbersome. *Id.* at 46 (statement of Eugene T. Rossides).
50. This would involve a probable cause hearing which the agencies also thought was burdensome. *Oversight Hearings into the Operations of the IRS*, supra note 16, at 121 (statement of Richard L. Thornburgh).
51. *Amend the Bank Secrecy Act Hearings*, supra note 2, at 46 (statement of Eugene T. Rossides). A "crippling of law enforcement" was predicted. *Id.*
53. *124 CONG. REC. H11,739* (daily ed. Oct. 5, 1978) (remarks of Rep. Rousselot) [hereinafter cited as 124 CONG. REC.]. It was argued that prior to the Act, the government could collect information in this area without any accountability and pursuant to no standards. According to Congress, the formal written request now merely prescribes criteria for the collection of information in these areas. *Id.*
54. The Right to Financial Privacy Act of 1978 was Congress' response to *Miller*, which held that an individual has no constitutionally recognizable privacy interest in financial records. *H.R. REP. NO. 1383*, supra note 10, at 34.
55. The Privacy Commission criticized the banking system for its lack of procedures impeding government access to financial records. *PRIVACY PROTECTION STUDY*, supra note 8, at 349-50. The only procedural change created by this Act, however, is to "formalize" the government's informal request for financial records by requiring the request to be in writing.
to issue subpoenas necessary to conduct criminal investigations. As Judge Wyzanski explained in *United States v. O'Connor*: “[t]o encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty.” By utilizing the formal written request provision, however, any government agency or department conducting a civil or criminal investigation can bypass the judiciary in acquiring an individual’s financial records. Thus, the procedures prescribed by the Act do not create a legitimate expectation of confidentiality with regard to financial records.

57. The basic power to issue a subpoena resides in the judiciary. 8 *Wigmore Evidence* § 2195, at 78 (McNaughton rev. ed. 1961) [hereinafter cited as *Wigmore*]. Although many agencies are statutorily endowed with subpoena power, there are some circumstances where it is necessary that this power be retained by the courts. B. *Mezines*, supra note 18, § 20.02, at 20-28. One such circumstance is the power to issue subpoenas to gather information for a criminal case. A court will never enforce civil administrative subpoenas issued solely to conduct criminal investigations. See *Donaldson v. United States*, 400 U.S. 517, 532-33 (1971); *Reisman v. Caplin*, 375 U.S. 440, 449 (1964); *United States v. Henry*, 491 F.2d 702, 705 (6th Cir. 1974); *United States v. Salter*, 432 F.2d 697, 699-700 (1st Cir. 1970); *United States v. Roundtree*, 420 F.2d 845, 847 (5th Cir. 1969); *Boren v. Tucker*, 239 F.2d 767, 772-73 (9th Cir. 1956); *United States v. O’Connor*, 118 F. Supp. 248, 251 (D. Mass. 1953).

An administrative subpoena will be enforced, however, if it is being utilized to aid a civil investigation which could potentially result in a criminal prosecution if the subpoena was issued in good faith and prior to the recommendation for criminal prosecution. *Donaldson v. United States*, 400 U.S. 517 (1971).

58. 118 F. Supp. 248 (D. Mass. 1953). The Internal Revenue Service had already closed its investigation of the taxpayer and made its final report. The Justice Department then requested an IRS agent to issue a subpoena for the taxpayer’s records to aid them in a criminal investigation. The court refused to enforce the administrative subpoena, stating: “Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases.” *Id.* at 250.

Search warrants and grand jury subpoenas are the proper discovery devices for criminal investigations. *United States v. Caplan*, 255 F. Supp. 805, 808 (E.D. Mich. 1966). Any inconvenience or injury that a criminal law enforcement agency would suffer as a consequence of being restricted to these two procedures would appear to be minimal since grand jury subpoenas are exempt from the Act. See note 24 supra.

59. 118 F. Supp. at 251. Judge Wyzanski reasoned:

The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. . . .

*Id.* at 250-51. Judge Wyzanski’s construction of administrative subpoena power in criminal investigations was accepted by the Supreme Court in *Donaldson v. United States*, 400 U.S. 517 (1971). The Court stated that “where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution, the purpose is not a legitimate one and enforcement may be denied.” *Id.* at 533, citing *United States v. O’Connor*, 118 F. Supp. 248 (D. Mass. 1953).

60. The Privacy Commission emphasized the need to create such an interest. See note 8 supra.
Emergency Access

Also casting doubt upon the congressional intent to recognize a privacy interest in financial records is the emergency access provision.61 This provision enables a government authority to procure an individual's financial records without following any of the enumerated procedures if it determines that the delay entailed by using the procedures would create an imminent danger of personal injury, serious property damage, or flight to avoid prosecution.62 In such cases, the government simply may certify in writing to the financial institution that it has complied with the applicable provisions of the Act and immediately receive the requested records. Within five days after receiving the records, a signed, sworn statement setting forth the grounds for the emergency access must be filed with the appropriate court and notice must be sent to the customer.63

Congress apparently recognized the serious potential for abuse inherent in the emergency access provision when it required every government authority to annually tabulate the occasions when this provision was used.64 The potential for abuse stems primarily from the inability of a judge to review the action taken, despite receipt of a statement from the government outlining the reasons for emergency access. This odd provision makes little sense unless Congress truly believes that public scrutiny and congressional oversight alone will deter government impropriety.

A preferred approach would have been to borrow the procedure for emergency wiretapping from the Omnibus Safe Streets and Crime Control Act.65 Under the Omnibus Act, a government authority must apply for a court order approving its emergency wiretap within forty-eight hours after installation of the tap.66 If a government agency or department knew that it would have to defend its emergency request for financial records before a judge, it undoubtedly would reduce the number of occasions in which the emergency access provision would be used.

Overall, the procedures of the Act which govern access to financial records significantly regulate government activity in this area. The government no longer has the freedom it possessed after Miller to informally obtain financial information.67 Indeed, certain procedures must be followed,68 and notice must be given to the customer in most situations.69 Some procedural pro-

62. Id. These conditions are similar to those which must be present in order to delay notice of the government's request for an individual's financial records. See note 39 supra.
64. Id. Neither the Act nor legislative history indicate who is to review these tabulations.
66. Id.
67. See note 6 and accompanying text supra for a discussion of informal access to financial records under Miller.
68. See notes 12-14 and accompanying text supra.
69. Notice must be given when financial records are requested by a subpoena or formal written request. See notes 23, 45, and accompanying text supra.
visions, however, could have gone further in protecting the individual. Notice should be sent to the customer in all situations, and the requirements under the emergency access provision are too lenient. Also, the provisions dealing with formal written request and delay of notice appear to be more concerned with assisting government investigations than protecting financial privacy.

**CUSTOMER CHALLENGE**

The Supreme Court in *Miller* held that an individual possessed no privacy interest in his financial records that could be vindicated in court. The customer challenge provision of the Act is the congressional response to that decision. This provision successfully overturns *Miller* by generally providing an individual with automatic standing to challenge the government's access to his financial records. This is a significant right for the customer. It finally enables the courts to hear financial privacy issues and thus develop case law in this area. The full impact of this right, however, is presently only speculative, and its development will depend upon how the courts engraft the standards set out in the Act into established legal principles.

**Subpoena and Formal Written Request**

Under the customer challenge provision, an individual has automatic standing to challenge a request for his or her financial records when they are sought by subpoena or formal written request. A customer served with process must file a motion to quash the subpoena or file an application to enjoin the institution's compliance with the formal written request within ten days. Otherwise the customer has fourteen days to challenge the government in court. This motion or application must contain an affidavit establishing the customer as the concerned party. It also must state the

70. Notice should be given to the customer when his records are sought with a search warrant. See notes 35-37 and accompanying text supra.
71. See notes 64-66 and accompanying text supra.
72. See notes 52, 54-57, and accompanying text supra.
73. See note 39 and accompanying text supra.
75. See note 54 supra.
77. See notes 92, 94, and accompanying text infra for the standards enacted by Congress.
78. Courts will have to revise their view on the “reasonable expectation of privacy” of financial records so that it can be integrated into the Act’s purpose. See note 5 supra for a discussion of this concept. Other legal principles that will have a role in the evolution of financial privacy law are good faith and reasonableness. See notes 93, 101, 102, and accompanying text infra.
80. *Id.*: If a motion to quash or an application to enjoin is not filed within the appropriate 10 or 14 days, the records become available to the government. 12 U.S.C.A. §§ 3405, 3408 (Supp. 1978).
applicant's reason for believing either that the records sought are irrelevant to the law enforcement inquiry or that there was not substantial compliance with the requirements of the Act. 81

Originally, the Privacy Commission recommended that the government, as the moving party in requesting the records, also be the moving party in enforcing its request. 82 Under this approach, the customer would object to the disclosure of his or her records by notifying the financial institution not to comply with the government's demand. The government then could seek enforcement in federal district court and the customer would be allowed to intervene. 83 This approach avoids the customer's "terrific burden of talking [sic] on the whole U.S. Government." 84

Congress instead chose to require that the customers initiate the court action. This procedure probably places too much responsibility on the individual. 85 Nevertheless, this burden is ameliorated to a degree because the burden of proof regarding the relevance of the records to a law enforcement proceeding rests solely with the government. 86 Even with this requirement, Congress realized that the law enforcement community received "an undeserved concession when the burden of going to court first was placed on the individual." 87

81. 12 U.S.C.A. § 3410(a) (Supp. 1978). The original proposal of the customer challenge provision required the customer to show "a factual basis for concluding that there is no reason to believe that the financial records sought contain information relevant to a legitimate law enforcement purpose." 124 CONG. REC., supra note 53, at H11,727. The customer, therefore, could not simply make allegations but would have to state facts to support his position. Failure to meet this standard would result in dismissal of the customer's complaint. To ensure that there would be no barriers to the customer's ability to judicially challenge a government request for his financial records, Congress removed any customer proof requirement. He now can merely allege his reasons for believing the financial records sought are irrelevant. Id. at H11,734.

82. The Privacy Commission recommended utilizing the procedure of the Tax Reform Act of 1976 for a taxpayer's challenge of an IRS summons when it is directed to a third party. Under this procedure the government is the moving party. The Commission, however, recommended greater substantive protections than those extended in the Tax Act. PRIVACY PROTECTION STUDY, supra note 8, at 360.

83. This is the procedure that is currently in effect under the Internal Revenue Code. I.R.C. § 7609(b).


85. See generally 124 CONG. REC., supra note 53, at H11,731 (remarks of Rep. Rousselot); H.R. REP. NO. 1383, supra note 10, at 53. It is too demanding to expect that everyone will have the knowledge and experience to initiate a legal proceeding. Also, individuals often are intimidated by the government. A challenge, therefore, may never even be contemplated since it is often felt that the government always gets what it wants.

86. 124 CONG. REC., supra note 53, at H11,731 (remarks of Rep. Rousselot); H.R. REP. NO. 1383, supra note 10, at 53. The customer does not have to demonstrate that the records are irrelevant. Id. See also note 81 supra.

87. 124 CONG. REC., supra note 53, at H11,732 (remarks of Rep. Rousselot). This concession was probably due to the resistance of government agencies and departments to the enactment of financial privacy legislation. These government authorities claimed that any restrictions on their access to financial records would seriously impair criminal, tax, and regulatory investi-
When enacting the customer challenge provision, Congress also was aware of the need to provide the individual with a legally recognized interest that can be asserted in order to protect financial records. \(^{88}\) Procedural defenses alone do not create a privacy interest. \(^{89}\) Without a defined substantive right of privacy in financial 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." \(^{90}\) The substantive standard that Congress created for financial privacy is relevancy. \(^{91}\)

Once the customer has filed a motion to quash the subpoena or an application to enjoin the formal written request, the government must meet a two-pronged standard of proof. First, the government authority must prove that a demonstrable reason exists for believing the law enforcement inquiry is legitimate. \(^{92}\) The government usually can meet this good faith standard by showing that the request does not exceed the agency's authority, and the individual is not being harassed. \(^{93}\) Second, the government authority must prove that it is reasonable to believe the records sought are relevant to the inquiry. \(^{94}\) Thus, relevancy is the standard which must be met in order to overcome the customer challenge. Any inspection, however, "throw[ing] light upon" an investigation generally is held to be relevant. \(^{95}\)

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\(^{88}\) The need to provide the individual with a legally recognized interest was reported by the Privacy Commission. See note 8 supra.

\(^{89}\) Privacy Protection Study, supra note 8, at 352.

\(^{90}\) Id.

\(^{91}\) See note 94 and accompanying text infra.


\(^{93}\) 124 CONG. REc., supra note 53, at H11,736 (remarks of Rep. Stark). An administrative subpoena will not exceed an agency's authority if it is issued for a purpose that is authorized by statute. See, e.g., I.R.C. § 7602 which authorizes the Secretary of the IRS or his delegate to issue subpoenas for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability. . . . If any IRS subpoena is issued for any reason beyond these purposes, it is exceeding the agency's authority.

A subpoena is harassing an individual if it is issued in order to put pressure on the individual to force him or her to settle a collateral dispute. United States v. Powell, 379 U.S. 48, 58 (1964). For a general discussion of abuses in administrative orders, see Jaffe, The Judicial Enforcement of Administrative Orders, 76 HARV. L. REV. 865 (1963).


\(^{95}\) United States v. Davey, 543 F.2d 96, 1000 (2d Cir. 1976) (IRS subpoena to a corporation to produce computer tapes comprising part of the corporation's financial record-keeping system); United States v. Turner, 480 F.2d 272, 279 (7th Cir. 1973) (IRS subpoena to compel tax preparer to produce names and social security numbers of clients whose tax returns he had prepared); United States v. Shlom, 420 F.2d 263, 265 (2d Cir. 1969), cert. denied, 397 U.S.
Due to this minimal standard, the customer challenge provision on its face does not offer the individual an extensive right to financial privacy. Although procedurally the individual has the right to go into court, under this relevancy standard, the basis for challenging the government’s request is so narrow that it will almost inevitably lead to disclosure. Courts, however, could vigorously review whether the requested records are reasonably described. This issue has not been extensively litigated. Prior cases dealing with government requests for financial records usually involved Internal Revenue Service subpoenas requesting information to be used in order to verify specific items on an individual’s tax return. The Internal Revenue Service in these cases, therefore, was able to identify the specific records it required. Also, prior to the Act, only a bank had the right to challenge a

1074 (1970) (IRS subpoena to attorney to produce specified books, records, and papers of his corporate client); Foster v. United States, 265 F.2d 183, 186-87 (2d Cir. 1959) (IRS subpoena to bank to produce all records concerning a corporation and a named taxpayer); United States v. Mellon Bank, 410 F. Supp. 1065, 1068 (W.D. Pa. 1976) (IRS subpoena to bank to produce list of entries by named taxpayers into their safety deposit boxes); United States v. Campbell, 390 F. Supp. 711, 713 (D.S.D. 1975), aff’d, 524 F.2d 604 (8th Cir. 1975) (IRS subpoena to taxpayer to produce handwriting exemplar to compare with writing on checks); United States v. Acker, 325 F. Supp. 857, 862 (S.D.N.Y. 1971) (IRS subpoena to corporation to produce minutes of meetings).

Normally, records and documents will be deemed relevant and an individual can rarely convince a court otherwise. See cases cited supra. See also United States v. Bisceglia, 420 U.S. 141 (1975) (John Doe subpoena to bank to discover identity of any person who has had bank transactions suggesting possible unpaid taxes); Ryan v. United States, 379 U.S. 61 (1964) (IRS subpoena to taxpayer ordering him to produce his books); United States v. Powell, 379 U.S. 48 (1964) (IRS subpoena to company president to produce records of the corporation); United States v. Morton Salt Co., 338 U.S. 632 (1950) (FTC summons to corporations to submit special reports); United States v. Harrington, 388 F.2d 520 (2d Cir. 1968) (IRS subpoena to attorney requiring him to produce records regarding alimony payments to his client, the wife of the taxpayer under review); United States v. McKay, 372 F.2d 174 (5th Cir. 1967) (IRS subpoena to appraiser to produce a report he made on a certain piece of real estate).

United States v. Matras, 487 F.2d 1271 (8th Cir. 1973), is one of the rare cases where the court held that documents sought were irrelevant. In Matras, the Internal Revenue Service issued a summons requesting the defendant’s proposed budgets for two years. The court of appeals affirmed the district court decision that these budgets were irrelevant to the determination of the defendant’s tax liability since the budgets were only projections of transactions. Any records, however, that actually resulted from these transactions would be relevant. Id. at 1272.

96. United States Attorney General, Griffin B. Bell, thought that a customer would have virtually no chance to enjoin a government request for his financial records under a relevancy standard. He, therefore, viewed the customer’s ability to challenge as simply a delay tactic. Administrative Summons and Anti-Disclosure Provisions of the Tax Reform Act of 1976: Hearings Before the Subcomm. on Over-Sight of the House Comm. on Ways and Means, 95th Cong., 1st Sess. 30-31 (1977) (statement of Griffin B. Bell).

97. See note 11 and accompanying text supra. The government authority does not have to describe every document it wishes to inspect in minute detail, but it must be able to describe them with “reasonable particularity.” First Nat’l Bank of Mobile v. United States, 160 F.2d 532, 535 (5th Cir. 1947).

98. See, e.g., Ryan v. United States, 379 U.S. 61 (1964) (IRS request for specified records); United States v. Powell, 379 U.S. 48 (1964) (IRS request for certain records relating to 1958 and
request for records and often it did not question whether the description was reasonable. 99

Under the Act, all government authorities are required to reasonably describe the records they request, and unlike the Internal Revenue investigators, these authorities often are not following the blueprint of a tax return. 100 Also, the customer now has the right to challenge a government request for financial records. The customer is more likely to be concerned with defeating a government request than the bank, since individual privacy interests are at stake. The issue of description, therefore, should become important. Requiring some precision in the description of the requested records may tighten the relationship between the relevance of the records and the investigation being conducted. A general description usually indicates the government is on a "fishing expedition." 101 In contrast, if the government authority can identify particular records, it is more likely that an investigation of a specific violation is being conducted. 102 Strict judicial scrutiny of the description of the requested records could then have the effect of

99. Although the government made general requests for all records in United States v. Miller, 425 U.S. 435, 437 (1976), and in Foster v. United States, 265 F.2d 183, 185 (2d Cir. 1959), the banks never raised the issue whether the records were reasonably described, and thus it was never litigated. 425 U.S. at 446 n.9, 265 F.2d at 188.

100. An income tax return will not aid investigations of bribery, gambling, drug trafficking, loan sharking, or extortion. Items relating to these kind of operations are not usually found on a return.

101. Government requests for records will not be complied with:

- if they are too general, too wanting in specification, as to indicate that they are merely exploratory fishing expeditions. [The government] is not entitled . . . to have the Bank produce all its records merely in order for [it] to go through them for the purpose of ascertaining whether or not the Bank possesses any records which may or may not be relevant to the . . . investigation.

First Nat'l Bank of Mobile v. United States, 160 F.2d 532, 534 (5th Cir. 1947) (refused to enforce an IRS subpoena requesting the bank to produce all books, papers, records, checks, and drafts that were kept for six years pertaining to four named individuals). See also United States v. Northwest Pa. Bank & Trust Co., 355 F. Supp. 607 (W.D. Pa. 1973). The Internal Revenue Service requested all the records for a six year period concerning certain named individuals and any family members not named. The court refused to enforce the request and stated that the government "must specify what records it wants and what specific persons whose records are wanted, and not merely designate the records of a given family." Id. at 614.

102. This appears to be the court's reasoning in United States v. Dauphin Deposit Trust Co., 385 F.2d 129, 131 (5th Cir. 1967). The Internal Revenue Service had requested the bank to produce " 'All records relative to other accounts during the years 1961 through 1964, such as records of other securities bought or sold for said . . . (customer(s)) or other transactions of any nature handled by the bank on behalf of said . . . (customer(s)).' " The request for "records of other securities bought and sold" was held to be sufficiently precise. The balance of the request, however, was too indefinite and therefore not enforced. Id.
enlarging the customer’s basis for challenging a government request for financial records.

In examining two other standards considered by Congress when enacting this legislation, it is evident that a stricter substantive standard could have been created in the customer challenge provision. The first financial privacy bill that was proposed would have required a government authority, when challenged, to show “probable cause which would be sufficient to support the issuance of a valid search warrant to obtain the financial records if the financial records were in the home of the customer.” Probable cause for issuance of a search warrant is a reasonable ground for belief of guilt. This has been construed as demanding more than mere suspicion but requiring less evidence than would be necessary for a conviction.

Government officials considered this standard to be too strict and opposed it. They argued that rarely does probable cause exist when a request for financial records is made because access to financial records usually is one of the initial steps in developing an investigation. The government felt that an entire investigation often could be blocked if probable cause was required at this stage. This standard, therefore, was rejected.

The other standard proposed in Congress was to provide the customer with “the same rights as if the records were in his possession.” Under this standard, an individual would have the same fourth and fifth amendment rights in financial records as in private papers. This is the type of privacy interest that was recommended by the Privacy Commission. This standard, however, was rejected on the belief that it would deny access to all records in the event the individual decided to exercise his or her right against self-incrimination. By creating the legal fiction of possession in the customer, this standard also would have extended the right to claim the fifth amendment privilege.

103. Amend the Bank Secrecy Act Hearings, supra note 2, at 18-19.
104. See authorities cited in note 27 supra.
105. Amend the Bank Secrecy Act Hearings, supra note 2, at 53 (statement of Eugene T. Rossides).
106. Id. at 90.
107. Id.
108. The next financial privacy bill that was proposed did not contain a probable cause standard. See The Effect of the Bank Secrecy Act Hearings, supra note 7, at 7. For a discussion of the standard that was proposed, see note 109 and accompanying text infra.
109. Right to Financial Privacy Act Hearings, supra note 7, at 9; The Effect of the Bank Secrecy Act Hearings, supra note 7, at 7.
110. The Privacy Commission recommended creating a protectible interest in records maintained by a financial institution that reflects the protections for private papers that are articulated in the fourth and fifth amendments. PRIVACY PROTECTION STUDY, supra note 8, at 363.
111. Right to Financial Privacy Act Hearings, supra note 7, at 36 (statement of Bill Brock); The Effect of the Bank Secrecy Act Hearings, supra note 7, at 132-33 (statement of M. James Lorenz).
112. The privilege against self incrimination is allowed when the person seeking to invoke the fifth amendment has possession of the information the government is seeking. See Couch v.
After Congress rejected this standard, the right to assert the fifth amendment privilege in response to a government request for private papers was seriously undermined in *Fisher v. United States*.\(^{113}\) The Supreme Court in *Fisher* held that an accountant's workpapers, because they are not prepared by the taxpayer, do not contain the taxpayer's compelled *testimonial* declarations and, therefore, do not come within the protection of the fifth amendment.\(^{114}\) Since an individual does not prepare the records maintained by a

United States, 409 U.S. 322 (1973), where the petitioner asserted the fifth amendment privilege when she challenged an Internal Revenue Service summons that directed her accountant to produce business records that she had given him for preparation of her tax returns. The Court denied her challenge, stating that "the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to the information that may incriminate him. . . . It is the extortion of information from the accused himself that offends our sense of justice." *Id.* at 328. *See also* United States v. White, 322 U.S. 694, 698-99 (1944); United States v. Cohen, 388 F.2d 464, 468 (9th Cir. 1967).

For a further discussion of the requirement of possession in order to invoke the fifth amendment, see Note, Constitutional Law—Taxation: A Taxpayer Who Has Demonstrably Relinquished Possession of Her Financial Books and Records to an Accountant Cannot Prevent Enforcement of a Summons Directed to the Accountant for Production of Such Records by Invoking Her Right to Privacy and Privilege Against Self-Incrimination, 40 BROOKLYN L. REV. 211 (1973); Note, Constitutional Law—Privilege Against Self-Incrimination—Compulsory Production of Taxpayer's Business Records in Third Party Possession Held Not Violative of the Fourth and Fifth Amendments, 19 VILL. L. REV. 186 (1973).


114. 425 U.S. at 409. The *Fisher* Court upheld a subpoena directing the taxpayer's attorney to surrender workpapers prepared by the taxpayer's accountant. The Court reasoned that the subpoena would have been valid even if it required the taxpayer to produce the accountant's workpapers that were in his own possession. Although these papers are based solely on financial information that the taxpayer gives to his accountant, they are not actually prepared by the taxpayer and thus they do not contain any testimonial declarations made by him. *Id.*

In reaching this conclusion, the *Fisher* Court questioned whether the fifth amendment protects an individual from complying with a subpoena for documents since the very act of producing them may constitute a compulsory authentication of incriminating evidence. *Id.* at 410-11. Some commentators subscribe to this view. *See* 8 Wigmore, *supra* note 57, § 2264, 379-80, where he stated:

It follows that the production of *documents or chattels* by a person . . . in response to a subpoena . . . or to other form of process relying on his moral responsibility for truth-telling, may be refused under the protection of the [fifth amendment] privilege. . . . [T]here is a testimonial disclosure implicit in their production. It is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded.

Although realizing that an element of compulsion is present with a subpoena, the Court in *Fisher* did not think that a taxpayer's admission of the existence and possession of an accountant's workpapers would rise to the level of testimonial self-incrimination for purposes of the fifth amendment. 425 U.S. at 410-11. The Court stated that:

The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client. Surely
financial institution, they also do not contain any testimonial declarations. Accordingly, the fifth amendment privilege against self-incrimination would not be available to a customer even if he or she had possessory rights in the financial records. Under this standard, financial privacy would then be left with only fourth amendment protections.

Under the fourth amendment, a government authority does not have to show probable cause for enforcement of a subpoena for private papers. If the investigation is conducted pursuant to a legitimate purpose, the private papers sought are relevant to that purpose, and the information requested is reasonably described, the reasonableness requirement of the fourth amend-

the Government is in no way relying on the ‘truth-telling’ of the taxpayer to prove the existence or his access to the documents. . . . The existence and location of the papers are a forgone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons 'no constitutional rights are touched. The question is not of testimony but of surrender.'

Id. at 411, quoting In re Harris, 221 U.S. 274, 279 (1911). The Court then developed the argument that the taxpayer is not competent to authenticate the accountant's workpapers either through compliance with a subpoena or through oral testimony. Id. at 412-13. The basis of this argument was that since the taxpayer did not prepare the papers, he could not vouch for their accuracy. Id. at 413.

Whether the fifth amendment protects an individual from producing records that he prepared and that are in his possession, was specifically left open in Fisher. Id. at 414. Dicta in Andresen v. Maryland, 427 U.S. 463 (1976), however, indicates that an individual would be protected in that situation. Documents containing statements made by the petitioner were seized in Andresen. The petitioner tried to suppress these papers by claiming the seizure violated his fourth and fifth amendment rights. The Court dismissed the fifth amendment claim, but indicated that this protection probably would have been available if a subpoena had been used to obtain the documents. Id. at 473-74. For a further discussion of this case, see Note, Private Papers Now Subject to Reasonable Search and Seizure—Andresen v. Maryland, 26 DePaul L. Rev. 848 (1977).


114. Like the records prepared by the accountant in Fisher, the records maintained by a financial institution are not prepared by the customer and thus do not contain any testimonial declarations made by him. See note 113 supra. The customer may write the checks, but the bank microfilms them and prepares the deposit slips and statements. It is these records that are prepared by the financial institution that a government authority requests and not the original checks.

116. See United States v. Powell, 379 U.S. 48, 57 (1964) (IRS does not have to meet a standard of probable cause to have a summons enforced); United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) (FTC can investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not"); Oklahoma Press Publish. Co. v. Walling, 327 U.S. 186, 216 (1946) (the investigative functions of the administrative subpoena power under the Fair Labor Standards Act must be limited by any predictions concerning the probable results of the investigation).
ment is satisfied and the administrative\textsuperscript{117} or judicial\textsuperscript{118} subpoena will be enforced.

Although this is essentially the same standard presently found in the Act,\textsuperscript{119} this standard for subpoenas has been criticized greatly in recent years.\textsuperscript{120} A subpoena is considered less intrusive than a search warrant, which often involves rummaging though one’s personal belongings,\textsuperscript{121} but the privacy interest is in the papers themselves. This interest is infringed upon whether the papers are obtained through a subpoena or a search warrant. \textsuperscript{122} Courts, therefore, have been urged to adopt a stricter standard for enforcement of subpoenas that is somewhere between relevancy and probable cause.\textsuperscript{123} If the Act provided the individual with the same rights in his financial records “as if they were in his own possession,” the standard for the customer challenge provision would have automatically incorporated any case law changes. By enacting a \textit{fixed} standard of relevancy, the Act may not be amenable to any stricter standards which might be judicially adopted.\textsuperscript{124}

An even greater impact would be found in situations involving the formal written request if the individual had possessory rights in his financial records. Since the formal written request is a new method of obtaining information, the applicable standard would have to be determined by the courts on a case by case approach. Thus, courts could require probable cause when financial records are sought for use in a criminal investigation and require a lesser standard for a civil investigation.\textsuperscript{125}

\begin{notes}
\item[121] The court in Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972), stated that a subpoena “is much less intrusive than a search warrant: the police do not go rummaging through one's home, office, or desk if armed only with a subpoena.” \textit{Id.} at 130.
\item[122] McKenna, supra note 113, at 89. The Supreme Court in Boyd v. United States, 116 U.S. 616 (1886), held that the compulsory production of papers by a subpoena is within the scope of the fourth amendment because it essentially accomplishes the same purpose. \textit{Id.} at 622. A subpoena, like a search warrant, forces an individual to forfeit his property. \textit{Id.} This holding remains persuasive and subpoenas should “be held to be within the protective ambit of the fourth amendment.” McKenna, supra note 113, at 86-87.
\item[123] See generally authorities cited in note 120 supra.
\item[124] See notes 127, 128, and accompanying text infra.
\item[125] The use of a relevancy standard to enforce a formal written request for information to be used in a criminal case echoes Judge Wyzanski's statement in O'Connor, that the use of an administrative subpoena in a criminal investigation "would diminish one of the fundamental
Even though a fixed standard of relevancy was adopted by Congress in the Act, the courts should attempt to achieve the same results which would have occurred if the individual had possessory rights in the financial records. The courts, therefore, should not set a different standard if they decide to give more protection to an individual's private papers. A different standard would not lead to greater protection of financial privacy. Instead, the relevancy standard itself should be tightened through stricter judicial construction in both private papers and financial records cases. This is where the true significance of the customer's ability to come into court and challenge the government becomes apparent.

Since courts now can hear financial privacy cases, the relevancy standard can be developed to reflect varying privacy interests. Thus, the amount of light an inspection of financial records must throw upon an investigation in order to be relevant would depend upon the court's perception of the relation between the facts of the case, the government's purpose, and the right to privacy. Under this approach, relevancy could gradually become a stricter standard. This analysis also would enable the courts to demand more from the government to prove relevancy when a criminal charge is involved. Congress may have enacted a certain standard for protecting disclosures of financial records, but the final interpretation and application of this standard to each financial privacy case is up to the courts.

**Search Warrant**

Another concession to the government in the customer challenge section is the noticeable absence of any provision dealing with search warrants. Congress apparently felt that the right to make a motion to return guarantees of liberty.” 118 F. Supp. at 251. See notes 58, 59, and accompanying text supra. A civil subpoena that is enforced under a relevancy standard has never been allowed in a criminal investigation. See note 57 supra. Thus, a standard resembling probable cause should be demonstrated by the government when a formal written request is used to obtain records in a criminal investigation.

126. See note 94 and accompanying text supra.
127. If a different standard was adopted, see note 123 and accompanying text supra, it would not be applicable to the Act because of its specific statutory language requiring relevancy. See note 94 and accompanying text supra.
128. Since the standard is fixed in the Act, the only way financial privacy can receive more substantive protection is by making the standard itself stricter. Established legal principles such as good faith and reasonableness could be used by the courts to accomplish this purpose. See notes 93, 101, and 102 supra.
129a See notes 76-78 and accompanying text supra.
130. See note 95 and accompanying text supra.
131. There are two other concessions to the government in the customer challenge provision. The first concession is to require the customer to be the moving party in the challenge. See note 87 and accompanying text supra. The second is the use of the relevancy standard. See note 94 and accompanying text supra.
and suppress evidence acquired by a search warrant under the Federal Rules of Criminal Procedure was adequate. Unfortunately, the limitations on standing to challenge search warrants make this protection insufficient. In order to have standing, the "movant must claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." The search and seizure of an individual's bank records does not meet any of these requirements. Hence, the customer lacks standing to move for the return of records the government acquires from his or her financial institution through a search warrant. If Congress had provided the customer with the same rights in his financial records "as if the records were in his own possession," the possession requirement would be met and the customer would have standing to motion for the return and suppression of his records.

It is possible that portions of the Act could support an argument that a customer of a financial institution has standing to challenge a search warrant. The absence of an explicit provision, however, probably will be fatal. If the courts do not imply such a right, it would be wise for Con-

133. Fed. R. Crim. P. 41(e) provides that:
   A person aggrieved by an unlawful search and seizure may move the district court . . . 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 trial or hearing. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment on information is filed, it shall be treated also as a motion to suppress under Rule 12.

134. The Privacy Commission also incorrectly arrived at this conclusion. PRIVACY PROTECTION STUDY, supra note 8, at 363-64.

135. Only a "person aggrieved" by an unlawful search and seizure has standing to make a motion to suppress evidence. United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973); Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 360-61 (1974). The Supreme Court has defined a person aggrieved as: "a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of the evidence gathered as a consequence of a search and seizure directed at someone else." Jones v. United States, 362 U.S. 257, 261 (1960).

136. 362 U.S. at 261. The defendant in Jones was staying at a friend's apartment when it was searched by federal agents and narcotics belonging to him were seized. Since the defendant was the owner of the seized items, he was allowed to make a motion to suppress the evidence that was seized. See also Boyle v. United States, 395 F.2d 413, 415-16 (9th Cir. 1968), where the court held that the defendant did not have standing to present a motion to suppress the evidence of seized cancelled checks that implicated him in income tax evasion. These checks were owned and in the possession of a third party.

137. See note 109 supra.

138. 12 U.S.C.A. § 3406 (Supp. 1978). This section states that after a government authority obtains an individual's financial records through the use of a search warrant, he "may have rights under the Right to Financial Privacy Act of 1978." It could be argued that an individual's right to challenge a search warrant can be implied from this general language.

139. Since Congress explicitly provided for a customer challenge in the subpoena and formal written request situations, see note 79 and accompanying text supra, the absence of such a right when search warrants are used probably indicates a congressional intent not to provide standing to challenge a search warrant.
gress to amend the Act to allow customer challenges of search warrants directed toward financial institutions. \(^{140}\) Although an ex parte probable cause hearing does subject a government’s request for records to the scrutiny of judicial review, this is no substitute for an adversary challenge hearing. Without a right to challenge, there is no way to assure that the government’s request for financial records is justified.

**CONCLUSION**

The Right to Financial Privacy Act of 1978 is significant because it creates a procedural and substantive right to privacy in an area where the Supreme Court previously held that none existed. \(^{141}\) Even though the procedural provisions could have been more protective of the bank customer, \(^{142}\) they will help regulate clandestine and undocumented government access to financial records. \(^{143}\) The most significant aspect of the Act, however, is that it gives the individual standing to come into court and substantively challenge a government request for his financial records. \(^{144}\) Although Congress did set a rather minimal standard which must be met by the government to overcome such a challenge, \(^{145}\) it is up to the courts to interpret and apply this standard to the financial privacy area. \(^{146}\) Thus, it appears that Congress intended to create the right to financial privacy but wished to have the courts develop it through case law.

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140. Congress either should provide the individual with possessory rights in his financial records so he has standing to make a motion to return and suppress evidence, or create a customer challenge provision for search warrants resembling the one presently in effect for subpoenas and formal written requests.

141. See note 5 and accompanying text *supra*.

142. See generally notes 36, 37, 52, 54-57, 64-66, 82-85, and accompanying text *supra*.

143. See notes 13, 14, and accompanying text *supra*.

144. See note 79 and accompanying text *supra*.

145. See notes 94, 95, and accompanying text *supra*.

146. See notes 128-130 and accompanying text *supra*. 