Mississippi College Law Review

Volume 4 | Issue 1 Article 5

1984

A Dilemma for Banks: Disclosure of Customer Records in Legal Proceedings

James A. Peden Jr.

VOLUME 4 FALL 1983 NUMBER 1

MISSISSIPPI COLLEGE LAW REVIEW

A DILEMMA FOR BANKS: DISCLOSURE OF CUSTOMER RECORDS IN LEGAL PROCEEDINGS

*James A. Peden, Jr.**

From time to time almost every adult citizen must face the unpleasant necessity of obtaining a loan from a bank, savings and loan association, credit union, or other financial institution. Moreover, if a person is to participate in the economic life of modern society, it is virtually a prerequisite that he have and use a bank checking account. Making application for a loan and utilizing a checking account are activities which generate written records—records that can reveal the most personal details about a bank customer.

If one has access to a customer's loan application, he can obtain detailed knowledge of that customer's income, assets, and liabilities. He can also learn much about the customer's personal or business plans. If one can secure copies of the checks drawn on a customer's checking account, he can readily discover the amount of a customer's monthly mortgage payment, the sums which the customer spends on utilities and groceries, the total the customer spends on medical care and the identity of physicians or hospitals providing that care, the name of insurance companies to whom the customer pays premiums, the titles of magazines to which the customer subscribes, the identity of charities to which the customer contributes, the names of the church or other organizations in which the customer holds membership, and the names of political parties or candidates to whom the customer has made financial contributions. Dozens of other facts about a bank customer and

* B.A. *summa cum laude*, J.D., University of Mississippi; Fulbright Scholar, University of Bristol, England; Partner, Stennett, Wilkinson & Ward, Jackson, Mississippi.

the manner in which he lives can be ascertained from an examination of his cancelled checks.

The Supreme Court of California has emphasized that a bank depositor, by using a checking account, "reveals many aspects of his personal affairs, opinions, habits, and associations. Indeed, the totality of bank records provides a virtual current biography."[1] Justice Douglas has similarly commented:

> The records of checks . . . are highly useful. In a sense a person is defined by the checks he writes. By examining them the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on *ad infinitum.*[2]

Customers understandably expect banks to hold their loan applications, cancelled checks, account statements, and other bank records in strict confidence. Banks wish to maintain the goodwill of their customers, and as a rule banks are careful not to disclose customer records to third parties. However, it is not uncommon for the Internal Revenue Service or for another agency of the federal or state government to seek the banking records of a customer. Federal and state grand juries may issue a subpoena duces tecum for bank records. In a civil proceeding between X and Y, one party may invoke discovery procedures to obtain the bank records of the other. Or, in a civil proceeding between X and Y, one party may have a subpoena duces tecum issued to obtain the bank records of Z, with whom the opposite party has some personal or business relationship. It is not unknown for a district attorney or a police officer to make a formal request or demand that a bank produce records of a customer under investigation.

How does a bank respond in such situations? What are its duties and responsibilities? Does it automatically honor every subpoena duces tecum served upon it for customer records? Does the source of the subpoena duces tecum affect the manner of the bank's response? Should the bank inform the customer that his records have been subpoenaed or are otherwise being sought? What if the bank so informs the customer and the customer then

---

1. Burrows v. Superior Court, 13 Cal. 3d 238, 246, 529 P.2d 590, 596, 118 Cal.Rptr. 166, 172 (1974).

2. California Bankers Assn. v. Shultz, 416 U.S. 21, 85 (1974) (Douglas, J., dissenting); *see also* Mortimer, *The IRS Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers—Revisited,* 92 BANKING L.J. 832 (1975); Note, *Bank Recordkeeping and the Customer's Expectation of Confidentiality,* 26 CATH. U.L. REV. 89 (1976).

demands that the bank still keep his records confidential? What if a United States marshal or a local sheriff serving a grand jury subpoena duces tecum on a bank tells bank officers not to reveal to the customer that his bank records are being sought? Does a bank ever incur liability to a customer for producing his bank records in response to a subpoena duces tecum? Does a bank ever incur liability for honoring a subpoena duces tecum for customer records if it does not inform the customer? What about the expense of, search for, and reproduction of bank records? Must the bank absorb this expense, or can the bank require the subpoenaing party to pay this expense?

As the foregoing questions suggest, maintaining the confidentiality of customer records while at the same time responding to a subpoena duces tecum or other lawful process can create a dilemma for banks. It is the purpose of this article to analyze that dilemma and to suggest some practical ways in which a bank, particularly one subject to Mississippi law, can steer a safe course between a modern-day Scylla and a contemporary Charybdis.[3]

I. CONFIDENTIAL BUT NOT PRIVILEGED

There seems to be no doubt that a customer's bank records are confidential. It is implicit in the bank-customer relationship that the bank, without the consent of the customer, will not disclose to a third party the information contained in the customer's records.[4] One text-writer has referred to "the existence of a duty of a rather high order on the part of the bank not to disclose the intimate details of its depositors' accounts."[5] The author of a legal encyclopedia has said:

> While a depositor has no proprietary interest in the records of the bank, and cannot prevent their publication in a proper case, he does have a property right in the information contained therein relative to the state of his account sufficient to place the bank under an implied duty to keep such records secret as a general rule.[6]

The first modern statement of confidentiality of bank records

---

3. For a description of the efforts by classical heroes to steer between the rock of Scylla and the whirlpool of Charybdis, *see* HOMER, THE ODYSSEY, book XII; VIRGIL, THE AENEID, book III.

4. Pigg v. Robertson, 549 S.W.2d 597, 600 (Mo. Ct. App. 1977); Sparks v. Union Trust Co. of Shelby, 256 N.C. 478, 481, 124 S.E.2d 365, 367 (1962).

5. Annot., 92 A.L.R.2d 900, 901 (1963).

6. 9 C.J.S. *Banks and Banking* § 271c, at 555 (1938).

was made in the leading English case, *Tournier v. National Provincial & Union Bank of England*,[7] in which Lord Justice Scrutton declared in a concurring opinion: "I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances."[8]

In the principal opinion in *Tournier*, Lord Justice Burkes specified the circumstances in which the rule of confidentiality would yield and in which disclosure of customer records would be allowed. First, disclosure is permitted where it is required by compulsion of law—for example, in response to a subpoena duces tecum. Second, disclosure is permitted where a bank has a public duty to disclose—for example, making information available to bank examiners. Third, disclosure is permitted where the interests of the bank require disclosure—for example, when a bank is in litigation with a customer, and his records must be disclosed if the bank is to protect its legal position. Fourth, records may be disclosed where the customer has given his express or implied consent to the disclosure—for example, by giving the bank as a business reference.[9]

Thus, the bank's duty of confidentiality to its customers is not absolute. While bank records may be generally considered confidential, they are not privileged from disclosure. The law does not recognize a bank-customer privilege akin to the spousal privilege,[10] the physician-patient privilege,[11] the priest-penitent privilege,[12] or the attorney-client privilege.[13]

American courts, while acknowledging the implicit duty of banks to keep confidential the financial transactions of their customers, have stated that the duty does not apply where a court compels disclosure. Indeed, the confidential information contained in the bank records of customers "has always been subject to compulsory disclosure pursuant to a duly issued court summons where the information was relevant to a controversy being litigated."[14]

More than fifty years ago, a New Jersey court, in a case in-

---

7. [1924] 1 K.B. 461 (C.A.).
8. *Id.* at 480.
9. *Id.* at 473.
10. MISS. CODE ANN. §13-1-5 (Supp. 1983).
11. *Id.* § 13-1-21.
12. *Id.* § 13-1-22.
13. *Id.* § 73-3-37(4) (1972).
14. LeValley and Lancy, *The IRS Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers*, 89 BANKING L.J. 979, 979-80 (1972).

volving an effort by a prosecutor to obtain from a bank the records of accounts, deposits, and withdrawals of certain customers, said: "There is an implied obligation . . . on the bank to keep these from scrutiny unless compelled by a court of competent jurisdiction to do otherwise."[15] The Supreme Court of Idaho has agreed that bank records may be produced in circumstances "authorized by law,"[16] and the Florida District Court of Appeal has declared:

> '*Indeed, it is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank,* or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a court . . . .'[17]

The Maryland Court of Special Appeals has similarly imposed upon banks a duty to keep customer records confidential "absent compulsion by law."[18]

In Mississippi, a somewhat poorly written statute indicates that customer information held by banks is not to be disclosed other than in legal proceedings:

> In no instance shall the name of any depositor, or the amount of his deposit, be disclosed to anyone, except when required to be done in legal proceedings or in case of insolvency of banks, and any violation of this provision shall be considered a misdemeanor, and, upon conviction thereof, in any court of competent jurisdiction, such persons shall be punished by fine of not more than one thousand dollars, or imprisoned in the county jail not more than six months, or both, and in addition thereto, shall be liable upon his bond to any person damaged thereby.[19]

This statute, which was enacted in 1934,[20] has never been amended. Nor has it ever been interpreted by the Supreme Court

---

15. Brex v. Smith, 104 N.J. Eq. 386, 390, 146 A. 34, 36 (N.J. Ch. 1929).
16. Peterson v. Idaho First National Bank, 83 Idaho 578, 588, 367 P.2d 284, 290 (1961).
17. Milohnich v. First National Bank of Miami Springs, 224 So. 2d 759, 761 (Fla. Dist. Ct. App. 1969) (quoting 10 AM. JUR. 2D, *Banks* § 332, at 295 (1963)) (emphasis added by the court).
18. Suburban Trust Co. v. Waller, 44 Md. App. 335, 344, 408 A.2d 758, 764 (1979).
19. MISS. CODE ANN. § 81-5-55 (1972).
20. 1934 Miss. Laws ch. 146.

of Mississippi. It does not use the word "confidentiality," and it states that only the name of a depositor and the amount of his deposit shall not be disclosed. However, an implication emerges from the statute that all types of customer records are to be kept confidential—an implication strengthened by a statutory prohibition placed upon the Commissioner of the Mississippi Department of Banking and Consumer Finance and the examiners and employees of his Department:

> None of them shall disclose to any person, official or otherwise, except when required in legal proceedings, any fact or information obtained in the course of the performance of their duties, except so far as it may be incumbent upon them under the law, to report to the commissioner, or to make public records and publish the same.[21]

It is significant to note that both Sections 81-5-55 and 81-1-89, while generally prohibiting the disclosure of bank records, make an exception when the disclosure is required in legal proceedings.

Subsequent discussion will examine more fully the various types of legal proceedings in which disclosure of customer records may be compelled. As a general rule, bank officers may be required to testify about customer accounts both in deposition proceedings and during a trial, and customer records may be obtained both during discovery and at trial through the issuance of a subpoena duces tecum. There have been many efforts by both bank customers and banks themselves to claim that customer records are exempt from disclosure. The courts have almost uniformly rejected such attempts.

As early as 1826, when a bank clerk testifying in an English court responded to a question concerning a customer's account balance by stating that it was the bank's policy not to disclose such information, Chief Justice Abbott said: "It is not a confidential communication. I think you are bound to answer the question."[22] In the early nineteenth century, American courts similarly overruled objections to the production of customer records in legal proceedings.[23] In one such case, Chief Justice Campbell of the Supreme Court of Michigan referred to "the remarkable notion that

---

21. MISS. CODE ANN. § 81-1-89 (Supp. 1983).
22. Loyd v. Freshfield, 172 Eng. Rep. 147, 148 (1826).
23. *See, e.g.*, Winder v. Diffenderffer, 2 Bland Ch. 166, 197 (Md. 1829).

banking business is privileged from scrutiny."[24]

During the twentieth century, American courts have continued to hold that a bank cannot decline to produce information concerning bank records of customers in legal proceedings. As a federal court sitting in New York commented in 1904: "It would be a singular extension of the rule concerning privileged communications that permitted the identity of one depositing securities with a banker to be concealed by that merchant. The principle, if acknowledged, would screen one who had stolen what he so deposited."[25] In rejecting an effort by a customer to prevent a broker from complying with two subpoenas duces tecum issued by the Securities and Exchange Commission, Circuit Judge Learned Hand emphasized that "the duty to disclose in a court all pertinent information within one's control, testimonially or by production of documents, is usually paramount over any private interests which may be affected."[26] As the United States District Court for the District of Columbia stated:

> The court has found no law of the United States which would make banking records privileged. The decisions are to the contrary. A banker or broker may not refuse to produce relevant documents on the ground that communications between him and his customers are confidential and privileged.[27]

The United States District Court for the Southern District of New York reached a similar conclusion in denying a motion by defendants for a protective order to prevent the deposition of a bank, a non-party to the litigation, from being taken:

> There is no banker-client privilege. The scope of the privilege doctrine is narrow indeed. . . .
>
> . . . .
>
> We see no analytical reason to raise an understandably confidential commercial situation of principal-agent or customer-banker to a privilege. The duties of confidentiality which a bank may owe a customer during their course of dealing do not overcome those duties of relevant disclosure which the customer and his bank may owe another litigant under the discovery rules.[28]

---

24. Heath v. Waters, 40 Mich. 457, 471 (1879).

25. ICC v. Harriman, 157 F. 432, 440 (C.C.S.D.N.Y.), *aff'd in part and rev'd in part on other grounds*, 211 U.S. 407 (1908).

26. McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937).

27. Societe Internationale v. McGranery, 111 F. Supp. 435, 443 (D.D.C. 1953).

28. Rosenblatt v. Northwest Airlines, Inc., 54 F.R.D. 21, 22-23 (S.D.N.Y. 1971). For similar expressions by federal courts that no banker-customer privilege prohibits dis-

State courts have enunciated similar views.[29] In the straightforward language of the Supreme Court of Minnesota: "A bank or banker is not privileged from disclosing the facts concerning a depositor's or customer's business with the bank."[30]

The foregoing expressions that bank records must be disclosed in legal proceedings are based upon "the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege."[31] As the United States Supreme Court declared in *United States v. Nixon*,[32] the most famous of cases involving a privilege claim:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the justice system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[33]

II. LIABILITY FOR PRODUCTION WITHOUT SUBPOENA

While bank records are not privileged from production in legal proceedings, banks should be certain that they do not release customer records unless there has been service of compulsory legal process. To release customer records to a third party in the absence of a subpoena duces tecum or other lawful process can ex-

---

closure of the customer's records in judicial proceedings, *see* United States v. Prevatt, 526 F.2d 400, 402 (5th Cir. 1976); Harris v. United States, 413 F.2d 316, 319 (9th Cir. 1969); United States v. Grand Jury Investigation, 417 F. Supp. 389, 391-92 (E.D. Pa. 1976); Stark v. Connally, 347 F. Supp. 1242, 1248 (N.D. Cal. 1972), *aff'd in part and rev'd in part on other grounds sub nom.* California Bankers Assn. v. Shultz, 416 U.S. 21 (1974); *In re* Insull Utility Investments, 27 F. Supp. 887, 889-90 (S.D.N.Y. 1934).

29. *In re* Davies, 68 Kan. 791, 794-95, 75 P. 1048, 1049 (1904); *In re* Addonizio, 53 N.J. 107, 133, 248 A.2d 531, 546 (1968); Woolley v. Hiner, 164 Or. 161, 172, 100 P.2d 608, 612 (1940); Biggers v. State, 358 S.W.2d 188, 191 (Tex. Civ. App. 1962); Smith v. Dawson, 234 S.W. 690, 691 (Tex. Civ. App. 1921); State v. Hambrick, 65 Wyo. 1, 45-46, 196 P.2d 661, 678, *reh'g denied*, 65 Wyo. 55, 198 P.2d 969 (1948).

30. State *ex rel.* G. M. Gustafson Co. v. Crookston Trust Co., 222 Minn. 17, 23-24, 22 N.W.2d 911, 916 (1946). For other statements repudiating the idea of a banker-customer privilege, *see* 8 J. WIGMORE, EVIDENCE § 2286, at 528-29 (McNaughton rev. 1961); 81 AM. JUR. 2D *Witnesses* § 141, at 182 (1976); 97 C.J.S. *Witnesses* § 256, at 742 (1957); Annot., 109 A.L.R. 1450 (1937); Limburg, *The Bankers' and Brokers' Privilege*, 25 COLUM. L. REV. 152, 152-53 (1925).

31. Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)); *see also* Trammel v. United States, 445 U.S. 40, 50 (1980).

32. 418 U.S. 683 (1974).

33. *Id.* at 709.

pose the bank to liability. Even if the third person seeking the records is clothed with some official authority—for example, a chief of police or a government prosecutor, the bank should insist upon a subpoena duces tecum or other process before it discloses a customer's records.

The leading American case is *Peterson v. Idaho First National Bank.*[34] In that case, an employer contacted an employee's banker and asked to be advised of any activity by the employee that might bring discredit to the company. The banker subsequently told the employer that the employee's personal financial situation was precarious and that the bank was dishonoring many checks written by the employee on account of insufficient funds. The employee then sued the bank. The trial court dismissed for failure to state a claim upon which relief could be granted. The Supreme Court of Idaho reversed, holding that the complaint stated a claim for breach of the bank's implied contract not to disclose information concerning the customer's account. The Supreme Court stated:

> It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors. . . .
>
> 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.[35]

Relying upon the Idaho precedent, a Florida appellate court reversed a trial court's dismissal of a complaint brought by a customer against a bank for divulging financial information about the customer to a third party. The appellate tribunal said: "We are of the opinion that this complaint alleged a cause of action for violation of an implied duty on the part of a national bank not to disclose information negligently, wilfully or maliciously or intentionally to third parties, concerning the depositor's account."[36] Courts in Maryland,[37] Missouri,[38] and Oklahoma[39] have reached similar

---

34. 83 Idaho 578, 367 P.2d 284 (1961).
35. *Id.* at 588, 367 P.2d at 290.
36. Milohnich v. First National Bank of Miami Springs, 224 So. 2d at 762 (Fla. Dist. Ct. App. 1969).
37. Suburban Trust Co. v. Waller, 44 Md. App. 335, 408 A.2d 758 (1979).
38. Pigg v. Robertson, 549 S.W.2d 597 (Mo. Ct. App. 1977).

conclusions.

These holdings that a bank can be civilly liable for divulging customer records to a third party without compulsory process recently led a Mississippi bank, upon the advice of the author, to decline to honor an administrative subpoena duces tecum issued by the Mississippi Secretary of State. This case well illustrates the type dilemma in which banks can find themselves as they attempt to protect the confidentiality of bank records. The case points up the type issues to which bank counsel should be sensitive.

In the autumn of 1981, the Secretary of State became suspicious that certain persons were engaged in securities fraud through a corporation known as Gulf Coast Energy, Inc. The corporation maintained a bank account at First State Bank, Gulfport, Mississippi. The Secretary of State conducted an investigation pursuant to the Mississippi Uniform Securities Act.[40] Relying on a provision of the Act giving him the power to subpoena witnesses and to require the production of documents and records as part of an investigation,[41] the Secretary of State issued an administrative subpoena duces tecum dated September 29, 1981, requiring First State Bank to produce for inspection all books, papers, documents, wire transfer logs, and records reflecting the accounts of Gulf Coast Energy, Inc.

The bank, in a formal letter prepared by the author of this article and hand delivered to the Secretary of State, respectfully declined to comply with the administrative subpoena duces tecum.[42] The letter pointed out that compliance might well constitute a violation of Section 81-5-55 of the Mississippi Code, which prohibits disclosure of the amount of a customer's deposit "except when required to be done in legal proceedings."[43] The letter made mention of the Idaho, Florida, Maryland, and Missouri prece-

---

39. Djowharzadeh v. City National Bank and Trust Co. of Norman, 646 P.2d 616 (Okla. Ct. App. 1982) (loan officer disclosed customer's confidential real estate investment plans to wives of bank chairman and bank president, and wives purchased real estate for their own accounts).

40. 1981 Miss. Laws ch. 521 (codified at MISS. CODE ANN. §§ 75-71-701 through -705 (Supp. 1983)).

41. MISS. CODE ANN. § 75-71-709 (Supp. 1983).

42. Letter from James A. Peden, Jr. to Edwin Lloyd Pittman, Secretary of State (October 7, 1981).

43. MISS. CODE ANN. § 81-5-55 (1972). *See supra* text accompanying note 19. The term "legal proceedings" appears to refer to actions at law, not to administrative investigations like that being conducted by the Secretary of State. *See* Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel and Iron Co., 241 Ala. 545, 549, 3 So. 2d 306, 309 (1941).

dents[44] and explained that compliance with the administrative subpoena duces tecum could potentially expose First State Bank both to civil and criminal liability. The letter further explained that the bank stood ready to produce the requested records in response to a proper court order.

The Secretary of State, upon the advice of the Attorney General's office, verbally acknowledged that the concerns of the bank were not without merit. The Secretary of State thereupon filed suit in the Chancery Court of the First Judicial District of Hinds County, Mississippi, and on March 3, 1982, obtained a citation directing the bank to produce the requested documents concerning Gulf Coast Energy, Inc. The bank complied with the citation and produced the records. At the request of the bank's counsel, the court included in an order dated July 27, 1982, a paragraph releasing and discharging First State Bank, together with its officers and employees, from any liability to Gulf Coast Energy, Inc., for producing the said records.[45]

It is simply prudent practice for bank counsel to insist upon a judicial subpoena duces tecum or an appropriate court order before allowing a bank to deliver confidential information concerning a customer's account to a third party, even if the third party holds some official position. The bank may have to incur certain legal expenses in asking the third party to obtain a court order, but those expenses will be substantially less than the costs of defending a suit or paying a judgment for breach of the statutory duty not to disclose confidential information about a customer's account.

There are instances where courts have indicated that a bank might escape liability for disclosing customer records to a third party in the absence of legal process. The Court of Appeals of Washington has stated that, where a bank itself is being victimized by a customer's fraudulent scheme, the bank may respond to police inquiries about the customer and his account transactions.[46] The Supreme Court of Minnesota has ruled that a bank, having knowledge that a customer is engaged in fraudulent activities, is under a duty to disclose that knowledge before making a loan that would further the fraud.[47]

---

44. *See supra* text accompanying notes 34-38.

45. Pittman v. Gulf Coast Energy, Inc., No. 118,591 (Chan. Ct., First Jud. Dist., Hinds Co., Miss., July 27, 1982).

46. State v. McCray, 15 Wash. App. 810, 551 P.2d 1376 (1976).

47. Richfield Bank & Trust Co. v. Sjogren, 309 Minn. 362, 244 N.W.2d 648 (1976).

In 1983, the United States District Court for the Eastern District of Missouri adjudicated a complaint brought against a bank and a municipal police department. At the request of the police department but without a subpoena, the bank delivered certain financial records of a customer to the police. The customer filed a civil rights suit pursuant to 42 U.S.C. §1983 alleging violation of his constitutional right to privacy. The court granted summary judgment for the defendants, ruling that the defendants had not violated any constitutionally protected right and that a Section 1983 action would thus not lie.[48] Had the plaintiff sued in state court for breach by the bank of its duty to keep his bank records and account transactions confidential, the outcome of the suit might well have been different.

For a bank to deliver the confidential bank records of a customer to a third party, where no subpoena duces tecum or other appropriate court order has been served upon it, is simply to invite litigation and to expose the bank to civil liability. As citizens become increasingly conscious of considerations of privacy, they are ever more likely to seek damages for breach by a bank of the duty to keep their bank records confidential.

III. PRIVACY

Concern for privacy is not of recent vintage in the United States. That concern was part of the motivation for the American Revolution.[49] When the Founding Fathers proclaimed the Bill of Rights, considerations of privacy led them to announce in the fourth amendment the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[50] Many state constitutions have similar provisions.[51]

Judge Cooley first articulated the right of personal privacy in the late nineteenth century when he spoke of the "right to be let alone."[52] Shortly thereafter two Boston lawyers, Samuel D. Warren and Louis D. Brandeis, the latter being a future Supreme Court Justice, used Judge Cooley's phrase as the basis for a fa-

48. Williams v. City Bank, 566 F. Supp. 827 (E.D. Mo. 1983).
49. L. PAPER, BRANDEIS 34 (1983).
50. U. S. CONST. amend. IV.
51. In Mississippi, for example, the constitutional language reads as follows: "The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search . . . ." MISS. CONST. art. 3, § 23.
52. T. COOLEY, TORTS 29 (2d ed. 1888).

mous law review article which advocated protecting people against invasions of privacy by other citizens.[53] Almost four decades later Justice Brandeis further endorsed his views on the right of privacy and the constitutional basis therefor in his classic dissent in a wiretapping case:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued for civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, by whatever means employed, must be deemed a violation of the Fourth Amendment.[54]

The majority opinion in *Olmstead,* which found no fourth amendment violation in the government's secret wiretapping of a telephone conversation, was overturned and the Brandeis view of privacy was vindicated in 1967, when the United States Supreme Court ruled that government eavesdropping on a telephone conversation violated privacy rights protected by the fourth amendment.[55]

In 1965, the United States Supreme Court, in striking down a Connecticut statute forbidding use of contraceptives, ruled that married persons using contraceptives were within a "zone of privacy," a zone created by "penumbras" emanating from specific guarantees in the Bill of Rights.[56] In subsequent cases, the Supreme Court has enlarged upon the constitutionally protected right of privacy, particularly in cases involving the home, marriage, and procreation. In *Eisenstadt v. Baird,*[57] the Court ruled that the right of privacy guaranteed access to contraceptives by unmarried persons. In *Roe v. Wade,*[58] the Court ruled that, subject to certain limitations, the right of privacy permitted a woman

---

53. Warren and Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890). Dean Prosser later referred to this article as "the outstanding example of the influence of legal periodicals upon American law." Prosser, *Privacy,* 48 CALIF. L. REV. 383 (1960).

54. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

55. Katz v. United States, 389 U.S. 347, 353 (1967).

56. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

57. 405 U.S. 438, 453 (1972).

58. 410 U.S. 113, 152-55 (1973).

to have an abortion notwithstanding state statutes to the contrary. The Court has also invoked the right of privacy to hold unconstitutional a statute requiring spousal consent or, in the case of unmarried minors, parental consent for abortion[59] and a statute prohibiting distribution of contraceptives to minors under the age of sixteen.[60]

Congress has joined the Supreme Court in seeking to protect the right of privacy. In 1970, finding a need to insure that credit reporting agencies act with "respect for the consumer's right to privacy,"[61] Congress amended the Consumer Credit Protection Act of 1968[62] to impose strict procedures and requirements on consumer credit reporters.[63]

Four years later Congress enacted the Privacy Act of 1974[64] to safeguard individual privacy from intrusions arising out of the misuse of federal records. In the purpose clause of the legislation, Congress found that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States."[65] Congress has also enacted laws to protect privacy rights in regard to education records[66] and, by virtue of the Privacy Protection Act of 1980,[67] to protect members of the news media from search and seizure of their work products by government officers.

Most important for the purposes of this article is the passage by Congress of the Right to Financial Privacy Act of 1978,[68] which limits access by agencies of the federal government to customer financial records maintained by banks and other financial institutions. This Act will be discussed in greater detail in part VI *infra*.

It may thus be said that during the last twenty years both the

---

59. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 60 (1975).

60. Carey v. Population Services International, 431 U.S. 678, 694 (1976).

61. Pub. L. No. 91-508, § 602(a)(4), 84 Stat. 1114, 1128 (1970) (codified at 15 U.S.C. § 1681(a)(4) (1970)).

62. Pub. L. No. 90-321, 82 Stat. 146 (1968).

63. *See* 15 U.S.C. §§ 1681-1681t (1970).

64. Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified at 5 U.S.C. § 552a (1976)).

65. Pub. L. No. 93-579, § 2(a)(4), 88 Stat. 1896 (1974).

66. *See* 20 U.S.C. § 1232g (1982).

67. Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified at 42 U.S.C. § 2000aa through 2000aa-12 (Supp. IV 1980)). This legislation was a congressional response to the decision of the United States Supreme Court in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), upholding a police search of the officers of a college newspaper pursuant to a search warrant.

68. Pub. L. No. 95-630, title XI, 92 Stat. 3697 (1978) (codified at 12 U.S.C. §§ 3401-3422 (Supp. II 1978)). The Right to Financial Privacy Act of 1978 is a separately named title of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641.

United States Supreme Court and Congress have evidenced an increasing interest in protecting the privacy rights of American citizens. Privacy has been the subject of analysis by authors and scholarly commentators,[69] and invasion of privacy is well recognized as an actionable tort.[70]

The Supreme Court of Mississippi first recognized the right of privacy in 1951, when it held that the right did not justify the action of a sheriff in assaulting a newspaper photographer taking photographs of the sheriff without his consent in connection with a legitimate news story.[71] In 1976, the Supreme Court of Mississippi, recognizing that "the law of privacy has developed along divergent lines and amid a welter of confusing judicial pronouncements," reversed the trial court's sustaining of a demurrer and allowed a suit for invasion of privacy to proceed against a newspaper publisher for publishing names and photographs identifying specific children as "mentally retarded."[72]

The Mississippi Supreme Court, like its counterparts in most other states, has never from a constitutional perspective analyzed the right of privacy as it applies to bank records. The first state tribunal to make such an analysis of this subject was the Supreme Court of California. In *Burrows v. Superior Court*,[73] the California tribunal dealt with a case involving possible grand theft by an attorney. A judge issued a warrant authorizing a search of the suspect's office for bank statements, cancelled checks, and account records. Deputy sheriffs executed the search warrant and seized certain bank records. Based upon these records, a detective in the sheriff's office informally contacted the banks where the suspect maintained accounts and requested copies of the suspect's bank statements and other financial records. Although no warrant, subpoena duces tecum, or other compulsory process was served on the banks, at least one bank provided copies of the suspect's financial records.

---

69. *See, e.g.*, A. WESTIN, PRIVACY AND FREEDOM (1967); M. MAYER, RIGHTS OF PRIVACY (1972); Joyce, *The Privacy Act: A Sword and a Shield But Sometimes Neither*, 99 MIL. L. REV. 113 (1983); Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); *Symposium on Privacy*, 31 Law & Contemp. Probs. 251-435 (1966); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Davis, *What Do We Mean by "Right to Privacy"?*, 4 SAN DIEGO L. REV. 1 (1959).

70. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1976); 3 J. DOOLEY, MODERN TORT LAW: LIABILITY AND LITIGATION §§ 35.01-35.08, at 1-13 (1977); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 802-18 (4th ed. 1971).

71. Martin v. Dorton, 210 Miss. 668, 50 So. 2d 391 (1951).

72. Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471, 473 (Miss. 1976).

73. 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

After being charged with grand theft, the accused moved to suppress the bank records. The trial court denied the motion. The accused then filed a petition asking the California Supreme Court to issue a writ of mandate compelling the trial court to approve his suppression motion. The supreme court granted him relief. Interestingly enough, it based its ruling not upon the fourth amendment to the United States Constitution, but upon the prohibition against unreasonable searches and seizures in the California Constitution.[74] The Supreme Court of California said:

> It cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations, will remain private, and that such expectation is reasonable. . . .
>
> . . . A bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal purposes. Thus, we hold petitioner had a reasonable expectation that the bank would maintain the confidentiality of those papers which originated with him in check form and of the bank statements into which a record of those same checks had been transformed pursuant to internal bank practice.
>
> . . . .
>
> We hold that any bank statements or copies thereof obtained by the sheriff and prosecutor without the benefit of legal process were acquired as the result of an illegal search and seizure . . . , and that the trial court should have granted the motion to suppress such documents.[75]

The opinion does not indicate whether the accused filed a civil suit against the bank which divulged his records without legal process. A suit for invasion of privacy rights would probably have been successful.

IV. GIVING NOTICE TO CUSTOMER

Less than a year after the *Burrows* pronouncement, the California Supreme Court amplified its views on the confidentiality of customers' bank records. In *Valley Bank of Nevada v. Superior Court,*[76] a party to civil litigation sought to take the deposition of the president of a bank and to examine a customer's bank records

---

74. CAL. CONST. art. I, § 13.

75. Burrows v. Superior Court, 13 Cal. 3d 238, 243-45, 529 P.2d 590, 593-95, 118 Cal. Rptr. 166, 169-71 (1974).

76. 15 Cal. 3d 652, 542 P.2d 977, 125 Cal.Rptr. 553 (1975).

that were relevant to the litigation. The bank, objecting to the disclosure of confidential records, sought a protective order. When the matter reached the California Supreme Court, that body articulated the duty which banks have in such circumstances. The court noted that a 1974 amendment to the state constitution had declared privacy to be an inalienable right.[77] Existing procedures, said the court, were inadequate to protect a customer's privacy interest in his bank records when they were the object of discovery in civil litigation to which the customer was not a party:

> Pursuant to existing law, when bank customer information is sought, the bank has no obligation to notify the customer of the proceedings, and disclosure freely takes place unless the bank chooses to protect the customer's interest and elects to seek a protective order on his behalf.
>
> . . . [I]t is readily apparent that the existing discovery scheme is inadequate to protect the bank customer's right of privacy which now is constitutionally founded. The protection of such right should not be entirely left to the protection of third persons . . . . On the other hand, we readily acknowledge that relevant bank customer information should not be wholly privileged and insulated from scrutiny by civil litigants.

Therefore, said the California Supreme Court:

> Striking a balance between the competing considerations, we conclude that before confidential customer information may be disclosed in the course of civil discovery proceedings, the bank must take reasonable steps to notify its customer of the pendency and nature of the proceedings and to afford the customer a fair opportunity to assert his interests by objecting to disclosure, by seeking an appropriate protective order, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered.[78]

By this holding, the California Supreme Court placed on California banks a heavy legal burden of notifying a customer (or taking other steps to protect his privacy interests) in the event that customer's bank records were subpoenaed.

Whether the target of discovery of an investigation must be given notice of a subpoena, judicial or administrative, is an issue still in fermentation. The Appellate Court of Illinois, taking a position different from that advanced by the California Supreme

77. CAL. CONST. art. I, § 1.

78. Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 656-58, 542 P.2d 979-80, 125 Cal. Rptr. 553, 555-56.

Court, recently held in a criminal case that a defendant was not entitled to suppress her records produced by a bank pursuant to a grand jury subpoena. The Illinois court so ruled even though the bank had not complied with an Illinois statute[79] requiring banks to give notice to a customer before disclosing his financial records pursuant to a subpoena. The court held:

> We do not agree that this notice provision provides [defendant] Jackson with grounds to suppress the subpoena of her bank records. The statute by its terms only tries to set out the obligations which a bank owes to its bank customers. These are the obligations of confidentiality and the obligation of notice to a customer if this confidentiality is abridged. The statute does not attempt to regulate governmental intrusion into a customer's confidential bank records. Thus relying solely upon this statute, Jackson cannot attempt to suppress a governmental subpoena or claim the right to notice when one is issued.[80]

The Illinois court did acknowledge in its opinion that a right to privacy enunciated in the Illinois Constitution[81] gave Illinois citizens a reasonable expectation of privacy in their bank records.[82] What the court did not express—but what is implied in the opinion—is that the defendant had a civil cause of action against the bank which failed to give her notification for violation of privacy rights protected by both a state statute and the Illinois Constitution.

It is interesting to note that on June 18, 1984, the United States Supreme Court unanimously ruled that the Securities and Exchange Commission is not required to give notice to the target of an administrative investigation that it has issued an administrative subpoena to a third party holding business records of the target.[83] In so ruling, the Supreme Court reversed a decision by the United States Court of Appeals for the Ninth Circuit that it was only by receipt of such notice that a target could insure that the SEC investigation was being conducted in accordance with constitutional requirements.[84] Speaking through Justice Marshall, the Supreme Court stated that notice of the administrative subpoena was not required to be given to the target under any constitutional

---

79. ILL. REV. STAT. ch. 17, § 48.1(d) (1981).
80. People v. Jackson, 116 Ill. App. 3d 430, 436-37, 452 N.E.2d 85, 90 (1983).
81. ILL. CONST. art. I, § 6.
82. People v. Jackson, 452 N.E.2d at 88-89.
83. SEC v. Jerry T. O'Brien, Inc., 52 U.S.L.W. 4815 (U.S. June 18, 1984).
84. Jerry T. O'Brien, Inc. v. SEC, 704 F.2d 1065 (9th Cir. 1983).

provision, under any securities statute, or under the theory that the target has a substantive right to insist that administrative subpoenas issued to third parties meet constitutional requirements.[85] The Supreme Court did not think it necessary to discuss the issue of privacy. This holding strongly suggests that the United States Supreme Court would find no federal constitutional requirement that a bank customer be notified when his bank records are subpoenaed.

Although Mississippi has no constitutional guarantee of privacy and has no statute that requires a bank to give notice to a customer when his bank records are subpoenaed, common sense dictates that a bank receiving a subpoena duces tecum notify the customer that his bank records are being sought. As is discussed in part VII, *infra,* there is an exception to this suggestion in regard to grand jury subpoenas.

With some frequency it happens that Mississippi banks represented by the law firm of which the author of this article is a member are served with a subpoena duces tecum for the bank records of a customer who is not a party to the litigation. In such circumstances, the firm ordinarily advises the bank to give telephonic notification to its customer whose records are being sought and then to send a letter enclosing a copy of the subpoena duces tecum. The firm advises the bank to inform the customer that it must comply with the compulsory legal process unless the customer goes into court and obtains an order quashing the subpoena duces tecum or secures some other protective order. Although customers do not relish having litigants examine their bank records, they are invariably grateful to the bank for giving them notification. Thus, the giving of notice to the customer, while not a formal legal requirement in Mississippi, is a prudent step that promotes good will for the bank.

On rare occasions a bank customer receiving notice from the bank that his records have been subpoenaed will insist that the bank keep his records confidential. He will instruct the bank to disregard the subpoena. Such a customer may threaten to sue the bank. In these circumstances, the bank would be well advised to

85. 52 U.S.L.W. at 4816-19. As enunciated by the United States Supreme Court in United States v. Powell, 379 U.S. 48, 57-58 (1964), the constitutional requirements are (1) that the agency has a legitimate purpose for its investigation, (2) that the inquiry is relevant to that purpose, (3) that the agency does not possess the information being sought, and (4) that the agency has followed required administrative procedures.

seek a protective order pursuant to the applicable discovery rules[86] and to give notice of its motion to all interested parties, including the irate customer. The motion for a protective order would state that the bank could neither honor nor disregard the subpoena duces tecum without putting itself in peril and would basically request the court to tell the bank what to do. This procedure should give maximum protection to the bank and preclude a suit for breach of the implied duty not to disclose bank records or for invasion of privacy.

Parenthetically, it should be pointed out that a bank served with a subpoena duces tecum may find it necessary to move for a protective order to have the party seeking a discovery to pay the cost of searching for, and reproducing, customer records. Depending on the scope of the subpoena duces tecum, compliance may require substantial personnel time and significant reproduction costs. Searching for microfilm copies of cancelled checks can be particularly time-consuming and expensive. Bank counsel should, in such circumstances, contact the attorney for the party seeking discovery and ask for advance payment of the estimated cost of complying with the subpoena duces tecum or at least secure an agreement from the attorney that he will pay for the cost of compliance. Often negotiations on the issue of costs will result in the attorney seeking discovery substantially reducing the scope of the subpoena duces tecum.

If no agreement about costs can be reached, bank counsel should file a motion for a protective order to require the party seeking discovery to pay search and reproduction costs. Both the federal and state rules governing discovery in civil litigation authorize courts to enter a protective order to protect a party from "undue burden or expense."[87] As a leading treatise explains: "The court may order the party seeking discovery to pay the expenses caused thereby. . . ."[88]

Congress has manifested an intent that the Internal Revenue Service reimburse financial institutions for the cost of reproducing customer records.[89] In a provision of the previously mentioned

86. FED. R. CIV. P. 26(c); FED. R. CRIM. P. 16(d)(1); MISS. R. CIV. P. 26(d). *See also* MISS. CODE ANN. § 13-1-226(c) (Supp. 1983).

87. FED. R. CIV. P. 26(c); MISS. R. CIV. P. 26(d). *See also* MISS. CODE ANN. § 13-1-226(c) (Supp. 1983).

88. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2038, at 277 (1970).

89. 26 U.S.C. § 7610 (1982).

Right to Financial Privacy Act of 1978,[90] Congress mandated that other government agencies obtaining financial records pay financial institutions for the expense of providing the requesting documents:

> [A] Government authority shall pay to the financial institution assembling or providing financial records pertaining to a customer and in accordance with procedures established by this chapter a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required or requested to be produced. The Board of Governors of the Federal Reserve System shall, by regulation, establish the rates and conditions under which such payment may be made.[91]

The United States Court of Appeals for the Fifth Circuit stated in applying this statute to a grand jury proceeding: "It is clear, and the government concedes, that in situations where an individual customer of the bank is being investigated, the bank could recover its costs under Section 3415."[92] In 1975, even before Congress had enacted statutes requiring the Internal Revenue Service and other federal agencies to pay financial institutions for the costs incurred in providing customer records, a California federal court had judicially imposed a reimbursement requirement. The court gave the following rationale for its holding:

> This 'cost' is not predictably part of the banking business, does not fall upon all equally, and was not specifically evaluated by the legislature and imposed by it upon all those who do a banking business. Although the statute demands compliance with legitimate summonses, it is silent on the issue of reimbursement. Given that silence, and the dictates of the Due Process Clause, this court feels that it would be unreasonable to expect a party such as respondent to bear anything other than nominal cost in complying with a government summons. The duties of a citizen to his government . . . do not run so far as absorbing a $2500 expense in aid of a government investigation of a third party.
>
> . . . .
>
> It will therefore be ordered that the United States reimburse respondent for the $2545.28 which it expended in complying with

90. Pub. L. No. 95-630, title XI, 92 Stat. 3697 (1978) (codified at 12 U.S.C. §§ 3401-3421 (Supp. II 1978)). *See also supra* note 68.

91. 12 U.S.C. § 3415 (1982). To implement this statute, the Board of Governors of the Federal Reserve System has promulgated a reimbursement schedule in Regulation S, 12 C.F.R. § 219.3 (1984).

92. *In re* Grand Jury Proceedings, 636 F.2d 81, 85 (5th Cir. 1981).

the summons in this case.[93]

V. THE BANK SECRECY ACT AND THE *Shultz* AND *Miller* DECISIONS

Prior to 1970 the matter of confidentiality of bank records had attracted little notice on the federal level. Some banks made copies of customer records as a protection against potential customer claims, but by the end of the 1960's many banks had discontinued the practice of photocopying checks. Congress perceived a need for the government, in particular circumstances, to have access to copies of bank checks.[94] In 1970, Congress passed the so-called Bank Secrecy Act.[95] Finding that adequate bank records "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings,"[96] Congress authorized the Secretary of the Treasury to issue regulations requiring banks and other financial institutions to follow recordkeeping and reporting requirements.[97] Title I of the Act dealt with recordkeeping; Title II dealt with reporting. The Secretary subsequently promulgated appropriate regulations to carry out the intent of the Bank Secrecy Act. Those regulations require a bank to make copies of virtually every aspect of a customer's transactions, including many types of checks, and to maintain records of currency transactions of more than $10,000 involving accounts or persons outside the United States and to maintain records of extensions of credit (except those secured by real property) in excess of $5,000. They further require a reporting by financial institutions of prescribed domestic and foreign financial transactions.[98]

A constitutional attack upon the Bank Secrecy Act and the implementing regulations was not long in coming. In June, 1972, shortly before the effective date of the regulations, two separate suits were filed in the United States District Court for the Northern District of California. The plaintiffs in one action were a Cali-

93. United States v. Farmers & Merchants Bank, 397 F. Supp. 418, 420-21 (C.D. Cal. 1975). *Contra, In re* Grand Jury Subpoena Duces Tecum, 436 F. Supp. 46 (D. Md. 1977).

94. Palmer and Palmer, *Complying with the Right to Financial Privacy Act of 1978,* 96 BANKING L.J. 196, 199 (1979).

95. Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified at 12 U.S.C. §§ 1730d, 1829b, 1951-59 (1970), and scattered sections of 31 U.S.C.).

96. 12 U.S.C. § 1829b(a)(1) (1970).

97. *Id.* §§ 1730d, 1829b(b), 1952 (1970).

98. 31 C.F.R. pt. 103 (1984).

fornia national bank, individual bank customers, and the American Civil Liberties Union. The plaintiff in the other action was the California Bankers Association, suing on behalf of all California banks. The plaintiffs alleged violation of due process, privacy, and other rights. The two suits were consolidated for trial before a three-judge court. Although the court upheld the requirement of reports on foreign financial transactions,[99] although it noted that bank-customer communications were not privileged, and although it acknowledged that production of bank records in response to a subpoena did not violate the fourth amendment,[100] the court ultimately ruled that the requirements concerning reporting of domestic financial transactions were overbroad violations of customers' privacy rights:

> [T]he Act in question, insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far exceeds the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the rights of privacy protected by The Bill of Rights, particularly the Fourth Amendment provision protecting 'the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.'[101]

The three-judge court thus enjoined the enforcement of the domestic transaction reporting provisions of the Bank Secrecy Act, with Judge Hamlin dissenting from the finding that those provisions were unconstitutional.[102]

On appeal, the United States Supreme Court held that the district court's finding of unconstitutionality was erroneous. In an opinion by Justice Rehnquist, a majority of six justices ruled that the record-keeping requirements and the costs attendant thereto did not violate the due process rights of banks,[103] that plaintiffs' claims of first and fifth amendment violations were premature,[104] and that Title I recordkeeping provisions of the Bank Secrecy Act did not violate the fourth amendment:

---

99. Stark v. Connally, 347 F. Supp. 1242, 1244-45 (N.D. Cal. 1972).
100. *Id.* at 1248.
101. *Id.* at 1251.
102. *Id.*
103. California Bankers Assn. v. Shultz, 416 U.S. 21, 50 (1974).
104. *Id.* at 56, 75.

> We see nothing in the Act which violates the Fourth Amendment Rights 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.[105]

In regard to the Title II reporting requirements of the Bank Secrecy Act, the Court held that the reporting requirements on foreign financial transactions fell within the congressional power to legislate on foreign commerce.[106] As for Title II domestic transaction reporting requirements, the Court held that those requirements did not abridge any fourth amendment rights of the banks themselves.[107] Finally, the Court determined that the plaintiffs lacked standing to assert fourth amendment claims in regard to Title II domestic reporting requirements.[108]

Justices Douglas, Brennan, and Marshall dissented, with Justice Douglas labeling as "unadulterated nonsense" the underlying assumption of the Act that all bank records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.[109]

Those who viewed the *Shultz* holding with disfavor were even more disturbed two years later when on April 21, 1976, the United States Supreme Court announced another major decision concerning bank records. In *United States v. Miller*,[110] the Court ruled that a bank depositor had no fourth amendment interest in bank records maintained by banks pursuant to the Bank Secrecy Act. The case arose when a United States District Court, in which a defendant was being prosecuted for possessing an unregistered still, denied the defendant's motion to suppress records obtained from his banks under allegedly defective subpoenas duces tecum. After being convicted, the defendant appealed. The United States Court of Appeals for the Fifth Circuit reversed, holding that obtaining copies of the defendant's records "by means of a faulty subpoena duces tecum constituted an unlawful invasion of [defendant] Miller's privacy, and that any evidence so obtained should

105. *Id.* at 52.
106. *Id.* at 60.
107. *Id.* at 66.
108. *Id.* at 69.
109. *Id.* at 85 (Douglas, J., dissenting).
110. 425 U.S. 435 (1976).

have been suppressed."[111]

In reversing the Fifth Circuit, Justice Powell spoke for a seven-man majority of the United States Supreme Court:

> On their face, the documents subpoenaed here are not respondent's "private papers." [The] respondent can assert neither ownership nor possession. Instead, these are the business records of the banks. . . .
>
> . . . .
>
> [W]e perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." 12 U.S.C. § 1829b(a)(1) . . . .
>
> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . .
>
> This analysis is not changed by the mandate of the Bank Secrecy Act that records of depositors' transactions be maintained by banks. . . .
>
> Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant.[112]

Justices Brennan and Marshall dissented. The former, citing the holding of the California Supreme Court in *Burrows v. Superior Court*,[113] opined that bank customers do have an expectation of privacy in their bank records that is protected by the fourth amendment.[114]

The majority's decision in *Miller* has attracted considerable comment.[115] It also spurred action, both within the halls of Con-

---

111. United States v. Miller, 500 F.2d 751, 756 (5th Cir. 1974) *rev'd*, 425 U.S. 435 (1976).

112. United States v. Miller, 425 U.S. 435, 440, 442-44 (1976).

113. Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal.Rptr. 166 (1974).

114. United States v. Miller, 425 U.S. at 447-55 (Brennan, J., dissenting).

115. *See, e.g.*, Walker, *Where Banks Stand in Defending Privacy of Customer*, 73 AM. BANKERS ASSN. BANKING J. 127 (1981); Alexander and Spurgeon, *Privacy, Banking*

gress and in certain statehouses, to provide statutory guarantees concerning the privacy of bank records.

VI. RESPONSES TO *Miller*

A. The Tax Reform Act of 1976

In the fall of 1976, Congress passed a comprehensive tax measure, the Tax Reform Act of 1976.[116] Included in this legislation was a provision inserting into the Internal Revenue Code of 1954[117] two new sections concerning the administrative summons procedure to be employed by the Internal Revenue Service in seeking the production of financial records from third-party recordkeepers such as banks.[118]

The Internal Revenue Service had long possessed the power to examine financial records, to summon persons having custody of such records to appear and produce those records, and to require the custodian to give testimony under oath about the records.[119] The federal courts had repeatedly upheld this power against challenges alleging fourth and fifth amendment violations[120] and had enforced administrative summonses issued to banks for the production of customer records.[121] Moreover, because the courts considered financial records to be the property of the bank and not of the customer, the Internal Revenue Service was under no duty to give notice to that customer when it summoned his records.[122] Even if a customer learned of the IRS summons, he lacked standing to object in court to its issuance.[123] Only the bank itself would have such standing.[124] When the United

---

Records and the Supreme Court: A Before and After Look at Miller, 10 SW. U. L. REV. 13 (1978); Comment, *A Bank Customer Has No Reasonable Expectation of Privacy of Bank Records: United States v. Miller,* 14 SAN DIEGO L. REV. 414 (1977).

116. Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified at various sections of 26 U.S.C.).

117. Act of August 16, 1954, Pub. L. No. 591, ch. 736, 68A Stat. 3 (1954).

118. 26 U.S.C. §§ 7609-10 (1976).

119. 26 U.S.C. § 7602 (1982).

120. Galbraith v. United States, 387 F.2d 617, 618 (10th Cir. 1968); Hinchcliff v. Clarke, 371 F.2d 697, 700 (6th Cir. 1967); Eberhart v. Broadrock Development Corp., 296 F.2d 685, 687 (6th Cir. 1961), *cert. denied,* 369 U.S. 871 (1962); Foster v. United States, 265 F.2d 183, 187-88 (2d Cir.), *cert. denied,* 360 U.S. 912 (1959).

121. United States v. Wills, 475 F. Supp. 492 (M.D. Fla. 1979); United States v. First National Bank of Mobile, 67 F. Supp. 616 (S.D. Ala. 1946).

122. Application of Cole, 342 F.2d 5, 7-8 (2d Cir. 1965).

123. United States v. Sahley, 526 F.2d 913, 916 (5th Cir. 1976); Harris v. United States, 413 F.2d 316, 318 (9th Cir. 1969); Galbraith v. United States, 387 F.2d 617, 618 (10th Cir. 1968); Application of Cole, 342 F.2d 5, 8 (2d Cir. 1965); Foster v. United States, 265 F.2d 183, 188 (2d Cir.), *cert. denied,* 360 U.S. 912 (1959).

124. DeMasters v. Arend, 313 F.2d 79, 85 (9th Cir.), *cert. dismissed,* 375 U.S. 936

States Supreme Court in 1975 upheld the constitutionality of a "John Doe" summons issued by the IRS pursuant to 26 U.S.C. § 7602,[125] it was obvious to all observers that, at least on the federal level, a bank customer's privacy rights in his bank records were virtually nil. A call arose, especially after the Supreme Court ruled in *Miller*, for legislation to protect these privacy rights.[126]

It was in this atmosphere that Congress inserted administrative summons provisions into the Tax Reform Act of 1976. Congress mandated that any person whose financial records were summoned by the IRS from a third-party recordkeeper such as a bank be given notice of the summons no later than three days after service and at least fourteen days (later amended to twenty-three days)[127] prior to the return date. Notice could be given by certified or registered mail sent to the person's last known address. Congress expressly gave the party noticed the right to seek to quash the summons within twenty days after notice or to intervene in any enforcement proceeding, thus negating the judicial rulings on standing. The IRS was required to secure court authorization to issue "John Doe" summonses.[128] These provisions significantly enhanced the privacy rights of taxpayers.

The new legislation also gave new protection to banks, declaring that they would not be liable to customers for disclosing bank records in "good-faith reliance" on a certificate from the IRS that the twenty-day period in which a party could seek to quash the summons had expired with no action on his part or on a certificate that the party consented to the examination of his records.[129] Moreover, the Act recognized that financial institutions were entitled to reimbursement for costs incurred in responding to an IRS summons.[130]

B. The Right to Financial Privacy Act of 1978

The second major legislative response to *Miller* occurred in 1978, when Congress passed the Right to Financial Privacy Act of

---

(1963). *Cf.* Donaldson v. United States, 400 U.S. 517 (1971). For a further discussion of the issue of standing, *see* Mortimer, *supra* note 2, at 837.

125. United States v. Bisceglia, 420 U.S. 141 (1975). For an analysis of this decision, *see* Note, *IRS Access to Bank Records: Proposed Modifications in Administrative Subpoena Procedure*, 28 HASTINGS L.J. 247, 275 (1976).

126. Dunne, *Financial Privacy: A Time to Act*, 92 BANKING L.J. 425 (1975).

127. Pub. L. No. 97-248, § 331(d)(1), 96 Stat. 324, 620 (1982).

128. 26 U.S.C. § 7609(a)-(f) (1982).

129. 26 U.S.C. § 7609(i)(2)-(3) (1982).

130. *Id.* § 7610.

1978.[131] It was the stated purpose of the Act "to protect the customers of financial institutions from unwarranted intrusions into their records while at the same time permitting legitimate law enforcement activity." The Act sought "to strike a balance between the customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations."[132]

The Act prohibits financial institutions from providing customer financial information to any department, agency, officer, or employee of the federal government except in compliance with the provisions of the Act.[133] Moreover, a financial institution is not to release customer financial records to the government until the government has certified in writing that it has complied with the Act.[134] It should be noted that the Act does not attempt to regulate disclosure of customer financial records to authorities of state or local governments.

The Act provides that a customer may authorize a financial institution to disclose his records by means of a signed and dated statement containing specified information.[135]

The government may obtain records by means of an administrative subpoena or summons only if "there is reason to believe that the records are relevant to a legitimate law enforcement inquiry."[136] However, the government must send a copy of the subpoena or summons and a privacy notice to the customer or personally serve him with a copy and a notice on or before the date of service on the financial institution. The government is not entitled to receive the records sought by administrative subpoena or summons until the expiration of ten days from service of the notice on the customer or until the expiration of fourteen days from the mailing of the notice to him.[137]

---

131. *Supra* note 68. For discussions of the Act, *see* Metzger, *Confidentiality of Bank Records*, PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MISSISSIPPI LAW INSTITUTE: CONSUMER CREDIT AND BANKING LAWS 177-201 (1979); Palmer and Palmer, *supra* note 94; Note, *The Right to Financial Privacy Act of 1978*, 28 DEPAUL L. REV. 1059 (1979).

132. H.R. REP. NO. 95-1383, 95th Cong., 2d Sess. 33, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9273, 9305.

133. 12 U.S.C. § 3403(a) (Supp. II 1978). The United States Court of Appeals for the Sixth Circuit recently declared that the Act "imposes an affirmative duty on the government and banking officials to safeguard the financial records of individuals utilizing the services of banks." *In re* Knoxville News-Sentinel Co., Inc., 723 F.2d 470, 476 (6th Cir. 1983).

134. 12 U.S.C. § 3403(b) (Supp. II 1978).

135. *Id.* § 3404.

136. *Id.* § 3405(1).

137. *Id.* § 3405(2)-(3).

The Act authorizes the government to obtain financial records under a search warrant obtained through the Federal Rules of Criminal Procedure. No later than ninety days after service of the warrant on the financial institution, the government must mail a copy of the warrant and a privacy notice to the customer. Upon application by the government, a court may extend the ninety-day period.[138]

Judicial subpoena is another mechanism sanctioned by the Act for obtaining customer financial records. The judicial subpoena must be authorized by law. It must be used only when the records sought "are relevant to a legitimate law enforcement inquiry."[139] As with administrative subpoenas, copies of judicial subpoenas, together with a privacy notice, must be served upon, or mailed to, customers whose records are being sought. No records may be obtained by judicial subpoena until the expiration of ten days after service of the notice upon the customer or until the expiration of fourteen days after mailing of the notice.[140]

Where the government does not have administrative summons or subpoena authority reasonably available, and where it seeks financial records which "are relevant to a legitimate law enforcement inquiry," the government may seek financial records by a formal written request. However, such a request must be authorized by regulations promulgated by the head of the department or agency seeking the records. In order to utilize the formal written request mechanism, the government must serve upon, or mail to, the customer a copy of the request and a privacy notice. No record may be obtained by formal written request until the expiration of ten days after service of the notice upon the customer or until the expiration of fourteen days after mailing of the notice.[141]

There can be no doubt that a central requirement of the Right to Financial Privacy Act is to require notice to a citizen that the government is seeking access to his financial records. However, the Act does provide that a court may delay customer notice where there is reason to believe that the notice will result in (1) endangerment to life or personal safety, (2) flight from prosecution, (3) destruction of evidence, (4) intimidation of potential

138. *Id.* § 3406.
139. *Id.* § 3407(1).
140. *Id.* § 3407(2)-(3).
141. *Id.* § 3408.

witnesses, or (5) the jeopardizing of an investigation or official proceeding.[142]

Of particular significance is the fact that the Act gives a customer who has received notice that his financial records are the object of a subpoena, summons, or formal written request the right to go into court and move to quash the subpoena or summons or to enjoin the formal written request.[143] Thus, a customer seeking to prevent government scrutiny of his banking records will encounter no standing problems.

Upon receiving an administrative subpoena or summons or a judicial subpoena, a financial institution is required to assemble the subject customer records and to prepare them for delivery upon receipt of the government's certificate that it has complied with the requirements of the Act.[144] Happily for financial institutions, the Act does provide for reimbursement for the costs incurred in assembling and providing financial records to the government.[145]

The Act does not apply to every instance in which the government seeks customer financial records. Section 3413 carves out several exceptions to the Act's coverage. For example, the Act does not prohibit the disclosure of information to agencies which supervise or regulate financial institutions.[146] Nor does it prohibit the disclosure of financial records under the Internal Revenue Code.[147] The Act does not apply to government attempts to secure customer financial records under the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure in litigation to which the government and the customer are parties.[148] Except in regard to cost reimbursement, the Act does not apply to the disclosure of records pursuant to a subpoena or court order issued in connection with grand jury proceedings.[149]

Should a financial institution violate the Act, it may be liable to the customer for a statutory sum of $100, for actual damages sustained by the customer, for punitive damages in case of willful

---

142. *Id.* § 3409.
143. *Id.* § 3410.
144. *Id.* § 3411.
145. *Id.* § 3415. *See also supra* note 91.
146. 12 U.S.C. § 3413(b) (Supp. II 1978).
147. *Id.* § 3413(c). For the Internal Revenue Code provisions, *see* 26 U.S.C. §§ 7602, 7609 (1982).
148. 12 U.S.C. § 3413(e) (Supp. II 1978).
149. *Id.* § 3413(i). But see the Act's requirements concerning the use of customer information obtained from a financial institution under a grand jury subpoena. *Id.* § 3420.

or intentional violation, and for court costs and attorney's fees.[150] However, there can be no liability on the part of a financial institution for disclosure of customer records made in good faith in reliance upon a government compliance certificate.[151]

The Right to Financial Privacy Act conveys "a message to bureaucrats not to treat lightly their access to customer financial records."[152] It imposes upon banks and other financial institutions significant new legal duties and responsibilities which their management and counsel must take care not to violate.[153]

While the Act is a congressional response to the decision of the United States Supreme Court in *Miller*, the Act does not really reverse *Miller*. The Act does not extend to bank customers a right against search and seizure of their bank records. The Right to Financial Privacy Act of 1978 does create a detailed mechanism by which the federal government can obtain customer financial records for specified purposes under procedures that give customers reasonable notice of what is occurring and an opportunity, if they so desire, to mount a legal challenge to the government's efforts.

C. *Responses on State Level*

Before the United States Supreme Court announced its *Miller* decision in 1976, a few states had enacted statutes governing confidentiality of, and access to, bank records. The *Miller* holding, coming at a time when there was an increasing awareness of privacy considerations among the American public led states with such statutes to modify and update their laws and prompted some states to enact for the first time laws making detailed provision for confidentiality of, and access to, bank records. At the present time, at least eight states have passed legislation on this subject. Those states include Alaska,[154] California,[155] Connecticut,[156] Illinois,[157] Louisiana,[158] Maryland,[159] New Hampshire,[160] and

150. *Id.* § 3417(a).
151. *Id.* § 3417(c).
152. Palmer and Palmer, *supra* note 94 at 223.
153. Metzger, *supra* note 131 at 180.
154. ALASKA STAT. § 06.05.175 (1978).
155. CAL. GOV'T CODE §§ 7460-90 (West 1980).
156. CONN. GEN. STAT. §§ 36-9j through -9n (1983).
157. ILL. ANN. STAT. ch. 17, ¶ 360 (Smith-Hurd Supp. 1983).
158. LA. REV. STAT. ANN. § 3571 (West Supp. 1983).
159. MD. FIN. INST. CODE §§ 1-301 through -305 (Supp. 1983).
160. N.H. REV. STAT. ANN. §§ 359-C:1 through -C:18 (Supp. 1981).

Oklahoma.[161] While the state statutes vary in wording, they generally prevent a financial institution from disclosing customer financial records except in instances of customer authorization, judicial or administrative subpoena, or search warrant. The California and New Hampshire statutes are the most comprehensive. All eight of the states provide that, in most instances, the customer is to be given notice that his bank records are being sought.

Because many of these state statutes are of recent vintage, there has been little judicial interpretation of them. The New Hampshire Supreme Court has upheld the suppression in a criminal proceeding of bank records obtained in violation of the New Hampshire Right to Privacy Act,[162] but the Appellate Court of Illinois has declined to suppress bank records obtained through a grand jury subpoena even though the requirements of Illinois law concerning notice to the customer were not met.[163] The Court of Special Appeals of Maryland has twice rejected efforts to quash grand jury subpoenas on the ground that the customers whose records were subpoenaed lacked standing to complain about disclosure.[164]

This article has previously made mention of the California Supreme Court's 1974 determination in *Burrows v. Superior Court*[165] that the privacy of bank records was protected by the prohibitions against unreasonable search and seizure found in the state constitution.[166] In response to *Miller*, the highest courts of two other states have taken similar approaches in cases involving confidentiality of bank records. In 1979, the Supreme Court of Pennsylvania reversed a murder sentence based on bank records obtained through an invalid subpoena secured by the district attorney from a court clerk for the local police department where there was no ongoing legal proceeding of any kind. The Supreme Court found that this action thwarted the "legitimate expectation of privacy" held by Pennsylvania citizens in their bank records and violated the protection against unreasonable search and seizure found in the Pennsylvania Constitution.[167]

---

161. OKLA. STAT. ANN. title 68, §§ 2201-06 (West Supp. 1983).

162. State v. Flynn, 464 A.2d 268, 271 (N.H. 1983).

163. People v. Jackson, 116 Ill. App. 3d 430, 436-37, 452 N.E.2d 85, 90 (1983).

164. *In re* Special Investigation No. 258, 55 Md. App. 119, 461 A.2d 34, 38 (1983); *In re* Special Investigation No. 242, 53 Md. App. 360, 365, 452 A.2d 1319, 1322 (1982).

165. 13 Cal. 3d 238, 246, 529 P.2d 590, 596, 118 Cal.Rptr. 166, 172 (1974).

166. *See supra* notes 74-75 and accompanying text.

167. Commonwealth v. DeJohn, 403 A.2d 1283, 1290 (Pa. 1979), *applying* PA. CONST. art. I, § 8. For an analysis of this decision, *see* Note, 18 DUQ. L. REV. 363 (1980).

In 1980, the Supreme Court of Colorado, applying the "unreasonable searches and seizures" clause of that state's constitution,[168] found that a Colorado citizen's "reasonable expectation of privacy in the bank records of his financial transactions" gave him standing to challenge a subpoena duces tecum for those records issued by the Colorado Department of Revenue.[169]

Thus, at least ten states have responded to *Miller*, either by statute or in a judicial decision, by expanding privacy rights in bank records. Mississippi has made no formal response to the United States Supreme Court's ruling. In this state, bank records are protected from disclosure by a common law implied duty and by a statute that prohibits disclosure of the name of a depositor and the amount of his deposit "except when required to be done in legal proceedings."[170] There is no state law requirement that a bank customer be given notice that his bank records have been subpoenaed in any legal proceeding.

VII. GRAND JURY SUBPOENAS

If a Mississippi bank receives a subpoena duces tecum for the bank records of a customer in a civil litigation matter, it is good business practice—though not a legal duty—to inform the customer that the bank is under the compulsion of lawful process to produce the subpoenaed records and that it must do so unless the customer obtains an order to quash or some other protective order. The same statement of good business practice would apply in criminal prosecutions that are beyond the indictment stage.

But what about grand jury proceedings? Should a bank notify a customer that his bank records have been subpoenaed by a grand jury, particularly when the prosecuting attorney or the marshal, sheriff, or policeman serving the subpoena notifies the bank not to inform the customer that he is the subject of a grand jury investigation? Could a bank or bank officer be held in contempt

---

168. COLO. CONST. art. II, § 7.

169. Charnes v. DiGiacomo, 612 P.2d 1117, 1122 (Colo. 1980). *See* Note, *A Right to Privacy in Bank Records: The Colorado Supreme Court Rejects United States v. Miller*, 52 U. COLO. L. REV. 529 (1981), for a study of the *Charnes* decision. *Cf. In re* First National Bank, Englewood, Colorado, 701 F.2d 115 (10th Cir. 1983), in which the United States Court of Appeals for the Tenth Circuit held that antitax organizations had standing to challenge a federal grand jury subpoena duces tecum issued to a Colorado bank to obtain bank records of the organizations. The Tenth Circuit, without mentioning *Charnes*, based its holding on the potential chilling effect of the subpoena duces tecum on first amendment associational rights. For a contrary view of standing to contest the disclosure of bank records, *see* State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982).

170. MISS. CODE ANN. § 81-5-55 (1972).

for giving such notification to a customer?

Several provisions of Mississippi law indicate that state grand jury proceedings are to be kept confidential. On pain of fine and imprisonment, a grand juror is not to disclose "the name or testimony of any witness who has been before the grand jury."[171] For six months after final adjournment of the grand jury, a juror "shall not disclose any proceeding or action had by the grand jury in relation to offenses brought before it."[172] The oath administered to jurors contains an admonition of secrecy.[173] The charge to the grand jury mandated by the Uniform Criminal Rules of Circuit Court Practice, as adopted by the Supreme Court of Mississippi on August 10, 1979, and as amended on October 26, 1982, contains the following language:

> The oath which you have taken contains essential principles which govern you in your deliberations. The oath is your promise that you will keep secret what takes place in the grand jury room. A grand juror . . . shall not discuss any proceeding or action in relation to offenses brought before it for six months after the adjournment of the court in which he was a grand juror. A grand jury shall not discuss the name or testimony of any witness who has testified before them. Any disclosure of secrets is punishable by fine or imprisonment for contempt of court.
>
> [The charge then explains that one reason for the secrecy] is that if anyone charged with a crime learns of your investigation, he is given an opportunity to escape and defeat the process of criminal justice.
>
> This requirement of secrecy demands that you do not communicate to anyone what has been said or done in the grand jury room unless you are ordered by a judge in open court to reveal it. The secrecy of your work is protected by a law which makes it a crime for others to question you about what happened in the grand jury.[174]

The public policy of the state in favor of secrecy of grand jury proceedings is further illustrated by the popularly named Open Meetings Act,[175] which exempts from the requirement of open meetings "all jury deliberations."[176] The statutes which authorize the subpoenaing of grand jury witnesses[177] impose no re-

171. *Id.* § 13-5-61 (Supp. 1983).
172. *Id.*
173. *Id.* § 13-5-45 (1972).
174. MISS. UNIFORM CRIM. R. CIR. CT. PRACTICE 2.01.
175. 1975 Miss. Laws ch. 481 (codified at MISS. CODE ANN. §§ 25-41-1 through -17 (Supp. 1983)).
176. MISS. CODE ANN. § 25-41-3 (Supp. 1983).
177. Grand jury subpoenas may be ordered by the grand jury foreman, *id.* § 13-5-63

quirement of secrecy on them. However, a Uniform Criminal Rule declares:

> No . . . witness . . . shall disclose to any unauthorized person that an indictment is being found or returned into court against a defendant or disclose any action or proceeding in relation to the indictment before the finding of an indictment or within six months thereafter or before defendant is arrested or gives bail or recognizance. . . . If such information is disclosed, the disclosing person may be found in contempt of court punishable by fine or imprisonment.[178]

Obviously, a bank disclosing to a customer that his records have been subpoenaed by a grand jury may well violate Uniform Criminal Rule 2.04. Prudence thus dictates that a bank keep secret from its customer the fact that a grand jury has issued a subpoena duces tecum for his bank records. Disclosure could lead to a citation for contempt and possibly to fine and a term in jail.

What if a bank receives a subpoena duces tecum for customer bank records from a federal grand jury? Is the bank required to keep this fact secret, or may it make disclosure to the customer?

In the words of Chief Justice Burger: "The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in English law and traditions, accepted the grand jury as a basic guarantee of individual liberty . . . ."[179] The requirement for indictment by grand jury appears in the Bill of Rights.[180] Among the powers of a grand jury is the right to call witnesses and to compel their attendance by subpoena.[181] As the United States Supreme Court has said:

> [T]he grand jury's authority to subpoena witnesses is not only historic . . ., but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege . . ., is particularly appli-

---

(1972), or issued by the circuit clerk in vacation upon application of the district attorney or a conservator of the peace. *Id.* § 99-9-23 (Supp. 1983).

178. MISS. UNIFORM CRIM. R. CIR. CT. PRACTICE 2.04.

179. United States v. Mandujano, 425 U.S. 564, 571 (1976).

180. U. S. CONST. amend. V.

181. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 101, at 217 (1982).

cable to grand jury proceedings.[182]

Or, as Justice Powell has written:

> The power of a federal court to compel persons to appear and testify before a grand jury is . . . firmly established. . . . The duty to testify has long been recognized as a basic obligation that every citizen owes his Government. . . . The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure.[183]

As is the case with state grand juries in Mississippi, secrecy is also a part of federal grand jury proceedings. Federal grand jury secrecy is "a long-established policy,"[184] which the Supreme Court deems "indispensable."[185] The Supreme Court has emphasized that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."[186]

Rule 6 of the Federal Rules of Criminal Procedure, which generally deals with the federal grand jury, implements the policy of secrecy through subsection (e)(2), which provides:

> *General Rule of Secrecy.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.[187]

Noticeably absent from the categories of grand jury participants covered by Rule 6(e)(2) is the grand jury witness. As Professor Wright has written:

> No obligation of secrecy can be imposed on any person except those

182. Branzburg v. Hayes, 408 U.S. 665, 688 (1972).
183. United States v. Calandra, 414 U.S. 338, 345 (1974).
184. United States v. Proctor & Gamble Co., 356 U.S. 677, 681 (1958).
185. United States v. Johnson, 319 U.S. 503, 513 (1943).
186. Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979).
187. FED. R. CRIM. P. 6(e)(2).

> specified. . . . The seal of secrecy on witnesses would be an unnecessary hardship, and might lead to injustice if the witness were not permitted to make a disclosure to his lawyer, his employer, or an associate. Accordingly no secrecy obligation can be imposed on grand jury witnesses, although they need not make disclosure if they do not wish to do so.[188]

It might appear at first blush that a bank could disclose to a customer the fact that a federal grand jury has subpoenaed his bank records. Indeed, a federal court sitting in California so ruled in a case involving Crocker National Bank. A federal grand jury subpoena which the bank received had attached a letter from the United States Department of Justice directing the bank not to disclose the existence of the subpoena duces tecum to the customer because disclosure would hamper the grand jury's investigation and interfere with law enforcement. When the bank's attorneys suggested that the directive concerning non-disclosure violated the law, the government responded with not-so-veiled hints that disclosure by the bank would be considered a violation of the federal statutes concerning obstruction of justice.

Crocker National Bank then filed a motion in federal court concerning the non-disclosure condition. After reviewing Rule 6(e)(2), the court concluded that the government's position was unlawful. The court said simply: "The government therefore cannot legally impose an obligation of secrecy upon Crocker with respect to this subpoena duces tecum."[189]

In 1981, Chief Judge Winner of the United States District Court for the District of Colorado dealt with a case involving a motion by two Colorado banks to quash federal grand jury subpoenas commanding production of customer records. A unique feature of the case was that an Assistant United States Attorney had publicly threatened Colorado bankers with prosecution for obstruction of justice for disclosing to bank customers the existence of subpoenas duces tecum from a federal grand jury.

Chief Judge Winner, in a written opinion, delivered a withering attack on the United States Attorney's Office. Although he declined to quash the subpoenas, he specifically ruled that, under Rule 6(e), the government could not impose a non-disclosure requirement on banks.[190] Acknowledging the Colorado Supreme

---

188. 1 C. WRIGHT, *supra* note 181, at 246-47.
189. *In re* Vescovo Special Grand Jury, 473 F. Supp. 1335, 1336 (C.D. Cal. 1979).
190. *In re* Grand Jury Subpoena, 517 F. Supp. 1061, 1066 (D. Colo. 1981).

Court's ruling in *Charnes v. DiGiacomo*,[191] he pointed out that failure by the banks to make disclosure to the customer could lead to a lawsuit against them in state court for violating protected privacy rights. The decision on notification thus belonged to the banks. Chief Judge Winner concluded: "If a bank notifies a customer, no sustainable prosecution for obstructing justice can follow."[192]

These rulings from California and Colorado indicate that disclosure to the customer by banks is lawful, the threats by prosecutors notwithstanding. As one authority has written: "Such threats by the prosecutor are illegal."[193]

Regrettably, the analysis of the disclosure issue does not end here. Recent developments in the law have reinforced grand jury secrecy requirements and have given prosecutors a legal basis to direct that a bank not inform its customer that a federal grand jury has subpoenaed his bank records. In a leading case, the United States Court of Appeals for the Fifth Circuit seemed to broaden the grand jury secrecy provisions. The case arose out of a federal grand jury investigation of Georgia banker Bert Lance. In an opinion written by United States Circuit Judge (now Chief Judge) Charles Clark of Mississippi, the Fifth Circuit said:

> Courts have interpreted the secrecy requirement imposed by Rule 6(e) to apply not only to information drawn from transcripts of grand jury proceedings, but also to anything which 'may tend to reveal what transpired before the grand jury.' . . . We construe the secrecy provisions of Rule 6(e) to apply not only to disclosures of events which have already occurred before the grand jury, such as a witness's testimony, but also to disclosures of matters which will occur, such as statements which reveal the identity of persons who will be called to testify or which report when the grand jury will return an indictment.[194]

Moreover, the United States Court of Appeals for the Seventh Circuit has ruled that certain subpoenaed documents were subject to the secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure.[195]

Of even greater significance is the fact that on April 28,

---

191. 612 P.2d 1117 (Colo. 1982).
192. *In re* Grand Jury Subpoena, 517 F. Supp. 1061, 1067 (D. Colo. 1981).
193. NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES § 7.4(b), at 139 (2d ed. 1982).
194. *In re* Grand Jury Investigation, 610 F.2d 202, 216-17 (5th Cir. 1980).
195. *In re* Special February, 1975 Grand Jury, 662 F.2d 1232 (7th Cir. 1981).

1983, the United States Supreme Court issued an order amending Rule 6(e) by inserting a new Rule 6(e)(6). The new provision, which became effective on August 1, 1983, reads as follows:

> (6) *Sealed records.* Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.[196]

The Advisory Committee Note accompanying Rule 6(e)(6) explained that the new language was needed to insure grand jury secrecy, particularly in regard to targets of investigation:

> Subdivision (e)(6) provides that records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for so long as is necessary to prevent disclosure of matters occurring before a grand jury. By permitting such documents as grand jury subpoenas and immunity orders to be kept under seal, this provision addresses a serious problem of grand jury secrecy and expressly authorizes a procedure now in use in many but not all districts. As reported in Comptroller General, More Guidance and Supervision Needed over Federal Grand Jury Proceedings 10, 14 (Oct. 16, 1980):
> 'In 262 cases, documents presented at open preindictment proceedings and filed in public files revealed details of grand jury investigations. These documents are, of course, available to anyone who wants them, including targets of investigations. [There are] two documents commonly found in public files which usually reveal the identities of witnesses and targets. The first document is a Department of Justice authorization to a U.S. attorney to apply to the court for a grant of immunity for a witness. The second document is the court's order granting the witness immunity from prosecution and compelling him to testify and produce requested information. . . .
> 'Subpoenas are the fundamental documents used during a grand jury's investigation because through subpoenas, grand juries can require witnesses to testify and produce documentary evidence for their consideration. Subpoenas can identify witnesses, potential targets, and the nature of an investigation. Rule 6(e) does not provide specific guidance on whether a grand jury's subpoena should be kept secret. Additionally, case law has not consistently stated whether the subpoenas are protected by Rule 6(e).
> 'District courts still have different opinions about whether grand jury subpoenas should be kept secret. Out of 40 Federal District

196. FED. R. CRIM. P. 6(e)(6) (1983 amend.), *reprinted in* 97 F.R.D. 245, 250 (1983). For a discussion of the new provision, *see* Rothstein, *Amendments to the Federal Rules of Criminal Procedure*, 69 A.B.A. J. 1838, 1839 (1983).

> Courts we contacted, 36 consider these documents to be secret. However, 4 districts do make them available to the public.'[197]

It thus appears that the new Rule 6(e)(6) has undermined the holdings in the grand jury cases arising from California[198] and Colorado.[199] Prosecutors can now insist that a bank not notify its customer of a grand jury subpoena duces tecum for his bank records.

Banks, at least those located in Mississippi, should not be concerned that non-disclosure of the existence of a federal grand jury subpoena duces tecum will make banks liable to customers. Neither a Mississippi statute nor a Mississippi judicial precedent requires disclosure of a subpoena duces tecum to a bank customer. Even if such a requirement existed under state law, that requirement could not stand in federal court against a contrary Federal Rule of Criminal Procedure. Moreover, a bank customer has no federal right to require notification from a bank. After all, as the United States Court of Appeals for the Fourth Circuit explained prior to the adoption of the new Rule 6(e)(6):

> While witnesses who appear and testify before a grand jury may wish to communicate the fact of their appearance and their testimony to the person who is the subject of the investigation, such communication is entirely optional with the witness. *The person who is the subject of the investigation has no right to require a witness to divulge such information.*[200]

The same point was made even more forcefully in an opinion rendered in legal proceedings arising out of the issuance of a subpoena duces tecum by a federal grand jury sitting in Pennsylvania. The grand jury subpoenaed certain financial records from a savings and loan association. The savings and loan association filed a motion to quash the subpoena duces tecum on the ground that state law did not authorize a savings and loan association to disclose such information to a grand jury and on the further ground that disclosure could subject the savings and loan association to civil liability. The United States District Court for the Eastern District of Pennsylvania denied the motion. The court

---

197. Advisory Committee Note, *reprinted in* 97 F.R.D. 276-77 (1983).
198. *In re* Vescovo Special Grand Jury, 473 F. Supp. 1335, 1336 (C.D. Cal. 1979).
199. *In re* Grand Jury Subpoena, 517 F. Supp. 1061, 1066 (D. Colo. 1981).
200. *In re* Swearingen Aviation Corp., 605 F.2d 125, 127 (4th Cir. 1979) (emphasis added).

said:

> We reject at the outset any suggestion of a banker-depositor privilege which would prevent the Government from obtaining or using information against a depositor obtained from the bank without the depositor's permission. Federal courts do not recognize any such privilege. . . .
>
> . . . The fact that this information was revealed to Home Unity [Savings and Loan Association] by the depositors on the assumption that it would be used only for a limited purpose and that its disclosure, without consent, was restricted does not, under these circumstances, create a cognizable Fourth Amendment interest. Thus, as we stated earlier, the Government had no obligation to provide notice of the subpoena to the depositors. . . .
>
> . . . Assuming that a civil action would lie against Home Unity . . . we think the risk of civil damages is slight and speculative. The chance that the depositors will suffer compensable damages by a disclosure to the federal grand jury, whose proceedings are kept secret, is quite remote. Moreover, we believe that Home Unity would have a valid defense, if it is sued, that disclosure was involuntary and due to compulsion by a federal court.[201]

A bank would thus be well advised not to disclose to its customer the fact that his bank records have been subpoenaed by a federal grand jury. The legal risks of non-disclosure are virtually non-existent. The legal risks of disclosure, especially in light of the new Rule 6(e)(6), are considerable. Moreover, the notice requirements of the Right to Financial Privacy Act of 1978 do not apply to federal grand jury proceedings.[202]

If a bank's relationship with a customer is such that it feels it must make an effort to inform him that a federal grand jury has subpoenaed his bank records, then the bank should file a motion with the federal district court seeking court authorization to disclose. Even if the motion is denied and federal prosecutors subsequently enter the subpoenaed records in evidence against the customer, the bank can still tell the customer that it tried to give him notice but was prevented by court order from doing so.

The bottom line in regard to grand jury subpoenas for bank records—be the grand jury state or federal—is simply this: Do not notify the customer unless a court order specifically authorizes such notification.

---

201. United States v. Grand Jury Investigation, 417 F. Supp. 389, 391-93 (E.D. Pa. 1976); *but see* Commonwealth v. DeJohn, 403 A.2d 1283, 1290 (Pa. 1979).

202. 12 U.S.C. § 3413(i) (Supp. II 1978).

VIII. CONCLUSION

As the foregoing analysis has shown, it is not a simple matter for banks to honor a subpoena duces tecum or other compulsory process requiring production of a customer's bank records and at the same time avoid potential liability to the customer for breach of the duty of confidentiality or for violation of his privacy rights. Bank officers and bank counsel placed in this dilemma should not respond to a subpoena in a casual or cavalier fashion. Every subpoena for bank records is a potential bombshell that could explode in the corporate face of the bank or the individual face of the bank officer responsible for responding to the subpoena. Depending upon the source or nature of the subpoena duces tecum or other compulsory process, variations in the manner or method of response may be required.

A comprehensive statute on the confidentiality of bank records setting forth a bank's duties and responsibilities in regard to response to compulsory process and in regard to disclosure or non-disclosure would be a helpful guide in Mississippi. Other states have enacted such a statute. But until such time as the Mississippi Legislature bestirs itself in this area, Mississippi banks, their officers, and bank counsel may find the following statements and suggestions to be a helpful guide.

(1) According to the decision of the United States Supreme Court in *United States v. Miller*,[203] a customer's bank records are not his private papers but rather business records of the bank. The prohibition against unreasonable search and seizure found in the fourth amendment does not give a customer any such expectation of privacy in his bank records as to defeat a subpoena duces tecum or other legal process.

(2) While the Supreme Court of Mississippi has recognized a right of privacy, it is not a right set forth in the state constitution or, for that matter, a right expressly articulated in a state statute. Nothing in Mississippi law prevents a customer's bank records from being delivered to another party in response to proper legal process.

(3) There is an implied common law duty arising out of the bank-customer relationship that the bank will not disclose the financial affairs of a customer to a third party except in response to compulsory process. Section 81-5-55 of the Mississippi Code,

---

203. United States v. Miller, 425 U.S. 435 (1976).

poorly written though it is, creates a statutory duty of non-disclosure "except when required to be done in legal proceedings . . . ." Violation of the statute is a criminal offense as well as the basis for civil liability.[204]

(4) There is no legal requirement in Mississippi, as there is in California by court decision[205] and in other states by statute,[206] that a bank give a customer notice that his bank records are being sought by subpoena duces tecum or that the bank is going to honor that compulsory process.

(5) Except in regard to grand jury subpoenas, it is a good business practice to notify a bank customer that his bank records have been subpoenaed.

(6) A bank should not disclose to a customer that his bank records have been subpoenaed by either a federal or state grand jury. Disclosure could lead to a citation for contempt for revealing the secrecy of grand jury proceedings.

(7) In the absence of a subpoena duces tecum or other compulsory legal process issued in a court proceeding, or in the absence of a compliance certificate from an agency of the federal government, a bank should never disclose customer records to a requesting party, even if that party is a police officer, district attorney, or other person clothed with some official authority.

(8) Because a subpoena duces tecum issued by an executive officer or administrative agency of the state government may not be one issued in a legal proceeding within the meaning of Section 81-5-55 of the Mississippi Code, prudence requires that a bank insist upon a court order before it responds to such an executive or administrative subpoena.

(9) Before responding to an administrative subpoena issued by the Internal Revenue Service, a bank should be certain that the IRS has provided it with the statutory certificate upon which the bank may rely in good faith and thus avoid possible liability to the customer.[207]

(10) Before delivering customer records to any other federal agency, officer, or employee, a bank should be certain that the government has provided it with a copy of the compliance certifi-

---

204. MISS. CODE ANN. § 81-5-55 (1972).

205. Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975).

206. *See supra* notes 154-61 and accompanying text.

207. *See* 26 U.S.C. § 7609(i)(2)-(3) (1982).

cate mandated by the Right to Financial Privacy Act of 1978.[208]

(11) If a bank is ever uncertain about whether it should comply with a subpoena duces tecum for bank records, if a bank seems to be caught between conflicting legal duties in regard to such a subpoena, or if a bank wishes for business and customer relations reasons to disclose to a customer the fact that his records are being subpoenaed by a federal or state grand jury, then the bank should file with an appropriate court a motion seeking a protective order or other relief.

(12) A bank should be certain that the cost of complying with a subpoena duces tecum for bank records is borne by the party seeking discovery. Congress has directed that the Internal Revenue Service[209] and other federal agencies[210] pay the cost of search for, and reproduction of, bank records. If another party in a civil proceeding will not pay this cost in advance, or at least agree to pay, then the bank should seek a protective order from the appropriate court.[211]

Careful attention to the foregoing statements and suggestions should enable Mississippi banks to resolve the potentially conflicting duties of complying with legal process and protecting confidentiality of customer records. Following these guidelines should help Mississippi banks to avoid either civil or criminal liability in regard to customer records.

208. *See* 12 U.S.C. § 3403(b) (Supp. II 1978).
209. 26 U.S.C. § 7610 (1982).
210. 12 U.S.C. § 3415 (Supp. II 1978).
211. *See supra* notes 87-88 and accompanying text.

AUTHOR'S ADDENDUM

As the foregoing article was going to press, the Mississippi Legislature passed two bills which affect the disclosure of bank records.

On April 10, 1984, the Governor of Mississippi signed into law House Bill No. 351, which will henceforth be identified as Chapter 327 of the General Laws of 1984. This act amended Section 81-5-55 of the Mississippi Code so as to permit Mississippi banks "to report to approved parties, such as credit bureaus, account verification services and others, the forcible closure of a deposit account due to misuse, such as fraud, kiting, or chronic bad check writing." The Act charged the Commissioner of Banking and Consumer Finance with determining whether a credit bureau, account verification service, or similar entity will be placed on the approved list to receive bank reports that accounts have been closed because of customer misuse.

From the perspective of Mississippi banks, this Act represents progress. However, Section 81-5-55 needs further modification before it becomes a modern statute that fully addresses the issue of preserving confidentiality of bank records in the contemporary banking environment.

On April 18, 1984, the Governor signed into law House Bill No. 448, which will henceforth be identified as Chapter 383 of the General Laws of 1984. This Act established a procedure for producing bank records in court proceedings similar to that procedure already established for the production of hospital records.[212] Space does not permit a full analysis of the new Act. However, when a subpoena duces tecum or order is issued in a state court proceeding requiring a bank to assemble or provide the financial records of a customer, the party requesting the subpoena or order is required to pay to the court "all reasonable charges of the bank in searching for, reproducing and transporting the records." Payment is to be made to the court promptly after delivery of the records to the requesting party. The charges are to be taxed as costs of court and are to be paid to the bank not later than final determination of the litigation by the court in which the suit is filed.

The Act further provided that, unless the production of original records is specifically required, the bank may comply with the subpoena duces tecum or court order by producing copies of the

212. *See* MISS. CODE ANN. §§ 41-9-101 through -119 (1972).

records sought. Moreover, unless the attendance of the bank records custodian is expressly required, the custodian does not have to appear personally with the records. He may send an affidavit certifying as to the authenticity of the records. The Act further specified a detailed procedure for assembling, sealing, and addressing the subpoenaed bank records.

Mississippi banks will welcome the passage of this legislation. For the first time, Mississippi banks will have a statutory basis to assure that they are reimbursed for the costs of producing customer financial records in state court proceedings.

The effective date of both Chapter 327 and Chapter 383 of the General Laws of 1984 is July 1, 1984.