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United States v. Miller: Without a Right to Informational Privacy, Who Will Watch the Watchers, 10 J. Marshall J. Prac. & Proc. 629 (1977)

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CASENOTE

UNITED STATES V. MILLER: WITHOUT A RIGHT TO INFORMATIONAL PRIVACY, WHO WILL WATCH THE WATCHERS?

INTRODUCTION

The fourth amendment to the United States Constitution provides that the people are to be "secure" from "unreasonable" searches and seizures.¹ It delineates a sphere of personal security, a right to privacy, surrounding the life of every citizen.² If the government intrudes upon this privacy without proper authorization, exemplified by a warrant or the presence of certain specified circumstances,³ no information obtained by the effort

1. U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Just what is contained within this sphere, is the subject of the principal case. If the government seeks to enter in search of evidence of crime to be used against an individual, it must have prior authorization or be faced with certain exigent circumstances making the search reasonable. If what is sought is not protected by the fourth amendment and the manner of the search is not excessive, then the ban simply does not come into play and the government may search as it pleases. See note 3 *infra*.

The traditional test for a right to privacy was stated in terms of property concepts:

Thus the areas which came to be considered protected under the fourth amendment were generally enclosed places such as buildings, rooms, cars, desks, and envelopes; for the most part these areas were privately owned, and all were thought of as being under close personal dominion. Even though this approach no longer enjoys its former stature, the viewing of certain areas as enclosed sanctuaries of private control was not illogical and, up to a point, was useful in reaching a supportable result.

Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 971 (1968) [hereinafter cited as *Post-Katz*]. This approach to privacy was symbolized by the phrase "constitutionally protected area" first used in *Lanza v. New York*, 370 U.S. 139 (1962), where a prison visiting room was held not to be such an area.

In more recent years this test has been abandoned as the sole indicator of a right to privacy. Now, if the government search "violated the privacy on which [the defendant] had justifiably relied," and the government lacked proper authorization, then the search was illegal. *Katz v. United States*, 389 U.S. 347, 353 (1967). Justice Harlan, in his concurring opinion, described the new test as "expectations of privacy." *Id.* at 360-62.

3. As the fourth amendment reads, only unreasonable searches are prohibited. But the Supreme Court has specified that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—sub-

may be used as evidence in criminal proceedings against the person so offended.⁴

Despite the prohibition of the fourth amendment, the Supreme Court of the United States held in *United States v. Miller*⁵ that no right of privacy is violated by a government search of checking account records in a bank. The evidence obtained can be used in criminal proceedings against the depositor. The effect and rationale of this holding seem contrary to the spirit and history of the fourth amendment.

The Substance of Fourth Amendment Privacy

In recent years the Supreme Court of the United States has enunciated and expanded a right to privacy either as a composite of the "penumbral" necessities of several amendments or in specific relation to one.⁶ Most scholars, however, seem to agree that privacy has always been the special province of the fourth amendment.⁷ It alone directly limits the government's power to

ject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). Except in certain particular situations, the searcher is not to be the judge of the propriety of his own actions. *E.g.*, *United States v. Robinson*, 414 U.S. 218 (1973) (complete search of a person following a full custody arrest); *Chimel v. California*, 395 U.S. 752 (1969) (reasonable search of arrestee, and the area within his immediate control, for weapons and evidence incident to a lawful arrest); *Warden v. Hayden*, 387 U.S. 294 (1967) (police entry into a house while in "hot pursuit" of a suspect).

4. This result is obtained by operation of the "exclusionary rule." *Mapp v. Ohio*, 367 U.S. 643 (1961) (where it was extended to the state courts); *Weeks v. United States*, 232 U.S. 383 (1914) (where it was first established for federal courts).

5. 425 U.S. 435 (1976).

6. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding the privacy of marriage against intrusive legislation by reference to the first, third, fourth, fifth, and ninth amendments); *NAACP v. Alabama*, 357 U.S. 449 (1958) (a right to privacy found in the first amendment to protect freedom of speech and association).

7. It has been called the "core of constitutional privacy." Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833, 856 (1974).

The most crucial provision of the Constitution protecting privacy, and the one most persistently identified with the concept, is the fourth amendment. This fundamental ban upon 'unreasonable' searches and seizures is based upon the premise that to breach the privacy of the individual is an extraordinary action; one that requires a number of safeguards to be satisfied before it can be undertaken.

Id.

Furthermore, the fourth amendment's protection differs materially from that of other amendments.

Although the first amendment protects freedom of expression and associational privacy, it does not limit the means by which the government can gather evidence for criminal prosecutions. . . . The protections of privacy offered by the first and fourth amendments are very different; they are not simply separate aspects of a single right transcending the individual amendments.

Post-Katz, *supra* note 2, at 981.

It is when the government seeks to obtain evidence to support crimi-

collect evidence for use against a citizen in a criminal proceeding—the oldest and most successful tool of tyranny.⁸

The drafters of the fourth amendment felt the indignity and recognized the danger of indiscriminate government searches.⁹ They did not seek to protect criminals, but rather to prevent would-be tyrants from being able to wrest from a man *private information* with which to prove him guilty of nebulous crimes. Their aim was to give recognition to that peculiar personal situation which exists only in free nations—a person's privacy. The autonomy of the individual, the goal of a democratic society, was to be protected by preventing unfettered government intrusion into the intimate sphere of one's personal affairs in search of incriminating information.¹⁰

nal charges against a person that privacy is invaded in the most telling sense. The threat of conviction and its aftereffects are the most immediate and obvious pressures which a government can bring to bear on an individual, and it is here that the fourth amendment specifically intervenes to prevent abuses of that great power to offend one's sense of personal security. Professor Kent Greenawalt, in his essay on privacy, said that:

[G]iving the state unlimited power to obtain information would be destructive of many of the values of a liberal society. Intimate human relationships depend largely on the sense that participants are free from the observations of others, and that sense is essential to the development of individual points of view and modes of life. Continuing contacts with those looking for damaging information are both highly unpleasant and deeply disturbing to any sense of security. Moreover, the more wide-sweeping the power to gather evidence, the greater the danger that the power will be arbitrarily used to harass those 'out of favor' or those against whom particular officials have personal grievances; the greater also the danger that information obtained will fall into inappropriate hands or be misused.

....

The most important limits on the government's power to search are set by the Fourth Amendment . . . whose meaning is filled out by judicial decisions . . .

K. Greenawalt, *The Right of Privacy*, in *THE RIGHTS OF AMERICANS* 300 (N. Dorsen ed. 1971).

8. In England and Colonial America, government agents broke down doors, seized goods, and rifled papers almost with impunity. The practice was a useful technique in stemming rampant smuggling, but it was more useful still in proving "sedition"—the crime of disagreeing with one's government. The king's messenger, armed with "Writ of Assistance" and "General Warrant" became a symbol of infamy helping to spark the revolution. See J. LANDYNSKI, *SEARCH & SEIZURE AND THE SUPREME COURT 19-47* (1966) [hereinafter cited as LANDYNSKI].

9. The Fourth Amendment was not a construct based on abstract considerations of political theory, but was drafted by the framers for the express purpose of providing enforceable safeguards against a recurrence of highhanded search measures which Americans, as well as the people of England, had recently experienced.

Id. at 20.

10. A proper interpretation of the fourth amendment requires one to focus more on what it protects than on the abuses it seeks to prevent. The "positive right" which it seeks to preserve must be recognized. See *Post-Katz*, *supra* note 2, at 986-87. Privacy must be seen as a situation or milieu guarding information about ourselves, which information we may have shared or set down, but the further publication of which

Background to United States v. Miller

It became the responsibility of the Supreme Court to maintain the vitality of the fourth amendment by applying the amendment's meaning to circumstances which its framers might or could not have anticipated.¹¹ In the late 1960's the develop-

we may reasonably seek to prevent. It is a situation into which the government should not be allowed to *freely* interpose itself by trying to intercept or collect that information as evidence.

Preserving a person's control over information about himself was the theme of the early attacks on abusive government searches. A search, after all, "is the gathering of nonpublic information." *Post-Katz, supra* note 2, at 974.

In outlawing the use of general warrants *Entick v. Carrington* was concerned with more than physical intrusion: another aspect of privacy—the individual's loss of control of information—was at stake. Lord Camden's famous opinion expressed abhorrence that the individual's 'house is rifled, *his most valuable secrets are taken out of his possession . . .*' A fear that 'the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger' prompted the court's holding.

The Fourth Amendment's drafters were thus concerned with privacy in the sense of control over information.

Comment, *Government Access to Bank Records*, 83 YALE L.J. 1439, 1457 (1974) (emphasis added) [hereinafter cited as *Government Access*] (speaking of the influence which Lord Camden's opinion had on the framers of the fourth amendment). *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765) was a civil suit in which an author sued agents of the Crown who had ransacked his papers looking for seditious writings.

11. As Professor Landynski described the obligation:

[One] of the Court's main tasks in the future will be to define the Fourth Amendment, in terms that will give it meaning, to protect against those threats to privacy which arise not from searches in the traditional sense but from 'figurative' searches, such as wire tapping and electronic eavesdropping, and from whatever new contrivances science may yet devise.

LANDYNSKI, *supra* note 8, at 270.

In the past ninety years, three particular cases have marked the Court's progress in carrying out this duty. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court prevented the compelled production of an incriminating paper, holding the attempt to be merely a new wrinkle on the old practice of abusive searches. With a sense of inevitability, the Court linked the fourth amendment to the privacies of life:

They [the sanctions of the fourth amendment] apply to all invasions on the part of the government and its employe's of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . .

Id. at 630.

But images of broken doors and levered desks slowed the growth of a fourth amendment definition of privacy. The government transgressed only when it crossed a certain line and took a solid thing. In *Olmstead v. United States*, 277 U.S. 438 (1928), the logical limits of this property oriented doctrine were exceeded. The case involved an extensive conspiracy to smuggle liquor into the United States during the prohibition era. Government agents placed wiretaps on the phone lines in the basement of the defendant's office building. The Court held that the wiretap placed on lines outside of the defendant's offices and the recordings of conversations used as evidence against him were not in violation of the fourth amendment. No search had occurred because no trespass had taken place; and nothing was seized because conversations were intangible.

Another phone call brought the fourth amendment into the twentieth

ment of computer technology posed a novel threat to privacy that was identified as a quickly ripening fourth amendment issue, whose underlying question the Supreme Court finally decided in *Miller*. Advances in computer science and data handling techniques had made the collection and use of masses of personal information simple, easy and effective.¹² With the ease of pushing a button, a myriad of intimate facts released by people as a matter of course in a highly documented society could be brought together to compile highly revealing dossiers and profiles.¹³ The simplicity of it all, from the government investigator's perspective, was that no warrant appeared necessary. The information was not possessed by the subject. He had, in fact, divulged it by choice. What privacy could be violated by simply conducting a record check of information in business and government files and data banks?

Congress reacted to the situation by coming down on both sides of the question; favoring personal privacy on one side,¹⁴ but

century. In *Katz v. United States*, 389 U.S. 347 (1967), F.B.I. agents had placed a recorder on top of a phone booth frequented by a suspected "bookie." Again, the recorded conversations were used as evidence. Rejecting arguments on either side as to whether the booth was a "constitutionally protected area," the Supreme Court declared that the fourth amendment *protected the privacy of people, not places*. *Id.* at 351. Absent a warrant or exigent circumstances, the government was not permitted to invade the justifiable "expectations of privacy" upon which a person had relied. Recognizing the deficiencies of the property test when applied to twentieth century society, the Court refused to allow technology to displace the fourth amendment and made the test of privacy three-dimensional.

12. Present capabilities in this field are staggering. By one process, data can be recorded at the rate of 12 million bits per second resulting in an accumulation of 645 million bits per square inch of plastic tape. A. WESTIN, *PRIVACY AND FREEDOM* 167 (1970).

13. At the same time, as philosophers remind us in a different context, knowledge is power. The issue of privacy raised by computerization is whether the increased collection and processing of information for diverse public and private purposes, if not carefully controlled, could lead to a sweeping power of surveillance by government over individual lives and organizational activity. As we are forced more and more each day to leave documentary fingerprints and footprints behind us, and as these are increasingly put into storage systems capable of computer retrieval, government may acquire a power-through-data position that armies of government investigators could not create in past eras.

A. WESTIN, *PRIVACY AND FREEDOM* 158 (1970).

14. *E.g.*, The Federal Privacy Act of 1974, 5 U.S.C. § 552a (Supp. V 1975), which offers some degree of relief for the overexposed individual on whom data has been collected, but whose position, in light of *Miller*, seems dubious. See Comment, *An Introduction to The Federal Privacy Act of 1974 And Its Effect On The Freedom of Information Act*, 11 NEW ENG. L. REV. 463 (1976).

Through I.R.C. § 7609, added by The Tax Reform Act of 1976, Pub. L. No. 94-455, § 1205, 90 Stat. 1699 (1976) (redesignating former I.R.C. § 7609 as § 7611), the Congress has recently made an effort to provide some protection for the privacy of taxpayers. I.R.C. § 7609(a) requires the giving of notice to those taxpayers about whom information is sought by the IRS through administrative summonses issued to third-party recordholders. I.R.C. § 7609(b) affords the taxpayer the opportunity to stay

giving in to the pressures of a harried society on the other. Facing the specter of rising crime, Congress passed into law the Bank Secrecy Act.¹⁵ It required banks to preserve copies of their depositors' checks because these had been shown to be "highly useful"¹⁶ investigative aids in law enforcement activities.

In 1974, the Supreme Court upheld the constitutionality of the Act when it came under attack in *California Bankers Association v. Schultz*.¹⁷ However, while the Court saw no violation of the depositors' fourth amendment rights in the recordkeeping requirements,¹⁸ it refused to hold on the validity of the regulation¹⁹ allowing government access to the records. These claims were dismissed as premature because no attempt to gain access had been made by the government.²⁰

Having passed through nearly ninety years of interpretation in linking privacy to the fourth amendment and defining the limits of its protection,²¹ the Supreme Court had yet to decide whether privacy in this particular form was to be considered a protected interest. When the factual situation of *United States v. Miller*²² came before the Court, the question was posed. The Court was called upon to decide whether, by a logical extension

compliance by such third party and the unconditional right to intervene in any subsequent enforcement proceeding in the district court. Under prior law, the taxpayer did not have a right to intervene in such proceedings by virtue of "interest" alone under Fed. R. Crv. P. 24(a). *Donaldson v. United States*, 400 U.S. 517 (1971); *Government Access*, *supra* note 10, at 1447-50. This provision was enacted only seven months after the decision in *Miller* was handed down by the Supreme Court.

15. Act of Oct. 26, 1970, Pub. L. No. 91-508, 84 Stat. 1114. 12 U.S.C. § 1829b (1970) (retention of records by insured banks); *id.* § 1730d (1970) (retention of records by savings and loan institutions insured by the FSLIC); *id.* §§ 1951-1959 (1970) (retention of records by all noninsured financial institutions); 31 U.S.C. §§ 1051-1122 (1970) (reporting of domestic and foreign currency transactions). The Treasury Department regulations issued pursuant to the Act were codified in 31 C.F.R. § 103 (1973).

The banks are required to maintain copies of signature cards, ledger cards, and the depositor's social security or taxpayer identification number. The check copying requirements result in virtually all of a depositor's checks being copied despite the specified exceptions in 31 C.F.R. § 103.34 (1973). See *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 25-41 (1974); Note, *The Bank Secrecy Act, the Fourth Amendment, and Standing*, 36 LA. L. REV. 834 (1976).

16. 12 U.S.C. § 1829b(a)(1) (1970).

17. 416 U.S. 21 (1974). As Professors Westin and Miller point out the very existence of large pools of data may in itself be a threat not only to privacy but many other freedoms as well. See note 12 *supra*. The Supreme Court allowed the creation of yet another data reservoir without mentioning privacy in its opinion. The proponents of what has come to be known as "informational privacy," as defined in note 24 *infra*, saw the decision in *California Bankers* to be a major setback to the establishment of such a right. See ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, *PRIVACY IN A FREE SOCIETY* 34, 81-83 (1974).

18. 416 U.S. at 52-53.

19. 31 C.F.R. § 103.51 (1973).

20. 416 U.S. at 51-52.

21. See note 11 *supra*.

22. 425 U.S. 435 (1976).

of the "expectations of privacy test,"²³ a right to informational privacy²⁴ was to be recognized or that the government's access to checking account records was to be paramount over any interest of the depositor. The *Miller* Court decided that the depositor's interest was patently inferior.

UNITED STATES V. MILLER

Facts

Mitchell Miller was tried on charges of running a still and conspiring to defraud the United States of tax revenues. Treasury Department agents had subpoenaed copies of Miller's cancelled checks from two of his banks, which copies had been preserved pursuant to the Bank Secrecy Act.²⁵ The copied checks provided investigative leads and were used as evidence at Miller's criminal trial. The district court denied his motion to suppress the checks on fourth amendment grounds and convicted him. The court of appeals overturned the conviction and the government petitioned the Supreme Court.

In reversing the appellate decision, the Supreme Court of the United States held that a depositor had no fourth amendment interest in his checks. Rather than extending fourth amendment protection to such documents and data under its most advanced test for privacy, the Court denied such a right.

Decision of the Supreme Court

In rejecting Miller's contentions that he had a fourth amendment interest in his checks, the Supreme Court established two basic ground rules: first, it would consider the original checks rather than the copies,²⁶ implying that if a protected

23. See note 2 *supra*.

24. "[T]he control individuals exercise over the collection and use of personal information about themselves." ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, *PRIVACY IN A FREE SOCIETY* 28 (1974).

The information contained in a depositor's checks is an excellent example of the sort of data which a right to informational privacy is expected to protect.

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*. These are all tied to one's social security number; and now that we have the data banks, these other items will enrich that storehouse and make it possible for a bureaucrat—by pushing one button—to get in an instant the names of the 190 million Americans who are subversives or potential and likely candidates.

California Bankers Ass'n v. Shultz, 416 U.S. 21, 85 (1974) (Douglas, J., dissenting).

25. See note 15 *supra*.

26. 425 U.S. at 442.

fourth amendment interest existed it was more likely to appear in the originals than in the microfilms;²⁷ second, the Court refused to consider only a situation involving an allegedly defective subpoena.²⁸ If a fourth amendment interest existed it would be independent of whatever sort of legal process might be used to effect an intrusion, and only if such an interest were found would the qualities of such process be at issue.²⁹

The Court applied both the classical "property" test and the *Katz* expectations of privacy analysis³⁰ in examining the nature of the evidence Miller sought to suppress. Failing both of these, the checks³¹ would simply be outside the sphere of a depositor's fourth amendment protection. The government's acquisition of the checks by whatever means would not have been an invasion of his privacy as a depositor, leaving Miller's objection groundless.³² In that case the general rule would be applicable: that "a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant," even in the midst of a criminal prosecution.³³

First, in applying the property test, the Court relied on its decision in *California Bankers*³⁴ to point out that banks are not "neutrals in transactions involving negotiable instruments," and that the checks properly become the records of the bank.³⁵ On this basis the Court distinguished *Boyd v. United States*,³⁶

27. For the Court to make a distinction between the original checks and the microfilm copies implies a property analysis of the depositor's right to privacy. While the checks may arguably be considered his property, any copies, e.g., microfilms, would undeniably be the property of the bank. *Government Access*, *supra* note 10, at 1451.

28. 425 U.S. at 441 n.2. The Court had effectively decided that the question of the subpoena's validity was not an issue, in that their entire decision was based on the sole ground of the complete absence of a fourth amendment interest. *Id.* at 440. But later in their opinion the Court implied that the subpoenas in *Miller* were, in fact, proper and on that basis distinguished the case relied on by Justice Brennan in his dissent. *Id.* at 445 n.7. Whatever implications the Court may have been trying to make as to the validity of the subpoenas, by the Court's own analysis the subject is irrelevant to the depositor. Having no interest at all in the information sought, his position would be the same as that of a depositor whose records were searched without any legal process. *Id.* at 448 n.2 (Brennan, J., dissenting).

29. If a fourth amendment interest had been discovered, the Court would have had to determine whether the legal process was proper under the circumstances or was a "figurative" search violating the fourth amendment as the Court held the compelled production of a document to be in *Boyd v. United States*, 116 U.S. 616 (1886).

30. See note 2 *supra*.

31. Deposit slips were also involved in *Miller*, but whatever determination may be made as to checks probably applies to deposit slips as well. *Government Access*, *supra* note 10, at 1450.

32. See note 28 *supra*.

33. 425 U.S. at 444.

34. 416 U.S. 21 (1974).

35. 425 U.S. at 440 (quoting *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 48-49 (1974)).

36. 116 U.S. 616 (1886).

which had been the mainstay of Miller's argument. The *Miller* Court said that the depositor could assert neither possession nor ownership of the documents in question, thereby precluding any right to privacy based on property interests.

Secondly, a depositor's expectations of privacy were negated by the fact that the checks were, in essence, published when placed into the banking cycle. Any information contained in the checks was "voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business,"³⁷ and the depositor thereby took the "risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the government."³⁸ The Court concluded that the test of *Katz* offered no comfort to Miller because "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection,"³⁹ and such information could be obtained by the government without infringing upon any privacy right.

Having arrived at this point, the question of the propriety of the process used to gain access to the checks was neither logically nor legally an issue. Miller had "no Fourth Amendment interest that could be vindicated by a challenge to the subpoenas."⁴⁰ The Court refused to give an inch in allowing a depositor a protectible interest despite the facts that Miller apparently had not surrendered his privacy in terms of its prior decisions and that there was precedent to show that depositors did have a property interest in their checks.⁴¹ The Supreme Court held, in effect, that one who engages in such an ordinary transfer of information thereby deprives himself of any privacy interest which could restrict the government's ability to search among that data for incriminating evidence.

37. 425 U.S. at 442.

38. *Id.* at 443. In support of this proposition, the *Miller* Court cited its decision in *United States v. White*, 401 U.S. 745, 751-52 (1971). In *White*, government agents had eavesdropped on conversations between the defendant and an informant who was carrying a miniature radio transmitter. The Court affirmed the conviction on the ground that White had taken the risk of the informant being a government agent when he conveyed to him information implicating himself in drug dealings. The *Miller* Court's characterization of its holding in *White* is neither strictly accurate nor applicable to the situation in *Miller*. See notes 55-63 and accompanying text *infra*.

39. 425 U.S. at 442 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

40. 425 U.S. at 445.

41. The Court relied on its decision in *United States v. White*, 401 U.S. 745 (1971), to show that a depositor voluntarily gives up his expectations of privacy when he transfers information to his bank via his checks. But the rationale of *White* apparently assumes the valid privacy of some transfers of information while excluding as unjustifiable the expectations of a defendant within the specific fact pattern of *White*. See note 38 *supra*.

The Depositor's Property Interest

With only one paragraph, the Court in *Miller* dismissed the depositor's argument that the checks taken by the government were his property and therefore private papers suitable for fourth amendment protection.⁴² The question is far more complex and confused than the Court seemed to indicate. A brief survey of relevant case law shows a far less certain conclusion.⁴³

42. 425 U.S. at 442.

43. The question of who has title to paid and cancelled checks, such as those taken in *Miller*, has not been litigated per se in the past half century (the same is true as to deposit slips), probably because title to such documents is of almost no commercial importance. *Government Access*, *supra* note 10, at 1450 n.47. What cases there have been on the matter show, however, that at common law any title there may have been was in the depositor.

In 1824, Lord Abbott said of them: "Checks are generally returned to the customer; but if not, while in the hands of the bank, they must be considered in the possession of the customer; the bank is his agent." *Partridge v. Coates*, 171 Eng. Rep. 976, 977 (K.B. 1824). The bank had little more than naked possession while the ownership of the depositor gave him "constructive possession" even though the items were held by the bank. Three years later, in urging on a litigant who was reluctant to produce a check at trial and who claimed as excuse that his banker had it, another English court said: "The bankers are your agents. You would have a right to go to the bankers and demand the check of them." *Burton v. Payne*, 172 Eng. Rep. 236 (K.B. 1827). Note that in these early cases the relationship between depositor and bank, at least in this facet, was one of principal to agent. In a criminal trial in 1850, the court stated definitively: "It is always considered that the check is the property of the drawer when paid." *Queen v. Watts*, 169 Eng. Rep. 398, 401 (C.A. 1850). An American court in 1916 had no more doubt on the point than the Royal judiciary. *Van Dyke v. Ogden Sav. Bank*, 48 Utah 606, 161 P. 50 (1916).

In later American cases the common law position has generally gone unnoticed. *But cf. Sabatino v. Curtiss Nat'l Bank*, 446 F.2d 1046 (3d Cir. 1971) which noted *Van Dyke* as some slight authority but preferred to rely upon the custom of dealing between customer and bank in reaching the same conclusion. Also, the American decisions have generally commingled property issues relating to actual bank records of transactions in which the bank was an active party (e.g., loan applications, loan repayment tickets, promissory notes, etc.) with those in reference to documents of primary concern to the depositor (e.g., checks, account statements, and so on). In the latter, the bank accomplishes little more than an accounting function, but the difference has been ignored. See *Government Access*, *supra* note 10, at 1439-40.

In *Harris v. United States*, 413 F.2d 316 (9th Cir. 1969), the court said that a depositor had no standing to challenge a subpoena directed at a bank for the production of his checks. *United States v. Gross*, 416 F.2d 1205 (8th Cir. 1969) came to a similar conclusion. *Gross* is cited by an authority on search and seizure to support the proposition that a depositor has no property interest in any records kept by a bank on his account on which to base a challenge to a subpoena as an indirect search in violation of his fourth amendment rights. 1 J. VARON, *SEARCHES, SEIZURES AND IMMUNITIES* 660 (2d ed. 1974).

Gross, however, supports a much narrower holding. In that case the bank itself was a victim of the customer's fraud. *Gross* had been running a "check kiting" operation, using the bank as his foil. As *Gross'* agent, therefore, the bank was no longer under any duty not to disclose the information in his checking account records to another, in this case the government. See RESTATEMENT (SECOND) OF AGENCY § 395, comment f (1957).

By the precedent which it cites *Gross* introduces another factor

In support of its contention that checks are bank records and not the depositor's papers, the *Miller* Court referred to its decision in *California Bankers*.⁴⁴ There it had said that "the body of law which has grown up in this area" is "voluminous."⁴⁵ Upon examination it appears that this may be its primary virtue. Actually the American precedents are confused, and when considered with the common law cases, the weight of prior decisions can be seen as favoring the depositor.

Even if the Court had seen the depositor in *Miller* as having a property interest in his checks, it would not have been of benefit when considering the copies made by the banks. Without serious doubt these are the property of the banks.⁴⁶ Furthermore, with the advent of electronic funds transfer systems, checks will become obsolete.⁴⁷ When deposits and withdrawals are relayed at the speed of light, and records are kept in the memory banks of time-shared computers, where and in what would the property interest be?

which often confuses the issue of bank record privacy. *Dosek v. United States*, 405 F.2d 405 (8th Cir. 1968), *cert. denied*, 395 U.S. 943 (1969) and *Galbraith v. United States*, 387 F.2d 617 (10th Cir. 1968) both involved corporate bank records. Corporate records do not have the same fourth amendment protection as is afforded an individual's private papers and are more easily subject to subpoena. 1 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 155, at 331-32 (12th ed. 1974). *Galbraith* sought support from *In re Cole*, 342 F.2d 5 (2d Cir. 1965) which dealt with a bank's own records in the strict sense.

In disposing of the defendant's surest prop for his claims of fourth amendment privacy, *Gross* highlights an anomaly in the chain of American decisions on bank record interests. *Gross* relied on the decision of *Zimmermann v. Wilson*, 81 F.2d 847 (3d Cir. 1936). Such reliance was misplaced because the third circuit reversed itself three years later when the *Zimmermann* case came up once more on appeal. *Zimmermann v. Wilson*, 105 F.2d 583 (3d Cir. 1939). This reversal was prompted by Judge Learned Hand's opinion in *McMann v. SEC*, 87 F.2d 377 (2d Cir. 1937). *Zimmermann* involved a claim of fourth amendment privacy as to the records held by the defendant's banker who was also his broker in securities. The *McMann* decision was concerned only with a government subpoena for brokerage records. Explicitly relying on *McMann*, the *Zimmermann* court reversed its earlier decision. Following a narrow construction of *McMann*, however, the *Zimmermann* holding was reversed only so far as the brokerage records were concerned, leaving Judge Buffington's 1936 statement in the first *Zimmermann* case of personal privacy as to bank records intact:

To say that their bank accounts, withdrawals, their loans and collateral deposits, are the property of their bankers and brokers, and the taxpayers have no right or standing to prevent an unreasonable search thereof, is to lose sight of substance and rest on shadow. . . .

[W]e regard the search here asserted as a violation of the natural law of privacy in one's own affairs which exists in liberty loving peoples and nations—for no right is more vital to 'liberty and the pursuit of happiness' than the protection of the citizen's private affairs, their right to be let alone.

Zimmermann v. Wilson, 81 F.2d 847, 848-49 (3d Cir. 1936). Judge Buffington dissented in the 1939 reversal.

44. 425 U.S. at 442.

45. 416 U.S. at 48.

46. See note 27 *supra*.

47. See *Government Access*, *supra* note 10, at 1441-42.

The *Miller* Court gave no edge to the depositor by focusing its property analysis on the original checks. Property distinctions were swiftly becoming an outmoded test of privacy in general and especially so when speaking of informational privacy. When the depositor transferred private information in his checks to a bank, he could no longer be said to own that information except by a strained interpretation of property concepts. But such an analysis should have been unnecessary in any case. He did expect that the privacy of that information would be maintained, and, in light of *Katz v. United States*,⁴⁸ unless those expectations were shown to be unjustified, the fourth amendment should have protected them.

Expected Privacy Denied

An individual seeking to maintain the privacy of personal information disclosed to business and other institutions must rely on the expanded right of privacy established by the Supreme Court in *Katz*.⁴⁹ What the *Miller* Court failed to emphasize was that when considering information which has been turned over to another and which may be transmuted into an intangible form, property concepts of privacy cease to be meaningful. All that remains is the individual's expectation that the privacy of that information will be protected.

The Katz Definition of Privacy

The Court in *Katz* recognized that privacy is not secrecy. No one could function in modern society if the only form of

48. 389 U.S. 347 (1967).

49. Only the *Katz* test protects one's sense of privacy when no property right is available with which to invoke the fourth amendment. *Katz* could have been a classic "constitutionally protected area" decision—the phone booth would have been a perfect foil for that analysis. See note 11 *supra*. But the Court obviously intended to extend the fourth amendment definition of privacy. As Professor Miller characterized it: "[T]he Supreme Court seems to have recognized the special threat of technology and has enunciated expansive general principles to protect a person's legitimate expectations concerning his privacy." A. MILLER, *THE ASSAULT ON PRIVACY* 319 n.121 (1972).

Katz "indicates that the Court [was] prepared to release the Fourth Amendment, as it had the Fifth Amendment [in *Miranda v. Arizona*, 384 U.S. 436 (1966)], from the moorings of precedent and determine its scope by the logic of its central concepts." Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133. As the Court said: "[T]he Fourth Amendment protects people not places." 389 U.S. at 351. The privacy of persons could no longer depend on property relationships in a society where property itself was represented more by intangibles than real entities. Privacy is a condition which one seeks to establish and which may be protected even when devoid of a property right. One may be forced to go into the public eye, but certain vestiges of confidentiality and personal integrity are retained—this is the privacy protected in *Katz*.

privacy respected was seclusion. What a person does keep entirely to himself is necessarily protected from exposure, but should he decide to confide his trust in a societal function or process recognized to be private in nature, the government should not be allowed to freely interfere. The core of the *Katz* opinion was expressed by the Supreme Court in these words: "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."⁵⁰

What *Katz* established, and what the *Miller* Court declined to recognize, was that there are two criteria to be met in order to determine that what a person claimed was private is to be treated so and accorded fourth amendment protection. First, a person must have "exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as reasonable."⁵¹ The individual must have actually relied on privacy he felt he had obtained and the expectation must have been one "buttressed by social norms; the intended walls of privacy must have some objective validity."⁵² Absent either of these factors, government seeking of information does not amount to an unreasonable search and the fourth amendment is not implicated.

The Court in *Miller* begged the first question of the *Katz* analysis by saying that a depositor published his checks when his

50. 389 U.S. at 351-52 (1967). To state the meaning of *Katz* both sentences are necessary. The first sentence refers to the first part of the two-tiered test of *Katz*. See note 51 and accompanying text *infra*. In *Miller*, the Court prefaced its denial of an expectation of privacy by quoting only the first sentence. See note 39 *supra*. In at least five other places both sentences are properly quoted. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 88-89 (1974) (Douglas, J., dissenting); 1 C. TORCIA, *WHARTON'S CRIMINAL PROCEDURE* § 150 at 320 (12th ed. 1974); Clark, *Constitutional Sources of the Penumbra Right to Privacy*, 19 VILL. L. REV. 833, 864 (1974); Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 138; Comment, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 NW. U.L. REV. 626, 631 (1974). One commentator quotes only the second sentence which, in any case, is still a valid representation of *Katz*. *Post-Katz*, *supra* note 2, at 976-77.

By this stunted reference the Court devalues the application of *Katz* to the present situation and provides an apparently logical link for its later use of *United States v. White* and builds an analytical framework which is consistent with neither case. See notes 54-55 and accompanying text *infra*. Such a practice by the present Court has been noted before. See Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1212-14 (1971).

51. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan's expression has been seen as a proper description of the mechanics of the *Katz* definition of privacy interests. See *Post-Katz*, *supra* note 2, at 982.

52. *Post-Katz*, *supra* note 2, at 984.

bank received them. The simple transfer of information might have increased the risk of disclosure, but it did not preclude the application of *Katz* to prevent government seizure of the data. The Court failed to ask the question of whether the relationship between the depositor and his bank was one in which a real respect for privacy was anticipated by the depositor.

Information Control and United States v. White

In analyzing a depositor's expectations of privacy for the information in the checks he writes, the focus of inquiry must shift from the documents themselves to the data that they transmit. The checks are only the means used to convey that which is the real object of privacy. Soon, even checks will drop out of the picture as new modes of financial transaction become feasible.

Recognizing this logical requirement the Court in *Miller* made its final denial of a depositor's fourth amendment interest by using its precedent on information control—*United States v. White*.⁵³ A depositor had no valid expectation of privacy, the Court said, because he had revealed the information in his checks to the bank and, in so doing, had taken the risk that the bank would convey it to the government.⁵⁴ In this respect he had failed to meet the first requirement of the *Katz* test; he had no actual expectation of privacy on which to rely. The rule in *White*, however, refers only to the second of those requirements and should only be applied when the information conveyed is of a certain nature and its recipient is of a specified character—neither of which can be found in the normal relationship between a depositor and his bank.⁵⁵

53. 401 U.S. 745 (1971). One commentator described *White* as the Court's "most progressive analysis of Fourth Amendment interests." *Government Access*, *supra* note 10, at 1461. There the case was seen as soundly supporting the justifiable nature of a depositor's expectations of privacy in terms of information control. *Id.* at 1461-63.

54. 425 U.S. at 443.

55. Whenever one transfers information to another he takes the risk that such other person may give it to yet another. But the *White* decision obviously assumed that certain transfers of information could be shielded from unsupervised government intrusions because of the valid expectations that nonparties had been excluded. Therefore, the fact of the transaction alone is insufficient to permit government monitoring without a warrant. On its facts, *White* specified that a transfer of information involving:

- 1) data clearly implicating the speaker in crime and,
- 2) a listener of objectively doubtful trustworthiness,

was not a transaction protected by the fourth amendment even though the speaker actually expected that his communications were private.

In a normal check writing situation, as in *Miller*, the quality of information in the checks falls below that which could notify the bank of criminal activity. Furthermore, banks are not generally considered to be of such a character that one should reasonably anticipate that they are acting as government spies. See notes 60 and 62 *infra*.

In *White*, government agents testified to incriminating conversations between the defendant and a government informant which they had overheard by means of a radio transmitter concealed on the person of the informant. The court of appeals reversed after applying the *Katz* test of privacy. In affirming the conviction and reversing the court of appeals, the Supreme Court specified that *Katz* was not retroactive and, therefore, could not be applied in deciding *White*.⁵⁶ Instead, *White* was seen as the latest in a series of informer-secret agent cases involving statements made by defendants to informants working for the government or undercover law enforcement officers.⁵⁷ The rulings in these cases were held to have been undisturbed by the decision in *Katz*. While not relying on *Katz*, the Court chose to use its language in defining the issue under consideration as whether the *actual* expectations of privacy of the defendant were objectively justifiable, given the particular circumstances.⁵⁸ The Court was probably trying to harmonize the informer situation cases with *Katz*.

Unlike *Miller*, the defendant in each informer case had voluntarily and definitively expressed the fact of his involvement in criminal activity to another. That other person in each case was one whose character or status made him an extremely poor *objective* risk for entrusting such information. The recurrence

56. 401 U.S. at 754.

57. A major impetus for the development of a new test of privacy had been the difficulty the Court had with three informer cases in the term prior to *Katz*, in 1966. In these cases government agents (either officers or informants) had eavesdropped on, or overheard, the defendant's conversations. One agent had carried a tape recorder. See *Osborn v. United States*, 385 U.S. 323 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966). The Court seemed anxious to show in each case that no violation of the fourth amendment had taken place in terms of the property test. In *Osborn* the Court noted that prior judicial authorization (but not actually a warrant) had been obtained for the recorder concealed on the agent. The Court appeared to be struggling for a rationale to replace the property test without depriving law enforcement authorities of the highly useful investigative tools of informers and secret agents which had been planted by the government in the criminal's camp. The decision in *Katz* seemed to place this technique under a cloud until *White* was handed down. Despite their use of much *Katz* language, the Court effectively carved out an enclave for the pre-*Katz* informer-secret agent situation which could not be jeopardized by the new test for privacy. See generally Kitch, *Katz v. United States: The Limits of The Fourth Amendment*, 1968 SUP. CT. REV. 133; Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974); *Post-Katz*, *supra* note 2.

58. Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. . . . Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally "justifiable"—what expectations the Fourth Amendment will protect in the absence of a warrant.
401 U.S. at 751-52.

of this combination in *White* was more than sufficient for the Court to determine that the defendant's actual expectations of privacy were not justifiable, either in the estimation of society or in the light of reason. The decision in *White* was not that one must expect that if he gives personal information to another it will very probably end up in the hands of the government; rather it was that a wrongdoer's actual expectation of privacy in relating his wrongful conduct to another, of similar character or otherwise doubtful trustworthiness, is not an expectation which society will recognize as reasonably private. Therefore, protection under the fourth amendment will not extend to it.⁵⁹

This rule should not apply to the relationship of a depositor to his bank as found in *Miller*. The depositor disclosed no picture of criminal conduct to the bank.⁶⁰ The bank itself, besides being totally ignorant of any wrongdoing on Miller's part, was a pillar of trustworthiness and confidentiality. It did not go to the police, but rather had the information in Miller's accounts taken from it.⁶¹ Seen in this light, the *White* decision should not have precluded the depositor's expectation of privacy, but rather should have stood him in good stead in asserting the justifiable character of the expectations he had.

By improperly invoking its decision in *White*, the Supreme Court denied Miller a fair evaluation of his expectations of privacy. That he had such expectations there is no doubt; both banks and customers traditionally acknowledge the confidentiality of checking account records.⁶² The only question left was whether his expectations were justifiable. His expectations of

59. All of the informer cases seem to etch out the simple, objective moral that partners in crime cannot rely on each other. An earlier case, within the same line of decisions, points out an even more obvious truth—that one contemplating a crime is better off not informing a known federal agent of the fact. *Lopez v. United States*, 373 U.S. 427 (1963) (where the defendant attempted to bribe an agent of the IRS).

60. Checks, excepting the case of an overdraft, normally do not convey the information necessary to make a bank cognizant of criminal activity as in the informer situations. In *Miller* the government had to go to the bank, search the files, and formulate the necessary composite of information by sifting through a good number of checks.

61. A similar situation may arise where one relates incriminating information to another whose status or character makes him an excellent depository but who betrays his apparent or avowed trustworthiness and goes to the police with the information for reasons of his own. Here the trusted party, and not the government, violates an expectation of privacy in which case the fourth amendment would not apply. This fact pattern is apparent in neither *White* nor *Miller*.

62. "Commercial banks have rigorously maintained the confidentiality of checking account transactions. Generally information is released to private parties only upon consent of the depositor and is confined to credit information." *Government Access*, *supra* note 10, at 1463 (footnotes omitted). The same commentator notes later that this recognition of confidentiality is supported by more than custom. Banks have been successfully sued for wrongful disclosure of account information. *Id.* at 1464.

privacy, however, never received the benefit of the *Katz* analysis. Had it been used, his fourth amendment interest should have been apparent.

As a depositor, Miller had the *actual* expectation that his account records would remain confidential. His expectations were justifiable in that, by engaging in the normal activity of maintaining a checking account he did not communicate a picture of criminal conduct to an objectively untrustworthy depository. His expectations were those of an ordinary citizen who writes checks and trusts his bank to keep them confidential. Despite this, the *Miller* Court denied that a depositor had any protectible privacy interest in his checks which would prevent the government from obtaining them from his bank simply on demand.⁶³

The implications of this decision pose the final riddle of *United States v. Miller*. Considering the purpose behind the Bank Secrecy Act⁶⁴ and the jeopardy to informational privacy that the collection of such data alone represented, was it either logical or necessary for the Court to go so far as to allow searches in such a sensitive field without any meaningful limitation by the traditional safeguard of prior judicial scrutiny?

63. The Supreme Court of California has provided an excellent example of the application of the *Katz* test in a case which is conceptually very close to the situation found in *Miller*. See *People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated and remanded per curiam*, 409 U.S. 33 (1972), *aff'd on rehearing*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973). Acting on a tip that the defendant was engaged in illicit drug and sex activities, the police in *Krivda* conducted a surveillance of her residence. They observed trash barrels in front of the house. Noticing an approaching garbage truck, they flagged it down and persuaded the driver to dump the well of his truck and then pick up *Krivda's* trash. After this the police examined the trash, opened several paper sacks and discovered evidence which they later used at *Krivda's* trial for violation of California drug laws. The California Supreme Court held the search without a warrant to be illegal. Relying on the decision in *Katz*, the court in *Krivda* found that the police had violated the defendant's expectations of privacy even though the trash appeared to be abandoned property and the police themselves had not retrieved it. People justifiably expect that government agents will not rummage through their carefully packaged trash, even though they may run the risk of private persons doing the same.

By analogy, Miller should have been afforded the same protection in his checking account records. People expect such records to be confidential. In *Miller*, as in *Krivda*, the entity through which the government obtained the data was, in relation to the data, no more than a simple conduit for the material in which the information was embodied. Neither had gone to the police, but rather both holders had been approached by law enforcement agents. *United States v. White*, 401 U.S. 745 (1971), would have been as ill-suited to negate *Krivda's* expectations of privacy as it was to deny Miller's. In neither situation was there an informant who had anything on which to *inform*. On these facts, the test of privacy in *Katz* which prevented *Krivda's* conviction should have shown that Miller had a protectible fourth amendment interest as well.

64. See note 15 *supra*.

THE IMPACT OF MILLER

The full impact of *Miller* can be realized by an examination of the method and control of access to records kept under the Bank Secrecy Act.⁶⁵ Government access was not at issue in *California Bankers*,⁶⁶ because no case or controversy was presented as to a government attempt at acquisition.⁶⁷ The access control again failed to receive a close scrutiny in *Miller*, because the depositor was not seen to have the requisite fourth amendment interest to raise an objection to the subpoenas used.⁶⁸ The Supreme Court did point out that the access control of "existing legal process," meant just that and no more and that a subpoena duces tecum under the Bank Secrecy Act was not to be subjected to any special test of its validity.⁶⁹ The *Miller* Court's lengthy discussion on the general validity of such legal process is especially interesting in that, as to the case in point, the question of validity of process was never reached.⁷⁰ No controversy as to the propriety of the subpoenas could arise unless initiated by one who had standing. The depositor, the person most intimately concerned with raising that issue, was seen as disqualified from doing so.

In one area Congress has already moved to correct this anomaly to some degree. The Tax Reform Act of 1976 gives the taxpayer, who has been identified in the description of records requested by an IRS summons directed to a third-party record holder, the right to be notified of the summons, to stay the third-party's compliance with the summons, and to intervene to prevent enforcement of the summons.⁷¹ While these provisions provide essential protections to the depositor, their scope is effectively limited by decisions such as *Miller*, because a taxpayer-intervenor will be precluded from asserting important constitutional defenses against the summons.⁷² This is especially inter-

65. 31 C.F.R. § 103.51 (1973) provides for the method and control of access to the records. The Court in *California Bankers* construed this Treasury Regulation to be an expression of the congressional intent that access to the information should be available under "existing legal process." 416 U.S. 21, 52 (1974).

66. 416 U.S. 21 (1974).

67. "Claims of the depositors against the compulsion by lawful process of bank records involving the depositors' own transactions must wait until such process issues." *Id.* at 51-52.

68. 425 U.S. at 445.

69. *Id.*

70. *Id.* at 440 (where the Court declares that the sole ground for its reversal of the court of appeals was the lack of a fourth amendment interest in the checks on the part of the depositor).

71. See note 14 *supra*.

72. In light of the Court's holding in *Miller* and its recent decision in *Fisher v. United States*, 25 U.S. 391 (1976) (holding that no fifth amendment privilege attached to tax related papers transferred by a taxpayer's accountant to his client's attorney), it is obvious that in the nor-

esting in light of the fact that the avowed purpose of the new provisions is to provide further "safeguards which might be desirable in terms of protecting the right of privacy."⁷³ The paradox of the Supreme Court being unable to detect a fourth amendment privacy interest, where Congress enacts further safeguards to protect what is seen to be an already existing right of privacy, should not be ignored.

Except in the case of an IRS summons, apparently only the bank itself, the recordholder, could raise a challenge to such process and then only with a small hope of success. Objections to compelled production of records are normally limited to the relevance of the material and the breadth of the request.⁷⁴ The lack of "relevance" would be difficult to show given the normal situation in which a bank is unable to identify the individual depositor as a person and will almost inevitably rely upon the government's statement of purposes and objectives for the inspection of records.⁷⁵ "Overbreadth" could logically be based only on the burden placed on the banks themselves in retrieving the required information. Any interests of the depositor on either score would be irrelevant because he has no protectible rights in the case of such a government inquiry.

The practice which will arise in the future is simple acquiescence to governmental demands. In that case, the necessity of a subpoena could be reasonably seen as an unnecessary

mal situation neither fourth nor fifth amendment claims will be available to a taxpayer intervening under the Tax Reform Act provisions. Note, *IRS Access to Bank Records; Proposed Modifications in Administrative Subpoena Procedure*, 28 HASTINGS L.J. 247, 272-75 (1976). Evidently all that is left for the intervening taxpayer to assert in opposition to a summons would be "sole criminal purpose" behind the summons, relevance, and overbreadth of the request. *Id.* As the legislative history indicates:

[T]hese provisions are not intended to expand the substantive rights of [the] parties. Also, of course, the noticee will not be permitted to assert as defenses to enforcement issues which only affect the interests of a third-party record keeper, such as the defense that the third-party record keeper was not properly served with the summons (i.e. wrong address) or that it will be unduly burdensome for the third-party record keeper to comply with the summons.

S. REP. NO. 94-938 (Part I), 94th Cong., 2d Sess. 370-71 (1976). The House Report uses almost identical language. H.R. REP. NO. 94-658, 94th Cong., 2d Sess. 309 (1976).

Another notable omission in the present legislation is that it fails to provide the taxpayer with the right to be present when the records are transferred by the record holder to the IRS. In this regard the taxpayer must still rely on the good offices of the third party to prevent transfer of any more than is required by the summons.

73. S. REP. NO. 94-938 (Part I), 94th Cong., 2d Sess. 368 (1976); H.R. REP. NO. 94-658, 94th Cong., 2d Sess. 307 (1976).

74. *Id.* at 445 (citing *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946)). See Comment, *Privacy, Papers and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 NW. U.L. REV. 626, 632 (1974).

75. Many bankers are unaware that there may be opportunity to resist such legal process. See *Government Access*, *supra* note 10, at 1470.

formality, easily dispensed with by corporate bodies interested in amicable relations with highly powerful government investigative agencies. The case which the Court distinguished, *Burrows v. Superior Court*⁷⁶ will then be the general rule rather than an "unattractive" exception.⁷⁷ With the interests of the depositor entirely removed from the picture, the phrase "existing legal process" becomes no more than mere words. Banks were precluded from asserting their customers' fourth amendment interests in *California Bankers*.⁷⁸ The customer was denied any protectible interest in *Miller*.⁷⁹ Whatever information is now passed between bank and government is almost entirely an affair of those two institutions.

The asserted purpose of the Bank Secrecy Act was to aid law enforcement activities in the increasingly difficult fight against crime.⁸⁰ With this purpose in mind the creation of yet another massive conglomeration of data was acceptable, even if not patently desirable. But, as even the Supreme Court recognized, Congress meant for access to this information to be controlled⁸¹—if not for the benefit of the depositor, then for

76. 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). In *Burrows* a police search of bank account records made without a warrant at the consent of bank officials upon an oral request of the police was held to be an illegal search in violation of the depositor's rights under the fourth amendment. Justice Brennan relied upon *Burrows* in his dissent and quoted it at length. *United States v. Miller*, 425 U.S. 435, 448-53 (1976) (Brennan, J., dissenting).

77. Neither *Miller* nor the depositor in *Burrows* were given notice of the government search. The Court in *Miller* notes that for the respondent this would have no legal consequences however "unattractive" it might be. 425 U.S. at 443 n.5. Justice Brennan, in his dissent, characterized this aspect of the case as "not just unattractive," but rather as a "fatal constitutional defect." *Id.* at 448 n.2.

78. "Whatever wrong [the recordkeeping requirements of the Bank Secrecy Act] might work on a depositor, it works no injury on his bank." 416 U.S. 21, 51 (1974).

79. Justice Marshall said in his dissent to *California Bankers* that "the majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late." 416 U.S. at 97. In his dissent to *Miller* he reiterated that "there is nothing new in today's holding. . . . I wash my hands of today's extended redundancy." 425 U.S. at 456.

80. This justification for broad search powers has been used before. Professor Landynski summarized Lord Camden's reaction to it when it was raised in *Entick v. Carrington*:

Lord Camden rejected the 'argument of utility' that the authorization of such warrants would be of indispensable assistance in the apprehension of criminals. He pointed out that even in crimes such as murder, rape, and forgery, all more serious offenses than libel, 'our law has provided no paper search in these cases to help forward the conviction.' Why this was so he could not say, but he suggested that it proceeded either 'from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public. . . .'

LANDYNSKI, *supra* note 8, at 55. For a discussion of *Entick v. Carrington* see note 10 *supra*.

81. Both the legislative history and the applicable regulation make

whom? His is the privacy in jeopardy. No other logical reason is evident. Such a total denial of protection for the person about whom the information will be sought can only be viewed as unnecessary and excessive. Recent legislation has indicated that Congress is still concerned with the protection of a depositor's privacy interest and, therefore, that *United States v. Miller* may have outpaced the congressional intent behind the Bank Secrecy Act.⁸²

With little difficulty, the holding of *Miller* can be aptly applied to almost any situation where one has disclosed personal information to another person or to an institution who then preserves it in files or records.⁸³ Only the recordholder could resist a search, and that with little chance of success. Information is kept on many more people, in other forms, by institutions with far less forceful a custom of customer information security than banks have.⁸⁴ Could a right of privacy be found in any of these which was not present in checking account records? Will the Supreme Court make a case by case review of each source and type of information? It seems neither practicable nor likely.

CONCLUSION

The need for informational privacy would not exist without the concomitant need for the massive transfer of personal information in a modern society. The individual must trade off the shield of secrecy if he is to function within the framework of a highly technical culture. Society also has its need—access to such information in order to regulate its affairs and to combat crime. These needs, however, must be balanced, with neither being given too dominant a position, keeping in mind that

specific reference to the fact that access to the records was to be controlled. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 52 (1974).

82. See note 14 *supra* and notes 71-73 and accompanying text *supra*.

83. It would seem that privileged communications would be excluded from the effect of *Miller*.

84. To help himself, to help science and to help society run efficiently, the individual now pours a constantly flowing stream of information about himself into the record files—birth and marriage records, public school records, census data, military records, passport data, government and private employment records, public-health records, civil defense records, loyalty-security clearance records, income-tax returns, social-security returns, land and housing records, insurance records, bank records, business reporting forms to government, licensing applications, financial declarations required by law, charitable contributions, credit applications and records, automobile registration records, post office records, telephone records, psychological and psychiatric records, scholarship or research-grant records, church records—and on and on. New forms of financial operations have produced the credit card, which records the where, when and how-much of many once-unrecorded purchasing, travel, and entertainment transactions of the individual's life.

A. WESTIN, *PRIVACY AND FREEDOM* 159 (1970).

because of their importance and fragility individual rights must necessarily be given the benefit of the doubt when the weighing is done. It is both unfair and dangerous for a government to take undue advantage of the individual's vulnerability as it has done in *United States v. Miller*.

The drafters of the fourth amendment recognized the danger inherent in free and unsupervised searches. The insidious threat of governmental abuse of such power was to be checked by the requirement for judicial review, forcing the searcher each time to make his purpose and objective known to an impartial magistrate who could objectively determine the propriety of the enterprise. The Supreme Court in *Miller* has drastically chosen to dispense with this requirement in an area desperately in need of such protection, without giving proper argument or displaying due consideration for the results which may obtain. It may sometime be seen that what *Olmstead v. United States*⁸⁵ was to wiretapping, *Miller* will be to informational privacy. In *Olmstead*, however, the Court could only be faulted for too rigid an adherence to outmoded principles, whereas the Court in *Miller* seemed guided more by private insight than cogent analysis. Perhaps they felt that the needs of society must come first when measured against an already much devalued individual right to privacy, for as Professor Landynski has noted: "The needs of the day have swept away much that was sacred in the American heritage; the barriers of privacy have crumbled on many fronts."⁸⁶ But as the files are being quietly examined by those seeking not only evidence of crime, but also proof of deviance from social or political norms, or information for private purposes either sinister or innocuous, we may well wonder who will watch the watchers?

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85. 277 U.S. 438 (1928). For a discussion of *Olmstead* see note 11 *supra*.

86. LANDYNSKI, *supra* note 8, at 270.