PRIVACY, BANKING RECORDS AND THE SUPREME COURT: A BEFORE AND AFTER LOOK AT MILLER

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PRIVACY, BANKING RECORDS AND THE SUPREME COURT: A BEFORE AND AFTER LOOK AT *MILLER*

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I. INTRODUCTION

Recent Supreme Court decisions in *United States v. Bisceglia,*[1] *California Bankers Association v. Schultz,*[2] and *United States v. Miller*[3] create concern about the intrusion of government into areas of personal and financial affairs in which citizens have had some expectation of privacy. The *Bisceglia* decision held that the Internal Revenue Service (I.R.S.) has authority under Internal Revenue Code sections 7601 and 7602[4] to issue an administrative summons to a bank in order to discover the identity of the depositor of four hundred deteriorated hundred dollar bills. These bills raised the suspicion that transactions involving the money might not have been properly reported for income tax purposes.[5] In *California Bankers Association,* the Court upheld the constitutionality of the Bank Secrecy Act of 1970[6] and held that the maintenance of detailed records pursuant to the Act did not violate a depositor's fourth amendment rights.[7] Against this

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1. 420 U.S. 141 (1975).

2. 416 U.S. 21 (1974).

3. 425 U.S. 435 (1976).

4. I.R.C.§§ 7601, 7602. Section 7601 gives the Internal Revenue Service a broad mandate of inquiry into the tax liability of citizens; § 7602 authorizes the I.R.S. to examine any records or data which may be relevant in ascertaining such liability.

5. United States v. Bisceglia, 420 U.S. 141 (1975).

6. *See* 12 U.S.C. §§ 1829b (maintenance of records by insured banks), 1730d (by savings and loans), 1951-55 (by noninsured financial institutions) (1970); 31 U.S.C. §§ 1051-1122 (reporting currency transactions).

7. 416 U.S. 21 (1974). 31 C.F.R. § 103.22 (1976) requires financial institutions to report

backdrop, the Court in *Miller* held that a bank depositor has no protectable fourth amendment interest in bank records relating to his account and maintained pursuant to the Bank Secrecy Act. The Court, thereby, completely opened the way for unrestrained government access to personal banking records via an administrative summons.[8] The Supreme Court decided *Miller* knowing that a section 7602[9] administrative summons is subject to abuse by I.R.S. agents since the agents have unsupervised discretionary power to issue and serve it. Thus, the combination of the 1970 Bank Secrecy Act's record-keeping requirements and the ease with which an administrative summons can be issued allows the I.R.S. to search anyone's bank records with impunity.

The nation as a whole was surprised to be told by the Supreme Court that no one had an expectation of privacy in his or her personal bank accounts. The *Miller* decision was particularly startling because the Supreme Court first recognized the concept of privacy in 1963[10] in a context suggesting a departure from eighteenth century concepts emphasizing a property analysis. Accordingly, in recent years, well respected courts have given greater recognition to this developing privacy doctrine.[11]

The Supreme Court's return to an eighteenth century analysis is alarming because the regression fails to address itself to the problems of a modern technological society that makes possible the maintenance and easy retrieval of a tremendous amount of personal information, particularly with respect to customers of financial institutions. The importance of such information to investigators is well recognized.[12] In addition to records voluntarily maintained by banks, the Bank Secrecy Act of 1970 requires additional detailed recording of virtually every banking transaction. Such well kept records create a serious threat to privacy as we know it today and can lead to such

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deposits, withdrawals, exchanges of currency or other payments or transfers by, through, or to such institutions of amounts involving more than $10,000.

8. 425 U.S. 435 (1976).

9. I.R.C. § 7602. *See* note 4 *supra*.

10. Griswold v. Connecticut, 381 U.S. 479 (1965). *See* text accompanying notes 72-74 *infra*.

11. *See* text accompanying notes 64-80 *infra*.

12. *See generally* NATIONAL ACADEMY OF SCIENCES, DATABANKS IN A FREE SOCIETY (1972); V. PACKARD, THE NAKED SOCIETY (1964); M. WARNER & M. STONE, THE DATABANK SOCIETY (1970); A. WESTIN, PRIVACY AND FREEDOM (1967); *Hearings on S. 3814 & S. 3828 Before the Subcomm. on Financial Institutions of the Senate Comm. on Bank, Housing and Urban Affairs*, 92nd Cong., 2d Sess. 292 (1972) [hereinafter cited as *Bank Disclosure Hearings*]; *Reports on the Bank Secrecy Act of 1970*, H.R. REP No. 975, 91st Cong., 2d Sess. 10, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4394; S. REP. NO. 1139, 91st Cong., 2nd Sess. 5 (1970); *Hearings on H.R. 15073 Before the House Comm. on Banking and Currency*, 91st Cong., 1st & 2d Sess. 1-180 (1969-70) [hereinafter cited as *Bank Secrecy Act Hearings*]. Such records "have a high decree of usefulness in criminal, tax and regulatory investigations and proceedings." 12 U.S.C. § 1829b(a)(1).

abuses as the covert investigation of citizens by the government. In order to place the problem in perspective, this article explores the procedural and substantive legal context of *Miller*, the eighteenth century origins of the privacy doctrine, recent changes in the definition of privacy, the effects of the *Miller* decision, and the congressional response to this decision.

II. BANK RECORDS AND THE I.R.S. PRIOR TO *MILLER*

Prior to the Tax Reform Act of 1976[13] a depositor who wanted to safeguard his banking records against uncontrolled government inspection was procedurally precluded from attempting to do so.[14] The rules allowing the I.R.S. to search bank records did not provide for notice to the depositor.[15] The depositor legally could rely only upon his bank to defend his interests or to notify him voluntarily so he could take such action. In either circumstance, however, both the bank and the depositor were denied standing to litigate their claims.

A. Standing Doctrine: Personal Injury to the Bank

Whether a litigant has standing to sue involves a rule of judicial economy which often is at issue when the legality of government action is challenged on grounds that it exceeds constitutional or statutory limitations or violates a private right.[16] The doctrine requires the court to determine whether the litigant is entitled to judicial review; that is, whether he is the proper person to raise the claim. If the court decides that the challenger is not properly situated, the merits of the claim will not be heard.

Ordinarily, problems that arise in claims of private wrongs are analyzed under real party in interest principles as set forth in Federal Rule of Civil Procedure 17(a).[17] It is not unusual to find standing requirements confused with real party in interest requirements.[18] To the extent that standing means

13. Act of Oct. 4, 1976, Pub. L. No. 94-455, § 1205, 90 Stat. 1525.

14. *See* text accompanying notes 26-54 *infra*.

15. I.R.C. §§ 7601-7609.

16. *See* Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601 (1968); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 Yale L.J. 425 (1974).

17. Fed. R. Civ. P. 17(a) provides that "[e]very action shall be prosecuted in the name of the real party in interest . . . ." The majority of courts have construed the words "real party in interest" to mean the party to whom the substantive law has given the right sought to be enforced. Titus v. Wallick, 306 U.S. 282 (1939); Leon v. Citizens' Bldg. & Loan Ass'n, 14 Ariz. 294, 127 P. 721 (1912); Wetmore v. City of San Francisco, 44 Cal. 294 (1872); Manley v. Park, 68 Kan. 400, 75 P. 557 (1904); Archer v. Musick, 147 Neb. 1018, 25 N.W. 2d 908 (1947); Eton v. Alger, 47 N.Y. 345 (1872); Falconio v. Larsen, 31 Ore. 137, 48 P. 703 (1897); Citizens' Bank v. Corkings, 9 S.D. 614, 70 N.W. 1059 (1897); Hilton v. Waring, 7 Wis. 492 (1859). *See also* 3a J. Moore, Federal Practice § 17.02, at 51 (2d ed. 1974).

18. *See, e.g.*, Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763 (8th Cir. 1971); Soap

that the litigant must establish that the challenged governmental activity caused "injury in fact,"[19] the standing requirement bears a close resemblance to the real party in interest rule.[20] Standing, however, is distinct from Rule 17(a) to the extent that the requirement derives from the "case or controversy" definition of judicial power expressed in Article III.[21] In this sense, the doctrine represents a constitutional limitation on the subject matter jurisdiction of federal courts.[22] The standing doctrine is further differentiated from Rule 17(a) in that it operates as a discretionary method of judicial calendar management.

The doctrine of standing has been variously defined. Moreover, its requisites remain so vague that it remains a powerful tool of judicial policy making. At a minimum, the party seeking to be heard must establish injury in fact to an interest or right that was intended to be protected under a particular statutory or constitutional rubric.[23]

The doctrine requires determining whether a party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues. . . ."[24] This requirement critically shifts the emphasis from a conceptual search for direct injury to a functional process of determining policy or the characteristics of a "personal stake" sufficient to permit judicial review of the controversy. It also improperly focuses attention on the party seeking to be heard rather than on the issues to be presented. It implies that determination of standing is to be made without considering the merits of the case when the contrary is true. The critical question becomes that of identifying the circumstances in which

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& Detergents Ass'n v. City of Chicago, 56 F.R.D. 423 (N.D. Ill. 1972); Kent v. Northern Cal. Regional Office of Am. Friends Serv. Comm., 497 F.2d 1325, 1329 (9th Cir. 1974).

19. Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 152 (1970).

20. Under Baker v. Carr, 369 U.S. 186 (1962), injury to a legally protectable right was required, but the Court subsequently held in Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970), *that the interest must be within a protectable zone. This latter* standard bears a closer resemblance to the substantive right requirement of FED. R. CIV. P. 17(a).

21. U.S. CONST. art. III. § 2.

22. Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968). *See generally* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1542, at 639-43 (1971).

23. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3531, at 176 (1975) [hereinafter cited as WRIGHT, MILLER, & COOPER].

24. Baker v. Carr, 369 U.S. 186, 204 (1962). Subsequent to the decision in which this basic requirement was stated, standing requirements had been relaxed further to allow broader access to judicial review even though the conceptual search for direct injury to a legal right persists. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968). *See also* Hasl, *Standing Revisited—The Aftermath of Data Processing*, 18 ST. LOUIS U.L.J. 12 (1973).

a litigant has enough of a "personal stake" to ensure concrete, adverse legal interests.

Arguably, a bank has that kind of "personal stake" both in terms of the cost burden imposed on it by the federal record-keeping requirements of the Bank Secrecy Act and in terms of the cost of litigation in cases arising out of third party summonses. In *California Bankers Association,* however, the Court concluded that record-keeping requirements were far from unreasonable and not so great an economic burden as to deny the banks due process.[25] Further, in regard to the costs of litigation, such expenditures may be too remote and speculative to qualify as the kind of "personal stake" necessary to establish standing.

B. Standing Doctrine: Third Party Injury to Customers

1. Generally

The more difficult question is whether a bank or any other financial institution has standing to assert claims on behalf of its depositors or customers. The Court, in a limited class of cases, has permitted a named party or one against whom a sanction is applicable to assert the rights of injured third persons.[26] There is no clear, fixed rule under which these exceptional cases fall, but one common factor is that the third party whose rights are being asserted is not in a position to assert or vindicate his own rights.[27] Usually, a case is governed by the general rule that a person has standing to vindicate only his own rights. It should be noted, however, that this conclusory approach frequently hides the fact that the court is refusing as a matter of policy to define and determine certain issues because of the identity of a party properly before the court, or because of the circumstances in which the issues are being presented.[28]

While the Court in *California Bankers Association* left the question undecided, it implied that a bank may not have standing to litigate a depositor's claim of injury if the bank itself was not injured by the third party summons.[29] If so, this stance could be supported by invoking the

25. 416 U.S. at 50.

26. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

27. *E.g.*, Moose Lodge v. Irvis, 407 U.S. 163, 166 (1972).

28. Professor Sedler prefers the term *jus tertii* to differentiate this problem from the problem of determining whether or not a litigant should even be in court. Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

29. 426 U.S. at 51-52. Because an I.R.S. summons had not yet been issued, depositors did not have ripe claims to challenge bank record-keeping requirements. The Court determined that on this precedural basis, the bank could not assert depositor rights. *See* text accompanying note 5 *supra*.

jurisdictional limitations of Article III and the requirement that a litigant must allege a direct and immediate personal injury to his own protectable rights.[30] In his dissenting opinion, Justice Douglas argued, however, that a bank would have standing, based upon *Sierra Club v. Morton* in which the Court had said that "an organization whose members are injured may represent those members in a proceeding for judicial review."[31] The *Sierra Club* case demonstrates that Article III does not invariably require personal injury and that sometimes a relationship between a proper party and a person injured in fact is sufficient, particularly when there are "weighty countervailing policies"[32] such that a court may appropriately exercise discretion to grant standing.[33]

There is precedent for granting standing when the challenged activity adversely affects a beneficial or advantageous relationship existing between a litigant and a party not before the court whose rights may be violated.[34] It is obvious that a mutually beneficial relationship exists between banks and their depositors. Its nature is analogous to that of any fiduciary relationship, and there are direct economic benefits accruing to both parties.

The other side of the coin is that a beneficial relationship, to the extent it provides the third party with ability to vindicate his own rights, may result in denial of standing to a litigant who attempts to assert those rights on his own behalf. If the third party's position is such that it is difficult or impossible to protect his own interests, standing may be granted;[35] but when he could easily protect his own interests, it may be denied.[36] It has been suggested that

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30. *See* McGowan v. Maryland, 366 U.S. 420 (1961); Tileston v. Ullman, 318 U.S. 44 (1943). *See also* Bickel, *Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 58 (1961).

31. California Bankers Ass'n v. Shultz, 416 U.S. at 79 (Douglas, J., dissenting), *quoting* Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

32. United States v. Raines, 362 U.S. 17, 22 (1960).

33. Some exceptions to the rule of practice may actually be compelled. Probably these exceptions can be identified as situations in which the court's own decision of the case before it will directly or indirectly affect the rights whose consideration is requested, or will commit the court to involvement in clearly tainted conduct. WRIGHT, MILLER & COOPER, *supra* note 23, § 3531, at 207-08. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); NAACP v. Alabama, 357 U.S. 449 (1958).

34. Procunier v. Martinez, 416 U.S. 396 (1974); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Doe v. Bolton, 410 U.S. 179 (1973); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 235 U.S. 33 (1915); Seneca Nursing Home v. Kansas State Bd. of Social Welfare, 490 F.2d 1324 (10th Cir. 1974); Akron Bd. of Educ. v. State Bd. of Educ., 490 F.2d 1285 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974). *See* Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 270 (1961); Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433, 446-47 (1962).

35. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

36. McGowan v. Maryland, 366 U.S. 420 (1961).

> when the person whose rights are invoked is clearly in a position to assert them effectively, there may be some advantage to a rule denying standing even to a party in some relationship with that person. The fact that a non-party has not asserted his own rights may indicate that he views them differently, or for some reason believes that it is better not to assert them in view of the consequences likely to be entailed. This residual concept might conveniently be thought of as a "best plaintiff" rule.[37]

2. The Depositor's Dilemma

It was nearly impossible procedurally for a bank depositor to vindicate his own rights when an I.R.S. summons had been issued to his bank because under the former law there was no requirement that depositors be notified of such action.[38] Even if the bank voluntarily notified its depositor,[39] his potential lawsuit would become moot should the bank comply with the summons without causing the I.R.S. to resort to judicial enforcement.[40]

When an organization and its members have corresponding rights, it may be easier to determine that there is sufficient injury to both parties to permit the organization to sue on behalf of its membership.[41] Some lower courts, however, have allowed standing to organizations without even exploring that question.[42] On the subject of organizational standing, it has been suggested that

> [a]lthough there is little explicit indication in the opinions, it seems inevitable that such standing will be confined to interests central to the purpose of the organization. A labor organization would have a much more obvious claim to challenge job safety regulations than draft regulations. Likewise, the organization ordinarily

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37. WRIGHT, MILLER & COOPER *supra* note 23, § 3531, at 211-12.

38. *See* Note, *California Bankers Association v. Schultz: An Attack on the Bank Secrecy Act*, 2 HASTINGS CONST. L.Q. 203, 209 (1975), analyzing the constitutionality of the Bank Secrecy Act with respect to first amendment rights of associations.

39. It has been argued that notice to the depositor should be required. Note, *Constitutional Law: California Bankers Ass'n v. Shultz, The Bank Secrecy Act and Expectations of Privacy*, 43 U.M.K.C.L. REV. 237 (1974). *See also* LeValley & Lancy, *The IRS Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers*, 89 BANKING L.J. 979 (1972).

40. I.R.C. § 7604 provides for the enforcement of summons issued under § 7602 by proceedings in the United States district courts. *See* text accompanying notes 44-54 *infra*.

41. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963).

42. American Nursing Home Ass'n v. Cost of Living Council, 497 F.2d 909, 912 (Temp. Emer. Ct. App. 1974); Florida v. Weinberger, 492 F.2d 488, 495 (5th Cir. 1974); Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974); Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Associated Students for the Univ. of Cal. at Riverside v. Attorney General, 368 F. Supp. 11 (D.C. Cal. 1973).

> should be subject to the same procedural requirements as the members whose rights it is asserting, unless cumulation of their interests can be shown to affect the organization itself. . . . And if only one or a small proportion of members are affected, it may be preferable to require that the members be left to their own litigation unless there is some reason to fear intimidation of individual litigants, [especially]. . . in situations of uniquely individual claims for physical injury or other distinctive personal wrongs.[43]

Under this rubric, to assure even minimum representation of the depositor's interest in the nondisclosure of his personal bank records, a bank at its own expense has to refuse to comply with an administrative summons, thus compelling the I.R.S. to initiate an enforcement proceeding against the bank in the local district court. Although the bank could seek to represent the interests of the depositor at that proceeding, the depositor would have a better chance to assert his interests if he could appear on his own behalf. Former law, however, did not even grant the depositor notice of the original administrative summons, much less of a subsequent judicial proceeding to enforce it. If the bank voluntarily gave notice, the depositor still encountered problems in seeking to intervene.

C. Intervention Problems for the Taxpayer-Depositor

In *First National Bank v. United States,*[44] the Supreme Court held that an I.R.S. summons directed to a third party bank did not violate either the taxpayer's or the bank's fourth amendment rights. That decision was reaffirmed in *Donaldson v. United States.*[45] A section 7602 summons permits the I.R.S. to request that a third party voluntarily disclose information on taxable persons and objects.[46] The crux of the problem was the procedural impasse encountered by a taxpayer who wanted to contest the propriety of such solicitation by the Service.

Since neither the I.R.S. nor the bank was obligated to notify a taxpayer-depositor that he was under investigation or that a summons had been served on his bank concerning a tax matter relating to him,[47] a great deal of government "spying" could take place without the taxpayer even being aware of it. So far as the record-keeping requirements of the Bank Secrecy Act are concerned, Congress' announced purpose was that the information

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43. WRIGHT, MILLER & COOPER, *supra* note 23, § 3531, at 214-15 (citations omitted).

44. 267 U.S. 576 (1925), *aff'g mem.*, 295 F. 142 (S.D. Ala. 1924).

45. 400 U.S. 517, 522 (1971). More recently, the Sixth Circuit has held that a third party may not assert a privacy defense on behalf of the taxpayer. United States v. Cleveland Trust, 474 F.2d 1234 (6th Cir.), *cert. denied,* 414 U.S. 866 (1973).

46. I.R.C. § 7601(a).

47. *See* note 39 *supra*.

would have "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[48] Justice Douglas has argued that it is "sheer nonsense" to assume that all bank records of every citizen will prove so useful unless we also assume that every citizen is a crook.[49] He cautioned:

> 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, eductional 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 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.[50]

Under former law, if the bank upon which the summons was served decided to comply without compelling the I.R.S. to resort to judicial enforcement, any potential taxpayer-depositor action to restrict access to the summoned financial records was mooted.[51] Even if the taxpayer-depositor was notified or otherwise learned that a summons had been issued, he had no mandatory right to intervene.[52] Under Federal Rule of Civil Procedure 24(b), however, a trial judge had discretionary authority to permit intervention[53] if the taxpayer could demonstrate a proprietary interest in the summoned records, a legally privileged or confidential relationship with the third party custodian, or that the evidence leading to the records was obtained by illegal means.[54] Once again, the depositor was thwarted since he was unable to prove that an inspection of the bank's records violated his fourth amendment rights.

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48. 12 U.S.C. §§ 1829b(a)(2), 1953(a) (1970).

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

50. *Id.*

51. *See, e.g.*, United States v. Lyons, 442 F.2d 1144 (1st Cir. 1971).

52. Donaldson v. United States, 400 U.S. 517, 527-30 (1971); United States v. Union Nat'l Bank, 371 F. Supp. 763, 767-68 (W.D. Pa. 1974). *See also In re* Magnus, 299 F.2d 335, 336 (2d Cir.), *cert. denied*, 370 U.S. 918 (1962), where a motion to quash a third party summons served on a corporation was denied on grounds that the taxpayer had no standing to intervene.

53. "Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . ." FED. R. CIV. P. 24(b).

54. *See* Couch v. United States, 409 U.S. 322, 326-27 (1973); Donaldson v. United States, 400 U.S. 517, 529-30 (1970); Reisman v. Caplin, 375 U.S. 440, 445 (1964). *See also* Note, *Taxation—IRS Fishing Expeditions—Third Party Summons Invalid Where No Specific Individual Is Under Investigation*, 43 FORDHAM L. REV. 329, 331 (1974).

III. BEFORE *MILLER*: PROTECTING BANK RECORDS UNDER THE FOURTH AMENDMENT

A. *Historical Perspective*

Traditionally, in order to claim the benefits of the exclusionary rule, a claimant has had to prove not only that the search was unreasonable,[55] but also that it violated a personal fourth amendment interest.[56] The latter requirement does not include the right to claim a violation of another's rights to possess property free from government intrusion.[57]

Historically, the right of possession has meant some actual physical interest in the searched structure or the surrounding premises.[58] The scope has been intended to include not only places owned by the protected party, but also premises lawfully occupied.[59] Since most seizures flow from searches of particular premises, the great majority of cases have analyzed the claimant's right to possess or occupy the particular place searched. Until *Miller*, the Supreme Court had never directly considered the question whether mere ownership of seized property was sufficient to give rise to constitutional protections.[60] While most individuals and banks consider banking records personal and private,[61] the problem in extending the protec-

55. The federal rule concerns itself only with the question of whether the search was reasonable and not whether it was reasonable to procure a search warrant. *E.g.*, United States v. Edwards, 415 U.S. 800 (1974), Cardwell v. Lewis, 417 U.S. 583 (1974), Coolidge v. New Hampshire, 403 U.S. 443 (1971). California follows the rule that warrantless searches are *per se* illegal unless the search falls within a recognized exception; *i.e.*, consent, exigent circumstances, or incident to arrest. People v. Superior Court (Kiefer), 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970); People v. Haven, 59 Cal. 2d 713, 381 P.2d 927, 31 Cal. Rptr. 47 (1963).

56. Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165 (1969); Wong Sun v. United States, 371 U.S. 471 (1963).

57. *See* United States v. Miller, 425 U.S. 435 (1976); Fisher v. United States, 425 U.S. 391 (1976); United States v. Bisceglia, 420 U.S. 141 (1975); Couch v. United States, 409 U.S. 322 (1973); Donaldson v. United States, 400 U.S. 517 (1971), supporting the federal rule. In California a defendant can claim the violation of a third party's rights. Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971); People v. Martin, 45 Cal. 2d 775, 290 P.2d 855 (1955); Note, *The Vicarious Exclusionary Rule in California*, 24 STAN. L. REV. 947 (1972); *see generally* B. TARLOW, ON SEARCH WARRANTS (1971); Note, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967).

58. Chimel v. California, 395 U.S. 752 (1969) (home); Mapp v. Ohio, 367 U.S. 643 (1961) (basement of home); Camara v. Municipal Court, 387 U.S. 523 (1967) (rental unit within home).

59. Coolidge v. New Hampshire, 403 U.S. 443 (1971) (car in driveway); Mancusi v. Deforte, 392 U.S. 364 (1968) (employee in employer's office); See v. City of Seattle, 387 U.S. 541 (1967) (warehouse); Stoner v. California, 376 U.S. 483 (1964) (hotel room); Chapman v. United States, 365 U.S. 610 (1961) (rented apartment).

60. In *Ex parte* Jackson, 96 U.S. 727, 733 (1877), the ownership of letters in the mail was noted to be a sufficient interest to provide constitutional protections (dictum).

61. Prior to *Miller*, it appeared that five Justices of the Supreme Court also shared this view. *See* California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974) (Powell & Blackmun, JJ., concurring; Douglas & Marshall, JJ., dissenting; Brennan, J., dissenting and concurring with Justice Douglas on depositor's privacy expectations). The confidentiality of checking account

tion of the fourth amendment to bank records prior to *Miller* was to demonstrate a protectable interest under traditional fourth amendment analysis. Basically, a showing was required that the search of the bank's premises violated the depositor's right to possession.[62] When these requirements were applied to bank records, the depositor's claim regularly failed on the ground of insufficient constitutional interest since the premises searched belonged to the bank, and the papers or documents seized either belonged to the bank or were in the bank's possession.[63]

B. Toward a Changing Concept of Privacy

The fourth amendment has long represented protection of the basic American interest in privacy and the right to be left alone.[64] The framers of the Constitution were responding to abusive colonial police practices in the form of general search warrants and writs of assistance when they mandated:

> 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

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transactions has long been respected by the banking industry both in the United States and foreign countries. This was well documented by the *Bank Secrecy Act Hearings* and the *Bank Disclosure Hearings, supra* note 12. *See also* cases cited at note 102 *infra*.

62. *See* cases cited in notes 55-59 *supra*.

63. Harris v. United States, 413 F.2d 316 (9th Cir. 1969) (bank is a stranger to its depositor); O'Donnell v. Sullivan, 364 F.2d 43 (1st Cir.), *cert. denied*, 385 U.S. 969 (1966); DeMasters v. Arend, 313 F.2d 79 (9th Cir.), *cert dismissed*, 375 U.S. 936 (1953); Foster v. United States, 265 F.2d 183 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959); United States v. Peoples Deposit Bank & Trust Co., 112 F. Supp. 720 (E.D. Ky. 1953), *aff'd*, 212 F.2d 86 (6th Cir.), *cert. denied*, 348 U.S. 838 (1954); Cooley v. Bergin, 27 F.2d 930 (1st Cir. 1928); Zimmerman v. Wilson, 105 F.2d 583 (3d Cir. 1939). *See* Donaldson v. United States, 400 U.S. 517 (1971), which suggests that records in the hands of any third party are unprotected.

64. Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas,J., concurring); Stanford v. Texas, 379 U.S. 476, 482 (1965); Boyd v. United States, 116 U.S. 616, 630 (1886); D. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND (1972); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937) *quoted in* Warden v. Hayden, 387 U.S. at 317 (Douglas, J., dissenting); R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS (1955); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Hufstedler, *The Directions and Mis-Directions of a Constitutional Right of Privacy*, 26 REC. OF N.Y.C.B.A. 546 (1971).

Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765), which outlawed general warrants, is generally viewed as the wellspring of the fourth amendment. Boyd v. United States, 116 U.S. 616, 626-27 (1885); Stanford v. Texas, 379 U.S. 476, 484 (1965).

The first amendment right to association has also been viewed as providing a right to privacy but not in the context of bank records. Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); NAACP v. Alabama, 357 U.S. 449 (1958); and United States Servicemen's Fund v. Eastland, 448 F.2d 1252 (D.C. Cir. 1973), all recognized the exercise of political rights.

describing the place to be searched, and the persons or things to be seized.[65]

The framers quite clearly were addressing themselves to the protection of personal information from government inspection.[66] The words chosen to express their concerns are interesting from a twentieth century perspective of drastically altered technology and reflect to a great extent the on-going problem of maintaining a system of rules against the rush of technological change.[67] In the context of eighteenth century technology, however, the solution to the terrorism of the general search and writs of assistance was to specifically preclude physical intrusion. This solution was accomplished by carefully defining protected physical property. Understandably, traditional analysis of fourth amendment problems employs a mechanical property test to determine whether a searched area is within a physical place protected by the fourth amendment.[68] The end result is a body of search and seizure case law constantly engaged in battle with new technology, and the creation of narrow, rigid property rules by case law, which in turn are regularly fragmented by new technology. Rules capable of accommodating changing technology and norms would be much better. While reliance upon precedent provides historical continuity and the authority of historical justification,[69] the path in this area has become so tortuous that it is indeed refreshing to observe a court taking a forward view and creating rules designed to solve not only today's but tomorrow's technological problems. An analysis of case law in the privacy area shows several examples of such foresight.

Not surprisingly, the watershed opinions involve issues related to speech and sex since both of these areas are marked by strong personal norms. In *Katz v. United States,*[70] the bugging of a telephone booth provided none of the conventional handles for rendering a search unconstitu-

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65. U.S. CONST. amend. IV.

66. Zimmerman v. Wilson, 81 F.2d 847, 849 (3d Cir. 1936) recognized that it is not the seizure of books and papers which is proscribed but the information contained in such documents. *Cf.* United States v. Gross, 416 F.2d 1205, 1213 (8th Cir. 1969) (questioning the soundness of this conclusion).

67. A provocative analysis of the yet-to-be-encountered problems arising from the use of a system of electronic transfer of funds (*sans* paper) can be found in *Legal and Regulatory Issues of Electronic Funds Transfer Systems and New Payment Services,* Reistad Research No. 7, Feb. 1973. *See also* Survey, *Toward a Less-Check Society,* 47 NOTRE DAME LAW 1163 (1972).

68. *See generally* A. MILLER, THE ASSAULT ON PRIVACY 213 (1971); Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Standing Problems,* 21 CATH. U.L. REV. 1, 27-33 (1971); Hufstedler, *The Directions and Misdirections of a Constitutional Right of Privacy,* 26 REC. OF N.Y.C.B.A. 546, 552 (1971); Philbrick, *Changing Conceptions of Property in Law,* 86 U. PA. L. REV. 691, 701 (1938); Note, *Standing to Object in the Field of Search and Seizure,* 6 ARIZ. L. REV. 65 (1964).

69. *See* text and cases accompanying notes 55-59 *supra*.

70. 389 U.S. 347 (1967).

tional. In surveilling the telephone conversation, government agents attached a listening device to the exterior of the booth without any physical penetration of the booth itself. In casting aside the questions of whether a telephone booth is a protected area and whether physical penetration of the space was required before a search would be held illegal, the Court declared that the fourth amendment protects people, not places, and that the bugging here violated the "privacy upon which [the defendant] justifiably relied."[71] The Court rejected the traditional analysis which looked only to the protection of property rights, which here included the telephone booth user's interest in possession of that space, and shifted to an analysis of his expectation of privacy.

In *Griswold v. Connecticut,*[72] the Court concluded that a statute which prohibited the dissemination of birth control information was unconstitutional because it violated the due process clause of the fourteenth amendment. The Court held that the statute was an impermissible invasion of the constitutional right of privacy emanating from the "penumbras" of the first, third, fourth, fifth, and ninth amendments.[73] The Court further noted that the right of privacy was "older than the Bill of Rights" and as such was a fundamental right.[74] Later Supreme Court decisions have made it clear that the equal protection clause of the fourteenth amendment requires the showing of a compelling state interest in order to justify an infringement of the fundamental right of privacy.[75]

While there is no definitive rule explicated in either *Griswold* or *Katz*, two currents are clear: the right of privacy is an interest separate from a strict property right, and the concept has evolved as a function both of conventional values and of existing technology.

The "expectation of privacy" approach has been adopted by the California Supreme Court. In *People v. Krivda,*[76] the warrantless curbside search of a trash can awaiting collection was held illegal. In reaching its conclusion, the California Supreme Court expressly declared that a property right in discarded trash was unnecessary and followed the *Katz* analysis.[77]

In the area of arrest records, there has been judicial recognition of the

71. *Id.* at 353.

72. 381 U.S. 479 (1965).

73. *Id.* at 484.

74. *Id.* at 486.

75. Roe v. Wade, 410 U.S. 113 (1973) (right of women to obtain an abortion); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel).

76. 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).

77. 5 Cal. 3d at 364, 486 P.2d at 1267, 96 Cal. Rptr. at 67.

potential threat to privacy inherent in centralized computer records.[78] The Colorado Supreme Court was the first to recognize these dangers in its landmark opinion in *Davidson v. Dill*[79] in which it expunged the arrest records of innocent arrestees, resting its analysis upon the penumbra of privacy rights enunciated in *Griswold*. The trend continued in the State of Washington in *Eddy v. Moore*,[80] which overruled a state statute providing for the maintenance of arrest records, and recognized the devastating effect of disseminating arrest records. In light of this judicial recognition of the right to privacy and the acknowledgement that the fourth amendment protects people not places, *Miller* placed law and order values and the right to privacy on a collision course.

IV. EXPECTATIONS OF BANKING PRIVACY PRIOR TO THE SUPREME COURT DECISION IN *MILLER*

Although *United States v. Miller* subsequently was reversed by the United States Supreme Court, a discussion of the analysis by the court of appeals is appropriate.[81] That decision, and a decision of the California Supreme Court,[82] had held that although a bank had voluntarily complied with a subpoena, the depositor's records were inadmissible at trial because the depositor's legitimate expectation of privacy was violated by such a disclosure.

A. Defective Grand Jury Subpoena: The Fifth Circuit's View

In *United States v. Miller*,[83] a United States Attorney, without the depositor-defendant's knowledge, purported to issue a grand jury subpoena

78. *See generally* Schiavo, *Condemned by the Record*, 55 A.B.A.J. 540, 541-42 (1969); Haskel, *The Arrest Record and New York City Public Hiring: An Evaluation*, 9 COLUM. J.L.& SOC. PROB. 442, 445-48 (1973); Kagan & Loughery, *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L.C. & P.S. 378 (1970); Karabian, *Record of Arrest: The Indelible Stain*, 3 PAC. L.J. 20, 21-24 (1972); Baum, *Wiping Out of Criminal or Juvenile Record*, 40 STATE B.J. 816 (1965); Steele, *A Suggested Legislative Device for Dealing with Abuses of Criminal Records*, 6 U. MICH. J. LEGAL REFORM 32, 38-42 (1972); Alexander & Walz, *Arrest Record Expungement in California: The Polishing of Sterling*, 9 U.S.F.L. REV. 299 (1974); Comment, *Arrest Records as a Racially Discriminatory Employment Criterion*, 6 HARV. C.R.-C.L. L. REV. 165, 168-71 (1970); Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 853 (1971); Note, *Discrimination on the Basis of Arrest Records*, 6 CORNELL L. REV. 470, 470-75 (1971); Note, *Removing the Stigma of Arrest: The Courts, the Legislatures and Unconvicted Arrestees*, 47 WASH. L. REV. 659, 660-62 (1972).

79. 180 Colo. 123, 503 P.2d 157 (1972).

80. 5 Wash. App. 334, 487 P.2d 211 (1971).

81. 425 U.S. 435 (1976), *rev'g* 500 F.2d 751 (5th Cir. 1974).

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

83. 500 F.2d 751 (5th Cir. 1974), *rehearing denied*, 508 F.2d 588 (5th Cir. 1975), *rev'd*, 425 U.S. 435 (1976).

for "all records of account" in the depositor's name from two banks in which he had accounts. The banks voluntarily produced microfilm copies of the depositor's checks and a deposit slip. These items subsequently were used to convict him. The United States Court of Appeals for the Fifth Circuit reversed the conviction holding that the defendant's fourth amendment rights were violated by the search because the subpoenas were fatally defective. In reaching its decision, the court maintained that *Boyd v. United States*[84] applied and that the government could not circumvent the *Boyd* doctrine "by first requiring a third party bank to copy all of its depositors' personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies."[85] The court distinguished *California Bankers Association* on the ground that the Supreme Court, far from "proclaiming open season on personal bank records," had relied heavily upon the notion that depositors were adequately protected because access to those records was governed by proper legal process.[86]

The Fifth Circuit's rationale in *Miller*, while not entirely clear, suggested that the depositor may have had both a proprietary and a privacy interest in his bank records.[87] In *Harris v. United States*,[88] the Court of Appeals for the Ninth Circuit ruled that a check could not be considered a confidential communication. The judges dissenting from the denial of a rehearing in *Miller* cited *Harris* to support the proposition that a depositor does not have a cognizable privacy interest to confer standing under *Katz v. United States*[89] because a bank customer is aware that any check he writes will be seen by various bank personnel, although he expects that access to the check will be restricted to bank employees.[90]

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84. 116 U.S. 616, 622 (1886): "[A] compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the Fourth Amendment . . . ."

85. 500 F.2d at 757.

86. *Id.* at 757-58.

87. *Id.* at 756-58. This sentiment was expressed by the dissenting judges on the denial of the rehearing. 508 F.2d 588, 590-95 (1975) (Simpson, J., dissenting). If this decision does rest on a depositor's proprietary interest, standing may not be the real issue. Rather, the depositor's right to object to the evidentiary use of illegally seized records simply represents an aspect of the exclusionary rule.

88. 413 F.2d 316 (9th Cir. 1969), *construed in* United States v. Miller, 508 F.2d 588, 591 (1975) (Simpson, J., dissenting).

89. 389 U.S. 347 (1967). The appropriate test under *Katz* is "[first] whether a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." 389 U.S. at 361 (Harlan, J., concurring).

90. As a practical matter, the widespread use of checking accounts (in excess of 92 million accounts) generates so much paper that any *actual* inspection is virtually nonexistent. *See generally* R. ALDOM et al., AUTOMATION IN BANKING (1963); B. YAVITZ, AUTOMATION IN COMMERCIAL BANKING (1967).

B. *Absence of Legal Process*

The California Supreme Court has found a right of privacy protected by the California Constitution. In *Burrows v. Superior Court*,[91] local police had obtained a warrant to search the office of an attorney suspected of misappropriating his client's funds. After seizing a large number of documents from the attorney's office, a detective obtained, without a warrant or any court process, photostatic copies of financial records from several banks in which the petitioner maintained accounts. A motion to suppress the bank records was denied and the depositor sought a statutory writ of mandamus to compel suppression. The California Supreme Court held that the accused had a reasonable expectation of privacy in his bank records, and that the police had unreasonably interfered with that expectation by obtaining the records without legal process, thereby rendering the seizure illegal under California law. The court reasoned that "[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 banking purposes."[92]

The many federal cases that have denied standing to a depositor seeking to resist a summons to a third party bank on fourth amendment grounds were distinguished as involving more than an informal request for information. In those cases records were furnished either pursuant to a valid administrative investigation or in a criminal proceeding in which the courts had been called upon to enforce a summons. The mere fact that the bank may have had a proprietary interest in the records was not regarded as dispositive.[93] The California Supreme Court noted that "[t]he disclosure by the depositor to the bank is made for the limited purpose of facilitating the conduct of his financial affairs; it seems evident that his expectation of privacy is not diminished by the bank's retention of a record of such disclosure."[94]

The court also said that the bank's voluntary relinquishment of records at police request did not constitute valid consent by the depositor, since the depositor's right of privacy was at issue.[95] Additionally, the court was not impressed by the argument that a bank is a mere depository of records already circulated in public. The court reasoned:

> For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life

91. 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).
92. *Id.* at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.
93. *Id.* at 243, 529 P.2d at 594, 118 Cal. Rptr. at 170.
94. *Id.* at 244, 529 P.2d at 594, 118 Cal. Rptr. at 170.
95. *Id.* at 244-45, 529 P.2d at 594, 118 Cal. Rptr. at 170.

> of contemporary society without maintaining a bank account. In the course of such dealings a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography . . . . To permit a police officer access to these records merely upon request, without any judicial control as to relevancy or other traditional requirements of legal process . . . opens the door to a vast and unlimited range of very real abuses of police power.[96]

The California Supreme Court declined to reach the question of fourth amendment rights under the United States Constitution, granting the motion to suppress based upon the California Constitution. The court discussed the *California Bankers Association* case at some length, and commented that it was unclear whether its conclusion in *Burrows* would withstand a constitutional challenge in the United States Supreme Court.[97]

In both *Miller* and *Burrows*, the courts found that intrusions into the records of bank depositors without valid legal process were unreasonable. Given the compelling privacy expectations of a depositor with respect to financial records in the possession of his bank, as developed in *Burrows*, it was anticipated that the use of an administrative summons by the I.R.S. in the future would be restricted. At the very least, the strong privacy interest of the depositor was expected to accord him standing to sue on his own behalf to quash an administrative summons served on his bank, since it would be neither fair nor reasonable to compel a depositor to rely upon the bank's attempt to assert his rights on principles of third party standing.[98] Although it has been argued that banks should be permitted to take such action, there is no guarantee that in all instances they would do so when faced with an administrative inquiry. Against this backdrop, the Supreme Court considered the government's appeal in *Miller*.

V. THE SUPREME COURT'S DECISION IN *MILLER* AND THE CONGRESSIONAL RESPONSE

On April 21, 1976, the Supreme Court reversed the judgment of the Fifth Circuit in *United States v. Miller*, holding that the bank depositor had no legitimate expectation of privacy in the contents of checks and deposit slips since the documents were not confidential communications, but rather were negotiable instruments voluntarily conveyed to the bank. Moreover, the Court ruled that the fourth amendment does not prohibit a third party

96. *Id.* at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.
97. *Id.* at 247, 529 P.2d at 595, 118 Cal. Rptr. at 171.
98. *See* text accompanying notes 29-34 *supra*.

from obtaining information and conveying it to the government.[99] The Bank Secrecy Act, which requires that detailed financial records be kept by banks, was viewed as not altering these considerations so as to create a protectable interest.[100]

The Supreme Court followed the old property interest line of analysis under the fourth amendment and noted that banks have "a substantial stake in [the] continued availability and acceptance [of checks]" which are the business records of the bank.[101] As a practical matter, a bank has no real occasion to inspect the transaction underlying a particular check. The only inspection that occurs is clearly perfunctory to insure against post-dating and inaccurate endorsements. The vast bulk of the more than twenty-five billion checks annually cleared by the American banking system are sorted and posted by data processing machines. The hearings before enactment of the Bank Secrecy Act showed that banks do maintain a high level of confidentiality regarding checking account transactions and are under a legal duty not to release such information except with the depositor's approval.[102] Such confidentiality is due to the longstanding recognition that the information contained in such records is highly personal.[103]

Nonetheless, the *Miller* decision clearly put to rest any confusion concerning the availability of the favored administrative summons for conducting investigations. After *Miller*, any I.R.S. agent could complete a section 7602 summons form and affidavit, present it to a bank, and neither bank nor depositor could raise any valid objection to the inquiry. As a result of *Miller*, the Supreme Court has effectively precluded a taxpayer from keeping his banking records private. Even though under present law access to a citizen's checking account records by private parties is precluded, the government may inspect them with impunity.

In light of the liberty given to the government to inspect banking records through the use of administrative summonses, it is impossible to reconcile *Miller* with *Katz* and *Griswold*. The observations of Associate Justice Stanley Mosk of the California Supreme Court in *Burrows* are particularly compelling:

> Cases are legion that condemn violent searches and invasions of an individual's right to privacy of his dwelling. The imposition

99. 425 U.S. 435, 442-43 (1976).

100. *Id.*

101. *Id.* at 440-41, *quoting* California Bankers Ass'n v. Schultz, 416 U.S. at 48-49.

102. *See Bank Secrecy Act Hearings, supra* note 12. *See also* Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936); Milhonich v. First Nat'l Bank, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961); Comment, *Banks and Banking: Florida Adopts a Duty of Secrecy, Milhonich v. First Nat'l Bank*, 22 U. FLA. L. REV. 482, 485 (1970).

103. *See* text accompanying notes 49-50, 92-96 *supra*.

> upon privacy, although perhaps not so dramatic, may be equally devastating when other methods are employed. Development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of the government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, judicial interpretations of the reach of the Constitutional protection of individual privacy must keep pace with the perils created by these new devices.[104]

The United States Supreme Court rejected the *Katz* "justifiable expectation of privacy" analysis, and opted for a mechanical "property interest" analysis which is unwieldy in its application to twentieth century technology. In the late 1700's there was no concern about the use of computerized records, central data banks, sophisticated electronic eavesdropping tools, communication satellites, readily available photocopying, or the mass use of national indexing systems such as those provided by social security or drivers' license numbers.[105] The articulation of rules that clearly are not adaptable to new technological innovations is folly, unless the Supreme Court intended to strengthen the investigative powers of the I.R.S. at the expense of refusing to recognize an idea whose time had come. As the *Burrows* analysis shows, the Supreme Court's decision could easily, and most convincingly, have been rendered in favor of the framers' understanding of the fourth amendment. The decision is all the more curious because, while *Miller* was under consideration by the Supreme Court, the Tax Reform Act of 1976 was before Congress, including provisions for reforming procedures regarding third party summonses.

The Tax Reform Act[106] remedies most of the evils of the administrative summons. It provides that, in the case of a third party summons, the taxpayer, or other persons to whom the summoned records pertain, are to receive notice of the summons from the I.R.S. within three days of its issuance and to have the right to stay compliance by notifying the person summoned within fourteen days not to comply. The I.R.S. then is required to seek enforcement of the summons in federal court, and the taxpayer has standing to challenge enforcement, including the right to intervene in any

104. Burrows v. Superior Court, 13 Cal. 3d at 247-48, 529 P.2d at 596, 118 Cal. Rptr. at 172. Accordingly, California courts have adopted the *Burrows* rule for telephone records. People v. McKunes, 51 Cal. App. 3d 487, 124 Cal. Rptr. 126 (1975). Although federal agents are precluded from listening to telephone conversations, 18 U.S.C. §§ 2510-20 (1970), long distance telephone records are readily available to federal investigators. *See* 18 U.S.C. § 2511(c) (1970).

105. For a full appreciation of the monumental changes in technology since the writing of the Constitution compare D. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND (1972) with a review of the Statistical Abstract of the United States by the U.S. Census Bureau.

106. The Tax Reform Act provides for administrative summonses, Pub. L. No. 94-455, § 1205, 90 Stat. 1525 (codified at I.R.C. § 7609).

proceeding seeking enforcement of a summons. In the case of a John Doe summons,[107] the I.R.S. must go into court, establish reasonable cause for requesting the summons, and receive court approval before issuing the summons.

The notice requirement is suspended when a summons is issued solely to determine if records exist or when notice may result in a material interference with an investigation. This amendment to the original House bill was intended to enable the I.R.S. to avoid material interference with an investigation if it reasonably believed that an investigation might occur. Petitions by the I.R.S., however, are not to be granted automatically by the courts and reasonable cause must be shown.

In addition, the new law provides for suspension of both criminal and civil statutes of limitations when a noticee who protests enforcement of the summons is either the taxpayer himself, his nominee or agent, or another person actually under the direction or control of the taxpayer. A corporation controlled by the taxpayer, for example, is covered under this rule. On the other hand, if a third party record-keeper, such as an attorney, accountant, or a bank, protests enforcement of the summons, the statute of limitations will not be suspended with respect to the taxpayer because the third party record-keeper is not the noticee and, presumably, is not under the noticee's control.

VI. Conclusion

The failure of modern courts to delineate and utilize a consistent privacy analysis is evidence that the juxtaposition of traditional property concepts and emerging concepts with respect to rights of privacy are in a state of change which makes it necessary to reexamine the ways in which the underlying and conflicting values become expressed in rules. As one jurist has noted:

> Our nation's current social development harbors insidious evolutionary forces which propel us toward a collective, Orwellian society. One of the features of that society is the utter destruction of privacy, the individual's complete exposure to the all-seeing, all-powerful police state. Government agencies, civilian and military, federal, state and local, have acquired miles and acres of files, enclosing revelations of the personal affairs and

107. John Doe summonses are regularly used when the identity of the taxpayer is not known and the purpose of the inquiry is to learn the identity of a person maintaining a numbered account or similar arrangement. For the purposes of the new statute, a numbered account is an account through which a person may authorize transactions solely through the use of a number, symbol, code name or other device not involving the disclosure of his identity. A person maintaining the account includes the person who established it and any person authorized to use the account or to receive records or statements.

> conditions of millions of private individuals. Credit agencies and other business enterprises assemble similar collections. Information peddlers burrow into the crannies of these collections. Microfilm and electronic tape facilitate the storage of private facts on an enormous scale. Computers permit automated retrieval, assemblage and dissemination. These vast repositories of personal information may easily be assembled into millions of dossiers characteristic of a police state. Our age is one of shriveled privacy.[108]

The opposing views of the United States Supreme Court and certain state courts, such as the California Supreme Court, reveal an upheavel in existing law as old rules change to accommodate new technology. Today's jurists, as they construe the fourth amendment, must look both to the intent of the framers and to the technological context in which it was drafted rather than merely follow a mechanical extension of eighteenth century rules. The "justifiable expectation of privacy" approach makes it possible to deal rationally not only with today's but with tomorrow's technological developments.

108. White v. California, 17 Cal. App. 3d 621, 631, 95 Cal. Rptr. 175, 181-82 (1975) (Freedman, J., dissenting).