OF RECORDS AND REPORTS: BANK SECRECY UNDER THE FOURTH AMENDMENT

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> *The Officers of Congress may come upon you now fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure every thing you eat, drink, and wear. They ought to be restrained within proper bounds.* Patrick Henry, June 14, 1788.[1]

In 1970, the 91st Congress passed the Bank Secrecy Act,[2] which gives unprecedented authority to the Secretary of the Treasury to require banks and their customers to record and report, without subpoena, summons or warrant, the details of virtually every domestic and foreign financial transaction. Attack on these provisions was inevitable and, recently, in *Stark v. Connally*,[3] a three-judge federal district court struck down that portion of the Act requiring reports of domestic transactions, finding those elements to be violative of the fourth amendment. Several provisions left untouched by the district court, however, are as economically burdensome and legally offensive as those the court found objectionable. This article will first examine the na-

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1. 3 ELLIOTT'S DEBATES 448, 449 (1866).

2. Bank Secrecy Act of 1970, 84 Stat. 1114 (*codified* in scattered sections of 12, 31 U.S.C. as follows: 12 U.S.C. 1730d, §§ 1829b, 1951-59, 31 U.S.C. §§ 1051-1122). Sections of the Act will hereinafter be cited to 12 or 31 U.S.C. The Act has been implemented as follows: Record keeping provision—31 C.F.R. §§ 103.31-103.37 (Supp. 1972); Reporting provisions—31 C.F.R. §§ 103.21-103.26 (Supp. 1972).

3. 347 F. Supp. 1242 (N.D. Cal. 1972).

ture, intent and effect of both the record keeping and reporting provisions of the legislation. The aspects of the Act as an example of what may be termed "collateral indictment" will then be examined in relation to the *Stark* case and the fourth amendment. Finally, alternatives to the Bank Secrecy Act will be proposed in an effort to establish a more realistic and effective approach to the problems presented by the secret bank account.

THE BANK SECRECY ACT

Congressman Wright Patman introduced bank secrecy legislation in the House of Representatives on December 3, 1969.[4] A Senate Bill was introduced by Senator William Proxmire on April 6, 1970.[5] Noting a "technological revolution in white-collar crime,"[6] the report of the Senate Committee on Banking and Currency stated that there has been a burgeoning use of both domestic and foreign financial institutions for criminal activities. Thus, although the stated purpose of the Act is to facilitate investigations of criminal, tax or regulatory matters generally,[7] the Act is most clearly directed toward those problems engendered by secret foreign bank accounts, which are conducive to white-collar crime. Indicating that the use of such accounts, which were at one time the exclusive province of the financially sophisticated, was becoming increasingly widespread,[8] the report noted that the accounts have been employed for a number of illegal purposes:

1. Avoiding the payment of capital gains taxes on securities transactions. The report notes that since foreign bank secrecy laws often shield the name of the depositor, there is no way for the Internal Revenue Service to determine if the capital gains taxes were paid on an individual transaction.
2. Manipulating United States securities markets in violation of Securities and Exchange Commission (SEC) rules and regulations. The report refers to cases where individuals sell fraudulent stock to the public, maintaining its price by purchases channeled through secret foreign bank accounts.[9]
3. Circumventing SEC rules on insider trading. The problem here arises when corporate officials trade in their company's

4. H.R. 15073, 91st Cong., 1st Sess. (1969).
5. S. 3678, 91st Cong., 2d Sess. (1970).
6. SENATE COMM. ON BANKING AND CURRENCY, FOREIGN BANK SECRECY AND BANK RECORDKEEPING, S. REP. No. 91-1139, 91st Cong., 2d Sess. 2 (1970) [hereinafter cited as Senate Report].
7. 31 U.S.C. § 1051 (1970).
8. Senate Report, *supra* note 6, at 3.
9. Secret accounts have also been used to circumvent SEC prohibitions on the sale of unregistered stock. See United States v. Hayufin, 398 F.2d 944 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968); United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

own stocks based on inside information and realize short-swing profits. The SEC is unable to determine who is trading the securities.

4. Acting as a depository for illegally acquired funds[10] which are then used as collateral for loans from legitimate sources. Thus, tainted money becomes at least superficially respectable.
5. Masking the acquisition of control of United States industries. In this area, the Committee expressed its concern over recent corporate takeovers that have in some circumstances been financed by foreign financial institutions. Thus, the Committee noted, the SEC has no way of knowing who the beneficial owners of the corporation really are.[11]
6. Exceeding the Federal Reserve Board's margin requirements on loans to carry securities.
7. Trading in gold in violation of United States law.

At the outset, it should be stated that the purpose of this article is not to contest the validity of these concerns. They are indeed proper instances for corrective action. The question raised, instead, is directed to the effectiveness and propriety of the remedies employed, in view of the relevant legal and economic considerations; in effect, this article questions means and not necessarily ends.

With broad strokes, Congress has drafted a document requiring comprehensive record keeping and extensive reporting by both financial institutions and individuals. In addition, the Act grants the Secretary of the Treasury discretionary powers of implementation so unrestricted as to constitute a threat to both commercial stability and personal privacy. While it is true that both the House[12] and Senate[13] committees stressed the desire of Congress to avoid unduly burdening legitimate commercial transactions or interrupting the mobility of international capital, that intent did not survive their action. Salvation rests, according to the Senate report, in the fact that the Secretary of the Treasury and the SEC are granted broad exemptive power to be utilized when the law enforcement benefits are insufficient to overcome the cost of implementation.[14] The problem, of course, is that if the statute itself

10. *See* United States v. Olin Mathieson Chem. Corp., 368 F.2d 525 (2d Cir. 1966) (payment of kickbacks to Vietnamese importers made by an American exporting agent and deposited in secret Swiss bank accounts).

11. "In one case an important defense industry was acquired by an overseas bank without the government being able to determine whether the bank owns the stock for its own account or for others." Senate Report, *supra* note 6, at 4.

12. HOUSE COMM. ON BANKING AND CURRENCY, BANK RECORDS AND FOREIGN TRANSACTIONS, H.R. REP. No. 91-975, 91st Cong., 2d Sess. 10 (1970) [hereinafter cited as House Report].

13. Senate Report, *supra* note 6, at 4.

14. *Id.*

is subject to abuse by administrator, agency or agent of the agency,[15] the exemption provisions, applied discriminatorily or not at all, will merely aggravate the situation.[16]

Record Keeping by Banks and Financial Institutions

Title I of the Bank Secrecy Act imposes substantial record keeping requirements upon banks and a wide range of other financial institutions.[17] Section 1829b[18] states that bank records, particularly microfilm and other reproductions of checks, as well as records of identities, are useful in criminal, tax, and regulatory investigations and proceedings. The institutions are therefore required[19] to maintain a record of all checks, drafts or similar instruments paid by the bank, or deposited with the bank, together with an identification of the account owner. The Act further provides in section 1829b(f) that the Secretary of the Treasury may require the maintenance of records in addition to or in lieu of those specified in the Act.[20] The Secretary is empowered to implement these recording requirements[21] in an essentially unrestricted manner.[22]

15. 31 U.S.C. § 1054 (1970) imposes responsibility on the Secretary to assure compliance with the Act, but gives him authority to "delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency."

16. The House Committee stated: "Obviously, the Secretary could impose record keeping and reporting requirements which would create a substantial and harmful burden on the free flow of legitimate international commerce or could result in a requirement of much valueless paper work, but your committee has every confidence that he will not, especially in view of his broad powers of exemption." House Report, *supra* note 12, at 13.

17. 12 U.S.C. § 1953(b) provides that: "The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.
(2) Transferring funds or credits domestically or internationally.
(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.
(4) Operating a credit card system.
(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

18. 12 U.S.C. § 1829b (1970).

19. 12 U.S.C. § 1953 (1970); 31 U.S.C. §§ 1051 *et seq.* (1970).

20. It is noteworthy that the House Committee considered its approach to 12 U.S.C. § 1829b as "conservative," stating that the approach provides what the committee termed "reasonable latitude for the exercise of administrative discretion." House Report, *supra* note 12, at 18. Apparently, the House Committee rejected a Senate version of the bill which gave the Secretary authority to exempt individual cases in situations he deemed appropriate. They therefore bargained for, and received, a version which gave him such exemptive powers *"as are consistent with the purposes of this section."* Section 1829b(c) (emphasis added). Reading section 1829b(b) in conjunction with section 1829b(f), it is remarkable that the Committee could conclude (1) they had *not* abdicated legislative responsibility and (2) they had in some way imposed significant restrictions on the Secretary's powers.

21. 31 U.S.C. § 1053 (1970) provides that "[t]he Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this chapter."

22. 12 U.S.C. § 1829b(b)(c)(d)—implemented by Treasury Regulation 31 C.F.R. subpart C, §§ 103.31 to .37 (Supp. 1972).

The initial observation to be made is that this portion of the Act is burdensome to the financial institutions. Despite Congress' stated wish to avoid a "mountain of paperwork," there is no viable option under the Act but to microfilm or in some way photocopy everything coming into and out of a bank. More selective regulations determining what is to be recorded, whether at the discretion of the Secretary of the Treasury or a bank official, are unmanageable since they clearly would be more complicated and burdensome to administer equitably in every situation. That Congress may have intended the recording requirement to be neither absolute nor permanent[23] is unpersuasive in view of the fact that section 1829b(f) provides for records in addition to such photocopies, and considering the specific requirement of section 1829b(d) which is devoted specifically to the microfilming of checks, drafts or similar instruments.[24]

Such broad record keeping requirements necessarily imply inordinate expense. Committee members report that the photocopying process is relatively inexpensive, ranging from one-half to one and one-half mils per check, and that, when compared to the bank's 10 cents per check service charge, the reproduction cost is negligible. Several observations are in order. First, the Committee's conclusion assumes the bank in fact charges this fee. It should be apparent, however, that the 10 cents per check service charge applies only to the very small depositor. Most banks today provide much smaller service charges, or no service charge at all, for commercial accounts or private depositors willing to maintain a minimum balance in the account. Second, since the Act and regulations require the copying of checks not only at the deposit but at the payment stage, the cost is doubled. Added to this is the expense of photocopying "drafts or similar instruments." Moreover, considering the possible, albeit unlikely, eventuality that the regulations would fail to exclude intermediary banks, the cost is thereby multiplied enormously.

The recording requirements, then, represent a substantial burden on the banking industry with slight, if any, reward.[25] In this light, Con-

23. House Report, *supra* note 12, at 16.

24. A House Committee suggestion that record keeping requirements not apply to domestic financial transactions involving less than $500 was deleted in the final version of the bill, perhaps at the urging of Chairman Patman, who opined that:

> The range of the use of checks under $500 by criminal elements is limitless. Graft, corruption and payoffs are many times in such amounts. It is not inconceivable that criminals will adopt the $499.99 check as their standard monetary instrument. There is no limit to the number of checks a single individual can negotiate.

House Report, *supra* note 12, at 31.

25. Stark v. Connally, 347 F. Supp. 1242, 1250-51 (N.D. Cal. 1972), *citing Hearings on S. 3678 and H.R. 15073 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. at 178 (1970) (state-

gressman Patman's assumption that microfilming costs "should be borne willingly by the banking community as part of their civic responsibility to combat crime"[26] is subject to question.

The Reporting Provisions

Title II of the Bank Secrecy Act, the Currency and Foreign Transactions Reporting Act,[27] is drafted in broader and more comprehensive terms than Title I and imposes even more stringent requirements upon institutions and individuals. In essence, its purpose is to provide American law enforcement authorities with the tools necessary to cope with problems created by secret bank accounts. Noting that law enforcement authorities and banking institutions in some foreign countries refuse to cooperate with American officials, the drafters of the bill recognized the futility of attempting to enforce American law in foreign jurisdictions. The response was to impose record keeping and reporting requirements on those in the United States who deal with foreign financial agencies. Accordingly, Title II provides for records and reports of domestic currency transactions,[28] of exports and imports of monetary instruments[29] and of foreign transactions by residents or citizens of the United States or persons doing business in this country.[30]

The provisions concerning domestic currency transactions require reports in terms limited only by the administrative ingenuity of the Secretary of the Treasury:

> Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances as the Secretary shall by regulation prescribe.[31]

These reports are required by both the financial institution and one or more of the parties involved in the transaction. Should one party be acting as an agent for another, he must also reveal the identity of his principal.[32] This information may be obtained by the Secretary without the use of a subpoena, warrant or any other court order.[33]

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ment of Eugene T. Rossides, Assistant Secretary of the Treasury for enforcement and operations).

26. House Report, *supra* note 12, at 31.
27. 31 U.S.C. §§ 1051-1122 (1970).
28. *Id.* §§ 1081-1083.
29. *Id.* §§ 1101-1105.
30. *Id.* §§ 1121-1122.
31. *Id.* § 1081.
32. *Id.* § 1082.
33. *See id.* §§ 1081-1083.

Reports as to the export or import of monetary instruments by any person are required only if an amount in excess of $5,000 is involved on any single occasion. Although the ingenuity of the Secretary is more limited in regard to the information which must be filed,[34] again no judicial approval of any type is required to obtain the recorded information. Indeed, section 1105, giving the Secretary standing to apply for a warrant in case he believes "that monetary instruments are in the *process of transportation* and with respect to which a report required under section 1101 . . . has not been filed or contains material omissions or misstatements,"[35] specifically notes that such requirement of a warrant shall not preclude the Secretary from acting under any other law.[36]

Reporting and record keeping requirements are also established for foreign transactions.[37] After paying initial umbrage to the need to avoid interfering with or regulating the export or import of currency or other monetary instruments, and after pledging due regard for the desire to avoid unreasonably restraining persons who engage in legitimate transactions with foreign financial agencies,[38] section 1121(a) provides that the Secretary of the Treasury:

> shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail as the Secretary may require:
>
> (1) The identities and addresses of the parties to the transaction or relationship.
>
> (2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.
>
> (3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.[39]

To shield the suppliers of this information, section 1121(b) establishes a protective provision which is illusory at best. It states that no

34. *Id.* § 1101(b).
35. *Id.* § 1105(a) (emphasis added).
36. *Id.* § 1105(b).
37. *Id.* § 1121-1122. *See also* INT. REV. CODE OF 1954, § 6011(a) which requires each taxpayer to provide all information necessary to complete the forms prescribed by the Director of Internal Revenue. This would include a disclosure of any foreign bank account. See Form 1040(a).
38. 31 U.S.C. § 1121(a) (1970).
39. *Id.*

person required to maintain records under the foreign transactions section shall be required to produce or disclose the contents of the records "except in compliance with a subpena [sic] or summons duly authorized and issued or as may otherwise be required by law."[40] Since section 1121(a) may require records *and* reports, however, and since the reports inevitably must require significant material contained in the records, the protection for the records can be slight indeed.[41] Moreover, it is possible for both a subpoena[42] and a summons[43] to be obtained without judicial sanction, unlike, for example, a warrant which requires as a minimum some judicial finding of probable cause.

This review of the pertinent provisions of the Bank Secrecy Act illustrates that it is so broadly drawn as to be, at the least, burdensome. If this were the only fault, the legislation might be tolerable. But one must also question the Act's effectiveness. Even the Senate Committee noted that there are no assurances that the record keeping requirements would end the misuse of foreign bank accounts. The so-called white-collar criminals cannot, of course, be expected to maintain extensive records of their foreign financial dealings if such records can be used to establish the illegality of their transactions.[44] Nevertheless, the Committee stated that:

> [T]he mere failure to keep the records required by the regulations constitutes a criminal violation. Thus, law-enforcement officials could obtain convictions of stock swindlers, tax evaders, and other white-collar criminals for a failure to keep records, while it might be more difficult to prove the exact range of their other illegal activities.[45]

Therein lies the third defect of the Act.

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40. *Id.* § 1121(b).

41. In Marchetti v. United States, 390 U.S. 39 (1968), the Supreme Court perceived

> no meaningful difference between an obligation to maintain records for inspection, and such an obligation supplemented by a requirement that those records be filed periodically with officers of the United States. We believe, as the United States argued itself in [*Shapiro v. United States*], that 'regulations permit records to be retained, rather than filed, largely for the convenience of the persons regulated.'

Id. at 56n.14 (citation omitted).

42. FED. R. CIV. P. 45(a) provides in part: "The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service." FED. R. CRIM. PRO. 17(c) contains a similar provision.

43. FED. R. CIV. P. 4(a): "Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specifically appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants." FED. R. CRIM. P. 17(a) contains a similar provision.

44. Senate Report, *supra* note 6, at 8.

45. *Id.*

Collateral Indictment

As evidenced by the Committee's remarks, the Act represents a prime example of what may be termed "collateral indictment"—indulging in the precarious practice of making criminal an essentially benign act because it may tend to be in some way associated with forbidden activity.[46] The problem inherent in this approach to law enforcement is that the further the proscribed activity is abstracted from the crime itself, the more the chance that criminal sanctions will apply to inoffensive conduct engaged in by the general public. It is agreed, for example, that burglary should be punished and, if possible, prevented. It is acceptable, therefore, to go a step further and punish individuals for possession of those devices defined as "burglary tools." While there is nothing per se immoral about the possession of a tool designed for the purpose of breaking into a building or vault, many jurisdictions have made such possession a felony when it can be established that such tools are possessed with the intent of using them for criminal purposes.[47] Given the difficulty of proving the intent element of the crime, it would be possible to extend the criminal sanctions in order to require individuals to report the nature of tools kept in basements or carried in car trunks. Hardware stores could conceivably be required to report any crowbars sold. Most would agree, however, that at some point the stage is reached where the interest protected is too far removed from the restrictive legislation. The burden on the private individual and on commerce eventually becomes greater than the benefits to be derived.

The enforcement of any such abstracted law must be approached with great caution. In cases where the primary motive for prosecution relates to matters other than the commission of the particular crime for which the defendant is being prosecuted, society must be reminded that few of its members have led such error-free lives as to avoid prosecution for some offense by a determined prosecutor. To

46. There are several sanctions imposed by the Act for failure to meet its requirements. *See, e.g.*, 12 U.S.C. § 1955 (civil penalties); *id.* §§ 1956, 1957 (criminal penalties); 31 U.S.C. §§ 1056 (1970) (civil penalty), 1058, 1059 (criminal penalties).

47. Michigan law, for example, provides that:

> Any person who shall knowingly have in his possession any nitroglycerine, or other explosive, thermite, engine, machine, tool or implement, device, chemical or substance, adapted and designed for cutting or burning through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ the same for the purpose of aforesaid, shall be guilty of a felony, punishable by imprisonment in the state prison not more than ten [10] years.

M.C.L.A. § 750.116, M.S.A. 28.311. *See also* ARIZ. REV. STAT. ANN. § 13-304 (1956) (misdemeanor).

illustrate, in *Yick Wo v. Hopkins*[48] Chinese laundrymen were convicted for operating laundries in wooden structures without licenses, thereby violating an ordinance concerning fire hazards. The moving force behind the convictions, however, was the discriminatory intent of city officials. Accordingly, the conviction was reversed.[49]

Both in its intent and in its drafting, the Bank Secrecy Act attempts to attack certain illusive crimes by punishing acts—themselves innocent—which are at best tangentially related to those crimes. As indicated previously, there are times when this may be justified. This is not such an instance. And while the premise that the Act's impositions will cause little or no expense or interference with commerce is ultimately merely naive, by its manner of securing information from private individuals without protection of judicial review, the Act is unconstitutional.

THE ACT, *Stark v. Connally* AND THE FOURTH AMENDMENT

There is no general protection against the use of bank records for purposes of criminal investigations when such records are properly obtained by use of an appropriate warrant or subpoena. This was recognized in *Stark v. Connally*[50] and is consistent with the philosophy of the Constitution. Stated otherwise, while an individual may expect a modicum of discretion and confidentiality in his relationship with his bank, the expectation of privacy cannot be said to be as great as in the area of personal notes retained in the home.[51]

48. 118 U.S. 356 (1886). *See also* United States v. Lenske, 66-2 T.C. 9686 (9th Cir. 1966) (conviction for income tax evasion overturned when it was shown that the prosecution had been motivated by the defendant's political activities).

49. *Compare* Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967), *with* Braun, *Ethics in Criminal Cases: A Response*, 55 GEO. L.J. 1048 (1967). *See also* Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770 (1933); Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960).

50. 347 F. Supp. 1242 (N.D. Cal. 1972).

51. Although there is no absolute right to the secrecy of bank records, several states do recognize a limited doctrine of bank secrecy. For example, in Milohnich v. First Nat'l Bank, 224 So. 2d 759 (Fla. Ct. App. 1969), the defendant bank had divulged information to a third party concerning the plaintiff's account. The court held that the complaint stated a claim upon which relief may be granted by alleging that the bank had breached an implied contractual obligation to keep the plaintiff's account secret. *See also* Brex v. Smith, 104 N.J.Eq. 386, 146 A. 34 (Ch. 1929); Sparks v. Union Trust Co., 256 N.C. 478, 124 S.E.2d 365 (1962). Other courts have approached this concept of bank secrecy on the basis of a tortious invasion of privacy. See Sewall v. Catlin, 3 Wend. 291 (Sup. Ct. N.Y. 1829). The depositor may, nevertheless, authorize the disclosure of information as, for example, when he seeks credit. Hinderman v. First Nat'l Bank, 98 F. 562 (6th Cir. 1899), *cert. denied*, 186 U.S. 483 (1901); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961). Moreover, a bank may be forced to disclose its record of accounts when properly ordered to do so by the Internal Revenue Service or some other public agency. United States v. Peoples Deposit Bank & Trust Co., 112 F. Supp. 720 (E.D. Ky. 1953), *cert. denied*, 348 U.S. 838 (1954). *See also* DeMasters v. Arend, 313 F.2d 79 (9th Cir.), *pet.*

In *Stark*, the plaintiffs, individuals and the American Civil Liberties Union suing as bank customers, a bank and the California Banker's Association, sought to enjoin the Secretary of the Treasury from enforcing the provisions of the Bank Secrecy Act on the grounds that it violated numerous constitutional guarantees. Speaking for a majority on a three-judge district court panel, Judge Sweigert summarily dismissed the allegations of constitutional violations in the record keeping provisions[52] and then focused on the reporting requirements. The court found that they violated the fourth amendment, but only in regard to certain transactions.

Reporting

The court began its inquiry into the reporting requirements by separating the provisions requiring reports of foreign financial matters from those requiring reports of domestic transactions. Concerning reports of international financial transactions, the court observed that the reporting provisions were limited to "a narrowly described area"[53] and therefore fell within the general rule that "the wisdom of legislation and the need for it are matters for the Congress to decide and the Courts should not substitute their judgment for that of the Congress."[54] Thus, those requirements were upheld.

On the other hand, the court was disturbed by the breadth of the reporting requirements for domestic transactions, citing the fact that the Act empowers the Secretary to require reporting, if he so decides, by both the financial institution and the other parties to transactions with that institution.[55] Moreover, it noted that the Secretary may potentially require reports not only of currency transactions but of any transaction involving any monetary instrument in any amount.[56]

To further buttress these observations, the court explained that the record keeping provisions of the Act require microfilming of all checks, drafts or similar instruments either drawn on, presented to or received for deposit or collection by a bank. Since the recording requirements include not only the bank, but also other parties to or participants in the bank transaction, the final report might well include

for cert. dismissed, 375 U.S. 936 (1963); *In re* Upham's Income Tax, 18 F. Supp. 737 (S.D.N.Y. 1937); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961).

52. 347 F. Supp. at 1244.

53. *Id.* at 1245.

54. *Id.*

55. *Id.* at 1246.

56. *Id.* at 1245. This is the case notwithstanding the fact that 31 C.F.R. § 103.22 (Supp. 1972), partially implementing 31 U.S.C. § 1082, requires financial institutions to record transactions involving only currency and then only in amounts exceeding $10,000.

not only the normal bank record of a customer account, but also information concerning the identity of the persons or organizations with whom the bank customer has dealt and such additional "detail" concerning the transactions as the Secretary may require from both the bank and other participating parties. Concerning the broad discretion vested in the Secretary by virtue of sections 1053 and 1055 of the Act, empowering him to prescribe such regulations as he may deem appropriate, the court observed that the Secretary had broadly implemented these authorizations in "regulations providing that in his sole discretion he may by written order make exceptions or exemptions or impose additional record-keeping or reporting requirements authorized by the statute or otherwise modify the requirements of the regulations."[57] The question, according to the court, was

> whether these provisions, broadly authorizing an executive agency of government to require financial institutions and parties to or participants in transactions with them, to routinely report to it, without previous judicial or administrative summons, subpoena or warrant, the detail of almost every conceivable financial transaction as a surveillance device for the discovery of possible wrongdoing on the part of bank customers, is such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment.[58]

The court observed that communications between banks and bank customers are not privileged insofar as bank customers have no rights in the bank records. Such records may be subpoenaed from the bank in spite of the depositor's objections. Consequently, the court held that production by the bank under subpoena of its records is, as to the customer, neither an illegal search and seizure under the fourth amendment nor self-incrimination under the fifth amendment.[59] But the court distinguished the present case from others involving production of bank records by observing that in those cases the government sought *only*

57. 347 F. Supp. at 1246. The court also noted that "[s]ection 1061 provides that the Secretary of the Treasury shall, upon such conditions and procedures as he may by regulation prescribe, make any information set forth in the required reports available, for any purpose consistent with the provision of the Act, to any other federal agency at its request." *Id.*

58. *Id.* Those refusing to report risk criminal prosecution under 31 U.S.C. § 1058 (1970), which states that "[w]hoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned not more than one year or both." Moreover, *id.* § 1059 provides additional penalties where the violation is (1) committed in furtherance of the commission of any other violation of Federal law, or (2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period." Such persons "shall be fined not more than $500,000 or imprisoned not more than five years, or both." *Id.*

59. 347 F. Supp. at 1248, *citing* Galbraith v. United States, 387 F.2d 617 (10th Cir. 1968); Application of Cole, 342 F.2d 5 (2d Cir. 1965); DeMasters v. Arend, 313 F.2d 79, 85 (9th Cir. 1963); Harris v. United States, 413 F.2d 316 (9th Cir. 1959).

the records of the bank dealing with the customer's account. Moreover, such records were obtained by judicial or administrative subpoena, summons or warrant, and the records sought were claimed to be material and relevant to a particular matter under investigation, such as the accuracy of a specific person's income tax return. Thus, the court distinguished bank records from an individual's private papers.

> Certainly, at least, a bank customer reasonably expects privacy concerning details of his personal financial affairs not shown on either the bank's own records or on the face of the customer's checks and which must be disclosed only by the report required of the bank customer, himself, as a party to or participant in a financial transaction.[60]

Since the power of the Secretary under the Act is not limited to reaching the bank's own records or to information based upon those records, but instead is more comprehensive, authorizing mandatory disclosure of information obtainable from microfilming checks and drafts and also requiring information from the parties to the transaction, the court found that the reporting provisions of the Act constituted an improper invasion of privacy. Citing *City of Carmel v. Young*,[61] which involved compulsory disclosure of all substantial financial interests of public officials in order to ascertain possible conflicts of interest, the court specifically objected to the fact that the Act fails to provide for a summons, either judicial or administrative, as the means whereby the Secretary may solicit reports from banks *and* their customers. Because he may peremptorily require such reports, the *Stark* court agreed with the finding of the Supreme Court of California in *City of Carmel*:

> In any event, we are satisfied that the protection of one's personal financial affairs and those of his (or her) spouse and children against compulsory public disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within that penumbra of constitutional rights into which

60. 347 F. Supp. at 1248. The court's language seems to suggest yet a further distinction. Noting that the Secretary's power is not limited to the bank's "own records or to information based thereon, e.g., the bank's ledger card record of the state of the customer's account or its own deposit slips or passbook entries," the court implies that a greater degree of privacy might be expected not only for the private papers of the individual but also for that information contained on the checks themselves, despite the fact that these checks pass through the banking processes. "We do note . . . that banks have traditionally returned, either directly or through the clearing house, all checks each month to the original drawer . . . ." Thus, said the court:

> It would seem reasonable therefore, for the drawer of a check to regard himself as the real owner of his checks, subject only to normal banking processing, and to expect that detailed information shown only on the face of his checks will not be automatically broadcast throughout the vast government bureaucracy without at least some notice, summons, subpoena or warrant in connection with some legitimate pending inquiry.

Id.

61. 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

> government may not intrude absent a showing of compelling need and that the intrusion is not overly broad . . . the law must be shown 'necessary, and not merely rationally related to, the accomplishment of state policy.' Griswold v. Connecticut . . . 'The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.' Shelton v. Tucker . . . .[62]

Record Keeping

The court in *Stark* chose not to detail its holding on the question of record keeping but instead summarily dismissed the issue in a single sentence, finding no constitutional violation.[63] The concept of compelling need and necessary relationship to permissible state policy, however, may be applied to the record keeping requirements as well as to the reporting mandates. Moreover, since the Act presented to the court the question of reasonable relationships between ends and means,[64] it must also be asked whether the record keeping requirements are not equally severe and therefore invalid under that same test.

The *Stark* opinion recognized the power of Congress to require records and reports from business entities and citizens in appropriate circumstances,[65] but quoted *Shapiro v. United States*[66] to the effect that there are limits beyond which a government may not proceed. Specifically, it may not require its citizens to keep records which may be inspected later by an administrative agency and possibly be used for the prosecution of statutory violations committed by the record keeper himself.[67] The test enunciated in *Shapiro* for defining those limits is whether there exists a sufficient connection between the activities sought to be regulated and the public concern. If such a relationship exists, the government can constitutionally regulate or forbid the basic activity involved and can properly require the keeping of particular records which are subject to inspection by the Administrator.[68] Although the court properly interpreted the *Shapiro* standard, it failed to follow through when applying the test. Despite having found the reporting require-

62. 347 F. Supp. at 1249 (citations omitted).
63. *Id.* at 1244.
64. *Id.* at 1250.
65. *Id. See also* United States v. Morton Salt, 338 U.S. 632 (1950); FTC v. American Tobacco Co., 264 U.S. 298 (1924). There, the court found objectionable a governmental fishing expedition into the papers of a corporation, on the *possibility* that they may disclose evidence of crime. The court found that this was so contrary to principles of justice that an intention to grant the power to a subordinate agency would not be attributed to Congress unless explicitly expressed.
66. 335 U.S. 1 (1948).
67. *Id.* at 32.
68. *Id.*

ments objectionable in view of their vague purpose[69] and despite having found an insufficient relationship between the end sought—"the possible assistance to the Government in its investigation of citizens"[70]—and the means used—"peremptory, sweeping, unsafeguarded reporting provisions"[71]—the *Stark* court found no constitutional objection to the private record keeping requirements. The fact remains that whether it be record keeping or reporting, the means established by the Act are disproportionate to the ends sought.[72]

Record keeping and reporting requirements are by no means a new phenomenon in American legislative history.[73] The key issue, of course, is whether and when records become public[74] and, more pertinent to this discussion, when records are so inherently private in nature that a record keeping requirement is tantamount to an invasion of privacy. Since broad record keeping requirements exist in virtually all major regulatory enactments of the federal government,[75] caution must be exercised in drafting additional requirements, not only for the sake of constitutional considerations but also for the sake of economic and business realities. At some point, a determination must be made that not all required records are necessarily public and, moreover, that the government has no unfettered right to require record keeping at its discretion.

The Fourth Amendment

The fourth amendment assures the right of individuals "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[76] It further requires that search warrants shall not be issued except upon probable cause being shown. Thus, it secures a citizen's right to be left alone, a right described by

69. The vague purpose is the "mere general possibility that such surveillance will help in criminal, taxation and unspecified governmental investigations . . . ." 347 F. Supp. at 1250.

70. *Id.*

71. *Id.*

72. United States v. United States District Court, 407 U.S. 297 (1972); Camara v. Municipal Court, 387 U.S. 523 (1967); McMann v. SEC, 87 F.2d 377 (2d Cir. 1937).

73. Dissenting in Shapiro v. United States, 335 U.S. 1, 51-52 (1948), Justice Frankfurter noted that since 1789 every Congress has promulgated both record keeping and reporting requirements. "Indeed, it was the plethora of such provisions that led President Roosevelt to establish the Central Statistical Board in 1933 . . . ."

74. If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses. Virtually every major public law enacted—to say nothing of State and local legislation—has record keeping provisions. In addition to record keeping requirements, is the network of provisions for filing reports.

Id. at 51 (Frankfurter, J., dissenting).

75. Some of the statutes which include such provisions, applicable to the records of non-corporate as well as corporate business enterprises, may be found in *id.* at 6.

76. U.S. CONST. amend. IV.

Mr. Justice Brandeis as "the most comprehensive of rights and a right most valued by civilized men."[77]

The fourth amendment proceeds on the general assumption that when there is a subjective and reasonable expectation of privacy, that privacy must be maintained against unreasonable search and seizure. For example, even in *Katz v. United States*,[78] where a closely restricted electronic surveillance of a telephone booth was conducted, a search warrant was held to be necessary. Noting that a judicial order could have accommodated the legitimate needs of law enforcement officials by authorizing a limited use of electronic surveillance, the Supreme Court underscored the need for such protection, citing instances[79] where a restrictive order authorizing the use of electronic devices insured no greater invasion of privacy than necessary under the circumstances.[80]

As noted earlier, the Senate Committee stated its confidence that the broad authority granted the Secretary of the Treasury would not be abused.[81] Yet in *Katz*, the Court was unimpressed by the fact that government agents not only possessed such authority but exercised it with restraint. Reasoning that such restraint was imposed by the agents themselves, not by a judicial officer, the Court stated that:

> [T]hey were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.[82]

Subject only to a few well-defined exceptions,[83] therefore, a search must be conducted subject to the scrutiny of a judge or magistrate.

Thus, the essence of the fourth amendment is protection against

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77. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *see* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

78. 389 U.S. 347 (1967).

79. Osborne v. United States, 385 U.S. 323, 329-30 (1966).

80. 389 U.S. at 355. In Berger v. New York, 388 U.S. 41 (1967), the Supreme Court stated that an order granting limited authorization of electronic surveillance devices "afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence." Thus, "no greater invasion of privacy was permitted than was necessary under the circumstance." *Id.* at 57.

81. *See* text accompanying note 14 *supra*.

82. Katz v. United States, 389 U.S. 347, 356-57 (1967).

83. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967); Cooper v. California, 386 U.S. 58 (1967); Brinegar v. United States, 338 U.S. 160 (1949).

the vice of the unlimited search—the invasion of an individual's privacy resulting from a "fishing expedition."[84] But the problems inherent in the unlimited search are not avoided by mandating extensive record keeping and reporting requirements. In effect, from the citizen's viewpoint, this changes the search from passive to active. The invasion of privacy is equally oppressive.[85]

Zones of Privacy

While the fourth amendment specifies the right of individuals to be secure in their households against unreasonable searches and seizures, the self-incrimination clause of the fifth amendment enables a citizen to create a "zone of privacy" which the government may not violate.[86] The fourth amendment had long been thought to protect a class of evidence which no government official could seize, with or without a warrant.[87] This type of evidence was commonly referred to as "mere evidence" and included, among other things, such testimonial items as private papers, records and documents, which also fell within the protection of the fifth amendment. The question now is whether such documents remain immune from seizure.

In *Warden v. Hayden*[88] the Supreme Court rejected any distinction between direct instrumentalities of a crime and "mere evidence." It found that the right of privacy is disturbed "no more by a search directed to a purely evidentiary object" than it is by a search directed to "an instrumentality, fruit, or contraband."[89] The Court further noted that papers and effects may be "mere evidence" in one case and an "instrumentality" in another. The majority then struck down the "mere evidence" rule, but refused to "consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."[90] The Court was, of course,

84. FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924); Stark v. Connally, 347 F. Supp. 1242, 1250 (N.D. Cal. 1972).

85. In United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), Judge Friendly indicated that introducing a diary into evidence, for example, might exceed the boundaries of a proper search under the fourth amendment. He observed that:

> The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries; most of us would feel rather differently with respect to a 'diary' whose cover page bore the title 'Robberies I have performed.'

Id. at 897.

86. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). *See generally* Beaney, *The Constitutional Right to Privacy*, 1962 SUP. CT. REV. 212; Griswold, *The Right to be Left Alone*, 55 NW. U.L. REV. 216 (1960); Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693 (1972).

87. Warden v. Hayden, 387 U.S. 294, 300 (1967).

88. *Id.*

89. *Id.* at 301-02.

90. *Id.* at 303. The Federal Circuit Courts of Appeals have now taken differing views in regard to this subject. *Compare* Hill v. Philpott, 445 F.2d 144 (7th Cir. 1970)

referring to testimonial items such as papers and other documents.

Justices Fortas and Warren, concurring, expressed their concern that the fourth amendment protections were being too readily abandoned and implied that some essential zone of privacy could well remain. In dissent, Justice Douglas specifically argued that the protection of the fourth amendment for books, pamphlets, papers, letters, documents and other personal effects remained intact. He said:

> Unless they are contraband or instruments of the crime, they may not be reached by any warrant nor may they be lawfully seized by the police who are in 'hot pursuit.' By reason of the Fourth Amendment the police may not rummage around among these personal effects, no matter how formally perfect their authority may appear to be . . . . Any invasion whatsoever of those personal effects is 'unreasonable' within the meaning of the Fourth Amendment . . . .[91]

Stating that "[p]rivacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses," Justice Douglas continued:

> The article may be a nondescript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing.[92]

If any stock is to be placed in fourth amendment protections, the immunity of private, communicative papers from search and seizure must continue to exist, at least insofar as those items which are also protected by the fifth amendment. And if that immunity does exist, then a comprehensive record keeping requirement for personal transactions is as offensive as the required reporting of that same information. As noted in *Marchetti v. United States*[93] when considering fifth amendment protections, there is no meaningful difference between recording and reporting requirements. Thus, if a person cannot be re-

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(search warrants may not reach personal documents which are self-incriminating), *with* United States v. Blank, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972) (communicative documents related to an illegal business are not immune to valid search warrants). The Ninth Circuit Court of Appeals recently joined the Seventh Circuit. See Vander Ahe v. Howland, No. 71-1982 at 16 (9th Cir. Mar. 26, 1973) (the Internal Revenue Service may not reach communicative documents through search warrants).

91. *Id.* at 321 (Douglas, J., dissenting).

92. *Id.* at 323.

93. 390 U.S. 39 (1968), *discussed*, note 41 *supra.*

quired to report his private transactions because they fall within a zone of protection, he cannot be required to record them for possible inspection under a subpoena or warrant.

While there can be no ready definition of a sacrosanct zone to determine which transactions and records are to be afforded absolute protection, it is possible to evaluate a given situation by weighing the governmental regulatory interest against the individual's right of privacy.[94] In assessing the government's interest, attention must be given to the potential effect of the legislation and its cost, both in economic and sociological terms. To the same extent that an individual must document, perhaps report, even the smallest currency transaction, he is potentially required to lay bare the most private details of his existence, albeit in a financial context. Check stubs in a drawer at home may, no less than a well-kept diary, provide an accurate, indeed intimate, journal of an individual's concerns.[95]

Required Records

To the extent the Act makes "required records" of private papers, it goes too far.[96] Since these "required records" can later be subpoenaed, the individual is being compelled to gather and retain the information to be later retrieved and used against him by the government.[97]

In *Shapiro v. United States*[98] a wholesaler of fruit and produce was obliged, by a regulation issued under the authority of the Emergency Price Control Act of 1942,[99] to keep and preserve for examination various records similar to those he customarily kept.[100] He was subsequently directed by administrative subpoena to produce certain of these records before attorneys of the Office of Price Administration. He complied, but asserted his constitutional privilege after being prosecuted for violating the Emergency Price Control Act. The petitioner, urging that the records had facilitated collection of evidence against him, claimed immunity from prosecution under the Act. The Supreme Court held that the Act did not confer immunity upon the petitioner, and that he could not properly claim protection of the privilege as to

94. *See* Jones v. United States, 362 U.S. 257 (1958); Gouled v. United States, 255 U.S. 298 (1921).

95. *See* Comment, *The Mere Evidence Rule: Doctrine or Dogma?*, 45 TEXAS L. REV. 526, 558-59 (1967). *See also* TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 64-71 (1969).

96. *See* Wilson v. United States, 221 U.S. 361 (1911).

97. The problem is compounded by the fact that the information obtained is generally available to other government agencies. 31 U.S.C. § 1061 (1970).

98. 335 U.S. 1 (1948).

99. 56 Stat. 23.

100. 8 Fed. Reg. 9548-49 (1943).

records he was required by administrative regulation to preserve. In this case, dealing primarily with the fifth amendment, it was held that the records in question were "public" in nature and that Congress had validly distinguished these required records from private papers. Therefore, the Court said, the privilege against self-incrimination which exists as to private papers does not protect individuals against being forced to produce records "required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established."[101]

Shapiro does not establish the parameters within which the government may require the keeping of records, although dicta in the case suggests the Court would recognize some limit.[102] The Court held, however, that whatever privilege exists as to private papers, it cannot be maintained in relation to required records.[103] The majority in *Shapiro* found that the record involved there was a sales record required to be maintained under an appropriate regulation.[104] It also found that the relevance of the required records to the lawful purpose of the Administrator was beyond question, and that the financial transaction which it recorded was of the type that could be legally entered into by the petitioner solely by virtue of the license granted to him by the statute.[105] The Emergency Price Control Act involved business sales records as well as wartime economic necessity. Those factors alone serve to distinguish that Act from the bank secrecy legislation under discussion.

Justice Frankfurter dissented in *Shapiro* and, in so doing, voiced objections which readily may be applied to the Bank Secrecy Act.[106]

101. 335 U.S. at 17, *citing* Wilson v. United States, 221 U.S. 361, 380 (1911) (emphasis deleted).

102. Speaking for the majority, Mr. Chief Justice Vinson noted that:

> It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activities sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator. It is not questioned here that Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the licensing and record-keeping requirements of the Price Control Act represent a legitimate exercise of that power.

Id. at 32.

103. *Id.* at 33.

104. *Id.* at 35.

105. *Id.*

106. The Acts are strikingly similar. The Emergency Price Control Act imposed four requirements:

Frankfurter's dissent noted the incursion of the Act and the Court's decision upon both fourth and fifth amendment protections. He criticized the majority for finding that when Congress prescribes a particular form for private individuals to follow in keeping records for a limited governmental purpose, Congress thereby removes such records from the prohibitions against self-incrimination and unreasonable searches and seizures.[107] Mr. Justice Jackson also dissented, noting the expansion of record keeping requirements "to the limits of . . . logic":

> It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to. The decision of today, applying this rule not merely to records specially required under the Act but also to records customarily kept, invites and facilitates that eventuality.[108]

As indicated earlier, there is no doubt that Congress may require the keeping and production of specified records. Such requirements must, however, be subject to appropriate limitations in connection with business matters Congress is entitled to regulate.[109] While the govern-

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> [P]ersons engaged in the vast range of business subject to the Act may be required to (1) make and keep records, (2) make reports and (3) permit the inspection and copying of records and other documents; such persons as well as others may be required to (4) 'appear and testify or to appear and produce documents, or both, at any designated place.' 335 U.S. at 41 (Frankfurter, J., dissenting).

It should be noted that, notwithstanding Frankfurter's dissent, there was arguably more justification for the Emergency Price Control Act than there would be for the Bank Secrecy Act. That is, the records involved were those directly related to the businesses and the transaction recorded was one specifically licensed under statute. Moreover, the majority opinions suggested that part of the rationale for the legislation was the fact that it was to be administered as an emergency statute. The Senate Committee on Banking and Currency amended a more lenient House bill, stating that:

> That Bill, when we were not actually at war, might have sufficed. If the authority granted had proved inadequate, additional powers might have been sought and there might have been time to do so. But the swiftly moving pace of war, with evidences of inflation already apparent, leaves little time for the luxury of experiment. The need for price stability is urgent . . . .

S. REP. No. 931, 77th Cong., 2d Sess. 3 (Jan. 2, 1942).

107. 335 U.S. at 36.

108. *Id.* at 77.

109. *See* Wilson v. United States, 221 U.S. 361 (1911); Paladini v. Superior Court, 178 Cal. 369, 173 P. 588 (1918); Louisville and N.R. Co. v. Commonwealth, 51 S.W. 167 (Ky. 1899); People v. Henwood, 123 Mich. 317, 82 N.W. 70 (1900); State v. Stein, 215 Minn. 308, 9 N.W.2d 763 (1943); State v. Davis, 108 Mo. 666, 18 S.W. 894 (1892); People v. Coombs, 158 N.Y. 532, 53 N.E. 527 (1899); State v. Farnum, 73 S.C. 165, 53 S.E. 83 (1905); State v. Davis, 68 W. Va. 142, 69 S.E. 639 (1910).

In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court held an 1874 revenue statute unconstitutional as repugnant to the fourth and fifth amendments. The statute required the defendant or claimant to produce in court his private books, invoices and papers on motion of the government attorney, or the allegations of the government would be taken as confessed. The statute had been applied to an invoice, which the government, as well as the defendant, treated throughout the trial and appellate proceedings as a private business record. The Court rejected the government's contention that the statute was constitutional:

> [C]ompulsory production of the private books and papers of the owner of goods

ment may require records in some way related to business functions, a law requiring all persons to maintain and produce records must inevitably resemble the kind of general warrant which is prohibited by the fourth amendment. Moreover, the fact that Congress has delegated this function to the Secretary of the Treasury raises even more serious questions concerning fourth amendment prohibitions.

Justice Rutledge's dissent in *Shapiro* recognized the problem of excessively broad requirements of record keeping and reporting. Stating that an overly comprehensive command might approach too closely the kind of general warrant the fourth amendment outlawed, the dissenting Justice continued that this "would be even more obviously true . . . in case Congress should delegate to an administrative or executive official the power to impose so broad a prohibiton."[110] Rutledge's objections to the Emergency Price Control Act are notable since that Act is so closely analogous to the Bank Secrecy Act:[111]

> The authority here conferred upon the Administrator by the Emergency Price Control Act, in reference to record-keeping and requiring production of records, closely approaches such a command. *Congress neither itself specifies the records to be kept and produced upon the Administrator's demand nor limits his power to designate them by any restriction other than that he may require such as he deems necessary or proper to assist him* . . . in carrying out his functions of investigation and prescribing regulations under, as well as of administration and enforcement of, the Act. And as the authority to specify records for keeping and production was carried out by the Administrator, the only limitation imposed was that the records should be such as had been 'customarily kept.' . . . Such a restriction is little, if any, less broad than the one concerning which I have indicated doubt that Congress itself could enact consistently with the Fourth Amendment.
>
> The authorization therefore is one which raises serious question whether, by reason of failure to make more definite specification of the records to be kept and produced, the legislation and regulations involved here do not exceed the prohibition of the Fourth Amendment against general warrants and unreasonable searches and seizures. There is a difference, of course, and often

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sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.

Id. at 634-35. Nevertheless, the majority of the Court carefully distinguished the "unreasonable search and seizure" affected by the statute before it from the "search and seizure" which Congress had provided for in revenue acts that required manufacturers keep certain records that were subject to inspection.

110. 335 U.S. at 75-76.

111. *See* text of note 106 *supra.*

> a large one, between situations where evidence is searched out and seized without warrant, and others where it is required to be produced under judicial safeguards. But I do not understand that in the latter situation its production can be required under a warrant that amounts to a general one. The Fourth Amendment stands as a barrier to judicial and legislative as well as executive or administrative excesses in this respect.[112]

As has been pointed out in the preceding discussion, the Bank Secrecy Act is objectionable on at least three grounds. First, it is expensive and unwieldy—prohibitively so. Second, there are serious constitutional infirmities, as has already been recognized by at least one court.[113] Finally, and this conclusion is not unrelated to the prior two, the Act strikes so indirectly at the heart of the problem that it is at once ineffective and oppressive. The Act, which deeply injects itself into peculiarly private areas, proceeds on a syllogism both fallacious and tyrannical—criminals use foreign bank accounts. He uses a foreign bank account. Therefore, he is a criminal. Further, while no clear standards exist indicating how far Congress may go in requiring individuals to maintain records, it is possible to establish a general rule of abstraction that the extent of the invasion of privacy is directly proportional to the distance between the prohibited action and the true offense.

The trend, however, appears to be toward greater governmental control of private financial affairs. Recently, in *Couch v. United States*,[114] the Supreme Court ruled that an individual forfeits any fifth amendment rights by turning over his tax records to an accountant. The Court refused to recognize a federal accountant-client privilege, and characterized the fifth amendment privilege as purely "personal," a privilege which is waived when the records leave the taxpayer's possession.[115] As a result of *Couch*, the government has added yet an-

112. 335 U.S. at 35 (emphasis added) (citations omitted).

113. Stark v. Connally, 347 F. Supp. 1242 (N.D. Cal. 1972).

114. 409 U.S. 322 (1973); *see* Comment, *Required Records Doctrine—The Privilege Against Self Incrimination, The National Firearms Act and the Federal Wagering Tax*, 4 LAND & WATER L. REV. 561 (1969).

115. Justice Douglas dissented, on the grounds that:

> It is the Constitution we are construing, not a legislative-judicial code of conduct that suits our private value choices or that satisfies the appetite of prosecutors for more and more short cuts that avoid constitutional barriers. Those constitutional barriers and the judicial traditions supporting them that are the sources of the privacy we value so greatly. That privacy 'protects people,' not places, under the Fourth Amendment . . . . And as already noted Boyd v. United States . . . held that when it comes to the 'forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of crime or to forfeit his goods'—that is an illustration of the manner in which 'the Fourth and Fifth Amendments run almost into each other.'

409 U.S. at 343.

> One's privacy embraces what the person has in his home, his desk, his files, his safe as well as what he carries on his person. It also has a very

other enforcement tool to its steadily-increasing collection. In this light, arguments over the inability to trace financial patterns of individuals should be given less credence.[116]

ALTERNATIVES

Modifications of the Act

At least two major modifications of the Bank Secrecy Act would be necessary to meet the foregoing objections. The alternative most immediately evident is that of requiring the government to employ subpoenas or warrants in order to obtain those records which it is entitled to review. Of course, this route is and has been available in the absence of the Act. It can be argued, however, that without broad record keeping provisions, a subpoena will be of questionable value. Yet if a proper balance in the relationship between governmental regulatory interests and personal privacy is to prevail, the government must accept the responsibility of restraint in its enforcement efforts.[117] Moreover, a particular person should be already under investigation before his records may be obtained, thus precluding a general "survey" of bank records.

The scope of the Act is also too broad. Congress should determine what records are actually necessary to be recorded and reported in order to accomplish the desired end; in effect, public records must be distinguished from private papers. In addition, or in the alternative, the Secretary's broad discretion established by the Act should be strictly controlled. Such controls could include limitations on the type of records required, the period of time in which they are to be kept and the amount of the transaction necessary to warrant governmental regulation.

International Cooperation

The basic problem—that of foreign bank secrecy—arises most noticeably in dealings with Switzerland since the Swiss view evasion of tax laws and avoidance of securities regulations as "fiscal" or "admin-

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meaningful relationship to what he tells any confidant—his wife, his minister, his lawyer, or his tax accountant. The constitutional fences of law are broken down by an ever-increasingly powerful government that seeks to reduce every person to a digit.

Id. (citations omitted).

116. *See also In re* Dionisio, 442 F.2d 276 (7th Cir. 1971), *rev'd*, 93 S. Ct. 764 (1973). In this case, the grand jury had subpoenaed 20 people to give voice samples. The Seventh Circuit held that this violates the fourth amendment insofar as the subpoena power is used to circumvent constitutional probable cause requirements. The Supreme Court reversed.

117. *See* 23 VAND. L. REV. 1359, 1363 (1970).

istrative" rather than criminal offenses. As a result, the Swiss government will not cooperate with foreign governments seeking to enforce their tax laws with criminal sanctions. Thus, bank secrecy is a special obstacle to the Internal Revenue Service and to the Securities and Exchange Commission.[118]

Secret bank accounts, not exclusively a Swiss concept,[119] originated in Switzerland in response to legislation by Nazi Germany that was designed to stem the flow of capital from that country. German citizens, under threat of death, were ordered to declare foreign holdings. Anticipating confiscation of their property, many Germans transferred assets to Swiss banks on the assumption that traditionally neutral Switzerland would not divulge information on personal finances. In 1934, the Swiss National Council codified the concept of banking secrecy.[120]

Swiss law has traditionally recognized the right of the individual to a zone of privacy (*Geheimsphaere*) extending to his financial affairs.[121] Violation of this right is actionable under tort principles as well as under a theory of implied contractual obligations in the case of

118. Mueller, *The Swiss Banking Secret*, 18 INT'L & COMP. L.Q. 361, 374 (1969). *See also* statement of Fred M. Vinson, Jr., Assistant Attorney General, *Hearings on the Legal and Economic Impact of Foreign Banking Procedures on the United States Before House Comm. on Banking and Currency*, 90th Cong., 2nd Sess., at 6 (1968) [hereinafter cited as *1968 Hearings*]; statement of Robert M. Morganthau, former United States Attorney S.D.N.Y., 1970, *Hearings on H.R. 15073 Before the House Comm. on Banking and Currency*, 91st Cong., 1st and 2nd Sess. 90 (1969, 1970) [hereinafter cited as *1969 Hearings*].

119. Numbered bank accounts also exist in banks in Lebanon, Urguay, Hong Kong, Singapore and the Bahamas.

120. Article 47 of the Swiss Banking Law of November 8, 1934, revised March 11, 1971, stipulates in part:

> 1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, authorized agent, liquidator or commissioner of a bank, as a representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed 6 months or by a fine not exceeding Sfrs. 50,000.
> 2. If the act has been committed by negligence, the penalty shall be a fine not exceeding Sfrs. 30,000.
> 3. The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.

ST. G.B. art. 273 supplements the preceding section, stating that:

> Whosoever explores trade secrets in order to make them accessible to foreign governments or foreign enterprises, or foreign organizations, or their agents and whosoever makes such trade secrets accessible to foreign governments, or organizations or private enterprises or to agents thereof, will be punished by imprisonment.

It should be noted that all Swiss bank accounts are secret, not just so-called "numbered" accounts. According to the Swiss Bank Corporation, "[b]y numbering an account, a bank reduces the chances that any of its personnel will be induced through indiscretion, bribery or blackmail to divulge information about a customer."

121. *See* Meyer, *The Banking Secret and Economic Espionage in Switzerland*, 23 GEO. WASH. L. REV. 284 (1955). *See generally* Thomason, *Secret Foreign Bank Accounts*, 6 TEX. INT'L L. FORUM 105 (1970).

banks.[122] This does not mean, however, that Swiss authorities are uncooperative in all cases. For example, they will help in any case where extradition of an accused might be possible. A United States treaty with Switzerland provides that both countries shall surrender persons who are charged with or convicted of certain criminal acts. The treaty further provides that the surrender shall be made in accordance with Swiss law at the time of the demand.[123]

Extradition is available in the case of such offenses as obtaining money by false pretenses and receiving money known to have been fraudulently obtained. Since these acts are criminal in both countries, and since judicial assistance is available when the act is criminal in both jurisdictions, there is no bar to Swiss cooperation. On the other hand, it appears that to the extent information obtained from bank records would be used by the United States to prosecute other crimes, such as tax evasion, Swiss judicial assistance would not be available.

A recent case suggests that a different procedural tack might be utilized, however.[124] An American, Francis M. Rosenbaum, and his accomplices, were indicted by a grand jury in the District of Columbia on charges of fraud, submission of false cost statements and acceptance of kickbacks in regard to supplying rocket launchers to the United States Navy. Part of the alleged fraud involved false invoices submitted by one Johann Senn, a Swiss citizen, and another Swiss banker who had established dummy European firms. Amounts were assumedly paid to these "firms" for materials never received. The Navy, receiving word of the alleged fraud, brought charges through the Justice Department. Upon receipt of a report from the Justice Department, the Zurich District Prosecutor initiated a criminal investigation of Senn and, in the course of the investigation, directed that various documents in Senn's office at the bank (he was an executive of the *Zurich Bank Fuer Handel und Effekten*) be impounded. The United States requested permission to examine the criminal files. The Swiss investigating judge requested that the United States formally declare that evidence obtained from the files would not be used for "fiscal" purposes, and the United States agreed. In return, the Zurich District Prosecutor issued an order granting legal representatives of the United States all

122. ZGB § 28 and OR §§ 41, 49 codify the right of an individual to sue for injunctive and legal relief.

123. Treaty with Switzerland for the Extradition of Criminals, May 14, 1900, art. I, 31 Stat. 1928 (1900); T.S. No. 354.

124. N. v. United States of America, District and Cantonal Prosecutors of Zurich, 95 BGE I 439 (Oct. 1, 1969) (Switz.) [1970] J. Trib. I. 290; X and Y Bank v. United States of America, District and Cantonal Prosecutors of Zurich, 95 BGE I 451 (Oct. 1, 1969) (Switz.) [1970]. For an excellent note concerning the details of this matter, see Note, *Banking Secrecy*, 12 HARV. INT'L L.J. 579 (1971).

rights of an "injured party" under Swiss law, including the right to inspect the files containing the bank records.[125] The decision to allow examination of this material by classifying the United States as an "injured party" was appealed to the Office of the Zurich Cantonal Prosecutor *(Staatsanwaltschaft)* and then to the Swiss Federal Supreme Court. That court held that cantonal authorities did not abuse their discretion in granting the United States such status. As one commentator has noted, the existence of the local statute allowing inspection of the bank records[126] was not perhaps the *sine qua non* of the American prosecutory efforts (the defendants later pleaded guilty):

> [R]ather, the same evidence might possibly have been secured through a judicial assistance, and the information in fact obtained was deemed 'cumulative.' *Yet the Swiss proceedings, in marking the first occasion in which bank records were made available to the United States other than by judicial assistance, contrasts suggestively with the general reluctance Swiss authorities have exhibited in granting access to bank files.*[127]

The ultimate impact of this procedural approach is presently unclear.[128] In those cases where cantonal procedures make *more* information available to Swiss authorities than would be available to United States authorities through judicial assistance, however, the case may well provide more ready access to the desired information.

Individually, none of the possible alternatives posited can resolve the problem of secret foreign bank accounts. But perhaps a combination of some redrafting of the Act as suggested and increased international cooperation in the form of bilateral and multilateral treaties may lead toward a better solution than that given by Congress in the present Bank Secrecy Act.

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125. Section 395 of the Zurich Code of Criminal Procedure (*Strafprozessordnung*) entitled "Those persons who were, or are threatened to be, directly injured by acts subject to judgment in a court of law (Injured [party]) [*Gesehaedigte*] to various legal remedies delineated by the Chapter: "[including] the injured party must be given an opportunity to inspect the files and to be present at the interrogation of the accused, so far as this can be accomplished without prejudice to the purpose of the investigations."

126. *Strafprozessordnung* (Code of Criminal Procedure of the Canton of Zurich) § 10.

127. Note, *supra* note 124, at 583. The defendants argued that section 273 of the Federal Penal Code of Switzerland precluded inspection of bank records by the United States. This section prohibits divulgence of business secrets to private enterprises and foreign organizations. The court held, however, that the Justice Department's formal declaration of intent not to use the information for prosecution of "fiscal" acts negated any attack on protected interests under that section and thus did not violate a Swiss law.

128. See Note, *supra* note 124, at 591, where the author indicates that United States access to Swiss bank records may not have been significantly expanded. Zurich bank files may only be inspected in investigations pursuant to Zurich law when Swiss criminal standards are met. In many cases, notes the author, such evidence might be more readily available through judicial assistance. Moreover, the effect of the case may be further limited since procedural codes of various Swiss jurisdictions designate bank records as privileged information. See Schaefer, *Das Bangeheimnis*, 49 SJZ 333, 334 (1953).

CONCLUSION

Alternatives do exist then. To say that those which have been proposed would be less desirable than the broad coverage of the Bank Secrecy Act would display an insensitivity to both the right of privacy and economic realities. True, the Act makes it easier for the government to enforce its laws against the so-called white-collar criminal, but ease of enforcement is insufficient to save the Act from constitutional challenge. As the Supreme Court of the United States has stated in reference to other laws, "[b]ecause that right is so fundamental to our scheme of individual liberty its restriction may not be justified by need to ease the administration of otherwise valid criminal laws."[129]

Thus, in examining regulatory statutes of this nature, a constantly sensitive perspective must be kept as to the relationship between individual privacy and the recognized needs of the government to maintain security. That perspective is lacking in the Bank Secrecy Act, and present challenges must, therefore, be regarded as proper.

129. Stanley v. Georgia, 394 U.S. 557, 568 (1969), *citing* Smith v. California, 361 U.S. 147 (1959).