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THE EFFECT OF THE BANK SECRECY ACT ON STATE LAWS

United States Congress. Senate. Committee on Banking,
Housing and Urban Affairs. Subcommittee on
Financial Institutions. **HEARINGS**

BEFORE THE

DEC 10
1974

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS

OF THE

**COMMITTEE ON
BANKING, HOUSING AND URBAN AFFAIRS**

UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 2200

TO GOVERN THE DISCLOSURE OF CERTAIN FINANCIAL INFORMATION BY FINANCIAL INSTITUTIONS TO GOVERNMENTAL AGENCIES, TO PROTECT THE CONSTITUTIONAL RIGHTS OF CITIZENS OF THE UNITED STATES AND TO PREVENT UNWARRANTED INVASIONS OF PRIVACY BY PRESCRIBING PROCEDURES AND STANDARDS GOVERNING DISCLOSURE OF SUCH INFORMATION, AND FOR OTHER PURPOSES

LOS ANGELES, CALIF.—JULY 26, 1974

SAN FRANCISCO, CALIF.—JULY 29, 1974

Printed for the use of the
Committee on Banking, Housing and Urban Affairs



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THE EFFECT OF THE BANK SECRECY ACT ON STATE LAWS

FRIDAY, JULY 26, 1974

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS,
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS,
Los Angeles, Calif.

The subcommittee met at 9:30 a.m. at 11000 Wilshire Boulevard, Los Angeles, Calif.

Present: Senator Alan Cranston and Congressman Pete Stark.

Senator CRANSTON. The hearing will please come to order.

I want to welcome Pete Stark, Congressman from northern California and a member of the House Banking and Currency Committee.

Congressman STARK. Thank you, Senator. I am delighted to be here.

Senator CRANSTON. I know what we do here can have impact on the House side as well as the Senate side.

SENATOR CRANSTON'S OPENING STATEMENT

Senator CRANSTON. The Subcommittee on Financial Institutions will begin 2 days of hearings on regulations issued by the Department of the Treasury to implement the Currency and Foreign Transactions Reporting Act of 1970, commonly known as the Bank Secrecy Act.

The principal purpose of the Bank Secrecy Act is to enable law enforcement authorities to obtain the evidence needed to prosecute white collar criminals.

The act was designed to achieve these objectives by requiring financial institutions to maintain certain records which the Secretary of the Treasury determined to have a high degree of usefulness in tax, criminal, or regulatory proceedings.

In prescribing these recordkeeping requirements, Congress clearly did not intend for law enforcement officials to have access to bank records without obtaining a subpoena.

For example, the report of the Senate Banking Committee on the 1970 legislation states:

Access by law enforcement officials to bank records required to be kept under this title would, of course, be only pursuant to a subpoena or other lawful process as is presently the case.

Unfortunately, this legislative intent may not have been realized in the regulations issued.

The regulations do not outline the procedures whereby Federal law enforcement officials can obtain access to records which banks and other financial institutions are required to keep.

Nor do these regulations require a subpoena or other legal process before a bank can release an individual's record.

The heart of the matter seems to be subpart C of the regulations (sec. 103.31-37), which invokes the general authority delegated to the Secretary of the Treasury in sections 101 and 123 of the statutes to require every bank to maintain:

(1) A record of each depositor's social security or taxpayer identification number;

(2) The original or a microfilm copy of each check, money order, ledger card, signature authority document, and a wide variety of other items relating to the account holder's financial activities;

(3) To file or store these documents "in such a way as to be accessible for 5 years."

The Department's regulations create a situation in which the Federal Government requires banks and financial institutions to maintain massive records concerning the financial dealing of untold numbers of Americans for long periods of time without imposing any limitation on the disclosure or use of this information, or establishing any procedure by which an individual might protect against the possibility of it being misused.

The risk for our citizens are not illusory or hypothetical.

In 1972 Richard Stark of Corte Madera opened his monthly bank statement and found an interdepartmental bank memo wrapped around his checks.

The memo, which bank officials said was included in the envelope by mistake, read:

This memo is to authorize you to read checks to the FBI before sending the statement to the customer.

Richard Stark has, since 1964, been funding organizations apparently considered radical by the FBI.

If this mistake had not occurred he would not have known the FBI was monitoring his checking account.

To this day Richard Stark has been charged with no crime.

Provisions of this act allowing law enforcement officials free access to checking accounts led to the location of Daniel Ellsberg's psychiatrist by the FBI and on to the burglary of his office which led to the conviction of John Ehrlichman for his part in that act.

This free access has led to the harassment of citizens who oppose the Vietnam war, people who committed no crime but were not on good terms with the FBI.

The congressional hearings on the Fair Credit Reporting Act contain ample evidence that banks and credit bureau records are often made available to Federal agents without the minimum safeguard of prior issuance of a subpoena.

Unlimited access to bank records by the Government can have a chilling effect on freedom of speech and association.

Today, in this hearing I hope to gain further insight on how to reconcile the rights of the public with adequate law enforcement.

I am certain these two vital interests can be reconciled. I know they must be reconciled.

[Copy of S. 2200 follows:]

93d CONGRESS
1st SESSION

S. 2200

IN THE SENATE OF THE UNITED STATES

JULY 19, 1973

Mr. CRANSTON (for himself, Mr. BROCK, Mr. ERVIN, Mr. GRAVEL, Mr. HUMPHREY, Mr. MATHIAS, Mr. PACKWOOD, and Mr. TUNNEY) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing and Urban Affairs

A BILL

To govern the disclosure of certain financial information by financial institutions to governmental agencies, to protect the constitutional rights of citizens of the United States and to prevent unwarranted invasions of privacy by prescribing procedures and standards governing disclosure of such information, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,*

3 **SHORT TITLE**

4 SECTION 1. This title may be cited as the "Right to
5 Financial Privacy Act of 1973".

6 **FINDINGS AND PURPOSE**

7 SEC. 2. (a) The Congress finds and declares that—

1 (1) procedures and policies governing the relationship between financial institutions and Government agencies have in some cases developed without due regard to citizens' constitutional rights;

5 (2) the confidential relationships between financial institutions and their customers and built on trust and must be preserved and protected; and

8 (3) certain reporting and recordkeeping requirements imposed on financial institutions by Government agencies constitute a burden on interstate commerce.

11 (b) The purposes of this Act are to protect and preserve the confidential relationship between financial institutions and their customers and the constitutional rights of those customers and to promote commerce by prescribing policies and procedures to insure that customers have the same right to protect against unwarranted disclosure of customer records as if the records were in their possession.

18 **DEFINITIONS**

19 SEC. 3. For the purposes of this Act—

20 (a) The term "financial institution" means—

21 (1) a bank or trust company organized under the laws of any State or of the United States;

23 (2) a savings and loan association or building and loan association organized under the laws of any State or of the United States;

1 (3) a credit union organized under the laws of any
2 State or of the United States;

3 (4) any other organization chartered under the
4 banking laws of any State and subject to the supervi-
5 sion of the bank supervisory authorities of a State.

6 (b) The term "financial records" means any original
7 or any copy of—

8 (1) any debit or credit to a customer's deposit or
9 share account with a financial institution;

10 (2) any record held by a financial institution con-
11 taining information pertaining to a customer's relation-
12 ship with the financial institution.

13 (c) the term "person" means an individual, partner-
14 ship, corporation, association, trust, or any other legal entity
15 organized under the laws of a State or the United States.

16 (d) the term "customer" means any person patronizing
17 a financial institution and utilizing service offered by that
18 financial institution.

19 (e) the term "supervisory agency" means—

20 (1) the Federal Deposit Insurance Corporation;

21 (2) the Federal Savings and Loan Insurance
22 Corporation;

23 (3) the Federal Home Loan Bank Board;

24 (4) the National Credit Union Administration;

25 (5) the Federal Reserve Board;

- 1 (6) the Comptroller of the Currency;
- 2 (7) any State department or agency which is re-
- 3 quired by law to perform periodic examination or audit
- 4 of the financial records of non-Federal financial institu-
- 5 tions; or
- 6 (8) any authority of any State or local government
- 7 which the Secretary of the Treasury determines by regu-
- 8 lation exercises supervisory functions substantially simi-
- 9 lar to those exercised by the agencies referred to in
- 10 clauses (1) through (7) of this paragraph.

11 CONFIDENTIALITY OF RECORDS—GOVERNMENT

12 SEC. 4. (a) Except as provided in section 10, no officer,

13 employee, or agent of the United States, or any agency or

14 department thereof, or of State or local governments may

15 obtain copies of, or the information contained in, the finan-

16 cial records of any customer from a financial institution unless

17 the financial records are described with particularity and—

18 (1) such customer has authorized such disclosure

19 in accordance with section 6; or

20 (2) such financial records are disclosed in response

21 to an administrative subpoena or summons which meet

22 the requirements of section 7; or

23 (3) such financial records are disclosed in response

24 to a court order which meets the requirements of section

25 8; or

1 (4) such financial records are disclosed in response
2 to a judicial subpoena which meets the requirements of
3 section 9.

4 (b) In any proceeding relating to such subpoenas, summons,
5 and court orders, the customer shall have the same
6 rights as if the records were in his possession.

7 **CONFIDENTIALITY OF RECORDS—FINANCIAL**

8 **INSTITUTIONS**

9 SEC. 5. (a) No financial institution, or any officer, employee, or agent of a financial institution, may provide to
10 any officer, employee, or agent of the United States, or any
11 agency or department thereof, or of State or local governments copies of, or the information contained in, the financial
12 records of any customer except in accordance with the requirements of section 6, 7, 8, and 9.

13 (b) This section shall not preclude a financial institution from notifying appropriate officials of Federal, State,
14 or local governments of violations of the criminal law suspected of being committed against the financial institution
15 itself: *Provided, however,* That any access to customer records shall be governed by section 4 and 5(a) of this law.

16 **CUSTOMER AUTHORIZATION**

17 SEC. 6. (a) A customer may authorize disclosure under
18 section 4(a) (1) if he or those seeking disclosure furnish

1 to the financial institution a signed and dated statement by
2 which the customer—

3 (1) authorizes such disclosure for a period not in
4 excess of one year; and

5 (2) identifies the financial records which are au-
6 thorized to be disclosed; and

7 (3) specifies the purposes for which, and the agen-
8 cies to which, such records may be disclosed.

9 (b) No such authorization shall be required as a con-
10 dition of doing business with such financial institution.

11 (c) The financial institution shall keep a record of all
12 examinations of the customer's financial records, including the
13 identity and purpose of the person examining the financial
14 records, the governmental agency or department which he
15 represents, and a copy of the authorization. The financial in-
16 stitution shall notify the customer that he has the right at
17 any time to revoke any authorization of disclosure and to
18 obtain a copy of the aforementioned record of examinations.

19 **ADMINISTRATIVE SUBPENAS AND SUMMONS**

20 SEC. 7. (a) An officer, employee, or agent of the United
21 States or any department or agency thereof or of State or
22 local governments may obtain financial records under section
23 4 (a) (2) pursuant to an administrative subpoena or summons
24 otherwise authorized by law only if:

25 (1) those serving such administrative summons or

1 subpena have first served a copy of the subpena or sum-
2 mons on the customer in person or by certified mail,
3 return receipt requested; and

4 (2) the subpena or summons includes the name of
5 the intended recipient and, if applicable, the statutory
6 purpose for which the information is to be obtained; and

7 (3) the customer directs the financial institution to
8 comply, or

9 (4) the financial institution is served with a court
10 order directing it to comply, issued after notice to and
11 opportunity for the customer to challenge such subpena
12 or summons.

13 (c) Nothing in this Act shall preclude a financial insti-
14 tution from notifying a customer of the receipt of an admin-
15 istrative summons or subpena.

16 SEARCH WARRANTS

17 SEC. 8. An officer, employee, or agent of the United
18 States or any agency or department thereof, or of State or
19 local governments, may obtain financial records under sec-
20 tion 4 (a) (3) only if he obtains a search warrant pursuant
21 to the Federal Rules of Criminal Procedure or to applicable
22 State law. The search warrants shall be served upon both
23 the customer and the financial institution. Examination of
24 financial records may occur as soon as the warrant is served
25 on the financial institution and the customer.

1

JUDICIAL SUBPENA

2 SEC. 9. An officer, employee, or agent of the United
3 States or any department or agency thereof or of State or
4 local governments may obtain financial records under section
5 4(a) (4) pursuant to a judicial subpoena only if:

6 (a) The subpoena specifies—

7 (1) that the subpoena is issued for good cause and
8 is material to the inquiry pursuant to which the subpoena
9 has been issued; and

10 (2) that a copy has been served on the customer,
11 in person or by certified mail, return receipt requested;
12 and

13 (b) Ten days pass without notice to the financial insti-
14 tution that the customer has moved to quash the subpoena.
15 Where so notified, the financial institution may comply with
16 the subpoena only when it is served with a court order direct-
17 ing it to comply, issued after determination of the customer's
18 motion.

19 SEC. 10. Copies of, or the information contained in,
20 financial records obtained pursuant to section 4 shall not
21 be used or retained in any form for any purpose other than
22 the specific statutory purpose for which the information
23 was originally obtained, nor shall such information or rec-
24 ords be provided to any other governmental department
25 or agency or other person except where the transfer of such
26 information is specifically authorized by statute.

1

EXCEPTIONS

2 SEC. 11. (a) Nothing in this title prohibits the dis-
3 semination of any financial information which is not identi-
4 fied with or identifiable as being derived from the finan-
5 cial records of a particular customer.

6 (b) Subject to the limitations in section 10, nothing
7 in this title prohibits examination by or disclosure to any
8 supervisory agency of financial records solely in the exer-
9 cise of its supervisory function or the making of reports
10 or returns required under the Internal Revenue Code of
11 1954.

12 **RECORDKEEPING AND REPORTING**

13 SEC. 12. Notwithstanding any other provision of law,
14 the Secretary of the Treasury may not require an institution
15 to maintain any financial records or to transmit any reports
16 relating to customers unless—

17 (a) such records are required for use by a super-
18 visory agency in the supervision of that institution; or,
19 (b) such records are required to be maintained by
20 the Internal Revenue Code of 1954.

21 **JURISDICTION**

22 SEC. 13. An action to enforce any provision of this Act
23 may be brought in any appropriate United States district
24 court without regard to the amount in controversy or in any
25 other court of competent jurisdiction within three years from

1 the date on which the violation occurs or the date of dis-
2 covery of such violation whichever is later.

3 **CIVIL PENALTIES**

4 SEC. 14. (a) Any person, financial institution, or any
5 officer, employee, or agent of a financial institution, of the
6 United States or any agency or department thereof, or of
7 State or local governments, who obtains or discloses one or
8 more financial records in violation of this Act is liable to
9 the customer to whom such records relate in an amount
10 equal to the sum of—

11 (1) \$100 for each violation,
12 (2) any actual damages sustained by the customer
13 as a result of the disclosure,

14 (3) such punitive damages as the court may allow,
15 where the violation is found to have been knowing or
16 willful, and

17 (4) in the case of any successful action to enforce
18 liability under this section, the cost of the action to-
19 gether with reasonable attorney's fees as determined by
20 the court.

21 **CRIMINAL PENALTIES**

22 SEC. 15. (a) Any person, officer, employee, or agent
23 of a financial institution, of the United States, or any agency
24 or department thereof, or of State or local governments who
25 willfully and knowingly participates in a violation of this

1 title shall, upon conviction, be imprisoned for not more than
2 one year, or fined not more than \$5,000, or both.

3 (b) Any person, officer, employee, or agent of a financial
4 institution, the United States or any agency or department
5 thereof, or of State or local governments, who induces
6 or attempts to induce a violation of this title shall, upon conviction,
7 be imprisoned for not more than one year, or fined
8 not more than \$5,000 or both.

9 INJUNCTIVE RELIEF

10 SEC. 16. In addition to any other remedy contained in
11 this chapter or otherwise available, injunctive relief shall be
12 available to any person aggrieved by a violation or threatened
13 violation of this title. In the event of any successful
14 action, costs together with reasonable attorney's fees as determined
15 by the court may be recovered.

16 WAIVER OF RIGHTS

17 SEC. 17. No waiver by of any right hereunder shall be
18 valid, whether oral or written, and whether with or without
19 consideration.

20 INCONSISTENT PROVISIONS OF LAW

21 SEC. 18. Should any other law of the United States
22 or any other jurisdiction grant or appear to grant power or
23 authority to any person to violate the provisions of this
24 chapter, the provisions hereof shall supersede and protanto

1 override and annul such law, except those statutes herein-
2 after enacted which specifically refer to this title.

3 **SEPARABILITY**

4 SEC. 19. If any provision of this Act, or the applica-
5 tion of such provision to any person or circumstance, shall
6 be held invalid, the remainder of this Act, or the applica-
7 tion of such provisions to persons or circumstances other
8 than those as to which it is held invalid, shall not be affected
9 thereby.

10 **EFFECTIVE DATE**

11 SEC. 20. The provisions of this title shall become effec-
12 tive upon the expiration of one hundred and eighty days
13 following the date of enactment.

Senator CRANSTON. Pete, do you have any opening statement?

OPENING STATEMENT OF CONGRESSMAN FORTNEY H. STARK, JR.

Congressman STARK. I am pleased to join with Senator Cranston today in opening hearings on legislation we jointly introduced known as the "Right to Financial Privacy Act."

In 1972, I filed suit to have the Bank Secrecy Act declared unconstitutional because it permits Government agents to pry into the private financial affairs of bank customers without restriction.

I was a bank president at the time, and it was my feeling that the act virtually ordered me to spy on my customers.

I was represented in the suit by the American Civil Liberties Union and later joined by the California Bankers Association.

The case went to the U.S. Supreme Court, which refused to reverse the regulation and passed the buck to Congress.

The legislation proposed by Senator Cranston and myself—which has wide bipartisan support—would remedy what we consider to be an intolerable potential for invading the privacy of individual bank customers.

Government agents can now obtain information from private bank accounts without the individual's consent or knowledge, if only to satisfy a whim. We consider this a chilling threat to personal freedom. A customer has a right to expect that his relationship with his financial institution will be wholly confidential.

The bills that Senator Cranston and I have introduced would place an obligation on financial institutions not to disclose information from records except by customer consent, or under subpoena, search warrant, or other court order. In drafting the bills, every effort was made to balance the rights of individuals with the practical requirements of investigators and law enforcement agents seeking criminal information from bank accounts.

I believe today's hearings will be only the beginning of much congressional debate on this critical legislation. The issue of privacy in all aspects of our lives has taken on a great deal of importance in the past year. I am hopeful that we will be able to move these bills through Congress to become law by early 1974.

I want to thank Alan Sieroty who is conducting hearings in Sacramento, I understand with great skill.

Assemblyman SIEROTY. Thank you.

I might say your opening statement I think very succinctly and that of Congressman Stark also puts the issue very clearly what is involved here. And, in attempting to do a similar thing in Sacramento on the State level, I have been amazed frankly at the number of State agencies which feel they are entitled to access to bank records.

Frankly, I was surprised at the extent to which our State and local governmental agencies think this is a right for them to be able to get into bank records. So, it is a much larger problem than I thought when we began this. I think you will find it true in the Federal agencies as well as local.

Senator CRANSTON. Thank you.

Now, we will call upon our first witness of the day, Fred Pownall, counsel, California Bankers Association.

STATEMENT OF FREDERICK M. POWNALL, COUNSEL, CALIFORNIA BANKERS ASSOCIATION

Mr. POWNALL. Thank you, Senator.

My name is Frederick M. Pownall. I am a partner in the San Francisco law firm of Landels, Ripley & Diamond and counsel to the California Bankers Association which this committee has been aware has been involved with this situation for some time.

I am appearing here on behalf of my client the California Bankers Association which includes within its membership every bank in California.

The association strongly supports the objectives of protecting the confidentiality of the bank-customer relationship which are embodied in your bill, S. 2200, and Congressman Stark's bill H.R. 9563, and parallel bills presently before the Congress and, of course, in Assemblyman Sieoty's bill.

My presentation today, with your permission, will be divided into three parts: (a) A brief review of the Bank Secrecy Act of 1970 (Public Law 91-508); (b) a review of the recent U.S. Supreme Court decision in the case of *California Bankers Association v. Schultz* which challenged the constitutionality of the Bank Secrecy Act; and (c) a review of assembly bill 1609 presently before the California Legislature and its relation to proposed Federal legislation.

a. The Bank Secrecy Act (Public Law 91-508, act of October 26, 1970, 84 Stat. 1114-12 U.S.C. SS1829b, 1730d, 1951-59 and 31 U.S.C. SS1051-1122).

The Bank Secrecy Act has two parts:

1. Title I and its implementing regulations require banks and other financial institutions to retain virtually every piece of paper relating to a bank customer which comes into its possession—checks, loans applications and information, deposit and withdrawal slips, and the like;

2. Title II requires banks and others to report automatically to the Secretary of the Treasury certain domestic and foreign currency transactions designated by the Secretary.

With respect to the recordkeeping requirement, it should be understood that many banks have found such records to be unnecessary to the efficient operation of the banking business, superfluous in light of modern data processing capabilities, and thus, absent the recordkeeping requirement, would not retain such information on bank customers.

The erstwhile purpose of the Bank Secrecy Act in requiring these records and reports is that they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." Since the term "criminal, tax, and regulatory investigations and proceedings" includes in its broad sense virtually every function of Government, what we are being told by the Bank Secrecy Act is that the Government at large might find it "useful" to be able to review any citizen's financial records for practically any reason. Yet nowhere in the Bank Secrecy Act is there any provision for notifying citizens that this surveillance is taking place on a regular or specific basis. More importantly, nowhere in the Bank Secrecy Act is there any provision establishing limits on the purposes for which the Government can require the banks to report information on customers. Nor is there any realistic limitation on the dissemination of such information once it is in the Government's hands. The act does provide that the Secretary of the Treasury shall only make available to other Federal agencies bank customer information "for a purpose consistent with the provisions" of the act, but as we have seen, the purpose of the act is to provide any information that is "useful" to Government. We must ask whether this is any limitation at all.

At the time of passage of the Bank Secrecy Act, Congress was told by the bill's authors that their goal was "to reduce the incidence of white collar crime" (116 Cong. Rec. 32627) and that the Bank Secrecy Act "will be the longest step in the direction of stopping crime than any other we have had before the Congress in a long time" (116 Cong. Rec. 16951).

We must sincerely question whether the Congress weighed the value of this alleged law enforcement tool against the invasion of privacy that would be imposed on the vast majority of Americans who obey the law and who do not like the idea of the Government monitoring their day-to-day financial activities.

We believe that the theory of this incredibly massive recordkeeping and reporting scheme—that it will uncover criminal wrongdoing—is farfetched. Simple statistics give an inkling of how farfetched. The 1972 Federal Deposit Insurance Corporation Summary of Accounts and Deposits in All Commercial Banks indicates that as of June 30,

1972, there were 200,700,515 bank accounts in the United States. The 1972 Federal Bureau of Investigation Uniform Criminal Reports states that the total number of estimated arrests that year for all crimes in the United States including homicide, arson, and the like was 8,712,400. Thus, even if we make the totally unfounded assumption that financial records have something to do with every crime, less than 4.4 percent of the 200 million bank accounts would be "useful."

The 1972 FBI reports also indicate that there were 78,600 arrests for illegal gambling—that figure would account for $\frac{1}{100}$ percent (0.04 percent) of bank accounts. Similarly there were 527,400 arrests for violation of State and Federal drug abuse laws— $\frac{3}{10}$ percent (0.3 percent) of bank accounts. Since drug abuse and gambling laws were the primary examples used in promoting the Bank Secrecy Act domestic recordkeeping and reporting requirements, we are asked to assume that the Congress intentionally ordered banks to keep records of all 200 million accounts comprising at least 50 billion separate items in order to obtain information on, at most, less than one-half of 1 percent of bank accounts.

We thus question whether the means adopted are appropriate to the end—are't the surveillance techniques applied to 200 million American bank accounts grossly disproportionate to the goal sought to be achieved? Is it really worthwhile to arguably void the constitutional protections and place in jeopardy the confidential treatment of 99½ percent of American bank customers to have a look at the other one-half percent? We think not, and we ask the committee to review the rationale of the Bank Secrecy Act and, at the least, to provide procedural safeguards to limit governmental access to bank customer records, if it decides that such records must be kept.

b. *California Bankers Association v. Schultz*, — U.S. —, 42 Law Week 4481, 94 S. Ct. Rptr. 1494 April 1, 1974.

On April 1, 1974, the U.S. Supreme Court handed down its decision on the constitutionality of the aforementioned Bank Secrecy Act. While its decision is illuminating in several respects, it is our position that the Court's majority, through various procedural devices, put off to another time the most difficult constitutional questions which the Bank Secrecy Act poses.

Specifically, the Court avoided deciding the two principal issues in the case. The first issue was whether the act's recordkeeping requirements effectively undermine the bank customer's constitutional right to protect his private papers against unreasonable searches and seizures. The second issue was whether the bank customer's constitutional rights were voided by the requirement that banks automatically report information to the Government without notice to the customer and without intervention by an impartial magistrate.

The first issue, stated another way, is that but for the act's requirement that the bank act as the Government agent in keeping specified records, thus making such records "third party papers" for legal purposes, any governmental agency attempting to review such papers in the hands of the bank customer would have had to meet and overcome all the various protections which the Bill of Rights grants to that customer. Or, put still another way, the recordkeeping requirements of the Bank Secrecy Act, whatever else they were intended to do, have removed fourth and fifth amendment protections from the bank cus-

tomer. The Court stated that this issue was "premature" and that decision must await a specific case where the customer had allegedly been injured. When such a case will reach the Court is, of course, anybody's guess, and in the meantime vast amounts of information are being accumulated by the banks and presumably being used by governmental agencies.

With respect to the second issue, the Court found that no depositor had standing to challenge the reporting requirements of the act since no depositor had alleged engaging in transactions covered by the regulation. Put another way, we will have to wait until some bank customer goes over the proverbial governmental waterfall before we can decide what to do to prevent others being hurt. If this does not make sense to you in this situation, it does not make sense to us either. The Congress can quickly remedy the situation, however, by modifying the recordkeeping and reporting requirements of the act. In the meantime, though, it should be clear that banks are making these reports covering their customers to the Federal Government on a daily basis.

We mention the above two points only because we believe that many have obtained the impression from stories in the press that the Supreme Court has upheld the constitutionality of the Bank Secrecy Act totally and completely and "that is that." Such is not the case and Congress has the ability to clarify or reevaluate its position on the act and provide procedural safeguards to protect citizens from unwarranted governmental intrusion well before the "right" case brings forth a concise Supreme Court decision on bank customers' rights.

Next, what does the Supreme Court's opinion suggest, if anything, in the way of congressional action in this area?

Two action points stand out in the majority opinion. The first is that any access to bank customer records by governmental agencies is or should be controlled by legal process. It is clear to the banks of this State that observance of legal niceties in gaining access to bank records is a sometimes thing on the part of law enforcement agencies. While banks over recent months and years have resisted access without warrants and other legal process, the pressures of the agencies involved are great. It is also clear that there is no specific legal procedure regarding access to customer records on the law books at this time—indeed, that is what S. 2200, H.R. 9563, and California's A.B. 1609 are all about. The conclusion then is that the Supreme Court is suggesting that such specific procedures be written or that existing legal process be the sole means of gaining entry to customer records. We should comment in passing that the latter approach, applying existing legal approach, applying existing legal process, will absolutely confound the operations of law enforcement agencies as well as much normal activity between banks and government.

Second, and perhaps more importantly, Justices Powell and Blackmun filed a concurring opinion casting grave doubt on the constitutionality of the domestic automatic reporting provisions of the act. The two jurists, without whom there would not have been a majority of the Court upholding the act, state that any significant extension of the Secretary of the Treasury's reporting regulations would "pose substantial and difficult Constitutional questions." They go on to say; and

I want to quote from the opinion and I would like to ask the committee to consider making a part of the record of this hearing the opinion of the Supreme Court in *California Bankers Association v. Schultz*.

Senator CRANSTON. We will put it in the record at the end of your statement (see p. 29).

Mr. POWNALL. Thank you.

Justices Powell and Blackmun stated :

In their full reach, the reports apparently authorized by the open-ended language of the Act touch on intimate areas of a person's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion on these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. [Emphasis added.]

The import of this brief opinion by two of the Supreme Court's majority cannot be overstated insofar as it affects the underlying theory of the Bank Secrecy Act and the implementation of the act from this point forward. Specifically, Powell and Blackmun appear to be saying: (1) That the Secretary cannot, in spite of the act, require any reports of dollar transactions less than the current \$10,000 figure, and (2) that the act presently permits access to bank customer records without judicial process. The first point is extremely important and, in our view, warrants immediate congressional review of the Bank Secrecy Act itself. The jurisdictional statement which the Justice Department filed with the Supreme Court in this case makes the point that the recordkeeping and reporting provisions which trouble Justices Powell and Blackmun "are necessary to carry out the central objective of the Bank Secrecy Act: To disclose transactions entered into for the purpose of concealing illegal sources of funds or preventing detection of their use in unlawful enterprises." The Justice Department further describes the recordkeeping without the reporting as a "serious loophole in the statutory scheme." If the Justice Department is right, then it is clear that the drastic curtailing of the reporting potential which Powell and Blackmun have impliedly ordered has gone a long way toward removing the efficacy of the act as contemplated by its proponents.

The second point which the Justices make respecting access to customer records is, of course, the objective of S. 2200, H.R. 9563, the other House bills, and A.B. 1609—to provide specific legal procedure for governmental access to bank records.

c. Assembly bill 1609 by Assemblyman Alan Sieroty—1973-74 California Legislature (presently in the Senate of the State of California—passed the Assembly of the State of California by a vote of 70 to 4 last year; it recently passed out of the Senate Governmental Operations Committee and at this time, procedurally, is before the Senate Finance Committee).

As discussed above, there are presently no specific guidelines in State or Federal law, with the possible exception of the Internal Revenue Code, covering governmental access to bank customer records.

The present situation is concisely set forth by Mr. Justice Thurgood Marshall in his dissenting opinion in *California Bankers Association v. Schultz*:

As the government itself concedes, banks have in the past voluntarily allowed law enforcement officials to inspect bank record without requiring the issuance of a summons. . . . Indeed, the Chief of the Organized Crime & Racketeering Section of the Criminal Division of the Justice Department told the Senate subcommittee in 1972 that access by the FBI "to bank records without process occurs 'with some degree of frequency'." * * * The plain fact of the matter is that the Act's record keeping requirement feeds into a system of widespread informal access to bank records by government agencies and law enforcement personnel. If these customers' Fourth Amendment claims cannot be raised now, they cannot be raised at all, for once recorded, their checks will be readily accessible, without judicial process and without any showing of probable cause, to any of the several agencies that presently have informal access to bank records.

The banks here and now ask the Congress to remedy this situation with respect to Federal agency access to bank records. The California Bankers Association suggests however that the Congress will want to carefully consider whether such a Federal rule on access should be applied to agencies of State and local government at this time or at all. The association has recently been in the forefront of a legislative effort in California designed to establish as a matter of State law certain limitations on and procedures for access to bank records.

In connection with this effort it should be noted in 1972 the voters of California overwhelmingly approved an amendment to their constitution making the right to privacy one of the basic components of California citizenship.

Assembly bill 1609 as it existed shortly after its introduction was practically identical to S. 2200 and the various House bills. The changes that have been made in A.B. 1609 in its course through the California Legislature are the result not only of hard bargaining among the many parties interested but of factual revelations to which Assemblyman Sieroty referred in his opening remarks that have occurred in the intervening period. While several State agencies continue to vigorously oppose the measure which is in its final legislative stages, their opposition now seems to be no more than an assertion that the status quo is good enough and that no statutory procedure for access is necessary. We disagree with their position. We believe the U.S. Supreme Court disagrees with their position and we believe that many Members of Congress including the authors of S. 2200 and H.R. 9563 disagree with their position.

We implore this committee to keep in mind that whatever else is alleged concerning A.B. 1609, S. 2200, and like measures, they are basically doing nothing more than establishing procedures for access to records. They are not denying access to any governmental agency. Nor, most emphatically, are they bills intended to disrupt law enforcement activities. They are intended to establish as a matter of law a confidential relationship between banks and their customers. They are further intended to either require notice to the customer prior to Government review of his records or have an impartial court of law determine that such Government review is in the public interest and that prior notice to the customer involved can be dispensed with. This latter instance would occur, of course, primarily in criminal investigations.

Without attempting to analyze assembly bill 1609 in detail, we would like to outline the bill and point out the important differences between it and various Federal bills. We have furnished you with our own markup of A.B. 1609 as amended June 28, 1974, because the official version is not yet in print. As soon as it becomes available, we will furnish you with the printed bill (see p. 113).

The basic format of the bill is simple : No governmental agency may obtain and no financial institution may provide information from customer records in connection with any type of investigation, formal or informal, except in accordance with one of four specific methods. These are (1) customer authorization, (2) administrative subpoenas or summons, (3) search warrants, (4) judicial subpoena.

The bill recognizes that probably the great preponderance of bank-government dealings affecting customers are not of the investigatory variety but rather transactions in the normal course of the banking business. Exchange of information between banks and governments in these circumstances is not limited. At the State level, for instance, banks on a daily basis deal on behalf of their customers and divulge various types of information to agencies in the course of making loans, buying and selling public and private securities, administering trusts, and buying, selling, and administering real property. At the Federal level, there are daily transactions between banks and agencies in every conceivable area : Agricultural and farm credit, import and export financing, defense contracts, CAB and FAA problems, commodity transactions, HEW programs, and many more. We urge the Congress then to consider such "normal course of business" provisions in drafting any such bill.

A.B. 1609, like the Federal bills, makes clear that no information obtained by a Government agency may be distributed to another agency except where specifically authorized by law.

A very important exception to the above procedure involves the situation where a crime report has been filed involving the fraudulent use of bank checks. This situation presented us with a dilemma. If certain basic information was not provided by the bank to law enforcement authorities, then there were literally no acceptable alternatives—drop the investigation, arrest the bank customer and then review bank records, or obtain literally hundreds of court orders per day to determine whether the likelihood that a crime had been committed warranted further investigation. The most common example of this problem is the customer who inadvertently issues a check without funds to cover it—the recipient gets mad and calls the police. Only by obtaining very basic information from the bank can the police determine whether there is a pattern indicating the likelihood of criminal behavior or merely an oversight on the part of the customer. The solution arrived at is set forth in proposed section 7480b of A.B. 1609 and provides that the bank shall provide to the law enforcement agency such information as the number of checks dishonored, the dates and amounts of the deposits and debits, and a copy of the signature appearing on the customer's signature card. We believe this exception is warranted and that the information to be set forth is abstract enough so that its usefulness in other than check fraud investigations will be minimal.

The last provision that should be mentioned here involves use of customer authorization procedures for governmental purposes. Certain agencies are charged with the responsibility of licensing, registering or otherwise monitoring various activities within the society. For instance, the Department of Motor Vehicles licenses and reviews the activities of new and used car dealers. In connection with this responsibility, we believe it is reasonable to allow them for their limited purpose to require a customer authorization for access to pertinent dealer bank records as a condition to the dealer obtaining a license to do business. There are numerous other business activities of a similar nature, some of which are presently set forth in A.B. 1609; the State attorney general's monitoring of health care service plans and charitable trusts and insurance department's monitoring of insurance agents' fiduciary accounts.

We thank you for this opportunity to appear and present our views. We of course are willing to work with the committee and its staff if any qualification of our statement or additional information is necessary.

We are, of course, available to answer further questions here today or later on if the committee or staff has such questions.

Senator CRANSTON. Thank you very much for your very forceful, clearcut and very helpful testimony.

The entire statement as prepared will appear in the record and with the documentation you provided.

I do have several questions.

Do you know the cost of all this recordkeeping imposed on the banks?

Mr. POWNALL. Senator, the absolute minimum cost without any embellishments at all is probably somewhere in the neighborhood of \$6 million a year to the American banking industry.

We say absolutely minimal because that is based on the cost of the project to the Bank of America, the largest bank in the world.

There are obviously economies in size and once the recordkeeping equipment is purchased by a bank such as the Bank of America then the cost per copy goes down rapidly.

The basic cost however, to much smaller banks where they operate individually or in consortium is probably much greater than that.

Senator CRANSTON. It is passed on to your customer. So, one way or another it is reflected in increasing charges per check.

Mr. POWNALL. No question about it.

Senator CRANSTON. Under what circumstances will you reveal each customer's records to Government agencies?

Mr. POWNALL. Under present circumstances?

Senator CRANSTON. Yes.

Mr. POWNALL. Increasingly in this State, I cannot speak for banks in other States I am not familiar with those banking operations. Banks, particularly the larger banks will not reveal any information on bank accounts without presentation of due legal process.

Some of the letters that the banks have received as a result of this practice, implemented over the last couple of years from law enforcement agencies in this State have been pretty high.

We think this indicates, as someone referred in their opening remarks, the fact agencies really consider these records to be their right, part of law enforcement apparatus and they should have access to them without due process.

Senator CRANSTON. What about the Internal Revenue Service?

Mr. POWNALL. The Internal Revenue Service to obtain not only bank but other records have what they call a pocket subpoena that can be issued by the agent involved practically on the scene.

The bank, however, under the terms of those subpoenas has the right to refuse to obey it for a period of time.

Usually, if the agent is particularly concerned with seeing records immediately, he will go right to a U.S. district court and the court, if it thinks such a subpoena is warranted, will issue it under the court's name.

Of course we have no problem with that and we doubt the Congress would because there you have the impartial, neutral magistrate between the Government and the bank customer.

Senator CRANSTON. How have your practices or bank practices generally changed since the enactment of the Currency and Foreign Transactions Reporting Act of 1970?

Mr. POWNALL. They have certainly become tighter with respect to releasing information to governmental agencies.

I think that maybe one comment would put all this in perspective. Why I say the banks within the last 2 years have changed their position, up until the Bank Secrecy Act was passed where banks were forced to keep all kinds of records they otherwise would not have kept and forced to divulge certain information automatically without notice to customers, the banks had a very, very good record, I think history will show, for not revealing information that was harmful to the customer. But when the Bank Secrecy Act was passed it put the banks in a very difficult position. They were being told specifically that they were agents of the Government for purposes of reviewing and recording their customers' affairs.

Now, that runs counter to a very ancient practice of banking that their first loyalty is to their customer and their customer relationships.

So, ironically the Bank Secrecy Act which was intended to provide more and more concise information to governmental agencies probably made it more difficult for governmental agencies to get this type of information.

Senator CRANSTON. Of course, under the present circumstances in the absence of the act that Congressman Stark and I, and others are proposing, it is up to the bank to make this decision, isn't it? While a large bank may resist and say, you come in with a court order, they don't have to do that and a smaller bank might not be willing to stand up to the great weight of the Federal Government.

Mr. POWNALL. That is correct, and we have to look to specific examples how does this all come about.

If an agent or officer of the Federal Bureau of Investigation or a local agency walks in and confronts the teller with his uniform, badge, and other prerequisites of authority, the likelihood that the teller wants to comply and gives certain information instantaneously without saying absolutely not, is pretty high.

Now banks, of course, in operational manuals and directives try to construct certain procedures to avoid this kind of thing.

We are not a military operation, we don't have that kind of control over the employees and we can't always insure that the guidelines set forth at the policy level are carried out in day-to-day business.

Senator CRANSTON. Did the banks sort of tighten up in the way you have indicated after there was considerable publicity and perhaps notoriety about the availability of these records without subpoenas, without court orders?

Mr. POWNALL. I think they tightened up well in advance of that.

Senator CRANSTON. What is the fact though?

Mr. POWNALL. The fact is there is no question that the publicity the Bank Secrecy Act itself engendered and that the case engendered forced all banks to carefully consider their policies in this area and for the most part they have tightened up since then.

Senator CRANSTON. Do banks notify a customer when there is a request for information about his account?

Mr. POWNALL. I can only speak for one bank where I have looked into that in detail, it is a very large bank in this State. And the answer is "Yes." That is specifically covered in their operations manual at this time.

Senator CRANSTON. This again is up to the individual bank?

Mr. POWNALL. Yes.

Senator CRANSTON. Do you ever give information concerning customers' financial records to another bank or financial institution?

Mr. POWNALL. Yes.

Senator CRANSTON. What safeguards do banks take to assure the customer confidentiality from outside requests by individuals other than law enforcement officials?

Mr. POWNALL. We can probably divide persons that want access to bank records into two general categories: governmental agents and for lack of a better term the other than governmental agents.

Within the second category the vast majority of requests concern credit reports and the like, asking whether so-and-so has any money in his account, has he had a long history of being a customer with the bank and the like.

Those, as you are well aware, are covered in the Federal Credit Reporting Act and certain State laws. We think that type of access is covered.

There is one area of access that probably is not covered and that would be by the very small percentage of other than credit-type report investigations; private investigators and the like.

Again, bank policies uniformly preclude revelation of that type of material but there are no laws we know of that regulate that.

Senator CRANSTON. How many requests per year are made on banks for inspection of bank records by public agencies?

Mr. POWNALL. I could give you an estimate.

Senator CRANSTON. Would you, for the record?

Mr. POWNALL. I would say in California there are probably at least 100 such requests a day.

You will have witnesses later in this hearing who are better able to answer that question than I.

Senator CRANSTON. Do you think bank customers expect banks to maintain the privacy of their records?

Mr. POWNALL. Absolutely.

Senator CRANSTON. How many of them are aware of this opportunity for access by Government agencies?

Mr. POWNALL. Very few. But we are at this point in time trying, attempting to educate our customers to the requirements the Government has imposed on us and I am sure a hearing such as this will bring it to the attention of the public.

Senator CRANSTON. Have banks in California ever been sued by customers for invasion of privacy on the ground that their records were wrongfully given out?

Mr. POWNALL. No, not in California to my knowledge. As a matter of fact, there were very few recorded cases anywhere in the United States on that point.

There was a Florida Law Review some 2 or 3 years ago which reviewed this situation and I would urge the committee staff to review that on those figures.

Senator CRANSTON. What is the legal nature of the fiduciary relationship between a bank and its customers?

Mr. POWNALL. There is not a fiduciary relationship as such. There is, of course, a fiduciary relationship in trusts, bank activities on behalf of its customers there.

One of the things that we approve of wholeheartedly in your bill and in the State bill is the attempt to make as a matter of law the relationship between a bank and its customers confidential.

Senator CRANSTON. In what way, if any, would law enforcement be impaired by imposing requirements as prerequisites for obtaining bank records?

Mr. POWNALL. We have asked ourselves that question long and hard over the past few months, because the opposition to these bills, which we support, by the numbers of law enforcement agencies in the State, is a problem to the banking industry.

The banking industry, as I emphasize in my statement, have long been supporters of every law enforcement agency. The agencies are aware of that and the public.

Senator CRANSTON. It is a problem for me and other supporters of legislation. We want to make sure we don't interfere with legitimate efforts of law enforcement bodies.

Mr. POWNALL. We think analyzing all the comments we have heard to date on A.B. 1609 and your bill, the principal problems of law enforcement agencies seem to be twofold: One, that notice might be provided to the customers in these areas; and second, the time problem that would be imposed on them if they choose not to go to court and get a court order.

The court can, of course, through search warrants or on its own authority order such records opened immediately.

But the bills that are before this committee and before the legislature have time limits in them as far as subpoenas and the like.

Senator CRANSTON. Bank entries, of course, provide evidentiary leads for law enforcement officials and if a customer must be informed before his bank records are inspected, is there a danger he would cover

up the information that might develop from these leads before the investigation takes place, or would it be impossible for him?

Mr. POWNALL. I would guess and Congressman Stark as a former banker can address himself to this, that it would be impossible once the records are maintained by the bank for them to be lost.

What the agencies are interested in tracing are dollars going through banks and those are matters of bank records for banking purposes. So those records are going to be there regardless of the time factor.

The one area that might be affected, of course, if someone is actually trying to get hold of a person's money that is in the bank; if given advanced notice he will go down, assuming the worst, and take his money out.

Senator CRANSTON. Is there any standard short of probable cause to allow inspection of the records before the customer is notified?

Mr. POWNALL. That is a difficult question. There are an awful lot of legal points that would affect my answer and I would like to answer that one in writing at a later date.

Senator CRANSTON. I wish you would, please.

Mr. POWNALL. Yes.

Senator CRANSTON. You stated, I believe, there is no law against private credit checks. Could I hire a private investigator to look into somebody's bank records for me, would he be able to do so?

Mr. POWNALL. I will answer that this way. As an attorney I receive in the mail from time to time flyers from various investigative agencies to tell me that for \$20, \$30, or \$40 they can give me information on any bank customer in the State or the country.

Senator CRANSTON. First, let me make it plain I don't want to do that. But should that be outlawed?

Mr. POWNALL. If we are going to have some regulations on governmental access to bank records it seems to me it would be reasonable to have some regulation on access by others to bank records also.

Senator CRANSTON. Is there any bank code of ethics covering these matters?

Mr. POWNALL. Yes, there is.

Senator CRANSTON. Would you submit for the committee a copy of that?

Mr. POWNALL. If I can get hold of one, yes.

Senator CRANSTON. If you cannot get hold of one, what purpose is it serving and where is it?

Mr. POWNALL. The reason for my answer is I am not sure that it says code of ethics at the top and then lists these things out.

I know it is embodied in virtually every bank's operations manual I have seen. And I would guess the type of thing I would be able to get my hands on and submit to the committee would be probably a copy of one or more banks operating manuals.

Senator CRANSTON. If you would look into that and advise us, I would appreciate it.

When a bank does a credit investigation check on one of its customers for making a loan or considering a loan, how does that affect the fiduciary relation between the customer and the bank?

Mr. POWNALL. Normally that type of credit investigation is certainly anticipated by the customer at the time he comes in and applies for a loan or other service of the bank regarding extension of credit.

Certainly no one I can think of would go in and apply for a loan without the idea that the bank was going to check on some of the references he, himself, put on his loan application.

Some bank loan statements by the way make it express that checks will be made on the various references given.

Senator CRANSTON. One suggestion has been made in one of the areas we are considering, that a compromise would be to allow law enforcement officials to obtain the date and amount of checks but not the designee. What is your feeling on that?

Mr. POWNALL. For any purpose?

Senator CRANSTON. Various purposes, specified purposes?

Mr. POWNALL. Going to the basic thrust of our testimony on these bills, I would say you would not want to do that.

You would want to have some governmental or statutory purpose expressed at the time that any such inquiry was made to protect the citizens. Who knows what that is going to be used for or how it can relate to his personal affairs.

Senator CRANSTON. Thank you very much.

Congressman Stark, do you have any questions?

Congressman STARK. Just a few quick ones, Senator.

I would ask Mr. Pownall if he would submit any of these for the record if the answers will be at all lengthy.

I would assume the Banking Industry in California—the California Bankers Association's—position is that the bankers are willing to accept any of the civil liabilities which they may be subject to under the Senator's bill?

Mr. POWNALL. They are subject to those liabilities now, Congressman Stark, without the Senator's bill.

That would be the only question we would have, whether it is necessary to put it in Federal legislation.

Congressman STARK. One other question and also one that I find difficult is, it is my understanding that under Federal law it is not a crime to pass a check with insufficient funds.

What we are discussing here is primarily a California law and it is my recollection—although I would like to have a legal opinion—that most businesses as a regular practice write checks against insufficient funds. Because of the legality of a deposit not being good until many days after a check is deposited, most individuals write checks regularly against insufficient funds.

There is no Federal law, outside of some intent to defraud, and that may have dollar limits across State lines. I wonder if you might address yourself to this in writing for the record. I'd like to know what the problems are in defining the Federal problem of insufficient funds and these commercial practices which go on frequently and are rarely prosecuted.

Mr. POWNALL. I address myself to the nonsufficient funds problem before this committee because the bill that is before this committee, S. 2200, purports to affect State agencies as well as Federal agencies.

You are right. To the best of my knowledge there is no Federal law involving nonsufficient funds. But obviously, your bills, if they go in the direction they seem to be heading, would affect NSF State check laws.

Congressman STARK. I wonder if you could go still a bit further—what I am getting at is the common practice by both individuals and private businesses abroad in the land today that has most of us writing checks against insufficient funds as a regular accepted practice. It is only when somebody gets mad that they decide this is a crime and attempt to prosecute.

It is not a very evenly applied law. Businesses do it regularly. It is an accepted risk that a businessman takes. Among consumers and—particularly people of less income and less sophisticated business knowledge—they are more often charged with this problem. This may be an unequal application of the law.

Maybe we should reconsider enforcing it at all.

Mr. POWNALL. I cannot answer that.

Congressman STARK. I would like your further comments in writing.

Senator CRANSTON. Thank you very much for your testimony. You have been a remarkably well-informed and able witness.

[Material received for the record follows:]

SUPREME COURT OF THE UNITED STATES

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CALIFORNIA BANKERS ASSN. v. SHULTZ, SECRETARY OF THE TREASURY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 72-985. Argued January 16, 1974—Decided April 1, 1974*

The Bank Secrecy Act of 1970, which was enacted following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in illegal activities, authorizes the Secretary of the Treasury to prescribe by regulation certain bank recordkeeping and reporting requirements, the Act's penalties attaching only upon violation of the regulations thus prescribed. (Unless otherwise indicated, references below to the Act also include the accompanying regulations.) The Act is designed to obtain financial information having "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." Title I of the Act requires financial institutions to maintain records of their customers' identities, to make microfilm copies of checks and similar instruments, and to keep records of certain other items. Title II of the Act requires the reporting to the Federal Government of certain foreign and domestic financial transactions. Title II, § 231, requires reports of the transportation of currency and specified instruments exceeding \$5,000 into or out of the country, exception being made, *inter alia*, for banks and security dealers. Section 241 requires individuals with bank accounts or other relationships with foreign banks to provide specified information on a tax return form. Section 221 delegates to the Secretary of the Treasury the authority to require reports of transactions "if they involve the payment,

*Together with No. 72-1073, *Shultz, Secretary of the Treasury, et al. v. California Bankers Assn. et al.*; and No. 72-1196, *Stark et al. v. Shultz, Secretary of the Treasury, et al.*, also on appeal from the same court.

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receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify . . . ,” § 222 providing that he may require such reports from the domestic financial institution involved, the parties to the transaction, or both, and § 223 providing that he may designate financial institutions to receive the reports. Under the implementing regulations only financial institutions must file reports with the Internal Revenue Service (IRS), and then only where the transaction involves the deposit, withdrawal, exchange, or other payment of currency exceeding \$10,000. The regulations provide that the Secretary may grant exemptions from the requirements of the regulations. Suits were brought by various plaintiffs challenging the constitutionality of the Act, principally on the ground that it violated the Fourth Amendment, because when the bank makes and keeps records under compulsion of the Secretary’s regulations it acts as a Government agent and thereby engages in a “seizure” of its customer’s records. A three-judge District Court, though upholding the recordkeeping requirements of Title I of the Act and the foreign transaction reporting requirements of Title II, concluded that the domestic reporting provisions of Title II, §§ 221–223, contravened the Fourth Amendment, and enjoined their enforcement. Three separate appeals were taken. In No. 72–985, the California Bankers Association, a plaintiff below, asserts that Title I’s recordkeeping provisions violate (1) due process, because there is no rational relationship between the Act’s objectives and the required recordkeeping and because the Act is unduly burdensome, and (2) rights of privacy. In No. 72–1196, a bank plaintiff, certain plaintiff depositors, and the American Civil Liberties Union (ACLU), also a plaintiff, as a depositor in a bank subject to the recordkeeping requirements and as a representative of its bank customer members, attack both the Title I recordkeeping requirements and the Title II foreign financial transaction reporting requirements on Fourth Amendment grounds; on Fifth Amendment grounds, as violating the privilege against compulsory self-incrimination; and on First Amendment grounds, as violating free speech and free association rights. In No. 72–1073, the United States asserts that the District Court erred in holding Title II’s domestic financial transaction reporting requirements facially invalid without considering the actual implementation of the statute by the regulations. *Held:*

1. Title I’s recordkeeping requirements, which are a proper exercise of Congress’ power to deal with the problem of crime in

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interstate and foreign commerce, do not deprive the bank plaintiffs of due process of law. Pp. 21-26.

(a) There is a sufficient nexus between the evil Congress sought to address and the recordkeeping procedure to meet the requirements of the Due Process Clause of the Fifth Amendment, and the fact that banks are not mere bystanders in transactions involving negotiable instruments but have a substantial stake in their availability and acceptance and are the most easily identifiable party to the instruments, make it appropriate for the banks rather than others to do the recordkeeping. *United States v. Darby*, 312 U. S. 100; *Shapiro v. United States*, 335 U. S. 1. Pp. 21-25.

(b) The cost burdens on the banks of the recordkeeping requirements are not unreasonable. Pp. 25-26.

(c) The bank plaintiffs' claim that the recordkeeping requirements undermine the right of a depositor effectively to challenge an IRS third-party summons is premature, absent the issuance of such process involving a depositor's transactions. P. 27.

2. Title I's recordkeeping provisions do not violate the Fourth Amendment rights of either the bank or depositor plaintiffs, the mere maintenance by the bank of records without any requirement that they be disclosed to the Government (which can secure access only by existing legal process) constituting no illegal search and seizure. Pp. 28-30.

3. Title I's recordkeeping provisions do not violate the Fifth Amendment rights of either the bank or depositor plaintiffs. Pp. 30-31.

(a) The bank plaintiffs, being corporations, have no constitutional privilege against compulsory self-incrimination by virtue of the Fifth Amendment. *Hale v. Henkel*, 201 U. S. 43, 74-75. Pp. 30-31.

(b) A depositor plaintiff incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights. *Johnson v. United States*, 228 U. S. 457, 458; *Couch v. United States*, 409 U. S. 322, 328. Pp. 30-31.

4. The ACLU's claim that Title I's recordkeeping requirements violate its members' First Amendment rights since the challenged provisions could possibly be used to identify its members and contributors (cf. *NAACP v. Alabama*, 357 U. S. 440), is premature, the Government having sought no such disclosure here. Pp. 31-32.

5. The reporting requirements in Title II applicable to foreign financial dealings, which single out transactions with the greatest

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potential for avoiding enforcement of federal laws and which involve substantial sums, do not abridge plaintiffs' Fourth Amendment rights and are well within Congress' powers to legislate with respect to foreign commerce. *Carroll v. United States*, 267 U. S. 132, 154; *Almeida-Sanchez v. United States*, 413 U. S. 226, 272. Pp. 35-39.

6. The regulations for the reporting by financial institutions of domestic financial transactions, are reasonable and abridge no Fourth Amendment rights of such institutions, which are themselves parties to the transactions involved, since neither "incorporated nor unincorporated associations [have] an unqualified right to conduct their affairs in secret," *United States v. Morton Salt Co.*, 338 U. S. 632, 652. Pp. 39-43.

7. The depositor plaintiffs, who do not allege engaging in the type of \$10,000 domestic currency transaction requiring reporting, lack standing to challenge the domestic reporting regulations. It is therefore unnecessary to consider contentions made by the bank and depositor plaintiffs that the regulations are constitutionally defective because they do not require the financial institution to notify the customer that a report will be filed concerning the domestic currency transaction. Pp. 43-46.

8. The depositor plaintiffs who are parties in this litigation are premature in challenging the foreign and domestic reporting provisions under the Fifth Amendment. Pp. 48-51.

(a) Since those plaintiffs merely allege that they intend to engage in foreign currency transactions with foreign banks and make no additional allegation that any of the information required by the Secretary will tend to incriminate them, their challenge to the foreign reporting requirements cannot be considered at this time. *Communist Party v. SACB*, 367 U. S. 1, 105-110, followed; *Albertson v. SACB*, 382 U. S. 70, distinguished. Pp. 48-50.

(b) The depositor plaintiffs' challenge to the domestic reporting requirements are similarly premature, since there is no allegation that any depositor engaged in a \$10,000 domestic transaction with a bank that the latter was required to report and no allegation that any bank report would contain information incriminating any depositor. *Marchetti v. United States*, 390 U. S. 39; *Grosso v. United States*, 390 U. S. 62; and *Haynes v. United States*, 390 U. S. 85, distinguished. Pp. 50-51.

9. The bank plaintiffs cannot vicariously assert Fifth Amendment claims on behalf of their depositors under the circumstances present here, since the depositors cannot assert those claims themselves at this time. See para. 8, *supra*. P. 47.

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10. The contentions of the ACLU that the reporting requirements with respect to foreign and domestic transactions invade its First Amendment associational interests are too speculative and hypothetical to warrant consideration, in view of the fact that the ACLU alleged only that it maintains accounts at a San Francisco bank but not that it regularly engages in abnormally large domestic currency transactions, transports or receives monetary instruments from foreign commercial channels, or maintains foreign bank accounts. Pp. 51-52.

347 F. Supp. 1242, affirmed in part, reversed in part, and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which BLACKMUN, J., joined. DOUGLAS, BRENNAN, and MARSHALL, JJ., filed dissenting opinions.

NOTICE : This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 72-985, 72-1073, AND 72-1196

The California Bankers Association, Appellant,	On Appeals from the United States District Court for the Northern District of California.
72-985 <i>v.</i>	
George P. Shultz, Secretary of the Treasury, et al.	
George P. Shultz, Secretary of the Treasury, et al., Appellants, 72-1073 <i>v.</i>	
The California Bankers Association et al.	
Fortney H. Stark, Jr., et al., Appellants, 72-1196 <i>v.</i>	
George P. Shultz et al.	

[April 1, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

These appeals present questions concerning the constitutionality of the so-called Bank Secrecy Act of 1970, and the implementing regulations promulgated thereunder by the Secretary of the Treasury. The Act, Pub. L. No. 508, 84 Stat. 1114 (1970), 12 U. S. C. §§ 1829b, 1730d, 1951-1959, and 31 U. S. C. §§ 1051-1122, was enacted by Congress in 1970 following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities

entailing criminal or civil liability. Under the Act, the Secretary of the Treasury is authorized to prescribe by regulation certain recordkeeping and reporting requirements for banks and other financial institutions in this country. Because it has a bearing on our treatment of some of the issues raised by the parties, we think it important to note that the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone.

The express purpose of the Act is to require the maintenance of records, and the making of certain reports, which "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 12 U. S. C. §§ 1829b (a)(2), 1951; 31 U. S. C. § 1051. Congress was apparently concerned with two major problems in connection with the enforcement of the regulatory, tax, and criminal laws of the United States.¹

First, there was a need to insure that domestic banks and financial institutions continued to maintain adequate records of their financial transactions with their customers. Congress found that the recent growth of financial institutions in the United States had been paralleled by an increase in criminal activity which made use of these institutions. While many of the records which the Secretary by regulation ultimately required to be kept had been traditionally maintained by the voluntary action of many domestic financial institutions, Congress

¹ See generally S. Rep. No. 91-1139, 91st Cong., 2d Sess. (1970); H. R. Rep. No. 91-975, 91st Cong., 2d Sess. (1970); Hearings before the House Committee on Banking and Currency on Foreign Bank Secrecy and Bank Records, 91st Cong., 1st and 2d Sess. (1970); Hearings before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency on Foreign Bank Secrecy (S. 3678), 91st Cong., 2d Sess. (1970).

noted that in recent years some larger banks had abolished or limited the practice of photocopying checks, drafts, and similar instruments drawn on them and presented for payment. The absence of such records, whether through failure to make them in the first instance or through failure to retain them, was thought to seriously impair the ability of the Federal Government to enforce the myriad criminal, tax, and regulatory provisions of laws which Congress had enacted. At the same time, it was recognized by Congress that such required records would "not be automatically available for law enforcement purposes [but could] only be obtained through existing legal process." S. Rep. No. 91-1139, 91st Cong., 2d Sess., 10 (1970); see H. R. Rep. No. 91-975, 91st Cong., 2d Sess., 5 (1970).

In addition, Congress felt that there were situations where the deposit and withdrawal of large amounts of currency or of monetary instruments which were the equivalent of currency should be actually reported to the Government. While reports of this nature had been required by previous regulations issued by the Treasury Department, it was felt that more precise and detailed reporting requirements were needed. The Secretary was therefore authorized to require the reporting of what may be described as large domestic financial transactions in currency or its equivalent.

Second, Congress was concerned about a serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax, and regulatory enactments. The House Report on the bill, No. 91-975, *supra*, at 12, described the situation in these words:

"Considerable testimony was received by the Committee from the Justice Department, the United

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States Attorney for the Southern District of New York, the Treasury Department, the Internal Revenue Service, the Securities and Exchange Commission, the Defense Department and the Agency for International Development about serious and widespread use of foreign financial facilities located in secrecy jurisdictions for the purpose of violating American law. Secret foreign bank accounts and secret foreign financial institutions have permitted proliferation of 'white collar' crime; have served as the financial underpinning of organized criminal operations in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock acquisitions, mergers and takeovers; have covered conspiracies to steal from the U. S. defense and foreign aid funds; and have served as a cleansing agent for 'hot' or illegally obtained monies.

"The debilitating effects of the use of these secret institutions on Americans and the American economy are vast. It has been estimated that hundreds of millions in tax revenues have been lost. Unwarranted and unwanted credit is being pumped into our markets. There have been some cases of corporation directors, officers and employees who, through deceit and violation of law, enriched themselves or endangered the financial soundness of their companies to the detriment of their stockholders.

Criminals engaged in illegal gambling, skimming, and narcotics traffic are operating their financial affairs with an impunity that approaches statutory exemption.

"When law enforcement personnel are confronted with the secret foreign bank account or the secret financial institution they are placed in an impossible position. In order to receive evidence and testimony regarding activities in the secrecy jurisdiction they must subject themselves to a time consuming and oftentimes fruitless foreign legal process. Even when procedural obstacles are overcome, the foreign jurisdictions rigidly enforce their secrecy laws against their own domestic institutions and employees.

"One of the most damaging effects of an American's use of secret foreign financial facilities is its undermining of the fairness of our tax laws. Secret foreign financial facilities, particularly in Switzerland, are available only to the wealthy. To open a secret Swiss account normally requires a substantial deposit, but such an account offers a convenient means of evading U. S. taxes. In these days when the citizens of this country are crying out for tax reform and relief, it is grossly unfair to leave the secret foreign bank account open as a convenient avenue of tax evasion. The former U. S. Attorney for the Southern District of New York has characterized the secret foreign bank account as the largest single tax loophole permitted by American law."

While most of the recordkeeping requirements imposed by the Secretary under the Act merely require the banks to keep records which most of them had in the past voluntarily kept and retained, and while much of the required reporting of domestic transactions had been required by earlier Treasury regulations in effect for

nearly 30 years,² there is no denying the impressive sweep of the authority conferred upon the Secretary of the Treasury by the Bank Secrecy Act of 1970. While an Act conferring such broad authority over transactions such as these might well surprise or even shock those who lived in an earlier era, the latter did not live to see the time when bank accounts would join chocolate, cheese, and watches as a symbol of the Swiss economy. Nor did they live to see the heavy utilization of our domestic banking system by the minions of organized crime as well as by millions of legitimate businessmen. The challenges made here to the Bank Secrecy Act are directed not to any want of legislative authority in Congress to treat the subject, but instead to the Act's asserted violation of specific constitutional prohibitions.

I

Title I of the Act, and the implementing regulations promulgated thereunder by the Secretary of the Treasury, require financial institutions to maintain records of the identities of their customers, to make microfilm copies of certain checks drawn on them, and to keep records of certain other items. Title II of the Act and its implementing regulations require reports of certain domestic and foreign currency transactions.

A. TITLE I—THE RECORDKEEPING REQUIREMENTS

Title I of the Bank Secrecy Act contains the general recordkeeping requirements for banks and other financial institutions, as provided by the Secretary by regulation. Section 101 of the Act, 12 U. S. C. § 1829b, applies by its terms only to federally insured banks. It contains congressional findings "that adequate records maintained by insured banks have a high degree of use-

² See n. 11, *infra*.

fulness in criminal, tax, and regulatory investigations and proceedings." The major requirements of the section are that insured banks record the identities of persons having accounts with them and of persons having signature authority thereover, in such form as the Secretary may require. To the extent that the Secretary determines by regulation that such records would have the requisite "high degree of usefulness," the banks must make and maintain microfilm or other reproductions of each check, draft, or other instrument drawn on it and presented to it for payment, and must maintain a record of each check, draft, or other instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected. Section 101 further authorizes the Secretary to require insured banks to maintain a record of the identity of all individuals who engage in transactions which are reportable by the bank under Title II of the Act, and authorizes the Secretary to prescribe the required retention period for such records. Section 102, 12 U. S. C. § 1730d, amends the National Housing Act to authorize the Secretary to apply similar recordkeeping requirements to institutions insured thereunder. Sections 121 and 123 of the Act, 12 U. S. C. §§ 1953, 1955, authorize the Secretary to issue regulations applying similar recordkeeping requirements to additional domestic financial institutions.³

³ Under section 123 (b), the authority of the Secretary extends to any person engaging in the business of:

"(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.

Although an initial draft of Title I, see H. R. 15073, 91st Cong., 1st Sess., would have compelled the Secretary of the Treasury to promulgate regulations requiring banks to maintain copies of all items received for collection or presented for payment, the Act as finally passed required the maintenance only of such records and micro-film copies as the Secretary determined to have a "high degree of usefulness."⁴ Upon passage of the Act, the Treasury Department established a task force which consulted with representatives from financial institutions, trade associations, and governmental agencies to determine the type of records which should be maintained. Whereas the original regulations promulgated by the Secretary of Treasury had required the copying of all checks, the task force decided, and the regulations were accordingly amended, to require check copying only as to checks in excess of \$100.⁵ The regulations also require

"(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."

Section 122 of the Act, 12 U. S. C. § 1954, authorizes the Secretary to require reports with respect to the ownership, control, and management of uninsured domestic financial institutions.

⁴ See House Hearings, n. 1, *supra*, at 60-61, 80, 146, 162, 314, 316, 321, 333; S. Rep. No. 91-1139, *supra*, at 18-19 (supplemental views).

⁵ For a summary of the task force study, see Hearings before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing, and Urban Affairs to amend the Bank Secrecy Act (S. 3814), 92d Cong., 2d Sess., 60-64 (1972). The Secretary of the Treasury initially issued regulations on April 5, 1972, implementing the provisions of the Act. See 31 C. F. R. Part 103 (37 Fed. Reg. 6912). The Treasury Department task force found that law enforcement would not be greatly impaired by limiting the check-copying requirement to checks in excess of \$100. An Assistant Secretary of the Treasury estimated that this exclusion would eliminate 90% of all personal checks from the microfilming requirement. Senate Hearings on S. 3814, *supra*, at 42, 44, 57-58. The regulations were thus amended shortly after their promulgation

the copying of only "on us" checks: checks drawn on the bank or issued and payable by it. 31 CFR § 103.34 (b)(3). The regulations exempt from the copying requirements certain "on us" checks such as dividend, payroll, and employee benefit checks, provided they are drawn on an account expected to average at least one hundred checks per month.⁶ The regulations also require banks to maintain records of the identity and taxpayer identification number of each person maintaining a financial interest in each deposit or share account opened after June 30, 1972, and to microfilm various other financial documents. 31 CFR § 103.34.⁷ In addition, the

to exclude the copying of checks drawn for \$100 or less. 31 CFR § 103.34 (b)(3), as amended, 37 Fed. Reg. 23114 (1972), 38 Fed. Reg. 2174 (1973), effective January 17, 1973.

⁶ Exempted by 31 CFR § 103.34 (b)(3) are dividend checks, payroll checks, employee benefit checks, insurance claim checks, medical benefit checks, checks drawn on governmental agency accounts, checks drawn by brokers or dealers in securities, checks drawn on fiduciary accounts, checks drawn on other financial institutions, and pension or annuity checks, provided they are drawn on an account expected to average at least one hundred checks per month.

⁷ 31 CFR § 103.34 (b) requires that each bank retain either the original or a microfilm or other copy or reproduction of (1) documents granting signature authority over accounts; (2) statements or ledger cards showing transactions in each account; (3) each item involving more than \$10,000 remitted or transferred to a person, account, or place outside the United States; (4) a record of each remittance or transaction of funds, currency, monetary instruments, checks, investment securities, or credit, of more than \$10,000 to a person, account, or place outside the United States; (5) each check or draft in an amount exceeding \$10,000 drawn on or issued by a foreign bank which the domestic bank has paid or presented to a nonbank drawee for payment; (6) each item of more than \$10,000 received directly from a bank, broker, or dealer in foreign exchange outside the United States; (7) a record of each receipt of currency, monetary instruments, checks, or investment securities, and each transfer of funds or credit in amounts exceeding \$10,000 received

Secretary's regulations require all financial institutions to maintain a microfilm or other copy of each extension of credit in an amount exceeding \$5,000 except those secured by interest in real property, and to microfilm each advice, request, or instruction given or received regarding the transfer of funds, currency or other money or credit in amounts exceeding \$10,000 to a person, account or place outside the United States. 31 CFR § 103.33.

Reiterating the stated intent of the Congress, see, *e. g.*, H. R. Rep. No. 91-975, *supra*, at 5; S. Rep. No. 91-1139, *supra*, at 10, the regulations provide that inspection, review or access to the records required by the Act to be maintained is governed by existing legal process. 31 CFR § 103.51.⁸ Finally, sections 125 through 127 of the Act provide for civil and criminal penalties for

directly from a bank, broker, or dealer in foreign exchange outside the United States; (8) records needed to reconstruct a demand deposit account and to trace checks in excess of \$100 deposited in such account.

31 CFR § 103.35 requires brokers and dealers in securities to maintain similar information with respect to their brokerage accounts.

The prescribed retention period for all records under the regulations is five years, except for the records required for reconstructing a demand deposit account, which must be retained for only two years. 31 CFR § 103.36 (c).

⁸ 31 CFR § 103.51 provides:

"Except as provided in §§ 103.34 (a)(1) and 103.35 (a)(1), and except for the purpose of assuring compliance with the record-keeping and reporting requirements of this part, this part does not authorize the Secretary or any other person to inspect or review the records required to be maintained by subpart C of this part. Other inspection, review or access to such records is governed by other applicable law."

This regulation became effective January 17, 1973. 37 Fed. Reg. 23114 (1972); 38 Fed. Reg. 2174 (1973).

willful violations of the recordkeeping requirements. 12
U. S. C. §§ 1955-1957.

B. TITLE II—FOREIGN FINANCIAL TRANSACTION REPORTING REQUIREMENTS

Chapter 3 of Title II of the Bank Secrecy Act and the regulations promulgated thereunder generally require persons to report transportations of monetary instruments into or out of the United States, or receipts of such instruments in the United States from places outside the United States, if the transportation or receipt involves instruments of a value greater than \$5,000. Chapter 4 of Title II of the Act and the implementing regulations generally require United States citizens, residents, and businessmen to file reports of their relationships with foreign financial institutions. The legislative history of the foreign transaction reporting provisions indicates that the Congress was concerned with the circumvention of United States regulatory, tax and criminal laws which United States citizens and residents were accomplishing through the medium of secret foreign bank transactions. S. Rep. No. 91-1139, *supra*, at 7; H. R. Rep. No. 91-975, *supra*, at 13.

Section 231 of the Act, 31 U. S. C. § 1101, requires anyone connected with the transaction to report, in the manner prescribed by the Secretary, the transportation into or out of the country of monetary instruments⁹ exceeding \$5,000 on any one occasion. As

⁹ "Monetary instrument" is defined by section 203 (l) of the Act as "coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates." 31 U. S. C. § 1052.

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provided by the Secretary's regulations, the report must include information as to the amount of the instrument, the date of receipt, the form of instrument, and the person from whom it was received. See 31 CFR §§ 103.23, 103.25.¹⁰ The regulations exempt various classes of persons from this reporting requirement, including banks, brokers or dealers in securities, common carriers and others engaged in the business of transporting currency for banks. 31 CFR § 103.23 (c). Monetary instruments which are transported without the filing of a required report, or with a materially erroneous report, are subject to forfeiture under section 232 of the Act, 31 U. S. C. § 1102; a person who has failed to file the required report or who has filed a false report is subject to civil penalties under sections 207 and 233, 31 U. S. C. §§ 1056, 1103, as well as criminal penalties under sections 209 and 210, 31 U. S. C. §§ 1058, 1059.

Section 241 of the Act, 31 U. S. C. § 1121, authorizes the Secretary to prescribe regulations requiring residents and citizens of the United States, as well as nonresidents in the United States and doing business therein, to maintain records and file reports with respect to their transactions and relationships with foreign financial agencies. Pursuant to this authority, the regulations require each person subject to the jurisdiction of the United States to make a report on yearly tax returns of any "financial interest in, or signature or other authority over, a bank,

¹⁰ The form provided by the Treasury Department for the reporting of these transactions is Form 4790 (Report of International Transportation of Currency or Monetary Instruments). See Motion to Affirm on behalf of the United States in No. 72-985, App. C, at 29-30. The report must identify the person required to file the report, his capacity and the identity of persons for whom he acts, and must specify the amounts and types of monetary instruments, the method of transportation, and, if applicable, the name of the person from whom the shipment was received.

securities or other financial account in a foreign country." 31 CFR § 103.24. Violations of the reporting requirement of section 241 as implemented by the regulations are also subject to civil and criminal penalties under sections 207, 209, and 210 of the Act, 31 U. S. C. §§ 1056, 1058, 1059.

C. TITLE II—DOMESTIC FINANCIAL TRANSACTION REPORTING REQUIREMENTS

In addition to the foreign transaction reporting requirements discussed above, Title II of the Bank Secrecy Act provides for certain reports of domestic transactions where such reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. Prior to the enactment of the Bank Secrecy Act, financial institutions had been providing reports of their customers' large currency transactions pursuant to regulations promulgated by the Secretary of Treasury¹¹ which had required reports of all currency transactions that, in the judgment of the institution, exceeded those "commensurate with the customary conduct of the business, industry or profession of the person or organization concerned."¹² In passing the Bank

¹¹ In issuing these regulations, the Secretary relied upon the authority of two statutory provisions: (1) the Trading with the Enemy Act, 40 Stat. 411, as amended by § 2, Act of Mar. 9, 1933, c. 1, 48 Stat. 1, and by § 301, First War Powers Act, c. 593, 55 Stat. 838 (1941). See 12 U. S. C. § 95a (Supp. V, 1940 ed.); (2) § 251 of the Revised Statutes, 31 U. S. C. § 427.

¹² The previous regulations promulgated by the Secretary, see 31 CFR § 102.1 (1949 ed.), 10 Fed. Reg. 6556, originally mentioned transactions involving \$1,000 or more in denominations of \$50 or more, or \$10,000 or more in any denominations. In 1952, the former amount was raised to \$2,500 in denominations of \$100 or more. See 17 Fed. Reg. 1822, 2306. When these regulations were revised in 1959 to simplify the reporting form, the Secretary noted the great value of the reports to law enforcement. See Treasury

Secrecy Act, Congress recognized that the use of financial institutions, both domestic and foreign, in furtherance of activities designed to evade the regulatory mechanisms of the United States, had markedly increased. H. R. Rep. No. 91-975, *supra*, at 10; S. Rep. No. 91-1139, *supra*, at 2-3. Congress recognized the importance of reports of large and unusual currency transactions in ferreting out criminal activity and desired to strengthen the statutory basis for requiring such reports. H. R. Rep. No. 91-975, *supra*, at 11-12. In particular, Congress intended to authorize more definite standards for determining what constitutes the type of unusual transaction that should be reported. S. Rep. No. 91-1139, *supra*, at 6.

Section 221 of the Bank Secrecy Act, 31 U. S. C. § 1081, therefore delegates to the Secretary of the Treasury the authority for specifying the currency transactions which should be reported, "if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify." Section 222 of the Act, 31 U. S. C. § 1082, provides that the Secretary may require such reports from the domestic financial institution involved or the parties to the transactions or both.¹³ Section 223 of the Act, 31 U. S. C. § 1083, authorizes the Secretary to designate financial institutions to receive such reports.

In the implementing regulations promulgated under this authority, the Secretary of the Treasury has required only that financial institutions file certain reports with the Commissioner of Internal Revenue. The regulations require that a report be made for each deposit, with-

Release No. A-590, August 3, 1959, included in the Jurisdictional Statement for the United States in No. 72-1073, App. E, at 127-130.

¹³ The proper interpretation of this section is a source of dispute in these appeals. See n. 29, *infra*.

drawal, exchange of currency¹⁴ or other payment or transfer "which involves a transaction in currency of more than \$10,000." 31 CFR § 103.22.¹⁵ The regulations exempt from the reporting requirement certain intrabank transactions and "transactions with an established customer maintaining a deposit relationship [in amounts] commensurate with the customary conduct of the business industry or profession of the customer concerned." *Ibid.*¹⁶ Provision is also made in the regulations whereby information obtained by the Secretary of

¹⁴ "Currency" is defined in the Secretary's regulations as the "coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money." 31 CFR § 103.11.

¹⁵ The form prescribed by the Secretary, see 31 CFR § 103.25 (a), for the reporting of the domestic currency transactions is Treasury Form 4789 (Currency Transaction Report). See Jurisdictional Statement for the United States in No. 72-1073, App. D, at 121. Form 4789 requires information similar to that required by the previous Treasury reporting form, see n. 12, *supra*, including (1) the name, address, business or profession and social security number of the person conducting the transaction; (2) similar information as to the person or organization for whom it was conducted; (3) a summary description of the nature of the transaction, the type, amount and denomination of the currency involved and a description of any check involved in the transaction; (4) the type of identification presented; and (5) the identity of the reporting financial institution.

The regulations also provide that the names of all customers whose currency transactions in excess of \$10,000 are not reported on Form 4789 must be reported to the Secretary on demand. 31 CFR § 103.22.

¹⁶ Transactions with Federal Reserve Banks or Federal Home Loan Banks, or solely with or originated by financial institutions or foreign banks, are also excluded from these reporting requirements. 31 CFR § 103.22.

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the Treasury may in some instances and in confidence be available to other departments or agencies of the United States. 31 CFR § 103.43; see 31 U. S. C. § 1061.¹⁷ There is also provision made in the regulations whereby the Secretary may in his sole discretion make exceptions to or grant exemptions from the requirements of the regulation. 31 CFR § 103.45 (a).¹⁸ Failure to file the

¹⁷ Section 212 of the Act, 31 U. S. C. § 1061, authorizes the Secretary to provide by regulation for the availability of information provided in the reports required by the Act to other departments and agencies of the Federal Government. Pursuant to this authority, the Secretary has promulgated 31 CFR § 103.43, which provides:

“The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor. Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought.”

The last sentence of this regulation was added by an amendment, see 37 Fed. Reg. 23114 (1972), 38 Fed. Reg. 2174 (1973), effective January 17, 1973.

¹⁸ 31 CFR § 103.45 (a) provides:

“The Secretary, in his sole discretion, may by written order or authorization make exceptions to, or grant exemptions from, the requirements of this part. Such exceptions, or exemptions, may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.”

When originally promulgated, this regulation additionally gave the Secretary the authority to “impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify the requirements of” the Act. 37 Fed. Reg. 6912 (1972). The

required report or the filing of a false report subjects the banks to criminal and civil penalties. 31 U. S. C. §§ 1056, 1058, 1059.

II

This litigation began in June 1972 in the United States District Court for the Northern District of California. Various plaintiffs applied for a temporary restraining order prohibiting the defendants, including the Secretary of the Treasury and heads of other federal agencies, from enforcing the provisions of the Bank Secrecy Act, enacted by Congress on October 26, 1970, and thereafter implemented by the Treasury Regulations. The plaintiffs below included several named individual bank customers, the Security National Bank, the California Bankers Association, and the American Civil Liberties Union, suing on behalf of itself and its various bank customer members.

The plaintiffs' principal contention in the District Court was that the Act and the Regulations were violative of the Fourth Amendment's guarantee against unreasonable search and seizure. The complaints also alleged that the Act violated the First, Fifth, Ninth, Tenth, and Fourteenth Amendments. The District Court issued a temporary restraining order enjoining the enforcement of the foreign and domestic reporting provisions of Title II of the Act, and requested the convening of a three-judge court pursuant to 28 U. S. C. 2284 to entertain the myriad of constitutional challenges to the Act.

The three-judge District Court unanimously upheld the constitutionality of the recordkeeping requirements of Title I of the Act and the accompanying Regulations, and the requirements of Title II of the Act and the Regulations requiring reports concerning the import and

amendment to the present form became effective January 17, 1973.
37 Fed. Reg. 23114 (1972); 38 Fed. Reg. 2174 (1973).

export of currency and monetary instruments and relationships with foreign financial institutions. The District Court concluded, however, with one judge dissenting, that the domestic reporting provisions of sections 221-223 of Title II of the Act, 31 U. S. C. §§ 1081-1083, were repugnant to the Fourth Amendment of the Constitution. 347 F. Supp. 1242 (1972). The court held that since the domestic reporting provisions of the Act permitted the Secretary of the Treasury to require detailed reports of virtually all domestic financial transactions, including those involving personal checks and drafts, and since the Act could conceivably be administered in such a manner as to compel disclosure of all details of a customer's financial affairs, the domestic reporting provisions must fall as facially violative of the Fourth Amendment. Their enforcement was enjoined.

Both the plaintiffs and the Government defendants filed timely notices of appeal from the portions of the District Court judgment adverse to them. We noted probable jurisdiction over three separate appeals from the decision below pursuant to 28 U. S. C. §§ 1252 and 1253. — U. S. — (1973):

No. 72-985. The appellant in this appeal is the California Bankers Association, an association of all state and national banks doing business in California. The Association challenges the constitutionality of the record-keeping provisions of Title I, as implemented by the regulations, on two grounds. First, the Association contends that the Act violates the Due Process Clause of the Fifth Amendment because there is no rational relationship between the objectives of the Act and the recordkeeping required, and because the Act places an unreasonable burden on the Association's member banks. Second, the Association contends that the recordkeeping requirements of Title I violate the First Amendment

right of privacy and anonymity of the member banks' customers.

No. 72-1196. This appeal was filed on behalf of a number of plaintiffs in the original suit in the District Court: on behalf of the Security National Bank, on behalf of the American Civil Liberties Union as a depositor in a bank subject to the recordkeeping requirements and as a representative of its bank customer members, and on behalf of certain bank customers. The appeal first challenges the constitutionality of the recordkeeping requirements of Title I of the Act and the implementing regulations, as does the appeal in 72-985, *supra*. Second, the appeal challenges the constitutionality of the foreign financial transaction reporting requirements of Title II of the Act and the implementing regulations. These recordkeeping and foreign reporting requirements are challenged on three grounds: first, that the requirements constitute an unreasonable search and seizure in violation of the Fourth Amendment; second, that the requirements constitute a coerced creation and retention of documents in violation of the Fifth Amendment privilege against compulsory self-incrimination; and third, that the requirements violate the First Amendment rights of free speech and free association.

No. 72-1073. In this appeal, the United States, as appellant, challenges that portion of the District Court's order holding the domestic financial transaction reporting requirements of Title II to violate the Fourth Amendment. The Government contends that the District Court erred in holding these provisions of Title II to be unconstitutional on their face, without considering the actual implementation of the statute by the Treasury Regulations. The Government urges that since only those who violate these regulations may incur civil or criminal penalties, it is the actual regulations issued by

the Secretary of the Treasury, and not the broad authorizing language of the statute, which are to be tested against the standards of the Fourth Amendment; and that when so tested they are valid.

For convenience, we will refer throughout the remainder of this opinion to the District Court plaintiffs as plaintiffs, since they are both appellants and appellees in the appeals filed in this Court.

III

We entertain serious doubt as to the standing of the plaintiff California Bankers Association to litigate the claims which it asserts here. Its complaint alleged that it is an unincorporated association consisting of 158 state and national banks doing business in California. So far as appears from the complaint, the Association is not in any way engaged in the banking business, and is not even subject to the Secretary's regulations which it challenges. While the District Court found that the Association sued on behalf of its member banks, the Association's complaint contains no such allegation. The Association seeks to litigate not only claims on behalf of its member banks, but also claims of injury to the depositors of its member banks. Since the Government has not questioned the standing of the Association to litigate the claims peculiar to banks, and more importantly since plaintiff Security National Bank has standing as an affected bank, and therefore determination of the Association's standing would in no way avoid resolution of any constitutional issues, we assume without deciding that the Association does have standing. See *Doe v. Bolton*, 410 U. S. 179, 189 (1973); *Sierra Club v. Morton*, 405 U. S. 727, 739 (1972); *NAACP v. Button*, 371 U. S. 415, 428 (1963).

We proceed then to consider the initial contention of the bank plaintiffs that the recordkeeping requirements

imposed by the Secretary's regulations under the authority of Title I deprives the banks of due process by imposing unreasonable burdens upon them, and by seeking to make the banks the agents of the Government in surveillance of its citizens. Such recordkeeping requirements are scarcely a novelty. The Internal Revenue Code, for example, contains a general authorization to the Secretary of Treasury to prescribe by regulation records to be kept by both business and individual taxpayers, 26 U. S. C. § 6001, which has been implemented by the Secretary in various regulations.¹⁹ And this Court has been faced with numerous cases involving similar recordkeeping requirements. Similar requirements imposed on the countless businesses subject to the Price Control Act dur-

¹⁹ See, e. g., Treas. Reg. § 1.368-3 (records to be kept by taxpayers who participate in tax-free exchanges in connection with a corporate reorganization); § 1.374-3 (records to be kept by a railroad corporation engaging in a tax-free exchange in connection with a railroad reorganization); § 1.857-6 (real estate investment trusts must keep records of stock ownership); § 1.964-3 (shareholders must keep records of their interest in a controlled foreign corporation); § 1.1101-4 (records must be kept by a stock or security holder who receives stock or securities or other property upon a distribution made by a qualified bank holding corporation); § 1.1247-5 (foreign investment company must keep records sufficient to verify what taxable income it may have); § 1.6001-1 (all persons liable to tax under subtitle A of the Int. Rev. Code shall keep records sufficient to establish gross income, deductions, and credits); § 31.6001 *et seq.* (requirements that various employers keep records of withholding under the Railroad Retirement Tax Act and the Federal Unemployment Tax Act); § 45.6001 (records to be kept by manufacturers of butter and cheese), § 46.6001 (records to be kept by manufacturers of sugar); § 46.6001-4 (records to be kept by persons paying premiums on policies issued by foreign insurers). Treas. Reg. § 301.7207-1 provides for criminal penalties for willful delivery or disclosure to the Internal Revenue Service of a document known by the person disclosing it to be false as to any material matter.

ing the Second World War were upheld in *Shapiro v. United States*, 335 U. S. 1 (1948), the Court observing that there was "a sufficient relation between the activity 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" *Id.*, at 32. In *United States v. Darby*, 312 U. S. 100 (1941), the Court held that employers subject to the Fair Labor Standards Act could be required to keep records of wages paid and hours worked:

"Since, as we have held, Congress may require production for interstate commerce to conform to [wage and hour] conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it." *Id.*, at 125.

We see no reason to reach a different result here. The plenary authority of Congress over both interstate and foreign commerce is not open to dispute, and that body was not limited to any one particular approach to effectuate its concern that negotiable instruments moving in the channels of that commerce were significantly aiding criminal enterprise. The Secretary of the Treasury, authorized by Congress, concluded that copying and retention of certain negotiable instruments by the bank upon which they were drawn would facilitate the detection and apprehension of participants in such criminal enterprises. Congress could have closed the channels of commerce entirely to negotiable instruments, had it thought that so drastic a solution were warranted; it could have made the transmission of the proceeds of any criminal activity by negotiable instruments in interstate or foreign commerce a separate criminal offense. Had

it chosen to do the latter, under the precise authority of *Darby* or *Shapiro, supra*, it could have required that each individual engaging in the sending of negotiable instruments through the channels of commerce maintain a record of such action; the bank plaintiffs concede as much.²⁰

The bank plaintiffs contend, however, that the Act does not have as its primary purpose regulation of the banks themselves, and therefore the requirement that the banks keep the records is an unreasonable burden on the banks. *Shapiro* and *Darby*, which involved legislation imposing recordkeeping requirements in aid of substantive regulation, are therefore said not to control. But provisions requiring reporting or recordkeeping by the paying institution, rather than the individual who receives the payment, are by no means unique. The Internal Revenue Code and its regulations, for example, contain provisions which require businesses to report income payments to third parties (26 U. S. C. § 6041 (a)), employers to keep records of certain payments made to employees (Treas. Reg. § 31.6001), corporations to report dividend payments made to third parties (26 U. S. C. § 6042), cooperatives to report patronage dividend payments (26 U. S. C. § 6044), brokers to report customers' gains and losses (26 U. S. C. § 6045), and banks to report payments of interest made to depositors (26 U. S. C. § 6049).

In *Darby* an identifiable class of employer was made subject to the Fair Labor Standards Act, and in *Shapiro* an identifiable class of businesses had been placed under the Price Control Act; in each of those instances, Congress found that the purpose of its regulation was adequately secured by requiring records to be kept by the

²⁰ Brief for Appellant California Bankers Association in No. 72-985, at 25.

persons subject to the substantive commands of the legislation. In this case, however, Congress determined that recordkeeping alone would suffice for its purposes, and that no correlative substantive legislation was required. Neither this fact, nor the fact that the principal congressional concern is with the activities of the banks' customers, rather than with the activities of the banks themselves, serve to invalidate the legislation on due process grounds.

The bank plaintiffs proceed from the premise that they are complete bystanders with respect to transactions involving drawers and drawees of their negotiable instruments. But such is hardly the case. A voluminous body of law has grown up defining the rights of the drawer, the payee, and the drawee bank with respect to various kinds of negotiable instruments. The recognition of such rights, both in the various States of this country and in other countries, is itself a part of the reason why the banking business has flourished and played so prominent a part in commercial transactions. The bank is a party to any negotiable instrument drawn upon it by a depositor, and upon acceptance or payment of an instrument incurs obligations to the payee. While it obviously is not privy to the background of a transaction in which a negotiable instrument is used, the existing wide acceptance and availability of negotiable instruments is of inestimable benefit to the banking industry as well as to commerce in general.

Banks are therefore not conscripted neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance. Congress not illogically decided that if records of transactions of negotiable instruments were to be kept and maintained, in order to be available as evidence under customary legal process if the occasion warranted, the bank was the most easily

identifiable party to the instrument and therefore should do the recordkeeping. We believe this conclusion is consistent with *Darby* and *Shapiro*, and that there is a sufficient connection between the evil Congress sought to address and the recordkeeping procedure it required to pass muster under the Due Process Clause of the Fifth Amendment.²¹

The bank plaintiffs somewhat halfheartedly argue, on the basis of the costs which they estimate will be incurred by the banking industry in complying with the Secre-

²¹ Congress had before it ample testimony that the requirement that banks reproduce checks and maintain other records would significantly aid in the enforcement of federal tax, regulatory, and criminal laws. See House Hearings, n. 1, *supra*, at 151, 322, 359; Senate Hearings, n. 1, *supra*, at 61-68, 175, 230, 250-255, 282. While a substantial portion of the checks drawn on banks in the United States may never be of any utility for law enforcement, tax or regulatory purposes, the regulations do limit the check-copying requirement to checks in excess of \$100. 31 CFR § 103.34 (b)(3) and (4). This \$100 exception was added to the regulations since this litigation was instituted, see n. 5, *supra*; in reviewing the judgment of the District Court in this case, we look to the statute and the regulations as they now stand, not as they once did. *Hall v. Beals*, 396 U. S. 45, 48 (1969) (*per curiam*); *Thorpe v. Housing Authority*, 393 U. S. 268, 281 n. 38 (1969).

The California Bankers Association contends that the \$100 exception is meaningless since microfilm cameras cannot discriminate between checks in different amounts. There was, however, testimony during the House Hearings that an additional step could be added to the check-handling procedures to sort out those checks not required to be copied, and that many banks have equipment that can sort checks on a dollar-amount basis. House Hearings, n. 1, *supra*, at 322, 359. In any event, it is clear that the Act and regulations do not require banks to microfilm all checks, which some banks have traditionally done, but instead leaves the decision to the banks. Given the fact that the cost burdens placed on the banks in implementing the recordkeeping requirements of the statute and regulations are also reasonable ones, see n. 22, *infra*, we do not think that the recordkeeping requirements are unreasonable.

tary's recordkeeping requirements, that this cost burden alone deprives them of due process of law. They cite no cases for this proposition, and it does not warrant extended treatment. In its complaint filed in the District Court, plaintiff Security National Bank asserted that it was an "insured" national bank; to the extent that Congress has acted to require records on the part of banks insured by the Federal Deposit Insurance Corporation, or of financial institutions insured under the National Housing Act, Congress is simply imposing a condition on the spending of public funds. See, e. g., *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937); *Helvering v. Davis*, 301 U. S. 619 (1937). Since there was no allegation in the complaints filed in the District Court, nor is it contended here that any bank plaintiff is not covered by FDIC or Housing Act Insurance, it is unnecessary to consider what questions would arise had Congress relied solely upon its power over interstate commerce to impose the recordkeeping requirements. The cost burdens imposed on the banks by the recordkeeping requirements are far from unreasonable, and we hold that such burdens do not deny the banks due process of law.²²

²² The only figures in the record as to the cost burdens placed on the banks by the recordkeeping requirements show that the Bank of America, one of the largest banks in the United States, with 997 branches, 29 billion dollars in deposits and a net income in excess of 178 million dollars (Moody's Bank and Finance Manual (1972), at 633-636), expended 392 thousand dollars in 1971, including start-up costs, to comply with the microfilming requirements of Title I of the Act. Affidavit of William Ehler, App. 24-25.

The hearings before the House Committee on Banking and Currency indicated that the cost of making microfilm copies of checks ranged from 1½ mills per check for small banks down to about ½ mill or less for large banks. See House Hearings, n. 1, *supra*, at 341, 354-356; H. Rep. No. 91-975, *supra*, at 11. The House Report

The bank plaintiffs also contend that the record-keeping requirements imposed by the Secretary pursuant to the Act undercut a depositor's right to effectively challenge a third-party summons issued by the Internal Revenue Service. See *Reisman v. Caplin*, 375 U. S. 440 (1964); *Donaldson v. United States*, 400 U. S. 517 (1970); *Couch v. United States*, 409 U. S. 322 (1973). Whatever wrong such a result might work on a depositor, it works no injury to his bank. It is true that in a limited class of cases this Court has permitted a party who suffered injury as a result of the operation of a law to assert his rights even though the sanction of the law was borne by another, *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), and conversely, the Court has allowed a party upon whom the sanction falls to rely on the wrong done to a third party in obtaining relief, *Barrows v. Jackson*, 346 U. S. 249 (1953); *Eisenstadt v. Baird*, 405 U. S. 438 (1972). Whether the bank might in other circumstances rely on an injury to its depositors, or whether instead this case is governed by the general rule that one has standing only to vindicate his own rights, e. g., *Moose Lodge v. Irvis*, 407 U. S. 163, 166 (1972), need not now be decided, since, in any event, the claim is premature. Claims of depositors against the compulsion by lawful process of bank records involving the depositors' own transactions must wait until such process issues.

Certain of the plaintiffs below, appellants in No. 72-1196, including the American Civil Liberties Union, the Security National Bank, and various individual plaintiff depositors, argue that "the dominant purpose of an Act

further indicates that the legislation was not expected to significantly increase the costs of the banks involved since it was found that many banks already followed the practice of maintaining the records contemplated by the legislation.

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is the creation, preservation, and collection of evidence of crime [and] . . . [i]t is against the standards applicable to the criminal law, then, that its constitutionality must be measured." They contend that the recordkeeping requirements violate the provisions of the Fourth, Fifth, and First Amendments to the Constitution. At this point, we deal only with such constitutional challenges as they relate to the recordkeeping provisions of Title I of the Act.

We see nothing in the Act which violates the Fourth Amendment rights of any of these plaintiffs. Neither the provisions of Title I nor the implementing regulations require that any information contained in the records be disclosed to the Government; both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process.

Plaintiffs urge that when the bank makes and keeps records under the compulsion of the Secretary's regulations it acts as an agent of the Government, and thereby engages in a "seizure" of the records of its customers. But all of the records which the Secretary requires to be kept pertain to transactions to which the bank was itself a party. See *United States v. Biswell*, 406 U. S. 311, 316 (1972). The fact that a large number of banks voluntarily kept records of this sort before they were required to do so by regulation is an indication that the records were thought useful to the bank in the conduct of its own business, as well as in reflecting transactions of its customers. We decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank or the person under investigation by the taxing authorities. See *First National Bank v. United States*, 267 U. S. 576 (1925), aff'g 295 Fed. 142 (SD Ala. 1924); *Donaldson v. United States*, 400 U. S. 517, 522 (1971).

"[I]t is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress." *Donaldson v. United States, supra*, at 537 (DOUGLAS, J., concurring).

Plaintiffs nevertheless contend that the broad authorization given by the Act to the Secretary to require the maintenance of records, coupled with the broad authority to require certain reports of financial transactions, amounts to the power to commit an unlawful search of the banks and the customers. This argument is based on the fact that 31 CFR § 103.45, as it existed when the District Court ruled in the case, permitted the Secretary to impose additional recordkeeping or reporting requirements by written order or authorization; this authority has now been deleted from the regulation;²³ plaintiffs thus argue that the Secretary could order the immediate reporting of any records made or kept under the compulsion of the Act. We of course must examine the statute and the regulations as they now exist. *Hall v. Beals*, 396 U. S. 45, 48 (1969) (*per curiam*); *Thorpe v. Housing Authority*, 393 U. S. 268, 281 n. 38 (1969). Even if plaintiffs were correct in urging that we decide the case on the basis of the regulation as it existed at the time the District Court ruled, their contention would be without merit. Whatever the Secretary *might* have authorized under the regulation, he did not in fact require the reporting of any records made or kept under the compulsion of the Act. Indeed, since the legislative history of the Act clearly indicates that records which it authorized the Secretary to require were to be available only by normal legal process, it is doubtful that the Secretary would have the authority ascribed to him by appellants even under the earlier form of the regulation. But in

²³ See n. 18, *supra*.

any event, whether or not he had the authority, he did not exercise it, and in fact none of the records were required to be reported. Since we hold that the mere maintenance of the records by the banks under the compulsion of the regulations invaded no Fourth Amendment right of any depositor, plaintiffs' attack on the record-keeping requirements under that Amendment fails.²⁴ That the bank in making the records required by the Secretary acts under the compulsion of the regulation is clear, but it is equally clear that in doing so it neither searches nor seizes records in which the depositor has a Fourth Amendment right.

Plaintiffs have briefed their contentions in such a way that we cannot be entirely certain whether their Fifth Amendment attack is directed only to the reporting provisions of the regulations, or to the recordkeeping provisions as well. To the extent that it is directed to the regulations requiring the banks to keep records, it is without merit. Incorporated banks, like other organizations, have no privilege against compulsory self-incrimination,

²⁴ Chapter 4 of the Act, section 241, 31 U. S. C. § 1121, authorizes the Secretary to by regulation require the maintenance of records by persons who engage in any transaction or maintain a relationship, directly or indirectly, on behalf of themselves or others, with a foreign financial agency. The Secretary has by regulation required the maintenance of such records by persons having such financial interests and by domestic financial institutions who engage in monetary transactions outside the United States. 31 CFR §§ 103.32, 103.33. The Act also provides that production of such records shall be compelled only by "a subpoena or summons duly authorized and issued or as may otherwise be required by law." 31 U. S. C. § 1121 (b). Though it is not apparent from the various briefs filed in this Court by the plaintiffs below whether this particular record-keeping requirement is challenged, our holding that a mere requirement that records be kept does not violate any constitutional right of the banks or of the depositors necessarily disposes of such a claim, since there is no indication at this point that there has been any attempt to compel the production of such records.

e. g., Hale v. Henkel, 201 U. S. 43, 74-75 (1906); *Wilson v. United States*, 221 U. S. 361, 382-384 (1911); *United States v. White*, 322 U. S. 694, 699 (1944). Since a party incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights, *Johnson v. United States*, 228 U. S. 457, 458 (1913); *Couch v. United States*, 409 U. S. 322, 328 (1973), the depositor plaintiffs here present no meritorious Fifth Amendment challenge to the recordkeeping requirements.

Plaintiff ACLU makes an additional challenge to the recordkeeping requirements of Title I. It argues that those provisions, and the implementing regulations, violate its members' First Amendment rights, since the provisions could possibly be used to obtain the identities of its members and contributors through the examination of the organization's bank records. This Court has recognized that an organization may have standing to assert that constitutional rights of its members to be protected from governmentally compelled disclosure of their membership in the organization, and that absent a countervailing governmental interest, such information may not be compelled. *NAACP v. Alabama*, 357 U. S. 440 (1958). See *Pollard v. Roberts*, 283 F. Supp. 258 (ED Ark. 1968), aff'd *per curiam*, 393 U. S. 14 (1968).

Those cases, however, do not elicit a *per se* rule that would forbid such disclosure in a situation where the governmental interest would override the associational interest in maintaining such confidentiality. Each of them was litigated after a subpoena or summons had already been served for the records of the organization, and an action brought by the organization to prevent the actual disclosure of the records.²⁵ No such disclosure

²⁵ The ACLU recognizes that these cases, and the other cases it cites involved situations in which a subpoena or summons had already issued. Brief for the Appellant ACLU in No. 72-1196,

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has been sought by the Government here, and the ACLU's challenge is therefore premature. This Court, in the absence of a concrete fact situation in which competing associational and governmental interests can be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred by cases such as *NAACP v. Alabama*, *supra*.²⁶ The threat to any First Amendment rights of the ACLU or its members from the mere existence of the records in the hands of the bank is a good deal more remote than the threat assertedly posed by the Army's system of compilation and distribution of information which we declined to adjudicate in *Laird v. Tatum*, 408 U. S. 1 (1972).

IV

We proceed now to address the constitutional challenges directed at the reporting requirements of the regulations authorized in Title II of the Act. Title II

at 57. See *Lamont v. Postmaster General*, 381 U. S. 301 (1965); *Gibson v. Florida Legislative Investigations Comm.*, 372 U. S. 539 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U. S. 293 (1961); *Shelton v. Tucker*, 364 U. S. 479 (1960); *Bates v. Little Rock*, 361 U. S. 516 (1960); *NAACP v. Alabama*, 357 U. S. 449 (1958); *United States v. Rumley*, 345 U. S. 41 (1953).

²⁶ The ACLU contends that present injunctive relief is essential, since the banks might not notify it of the fact that their records have been subpoenaed, and might comply with the subpoena without giving the ACLU a chance to obtain judicial review. While noting that "most banks formally prohibit" it (citing *American Banker*, May 12, 1972, p. 1, cols. 3-4), the ACLU also contends that the "day-to-day practice of permitting 'informal' access to bank records is, unfortunately, widespread." Brief for Appellant ACLU in No. 72-1196, at 58-59.

The record contains no showing of any attempt by the Government, formal or informal, to compel the production of bank records containing information relating to the ACLU; we accordingly express no opinion whether notice would in such an instance be required by either the Act or the Constitution.

authorizes the Secretary to require reporting of two general categories of banking transactions: foreign and domestic. The District Court upheld the constitutionality of the foreign transaction reporting requirements of regulations issued under Title II; certain of the plaintiffs below, appellants in No. 72-1196, have appealed from that portion of the District Court's judgment, and here renew their contentions of constitutional infirmity in the foreign reporting regulations based upon the First, Fourth, and Fifth Amendments. The District Court invalidated the Bank Secrecy Act insofar as it authorized the Secretary to promulgate regulations requiring banks to report domestic transactions involving their customers, and the Government in No. 72-1073 appeals from that portion of the District Court's judgment.

As noted above, the regulations issued by the Secretary under the authority of Title II contain two essential reporting requirements with respect to foreign financial transactions. Chapter 3 of Title II of the Act, 31 U. S. C. § 1101-1105, and the corresponding regulation, 31 CFR § 103.23, require individuals to report transportation of monetary instruments into or out of the United States, or receipts of such instruments in the United States from places outside the United States, if the instrument transported or received has a value in excess of \$5,000. Chapter 4 of Title II of the Act, 31 U. S. C. § 1121-1122, and the corresponding regulation, 31 CFR § 103.24, generally require United States citizens, residents, and businessmen to file reports of their relationships with foreign financial institutions.

The domestic reporting provisions of the Act as implemented by the regulations, in contrast to the foreign reporting requirements, apply only to banks and financial institutions. In enacting the statute, Congress provided in section 221, 31 U. S. C. § 1081, that the Secretary

might specify the types of currency transactions which should be reported:

"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."

Section 222 of the Act, 31 U. S. C. § 1082, authorizes the Secretary to require such reports from the domestic financial institution involved, from the parties to the transactions, or from both. In exercising his authority under these sections, the Secretary has promulgated regulations which require only that the financial institutions make the report to the Internal Revenue Service; he has not required any report from the individual parties to domestic financial transactions.²⁷ The applicable regulation, 31 CFR § 103.22, requires the financial institution to "file a report on each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than \$10,000." The regulation exempts several types of currency transactions from this reporting requirement, including transactions "within an established customer maintaining a deposit relationship with the bank, in amounts which the banks may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned." *Ibid.*

²⁷ See n. 29, *infra*.

A. FOURTH AMENDMENT CHALLENGE TO THE FOREIGN REPORTING REQUIREMENTS

The District Court, in differentiating for constitutional purposes between the foreign reporting requirements and the domestic reporting requirements imposed by the Secretary, relied upon our opinion in *United States v. United States District Court*, 407 U. S. 297 (1972), for the proposition that Government surveillance in the area of foreign relations is in some instances subject to less constitutional restraint than would be similar activity in domestic affairs. Our analysis does not take us over this ground.

The plenary authority of Congress to regulate foreign commerce, and to delegate significant portions of this power to the Executive, is well-established. *C & S Airlines v. Waterman Corp.*, 333 U. S. 103, 109 (1948); *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294 (1933). Plaintiffs contend that in exercising that authority to require reporting of previously described foreign financial transactions, Congress and the Secretary have abridged their Fourth Amendment rights.

The familiar language of the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" Since a statute requiring the filing and subsequent publication of a corporate tax return has been upheld against a Fourth Amendment challenge, *Flint v. Stone Tracy Co.*, 220 U. S. 107, 174-176 (1911), reporting requirements are by no means *per se* violations of the Fourth Amendment. Indeed, a contrary holding might well fly in the face of the settled sixty-year history of self-assessment of individual and corporate income taxes in the United States. This Court has on numerous occasions recognized the im-

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portance of the self-regulatory aspects of that system, and interests of the Congress in enforcing it:

"In assessing income taxes the Government relies primarily upon the disclosure by the taxpayer of the relevant facts. This disclosure it requires him to make in his annual return. To insure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions. Such sanctions may confessedly be either criminal or civil. *Helvering v. Mitchell*, 303 U. S. 391, 399 (1938).

To the extent that the reporting requirements of the Bank Secrecy Act and the settled practices of the tax collection process are similar, this history must be overcome by those who argue that the reporting requirements are a violation of the Fourth Amendment. Plaintiffs contend, however, that *Boyd v. United States*, 116 U. S. 616 (1886), establishes the invalidity of the foreign reporting requirement under the Fourth Amendment, and that the particular requirements imposed are so indiscriminate in their nature that the regulations must be deemed to be the equivalent of a general warrant of the kind condemned as obnoxious to the Fourth Amendment in cases such as *Stanford v. Texas*, 379 U. S. 476 (1965). We do not think these cases would support plaintiffs even if their contentions were directed at the domestic reporting requirements; in light of the fact that the foreign reporting requirements deal with matters in foreign commerce, we think plaintiffs' reliance on the cases to challenge those requirements must fail.

Boyd v. United States, *supra*, is a case which has been the subject of repeated citation, discussion, and explanation since the time of its decision 88 years ago. In *Communist Party v. SACB*, 367 U. S. 1 (1961), the Court described the *Boyd* holding as follows:

"The *Boyd* case involved a statute providing that

in proceedings other than criminal arising under the revenue laws, the Government could secure an order of the court requiring the production by an opposing claimant or defendant of any documents under his control which, the Government asserted, might tend to prove any of the Government's allegations. If production were not made, the allegations were to be taken as confessed. On the Government's motion, the District Court had entered such an order, requiring the claimants in a forfeiture proceeding to produce a specified invoice. Although the claimants objected that the order was improper and the statute unconstitutional in coercing self-incriminatory disclosures and permitting unreasonable searches and seizures, they did, under protest, produce the invoice, which was, again over their constitutional objection, admitted into evidence. This Court held that on such a record a judgment for the United States could not stand, and that the statute was invalid as repugnant to the Fourth and Fifth Amendments." 367 U. S. 1, 110.

But the *Boyd* Court recognized that the Fourth Amendment does not prohibit all requirements that information be made available to the Government:

"[T]he supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures." *Boyd v. United States, supra*, 116 U. S., at 623-624.

Stanford v. Texas, supra, involved a warrant issued by a state judge which described petitioner's home and authorized the search and seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures,

recordings and other written instruments concerning the Communist Party of Texas." This Court found the warrant to be an unconstitutional general warrant, and invalidated the search and seizure conducted pursuant to it. Unlike the situation in *Stanford*, the Secretary's regulations do not authorize indiscriminate rummaging among the records of the plaintiffs, nor do the reports they require deal with literary material as in *Stanford*; the information sought is about commerce, not literature. The reports of foreign financial transactions required by the regulations must contain information as to a relatively limited group of financial transactions in foreign commerce, and are reasonably related to the statutory purpose of assisting in the enforcement of the laws of the United States.

Of primary importance, in addition, is the fact that the information required by the foreign reporting requirements pertains only to commercial transactions which take place across national boundaries. Chief Justice Taft, in his opinion for the Court in *Carroll v. United States*, 267 U. S. 132 (1925), observed:

"Travellers may be so stopped in crossing an international boundary because of national selfprotection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Id.*, at 154.

This settled proposition has been reaffirmed as recently as last Term in *Almeida-Sanchez v. United States*, 413 U. S. 266, 272 (1973). If reporting of income may be required as an aid to enforcement of the federal revenue statutes, and if those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment, we see no reason to invalidate the Secretary's regulations here.

The statutory authorization for the regulations was based upon a conclusion by Congress that international currency transactions and foreign financial institutions were being used by residents of the United States to circumvent the enforcement of the laws of the United States. The regulations are sufficiently tailored so as to single out transactions found to have the greatest potential for such circumvention and which involve substantial amounts of money. They are therefore reasonable in the light of that statutory purpose, and consistent with the Fourth Amendment.

B. FOURTH AMENDMENT CHALLENGE TO THE DOMESTIC REPORTING REQUIREMENTS

The District Court examined the domestic reporting requirements imposed on plaintiffs by looking to the broad authorization of the Act itself, without specific reference to the regulations promulgated under its authority. The District Court observed:

"[A]lthough to date the Secretary has required reporting only by the financial institutions and then only of *currency* transactions over \$10,000, he is empowered by the Act, as indicated above, to require, if he so decides, reporting not only by the financial institution, but also by other parties to or participants in transactions with the institutions and, further, that the Secretary may require reports, not only of currency transactions but of any transaction involving any monetary instrument—and in any amount—large or small." 347 F. Supp., at 1246.

The District Court went on to pose, as the question to be resolved, whether "these provisions, broadly authorizing an executive agency of government to require financial institutions and parties [thereto] to routinely report . . . the detail of almost every conceivable transaction . . . are reasonable in the light of the purpose of the Fourth Amendment."

able financial transaction . . . [are] such an invasion of a citizen's right of privacy as amounts to an unreasonable search and seizure within the meaning of the Fourth Amendment." *Ibid.*

Since, as we have observed earlier in this opinion, the statute is not self-executing, and were the Secretary to take no action whatever under his authority there would be no possibility of criminal or civil sanctions being imposed on anyone, the District Court was wrong in framing the question in this manner. The question is not what sort of reporting requirements *might* have been imposed by the Secretary under the broad authority given him in the Act, but rather what sort of reporting requirements did he *in fact* impose under that authority.

"Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality. 'Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.' *Watson v. Buck*, 313 U. S. 387, 402." *Communist Party v. SACB, supra*, 367 U. S., at 71.

The question for decision, therefore, is whether the regulations relating to the reporting of domestic transactions, violations of which could subject those required to report to civil or criminal penalties, invade any Fourth Amendment right of those required to report. To that question we now turn.

The regulations issued by the Secretary require the reporting of domestic financial transactions only by financial institutions. *United States v. Morton Salt Co.*,

338 U. S. 632 (1950), held that organizations engaged in commerce could be required by the Government to file reports dealing with particular phases of their activities. The language used by the Court in that case is instructive:

"It is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment. Cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186. Although the 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men,' Brandeis, J., dissenting in *Olmstead v. United States*, 277 U. S. 438, 471, at 478, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, *Boyd v. United States*, 116 U. S. 616, *Hale v. Henkel*, 201 U. S. 43, 70, neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. *Hale v. Henkel*, *supra*; *United States v. White*, 322 U. S. 694.

"While they may and should have protection from unlawful demands made in the name of public investigation, cf. *Federal Trade Comm'n v. American Tobacco Co.*, 264 U. S. 298, corporations can claim no equality with the individuals in the enjoyment of a right of privacy. Cf. *United States v. White*, *supra*. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. [Citations omitted.] Even if one were to regard the request for information in this case as caused by noth-

ing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." 338 U. S. 632, 651-652.

We have no difficulty then in determining that the Secretary's requirements for the reporting of domestic financial transactions abridge no Fourth Amendment right of the banks themselves. The bank is not a mere stranger or bystander with respect to the transactions which it is required to record or report. The bank is itself a party to each of these transactions, earns portions of its income from conducting such transactions, and in the past may have kept records of similar transactions on a voluntary basis for its own purposes. See *United States v. Biswell*, 406 U. S. 311, 316 (1972). The regulations presently in effect governing the reporting of domestic currency transactions require information as to the personal and business identity of the person conducting the transaction and of the person or organization for whom it was conducted, as well as a summary description of the nature of the transaction. It is conceivable, and perhaps likely, that the bank might not of its own volition compile this amount of detail for its own purposes, and therefore to that extent the regulations put the bank in the position of seeking information from the customer in order to eventually report it to the Government. But as we have noted above, "neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." *United States v. Morton Salt Co., supra*, at 652.

The regulations do not impose unreasonable reporting requirements on the banks. The regulations require the reporting of information with respect to abnormally large transactions in currency, much of which informa-

tion the bank as a party to the transaction already possesses or would acquire in its own interest. To the extent that the regulations in connection with such transactions require the bank to obtain information from a customer simply because the Government wants it, the information is sufficiently described and limited in nature, and sufficiently related to a tenable congressional determination as to improper use of transactions of that type in interstate commerce, so as to withstand the Fourth Amendment challenge made by the bank plaintiffs. “[T]he inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. ‘The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.’” *United States v. Morton Salt Co., supra*, at 652-653, see *Okla. Press Pub. Co. v. Walling*, 327 U. S. 186, 208 (1946).

In addition to the Fourth Amendment challenge to the domestic reporting requirements made by the bank plaintiffs, we are faced with a similar challenge by the depositor plaintiffs, who contend that since the reports of domestic transactions which the bank is required to make will include transactions to which the depositors were parties, the requirement that the bank make a report of the transaction violates the Fourth Amendment rights of the depositor. The complaint filed in the District Court by the ACLU and the depositors contains no allegation by any of the individual depositors that they were engaged in the type of \$10,000 domestic currency transaction which would necessitate that their bank report it to the Government. This is not a situation where there might have been a mere oversight in the specificity of the pleadings and where this Court could properly infer that participation in such a transaction was necessarily inferred from the fact that the individual plaintiffs allege that they are in fact “depositors.”

Such an inference can be made, for example, as to the recordkeeping provisions of Title I, which require the banks to keep various records of certain transactions by check; as our discussion of the challenges by the individual depositors to the recordkeeping provisions, *supra*, implicitly recognizes, the allegation that one is a depositor is sufficient to permit consideration of the challenges to the recordkeeping provisions, since any depositor would to some degree be affected by them. Here, however, we simply cannot assume that the mere fact that one is a depositor in a bank means that he has engaged or will engage in a transaction involving more than \$10,000 in currency, which is the only type of domestic transaction which the Secretary's regulations require that the banks report. That being so, the depositor plaintiffs lack standing to challenge the domestic reporting regulations, since they do not show that their transactions are required to be reported.²⁸

"Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.' *Linda R. S. v. Richard D.*, 410 U. S. 614, 617 (1973). There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker v. Carr*, 369 U. S. 186, 204 (1962) Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately

²⁸ We hold here and in other parts of this opinion that certain of the plaintiffs did not make the requisite allegations in the District Court to give them standing to challenge the Act and the regulations issued pursuant to it. In so holding, we do not, of course, mean to imply that such claims would be meritorious if presented by a litigant who has standing.

in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. *Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923). The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' *Golden v. Zwickler*, 394 U. S. 103, 109-110 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941); *United Public Workers v. Mitchell*, 330 U. S. 75, 89-91 (1947)." *O'Shea v. Littleton*, 414 U. S. —, — (1974) (footnote omitted).

We therefore hold that the Fourth Amendment claims of the depositor plaintiffs may not be considered on the record before us. Nor do we think that the California Bankers Association or the Security National Bank can vicariously assert such Fourth Amendment claims on behalf of bank customers in general.

The regulations promulgated by the Secretary require that a report concerning a domestic currency transaction involving more than \$10,000 be filed only by the financial institution which is a party to the transaction; the regulations do not require a report from the customer. 31 CFR § 103.22; see 31 U. S. C. § 1082. Both the bank and depositor plaintiffs here argue that the regulations are constitutionally defective because they do not require the financial institution to notify the customer that a report will be filed concerning the domestic currency transaction. Since we have held that the depositor plaintiffs have not made a sufficient showing of injury to make a constitutional challenge to the domestic reporting requirements, we do not address ourselves to the necessity of notice to those bank customers whose transactions must be reported. The fact that the regulations do not require the banks to notify the customer of the report violates no constitutional right of the banks, and

the banks in any event are left free to adopt whatever customer notification procedures they desire.²⁹

C. FIFTH AMENDMENT CHALLENGE TO THE FOREIGN AND DOMESTIC REPORTING REQUIREMENTS

The District Court rejected the depositor plaintiffs' claim that the foreign reporting requirements violated

²⁹ Plaintiffs similarly contend that the Secretary's regulation requiring the reporting of domestic currency transactions *only* by the banks or financial institutions which are parties thereto, violates a specific requirement of the Act. Section 222 of the Act, 31 U. S. C. § 1082, provides in pertinent part:

"The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require."

Plaintiffs contend that this language *requires* the Secretary to require either a signature on the report by the individual customer in the currency transaction, or a report from that customer. Since the Secretary has only required a report from the financial institution, plaintiffs urge, in addition, that there will not be notice to the individual customer of the report made by the financial institution.

In rebuttal, the Government urged in oral argument, Tr. of Oral Arg. 64-70, that not only does section 206 of the Act, 31 U. S. C. § 1055, give the Secretary broad authority to make exceptions to the requirements of the Act in promulgating the regulations, but that the House and Senate Reports on the bills considered by each house of the Congress, each of which contained a provision identical to the language of section 222, indicated that each chamber read that language differently. The Senate Committee believed that the language permitted the Secretary to require reports from the financial institution, the customer, *or* both, S. Rep. No. 91-1139, *supra*, at 15, while the House Committee felt that the language required reports to be filed by both the financial institution and the customer, H. R. Rep. No. 91-975, *supra*, at 22.

We similarly do not reach this claim as it relates to the depositor plaintiffs since they failed to allege sufficient injury below. Whatever the merits of such a contention vis-a-vis the depositors, the regulation clearly has no adverse effect on any constitutional right of the banks, since the statute indisputably authorizes the Secretary to require a report from the bank.

the depositors' Fifth Amendment privilege against compulsory self-incrimination, and found it unnecessary to consider the similarly based challenge to the domestic reporting requirements since the latter were found to be in violation of the Fourth Amendment. The appeal of the depositor plaintiffs in No. 72-1196 challenges the foreign reporting requirements under the Fifth Amendment, and their brief likewise challenges the domestic reporting requirements as violative of that Amendment. Since they are free to urge in this Court reasons for affirming the judgment of the District Court which may not have been relied upon by the District Court, we consider here the Fifth Amendment objections to both the foreign and the domestic reporting requirements.

As we noted above, the bank plaintiffs, being corporations, have no constitutional privilege against compulsory self-incrimination by virtue of the Fifth Amendment. *Hale v. Henkel, supra.* Their brief urges that they may vicariously assert Fifth Amendment claims on behalf of their depositors. But since we hold *infra* that those depositor plaintiffs who are actually parties to this action are premature in asserting any Fifth Amendment claims, we do not believe that the banks under these circumstances have standing to assert Fifth Amendment claims on behalf of customers in general.

The individual depositor plaintiffs below made various allegations in the complaint and affidavits filed in the District Court. Plaintiff Stark alleged that he was, in addition to being president of plaintiff Security National Bank, a customer of and depositor in the bank. Plaintiff Marson alleged that he was a customer of and depositor in the Bank of America. Plaintiff Lieberman alleged that he had repeatedly in the recent past transported or shipped one or more monetary instruments exceeding \$5,000 in value from the United States to places outside the United States, and expected to do likewise in the near

future. Plaintiffs Lieberman, Harwood, Bruer, and Durell each alleged that they maintained a financial interest in and signature authority over one or more bank accounts in foreign countries. This, so far as we can ascertain from the record, is the sum and substance of the depositors' allegations of fact upon which they seek to mount an attack on the reporting requirements of regulations as violative of the privilege against compulsory self-incrimination granted to each of them by the Fifth Amendment.

Considering first the challenge of the depositor plaintiffs to the foreign reporting requirements, we hold that such claims are premature. In *United States v. Sullivan*, 274 U. S. 259 (1927), this Court reviewed a judgment of the Circuit Court of Appeals for the Fourth Circuit, 15 F. 2d 809 (1926), which had held that the Fifth Amendment protected the respondent from being punished for failure to file an income tax return. This Court reversed the decision below, stating:

"As the defendant's income was taxed, the statute of course required a return. See *United States v. Sischo*, 262 U. S. 165. In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant

desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." 274 U. S., at 263-264.

Here the depositor plaintiffs allege that they intend to engage in foreign currency transactions or dealings with foreign banks which the Secretary's regulations will require them to report, but they make no additional allegation that any of the information required by the Secretary will tend to incriminate them. It will be time enough for us to determine what, if any, relief from the reporting requirement they may obtain in a judicial proceeding when they have properly and specifically raised a claim of privilege with respect to particular items of information required by the Secretary, and the Secretary has overruled their claim of privilege. The posture of plaintiffs' Fifth Amendment rights here is strikingly similar to those asserted in *Communist Party v. SACB*, *supra*, 367 U. S., at 105-110. The Party there sought to assert the Fifth Amendment claims of its officers as a defense to the registration requirement of the Subversive Activities Control Act, although the officers were not at that stage of the proceeding required by the Act to register, and had neither registered nor refused to register on the grounds that registration might incriminate them. The Court said:

"If a claim of privilege is made, it may or may not be honored by the Attorney General. We cannot, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions. What-

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ever proceeding may be taken after and if the privilege is claimed will provide an adequate forum for litigation of that issue." 367 U. S., at 107.

Plaintiffs argue that cases such as *Albertson v. SACB*, 382 U. S. 70 (1965), have relaxed the requirements of earlier cases, but we do not find that contention supported by the language or holding of that case. There the Attorney General had petitioned for and obtained an order from the SACB compelling certain named members of the Communist Party to register their affiliation. In response to the Attorney General's petitions, both before the Board and in subsequent judicial proceedings, the Communist Party members had asserted the privilege against self-incrimination, and their claims had been rejected by the Attorney General. A previous decision of this Court had held that an affirmative answer to the inquiry as to membership in the Communist Party was an incriminating admission protected under the Fifth Amendment. *Blau v. United States*, 340 U. S. 159 (1950). The differences then between the posture of the depositor plaintiffs in this case and that of petitioner in *Albertson v. SACB, supra*, are evident.

We similarly think that the depositor plaintiffs' challenge to the domestic reporting requirements are premature. As we noted above, it is not apparent from the allegations of the complaints in these actions that any of the depositor plaintiffs would be engaged in \$10,000 domestic transactions with the bank which the latter would be required to report under the Secretary's regulations pertaining to such domestic transactions. Not only is there no allegation that any depositor engaged in such transactions, but there is no allegation in the complaint that any report which such a bank was required to make would contain information incriminating any depositor. To what extent, if any, depositors may claim a

privilege arising from the Fifth Amendment by reason of the obligation of the bank to report such a transaction may be left for resolution when the claim of privilege is properly asserted.

Depositor plaintiffs rely on *Marchetti v. United States*, 390 U. S. 39 (1968), *Grosso v. United States*, 390 U. S. 62 (1968), and *Haynes v. United States*, 390 U. S. 85 (1968), as supporting the merits of their Fifth Amendment claim. In each of those cases, however, a claim of privilege was asserted as a defense to the requirement of reporting particular information required by the law under challenge, and those decisions therefore in no way militate against our conclusion that depositor plaintiffs' efforts to litigate the Fifth Amendment issue at this time are premature.

D. PLAINTIFF ACLU'S FIRST AMENDMENT CHALLENGE TO THE FOREIGN AND DOMESTIC REPORTING REQUIREMENTS

The ACLU claims that the reporting requirements with respect to foreign and domestic transactions invade its associational interests protected by the First Amendment. We have earlier held a similar claim by this organization to be speculative and hypothetical when addressed to the recordkeeping requirements imposed by the Secretary. *Ante*, pp. _____. The requirement that particular transactions be reported to the Government, rather than records merely being kept to be available through normal legal process, removes part of the speculative quality of the claim. But the only allegation found in the complaints with respect to the financial activities of the ACLU states that it maintains accounts at one of the San Francisco offices of the Wells Fargo Bank and Trust Company. There is no allegation that the ACLU engages with any regularity in abnormally large domestic currency transactions, transports or re-

ceives monetary instruments from channels of foreign commerce, or maintains accounts in financial institutions in foreign countries. Until there is some showing that the reporting requirements contained in the Secretary's regulations would require the reporting of information with respect to the organization's financial activities, no concrete controversy is presented to this Court for adjudication. *O'Shea v. Littleton, supra*, 414 U. S., at

—.

V

All of the bank and depositor plaintiffs have stressed in their presentations to the District Court and to this Court that the recordkeeping and reporting requirements of the Bank Secrecy Act are focused in large part on the acquisition of information to assist in the enforcement of the criminal laws. While, as we have noted, Congress seems to have been equally concerned with civil liability which might go undetected by reason of transactions of the type required to be recorded or reported, concern for the enforcement of the criminal law was undoubtedly prominent in the minds of the legislators who considered the Act. We do not think it is strange or irrational that Congress, having its attention called to what appeared to be serious and organized efforts to avoid detection of criminal activity, should have legislated to rectify the situation. We have no doubt that Congress, in the sphere of its legislative authority, may just as properly address itself to the effective enforcement of criminal laws which it has previously enacted as to the enactment of those laws in the first instance. In so doing, it is of course subject to the strictures of the Bill of Rights, and may not transgress those strictures.³⁰

³⁰ There have been recent hearings in Congress on various legislative proposals to amend the Bank Secrecy Act. Hearings before the Subcommittee on Financial Institutions of the Senate

But the fact that a legislative enactment manifests a concern for the enforcement of the criminal law does not cast any generalized pall of constitutional suspicion over it. Having concluded that on the record in these appeals, plaintiffs have failed to state a claim for relief under the First, Fourth, and Fifth Amendments, and having concluded that the enactment in question was within the legislative authority of Congress, our inquiry is at an end.

On the appeal of the California Bankers Association in No. 72-985 from that portion of the judgment of the District Court upholding the recordkeeping requirements imposed by the Secretary pursuant to Title I, the judgment is affirmed. On the appeal of the bank and depositor plaintiffs in No. 72-1196 from that portion of the District Court's judgment upholding the recordkeeping requirements and regulations of Title I and the foreign reporting requirements imposed under the authority of Title II, the judgment is likewise affirmed. On the Government's appeal in No. 72-1073 from that portion of the District Court's judgment which held that the domestic reporting requirements imposed under Title II of the Act violated the Constitution, the judgment is reversed. The cause is remanded to the District Court for disposition consistent with this opinion.

So ordered.

Committee on Banking, Housing, and Urban Affairs to amend the Bank Secrecy Act, 92d Cong., 2d Sess. (1972). See S. 3814 and S. 3828, 92d Cong., 2d Sess. (1972).

SUPREME COURT OF THE UNITED STATES

Nos. 72-985, 72-1073, AND 72-1196

The California Bankers Association, Appellant, 72-985 <i>v.</i>	On Appeals from the United States District Court for the Northern District of California.
George P. Shultz, Secretary of the Treasury, et al.	
George P. Shultz, Secretary of the Treasury, et al., Appellants, 72-1073 <i>v.</i>	
The California Bankers Association et al.	
Fortney H. Stark, Jr., et al., Appellants, 72-1196 <i>v.</i>	
George P. Shultz et al.	

[April 1, 1974]

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring.

I join the Court's opinion, but add a word concerning the Act's domestic reporting requirements.

The Act confers broad authority on the Secretary to require reports of domestic monetary transactions from the financial institutions and parties involved. 31 U. S. C. §§ 1081 and 1082. The implementing regulations, however, require only that the financial institution "file a report on each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a *transaction in currency of more than \$10,000.*" 31 CFR § 103.22 (italics added). As the Court properly recognizes, we

must analyze appellees' contentions in the context of the Act as narrowed by the regulations. *Ante*, at —. From this perspective, I agree that the regulations do not constitute an impermissible infringement on any constitutional right.

A significant extension of the regulation's reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. *United States v. United States District Court*, 407 U. S. 297, 316-317 (1971). As the issues are presently framed, however, I am in accord with the Court's disposition of the matter.

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[April 1, 1974]

MR. JUSTICE DOUGLAS, dissenting.

I

The Court expresses a doubt that the California Bankers Association has standing to litigate the claims it asserts. That doubt, however, should be dissipated by our decisions.

Sierra Club v. Morton, 405 U. S. 727, 739 stated unequivocally that “an organization whose members are injured may represent those members in a proceeding for judicial review.”

Appellants in No. 72-1196 are a national bank, a bank customer and depositor, a membership organization which

is a customer of banks and receives money through banks for its members, a businessman who has engaged in and expects to engage in foreign financial transactions, and individuals having interests in or authority over foreign bank accounts. There can hardly be any doubt that these persons—at least the individuals and the membership organization—have standing. I think the same is true of the national bank in 72-1196 and the California Bankers Association in 72-985.

The claims the associations litigate in these cases are not only those of its members but also those of the depositors of those member banks. This will cost the banks, it is estimated, over \$6 million a year. Certainly that is enough to give the banks standing. Moreover, they must spy on their customers. The Bank Secrecy Act requires banks to record and retain the details of their customers' financial lives. In *Pierce v. Society of Sisters*, 268 U. S. 510, the Court upheld the right of a representative litigant, a parochial school, to have standing to raise questions pertaining to the rights of parents, guardians, and children. See *Barrows v. Jackson*, 346 U. S. 249, 257. In *Eisenstadt v. Baird*, 405 U. S. 438, we upheld the standing of a distributor of contraceptives to assert rights of unmarried persons, since they were denied "a forum in which to assert their own rights." *Id.*, at 446. The question of standing has been variously described. But the "gist" of the question we said in *Baker v. Carr*, 369 U. S. 186, 204, was whether the party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." There is that "concrete adverseness" here; and that doubtless is the reason the Solicitor General does not raise the question which the Court now stirs.

II

The Act has as its primary goal the enforcement of the criminal law.¹ The recordkeeping requirements originated according to Congressman Patman, author of the measure, with the Department of Justice and IRS in response to two problems: (1) “[a] trend was developing in the larger banks away from their traditional practices

¹ The House Report No. 91-975, 91st Cong., 2d Sess., 10 states: “Petty criminals, members of the underworld, those engaging in ‘white collar’ crime and income tax invaders use, in one way or another, financial institutions in carrying on their affairs.”

That was the reason for requiring the report of large domestic cash transactions. “Criminals deal in money—cash or its equivalent. The deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity. The money in many of these transactions may represent anything from proceeds of a lottery racket to money for the bribery of public officials.” *Id.*, at 11.

A sponsor on the floor of the House stated: “With respect to full financial recordkeeping, the problem can be simply stated; in the past decade, as organized crime and criminals have become more sophisticated, more and greater use has been made by criminal elements of our Nation’s financial institutions. Law enforcement officials believe that an effective attack on organized crime requires the maintenance of adequate and appropriate records by financial institutions.” 116 Cong. Rec. 16950.

Congressman Patman, author of the bill, stated: “This is really a bill which, if enacted into law, will be the longest step in the direction of stopping crime than any other we have had before this Congress in a long time.” *Id.*, at 16951.

While it started with a different objective, it was changed to serve an additional purpose: “We also discovered that secret foreign bank accounts were not the only criminal activities related to the banking field. The major law enforcement authority—the Justice Department—of the U. S. Government called our attention to the urgent need for regulations which would make uniform and adequate the present recordkeeping practices, or lack of recordkeeping practices, by domestic banks and other financial institutions.” *Id.*, at 16952.

of microfilming all checks drawn on them." 116 Cong. Rec. 16953. (2) As respects the identification of depositors, "A typical example might involve a situation where a person with a criminal reputation holds an account but does not personally make deposits or withdrawals." *Ibid.*

The purpose of the Act was to give the Secretary of the Treasury "primary responsibility" under Title II "to see to it that criminals do not take undue advantage of international trade and go undetected and unpunished." *Id.*, at 16954. He added; ". . . I would be the first to admit that this legislation does not provide perfect crime prevention. However, it is felt that the legislation will substantially increase the risk of discovery of any criminal who undertakes to hide his activity behind foreign secrecy." *Id.*, at 16955.

The same purpose was reflected in the Senate. Senator Proxmire, the author of the Senate version of the bill, stated, ". . . the purpose of the bill is to provide law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime."² 116 Cong. Rec. 32627.

Customers have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected in their bank accounts. That wall is not impregnable. Our Constitution provides the procedures whereby the confidentiality of one's financial affairs may be disclosed.

A

First, as to the recordkeeping requirements.³ Their announced purpose is that they will have "a high degree

² The Senate Report, No. 91-1139, 91st Cong., 2d Sess., is replete with the same philosophy. See pp. 1, 5, 7, 8.

³ The Act authorizes the Secretary to issue Regulations to carry out its purposes, 12 U. S. C. § 1829b (b). It did empower him to

of usefulness in criminal, tax, or regulatory investigations or proceedings," §§ 101 (a)(2), 123 (a), 12 U. S. C. § 1829b (a)(2), 1953(a). The duty of the banks or institutions is to microfilm or otherwise copy every check, draft, or similar instrument drawn on it or presented to it for payment and to keep a record of each one "received by it for deposit or collection," § 101 (d)(1) and (2), 12 U. S. C. § 1829b (d)(1), (d)(2). The retention is for up to six years unless the Secretary determines that "a longer period is necessary," § 101 (g), 12 U. S. C. § 1829b (g). The Regulations⁴ issued by the

define institutions or persons affected, 12 U. S. C. § 1953 (a), (b)(5) to make exceptions, exemptions, or other special arrangements, 12 U. S. C. § 1829b (c), (f); to seek injunctions, 12 U. S. C. § 1954; and to assess and collect civil penalties, 12 U. S. C. § 1955.

⁴ 31 CFR § 103.34 provided that banks shall:

"... secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

"(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

"(1) Each document granting signature authority over each deposit or share account;

"(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

"(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts,

Secretary show the depth and extent of the quicksand in which our financial institutions must now operate.⁵

It is estimated that a minimum of 20 billion checks—

(ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

“(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer, comprising a debit to a customer’s deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section;

“(5) Each item, including checks, drafts, or transfers of credit, of more than \$10,000 remitted or transferred to a person, account or place outside the United States;

“(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than \$10,000 to a person, account or place outside the United States;

“(7) Each check or draft in an amount in excess of \$10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

“(8) Each item, including checks, drafts or transfers of credit, of more than \$10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

“(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than \$10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

“(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.” (31 CFR § 103.34.)

During this litigation the above provision was amended by the Secretary making it unnecessary to microfilm copies of checks “drawn for \$100 or less,” 31 CFR § 103.34 (b)(3) (1973). Since banks must copy all checks it is hard to see how this new exemption is meaningful.

⁵ Like requirements are placed on brokers and dealers in securities, 31 CFR § 103.35.

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and perhaps 30 billion—will have to be photocopied and that the weight of these little pieces of paper will approximate 166 million pounds a year.⁶

It would be highly useful to governmental espionage to have like reports from all our bookstores, all our hardware and retail stores, all our drugstores. These records too might be “useful” in criminal investigations.

One's reading habits furnish telltale clues to those who are bent on bending us to one point of view. What one buys at the hardware and retail stores may furnish clues to potential uses of wires, soap powders, and the like used by criminals. A mandatory recording of all telephone conversations would be better than the recording of checks under the Bank Secrecy Act, if Big Brother is to have his way. The records of checks—now available to the investigators—are highly useful. In a sense a person is defined by the checks he writes. By examining them the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads and so on *ad infinitum*. These are all tied to one's social security number; and now that we have the data banks, these other items will enrich that storehouse and make it possible for a bureaucrat—by pushing one button—to get in an instant the names of the 190 million Americans who are subversives or potential and likely candidates.

It is, I submit, sheer nonsense to agree with the Secretary that *all bank records of every citizen* “have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.” That is unadulterated nonsense unless we are to assume that every citizen is a crook, an assumption I cannot make.

⁶ Hearings on H. R. 15073, H. Committee, Banking and Currency, 91st Cong., 1st Sess., 320 (1970).

Since the banking transactions of an individual give a fairly accurate account of his religion, ideology, opinions, and interests, a regulation impounding them and making them automatically available to all federal investigative agencies is a sledge hammer approach to a problem that only a delicate scalpel can manage. Where fundamental personal rights are involved—as is true when as here government gets large access to one's beliefs, ideas, politics, religion, cultural concerns and the like—the Act should be “narrowly drawn” (*Cantwell v. Connecticut*, 310 U. S. 296, 307) to meet the precise evil.⁷ Bank accounts at times harbor criminal plans. But we only rush with the crowd when we vent on our banks and their customers the devastating and leveling requirements of the present Act. I am not yet ready to agree that America is so possessed with evil that we must level all constitutional barriers to give our civil authorities the tools to catch criminals.

Heretofore this Nation has confined compulsory record-keeping to that required to monitor either (1) the record-keeper, or (2) his business. *Marchetti v. United States*, 390 U. S. 39, and *United States v. Darby*, 312 U. S. 100, are illustrative. Even then, as Justice Harlan writing for the Court said, they must be records that would “customarily” be kept, have a “public” rather than a private purpose, and arise out of an “essentially non-

⁷ And see *Roe v. Wade*, 410 U. S. 113, 155; *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 101; *Gooding v. Wilson*, 405 U. S. 518, 522; *Shuttlesworth v. Birmingham*, 394 U. S. 147, 151; *Cameron v. Johnson*, 390 U. S. 611, 617; *Zwickler v. Koota*, 389 U. S. 241, 250; *Whitehill v. Elkins*, 389 U. S. 54, 62; *Ashton v. Kentucky*, 384 U. S. 195, 201; *Elfbrandt v. Russell*, 384 U. S. 11, 18.

The same view is often expressed in concurring opinions. See *Doe v. Bolton*, 410 U. S. 179, 216 (DOUGLAS, J., concurring); *Gregory v. Chicago*, 394 U. S. 111, 119 (BLACK, J., concurring); *United States v. Robel*, 389 U. S. 258, 270 (BRENNAN, J., concurring).

criminal and regulatory area of inquiry." *Marchetti v. United States, supra*, at 57.

Those requirements are in no way satisfied here, and yet there is saddled upon the banks of this Nation an estimated bill of over \$6 million a year to spy on their customers.

B

Second, as the *reporting* provisions of the Act, it requires disclosure of two types of foreign financial transactions and relationships. One is a *report of transportation* into or out of the country of monetary instruments exceeding \$5,000.⁸ Another requires parties to any transaction or relationship with "a foreign financial agency" to make such reports or make and keep such records as the Secretary may require.⁹ Civil¹⁰ and criminal¹¹ penalties are sanctions behind these *reporting* provisions.

The Act also requires the Secretary to make the *reported information* concerning transactions "available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal government" upon request.¹² And to overcome any

⁸ 31 U. S. C. § 1101.

⁹ 31 U. S. C. § 1121. The Secretary requires reports in yearly tax returns of any "financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country," 31 CFR § 103.24.

¹⁰ 31 U. S. C. § 1056, 1102-1103; 31 CFR § 103.47-48.

¹¹ 31 U. S. C. § 1058-1059; 31 CFR § 103.49.

¹² 31 U. S. C. § 1061. The Regulations read as follows: "The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefore." 31 CFR § 103.43.

claims of self-incrimination it requires the grant of use immunity.¹³

As respects domestic transactions the Secretary established two *reporting* requirements. (1) Routine reports are, with some exceptions, required concerning any transaction of more than \$10,000 in currency from each financial institution involved.¹⁴ The signature of at least one principal party to the transaction is required.¹⁵ (2) The Secretary at the time of the trial reserved the right to grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify the requirements of this part.¹⁶

¹³ 31 U. S. C. § 1060. The Court in *Kastigar v. United States*, 406 U. S. 441, held that "use immunity" satisfies the Self-Incrimination Clause of the Fifth Amendment. I disagreed then and persist in my view that it is "transactional" immunity, not "use" immunity, that is required to lift this constitutional protection. See *Kastigar v. United States, supra*, pp. 462-467. But since "use" immunity is "the law" of the present Court—though I doubt if it can long survive—I do not write this dissent against the narrow immunity that is granted.

¹⁴ 31 CFR § 103.22.

¹⁵ 31 U. S. C. § 1082.

¹⁶ At that time CFR § 103.45 read as follows: "(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable to the sole discretion of the Secretary. (b) The Secretary shall have authority to further define all terms used herein."

Since then "impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify" have been deleted from § 103.45.

We said in *Katz v. United States*, 389 U. S. 347, 351-352. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." As stated in *United States v. White*, 401 U. S. 745, 752, the question is "what expectations of privacy" will be protected by the Fourth Amendment "in the absence of a warrant." A search and seizure conducted without a warrant is *per se* unreasonable subject to "jealously and carefully drawn" exceptions, *Jones v. United States*, 357 U. S. 493, 499. One's bank accounts are within the expectations of this society in that category. For they mirror not only one's finances but his interests, his debts, his way of life, his family and his civic commitments. There are administrative summonses for documents, cf. *Camara v. Municipal Court*, 387 U. S. 523; *See v. City of Seattle*, 387 U. S. 541. But there is a requirement that their enforcement receive judicial scrutiny and a judicial order, *United States v. United States District Court*, 407 U. S. 297, 313-318. As we said in that case, "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *Id.*, at 317.

Suppose Congress passed a law requiring telephone companies to record and retain all telephone calls and

make them available to any federal agency on request. Would we hesitate even a moment before striking it down? I think not, for we condemned in *United States v. United States District Court* "the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails." *Id.*, at 313.

A checking account, as I have said, may well record a citizen's activities, opinion, and beliefs, as fully as transcripts of his telephone conversations.

The Fourth Amendment warrant requirements may be removed by constitutional amendment but they certainly cannot be replaced by the Secretary of the Treasury's finding that certain information will be highly useful in "criminal, tax, or regulatory investigations or proceedings." 12 U. S. C. § 1951 (b).

We cannot avoid the question of the constitutionality of the reporting provisions of the Act and of the Regulations by saying they have not yet been applied to a customer in any criminal case. Under the Act and Regulations the reports go forward to the investigative or prosecuting agency on written request without notice to the customer. Delivery of the records without the requisite hearing of probable cause¹⁷ breaches the Fourth Amendment.

¹⁷ A criminal prosecution in this country for not reporting an overseas transaction is still a criminal prosecution under the Bill of Rights; and to these the Fourth Amendment has been applicable from the beginning. Cases of immigration officers stopping people at the border who are leaving or entering the country are obviously inapposite and certainly the Court cannot be serious in saying that the monetary value of the article being seized is relevant to whether the search and seizure without a warrant was constitutional. As said in *Katz* it is "persons" not "places" that the Fourth Amendment protects; and it would labor the point to engage in lengthy argument that "things" as well as "places" are not the object of the Fourth Amendment's concerns.

I also agree in substance with my Brother BRENNAN's view that the grant of authority by Congress to the Secretary of the Treasury is too broad to pass constitutional muster. This legislation is symptomatic of the slow eclipse of Congress by the mounting Executive power. The phenomenon is not brand new. It was the case in *Schechter Corp. v. United States*, 295 U. S. 495. *United States v. Robel*, 389 U. S. 258, is a more recent example. *National Cable Television Assn. v. United States*, — U. S. —, and *FPC v. New England Power Co.*, — U. S. —, are even more recent. These omnibus grants of power allow the Executive Branch to make the law as it chooses in violation of the teachings of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, as well as *Schechter*, that lawmaking is a congressional, not an Executive, function.

SUPREME COURT OF THE UNITED STATES

Nos. 72-985, 72-1073, AND 72-1196

The California Bankers Association, Appellant, 72-985 <i>v.</i>	On Appeals from the United States District Court for the Northern District of California.
George P. Shultz, Secretary of the Treasury, et al.	
George P. Shultz, Secretary of the Treasury, et al. Appellants,	
72-1073 <i>v.</i>	
The California Bankers Association et al.	
Fortney H. Stark, Jr., et al., Appellants,	
72-1196 <i>v.</i>	
George P. Shultz et al.	

[April 1, 1974]

MR. JUSTICE BRENNAN, dissenting.

I concur in Parts I and IIA of MR. JUSTICE DOUGLAS' opinion. As to the Act's foreign and domestic reporting requirements, however, I see no need to address the independent constitutional objections the plaintiffs below attempt to raise. The reporting requirements are inseparable from—and in some cases considerably broader than—the recordkeeping requirements. Thus, since in my view the recordkeeping provisions unconstitutionally vest impermissibly broad authority in the Secretary of the Treasury, see *United States v. Robel*, 389 U. S. 258, 269 (1967) (BRENNAN, J., concurring), the reporting provisions too are invalid.

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The symbiotic nature of the recordkeeping and reporting requirements is clearly manifested in the expressions of congressional purpose found in 12 U. S. C. § 1951(b) and 31 U. S. C. § 1051, which lay down blanket commands that "records" and "reports" be required where they "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."

One example of this interdependence may be found in 12 U. S. C. §§ 1951–1953, which apply to "any uninsured bank or uninsured institution," terms which are themselves not defined in the Act. Section 1953 authorizes the Secretary to require the keeping of "any records or evidence of any type" so long as he may require them of insured banks. Section 1952 authorizes him to require "the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes therein." As appears from the legislative history, these provisions work in tandem, permitting the Secretary to detect instances of the use of sham or illegal transactions in which the institutional party is merely an alter ego of the customer it purportedly services. See S. Rep. No. 91–1139, 91st Cong., 2d Sess., 3 (1970); Hearings before the House Comm. on Banking and Currency on H. R. 15073, 91st Cong., 1st and 2d Sess., 10–14 (1969–1970). Neither provision would usefully aid the detection of such practices without the other.

Not only are the reporting and recordkeeping requirements functionally inseparable, but the reporting requirements impose additional requirements, thus adding to the power of the Secretary to invade individual rights. For instance, the reporting requirement for all transactions involving domestic financial institutions, 31 U. S. C. § 1081, authorizes the Secretary to require reports

at any time and in any manner and detail, of any transaction that involves the "payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify." Although the Secretary has by regulation limited the meaning of "monetary instruments," 31 CFR § 103.11, and invoked the section only where the transaction involves more than \$10,000, see 31 CFR § 103.22, this in no way alters the fundamental vice of the statute.

That vice, see concurring opinion in *United States v. Robel, supra*, is the delegation of power to the Secretary in broad and indefinite terms under a statute that lays down criminal sanctions and potentially affects fundamental rights. See *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 (1963); *Cantwell v. Connecticut*, 310 U. S. 296, 304-307 (1940). My view in *Robel* applies here:

"Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. '[S]tandards of permissible statutory vagueness are strict . . .' in protected areas. *NAACP v. Button*, 371 U. S., at 432. 'Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.' *Greene v. McElroy*, 360 U. S. 474, 507." 389 U. S., at 276.

In the case of the Bank Secrecy Act, also potentially involving First, Fourth, and Fifth Amendment rights of the vast majority of our citizenry, it exceeds Congress' constitutional power of delegation to empower the Secre-

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tary of the Treasury to require whatever reports and records he believes to be possessed of a "high degree of usefulness" where the purpose is to further "criminal, tax, and regulatory investigations and proceedings."

SUPREME COURT OF THE UNITED STATES

Nos. 72-985, 72-1073, AND 72-1196

The California Bankers Association, Appellant, 72-985 <i>v.</i> George P. Shultz, Secretary of the Treasury, et al. George P. Shultz, Secretary of the Treasury, et al., Appellants, 72-1073 <i>v.</i> The California Bankers Association et al. Fortney H. Stark, Jr., et al., Appellants, 72-1196 <i>v.</i> George P. Shultz et al.	On Appeals from the United States District Court for the Northern District of California.
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[April 1, 1974]

MR. JUSTICE MARSHALL, dissenting.

Although I am in general agreement with the opinions of my Brothers DOUGLAS and BRENNAN, I believe it important to set forth what I view as the essential issue in these cases.

The purposes of the recordkeeping requirements of the Bank Secrecy Act are clear from the language of the legislation itself—to require the maintenance of records which will later be available for examination by the Government in “criminal, tax, or regulatory investigations or proceedings.” See 12 U. S. C. §§ 1829b (a)(2) and 1951 (b). The maintenance of the records is thus but the initial step in a process whereby the Government

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seeks to acquire the private financial papers of the millions of individuals, businesses, and organizations that maintain accounts in banks and use negotiable instruments such as checks to carry out the financial side of their day-by-day transactions. In my view, this attempt to acquire private papers constitutes a search and seizure under the Fourth Amendment.

As this Court settled long ago in *Boyd v. United States*, 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 to the Constitution" The acquisition of records in this case, as we said of the order to produce an invoice in *Boyd*, may lack the "aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers" 116 U. S., at 622. But this cannot change its intrinsic character as a search and seizure. We do well to recall the admonishment in *Boyd*, 116 U. S., at 635:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

By compelling an otherwise unwilling bank to photocopy the checks of its customers, the Government has as much of a hand in seizing those checks as if it had forced a private person to break into the customer's home or office and photocopy the checks there. See *Byars v. United States*, 273 U. S. 28 (1927). Cf. *Burdeau v. McDowell*, 256 U. S. 465 (1921), with *Lustig v. United States*, 338 U. S. 74, 78-79 (Frankfurter, J.). See also *Corngold v. United States*, 367 F. 2d 1 (CA9 1966). Our Fourth Amendment jurisprudence should not be so wooden as to ignore the fact that through microfilming

and other techniques of this electronic age, illegal searches and seizures can take place without the brute force characteristic of the general warrants which raised the ire of the Founding Fathers. See *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765); *Stanford v. Texas*, 379 U. S. 476, 483-484 (1965). As we emphasized in *Katz v. United States*, 389 U. S. 347 (1967), the absence of any physical seizure of tangible property does not foreclose Fourth Amendment inquiry. 389 U. S., at 352-353. The Fourth Amendment "governs not only the seizure of tangible items but extends as well to the recording of oral statements . . ." *Id.*, at 353. By the same logic, the Fourth Amendment should apply to the recording of checks mandated by the Act here. And such a massive and indiscriminate search and seizure, not only without a warrant but also without probable cause that any evidence to be obtained is relevant to any investigation, is plainly inconsistent with the principles behind the Amendment. See *Stanford v. Texas, supra*, 379 U. S., at 485-486; *Katz v. United States, supra*, 389 U. S., at 356-359.

It is suggested that there is no seizure under the Fourth Amendment because the bank, which is required to create and maintain the record, is already a party to the transaction. See *ante*, at 28. Surely this is irrelevant to the question of whether a Government search or seizure is involved. The fact that one has disclosed private papers to the bank, for a limited purpose, within the context of a confidential customer-bank relationship, does not mean that one has waived all right to the privacy of the papers. Like the user of the pay phone in *Katz v. United States*, who, having paid the toll, was "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world," 389 U. S., at 352, so the customer of a bank, having written or deposited a check, has a reasonable expectation that his check will be examined

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for bank purposes only—to credit, debit or balance his account—and not recorded and kept on file for several years by Government decree so that it can be available for Government scrutiny. See *United States v. First Nat'l Bank of Mobile*, 67 F. Supp. 616 (SD Ala. 1946).

The majority argues that any Fourth Amendment claim is premature, since the Act itself only affects the keeping of records but in no way changes the law regarding acquisition of the records by the Government. I cannot agree. This attempt to bifurcate the acquisition of information into two independent and unrelated steps is wholly unrealistic. As the Government itself concedes, "banks have in the past voluntarily allowed law enforcement officials to inspect bank records without requiring the issuance of a summons." Brief for the Appellees in Nos. 72-985 & 72-1196, at 38 n. 19. Indeed, the Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Justice Department told a Senate Subcommittee in 1972 that access by the FBI to bank records without process occurs "with some degree of frequency." Hearing before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency on Foreign Bank Secrecy, 91st Cong., 2d Sess., at 114-115.

The plain fact of the matter is that the Act's record-keeping requirement feeds into a system of widespread informal access to bank records by government agencies and law enforcement personnel. If these customers' Fourth Amendment claims cannot be raised now, they cannot be raised at all, for once recorded, their checks will be readily accessible, without judicial process and without any showing of probable cause, to any of the several agencies that presently have informal access to bank records.

The Government suggests that the Act does not in any way preclude banks from refusing to allow informal

access and insisting on the issuance of legal process before turning over a customer's financial records. Such a refusal, however, even if accompanied by notice to the customer with an opportunity for him to assert his constitutional claims, comes too late, for the seizure has already taken place. By virtue of the Act's recordkeeping requirement, copies of the customer's checks are already in the bank's files and amenable to process. The seizure has already occurred, and all that remains is the transfer of the documents from the agent forced by the Government to accomplish the seizure to the Government itself. Indeed, it is ironic that although the majority deems the bank customers' Fourth Amendment claims premature, it also intimates that once the bank has made copies of its customer's checks, the customer no longer has standing to invoke his Fourth Amendment rights when a demand is made on the bank by the Government for the records. See *ante*, slip op., at 28-29. By accepting the Government's bifurcated approach to the recordkeeping requirement and the acquisition of the records, the majority engages in a hollow charade whereby Fourth Amendment claims are to be labelled premature until such time as they can be deemed too late.

Nor can I accept the majority's analysis of the First Amendment associational claims raised by the American Civil Liberties Union on behalf of its members who seek to preserve the anonymity of their financial support of the organization. The First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest. See *NAACP v. Alabama*, 357 U. S. 449 (1958). See also *Lamont v. Postmaster General*, 381 U. S. 301 (1965); *Gibson v. Florida Legislative Investigation Comm.*, 372 U. S. 539 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U. S. 293 (1961); *Shelton v. Tucker*,

364 U. S. 479 (1960); *Bates v. City of Little Rock*, 361 U. S. 516 (1960); *United States v. Rumely*, 345 U. S. 41 (1953). It is certainly inconsistent with this long line of cases for the Government, absent any showing of need whatsoever, to require the bank with which the ACLU maintains an account to make and keep a microfilm record of all checks received by the ACLU and deposited to its account. The net result of this requirement, obviously, is an easily accessible list of all of the ACLU's contributors. And given the widespread informal access to bank records by Government agencies, see *ante*, at —, the existence of such a list surely will chill the exercise of First Amendment rights of association on the part of those who wish to have their contributions remain anonymous. The technique of examining bank accounts to investigate political organizations is, unfortunately, not rare. See, e. g., *Pollard v. Roberts*, 283 F. Supp. 248 (ED Ark. 1968), aff'd *per curiam*, 393 U. S. 14 (1968); *United States Servicemen's Fund v. Eastland*, — U. S. App. D. C. —, 488 F. 2d 1252 (1973).

First Amendment freedoms are "delicate and vulnerable." They need breathing space to survive. *NAACP v. Button*, 371 U. S. 415, 433 (1963). The threat of disclosure entailed in the existence of an easily accessible list of contributors may deter the exercise of First Amendment rights as potently as disclosure itself. Cf. *ibid.* See also *United States Servicemen's Fund v. Eastland*, *supra*, — U. S. App. D. C., at —; 488 F. 2d, at 1265–1268. More importantly, however slight may be the inhibition of First Amendment rights caused by the bank's maintenance of the list of contributors, the crucial factor is that the Government has shown no need, compelling or otherwise, for the maintenance of such records. Surely the fact that some may use negotiable instruments for illegal purposes cannot justify the Government's

running roughshod over the First Amendment rights of the hundreds of lawful yet controversial organizations like the ACLU. Congress may well have been correct in concluding that law enforcement would be facilitated by the dragnet requirements of this Act. Those who wrote our Constitution, however, recognized more important values.

I respectfully dissent.

AMENDED IN SENATE JUNE 28, 1974

AMENDED IN SENATE MAY 20, 1974

AMENDED IN ASSEMBLY AUGUST 16, 1973

AMENDED IN ASSEMBLY AUGUST 9, 1973

AMENDED IN ASSEMBLY JUNE 18, 1973

AMENDED IN ASSEMBLY JUNE 4, 1973

CALIFORNIA LEGISLATURE—1973-74 REGULAR SESSION

ASSEMBLY BILL

No. 1609

Introduced by Assemblyman Sieroty

April 25, 1973

REFERRED TO COMMITTEE ON FINANCE AND INSURANCE

An act to amend Section 25606 of the Corporations Code, and to repeal Section 1917 of the Financial Code, and to amend Sections 12537 and 12586 of, and to add Chapter 20 (commencing with Section 7460 to Division 7 of Title 1 of the Government Code, to add Sections 904 and 1703 to the Insurance Code, and to amend Sections 11503, 11703, and 11802 of the Vehicle Code, relating to financial records.

The people of the State of California do enact as follows:

SECTION 1. Section 25606 of the Corporations Code is amended to read:

25606. The Attorney General shall render to the commissioner opinions upon all questions of law, relating to the construction or interpretation of any law under his jurisdiction or arising in the administration thereof, that may be submitted to him by the commissioner, and shall act as the attorney for the commissioner in all actions and proceedings brought by or against him under or pursuant to any provision of any law under his jurisdiction. The commissioner may, upon his own authority, obtain a search warrant pursuant to Chapter 3 (commencing with Section 1523) of Title 12 of Part 2 of the Penal Code.

SEC. 2. Section 1917 of the Financial Code is repealed.

Sec. 3. Chapter 20 (commencing with Section 7460) is added to Division 7 of Title 1 of the Government Code, to read:

CHAPTER 20. GOVERNMENTAL ACCESS

TO FINANCIAL RECORDS

Article 1. Declaration of Policy

7460. This chapter shall be known as the "California Right to Financial Privacy Act."

7461. The Legislature finds and declares as follows:

(a) Procedures and policies governing the relationship between financial institutions and government agencies have in some cases developed without due regard to citizens' constitutional rights.

(b) The confidential relationships between financial institutions and their customers are built on trust and must be preserved and protected.

(c) The purpose of this chapter is to protect the confidential relationship between financial institutions and their customers and the constitutional rights of citizens inherent to that relationship.

Article 2. Definitions

7465. For the purposes of this chapter:

(a) The term "financial institution" includes state and national banks, state and federal savings and loan associations, trust companies, industrial loan companies, and state and federal credit unions.

(b) The term "financial records" means any original or any copy of any record or document held by a financial institution pertaining to a customer of the financial institution.

(c) The term "person" means an individual, partnership, corporation, association, trust, or any other legal entity organized under the laws of this state.

(d) The term "customer" means any person who has transacted business with or has used the services of a financial institution or for whom a financial institution has acted as a fiduciary.

(e) The term "state agency" means every state office, officer, department, division, bureau, board, and commission or other state agency.

(f) The term "local agency" includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; or other local public agency.

(g) The term "supervisory agency" means any of the following:

- (1) The State Banking Department.
- (2) The Department of Savings and Loans.
- (3) The Department of Corporations.
- (4) The State Controller.
- (5) The Franchise Tax Board.
- (6) The State Board of Equalization.

(7) Any other state or local agency which is required by state law to perform periodic examination or audit of the financial records of a financial institution.

(8) Any state or local agency which the Attorney General, pursuant to the Administrative Procedure Act, determines exercises supervisory functions substantially similar to those exercised by the agencies referred to in paragraphs (1) to (6), inclusive, of this subdivision.

(h) *The term "investigation" includes, but is not limited to, any inquiry by a peace officer, sheriff, or district attorney, or any inquiry made for the purpose of determining whether a criminal law has been violated or a tax deficiency owed.*

Article 3. Confidentiality of, and Access to, Financial Records

7470. (a) Except as provided in Section 7480, no officer, employee, or agent of a state or local agency or department thereof, in connection with a civil or criminal investigation of a customer, whether or not such investigation

is being conducted pursuant to formal judicial or administrative proceedings, may request or receive copies of, or the information contained in, the financial records of any customer from a financial institution unless the financial records are described with particularity and are consistent with the scope and requirements of the investigation giving rise to such request and:

- (1) Such customer has authorized disclosure to such officer, employee or agent of such state or local agency or department thereof in accordance with Section 7473; or
 - (2) Such financial records are disclosed in response to an administrative subpoena or summons which meet the requirements of Section 7474; or
 - (3) Such financial records are disclosed in response to a search warrant which meets the requirements of Section 7475; or
 - (4) Such financial records are disclosed in response to a judicial subpoena or subpoena duces tecum which meets the requirements of Section 7476.
- (b) In any proceeding relating to such subpoenas, summons, or search warrants, the customer shall have the same rights as if the records were in his possession.
- (c) Nothing in this section or in Sections 7473, 7474, 7475, or 7476 shall require a financial institution to inquire or determine that those seeking disclosure have duly complied with the requirements set forth therein, provided only that the customer authorization, administrative subpoena or summons, search warrant, or judicial subpoena or order served on or delivered to a financial institution pursuant to such sections shows compliance on its face.

(d) *The financial institution shall maintain for a period of five years a record of all examinations or disclosures of the financial records of a customer including the identity and purpose of the person examining the financial records, the state or local agency or department thereof which he represents, and a copy of the customer authorization, subpoena, summons or search warrant providing for such examination or disclosure.*

7471. (a) Except in accordance with requirements of Section 7473, 7474, 7475 or 7476, no financial institution, or any director, officer, employee, or agent of a financial institution, may provide to an officer, employee, or agent of a state or local agency or department thereof, any financial records, copies thereof, or the information contained therein, if the director,

officer, employee or agent of the financial institution knows or has reasonable cause to believe that such financial records or information are being requested in connection with a civil or criminal investigation of the customer, whether or not such investigation is being conducted pursuant to formal judicial or administrative proceedings.

(b) *This section is not intended to prohibit disclosure of the financial records of a customer or the information contained therein incidental to a transaction in the normal course of business of such financial institution if the director, officer, employee or agent thereof making the disclosure has no reasonable cause to believe that the financial records or the information contained in the financial records so disclosed will be used by a state or local agency or department thereof in connection with an investigation of the customer, whether, or not such investigation is being conducted pursuant to formal judicial or administrative proceedings.*

(c) *This section shall not preclude a financial institution, in its discretion, from notifying, and thereafter communicating with and disclosing customer financial records to, appropriate state or local agencies concerning suspected violation of any law which directly affects the financial institution.*

(d) *A financial institution which refuses to disclose the financial records of a customer, copies thereof or the information contained therein, in reliance in good faith*

upon the prohibitions of subdivision (a) of this section shall not be liable to its customer, to a state or local agency, or to any other person for any loss or damage caused in whole or in part by such refusal.

7472. Copies of financial records or the information contained therein, including information supplied pursuant to subdivision (b) of Section 7480, which are obtained by any state agency, local agency or supervisory agency may not be:

(a) Used or retained in any form for any purpose other than the specific statutory purpose for which the information was originally obtained; or

(b) Provided to any other governmental department or agency or other person except where authorized by state law.

7473. (a) A customer may authorize disclosure under paragraph (1) of subdivision (a) of Section 7470 if those seeking disclosure furnish to the financial institution a signed and dated statement by which the customer:

(1) Authorizes such disclosure for a period to be set forth in the authorization statement;

(2) Specifies the name of the agency or department to which disclosure is authorized and, if applicable, the statutory purpose for which the information is to be obtained; and

(3) Identifies the financial records which are authorized to be disclosed.

(b) No such authorization shall be required as a condition of doing business with such financial institution.

(c) *Any officer, employee or agent of a state or local agency seeking disclosure of customer financial records by customer authorization shall notify the customer that the customer has the right at any time to revoke such authorization, except where such authorization is required as a condition of doing business or employment or licensing or registration by other laws of this state.*

7474. (a) An officer, employee, or agent of a state or local agency or department thereof, may obtain financial records under paragraph (2) of subdivision (a) of Section 7470 pursuant to an administrative subpoena or summons otherwise authorized by law and served upon the financial institution only if:

(i) The person issuing such administrative summons or subpoena has served a copy of the subpoena or summons on the customer pursuant to Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure; and

(2) The subpoena or summons includes the name of the agency or department in whose name the subpoena or summons is issued and the statutory purpose for which the information is to be obtained; and

(3) *The customer has not moved to quash such subpoena or summons within 10 days of service.*

(b) Nothing in this chapter shall preclude a financial institution from notifying a customer of the receipt of an administrative summons or subpoena.

7475. An officer, employee, or agent of a state or local agency or department thereof, may obtain financial records under paragraph (3) of subdivision (a) of Section 7470 only if he obtains a search warrant pursuant to Chapter 3 (commencing with Section 1523) of Title 12 of Part 2 of the Penal Code. Examination of financial records may occur as soon as the warrant is served on the financial institution.

7476. An officer, employee, or agent of a state or local agency or department thereof, may obtain financial records under paragraph (4) of subdivision (a) of Section 7470 pursuant to a judicial subpoena or subpoena duces tecum only if:

(a) The subpoena or subpoena duces tecum is issued *and served upon the financial institution and the customer* in compliance with Chapter 2 (commencing

with Section 1985) of Title 3 of Part 4 of the Code of Civil Procedure; and

(b) Ten days pass without notice to the financial institution that the customer has moved to quash the subpoena. If testimony is to be taken, or financial records produced, before a court, the 10-day period provided for in this subdivision may be shortened by the court issuing the subpoena or subpoena duces tecum upon a showing of good cause. The court shall direct that all reasonable measures be taken to notify the customer within the time so shortened.

Article 4. Exceptions

7480. Nothing in this chapter prohibits any of the following:

- (a) The dissemination of any financial information which is not identified with, or identifiable as being derived from, the financial records of a particular customer.
- (b) When any police or sheriff's department or district attorney in this state certifies to a bank in writing that a crime report has been filed which involves the fraudulent use of drafts, checks or other orders drawn upon any bank in this state, such police or sheriff's department or district attorney may request a bank to furnish, and a bank shall supply, a statement setting forth the following information with respect to a customer account specified by the police or sheriff's department or district attorney for a period 30 days prior to and up to 30 days following the date of occurrence of the alleged illegal act involving the account:

- (i) The number of items dishonored;
 - (ii) The number of items paid which created overdrafts;
 - (iii) The dollar volume of such dishonored items and items paid which created overdrafts and a statement explaining any credit arrangement between the bank and customer to pay overdrafts;
 - (iv) The dates and amounts of deposits and debits and the account balance on such dates;
 - (v) A copy of the signature appearing on a customer's signature card;
 - (vi) Date account opened and, if applicable, date account closed.
- (c) Subject to the limitations in Section 7472, the examination by, or disclosure to, any supervisory agency of financial records which relate solely to the exercise of its supervisory function. The scope of an agency's supervisory function shall be determined as follows:
- (1) With respect to the Superintendent of Banks by reference to Division 1 (commencing with Section 99) of the Financial Code.
 - (2) With respect to the Department of Savings and Loans by reference to Division 2 (commencing with Section 5000) of the Financial Code.
 - (3) With respect to the Corporations Commissioner by reference to Division 5 (commencing with Section 14000) and Division 7 (commencing with Section 18000) of the Financial Code.
 - (4) With respect to the State Controller by reference to Title 10 (commencing with Section 1300) of Part 3 of the Code of Civil Procedure.
 - (5) With respect to the Franchise Tax Board and the Board of Equalization by reference to the Revenue and Taxation Code.
 - (6) With respect to any other state or local agency by reference to the statute which grants authority to examine or audit financial records or financial institutions.

Article 5. Penalties and Remedies

7485. (a) Any person who willfully or knowingly participates in a violation of this chapter is guilty of a misdemeanor, and upon conviction shall be imprisoned for not more than one year, or fined not more than five thousand dollars (\$5,000), or both.

(b) Any person who induces or attempts to induce a violation of this chapter is guilty of a misdemeanor and upon conviction shall be imprisoned for not more than one year, or fined not more than five thousand dollars (\$5,000), or both.

7486. In any successful action to enforce liability for a violation of the provisions of this chapter, the customer may recover the cost of the action together with reasonable attorney's fees as determined by the court.

7487. In addition to any other remedy contained in this chapter or otherwise available, injunctive relief shall be available to any customer aggrieved by a violation, or threatened violation, of this chapter in the same manner as such injunctive relief would be available if the financial records concerning the customer accounts were in his possession. In any successful action by the customer, costs together with reasonable attorney's fees as determined by the court may be recovered.

7488. An action to enforce any provision of this chapter must be commenced within three years after the date on which the violation occurred.

Article 6. Miscellaneous

7490. Except as provided in Section 7473, no waiver by a customer of any right hereunder shall be valid, whether oral or written, and whether with or without consideration.

7491. Should any other law grant or appear to grant power or authority to any person to violate the provisions of this chapter, the provisions of this chapter shall supersede and pro tanto override and annul such law, except those statutes hereinafter enacted which specifically refer to this chapter.

7492. If any provision of this chapter or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this chapter which can be effected, without the invalid provision or application, and to this end the provisions of this chapter are severable.

Sec. 3.3. Section 12537 of the Government Code is amended to read:

12537. The Attorney General shall maintain a register of health care service plans. On or before March 31 of the calendar year following the effective date of this article and annually thereafter, each health care service plan shall register with the Attorney General by submitting the name, organizational form and principal place of business of the plan and the following:

(a) A form of each standard membership contract which the plan proposes to issue including standard forms in use on the date of submission.

(b) Copies of all advertising which the plan proposes to use.

(c) An authorization for disclosure to the Attorney General of financial records of the health care service plan pursuant to Section 7473 of the Government Code.

{e} (d) Such other pertinent and relevant information as the Attorney General may reasonably require for the proper administration of this article; provided, however, that

(1) Nothing in this article shall affect or modify the physician-patient relationship prescribed in Section 1881 of the Code of Civil Procedure; and

(2) All information furnished under this paragraph ~~{e}~~ (d) shall be kept confidential by the Attorney General, except to the extent that it may be produced in any judicial or administrative proceeding and may be admissible in evidence therein.

Sec. 3.5. Section 12586 of the Government Code

is amended to read:

12586. (a) Except as otherwise provided and except corporate trustees which are subject to the jurisdiction of the Superintendent of Banks of the State of California or to the Comptroller of Currency of the United States, every charitable corporation and trustee subject to this article shall, in addition to filing copies of the instruments previously required, file

with the Attorney General: (i) periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the corporation or trustee, in accordance with rules and regu-

lations of the Attorney General; (ii) an authorization for disclosure to the Attorney General of financial records of the charitable corporations pursuant to Section 7473 of the Government Code.

(b) The Attorney General shall make rules and regulations as to the time for filing reports, the contents thereof, and the manner of executing and filing them. He may classify trusts and other relationships concerning property held for a charitable purpose as to purpose, nature of assets, duration of the trust or other relationship, amount of assets, amounts to be devoted to charitable purposes, nature of trustee, or otherwise, and may establish different rules for the different classes as to time and nature of the reports required to the ends (1) that he shall receive reasonably current, periodic reports as to all charitable trusts or other relationships of a similar nature, which will enable him to ascertain whether they are being properly administered, and (2) that periodic reports shall not unreasonably add to the expense of the administration of charitable trusts and similar relationships. The Attorney General may suspend the filing of reports as to a particular charitable trust or relationship for a reasonable, specifically designated time upon written application of the trustee filed with the Attorney General and after the Attorney General has filed in the register of charitable trusts a written statement that the interests of the beneficiaries will not be prejudiced thereby and that periodic reports are not required for proper supervision by his office.

(c) A copy of an account filed by the trustee in any court having jurisdiction of the trust or other relationship, if the account substantially complies with the rules and regulations of the Attorney General, may be filed as a report required by this section.

(d) The first report for a trust or similar relationship hereafter established, unless the filing thereof is suspended as herein provided, shall be filed not later than four (4) months and fifteen (15) days following the close of the first calendar or fiscal year in which any part of the income or principal is authorized or required to be applied to a charitable purpose. If any part of the income or principal of a trust previously established is authorized or required to be applied to a charitable purpose at the time this article takes effect, the first report shall be filed at the close of the calendar or fiscal year in which it was registered with the Attorney General or not later than four (4) months and fifteen (15) days following the close of such calendar or fiscal period.

Sec. 3.6. Section 904 is added to the Insurance Code, to read:

904. In addition to the annual statement required to be filed pursuant to Section 900, each admitted insurer shall file an authorization for disclosure to the commissioner of financial records pertaining to such funds pursuant to Section 7473 of the Government Code, to be effective until the next such annual filing.

Sec. 3.8. Section 1703 is added to the Insurance Code, to read:

1703. Every applicant for an original or a renewal license to act as an insurance agent, broker or solicitor, life agent, life analyst, surplus line broker, special lines surplus line broker, motor club agent, or bail agent or solicitor shall, as part of the application, endorse an authorization for disclosure to the commissioner of financial records of any fiduciary funds as defined in Section 1733, pursuant to Section 7473 of the Government Code.

SEC. 4. Section 11503 of the Vehicle Code is amended to read:

11503. The department may refuse to issue a license and special plates to an applicant when it determines that:

(a) The applicant was previously the holder of a license and special plates issued under this code, which license and special plates were revoked for cause and never reissued by the department, or which license and special plates were suspended for cause and the terms of suspension have not been terminated.

(b) The applicant was previously a limited or general partner, stockholder, director, or officer of a partnership or corporation whose license and special plates issued under the authority of this chapter were revoked for cause and never reissued or were suspended for cause and the terms of suspension have not been terminated.

(c) If the applicant is a partnership or corporation, that one or more of the limited or general partners, stockholders, directors or officers was previously the holder or a limited or general partner, stockholder, director or officer of a partnership or corporation whose license and special plates issued under the authority of this chapter were revoked for cause and never reissued or were suspended for cause and the terms of suspension have not been terminated, or that by reason of the facts and circumstances touching the organization, control and management of the partnership or corporation, business will be directed, controlled, or managed by individuals who, by reason of their conviction of violations of this code, would be ineligible for a license and that by licensing such corporation or partnership the purposes of this code would likely be defeated.

(d) The applicant, or one of the limited or general partners, if the applicant be a partnership, or one or more of the officers or directors of the corporation, if a corporation be the applicant, or one or more of the stockholders if the policy of such business will be directed, controlled, or managed by such stockholder or stockholders, has ever been convicted of a felony or a crime involving moral turpitude. A conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section.

(e) The information contained in an application is incorrect.

(f) The applicant, or one of the limited or general partners, if the applicant be a partnership, or one or more of the officers, directors or stockholders of the corporation, if a corporation be the applicant, based on the information contained in the application or by subsequent investigation, is not of good moral character.

(g) The decision of the department to suspend or revoke a license under the provisions of subdivision (b) of Section 11518 or subdivision (c) of Section 11721 has been entered, and the applicant was the licensee, a copartner, or an officer, director, or stockholder of such suspended or revoked licensee.

(h) The applicant has failed to effectively endorse an authorization for disclosure as provided for in Section 7473 of the Government Code.

Sec. 5. Section 11703 of the Vehicle Code is amended to read:

11703. The department may refuse to issue a license and special plates to a manufacturer, manufacturer branch, distributor, distributor branch, transporter, or dealer, when it determines that:

(a) The applicant was previously the holder of a license and special plates issued under this chapter, which license and special plates were revoked for cause and never reissued by the department, or which license was suspended for cause and the terms of suspension have not been fulfilled.

(b) The applicant was previously a limited or general partner, stockholder, director, or officer of a partnership or corporation whose license and special plates issued under the authority of this chapter were revoked for cause and never reissued or were suspended for cause and the terms of suspension have not been terminated.

(c) If the applicant is a partnership or corporation, that one or more of the limited or general partners, stockholders, directors or officers was previously the holder or a limited or general partner, stockholder, director or officer of a partnership or corporation whose license and special plates issued under the authority of this chapter were revoked for cause and never reissued or were suspended for cause and the terms of suspension have not been terminated, or that by reason of the facts and circumstances touching the organization, control, and management of the partnership or corporation business the policy of such business will be directed, controlled, or managed by individuals who, by reason of their conviction of violations of the provisions of this code, would be ineligible for a license and that by licensing such corporation or partnership the purposes of this code would likely be defeated.

(d) The applicant, or one of the limited or general partners, if the applicant be a partnership, or one or more of the officers or directors of the corporation, if the corporation be the applicant, or one or more of the stockholders if the policy of such business will be directed, controlled, or managed by such stockholder or stockholders, has ever

been convicted of a felony or a crime involving moral turpitude. A conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section.

(e) The information contained in the application is incorrect.

(f) The decision of the department to suspend or revoke a license under the provisions of subdivision (e) of Section 11721 has been entered, and this applicant was the licensee, a copartner, or an officer, director or stockholder of such suspended or revoked licensee.

(g) An applicant for a dealer's license has failed to effectively endorse an authorization for disclosure as provided for in Section 7473 of the Government Code.

Sec. 6. Section 11802 of the Vehicle Code is amended to read:

11802. (a) The department shall issue a vehicle salesman's license when satisfied that the applicant has furnished the required information, and that he intends in good faith to act as a vehicle salesman, and has paid the fees as required in Section 11509.

(b) The department may refuse to issue or may suspend or revoke a license when satisfied that:

1. The information contained in the application is incorrect.

2. The applicant or licensee, based on the information contained in the application or by subsequent investigation, is not of good moral character.

The conviction of a crime, including a conviction after a plea of nolo contendere, involving moral turpitude shall be *prima facie* evidence that the applicant or licensee is not of good moral character.

3. The applicant or licensee has outstanding an unpaid final court judgment rendered in connection with an activity licensed under the authority of this chapter.

4. The applicant or licensee does not hold a valid California driver's license.

5. The applicant or licensee was previously the holder of or was a partner in a partnership or was an officer, director, or stockholder involved in management of a corporation which was the holder of a license and certificate issued under this chapter, which license and certificate were revoked for cause and never reissued by the department or which license and certificate were suspended for cause and the terms of suspension have not been fulfilled.

6. The applicant or licensee has violated any of the terms and provisions of Chapter 2b (commencing with Section 2981) of Title 14 of Part 4 of Division 3 of the Civil Code.

7. The applicant or licensee has violated any of the provisions of Chapter 4 (commencing with Section 11700) of Division 5 of this code.

8. The applicant or licensee has failed to surrender possession of, or failed to return any vehicle to a dealer lawfully entitled thereto upon termination of employment.

9. The applicant or licensee has failed to pay over funds or property received in the course of employment to the dealer entitled thereto.

10. The applicant or licensee has knowingly purchased, sold or otherwise acquired or disposed of a stolen motor vehicle.

The applicant or licensee has failed to effectively endorse an authorization for disclosure as provided for in Section 7473 of the Government Code.

(c) Pending the satisfaction of the department that the applicant has met the requirements under this chapter, it may issue a temporary permit to any person applying for a vehicle salesman's license. The temporary permit shall permit the operation by the salesman for a period not to exceed 120 days while the department is completing its investigation and determination of all facts relative to the qualifications of the applicant to such a license. If the department determines to its satisfaction that the temporary permit was issued upon a fraudulent application, the department may cancel the temporary permit and such cancellation shall be effective immediately. The department may also cancel such temporary permit when it has determined or has reasonable cause to believe that the application is incorrect or incomplete or the temporary permit was issued in error and such cancellation shall be effective immediately. If however, the department determines that the information in the application is correct and complete, such temporary permit shall be invalid when the applicant's license has been issued or refused unless within five days of receipt of a notice of refusal and statement of issues the applicant demands a hearing pursuant to subdivision (b) of Section 11803. The filing of a demand for a hearing shall stay the effective date of the invalidation of the temporary permit pending a hearing and determination of the issues. The notice of refusal shall be made effective not less than five days after its receipt by the applicant.

(d) The department may issue a probationary vehicle salesman's license upon any ground or grounds contained in subdivision (b) of this section subject to conditions to be observed in the exercise of the privilege granted either upon application for issuance of a license or upon application for renewal of a license. The conditions to be attached to the exercise of the privilege shall not appear on the face of the license but shall be such as may, in the judgment of the department, be in the public interest and suitable to the qualifications of the applicant as disclosed by the application and investigation by the department of the information contained therein.

SEC. 7. No appropriation is made by this act, nor is any obligation created thereby under Section 2231 of the Revenue and Taxation Code, for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by it by this act because the Legislature recognizes that during any legislative session a variety of changes to laws relating to crimes and infractions may be enacted that serve to cause both increased and decreased costs to local governmental entities which, in the aggregate, do not result in significant identifiable cost changes.

SEC. 8. *This act shall become operative on July 1, 1975.*

Senator CRANSTON. Our next speaker is Mr. James Lorenz, deputy district attorney of San Diego County.

Thank you very much for your presence here today.

**STATEMENT OF M. JAMES LORENZ, DEPUTY DISTRICT ATTORNEY,
SAN DIEGO COUNTY**

Mr. LORENZ. Thank you for the opportunity of appearing here today on behalf of the San Diego District Attorney's Office.

I am presently in charge of the fraud division and I am speaking from experience. In that capacity we prosecute all white-collar crimes, sophisticated business crimes, economic crimes and organized crimes and I will speak in this capacity as it relates to the specific bill to which we are opposed for the following reasons:

POINT 1

The text of the proposed legislation creates a privilege and confidential relationship that is inconsistent to other privileges provided by our law. As an example, the attorney-client privilege and physician-patient privilege both have specific exceptions that comply with constitutional safeguards yet grant law enforcement legitimate exceptions for the prosecution of crimes.

POINT 2

The privilege that constitutes bank records similar to private records would grant the possessor the right to preclude the records by exercising the rights under the fifth amendment of the Constitution against self-incrimination. Documents that are otherwise available under the subpoena power could be permanently unavailable once notice is given if the citizen should decide to exercise his fifth amendment rights.

POINT 3

The procedures outlined in sections 6, 7, 8, and 9 of the proposed legislation do not appear to take into consideration the problems that will be created when attempting to comply with the procedures as they relate to existing State law:

No. 1, the procedures outlined within the proposed legislation would require additional and unreasonable costs to the taxpayer; No. 2, such procedures may be in conflict with other State statutory requirements designed to foster the speedy adjudication of criminal matters; and No. 3, such procedures are unworkable and ultimately will require additional legislation to pursue sophisticated and organized activities.

POINT 4

The serious flaw in this bill is not so much in allowing private citizens and businesses to have access to purportedly confidential information, as it is the unrealistic burdens placed on legitimate governmental interest in confidential investigations. The bill is quite explicit that no

governmental agency may have confidential access without first notifying the customer. Yet to require notification of a suspect in a securities swindle or land fraud or organized crime case that he is under investigation is to ring the death knell for such investigations.

POINT 5

The bill appears to be reaction to the Watergate situation involving the abrogation of rights to privacy. It appears that local law enforcement is being penalized for problems that have resulted at the Federal level. Sophisticated criminal activities will be significantly aided by this bill and in effect the public will be the ultimate loser by the inability to pursue economic crimes effectively on the local level.

I would terminate my statement basically with these remarks.

Senator CRANSTON. Thank you very much. I very much appreciate your statement. And I do have some questions I want to ask.

If, as you suggest, the customer invokes the fifth amendment, how would that prevent you from getting a subpoena to protect the records?

Mr. LORENZ. Well, if the records are the private records of an individual it is similar to a statement. You cannot force someone to make a statement against his interests. For the same reason you could not force a person to turn over his records. Therefore you would have no access. They would be permanently barred to be utilized for testimony.

The way it stands now when you procure records legally under a subpoena they are in your custody, at that time you have already seen them, then the suspect cannot invoke the fifth amendment because the records rightfully are in the hands of the prosecution.

Senator CRANSTON. It would be up to the court to determine that issue, would it not?

Mr. LORENZ. There is case law. It is actually more liberally construed on the Federal side than the State side.

There are cases on the Federal side that say corporation documents, closed corporation documents cannot be subpeneed whatsoever.

In the State of California you can subpoena corporation documents but private individual proprietor documents are privileged.

Now, it could be up to the court. But I know of no court I have ever been before that, once the individual has invoked the fifth amendment, that those documents are private documents which this bill specifically says in its preamble that it does, in fact, make bank records the private business records of an individual as if they were in the household.

We in no way could procure a record in someone's household under the circumstances. So, this would extend it to the bank and I feel that they would be privileged and I don't think a court would turn them over.

Senator CRANSTON. Should a government agency, in your opinion, be able to obtain the financial records of a citizen from a bank through different procedures from those that you would expect to obtain them from a citizen directly?

Mr. LORENZ. I think in dealing with organized crime and sophisticated business crimes you should be able to procure documents from a bank without giving notice to a citizen or maybe at some later time.

Maybe as a safeguard after 90 days of the subpoena the bank then should inform the citizen. Some safeguard so at least the citizen knows at a given date that the bank records have been handed over.

But to give notice at a preliminary phase, I think there should be an exception because in my experience banks are used as an instrumentality to commit crimes, not just the custodian of documents.

Senator CRANSTON. Do you think there should be restrictions on law enforcement access to bank accounts?

Mr. LORENZ. I think very definitely some judicial method should be procured. We use the subpoena method to do so.

I am aware of the financial code provision that allows enforcement to procure bank records without a subpoena in California although my experience is that the banks are not honoring that in my locality. They require a subpoena.

Senator CRANSTON. Do you feel the law should require subpoenas?

Mr. LORENZ. I feel they should.

Senator CRANSTON. The subpoena does not require notice but it would require a court order?

Mr. LORENZ. That is right.

Senator CRANSTON. Are blind subpoenas without notice available in California?

Mr. LORENZ. I am not sure, Senator, exactly what you mean by a blind subpoena.

Senator CRANSTON. Where no notice is given.

Mr. LORENZ. Oh, yes.

Senator CRANSTON. How many individual bank records does your agency inspect in a given year on the average?

Mr. LORENZ. We presently have over 85 subpoenas out in the fraud division itself. It does not include NSF check cases. That is not my division but I know there are many in a year.

Senator CRANSTON. How many result in criminal prosecution on the average?

Mr. LORENZ. Well, I can only speak from my own experience. In every case where we have issued subpoenas, to my knowledge we have charged someone with a violation of law. We don't fish. We know we are zeroed in to a certain degree. We may utilize the first bank account to move to the second bank account and maybe third bank account, and maybe fourth because that is the way it is perpetrated in some cases.

I might add we have our own investigation capability in our particular section.

Senator CRANSTON. Under the law as it stands at present, you could fish if you want, could you not?

Mr. LORENZ. Yes.

Senator CRANSTON. What procedures do you follow at the present time to gain access to bank customer's records?

Mr. LORENZ. We issue at the present time, of course, the regular judicial procedure subpoena and once the case is filed we utilize the grand jury subpoena and produce cases before the grand jury.

Senator CRANSTON. Where cases have not been filed how would procedures be altered?

Mr. LORENZ. In the judicial subpoena primarily. Although I do know law enforcement would be impaired in the non-sufficient-funds check

cases not within my jurisdiction but within my knowledge, they would be impaired.

Senator CRANSTON. Your concerns go primarily to the first point and second to the next point?

Mr. LORENZ. Yes. It is primarily my interest.

Senator CRANSTON. Are there any questions?

Thank you. You have been a very constructive witness.

Our next speaker is Mr. Jan Stevens, assistant attorney general, representing Evelle J. Younger, attorney general of the State of California.

Mr. STEVENS. Thank you for inviting us, we appreciate the opportunity to testify. We have filed a formal statement and would request it likewise be made part of the committee's record.

Senator CRANSTON. Certainly.

**STATEMENT OF ATTORNEY GENERAL EVELLE J. YOUNGER, AS
PRESENTED BY JAN STEVENS, ASSISTANT ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA**

Mr. STEVENS. Senate bill 2200 in its present form imposes severe and unwarranted restrictions upon the ability of State and local law enforcement agencies to perform the regulatory and enforcement functions which they have been called upon to carry out for the protection of the people. Although it is entitled the "Right to Financial Privacy Act," it fails to provide the customers of banks any real privacy, or to protect their constitutional rights. It places severe sanctions on the dissemination of information to public regulatory agencies, while at the same time permitting financial institutions to make the details of the financial lives of their customers freely available to credit reporting bodies, local businessmen, and friends and relatives of bank officials. This bill is irrationally discriminatory, inaccurate in its basic premises, and contrary to the public interest. It would severely hamper the regulatory and law enforcement activities of State and local agencies in a number of important fields.

Furthermore, this bill unhappily attempts to impose detailed rules of investigative procedure on State and local agencies. We submit that it creates a dangerous precedent, one not mandated by the Constitution and one whose authority under the commerce clause is dubious at best. The California Legislature is at this time considering this problem in an assembly bill [AB 1609] which has reached the State senate finance committee and will be heard early next month. Within constitutional limits, the investigative procedures of State and local governments should be worked out within the ambits of State policies, laws, and procedures. California should be allowed to cope with this problem in her own way.

Senate bill 2200 and its other Federal and State counterparts would prohibit financial institutions from disclosing information relating to their customers to a State, Federal, or local law enforcement agency unless the records are "described with particularity" and either:

Disclosure is authorized by the customer; an administrative subpoena is issued, served on the customer, and followed by a court order directing compliance after notice and opportunity for the customer for

challenge; a search warrant is served upon both customer and financial institution; or a judicial subpoena is issued, a copy served on the customer, 10 days have passed without notice that the customer has moved to quash, and a court order is issued directing compliance.

Preliminarily, it appears that notwithstanding its declaration of intent, S. 2200 guarantees little privacy to a bank's customers. As the National Association of Attorneys General pointed out in a resolution opposing this measure, nothing in S. 2200 prohibits banks and other financial institutions from freely disclosing information about their customers to credit reporting agencies and other private persons and organizations. Nor does this bill prohibit some kind of disclosure to law enforcement agencies of violations of law committed against the institution itself. Thus, while bank officials could complain against a customer it suspected of making a fraudulent credit statement, they would be prohibited absolutely from:

Notifying regulatory agencies of the status of the account of a suspected stock swindler; informing the authorities of the apparent deposit of extortion funds by a suspected kidnaper; and providing police with a handwriting example in order to authenticate a message from a kidnap victim.

Recently, the FBI was reportedly criticized for failing to keep the bank account of an alleged SLA member suspected of implication in the Hearst kidnaping under close surveillance, so she could have been apprehended when she withdrew the funds. Under S. 2200, the FBI would never have been able to locate the account in the first place.

Whether such records as canceled checks deserve even the limited and discriminatory protection afforded here is open to question. As the ninth circuit pointed out in *Harris v. U.S.*, 413 F. 2d 316, 319 (1969) :

* * * the client, by writing the check which the attorney will later cash or deposit at the bank, has set the check afloat on a sea of strangers. The client knows * * * that the check will be viewed by various employees at the bank when it is cashed or deposited, at the clearinghouse through which it will eventually return.

S. 2200 would require agencies to close their eyes to apparent wrongdoing. This bill prohibits a governmental agency which has gone through the procedure set forth above from disseminating information it obtains to any other governmental department or agency unless specifically authorized by statute. Enactment of S. 2200 could easily lead to a situation in which, for instance, the Internal Revenue Service or the State franchise tax board discovered in an examination of customer records that a judge had been receiving large payments from a corporation engaged in litigation in his court. These agencies would be powerless to refer this fact to the district attorney, the grand jury, or the commission on judicial qualifications.

S. 2200 would emasculate the clean elections laws of California. With the enactment of proposition 9—the "clean election initiative—California has some of the most stringent lobbyist regulation and campaign disclosure laws in the country. The recent Watergate disclosures have clearly shown the necessity for effective enforcement of those laws in tracing funds from one bank account to another. In

one case uncovered by Watergate investigators, funds were traced through four separate financial institutions. Faced with the necessity to investigate the possible laundering of funds in similar situations in California under S. 2200 a search warrant probably would not be available since no probable cause would initially exist. In order to trace those records it would be necessary to either: File an action at law, obtain a judicial subpoena, let 10 days pass and obtain a court order. This could compel the filing of actions against possibly innocent persons before an investigation was fully completed. No compelling need has been demonstrated which would illustrate the need for such a Hobson's choice, with its concomitant expense to the public, confusion, and embarrassment to the person against whom the action is filed.

Alternatively, an administrative subpoena could be issued by the attorney general [not by a district attorney, who lacks this authority although it is his responsibility to enforce clean election laws for local elections]. In the event such a subpoena was served, the customer would have to be given an opportunity to contest it, and a court order would again have to be obtained.

Imagine what the result would have been if this law had been in effect and the perpetrators of Watergate had an opportunity to contest each separate effort to gain access to financial records in the numerous institutions through which campaign funds were funneled. It is reasonable to assume that each and every effort to obtain these records would still be embroiled in the courts at various levels of appeal.

The contested enforcement of one administrative subpoena alone by a determined adversary in California necessitated two superior court proceedings and an appeal to the higher court before, after 3 years of protracted litigation, the validity of the process was upheld. *People v. West Coast Shows, Inc.*, 10 Cal. App. 3d 462, 89 Cal. Repr. 290 (1970).

The grand jury process would be drastically changed. The grand jury provides one of our most necessary and useful tools for investigation of conspiracy in organized crime and other crimes which do not lend themselves to the ordinary methods of investigation. Its usefulness was again well illustrated in the recent chain of indictments arising from alleged violations of the Federal election laws. However, there is no recognition given in this bill to a grand jury subpoena and to the necessity for secrecy in grand jury proceedings. Nor, it appears, would this bill permit a legislative committee to obtain any records at all without the consent of the customer.

Financial institutions may inform law enforcement of the apparent violations only if those violations relate to the institution itself. Furthermore, it is doubtful whether under S. 2200 an institution could even disclose enough facts about an apparent embezzlement, for instance, to permit a law enforcement agency to investigate. There is serious question as to whether section 5 would even permit disclosure of the name of a suspected embezzler. A bank could, quite possibly, be limited to notifying the police department that it suspected such a crime, but was not at liberty to disclose any further information without a search warrant or subpoena.

The efforts of California in the organized crime field would be severely hampered. One of the most important functions of law enforcement in the organized crime area is to conduct continued surveillance over the possible diversion of proceeds of organized crime into legitimate businesses. Organized crime figures are sophisticated, and their method of operation changes drastically if they ascertain that their activities are under surveillance. It would be impossible under S. 2200 to maintain any surveillance over the flow of organized crime funds into California.

Investigations of the conduct of public officers would be severely hampered. One of the most important and delicate tasks this office has to perform is to investigate charges brought against public officers for misconduct in office. Very often these charges involve alleged bribery or extortion and they may well require examination of the accounts of third persons. The notice and adversary proceeding requirements of this bill would have two possible effects;

No. 1, they could require the institution of public judicial proceedings [and the concomitant embarrassment and possible ruin to the reputation of the person involved] in order to obtain a subpena—even before the existence or nonexistence of evidence was recovered.

No. 2, notice of an investigation would provide ample opportunity for the person accused to cover his tracks and conceal evidence. In this respect, S. 2200 seems to make the assumption that the person accused of a crime should be advised of the fact that an investigation is being conducted. This assumption has nothing to do with constitutional rights. Its adoption would place the law enforcement field on an entirely different footing; and one very difficult for it to maintain effectively.

The bill would make it extremely difficult to enforce the law of charitable trusts in California. Historically, the attorney general has been the guardian of charitable trusts. In this field, literally billions of dollars have been entrusted by persons—both deceased and living—for charitable purposes. One of the most important functions of the attorney general is to insure that these funds are used for the purposes for which they are intended.

The financial records maintained by charitable trusts must be subject to continual examination. And these records are not the records of the trustees. On the contrary, they are records maintained for the interests of the beneficiaries. The attorney general represents the beneficiaries of the trust when he inspects these records. S. 2200 makes no recognition of this important doctrine. It assumes that trustees are entitled to privacy in their manipulation of trust funds against the public officer who is charged with their supervision.

Furthermore, it is no answer to characterize the attorney general as a regulatory agency with auditing duties in this respect. One of the most important aspects of these investigations is the examination of transactions of trustees with third persons.

The effective regulation of prepaid health plans in California would be jeopardized. It is the function of the attorney general of California under the Knox-Mills Health Plan Act [Calif. Govt. Code SS 12530 et seq.] to supervise and regulate the activities of prepaid health plans

in California. Presently there are some 143 plans registered in this State, serving approximately 3½ million families. Financial audits and examinations are essential to insure that the persons covered by these plans will be adequately protected. One of the most gross abuses in this health plan field has been the utilization of management companies and subsidiaries which in various forms utilize or siphon off the funds of health plans. S. 2200 imposes an intolerable burden on this office in attempting to ascertain the activities of these multi-layered corporate structures.

The privacy of California bank customers is adequately protected by existing State law. One of the problems of attempting to regulate the regulators of each State is that the broad Federal brush fails to recognize State differences. The California courts have consistently upheld the constitutionality of the administrative subpoena process that S. 2200 seeks to change. Our supreme court upheld this process against fourth amendment objection provided: (1) The inquiry be one which the agency demanding projection is authorized to make, (2) that the demand be not too indefinite, and (3) that the information sought be reasonably relevant to the intended investigation. *Brovelli v. Superior Court*, 56 Cal. 2d 524, 529, 5 Cal. Reptr. 630, 364 P.2d 462 (1971). *People v. West Coast Shows, Inc.*, 10 Cal. App. 3d 462, 470, 89 Cal. Reptr. 290 (1970).

If a person affected by the (administrative) subpoena shall believe that Brovelli's requirements are not met, without contempt or other penalty he need not respond. Thereupon the investigating agency is obliged, on an order to show cause, to arrange a superior court hearing at which conformity of the subpoena duces tecum to constitutional and legal standards may be judicially tested. (Citations) Thus, the Government Code provides an opportunity for adjudication of all claimed constitutional and legal rights before one is required to obey the command of a subpoena duces tecum issued for investigative purposes. *People v. West Coast Shows, Inc.*, supra.

As the U.S. Supreme Court stated:

Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. *U.S. v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950).

CONCLUSION

Although S. 2200 purports to be a right to privacy bill, the privacy it purports to create is not one mandated by the Constitution. For example *Brovelli v. Superior Court*, 56 Cal. 2d 524; 15 Cal. Reptr. 630, 364 P.2d 462 (1961); *People v. West Coast Shows, Inc.*, *supra*. Nor is it privacy which must be mandated by law. Nothing in existing California law prohibits a bank or other financial institution from informing its customers when a regulatory agency, a law enforcement investigator, or a private concern inquires into a customer's records. Nor does the law of this State prohibit a financial institution from refusing to divulge the contents of such records without a subpoena or other process of law.

The privacy of S. 2200 is a privacy available to criminal suspects against law enforcement agencies but not available for all citizens against the myriad of private reporting agencies who are interested in knowing about them and who compile files on them. It is a privacy which permits a financial institution to defend itself by informing law enforcement about violations of the law affecting it, but prohibits the officers of such an institution from reporting violations of the law against others. In effect, it is a bill which seeks to institute in the United States a sort of Swiss banking system to the detriment of effective enforcement of these laws which are most sensitive and central to the integrity of the democratic process—those relating to elections, the corruption of public officials, and organized crime.

No effective showing has been made for the necessity of such an act. We respectfully urge its rejection.

Senator CRANSTON. Thank you. I appreciate very much your very interesting, illuminating, and constructive statement.

In regard to administrative procedure or administrative subpoenas, I recognize California law does not require notice.

In regard to other subpoenas, the bill we are considering requires law enforcement to get a subpoena according to the Federal rules of criminal procedure or under State laws on the subject.

If State law does provide, as it does in some instances, for a subpoena without notice the bill plainly will not alter that.

In that case there is an impartial body determining that no notice should be made under those circumstances. Is not that correct?

Mr. STEVENS. Except that the bill would expressly provide notice and opportunity to contest even for an administrative subpoena. We read that to apply to State administrative subpoenas as well as Federal. It would also add new standards which may or may not be the standard which the California court has imposed upon it.

Senator CRANSTON. Do you feel there is in existence a confidential relationship between bank and customers?

Mr. STEVENS. I believe Mr. Pownall has testified to some extent there is. It is certainly not a privilege. It varies as to the policy of one bank and another and one that seems to exist in varying degrees to private investigators as well as public ones. To say there is this relationship is only the beginning of the inquiry.

Senator CRANSTON. Has your office ever notified a bank customer his records were being inspected?

Mr. STEVENS. I don't know. I should preface by saying we are not customarily engaged in this. To a large extent the district attorneys are the local law enforcers and the State agencies which are enforcers could better respond to this. We will be in the proposition 9 matters in the future but we are not at the present time.

STATEMENT OF JOHN H. ROUSSELOT, REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Senator CRANSTON. Welcome Congressman John Rousselot, member of the House Banking Committee who will sit with us on this hearing.

Congressman ROUSSELOT. May I ask a question?

Senator CRANSTON. Of course.

Congressman ROUSSELOT. Are you involved in avoidance of State income tax, do you work on that?

Mr. STEVENS. Yes.

Congressman ROUSSELOT. In those cases would you go to bank records?

Mr. STEVENS. We would have cases referred to us by the Franchise Tax Board for civil proceeding and occasionally further investigation.

Congressman ROUSSELOT. Do you have to get a court order to do it or do you just have automatic access?

Mr. STEVENS. We would have to get a court order under this bill. Under present California judicial procedure a subpoena would be sufficient and would meet any constitutional requirements.

Congressman ROUSSELOT. You already have ready access?

Mr. STEVENS. Often banks, as I understand now, are requiring subpoenas of one sort or another. But that does not pose a problem to us.

Senator CRANSTON. How many individual bank records does your agency inspect in a given year on the average?

Mr. STEVENS. I could not tell you, Senator. They will be basically in the field of charitable trusts and Knox-Mills Health Plan Act, otherwise the district attorneys and State regulatory agencies do the inspection.

Senator CRANSTON. Any other questions?

Congressman STARK. Yes.

First of all, Mr. Stevens, thank you and the attorney general's office for being here this morning.

Am I correct in assuming that you do not object to the bill before the State legislature that Assemblyman Sieroty has proposed?

Mr. STEVENS. We still have problems with it.

Congressman STARK. Is it true that you feel if our bill did not go any further than that one that many of your objections, would be met?

Mr. STEVENS. Mr. Sieroty has endeavored to meet many objections that have been raised to date. I think we have a basic philosophical objection to having this imposed by Federal legislation. We prefer it at the State level.

Congressman STARK. In instances of federally regulated financial institutions we have no way of getting national bank records except through the good graces of the controller of the currency, and this would have to be done under Federal law. To the extent we can write a law or a bill that will provide a method for law enforcement officers—be they Federal or State—to fairly get information they need while protecting the rights of individuals from the kind of spying that say went on in the *Ellsberg* case, we might be able to have a Federal law that would not inhibit your State laws.

That is what we hope to do. There are some cases where the Federal restrictions are necessary. If you could at a later date submit for our records your comments on Mr. Sieroty's bill, I think many of the points you raised in connection with that bill will relate to this Federal bill.

It would be a great help to us if you could further expand on this. If the Sieroty bill is acceptable from your standpoint, or if it is acceptable with some changes, it would help us in making future changes in our bill.

Congressman ROUSSELOT. Thank you.

Senator CRANSTON. Thank you, Mr. Stevens. You have been very, very helpful and we are grateful to have you with us.

Now I want to state that there will be one slight change in our procedure. We were to have two panels, one after another, of law enforcement officials. The second panel was only two people and one of them, Mr. Kirshner, had to cancel out.

So, I would like to ask that we combine the two panels and if those people will come forward. They are: Michael Barber, Lawrence Baker, Lt. Lewis Riker, Sgt. Gil Luft, and Richard Pachtman who was to have been on the second panel.

Will you come forward, please, and after you are seated identify yourself for the record.

Mr. BARBER. Michael Barber, deputy district attorney, Sacramento County, legal representative of the California Family Support Council.

Mr. BAKER. Lawrence C. Baker, Jr., chief deputy insurance commissioner, State of California, speaking on behalf of the Department of Insurance and the National Association of Insurance Commissioners.

Sergeant LUFT. Gilbert J. Luft from the Los Angeles County Sheriff's Department, Fraud Unit of the forgery-fraud detail, and I am representing the Southern California Fraud Investigative Association.

Mr. PACTMAN. Richard E. Pachtman, head deputy district attorney for the county of Los Angeles, in charge of the Major Fraud Division, representing the district attorney of Los Angeles County.

Lieutenant RIKER. Lewis J. Riker of the Los Angeles Police Department Bunko-Forgery Division, and I am here today representing Chief Davis who wanted me to thank Senator Cranston for the invitation. And I am also representing the California Check Investigators Association.

Senator CRANSTON. Again, I welcome each of you. Because of the time problem we want to request if you have prepared statements to just submit them and we will include them in full in the record.

STATEMENT OF MICHAEL E. BARBER, DEPUTY DISTRICT ATTORNEY, SACRAMENTO COUNTY LEGAL REPRESENTATIVE, CALIFORNIA FAMILY SUPPORT COUNCIL

I. BACKGROUND

Mr. BARBER. The Family Support Council is an arm of the California District Attorney's Association providing a professional organization for those personnel in law enforcement and social welfare agencies who specialize in recovery of reimbursement of welfare funds expanded where such recovery is permitted from absent fathers or such funds have been paid out through fraud or recipient mistake. Necessary increments of such duties are collection of child support in low-income cases, whether welfare related or not, prosecution of failure to provide cases, and prosecution of welfare fraud. As a result of this varied activity, this organization shares with other units of law enforcement and regulatory agencies a fear that the legislation in question will become a shield for a variety of financial crimes.

II. SPECIFIC PROBLEMS

The key problems for our organization presented by Senate bill 2200 involve the identification of assets and verification of the value of assets and title thereto, without prior notification or consent from the subject of inquiry. Problems created by the bill in these areas would arise in the following contexts.

A. Writs of execution : To serve a writ of execution. We must determine whether the nonproviding parent is the owner of the account. More specifically we must identify the account with sufficient particularity so that there will be no confusion as to the object of the writ. If we have to ask the defendant in advance for this information or if the defendant is notified in advance of our interest in the account the defendant may either confuse the ownership of the account or secrete the funds in the account. This bill, therefore, could aid absent parents in hiding their assets from their families and welfare officials.

B. Use of checks to pay child support. In a given month the district attorney for Sacramento County handles 8,000 or more personal checks in payment for child support, transmitting as soon as possible these funds to the abandoned families. It is able to do this because both the maker and this agency know that before acceptance we have the power to verify that the sum offered on the face of the check is on deposit. This bill, because of the language of sections 3(b)(2), t and 15(b) would prevent this verification. Thus if this bill is enacted, Sacramento could either:

- (1) Terminate accepting checks from 8,000 absent parents, or
- (2) Delay sending child support to abandoned children for about 2 weeks until the checks cleared the bank.

C. Securing evidence of criminal nonsupport. Inquiries necessary to verify that the defaulting parent had at some prior time sufficient funds to provide for the children, on deposit in a bank, would be thwarted by this bill. The power to subpoena in this regard is illusory since, to prepare the declaration for the subpoena it must be established that an account exists or has existed. This inquiry is prevented by a combination of sections 3(b)(2), 5, and 15(b). Thus a defaulting parent who is retired or self-employed may conceal resources and cheat both the taxpayer and the children, if this bill is enacted into law.

D. Verification of welfare eligibility. Welfare laws generally permit only a limited amount of liquid personal property; in California this sum, for AFDC purposes, is \$600. It is doubtful that unverified complaints of excess sums on deposit with a financial institution, would be sufficient to permit either a search warrant or subpoena duces tecum. Further to require a waiver under this act would (section 6) add a new condition to eligibility for welfare, it might also violate both section 15(a) in the form referred to and in section 17 of the act. The bill then creates more litigation on this subject and another possible basis for welfare fraud.

E. Criminal investigations related to negotiations of welfare warrants and food stamp authorizations to purchase. As an example of how this bill would endanger protection of public funds, let me present

the following: An estimated \$250,000 in food stamps was embezzled from Sacramento County over a 2-year period. To obtain the stamps the defendants had to take documents termed ATP's (authorization to purchase) to local banks and negotiate them for stamps by signing the document at the bank and paying cash. There was no liability to the bank, so section 5(b) of this bill would not apply. One individual, part of the conspiracy using the alias "Bill Lee," passed in excess of \$20,000 worth of these ATP's at 22 financial institutions, as defined in section 3 of this bill. When the crime was discovered, inquiry was made with all the banks in question as to whether they could identify "Bill Lee." A composite picture was prepared based on a teller's description of the defendant. When apprehended as a result of this composite picture, "Bill Lee" confessed and his confession assisted in the conviction of eight other individuals. Because of the ambiguous language of sections 4(a), 5(a), and 15(b), I cannot help but believe that this investigation would have been seriously curtailed, with disastrous results to the taxpayer, had this bill been law. A second source of evidence in this case was the bank records of one of the defendants. They showed income far in excess of his declared income for welfare purposes. Subpnaed into court at his trial they helped substantially in convicting him. This bill could have created ancillary litigation that could have prevented their practical use at trial. (See sec. 4(b) and sec. 9.)

III. OTHER AREAS OF INVESTIGATIVE ACTIVITY AFFECTED BY THIS BILL

A. Policing campaign contributions.

B. Kidnaping such as the Hearst kidnaping. It should also be noted that while the bill would thwart legitimate investigative activity on behalf of the public it would apply no restrictions on publication of financial records for any newsworthy purpose nor would it limit inquiry by private investigative or credit agencies.

IV. SUMMARY

The above illustrates how this bill as presently written would provide a vehicle for disruptive payment of child support in up to 8,000 accounts in one county, would facilitate the concealment of assets for the purpose of defeating the child support and welfare laws and would disrupt investigation of criminal conduct where bank transactions are a necessary part of such conduct.

It is recognized by the California District Attorney's Family Support Council that privacy is a legitimate concern and that promiscuous use of personal data is an impairment of the spirit of the fourth amendment, but overreaction that ignores the legitimate right of society to, in the words of the Constitution, "Establish justice (and) insure domestic tranquility" will result in an even graver impairment of the spirit of the fourth amendment. The public must be assured that its rights before the law and in the administration of social programs are as adequately protected as those of defendants and that claims of privacy are not an exaggerated sham designed to conceal wrongdoing. Otherwise the public will reject legitimate social pro-

grams and develop a lasting antagonism to the legal system. Few social problems are more vulnerable to generating this type of reaction than the problems of welfare fiscal integrity and child support.

STATEMENT OF GILBERT J. LUFT, PRESIDENT, SOUTHERN CALIFORNIA FRAUD INVESTIGATORS ASSOCIATION

Mr. LUFT. As president of the Southern California Fraud Investigator's Association, I wish to express our unanimous and vigorous opposition to S. 2200 that you introduced to the Senate July 19, 1973. We have a membership of 140 fraud investigators from Federal, State, and local law enforcement agencies, who unanimously demanded opposition to your S. 2200. We believe passage of this bill would destroy effective enforcement of most fraud cases by the criminals knowingly avoiding the serving of a subpoena or summons.

When I appear as a witness on behalf of the Southern California Fraud Investigations Association at Senator Cranston's hearing in Los Angeles, I intend to voice opposition to the following portions of your bill: Section 4(a) subsection (1) "Such customer has authorized such disclosure in accordance with section 6, lines 18 and 19, page 4.

Section 6 in its entirety.

Section 7(a) subsection (1); Those serving such administrative summons or subpoenas have first served a copy of the subpoena or summons on the customer in person, or by certified mail, return receipt requested; page 6, line 25; page 7, lines 1, 2, and 3.

Section 8; The search warrants shall be served upon both the customer and the financial institution. Examination of financial records may occur as soon as the warrant is served on the financial institution and the customer; page 7, lines 22, 23, 24, and 25.

Section 9, subsection (2); That a copy has been served on the customer, in person or by certified mail, return receipt requested, and section (B) 10 days pass without notice to the financial institution that the customer has moved to quash the subpoena. Where so notified, the financial institute may comply with the subpoena only when it is served with a court order directing it to comply, issued after determination of the customer's motion; page 8, lines 10, 11, 12, 13, 14, 15, 16, 17, and 18.

Section 15(a) (Defined as \$5,000 fine or year imprisonment or both for violation or attempted violation of this Code.)

STATEMENT OF DEPUTY DISTRICT ATTORNEY RICHARD D. PACHTMAN, LOS ANGELES COUNTY

Mr. PACHTMAN. I am head of the major fraud division in the Office of the District Attorney of the County of Los Angeles. Because of my division's particular involvement in the field on financial crimes, District Attorney Joseph Busch has requested that I present the position of our office on the proposed Financial Privacy Act of 1973.

It is the function and responsibility of my division to prosecute that broad area of criminal law commonly termed white-collar crimes. These types of crimes have their basis in seemingly legitimate business transactions encompassing the fields of securities, real estate, banking,

insurance, brokering, commodity options, trust, bullion and coins, and such other fields of business endeavor that the imagination of man can create.

The perpetrators of these type of crimes are very sophisticated and operate by trick, subterfuge, and misrepresentation. For the most part, their victims are decent men and women seeking to make legitimate investments and realize modest returns. More often than not, these are people who can ill afford the resulting chaos to their personal affairs.

The format followed by the perpetrators of these white-collar crimes, regardless of the degree of sophistication, has a common theme. These operators use early investment money to create the facade of success and responsibility. They try to delay their obligations as long as possible to avoid payoffs. When payoffs do occur, they come from the moneys of new investors paid to original investors and not as the result of the purported business operation as has been promised. As a result of the facade, new investors are constantly being enticed, and the situation continues until such time as the substantial payoffs approach the cash inflow. It is at this point that the business folds. Throughout this period of operation its operators have been handsomely rewarding themselves from the incoming money.

It is sometime in the early stages of such fraudulent operations that law enforcement agencies have the first opportunity to make a breakthrough. It usually comes about by some highly suspicious investor. It is at this point when the experienced fraud investigator can see a pattern developing which, based on his past experience, indicates that a fraud is being perpetrated upon the public. However, at this stage the information is insufficient to establish the probable cause necessary to obtain a search warrant. The experienced investigator must first find answers to two questions.

1. Are the operators of the purported business venture doing what they promised with the investor's money; and

2. If not, to whom is the money being diverted?

The cornerstone to the effective investigation of what is occurring within the organization rests upon records of financial transactions; that is, the tracing of the funds to the various people within the organization. It is only by means of such tracing that the answers to the two aforementioned questions become available. To impose a standard of probable cause prior to securing such information would cut the investigators off at the starting gate. If the investigators were to wait until such operations folded, their efforts to protect investors and potential investors would be futile. If this proposed legislation becomes the law of the land, it will be impossible to trace funds. I do not say that this bill will tie the hands of investigative agencies or make their job more difficult, I say it will absolutely and completely stop them. Their ability to prosecute the white-collar criminal will be totally destroyed, and their ability to protect the public will also be destroyed. I should also like to emphasize at this point that the records sought by investigators in these white-collar crimes are as much a record of the potential victims' money and the use to which it is being put as it is an intrusion into the private workings of the particular company under investigation.

Our prosecution files are loaded with white-collar fraud cases that would have been impossible to prosecute had we not been able to obtain financial records to help us establish probable cause. I have many examples I can provide if you so desire. Situations wherein complicated land frauds involving many corporations were stopped by tracing the checks of the victims into the personal accounts of the suspects; or situations wherein the money of investors was traced not to the corporation to whom it should have been paid, but to the personal accounts of the promoters; or situations where misappropriated county and State funds were traced to the thieves utilizing financial records of savings and loan associations.

One of the biggest frauds in the history of Los Angeles County involves Hamilton Thrift & Loan and Charter Thrift & Loan, and was one in which literally thousands of little investors were wiped out by thefts of \$2½ million. This was a case where the perpetrators were discovered only by means of tracing the highly complicated transactions through a maze of accounts that almost defies imagination. These few situations I have related do not even scratch the surface of the problem, but it does demonstrate that probable cause only comes from the initial tracing and does not exist before this tracing.

The prior notice requirements of each of the sections of this proposed legislation would further complicate our problems in prosecuting as it would serve to provide notice to the perpetrators of these white-collar crimes that it is then necessary for them to close shop and abscond with the funds. Even the concurrent notice of the search warrant provision would constitute such prior notice inasmuch as the retrieval of microfilm bank records commonly take several weeks. Analysis and followup investigation would ordinarily take many additional weeks and sometimes months.

If we desire accountability—if we desire to be certain that investigative agencies do not abuse their powers, than it does seem logical, correct, and fair that they should be required to state the purpose for which records are sought and to relate their use of those records for other purposes. Also, a requirement that notification of the inquiry into such financial records be made at the conclusion of the investigation would be appropriate. Such requirements would serve the purpose of limiting the possibility of arbitrary intrusions into financial records, and would serve to limit justifiable requests for disclosure; but, to go further, as does this proposed legislation and require the giving of prior notice and imposing a standard of probable cause would simply give free rein to the most sophisticated and most culpable white-collar criminal.

**STATEMENT OF LT. LEWIS J. RIKER, LOS ANGELES POLICE
DEPARTMENT, LEGISLATIVE CHAIRMAN, CALIFORNIA CHECK
INVESTIGATORS ASSOCIATION**

Lieutenant RIKER. The California Check Investigators Association opposes Senate bill 2200 for the following reasons:

1. The number of worthless document crimes committed throughout the State is of such magnitude that compliance with the restrictions

as enumerated in S. 2200 would be practically impossible. In fact, such requirements would actually serve to foster this type of crime.

In the city of Los Angeles alone, the reported crimes involving worthless documents reached an all-time high of 47,157 in 1973, and the prognosis for 1974 is an additional increase of approximately 25 percent. This prognosis is based on the fact that as of July 14, 1974, the Los Angeles Police Department received 22.9 percent more worthless document reports than it did for the same period in 1973.

2. S. 2200 allows the dissemination of financial records upon authorization by the customer. Usually, the writer of bad checks cannot be located at the address imprinted on his checks. Even if he could be located, it is extremely unlikely that he would give authorization for such disclosure knowing full well that the information thus provided could result in his conviction.

3. Disclosure pursuant to an administrative subpoena or summons sounds feasible until you realize that the administrative subpoena or summons is not available to local law enforcement officers investigating worthless documents crimes. Even if it were available, S. 2200 requires the customer be served and that he authorize dissemination of these records, or a court order directing compliance must be obtained.

Most law enforcement agencies and California courts are under-staffed and cannot adequately cope with the current worthless document problem. To require additional procedures and hearings would create utter chaos in the criminal justice system.

4. Disclosure pursuant to a search warrant appears reasonable until you analyze the requirements for the issuance of a search warrant. A search warrant is issued by a magistrate upon the showing of probable cause. Couple that with the requirement that the customer and the financial institution be served and it becomes obvious that disclosure pursuant to a search warrant is extremely impractical.

5. A judicial subpoena cannot be obtained until a complaint has been filed. A complaint in a worthless document case cannot be filed until the information contained in the financial records of the suspect are available. These records are necessary to show intent to defraud as required by section 476a of the California Penal Code which is the statute defining the crime of issuing checks without sufficient funds. If it were possible to charge an arrested person with a violation of issuing checks without sufficient funds without the information contained in bank records, it is still extremely doubtful that the subpoenas could be served in sufficient time to allow compliance with S. 2200 and California Penal Code section 859b.

At the time of arraignment, a magistrate sets the date for the preliminary hearing which is statutorily between 2 and 10 court days after the date of arraignment. It is at this time that the magistrate orders the issuance of the required subpoenas. In Los Angeles County the subpoenas are actually generated by computer and are mailed to the concerned investigator for service. These subpoenas are normally received approximately 2 days after the arraignment.

Most worthless document arrestees are released on bail shortly after their arrest. Experience has shown that the residence address given at the time of arrest is often incorrect. The probability of relocating the arrestee and serving him with a copy of the subpoena in sufficient time

to allow the 10-day waiting period before the financial institution can furnish these records to the court as required in S. 2200 is extremely remote.

The California Check Investigators Association respectfully submits the following suggested amendment which would allow criminal worthless document investigations to continue unhampered. This amendment could be included under the exceptions clause as enumerated in section 11 of S. 2200:

(c) When a law enforcement agency certifies to a financial institution in writing that a crime report has been filed with that agency which involves the fraudulent use of bank drafts, checks, or other orders payable upon demand of any bank, such law enforcement agency may request a financial institution to furnish, and a financial institution shall supply, a statement setting forth the following information with respect to a customer's account specified by the law enforcement agency for a period 30 days prior to and up to 30 days following the date the alleged illegal act involving the account occurred:

- (1) The number of items dishonored;
- (2) The number of items paid which created overdrafts and the dollar volume of such overdrafts;
- (3) A statement explaining any credit arrangement between bank and customer to pay overdrafts;
- (4) The dates and amounts of deposits; debits and balances on such dates;
- (5) A copy of the signature appearing on a customer's signature card;
- (6) The date the account was opened and, if applicable, the date the account was closed.

(d) Nothing in this title prohibits the dissemination, on the date indicated on the subpoena, of financial information in response to a judicial subpoena issued by the magistrate in a criminal court when the customer is a named defendant in said criminal case.

Senator CRANSTON. Thank you.

Lieutenant RIKER. I would like to address a few remarks to questions that were asked during the hearing, one that Congressman Stark mentioned was are your NSF laws actually needed.

The NSF crime in the United States probably take more money than the majority of any other type crime. The 12th Federal Reserve District Bank rejected in the year of 1973, 8,000,422 items. That is an approximate figure. We rounded it off. And that represents over \$1,883 million. That is one Federal Reserve District.

I don't know how a law enforcement officer could tell a person that comes in to make a crime report that has a nonsufficient funds or account-closed check for \$10, I am sorry, we don't have a law that will cover this.

Business could not operate without nonsufficient fund laws. Your bill, unfortunately, if it were enacted in its present form would nullify our 476(a) of the California Penal Code, which is the law that we operate under in the NSF field.

Another item that was brought up several times was notification and I have to agree that notification is a problem, not so much that we

care if the customer or suspect is notified. We can't find them and this is the problem.

If the person was able to be located most of the merchants would find them and get the money back. So, notification is a definite problem.

The idea of having subpoenas, the administrative subpoena sounds feasible until you realize that local law enforcement officers don't have the capability of issuing an administrative subpoena.

The judicial subpoena, as far as local law enforcement officers are concerned, we go to the district attorney's office to get a subpoena and he says, well, do you have enough to file a case.

Well, we cannot file a case until we have the information contained in the bank records. So, we have a vicious circle. We have no complaint. We have no subpoena. These are my main contentions.

One other thing brought up was about the National Bank. In 1973 the United States National Bank completely shut off law enforcement from obtaining any information from their banks. Their theory was their confidential relationship with their customers authorized them to refuse to give law enforcement any information.

The victims of nonsufficient funds and account closed crimes were notified by our department that we were sorry we could not prosecute their cases and our criminal investigation came to a close.

They, in turn, wrote letters to the bank and told them their checks would no longer be honored in these businesses and it took them 1 month and they had to change their mind.

It makes a big financial impact on a bank and if there is legislation to be made to restrict National banks, you might as well make it for all of them.

One other thing on search warrants. Last year we had a bumper crop of worthless checks and 47,157 reports were made to the Los Angeles Police Department. If we tried to get a search warrant for each one of those cases the minimum time, and I am even skimming on minimum time, is 3 hours per warrant.

This does not include any investigative time but just the actual processing of the warrant is 3 hours.

We don't have the men. The courts do not have the judges or capability of issuing 47,000 search warrants for nonsufficient fund crimes alone.

I have one last statement and that is I am a law enforcement officer, but my sentiments are agreed with by many private people and businessmen, a few of them who are here today. And with your permission, Senator, I would like to have them stand up just so you may recognize the fact there are nonlaw enforcement people who are interested.

Senator CRANSTON. Fine. I welcome you all here.

Lieutenant RIKER. We have representatives from the airlines, supermarkets, department stores and other types of businesses.

Senator CRANSTON. Thank you very, very much for your very helpful testimony.

I have just a couple of questions I want to ask and I just pose them to whoever feels like answering.

If, in the course of investigating someone's account say for insufficient funds, you find evidence that he may have been involved in some criminal activities that you were not looking for when you went in,

like transactions with a bookie, would you then go on to explore that matter?

Lieutenant RIKER. Yes; we would. We do not close our eyes to any crime whether it be worthless documents, narcotics or any other crime. If we observe something that indicates a crime has occurred we will investigate it and, if at all possible, file a complaint.

Sergeant LUFT. Any investigative officer when faced with investigation of a new crime will go to the district attorney and present it to him, I would think, for his comments or decision.

Mr. BARBER. I can only echo that sentiment. Should we turn up something in the nonsupport field it would be referred to the appropriate investigating agency in the county promptly.

Senator CRANSTON. Would you get a subpoena?

Sergeant LUFT. I would go to the district attorney.

Senator CRANSTON. Do you feel free in whatever information you pick up to go on and give it to some other law enforcement agency or just to the district attorney, whether it is related to the case itself you are looking into or some unspecified matter?

Mr. BAKER. I think most law enforcement agencies work together.

In our division we have the corporations investigators working with the Los Angeles Police Department or Los Angeles Sheriff's Bunko Division. They work pretty closely together because usually corporation matters being violated also encompass possible grand theft. And those people work close together from my experience.

Sergeant LUFT. If I may say something in that regard. Through the years I think most investigators establish a list of people they will give information to. Some law enforcement agencies don't do anything but sit on the information.

In our case, we encompass the whole county and we can act wherever it occurs and when it is Los Angeles we turn the information over to them.

Mr. BAKER. When we discover crimes we have an obligation under the statute to turn the information over to the district attorney and certify it to him.

Your bill would present a problem. No such statutory authority is present to turn any information over to the United States Attorney, which we do regularly or Federal law enforcement official, if we discover violations, Federal crimes, which is not within the jurisdiction of the district attorney and that is often the case.

Senator CRANSTON. Could I ask each of you to state, down the table, how many bank records each of your agencies look at in the course of a year and how many result in criminal prosecution, just roughly? If you cannot supply it now, if you can later for the record.

Mr. BAKER. I will try to approximate. I would guess probably most of the insurance companies we examine have at least 50 bank accounts on the average, and we examine about a hundred insurance companies every year.

We examine probably 400 to 500 trust accounts for violations. We just do routine audits on trust accounts, maybe 1,000 to 2,000 every year.

Sergeant LUFT. I would say that in the fraud detail it would probably be close to 6,000 or 7,000 increase.

Mr. PACHTMAN. The district attorney's office participates in thousands and thousands of inspections of bank records and I would say they do not all result in criminal prosecution.

Oftentimes as a result of looking into those records it becomes amply clear the finger of suspicion pointed at someone, unjustifiably pointed at them and it absolves them. So, I would say it serves a dual purpose.

Lieutenant RIKER. I can only speak for the worthless document investigators in the city of Los Angeles. As I said, we have in excess of 47,000 cases assigned a year and I would estimate that we look into the bank records of approximately half that number.

The number of arrests, those arrested for worthless document crimes is in the area of 2,300 to 2,400 per year.

We have a filing rate of in excess of 86 percent. The remaining 14 percent that are not actually filed on does not mean they were not criminally involved, it means we could not come up with the necessary witnesses.

Senator CRANSTON. If I may ask one question to whoever chooses to answer it. How effective is the use of bank records in preliminary investigations to establish probable cause?

Mr. BAKER. I think it is absolutely essential, Senator. Because oftentimes, as I tried to make clear in my statement, we just don't have anything but a suspicion and by going to those bank records it enables us to follow through a course of conduct with these records, tracing money to places where it just isn't supposed to be.

Mr. BARBER. I think the heart of the problem, the words information contained in bank records, used in your statute; we need that information, as I indicated in my initial statement for, in some cases, even identification of who the customer may be, in reaching the actual physical documents I would submit is adequately controlled by State law.

But probable cause to go forward and basis for the subpoena cannot be, at least that threshold information you need may not be secured by asking at least the bank if the individual does business with them, maintains an account or has a balance in excess of. It is true not only in non-support cases but NSF cases.

Sergeant LUFT. Bank records sometimes allow investigators to obtain the identity of a suspect who probably started an account there under a fictitious corporation name or fictitious account. Because if you talk to your witness-victim, they have one name and later on you go to the bank and see the same name and perhaps the same corporation but then through the checks that have been written you might discover the name being used is fictitious and it serves to identify the true identity of the suspect.

Mr. BAKER. We do not examine for the express purpose of finding criminal violations. We are more interested in determining the actual financial condition of the institution under our control.

But I might comment on your question that it is amazing the number of times we go to verification of the financial statements of insurance companies by examining bank records and find that those statements are incorrect and that one of the victims is the bank itself, and the bank has relied on those financial statements in its transactions with the institution.

Under our regulations, of course, the bank usually comes out ahead because they are holding the money and they offset that.

Senator CRANSTON. Congressman Stark, do you have any questions?

Congressman STARK. A few short questions.

Mr. Baker, perhaps you could respond in writing. I am currently a licensee of your department and I might add that I am somewhat familiar with trust fund and fiduciary requirements. It might meet some of Mr. Stevens' objections if the customer could authorize access to records under your licensing procedure. And if it wouldn't we would like to work it so it could.

Would you comment to see if that might not be a way that a great amount of the problems you have would be overcome—where any licensee with an account would give you the right to go through any bank records?

Mr. BAKER. We have considered that in connection with the State legislation. As I mentioned, we have some 90,000 licensees under our jurisdiction and they are licensed every 2 years.

I might add we are in a rather problem process of trying to convert that to electronic data processing.

But among the things we do in that licensing procedure, is minimize the number of hand records we have to keep.

If we have to keep a specific authorization from each individual in order to look at a particular bank record, I think it is going to be quite a burden on us from the standpoint of just managing the thing physically.

The other part of it that would present a problem is that we often are faced with having to find things that are not reported. It is the absence of the truth in the statements that are made to us that are the problem.

We obviously cannot get authorization to look at an account that we do not know exists or ask the bank to look, or get authorization to look. We don't know it exists until we ask the bank if it exists. That would be the problem with that procedure.

Lieutenant RIKER. As I understand it, Congressman Stark, what you are asking for is prior waiver which, according to this bill, is illegal.

Congressman STARK. I would think that under section 6—in the kind of case Mr. Baker is referring to, and that Mr. Stevens refers to where a trust fund account or insurance account maintained is not their money—it might be possible. If that is not the case, I think the bill could be changed.

It was not our intention to cover attorneys' trust funds, certain accounts where a person handles them with fiduciary responsibility or State regulatory authority any more than this bill was to keep from looking at bank records. If it is an oversight it can be corrected.

I want to compliment you. The Los Angeles Police Department has been very cooperative in describing the great amount of work they go to.

I do have a suspicion, though, as a former banker, that your department, and departments like yours across the country, may well be put to extra work due to a laxity on the part of the banks in opening and granting checking accounts. And indeed also on the part of many

merchants in their anxiousness to accept checks without getting proper identification. I don't think this was ever intended to be the responsibility of the police departments.

It would be very helpful if you could, in either a detailed or summary way submit how many of the cases you have related to us in your department over the past year might have been prevented, in your opinion, had the bank and/or the person cashing the check been more careful in identifying the customer or in checking on the customer before opening the account.

I don't think either of us feels that it is our duty to do the banker's job for him or indeed to do the merchant's job.

So, your comments on this would be very enlightening.

Lieutenant RIKER. We are operating under the 1917 California Financial Code Section and when we request information we don't get all the information from the bank account, and to try to come up with the information you are asking, I would have to get information going clear back to the date it was opened.

Many times we get 1 month before, through the thing, and 1 month after.

Congressman STARK. In your opinion what is the number of times somebody cashes a check and the merchant doesn't ask to see a driver's license or other kind of information. And you say, "if the dummy had only looked"—or in the case of a bank, one of those former dummies. I have often opened accounts and not taken the time to get an address, but accepted a post office box. This is really not good business practice and it makes your job harder in following up an investigation.

How many of these large items might you be saved, in the absence in our bill, if merchants or banks were more careful?

Mr. BARBER. I brought this point out in my written testimony. I think it should be brought out again, Mr. Stark.

We accept 8,000 checks a month in child support and your bill would prevent us from verifying, conducting the type of verification you suggested, at least with banks, we could not verify the amount in the account as to whether it covers the check.

Sergeant LUFT. I want to make one point here that I don't think anybody has mentioned.

In the course of our investigations sometimes we get the grand jury secret investigation. Now, this bill here would be in conflict with the secret investigation.

You get a grand jury subpoena and you are forbidden by law to divulge the investigation to anybody, and to go and notify the person you are going to get his records would be in violation of this secret grand jury investigation which could be a real problem, especially for the investigator.

Congressman STARK. Thank you.

Senator CRANSTON. Congressman Rousselot.

Congressman ROUSSELLOT. Thank you again for giving me an opportunity to participate.

Now, Mr. Pachtman, in the two cases that you mentioned to us, did you have difficulty in getting subpoenas to go for this?

Mr. PACTHMAN. What we used were grand jury subpoenas.

Congressman ROUSSELLOT. Did you have trouble getting them?

Mr. PACHTMAN. No. But the problem would be the notice requirements and the right to quash the subpoenas. That would have been the difficulty in those cases.

Congressman ROUSSELLOT. You mean under this bill?

Mr. BAKER. If the officers of corporations knew we were going to go into the financial records they would have just stopped us cold and that would have been it.

Congressman ROUSSELLOT. Let me state our problem.

My bill is slightly different than both Senator Cranston and Congressman Stark. I have just tried to speak to the Federal level. I think that is our only responsibility. That is my problem but I realize many States are now trying to deal with this problem.

We are just deluged with the problem of how we protect people under article 4 of the Constitution, and I mean it is getting to be fantastic. And we have got to balance this thing out and that is our bills put in are the best we could draft. That is why we are having the hearing to get your input back.

But do you really, when you have probable cause, have difficulty getting a subpoena?

Mr. BAKER. When we have probable cause we get a search warrant and with the search warrant we are able to get to the record.

But my whole point here was that we don't get to the point where we have probable cause until we can go and look into the records to ascertain if a crime was committed and who committed that crime.

Congressman ROUSSELLOT. And the defense lawyer says you are on a fishing expedition.

Mr. BAKER. We may be on a fishing expedition to an extent but it comes to our attention through some means or other.

For example, the stock option programs going on, everybody feels the people selling the stock options were ripping them off. It was common knowledge but try to prove it. You couldn't until you got some records to find out first of all if the money was being used for the purpose it was supposed to be used for.

Congressman ROUSSELLOT. The people buying stock should take more time to see if it is a wise investment or not. In other words, you cannot be put in the position to have to patrol. The buyer has to beware, too.

Part of the problem is because of the extremely easy credit concept in the merchandising field and in this country. The thought is maybe we can make it big in this investment. Because it has all the trick deals that people tend to go into in these things and it puts you, as Congressman Stark says, in the position of having to protect people after the horse is out of the barn.

Mr. BAKER. Don't forget, a lot like Thrift & Loan are ostensibly under the jurisdiction of the Department of Corporations and the Department of Corporations is supposed to regulate them and in so doing find out about these activities.

Congressman ROUSSELLOT. We have not got the time but we have the basic problem that the Senator has to go, of trying to uphold the fourth amendment of the Constitution, the Bill of Rights that there has to be probable cause before we can allow all this search and seizure.

I know your law enforcement problem and I am very sympathetic. Basically, I am not as worried about the large corporations as the small individual we have to protect.

Mr. BAKER. I don't know why the fourth amendment has to apply here. Commercial transactions are an integral part of this Nation's activities, its financial activities. This makes us quasi-public. When you are going to the bank to use the bank it is quasi-public.

You mention the fourth amendment, we don't find in the case law in any part of the statutes any principle that the fourth amendment applies to corporations under any kind of regulatory provision.

Congressman ROUSSELOT. We go to an individual's bank records that he has in a bank, we think it is part of his personal property held on behalf of the bank. That is what we are saying.

Senator CRANSTON. We have to emphasize one point, that the present procedures in California where subpoenas can be kept secret will not be interfered with in any way by the proposed legislation.

I do want to also state that you, together with Mr. Lorenz and Mr. Stevens, who testified from the point of view of law enforcement responsibilities have made some points that obviously we must consider very, very carefully.

There is no intent or desire, in fact precisely the opposite, to interfere in any way with effective law enforcement with relation to white collar crimes or any other type of crime.

We want to make sure this legislation does not provide that interference and we will consider the testimony we have had and some revisions, I am sure, are in order in the legislation.

Concerning the point you raised, the matter of notice with relation to the administrative subpoena, that must be carefully considered, obviously. There is certainly no desire to disrupt proposition 9.

I led the battle in the Senate with a few other Senators for that back there and I strongly support what proposition 9 seeks to bring to California. And this bill was written before proposition 9 became the position of the people of California.

We have to take that into account and take into account the point made about insurance financial information and not raise any barriers in regard to what must be done there and no conflict with their laws.

I thank you for your testimony, it has been extremely helpful to us.

Now, Congressman Rousselot, did you wish to put something in the record?

Congressman ROUSSELOT. Yes, but in the interest of time I will submit my remarks on this matter as they appear in the Congressional Record of August 3, 1973:

THE RIGHT TO FINANCIAL PRIVACY ACT OF 1973

Mr. ROUSSELOT. Mr. Speaker, today the Honorable Clair Burgener, my colleague from California, and I have introduced a bill entitled, "The Right to Financial Privacy Act of 1973."

This bill is designed to protect the constitutional rights of citizens of the United States, and to prevent unwarranted invasions of privacy by prescribing procedures and standards governing the disclosure of financial information by financial institutions to Federal officials or agencies. Clair Burgener and I, as members of the House Committee on Banking and Currency, believe this legislation is necessary to preserve the confidential relationship between financial

institutions and their customers and the constitutional rights of these customers. Enactment of this bill would insure that the individual has the same rights of protection against unwarranted disclosure of records maintained in the financial institution as he would have if these records were maintained in his own possession.

The bill we have introduced today would allow the disclosure of a customer's records only if: the customer specifically authorizes the disclosure; the financial records are disclosed in response to an administrative subpoena or summons providing the individual is notified by certified mail and directs the financial institution to comply, or the financial institution is served with a court order directing it to comply which is issued after the customer has been notified and has an opportunity to challenge the subpoena or summons; a search warrant is obtained by the Federal official or agency which is served on both the customer and the financial institution; or a judicial subpoena is issued with a copy being served on the customer and 10 days pass without notice that the customer has moved to quash the subpoena.

A similar bill has been introduced by our colleague from northern California, the Honorable Fortney Stark, but the Rousselot-Burgener bill differs in that it does not preempt State and local laws regulating disclosure of customer information. Like legislation to govern actions by State and local officials and agencies has been introduced in California's State assembly, and it is entirely possible that other State legislative bodies might also wish to establish such regulatory controls as are appropriate to their individual requirements. The bill introduced by Mr. Burgener and myself regulates only those actions of Federal officials and agencies.

Other financial privacy bills extend the regulating provisions to also govern actions by State and local officials and could possibly be in conflict with States rights. Also, other versions would only allow a financial institution to notify law enforcement officials of violations of criminal law suspected of being committed against the financial institution itself. The Rousselot-Burgener bill recognizes that in some rare instances the financial institution could have reason to suspect other violations of criminal law.

I urge that my colleagues review this important piece of legislation and consider it favorably when it comes before this House for a vote.

The bill follows:

H.R. ——

A BILL To protect the constitutional rights of citizens of the United States and to prevent unwarranted invasions of privacy by prescribing procedures and standards governing the disclosure of certain financial information by financial institutions to governmental agencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Right to Financial Privacy Act of 1973".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) procedures and policies governing the relationship between financial institutions and government agencies have in some cases developed without due regard to citizens' constitutional rights;

(2) the confidential relationships between financial institutions and their customers are built on trust and must be preserved and protected; and

(3) certain reporting and recordkeeping requirements imposed on financial institutions by government agencies constitute a burden on interstate commerce.

(b) It is, therefore, the purpose of this Act to protect and preserve the confidential relationship between financial institutions and their customers and the constitutional rights of those customers and to promote commerce by prescribing policies and procedures to insure that customers have the same right of protection against unwarranted disclosure of customer records as they would have if the records were in their possession.

Senator CRANSTON. Thank you, Congressman Rousselot.

Now, our last witness is Mr. Jim Lowery. I thank you very much for your presence and your patience. If I may, I would like to ask if you would submit for the record your prepared statement which we will print in full.

STATEMENT OF JAMES LOWERY, DIRECTOR, CENTER FOR NEW CORPORATE PRIORITIES

Mr. LOWERY. Senator Cranston and members of the committee: I appreciate your invitation to testify before your committee on substance of Senate bill 2200. My name is James Lowery, and although I testify as a private citizen. I am the director of the Center for New Corporate Priorities, a nonprofit research organization which conducts public interest research. Our focus has been on the banking industry and its impact on the urban and rural poor, the environment and the consumer.

Your proposed bill to protect citizen rights by prohibiting indiscriminate examination of bank records is commendable.

However, I believe the phrase "better late than never" is appropriate here.

In 1970, Congress was quite enthusiastic about the Bank Secrecy Act, as it rallied to protect the United States from international thieves and money launderers. With little consideration of protecting fourth amendment rights, it approved the act.

Rather than insure citizen protection outright, the Bank Secrecy Act in effect gave this role over to the Treasury, which was entrusted with implementing the law in such a way as to protect our fourth amendment rights. The Treasury, an advocate and investigator, was put into the role of protector of our rights. When legislators, including Senator Tunney, complained, then, that the Treasury had overstepped its boundaries in implementing the act, those same legislators should have turned around and repudiated their own support of the original act. That is where the problem was.

Congressman ROUSSELLOT. That went to the Congress. It went through the House by voice vote. That shows how carefully we looked at it.

Mr. LOWERY. That is what I understood.

I view the Bank Secrecy Act with suspicion because it is an overly broad measure which assaults depositors' right to privacy, deprives them of judicial protection and undermines their confidence in the banking establishment—all of this in order to attack a very narrow problem, the generation and transfer of large sums of illegal capital.

The 1970 act is unsatisfactory because it strips the depositor of the protective armor of the fourth amendment guarantee against unreasonable search and seizure and lays bare his financial records to the scrutiny of executive surveillance. Yet those same records, stored in the home of a citizen, are protected. I contend that just as the constitutional guarantees of free speech do not stop at the schoolhouse door, neither do the guarantees against unreasonable search and seizure stop at the teller's window.

The fourth amendment protects what the citizen attempts to keep private. A citizen does not keep records in a bank to make them public; he keeps them there because our society gives him no other choice.

Further, the 1970 Bank Secrecy Act is barren of any judicial review to curb overzealous investigations by governmental agencies. Stories abound in the Los Angeles Times, Wall Street Journal and other newspapers of Federal investigators so eager to monitor and survey what they claim to be suspicious or political groups or individuals, that they illegally and improperly examine related bank records.

Last, the citizen's confidence in his financial institution is undermined by the realization that his personal records can be routinely and thoroughly examined without consent or even prior knowledge. Today's society, unfortunately, requires that to be a full citizen, a person must have a checking or savings account, just as he must have a driver's license and employment history. If a citizen does not wish to have Government agents tramping through his records, of course, he can close his accounts and become a nonperson. In other words, he cannot live without his accounts, and he cannot expect protection of his rights with them.

In summary then, the Banking Secrecy Act employs a scattergun approach which violates the rights of the majority in hopes of hitting a few tax evaders and money launderers. That is too high a price to pay.

I see the Financial Privacy Act of 1973 as a positive means to curb constitutional excesses now sanctioned by the BSA, because it imposes regular and reasonable procedures to allow those agencies to obtain the information they claim to need only when they can prove they need it.

The four means for financial information to be released are customer consent, administrative subpoena, judicial subpoena and search warrant.

Section 6 of S. 2200 outlines the conditions for releasing information by customer consent. I have only one suggestion to this section, but I feel it is important.

What happens when the IRS or another agency approaches the bank account holder with a request for his signature, in order to acquire certain records? The unwary citizen may fear he will be automatically penalized if he does not sign permission for releasing his records. More importantly, he may think that his records are legally available to them anyway—as they have been for 2 years—and that he therefore has no choice.

In short, the Government agency can easily intimidate a citizen and achieve the same result as indiscriminate investigation.

Therefore, I suggest that section 6 be amended to require the investigating agency to include in writing and as a part of the document to be signed, a statement of rights.

Such a statement would inform the bank customer in large type, (1) that he is under no penalty or obligation to sign the release-of-information form, (2) that without a search warrant, judicial subpoena or administrative subpoena, his records remain protected, and (3) that if he has doubts about the extent and purpose of information

to be revealed, he should obtain legal counsel before signing the document.

The second and third means by which agencies may obtain financial records are by judicial subpoena and administrative subpoena. Each of these sections of the proposed bill contain the important requirement that the citizen be informed at the time of the subpoena that his records are being sought.

Law enforcement agencies may object—and a representative of the Treasury Department has objected—that notifying a suspect of an investigation will jeopardize that investigation. I reject this contention, since, carrying the point to its logical conclusion, all forms of the subpoena make the law enforcement job more difficult. Second, we must recognize that we are speaking of a customer's records held in trust by the bank for the customer. If these records were instead held at the customer's home, he would be entitled to the courtesy of a subpoena.

In short, I personally support the substance of S. 2200, and urge you to consider an amendment to section 6, as I described earlier.

Before I conclude, I would like to raise one additional point about your bill and extension of its principle to other areas. Like bank records, a person's credit records and health records should be protected from unconstitutional search, and from indiscriminate distribution. I am not familiar with existing State and Federal law in these areas but would urge your staff to investigate these areas.

In conclusion, Senate bill 2200, I think, will plug a gaping hole in the Bank Secrecy Act. The moral, though, is that your committee in the future should exercise more foresight and more sensitivity to people's constitutional rights before leaping on the bandwagon to enact sloppy legislation. But your bill is commendable.

Thank you.

Senator CRANSTON. Thank you for your very helpful and forceful testimony.

I have quite a few questions but I will submit them in writing to you and if you can respond fairly swiftly I would appreciate that. I have to do it this way because of the time problem.

I want to thank you all very, very much.

We now stand in recess.

[The following letters and statements were received for the record:]



COUNTY OF SACRAMENTO

DISTRICT ATTORNEY

DOMESTIC RELATIONS
 1801 - 19TH STREET
 SACRAMENTO, CALIFORNIA 95814

JOHN M. PRICE
 DISTRICT ATTORNEY

GEOFFREY BURROUGHS
 CHIEF DEPUTY

MICHAEL E. BARBER
 SUPERVISING DEPUTY

JON T. HEINZER
 DIVISION CHIEF

August 6, 1974

Senator Alan Cranston
 Federal Building, Room 10223
 11000 Wilshire Boulevard
 West Los Angeles, California

RE: S 2200

Dear Senator Cranston:

Let me first thank you for the opportunity to express freely my position in opposition to your bill S 2200, last Friday in Los Angeles. In reflecting on my testimony and that of others at this session, I submit the following as additional considerations to supplement my previously submitted written testimony.

I. Violation of the First Amendment.

It is respectfully submitted that the bill directly violates the First Amendment right of citizens to petition government for a redress of grievance in two aspects, and the whole tenor of the bill casts a chill over the exercise of this constitutional right. The criminal prohibitions against bank employees communicating to government agencies observed abuses, where such communication contains information also contained in the records of their employer, flies in the face of the language and spirit of the First Amendment. The same holds true for the prohibition against communications among government agents where a regulatory agency has observed evidence of criminal conduct. Further, the fact that on receipt of a complaint involving information that could be in a bank record, to obtain the record in question outside investigation must be undertaken. This could, I submit, result in untoward exposure of the individual whose "petition for redress of a grievance" initiated the investigation. The inevitable result of this delay would increase the risk of retribution to the petitioner to such a level as to indeed chill the exercise of his rights under the First Amendment.

Thus the restrictions on communication, the notice provision, and the procedural delays all combine to have a detrimental effect on the First Amendment freedom referred to above.

III. The statute is illusory as a protector of privacy.

To secure the information necessary to properly prepare process as defined in the statute, law enforcement would be required to make an inquiry in the community in which the subject of the inquiry does his banking business. Thus, on receiving a complaint of consumer fraud related to the misuse of a bank account the law enforcement agency would now be forced to turn to the associates of the subject, since to turn to the subject would promote the flight of the criminal and his secretion of assets that ought to be protected for the victims. For an honest man such an inquiry could spell ruin. Yet law enforcement cannot turn its back when confronted with an allegation of wrong doing. The same reasoning and problems apply to complaints concerning misused campaign contributions and bribery. Thus, the protection of privacy offered by the bill is illusory and the protection to the public against crime is materially diminished.

III. The bill injures bank officials and personnel.

The gag provisions of the bill are so all-inclusive that a bank officer who is a victim of or a witness to a crime could not fully report the crime if the evidence he or she were to give is reflected in the records of a customer. The kidnapping of bank officers and their families has become more prevalent of late. It would be a cruel irony if this banker's promoted bill encouraged this crime by preventing banker victims from identifying the culprits because they were depositors.

IV. The bill creates a new concept of privileged communications in our society, a possible privilege to communicate to further a crime.

Present privileged communications statutes as represented by Sections 907, 981 and 956 of the Evidence Code of California do not permit anyone to use a privileged communication to commit or plan to commit a crime. Because this legislation gags bankers who could be used as instruments of a variety of crimes, it does permit the communication to be used to commit a crime.

V. The bill creates an apparently new proprietary right for customers in a businessman's private papers.

The possessory interest that this bill gives to customers in bank records is, according to friends of mine in the business community, unprecedented. One wonders if the proprietary right might be extended to cover personal communications within the bank administration concerning a customer. How broadly this could be extended is unclear to me, but I wonder if business in general and banking in particular wants to create this possessory interest without carefully considering the implication. It should be noted that, excepting for requirements of regulatory agencies or taxing authorities, I submit that the records of the bank are its property. One wonders how much administration of a business including banking will be hampered if customers have a possessory right therein.

In summary then, the violations of the First Amendment, the failure of this bill in protecting privacy in many cases, the fact that the gag nature of the bill facilitates criminal acts against the bankers and the public at large, the fact the bill creates an unprecedented (though limited) privilege to use a commercial communication in furtherance of a crime, and the novel proprietary theory created in this bill, all militate to void this legislative proposal as against the public interest.

It is therefore suggested that this bill be withdrawn.

I have a suggestion for a substitute that would protect bank and public from fishing expeditions and yet avoid the problems outlined above. Pass legislation holding the bank harmless provided that the law enforcement agency requesting information file an affidavit with it alleging a specific crime or authorized civil law basis and provide specific protection for the banks where their personnel act in good faith in the exercise of their First Amendment right to petition their government. I strongly suggest this suggestion be submitted to law enforcement agencies for their review and comment.

Very truly yours,

JOHN M. PRICE
DISTRICT ATTORNEY



Michael E. Barber,
Supervising Deputy District Attorney

MEB:gw

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July 17, 1974

Honorable Alan Cranston
Senator for California
Senate Office Building
Washington, D. C. 20510

Re: Right to Financial Privacy Act of 1973
S. 2200

Dear Senator Cranston:

Thank you very much for the copy of S.2200 which was recently received. I have reviewed the Bill and must respectfully offer the following comments:

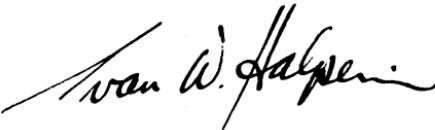
Section 7 of the Bill deals with Administrative Subpenas and Summons. Subdivision (a) (1) only requires that a copy of the subpoena be served on the customer in person, or by certified mail. There is no provision creating a time period between the time of service upon the institution and the time for surrender of the information. I recommend that a ten (10) day interim be required so that the customer may have an opportunity to take action to quash the subpoena.

Section 7, Subdivision (a) allows a financial institution to notify a customer of the receipt of an administrative summons or subpoena. This section should be modified to require the giving of notice and to further require the institution to state the date and time at which the information sought will be released.

I have represented financial institutions for a number of years. My experience in matters involving administrative subpoenas and summons indicates that the agencies or departments which used such procedures tend to abuse them. Further, in those matters which I have been directly involved, I notice that little thought is ever given to the right of privacy of the customer, and even less thought is given to providing an opportunity to contest an administrative summons or subpoena.

Senator Cranston, as part of my practice, I represent not only financial institutions but also private individuals and corporations in the Gaming Industry. This letter expresses only my own opinion and must not, in any way, be considered to represent the opinions of my clients.

Yours very truly,



IWH:lfl

CECIL HICKS
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ALPHONSIUS C. NOVICK
DIVISION CHIEF

OFFICE OF THE DISTRICT ATTORNEY

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August 5, 1974

The Honorable Alan Cranston
United States Senator
Senate Office Building
Washington, D. C. 20510

The Honorable Fortney H. Stark
Member, House of Representatives
1034 Longworth House Office Building
Washington, D. C. 20515

The Honorable John H. Rousselot
Member, House of Representatives
1706 Longworth House Office Building
Washington, D. C. 20515

Subject: S-2200 (Right to Privacy)

Gentlemen:

I was in the audience on Friday, July 26, 1974, when you held a hearing on S-2200.

During that hearing the Family Support Council of California (FSC) was represented by Mr. Michael Barber, Deputy District Attorney, Chief of the Family Support Division of the Sacramento County District Attorney's Office. In regard to legislative matters I assist Mr. Barber for the FSC. I am writing to you in that FSC capacity. I understand that the California District Attorneys Association is interested in S-2200 (and AB 1609, the State of California version) and I in no way am representing any opinion other than the FSC at this time.

My present position is as Chief of the Family Support Division of the Orange County District Attorney's Office. I have also had at least one and one-half years experience as a prosecutor in major frauds where the largest fraud in monetary terms that I prosecuted involved about \$3,000,000 and covered activities in three states.

I would like to respond directly to various questions and comments that were made during the hearing.

I Though the question was asked several times, it was never clearly brought out exactly how the current law, results and procedures stand as compared to S-2200.

Simply stated, the current procedure is that when an alleged victim comes into our office we are given certain facts by that victim. The deputy district attorney (DDA) does not solicit complaints from citizens. When the victim relates the facts to the DDA the DDA must decide whether sufficient grounds exist for an investigation.

Since financial records are almost always involved in a fraud, if the DDA feels the matter warrants investigation the DDA will make a preliminary check with the financial institution to determine if those records support the complainant. This is done without a subpoena, with the bank's cooperation.

This has a number of advantages. First, the DA's office has as much responsibility not to file a complaint in the interest of justice as it has to file a complaint when it is warranted. The preliminary check of financial records could show that all is in order (at least as far as the financial records are concerned). An added benefit would be that the case is resolved prior to the issuance of a complaint.

If the records further the fact that a crime is probably being committed or has been committed, the DDA will get his facts together and if probable cause exists he will issue a criminal complaint and thereafter subpoena the records.

Under S-2200, the preliminary check would be impossible without suspect's consent, search warrant or subpoena. Without the information from the preliminary check the DDA will in most cases with financial records not have reasonable cause to issue a complaint. No complaint means no judicial subpoena. In these cases there would probably not be sufficient basis for obtaining a search warrant. To seek authorization from suspect or to serve him with subpoena for records merely gives him the opportunity to attempt to destroy records, withdraw the funds in question and/or flee.

The major point is that without the preliminary financial check a criminal case would probably never be developed to the point where a criminal case could be established to issue a complaint. Not being able to make the preliminary check would put the DDA in the position of deciding whether to issue a complaint based on probable cause where the factual basis is not as concrete as it would be where financial records were known to the DDA. Probable cause is probable cause, but a decision based in part on financial records is less apt to be an honest error of judgment.

If a complaint is filed, without knowledge of the financial records, subsequent revelation of those records may determine that the criminal

action should not, in the interest of justice, be pursued. Yet, the suspect has been arrested and he has a record.

If the complaint is filed and the suspect flees the jurisdiction on being notified of the subpoena, it thwarts justice. Justice is also thwarted if the suspect destroys or alters records because he was notified of the DDA's investigation.

To synopsis the procedure:

Current

1. Complaint by alleged victim.
2. Preliminary check by DDA without subpoena.
3. Complaint issued (if warranted).
4. Subpoena of all pertinent records.

S-2200

1. Complaint by alleged victim.
2. Substantial probability that no complaint will be issued.
3. If issued, subpoena records and chance defendant's fleeing, taking all available investments with him.

I would like to cite some actual cases and show how S-2200 would have affected them.

Case #1. Suspects were selling candle-making franchises. One material representation by suspects was that all investors' money would be retained in a trust account for four years. Investors had problems with suspects causing investors' suspicion. Investors came to the D.A. D.A. informally (without subpoena) checked the trust account. The account showed that "trust money" was being bled out of the account. Within a week defendants were arrested and within two weeks the corporation was insolvent, having gone through \$150,000 of investors' money. Suspects were convicted.

Two of the suspects were already in San Francisco setting up a "Northern Branch."

If pursuant to S-2200 suspects received notice of our inquiry wouldn't all of them have fled?

Except for the material misrepresentation on the trust account as uncovered by the preliminary check, it appeared that there was insufficient probable cause to issue a complaint, then no subpoena for records. The evidence would have grown stale and the fraud would have been repeated in other areas, compounding the loss.

The stopping of the local fraud-in-question is only one benefit of law enforcement's action, because being able to move fast on white-collar criminals is essential to minimizing the local loss and to prevent repetition of the fraud in other counties.

Case #2. In several recent cases the "silent partner" in the fraud was a bank or savings and loan association employee, which would facilitate the possible alteration or destruction of the records were that person informed of our investigation.

I respectfully submit the following conclusions:

We have never sought information, to my knowledge, from any financial institution without first receiving information from the public regarding a possible crime. Thus, the DDA doesn't go knocking on doors asking people if they want to report a crime in order to have a reason to check someone's account.

Secondly, any information obtained from a financial institution is used solely for purposes related to the criminal statutes. To my knowledge, our office has never been accused by defendants, defense counsel, courts or financial institutions of misusing the financial records.

- II Another point that came up was a question of whether law enforcement prosecutes the suspect for other crimes that are revealed by the bank records.

A law enforcement agency cannot ignore other crimes that come to its attention while investigating the original complaint. For example, I have personally never experienced a white-collar criminal reporting his embezzlement, fraud or other like "income" to the I.R.S. or F.T.B.
- III I believe the Honorable John Roussetot raised the matter of whether it is law enforcement's responsibility to protect victims of fraud when the victim might have done a little more checking prior to investing and not become involved in the fraud. I believe the point was that the

victim could check with his/her banker, lawyer, etc. in order to obtain the necessary professional advice prior to investing.

I respectfully submit that most all fraud victims are not business-sophisticated. Many are people with life savings amounting to \$5,000 or perhaps \$50,000. In any event, when they are contemplating an investment they depend on the honesty and integrity of the person dealing with them. The average victim doesn't have a lawyer or, as such, a banker for investment purposes. The banker is not aware of the investment and would most likely refer the investor to an attorney.

If an investor did consult with an attorney it would mean getting advice on many aspects but two things are apparent:

First, regardless of how well an attorney-client plan the investment the element of honesty must be relied on somewhere during the relationship. An investor cannot be with the "suspect" 24 hours a day. If that "suspect" plans on defrauding the investor he can accomplish that despite the investor's precautions.

Secondly, if the investor pushes the "suspect" too far with conditions, protection for his investment, etc., the "suspect" will merely move on to another investor. And, even with a promotion campaign to acquaint the public with care in investing, there will always be those who will succumb to a fraud or deal with a handshake.

The question was asked whether those investors are to be protected by law enforcement for their own lack of thought or care or their "greed" in trying to make a profit without realizing that it may be a fraud due to the high potential return?

Yes.

The law protects a victim in that regard. On a false pretense case the jury is specifically instructed that "An owner of money or other property is under no duty to make an investigation, and has the right to rely on the representation made to him." See CALJIC 14.11, attached.

Also, there is a special instruction in the case law in California that the prosecution submits for the jury in fraud cases. That instruction in effect states that the fact that the victims of defendants' false pretenses were incredibly credulous and greedy doesn't absolve defendant of guilt; foolish reliance by a victim of a preposterous fraud will not set defendant free; the guilt of defendant doesn't depend on the degree of folly or credibility of the party defrauded. People v. Gilliam 141 CalApp 2nd 749.

In other words, the law protects the unreasonable, the dumb or the selfish victim in a fraud just as much as it protects the victim of a burglar where the homeowner leaves his door wide open or the car owner who leaves his keys in the ignition and his car is then stolen.

Throughout many areas of the criminal law, the victim's own negligence is never a defense.

IV Lastly, I respectfully submit that all victims of fraud cases are not investors looking for a profit. They might be just plain consumers. Examples: A defendant signs victims up to an \$800 contract promising various types of food under a food-freezer plan. The defendant's firm signs up over 300 households and sells the paper to a loan company before we were notified of the fraud that about one-half of the promised food was ever delivered.

The proposed S-2200 has much merit in its intent to protect the peoples right to privacy. Everyone is interested in privacy and such a right should be protected. However, it is respectfully submitted that S-2200 as currently written would protect the right with an overbalancing but unintentional protection to people engaged in committing fraud and other crimes while using financial institutions as an instrumentality in their criminal activities.

I respectfully submit that passage of S-2200 (or the comparable California AB 1609) would seriously impede if not stop the detection of fraud, the minimizing of the loss to the public and the spreading of the fraud to other geographical areas.

We respectfully submit for your consideration that law enforcement should be provided with as effective method of obtaining preliminary information from financial records, and subsequently through use of a judicial subpoena, without notification to the account holder and without giving the account holder a right to a hearing on those records prior to trial. The account holder currently has all the remedies necessary to object to the admissibility of those records at time of trial.

I'll be happy to answer any questions that you may have on this matter.

Very truly yours,

A. C. Novick

A. C. NOVICK
Deputy District Attorney
Division Chief, Family Support Division
ACN:es
Enclosure

14.11**CRIMES AGAINST PROPERTY****CALJIC 14.11****FALSE PRETENSE—RELIANCE ON
REPRESENTATION**

In order for a false representation to be a material element in inducing an owner to part with property, intending to divest himself of title, the owner must rely wholly or in part on that representation, and he must act in that reliance. An owner of [money] [or other] [property] is under no duty to make an investigation, and has the right to rely on the representation made to him.

However, if, before transferring property to another, he does make independent inquiry or investigation and relies thereon rather than on any representation made to him by the other person, or when, for any reason, the owner does not rely on any false representation or pretense made to him by that other person, the latter is not guilty of obtaining said property by false or fraudulent representation or pretense.

COMMENT

1 Witkin, Calif.Crimes, §§ 410–411; Fricke-Alarcon, Calif. Crim.Law (9th ed.), pp. 289, 295.

In a prosecution for attempted grand theft it is not necessary that the intended victim be deceived by the falsity of the representations or that he place any reliance upon them. People v. Camodeca, 52 Cal.2d 142, 338 P.2d 903.

Library References:

West's Key No. Digests, False Pretenses ➤52.

WYMAN, BAUTZER, ROTHMAN & KUCHEL,
Beverly Hills, Calif., July 29, 1974.

Hon. ALAN CRANSTON,
U.S. Senate,
Washington, D.C.

DEAR ALAN: As a former California Commissioner of Corporations, I have been approached by the Staff of the California Department of Corporations with respect to certain reservations they have with your pending legislation entitled the "Right to Financial Privacy Act of 1973", which is now in the hearing process.

As I am sure you are aware, your S. 2200 parallels, in many significant respects, Assembly Bill 1609 which has been introduced in the California Assembly by Alan Sieroty.

My interest in this legislation is not on behalf of any private client and is motivated solely by my discussions with the Department of Corporations and my concern for its continued ability to effectively protect the public interest in the area of California securities regulation and other matters related to the jurisdiction of Commissioner of Corporations.

The Staff of the Department has attempted to determine the specific abuses sought to be curbed by your legislation in order that they might make appropriate suggestions which would preserve certain of their existing rights and at the same time meet the needs which your legislation seeks to address. They have been unable as yet to determine such specific abuses. At the same time, the Staff of the Department of Corporations, exercising its administrative subpoena power, has long been recognized as one of the most responsible agencies in effectively curbing securities frauds and other similar misadventures. They have in the past been uniquely able to move with dispatch while not, to my knowledge, improperly invading the financial or other privacy of the general public. It appears that their record of responsible exercise of discretion has been outstanding.

I discussed this matter at some length last week with Alan Sieroty. In addition to the concerns indicated above, I voiced to him my deep concern for invasions of financial privacy which are permitted by our financial institutions daily within the context of private inquiries through private investigators, and suggested that additional consideration should be given to that broader area of financial privacy. Perhaps this can be combined with an appropriate accommodation for the particular problems of those government officials and agencies who operate under duly constituted subpoena power but who would be hampered by compliance with the notice provisions in the legislation now proposed both in Congress and in California.

Alan Sieroty will be meeting with the Staff of the Department of Corporations as well as with other agencies voicing similar problems, on July 31, 1974 to determine the propriety of their concerns and to ascertain the extent to which their legitimate needs can be accommodated within the framework of his pending legislation. At this time, my principal request would be that your Staff consider contacting the Department of Corporations (and particularly, the Honorable Robert E. LaNoue, Assistant Commissioner for Policy and Planning in Sacramento) to determine whether any accommodation of the Department's problem is appropriate within your legislation, and that they consider examining the results of Alan Sieroty's meetings on the State level to determine whether they provide any legitimate basis for paralleled refinement of your Bill in the Senate.

I deeply appreciate the opportunity to communicate these thoughts to you and know that whatever decision you finally reach will be motivated by our mutual concern for responsible government, coupled with the rights of individuals to maintain a reasonable privacy of their affairs.

I am looking forward to seeing you at Roz' home on August 10. Until then, my best personal regards.

Sincerely,

JERALD S. SCHUTZBANK.

LANDELS, RIPLEY & DIAMOND,
San Francisco, Calif., September 4, 1974.

Re Right to Financial Privacy Act.

Ms. CAROLYN D. JORDAN,

Senator Cranston's Office, Old Senate Office Building, Washington, D.C.

DEAR CAROLYN: I'm enclosing a copy of a "Fact Sheet" sent by the Domestic Council Committee on the Right of Privacy. As you know, this committee until recently had as its chairman Vice President Gerald R. Ford and as its executive director Philip W. Buchen, the new White House counsel.

The Privacy Committee recently considered 14 privacy initiatives. Initiative #13 is concerned with protection of the confidentiality of customer records maintained by financial institutions. It was the Committee's recommendation that "support be given to the basic concepts of legislation now proposed which would prohibit federal agencies and state and local governments from obtaining information in records on the customers in financial institutions, unless under a court order or subpoena, an administrative summons, or unless the customer authorizes such a disclosure".

It would appear from the wording of Initiative #13 that the Committee might have Senator Cranston's Privacy bill in mind.

Best regards,

WILLIAM R. PASCOE.

FACT SHEET—DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY

MEMBERSHIP

Chairman : Vice President Gerald R. Ford.

Members : Secretary of the Treasury William E. Simon, Secretary of Defense James R. Schlesinger, Secretary of Commerce Frederick B. Dent, Secretary of Labor Peter Brennan, Secretary of Health, Education, and Welfare, Caspar W. Weinberger, The Attorney General William B. Saxbe, Director, Office of Management and Budget, Roy L. Ash, Director, Office of Telecommunications Policy, Clay T. Whitehead, Chairman, Civil Service Commission, Robert E. Hampton, and Director, Office of Consumer Affairs, Mrs. Virginia Knauer.

Staff Directors : Executive Director of the Committee, Philip W. Buchen and Deputy Executive Director, Douglas W. Metz.

COMMITTEE FUNCTIONS

The Committee, chaired by the Vice President, was established February 23, 1974, by President Richard M. Nixon, in a radio address to the nation on the right to privacy. It was charged with responsibility for recommending at the earliest possible time measures which can be taken to ensure that the individual's right to privacy is protected. The Vice President appointed Philip Buchen Executive Director of the Committee on March 15, 1974, followed by information of a small staff which in April initiated projects for immediate attention. The projects represented areas in which action was urgently needed and where possibilities were good for implementation this year.

Interagency task forces, individuals and groups outside the Federal government, Members of Congress and Congressional Committee staffs are contributing to the staff efforts. Not involved are the subjects of wiretapping and electronic surveillance, because they are under study by the Congressionally created National Commission for Review of Federal and State Laws relating to the two subjects as authorized by Title III of the Omnibus Crime Control Act of 1968.

The Domestic Council Committee on the Right of Privacy on July 10, 1974, considered 14 privacy initiatives for immediate action. The initiatives encompass a wide range of subjects including legislative prohibitions of military surveillance of civilian political activities, greater protections for personal bank account

records against disclosures to government agents, tighter safeguards against unauthorized disclosure of IRS taxpayer returns, and provision for building in privacy safeguards in Federal computer and communications systems.

Although several initiatives impacting the private sector are proposed, most of the initiatives reflect the Committee's view that its initial privacy initiatives should focus on the Federal government. The Committee believes that Federal example and experience in this complex field should precede Federal directives to the non-Federal governmental and private sectors.

A significant example of this approach is reflected in draft legislation developed by the Office of Management and Budget in consultation with the Privacy Committee staff and transmitted to the Congress on June 19, 1974. This bill will require Federal agencies maintaining record-keeping systems containing personal information to give the individual the rights to know, challenge and amend information about him in Federal agency files. The bill exempts national defense and foreign policy, law enforcement, and certain Federal employee files on the grounds that these complex subjects merit special attention through separate legislation.

This approach is being adopted at the State level where broad initial legislation (enacted in Minnesota; pending in California) has been restricted to the government sector record-keeping systems.

SUMMARY OF PRIVACY INITIATIVES ENDORSED BY THE COMMITTEE

Initiative No. 1—Federal Data Processing and Data Communications Systems Procurement

This initiative is designed to establish practices and procedures within Executive Departments and agencies that will ensure systematic consideration of personal privacy rights in planning and use of Federal data processing and communications systems.

It is recommended that agencies prepare privacy safeguard plans for data processing or communications systems containing personal data before starting the design and procurement of such systems; that all existing systems be subject to a review of their privacy protections.

Initiative No. 2—Computer System and Network Security

This initiative is designed to continue development of standards and guidelines begun by the National Bureau of Standards to safeguard the integrity and confidentiality of personal information in computer systems and networks.

It is recommended that the National Bureau of Standards accelerate the development of standards for safeguarding the security and confidentiality of personal information in computer systems, and to make such standards applicable to Federal systems.

Initiative No. 3—Consumer Transactions

This initiative is designed to provide further Federal leadership in protecting consumer rights of privacy in the marketplace.

It is recommended that the Office of Consumer Affairs propose a Declaration of Individual Rights of Privacy in Consumer Transactions. This would establish principles for protecting the privacy of personal information about consumers gathered in connection with consumer transactions. Businesses would be asked to subscribe voluntarily to a Code of Fair Information Practices which would protect the privacy rights of consumers.

Initiative No. 4—Cable Television Systems

This initiative is designed to safeguard consumer and personal privacy in cable television systems.

It is recommended that support be given to the privacy provisions of the proposed Cable Communications Act of 1974 which would prohibit cable operations from disclosing personally identifiable information about cable subscribers without a court order.

Initiative No. 5—Federal Mail Lists

This initiative is designed to ease concern over privacy invasions that could result from the use of Federal mail lists for other than official uses of the Federal government.

It is recommended that pending a full review of Federal mail list policy, any individual on a mail list maintained by a Federal agency be given the right on future government forms to exclude his name from lists made available for dissemination outside the Federal government.

Initiative No. 6—IRS Taxpayer Data

This initiative is designed to further assure confidentiality and security of data furnished the Internal Revenue Service by the taxpayer.

It is recommended that the IRS be encouraged in its efforts to improve security and confidentiality protections for taxpayer data and to develop comprehensive new legislation placing greater restrictions on access to tax returns.

Initiative No. 7—Notice of Rights of Data Subjects

This initiative is designed to assure that Federal agencies explain to an individual why he is being asked for information about himself or others.

It is recommended that the Office of Management and Budget require each Executive agency to have procedures which will assure that people are not asked questions about themselves or others without first being told clearly whether they are legally required to answer and what uses will be made of the answers they give.

Initiative No. 8—Electronic Funds Transfer System

This initiative is designed to help prepare for privacy safeguards which may be needed in the so-called "checkless-cashless society."

It is recommended that Federal agencies concerned with this area be requested to undertake special studies of the potential impact on personal privacy of electronic funds transfer systems for handling consumer financial transactions.

Initiative No. 9—Individual Access to Federal Records

This initiative is designed to establish an individual's right of access to Federal records containing information about himself.

It is recommended that endorsement be given to the principles embodied in the OMB draft bill requiring each Federal agency to permit individuals to inspect records about themselves and correct or amend inaccurate information, with some exemptions for records relating to national defense and law enforcement investigations.

Initiative No. 10—Military Surveillance of Political Activities

This initiative is designed to prevent military surveillance of civilians.

It is recommended that an acceptable revision of S. 2318 be enacted prohibiting military surveillance of civilian political activity, and providing penalties and remedies for violations.

Initiative No. 11—Federal Employees' Rights

This initiative is designed to encourage legislation to protect the privacy of civilian employees of the Executive Branch of the Federal government.

It is recommended that the Civil Service Commission prepare, as soon as possible, proposed legislation or executive orders which would protect the privacy of civilian employees of the Executive Branch.

Initiative No. 12—Parent/Student Access to Education Records

This initiative is designed to provide a Federal policy that would protect the basic privacy rights of parents and students with respect to school records, as reflected in the Buckley Amendments to the Elementary and Secondary Education Authorization Bill.

It is recommended that support be given to legislation embodying principles which assure rights of access to school records for students and parents, provide appropriate safeguards against disclosure of such records to third parties, and take into account the privacy rights of individuals furnishing evaluation information to admissions offices of educational institutions.

Initiative No. 13—Individuals' Financial Records Maintained by Banks

This initiative is designed to protect the confidentiality of records that financial institutions maintain about consumers, and to protect legitimate interests of the government in such records.

It is recommended that support be given to the basic concepts of legislation now proposed which would prohibit Federal agencies and State and local governments from obtaining information in records on the customers of financial institutions, unless under a court order or subpoena, an administrative summons, or unless the customer authorizes such a disclosure.

Initiative No. 14—Fair Credit Reporting Act

This initiative is designed to broaden the privacy protections in the Fair Credit Reporting Act.

It is recommended that legislation be supported to amend the Fair Credit Reporting Act to require that the consumer be notified of any consumer-reporting file established on him (except one resulting from his own credit application); to require that the consumer have access to the information in a consumer-reporting file about him and the right to challenge its accuracy; to require that the consumer be notified of adverse action taken by virtue of credit or investigative reports about him; to require that the consumer authorize, in writing, investigative reports about him; and to require that the consumer authorize in writing collection of potentially sensitive medical information about him.

* * * * *

The Committee was not asked to take action on legislation to control criminal justice information, because a recent Committee Revision of S. 2963 is under active review by a newly formed Privacy Committee of the Justice Department.

The Committee, at its next meeting, probably in September, will consider additional privacy initiatives resulting from projects underway concerned with Social Security Number policy and safeguards for statistical and research information. New projects are being launched concerned with privacy protections for employment records and health records and with ways to restrain or control more effectively the gathering of personal information by Federal agencies. .

The implementation of the privacy initiatives will involve follow-through with the Conference of Governors and Mayors and other intergovernmental organizations and, as appropriate, with groups in the private sector.

THE EFFECT OF THE BANK SECRECY ACT ON STATE LAWS

MONDAY, JULY 29, 1974

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS,
San Francisco, Calif.

The subcommittee met at 10:20 a.m. in Ceremonial Courtroom, 19th Floor, Federal Building, 450 Golden Gate Avenue, San Francisco, Calif.

Present: Senator Alan Cranston and Congressman Pete Stark.

Senator CRANSTON. The hearing will please come to order. The Subcommittee on Financial Institutions of the Senate Banking, Housing and Urban Affairs Committee is holding the second of 2 days of hearings, relating to legislation, issued by the Department, to implement the Currency and Foreign Transaction Reporting Act of 1970, commonly known as the Bank Secrecy Act.

The principal purpose of the Bank Secrecy Act is to enable law enforcement agencies to obtain the evidence to prosecute white-collar criminals.

In prescribing the recordkeeping requirements, Congress clearly did not intend for law enforcement officials to have bank records without a subpoena. The report of the Senate Banking Committee made that point very plain.

The regulations of the Department of the Treasury, as drawn, do not outline the procedures whereby Federal law enforcement officials can obtain excerpts of records which banks and other financial institutions are required to keep.

The risks for citizens in the situation are quite serious, mainly their financial transactions can be looked at without their knowing it is happening, without the necessity of a court order, in ways that can lead to exploring their private affairs, their political views, their religious affiliations—matters not necessarily relevant in any way to the requirement of effective law enforcement.

The legislation that we are considering, which I have introduced in the Senate, which Congressman Stark has introduced in the House, is designed to provide adequate protections to the privacy of individuals without interfering with effective law enforcement.

We have heard from law enforcement witnesses already in the first day's hearing. They feel that there are needs to amend the legislation to insure that they can do their work effectively.

I believe that we can find ways to revise legislation to ensure that we do not diminish the effectiveness of law enforcement while at the same time protecting the right to privacy of individuals.

I hope to gain further insight during today's hearing on how to reconcile the rights of the public with law enforcement. I am sure the rights can be reconciled with respect to particular matters that we're now considering. I know they must be reconciled.

Congressman Stark, do you have any opening statement before we proceed?

Congressman STARK. Thank you very much. I would like to state for the record that I am here representing the Bank Supervision Subcommittee of the House Banking and Currency Committee which is considering this bill and to thank you very much for letting us ride on your distinguished coattails in the interest of speeding up the hearing process.

We are finding on the House side as well that the only legislative problems we have is working out provisions to increase the efficiency of law enforcement agencies in getting the information they are rightfully entitled to in an effort to investigate and prosecute criminal actions.

My remarks are simply for the benefit of the record.

Senator CRANSTON. Very well. Again, thank you for your presence.

The first witness this morning is Harold R. Arthur, vice president of the Wells Fargo Bank.

Mr. Arthur, we are delighted to have you with us.

STATEMENT OF HAROLD R. ARTHUR, VICE PRESIDENT, WELLS FARGO BANK

Mr. ARTHUR. Thank you for allowing me to be here.

I am Harold R. Arthur, vice president and cashier of the Wells Fargo Bank, National Association. Our bank has over 300 branches in the State of California and has several international subsidiaries, wholly owned subsidiaries.

In addition, I am chairman of the committee on operations for the California Bankers Association. The committee membership includes a cross section of the banks in the State of California, small and large, member and nonmember, national and State.

The committee has been extremely interested in the legislation that is proposed as it will provide guidelines for the dissemination of information and maintain the confidentiality of the bank records. We think that this legislation will do much to relieve the current problems that we face relative to access to our records.

My presentation will be brief and confined primarily to the questions of records being maintained by the banks and access to the dissemination of information contained in those records.

The question of the confidentiality of the bank-customer relationship has become increasingly difficult in the past 10 to 15 years. Several circumstances have led to this situation. No small part of that has been the tremendous increase of the use of banks by the public.

As an example, prior to World War II, many companies paid their employees by cash. During World War II, they changed and paid

them by check, and the last 10 to 15 years many companies are utilizing the payroll deposit system. This, in essence, automatically makes customers of the banks.

As an example of the volume that we handle, in Wells Fargo Bank, which is the third largest bank in the State and the 11th largest in the country, we process over 2 million items per night. We have over 600,000 checking account customers.

Prior to the inauguration of the Bank Secrecy Act, we only maintained records of those items which were necessary in the course of our business, to make sure that we could trace items through the channels in the event they were lost. This was a relatively small percentage of the total items being processed. Now we microfilm 2 million items per night.

Access to that tremendous amount of records that we maintain is prescribed in our Service and Operations Manual, and if I may, I will quote from that manual:

ACCESS TO BANK RECORDS

Access to Bank records should not be allowed any representative of an outside agency except examiners of the Comptroller of the Currency and the Federal Reserve Bank, and then *only* on the authority of an officer.

Then in another section, Authority for Giving Information:

ACCOUNT INFORMATION

Information regarding customers' accounts must not be given in response to oral or written inquiries, except under the following conditions:

1. When specific written authority is given the Bank by the customer.
2. When the Bank is served with a subpoena or other valid written order or request. . . .

Senator CRANSTON. You do not give information in your bank unless there is a subpoena?

Mr. ARTHUR. That is the instruction we have.

We tried to analyze the access to the records in the last year, and we have come up with some average statistics that we think might be of interest.

Subpenas—324. These include the Internal Revenue Service, law enforcement agencies, and civil actions. We do not break the type of subpoenas down.

Congressman STARK. If I may interrupt for a moment, are you aware and are your bank officers aware that it is common practice for especially IRS agents to carry blank subpoenas in their pockets, and if they want to see a customer's record they fill in his name and hand the officer the subpoena.

Are your bank officers generally aware that they're not obligated by law to respond immediately to the subpoena, but may, if it is bank policy, notify the customer and allow him 24 hours to go to get an exhibit?

Mr. ARTHUR. We do notify our customers.

Congressman STARK. Is that common practice in the banking industry, or does it vary from bank to bank?

Mr. ARTHUR. It varies from bank to bank, but of those members of the committee it is universal.

Congressman STARK. Thank you. I am very sorry to interrupt.

Mr. ARTHUR. The IRS notices of levies that we received totaled almost 2,500.

FBI inquiries were 90.

Information requests under section 1917 of the California Financial Code, and this, I think, is a most important section of the code for the utilization of law enforcement—250.

Specific subpoenas from law enforcement have been 30.

From the figures of the use of section 1917 of our State code, I think it is evident that the provision of California law relative to access in investigations regarding checks, the fraudulent use of checks, is a most important asset to them.

As you know, there is no legal basis at present for the banks to refuse to give information. It is only by bank policy that they are able to maintain the confidentiality of bank records.

We believe the legislation is most important in this area to solve our problems in dealing with request orders for information.

Thank you again for allowing me the privilege to appear here.

Senator CRANSTON. In your opinion do the customers of your bank expect you to maintain the privacy of their records?

Mr. ARTHUR. Yes, sir.

Senator CRANSTON. Are they aware of the possibility of law enforcement looking at their records without a real subpoena?

Mr. ARTHUR. I think they are from the public information standpoint, Senator.

Senator CRANSTON. Is that awareness something that has been recently developed?

Mr. ARTHUR. That is correct. During the last 2 or 3 years, since the Bank Secrecy Act or the publicity involved in the Bank Secrecy Act brought it home.

Senator CRANSTON. Are you aware of the concern and opposition of the law enforcement agencies to the present legislation?

Mr. ARTHUR. Yes, I am.

Senator CRANSTON. Do you have any thought as to ways in which their needs might be taken into account, without sacrificing you or your customers?

Mr. ARTHUR. I think you are familiar with the proposed bill in our State legislature, A.B. 1609, I believe. That bill has received very minute attention of our committee and I believe by law enforcement.

The provisions in this bill relative to access, the guidelines that are established, I think, are necessary for it, and would be helpful and should be incorporated in this type of thing in any bill. It provides specific ways in which access can be maintained.

Senator CRANSTON. Thank you.

Pete, do you have anything?

Congressman STARK. Just a few questions, Senator.

Mr. Arthur, Wells Fargo Bank is what rank among California banks?

Mr. ARTHUR. Third.

Congressman STARK. And among banks in the Nation?

Mr. ARTHUR. Eleventh.

Congressman STARK. And is it correct that the figures you submitted to us on the number of inquiries you had on an average covered 300 branches and approximately 600,000 checking accounts?

Mr. ARTHUR. That is correct.

Congressman STARK. You then are only receiving several thousand, or less than a tenth of a percent of total accounts or of accounts of certain offices. Might the other members of your committee submit their number of requests or make some estimate of this for the record? With the cooperation of a very few banks in the State we could get a fairly good idea of the number of inquiries for records in the State.

Mr. Arthur, are you familiar with either Robert Morris Associates or some other type or association that has a code of ethics which describes the conditions under which banks will share credit information with one another?

Mr. ARTHUR. In general, yes.

Congressman STARK. Do you think that one might draft a code of ethics to govern the sharing of nondescriptive information with law enforcement agencies? In this way they might indeed get the information they need to determine intent to commit a crime without divulging the personal nature of the records and the personal items they document. Would you be interested in pursuing such an idea?

Mr. ARTHUR. I would like to think about it.

Congressman STARK. If you would be willing to submit to us those policies under which banks or credit grantors exchange credit information, and perhaps comment on whether this might apply to divulging certain restricted information on checking accounts, it would be most helpful for future proceedings.

Thank you very much.

Senator CRANSTON. I would like to ask you one more question: When somebody representing a Government agency comes to your bank and wishes to look at some individual accounts, who do they have to go to to get that authority?

Mr. ARTHUR. An officer of the bank.

Senator CRANSTON. They can't come to the window and ask a teller for the information?

Mr. ARTHUR. Our tellers are directed to send them to an officer before any information is given.

Senator CRANSTON. Thank you very much. I appreciate your being here very much.

Our next witness is Chuck Marson, director of the American Civil Liberties Union. Thank you very much for being here.

STATEMENT OF CHARLES C. MARSON, LEGAL DIRECTOR, AMERICAN CIVIL LIBERTIES UNION IN NORTHERN CALIFORNIA

Mr. MARSON. Thank you, Senator.

My name is Charles C. Marson. I am the legal director for the American Civil Liberties Union in northern California. I am testifying here this morning for the ACLU nationwide.

We have particularly intense exposure to the issues surrounding the Bank Secrecy Act, because of the public clamors of its effectiveness.

In addition, I have the honor of representing Congressman Stark as well as other bank customers in representation before the U.S. Supreme Court. This resulted in the April 1 decision concerning the Bank Secrecy Act, and I would like to make myself available for any questions you might have about the meaning and the interpretation of the decision of the Court.

Primarily I am here to advance ACLU's views concerning S. 2200. We very much support S. 2200 in its present form and any form into which it will be amended and giving an opportunity to bank customers to protest process against their account.

We think that people reasonably expect that the details of their financial transactions shall remain between them and their banks. Mr. Justice White a few years ago in a fourth amendment case said:

What counts when you talk about the expectations of privacy of the Fourth Amendment and what you are supposed to expect is, first, whether there is a subjective expectation of privacy.

And second, whether society is prepared to recognize that expectation as a reasonable one.

There is no doubt here in northern California particularly that bank customers subjectively expect that the details of their transactions as revealed in their bank accounts ought not to be revealed between them and their banks, and I can't think of any single issue in which we had more telephone calls and mail at the ACLU when the provisions of the Bank Secrecy Act became known.

We think it is an eminently reasonable expectation that people should feel that those details are between themselves and the bankers. We are long past the days in fourth amendment laws when property rights determine when you can expect something to be private, at least since the U.S. Supreme Court decided the *Katz* case, in which a glass-walled public telephone booth on the street was ruled to be a telephone over which conversations could reasonably be private, and not wiretapped.

At least since that day the Court has said in its holding that the fourth amendment protects people, not places, and therefore the fact that this information is in the hands and ownership and control of somebody else does it not make subject to the fourth amendment any more than the fact that the telephone company that owns the instrument and the wires does not make those facilities and communications not subject to the fourth amendment.

But rather than remake the case here for the privacy of information in bank records, I thought it would be more useful to the committee if I could respond in some detail to the discussions Friday in Los Angeles, when the committee heard from many law enforcement officers concerning the provisions of the bill.

Their objections to the bill were many and varied, but I thought I discerned in listening to them at least three threads that were common to them all: The first is easy to dispose of, if only to admit it, and that is if this bill is enacted, it is going to require in some cases a little bit more work.

Lieutenant Riker, from the Los Angeles Police Department, for example, estimated that it would take his department about 3 hours to obtain the kind of process that this bill in some instances would call for.

It is useful to divide criminal from civil functions, because in the civil context, as Congressman Stark just pointed out, usually it is a tax man and usually that man has the blank summons provided for by the tax code, which he can rip out of his pocket, fill in, and give to the bank. So in the civil context there is usually no need to seek judicial intervention, that is done when the customer resists, a judge decides whether or not to require the summons.

In the criminal context, it might require more work, but that, we think, is right and proper, and these accounts are, in our analysis, entitled to have fourth amendment rights. As Justice Powell pointed out in a case in 1972, when by eight to nothing the Supreme Court rejected the argument that the extra work load justified an exception to the requirement, Justice Powell said that although the reasonableness requirement of the fourth amendment does reflect a concern for law enforcement, that amendment was concerned with serving higher values than efficiency alone.

The second was the possibility that if notified, customers would start altering records, destroying records, or even flee the jurisdiction.

This concern, we think, is minimal. In the first place, the records that are sought by process and as to which notice is attached are records that are in the hands of the bank, not in the hands of the customer who is being investigated, and it would be hard if not impossible for the customer to alter those records.

Of course, he might alter his own, but if he alters his own and they are related to the records unaltered in the bank, it might make his position worse, if the bank's copy of the check says one thing and his checks another, that in itself is a cause for investigation, and probable cause.

But whether or not a financial institution is involved and whether or not notice under this bill is given to the customers, since we're talking almost exclusively about white-collar crime, we have got to recognize that it is the very, very rare suspected white-collar criminal who does not learn of the investigation against him until the moment his records are whisked away by the police or by search warrants or other process.

Nearly always investigations that take place come in the form of tax liens, notice from the IRS that an investigation is being undertaken, a request for documents, a summons or other process in the civil case or the like.

In white-collar criminal investigations or even civil investigations where records are sought before probable cause is established, the individual suspect in a white-collar crime case, and whether these records are sought to establish criminality of the act engaged in by people established in the community with business and family groups—the simple fact is that the individual is going to know about it, anyway, banks or no banks. They are the people least likely to flee the jurisdiction while under investigation. They are the people most eligible for release under their own recognizance or low bail. So that the presence or absence of the provisions of S. 2200 has little to do with the danger that people will destroy records or flee the jurisdiction, to the extent that the danger exists by the nature of the investigation and S. 2200 is not going to have serious impact on this.

The third one, and it was stated differently by law enforcement officers, depending on their perspective and what work they did, is that litigation would tie up their investigations. People, because they got notice, would assert constitutional rights, which they would not have an opportunity to assert otherwise. Sophisticated criminals would immediately plead the fifth amendment, and this was wrong, because this was a sort of a privilege that S. 2200 was creating, and if this privilege were permitted to be created and assumed, investigations would be hampered to the extent that they were successfully asserted in court.

We think this is a legitimate and understandable concern of law enforcement, but we think this committee should turn a deaf ear on it. We don't think any legislation ought to be premised on the notion that if people knew of their constitutional rights and assert them, something should happen, and we should therefore design something that would prevent them from so doing.

ACLU believes that if a claim is of substantial substance, the court will uphold it, and that is how it ought to be, and no procedure ought to be designed to make it untimely to assert those rights.

If the fourth amendment protects compulsion from Government, they do so, and this committee ought to live with that and design procedures that reflect it, not avoid it. We don't think that notice after the fact, after records are examined, is much different from no notice at all. And we don't think that Congress should act on the assumption that if you procedurally avoid the assumption of constitutional rights, and then law enforcement affords those rights, it would be a privilege. It is slightly wrong to call this a privilege. Privileges stem only from evidence in court they stem from communications where the fourth amendment affects houses, objects, and things.

And privilege, as was repeatedly pointed out in Los Angeles, does not apply when criminality is discussed or criminality carried out.

On the contrary, the fourth amendment protects your papers, whether it is criminal or not. The fifth amendment, the self-incrimination provision, protects papers especially, because there is criminality. No procedures ought to be designed to avoid those constitutional facts.

The fear that people will assert fourth and fifth amendment rights which the courts will uphold in their personal bank account is one thing, bank accounts that are being investigated for possible stock fraud is a wholly different field. The U.S. Supreme Court has said that corporations do not enjoy the privilege against self-incrimination, so there is no fear that a corporation whose bank account is subject to summons and notice under S. 2200 is going to come under the fifth amendment privilege against self-incrimination, because as a corporation it does not exist. Corporations have fourth amendment rights, but they are of a different nature.

We do not think that the objection that rights will successfully be asserted ought to play any part in the preparation of this bill.

That concludes my prepared remarks. I would ask that they be made part of the record.

Senator CRANSTON. Thank you very much for a very forceful and useful statement.

Would you mind if Mr. Poole would come up and give his statement, he has a time problem, and then we will come back and you can answer questions.

Mr. MARSON. Not at all.

Senator CRANSTON. Thank you very much.

Good morning, Mr. Poole.

Mr. POOLE. May I proceed, Senator?

Senator CRANSTON. Yes.

STATEMENT OF CECIL POOLE

Mr. POOLE. I am Cecil Poole, I live in San Francisco, and for approximately 8½ to almost 9 years I served as the U.S. attorney for this northern district of California.

As such, I had occasion after a long period of time to become familiar with the practices and policies with respect to obtaining financial documents from banks, savings and loan associations, and other financial institutions.

I want to thank the subcommittee for the opportunity to express my views on certain aspects of the proposed Right to Financial Privacy Act of 1973, which has been proposed as introduced by Senator Cranston.

There have been several legislative enactments by which the Congress had practically eliminated what had theretofore been considered a well-established right to confidentiality by a citizen with respect to his records, which were in the custody of banks, lending institutions, and other financial institutions.

In title 12 of the United States Code, section 1829, the legislation requires that insured banks retain records by microfilm or other reproduction of each check, draft, or similar instrument received by it, together with an identification of the party for whose account it is to be deposited or collected and shall maintain those records as well as the records identifying the depositor and each person authorized to act on behalf of the depositor for a period as may be prescribed by the Secretary of the Treasury up to 6 years.

The same is required with respect to uninsured banks pursuant to the provisions of section 1951 of title 12.

The 1970 Currency and Foreign Transactions Reporting Act, which is entitled section 31, United States Code 1051 et seq., subject foreign and domestic currency transactions to regulation by and disclosure to the Secretary.

As I understand the purpose of the Right to Financial Privacy Act of 1973, it is intended to restore some right of confidentiality despite the fact that in the statutory enactment to which I have made reference, the Congress did make a solemn legislative finding that such customers' records have "a high degree of usefulness in criminal, tax and regulatory investigations and proceedings."

Now having required that financial institutions maintain those records and keep them available for inspection, the Congress further provided, as appears in section 1061 of title 31, United States Code, that the Secretary is authorized by regulation to make any information set

forth in these reports available to any other Department or Agency of the Federal Government on the request of the head of that Department or Agency.

The result of that is that the citizen's financial records are completely exposed at the request of any Agencies of the innumerable Departments, and I might state that means down the line to almost any minor bureaucrat.

It has been very easy for Federal investigators and law enforcement investigators to obtain copies and access to citizens' banking records, and I might parenthetically add here, without any process of subpoenas whatsoever. Your bill seeks to put some brakes on the free accessibility of those records and the right to have them held in confidence, subject only to real requirements and necessities of regulation and law enforcement.

Looking at your specific legislation I have some comments:

For example, section 5(b) provides that a financial institution may notify the appropriate agencies of criminal violations suspected of having been committed against the institution. Presumably this relates to banking act violations, fraud, and other unlawful dealings.

I would suggest that given the protection of your statute, it would be in the interest of justice to make such reporting of illegal acts mandatory. Otherwise the discretion of the institution or the discretion of supervisory agencies might combine to conceal evidence of wrongdoing. Again, I might say to you parenthetically that there has been documented experience along that line that might support this allegation.

Section 8 requires production of records pursuant to search warrant, which also must have been served upon the customer. I see no harm in this that the customer should know and be furnished with the underlying supporting data justifying the issuance of the warrant.

I believe the 10-day requirement under section 8 for disclosure pursuant to a judicial subpoena is too long a period of time. Unless the customer or his representative is unavailable, this time could well be shortened to at least 5 days.

All in all, I believe the purpose of the proposed legislation is salutary. It is in the interest of privacy, and the legislation to me appears to impose no serious obstacle to legitimate law enforcement.

That, Senator, is the statement I wish to make.

I referred to a number of things that you may wish to ask questions about, and I would be very glad to answer.

SENATOR CRANSTON. Can you give us any insight from your own experience as U.S. attorney, and whether you were involved in requesting access to bank accounts, and under what circumstances, and what that accomplished?

MR. POOLE. Senator, not only as U.S. attorney but before then in the years prior as a member of the district attorney's office of San Francisco, I never had any difficulty getting bank records without any kind of subpoena process.

Generally speaking, the law enforcement official who went to the bank for the information would assure the bank that they would "cover" the matter by the issuance of a subpoena, if they were needed for the grand jury or for court.

I know that this procedure has been tightened up to some extent now and that the banks themselves called a halt to much of this free disclosure of information.

However, I discovered just the other day the existence of a little gimmick, of which I had not thought before, and that is that it is not unusual for the agent to come to the bank to request the records, and upon being denied access to them to pull out of his pocket a blank subpena, which he fills out and gives to the bank. The bank actually notes in its records that it turned the information over pursuant to the subpoena.

I believe this to be an abuse of process. I believe a subpoena ought to be issued on the instance of the agency of the court or the administrative tribunal which authorized to do it. It is not intended to give carte blanche to law enforcement officials simply to fill out blank subpoenas whenever they need them.

This is, in effect, a subpoena duces tecum, and in State and Federal procedures the issue of such process is required to be with more solemnity than a general subpoena ad testificandum.

Senator CRANSTON. The principal concern expressed by law enforcement has been over the disadvantages that occur from their point of view, if in every case the customer involved is alerted at the time the subpoena is sought.

Do you believe there are any circumstances which would be appropriate to have a subpoena sought under conditions where the individual involved would not then be notified?

Mr. POOLE. Well, I can conceive of the possible existence of circumstances which suggest the probable destruction of records, where the nature of the investigation would be exposed and would prejudice, if it became known to the customer that he figured in such an investigation.

I can see that there are areas in which the undisclosed investigation would have some real value.

It could, for example, alert a customer who might, let us say, be of the dangerous sort, that the authorities are aware of his relationship with other persons who might themselves or their families be in danger.

I concede that is a possibility, and if so, perhaps some procedures by which this information might be made available to a court in camera, who would pass upon it, much as a court does in passing upon the issuance of a search warrant, or in making determination that an indictment should be sealed and not made public.

Those provisions are simple, they could be put in and they would, I think, give all the protection necessary.

Senator CRANSTON. Do you feel that a person should be notified after a subpoena has been issued, at some point along the way, if not at the outset, someone whose account has been looked at, should he be told thereafter that has occurred?

Mr. POOLE. Yes. You are referring, I suppose, to the provision of your statute that says that there will be a report made available to the customer that there had been an examination of his records.

As a normal practice, I would think so, they are his records. Someone has examined them by legitimate process. Certainly they ought to know what has happened.

Senator CRANSTON. When you say it is a normal practice, do you mean there are some circumstances where perhaps it would not be normal?

Mr. POOLE. No. What I mean, normally a customer may obtain information from the institution that there has been an examination, if he is alert enough. They will tell you, and therefore there is no reason why I think they should not be standing procedures.

Congressman STARK. I have no questions.

Senator CRANSTON. Thank you very much for a very good report.

Will you return, Mr. Marson.

I would like to ask you that same question. Do you envision any circumstances where the individual involved should not be notified before access or subpoena is granted?

Mr. MARSON. I cannot rule out the possibility, Senator, I would like to be able to say that there ought to be flat rules, but I think Mr. Poole is right.

There may be some extremes in unusual cases. I'm not sure I agree with one of the things he proposed, the problem of someone destroying evidence in his own house, for example, if he knew that his bank records were looked at, is a traditional exemption to the warrant requirement of the fourth amendment already. Traditionally, if police know that evidence of a crime is possessed, and it is going to be destroyed, they can go in and get it without a warrant. That is established law.

There may be cases of danger to life and limb, where organized crime figures have power over witnesses, and perhaps Mr. Poole's suggestion may be a good one in an unusual case, where a court might grant leave not to notify, if the committee carefully defines the circumstances, so that they reach only the unusual case.

I do not think that in this respect as well as in any other concerning the bill you ought to premise the general rules on the notion that these accounts are held by the godfather. We are talking about better than 200 million bank accounts, and assuming that criminals with guns and major criminals may be important to small exceptions of the bill, but not on the whole as such.

Senator CRANSTON. Would you discuss some of the compromises that are particularly relevant that have been worked out to the State bill relative to law enforcement on one hand and protecting the privacy on the other?

Mr. MARSON. One of the problems that we have faced in California, which may be different on the Federal level and different in other States has to do with NSF checks and checks against closed accounts.

Some years ago the California Legislature enacted section 1917 into law, which provides basically that where there is a crime report filed for NSF checks and a law enforcement officer so certifies to the bank, then the bank is not civilly liable for any further proceeding for releasing what is described as copies of records, reports, or files.

That section was passed on the plea of law enforcement. It is impossible to clear people who are innocent, as well as identify people who are guilty of NSF checks, if all they got is a check that has bounced, because there is no money. But the threshold question they have to take is whether it is a long pattern of activity, and Congress-

man Stark indicated in Los Angeles, it is sometimes the custom of business and people to write a check and hope to have the money in the bank when it is cashed.

This was further clarified in three-way discussions between the ACLU, the Bankers Association, and the peace officers, whether Assemblyman Sieroty's bill provisions, which carry two changes in provision of 1917, where a crime report is filed—then the checkwriter may ask for and receive from the bank a list of certain information, balances on particular dates, deposits on particular dates, amounts when the check was written, amounts when the check was passed—I would be happy to provide that language in writing.

Senator CRANSTON. Would you do that?

Mr. MARSON. Certainly.

And as I recall, that was agreed on by all sides as sufficient to take care of the NSF problem.

We also had discussions with the California Judicial Council concerning the 10-day waiting for the subpoena. The judicial council took the view, where at least the material was to be produced before a judge, that it might clog the judicial process to interrupt a criminal trial in the middle of the defendant's case, where all of a sudden examination of a bank record would take place, and wait 10 days if somebody wanted to move to quash a subpoena.

We therefore agreed upon an insertion in 1609, which said more or less where the evidence is to be produced before a court, this is not an exception for the convenience of law enforcement or for the convenience of lawyers in civil litigation and depositions and the like, but for the court's calendar, where this must be produced before the court, a court upon the showing of a good cause can shorten the time of the waiting period to see if someone who is going to move to quash has to wait until the expiration of the period, and in that event law enforcement will take reasonable steps to see if notification can be given.

That exception, if it is at all relevant to the Federal courts, as to the California Judicial Council would certainly be satisfactory to us, but I would urge that the committee limit it to the production of evidence before courts.

We may be concerned about not congesting courts' calendars, but for lawyers and depositions we think the 10-day waiting period is appropriate.

Senator CRANSTON. It is your position that bank records are private property protected by the fourth amendment?

Mr. MARSON. Yes, it is.

Senator CRANSTON. Do you believe an individual's tax returns would be covered by the fourth amendment, if they did not receive special protection by an act of Congress?

Mr. MARSON. I am hesitating to answer the question, Senator, because part of the formula that goes into the legal question of determining fourth amendment protection is the reasonable expectation of people and the special congressional protection, which is always colored, in effect, the reasonable expectation of people in the privacy of their tax return.

In general, yes, there is no reason to assume because Government needs information for one purpose that it is free to spread it around the Government for other purposes.

One of the big problems facing Congress in the next 20 years is going to be the control of information gained for one purpose and used for another.

Senator CRANSTON. What are the factors that should be taken into account for determining what is private property as defined by the fourth amendment?

Mr. MARSON. I urge that we cast aside the notion of property in the fourth amendment, as indicated in the telephone case, but to determine the reasonable expectation of privacy.

First of all you ask whether subjectively, justifiably or not, somebody reasonably expected that a conversation, a fact, an object, would not be looked at, would not be gazed upon by the general world. And then you have to insert aside from that person's point of view an objective view whether it is reasonable in itself.

Balancing the need of law enforcement against the protection of the citizen's privacy, that particular area should be carved out.

As the Court put it in the *Telephone Booth* case, once you walk into the telephone booth, owned by the telephone company, visible from the street, drop in the dime and lift off the receiver, you have a reasonable expectation that your words will not be broadcast to the world.

It was suggested in Los Angeles that bank checks are different, that because you expose them to a teller and clearinghouse operator, who deals with them in bundles wrapped this high [indicating], you should not object that they will be exposed to anybody else.

I think that is wrong. It does not follow if you expose things for limited purposes, you expose them to everything.

I can hold a conference call with 10 people, but that does not mean that the Government is entitled to listen in to it.

I think the rule for checks ought to be the same.

Senator CRANSTON. Thank you very much.

Congressman STARK. Thank you, Senator. Thank you for your testimony.

Mr. Marson, I have just a few questions. It is common for banks to disclose information about checking accounts to other banks and to credit agencies. However, it is done in a jargon and in a style which, I think, might be different.

For example, if you had an account in the bank I used to be associated with, and another bank inquired about it, we might have referred to the way in which you conduct your banking affairs as "satisfactory" or "unsatisfactory." We might have rated you A, B, C, or D, depending on how many overdrafts you had in a year, and we might also have referred to the average balance in terms of low three, medium three, high three—being three-digit balances in the thousand-dollar range.

Do you find that this kind of a compromise—giving information to other private parties—is different from allowing people access to the records themselves?

Mr. MARSON. It is a related problem, Congressman, but I think it is most appropriately dealt with in separate legislation.

I think this committee has enough on its hands dealing with the questions of governmental action.

Congressman STARK. This gets close to the kind of compromises that we're talking about, unfortunately, in dealing with NSF checks. You might give some thought to this. This is a standard practice. If the banks can do this with private credit agencies or other banks, why can't they do it with the San Francisco Police Department?

Mr. MARSON. I would like a chance to ponder on it before responding fully.

One difference that strikes me, when someone asks for credit, inquiry is made.

Congressman STARK. He does not necessarily apply for credit.

Mr. MARSON. It is sometimes voluntary and sometimes not.

Senator CRANSTON. If you will give an answer in writing, that will be fine.

Congressman STARK. Another question arises along these same lines. If you can verify the validity, of a check now by presenting it at the teller's window—so if you gave me a \$100 check, I would know if it was good—I can get that much quantitative information. I may not know if you are a dollar short or \$100 short, but I would know if you do not have \$100 on account.

With the advent of wire transfer—and we are going to get into it in the Bay Area—you're going to transfer information rapidly all over the country for the bank's and customer's convenience. Would you comment on the difference between being able to verify checks remotely, over the telephone or by electronic transfer, and actually presenting it at a teller's window for verification?

If this were an acceptable compromise, we could start to deal with some of the objections to it. We could get into the question of the fifth amendment of corporate accounts, and how that might spread to non-corporate businesses, such as individual insurance agents who are licensed by the State, or attorneys' trust accounts. Would those not fall under the fifth amendment?

Mr. MARSON. It may be that there are kinds of bank accounts that society is not prepared to recognize as a reasonable depository for an expectation of privacy.

A trust account is perhaps a very good example, where a stock-broker holds the money of another for investment by a third. That may be a place where society and the stockholder may say there is a sufficient fiduciary obligation where checking on that account would be all right.

The extreme is the exception for supervisory agencies, the bill does not interfere at all with the ability of the Feds to audit a financial institution.

Congressman STARK. The other thing would be and—please do comment on this—where a supervisory agency or a governmental agency has an absolute right to continually monitor a corporate or personal set of books, or bookkeeping records.

Would it not be as logical for them to also to be able to check records to verify those records? You can create a set of books out of canceled checks. A person who has a right to look at just the books might even have the right to get this in the verification process?

This comes up in investigating fraud and security fraud. It is clear that they have a right to the books, and these are destroyed or purloined.

Mr. MARSON. Offhand, I would think it could be done without doing any major damage to the purposes of this bill.

Senator CRANSTON. Thank you very much. You have been very helpful.

The next witness is Robert Cole, professor of law, Boalt Hall, University of California. Thank you very much for being with us.

STATEMENT OF ROBERT COLE, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA

Prof. ROBERT COLE. Thank you, Senator, very much for giving me the chance to be here.

My name is Robert Cole, I am professor of law at the University of California. I teach constitutional law and torts.

I have been on leave this summer, and so coming here today was a kind of break in my leave, and as a result, I have not prepared any formal comments to submit to you, but I would like to say a few things informally now, and, of course, answer any questions.

First of all, I would like to say in the fall of 1973 I served as a consultant to Landels, Ripley & Diamond, which was the law firm which represented the California Bankers Association before the Supreme Court.

I did not brief the cases or argue them, but I did deal extensively with them, to go into the issues and suggest an outline of argument.

I did work on the case for them mainly because I had strong value judgments about the Bank Secrecy Act, and I had no interest in the drafting of this legislation, in fact, I had never seen S. 2200 until last night and did not know until this morning, whether the Landels firm or the California Bankers Association was even in favor of it. I myself am very much in favor of it.

I think it is a salutary piece of legislation. It seems to me it is beautifully drafted and by and large it seems to me is making very sound judgments. I think it is a very moderate, balanced piece of legislation, and I hope very much it is going to be passed.

I would like to talk briefly about three subjects: One is a couple of general observations about your legislative posture in resolving doubts about what the effects of the legislation would be.

The second is to talk briefly about what I think the problems with the Bank Secrecy Act are.

And third, to comment on the effectiveness of this bill in dealing with those problems, and to the way I will try to answer some questions that Mr. Shefler suggested I think about.

The first subject I wanted to briefly talk about it some general observations about the legislative posture here, and I had three points to make:

I think it is very important—I am sure these things are obvious to you—that Congress view this problem as one of exercising its independent judgment about what is right in striking a balance between privacy and others social needs, other than viewing the problem of

"What has the Court held, and therefore how does the Court define the fourth amendment, and therefore what are we supposed to do?"

You don't want to lock yourself into judicial decisions about what kind of protections are necessary. The question is beyond those that are necessary to meet the fourth amendment. What kind of protections are desirable? And that is very much a matter of legislative judgment, and I would like to emphasize that by making two comments:

In this *Bank Secrecy* case, what the Supreme Court has said, more or less, on the issues that they decided the merits of, they said:

Look. This legislation requires certain transactions to be reported and certain records to be kept, and it satisfies the Fourth Amendment because it is "reasonable." Reasonable in the Fourth Amendment is the test, reasonable searches and seizures.

They say it is reasonable, because Congress has found that law enforcement agencies need this authority. They have, in other words, deferred to congressional judgment, too much so, in my opinion, but they said the statute is legal, because Congress made a judgment.

Congress should not now say, "Since the Court has told us the statute is legal, we should follow what the Court says. The Court defers to us and we say we will defer back to them," and it is just a circle. In other words, the basis for this being held legal is that Congress decided it wanted the statute. If Congress did not want it, there is no reason to think you did not use the fourth amendment in a sound way.

Similarly, because Congress, with all deference, in my view has been too inactive over the last 25 years in dealing with these problems, they have put a great burden on the Court. When Congress does not act when it needs to act, it tends to make bad law, and when Congress makes a bad statute, it makes bad law, and I think the bank statute is a bad statute, and we ended up with unreasonableness under the fourth amendment.

Because Congress puts pressure to the Court's responsibility, the Court is a limited guide to Congress, and you are the guide to the Court. That is my first point, that one ought not to get too concerned what the particular rulings under the fourth amendment are. You can always go further if a new judgment is warranted.

The second point I wanted to make, which is related to the role of the courts here, that maybe the principal constituency affected by this kind of legislation is the ordinary businessman and businesswoman, the ordinary depositor, the middle-class person, and those are the people who are not going to end up being involved in litigation.

They are required by the way the economy is organized to use banks. They just can't do anything else, and because banks are big, and they are little, they are required to do what the banks tell them. If the bank says, "We have a policy of turning this over," what are you going to do? Start your own bank? You can do it, Congressmen, but very, very few of us can do it, and it is precisely that, it is the only kind of opening wedge you get at all in the middle class breaking through the kind of coerced situation he finds himself in in the technological welfare society.

That leads me into the third point here, that in view of the situation in which the depositor finds himself, and in view of your relationship to the court, that in general you ought to, I hope you don't call

it presumptuous, Congress ought to make laws in favor of proper privacy rather than anything else. And you view the courts and the police, you have a very sorry record under the statute, those are institutions more likely involved in litigation and have access to Congress to remedy mistakes much more readily than the ordinary depositor or the ordinary business person.

And so it seems to me you start by putting the obligation to show that experience is not going to work out, or experience is adverse to the side of those institutions that have resources to call it to your attention, and therefore it seems to me when you're having doubts about these compromises, you ought to call the question in favor of privacy and see whether or not experience turns out to be adverse to institutions that have the clout to show you that their experience has been adverse.

I might say that the fourth amendment itself seems to me to take that posture, in that the fourth amendment says, "We know perfectly well that relevant, illegally seized evidence, is just what you need to put people in jail. You don't get any fourth amendment cases that show the guy is guilty."

The fourth amendment says it is too bad, you can't have it. That is a value judgment, that is the weighing the information between relevant, guilt-showing evidence, and the long-range adverse effects on law enforcement. We prefer to run risks on law enforcement, and I think most of us would agree to this.

Therefore, looking at the role of legislation in the relationship both to the court and other constituencies and other institutions, I would urge you to call doubts in favor of protecting privacy and letting experience show you that that was unsound, rather than not protecting and letting experience show you that it was unsound.

That is my first kind of point.

My second kind of point, Senator, was to summarize very briefly what seemed to me to be the three—to put names on—main problems under the Bank Secrecy Act.

I won't comment on it at all, except to identify it to say that it is clear to some extent that knowing that the Government has access to some materials that you don't know about as a depositor, to your entire checking account over the last 5 years, is likely to inhibit some of the things you do with checks.

I don't know whether it is paying Dr. Fielding, the psychiatrist, with the checks, or the ACLU, but it is bound to inhibit some margin people's use of checks to certain kinds of activities. The trouble with that is you are not left with a lot of options.

It raises the cost of banking quite high for a lot of people who want to do nonconformist things.

The second and more important for our purposes point is that the Bank Secrecy Act undermines the basic philosophy of the fourth amendment. The basic philosophy as to particularities is not to proceed by a general class of information but to particularize information that for some reason the Government wants, and if you look at all the different rules under the fourth amendment, rules having to do with required records, administrative searches, administrative summonses, judicial subpoenas—you find that they all tend to exist on particularization, because they're trying to ensure that a balance has

been struck between the need of Government and more particularly the information as to what the Government needs.

They say, "Look, we need to know what happens at such and such a time." That enhances the probability that they need it. By narrowing, you preclude the intrusion into the privacy.

Finally, all of these rules tend to require that some relatively objective Government person make a more or less particularized judgment that this information is needed, this particular information is needed. The Bank Secrecy Act undermines all that by permitting and encouraging and by the Treasury proceeding to say, "We need information in general, we need a class of information." You get no particularized judgment by a Government official that this information is needed for some particular purpose and is really needed.

So we could, if you want to talk about the fourth amendment later, discuss how these doctrines tend to maximize the same values, and how the statute goes in the opposite direction.

The third thing, and for my purposes that I wanted to stress, although I won't do it at length, is what the statute does is to socialize the strategic occupation or industry. It says, "From now on, the banking industry, because it is strategic, has got to be deputized or socialized for Government purposes.

I think everybody agrees that these strategic institutions, like banks and telephone companies, do have some special social obligations, and they are not just laissez faire type, that is the way the banks are behaving, they laissez fairely turned over all kinds of information without any compulsion to all kinds of people who ought not to have had it, not just the Government but private people.

So we all agree in a technological welfare state like ours, you can't just have laissez faire about the strategic occupations, but the issue in a society and I want to satisfy it in a fairly general way, because I think the distinction between your bill and the statute illustrates, you have two choices: One is to socialize for purposes of Government a strategic occupation; and the other one is a democratic access to the strategic occupation, so if you look at the banks in the way that a democratic access is give the depositor more opportunity to participate, so to speak, in the decisions that the bank is making, that means in this case letting him know what the bank is doing with his records. Giving him some opportunity to protect himself.

That is a way of democratizing the bank in a technological society. That is what S. 2200 does and does it very beautifully, in my opinion.

On the other hand, what the Bank Secrecy Act does is to socialize it for the benefit of the Government, and in our society you find this in virtually every field, that this conflict is going on and it seems to me perfectly clear that you have to call the doubt in favor of democratizing the strategic occupations.

I will just say it seems to me that S. 2200 looked at from this more general point of view seems to me to do a very good job, in calling the close ones in favor of privacy.

It requires a court order to enforce an administrative summons. That seems to me to be a very, very sound requirement. It says: We don't know when a depositor's fourth and fifth amendment rights are at stake, we will treat him or her as if they were at stake, and that very

much democratizes his access to the bank and calls the doubts of what ought to be litigated in favor of what protects him.

What the statute has done is more or less calling the close ones in favor of privacy and more or less on the side of saying that we want to regulate these institutions by democratizing them. So looked at this way, it is a very very salutary statute.

The questions that Mr. Shefler asked me, I can answer in a couple of words: One question was whether or not it might be more sound to create a confidential relationship—I hope I got this right—between the depositor and the bank, and to proceed that way instead of the way the statute does proceed, which is to say, “Let’s just legislatively state that we want the courts to treat these bank records as if they were in the hands of the depositor.”

I think the “as if” approach is more sound than creating a general class of confidential relationship. The bank’s confidential relationship bears not just on law enforcement getting this information, it bears on all kinds of other disclosures. It bears on privileged testimony before courts.

Confidentiality is a functional concept, it depends on the context, and instead of making a declaration of a new statute, I think the way you have done it is more sound. It sticks to what you know about, does not get into testimony in court, or other questions of privilege, and you say you want the courts to treat him as if these things were in his hands. So I would be inclined to leave that provision the way it is.

I think that the question Mr. Shefler asked me, whether you ought to consider protecting disclosures to all kinds of third persons, not just Government officials but all kinds of other people, credit agencies, private industries, et cetera, it seems to me if you could find a way to draft a line legislatively between the typical case, where you think the depositor would like to have the information known, and the typical case, where you don’t think he would—if you could put that in legislative terms, it seems to me it would be perfectly sound to expand the protections in the statute.

That is not an easy thing to do and the trouble with doing it, you say, “You can’t turn these things over, the banks will think I’m nuts,” and they won’t support the bill, and I would like to see more protection against personal disclosure, very much, and I would recommend it, and I would urge that one try to draft a line like that, but if one is not certain, I think it would be better to stick with what one knows and then deal again with the whole disclosure credit information, which is an agonizing problem and the subject of great abuse separately.

I guess that is perhaps all I have to say.

Senator CRANSTON. Thank you very much for your testimony. It is very helpful and I deeply appreciate it.

I would like to ask you two quick questions, if you will give me a brief response, perhaps respond in writing, because it may be a little complicated.

Do you feel that an individual should be able to plead the fifth amendment to prevent a Government review of his bank records?

Professor COLE. Yes. But you said “should,” and I don’t know whether you mean that the statute ought to give him that right or

whether or not I as a judge think that is the way the fifth amendment should be construed.

Senator CRANSTON. Does he have the right under the amendment?

Professor COLE. Under the present law he does not have that right. The way the Court has treated these bank records, in effect they have said, "You have given them to the bank, you did not say they were yours, and so that is it."

That is the point I made about who can deal with the bank. It is a big institution.

I can't make a special deal with my little checking account and say, "This is really my records."

Senator CRANSTON. Under a subpoena, if you were aware that a subpoena were being granted, would you have a fifth amendment right?

Professor COLE. Not if the subpoena is directed to the bank for your records. The way it is right now, you don't have a fifth amendment right unless you reserve very special permanent custody of the records, and this statute and the common law generally say "No" to that.

Senator CRANSTON. Under our bill, as written, would they have those protections?

Professor COLE. Yes. As I read your bill it would. That is one of the splendid things about it, it deals with the problem without cloaking the status of relationship.

Let me point out one subject point: There are in this case holdings which say certain claims are premature and cannot be raised. You are making nonpremature by your bill some things which the Court said were premature. In my view, that does not make your bill unconstitutional. Those views about prematurity used in this case are ones that Congress can regulate.

You can't say to the Court that they must litigate a claim which they don't have jurisdiction to litigate. That would be unconstitutional.

But in this bill they have not done it. I don't think there is a serious question of constitutionality.

Senator CRANSTON. Do you feel that the fifth amendment right under our bill would severely inhibit law enforcement?

Professor COLE. Obviously I don't know very much about law enforcement, and so I am reluctant to say much.

But my guess is that it would not. We have to spend more money, professionalize it. We have to be willing to do it, and if we are willing to professionalize and spend more money, all your bill will do is raise the cost a little bit, and that is one of the commitments that the fourth and fifth amendments make.

It is better to make it costly than to make it impossible for a person to live in a society with repose and security.

Congressman STARK. Thank you for your testimony.

I wonder if you are aware that the general records of an individual's checking account—canceled checks and some form of paper statement showing an activity for a period of time—have really never been kept for the bank.

Assuming that the customer agrees that his balance is what the bank says it is, there is absolutely no reason for the bank to keep it. Those records, it can be clearly shown, are the checking account customer's records.

Professor COLE. Sure, by the statute.

Congressman STARK. The Bank Secrecy Act mandated the keeping of records for several years. I have never questioned in my mind that those were customers' records and not the bank's.

Professor COLE. Well, Congressman, I think I would agree with you if it was an original question, but I think the cases are against that position.

Could I make one followup sentence on what you just said : I suspect a lot of banks have kept a lot of records that they did not need and turned over all kinds of records to all kinds of people without process that they did not have to turn it over. It is easier to do it, and to live with law enforcement.

It is just a much easier way to do business, and it seems to me that there is one thing that the bill could strengthen in a way, recognizing that the customer does not have any clout with this bank, which is to require some statement by banks about what their policy is on disclosure, on voluntary disclosure.

I don't see why I ought not to be able to know that Wells Fargo is not going to give my records over without a subpoena.

But let's say Bank of America is, then there are some of us that might want to go to one bank rather than another.

And if you want to maximize the role of the market in forcing banks to live up to people's personally chosen values and democracy's theme again, it would be quite sound to require an annual inclusion in your statement from the bank what their view is on matters of confidentiality.

Senator CRANSTON. Thank you very much.

The next witness is Jerry Baker and David Woods, attorneys with the State Corporations Commission. I am delighted to have you with us.

STATEMENT OF JERRY L. BAKER, ASSISTANT COMMISSIONER, CALIFORNIA DEPARTMENT OF CORPORATIONS

Mr. BAKER. Mr. Chairman, my name is Jerry L. Baker. I am an assistant commissioner with the California Department of Corporations. I am appearing on behalf of Commissioner Robert L. Toms. I head up the enforcement division within the department with primary responsibility of supervising enforcement actions taken against permittees or licensees—for those operating as permittees or licensees but who have not obtained authority—administered by our department. Most of our enforcement activity is in the area of fraudulent securities issues or violation of the State franchise law.

For the last year and a half the department has been monitoring AB 1609, introduced by California Assemblyman Alan Sieroty. AB 1609 proposes to limit the administrative subpoena power of Government agencies in substantially the same manner proposed by S. 2200. The bill has passed the assembly and is now pending in the California Senate. The Department of Corporations has at all times been opposed to AB 1609.

The specific problems we have with proposed S. 2200 relate to the fact that this would delay investigations. The bill would substantially

delay the investigations conducted by our department and thus frustrate our efforts to prevent loss to public investors in securities and commodities frauds.

We also have the problem in relation to section 10 of the bill, the California Department of Corporations does have the power to investigate securities frauds, and after that investigation has been completed to present that evidence to the appropriate district attorney within the State for prosecution.

As I understand the inhibitions in section 10 of the bill, we would be foreclosed from presenting the evidence that we had accumulated from our investigation to a district attorney for prosecution. This would seem to effectively do away with the investigative abilities of the administrative agencies and take that power away from them, and perhaps place it only within the district attorney's office.

We also have a problem in relation to where we have multiple corporations and multiple bank accounts. In one recent case involving a securities prosecution in California, there was a situation where eventually 20 people were charged with violations of the State securities law. In that one case alone, we issued 38 subpoenas relating to bank accounts, in order to prove violations of the State securities law and allied fraud and theft charges.

Within the notice provisions of the bill, it is possible for someone with multiple accounts to make use in filing those bills to let the statute of limitations run perhaps on an action.

The procedure in the bill in relation to giving notice to a bank customer of the issuance of a subpoena is also a problem in delaying the investigation. It is noted that one of the alternatives you have is the sending of notice by certified mail, return receipt requested. Presumably the recipient of such a notice if, in fact, you have to have the receipt returned and signed before you can proceed, is by refusing to pick up the notice or by having a signatory other than the person to whom the service is directed.

The cooperation of State and Federal agencies in relation to the same area of law, such as our Department and the Securities and Exchange Commission, would also be substantially foreclosed by the provisions in section 10 of the bill.

We also have a problem in relation to the consent provisions. The consent provisions of the bill are meaningless to us, because the bulk of our enforcement activity is against nonlicensees.

We are also opposed to the search warrant provisions. We feel that those provisions are inconsistent with the needs and purposes of administrative investigations, investigations that are conducted by our department. There are a substantial number of those investigations where you cannot initially prove probable cause as a basis to have a search warrant issued. If there is to be a procedure similar to that you have set forth in the current draft of the bill, perhaps the standard should be made less than probable cause.

The way the Department of Corporations issues its subpoenas presently, and we do issue subpoenas in advance of requesting information from recipients in relation to banks, we issue subpoenas duces tecum normally with a return date of 10 days. We obviously accept the in-

formation from the bank earlier, and if they don't desire to wait the time they are entitled to.

Not only do we issue subpoenas duces tecum, we have internal procedures that these subpoenas are only signed by two officials in the State : One is the supervising counsel here and one in Los Angeles.

All the investigations are conducted under the auspices of a specific attorney, so to the best of our knowledge, we have not contributed to any abuse in connection with which there needs to be remedial legislation.

The subpoenas that we do issue are judged by a standard that our agency is authorized to make that inquiry. The subpoena cannot be too indefinite, and information requested must be reasonably relevant to the purposes of the investigation, meaning it should specify the statutory violations that you are attempting to prove.

We also object to the increase in cost of enforcement work, which would be caused by the procedure set forth in the bill and the delays and extra procedures that we would be compelled to follow.

It is my understanding that in your hearing in Los Angeles, there was some allusion to the cost that the banks may pass on to their customers due to the retention to be required by some of the information in the Bank Secrecy Act, and I'm sure that is true.

The analysis we have made in relation to the increased costs under the State bill, in relation to our particular department, would increase our annual expenditures approximately \$463,000. We think that is an unwarranted cost where there has been no demonstration of abuse.

It would also appear that this is an instance where the Federal Government, which is not primarily a law enforcement agency in relation to much of the activity, at least, that is conducted in the State, is trying to impose procedural rules in relation to the way States and State agencies conduct their administrative investigations.

A great deal of the work of our department in relation to work on securities cases is not directed toward a criminal prosecution. Much of the work we do is of the nature where we are seeking to preserve customers' funds.

Two years ago in the midst of the commodity options scandals in California, at one time we had five civil proceedings going, seeking an injunction and a receivership. The advance notice requirement under this law would enable someone who was of a mind to do it, who had money in one of these accounts, to secrete this money and thus defeat any right of recovery that the customers might have.

Business frauds are complex, and the illegal operator's bank account is an integral part of the fraud. The key to effective enforcement in the area of securities fraud, in my opinion, is to subpoena bank records. By imposing delays in the use of it, all of our work would be after the fact. It should be noted that a criminal proceeding usually occurs only after the funds have been lost and is only a palliative to the investors.

An expectation that the person engaged in illegal activities will consent to our inspection of his records or of his bank account is unrealistic. In the rare case in the past where we found consent was obtained, we have found that in most situations the promotor's records are not existent, incomplete, or untrustworthy. Therefore, you have to

have a verifying source to trace the activities of the business entity. The most effective source is the bank records.

In many instances of the frauds that we investigate, including the securities frauds and commodity frauds, the investors are initially uncooperative with our department and usually adverse to us, because they are not aware of the fraud, because in most of these instances it is a Ponzi-type case, where the people who are in the front end of the fraud may recoup funds, but that recoupment is against later investors, so that an operator may build up an operation from small beginnings into a several-million-dollar operation before he collapses the corporation and secretes the funds to his own benefit.

As I have indicated, the department's subpoenas have always met the standard for injunctive and civil enforcement, even though they don't meet probable cause standards. I would urge that you review those procedures in connection with any further revision that you intend to do in connection with the bill.

The department did ask me to appear to indicate to you our opposition to the bill. It is a privilege for me being able to do that.

Senator CRANSTON. Thank you very much. I appreciate very much your being able to be with us. The testimony is helpful.

Would you submit for the subcommittee how the cost in excess of \$400,000 would be imposed? I would appreciate that very much.

Pete.

Congressman STARK. I have one question. As a nonlawyer, I have to ask the speaker if it came to a decision between safeguarding the public privacy or safeguarding against the loss of the investing public's money, which would you feel represent a higher order of privilege?

Mr. BAKER. You have to weigh the priority what is regarded as a right of privacy against the protection the citizens need to make our society work. Even though the right of privacy may not be within the expressed terms of the Constitution.

Senator CRANSTON. Thank you very much.

Our next witness is Jerry O'Shea of the San Francisco Police Department. We expected Richard Iglehart of the California Police Association, but he has been delayed in San Diego.

We are delighted to have you with us.

STATEMENT OF JERRY O'SHEA, SAN FRANCISCO POLICE DEPARTMENT

Mr. JERRY O'SHEA. Thank you, Senator.

Preliminarily, I would like to point out that the San Francisco Police Department has similar concerns for the right of privacy of the individual. We consider our criminal history information and the types of records confidential, and we do not release those records unless we have the permission of the individual whose records are being kept, or the proper judicial process such as subpoena or court order.

The primary concern of the San Francisco Police Department with this bill is in the area of worthless checks, bad checks.

The San Francisco Police Department has approximately 10,000 inquiries a year regarding worthless checks that have been issued.

The average amount for which the check is drawn is approximately \$100. They run the gamut, but this is the approximate amount.

Of those 10,000 inquiries approximately, the department is able to establish enough criminal intent to take 2,000 of those to the district attorney's office.

The determination is then made by the district attorney whether or not to prosecute or whether or not some other remedy can be had.

I don't have the actual prosecution records, where the San Francisco Police Department investigates a check case, which is when the individual victim comes to the department. The department finds out if the individual has the check in his hand, and has it been returned by the bank. It then tries to establish from the victim why it was returned. The check itself may say, "Refer to Maker," or it may say, "Insufficient Funds," or just "Dishonored."

The department then requests the victim to try to run the check through again. If the check goes through and it is honored at that point, no further proceedings are had, that is all there is to it.

If at the second time the check is not honored, the department goes back to the bank and checks the balance the day before the check was issued, the balance of the day of the issuance of the check, and the balance approximately 3 days later. This is to establish criminal intent for prosecution.

If this can be done, the suspect is then interviewed to find out what is happening, to see if you can further establish criminal intent.

Usually by the time this procedure is gone through, the individual has satisfied the requirements either of criminal prosecution or the matter is handled civilly.

To point out our primary victims are the individual, the small store, grocery store, the small retail store, the small service station, and such stores that depend on the use of checks for their type of commerce.

Let me point out that a California penal statute makes it a prima facie crime or makes it substantial evidence presented in court that when a letter of protest is returned on a check, a letter of protest is the bank's notarized dishonoring of a person's check, that letter upholds a conviction for passing of worthless paper.

If this bill is passed, I can foresee the police department taking one of two courses: We do not have the manpower to handle 10,000 checks through the judicial process. If we cannot handle it administratively, the investigations cannot handle it informally and immediately, then our investigations will drop, will drop considerably to the point where we have to make a value judgment as to what amount of money taken is sufficient for the cost of investigating the crime, and those others we will have to advise to proceed civilly.

Or the department may take the position that if the victim is willing to get a letter of protest, we will simply proceed on that matter and let the suspect or defendant produce his own records in his own defense. The disadvantage of this is that the innocent person who issues a check without sufficient funds, either unknowingly or with the intention of covering the check the next day or whatever when his funds come in, is then presented with a criminal complaint. He is then saddled with being a defendant in court. He has a criminal record, and this is something that is going to stay with him.

I would also like to point out that many of the victims themselves don't have the wherewithal or the means to proceed civilly against the person who issues this check.

Third, those persons who issue these types of checks are generally judgment proof, where a civil procedure serves no purpose to the victim.

I would like to make one point with regard to the fourth amendment rights on these types of paper: I think the analogy was made that the person has the right of privacy to a public telephone booth. That is true, up to the point where that person uses that phone not as part of the crime itself, such as the person making a knowing phone call, he loses the privacy right; and when the person uses the check itself as the crime, he has then lost that right of privacy and lost that right of expectation of privacy. I think that is what I have.

Senator CRANSTON. Thank you very much. Your testimony is very helpful, and your description of exactly what goes on, is also very useful to us.

What is your opinion on the compromise that has been worked out in the State bill, where it would be possible for the investigators to get the balance in an individual's account but not gain access to the details, the designation, et cetera?

Mr. O'SHEA. That does satisfy many of the questions. There are still other problems with that bill that the department has.

May I also add something I meant to say earlier: The San Francisco Police Department has not had an internal complaint by a citizen as to abuse of bank or financial records. No individual has complained that a police officer has abused his privilege to access to those records.

Also, to the best of our knowledge, we have never had any civil suit for violation of any person's right to privacy or misuse of financial records.

Senator CRANSTON. How does establishing a balance really give you an ability to judge criminal intent? The balance of the bank may not be related at all to somebody in error or who for other reasons is developing his own checkbook. If you could see his checkbook and could see where he knew he did not have the money in the bank—but the balance in the bank account for any given day would be quite different.

Mr. O'SHEA. What happens very often is that a victim will bring in a check that has been returned, and when the investigator goes back to the bank, he will find that there are maybe 34 or 35 checks returned that nobody has complained of, and this will show that the person has a consistent pattern of issuing checks with no money or very little money in his account.

Senator CRANSTON. Pete.

Congressman STARK. Could I follow this up. I wonder if it isn't true that there is a real difference between a person who on Friday decides the weekend looks long and lonely without an extra \$100 and really intends to get that \$100 back somehow next week and cashes a check at Safeway or whatever, and a person who comes in town with phony identification. Is there a pattern there that you see? The professional checkpasser, in my limited knowledge, very seldom has an account in the bank itself. He is not the guy who lives here and has opened an account.

Occasionally some guy might run an account for the purpose of kite passing. Usually the checkpasser had stolen the checks—payroll checks—and by the whole mode of operating it was completely different than you or I running short at the end of the month. If you just took the people who were out to steal money in the sense of running a game on the merchants as differentiated from the guy who always intended to pay it back and was not going to move out of town, how many would you say were hard-core criminals and how many not—out of 10,000?

Mr. O'SHEA. I said we found a sufficient criminal intent in approximately 2,000; it is 1,980.

Congressman STARK. As many as 2,000 real bunco artists?

Mr. O'SHEA. We felt they had enough criminal intent to take that to the district attorney's office.

Maybe the person who issues the check has absolutely no interest or no desire to honor that check. He has shown his complete bad faith. He is not just passing one check, but he has multiple victims, such as the person who has one criminal complaint but there are 35 or 40 victims.

May I point out that very often we have—in fact, Friday we had a situation where a grocer came in, where a resident of the neighborhood for the last 3 years who had been writing checks for those 3 years on that bank, wrote three checks totaling approximately \$100 total and walked out and left. He just left the area and left three worthless checks and closed his account.

There is quite a bit of this. There is a lot of bad faith, and this is a crime.

Maybe it is smalltime crime, two-bit crime, it is not the professional bunco artist, but the State of California has deemed this to be a serious enough crime that they don't go by the standard of grand theft definition, which requires theft of \$200 to be a felony. They say that issuance of a worthless check over \$100 is a felony.

Congressman STARK. The same guy who left town on Friday with \$100 of worthless checks in the neighborhood might just as well have done it with Master Charge, Bank of America, or Macy's, where he had a charge account and charged a \$100 suit and left town. If he charged a \$100 suit and never answered Macy's again, Macy's has no way of going after the guy. They would have to go to a check collection agency. I often worry that your department has been imposed upon by the commercial world to do the job they don't want to do, which might involve getting to know the checking or charge account customer better, or the merchant cashing his check. Do you agree that some large portion of this sort of effort could take the burden off your back? Would a process that is more personal and careful prevent many of these cases before they happen?

Mr. O'SHEA. There is no question about it that if this bill goes into effect, it will take a considerable burden off our back. We will not be able to investigate these types of complaints. Whether that is right or wrong—but that is according to the head of our fraud detail. It would be impossible, we only have six investigators that handle all these complaints. We don't have the money, the board of supervisors does not give us the amount of money to put more people on the fraud detail,

and the administration of the department requires more people on the street rather than investigators, so the chances are either of minimum investigation or no investigation.

Senator CRANSTON. Thank you very much. You have been very helpful, I appreciate it.

Our final speaker is Maureen Lenahan, Family Support Council and Family Support Division of the district attorney's office, Alameda County.

We are delighted to have you with us. Thank you for your patience.

I want to apologize that I may have to leave before you complete your testimony. I have been called to something else. Pete, will you please wind up the hearing, and Miss Jordan or Mr. Shefler may also ask some questions.

STATEMENT OF MAUREEN LENAHAN, ALAMEDA DISTRICT ATTORNEY'S OFFICE, FAMILY SUPPORT DIVISION

Ms. LENAHAN. Very well.

As stated, I am with the Alameda district attorney's office, currently assigned to the family support division.

I would respectfully like to voice the Family Support Council of California's opposition, as well as our own department's opposition, to S. 2200. The Family Support Council of California is composed of members of the attorney general's office, district attorneys and their investigators, probation officers and welfare personnel. All of us are actively involved with collecting absent parent child support contributions.

We felt that this legislation will allow individuals to use federally insured, supported and controlled institutions to conceal monetary assets in order to commit tax frauds, welfare frauds and to avoid child support obligations. From our point of view this places such an unreasonable burden on the investigation on the above typed criminal activity as to make its detection and prosecution almost impossible. This bill, we feel, will impede the effective and efficient enforcement of our child support collection efforts here in the State of California.

In Alameda County alone we have over 9,000 open computerized accounts, collecting absent parent child support contributions. In many instances, because of the manner in which the court order reads, the collections come through our office, payable to the Treasurer of Alameda County, and once we receive the check we will draw a warrant on our own treasury and forward it to the mother and her needy children. But before a warrant can be issued on the county's account and forwarded, we must verify that the absent parent's check has cleared the bank, and therefore we are permitted to draw the warrant. This verification is usually done by telephone to the absent parent's bank, by verifying the existence of the account, giving the number on the check and checking to see whether the check has cleared or not.

If we are not able to verify checks in this manner, it is conceivable that mothers and their needy children will have to wait up to 25 days for bank verification to be received by us in order that we may draw a county warrant for the mother and the needy children.

I think in the enforcement of child support delinquent accounts, one of our most effective remedies is to issue executions or attachments of bank accounts, where the child support obligation has become greatly delinquent in the amount of \$1,000 or more.

To issue a writ of execution on the bank account, we have to verify the existence of that account and also to some extent the size of that bank account. We don't want to issue writs of execution on bank accounts for \$10 or \$20, when our delinquency is up in the thousands of dollars, because that would be a fairly futile process. Therefore, we feel if we cannot verify the existence of a bank account, identify the bank account sufficiently to have a writ of execution issued, to some extent that bank account, which is a most effective tool in collecting child support, will not be available to us.

Also, in prosecuting criminal 270's, criminal nonsupport of minor children, and in using the civil court process order to show cause in re contempt, both are used extensively throughout California by our family support units. We must show that the defendant absent father has sufficient funds to support the children.

Where a father is self-employed or retired, the existence of a bank account or bank accounts may be the only means we have to show ability to support minor children.

Again, this requires verifying accounts, the extent of the account, and then identifying the existence of the account.

Also, because of the inherent interrelationship of nonsupporting absent parents and welfare when fathers don't contribute to their children's support, mothers and children ipso facto usually have to go onto welfare. District attorney investigators as well as welfare department investigators are actively involved in determining welfare eligibility and in recovering welfare frauds.

One of the eligibility requirements for welfare is that you cannot have excess personal property in excess of \$600, or excess income over a specific amount, depending upon the size of your family.

Therefore, we feel that certain basic threshold investigatory information received from financial institutions is essential in determining if the welfare recipient is actually entitled to receive welfare and therefore eligible, or if the recipient has excess income, which is sometimes shown by a bank account.

If her grant is \$197 a month and she is depositing \$300 in the account in the month, we know she has income from another source that has not been reported to the welfare department.

Usually in these welfare fraud cases and also in cases where an absent parent is not supporting his minor children, the information about existing bank accounts comes to an investigator usually from either an estranged spouse, an anonymous phone call, some neighbor who sees the welfare system being used and who does not want to get involved but wants something done about, or from the investigator's own observation of expensive personal property that would indicate to him that a welfare recipient or an absent parent has more assets than he told the welfare department or he has told the family support division.

While this is good type information, it is not really sufficient probable cause to obtain a search warrant.

So that your provisions in the bill would eliminate us from this basic investigation. One, we can't get a search warrant, because we don't have sufficient probably cause from the type of information that we have obtained.

Two, it is unrealistic to think that any defrauding welfare recipient or nonsupporting absent parent authorizes us to check his bank account.

The district attorney does not have the right to use an administrative subpoena, and before we can charge a case, we have to have basic information, therefore before a case is charged, we have no judicial process.

So by limiting the basic investigatory information that is essential for our operation, we would be unable to proceed with these investigations.

Further, the Family Support Council feels that Senate bill 2200 is discriminatory as it prohibits any governmental agency from obtaining crucial investigatory information from financial institutions while allowing private citizens and the press access to this information.

Congressman STARK. Could I interrupt you there? I saw that paragraph in reading ahead in your testimony. I wonder if you could elaborate on that particular point. It is somewhat unclear to me.

Ms. LENAHAN. I think it was last week or the week before last when one of our investigators had some type of information that a husband and wife that were on welfare in Alameda County did have a bank account, and there was a bank account in existence at a particular bank. He went down to the bank and tried to see the securities operations officer to identify the bank account and the extent of the bank account to see if, in fact, they had excess personal property. The security operations officer said she could not give that information to law enforcement.

So the investigator left, and knowing that that information had been given to private citizens, the next day he talked to the same bank, talked to the very same operations officer, indicated that he was a contractor and doing some work for this particular party, and that they had agreed to pay him by check, and he was wondering whether there were sufficient funds in the bank for him to accept their check.

The same security officer, thinking that he was a contractor, told him, yes, there would be sufficient funds in that bank account that he could accept a check in excess of so many thousand dollars.

To further verify a signature on the check, he wondered if either party could sign the check if he accepted a one-party signature from either party, if that would be sufficient from that account, and again the security operations officer told him, yes, she could sign the check.

In this sense the whole attitude of restricting law enforcement from certain basic information, while allowing this information to credit agencies, to private individuals who inquire, is discriminatory, and the bill would not—as I read it—prohibit private citizens or private collection agencies from obtaining that information.

Congressman STARK. I believe that it would. I must disagree on that interpretation. Whether the investigator were, in fact, a contractor or an investigator, in both instances, in my view, this would be improper. Therefore, I don't want to leave uncorrected the idea that the press or

private collection agencies or anybody else should have this information either.

What you just portrayed could very well happen with a variety of practices in the banking industry today. In fact, if your investigator said instead that he was from another bank, he would probably get even more information.

But I am not sure it is right. I'm sorry, go ahead.

Ms. LENAHAN. I was referring to the provision of sections 4 and 5 which only seems to prohibit governmental, local, State or Federal agencies from obtaining the information. Both sections 4 and 5 of the bill seem to specifically indicate those are the only people prohibited from obtaining that type of information.

Congressman STARK. Very quickly, in the original act, the Secretary of the Treasury was given the right to get information about any record or any bank account transmitted to any other governmental agency almost unfettered by regulatory letter, and those sections were designed to correct that previous legislative oversight.

Ms. LENAHAN. All right. Contrary to the belief of the backers of this legislation, I do not believe that most citizens expect that there exists a right to privacy in financial records. I think that was borne out this morning by the vice president of Wells Fargo Bank, who testified and who said that he believes that most people that do business or citizens that do business with his bank are aware of the fact that certain governmental agencies do have access to bank records. So that when we do talk about a right of privacy, and as the ACLU has pointed out, one of the most important things is that the individual doing business or the person who is doing business with the bank expects that their records be private.

Second, the society recognizes that as a reasonable expectation.

I think both of those criteria for the right of privacy test do not exist in financial records, bank records themselves.

I agree when you start going through every check that a person issues to discern a pattern of how he lives and who he associates with and what he does with his time and money, then we are into something a little different, and there does exist a right to have that kind of information not disseminated and not to have dossiers compiled on the lives of private individuals.

As far as this legislation goes to that end, I think it is a very legitimate and very real concern and one that the American people should have protected.

Congressman STARK. Thank you. You represent the department out of which one of the most famous Supreme Court Justices in this country had come, a very able district attorney, and a department which does an outstanding job to keep our district as free from crime as humanly possible.

We have a tremendous burden in this particular region, more so than in many areas of the country. There are a substantial number of welfare recipients, people who need aid and assistance, and in this large kind of bureaucracy that is dispensing public money and/or helping to collect private money, there is a lot of opportunity for wrongdoers. Yours is a difficult job.

I would just like to cover briefly some of the areas that you covered today, because for us to pursue this legislation in the face of hungry

children and single mothers done out of their rightful and often meager monthly pittance is a task that no legislator relishes. And you indeed have motherhood on your side.

I would like to see if we can't come to some amicable terms with your cause.

For instance, in your earlier testimony you mentioned that the courts order child support payments made payable to the Treasurer. Is this required in all cases, or is there any reason why a check can't be made payable to the mother herself? I am unclear about the necessity of your having a check made payable to Alameda County and then another check made to Mrs. Jones?

Ms. LENAHAN. The checks come basically to our office first, so that when we go into court we have records how much the absent father paid, when he paid it, and accurate statistics as to payments.

Congressman STARK. If the check were made payable directly to Mrs. Jones and you were able to see Mrs. Jones, if you had a check in your hand or Mrs. Jones did, made payable to her and drawn on the Bank of America, then under present law—and I would submit under S. 2200—you would be able to present that check at the bank, and they could immediately verify whether or not it was covered and pay it. It would be an immediate transaction.

With the advent of an electronic transfer system, I see no reason why the law would not accommodate a third party in effect verifying a check, any more than you could take a check drawn on the Treasurer, and rather than deposit it through the normal channels go right to the bank and collect it.

That may be more troublesome, but what you can physically do by walking down to the teller's window, where there happens to be a bank available, it seems to me you ought to be able to do by electronic transmission.

If you and I could agree that could happen under this bill, the mechanical problems of bank transfers notwithstanding, would that tend to handle that objection?

Ms. LENAHAN. Yes; that really would, because we do have a lot of verification that we do, and if you could walk down to the bank and cash the check, why can't you verify it on the telephone?

Congressman STARK. Given the proper identification procedures, I don't know whether it would be difficult to devise a compromise under the act. I still think back to the days when there was great indignation about enforcing welfare laws, when there was spying literally, looking over the transom into the bedroom to see whether there was a man there on weekends in the same bed with the woman who contended there was no marriage partner.

This has always seemed to me to be the dehumanizing part of welfare. Perhaps for us legislators to correct the problem that you are talking about, we must make the measures relate directly to need. Is the child hungry? Not whether or not a person in a remote place has a few hundred dollars or \$1,000 sequestered in a bank account.

I would hope we could do two things this morning: We ought to revise the approach in which we help people, but second, we must strengthen their constitutional right to privacy, and if you would agree with me that we could take that kind of standard away from deter-

mining welfare, we might get two steps ahead, instead of one step ahead and two steps backward.

Ms. LENAHAN. I think with welfare, the problem we see in Alameda County, there is only so much money to go around and the people that are really needy should get the money, not the people that have money in the bank account.

We see so many really needy people, that is another example when you see somebody with \$5,000 or \$10,000 in the bank account who has his wife and five children on aid, that is such an abuse of the system that it takes away from those who really need the welfare, that in a sense identifying existing assets is a very important part of distributing efficiently and equitably the welfare funds that are available.

Congressman STARK. If a person is hiding the asset, he is not that mobile. Couldn't that be easily determined? Would he have that much trouble in getting a search warrant?

I am not familiar with the types of warrants or subpoenas, but it would seem to me, based on those kinds of tips, you ought to be able then to go to the judge and say, "We have it on good authority that these assets exist."

Ms. LENAHAN. But the problem is the authority. First, you have to have a reliable informant. Then you have to have reliable information. Usually an informant is reliable, "What do you mean he is not paying child support? He has got \$10,000 in the bank." The last time she was with him, that is 6 months ago, and that information is 6 months old—the lady that is reporting to us the fact that there are assets may be a reliable citizen, but the information is not reliable in that it is not timely information, and under the two-prong test of Aguilar, we cannot obtain a search warrant in the case.

Congressman STARK. You lose me on a technicality there.

How would you proceed, whether or not the person's observation is correct, if this law is not enacted?

Ms. LENAHAN. As stated in the Congressional Record, it is up to the bank whether they want to give us that information and a lot of banks will give information that an account exists and a digital information on that account.

Congressman STARK. Assume for the moment that the banks won't. I know one bank for sure that used not to, and Wells Fargo said they would not. How then would you proceed? Could you not then go back and get a search warrant and subpoena?

Ms. LENAHAN. The thing that we could do, we could not get a search warrant, because I think we would have no more information, and this problem is a very recent one that has become more apparent after the Stark case and after certain banks have become more cautious as to law enforcement.

So it is really a very recent problem in our experience and we don't have that much experience to relate what we would do at that point.

We could issue a complaint, charge the people criminally, which would be terribly unfair, and if we did not turn up the evidence dismiss. But if we are to proceed in that manner, the criminal complaint that would issue, they would be jailed, they would have to post bail, and if we turned up the fact that only \$200 existed in the bank account rather than the thousands somebody told us existed, we would not be

able to proceed, and the people would have been more annoyed knowing whether we had a case or not rather than charging the information and then finding if we had a good subpoena.

Getting the basic information, which I feel is basic threshold investigatory information, the existence of an account and the digital number of the account. Not how it got there, not going through every little check that came through.

Congressman STARK. I'm sure that knowing that exists, it is a question of how you find it out.

Ms. LENAHAN. But the Internal Revenue finds that basic information out, because every bank has to report interest paid.

Congressman STARK. Let me point out that there is a vast difference. Interest paid has absolutely no relationship at any point in time to the amount of money in that account. That interest paid could involve an average amount, or it could be carried by the month, or it could involve an amount that was in there for 2 days, sometimes in the middle of the year. The information there, which is not transmitted to anyone else, I might add, is so vastly different from the kind of information that you want that it is a completely different situation.

Ms. LENAHAN. Right, I do think you can't pinpoint the time that the interest was paid on certain money, but you can from the interest notes that go out to the Federal and the State governments.

Congressman STARK. You can't determine the amount of the principal, because you can't determine the interest rate, nor can you determine the length of time, only income.

Ms. LENAHAN. But within a digital range, within the same digital range that we would like to be in.

Congressman STARK. I am submitting \$300,000 for one day, or it could be \$1,000 all year.

Ms. LENAHAN. I would agree with that, yes.

Congressman STARK. What I would like to come back to is that I fervently hope that we can find a way to protect this right to privacy, which so often in your profession is the right that is most invaded, and particularly invaded by those people who are trying to help. I say this most sincerely. I hope that you will think about other testimony that was given here this morning and perhaps be good enough to write in or perhaps to even discuss again with your boss ways in which we might be able to accommodate the needs of your department and the bill.

Ms. LENAHAN. There is just one other comment and I do believe in the right to privacy, but I think when we try to extend confidentiality and make bank records privileged information, we are going so far beyond the recognized privileged and confidential information, the confidentiality between lawyer and client, priest and penitent, husband and wife—these very personal relationships where communications are confidential—we are going into the commercial world and trying to make commercial transactions privileged and confidential.

Congressman STARK. As Professor Cole eloquently stated earlier, if your client or the public at large were dealing with cash and the type of accounting I can remember, where the head of the household would put a various amount of cash in a variety of envelopes tacked on the bulletin board, and the bookkeeping was done by receipts and a small

pocket notebook—that information, because it was within the cartilage of the house, was private information that you couldn't get at.

Now, we have to accommodate living in a modern, complex world, instead of sorting the weekly paycheck. It was not a check then, but a pay envelope, distributed among lots of other envelopes, which somebody saved to the proper times of the month or week to be taken to the drugstore to pay the bill. And you did not have those, unless you were very rich. To find a place in Alameda County where you can pay P. G. & E. by cash—

Ms. LENAHAN. Capwell's.

Congressman STARK. That would be a long way to go, so it is indeed a problem. This person who traditionally could keep that information very confidential is now, by necessity, using a commercial transaction. I don't know whether there is any more right to get at those checks or that account than you had a right to get at that little book or to look in the envelopes on that bulletin board.

Ms. LENAHAN. The courts have said it is a decision which way the legislature wants to go, as Professor Cole pointed out, they're not privileged records, in fact, they are not within the fourth and fifth amendments. It is a question.

Congressman STARK. In court he told us, that if it went below \$5,000 they would want to reconsider. I'm not sure the word "higgledy-piggledy," was used, but the legislatures ought to get about passing some laws to define this.

CAROLYN JORDAN. Are there any provisions of the State bill that you want to comment on, the compromises?

Ms. LENAHAN. I have the State bill. I am not currently aware what compromises are pending on the bill.

CAROLYN JORDAN. When you find out that a mother has cash or assets, do you automatically cut off payments, or do you have an administrative hearing?

Ms. LENAHAN. We are only involved, our office is only involved, with charging criminal and prosecuting welfare frauds.

A welfare recipient is always entitled to any fair hearing before the department.

CAROLYN JORDAN. That is before it gets to you?

Ms. LENAHAN. Before they can cut off their grant.

CAROLYN JORDAN. The welfare agency?

Ms. LENAHAN. They are investigating, there are investigators with the welfare department who are doing nothing but welfare fraud investigations.

We have an investigator with our department, the district attorney's office, that because of the interrelationship, when we are interviewing people, tips, or areas of fraud, or areas of inconsistency, will come up, and we have an investigator from the district attorney's office.

CAROLYN JORDAN. Do they generally look at the bank records after they get the tip and turn it over to you, or do you generally look at the record?

Ms. LENAHAN. The attorney does not, the investigator does all the preliminary work.

CAROLYN JORDAN. In your department?

Ms. LENAHAN. In the district attorney's department and also in the welfare department, there are two sets of investigatory departments.

Congressman STARK. So at the present time all the people in the investigative agency, working for the district attorney and the welfare department, can get at the bank?

Ms. LENAHAN. Insofar as the bank giving us certain information.

Congressman STARK. Would you define exactly what it is you need from the bank; do you need a pattern of deposits or do you need the actual amount in the bank?

Ms. LENAHAN. It depends, we want to issue a writ of attachment or a writ of execution against a bank account, the basic thing we need is to verify the existence of the account and some estimation of the extent, whether it is \$10, \$100, \$1,000, or \$10,000.

Congressman STARK. You need the balance?

Ms. LENAHAN. Right.

Congressman STARK. Do you need to look at the record of deposits?

Ms. LENAHAN. Not on that particular type of case we would not need to.

Congressman STARK. Is there a type of case on which you do?

Ms. LENAHAN. I would imagine that a welfare fraud investigator who has some information that a person is self-employed and is not reporting his income, and drawing welfare, would want to see some kind of deposit information, how much money he's putting into his bank.

Congressman STARK. But would it be sufficient for the bank to give you the amount and times and frequency of deposits as opposed to showing you the checks?

Ms. LENAHAN. Yes. I am not an investigator but from my understanding of how it is investigated, the fact that certain amounts were deposited at a specific time without knowing where or what they came from, to charge a case would be sufficient.

Congressman STARK. So it would be sufficient for the bank to give you the information, as opposed to your searching the records or looking at them yourselves?

Ms. LENAHAN. Right. As I understand our process of investigation.

STEPHEN SHEFLER. We will have some additional questions sent to witnesses and we would appreciate it if you would respond to them.

Congressman STARK. Thank you very much.

[Whereupon the hearing closed at 12:35 p.m.]



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