University of Dayton Law Review

Volume 3 | Number 1 Article 12

1-1-1978

Search and Seizure: Standing to Challenge Illegally Obtained Bank Records

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SEARCH AND SEIZURE: Standing to Challenge Illegally Obtained Bank Records—*United States v. Miller,* 425 U.S. 435 (1976).

Amid growing concern over the increasing utilization of foreign financial institutions to evade taxes and conceal other illegal activities,[1] Congress passed the Bank Secrecy Act.[2] It was aimed at organized and white collar crime, and required banks and other financial institutions to maintain records of customers' names and the activity in their accounts.[3] Moreover, the Act gave the Secretary of the Treasury broad discretion to determine what types of records and other evidence are useful in criminal, tax, or regulatory investigations or proceedings and to "prescribe regulations to carry out the purposes of this section."[4] Pursuant to this authority, the Secretary promulgated regulations directing banks to report each deposit, withdrawal or transfer involving domestic transactions in currency of more than $10,000.[5]

In *Stark v. Conally,*[6] the Act was challenged on the ground that it was an unconstitutional invasion of citizens' right of privacy, in violation of the fourth amendment. The *Stark* Court originally struck down[7] the domestic reporting provision,[8] but in *California*

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1. *Hearings on H.R. 15073 Before the House Committee on Banking and Currency,* 91st Cong., 1st & 2nd Sess. 18 (1970) (statement of Robert M. Morgenthau, U.S. Attorney for the Southern District of New York).

2. 12 U.S.C. § 1829b (1970) (retention of records by insured banks); 12 U.S.C. § 1730d (1970) (retention of records of savings and loan institutions insured by the Federal Savings and Loan Ins. Corp.); 12 U.S.C. §§ 1951-59 (1970) (retention of records by noninsured financial institutions); and 31 U.S.C. §§ 1051-1122 (1970) (reporting of domestic and foreign currency transactions). Enacted as Act of October 26, 1970, Pub. L. No. 91-508, 84 Stat. 1114-24.

3. 12 U.S.C. § 1829b (1970), implemented by 31 C.F.R. §§ 103.31-.37 (1976). In addition, 12 U.S.C. § 1829b(d) provides:

> Each insured bank shall make, to the extent that the regulations of the Secretary of the Treasury so require—
>
> (1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and
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> (2) a record of each check, draft, or similar 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, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

4. Bank Secrecy Act, 12 U.S.C. § 1829b(b)(1970).

5. 31 C.F.R. § 103.22 (1976).

6. 347 F. Supp. 1242 (N.D. Cal. 1972).

7. The *Stark* Court noted that the Act "so far transcends the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the right of privacy protected by The Bill of Rights, particularly the Fourth Amendment . . . ." *Id.* at 1251.

8. 31 U.S.C. § 1081 (1970), which provides, in part, as follows:

> Transactions involving any domestic financial institution shall be reported to the

Bankers Ass'n v. Shultz,[9] the Supreme Court later upheld the Act's constitutionality, at least to the extent that it did not infringe on the rights of the financial institutions.[10] Thus, the constitutionality of the Act has been determined, at least in a limited fashion. It must be noted, however, that the *California Bankers* decision "did not place the judicial stamp of approval upon every prosecutorial tactic for obtaining records compiled under the requirements of the Act."[11]

It is the purpose of this case note to focus on the implications of *United States v. Miller*,[12] a recent Supreme Court case which denied a bank depositor limited standing to challenge an illegal subpoena of his bank records.[13] This case note will first analyze the case and then discuss its ramifications regarding future government searches of a bank depositor's bank records.

I. Facts of the Case

On January 9, 1973, a fire broke out in a Kathleen, Georgia, warehouse rented to the defendant, Mitchell Miller. While fighting the blaze, firemen and sheriff department officials discovered a 7500 gallon capacity distillery, 175 gallons of non-tax paid whiskey, and related paraphernalia. Although no arrests were made at the time, five persons, including the defendant Miller, were subsequently charged.[14]

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.

9. 416 U.S. 21 (1974).

10. However, the Court noted that because the depositors in the suit did not engage in the $10,000 transactions which were affected by the Act, they lacked standing. Thus, the Act's constitutionality has not been determined with respect to a bank depositor's rights.

11. United States v. Miller, 500 F.2d 751, 757 (5th Cir. 1974), *cert. granted*, 421 U.S. 1010 (1975), *rev'd*, 425 U.S. 435 (1976).

12. 425 U.S. 435 (1976).

13. Limited standing, as opposed to full standing, would enable a party to enter an appearance for a limited purpose only. In this case, it would be for the purpose of challenging the legal sufficiency of the subpoenas. Thus, while a bank depositor would have no standing to challenge the use of his bank records if the existing legal process is complied with, which is consistent with recent federal court decisions, *see* cases cited note 25 *infra*, he would have limited standing to challenge any illegally obtained evidence sought to be admitted at his trial. *See generally*, 36 La. L. Rev. 834 (1976). It is the position of this casenote that such a procedure is useful as a means of excluding illegally obtained evidence, and to prevent an abuse of subpoena powers by the state.

14. The charges included possessing an unregistered still, carrying on the business of a distiller without giving bond and with intent to defraud the government of whiskey tax, possessing 175 gallons of non-tax paid whiskey, and conspiracy to defraud the United States of tax revenues.

On January 23, 1973, a subpoena *duces tecum*, completed by the U.S. Attorney's Office, was served on the presidents of the two banks at which the defendant had accounts. These subpoenas required the two bank presidents to produce all records of the defendant's accounts from October 1, 1972, through January 23, 1973. These records, which were being kept in compliance with the Bank Secrecy Act, were supplied, but the defendant was not advised of the subpoenas or of the fact that copies of the records had been turned over to a federal agent.

Prior to trial, the defendant moved to supress copies of checks and other bank records obtained by means of the subpoenas. Miller alleged the subpoenas were defective, in that they were issued by the U.S. Attorney's Office rather than by a court, no return had been made to a court, and they were returnable on a date when the grand jury was not in session.[15]

The district court dismissed the motion, and the prosecution was allowed to use the surrendered copies, several of which helped establish at least three of the counts charged against Miller.[16] The defendant was subsequently convicted.[17]

On appeal, the Court of Appeals for the Fifth Circuit reversed[18] holding that the records in question fell within the zone of privacy protected by the fourth amendment; "that obtaining copies of Miller's bank checks by means of a faulty subpoena duces tecum constituted an unlawful invasion of Miller's privacy; and that any evidence so obtained should have been suppressed."[19] In reaching its decision, the court of appeals concluded *sub silentio* that the defendant had standing to challenge the subpoenas.

II. The Supreme Court's Decision

On *certiorari* to the Supreme Court of the United States the decision of the court of appeals was reversed. In an opinion delivered by Mr. Justice Powell, the Court held that the documents were the banks' business records and not the respondent Miller's personal

15. The grand jury did not meet again until February 12, 1973.

16. Copies of the obtained checks were introduced at trial to establish the overt acts alleged to have been committed in furtherance of the conspiracy, which included three financial transactions—the rental by Miller of a van-type truck, the purchase of radio equipment, and the purchase of a quantity of sheet metal and metal pipe.

17. The trial of the defendant began on April 23, 1973, and ended in a mistrial on May 1, 1973. A second trial commenced on May 7, 1973, and resulted in the defendant's conviction. *See* note 14 *supra*. The defendant was sentenced to three years imprisonment.

18. 500 F.2d 751 (5th Cir. 1974) (affirmed in part, but Miller's conviction was reversed).

19. *Id.* at 756.

papers. Powell noted that the respondent could not have asserted either ownership or possession of the records.[20] Moreover, because the original checks were negotiable instruments to be used in commercial transactions, and were voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business, the respondent had no reasonable expectation of privacy.[21] The majority concluded that, since the respondent had no protectable fourth amendment interest, he lacked standing to challenge the legal sufficiency of the subpoenas. In coming to this conclusion, the Court failed to reach the important issue of whether the subpoenas were defective, nor did the Court give any indication of the importance of this contention.[22]

Mr. Justice Brennan dissented from the reversal because he felt the accused had a reasonable expectation of privacy in his bank statements and records, and that obtaining the accused's bank records without benefit of legal process constituted an illegal search and seizure.[23] Mr. Justice Marshall, in a separate dissenting opinion, refused to follow the majority because the record-keeping requirement of the Bank Secrecy Act permits the seizure of customers' bank records without a warrant for probable cause, and because the respondent had standing to challenge the Act's constitutionality.[24]

III. ANALYSIS

A. *Access to Records Governed by Existing Legal Process*

Federal courts have consistently held that bank records are not the private papers of the depositor, and consequently the depositor has been denied standing to challenge their appropriation and use.[25] As one writer has noted, however, cases denying standing have only dealt with legal subpoenas and summonses.[26] This was not the case in *Miller* because the subpoenas challenged there had not been issued by a court, but by the U.S. Attorney's Office. By denying

20. 425 U.S. at 440.

21. *Id.* at 442.

22. The Supreme Court stated that "[W]e do not limit our consideration to the situation in which there is an alleged defect in the subpoena served on the bank." *Id.* at 441 n.2. The Court never addressed this issue again. It is this writer's opinion that the Court should not have dismissed so important a question as casually as it did.

23. 425 U.S. at 448.

24. *Id.* at 455-56.

25. *See, e.g.*, United States v. Continental Bank and Trust Co., 503 F.2d 45, 49 (10th Cir. 1974); Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326, 333 (2nd Cir. 1973).

26. 36 LA. L. REV. 834 (1976). *See, e.g.*, Galbraith v. United States, 387 F.2d 617 (10th Cir. 1968); Cole v. Franklin National Bank, 342 F.2d 5 (2nd Cir. 1965).

Miller standing to challenge the defective subpoenas, the Supreme Court sanctioned the use of illegally obtained evidence.

In declaring the Bank Secrecy Act constitutional, the *California Bankers* majority stated that "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."[27] Thus, the majority was concerned about legal protections for bank depositors, and based its decision on the premise that depositors would have "adequate legal protections from improper government access to their records."[28]

One of these protections is requiring that a subpoena be issued by a judge, and then only upon a showing of probable cause.[29] The purpose of the hearing before a court[30] is to insure that an individual will not be directly confronted with the organized forces of society; the judge acts as a buffer between the individual and the state.[31] In *Miller,* however, the subpoenas were neither issued by a court nor returned to one. The delivery of bank records without a hearing on the issue of probable cause violates the fourth amendment[32] and does not constitute sufficient "legal process" within the meaning of *California Bankers.*

In its decision, the *Miller* Court dealt a death blow to the "existing legal process" relied upon by the *California Bankers* Court when it upheld the Bank Secrecy Act's constitutionality.[33] Over ninety years ago the Supreme Court decided *Boyd v. United*

27. 416 U.S. at 52. The Report of the House Committee on Banking and Currency states: "It should be borne in mind that records to be maintained pursuant to the regulations of the Secretary of the Treasury will not be made automatically available for law enforcement purposes. They can only be obtained through existing legal process." H. REP. No. 91-975, 91st Cong., 2d Sess. 10, *reprinted in* [1970] 2 U.S. CODE CONG. & ADMIN. NEWS 4395.

28. 500 F.2d at 757.

29. U.S. CONST. amend. IV.

30. Subpoenas may also be issued by agencies, but only by congressional authorization. *See, e.g.,* I.R.C. §§ 7602-7609. In such a case, the judicial role changes. As the Supreme Court noted in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), "[t]he requirement of 'probable cause, supported by oath or affirmation', literally applicable in the case of a warrant, is satisfied . . . by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and that the documents sought are relevant to the inquiry." *Id.* at 209. The Bank Secrecy Act, however, contains no such authorization.

31. *See, e.g.,* United States v. United States District Court, 407 U.S. 297, 313-18 (1972); Wong Sun v. United States, 371 U.S. 471, 481-82 (1963).

32. California Bankers Ass'n. v. Shultz, 416 U.S. 21, 90 (1974) (Douglas, J., dissenting).

33. In *California Bankers,* Justice Powell joined the majority opinion, but he made it clear that a significant extension of the reporting requirement would pose substantial constitutional questions, and stated that concurrence with the majority was based upon the provision of the Act as narrowed by the regulations. *Id.* at 78-79. In *Miller,* however, Justice Powell appears to have forgotten about these constitutional questions.

States,[34] in which it was stated that "a compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the Fourth Amendment . . . ."[35] Since the *Miller* decision, however, it can be questioned whether the *Boyd* doctrine still retains its vitality.

As the court of appeals in *Miller* noted, "the government may not cavalierly circumvent *Boyd's* precious protection by first requiring a third party bank to copy all of its depositors' personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies."[36] But, the Supreme Court's decision in *Miller* allows the government to do just that. By allowing unreviewed government access to personal bank records, the Court has abandoned ninety years of precedent established by *Boyd.* Thus, the "existing legal process" relied upon so heavily by the *California Bankers* majority to protect the bank depositor provides no protection at all.

B. A Bank Depositor's Expectation of Privacy

One of the reasons given by the *Miller* Court to justify its decision was that the defendant had voluntarily conveyed the records to the banks and had thereby knowingly exposed them to the prying eyes of bank employees. It was also pointed out that Miller could not have asserted ownership or possession of the records. The Court concluded that Miller did not have a reasonable expectation of privacy. The Court overlooked the possibility that a bank depositor has at least a limited expectation of privacy,[37] and in so doing denied the defendant standing to challenge the legal sufficiency of the two subpoenas.[38]

In *Katz v. United States,*[39] it was held that fourth amendment protection applies only where there is a reasonable expectation of

34. 116 U.S. 616 (1886). The *Miller* Court tried to distinguish *Boyd* on the ground that the claimants in *Boyd* could assert a right to privacy in those papers based on their ownership and possession of them. Standing, however, does not depend upon a property right. *See* note 59 & accompanying text *infra.*

35. *Id.* at 622.

36. 500 F.2d at 757.

37. It is not this writer's contention that the defendant had a reasonable expectation the records would remain private, but it is contended that a bank depositor does reasonably expect the records will be divulged only pursuant to legal process. *See* text accompanying note 27 *supra.*

38. As noted earlier, federal courts have consistently held that a bank depositor lacks standing to sue, but such cases have only dealt with legal subpoenas and summonses. Such was not the case in *Miller. See* cases cited note 26 *supra.*

39. 389 U.S. 347 (1967).

privacy in an area subject to governmental intrusion.[40] The *Katz* Court went on to say that "what . . . [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[41]

It cannot be gainsaid that a depositor does not expect public disclosure of his private financial transactions.[42] Doubtless some expectation of privacy exists in the details of one's personal financial affairs,[43] even though exposures normally do occur in everyday transactions, *e.g.*, credit checks among lending institutions.[44] Despite such knowledge that each discrete transaction is exposed to the view of other individuals, the depositor does not expect a universal eye to oversee the totality of these exchanges.[45] Furthermore, any exposure by governmental intrusion is not expected to be obtained illegally through, for example, an illegal subpoena.[46]

The California Supreme Court in a recent case[47] noted that a bank depositor's "reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the banks only for internal banking purposes."[48] In that case,

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40. *Id.* at 360 (Harlan, J., concurring).

41. *Id.* at 351-52.

42. *See generally,* 36 LA. L. REV. 834 (1976).

43. City of Carmel-by-the-Sea v. Young, 2 Cal.3d 259, 268-69, 466 P.2d 225, 231-32, 85 Cal. Rptr. 1, 7-8 (1970). In that case, the Supreme Court of California declared that a financial interests public disclosure statute directing that every public officer and each candidate file a statement describing his investments and those owned by either his spouse or minor child was constitutionally overbroad, in that it intruded into the private financial affairs of the numerous public officials and employees. The court noted that "[T]he right of privacy concerns one's feelings and one's own peace of mind, and certainly one's personal financial affairs are an essential element of such peace of mind." *Id.* at 268, 466 P.2d at 231, 85 Cal. Rptr. at 7 (footnote omitted).

44. In *California Bankers,* Justice Powell noted that:

> 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.

416 U.S. at 78-79 (Powell, J., concurring).

45. *See generally,* 51 TEXAS L. REV. 602 (1972).

46. *See* note 42 *supra.*

47. Burrows v. Superior Court of San Bernardino County, 13 Cal.3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). This decision was quoted with much approval by Mr. Justice Brennan in his dissent in *Miller.*

48. *Id.* at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169. The California Supreme Court went on to hold that the petitioner in that case "had a reasonable expectation that the bank would maintain the confidentiality of those papers which originated with him in check form

representatives of several banks testified that information in their possession regarding a customer's account was considered by them to be confidential.[49]

It is the general rule in other jurisdictions, as well, that a bank impliedly agrees not to divulge confidential information without the customer's consent, unless compelled by a court order.[50] It has been assumed in those jurisdictions that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life.[51] Other courts have thus held that a bank depositor has an expectation of privacy and that he does have standing to challenge a subpoena of his bank records. The *Miller* Court should have recognized this expectation and granted Miller limited standing.

C. *Standing*

The doctrine of "standing" emanates from the "case or controversy" requirement of the Constitution[52] and from general principles of judicial administration.[53] It seeks to insure that the plaintiff has alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . . ."[54] The *Miller* Court reasoned that because Miller had no reasonable expectation of privacy, he did not have a real interest in the ultimate adjudication. But, as pointed out earlier, a bank depositor does have at least a limited expectation of privacy.

While Miller was denied limited standing, the Supreme Court indicated that the banks involved did have standing and could have objected to the subpoenas. It can be questioned, however, whether the two banks could, or would, adequately represent and protect the

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and of the bank statements into which a record of those same checks had been transformed pursuant to internal bank practice." *Id.* at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.

49. *Id.* at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.

50. *See* First National Bank in Lenox v. Brown, 181 N.W.2d 178 (1970); Milohnich v. First National Bank of Miami Springs, 224 So. 2d 759 (1969).

51. As the Idaho Supreme Court noted in Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P.2d 284 (1961), "It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors." *Id.* at 584, 367 P.2d at 290.

52. U.S. CONST. art. III, cl. 2.

53. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 255 (1953).

54. Baker v. Carr, 369 U.S. 186, 204 (1962). *See also* Sierra Club v. Morton, 400 F. Supp. 610, 623 (N.D. Cal. 1975); Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689, 692 (E.D. Va. 1973).

defendant.[55] As the court of appeals accurately stated, "[H]e whose rights are threatened by the improper disclosure here was a bank depositor, not a bank official, and depositors as well as banks must be accorded the protection of 'legal process' ".[56] If the subpoenas were defective, as Miller contended, then this would not be valid legal process.[57]

Because banks have little to lose, there is no assurance that they have the necessary personal stake to guarantee that clear and justiciable issues will be formulated. A bank depositor, on the other hand, does have an important personal stake, and will suffer direct injury as a result of any governmental abuse of the legal process. As the Supreme Court of California has noted, "[T]he protection . . . [of the bank customer's right of privacy] should not be left entirely to the election of third persons who may have their own personal reasons for permitting or resisting disclosure of confidential information received from others."[58] Accordingly, Miller should have been granted limited standing to protect his own interests.

The *Miller* Court emphasized that Miller could not have asserted either ownership or possession of the records. Standing, however, does not depend upon a property right, but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.[59]

As a further justification for denying standing, the *Miller* Court noted that the Act was not designed to circumvent established fourth amendment rights, but rather "[i]t is merely an attempt to facilitate the use of a proper and longstanding law enforcement technique[s] by insuring that records are available when they are needed."[60] While the elimination of tax fraud and other criminal conduct through the regulation of bank records is a proper govern-

55. Evidence of this fact is the banks' failure to challenge the subpoenas, or even to notify the defendant that his bank records were being requested.

56. 500 F.2d at 758. *See also* Donaldson v. United States, 400 U.S. 517, 537 (1971) (Douglas, J., concurring); United States v. Kordel, 397 U.S. 1, 7 (1970).

57. 500 F.2d at 757-758.

58. Valley Bank of Nevada v. Superior Court of San Joaquin County, 15 Cal.3d 652, 657, 542 P.2d 977, 979, 125 Cal. Rptr. 553, 555 (1975).

59. *See* Katz v. United States, 389 U.S. 347, 352 (1967). *See also* Mancusi v. Deforte, 392 U.S. 364, 368-69 (1968); Jones v. United States, 362 U.S. 257, 267 (1960). In his dissent in Alderman v. United States, 394 U.S. 165 (1969), Justice Fortas went even further, asserting that "any defendant against whom illegally acquired evidence is offered, whether or not it was obtained in violation of his right to privacy, may have the evidence excluded." *Id.* at 205-06 (Fortas, J., dissenting). Justice Fortas felt that this is the only way to fully implement fourth amendment protections.

60. 425 U.S. at 441.

mental purpose,[61] that alone does not justify means that broadly stifle fundamental liberties where the end can be more narrowly achieved.[62] There must be a balancing of interests between the possible assistance to the government in its investigations of citizens, on the one hand, and the right to maintain privacy in one's personal financial affairs, on the other. The *Miller* Court, however, failed to balance these societal and individual interests. In doing so, the responsibility for this balancing is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate.[63]

By allowing an illegal subpoena of a depositor's bank records without benefit of a judicial hearing on the issue of probable cause, the Supreme Court has left the door wide open for unreviewed access to all bank records. Moreover, if the bank depositor is denied standing, no objection will ever be raised unless the bank has its own reasons to challenge the subpoenas.

IV. CONCLUSION

The Supreme Court's recent decision in *Miller* had a fatal effect on a depositor's standing to challenge an illegal subpoena of his bank records. In reversing the court of appeals' decision, the Court denied the defendant the right to challenge illegally obtained evidence which was used against him at trial. This, in turn, created the possibility of convicting a defendant on illegally obtained evidence, which is, or was, that against which the fourth amendment was designed to protect.

At common law, the admissibility of evidence was not affected by the illegality of the means by which it was obtained.[64] The

61. *See* 12 U.S.C. § 1829b(a)(1) (1970), where it is stated that the records are to be maintained because they "have a high degree of usefullness in criminal, tax, and regulatory investigations and proceedings."

62. The familiar rule is that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964). *See also* Shelton v. Tucker, 364 U.S. 479 (1960). One of the ways the end could have been narrowly achieved would be to require a court-issued subpoena before bank records could be released.

63. *See* note 44 *supra*. The *Burrows* court, 13 Cal.3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974), noted that:

> To permit a police officer access to these [bank] records merely upon his request, without any judicial control as to relevancy or other traditional requirements of legal process, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuses of police power.

Id. at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

64. *See* Olmstead v. United States, 277 U.S. 438 (1928).

Court's decision in *Miller* marks a return to this harsh rule, and represents a dangerous step toward further governmental intrusion into the privacy of its citizens. Earlier concerns have been disregarded.[65] Moreover, the Supreme Court has either rejected or overlooked the concern expressed by many state courts over the disclosure by banks of the intimate details found in their depositors' accounts.[66] These state decisions "strikingly [illustrate] the emerging trend among high state courts of relying upon state constitutional protections of individual liberties—protections pervading counterpart provisions of the United States Constitution, but increasingly being ignored by decisions of this [Supreme] Court."[67]

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65. *See* notes 33 and 44 *supra*.
66. *See* notes 43, 48, 51, and 63 *supra*.
67. 425 U.S. at 446 (Brennan, J., dissenting).