



10-1975

United States v. Miller

Lewis F. Powell Jr.

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(Included to
Deny)

DISCUSS

Resps bank statements were
subpoenaed by U.S. atty for
a G/2 ^{hearing} but before G/2
commenced. Resp. was not
notified of the subpoena.

Resp. was convicted on basis
of evidence thus obtained
illegally

DISCUSS
DB

Preliminary Memo

June 5, 1975 Conference
List 1, Sheet 2

The last thing to
do with this case
is Remand under
No. 74-1179

Peltier- UNITED STATES

I think that
both the
standing issue
and the propriety
of the subpoena
might be
a/w

v.

MILLER

Cert to CA 5
(Gwin, Goldberg
and Clark)
Federal/Criminal

Timely (by
extension)

1. Resp was convicted after a trial in the USDC
(M.D. Ga.) (Owens) of five counts of possessing an un-
registered still, carrying on the business of a distiller
without giving bond and with intent to defraud the government
of whiskey tax, possession of 175 gallons of whiskey upon
which no taxes had been paid, and conspiracy to defraud the
United States of tax revenues, violations of 18 U.S.C.
§ 371 and 26 U.S.C. § 5601. He was given concurrent prison

terms of three years. CA 5 reversed on the ground that resp's Fourth Amendment rights were violated by the admission of evidence obtained by defective subpoenas directed to two banks. Rehearing and rehearing en banc were denied, the latter by an 8-7 vote (Simpson, Brown, Bell, Ainsworth, Dyer, Roney, Gee, dissenting). The SG petitions for cert contending that resp did not have standing to raise Fourth Amendment objections to the subpoenas, that the subpoenas were not defective and violative of the Fourth Amendment, and that, if there was such a violation, there was no prejudice to resp requiring reversal of his conviction.

2. FACTS: Agents of the Federal Alcohol, Tobacco & Firearms Unit presented to the presidents of two banks in Georgia grand jury subpoenas duces tecum requiring that they appear in the USDC at 9:00 a.m. on January 24, 1973, and that they produce "all records of accounts, i.e., savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller, Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date." Resp was not given notice of these subpoenas. When the banks supplied the requested materials to the agents, the presidents were told that they would not have to appear at the District Court for the January 24 and grand jury session. The grand jury did not meet until February 12, 1973. The agents had reviewed the bank records and made copies of some which were introduced by the prosecution at trial. They

were used to help establish at least three of the overt acts charged against resp in furtherance of the conspiracy. The presidents of the banks indicated that the microfilm copies of the records which were shown to the agents were kept in compliance with the Treasury and Banking regulations issued under the Bank Secrecy Act. The DC denied resp's motion to suppress the copies of the records.

CA 5 reversed. It noted that this Court in upholding the Bank Secrecy Act in California Bankers Association v. Schultz, 416 U.S. 21 (1974), had observed that depositors had adequate protection from improper governmental access to the records which the banks were required to keep because "access to the records is to be controlled by existing legal process." Id., at 52. In this case, the government had not complied with that legal process: "Surely a purported grand jury subpoena, issued not by the court or by the grand jury, but by the United States Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of Miller's financial records to the government, does not constitute sufficient 'legal process' within the meaning of the majority opinion." Petn. Appx., at 14a-15a (footnote omitted). Boyd v. United States, 116 U.S. 616 (1886), applied: "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." It was an insufficient answer to point

That certainly
sounds correct
to me.

Does
make
sense

NO

to the willing cooperation of the banks. The legal process was designed to protect the depositors as well as the banks.

Judge Simpson, in dissenting from the denial of rehearing en banc, stressed first that the panel had made radical new standing law without discussion. It appeared that the panel had viewed resp as having both an ownership interest in the records and a cognizable privacy interest. Prior to the passage of the Bank Secrecy Act, a depositor had not had a recognized standing to challenge IRS subpoenas of bank records pertaining to his banking transactions. The Act did not require a change in that law. Indeed it would be anomalous to give a depositor greater rights as a result of a statute requiring the keeping of bank records. This issue was reserved for later

It seems to me that the protection of having subpoenas issued by a sitting grand jury is a real one. Even assuming the grand jury will issue virtually all subpoenas the DA requests, it none the less exercises a power of veto, which may at times be exercised. The DA's ability to issue a subpoena on behalf of an anticipated grand jury would seem to lead to provide excessive potential for abuse.

decision in the California Bankers decision. See 416 U.S., at 51-52. Assuming that resp had standing, the dissent found that the subpoenas were not defective. As long as the U.S. Attorney was preparing in good faith for the grand jury session, there was nothing wrong in requiring production prior to the session. That would conserve the grand jury's time and enable preparation for that session. See United States v. Morton Salt, 216 F. Supp. 250 (D. Minn. 1962), aff'd summarily, 382 U.S. 44 (1965). If there is a question about the good faith of the prosecution, then there should be a remand for a hearing on that issue. Even if the process were defective, the defect is not such to require reversal.

Point

3. CONTENTIONS:

a. The SG's contentions follow the points made by Judge Simpson's dissent to the denial of rehearing en banc.

(1) The SG contends that the CA panel erred in assuming that resp had standing to challenge the subpoenas on Fourth Amendment grounds. Several courts had held that there was no such standing to attack IRS subpoenas. See petn, at 9 n. 8. The only protected Fourth Amendment interest belongs to the bank. The depositor has no reasonable expectation of freedom from governmental inspection of the records. Checks and similar documents are knowingly exposed to the public. If it is desirable anyway to restrict governmental access to such bank records, the arguments should be addressed to Congress. The enactment of the Bank Secrecy Act did not change the law of standing in this area. The banks continue to pay for the copying and storing of records. Indeed, depositors have less reason to think that the records will be private. The Act itself requires the maintenance of records having a high utility "in criminal, tax, or regulatory investigations . . . ," 12 U.S.C. § 1829(b)(2), and thus it is doubtful that Congress intended to expand the standing of depositors to challenge governmental access to the records.

(2) Even if resp had standing, there was nothing unlawful about the subpoenas. They were issued in accordance with Rules 17(a) and 17(c), F. R. Crim. Proc. The government

attorney should be able to review the material prior to the grand jury session so that the session can be conducted in an orderly fashion. Much time will be consumed if the grand jury itself has to issue the subpoena, and it has to be returned on a day when the grand jury is in session. Requiring court approval of such subpoenas would waste judicial resources. The subpoena can be challenged prior to compliance in a motion to quash or in a show-cause hearing. There may be some abuse, but that abuse can be handled by the courts. Compare United States v. Bisceglia, ___ U.S. ___ (1975). There was no basis for an inference of abuse here. There was a specific ongoing investigation; the records were identified with some particularity. Indeed the grand jury can issue subpoenas on the suspicion that the law is being violated.

(3) Even if the subpoenas were defective under the Fourth Amendment, it does not follow that retrial was the remedy. Since the records could presumably be reacquired by validly issued trial subpoenas, they could be reintroduced by an independent source. The SG, however, points out that the CA did not indicate whether the taint it had found could be eliminated in this way. The question should be answered now prior to retrial.

b. Resp answers that under State law the banks had limited interests in the checks. They were customarily returned to the depositor. The facts indicate that the subpoenas were being used for a general search of documents in the hope of

finding something of use in a criminal prosecution. The search was too broad and hence violated the Fourth Amendment. See FTC v. American Tobacco Co., 264 U.S. 298, 306 (1923).

The depositor does have a reasonable expectation of privacy in presenting personal checks. The expectation is that the check will be used for the limited purpose of negotiation and then returned to him for his personal record. Compare Katz v. United States, 389 U.S. 347 (1967). Here access was obtained without judicial scrutiny or notice to resp. The facts show the potential for abuse through subpoenaing records for a grand jury, but without ever presenting the materials to the grand jury or making a return in court.

4. DISCUSSION: The CA 5 panel opinion does not discuss the standing question and it cites no authorities for its conclusion that the subpoenas were unlawful. Its opinion smacks of a conclusion that the prosecution was in bad faith and was using the grand jury as a facade, but it makes no findings of that sort nor cites any made by the DC. ^{1/} Perhaps the best disposition of the case would be to hold it for Peltier, No. 73-2000, and then vacate and remand for reconsideration in light of the latter. That would call at least for further discussion of the Fourth Amendment violation by the CA -- if the prosecution should have known that the subpoenas were unlawful -- although the fact that

^{1/} The SG does observe that "[t]he record does not reveal whether any of the bank records were presented to the grand jury." Petn., at 6 n. 6.

I think that's correct. I would certainly feel that my privacy was invaded and my relationship with my bank abused if they gave all my cancelled checks to someone

NO!!
This would engender precisely the kind of confusion you sought to avoid by having that opinion changed

?
I don't
understand
how one relates
to the other
at all?

→ the standing question was explicitly left open here in the California Bankers case would make such a conclusion highly doubtful. See also Morton Salt, supra, 216, F. Supp., at 257. The CA would probably be forced to remand to the DC for an evidentiary hearing on the good faith point. A factor militating in favor of immediate consideration on the merits here would be the possibility that the CA decision has called into question a widespread prosecution practice. The standing issue clearly warrants answering, but the question remains whether it need be reached in this case.

There is a response.

5/27/75

Malysiak

CA Opinion and
Dissenting Opinion
to Denial of Re-
hearing en banc in
Petr. Appx.

ME

The standing point must be addressed before the good faith point. While the remedy (eg: exclusionary rule) may be affected by ~~that~~ issue, the question of standing should not.

*Papers of
Order by
J. Goldberg*

CA 5
appointed

June 23, 1975 Conference
Supplemental List

No. 74-1179

UNITED STATES

v.

MILLER

Resp's Motion for
Appointment of
Counsel

On June 9, the Court granted cert to CA 5 in this case to consider a 4th Amendment issue involving subpoenas served on resp's banks. The Court also granted resp's motion to proceed IFP.

Resp moves that D. E. Rampey, Jr., Esquire, of Warner Robins, Georgia, be appointed to represent him before this Court. He notes that Mr. Rampey was appointed by CA 5 under the Criminal Justice Act for the purpose of responding to the Government's petition for cert.

*Do you
want me
to try to
check on
this?*

↓ JB

*Ginty says
that CA 5
appointment
was by
Goldberg*

Mr. Rampey is a member of the Bar of this Court.

There is no response.

Ginty

ReverseTwo Q's

1. Validity of subpoena issued by clerk at request of U.S. atty while G/Jury was not in session. Not invalid.

2. Whether subpoena of Resp's bank records violates 4th Amend?

No. Resp. relies on Katz but U.S. v White (if wire-tap cases are relevant) is more pertinent. ~~It~~

Resp. has no standing to object to disclosure (or subpoenaing) of data he voluntarily placed in possession of another - retaining no possessory interest. Alderman
Jones
Goldstein

Bank Records Act does not change law in this respect.

Wallace (SG)

Subpoena of bank records is consistent with objective of obtaining documentary ev from 3rd parties rather than seeking admissions from an accused or intruding - by search warrants - on D's privacy when G/J is not in continuous session, it is customary for U.S. atty to request issuance of summons. Otherwise, work of G/J's would be slowed.

Basic error of CA 5 was holding that alleged defect in subpoena resulted in invasion of privacy.

4th Amend cannot be construed as a general rt. to privacy

Relies on Goldstein, Jones, Wong Sun, & Alderman

Donaldson ~~holds~~ is directly on point: ok to ~~sub~~ subpoena records of 3rd parties

Wallace (cont)

Relies on Couch - even tho it was a 5th amend. case primarily.

No privilege bet. a bank & its customers. ~~Even if it~~

No notice to depositor is necessary or required - but Bk could notify. Wallace says no standing in customer to raise 4th amend claim. May be different as to 1st amend. Associational etc.

Record keeping requirements of Bank Records Records Act do not change general law as to etc. to subpoena records

Under Couch, even if ~~papers~~ records were owned by Bank they had been ~~relinquished~~ relinquished by owner.

Ramsey (for Resk)

Subpoena was invalid.

Relies on reasonable expectation
of privacy under Bank Records
Act.

Relies on Katz as to privacy
also claims a proprietary
interest in records

Agrees that record (micro film)
is owned by Bank but information
is private.

Scope of subpoena is not
the issue. Would be ~~at~~ same issue
if only one check were involved.

Case would be different
absent Bank Records Act

BOBTAIL MEMORANDUM

TO: Justice Powell

FROM: Carl Schenker

DATE: January 12, 1976

No. 74-1179 United States v. Miller

I recommend reversal.

The parties appear to agree that the CA 5 panel held that the alleged defects in the subpoena ~~was~~ violated petitioner's Fourth Amendment rights.¹ Addressing the case on that premise,² I think that the SG is correct that petitioner has no Fourth Amendment rights in this context, so that the subpoena cannot be challenged on that ground.

1. I might mention in passing that a rather superficial survey of U.S.C.A. annotations suggests to me that there is nothing to the CA 5 panel's holding that this subpoena was defective. Even the issuance of the subpoena by the U.S. attorney appears permissible. Thus, I don't think we can find support for the reaction that you and David Boyd initially had to the effect that the grand jury should issue the subpoena. / *yes*

2. The opinion could be read in another way, as I discuss infra at 3.

The most useful analogy is to the "bugged informant" cases (e.g., United States v. White, 401 U.S. 745.) There the Court has held that when one exposes his affairs to another, he runs the risk that the other is a government informant who will "rat" on him. He further runs the risk that the informant will "rat" very accurately (i.e., that the informant is bugged for sound). People dealing with banks run the same risks. They expose their affairs to the scrutiny of bank employees, thereby foregoing any significant privacy expectation in those affairs. Bank employees could testify to those transactions, if they could remember them. The bank can also choose to record the transactions to help bolster the memory of the employees. I do not view the Fourth Amendment privacy analysis as being changed significantly by the fact that the bank is required to keep records by the Act. The "recruiting" of the bank into investigative purposes is no different than the hiring of an informant. In fact, it is less offensive in many respects because it is known that the bank plays this roll. (Cf. Hoffa v. United States, 385 U.S. 293 (Warren, C.J., dissenting.)³)

3. I know from your brief concurring statement in California Bankers Assn. that you have some doubts about the propriety of broadly sweeping reporting requirements under the Bank Secrecy Act. I do not view your concerns as inconsistent with my analysis. When the recordkeeping requirements are used through legal process in a criminal case, much different concerns are implicated than with blanket reporting unrelated to a criminal case. I think your concurring statement reflects this distinction.

This is all that needs to be said to dispose of this case as the parties view it. Thus, reversal is called for.

Let me advance, however, some further thoughts on the case. I think that the CA 5 panel opinion is susceptible to another interpretation. The opinion could be read to say:

(1) There are Fourth Amendment overtones to the Act's record-keeping requirements. (2) Despite those overtones, the requirements are constitutional (California Bankers Ass'n.), and the Government may by proper process compel the production of the required records. (3) But, in doing so, the Government's exercise of process must be valid. Here it was invalid because of the various alleged defects in the subpoena.

In short, this reading of the opinion is that the CA 5 panel found no Fourth Amendment violation but simply required that process be used in accord with procedural niceties. The trouble with this approach, however, is again the matter of "standing." Ordinarily defects in process should be challenged in a motion to quash, which allows their correction. Since the defects will often be correctable, a complaining witness should not be able to disclose and then get suppression, as CA 5 ordered here. The "witness" here having disclosed without objection to the subpoena, suppression on behalf of the customer seems inappropriate. The problem, however, is that the "real party in interest" is the petitioner, ^{who had no notice,} and the bank has little reason to resist defective subpoenas.

This problem, though, is not unique to this area. It arises also in the context of administrative summons to third parties with regard to, for example, an individual's tax liability. And the Court has had occasion to examine the third party issue in that context. See, e.g., Donaldson v. United States, 400 U.S. 517. There the Court held that under Fed. R. Civil Pro. 24(a)(2) an interested taxpayer could intervene in a suit to enforce an administrative subpoena to show that the subpoena power was being abused.

I think the same guarantee should be available to those situated as was petitioner. Although this is a grand jury subpoena rather than an administrative summons, the enforcement procedures appear to be the same. See In re Grand Jury Proceedings (Schofield I), 486 F. 2d 85, 90 ("There is no indication that Congress intended the role of the court to be different in" administrative summons enforcement cases than in grand jury subpoena enforcement cases.) Thus, I think that under Fed. R. Civil Pro. 24(a)(2), or the inherent rule making authority of this Court, those situated as is petitioner should be able to intervene in an enforcement suit. In that suit, such an individual could contest the validity of the summons.

Of course, recognizing such an intervention right does not get one very far if the bank voluntarily turns over the subpoenaed matter. But at present I can see no basis on which the Court could require notice of the subpoena directly to

the bank customer and the initiation by the customer of a direct action to quash. Banks, however, might agree contractually to oppose subpoenas in order to allow their customers to intervene. Congress might also allow for a direct action.

In sum, as we have the case, I would reverse.

Carl.

Subpoena may be issued by U.S. atty - who is "officer" of G/Jury.

Depositor has no standing. Records are prop. of bank.

Resp. has only limited interest in records (what is this?)

Subpoena OK

Resp. has no standing to object to subpoena.

No 4th Amendment violation

Brennan, J. ~~Re~~ Affirm

That Resp. has no standing to attack subpoena as such. But this is not end of case. ~~There~~ There was a motion to suppress introduction into ev., & there was standing. Also there was a 4th Amend. violation & records should have been suppressed.

But this error may well be harmless, & ~~we~~ might join a reversal on this basis if op. were written very narrowly.

Stewart, J. Reverse

Q is whether ev. should be excluded at Resp's trial. This standing Q is different from standing to object to subpoena.

Under Jones & other cases, Resp. had no standing to object to ev.

Nor was there any violation of 4th Amend.

Reverse

Agrees with C.J.
& P.S.

"Standing" here is
code word for saying
no violation of
4th Amend rights.

Reverse

Agrees ~~no standing~~
with Stewart.

Blackmun, J. Reverse

Not sure how case
should be written.

Agrees with Byron

Powell, J. Reverse

(See my notes.)

No first amend.
issue in this case.

I agree with C.J.,
P.S., White, &
particularly with
analysis of Rehnquist

Rehnquist, J. Reverse

Only ^{the} person upon whom
subpoena is served
~~may~~ has standing
to suppress it.

On 4th Amend claim,
Resp. has "standing"
to raise the issue.
But he ~~is~~ has no
4th Amend rights.
Thus, we really
decide case on
merits. ~~Resp. has~~
~~no 4th Amend~~

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1179

United States, Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
v.		
Mitchell Miller,		

[April —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent was convicted of 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 whiskey upon which no taxes had been paid, and conspiring to defraud the United States of tax revenues. 18 U. S. C. § 371; 26 U. S. C. § 5179, 5205, 5601 *et seq.* Prior to trial respondent moved to suppress copies of checks and other bank records obtained by means of allegedly defective subpoenas *duces tecum* served upon two banks at which he had accounts. The records had been maintained by the banks in compliance with the requirements of the Bank Secrecy Act of 1970, 12 U. S. C. § 1829 (d).

The District Court overruled respondent's motion to suppress and the evidence was admitted. The Court of Appeals for the Fifth Circuit reversed on the ground that a depositor's Fourth Amendment rights are violated when bank records maintained pursuant to the Bank Secrecy Act are obtained by means of a defective subpoena. It held that any evidence so obtained must be suppressed. Since we find that respondent had no protectable Fourth Amendment interest in the subpoenaed documents, we reverse the decision below.

I

On December 18, 1972, in response to an informant's tip, a deputy sheriff from Houston County, Ga., stopped a van-type truck occupied by two of respondent's alleged coconspirators. The truck contained distillery apparatus and raw material. On January 9, 1973, a fire broke out in a Kathleen, Ga., warehouse rented to respondent. During the blaze firemen and sheriff department officials discovered a 7,500 gallon-capacity distillery, 175 gallons of nontax-paid whiskey, and related paraphernalia.

Two weeks later agents from the Treasury Department's Alcohol, Tobacco & Firearms Unit presented grand jury subpoenas issued in blank by the clerk of the District Court, and completed by the United States Attorney's office, to the presidents of the Citizens & Southern Bank of Warner Robins and the Bank of Byron, where respondent maintained accounts. The subpoenas required the two presidents to appear on January 23, 1973, and to produce

"all records of accounts, i. e., savings, checking, loan or otherwise, in the name of Mr. Mitch Miller [respondent], 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 22, 1973, in the case of the Bank of Byron, and January 23, 1973, in the case of the Citizens & Southern Bank of Warner Robins]."

The banks did not advise respondent that the subpoenas had been served but ordered their employees to make the records available and to provide copies of any documents the agents desired. At the Bank of Byron, an agent was shown microfilm copies of the relevant checks and provided with copies of one deposit slip and two checks.

At the Citizens & Southern Bank microfilm records also were shown to the agent, and he was given copies of the records of respondent's account during the applicable period. These included all checks, deposit slips, two financial statements and three monthly statements. The bank presidents were then told that it would not be necessary to appear in person before the grand jury.

The grand jury met on February 12, 1973, 19 days after the return date on the subpoenas. Respondent and four others were indicted. The overt acts alleged to have been committed in furtherance of the conspiracy included three financial transactions—the rental by respondent of the van-type truck, the purchase by respondent of radio equipment, and the purchase by respondent of a quantity of sheet metal and metal pipe. The record does not indicate whether any of the bank records were in fact presented to the grand jury. They were used in the investigation and provided “one or two” investigatory leads. Copies of the checks also were introduced at trial to establish the overt acts described above.

In his motion to suppress, denied by the District Court, respondent contended that the bank documents were illegally seized. It was urged that the subpoenas were defective because they were issued by the U. S. Attorney rather than a court, no return was made to a court, and the subpoenas were returnable on a date when the grand jury was not in session. The Court of Appeals reversed, 500 F. 2d 751 (1974). Citing the prohibition in *Boyd v. United States*, 116 U. S. 616, 622 (1886), against “compulsory production of a man's private papers to establish a criminal charge against him,” the court held that the government had improperly circumvented *Boyd's* protections of respondent's Fourth Amendment right against “unreasonable searches and seizures” 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." 500 F. 2d, at 757. The court acknowledged that the recordkeeping requirements of the Bank Secrecy Act had been held to be constitutional on their face in *California Bankers Assn. v. Shultz*, 416 U. S. 21 (1974), but noted that access to the records was to be controlled by "existing legal process." *Id.*, at 52. The subpoenas issued here were found not to constitute adequate "legal process." The fact that the bank officers cooperated voluntarily was found to be irrelevant, for "he whose rights are threatened by the improper disclosure here was a bank depositor, not a bank official." 500 F. 2d, at 756.

The Government contends that the Court of Appeals erred in three respects: (i) in finding that respondent had standing to challenge the validity of the subpoenas *duces tecum* through his motion to suppress; (ii) in holding that the subpoenas were defective; and (iii) in determining that suppression of the evidence obtained was the appropriate remedy if a constitutional violation did take place.

We find that there was no intrusion into any area in which respondent had a protected Fourth Amendment interest and that the District Court therefore correctly denied respondent's motion to suppress. Because we reverse the decision of the Court of Appeals on that ground alone, we do not reach the Government's latter two contentions.

II

In *Hoffa v. United States*, 385 U. S. 293, 301-302 (1966), the Court said that "no interest legitimately protected by the Fourth Amendment" is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into "the security a man

relies upon when he places himself or his property within a constitutionally protected area." The Court of Appeals, as noted above, assumed that respondent had the necessary Fourth Amendment interest, pointing to the language in *Boyd v. United States*, 116 U. S., at 622, which describes that Amendment's protection against the "compulsory production of a man's private papers."¹ We think that the Court of Appeals erred in finding the subpoenaed documents to fall within a protected zone of privacy.

On their face, the documents subpoenaed here are not respondent's "private papers." Unlike the claimant in *Boyd*, respondent can assert neither ownership nor possession. Instead, these are the business records of the banks. As we said in *California Bankers Assn. v. Shultz*, 416 U. S., at 48-49, "[b]anks are . . . not . . . neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance." The records of respondent's accounts, like "all of the records [which are required to be kept by the Bank Secrecy Act,] pertain to transactions to which the bank was itself a party." *Id.*, at 52.

Respondent argues, however, that the Bank Secrecy Act introduces a factor that makes the subpoena in this case the functional equivalent of a search and seizure of the depositor's "private papers." We have held, in *California Bankers Assn. v. Shultz*, *supra*, at 54, that the mere maintenance of records pursuant to the requirements of the Act "invade[s] no Fourth Amendment right of any depositor." But respondent contends that the

¹ The Fourth Amendment implications of *Boyd* as it applies to subpoenas *duces tecum* have been undercut by more recent cases. *Fisher v. United States*, — U. S. — (1976), slip op., at 15. See *infra*, at ———.

combination of the recordkeeping requirements of the Act and the issuance of a subpoena² to obtain those records permits the Government to circumvent the requirements of the Fourth Amendment by allowing it to obtain a depositor's private records without complying with the legal requirements that would be applicable had it proceeded against him directly.³ Therefore, we must address the question whether the compulsion embodied in the Bank Secrecy Act as exercised in this case creates a Fourth Amendment interest in the depositor where none existed before. This question was expressly reserved in *California Bankers Assn.*, *supra*, at 53-54 & n. 24.

Respondent urges that he has a Fourth Amendment interest in the records kept by the banks because they are merely copies of personal records that were made available to the banks for a limited purpose and in which he has a reasonable expectation of privacy. He relies on this Court's statement in *Katz v. United States*, 389 U. S. 347, 353 (1967), quoting *Warden v. Hayden*, 387 U. S. 304 (1967), that "we have . . . departed from the narrow view" that "property interests control the right of the Government to search and seize," and that a "search and seizure" become unreasonable when the

² Respondent appears to contend that a depositor's Fourth Amendment interest comes into play only when a defective subpoena is used to obtain records kept pursuant to the Act. We see no reason why the existence of a Fourth Amendment interest turns on whether the subpoena is defective. Therefore, we do not limit our consideration to the situation in which there is an alleged defect in the subpoena served on the bank.

³ It is not clear whether respondent refers to attempts to obtain private documents through a subpoena issued directly to the depositor or through a search pursuant to a warrant. The question whether personal business records may be seized pursuant to a valid warrant is before this Court in No. 74-1646, *Anderson v. Maryland*.

Government's activities violate "the privacy upon which [a person] justifiably relie[s]." But in *Katz* the Court also stressed that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Id.*, at 351. We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate "expectation of privacy" concerning their contents. See *Couch v. United States*, 409 U. S. 322, 335 (1973).

Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 12 U. S. C. § 1829 (a)(2). Cf. *Couch v. United States*, *supra*, at 335.

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government. *United States v. White*, 401 U. S. 745, 751-752 (1971). This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption

that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. *United States v. White, supra*, at 752; *Hoffa v. United States*, 385 U. S., at 302; *Lopez v. United States*, 373 U. S. 427 (1963).

This analysis is not changed by the mandate of the Bank Secrecy Act that records of depositors' transactions be maintained by banks. In *California Bankers Assn. v. Shultz, supra*, at 52-53, we rejected the contention that banks, when keeping records of their depositors' transactions pursuant to the Act, are acting solely as agents of the government. But, even if the banks could be said to have been acting solely as government agents in transcribing the necessary information and complying without protest with the requirements of the subpoenas, there would be no intrusion upon the depositors' Fourth Amendment rights. See *Osborn v. United States*, 385 U. S. 323 (1966); *Lewis v. United States*, 385 U. S. 206 (1966). This may be an unattractive role for nationally regulated banks to play, but that is a question for the legislature, rather than a matter of constitutional right. In enacting the Bank Secrecy Act, Congress has indicated its decision that the role is proper.

III

Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued, *California Bankers Assn. v. Shultz*, 416 U. S., at 53; *Donaldson v. United States*, 400 U. S. 517, 537 (1971) (Douglas, J., concurring). Under these principles, it was firmly settled, before the passage of the Bank

Secrecy Act, that an Internal Revenue Service summons directed to a third-party bank does not violate the Fourth Amendment rights of a depositor under investigation. See *First National Bank v. United States*, 267 U. S. 576 (1925), *aff'g*, 295 F. 142 (SD Ala. 1924). See also *California Bankers Assn. v. Shultz*, *supra*, at 53; *Donaldson v. United States*, 400 U. S., at 522.

Many banks traditionally kept permanent records of their depositors' accounts, although not all banks did so and the practice was declining in recent years. By requiring that such records be kept by all banks, the Bank Secrecy Act is not a novel means designed to circumvent established Fourth Amendment rights. It is merely an attempt to facilitate the use of a proper and longstanding law enforcement technique by insuring that records are available when they are needed.*

We hold that the District Court correctly denied respondent's motion to suppress, since he possessed no Fourth Amendment interest that could be vindicated by a challenge to the subpoenas.

IV

Respondent contends not only that the subpoenas

*Petitioner does not contend that the subpoenas infringed upon his First Amendment rights. There was no blanket reporting requirement of the sort we addressed in *Buckley v. Valeo*, — U. S. — (1976), *slip op.*, at 54-69, nor any allegation of an improper inquiry into protected associational activities of the sort presented in *Eastland v. United Servicemen's Fund*, 421 U. S. 491 (1975).

We are not confronted with a situation in which the Government, through "unreviewed executive discretion," has made a wide-ranging inquiry that unnecessarily "touches upon intimate areas of an individual's personal affairs." *California Bankers Assn. v. Shultz*, *supra*, at 78-79 (Powell, J., concurring). Here the Government has exercised its powers through narrowly directed subpoenas *duces tecum* subject to the legal restraints attendant to such process. See Part IV, *infra*.

duces tecum directed against the banks infringed his Fourth Amendment rights, but that a subpoena issued to a bank to obtain records maintained pursuant to the Act is subject to more stringent Fourth Amendment requirements than is the ordinary subpoena. In making this assertion he relies on our statement in *California Bankers Assn.*, *supra*, at 52, that access to the records maintained by banks under the Act was to be controlled by "existing legal process."

In *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 208 (1946), the Court said that "the Fourth [Amendment], if applicable [to subpoenas for the production of business records and papers], at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." See also *United States v. Dionisio*, 410 U. S. 1, 11-12 (1973). Respondent, citing *United States v. United States District Court*, 407 U. S. 297 (1973), in which we discussed the application of the warrant requirements of the Fourth Amendment to domestic security surveillance through electronic eavesdropping, suggests that greater judicial scrutiny, equivalent to that required for a search warrant, is necessary when a subpoena is to be used to obtain bank records of a depositor's account. But in *California Bankers Assn.*, *supra*, at 52, we emphasized only that access to the records was to be in accordance with "existing legal process." There was no indication that a new rule was to be devised, or that the traditional distinction between a search warrant and a subpoena would not be recognized.⁶

⁶ A subpoena *duces tecum* issued to obtain records is subject to no more stringent Fourth Amendment requirements than is the

In any event, for the reasons stated above, we hold that respondent lacks the requisite Fourth Amendment interest to challenge the validity of the subpoenas.

V

The decision of the Court of Appeals is reversed. The Court deferred decision on whether the trial court had improperly overruled respondent's motion to suppress distillery apparatus and raw material seized from a rented truck. We remand for disposition of that issue.

So ordered.

ordinary subpoena. A search warrant, in contrast, is issuable only pursuant to prior judicial approval and authorizes government officers to seize evidence without requiring enforcement through the courts. See *United States v. Dionisio*, 410 U. S. 1, 9-10 (1973).

*There is no occasion for us to address whether the subpoenas complied with the requirements outlined in *Walling*. The banks upon which they were served did not contest their validity.

MAR 25 1976

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SUPREME COURT OF THE UNITED STATES

No. 74-1179

United States, Petitioner,	}	On Writ of Certiorari to the United States Court of Ap- peals for the Fifth Circuit.
v.		
Mitchell Miller.		

[April —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent was convicted of 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 whiskey upon which no taxes had been paid, and conspiring to defraud the United States of tax revenues. 18 U. S. C. § 371; 26 U. S. C. § 5179, 5205, 5601 *et seq.* Prior to trial respondent moved to suppress copies of checks and other bank records obtained by means of allegedly defective subpoenas *duces tecum* served upon two banks at which he had accounts. The records had been maintained by the banks in compliance with the requirements of the Bank Secrecy Act of 1970, 12 U. S. C. § 1829 (d).

The District Court overruled respondent's motion to suppress and the evidence was admitted. The Court of Appeals for the Fifth Circuit reversed on the ground that a depositor's Fourth Amendment rights are violated when bank records maintained pursuant to the Bank Secrecy Act are obtained by means of a defective subpoena. It held that any evidence so obtained must be suppressed. Since we find that respondent had no protectable Fourth Amendment interest in the subpoenaed documents, we reverse the decision below.

I

On December 18, 1972, in response to an informant's tip, a deputy sheriff from Houston County, Ga., stopped a van-type truck occupied by two of respondent's alleged coconspirators. The truck contained distillery apparatus and raw material. On January 9, 1973, a fire broke out in a Kathleen, Ga., warehouse rented to respondent. During the blaze firemen and sheriff department officials discovered a 7,500 gallon-capacity distillery, 175 gallons of nontax-paid whiskey, and related paraphernalia.

Two weeks later agents from the Treasury Department's Alcohol, Tobacco & Firearms Unit presented grand jury subpoenas issued in blank by the clerk of the District Court, and completed by the United States Attorney's office, to the presidents of the Citizens & Southern Bank of Warner Robins and the Bank of Byron, where respondent maintained accounts. The subpoenas required the two presidents to appear on January 23, 1973, and to produce

"all records of accounts, i. e., savings, checking, loan or otherwise, in the name of Mr. Mitch Miller [respondent], 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 22, 1973, in the case of the Bank of Byron, and January 23, 1973, in the case of the Citizens & Southern Bank of Warner Robins]."

The banks did not advise respondent that the subpoenas had been served but ordered their employees to make the records available and to provide copies of any documents the agents desired. At the Bank of Byron, an agent was shown microfilm copies of the relevant checks and provided with copies of one deposit slip and two checks.

At the Citizens & Southern Bank microfilm records also were shown to the agent, and he was given copies of the records of respondent's account during the applicable period. These included all checks, deposit slips, two financial statements and three monthly statements. The bank presidents were then told that it would not be necessary to appear in person before the grand jury.

The grand jury met on February 12, 1973, 19 days after the return date on the subpoenas. Respondent and four others were indicted. The overt acts alleged to have been committed in furtherance of the conspiracy included three financial transactions—the rental by respondent of the van-type truck, the purchase by respondent of radio equipment, and the purchase by respondent of a quantity of sheet metal and metal pipe. The record does not indicate whether any of the bank records were in fact presented to the grand jury. They were used in the investigation and provided "one or two" investigatory leads. Copies of the checks also were introduced at trial to establish the overt acts described above.

In his motion to suppress, denied by the District Court, respondent contended that the bank documents were illegally seized. It was urged that the subpoenas were defective because they were issued by the U. S. Attorney rather than a court, no return was made to a court, and the subpoenas were returnable on a date when the grand jury was not in session. The Court of Appeals reversed. 500 F. 2d 751 (1974). Citing the prohibition in *Boyd v. United States*, 116 U. S. 616, 622 (1886), against "compulsory production of a man's private papers to establish a criminal charge against him," the court held that the government had improperly circumvented *Boyd's* protections of respondent's Fourth Amendment right against "unreasonable searches and seizures" 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." 500 F. 2d, at 757. The court acknowledged that the recordkeeping requirements of the Bank Secrecy Act had been held to be constitutional on their face in *California Bankers Assn. v. Shultz*, 416 U. S. 21 (1974), but noted that access to the records was to be controlled by "existing legal process." *Id.*, at 52. The subpoenas issued here were found not to constitute adequate "legal process." The fact that the bank officers cooperated voluntarily was found to be irrelevant, for "he whose rights are threatened by the improper disclosure here was a bank depositor, not a bank official." 500 F. 2d, at 756.

The Government contends that the Court of Appeals erred in three respects: (i) in finding that respondent had standing to challenge the validity of the subpoenas *duces tecum* through his motion to suppress; (ii) in holding that the subpoenas were defective; and (iii) in determining that suppression of the evidence obtained was the appropriate remedy if a constitutional violation did take place.

We find that there was no intrusion into any area in which respondent had a protected Fourth Amendment interest and that the District Court therefore correctly denied respondent's motion to suppress. Because we reverse the decision of the Court of Appeals on that ground alone, we do not reach the Government's latter two contentions.

II

In *Hoffa v. United States*, 385 U. S. 293, 301-302 (1966), the Court said that "no interest legitimately protected by the Fourth Amendment" is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into "the security a man

relies upon when he places himself or his property within a constitutionally protected area." The Court of Appeals, as noted above, assumed that respondent had the necessary Fourth Amendment interest, pointing to the language in *Boyd v. United States*, 116 U. S., at 622, which describes that Amendment's protection against the "compulsory production of a man's private papers."¹ We think that the Court of Appeals erred in finding the subpoenaed documents to fall within a protected zone of privacy.

On their face, the documents subpoenaed here are not respondent's "private papers." Unlike the claimant in *Boyd*, respondent can assert neither ownership nor possession. Instead, these are the business records of the banks. As we said in *California Bankers Assn. v. Shultz*, 416 U. S., at 48-49, "[b]anks are . . . not . . . neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance." The records of respondent's accounts, like "all of the records [which are required to be kept by the Bank Secrecy Act,] pertain to transactions to which the bank was itself a party." *Id.*, at 52.

Respondent argues, however, that the Bank Secrecy Act introduces a factor that makes the subpoena in this case the functional equivalent of a search and seizure of the depositor's "private papers." We have held, in *California Bankers Assn. v. Shultz*, *supra*, at 54, that the mere maintenance of records pursuant to the requirements of the Act "invade[s] no Fourth Amendment right of any depositor." But respondent contends that the

¹ The Fourth Amendment implications of *Boyd* as it applies to subpoenas *duces tecum* have been undercut by more recent cases. *Fisher v. United States*, — U. S. — (1976), slip op., at 15. See *infra*, at ———,

combination of the recordkeeping requirements of the Act and the issuance of a subpoena² to obtain those records permits the Government to circumvent the requirements of the Fourth Amendment by allowing it to obtain a depositor's private records without complying with the legal requirements that would be applicable had it proceeded against him directly.³ Therefore, we must address the question whether the compulsion embodied in the Bank Secrecy Act as exercised in this case creates a Fourth Amendment interest in the depositor where none existed before. This question was expressly reserved in *California Bankers Assn.*, *supra*, at 53-54 & n. 24.

Respondent urges that he has a Fourth Amendment interest in the records kept by the banks because they are merely copies of personal records that were made available to the banks for a limited purpose and in which he has a reasonable expectation of privacy. He relies on this Court's statement in *Katz v. United States*, 389 U. S. 347, 353 (1967), quoting *Warden v. Hayden*, 387 U. S. 304 (1967), that "we have . . . departed from the narrow view" that "property interests control the right of the Government to search and seize," and that a "search and seizure" become unreasonable when the

² Respondent appears to contend that a depositor's Fourth Amendment interest comes into play only when a defective subpoena is used to obtain records kept pursuant to the Act. We see no reason why the existence of a Fourth Amendment interest turns on whether the subpoena is defective. Therefore, we do not limit our consideration to the situation in which there is an alleged defect in the subpoena served on the bank.

³ It is not clear whether respondent refers to attempts to obtain private documents through a subpoena issued directly to the depositor or through a search pursuant to a warrant. The question whether personal business records may be seized pursuant to a valid warrant is before this Court in No. 74-1646, *Andreson v. Maryland*.

Government's activities violate "the privacy upon which [a person] justifiably relie[s]." But in *Katz* the Court also stressed that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Id.*, at 351. We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate "expectation of privacy" concerning their contents. See *Couch v. United States*, 409 U. S. 322, 335 (1973).

Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 12 U. S. C. § 1829 (a)(2). *Cf. Couch v. United States*, *supra*, at 335.

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government. *United States v. White*, 401 U. S. 745, 751-752 (1971). This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption

that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. *United States v. White*, *supra*, at 752; *Hoffa v. United States*, 385 U. S., at 302; *Lopez v. United States*, 373 U. S. 427 (1963).

This analysis is not changed by the mandate of the Bank Secrecy Act that records of depositors' transactions be maintained by banks. In *California Bankers Assn. v. Shultz*, *supra*, at 52-53, we rejected the contention that banks, when keeping records of their depositors' transactions pursuant to the Act, are acting solely as agents of the government. But, even if the banks could be said to have been acting solely as government agents in transcribing the necessary information and complying without protest^{*} with the requirements of the subpoenas, there would be no intrusion upon the depositors' Fourth Amendment rights. See *Osborn v. United States*, 385 U. S. 323 (1966); *Lewis v. United States*, 385 U. S. 206 (1966).

III

Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued. *California Bankers Assn. v. Shultz*, 416 U. S., at 53; *Donaldson v. United States*, 400 U. S. 517, 537 (1971) (Douglas, J., concurring). Under these principles, it was firmly settled, before the passage of the Bank Secrecy Act, that an Internal Revenue Service summons directed to a third-party bank does not violate the

^{*} Nor did the banks notify respondent, a neglect without legal consequences here, however unattractive it may be.

Fourth Amendment rights of a depositor under investigation. See *First National Bank v. United States*, 267 U. S. 576 (1925), *aff'g*, 295 F. 142 (SD Ala. 1924). See also *California Bankers Assn. v. Shultz*, *supra*, at 53; *Donaldson v. United States*, 400 U. S., at 522.

Many banks traditionally kept permanent records of their depositors' accounts, although not all banks did so and the practice was declining in recent years. By requiring that such records be kept by all banks, the Bank Secrecy Act is not a novel means designed to circumvent established Fourth Amendment rights. It is merely an attempt to facilitate the use of a proper and long-standing law enforcement technique by insuring that records are available when they are needed.⁵

We hold that the District Court correctly denied respondent's motion to suppress, since he possessed no Fourth Amendment interest that could be vindicated by a challenge to the subpoenas.

IV

Respondent contends not only that the subpoenas *duces tecum* directed against the banks infringed his

⁵ Petitioner does not contend that the subpoenas infringed upon his First Amendment rights. There was no blanket reporting requirement of the sort we addressed in *Buckley v. Valeo*, — U. S. — (1976), slip op., at 54-69, nor any allegation of an improper inquiry into protected associational activities of the sort presented in *Eastland v. United Serviceman's Fund*, 421 U. S. 491 (1975).

We are not confronted with a situation in which the Government, through "unreviewed executive discretion," has made a wide-ranging inquiry that unnecessarily "touches upon intimate areas of an individual's personal affairs." *California Bankers Assn. v. Shultz*, *supra*, at 78-79 (Powell, J., concurring). Here the Government has exercised its powers through narrowly directed subpoenas *duces tecum* subject to the legal restraints attendant to such process. See Part IV, *infra*.

Fourth Amendment rights, but that a subpoena issued to a bank to obtain records maintained pursuant to the Act is subject to more stringent Fourth Amendment requirements than is the ordinary subpoena. In making this assertion he relies on our statement in *California Bankers Assn.*, *supra*, at 52, that access to the records maintained by banks under the Act is to be controlled by "existing legal process."

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In any event, for the reasons stated above, we hold that respondent lacks the requisite Fourth Amendment interest to challenge the validity of the subpoenas.⁷

V

The decision of the Court of Appeals is reversed. The court deferred decision on whether the trial court had improperly overruled respondent's motion to suppress distillery apparatus and raw material seized from a rented truck. We remand for disposition of that issue.

So ordered.

ordinary subpoena. A search warrant, in contrast, is issuable only pursuant to prior judicial approval and authorizes government officers to seize evidence without requiring enforcement through the courts. See *United States v. Dionisio*, 410 U. S. 1, 9-10 (1973).

⁷ There is no occasion for us to address whether the subpoenas complied with the requirements outlined in *Walling*. The banks upon which they were served did not contest their validity.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART



March 26, 1976

Re: No. 74-1179, United States v. Miller

Dear Lewis,

I am glad to join your opinion for the Court
in this case.

Sincerely yours,

P.S.
/

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



March 26, 1976

Re: No. 74-1179 - United States v. Miller

Dear Lewis:

Please join me.

Respectfully,

A handwritten signature in blue ink, appearing to be 'JP' or similar, located below the 'Respectfully,' text.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



March 29, 1976

Re: No. 74-1179 - United States v. Miller

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

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MAR 30 1976

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SUPREME COURT OF THE UNITED STATES

No. 74-1179

United States, Petitioner,	On Writ of Certiorari to the	
v.		United States Court of Ap-
Mitchell Miller.		peals for the Fifth Circuit.

[April —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent was convicted of 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 whiskey upon which no taxes had been paid, and conspiring to defraud the United States of tax revenues. 26 U. S. C. § 5179, 5205, 5601 *et seq.*; 18 U. S. C. § 371. Prior to trial respondent moved to suppress copies of checks and other bank records obtained by means of allegedly defective subpoenas *duces tecum* served upon two banks at which he had accounts. The records had been maintained by the banks in compliance with the requirements of the Bank Secrecy Act of 1970, 12 U. S. C. § 1829b (d).

The District Court overruled respondent's motion to suppress and the evidence was admitted. The Court of Appeals for the Fifth Circuit reversed on the ground that a depositor's Fourth Amendment rights are violated when bank records maintained pursuant to the Bank Secrecy Act are obtained by means of a defective subpoena. It held that any evidence so obtained must be suppressed. Since we find that respondent had no protectable Fourth Amendment interest in the subpoenaed documents, we reverse the decision below.

UNITED STATES v. MILLER

I

On December 18, 1972, in response to an informant's tip, a deputy sheriff from Houston County, Ga., stopped a van-type truck occupied by two of respondent's alleged co-conspirators. The truck contained distillery apparatus and raw material. On January 9, 1973, a fire broke out in a Kathleen, Ga., warehouse rented to respondent. During the blaze firemen and sheriff department officials discovered a 7,500 gallon-capacity distillery, 175 gallons of nontax-paid whiskey, and related paraphernalia.

Two weeks later agents from the Treasury Department's Alcohol, Tobacco & Firearms Unit presented grand jury subpoenas issued in blank by the clerk of the District Court, and completed by the United States Attorney's office, to the presidents of the Citizens & Southern National Bank of Warner Robins and the Bank of Byron, where respondent maintained accounts. The subpoenas required the two presidents to appear on January 24, 1973, and to produce.

"all records of accounts, i. e., savings, checking, loan or otherwise, in the name of Mr. Mitch Miller [respondent], 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 22, 1973, in the case of the Bank of Byron, and January 23, 1973, in the case of the Citizens & Southern National Bank of Warner Robins]."

The banks did not advise respondent that the subpoenas had been served but ordered their employees to make the records available and to provide copies of any documents the agents desired. At the Bank of Byron, an agent was shown microfilm records of the relevant account and provided with copies of one deposit slip and one or two checks.

At the Citizens & Southern National Bank microfilm records also were shown to the agent, and he was given copies of the records of respondent's account during the applicable period. These included all checks, deposit slips, two financial statements and three monthly statements. The bank presidents were then told that it would not be necessary to appear in person before the grand jury.

The grand jury met on February 12, 1973, 19 days after the return date on the subpoenas. Respondent and four others were indicted. The overt acts alleged to have been committed in furtherance of the conspiracy included three financial transactions—the rental by respondent of the van-type truck, the purchase by respondent of radio equipment, and the purchase by respondent of a quantity of sheet metal and metal pipe. The record does not indicate whether any of the bank records were in fact presented to the grand jury. They were used in the investigation and provided "one or two" investigatory leads. Copies of the checks also were introduced at trial to establish the overt acts described above.

In his motion to suppress, denied by the District Court, respondent contended that the bank documents were illegally seized. It was urged that the subpoenas were defective because they were issued by the U. S. Attorney rather than a court, no return was made to a court, and the subpoenas were returnable on a date when the grand jury was not in session. The Court of Appeals reversed. 500 F. 2d 751 (1974). Citing the prohibition in *Boyd v. United States*, 116 U. S. 616, 622 (1886), against "compulsory production of a man's private papers to establish a criminal charge against him," the court held that the government had improperly circumvented *Boyd's* protections of respondent's Fourth Amendment right against "unreasonable searches and seizures" 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." 500 F. 2d, at 757. The court acknowledged that the recordkeeping requirements of the Bank Secrecy Act had been held to be constitutional on their face in *California Bankers Assn. v. Shultz*, 416 U. S. 21 (1974), but noted that access to the records was to be controlled by "existing legal process." See *id.*, at 52. The subpoenas issued here were found not to constitute adequate "legal process." The fact that the bank officers cooperated voluntarily was found to be irrelevant, for "he whose rights are threatened by the improper disclosure here was a bank depositor, not a bank official." 500 F. 2d, at 758.

The Government contends that the Court of Appeals erred in three respects: (i) in finding that respondent had the Fourth Amendment interest necessary to entitle him to challenge the validity of the subpoenas *duces tecum* through his motion to suppress; (ii) in holding that the subpoenas were defective; and (iii) in determining that suppression of the evidence obtained was the appropriate remedy if a constitutional violation did take place.

We find that there was no intrusion into any area in which respondent had a protected Fourth Amendment interest and that the District Court therefore correctly denied respondent's motion to suppress. Because we reverse the decision of the Court of Appeals on that ground alone, we do not reach the Government's latter two contentions.

II

In *Hoffa v. United States*, 385 U. S. 293, 301-302 (1966), the Court said that "no interest legitimately protected by the Fourth Amendment" is implicated by governmental investigative activities unless there is an in-

trusion into a zone of privacy, into "the security a man relies upon when he places himself or his property within a constitutionally protected area." The Court of Appeals, as noted above, assumed that respondent had the necessary Fourth Amendment interest, pointing to the language in *Boyd v. United States*, 116 U. S., at 622, which describes that Amendment's protection against the "compulsory production of a man's private papers."¹ We think that the Court of Appeals erred in finding the subpoenaed documents to fall within a protected zone of privacy.

On their face, the documents subpoenaed here are not respondent's "private papers." Unlike the claimant in *Boyd*, respondent can assert neither ownership nor possession. Instead, these are the business records of the banks. As we said in *California Bankers Assn. v. Shultz*, 416 U. S., at 48-49, "[b]anks are . . . not . . . neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance." The records of respondent's accounts, like "all of the records [which are required to be kept pursuant to the Bank Secrecy Act,] pertain to transactions to which the bank was itself a party." *Id.*, at 52.

Respondent argues, however, that the Bank Secrecy Act introduces a factor that makes the subpoena in this case the functional equivalent of a search and seizure of the depositor's "private papers." We have held, in *California Bankers Assn. v. Shultz*, *supra*, at 54, that the mere maintenance of records pursuant to the requirements of the Act "invade[s] no Fourth Amendment right of any depositor." But respondent contends that the

¹ The Fourth Amendment implications of *Boyd* as it applies to subpoenas *duces tecum* have been undercut by more recent cases. *Fisher v. United States*, — U. S. — (1976), *slip op.*, at 15. See *infra*, at 10.

combination of the recordkeeping requirements of the Act and the issuance of a subpoena² to obtain those records permits the Government to circumvent the requirements of the Fourth Amendment by allowing it to obtain a depositor's private records without complying with the legal requirements that would be applicable had it proceeded against him directly.³ Therefore, we must address the question whether the compulsion embodied in the Bank Secrecy Act as exercised in this case creates a Fourth Amendment interest in the depositor where none existed before. This question was expressly reserved in *California Bankers Assn., supra*, at 53-54 & n. 24.

Respondent urges that he has a Fourth Amendment interest in the records kept by the banks because they are merely copies of personal records that were made available to the banks for a limited purpose and in which he has a reasonable expectation of privacy. He relies on this Court's statement in *Katz v. United States*, 389 U. S. 347, 353 (1967), quoting *Warden v. Hayden*, 387 U. S. 294, 304 (1967), that "we have . . . departed from the narrow view" that "'property interests control the right of the Government to search and seize,'" and that a "search and seizure" become unreasonable when

² Respondent appears to contend that a depositor's Fourth Amendment interest comes into play only when a defective subpoena is used to obtain records kept pursuant to the Act. We see no reason why the existence of a Fourth Amendment interest turns on whether the subpoena is defective. Therefore, we do not limit our consideration to the situation in which there is an alleged defect in the subpoena served on the bank.

³ It is not clear whether respondent refers to attempts to obtain private documents through a subpoena issued directly to the depositor or through a search pursuant to a warrant. The question whether personal business records may be seized pursuant to a valid warrant is before this Court in No. 74-1646, *Andresen v. Maryland*.

the Government's activities violate "the privacy upon which [a person] justifiably relie[s]." But in *Katz* the Court also stressed that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Id.*, at 351. We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate "expectation of privacy" concerning their contents. Cf. *Couch v. United States*, 409 U. S. 322, 335 (1973).

Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." 12 U. S. C. § 1829b.(a)(1). Cf. *Couch v. United States*, *supra*, at 335.

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government. *United States v. White*, 401 U. S. 745, 751-752 (1971). This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption

that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. *Id.*, at 752; *Hoffa v. United States*, 385 U. S., at 302; *Lopez v. United States*, 373 U. S. 427 (1963).⁴

This analysis is not changed by the mandate of the Bank Secrecy Act that records of depositors' transactions be maintained by banks. In *California Bankers Assn. v. Shultz*, *supra*, at 52-53, we rejected the contention that banks, when keeping records of their depositors' transactions pursuant to the Act, are acting solely as agents of the government. But, even if the banks could be said to have been acting solely as government agents in transcribing the necessary information and complying without protest⁵ with the requirements of the subpoenas, there would be no intrusion upon the depositors' Fourth Amendment rights. See *Osborn v. United States*, 385 U. S. 323 (1966); *Lewis v. United States*, 385 U. S. 206 (1966).

III

Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued. *California Bankers Assn. v. Shultz*, 416 U. S., at 53; *Donaldson v. United States*, 400 U. S. 517, 537 (1971) (Douglas, J., concurring). Under these principles, it

⁴ We do not address here the question of evidentiary privileges, such as that protecting communications between an attorney and his client. Cf. *Fisher v. United States*, — U. S. — (1976), slip op., at —.

⁵ Nor did the banks notify respondent, a neglect without legal consequences here, however unattractive it may be.

IV

Respondent contends not only that the subpoenas *duces tecum* directed against the banks infringed his Fourth Amendment rights, but that a subpoena issued to a bank to obtain records maintained pursuant to the Act is subject to more stringent Fourth Amendment requirements than is the ordinary subpoena. In making this assertion he relies on our statement in *California Bankers Assn.*, *supra*, at 52, that access to the records maintained by banks under the Act is to be controlled by "existing legal process."

In *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 208 (1946), the Court said that "the Fourth [Amendment], if applicable [to subpoenas for the production of business records and papers], at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." See also *United States v. Dionisio*, 410 U. S. 1, 11-12 (1973). Respondent, citing *United States v. United States District Court*, 407 U. S. 297 (1972), in which we discussed the application of the warrant requirements of the Fourth Amendment to domestic security surveillance through electronic eavesdropping, suggests that greater judicial scrutiny, equivalent to that required for a search warrant, is necessary when a subpoena is to be used to obtain bank records of a depositor's account. But in *California Bankers Assn.*, *supra*, at 52, we emphasized only that access to the records was to be in accordance with "existing legal process." There was no indication that a new rule was to be devised, or that the traditional distinction

between a search warrant and a subpoena would not be recognized.⁷

In any event, for the reasons stated above, we hold that respondent lacks the requisite Fourth Amendment interest to challenge the validity of the subpoenas.⁸

V

The decision of the Court of Appeals is reversed. The court deferred decision on whether the trial court had improperly overruled respondent's motion to suppress distillery apparatus and raw material seized from a rented truck. We remand for disposition of that issue.

So ordered.

⁷ A subpoena *duces tecum* issued to obtain records is subject to no more stringent Fourth Amendment requirements than is the ordinary subpoena. A search warrant, in contrast, is issuable only pursuant to prior judicial approval and authorizes government officers to seize evidence without requiring enforcement through the courts. See *United States v. Dionisio*, *supra*, at 9-10.

⁸ There is no occasion for us to address whether the subpoenas complied with the requirements outlined in *Walling*. The banks upon which they were served did not contest their validity.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 30, 1976

Re: No. 74-1179 - United States v. Miller

Dear Lewis:

Please join me in your circulation of today.

Sincerely,



Mr. Justice Powell

cc: The Conference

CHAMBERS OF
THE CHIEF JUSTICE

Chris
Take a look
Supreme Court of the United States
Washington, D. C. 20543

March 30, 1976

Re: 74-1179 - United States v. Miller

Dear Lewis:

I join your proposed opinion of March 25. I
was ready to reverse this summarily.

Regards,
WLB

Mr. Justice Powell

Copies to the Conference

↓
P.S. [LFP only] Page 11, paragraph V: Should
"decision" be "judgment"?

*yes - I will make
the change.
CJW*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

✓
April 2, 1976

Re: No. 74-1179 - United States v. Miller

Dear Lewis:

Please join me.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

10, 11
APR 13 1976

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PLEASE RETURN
TO FILE

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1179

United States, Petitioner,		On Writ of Certiorari to the United States Court of Ap- peals for the Fifth Circuit.
v.		
Mitchell Miller.		

[April —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent was convicted of 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 whiskey upon which no taxes had been paid, and conspiring to defraud the United States of tax revenues. 26 U. S. C. § 5179, 5205, 5601 *et seq.*; 18 U. S. C. § 371. Prior to trial respondent moved to suppress copies of checks and other bank records obtained by means of allegedly defective subpoenas *duces tecum* served upon two banks at which he had accounts. The records had been maintained by the banks in compliance with the requirements of the Bank Secrecy Act of 1970, 12 U. S. C. § 1829b (d).

The District Court overruled respondent's motion to suppress and the evidence was admitted. The Court of Appeals for the Fifth Circuit reversed on the ground that a depositor's Fourth Amendment rights are violated when bank records maintained pursuant to the Bank Secrecy Act are obtained by means of a defective subpoena. It held that any evidence so obtained must be suppressed. Since we find that respondent had no protectable Fourth Amendment interest in the subpoenaed documents, we reverse the decision below.

At the Citizens & Southern National Bank microfilm records also were shown to the agent, and he was given copies of the records of respondent's account during the applicable period. These included all checks, deposit slips, two financial statements and three monthly statements. The bank presidents were then told that it would not be necessary to appear in person before the grand jury.

The grand jury met on February 12, 1973, 19 days after the return date on the subpoenas. Respondent and four others were indicted. The overt acts alleged to have been committed in furtherance of the conspiracy included three financial transactions—the rental by respondent of the van-type truck, the purchase by respondent of radio equipment, and the purchase by respondent of a quantity of sheet metal and metal pipe. The record does not indicate whether any of the bank records were in fact presented to the grand jury. They were used in the investigation and provided "one or two" investigatory leads. Copies of the checks also were introduced at trial to establish the overt acts described above.

In his motion to suppress, denied by the District Court, respondent contended that the bank documents were illegally seized. It was urged that the subpoenas were defective because they were issued by the U. S. Attorney rather than a court, no return was made to a court, and the subpoenas were returnable on a date when the grand jury was not in session. The Court of Appeals reversed, 500 F. 2d 751 (1974). Citing the prohibition in *Boyd v. United States*, 116 U. S. 618, 622 (1886), against "compulsory production of a man's private papers to establish a criminal charge against him," the court held that the government had improperly circumvented *Boyd's* protections of respondent's Fourth Amendment right against "unreasonable searches and seizures" 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." 500 F. 2d, at 757. The court acknowledged that the recordkeeping requirements of the Bank Secrecy Act had been held to be constitutional on their face in *California Bankers Assn. v. Shultz*, 416 U. S. 21 (1974), but noted that access to the records was to be controlled by "existing legal process." See *id.*, at 52. The subpoenas issued here were found not to constitute adequate "legal process." The fact that the bank officers cooperated voluntarily was found to be irrelevant, for "he whose rights are threatened by the improper disclosure here was a bank depositor, not a bank official." 500 F. 2d, at 758.

The Government contends that the Court of Appeals erred in three respects: (i) in finding that respondent had the Fourth Amendment interest necessary to entitle him to challenge the validity of the subpoenas *duces tecum* through his motion to suppress; (ii) in holding that the subpoenas were defective; and (iii) in determining that suppression of the evidence obtained was the appropriate remedy if a constitutional violation did take place.

We find that there was no intrusion into any area in which respondent had a protected Fourth Amendment interest and that the District Court therefore correctly denied respondent's motion to suppress. Because we reverse the decision of the Court of Appeals on that ground alone, we do not reach the Government's latter two contentions.

II

In *Hoffa v. United States*, 385 U. S. 293, 301-302 (1966), the Court said that "no interest legitimately protected by the Fourth Amendment" is implicated by governmental investigative activities unless there is an in-

trusion into a zone of privacy, into "the security a man relies upon when he places himself or his property within a constitutionally protected area." The Court of Appeals, as noted above, assumed that respondent had the necessary Fourth Amendment interest, pointing to the language in *Boyd v. United States*, 116 U. S., at 622, which describes that Amendment's protection against the "compulsory production of a man's private papers."¹ We think that the Court of Appeals erred in finding the subpoenaed documents to fall within a protected zone of privacy.

On their face, the documents subpoenaed here are not respondent's "private papers." Unlike the claimant in *Boyd*, respondent can assert neither ownership nor possession. Instead, these are the business records of the banks. As we said in *California Bankers Assn. v. Shultz*, 416 U. S., at 48-49, "[b]anks are . . . not . . . neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance." The records of respondent's accounts, like "all of the records [which are required to be kept pursuant to the Bank Secrecy Act,] pertain to transactions to which the bank was itself a party." *Id.*, at 52.

Respondent argues, however, that the Bank Secrecy Act introduces a factor that makes the subpoena in this case the functional equivalent of a search and seizure of the depositor's "private papers." We have held, in *California Bankers Assn. v. Shultz*, *supra*, at 54, that the mere maintenance of records pursuant to the requirements of the Act "invade[s] no Fourth Amendment right of any depositor." But respondent contends that the

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combination of the recordkeeping requirements of the Act and the issuance of a subpoena² to obtain those records permits the Government to circumvent the requirements of the Fourth Amendment by allowing it to obtain a depositor's private records without complying with the legal requirements that would be applicable had it proceeded against him directly.³ Therefore, we must address the question whether the compulsion embodied in the Bank Secrecy Act as exercised in this case creates a Fourth Amendment interest in the depositor where none existed before. This question was expressly reserved in *California Bankers Assn., supra*, at 53-54 & n. 24.

Respondent urges that he has a Fourth Amendment interest in the records kept by the banks because they are merely copies of personal records that were made available to the banks for a limited purpose and in which he has a reasonable expectation of privacy. He relies on this Court's statement in *Katz v. United States*, 389 U. S. 347, 353 (1967), quoting *Warden v. Hayden*, 387 U. S. 294, 304 (1967), that "we have . . . departed from the narrow view" that "'property interests control the right of the Government to search and seize,'" and that a "search and seizure" become unreasonable when

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Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." 12 U. S. C. § 1829b.(a)(1). Cf. *Couch v. United States*, *supra*, at 335.

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III

Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued. *California Bankers Assn. v. Shultz*, 416 U. S., at 53; *Donaldson v. United States*, 400 U. S. 517, 537 (1971) (Douglas, J., concurring). Under these principles, it

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⁵ Nor did the banks notify respondent, a neglect without legal consequences here, however unattractive it may be.

was firmly settled, before the passage of the Bank Secrecy Act, that an Internal Revenue Service summons directed to a third-party bank does not violate the Fourth Amendment rights of a depositor under investigation. See *First National Bank v. United States*, 267 U. S. 576 (1925), aff'g 295 F. 142 (SD Ala. 1924). See also *California Bankers Assn. v. Shultz*, *supra*, at 53; *Donaldson v. United States*, 400 U. S., at 522.

Many banks traditionally kept permanent records of their depositors' accounts, although not all banks did so and the practice was declining in recent years. By requiring that such records be kept by all banks, the Bank Secrecy Act is not a novel means designed to circumvent established Fourth Amendment rights. It is merely an attempt to facilitate the use of a proper and longstanding law enforcement technique by insuring that records are available when they are needed.*

We hold that the District Court correctly denied respondent's motion to suppress, since he possessed no Fourth Amendment interest that could be vindicated by a challenge to the subpoenas.

*Petitioner does not contend that the subpoenas infringed upon his First Amendment rights. There was no blanket reporting requirement of the sort we addressed in *Buckley v. Valeo*, — U. S. — (1976), slip op., at 54-76, nor any allegation of an improper inquiry into protected associational activities of the sort presented in *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975).

We are not confronted with a situation in which the Government, through "unreviewed executive discretion," has made a wide-ranging inquiry that unnecessarily "touch[es] upon intimate areas of an individual's personal affairs." *California Bankers Assn. v. Shultz*, *supra*, at 78-79 (Powell, J., concurring). Here the Government has exercised its powers through narrowly directed subpoenas *duces tecum* subject to the legal restraints attendant to such process. See Part IV, *infra*.

IV

Respondent contends not only that the subpoenas *duces tecum* directed against the banks infringed his Fourth Amendment rights, but that a subpoena issued to a bank to obtain records maintained pursuant to the Act is subject to more stringent Fourth Amendment requirements than is the ordinary subpoena. In making this assertion he relies on our statement in *California Bankers Assn., supra*, at 52, that access to the records maintained by banks under the Act is to be controlled by "existing legal process."⁷

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⁷ This case differs from *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P. 2d 590, 118 Cal. Rptr. 166 (1974), relied on by Mr. Justice BRENNAN in dissent, in that the bank records of respondent's accounts were furnished in response to "compulsion by legal process" in the form of subpoenas *duces tecum*. The court in *Burrows* found it "significant . . . that the bank [in that case] provided the statements to the police in response to an informal oral request for information." 13 Cal. 3d, at 243, 529 P. 2d, at 593, 118 Cal. Rptr., at 169.

alent to that required for a search warrant, is necessary when a subpoena is to be used to obtain bank records of a depositor's account. But in *California Bankers Assn., supra*, at 52, we emphasized only that access to the records was to be in accordance with "existing legal process." There was no indication that a new rule was to be devised, or that the traditional distinction between a search warrant and a subpoena would not be recognized.⁸

In any event, for the reasons stated above, we hold that respondent lacks the requisite Fourth Amendment interest to challenge the validity of the subpoenas.⁹

V

The judgment of the Court of Appeals is reversed. The court deferred decision on whether the trial court had improperly overruled respondent's motion to suppress distillery apparatus and raw material seized from a rented truck. We remand for disposition of that issue.

So ordered.

⁸ A subpoena *duces tecum* issued to obtain records is subject to no more stringent Fourth Amendment requirements than is the ordinary subpoena. A search warrant, in contrast, is issuable only pursuant to prior judicial approval and authorizes government officers to seize evidence without requiring enforcement through the courts. See *United States v. Dionisio, supra*, at 9-10.

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Certiorari to U.S. Court of Appeals for 5th Circuit.

in this case
Respondent was convicted for possessing 175 gallons of whiskey upon which ~~no taxes~~ ^{he} had ~~been~~ paid *no taxes*.

Prior to his trial, he moved to suppress copies of his checks, deposit slips and other bank records deemed to be incriminating. These records had been obtained by subpoenas duces tecum served upon two banks in which respondent had accounts. The banks maintained ~~that~~ these records in accordance with the requirements of the Bank Secrecy Act of 1970.

The District Court declined to suppress the records, but the Court of Appeals reversed. It concluded that the records had been obtained by defective subpoenas, thereby violating respondent's Fourth Amendment rights.

We take a different view. The records subpoenaed were not respondent's private papers. Rather, they were business records of the banks'. Even with respect to the original checks and deposit slips copied by the banks, respondent - having made these available to a third party, the bank - could have had no legitimate expectation of privacy in their contents. The depositor takes the risk,

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We conclude, therefore, that there was no intrusion upon protected Fourth Amendment interests of respondent, ~~/~~ and that the District Court correctly denied respondent's motion to suppress. Accordingly, we reverse the decision of the Court of Appeals.

Mr. Justice Brennan and Mr. Justice Marshall have filed dissenting opinions.

Certiorari to U.S. Court of Appeals for 5th Circuit.

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Mr. Justice Brennan and Mr. Justice Marshall have filed dissenting opinions.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 29, 1976

Case held for No. 74-1179 U.S. v. Miller

MEMORANDUM TO THE CONFERENCE:

No. 75-5425 Riddick v. United States

The only question in this case is that addressed by the Court in Miller: Whether a defendant can challenge the admission into evidence at trial of bank records subpoenaed from a bank handling his financial transactions. In this case, unlike Miller, the subpoenas were concededly in compliance with Rule 17 of the Federal Rules of Criminal Procedure. But, as we said in Miller (note 2):

"We see no reason why the existence of a Fourth Amendment interest turns on whether the subpoena is defective. Therefore, we do not limit our consideration to the situation in which there is an alleged defect in the subpoena served on the bank."

CA8 refused to allow petitioner to challenge the introduction of the subpoenaed evidence. I will vote to Deny certiorari.

L.F.P.

L.F.P., Jr.

