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The Non-Privacy of Bank Accounts

THE SUPREME COURT is continuing to interpret the right of privacy so narrowly as to give citizens little or no protection against governmental intrusion into many aspects of their everyday personal affairs. A notable example was the Court's 7-2 ruling on Wednesday that no constitutionally protected zone of privacy has been invaded when the government subpoenas records of a person's banking transactions from the bank.

The decision upheld the traditional view that the records of banks, like those of telephone companies, credit-card firms and other businesses, belong to the company, not the customer. Even though sensitive personal information is often involved, this approach gives the customer no right to intervene—or even to be notified—before the business opens up the records to a law-enforcement officer. In the case decided the other day, the citizen involved—who happened to be accused of operating an illegal still—claimed that his banks' compliance with federal subpoenas violated his expectation of privacy in dealing with the banks. A lower federal court had agreed, but the High Court did not.

The most disturbing aspect of this decision is the Court's refusal to recognize that banking involves any reasonable claims of confidentiality at all. Justice Lewis F. Powell Jr., for one, seems to have modified his views along the way to this result. In an earlier case upholding government record-keeping rules, Justice Powell wrote, "Financial transactions can reveal much about a person's activities, associations and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy." The other day, however, Justice Powell wrote for the Court that checks and deposit slips "are not confidential communications but negotiable instruments" and "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." Thus he concluded that no legitimate expectation of privacy is involved; on the contrary, any depositor "takes the risk" that a bank will share this information with the government.

That concept of the banking relationship is not, obviously, the one held by most bankers or most of their customers. The average citizen assumes that his transactions will be kept confidential, and that bank employees will use information about his accounts only for banking purposes. Even this limited disclosure is not entirely voluntary; as the California Supreme Court said recently, "it is impossible to participate in the economic life of contemporary society without maintaining a bank account." And it is precisely the "ordinary" kinds of personal business that should enjoy the most protection against improper or excessive scrutiny by government.

By refusing to acknowledge any legitimate confidentiality in this field, the Court has left the privacy of a wealth of detailed information about virtually all Americans entirely in the hands of the banks and other firms with which they deal. Many companies do regard this as a solemn trust; a growing number, for example, notify a customer when information about his account is demanded by the government. Others do not. Some do not even wait for proper subpoenas, but turn over information in response to the most casual request by law-enforcement officers. Thus individuals enjoy uneven protection at best, while the companies bear the burdens of trying to judge the propriety of official demands in cases they know little about.

Since the Court has refused to find any constitutional defect in this state of affairs, the remedy will have to come from Congress. After years of intermittent discussion, a House Judiciary subcommittee has recommended legislation that would insure citizens notice and a chance to challenge official demands for records of their dealings with financial institutions, telephone companies, credit-card issuers and the like. The notice requirement could be waived only if a judge found that advising the individual would seriously jeopardize the investigation of specified crimes. The bill (H.R. 214) ought to be passed. It would give force to the concept of confidentiality in everyday financial dealings which most people have been banking on, but which the high court has unaccountably failed to grasp.