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Access to Bank Data Held Void

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By Tom Hall

A three-judge federal panel ruled 2 to 1 here today that the reporting of domestic banking transactions as required by the Bank Secrecy Act is unconstitutional.

The act, which was to become effective July 1, requires banks to microfilm and keep records of all check transactions. A restraining order had halted the effective date.

The aim of the measure is to stop the flow of illegal funds into foreign countries. It was to be used as a weapon against illegal drugs, gambling, gold trading and the use of secret bank accounts.

The panel issued a preliminary injunction against enforcement of the domestic section of the act.

Transcends

The court, however, found that the reporting of foreign banking transactions as well as the keeping of records by banks as required under the act are constitutional.

The majority opinion said: "We are of the opinion that the act, insofar as it authorizes the secretary (of the Treasury) to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device . . . transcends

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the constitutional limits as laid down by the U.S. Supreme Court."

Surveillance

The opinion said the Act transcends these limits "for this kind of legislation as to unreasonably invade the right of privacy protected by the Bill of Rights, particularly the 4th Amendment provision protecting the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

It noted its opinion covers surveillance "for the alleged purpose of discovery but not specified wrongdoing among the citizenry."

After basing their ruling on the unreasonable search provision, the court then said it was unnecessary to consider challenges by opponents of the act that it violated 5th Amendment privileges against self-incrimination and due process, and the 1st Amendment guarantee of freedom of association.

The majority opinion was signed by U.S. District Judges William Sweigert, San Francisco, and William East of Portland, Ore.

Dissent

The short dissenting opinion was written by Judge O. D. Hamlin of the U.S. Ninth Circuit Court of Appeals. His dissent was to the majority finding that disclosure in domestic banking transactions is unconstitutional.

Hamlin said he could see no difference between laws covering domestic and those covering foreign banking requirements.

The act, passed by Congress Oct. 26, 1970, awaited drafting of rules and these rules were to become effective July 1. Effectiveness was halted June 30 when Sweigert issued a temporary restraining order pending a three-judge hearing.

Record-Keeping

That temporary order, however, did not halt the recordkeeping provision of the act.

The court acted on suits brought by the American Civil Liberties Union of Northern California on behalf of itself and bank customers, the Security National Bank of Walnut Creek and the California Bankers Association.

The majority opinion said the law allows government agencies to subpoena bank records. It said legal procedure still is available for investigation of possible criminal wrongdoing, such as tax evasion.

Distinction

In ruling on foreign transactions, the judges said the Supreme Court, "when dealing with matters of reporting to and surveillance by the executive, has traditionally recognized a distinction between domestic surveillance where foreign nations are involved."

It pointed out that what might be "impermissible in domestic cases may be constitutional where foreign

powers are involved."

The majority criticized the lack of "procedural safeguards" in the act with respect to reporting of domestic transactions.

The majority opinion stressed that the relationship between surveillance authorized by the act and the expectation that surveillance could uncover wrongdoing "is far-fetched." It cited testimony of an assistant secretary of the Treasury before a congressional committee.

"In excess of 20 billion checks are drawn annually in the U.S. and flow through the banking system, and only a small percentage of these are likely to give use in criminal, tax or regulatory investigations and proceedings."

It also was noted in the majority opinion that the

government in its brief "remarkably" told the court that "... nothing in the statute gives the government any greater right to access to bank records than it possessed before."

The court said if the government intended only to seek records as it had done under existing law "then one may well question the need for this new legislation."