Bank Secrecy Act upheld by Supreme Court

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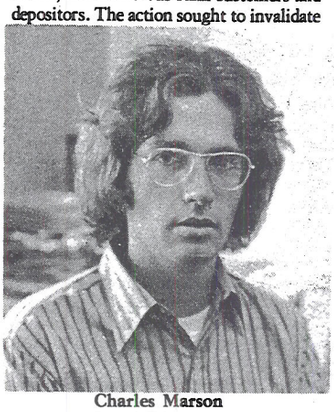
On April first, appropriately, the United States Supreme Court, by a vote of six to three, rejected all of our challenges to the Bank Secrecy Act. The lengthy decision, containing five separate opinions, has major implications for the future of the First, Fourth and Fifth Amendments in the Burger Court. None of them is good.

In June of 1972, ACLU-NC brought suit in Federal District Court in San Francisco on behalf of itself, East Bay Congressman Fortney H. ("Pete") Stark, the Security National Bank in Walnut Creek, and numerous bank customers and depositors. The action sought to invalidate



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the Bank Secrecy Act in its entirety. ACLU was soon joined by the California Bankers Association, an organization of all the state and national banks in California, which sought the same relief.

The Bank Secrecy Act slipped quietly through Congress in 1970; it was written primarily by John Mitchell's Justice Department and the Internal Revenue Service. Ostensibly directed toward organized crime, the Act requires banks to make and keep records of nearly every aspect of their relationships with their customers — including the front and back of nearly all checks — and to report large domestic and foreign transactions directly and routinely to the government ($10,000 in currency for domestic transactions; $5,000 in any form for foreign transactions). To facilitate criminal and other investigations, the Act also requires banks to collect Social Security Numbers and other identifiers of their customers, and makes provision for the distribution of information throughout the law enforcement bureaucracy of the federal government. The declared purpose of the Act was not to monitor banks, but to force them to make and keep evidence useful in criminal and other investigations of bank customers.

A three-judge district court was convened, took evidence, heard arguments, and issued a partial preliminary injunction that effectively split the baby but satisfied no one. The District Court enjoined the domestic reporting requirement — the demand that banks report most transactions exceeding $10,000 in cash — but upheld as constitutional the foreign transactions reporting requirement and all of the recordkeeping provisions. The Government appealed directly to the Supreme Court to challenge the partial injunction; ACLU and the California Bankers Association cross-appealed claiming that the injunction should have issued against the entire Act.

Justice William Rehnquist wrote the opinion for the six-man majority of the Supreme Court, sustaining the Government's argument at every point and reversing the partial injunction granted by the District Court. The following passage from his lengthy opinion is typical of the reason and rhetoric underlying the majority's result:

> . . . there is no denying the impressive sweep of the authority conferred upon the Secretary of the Treasury by the Bank Secrecy Act of 1970. While an Act conferring such broad authority over transactions such as these might well surprise or even shock those who lived in an earlier era, the latter did not live to see the time when bank accounts would join chocolate, cheese, and watches as a symbol of the Swiss economy. Nor did they live to see the heavy utilization of our domestic banking system by the minions of organized crime as well as by millions of legitimate businessmen.

This logic was agreed to by Chief Justice Burger and Justices Blackmun, Powell, Stewart and White. Blackmun and Powell issued a concurring opinion; Justices Douglas, Brennan and Marshall dissented in separate opinions.

The majority ruled that none of the Act's provisions violated the Fourth Amendment's prohibitions of unreasonable search and seizure, the Fifth Amendment's prohibitions of compulsory self-incrimination, or the First Amendment's protections of associational privacy. Justice Rehnquist's opinion argued that the claims of bank depositors that the Act violated the Fourth Amendment were "premature" because no one had yet been victimized by the government use of records kept as required by the Act. At the same time, ACLU's contention that a checking account even of the ordinary customer reveals all sorts of political and social ties, and that the ACLU's checking account, if copied, amounts to a readily available membership list, was rejected for the same reason — it is "premature" until a summons or subpoena is issued for the account.

All this ignores the facts — obvious to the Court and admitted by the Government — that it is the frequent practice of government to obtain bank records without lawful process, and that in any case it is nearly universally true that bank customers are not told of process issued for their bank accounts. Justice Marshall, dissenting, perceived the problem clearly:

> The plain fact of the matter is that the Act's recordkeeping requirement feeds into a system of widespread informal access to bank records by government agencies and law enforcement personnel. If these customers' Fourth Amendment claims cannot be raised now, they cannot be raised at all . . . .
>
> . . . the majority engages in a hollow charade whereby Fourth Amendment claims are to be labelled premature until such time as they can be deemed too late.

The implication of the Court's ruling is that a bank customer cannot litigate the legality of governmental access to his bank account until information gained thereby is used against him (or in the unlikely event that process is issued and he learns of it in time). But if the claim must wait until use, for example in a criminal action, then the claim becomes subject to all the Burger Court's distaste for the exclusionary rule.

The bank depositors' Fifth and First Amendment claims were treated similarly. The legislative history of the Bank Secrecy Act makes plain that enforcement of the *criminal* law is the primary, almost exclusive, purpose of the act. The Government at one point in its briefs called criminal law enforcement "the purpose" of the Act. Justice Rehnquist stooped in his opinion to the plain untruth that "congress seems to have been equally concerned with civil liability," a distortion that drew bitter attack from the dissenters. Having thus pretended that criminal law enforcement was only a part of the purpose of the Act, it was easy for the majority to take the next short step to holding that it would not decide whether the Act violated the constitutional prohibiton against compulsory self-incrimination until someone was actually the victim of the use of the information in a criminal proceeding. Similarly, the majority held that it would not entertain the ACLU complaint about the forced accumulation by its banks of a readily accessible list of its members until a subpoena had issued for the ACLU's bank account.

The Court then held that the foreign and domestic reporting requirements of the Act were permissible. Justice Rehnquist defended the requirement that $10,000 cash transactions be reported because they are "large" and have the greatest "potential" for reflecting improper activity and are therefore "reasonable." (Justice Douglas commented that the Court "cannot be serious" in asserting that dollar amounts have anything to do with probable cause.) The foreign transaction reporting requirements were also upheld because they were said to be analogous to searches of persons and luggage at borders. Justices Powell and Blackmun, in a concurring opinion, said that they had serious doubts about the domestic reporting requirements and would probably hold them invalid if the amount were any less than $10,000.

The claims of the bank plaintiffs were brushed aside by the assertions that the six million dollars a year it will cost them to spy on their customers is "far from unreasonable" and that no rights of the banks were violated by forcing them into that role.

Justice Douglas, dissenting, said:

> I am not yet ready to agree that America is so possessed with evil that we must level all constitutional barriers to give our civil authorities the tools to catch criminals.

Pointing out that "a person is defined by the checks he writes," Douglas argued that there is little essential difference between photocopying bank accounts and recording telephone calls: "A mandatory recording of all telephone conversations would be better than the recording of checks under the Bank Secrecy Act, if Big Brother is to have his way."

Justice Brennan would have invalidated the entire Act on the ground that it is an overly broad delegation of legislative power to the Executive Branch (the Secretary of the Treasury is empowered to decide nearly everything that must be recorded or reported).

The case is the first in Supreme Court history to allow Congress to require one group of private citizens to keep records on another for the purpose of enforcing the criminal laws. The implications of this broad mandate are depressing; as soon as the telephone company has the technology to record many calls, the analogy will be compelling.

The decision also illustrates the lengths to which the Court is willing to go to annull the restrictions that the Fourth and Fifth Amendments place upon criminal law enforcement by pretending that something else is at stake. In the future Congress may simply assert a multiple purpose for its actions so that any claim that the rules of criminal law enforcement are being violated will be labelled as "premature" until such time as it is publicly disclosed that the Congressional Act is being used in a criminal prosecution.

Finally, the decision clearly implies, although it does not forthrightly state, that bank depositors have no recognizable Fourth or Fifth Amendment interest in the records about them kept by banks. In this respect the Court has probably gone too far; there is much interest in Congress in amending the bank secrecy Act as the result of the decision, and more than one hundred members of Congress, at this writing, are authors or coauthors of legislation to extend some privacy to bank accounts. This dispute probably will have its ultimate outcome where it began — in Congress. Readers are encouraged to write their Congressional representatives in support of H.9563 (Stark) and S.2200 (Cranston and Tunney).

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