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## Stark v. Connally: Defining the Bank Customer's Right of Privacy

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# NOTES

## STARK V. CONNALLY: DEFINING THE BANK CUSTOMER'S RIGHT OF PRIVACY

In 1970, Congress passed the Bank Secrecy Act.<sup>1</sup> The Act was designed primarily to help the Treasury Department and other investigatory agencies prevent United States citizens from using foreign banks to avoid United States tax and securities laws.<sup>2</sup> However, the Act also included, in title II,<sup>3</sup> three provisions requiring reports on domestic transactions.<sup>4</sup> In *Stark v. Connally*,<sup>5</sup> a three judge panel for the

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1. 12 U.S.C. §§ 1730d, 1829b, 1951-59 (1970); 15 U.S.C. § 78g(f) (1970); 15 U.S.C. §§ 1602(j)-(o), 1642-44, 1681-81t (1970); 31 U.S.C. §§ 1051-122 (1970).

The Bank Secrecy Act is divided into six titles. The first three deal with the problems arising from the use of secret foreign bank accounts and with the reporting and recordkeeping requirements of the Act. Title I, which establishes recordkeeping requirements for financial institutions, amends the National Housing Act, 12 U.S.C. §§ 1701-50g (1970); the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-31 (1970); and establishes additional provisions, 12 U.S.C. §§ 1951-59 (1970). Title II is the Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 1051-1122 (1970). Title III establishes certain margin requirements and amends the Securities Exchange Act of 1934, 15 U.S.C. § 78a-78111 (1970). Title IV establishes the effective date of titles I-III of the Act. Bank Secrecy Act of 1970, § 401, Pub. L. No. 91-508, § 401, 84 Stat. 1125. Titles V and VI, which deal with credit cards and credit reporting agencies, are not relevant to the bank secrecy problem. For further information about the provisions of the Bank Secrecy Act see Note, *The "Secret" Swiss Account: End of an Era*, 38 BROOKLYN L. REV. 384 (1971) [hereinafter cited as Note] and Note, *The Foreign Banking Act of 1970*, 7 TEX. INT'L L.J. 151 (1971).

2. 115 CONG. REC. 36770 (1969) (remarks of Representative Patman).

3. Title II contains provisions requiring reports of exports and imports of monetary instruments, 31 U.S.C. §§ 1101-05 (1970); records and reports of foreign transactions, 31 U.S.C. §§ 1121-22 (1970); and reports on domestic transactions, 31 U.S.C. §§ 1081-83 (1970).

The general provisions of title II give the Secretary of the Treasury wide discretion in prescribing regulations to effectuate the purpose of the Act, in imposing additional regulations on particular classes of financial institutions, and in exempting certain financial institutions from the requirements of the Act. 31 U.S.C. §§ 1053, 1054(b), 1055 (1970). The use of civil penalties, injunctions and criminal penalties is available to the Secretary for violations of the provisions of this Act. 31 U.S.C. §§ 1056-58 (1970). Furthermore, the Secretary may, at his discretion, make available to any other agency or department of the federal government any information received from the reports filed under the Act. 31 U.S.C. § 1061 (1970).

4. 31 U.S.C. §§ 1081-83 (1970). The most important provision for purposes of this note is 31 U.S.C. § 1081 (1970). This section provides the Secretary of the Treasury with virtually unlimited power to require reports pertaining to domestic transactions:

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

31 U.S.C. § 1081 (1970). However, the Treasury Department chose only to require reports from financial institutions concerning transactions in currency in excess of

Federal District Court of the Northern District of California held these domestic sections unconstitutional. According to the court, the provisions unreasonably invade bank customers' rights of privacy as protected by the fourth amendment.<sup>6</sup> Since *Stark* is presently before the Supreme Court, the Court's disposition of the case, along with *Stark's* impact on pending federal legislation, should finally decide the scope of a person's right to privacy in his bank records.

### THE BANK SECRECY ACT

During the late sixties the United States government was growing increasingly concerned over a statutory duty of secrecy imposed by certain foreign governments upon their banks.<sup>7</sup> The Swiss, for example, will not disclose any information from their accounts in cases of political, military or fiscal crimes.<sup>8</sup> Thus, the United States often could obtain no assistance when attempting to curb the illegal flow of monetary instruments to and from the United States.

Understanding this problem, Representative Wright Patman spearheaded the drive to pass the Bank Secrecy Act. Time after time he assured Congress that the Act would not interfere with the laws of other nations, but was just an attempt to make up for the inadequacies in American law<sup>9</sup> and, specifically, to eliminate numerous illegal practices.<sup>10</sup> The goal

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\$10,000. 37 Fed. Reg. 6913 (1972). Furthermore, to enable financial institutions to make these reports, the regulations require financial institutions to maintain records of every extension of credit greater than \$5,000, except those secured by an interest in real property. 37 Fed. Reg. 6914 (1972). Similarly, banks must, as to deposit or share accounts, retain records in original, microfilm or other copy of: (1) the taxpayer identification number of the person maintaining the account (if the account was opened after June 30, 1972) or the social security number of any individual having a financial interest in the account; (2) the authorizing signature card of each account; (3) each statement showing every transaction with respect to every account; (4) each check, or similar instrument, drawn on the bank, with certain exceptions; and (5) certain other debits to accounts. 37 Fed. Reg. 6914 (1972), *as amended*, 38 Fed. Reg. 2175 (1973).

5. 347 F. Supp. 1242 (N.D. Cal. 1972).

6. *Id.* at 1251.

7. *See*, Comment, *Swiss Banking Secrecy*, 5 COLUM. J. TRANSNAT'L L. 128, 128-29 (1966); Note, *supra* note 1, at 387.

8. Note, *supra* note 1, at 391.

The Swiss position is that foreign countries must provide their own controls over political, military and fiscal crimes through internal legislation. *Id.* at 392. This is not to say that the Swiss will never provide information from the bank accounts. The duty of secrecy does not prevail if the information sought by foreign officials concerns acts considered crimes under Swiss law, and are not mere violations of administrative law. For example, information will be provided to the foreign officials if the case involves tax fraud. *Id.* at 404; *see* 116 CONG. REC. 15476 (1970) (remarks of Assistant Secretary of the Treasury Rossides).

9. 115 CONG. REC. 36770 (1969).

10. Those illegal practices included:

One, evasion of taxes.

of controlling the use of foreign bank accounts was an objective which met with little, if any, opposition. There were, however, at least three major objections to title II of the Act.

First, some Congressmen were afraid that too much authority had been delegated to the Secretary of the Treasury; he had too much discretion to determine legislative intent. It was maintained that specific congressional criteria with some administrative flexibility should have been set out.<sup>11</sup> Nevertheless, the discretionary power granted to the Secretary of the Treasury passed congressional muster because it was argued that the discretionary power was limited by the wording of the purpose clause<sup>12</sup> and that the remaining discretionary power provided the administrative flexibility necessary to relieve any burdensome results of the Act.<sup>13</sup>

Second, it was pointed out that the original purpose of the Bank Secrecy Act was to control the illegal use of foreign bank accounts.<sup>14</sup> Yet title II contained provisions whereby domestic transactions and accounts could be monitored.<sup>15</sup> It was argued that these provisions were not relevant to the original purpose.<sup>16</sup> Thus, the suggestion was made that it might be worthwhile to sever this part of the Act for further consideration.<sup>17</sup> Yet because of the recognized urgent need for the bill and the fact that the Internal Revenue Service and Justice Department indicated a need

Two, taking over of legitimate businesses by organized crime.

Three, financing of the narcotics traffic.

Four, overstating of the cost of Government contracts in order to defraud the Government. This has resulted in the Government buying shoddy and inferior equipment for our soldiers in Vietnam.

Five, manipulation of stock prices on our securities market.

Six, violating the margin requirements in purchasing stock.

Seven, corporate officers trading in their company's stock because of inside information.

Eight, illegal buying of gold by American citizens.

Nine, hiding of untaxed, skimmed money from Nevada gambling casinos.

116 CONG. REC. 16951-52 (1970) (remarks of Representative Patman).

11. *Id.* at 36576-77 (remarks of Representative Schmitz).

12. *Id.* at 35938-39 (remarks of Senator Proxmire). The purpose clause reads as follows:

It is the purpose of this chapter to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

31 U.S.C. § 1051 (1970).

13. 116 CONG. REC. 16957, 16964 (1970) (remarks of Representatives Widnall & Hanley). For example, the Secretary of the Treasury could use his exemptive powers to remove normal business transactions from the reporting and recordkeeping requirements of the Act. 31 U.S.C. § 1055 (1970).

14. 116 CONG. REC. 16957 (1970) (remarks of Representative Widnall).

15. 31 U.S.C. §§ 1081-83 (1970).

16. 116 CONG. REC. 16957 (1970) (remarks of Representative Widnall).

17. *Id.*

for uniform recordkeeping,<sup>18</sup> the bill was passed over this objection.

Finally, because the life one leads can often be told from his financial records, some Congressmen expressed the fear that the domestic transactions reporting provisions would invade the privacy of bank customers.<sup>19</sup> To allay this fear, many Congressmen repeated the same statement: Information from the required *records* could not be obtained without legal process.<sup>20</sup> Presumably because of this congressional assumption, no provisions for legal process were written into the domestic transactions reporting provisions. But this assumption did not recognize the distinction between records and reports: A recordkeeping requirement demands maintenance of a depository of information while a reporting requirement demands a dissemination of information from the records. In *United States v. Morton Salt Co.*,<sup>21</sup> the Supreme Court indicated that legal process is not necessary to obtain "reasonable" reports from business entities.<sup>22</sup> Nevertheless, with reassurance both that legal process would be required and that the Secretary's discretion would be limited through the purpose clause,<sup>23</sup> the Bank Secrecy Act was passed over this objection.

#### THE STARK DECISION

Two suits were brought in the United States District Court for the Northern District of California attacking the constitutionality of the Bank Secrecy Act and the regulations issued thereunder, and seeking an injunction against the Secretary of the Treasury to prevent him from enforcing the provisions of the Act.<sup>24</sup> The cases were consolidated by the court because each made essentially the same constitutional arguments.

Although several constitutional arguments were posed, the court restricted its analysis to the plaintiffs' allegation that the Act violated their fourth amendment rights of privacy and freedom from unreasonable searches.<sup>25</sup> After short deliberation, the court held the recordkeeping and foreign transactions reporting provisions constitutional.<sup>26</sup> However, the

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18. *Id.* at 16953 (remarks of Representative Patman).

19. *Id.* at 16962-63 (remarks of Representative Hanna).

20. *Id.* at 16954, 16959, 16963 (remarks of Representatives Patman, Gonzalez & Annunzio).

Individuals or businesses may demand legal process from the government upon a governmental request to inspect records. See *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 363-64 (1942); *Shapiro v. United States*, 159 F.2d 890, 893 (2d Cir. 1947), *aff'd*, 335 U.S. 1 (1948).

21. 338 U.S. 632 (1950).

22. *Id.* at 647-54.

23. See note 12 *supra* & text accompanying.

24. *Stark v. Connally*, 347 F. Supp. 1242, 1244 (N.D. Cal. 1972).

25. *Id.* at 1251.

26. *Id.* at 1244-45.

court held that §§ 1081-83 of title II<sup>27</sup> allowed unreasonable searches of financial records and, thereby, invaded a bank customer's "right of privacy protected by the Bill of Rights, particularly the Fourth Amendment."<sup>28</sup> The court's opinion may be interpreted as having reached this conclusion through two related methods of analysis.

First, the *Stark* court noted that Congress has the power to require records and reports from business entities and citizens only when the "records or reports bear some reasonable relationship to the matters under inquiry."<sup>29</sup> Thus, the government may not engage in a "fishing expedition." Yet legislative history<sup>30</sup> and "the mere general possibility that [bank record] surveillance will help in criminal, taxation and unspecified governmental investigations,"<sup>31</sup> indicated to the court that the government might attempt precisely this type of expedition by exercising the Secretary's discretionary power. Without some provision for legal process or some limitation on the Secretary's discretionary power to demand virtually unlimited domestic transactions reporting, the "reasonableness" test enunciated by *Morton Salt* and other Supreme Court cases could not be met.<sup>32</sup>

But an even more stringent standard apparently was behind the *Stark* decision. Judge Sweigert, writing for the majority, noted that an individual's fourth amendment rights concerning bank records have traditionally been restricted.<sup>33</sup> However, he continued, the domestic re-

27. 31 U.S.C. §§ 1081-83 (1970).

28. 347 F. Supp. at 1251.

29. *Id.* at 1250.

30. *Id.* at 1250-51.

31. *Id.* at 1250.

32. *Id.* at 1251.

Although it may be difficult to give content to "reasonableness," there is no question that Supreme Court cases indicate some limitation on congressional power to require records, information from records or reports from individuals or businesses. The general rule is that the demand for the records or reports must be "reasonable," *i.e.*, the records or reports must be reasonably related to the matters under inquiry. *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961) (reports); *United States v. Morton Salt*, 338 U.S. 632 (1950) (reports). *See also Shapiro v. United States*, 335 U.S. 1 (1947) (records); *Oklahoma Publishing Co. v. Walling*, 327 U.S. 186 (1946) (records).

In discussing the reasonableness standard, the *Stark* court emphasized that the domestic transactions reporting provisions appear to be a domestic surveillance device. These provisions could provide the government with information concerning every detail of citizens' financial transactions without any fourth amendment protection. In this regard, the court drew an analogy to *United States v. United States District Court*, 407 U.S. 297 (1972), where it was maintained that surveillance of domestic organizations for national security purposes—an interest much more vital than any interest in the case at hand—is subject to fourth amendment standards. Thus, the *Stark* court opined that the lack of fourth amendment protection as required by *United States* is an additional indication of the unreasonableness of the domestic transactions reporting provisions. 347 F. Supp. at 1247, 1250.

33. 347 F. Supp. at 1248. The court stated that the cases enunciating this tradi-

porting provisions of title II demand more than reports based solely on the *bank's own records*; the provisions also demand information obtained from microfilms of bank customers' drafts and checks.<sup>34</sup> Since such information went well beyond mere bank records

[i]t would seem reasonable . . . for the drawer of a check to regard himself as the real owner . . . and to expect that detailed information shown only on the face of his checks [would not be released] without at least some notice . . . or warrant in connection with some legitimate pending inquiry.<sup>35</sup>

Thus, although Judge Sweigert recognized certain limitations on this second argument,<sup>36</sup> he seemed intent on defining an even more expansive concept of protectable privacy than his first argument would indicate.

#### THE STARK DECISION ON APPEAL

*Stark* was appealed by all parties directly to the Supreme Court.<sup>37</sup> The path which the Court's analysis follows will be very important. Affirming *Stark* on the grounds that inadequate reporting limitations were

tional position had three common threads: (1) legal process was used to obtain (2) the bank's own records (3) for a specific purpose. *Id.*

34. *Id.*

35. *Id.* Although the court did not decide whether the customers' checks become the property of the bank, it does seem to indicate that incidents of ownership in the checks give rise to a reasonable expectation of privacy—in the *Katz v. United States*, 389 U.S. 347 (1969) sense—as to the information appearing on the checks. 347 F. Supp. at 1248. The court attempts to support this proposition by citing *City of Carmel-By-The-Sea v. Young*, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970), and two other cases relating to procedures which the Internal Revenue Service utilizes to examine books and witnesses: *Donaldson v. United States*, 400 U.S. 517 (1971) and *Riesman v. Coplin*, 375 U.S. 440 (1964). 347 F. Supp. at 1249.

*Young* is used to illustrate that the financial affairs of individuals are private. *Id.* Note, however, that this case is easily distinguished. *Young* involved a public disclosure statute which is significantly different from provisions requiring reports to the Secretary of the Treasury. 31 U.S.C. § 1052(j) (1970), provides that reports and records of such reports are exempted from public disclosure under 5 U.S.C. § 552 (1970).

But more importantly, the court noted that *Donaldson* modified *Riesman* insofar as *Donaldson* held that a taxpayer does not have the right to intervene in a summons directed to another party holding records pertaining to the taxpayer's financial condition unless the taxpayer has a proprietary interest in the records. 347 F. Supp. at 1249 n.2. Furthermore, *Donaldson* indicated that the taxpayer would also have the right to intervene if a criminal charge is pending against him or the sole purpose for the summons is to aid in a criminal investigation. *Donaldson v. United States*, *supra* at 533. Subsequently, the court stated that a customer-taxpayer has the right to intervene as a third party interest when records concerning his financial transactions are summoned from the bank under INT. REV. CODE OF 1954 §§ 7602 *et seq.* 347 F. Supp. at 1249. The court by using *Donaldson* and *Riesman* is implying that a bank customer has a proprietary interest in the microfilms of his checks.

36. 347 F. Supp. at 1248-49.

37. *Stark v. Schultz*, 41 U.S.L.W. 3487 (U.S. Mar. 13, 1973); *Schultz v. California Bankers Assoc.*, 41 U.S.L.W. 3431 (U.S. Feb. 13, 1973); *California Bankers Assoc. v. Schultz*, 41 U.S.L.W. 3410 (U.S. Jan. 23, 1973).

promulgated for title II would probably change the current state of the law. Affirmance on these grounds would attempt to show that §§ 1081-83 simply contravene *Morton Salt* guidelines;<sup>38</sup> in other words, virtually unlimited reporting is unreasonable by definition.

If the Supreme Court affirmed *Stark* on the basis of this analysis, §§ 1081-83 could easily be corrected. It would only be necessary to legislate stricter guidelines outlining what reports should be required, what information they should contain and their purpose. Once these guidelines were passed, reports could be required from banks (as business entities) without prior legal process or customers' knowledge.

However, such an analysis—that the domestic transactions reporting provisions are invalid because they violate the *Morton Salt* guidelines—is not accurate. The *Morton Salt* standard is that administrative agencies may require reports if “the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.”<sup>39</sup> If *Stark* is read to say that this standard is not met because the domestic transactions reporting provisions authorize unlimited reporting, the court is apparently writing new law. *Morton Salt* and other cases have upheld a similarly broad provision in the Federal Trade Commission Act,<sup>40</sup> indicating that not only are adequate procedural protections available to the petitioner,<sup>41</sup> but that less procedural protection is necessary

38. See text accompanying note 39 *infra*.

39. 338 U.S. at 652.

40. 15 U.S.C. §§ 41-77bbbb (1970).

The provision granting the Federal Trade Commission the power to require corporations to file reports is as follows:

To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act, to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

15 U.S.C. § 46(b) (1970).

41. The Court in *Morton Salt* stated:

Before the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions. . . . Since we do not think this record presents the question, we do not undertake to determine whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order. . . . It is enough to say that, in upholding this order upon this record, we are not

for an administrative investigation into corporate affairs than is necessary in adjudicative proceedings.<sup>42</sup> Because of *Morton Salt* and its progeny, and the fact that title II incorporates the protection of the Administrative Procedure Act,<sup>43</sup> it is not likely that the Supreme Court would affirm *Stark* on the basis that virtually unlimited reporting is unreasonable by definition.

However, the foregoing analysis based on *Morton Salt* may be putting the cart before the horse; *Morton Salt* may be inapplicable. *Morton Salt* and its progeny dealt with reports required of corporations, and it is clear that corporations are not afforded the same constitutional protection as individuals.<sup>44</sup> Thus, the Court should first focus on whether the information from the bank records "belongs" to the bank as a business entity or to the individual bank customer—the second method of analysis suggested by *Stark*.

Using the second avenue of analysis, the Supreme Court could predicate its decision on the *Stark* court's broad formulation of bank customer privacy. This formulation is two-pronged. The *Stark* court believed the bank customer considers himself the real owner of the information contained on his checks. In turn, this proprietary interest leads to reasonable expectations of privacy.<sup>45</sup> This formulation, if valid, would place *Stark* within the scope of *Katz v. United States*<sup>46</sup> which indicated that when an individual has expectations of privacy which society considers reasonable, he is entitled to fourth amendment protection.<sup>47</sup> This two-pronged formulation would require legal process whenever the government seeks information from bank records through reports or otherwise.

to be understood as holding such orders exempt from judicial examination. . . .

338 U.S. at 653-54.

The implication from *Morton Salt* that adequate procedural protections are available to corporations subject to broad reporting requirements was reiterated more forcefully in *St. Regis Paper Co. v. United States*, 368 U.S. 208, 227 (1961). Indeed, the Second Circuit in the *St. Regis* case held that adequate remedies to a broad reporting order were available under the Declaratory Judgment Act or the Administrative Procedure Act. 285 F.2d 607, 615-16 (2d Cir. 1960).

42. *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1388 (5th Cir. 1971).

43. 31 U.S.C. § 1062 (1970).

44. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 204-08 (1946).

45. See note 35 *supra* & text accompanying.

46. 389 U.S. 347 (1967).

47. *Katz* abandoned the trespass doctrine and brought wiretapping within the purview of the fourth amendment by holding that the protection of the fourth amendment extends to "people, not places." *Id.* at 351. The Court held that people have reasonable expectations of privacy when they use a telephone booth—expectations which society is willing to protect. *Id.* at 352, 361 (Harlan, J., concurring). Thus, a warrantless wiretap of a telephone booth by the Federal Bureau of Investigation to gather information about certain gambling operations was a violation of the fourth amendment. *Id.* at 359.

The rationale that the bank customer has reasonable expectations of privacy in the microfilms of his checks is questionable. First, the *Stark* court chose to discount numerous cases which hold that a bank customer has no rights in bank records concerning his financial transactions.<sup>48</sup> Second, the court ignored cases from the Seventh and Tenth Circuits which, in construing *Donaldson v. United States*,<sup>49</sup> had maintained that bank customers have no proprietary interests in their bank records.<sup>50</sup> Finally, the *Stark* court refused to recognize cases which explicitly held that microfilms of checks are the property of the bank and that the customer has no interest in them.<sup>51</sup> Indeed, the Court of Appeals for the Ninth Circuit—the circuit of the *Stark* court—stated, in *Harris v. United States*,<sup>52</sup> that microfilms of checks are the property of the banks.

Thus, not only may the *Stark* court be writing new law when it suggests that a proprietary interest in bank records gives rise to a right of privacy for bank customers, but also the court would be writing new law by merely stating that a bank customer has a proprietary interest in bank records.<sup>53</sup> Consequently, it is not hard to conclude that this broad interpretation of the *Stark* holding may be avoided by the Court.

Nevertheless, there are other bases, not explicit in the *Stark* holding, for maintaining that bank customers have reasonable expectations of privacy in their bank records and all information contained therein. First, the banking process is necessary to our society. It has been noted that, even absent some proprietary interest in bank records, bank customers do have some protectable interest in maintaining their anonymity.<sup>54</sup> This is illustrated by the fact that banks have assumed (or have been required to assume in a few states) a limited duty of secrecy as to bank records.<sup>55</sup>

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48. 347 F. Supp. at 1248-49. There are numerous cases holding that a bank customer has no rights in bank records concerning his financial transactions. *E.g.*, *United States v. Gross*, 416 F.2d 1205, 1213 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970); *Galbraith v. United States*, 387 F.2d 617, 618 (10th Cir. 1968); *In re Cole*, 342 F.2d 5, 7 (2d Cir. 1965), *cert. denied*, 381 U.S. 950 (1965); *DeMasters v. Arend*, 313 F.2d 79, 85 (9th Cir. 1963), *petition for cert. dismissed*, 375 U.S. 936 (1963); *Cooley v. Bergin*, 27 F.2d 930, 933 (D. Mass. 1928).

49. 400 U.S. 517 (1971). For a summary of the *Stark* court's use of *Donaldson* see note 35 *supra*.

50. *United States v. Nat'l State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972); *SEC v. First Security Bank of Utah*, 447 F.2d 166, 168 (10th Cir. 1971), *cert. denied*, 404 U.S. 1038 (1972).

51. *E.g.*, *Harris v. United States*, 413 F.2d 316, 318 (9th Cir. 1969); *O'Donnell v. Sullivan*, 364 F.2d 43, 44 (1st Cir. 1966), *cert. denied*, 385 U.S. 969 (1966).

52. 413 F.2d 316 (9th Cir. 1969).

53. Even if one does have a proprietary interest in his bank records it does not necessarily follow that he has reasonable expectations of privacy in those records.

54. Note, *supra* note 1 at 386; Case Note, *Banks and Banking: Florida Adopts a Duty of Secrecy*, 22 U. FLA. L. Rev. 482, 485 (1970) [hereinafter cited as Case Note].

55. Case Note, *supra* note 54, at 486. This limited duty of secrecy is evidenced

Therefore, the Court may consider bank customers' expectations of privacy in bank records reasonable—just as *Katz* recognized that people have reasonable expectations of privacy in their public telephone conversations.<sup>56</sup> Second, there is generally no need to allow such broad surveillance into bank records through reports. Not only is it possible that such reports would engender too much information for the government to utilize efficiently,<sup>57</sup> but there is also ample time to obtain legal process because investigations into domestic transactions are usually long-range in character. Third, § 1061<sup>58</sup> could be used by the Treasury to distribute its reported information to other agencies. While these agencies would have needed an authorized summons or subpoena to obtain this information themselves, distribution by the Treasury would enable them to bypass this requirement.<sup>59</sup> Finally, the legislative history of the Bank Secrecy Act indicates that a reasonable expectation of privacy in bank records should be recognized.<sup>60</sup>

In sum, the Supreme Court could go well beyond the limited proscription of "reasonable" reporting. Interpreted broadly, the *Stark* decision expands a person's right to prevent any disclosure of bank information without following some procedural safeguard. Perhaps due to a fear that the Supreme Court will not adopt this broader formulation, legislation is now being proposed in Congress to insure the privacy of bank customers.

#### PROPOSED LEGISLATION: THE FINANCIAL RECORDS PRIVACY ACT

[S]ome people . . . have the attitude that a person's checking account is not his private property; that, somehow, the records

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by the fact that banks usually consider their customers' accounts confidential.

56. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. . . . To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

*Katz v. United States*, 389 U.S. 347, 352 (1967).

57. *Hearings on H.R. 15073 Before the House Comm. on Banking and Currency*, 91st Cong., 1st Sess. 68 (1969).

Similarly, it is important to note that, while it may be constitutionally permissible to require financial institutions to maintain records, it can be unreasonable to require financial institutions to disseminate information from the records through reports because the process of organizing the abundance of information may be too costly. *United States v. Third Northwestern Nat'l Bank*, 102 F. Supp. 879, 882-83 (D. Minn. 1952), *appeal dismissed*, 196 F.2d 501 (8th Cir. 1952).

58. 31 U.S.C. § 1061 (1970).

59. 118 CONG. REC. 11303 (daily ed. July 20, 1972) (reprint of comments of Roy Englert, Deputy General Counsel for the Treasury Dept., from *American Banker*).

60. 116 *id.* at 16962, 16964, 35938 (1970) (remarks of Representatives Brown & St. Germain & Senator Proxmire).

relating to the checking account belong to the bank or to a governmental agency. . . .<sup>61</sup>

After the Bank Secrecy Act was passed, some Congressmen began to have second thoughts. Title II, they felt, granted too much authority to the Treasury Department to monitor domestic transactions.<sup>62</sup> After the Secretary of the Treasury issued his department's title II regulations the concern became much more vocal. One senator felt that the regulations "have not gone beyond the letter of the law . . . but they have clearly gone beyond the intent of Congress."<sup>63</sup> Another noted that there was no federal law which prevented a bank from releasing information from customers' records to government officials upon request<sup>64</sup> and that there were over 100 subpoenas the government could use to obtain the information with no notice to the bank customer.<sup>65</sup> These views, combined with newspaper accounts of the government using bank records for political surveillance,<sup>66</sup> the testimony of federal officials that political surveillance through bank records was a common practice<sup>67</sup> and the constitutional challenge presented by *Stark*, prompted the introduction of the Financial Records Privacy Act, which would establish a bank customer's right of privacy in records concerning his banking transactions.<sup>68</sup>

61. 118 *id.* at 11315 (daily ed. July 20, 1972) (remarks of Senator Tunney).

62. *Id.* at 9131 (daily ed. June 12, 1972) (remarks of Senator Tunney; *id.* at 11300 (daily ed. July 20, 1972) (remarks of Senator Mathias).

63. *Id.* at 11311 (daily ed. July 20, 1972) (remarks of Senator Mathias).

64. *Id.* at 10829 (daily ed. June 30, 1972) (remarks of Senator Tunney).

65. *Id.* at 11299 (daily ed. July 20, 1972) (remarks of Senator Tunney).

This observation regarding a lack of notice has been made previously with respect to INT. REV. CODE OF 1954, §§ 7602-04. *Scarafiotti v. Shea*, 456 F.2d 1052, 1053 (10th Cir. 1972). Indeed, it has been noted that it is not uncommon for banks to release information to government agents without demanding a subpoena. Bailin, *Banks Ordinarily Cooperate with IRS in Tax Examinations of Customers*, 14 J. TAX 220 (1961)

66. 118 CONG. REC. 9132 (daily ed. June 12, 1972) (remarks of Senator Tunney).

67. *Id.* at 15711 (daily ed. Sept. 22, 1972) (remarks of Senator Tunney).

68. There have been four bills proposed to accomplish this aim—S. 3814 92d Cong., 2d Sess. (1972), by Senator Tunney; S. 2828 92d Cong., 2d Sess. (1972), by Senator Mathias; H.R. 16190 92d Cong., 2d Sess. (1972), by Representative St. Germain; and, H.R. 8062, 93d Cong., 1st Sess. (1973), by Representative Addabbo. Due to their similar goals, only S. 3814 (reprinted at 118 CONG. REC. 11299 (daily ed. July 20, 1972)) will be discussed in this note.

It is interesting that Senator Mathias' original proposal would only require banks to maintain records of foreign transactions. Maintenance of records pertaining to domestic transactions would be optional. 118 CONG. REC. 14661 (daily ed. Sept. 12, 1972) (remarks of Senator Mathias). It is doubtful that Congress would pass this measure.

The proposed Financial Records Privacy Act appears to cover foreign, as well as domestic transactions. The potential effect of this Act on the foreign reporting provisions of the Bank Secrecy Act is, however, beyond the scope of this Note.

The purpose of the proposed legislation is to regulate the disclosure of information from financial records so that constitutional rights—especially rights of privacy—of bank customers will be protected.<sup>69</sup> In this regard, § 4 of the bill proposes that disclosure by financial institutions is permitted only when either the bank customer has consented in writing, when an authorized subpoena has been served upon the account holder in a prescribed manner or when a court order is issued, subsequent to a probable cause hearing, to disclose the records.<sup>70</sup>

Section 5 attempts to control the use of information obtained by any governmental agency. It provides that the information may be used only for the specific statutory purpose for which the information was obtained, unless the information engenders a civil or criminal complaint within six months of obtaining the information.<sup>71</sup> However, statistical information may be compiled and disseminated without reference to individual bank customers.<sup>72</sup> Presumably, § 5 is designed to counteract the authority granted to the Secretary of the Treasury to dispense information to other government agencies under § 1061 of title II.<sup>73</sup>

Finally, § 7 provides bank customers with a civil cause of action against financial institutions, the United States or any other person for willful or other violations of the Act.<sup>74</sup> In addition, criminal penalties may obtain against employees of financial institutions who willfully violate the Act, or against any government agent who induces or attempts to induce a violation of the Act.<sup>75</sup>

#### CONCLUSION

Title II's domestic transactions reporting provisions have been declared unconstitutional. Both Congress and the Supreme Court will ultimately decide the amount of protection a person's bank records will be afforded. Congress' proposed legislation should go a long way towards

69. S. 3814, 92d Cong., 2d Sess. § 2 (1972).

70. S. 3814, 92d Cong., 2d Sess. §§ 4(a)-(e) (1972). It should be noted that § 6 sets out certain exceptions to § 4. These exceptions allow limited disclosure of records by financial institutions to enable the financial institutions to process checks, comply with the Internal Revenue Code and function in other specified ways which do not pose a threat to bank customers' privacy. S. 3814, 92d Cong., 2d Sess. § 6 (1972).

71. S. 3814, 92d Cong., 2d Sess. § 5 (1972).

72. *Id.*

73. *See*, note 57 *supra* & text accompanying. 31 U.S.C. § 1061 (1970). For a discussion of this provision see notes 58-59 *supra* & text accompanying.

74. S. 3814, 92d Cong., 2d Sess. § 7 (1972) (damages). The Act also provides for injunctive relief. *Id.* § 10.

The cause of action may be brought in the appropriate United States district court or any other court of competent jurisdiction within three years of the violation, or the discovery of the violation, whichever is longer. *Id.* § 7.

75. S. 3814, 92d Cong., 2d Sess. § 8 (1972). In addition, a government official, upon conviction, would be removed from the civil service. *Id.* § 9.

protecting a bank customer's right to privacy in his financial affairs while at the same time insuring efficient operation of financial institutions and governmental access to account holders' records. And, increasing concern over individual rights of privacy should lead the Supreme Court to overturn earlier bank record decisions and provide bank customers with the full protection of the Constitution.

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