

# CALIFORNIA BANKERS ASSOCIATION v. SHULTZ: AN ATTACK ON THE BANK SECRECY ACT

By L. GENE SANFORD\*

## Introduction

In December, 1969, legislation leading to enactment of the Bank Secrecy Act was introduced in the House of Representatives.<sup>1</sup> Hearings were held in June, 1970, with the final act receiving approval by Congress and being signed into law by the president the following October.<sup>2</sup> The secretary of the treasury promulgated implementing regulations on March 31, 1972,<sup>3</sup> which became effective July 1, 1972.<sup>4</sup>

The stated purpose of the Bank Secrecy Act (hereinafter referred to as the act) is "to require the maintenance of appropriate types of records . . . where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."<sup>5</sup> The chairman of the House Banking and Currency Committee, Rep. Wright Patman, described the act as a means of combating the use of "secret foreign bank accounts and foreign financial institutions as part of illegal schemes by American Citizens and others . . . ."<sup>6</sup> Assistant Attorney General Will Wilson speaking in support of the act for the Department of Justice said:

We are deeply concerned when foreign secrecy laws prevent foreign bankers from introducing foreign bank documents into evidence. We are equally concerned when domestic banks and other domestic

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\* Member, third year class.

1. H.R. 15073, 91st Cong., 1st Sess. (1969).

2. Act of Oct. 26, 1970, 12 U.S.C. §§ 1829b, 1951-1959; 31 U.S.C. §§ 1051-1122 (1970).

3. "Where the Secretary of the Treasury . . . determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section." 12 U.S.C. § 1829b(b) (1970).

4. 31 C.F.R. §§ 103.11-103.51 (1973).

5. "It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 12 U.S.C. §§ 1829b(a)(2) (1970).

6. *Hearings on H.R. 15073 Before the House Committee on Banking and Currency*, 91st Cong., 1st and 2d Sess., 8 (1970).

financial institutions fail to retain records highly useful to enforcement of the criminal laws—federal, state and local.<sup>7</sup>

### Title I:

In pursuit of its prescribed purpose, Title I of the act authorizes regulations compelling banks<sup>8</sup> and other financial institutions<sup>9</sup> to maintain sufficient records to reconstruct a demand deposit or savings account and to trace a check deposited in such account through its domestic processing system. These records must contain, in such form as the secretary of the treasury (hereinafter the secretary) shall require,<sup>10</sup> the identity of each person having an account in the United States,<sup>11</sup> the identity of each person having signature authority over that account,<sup>12</sup> and a microfilm or other reproduction of each check, draft, or similar instrument drawn on the account.<sup>13</sup> In addition, a record of each check, draft, or similar instrument received by an institution for deposit or collection together with an identification of the party for whose account it is to be deposited or collected, must be maintained.<sup>14</sup>

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7. *Id.* 2d Sess., 58.

8. "Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section." 12 U.S.C. § 1829b(c) (1970).

9. The Secretary of the Treasury is given authority to extend or prescribe regulations to any uninsured bank, or any person engaged in the business of check redemption, issuance of money orders or travelers checks, operating credit card systems or currency exchanges, or any institution performing similar related or substitute functions. 12 U.S.C. §§ 1953, 1955 (1970).

10. See note 8 *supra*.

11. *Id.*

12. *Id.*

13. "Each insured bank shall make, to the extent that the regulations of the Secretary so require—

"(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment . . . ." 12 U.S.C. § 1829b(d)(1) (1970).

The secretary of the treasury has provided for certain exceptions to this requirement. The most important being accounts which are expected to have an average of 100 checks per month drawn on them for dividend payments, payroll employee benefits, insurance claims, or medical benefits. 31 C.F.R. § 103.34(b)(3) (1973). Pending appeal of California Bankers Association v. Shultz, the secretary also exempted checks of \$100 or less from every account. 31 C.F.R. § 103.34(b)(4) (1973).

14. "Each insured bank shall make, to the extent that the regulations of the Secretary so require—

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 "(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected . . . ." 12 U.S.C. § 1829b(d)(2) (1970).

**Title II:**

Title II of the act requires banks and other financial institutions to report directly to the secretary certain domestic and foreign currency transactions.<sup>15</sup> Under regulations promulgated by the secretary,<sup>16</sup> these reports must identify all parties involved in any domestic currency transaction in excess of \$10,000<sup>17</sup> or foreign transaction in excess of \$5,000.<sup>18</sup> In addition, private individuals involved in transactions of

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15. 31 U.S.C. §§ 1051-1062, 1081-1083, 1101-1105, 1121, 1122 (1970).

16. "Before effecting any transaction . . . a financial institution shall verify and record the identity, and record the account number on its books or the social security or taxpayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification." 31 C.F.R. § 103.26 (1973).

17. "(a) Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than \$10,000.

"(b) Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him." 31 C.F.R. § 103.22 (1973).

18. "(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding \$5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

"(b) Each person who receives in the U.S. currency or other monetary instruments in an aggregate amount exceeding \$5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under paragraph (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

"(c) This section shall not require reports by (1) a Federal Reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a commercial bank or trust company organized under the laws of any State'

these amounts must report comparable information to the secretary.<sup>19</sup>

### District Court Litigation:

Litigation seeking injunctive and declaratory relief to prevent enforcement of the act and the regulations promulgated by the secretary under authority of the act was instituted in two separate actions before the district court for the Northern District of California in June, 1972.<sup>20</sup> The district court consolidated the two cases<sup>21</sup> and convened a three-judge court to hear and decide the constitutional issues raised by the complaints.<sup>22</sup>

Plaintiff, California Bankers Association, asserted that Title I's record-keeping provisions violated (1) due process of its member banks and (2) the right of privacy of the customers of member banks. The American Civil Liberties Union, as a depositor in a bank subject to the record-keeping requirements and as a representative of its members who are bank customers, attacked Title I on First Amendment grounds as violating rights of free speech and of free association.

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or of the United States with respect to overland shipments of currency or monetary instruments shipped to or received from an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned, (4) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (5) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (6) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (7) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, (8) nor by a person engaged as a business in the transportation of currency, monetary instruments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

"(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by paragraph (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed." 31 C.F.R. § 103.23 (1973).

19. *Id.*

20. Plaintiffs in the first action were the Security National Bank, several bank customers and the ACLU. Plaintiff in the second action was the California Bankers Association.

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

22. This procedure is required by the Judicial Procedure Act of June 25, 1948, ch. 646, 28 U.S.C. § 2282, whenever "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States" is sought.

**District Court Decision:**

The district court, in its September 11, 1972, decision, upheld the act's recordkeeping and foreign transaction reporting requirements, but found the act's domestic reporting requirements unconstitutional and, with one judge dissenting, issued a preliminary injunction. The decision does not discuss plaintiffs' objections to the act's record-keeping requirements. The court simply states that they found "no constitutional violation in these record-keeping provisions, as such."<sup>23</sup> Appeals were taken by the various plaintiffs.

This note will analyze the appeal taken by the ACLU alleging that the record-keeping provisions of the Bank Secrecy Act will curtail its ability to reasonably and effectively maintain the anonymity of its members and supporters in contravention of its guaranteed First Amendment rights of freedom of speech and association.<sup>24</sup>

The ACLU argued that in complying with the provisions of the act, the record-keeping institution would be creating a documentation of its customers' social, financial, and political profile. In addition, as to the ACLU's own private business account, the required records would amount to a virtual listing of ACLU members and supporters who use the regulated institutions to pay membership dues or to send financial contributions to their organization. Because of the controversial nature of the ACLU and its activities, the ACLU argued that this listing would cause present members and supporters as well as future members and supporters to forego their support due to fear that the list would fall into the hands of those who would use the information for political retaliation.<sup>25</sup> This inhibiting effect upon their members and supporters and the subsequent financial loss to the ACLU could not, argued the ACLU, pass constitutional muster in view of the scope and purpose of the act<sup>26</sup> and the logical and reasonable alternatives existing that would not have the same inhibiting consequences.<sup>27</sup>

**California Bankers Association v. Shultz**

For reasons best known only to the majority, the Supreme Court in *California Bankers Association v. Shultz*<sup>28</sup> failed to come to grips

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23. 347 F. Supp. at 1244.

24. The First Amendment of the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

25. Brief for Appellant, *California Bankers Ass'n v. Shultz*, 72-1196 at 55-58.

26. See text accompanying notes 5-7 *supra*.

27. See text accompanying note 83 *infra*.

28. 94 S. Ct. 1494 (1974).

with the issues presented on appeal by the ACLU. In a 6-3 decision, the Court found that since the ACLU had not shown proof of any attempt by the government, formal or informal, to compel production of records containing information relating to their accounts or the accounts of their members and supporters, their challenge was premature and there was not a justiciable case or controversy. Without a showing of a subpoena or summons, stated the majority, there exists no "concrete fact situation in which competing associational and governmental interests can be weighed."<sup>29</sup>

In analyzing the majority decision, this note will comment on the failure of the Court to handle the very important and relevant constitutional questions presented by the ACLU. In addition, this note will point out the difficult position of the ACLU and other membership organizations in their attempts to protect the anonymity of their membership in light of *Shultz*.

### Organizational Rights Under the First Amendment

Recent Supreme Court decisions establish that an organization made up of private individuals has standing to protect those individuals from unwarranted invasions by government of their rights of association and privacy guaranteed by the First Amendment.<sup>30</sup> In establishing this principle the Court has recognized that affiliation with controversial organizations may provoke reprisals from those opposed to the group and such reprisals or threats of reprisal tend to discourage the exercise of constitutional privileges.<sup>31</sup>

The technique of examining bank accounts to investigate political organizations is, unfortunately, not rare.<sup>32</sup> A checking account may

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29. *Id.* at 1515.

30. *See* *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958); *United States v. Rumely*, 345 U.S. 41 (1953).

31. *See* *Pollard v. Roberts*, 283 F. Supp. 248, 256 (E.D. Ark. 1968), *aff'd per curiam*, 393 U.S. 14 (1968), in which the court stated: "The rationale of those decisions [*supra* n.13] is that the First and Fourteenth Amendments protect the rights of people to associate together to advocate and promote legitimate, albeit controversial, political, social, or economic action; that when the objective of the group or the group itself is unpopular at a given time or place, revelation of the identities of those who have joined themselves together or have affiliated with the group may provoke reprisals from those opposed to the group or its objectives; and that the occurrence or apprehension of such reprisals tends to discourage the exercise of the rights which the Constitution protects."

32. *See* *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968); *United States Servicemen's Fund v. Eastland*, 488 F.2d 1252 (D.C. Cir. 1973); *NAACP v. Alabama*, 357 U.S. 449 (1958).

well record a citizen's or group's activities, opinions and beliefs, as fully as transcripts of telephone conversations.<sup>33</sup> It has been reported that the identity of Daniel Ellsberg's psychiatrist was first learned by means of the examination of Ellsberg's bank checks—an examination that, according to a pending indictment in the superior court in Los Angeles, led to subsequent burglary of the psychiatrist's office by former high government officials.<sup>34</sup>

An analysis of the act indicates that upon its enactment the ACLU, along with other membership organizations, faces a dilemma in protecting the identities of its members and supporters from disclosure. The act greatly infringes upon the right of associational privacy previously afforded by the Court<sup>35</sup> by requiring the recording of information that identifies members and supporters which will be in the hands of third parties and not subject to protection by the organization involved. As a consequence the ACLU will be unable to protect itself from the revenue loss incurred as its members and supporters, because of fear of political reprisal, refrain from giving financial support.

First, although the act sets up formal subpoena requirements to obtain any records maintained under its provisions,<sup>36</sup> there is no requirement that the customer be notified of the subpoena by either the government or the subpoenaed party. Since the subpoenaed institution would not have a sufficient adversary interest to challenge the subpoena,<sup>37</sup> and since the ACLU cannot force or expect the institution's uninvolved officials to run the risk of contempt citations and possible criminal trials,<sup>38</sup> it is apparent that the subpoenaed institution may likely comply without the depositor ever learning of the subpoena to afford the opportunity for challenge necessary to prevent abuse.

Second, notwithstanding the act's formal subpoena requirement, a recent study by the ACLU shows that while the majority of the nation's largest banks support the confidentiality of bank records, this policy may not be enforced on a day-to-day basis at the local level.<sup>39</sup>

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33. See *California Bankers Association v. Shultz*, 94 S. Ct. 1494, 1529 (Douglas, J., dissenting).

34. *N.Y. Times*, April 30, 1973, at 1, 21, col. 2.

35. See notes 37, 38 *supra*.

36. "No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpoena or summons duly authorized and issued or as may otherwise be required by law." 31 U.S.C. § 1121(b) (1970).

37. See *Donaldson v. United States*, 400 U.S. 517 (1971), *First Nat'l Bank v. United States*, 267 U.S. 576 (1925), *aff'g* 295 F. 142 (S.D. Ala. 1924).

38. See *United States Servicemen's Fund v. Eastland*, 488 F.2d 1252 (D.C. Cir. 1973).

39. *American Banker*, May 12, 1972, at 1, cols. 3, 4.

The study indicates:

[M]any banks voluntarily allow agents of the government—police, FBI agents, investigators for Congressional committees—to examine at will the records of individuals and organizational accounts, without the permission or indeed the knowledge of any of the people involved.<sup>40</sup>

Third, it is important to note that the act provides no safeguards other than the subpoena. There is neither criminal or civil liability if free access is allowed by the regulated institution or its employees, nor any specifications as to where or how the records are to be maintained for security purposes.

Because of these three factors, the records required to be maintained by the act will be vulnerable both to present and future process unknown to its customer. This vulnerability, in conjunction with the intergovernmental availability of the information provided for in the act,<sup>41</sup> creates a situation whereby agencies of the government and individuals hostile to the depositor may gain access to confidential information.

The standing requirement of the Court dramatizes the dilemma of the bank customer. In order to gain the Court's attention, the ACLU was required to obtain information not readily accessible, if accessible at all.

It cannot reasonably be assumed that all regulated institutions receiving a government subpoena will notify their customer prior to complying. To the contrary, a reasonable assumption is that many institutions will comply immediately without bothering to give notice. As to those institutions affording free access to customers' account records, it cannot reasonably be assumed that after violating their customer's banking privacy, they will notify him or her of their transgressions. This would be true regardless of the reason free access was provided. If the involved institution feels pressure from the requesting government agency sufficient to provide free access, it is a reasonable assumption that this same pressure will inhibit notifying a customer who might challenge the governmental agency involved. If access has been provided for political reasons, then quite certainly the institution's political

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40. *Id.* at 3.

41. "The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought and the official need therefor. Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought." 31 C.F.R. § 103.43 (1973).



bias, whatever it might be, would dictate that no notice be given to its customer.

The majority in *Shultz*, while recognizing the right of an organization to protect its membership from any undue governmentally compelled disclosure,<sup>42</sup> ironically leaves the ACLU in a catch-can position in any attempt to do so. Only if the ACLU can catch someone gaining free access to these records, or show that a subpoena has issued despite the lack of a notice requirement within the act, will they have a ripe issue for the Court's attention.

The majority relied on the fact that the line of cases providing organizational standing to protect membership anonymity<sup>43</sup> were all "litigated after a subpoena or summons had already been served for the records of the organization, and an action brought by the organization to prevent the actual disclosure of the records."<sup>44</sup> This, of course, is factually correct, but using this fact to prevent standing in *Shultz* ignores one basic and permeating distinction. In all the cases cited the records involved were in the hands of the party desiring to protect their contents. Consequently, that party would obviously know if a subpoena or summons had been issued and could take proper action to protect unwarranted disclosure. Since the information was within the protective custody of the party in interest the problem of "free access" was not an issue. These cases do not afford insight into the factual situation involved in *Shultz* and are not a sound basis for the Court's decision.

Perhaps more important than the distinction stated above is the fact that the underlying proposition of the cases affording organizational standing dictates a different conclusion in *Shultz*. They suggest that access to lists of persons engaged in controversial activities or with controversial organizations, no matter the reason this access may be requested, poses a threat to the exercise of freedom of speech and association.

For example, the Court in *Lamont v. Postmaster General*,<sup>45</sup> while resting its decision on the narrow ground that to obtain controversial mail one could not be required to make a special request for each parcel, especially noted:

This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government

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42. 94 S. Ct. at 1514.

43. See note 30 *supra*.

44. 94 S. Ct. at 1515.

45. 381 U.S. 301 (1965).

says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda."<sup>46</sup>

The problem concerning the Court in *Lamont*, and in the other cited cases, was the existence of a list in the hands of government officials which could become accessible to those that might misuse the information. The particular fact that the government was forced into using a subpoena or summons in order to obtain the information is quite ironically the protection that is lost by the record-keeping provisions of the Bank Secrecy Act. That is, with the records being maintained by a third party, the party in interest has lost the protection of being aware of all governmental inquiries. It is important to note that if the records protected in these cases had been maintained by third parties under similar facts as in *Shultz*, the concept of organizational protection would have not been judicially created. Under the rationale in *Shultz*, a challenge would not have been successful because the party of interest would not have had proper standing.

The approach taken by the majority does not give proper credence to the fact that once an institution relinquishes its records the damage is irreparably done. The anonymity of the ACLU's members and supporters will be lost, and any action subsequently taken by the Court cannot repair this damage, even though the necessary proof is somehow acquired.

In the unique situation where a justiciability requirement will make it difficult if not impossible for a litigant to obtain a hearing, an exception is sometimes warranted. Proceeding without regard to its usual rules of standing is not foreign to the Court when rules of practice are outweighed by the need to protect fundamental rights.<sup>47</sup> In this circumstance unfairness can easily occur and yet be so easily concealed that no scrutiny by the ACLU will uncover it.

### Standing Generally

Standing has been viewed traditionally as an element of justiciability. As stated by Justice Douglas in *Data Processing Service Organi-*

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46. *Id.* at 307 (Brennan, J., concurring).

47. See *Barrows v. Jackson*, 346 U.S. 249 (1953) (party being sued for breach of a covenant forbidding use and occupancy of real estate to non-Caucasians allowed to assert constitutional equal protection rights of non-Caucasians); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (school allowed to assert the Constitutional rights of the parents of school children in defense of the school's property rights). See also *United States v. Jeffers*, 342 U.S. 48 (1951); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942); *Helvering v. Gerhardt*, 304 U.S. 405 (1938); *Truax v. Raich*, 239 U.S. 33 (1915).

*zations, Inc. v. Camp*, "the question of standing . . . is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.'"<sup>48</sup> The role of standing has been generally perceived as assuring adverseness in a "case" or "controversy". In *Flast v. Cohen*, Chief Justice Warren wrote:

[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.<sup>49</sup>

In *Baker v. Carr*,<sup>50</sup> the Supreme Court stated the most basic rule of standing. The Court held that a party must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."<sup>51</sup>

### There Is a Case in Controversy

The facts in *Shultz* support the contention that the ACLU and governmental interests are in opposition and that a concrete factual situation does exist for the Court's determination. The issue is whether the government through legislation has the power to require record-keeping for the purpose of potential criminal investigation, when the very act of keeping records will have an inhibiting effect on First Amendment guarantees,<sup>52</sup> and when reasonable and less far-reaching alternatives exist.<sup>53</sup>

The ACLU is fully prepared to argue the merits of the case and has "such a personal stake" in the outcome as to guarantee sound constitutional process. The consequences to the ACLU of not using all the skills at their disposal to present their position will be the accumulation of records which will lead to disclosure of the identities of their members and supporters. To a controversial organization the effect of this loss of anonymity is obvious. Moreover, to dwell on the thought that the ACLU would not adequately sharpen the issues would be politically naive.

The majority, adding support to their position, stated that without a subpoena or summons the allegations made by the ACLU were more remote<sup>54</sup> than those alleged in the case of *Laird v. Tatum*.<sup>55</sup>

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48. 397 U.S. 150, 151 (1970).

49. 392 U.S. 83, 101 (1968).

50. 369 U.S. 186 (1962).

51. *Id.* at 204.

52. See text accompanying notes 24-27 *supra*.

53. See text accompanying note 83 *infra*.

54. 94 S. Ct. at 1515.

55. 408 U.S. 1 (1972).

**Laird v. Tatum**

In *Tatum*, the plaintiffs alleged that army surveillance of lawful and peaceful civilian demonstrations chilled the exercise of their First Amendment rights. The surveillance system under attack gathered information about protest activities principally from news media, publications in general circulation, and army intelligence officers who attended public meetings and wrote reports describing the meeting, the identity of sponsoring organizations and speakers, the attendance and whether any disorders occurred. The information was compiled at headquarters, disseminated at army posts throughout the country and stored in a computer bank.

In making its finding the Court in *Tatum* specifically acknowledged prior Supreme Court cases, which "fully recognized that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights."<sup>56</sup> However, the Court went on to hold that plaintiffs' allegation of a "subjective chill" did not meet the test of a "specific present objective harm or a threat of specific future harm"<sup>57</sup> requisite to the invocation of the jurisdiction of a federal court. The Court thus held that on the record plaintiffs did not present a case and controversy for judicial resolution.

Comparing the harm alleged in *Tatum* to that alleged in *Shultz* is an improper analogy for several reasons.

First, the information obtained by the army in *Tatum* applies to particular individuals involved in protest demonstrations. The majority was careful to point out that the "principal sources of information were the news media and publications in general circulation."<sup>58</sup> By being involved in public demonstrations the plaintiff has at least placed himself in a position whereby some police (army) activity being focused upon him can plausibly be argued as necessary.

However, in *Shultz*, the overwhelming majority of the persons affected are ordinary citizens engaging in everyday economic activity which is greatly facilitated by the use of banking institutions. The information is private, and of the type consistently recognized by the American courts as not open to disclosure without the customers' express permission.<sup>59</sup> In addition, instead of recording the public

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56. *Id.* at 12, 13.

57. *Id.* at 13, 14.

58. *Id.* at 6.

59. See *Peterson v. Idaho First Nat'l Bank*, 83 Ida. 578, 367 P.2d 284 (1961); *United States v. First Nat. Bank of Mobile*, 67 F. Supp. 616 (S.D. Ala. 1946); *Zimmerman v. Wilson*, 81 F.2d 847 (3d Cir. 1936). In the *Peterson* case for example, the court said:

activities of one individual, or one group of individuals, the government is recording the private beliefs, politics, associations and cultural concerns of all Americans.

There would be a proper analogy between *Tatum* and *Shultz* if Congress had passed a law calling for the army to begin surveillance on all 211,000,000 Americans because a few were involved in demonstrations. If this had been the case in *Tatum* it is hardly conceivable that the army's activities would have been considered as presenting too remote a harm for the Court's attention.<sup>60</sup> In *Shultz*, however, this is the case. All Americans, through forced record-keeping, are having their private lives recorded because in a few cases such records may have "a high degree of usefulness" in investigations for possible illegal behavior.<sup>61</sup>

Second, there is a basic distinction in the scope of the challenge made in *Tatum* to that made in *Shultz*.

In *Tatum*, the Court was primarily concerned with the federal courts becoming "monitors of the wisdom and soundness of Executive action."<sup>62</sup> In expressing their concern the majority stated:

Stripped to its essentials, what respondents appear to be seeking is a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the Army's intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission.<sup>63</sup>

The Court made a threshold determination that the army was not functioning outside the scope of its constitutional powers in maintaining the controverted surveillance while acting as a domestic police force. Based on this determination, the Court was unwilling to become involved in every executive decision made in carrying out this function.

In *Shultz*, the issue is not whether sound executive decisions have been made within the scope of proper constitutional powers, "but

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"It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolable secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors. . . .

"It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or depositor, the bank must be held liable for breach of the implied contract." 83 *Ida.* at 588, 367 P.2d at 290.

60. 408 U.S. at 16 (Douglas, J., dissenting).

61. See note 5 *supra*.

62. 408 U.S. at 15.

63. *Id.* at 14.

instead to the Act's asserted violation of specific constitutional prohibitions."<sup>64</sup>

By viewing the harm alleged in *Tatum* out of context it may plausibly appear to support the holding of the majority in *Shultz*. However, it is important to note the method used by the Court in *Tatum* in reaching its decision. Although voiced in terms of standing, the Court arrived at its decision only after a full analysis of the merits of the case was made. The factors considered by the Court in making its decision were (1) the necessity of the government action involved, (2) the remoteness of the harm alleged, (3) the proof, or lack of proof, of a history of government activity that would support the fear of harm alleged, and (4) any future protections existing for the plaintiffs in case the alleged harm became a reality.

Quoting from the court of appeals decision, the majority in *Tatum* agreed:

In performing this type function the Army is essentially a police force or the back-up of a local police force. To quell disturbances . . . the Army needs the same tools and, most importantly, the same information to which local police forces have access.<sup>65</sup>

The Court found that the army was functioning within its prescribed powers, that they were necessary to quell domestic disturbances, and that information of the type typically obtained by a police department was necessary to carry out their function.

After making this determination the Court turned to the nature of the harm alleged. The harm alleged by plaintiffs in oral argument was:

*in some future civil disorder* of some kind, the Army is going to come in . . . and go rounding up people and putting them in military prisons somewhere.<sup>66</sup>

In reply to this allegation of harm, the Court emphasized the fact that a writ of habeas corpus would afford protection to plaintiffs in this situation. The Court then went on to point out the fact that plaintiffs could not point to any past or present conduct of the army which warranted the fear alleged.

In *Shultz*, standing is handled as a threshold question without an analysis of the merits of the case. Had the Court made the same type of analysis as was made in *Tatum* they would have been offered proof that (1) the act is overbroad with respect to its stated purpose,<sup>67</sup> (2) the plaintiffs are afforded no other adequate protection at law,<sup>68</sup> and

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64. 94 S. Ct. at 1502.

65. 408 U.S. at 5.

66. 408 U.S. at 8, 9 n.5.

67. See text accompanying notes 77-84 *infra*.

68. See text accompanying notes 35-47 *supra*.

(3) the history of political retaliation, and attempted political retaliation, against the ACLU and other membership organizations by government officials and private citizens is a documented fact and not too remote when considered in the light of (1) and (2) above.<sup>69</sup>

First Amendment rights of free speech and association are fundamental and "need breathing space to survive."<sup>70</sup> "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."<sup>71</sup> And as declared in *NAACP v. Alabama*, "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] . . . effective . . . restraint on freedom of association . . . ."<sup>72</sup>

Congress is expressly restrained within the ambit of the First Amendment<sup>73</sup> from abridging freedom of speech and association. This has been held to include inhibitions as well as prohibitions against the exercise of First Amendment rights.<sup>74</sup> As the Court said in *Boyd v. United States*:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.<sup>75</sup>

"In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose."<sup>76</sup>

By requiring banks to monitor every bank account, the secretary has determined that the banking records of every citizen have "a high degree of usefulness in criminal, tax, or regulatory investigations or

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69. See *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

70. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

71. *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

72. 357 U.S. 449, 462 (1958).

73. See note 24 *supra*.

74. See *Freedman v. Maryland*, 380 U.S. 51 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Speiser v. Randall*, 357 U.S. 513 (1958).

75. 116 U.S. 616, 635 (1886).

76. *Lamont v. Postmaster General*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring); cf. *Butler v. Michigan*, 352 U.S. 380 (1957).

proceedings.”<sup>77</sup> This, of course, is nonsense—unless one assumes every citizen is a crook.<sup>78</sup>

Even more unreasonable is the assumed relationship between the mass of material required by the act and its basic purpose, the apprehension and conviction of criminals.<sup>79</sup>

### Statistics Are In Order

First, available data indicates that as of June 30, 1972, there were 200,700,515 bank accounts in the United States.<sup>80</sup>

Next, consider two crimes in which the use of cash or its equivalent is intrinsic: gambling and drug abuse. According to the Federal Bureau of Investigation there were 78,600 and 527,400 arrests for these crimes, respectively, in the United States in 1972.<sup>81</sup>

Assuming that all violations of these two crimes would be indicated by bank records, less than .03% of the bank accounts in the United States would contain pertinent information. Even if the estimated number of arrests is doubled under the assumption that the Act will reveal otherwise undetected crimes, less than .06% of the over two hundred million bank accounts would be involved.

Consider also, that if we take the total number of arrests in 1972 for all crimes (8,712,400),<sup>82</sup> including those that have little or nothing to do with banks and bank accounts, such as arson, rape and homicide, the records relating to less than 4.4% of the American bank accounts would be useful.

There is then a gross disparity between the objectives of the act and its record-keeping requirements.

Finally, the objectives of the Bank Secrecy Act could be met by any number of alternate means. These might include a requirement that individuals retain certain bank records, that record-keeping be limited to certain defined types of accounts, that it be limited to certain defined transactions, or that “reasonable cause” would have to be demonstrated to a neutral magistrate and a warrant issued before the transactions of an account could be recorded. There are numerous alternatives to the gluttonous recording of all 200 million American bank accounts. Even assuming the government’s interest is legitimate and substantial, it “cannot be pursued by means that broadly stifle

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77. See note 3 *supra*.

78. 94 S. Ct. at 1529 (Douglas, J., dissenting).

79. See note 5 *supra*.

80. FDIC, SUMMARY OF ACCOUNTS AND DEPOSITS IN ALL COMMERCIAL BANKS, June 30, 1972 (National Summary), at 18 (1972).

81. FBI, UNIFORM CRIME REPORTS FOR THE UNITED STATES, at 119 (1972).

82. *Id.*



fundamental personal liberties when the end can be more narrowly achieved.”<sup>83</sup>

When, as in this case, the claim is made that particular legislation infringes substantially upon First Amendment rights, the courts are called upon to, and must, determine the permissibility of the challenged action. As stated by the Court in *Schneider v. State*:

Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.<sup>84</sup>

The ACLU contended that the present existence of this system of gathering and distributing information constitutes an impermissible burden which exercises an inhibiting effect on its members' full expression of First Amendment rights of free speech and association. The effect then is a *present inhibition* of lawful behavior and of First Amendment rights. The issue can be considered justiciable at this time because the evil alleged in the system is overbreadth, i.e., the collection of information not reasonably relevant to “criminal, tax, or regulatory investigations or proceedings”,<sup>85</sup> and because there is no indication that a better opportunity will later arise to test the constitutionality of the Act.<sup>86</sup>

### Conclusion

Within recent years standing has come under attack by many writers questioning whether it is a constitutional requirement or simply a rule of self-restraint.<sup>87</sup> They argue that “personal stake” is not a necessary prerequisite to the constitutional requirement of “case or controversy” since adverseness may exist when the plaintiff has no per-

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83. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

84. 308 U.S. 147, 161 (1939).

85. See text accompanying note 77-84 *supra*.

86. See text accompanying note 36-47 *supra*.

87. *E.g.*, Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969). Courts have also raised this question. In *Flast v. Cohen*, Chief Justice Warren viewed the confusion over standing as having stemmed from commentators' attempts to determine whether the rule of standing pronounced in *Frothingham v. Mellon* established “a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled.” 392 U.S. 83, 92. Warren observed in a footnote that “[t]he prevailing view of the commentators is that *Frothingham* announced only a nonconstitutional rule of self-restraint.” *Id.* at 92 n.6.

sonal stake.<sup>88</sup> While the citadel is under attack, *Shultz* is a strong indication that at least for the present, the Supreme Court is not heeding the challenge. However, decisions like *Shultz*, where formality is allowed to win over substance, will certainly add fuel to the fire of discontent.

The use of mass information-gathering systems and its effect upon individual constitutional liberties are of growing concern, and will continue to spawn litigation. The issue is ripe. The Court's present refusal to deal with the problem will only make what future relief it may afford less effective, as what is being recorded in the present will not be erased by judicial relief in the future.

The interests here at stake are of significant magnitude, and neither their resolution nor impact is limited to, or dependent upon, the particular parties here involved. Freedom and viable government are both, for this purpose, indivisible concepts; whatever affects the rights of the parties here, affects all.<sup>89</sup>

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88. Professor Jaffe has made the clearest exposition of this argument by asking "whether it is a necessary element of a case that there be a plaintiff who proffers for judicial determination a question concerning his own legal status." Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968). See also Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972). Professors Jaffe and Scott both argue that the costs of litigation serve to ensure that plaintiffs will pursue litigation with the proper zeal. Scott concludes that "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom." Scott, *supra* at 674.

89. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 545-46 (1963).