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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner	:	
v.	:	No. 74-1179
MITCHELL MILLER	:	

Washington, D.C.

Monday, January 12, 1976

The above-entitled matter came on for argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C. 20530
For Petitioner

DENVER LEE RAMPEY, JR., Esq., Warner Robins, Georgia 31093
For Respondent
(Appointed by this Court)

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in United States against Miller, 74-1179.

Mr. Wallace, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

ON BEHALF OF PETITIONER

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

This case involves Fourth Amendment claims concerning two Grand Jury subpoenas of bank records.

In January of 1973, while fighting a fire at a warehouse in Kathleen, Georgia, which was rented to the Respondents, local law enforcement officials discovered a distillery, a quantity of non-tax-paid whiskey and related paraphernalia.

Several weeks earlier, a van-type truck, occupied by two of Respondents later-alleged coconspirators, was stopped on the basis of information from an informant and found to contain distillery apparatus.

As a result of these two incidents, two Grand Jury subpoenas were issued from the United States' Attorney's Office to banks in nearby communities in which Respondents had bank accounts. This was in the conduct of the investigation being conducted by the United States'

Attorney's Office and Treasury Department agents on behalf of the Grand Jury.

The obvious purpose of the subpoenas was to determine whether the record of the Respondent's account would reflect transactions that would connect him with the maintenance or operation of the distillery discovered during the fire with its proceeds and that would connect that operation with the van that had been stopped a few weeks earlier.

And I would like to interject at the outset that this is a normal method of investigating an instance of this kind and we believe an entirely proper line of investigation. If anything, a major thrust of this Court's criminal procedures in the past 40 years has been to encourage law-enforcement officials to seek objective, reliable, documentary or real evidence of this sort from certain parties rather than focus the investigation entirely on trying to elicit incriminating statements from the suspects themselves.

QUESTION: These subpoenas were issued at the behest of the Treasury Department, were they?

MR. WALLACE: They were issued -- yes, they were cooperating with the United States Attorney in the conduct of the investigation, Mr. Justice.

QUESTION: So these were --

MR. WALLACE: So this was non-tax-paid whiskey that had been discovered.

QUESTION: And is it the theory of the Government that this was a criminal investigation or an income tax investigation?

MR. WALLACE: It was an investigation. What was issued was subpoenas on behalf of the Grand Jury, a criminal investigation -- the Grand Jury investigation. And the subpoenas were issued out of the United States Attorney's Office. No inquiry was made at the hearing and in the absence of evidence to the contrary, presumably these subpoenas were issued in compliance with Rule 17 of the Federal Rules of Criminal Procedure, which provides for their issuance in blank by the Clerk of the Court to parties to proceedings. This has been applied to Grand Jury trials.

QUESTION: These were Treasury Department agents, though, weren't they?

MR. WALLACE: Yes, they were assisting, as FBI agents often assist the U. S. Attorney in the conduct of the investigation preparatory to Grand Jury proceedings.

In this case it was a federal offense that the Treasury Department is concerned with in its investigations.

The banks --

QUESTION: Is there anything in the rule,

Mr. Wallace, that requires a member of the Bar to request the subpoena, that is, to physically receive it from the clerk or may a member of the Bar send a messenger for a Grand Jury subpoena?

MR. WALLACE: The rule doesn't specify, Mr. Chief Justice.

QUESTION: But it does authorize the issuance --

MR. WALLACE: Of the subpoenas to --

QUESTION: -- to a lawyer.

MR. WALLACE: To attorneys. The rule is really drafted for trial subpoenas and has been applied by analogy to Grand Jury subpoenas but the drafting doesn't fit the Grand Jury situation precisely.

In any event, it is the normal practice to have these subpoenas in the United States Attorney's Office for issuance on behalf of the Grand Jury.

QUESTION: Well, Mr. Wallace, he can subpoena them himself, can't he -- the U. S. Attorney?

MR. WALLACE: He could issue a trial subpoena, yes.

QUESTION: But in the investigation he has to use a Grand Jury subpoena?

MR. WALLACE: That is the normal method used.

QUESTION: If the case never goes to the Grand Jury?

MR. WALLACE: The case may not go to the Grand Jury but the idea is seeking information that can be presented to the Grand Jury. Sometimes the case proceeds by information rather than indictment. Eventually this one did go to the Grand Jury.

QUESTION: Well, suppose this man in this case, his lawyer wanted to subpoena somebody? He could not do it, could he?

MR. WALLACE: Not until proceedings have been brought.

QUESTION: So it does not apply equally to both, does it?

MR. WALLACE: It does --

QUESTION: At the Grand Jury.

MR. WALLACE: -- in application to trial proceedings, but not in --

QUESTION: At the Grand Jury proceedings it only applies to the Government.

MR. WALLACE: Well, it is the Grand Jury subpoena. This is the way the Grand Jury subpoenas evidence so that it can function.

QUESTION: I thought you said anybody could pick it up. That is not true.

MR. WALLACE: No, not anybody. The subpoena is issued by the Clerk of the Court to the attorney for the

Grand Jury, who is the United States Attorney and it is issued in blank and then filled out at the United States Attorney, acting on behalf of the Grand Jury, seeks evidence for presentation to the Grand Jury.

QUESTION: It doesn't go to the Grand Jury unless he decides so.

MR. WALLACE: Well, that is correct, although in this case the evidence did go to the Grand Jury. Often there is voluminous evidence only some of which would be pertinent to the Grand Jury proceedings, after it is screened.

QUESTION: Could the Grand Jury itself direct or ask the U. S. Attorney to subpoena a particular witness that it wanted to hear?

MR. WALLACE: It certainly could, or it could issue a subpoena on its own but in a situation like this one in particular where the Grand Jury is not in continuous session -- in fact, it sits infrequently. This is a non-urban area and the Grand Jury sessions are infrequent and of short duration.

The common thing is for the United States Attorney to act on its behalf and gather the evidence for presentation to the Grand Jury. Otherwise, service on the Grand Jury, which often entails long distances of driving for people in a rural district of this kind would become a

very burdensome thing.

Well, in this case, the banks complied with the subpoena without actually attending a Grand Jury session by handing the information over to the agent working with the United States Attorney so that it could be then presented by them to the Grand Jury later on.

The Grand Jury did indict Respondent and four others on five counts of violations related to the operation of the distillery.

A pretrial motion to suppress evidence secured by the subpoenas was denied by the trial court and at the trial some evidence procured by these subpoenas was introduced and the subpoenas also gave the investigators some leads that may have led to other evidence introduced at the trial and the Respondent was convicted on all five counts with which he was charged with concurrent sentences of three years imprisonment.

On appeal, the Court of Appeals, in effect, held that his pretrial motion to suppress should have been granted on the three grounds asserted in that motion and the Government's petition for rehearing was denied by an eight to seven vote of the Court of Appeals.

In our view, the basic error of the Court of Appeals, the panel's opinion and decision in this case, is in its holding that the alleged defects in the subpoena

violated, as that Court put, the Respondent's right to privacy in the banks' recordsof his account.

It seems to us that this holding departs from this Court's admonition in Katz against the United States that the Fourth Amendment cannot be translated into a general constitutional right to privacy.

The pertinent language of the Fourth Amendment that we are concerned with in this case is on page 2 of our brief, the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

Now, Katz held that that right to be secure in one's person includes security from unreasonable intrusion by the uninvited ear of the government as well as other protection but neither Katz nor any other case in the court has ever held that these protections apply to anything other than the claimant's own person, houses, papers or effects.

In fact, the rule has been precisely the contrary -- the Fourth Amendment does not protect what is often referred to as jus tertii interests, that it is only the person, papers, house or effects are the subject of the search standing to complain of non-compliance with the Fourth Amendment, not someone against whom that evidence may later be used.

This has been reiterated time and again.

The modern cases that spell it out start with Goldstein against the United States and go on through Jones, Wong Sun and Alderman, all of which are quite specific on this point, and the Court has also applied this doctrine with specific reference to the papers of third parties that concern transactions between those third parties and the person seeking to complain of the intrusion of those papers.

That was done in both Donaldson against the United States involving a former employer's records concerning Donaldson and then later in California Bankers against Shultz where the Court pointed out that as long ago as 1925 it had decided that an Internal Revenue summons directed to a third party bank was not a violation of the Fourth Amendment rights of either the bank or the person under investigation by the taxing authorities and then quoted with approval Mr. Justice Douglas' statement concurring in Donaldson that it is difficult to see how the summoning of a third party and the records of a third party can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress, which seems to us to be directly on point here.

As the Court also pointed out in Couch against the United States, the landmark precedent concerning the

Fourth Amendment protection of private papers, Boyd against the United States did not contemplate -- the Court said in Couch -- the divergence of ownership and possession of the papers and a fortiorari, it did not contemplate the complete lack of possession or ownership of the papers by the person making the complaint, which is the situation here.

These records are owned and maintained by the bank. They are the bank's records --

QUESTION: Well, Couch was a Fifth Amendment case, wasn't it?

MR. WALLACE: Well, there was also a Fourth Amendment claim in Couch which the Court rejected and discussed. It is true that this case is only a Fourth Amendment case but I don't think that makes Couch less a precedent for it that it rejected claims under both amendments, Mr. Justice.

So the papers themselves belong to the bank. The papers which the bank could consent to a search of without any right of the Petitioner to prevent the bank from voluntarily turning them over to the Government under this Court's consent search cases and this leaves only the question whether, because the information was secured from the Petitioner's checks -- and in the course of transactions between the Petitioner and the bank, whether that information

somehow protected it or whether Petitioner has standing to claim that the information cannot be disclosed by the bank to the government.

This is, in our view, not really a Fourth Amendment claim but because the Fourth Amendment does not protect against the disclosure of the information itself, that was pointed out in United States against White, that the person with whom one had the conversation in Katz could later testify about it as long as it was a non-privileged conversation and not a confidential communication within a privileged relationship.

The protection of the information itself is really the providence of the law of testimonial privileges for confidential communications and here there is no such privilege recognized between a bank and a bank customer any more than there is between an individual and his accountant or others with whom he conducts business transactions.

QUESTION: What if state law recognized such a privilege? Would that be conclusive as to the disposition of a federal question such as this?

MR. WALLACE: I don't believe so, Mr. Justice, because whether such a privilege would be honored in the federal courts or would bar the testimony of bank officials as to their transactions with an individual would be a

question of federal law and the Federal Rules of Evidence would, of course, bear on it but no state, to my knowlege, recognizes such a testimonial privilege.

There may be some rights of confidentiality in one's bank records as against disclosure to third persons but that doesn't mean that there is a testimonial privilege to refuse, in response to proper legal process, to testify about -- after all, these are the bank's own transactions and they have been a common source of evidence in both state and federal criminal prosecutions for many, many years, as the Court recognized in California Bankers.

QUESTION: Mr. Wallace, you would make the same answer if there were a contract between the bank and the customer that the bank would resist every effort to divulge the --

MR. WALLACE: The answer would be the same. There might be some contractual rights there, some basis for a suit for breech of contract, but a contract can't amend the legal process that is provided for by Congress under the Federal Rules for Criminal Procedure for securing evidence and --

QUESTION: Mr. Wallace, was the customer of the bank notified in this case of the issuance of the subpoena?

MR. WALLACE: He was not notified by either the United States Attorney or by the bank -- or by either bank.

QUESTION: I suppose a bank could adopt a policy of notifying customers whenever a customer's record is subpoenaed but I take it your position would be that the customer would have no standing to go into court at that point and attempt to enjoin the implementation of the subpoena, let's say, on the ground that it was a fishing expedition or otherwise invalid.

MR. WALLACE: No standing under the Fourth Amendment, Mr. Justice.

We don't address the possibility of standing under the First Amendment if the allegation -- which isn't made here -- is that this is an improper inquiry into its associational activities or that sort of thing.

QUESTION: I suppose the depositor would have standing to bring a proceeding to enjoin the bank from complying with the subpoena if he thought that there was no legal duty to do so.

MR. WALLACE: Well, in this case --

QUESTION: Or I suppose the bank was really not required to turn the records over at the time it did turn them over.

MR. WALLACE: It was not required to do so. It could have --

QUESTION: If there had been a contract, I suppose the depositor could have prevented them from doing so.

MR. WALLACE: Well, whether that kind of a contractual remedy would be a proper way of interfering with the execution of federal processes is something that doesn't have to be reached in this case.

QUESTION: At least the depositor would have standing to do so, to raise the issue in the court.

MR. WALLACE: He would have standing to be able to bring such a suit but he may not have a cause of action there.

But here there was no problem of that sort and, indeed, what the district court said was that the bank had realy voluntarily handed the records over after receiving the subpoena.

Now, there is some discussion in the Court of Appeals opinion of the Bank Secrecy Act which, in our view, does not change the situation. We are not involved here with the reporting requirements of that Act which were the concerns expressed in the concurring opinion in California Bankers of Mr. Justice Powell joined by Mr. Justice Blackmun.

We are concerned here only with the record-keeping requirements and those requirements don't change the fact that the records belong to the bank and are records of its own financial transactions.

I don't see any basis on which those record-keeping requirements would lead to a difference in the

result on this issue.

Now, our basic position, therefore, is that that should have been the end of the matter in the Court of Appeals, that the complaint by the Respondent about alleged defects in the subpoena should not have been entertained.

We do not urge, however, that that should be the end of the matter in this Court if the Court agrees with us because the Court of Appeals went on to hold that the subpoenas were defective in three respects and we would urge the Court to consider the course of action here that it adopted in Donaldson where, after holding that Mr. Donaldson did not have a right to intervene, to contest the validity of the Internal Revenue summons, nonetheless, because of the importance of the issue to the administration of justice and the fact that it had been presented to the Court, went on to decide that the summons was being used for a proper purpose in any event, which was the issue that Mr. Donaldson had sought to raise through his attempted intervention.

Here, there is even more reason to go on and comment about these alleged defects in the subpoena because, unlike the situation in Donaldson, there is a holding by the Court of Appeals on this subject which, while technically would be vacated, is still a holding that would be very

troublesome in the administration of criminal justice in the Fifth Circuit Court of Appeals.

QUESTION: What case was it, Mr. Wallace, if you remember, within the last year or 18 months in which the Senate Committee, in conducting an inquiry, had subpoenaed bank records of an organization which it was investigating -- that is, they were investigating the organization and the sources of its --

MR. WALLACE: United Servicemen's Fund against Eastland, I believe.

QUESTION: Yes. You haven't cited that -- or have you? I couldn't find it in --

MR. WALLACE: I don't recall if I did.

QUESTION: Well, it is not important. Do you think it has any bearing here?

MR. WALLACE: It is not one of the cases most closely on point, because it --

QUESTION: Wasn't there a standing issue of the organization -- of the depositor there?

MR. WALLACE: Yes, Mr. Chief Justice. But the case was primarily about the scope of the debate clause and it was a case which raised First Amendment claims rather than Fourth Amendment claims so it seemed to us not as --

QUESTION: Well, the privacy issue would be common to both, would it not? Wasn't that the claim of

the United Servicemen's Organization, that this was a violation of their right of privacy and that it would open to public gaze the members?

MR. WALLACE: That was their claim but in the context of the First Amendment claim and here we are dealing with the Fourth Amendment claim which, as I said earlier, we don't equate with the claim to the right to privacy. It is a claim about improper intrusion into the person's papers and effects which are not the Respondent's.

That seems to us to be an end of the matter with respect to the standing to raise that kind of claim.

QUESTION: Mr. Wallace, could I go back to your standing argument for a minute? Does it really make any difference whose papers they were, as long as they were in the custody of the bank?

You seem to stress the fact that they were the bank's papers but I am not sure that is relevant.

MR. WALLACE: Well, under Couch, even if they were the Respondent's papers, if he had relinquished possession of them to the bank --

QUESTION: What I am asking is, would your standing argument be precisely the same regardless of who owned the papers?

MR. WALLACE: Well, it just adds to the fact that there is -- it is sort of an a fortiorari argument since

the papers are not in the Respondent's possession, actual or constructive. There is no basis for asserting a possessory interest in them and Couch disposes of his claim on that ground alone but we never took the position in Couch that Mrs. Couch couldn't be heard to assert the claim that she still had constructive possession over her records so that there is more of a basis for standing to complain in the owner of the records.

If there is a proprietary interest, I think there is some implication in Donaldson also that that can be a basis for a standing to complain, which may well be rejected on the merits, as it was in both of those cases.

QUESTION: As my brother White pointed out earlier, Couch was a Fifth Amendment case, at least it was both a Fourth Amendment and a Fifth Amendment case and --

MR. WALLACE: That is correct, Mr. Justice.

QUESTION: -- the questions of standing might be resolved differently under the Fifth Amendment from they might be under the Fourth.

MR. WALLACE: They might well.

They might well. Well --

QUESTION: You said we rejected in Couch the Fifth Amendment claim.

MR. WALLACE: As well as the Fourth Amendment claim. That was also rejected in Couch.

QUESTION: But the Fourth Amendment claim in Couch considered the nature of the records as well, not just ownership or possession and indicated that these papers weren't private papers anyway -- even if he owned them.

MR. WALLACE: That is correct. That is correct.

QUESTION: So that is a somewhat different approach than some rigid rule about not having possession or ownership.

MR. WALLACE: Well, because in that case they were the Complainant's records. There was ownership and we have in our brief analogized to those considerations in Couch by pointing out that the checks here are cast upon a sea of commerce over which the Respondent has no control.

Now, I do think have to -- and he has no control over the endorsements, who will see the information, et cetera.

QUESTION: Mr. Wallace, when you say that, that doesn't apply to deposits or --

MR. WALLACE: No, it applies only to checks. It doesn't apply to the deposit slips. But even where privilege has been recognized for confidential communications, it has been held not to apply to transactions but only to confidential communications -- transactions between the attorney and client, the amount of the fee and the

identity of the client have held not to be privileged under the attorney-client privilege, for example.

I'll have to leave to our brief the discussion of the alleged defects of the subpoena and I'll reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Mr. Rampey.

ORAL ARGUMENT OF DENVER LEE RAMPEY, JR., ESQ.

ON BEHALF OF RESPONDENT

MR. RAMPEY: Mr. Chief Justice and may it please the Court:

My name is Lee Rampey. I represent the Respondent in this case -- ever since this whole case started.

Let me very quickly make a factual condensation of this case in regards to these subpoenas. I think the Appendix that the Court has before it is within about 60 pages in length and it will show that the subpoenas were apparently completed and, as the government concedes, issued in the United States Attorney's Office. Two Alcohol, Tobacco and Firearms agents came and picked up the subpoenas, one issued to the C and C Bank of Warner Robins, Georgia, one to the Bank of Byron -- two small, state-type banks though a lot of this is federally regulated and subject to the Bank Secrecy Act.

They went there. They served the subpoenas. At

the C and S Bank of Warner Robins, the agent secured all of the information he asked for over a four-month period.

Copies of the check, financial statement, deposit slips, everything he requested in regards to Miller's financial transactions at the C and S Bank of Warner Robins, those --

QUESTIONS: Is it your point that it makes some difference whether the United States Attorney did it personally or sent an FBI agent or a United States Marshal or one of his secretaries?

MR. RAMPEY: Your Honor, I think Rule 17 is couched in terms of a party requesting a subpoena in blank and it being used in that manner. The reason I am going over this point is to show that, really, as a practical matter, the only people that knew what was going on as to these documents -- the use of these subpoenas, was the ATF agents and, to some unknown extent, the United States Attorney's office because here, the ATF agent retained the documents that he secured from the two banks in his possession from the time that he received them until the time of the hearing.

In the Appendix at pages 41 and 42, the agent is sitting right there on the stand in April, three months after he had secured the documents from the bank -- is sitting there and he has all of the papers and these

documents and exhibits right out of the banks are lodged with the Clerk of this Court for your inspection.

QUESTION: Is this agent part of the United States Government?

MR. RAMPEY: Yes, sir, he is an Alcohol, Tobacco and Firearms Agent and --

QUESTION: And so is the United States Attorney an agent of the United States Government, is he not?

MR. RAMPEY: Yes, sir, but I don't think the agent is necessarily -- the United States Attorney might request subpoenas on behalf of the party, i.e., the United States of America, but my point is that there was no return on these subpoenas to the court where they were purported to be issued from.

The agent says, "Well, I filled in the information and I still have the original subpoenas." There was no notice to the defendant, no return to the court.

QUESTION: Mr. Rampey, would you say your client's Fourth Amendment rights were violated if the government lawyer had written a letter to the bank and said, "Please turn over the following documents. If you don't turn them over voluntarily, we will get out a Grand Jury subpoena," and the bank had responded to this letter by doing just what it did here?

MR. RAMPEY: I think they still would have been.

Yes, sir, I do because I think a depositor has, even under this Court's rulings and more recently, in the Supreme Court of California, has ruled under their constitutional provisions that a bank depositor has a reasonable expectation of privacy under their equivalent of the Fourth Amendment to the sanctity of those documents.

QUESTION: Has he the right of action against the government or the bank?

MR. RAMPEY: There are some cases cited in my brief, Mr. Justice, where a private right of action in contract is available.

I think, though, that here the depositor does have a constitutionally protected right of privacy under the Fourth Amendment.

QUESTION: Well, the bank turned them over voluntarily.

MR. RAMPEY: Well, your Honor --

QUESTION: Well, suppose the bank on its own says, "I think that so-and-so is a violator of the law and I have got some records and I am going to give them to the U.S. Attorney," and hands them to him. Is that a violation of the Fourth Amendment?

MR. RAMPEY: Not if he does it on his own without any governmental --

QUESTION: That is what I said.

MR. RAMPEY: Yes, sir, that's true.

QUESTION: That is not a violation of the Fourth Amendment.

MR. RAMPEY: That's true. But there is no --

QUESTION: Well, now, what is the difference between that and the way he does it pursuant to subpoena?

MR. RAMPEY: Our point is this. These subpoenas, number one, were invalid as a process of a grant.

QUESTION: Well, I am talking about standing now. I'm not talking about the validity. I am talking about standing.

MR. RAMPEY: Because if the government intervenes to some extent in the procurement of these records and documents in which we contend the depositor has a reasonable expectation of privacy that is justifiable, then this gives -- this is the same situation as where, for example, a secret service agent asks an airline employee to search a piece of baggage and he does so. I think this Court --

QUESTION: Well, suppose the Alcohol, Tax and Beverage -- or whatever that guy is, goes to the man -- the auditor and says, "I want to see this man's records"?

Would that be a violation of the Fourth Amendment?

MR. RAMPEY: His accountant?

QUESTION: Yes.

MR. RAMPEY: But that is not --

QUESTION: You have got a little trouble there, don't you?

MR. RAMPEY: Yes, sir, I do, your Honor, but that is not the case here. Number one --

QUESTION: Do you think an accountant is less obliged to protect his secrecy than a bank?

MR. RAMPEY: I think banks are more obliged to protect the secrecy in this instance because, number one, the records are compelled to be kept by banks under the Bank Secrecy Act and number two, there is a reasonable expectation of privacy as to these records and documents.

The banks really don't necessarily have to have all of these copies of the checks and the documents.

QUESTION: Well, suppose he gives the agent the exact check and not a copy?

MR. RAMPEY: The bank would have no right to do that.

QUESTION: Well, suppose it did. What would you do about it?

MR. RAMPEY: The bank should be sued because they have no right to the check in the first place.

QUESTION: Well, could the U. S. Attorney's office use it?

MR. RAMPEY: They could, if it were voluntarily handed over.

QUESTION: You don't think this was voluntary?

MR. RAMPEY: I don't --

QUESTION: On the record facts you just gave, you said the man came in and said, "I've got a subpoena. Give me the stuff," and the guy said, "Here it is." That is close to voluntary.

MR. RAMPEY: But this Court has also held that, for example, a landlord cannot go in on his own and allow the law enforcement officers to go in and search in a house where a distillery is located.

QUESTION: It said it couldn't take the man's property, but this was not the man's property.

MR. RAMPEY: But we are contending that --

QUESTION: Was it?

MR. RAMPEY: As a matter of pure property law, that is correct. But we are contending that there is a reasonable expectation of privacy as to these microfilm records that are kept under the Bank Secrecy Act, that these are not otherwise, even prior to the Act, not normally kept by the banks. In fact, one of the banks here never kept a --

QUESTION: Isn't it true that once you put something in the computer it is everybody's knowledge?

MR. RAMPEY: No, your Honor, I certainly hope that is not the case.

QUESTION: Mr. Rampey.

MR. RAMPEY: Yes, sir.

QUESTION: Let's assume for the moment that the records involved in this case had been those of a department store that had extended credit to your client. Would you have a different case?

MR. RAMPEY: The records of a department store?

QUESTION: Yes. Your client had been extended credit by the department store. It obviously had records of the account with your client.

Let's assume that the U.S. Attorney had issued a subpoena to obtain those records.

MR. RAMPEY: Mr. Justice, I think that would be a different case.

QUESTION: Why?

MR. RAMPEY: Because, number one, that would expose only his transactions with that department store. The records that we are talking about today are records that, even as conceded in the California Bankers Association case, are records that really tell more about the individual. They ought to be protected. In our arguments, they ought to be protected. They show a person's lifestyle, his thoughts, what he does with his money, what his politics might be, what his problems are -- almost anything you can find out about a person you can find out from his financial records

and I think -- even Donaldson, we contend that Donaldson is distinguishable in this particular instance.

Number one, Donaldson was not a constitutional case in the sense of this case. It was a question of whether or not the taxpayer had a right to intervene.

We would argue that the language in Donaldson is basically from Rule 2482 of the Federal Rules of Civil Procedure, I.e., whether or not he had a right to intervene to protect an interest relating to property.

QUESTION: Let me change and give you another variation of these hypothetical cases that have been put to you. As you know, some people who receive checks, particularly businesses, make a microfilm of every check they receive.

MR. RAMPEY: Yes, sir.

QUESTION: And suppose somewhere along the line, one of the holders in due course of this man's check had made microfilms. Now, he is not a banker. He is simply a person who received that check in due course and while he had it, of course, he had a property right in it. You would agree, I am sure.

Now, could a subpoena reach that check in the hands of that former holder in due course of the check?

MR. RAMPEY: If he still retained the original, yes, sir, I think so, but --

QUESTION: No, the original goes back to the issuer, doesn't it?

MR. RAMPEY: Oh, the microfilm, yes, sir.

QUESTION: No, no, the microfilm copy of that check is in the hands of one of the holders in due course and it may have been -- he might have three or he might have 30, conceivably.

MR. RAMPEY: Yes, sir.

QUESTION: Now, is that -- the right of privacy is the same, isn't it?

In this case, in my hypothetical.

MR. RAMPEY: I would argue not. No, sir, I would argue not for the reason, as I again indicated, that that exposes only one single transaction.

This case right here is a graphic example of where you can get four months of a man's total financial life unfolded before you with what we contend are illegal Grand Jury subpoenas.

QUESTION: Well, frequently, the Government does that when they are making a tax fraud case, do they not, a net worth case?

MR. RAMPEY: They do.

QUESTION: Any problem about getting that by a subpoena?

MR. RAMPEY: Well, our contention is, to the

subpoenas themselves, are that the subpoenas were improperly used.

QUESTION: Well, but that is a different point.

MR. RAMPEY: Yes, sir.

QUESTION: That is not the privacy point.

How do you distinguish this -- to pick up the net worth tax case -- how do you distinguish the right of privacy here from the right of privacy that is involved when the government is making a net worth tax-fraud case using bank records and a great many other types of records -- accountant's records?

MR. RAMPEY: Our point is that the Grand Jury subpoena as used in this manner to acquire these voluminous records from banks invades the depositor's reasonable expectation of privacy that is protected under the Fourth Amendment of the United States of America and we rely on Katz -- the language in Katz and also as to the proprietary interest in the documents themselves, we also cite Mancusi versus DeForte, which is a case where the man did not have any proprietary interest in the union documents that were secured in his shared office space and in this particular instance, we have compulsory record-keeping of everyone's financial documents and papers by all the banks in the nation.

We have a situation graphically demonstrated here

where Grand Jury subpoenas can be utilized by Alcohol, Tobacco and Firearms agents and ostensibly under the supervision of the United States Attorney's Office in the absence of a Grand Jury and in the absence of a return made to the Court until the question is made.

QUESTION: Mr. Rampey, are you saying in response to the Chief Justice's question that assuming the subpoena had been proper and a proper return had been made that these bank records are simply immune from any sort of discovery?

MR. RAMPEY: No, sir, I am not saying that.

QUESTION: Then what showing does the government have to make in order to discover them?

MR. RAMPEY: Well, the government -- in this instance, as the government concedes, they were looking for possible transactions that --

QUESTION: Okay, well, what is your answer to my question? What showing does the government have to make if they are not absolutely immune?

MR. RAMPEY: I think at this stage they should have to make a probable cause showing to --

QUESTION: Well, how does the government develop probable cause except running down leads such as this?

MR. RAMPEY: Well, they can develop -- if they can't develop probable cause, they should not intrude into a constitutionally-protected area.

QUESTION: Well, this would just wipe out any successful prosecution of white collar crime, what you are suggesting.

MR. RAMPEY: Well, I think, your Honor, Mr. Justice, that by the same token, approving what the government has done in this case will allow them, in an unsupervised manner, to go and look at anyone's records in these banks at any time.

QUESTION: But the government has been doing that for years with subpoenas so it is you that is asking for the change, not the government.

MR. RAMPEY: But the essential difference also is that we are contending today that these records should be allowed the same dignity as the original records that were at home, at the home of the defendant. They could not have secured those records by subpoena. They would have had to have secured a search warrant for mere evidence of crime.

QUESTION: What if they were in the hands of his accountant?

MR. RAMPEY: Well, I realize the Court's rulings in that regard. He has voluntarily turned them over to a third party.

Of course, we would argue here that this is -- actually, using a bank is a necessity of human life. You

have to use it. The case -- the California Supreme Court case concedes that.

I realize this is a state ruling but I cited full persuasive authority that you have to have that and cases cited in my brief indicate that depositors themselves have a right of privacy and contract and tort that they can enforce in this regard but the --

QUESTION: What if the Grand Jury was investigating the bank -- not your client but investigating the bank and they served the same subpoena and the bank had objected on Fourth Amendment grounds?

MR. RAMPEY: I --

QUESTION: You would have a little trouble there, wouldn't you, under Walling v. Oklahoma Press -- under that?

MR. RAMPEY: To some extent, but --

QUESTION: Well, the point is, Walling said, the point is that the Fourth Amendment is not inapplicable but that the reasonable equivalent of probable cause is the need of the Grand Jury or the Government to investigate violations of the law.

MR. RAMPEY: That is another point, too, that it is really not the need of the Grand Jury. I think it is the need of --

QUESTION: Well, you see, that is the traditional function of the Grand Jury.

MR. RAMPEY: Well, it is and I think even the Department of Justice, in a statement to the House Judiciary Committee on December the 5th, 1974, has indicated that the traditional functions of independence of Grand Juries is really a myth. This is a letter at Congressional Record, House, page 11355 and 356, written by Assistant Attorney General Rakestraw and in response to pending legislation regarding eliminating Grand Juries, he refers to the independence of Grand Juries as really non-existent any more as a practical matter.

They work under the auspices of the United States Attorney's Office.

QUESTION: That is hardly responsive to my question on Walling.

MR. RAMPEY: I'm sorry, your Honor.

QUESTION: Isn't it. How would the bank respond to a subpoena for its own records.

MR. RAMPEY: In behalf of their depositors?

QUESTION: No, in behalf of the bank.

QUESTION: Perhaps the bank examiners.

MR. RAMPEY: Yes, sir. Well -- but that -- that would be an investigation relating to the bank but not to depositors.

QUESTION: What if the records here were in the possession of the taxpayer himself? What if they subpoenaed

his own records?

MR. RAMPEY: He could invoke his Fifth Amendment rights.

QUESTION: I am not talking about that. I am talking about his Fourth Amendment rights -- a subpoena to your client for his own records investigating his taxes.

MR. RAMPEY: He could rely -- he could start by relying on the Boyd case, which held that the Fourth and the Fifth Amendment runs together.

QUESTION: Well, do you think Walling and cases like that continued that approach insofar as the subpoena and the Fourth Amendment are concerned?

MR. RAMPEY: Mr. Justice, I have to admit I am not too familiar with the Walling case so I don't think I could really respond to that. I am sorry.

QUESTION: Well, you are asking here to apply the Fourth Amendment to the subpoena situation.

MR. RAMPEY: Yes, sir.

QUESTION: Not to invasions of some other protective areas.

MR. RAMPEY: Well, I am really asking to apply the Fourth Amendment to the individual depositors' rights --

QUESTION: I know, but with respect to the subpoena of certain documents of which you say they have some privacy interest.

Now, surely, you wouldn't think the Fourth Amendment would protect these documents in the hands of the bank if it wouldn't protect them in the hands of the depositor.

MR. RAMPEY: Well, as I indicated, I don't know that I can respond because I am not familiar with the Walling case. I am sorry. But --

QUESTION: Isn't your real complaint against the fact that the banks do microfilming of the checks?

MR. RAMPEY: Mr. Justice, our complaint is two-fold. One, is the compulsory microfilming, working in conjunction with the Grand Jury subpoena process.

If this honorable Court will recognize a right of -- a constitutional Fourth Amendment right in these records, then we contend that Grand Jury subpoenas and Grand Jury process does nothing but give --

QUESTION: Do you want us to say that, while the Congress can compel them to microfilm, nobody can use them?

MR. RAMPEY: No, sir, that --

QUESTION: Well, what good is the microfilm if you can't use it?

MR. RAMPEY: Well, it may be perfectly all right if these records are indeed not protected under the Fourth Amendment, but our contention is, if they are protected under the Fourth Amendment Grand Jury procedures, just

simply do not afford any protection to the individual depositor. It leaves in the hands of the agent and the United States Attorney's Office, as a practical matter, the securing of these records, ostensibly for the Grand Jury proceedings, which, even in this record it is not shown whether or not these materials were even handed over to the Grand Jury.

QUESTION: Mr. Rampey, do you disagree with the Government's statement that these records were the property of the bank rather than the property of your client?

MR. RAMPEY: I think, Mr. Justice, that from a pure title standpoint, the bank owns the microfilm but as a practical matter, really, they are not looking for tangible evidence, they are looking for the information on the microfilm. We are seeking to protect the information on the microfilm. And the point here --

QUESTION: You object to the search as well as the seizure, in effect.

MR. RAMPEY: Sir?

QUESTION: You object to the search as well as the taking possession of the records.

MR. RAMPEY: Yes, sir.

QUESTION: So you would object even if an agent had gone in and voluntarily requested to see them without any process at all. You would make precisely the same

argument.

MR. RAMPEY: Yes, sir, and, in fact --

QUESTION: That is why you made the same argument on the letter example I gave you.

MR. RAMPEY: And, in fact, the California --

QUESTION: Would your argument not be the same even if he asked for just one check instead of for four months of records?

MR. RAMPEY: Yes, sir.

QUESTION: So the scope of the subpoena really has nothing to do with your Fourth Amendment contention.

MR. RAMPEY: Well, but -- in this particular case we contend that the scope was too broad because as a practical matter they didn't -- the government argues there may be independent sources for their inquiry. I don't think the record demonstrates any independent knowledge or request for a particular check.

In fact, in both instances -- in one instance they microfilmed everything and put it in a bag and in the other instance they sit down at the machine with a young lady and look at everything and not only just this defendant, they look at everyone else -- have to sort of look at everyone else on the whole microfilm but as to the independent source argument by the government, we contend it is not even demonstrated by the record in this case -- that it is

graphically demonstrated that the agents didn't know anything about any particular transactions and --

QUESTION: Mr. Rampey?

MR. RAMPEY: Yes, sir.

QUESTION: It is not entirely clear to me the extent to which you rely on the Bank Records Act. Would you be here today if that Act were not on the books?

MR. RAMPEY: I don't believe we would, Mr. Justice, because the C&S Bank of Warner Robins used limited microfilming procedures, for example, and in that particular instance there would have been no records.

QUESTION: But banks traditionally have had ledger accounts --

MR. RAMPEY: Some, yes, sir.

QUESTION: Reflecting the accounts of their customers. Obviously they have to maintain records.

MR. RAMPEY: Yes, sir, they have to maintain some records that they feel are necessary for their operation.

QUESTION: But if this case had arisen before the Bank Records Act, you think the subpoena would have been all right?

MR. RAMPEY: Well --

QUESTION: Or such records as may then have existed.

MR. RAMPEY: Well, I certainly wouldn't want to concede that the subpoena and the manner in which it was handled would have been all right.

QUESTION: Right. Apart from that, assuming that you had a valid subpoena, as you view it, such records as the bank then had could have been subpoenaed without violation of the Fourth Amendment.

MR. RAMPEY: Well, Mr. Justice, I would have probably relied again on the California courts' rulings and not only in their case where that was an instance where the police officer requested just the statements, the man's statements. He didn't get any checks and they held that under their constitutional provisions he had a right to privacy that was protected and also they have held that the compulsory financial statements required of public officials violates an individual's reasonable expectation of privacy as to his financial affairs.

And I would note, in closing, that as we have indicated in brief, there are state cases where the depositors have enforced their contractual and tort right to privacy as to the rights of depositors for unreasonable disclosing of these materials.

I would also cite a case that I do not have in brief. It is a Third Circuit case, Zimmerman versus Wilson, 81 Federal Second 847 in the Third Circuit.

This case was somewhat modified at a later date but if, indeed, there is a reasonable expectation of privacy as to these records on the part of bank depositors, I believe the language in this case where, in fact, they note, as even in the old case of Entick versus Carrington, it really is not the paper, it is the information on the paper that is sought to be protected and we contend here that the interaction, the compulsory recording of all these records under the Bank Secrecy Act with the interaction of these subpoenas does indeed invade an area where depositors reasonably and justifiably can and should be protected.

If one cannot keep his own financial affairs out of the scrutiny of the government except with some type of probable cause showing, we would at least argue that, certainly, his right to privacy has been diminished in a great extent and even our Constitution --

QUESTION: But your clients knew about the Bank Secrecy Act.

MR. RAMPEY: Sir?

QUESTION: But your clients knew about the Act.

MR. RAMPEY: No, sir, my client did not know about the Act.

QUESTION: Well, isn't he presumed to know?

MR. RAMPEY: Well, he had never indicated any knowledge of the microfilm recording, Mr. Justice, until

well after the fact. We did not know about it until after --

QUESTION: You didn't know about it, either.

MR. RAMPEY: I knew about the Act, yes, sir.

QUESTION: Well, why didn't you tell your client?

MR. RAMPEY: Because I didn't represent him at the time of these subpoenas.

I didn't represent him until March, when he was --

QUESTION: Uh huh, that's when you read the Act.

MR. RAMPEY: I thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rampey.

Do you have anything further, Mr. Wallace?

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

MR. WALLACE: Just briefly, Mr. Chief Justice.

The reasonable expectation of privacy involved under the Fourth Amendment is only an expectation of privacy in one's own person, effects, et cetera. If there is to be privacy protection afforded to third party records, that is a matter for legislative consideration. It is not a Fourth Amendment right.

We have pointed out on page 31 of our brief in footnote 21, bills have been introduced in Congress on this subject and have also pointed out legislation that exists with respect to telephone company records and the records of credit reporting agencies where Congress has seen fit to provide some legislative protection.

Now, here there is no allegation of improper disclosure of any matters relating to the Respondent's personal affairs. The only allegation is that these were exposed to the agents conducting a proper government investigation and I do want to point out to the Court that one of the rules of criminal procedure not cited in the briefs, Rule VI(e), does contemplate that government attorneys will see Grand Jury evidence in the performance of their duties.

QUESTION: Mr. Wallace, one other question on your standing argument, please. Do you contend that the test of standing is the same when you are asking whether one can object to a subpoena as it is when one is asked to make an objection to the admissibility of evidence on Fourth Amendment grounds?

I am wondering if you are not confusing two different kinds of standinggquestions in your brief?

MR. WALLACE: Well --

QUESTION: Do you understand what I am asking?

MR. WALLACE: I think it would be different. It is the person subpoenaed who has standing to object to the subpoena and --

QUESTION: And so if a person has standing to attack a subpoena, the question of ownership would not be relevant, whereas, it might be relevant when he is talking

about to raise a Fourth Amendment objection.

MR. WALLACE: Well, I think anyone who is unduly burdened by the need to comply with a subpoena has standing to complain about the subpoena.

QUESTION: And no one else, is your position.

MR. WALLACE: And no one else. It is only the one who has to comply with it because the subpoena is very comparable to the letter that you were posing hypothetically. It is merely a request to produce information and if the person subpoenaed wants to object that it is too burdensome for him to do so, that it violates his Fourth Amendment rights or that the subpoena is defective in some way, he may do so. If he doesn't raise an objection, it is tantamount to voluntarily turning over the records in response to an oral or written request that isn't --

had

QUESTION: If he/turned over the records you might have quite a different question in the trial of a case when the motion is to exclude evidence, as my brother Stevens suggests.

MR. WALLACE: It is a different question, your Honor.

QUESTION: It is a different question and a different standard.

MR. WALLACE: That is correct.

QUESTION: Your standing argument sounds as though

you are just saying, what I really mean is, there is no violation of the Fourth Amendment here with respect to the depositor.

MR. WALLACE: Well, it is a different question but the answer to the question has been that the Fourth Amendment in the context of seeking to exclude evidence does not protect jus tertii interests. It does not protect --

QUESTION: Well, let's just say -- you are saying --

MR. WALLACE: someone from having evidence used against him which was taken in violation of someone else's Fourth Amendment rights.

It just happens here that there was no Fourth Amendment violation anyway but the standing point is still in the case. The answer is the answer given in Wong Sun when it was said that the evidence could be used against one of the defendants, although not against the other one, whose premises were violated, whose rights and his premises were violated. That is the answer to it. It is a standing issue as -- well, it is obscured slightly in this case because it is, in our view, fairly obvious that there was no Fourth Amendment violation of anyone's rights here.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:04 a.m., case was submitted.]