

21 SEP 1979

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Constitutionality of the Administration's
Privacy Legislation

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This responds to your memorandum of August 6, 1979 requesting our views on the constitutionality of draft legislation prepared by the Administration regulating the collection and disclosure of personal information by creditors, organizations that service creditors, insurance companies and agents and other financial institutions. Broadly, the legislation seeks to afford consumers an opportunity to contest the accuracy and release of personal information maintained by these institutions and persons. The legislation also restricts the kinds of personal information that may be gathered and the sources of such information; it further requires the regulated institutions to inform customers of the kind of information that may be maintained and to whom such information may be disclosed. The legislation preempts less protective state laws and establishes procedures regulating access by state authorities to the protected information. This memorandum addresses the authority of Congress to enact the proposed legislation and the constitutionality of imposing restrictions on state authorities.

I. The Legislation

The proposed legislation consists of the Privacy of Electronic Fund Transfers Act of 1979 (PEFTA) and five titles comprising the Privacy Protection Amendments of 1979. Each proposal restricts access of state authorities to information collected and/or maintained by the covered institutions.

Titles I, II, IV and V permit disclosure of protected information to a governmental authority only by way of subpoena, summons or other form of compulsory process if the information is to be disclosed or used in any trial, hearing or proceeding before any state authority. 1/ The consumer to whom the

1/ They also permit disclosure to State authorities of a consumer's name, address and place of employment without notice to the consumer.

information pertains, except in the case of a search warrant, must be served with a copy of the process and informed of an opportunity to appear and contest disclosure. Until a court certifies that these requirements have been met or the state authority certifies that the consumer has not contested disclosure, the institution may not disclose the requested information. The States are given the opportunity to enact other procedures for regulating disclosure, provided that the procedures afford at least as much protection as the provisions of the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 et seq. (which limit access of federal agencies and officials to records maintained by financial institutions). Titles II, IV and V, although not Title I, also permit disclosure (1) where it is required by state statute 2/ and (2) to a law enforcement authority in order to prevent fraud on the institution or if the institution has a reasonable belief of illegal activities on the part of customers.

Title III and the proposed PEFTA establish a different procedure. They adopt the approach of the Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which regulates interception of wire and oral communications. 18 U.S.C. § 2501 et seq. The State Attorney General or a comparable local official must petition a state court for an order permitting interception or acquisition of a protected record where the requested item may provide evidence of a felony. The petition must detail the need for and circumstances of the interception and must describe why other investigative techniques would not be successful. 3/ No provision is made for disclosure to any other state authority, including grand juries, although under the PEFTA the covered institutions may disclose its record of an "item" (defined as "any instrument for the payment of money, whether or not it is negotiable and whether or not it takes a

2/ We are uncertain what effect this exception would have on the proposed legislation. For example, it would appear that a State could nullify protections afforded by the proposals by simply passing statutes requiring disclosure in any or all circumstances. Perhaps the legislation should include a provision limiting disclosure pursuant to existing state laws. Cf. 20 U.S.C. § 1232g(b)(1)(E) (permitting disclosure of educational records to State authorities pursuant to state statutes enacted prior to the effective date of the statute).

3/ Provision is also made for emergency interceptions which require subsequent court approval on the same basis as a pre-interception application.

paper form") pursuant to other laws. 4/ Furthermore, an institution may disclose to government authorities an item or other financial information if it has a reasonable belief that the item or information reflects criminal activity. 5/

Before considering the constitutional issues raised by this proposed legislation, we believe it is important to note that the proposed legislation does not adequately address the role of search warrants in the release of protected information.

Under Titles I, II, IV and V, information may not be released pursuant to any form of compulsory legal process "other than a search warrant" unless the consumer to whom the information pertains is served with a copy of the process and given an opportunity to contest disclosure. The exception for search warrants is ambiguous. It could either mean that no notice to the consumer is required if disclosure is sought pursuant to a search warrant, or it may mean that the disclosure provisions are intended to replace search warrant procedures. In our view, the former reading would raise no substantial constitutional issues while the latter would raise constitutional issues similar to those discussed below regarding Title III and the PEFTA. The Right to Financial Privacy Act includes a special provision for search warrants, which requires notice to be mailed to consumers within ninety days after service of the warrant. The Government may seek to delay notice in order to protect witnesses or other evidence or stop flight from prosecution. § 1106, 12 U.S.C. § 3406. Since, as explained by the section-by-section analysis, Titles I, II, IV and V seek to protect records from government access in a manner similar to that afforded by the Right to Financial Privacy Act, we believe that the legislation should include a provision regarding search warrants similar to section 1106.

The Fourth Amendment Implications of Title III and the PEFTA

Title III and PEFTA present a different problem. Both proposals permit release of protected information only upon

4/ The proposals do not define "other laws." Does it include, for example, local ordinances or state regulations?

5/ As provided in the other titles, institutions covered by Title III and the PEFTA may release to government authorities the identity, address and place of employment of a customer.

issuance of a court order based upon a finding by the court that "there is reasonable cause for belief" (1) that an individual is committing, has committed or is about to commit a felony, (2) that interception of the protected information will locate the individual or (3) that interception will yield information or evidence relevant to a felony. We understand that the purpose of the provision is to give persons a protectable interest in personal information which they presently do not enjoy. However, the proposals seem to ignore the rights of the regulated institutions. The institutions which transmit, collect or maintain the protected information have cognizable Fourth Amendment rights; and if the standard of the proposed legislation ("reasonable belief") permits a search of these institutions on less than probable cause, then the legislation may well be unconstitutional. To avoid this problem we suggest that the proposals include a provision which would permit search of the regulated institutions only in manner consistent with the Fourth Amendment.

II. Congress' Authority to Enact the Proposed Legislation

A. The Commerce Clause

The reach of the Commerce Clause is broad. Congress may enact legislation appropriate for the protection and advancement of interstate commerce. NLRB v. Jones & Laughlin, 301 U.S. 1 (1937). On an appropriate record, Congress may regulate the incidents of local commerce if they affect the flow of goods and services across state lines. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). Several statutes, enacted under the Commerce Clause, regulate the extension of credit and afford protection for consumers. The Truth in Lending Act, 15 U.S.C. § 1601 et seq., which imposes mandatory disclosure requirements on creditors, was based upon the congressional finding that "economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the formal use of credit." Id. § 1601(a). The Supreme Court has held that the Act "is within the power granted to Congress under the Commerce Clause." Mourning v. Family Publications Service, Inc., 411 U.S. 356, 377 (1973).

The Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681t, which Title I of the draft legislation amends and extends, restricts disclosure of consumer reports by consumer reporting agencies and provides consumers access to reports prepared about

them. 6/ The constitutionality of the Act has been sustained against a challenge based on the First Amendment. See Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829 (8th Cir. 1976).

We have no doubt that Congress can establish an appropriate record demonstrating a nexus between accurate reporting and disclosure of consumer information and better functioning of the economy. On such a showing, the proposed legislation would be within the authority of Congress under the Commerce Clause. 7/

The conclusion that the Commerce Clause provides a basis for the proposed legislation does not, however, end our inquiry. The Supreme Court has recently recognized that fundamental principles of federalism embodied in the Constitution protect some state and local governmental functions from congressional regulation grounded in the Commerce Clause. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court held unconstitutional the application of federal minimum wage and maximum hour standards to the States. The Court stated:

6/ The Act was based on congressional findings that:

(1) The Banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy. 15 U.S.C. § 1681(a).

7/ Nor do we believe that the legislation would be invalidated under the Due Process Clause as imposing an unreasonable burden on the regulated institutions. Cf. California Bankers Ass'n v. Shultz, 416 U.S. 21, 45-49 (1974) (upholding Bank Secrecy Act of 1970 against similar challenge).

Congress may not exercise [the Commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.

Id., at 855. Although the federal statute clearly regulated state activities which affected interstate commerce, the Court found that the imposition of the standards would displace the state policies concerning the delivery of traditional state services and force relinquishment of integral governmental activities. The legislation therefore directly threatened the "separate and independent existence" of the States. Id., at 851 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).

As detailed above, the proposed legislation will impose burdens on state law enforcement and administrative agencies. The provisions limiting access to state authorities are of two kinds: those which limit access altogether and those which establish procedural rights in the consumer prior to disclosure. To the extent that state authorities have relied upon informal means of acquiring information from the covered institutions in the past, see generally Privacy Protection Study Commission, Personal Privacy in an Information Society, 345-91 (G.P.O., July 1977), the mandated procedures will impose financial and time burdens. It is not inconceivable that some state authorities might forego investigations or not follow up some leads because of the notice requirements. The question for analysis is whether this burden is so great as to threaten the states' and localities' performance of traditional state functions and accordingly run afoul of the principles of National League of Cities.

In National League of Cities the Supreme Court identified various traditional state activities: fire prevention, police protection, sanitation, public health, parks and recreation. 426 U.S., at 851. Regulating the access to financial records by state and local law enforcement agencies would clearly burden a traditional local government function; and, conceivably, other state and local agencies might have use for such information. Thus the restrictions delineated in the proposed legislation implicate concerns identified in National League of Cities. However, we are not persuaded that the requirements imposed by the legislation would threaten the "separate and independent existence" of the States. What concerned the National League of Cities Court was that imposition of the federal standards "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S., at 852. Thus, a federal requirement that state and local authorities provide access to their own records might well be beyond Congress' Commerce Clause authority. But a

regulation of commercial institutions aimed at protecting privacy which indirectly affects local law enforcement seems quite different. Since addressees of subpoenas and summonses may typically move to quash the process, the procedures which the proposed legislation would impose will simply add a new party to an existing proceeding. rather than force the States to create a new proceeding. Furthermore, the proposed legislation, with the exception of Title I, permits the covered institutions to release information pursuant to existing state law and further permits law enforcement authorities to have access to identifying information.

It might be argued that the notice requirements will substantially interfere with law enforcement to the extent that they force agencies to inform targets of investigations of the fact of the investigation. Notice requirements may particularly intrude on grand jury investigations. While we believe that States would have to make a very strong factual showing that the proposed access procedures unduly burden their ability to enforce state laws before the Court would strike down the legislation, we believe that the problem could be significantly mitigated by including provisions similar to those in § 1109 of the Right to Financial Privacy Act which delay notice to customers on a finding that notice would lead to destruction of evidence, flight from prosecution, harm to witnesses or otherwise seriously jeopardize an investigation.

Provisions in Title III and the PEFTA do more than require the States to adopt procedures for access. Some provisions deny access altogether. Law enforcement officials are denied access to protected information if they are investigating a misdemeanor, and administrative agencies are denied access except as permitted by other state laws. We are unable to assess the actual burden that the denial of such information would place on state authorities. We would note that § 802 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2516(a), permits interception of wire and oral communications only in the case of felonies. Furthermore, as presently enacted, the Fair Credit Reporting Act prohibits disclosure of credit reports to state authorities except pursuant to court order or for identification purposes. 8/

8/ It should be noted that 18 U.S.C. § 2515 excludes from state proceedings evidence obtained through violation of Title III. See Langella v. Comm'r of Corrections, 545 F.2d 818, 821 (2d

We are unaware of any constitutional challenges to these provisions or any evidence that they have unduly burdened law enforcement activities. We would recommend that Congress recognize and investigate the burden that the proposals would place on law enforcement authorities and make appropriate findings if indeed local enforcement will not be substantially hampered.

We are more troubled by limits placed on state grand juries. The Supreme Court has recognized the wide ranging powers of grand juries to investigate crimes and compel testimony. United States v. Calandra, 414 U.S. 338 (1974); United States v. Dionisio, 410 U.S. 1 (1973); Blair v. United States, 250 U.S. 273 (1919).

In theory, a flat prohibition against access seems a substantial intrusion on an integral state function. However, in practice, as we understand the technology, interception will be made primarily to determine a person's whereabouts - information a grand jury is unlikely to seek. (The actual records of transactions will be accessible under the amended version of the Right to Financial Privacy Act.). Thus the actual burden on grand juries may be non-existent. 9/

8/ Continued

Cir. 1976, cert. denied, 430 U.S. 983 (1977). Such exclusion may occur for non-constitutional violations. See United States v. Giordano, 416 U.S. 505, 527 (1974). Thus, state authorities maybe denied evidence that absent the federal statute, would be constitutionally permissible to present. We are unaware of any constitutional challenge to this interference in state proceedings. Cf. Adams v. Maryland, 347 U.S. 179 (1954) (federal statute forbidding use of testimony given before Congress in State proceeding is constitutional). Indeed state courts have undertaken lengthy analyses of whether state wiretap statutes comport with the federal standards. See, e.g., Commonwealth v. Vitello, 321 N.E. 2d 819 (Mass. 1975).

9/ We recognize that a purpose behind the prohibition against grand jury subpoenas may be elimination of use of the process by state prosecutors for reasons other than edification of the grand jury. See Privacy Commission, supra, at 373-79. However, less intrusive controls are imaginable. For example, section 1120 of the Right to Financial Privacy Act provides that records subpoenaed by a grand jury must be actually presented to the grand jury and used only for the indictment process or protection. 12 U.S.C. § 3420. It may be advisable to adopt these procedures to ensure the constitutionality of the proposal.

B. The Enforcement Clause § 5 of the Fourteenth Amendment

Section 5 of the Fourteenth Amendment grants Congress the power "to enforce, by appropriate legislation, the provisions of this [Amendment]." The Due Process Clause of the Fourteenth Amendment protects certain attributes of personal privacy against unjustifiable invasions by the States, see e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). The Due Process Clause also embodies the basis of the Fourth Amendment and thus renders that Amendment's protections against arbitrary state intrusions enforceable against the States. Wolf v. Colorado, 338 U.S. 25 (1949). Thus it is arguable that Congress may enact legislation under § 5 of the Fourteenth Amendment to enforce the protection of privacy afforded by the Due Process Clause. If Congress does have the power under § 5 to enact the proposed legislation, then it is fairly well established that such power is not subject to the constraints imposed on an exercise of power under the Commerce Clause by the holding in National League of Cities v. Usery. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Marshall v. Owensboro-Davissess County Hospital, 581 F.2d 116 (6th Cir. 1978); Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977).

In construing the reach of Congress' power under the Enforcement Clause, the Supreme Court has indicated that the power is extraordinarily broad when used to enforce core protections of the Amendment, such as ending racial discrimination under the Equal Protection Clause. See Katzbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112, 127 (1970) (opinion of Black, J.). In Katzbach v. Morgan, the Court sustained the constitutionality of a section of the Voting Rights Act of 1965 which essentially overrode a New York statute requiring English literacy as a voting qualification. The Court held that the test of the constitutionality of the legislation was whether it was (1), "plainly adopted" to enforcement of the Equal Protection Clause and (2), consistent with the letter and spirit of the Constitution. 384 U.S., at 651. It thus upheld the statute, enacted to protect the right of New York City's Puerto Rico minority to vote, even though the New York statute might not itself have violated the Fourteenth Amendment. Read broadly, Katzbach v. Morgan holds that § 5 empowers Congress to define the substantive limits of the Equal Protection Clause and perhaps of the entire Fourteenth Amendment. See generally Burt, Miranda and Title III: A Morganatic Marriage, 1969 S. Ct. Rev. 81.

Oregon v. Mitchell, *supra*, indicates that Congress' broad power under § 5 may be diminished either when it is not elaborating upon rights embodied in the Equal Protection Clause, *see* 400 U.S. at 293-96 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.), or when it is invading areas reserved to the States by the Constitution. *See id.*, at 130 (opinion of Black, J.); *id.* at 152-209 (opinion of Harlan, J.). There, the Court, in a 5-4 decision with five opinions, struck down Congress' attempt to lower the voting age in state elections to 18.

The difficulty of interpreting the Supreme Court's pronouncements on the Enforcement Clause is compounded by the difficulty of defining the precise rights embodied in the Due Process Clause that Congress would be enforcing or protecting in the proposed legislation. Recent Supreme Court cases cast doubt on whether there is any substantive constitutional right implicated in this proposed legislation to protect.

1. The Right of Privacy

Numerous Supreme Court cases recognize constitutional protection for personal privacy. The Court has recently characterized these cases as involving two separate interests: the right to avoid disclosure of personal matters and the right to make certain important personal decisions without state interference. Whalen v. Roe, 429 U.S. 589, 599-601 (1977). Arguably both these interests are at stake when persons make credit and other financial arrangements. Applications for loans, insurance and the like, typically request personal information that applicants may prefer not be made public. Furthermore, uncontrolled government access to and use of such information might deter some persons from undertaking in such transactions.

The Supreme Court faced similar arguments to these in Whalen v. Roe, *supra*, where doctors and patients challenged the constitutionality of New York's establishment of a centralized computer file that recorded the names and addresses of persons who obtained certain prescription drugs. The Court upheld the legislation as a legitimate exercise of the police power to minimize the misuse of drugs. It further held that the statute did not violate privacy rights, noting that the statute established adequate protections concerning access to and dissemination of the collected information. The Court specifically left open the constitutionality of other information collection systems maintained by a State which do not

contain security provisions comparable to those employed by New York. Id., at 606-07. Justice Brennan concurred in the opinion on the understanding that broad dissemination by state officials of personal information would "clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests." Id., at 607. Justice Stewart concurred to dispute Justice Brennan's apparent acceptance of a general constitutional right to privacy. He asserted that the Court's cases do not recognize "a general interest in freedom from disclosure of private information." Id., at 609.

If Justice Brennan's view--that the Constitution protects against unwarranted disclosure of personal information by state authorities--prevails, then an argument can be made that Congress has power to enact this legislation under § 5. 10/ Several lower courts have read Whalen v. Roe as

10/ If Justice Stewart's view--that there is no general right of privacy in the Constitution--commands a majority of the court in the future, then it would be difficult to characterize the proposed legislation as enforcing a right under the Fourteenth Amendment. Only if one adopts the view, relying upon the broadest reading of Katzbach v. Morgan, that Congress can expand the substantive protections of the Fourteenth Amendment could the proposed legislation be sustained as a proper exercise of the Enforcement Clause. That is, in order to sustain the legislation if Justice Stewart's view prevails, the Court would have to find that Congress' legislation overturns the Court's interpretation of the Due Process Clause.

At first blush, such an argument seems to conflict with fundamental notions of the separation of powers established by Marbury v. Madison. ("[I]t is emphatically the province and duty of the judicial department to say what the law is.") However, it is conceivable that Congress' authority to redefine the protections of the Fourteenth Amendment could be upheld if the Supreme Court's decision turned on factual assumptions and conclusions that Congress -- in its traditional role as fact-finder -- could demonstrate were incorrect. See generally Cox, The Role of Congress in Constitutional Determinations, 40 U. Cinn. L. Rev. 199 (1971); Burt, supra, at 112-14; Citizens Privacy Protection Act, Hearings on S. 3162 & S. 3164 before the Subcomm. on the Constitution of the Senate Judiciary Comm., 95th Cong., 2d Sess. 367-69 (1978) (testimony of Prof. Paul Bender) (hereinafter cited as "Hearings"). For example, the Court might well hold that release of financial information by

[to be continued on page 12]

recognizing a constitutional privacy right in avoiding disclosure of personal matters; these cases have then applied a balancing test, evaluating the level of intrusion against the state interest in disclosure. See Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978) (financial disclosure laws for state officials); Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979) (disclosure by policeman to superiors of sexual activities); Providence Journal v. FBI, 460 F. Supp. 762 (D.R.I. 1978). But see United States v. Choate, 576 F.2d 165 (9th Cir. 1978) (mail cover does not violate privacy rights; no general right to privacy); Service Machine & Shipbuilding Corp. v. Edwards, 466 F. Supp. 1200 (W.D. La. 1979) (upholding constitutionality of worker registration ordinance; no protection for the type of unsensitive personal information requested). In Nixon v. Administrator of General Services, 433 U.S. 425, 455-65 (1977), Justice Brennan, writing for a majority of the Court, balanced former President Nixon's privacy in personal

10/ Continued

institutions to law enforcement officers infringes no personal right of privacy because persons expect and accept such disclosure or because disclosures are rare. However, Congress might find -- the hypothetical Supreme Court decision to the contrary notwithstanding -- that government access to personal information maintained in financial files forces persons to forego important financial transactions and has substantial consequences in the provision of adequate care for family members through credit extensions and insurance. Such findings could compel the Court to rethink the basis of its conclusion concerning the reach of the Due Process Clause in protecting personal privacy.

Clearly, this reasoning is highly speculative given the absence of any firm Supreme Court legal conclusions or "factual findings" in the area. While Katzenbach v. Morgan recognized Congress' authority to extend the reach of the Equal Protection Clause to eliminate state requirements which it found to perpetuate racial discrimination, there is no precedent for Congress' exercise of enforcement clause authority to revise the Supreme Court's definition of the Due Process Clause. Given that Clause's broad and nebulous reach, recognition of Congress' power to create or discover new rights embodied in it would stretch Katzenbach v. Morgan to its limits. In light of Justice Stewart's opinion in Oregon v. Mitchell, joined by Chief Justice Burger and Justice Blackmun, there is reason to doubt that such legislation could be sustained under this theory.

papers against the public interest in reviewing Presidential documents. 11/

If the Due Process Clause were interpreted by the courts to embody a right of privacy to avoid disclosures of personal information -- albeit, one that must be weighed against the public interest in disclosure and protections afforded against unwarranted disclosure -- then the proposed legislation would be protecting or promoting a right under the Fourteenth Amendment. It would thus be an appropriate exercise of § 5 authority.

Another theory of the Enforcement Clause might also sustain the proposed legislation if the Court were to recognize a "general right to privacy." Recognition of that right would establish an obligation on state authorities to collect and disseminate personal information in a manner that reasonably protects the privacy of persons to whom the information relates. Because § 5 authorizes Congress to establish remedies for state violations of the Fourteenth Amendment, cf., South Carolina v. Katzenbach, 383 U.S. 301 (1966), the proposed legislation might be sustainable as a prophylactic remedy that would prevent likely constitutional violations of personal privacy by state authorities. Congress could enact the legislation on a finding that States have proven to be unwilling to limit adequately their access to or dissemination of personal information. The legislation could then impose procedures on the States regulating access to information that would require a state authority to establish a legitimate need for the information. This protective legislation would thus guarantee maintenance of constitutional limits which, it has been suggested, have been established by the Due Process Clause. 12/

11/ We note that Justice Stewart concurred in that portion of the opinion upon the same basis as he concurred in Whalen v. Roe.

12/ Cf. Hearings, supra, at 369-72 (testimony of Prof. Bender arguing that this prophylactic theory of section 5 could be used to sustain legislation limiting state search warrants against third parties even though Supreme Court found in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), that such measures are not constitutionally required).

We are aware that this theory is novel and grants Congress considerably more power under the Enforcement Clause than the Court has heretofore recognized. However, assuming that Justice Brennan's view of the Constitution's protection against disclosure of personal information is accepted by the Court, the use of § 5 as a basis for the proposed legislation should not be overlooked.

2. The Fourth Amendment

The Fourth Amendment's prohibition against unreasonable searches and seizures establishes a well-recognized zone of personal privacy in one's person, home and effects which places direct limits on access to personal information. However, federal legislation to regulate state access to personal information under the Fourth Amendment encounters problems similar to those noted above.

Several Supreme Court cases have held that persons do not have constitutionally based privacy interests in financial information held by third-parties, and government access to such information implicates no Fourth Amendment principles or procedures. See United States v. Miller, 425 U.S. 435 (1976) (person has no expectation of privacy in personal checks held by bank; records sought by the government are bank records based on information voluntarily exposed to public by individual); Couch v. United States, 409 U.S. 362 (1973) (taxpayer has no expectation of privacy in records turned over to accountant for preparation of tax returns); Donaldson v. United States, 400 U.S. 517 (1971) (IRS summons to third party for records about taxpayer does not violate Fourth Amendment). Cf. Smith v. Maryland, No. 78-5374 (S. Ct. June 20, 1979) (no expectation of privacy in telephone records indicating numbers dialed). The Court has

held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Smith v. Maryland, supra, slip op. at 9, quoting United States v. Miller, supra, 425 U.S., at 443 (emphasis added).

These cases raise a serious doubt as to whether a person could assert any cognizable Fourth Amendment claim against government access to the types of financial records sought to be protected by the proposed legislation. 13/ If no Fourth Amendment right exists, then we are faced with the same problem discussed above; how can Congress purport to enforce or protect a right under § 5 that the Supreme Court has held does not exist in the Fourth (and Fourteenth) Amendment?

While we doubt that the Court would interpret Katz v. Morgan as permitting Congress to overrule the Court's interpretation of the Constitution, we believe, as stated above, that a defensible interpretation of Katz v. Morgan would permit Congress to find facts differently than the Supreme Court, to enact legislation based on such facts and then to have the Court reconsider its constitutional holding in light of the facts found in the congressional record.

This line of reasoning seems appropriate in the Fourth Amendment area since the Court's decision in Katz v. United States, 389 U.S. 347 (1967), has established the "reasonable expectation of privacy" test as the prevailing mode of analysis for Fourth Amendment protections. Under this test, the Court examines whether the individual has exhibited an actual (subjective) expectation of privacy and whether this subjective expectation is one that society is prepared

13/ But see California Bankers Ass'n v. Shultz, 416 U.S. 21, 78-79 (1974) (opinion of Powell, J., joined by Blackmun, J.):

Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process.

It is not easy to reconcile Justice Blackmun's concurrence in Justice Powell's opinion with the statement quoted above in the majority opinion he authored in Smith v. Maryland.

to recognize as reasonable. Smith v. Maryland, supra, slip. op. at 5. 14/ These standards appear peculiarly fact-laden. Whether or not society as a whole believes that a particular record or form of communication will be kept private seems an appropriate area for congressional fact-finding. Congress may well find that most persons who use the phone believe that local calls will be kept private or that information given to banks, creditors and insurance companies will not be disclosed to the government or other organizations. Thus Congress could find that society as a whole is prepared to recognize as legitimate an expectation of privacy in the types of information sought to be protected by the proposed legislation. The legislation could then be justified under § 5 as establishing procedural protections for these expectations.

It is difficult to assess how the Court would treat such fact-finding, particularly in an area in which it has reached "factual" conclusions of its own. At the least, the Court should take such enactments as probative of what is or is not a legitimate expectation. Twice the Court has used the existence of federal statutes that undermine protection of privacy as evidence that persons could have no "reasonable" expectation of privacy. See United States v. Miller, supra, 425 U.S., at 442-43 ("The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained . . . "); Couch v. United States, supra, 409 U.S. at 335-36 (taxpayer has no legitimate expectation of privacy in documents turned over to accountant for preparation of tax returns where Congress has required disclosure). Conceivably,

14/ For example, in Smith v. Maryland, supra, the Court found that use of pen registers (which record numbers dialed from a telephone) violates no constitutional expectation of privacy because long distance numbers are routinely recorded and pen registers are typically used in identifying the source of annoying or obscene phone calls. Moreover, an individual "knowingly exposes" to the phone company the numbers dialed. The Court thus concluded that the petitioner "in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that even if he did, his expectation was not 'legitimate.'" Slip op. at 10.

similar logic could lead the Court to find a legitimate expectation where Congress has specifically protected particular information from disclosure. Cf. Rakas v. Illinois, 47 U.S.L.W. 4025, 4030 n. 12 (Dec. 5, 1978) ("Legitimation of expectation of privacy must have been a source outside the Fourth Amendment, either by reference to real or personal property law or to understandings that are recognized and permitted by society.")

Under this reasoning, the Court could interpret enactment of the proposed statutes as evidence that society as a whole believes it has a reasonable expectation of privacy in financial records. ^{15/} The proposed legislation would then do double service; it would help create a cognizable privacy right and also provide procedural protections for the new rights (which could be imposed on the States under § 5).

III. Conclusion

In sum, we believe that the peculiarly factual nature of the Court's analysis of Fourth Amendment protections may present Congress with an opportunity to help create legitimate expectations of privacy in financial records maintained by third parties, and thus expand the protections of the Fourth Amendment. Legislation defining and protecting those rights could be justified under § 5 of the Fourteenth Amendment. We recognize that this is a novel argument and believe that a stronger case can be made under the Commerce Clause notwithstanding the Tenth Amendment implications of that argument.

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Deputy Assistant Attorney General
Office of Legal Counsel

^{15/} Taken to its limits, the Katz analysis would permit Congress to alter directly the substantive content of the Fourth Amendment by simply enacting statutes that either grant or take away privacy rights. See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 384 (1974) ... The Court has recognized this reductio ad absurdum and has made clear that in such cases it would adopt a "normative inquiry" (presumably whether Congress has violated fundamental principles that inform American constitutional history). Smith v. Maryland, slip op. at 5 n.5.