FRAUD & NEGLIGENCE

The Required Records Doctrine: The Fifth Amendment Privilege Under Attack

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A momentous decision from the Ninth Circuit denied the Fifth Amendment privilege against self-incrimination in a case involving undisclosed foreign accounts. In light of the Service's ongoing emphasis on tracking down U.S. accountholders of such assets, the potential ramifications of this decision cannot be underestimated.
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As part of its wave of investigations into undisclosed overseas bank accounts following its deferred prosecution of UBS AG, the Department of Justice (DOJ) has invoked the required records doctrine, a rarely used exception to the Fifth Amendment, to compel foreign account holders to produce records of their accounts over their Fifth Amendment act-of-production objections. Thus far, with at least one exception, the government largely has been successful in these efforts. Its most significant victory came with the Ninth Circuit's recent, groundbreaking decision in In re: Grand Jury Investigation M.H., 108 AFTR 2d 2011-5880 648 F3d 1067 (CA-9, 2011) ("In re M.H."), in which the court held that foreign bank account owners have no Fifth Amendment right to avoid production of their account records, even if the very act of producing those records would incriminate them.

The Supreme Court's holding in Shapiro v. U.S., 335 US 1 92 L Ed 1787 (1948), is credited with giving birth to the required records exception to the Fifth Amendment.[1] In his dissenting opinion in Shapiro, Justice Robert H. Jackson issued the following prescient warning:

"The protection against compulsory self-incrimination, guaranteed by the Fifth Amendment, is nullified to whatever extent ... that Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who then can use it to convict him. Today's decision introduces a principle of considerable moment. Of course, it strips of protection only business men and their records; but we cannot too often remind ourselves of the tendency of such a principle, once approved, to expand itself in practice 'to the limits of its logic.' ... It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to. The decision of today, applying this rule ... to records 'customarily kept,' invites and facilitates that eventuality."

Justice Jackson's dissent in Shapiro conveys his fear of the day when the majority's holding might expand to eviscerate many of the fundamental protections of the Fifth Amendment itself. In re M.H. and other recent precedents interpreting the required records doctrine in connection

with foreign bank accounts suggests that that day may have arrived.

The significance of the Fifth Amendment issues addressed in In re M.H. cannot be overstated. Several cases are already making their way through the district courts on this very issue, with varying outcomes. More are certain to follow. In the immediate term, the Ninth Circuit's decision is a boon to prosecutors spearheading these multiple ongoing investigations, or those soon to come, into undisclosed foreign bank accounts. Its significance stretches far beyond its immediate impact, however,

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having far-reaching consequences for Fifth Amendment jurisprudence. It raises the question of whether the government can constitutionally require individuals to maintain records of criminal conduct to be turned over at the government's insistence, and answers the question in the affirmative. In so doing, it threatens to imperil the very premise of the Fifth Amendment's protections as extended to the written word.

Using the Ninth Circuit's decision in In re M.H. as the framework for its analysis, this article explains why the Ninth Circuit got it wrong. The use of the required records exception to deprive foreign account owners of Fifth Amendment act-of-production protection over their foreign bank records is an unwarranted extension of Supreme Court precedent.

THE CASE—FACTS AND HOLDING

The facts of In re M.H. resemble those of many investigations into offshore bank accounts currently underway across the country. M.H. was one of approximately 250 customers of UBS whose identity was disclosed to DOJ by UBS in connection with its 2009 deferred prosecution agreement with DOJ.

In 2010, DOJ served M.H. with a grand jury subpoena demanding the production of "[a]ny and all records required to be maintained pursuant to 31 C.F.R. §103.32 [subsequently relocated to 31 C.F.R. §1010.420] relating to foreign financial accounts that you had/have a financial interest in, or signature authority over, including records reflecting the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during each specified year."[2]

The subpoena tracked the language of 31 C.F.R. section 1010.420,[3] which requires anyone with an obligation to report a foreign bank account pursuant to 31 C.F.R. section 1010.350[4] to maintain records of all such accounts for a period of five years and to keep such records available "at all times ... for inspection as authorized by law." The records required by section 1010.420 include the following information:

- (1) The name in which each account is maintained.
- (2) The number or other designation of the account.
- (3) The name and address of the foreign bank or other person with whom such account is maintained.

- (4) The type of such account.
- (5) The maximum value of each such account during the reporting period.

Section 1010.420 operates in tandem with section 1010.350, which requires any U.S. person with an ownership interest in or signatory or other authority over a foreign bank account to report that interest to the Secretary of the Treasury, which is done by filing Form TD F 90-22.1 ("Report of Foreign Bank and Financial Accounts"), commonly known as the FBAR.

Both regulations derive their authority from the Currency and Foreign Transaction Reporting Act of 1970, 31 U.S.C. section 1051 et seq. (the "Bank Secrecy Act," or BSA), the stated purpose of which is "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings...."[5] The willful failure to comply with either section 1010.350 or section 1010.420 is a crime, punishable by a term of imprisonment of up to five years and criminal fines of up to $250,000.[6]

M.H. refused to respond to the government's subpoena, invoking his Fifth Amendment protection against self-incrimination. He did so by relying on the Fifth Amendment's act-of-production doctrine. Spawned by two Supreme Court decisions,[7] the act-of-production doctrine recognizes that, while the contents of records generally are not privileged, the actual act of producing records has testimonial aspects which can be incriminatory.[8] The Supreme Court affirmed the doctrine's viability in U.S. v. Hubbell, 530 US 27 147 L Ed 2d 24 (2000), stating:

"... [W]e have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That constitutional privilege has the same application to the testimonial aspect of a response to a subpoena seeking discovery of those sources."[9]

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M.H.'s situation presented a textbook case for application of the act-of-production doctrine under Hubbell. The production of M.H.'s foreign bank records would be tantamount to testifying that he owned such an account which, given his failure to report the account on an FBAR, would have been an admission to a violation of the reporting statute.

Notwithstanding M.H's invocation of act-of-production protection, the district court ordered him to comply with the subpoena, relying on the required records exception to the Fifth Amendment announced in Shapiro, which renders the Fifth Amendment inapplicable when its criteria are met. Those criteria are:

- (1) The purpose of the relevant legislation is "essentially regulatory."
- (2) The required records are of a kind that the regulated party has customarily kept.
- (3) The records have assumed "public aspects" that render them quasi-public documents.[10]

The Ninth Circuit affirmed the district court's opinion, holding that the recordkeeping

requirements of section 1010.420 satisfied all three conditions for the application of the required records exception.

In reaching its holding concerning the applicability of the required records doctrine, the Ninth Circuit made several critical errors that threaten drastic consequences for Fifth Amendment jurisprudence. To appreciate the significance of In re M.H., and the flaws in its reasoning, it is first necessary to understand the history of the required records exception.

THE REQUIRED RECORDS DOCTRINE

The required records doctrine is a judicially created exception to the Fifth Amendment privilege, traceable to the Supreme Court's decision in Shapiro.

In Shapiro, a wholesaler of fruit and produce invoked his Fifth Amendment privilege in response to an administrative subpoena issued by the Office of Price Administration seeking various business records. The records in question were required to be maintained by regulations promulgated under the Emergency Price Control Act (EPCA), which was passed immediately following the outbreak of World War II to prevent inflation and price gouging through the regulation of commodities pricing.

The required records in Shapiro consisted of those "customarily kept" by individuals engaging in commodities sales, and included "invoices, sales tickets, cash receipts, or other written evidences of sale or delivery which relate to the prices charged pursuant to [the EPCA]."[11]

The Supreme Court determined that the EPCA represented a valid exercise of Congress's regulatory authority and that the recordkeeping provisions of the EPCA were essential to the administration of the statute's objectives. Citing dicta from Davis v. U.S., 328 US 582 90 L Ed 1453 (1946), the Court noted that "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established.'"

Critical to Shapiro's holding that the Fifth Amendment was inapplicable to the records in question was the Court's determination that the required records had attained "public aspects," such that they could be considered quasi-public records. As the Court observed, "there is an important difference in the constitutional protection afforded their possessors between papers exclusively private and documents having public aspects...." In other words, in the Court's estimation, it was the quasi-public nature of the records in Shapiro that allowed their compulsory production to be excepted from Fifth Amendment privilege.

The Shapiro Court was keenly aware of the risk that its holding could be extended too far, acknowledging that "[i]t may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself." It did not endeavor to determine those limits, however, merely stating that it had "no serious misgiving[s]" that the EPCA's recordkeeping provisions passed constitutional scrutiny insofar as there was a "sufficient relation between the activity sought to be

regulated and the public concern...."

The majority's failure to address the constitutional implications of its holding led to Justice Jackson's admonition that Shapiro's holding might one day be extended to the point of authorizing Congress to "require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand

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of government inspectors, who then can use it to convict him."[12]

Twenty years after Shapiro, the Supreme Court revisited its holding in the companion decisions of Marchetti, 21 AFTR 2d 539 390 US 39 19 L Ed 2d 889 1968-1 CB 500 (1968), and Grosso, 21 AFTR 2d 554 390 US 62 19 L Ed 2d 906 1968-1 CB 495 (1968). In Marchetti and Grosso, the petitioners were prosecuted for failing to register with the federal government as an enterprise engaged in the business of wagering and failing to pay taxes imposed on wagering businesses. Unlike Shapiro, which involved a recordkeeping requirement, at issue in Marchetti and Grosso were federal statutes requiring those in the business of wagering to register with the federal government and pay excise and occupational taxes, and to file appropriate excise and occupational tax returns in connection with those activities.

The Supreme Court held that the nature of the federal requirements were such that someone engaged in the business of accepting wagers could not comply with them without essentially admitting that he was engaged in such business, which was outlawed by almost all 50 states, and also carried with it potential federal criminal exposure. In light of this fact, the Court held that the petitioners' refusals to comply with the statutes at issue were protected by the Fifth Amendment insofar as compliance would have been tantamount to a confession of criminal conduct in an area "permeated by criminal statutes."

Before concluding their Fifth Amendment inquiries, the Marchetti and Grosso opinions stopped to consider whether the required records doctrine, as articulated in Shapiro, would command a different outcome in the situations before the Court. In holding that the required records doctrine was inapplicable to the circumstances before it in each case, the Court articulated a three-part test, derived from Shapiro's holding, for determining the applicability of the required records doctrine. As summarized in Grosso, those three requirements are as follows:

"[F]irst, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents."

The Court in Marchetti and Grosso held that, according to this test, the required records exception did not apply to the circumstances before it. For one, it held that, unlike the EPCA, which was an "essentially non-criminal and regulatory" regime, the wagering laws at issue were part of a regime "permeated" by criminal statutes directed at "a selective group inherently suspect of criminal activities."

Second, the Court held that the wagering laws at issue affirmatively required the petitioners to

create records, such that it could not be said that the records in question were "customarily" maintained by the regulated party. Finally, the Court held that the records in question lacked public aspects. Although it gave no guidance as to what would be required to infuse records with "public aspects," the Court made clear that the mere fact that they were required to be maintained by a statute would not be sufficient:

"The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress." (Emphasis added.)

It is significant that, while the Grosso test has been accepted as defining the parameters of the required records doctrine, neither Marchetti nor Grosso serves as an example of the application of the doctrine. In fact, the Marchetti/Grosso Court refused to address the constitutional limits of the doctrine, noting that "we find it unnecessary for present purposes to pursue in detail the question, left unanswered in Shapiro, of what 'limits ... the government cannot constitutionally exceed in requiring the keeping of records. ...'"

Shapiro, Grosso, and Marchetti all recognized the weighty ramifications of the required records exception.[13] In circumstances in which the exception applies, it renders the Fifth Amendment privilege inapplicable in the face of a compulsory production of records that fall within its reach.[14] Given that the consequences of the doctrine's application is to obviate a constitutional privilege, a number of courts have recognized

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that the doctrine is to be construed narrowly.[15]

Nevertheless, since its articulation in Grosso and Marchetti, the required records doctrine has been held to apply in limited circumstances to compel the production of records deemed to be tantamount to public documents, such as tax forms (including income tax returns, W-2 wage statements, and Forms 1099),[16] immigration documents,[17] physician prescription records,[18] state unemployment and worker's compensation records,[19] and odometer statements on motor vehicles.[20]

Until recently, the required records exception had not been held to apply to personal financial records.[21] In re M.H. suggests, however, that that no longer may be the case.

THE DOCTRINE AS APPLIED TO SECTION 1010.420 (HOW IN RE M.H. GOT IT WRONG)

It is against this backdrop that DOJ has recently sought to use 31 C.F.R. section 1010.420 to compel the production of foreign bank records over accountholders' Fifth Amendment act-of-production objections. It is presently a hotly contested area of Fifth Amendment jurisprudence

that already has resulted in a divergence of opinions at the district court level. For instance, in a decision earlier this year, the Southern District of Florida compelled the production of foreign bank records on the grounds that they were required records pursuant to 31 C.F.R. section 1010.420.[22] By contrast, in a very recent decision, the Southern District of Texas held that section 1010.420 did not satisfy Grosso's test and, accordingly, refused to compel the production of foreign bank records over a subpoenaed party's Fifth Amendment act-of-production assertion.[23]

In re M.H. represents a significant victory for the government on this emerging issue. Relying on Grosso's three-part test, it concluded that the Fifth Amendment did not apply to the compulsory production of M.H.'s foreign bank records into DOJ's hands because Congress required that he maintain such records pursuant to an "essentially regulatory" statutory regime, i.e., the Bank Secrecy Act.

As to Grosso's first requirement, the Ninth Circuit held that the recordkeeping requirements of section 1010.420 were part of an "essentially regulatory regime" since the BSA and its regulations were neither "an area 'permeated with criminal statutes'" nor "aimed at a highly selective group inherently suspect of criminal activities...."[24] In reaching this conclusion, the court relied extensively on its prior decision in U.S. v. Des Jardins, 747 F2d 499 (CA-9, 1984), vac'd in part on other grounds 772 F2d 578 (CA-9, 1985), in which it upheld the constitutionality of the currency reporting requirements of the Bank Secrecy Act.[25] In particular, the In re M.H. court held that there was nothing unlawful about possessing a foreign bank account and nothing "inherently criminal" about the information required to be maintained, such that the recordkeeping requirement could not be said to target criminal activity.

The Ninth Circuit also held that the required bank records were of a kind that customers of foreign banks would be expected to "customarily keep," partly because of the regulations requiring them to report such information, thereby satisfying Grosso's second prong. The court further determined that the bank records at issue had "public aspects," noting that simply because "the information sought is traditionally private and personal as opposed to business-related does not automatically implicate the Fifth Amendment." Citing Shapiro, the court held that because the records at issue were required to be maintained

pursuant to an "essentially regulatory" statute, they ipso facto possessed "public aspects."[26]

Having concluded that all three prongs of Grosso's test had been satisfied, the Ninth Circuit held, without further analysis, that "[b]ecause the records sought through the subpoena fall under the Required Records Doctrine, the Fifth Amendment privilege against self-incrimination is inapplicable, and M.H. may not invoke it to resist compliance with the subpoena's command." The court accordingly affirmed the district court's order compelling compliance with the subpoena.

Although the Ninth Circuit viewed itself as simply applying longstanding precedent in compelling M.H.'s compliance with the subpoena over his Fifth Amendment objections, the

opinion is, in fact, groundbreaking. To the author's knowledge, never before has a federal appellate court held that an individual's personal banking records fell within the required records exception.

The implications of the In re M.H. decision are vast. In the immediate term, it has the potential to affect the scores of cases making their way through the courts concerning active investigations into foreign bank accounts. Of greater significance, the logical implications of the Ninth Circuit's holding have the potential to strip any personal records of the Fifth Amendment's act-of-production protection in the face of congressional action. A thorough review of the holding in In re M.H., however, suggests that its reasoning is flawed in several respects.

Grosso's First Prong: Is 1010.420 'Essentially Regulatory'?

The first Grosso factor requires that the "purpose of the government's inquiry be essentially regulatory" (emphasis added). Given the Fifth Amendment's fundamental concern with governmental compunction, the focus of this prong is firmly (and properly) on the government's intent. And as the language of this prong suggests, it is not enough that the statutory scheme have some non-prosecutorial, regulatory purpose. Rather, the "essence" of the regime must serve non-prosecutorial ends. A review of the text of the BSA, its history, and relevant case law strongly suggest, however, that—far from being part of an "essentially regulatory" regime—the recordkeeping requirements of 31 C.F.R. section 1010.420 were enacted primarily with a criminal law enforcement purpose in mind.

Language of the statute and regulations. Beginning with the text of the legislation, the language of the BSA refers several times to criminal law enforcement and criminal proceedings. For example, the statutory "declaration of purpose" of the BSA in 31 U.S.C. §5311 expressly states that its purpose is "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings..." (emphasis added).

The text of 31 C.F.R. section 1010.420 also reflects its role in criminal law enforcement proceedings. For one, it requires that records be maintained for five years, a period coinciding with the criminal statute of limitations for willfully failing to file an FBAR.[27] The regulation also expressly states that, in computing the five-year period for which recordkeeping is required, "there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent Federal income tax return or failing to file a Federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding." The consequence to a taxpayer for willfully not retaining his records under this regulation is criminal prosecution.[28]

This is in addition to the fact that 31 C.F.R. section 1010.350 (the companion regulation to the regulation at issue) creates the obligation to file an FBAR, the willful disregard of which is also a federal crime under the BSA.[29] With such overt references to criminal prosecution, it is hard to conceive of these regulations as being "essentially regulatory."

Another strong indication of the regulation's true purpose is its requirement that the bank records which it requires "shall contain the name in which each such account is maintained" (emphasis

added). It is hard to conceive of a civil regulatory purpose for this requirement. For instance, if the primary purpose of the BSA's foreign bank reporting and recordkeeping requirements were to maintain data on foreign banking by U.S. citizens, the names of accountholders would not be needed to accomplish this purpose.

In addition, since the FBAR already requires accountholders to disclose the person in whose name each account is held, it is hard to understand how requiring individuals to retain records of such information adds to the sum total of the government's information from a civil regulatory perspective. Rather, the inclusion of this requirement makes much more sense when viewed from an evidentiary standpoint, as it would be much harder to bring a prosecution for willfully failing to report a foreign bank account

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without admissible evidence as to the account's owner.[30]

Furthermore, unlike truly regulatory schemes in which submission to government oversight is a condition of doing business and/or licensing, there is no licensure or other employment condition, or routine governmental oversight, at issue with respect to the BSA.[31] Rather, after years of being seemingly ignored from a civil regulatory standpoint, the regulation has only recently received attention in connection with criminal investigations into unreported foreign bank accounts.[32]

Legislative history. In addition to the statutory language, the legislative history of the BSA further indicates that its recordkeeping requirements were expressly conceived to assist law enforcement agencies in targeting persons owning secret foreign bank accounts.

For example, the House Report explained that the need for the foreign transaction reporting requirements was due to the "proliferation of white collar crime," which the House concluded had been aided by secret foreign bank accounts, including "organized criminal operations," tax evasion, securities fraud, and other "schemes to defraud the United States," conspiracies to steal from the United States, and money laundering.[33] The House Report also noted that "United States law enforcement agencies are often delayed or totally frustrated when wrongdoers cloak their activities in the shield of foreign financial secrecy."[34]

As the House Report makes clear, the BSA was intended to address these "frustrations" experienced by "law enforcement personnel" who, in the absence of the BSA's provisions, "must subject themselves to a time consuming and often fruitless foreign legal process" when conducting criminal investigations of undisclosed foreign accounts.[35] Accordingly, the legislative history makes clear that 31 C.F.R. section 1010.420 is not part of a regulatory regime intended to regulate an industry or promote the public welfare, as occurred in Shapiro and other required records cases, but rather was promulgated with the primary intent to enhance the evidence-gathering efforts of law enforcement in investigating and prosecuting financial crimes.

Judicial precedent. Several courts that have endeavored to discern the purpose of the BSA also

have interpreted its reporting requirements as being fundamentally prosecutorial in nature.

For instance, in Hajecate, 51 AFTR 2d 83-1282 683 F2d 894 (CA-5, 1982), the Fifth Circuit upheld a defendant's invocation of the "exculpatory no" doctrine in a prosecution for violating 28 U.S.C. section 1001 by falsely indicating on a federal income tax return that the defendant had no interest in a foreign account. The applicability of the "exculpatory no" doctrine turned on whether the relevant provisions of the BSA that engendered the challenged question on the defendant's tax return qualified as "investigative" (as opposed to "administrative") in nature.[36]

To answer the question, the Fifth Circuit looked to the legislative history of the BSA, where it found "a presumption by Congress that secret foreign bank accounts and secret foreign financial institutions are inevitably linked to criminal activity in the United States." After considering all relevant authority, the court stated that it was "compelled to hold that [the question concerning foreign bank accounts on the federal income tax return] must be classified as investigative."

In San Juan, 37 AFTR 2d 76-810 405 F Supp 686 (DC Vt., 1975), the court reached the same conclusion in considering the purpose of the BSA, noting that the "underlying purposes of Congress in promulgating [BSA's] foreign reporting

requirements ... were fundamentally prosecutorial" (emphasis added) on its way to holding that the BSA satisfied none of the "essential factors" of the required records exception.[37]

The Ninth Circuit in In re M.H. disregarded this authority, finding instead that the Supreme Court, in California Bankers Ass'n v. Shultz, 33 AFTR 2d 74-1041 416 US 21 39 L Ed 2d 812 1974-1 CB 393 (1974), had "considered and rejected these arguments as they relate to the BSA generally."[38] In doing so, it relied on language from Shultz, in responding to a facial Fifth Amendment challenge to the BSA, that "the fact that a legislative enactment manifests a concern for the enforcement of the criminal law does not cast any generalized pall of constitutional suspicion over it."

It is significant, however, that Shultz was not a required records case, and accordingly the Supreme Court was not addressing the pivotal question at the heart of Grosso's first prong, i.e., whether the statute was "essentially regulatory." Rather, the issue in Shultz was whether the BSA as a whole was constitutionally infirm on its face. In determining that it was not, the Supreme Court nevertheless recognized that the BSA "manifests a concern for the enforcement of the criminal law."[39] Indeed, this recognition on the part of the Shultz Court of the "prominen[ce]" of the concerns for criminal law enforcement in the minds of the BSA's enactors caused the Fifth Circuit, in Hajecate, to cite Shultz in support of its conclusion that the BSA was motivated primarily by law enforcement objectives, and therefore was predominantly "investigatory" in nature.

Although Shultz also notes that civil regulatory enforcement was among the purposes of the BSA as well, its language hardly suggests that the BSA is an "essentially regulatory" statute.[40] If

anything, it suggests the opposite.

The other mistake in In re M.H.'s analysis under Grosso's first prong is its reliance on cases involving reporting statutes, in particular the Ninth Circuit's earlier opinion in Des Jardins, which upheld the constitutionality of the currency reporting provisions of the BSA against a Fifth Amendment challenge. In holding that the BSA's reporting requirements passed Fifth Amendment scrutiny, the court in Des Jardins found that the risk of incrimination posed to those exposed to the reporting requirements was not substantial given that the reporting was not required in "an area permeated by criminal statutes" and was not directed at "a highly selective group inherently suspect of criminal activities."

The Ninth Circuit in Des Jardins derived this standard from a long line of authority dating back to Albertson v. Subversive Activities Control Board, 382 US 70 15 L Ed 2d 165 (1965), in which the Supreme Court invalidated a statute that imposed a registration requirement on members of the Communist Party. In determining that the Communist Party members could not comply with the law without a substantial risk of incriminating themselves, the Albertson Court pointed to the fact that the law was "directed at a highly selective group inherently suspect of criminal activities" in an area "permeated with criminal statutes." Since Albertson, cases involving Fifth Amendment challenges to reporting statutes, such as Des Jardins, have applied its test in balancing the risks to the individual of incrimination against the governmental interests advanced by the regulation.[41]

By treating Des Jardins as controlling in its required records analysis, In re M.H. effectively engrafted Albertson's test, which applies only to reporting cases, onto Grosso's first prong. It therefore concluded that the section 1010.420 recordkeeping requirement was "essentially regulatory" because, according to the Ninth Circuit, it was not directed at "a highly selective group inherently suspect of criminal activities" in an area "permeated with criminal statutes."

But reporting requirement cases are a distinctly different animal than required records cases. In the case of reporting requirements, the Fifth Amendment is assumed to apply. Consequently, the relevant inquiry becomes one of balancing the competing interests of the government in regulating the area in question

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against the risk of self-incrimination posed to the individual.[42] Under this analysis, the courts have determined that the risk of self-incrimination in the act of reporting is greatly reduced, and the reporting requirement generally acceptable, when the reporting is required to be made in an area that is not permeated with criminal statutes or directed at an inherently suspect group.[43] The focus in such cases is the likely effect of the statute, i.e., whether it could be expected to pose a risk of self-incrimination to most persons.[44]

By contrast, the required records doctrine renders the Fifth Amendment inapplicable in cases where the doctrine applies. Unlike in reporting cases, the focus of the analysis is not the risk of self-incrimination. In fact, as one court put it, "where the narrow parameters of the doctrine are met, and the balance weighs in favor of disclosure, the information must be forthcoming even in

the face of potential incrimination."[45]

Instead, as Grosso and Marchetti instruct, the focus in such cases is on the "purpose of the government inquiry" (emphasis added). And given that the consequence of finding the doctrine applicable is to find that the affected party has no Fifth Amendment rights to assert, if that purpose is in part motivated by criminal law enforcement objectives—let alone substantially motivated by such objectives, as is true with the BSA—it cannot be found to be an "essentially regulatory" statute.

By limiting the definition of what is an "essentially regulatory" statute to exclude only those narrow sets of laws that exist as part of a regime permeated by criminal statutes or that target those inherently suspected of criminal activity, the In re M.H. court turns Grosso's definition on its head, blessing all manner of regulations with clear prosecutorial motives underlying them, so long as the government was able to articulate a non-prosecutorial motive as well.

The district court in San Juan recognized this distinction between the constitutional analysis applicable to the BSA's reporting requirements and the stricter test for determining the application of the required records doctrine. Like Des Jardins and Dichne, 612 F2d 632 (CA-2, 1980), San Juan involved a constitutional challenge to the BSA's currency reporting requirements. The government responded to this challenge by arguing both that the required records doctrine rendered the Fifth Amendment inapplicable and that, regardless, the BSA's reporting requirements were constitutional. The district court treated the issue of the BSA's constitutionality as entirely separate and distinct from the question of whether the required records doctrine applied. As to the latter question, the court rejected the government's argument that the defendant's challenge could be defeated by the required records doctrine.

At the outset, the San Juan court acknowledged that, unlike the situations in Marchetti,[46] Albertson,[47] and Haynes,[48] the reporting requirements of the BSA did not arise in an area permeated by criminal statutes. Nevertheless, rather than treating this as the end of the analysis—as did the Ninth Circuit in In re M.H.—the San Juan court went on to hold that "[t]hese significant differences ... cannot mask the underlying purposes of Congress in promulgating the foreign reporting requirements of the [BSA]—purposes which were fundamentally prosecutorial" (emphasis added).

As in Des Jardins and Dichne, the San Juan court went on to hold that the BSA's reporting requirements were constitutional, but only after rejecting the applicability of the required records doctrine on the grounds that the statute was not an "essentially regulatory" one. San Juan's in-depth treatment of the issue highlights In re M.H.'s error in conflating the constitutionality of the BSA's reporting requirements, which has been well established, with a finding that it is an "essentially regulatory" statute, a proposition for which there is scant support.

In re M.H.'s parallel between the BSA's recordkeeping provisions and its currency reporting requirements is flawed for another reason. As the Ninth Circuit in Des Jardins itself noted, the information which is required by the BSA's currency reporting forms would not necessarily incriminate even those persons who were, in fact, guilty of transporting monetary instruments in

connection with illegal activity.[49]

Using this same logic, the Sixth Circuit upheld the constitutionality of the BSA's requirement that foreign accountholders file an FBAR, reasoning that, since the FBAR does not seek information about the source of the funds, there is nothing incriminatory about complying with the FBAR obligation.[50] Thus, even the criminal could complete the required currency reporting and FBAR forms without incriminating himself.

By contrast, the recordkeeping requirements of section 1010.420, while presumably benign as applied to the lawful accountholder, necessarily require the holder of an unreported foreign bank account to maintain and

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produce evidence directly incriminating himself in a criminal offense (e.g., the willful failure to file an FBAR). Thus, while it is debatable as to whether there is anything incriminatory about filing an FBAR, for those who willfully fail to file the form, being compelled to provide their foreign bank statements is tantamount to an admission. Accordingly, In re M.H.'s contention that the recordkeeping requirements at issue do not provide a "link in a chain of evidence" against foreign accountholders is simply wrong.

Even assuming that In re M.H. correctly construed Grosso's first prong, it still erred in finding that the government had satisfied that prong. This is because the BSA's recordkeeping requirements are, in fact, "aimed at persons inherently suspected of criminal activity" (i.e., holders of undisclosed foreign accounts). Although the In re M.H. court was correct that there is nothing "inherently illegal" about owning a foreign account, as noted previously, the legislation's congressional record evidences that Congress's primary concern was not with persons who used foreign accounts for legal purposes but rather those who used such accounts for illegal purposes.[51] Thus, even according to In re M.H.'s (incorrect) standard for determining whether the BSA was an "essentially regulatory" statutory regime, the BSA fails the test.

Grosso's Second Prong: Are the Records 'Customarily Kept'?

Grosso's second prong requires that the records which the government has required to be kept be of a kind which the regulated party would "customarily keep." This requirement is traceable to Shapiro, where the EPCA regulation in question expressly required "[e]very person subject to this regulation [to] keep and make available for examination ... records of the same kind as he has customarily kept, relating to the prices which he charges for fresh fruits and vegetables...."[52]

In Grosso and Marchetti, the Court contrasted this with the circumstances before it in those cases, in which the defendant was required to "provide information, unrelated to any records which he may have maintained, about his wagering activities." In light of this context, it is evident that, in establishing the test's second prong, Grosso and Marchetti were concerned with limiting the doctrine's application to records which the regulated party otherwise would have maintained in the absence of the government regulation. This makes sense, since the more it appears that the regulated party would not maintain the records but for government compulsion,

the more the Fifth Amendment becomes implicated.

In re M.H. states that "[t]he information that §1010.420 requires to be kept is basic account information that bank customers would customarily keep, in part because they must report it to the IRS every year as part of the IRS's regulation of offshore banking, and in part because they need the information to access their foreign bank accounts."

The aforesaid statement, however, ignores the fact that many foreign banks, particularly those in secrecy jurisdictions such as Switzerland, do not provide their customers with account statements unless specifically requested to do so. In many of these jurisdictions, this practice has had nothing to do with tax evasion,[53] but rather with a time-honored tradition of bank secrecy. Likewise, many U.S. customers of these banks do not customarily maintain records of their foreign banking activities. While many of these customers are undoubtedly motivated by tax evasion, others have more legitimate reasons for concealing their ownership in a foreign account, such as protection from creditors or fear of governments.[54] These foreign bank customers would not, and did not, "customarily" maintain records of their account in the absence of government compulsion.

Moreover, even in those instances where customers of accounts in bank secrecy jurisdictions do receive copies of their bank statements, those statements normally do not contain any indication of the account's owner. Generally, this does not result from a specific request by the customer in order to avoid detection, but rather it is standard practice for most banks in such jurisdictions. Therefore, even if could be deemed "customary" for foreign bank accountholders to maintain copies of their accounts, many customers would not "customarily" maintain the "kind" of records required by section 1010.420 were it not for the regulation's requirements. It is even less likely that those customers would retain their records for a period of five years, as required by the statute.

The fact that many holders of foreign accounts would not, and did not, customarily keep their records in the form required by section 1010.420 lends further constitutional suspicion to employing government compulsion to turn over such records when they tend to incriminate. In this regard, In re M.H.'s conclusion concerning the second Grosso prong is also incorrect.

Grosso's Third Prong: Do the Records Possess 'Public Aspects'?

The third requirement of the Grosso test—that the records being required have attained public

aspects—is arguably its most significant. The reason for this is that the purpose of the doctrine is to determine whether the Fifth Amendment even applies in the first instance to the government compulsion in question, not whether the government can overcome a Fifth Amendment challenge.[55]

As the Supreme Court acknowledged in Shapiro, "'there is an important difference in the constitutional protection afforded their possessors between papers exclusively private and

documents having public aspects.'"[56] Therefore, unless the records could be said to belong in some fashion to someone other than the person seeking to assert the privilege (i.e., the public or the government), the Fifth Amendment is implicated and the doctrine cannot apply.

It is with respect to Grosso's third prong that In re M.H.'s reasoning is least persuasive. The Ninth Circuit concluded that the personal bank records at issue possessed "public aspects" by conflating this prong of the analysis with Grosso's first prong. It justified this approach by citing Shapiro for the notion that "[t]he Supreme Court has recognized that if the government's purpose in imposing the regulatory scheme is essentially regulatory, then it necessarily has some 'public aspects.'"[57]

Even assuming the Shapiro Court did intend to engage in such tautological reasoning, any suggestion that records could attain public aspects merely by being compelled by government regulations was refuted by Grosso and Marchetti, which made clear that the question of whether specific records had attained "public aspects" was separate and distinct from the question of whether the records were required pursuant to an "essentially regulatory" regime. Indeed, Marchetti made this distinction abundantly clear in providing guidance as to the showing required before records would be considered to have public aspects; so clear that it is worth repeating the language we quoted earlier in this article:

"The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the [Fifth Amendment]. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress."

In re M.H. sidesteps this distinction by citing the Supreme Court's decision in California v. Byers, 402 US 424 29 L Ed 2d 9 (1971), for the proposition that just because "the information sought is traditionally private and personal as opposed to business-related does not automatically implicate the Fifth Amendment." Byers is not a required records case, however, but rather another example of a reporting requirement case, involving a California statute requiring drivers to provide identifying information at the scene of an accident. The Byers Court therefore did not address the question of whether the personal identifying information possessed "public aspects."

In any event, the statutory regime in question in Byers was vastly different from that at issue in In re M.H., rendering Byers of little precedential value. Driving is by its very nature a distinctly public act. It involves public roadways on which one interacts with thousands of other drivers. It also is an activity heavily regulated by laws intended to protect the public that, in order to be properly administered, require the type of information compelled by the statute in Byers. None of this is true of the area of personal banking. Rather than the support sought by the Ninth Circuit in In re M.H., Byers actually reinforces the argument for a comparable lack of public aspects attendant to the bank records required to be kept by section 1010.420.

Relevant case law suggests that instances in which records have been held to have attained "public aspects" for purposes of the required records doctrine generally have been situations where either the records related to areas subject to government or professional licensing,[58] or the records related to a regulatory scheme intended to protect segments of the public or promote the

public welfare,[59] or where the records were essential to the proper administration of a regulatory regime of vital importance to the public and/or the

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proper functioning of the government.[60] In contrast, records that are personal to the individual have been held to lack public aspects, even when such records have been subjected to governmental recordkeeping requirements.[61]

Porter, 52 AFTR 2d 83-5511 711 F2d 1397 (CA-7, 1983), provides perhaps the most analogous example to the situation in In re M.H. That case involved an appeal by a taxpayer from an order requiring the production of the taxpayer's business records—cancelled checks, bank slips, bookkeeping journals, and payroll and sales records—in response to an IRS summons. In rejecting the applicability of the required records exception to the taxpayer's Fifth Amendment act-of-production claim, the Seventh Circuit was unmoved by the fact that Reg. 1.6001-1(a) required taxpayers to maintain the type of records requested by the summons.

The Porter court contrasted the situation before it with that in Shapiro, where it described the defendant as being "required to keep such records as an ongoing condition of operating his business under a comprehensive government regulatory scheme." The Seventh Circuit went on to note that the "taxpayer-IRS relationship is, instead, a more limited one which creates an imperative for access to records only in rare cases," such that "the taxpayer's substantive activities are not positively 'regulated' by the IRS sufficient to create a Shapiro -type interest in unconditional access to those records." The court went further to observe that:

"[T]he very nature of the limited taxpayer-government relationship is, we think, insufficient to imbue the taxpayer's cancelled checks and deposit slips with 'public aspects' as required under Shapiro. Unlike the transaction records which the Emergency Price Control Act provided would be routinely available to the government as a condition of the business' operation, a sole proprietor's checks and bank transactions are inspected by revenue authorities only in the unusual situation of an audit. This rarely attempted access hardly transforms the gamut of an individual businessman's financial records into an extension of the public archives."[62]

The records required by section 1010.420 fall into none of the categories of records traditionally deemed to have public aspects and are even more personal than those at issue in Porter. In a culture and an era where fewer and fewer of one's activities enjoy the protections of privacy, one of the few remaining arenas that is afforded privacy protections is one's personal banking. Congress has itself recognized the privacy of bank information in passing the Right to Financial Privacy Act,[63] which protects bank customers from intrusions into their bank data without their consent in the absence of a legitimate law enforcement purpose. Many states also expressly protect the confidentiality of personal bank information.[64]

In re M.H. acknowledges that personal banking records are subject to privacy protections, but notes that "[t]he fact that documents have privacy protections elsewhere does not transform those documents into private documents for the purpose of grand jury proceedings." Of course, if a grand jury subpoena were sufficient to infuse records with "public aspects," Grosso's test would

serve no purpose, as every record could be converted to a public record simply by the government's demand for it.[65]

Even in the age of Facebook, Twitter, and omnipresent video surveillance, it is reasonable to believe that most citizens would be outraged if informed that their personal banking information was deemed to be a quasi-public record. Although In re M.H. gives them reason to be alarmed, its reasoning is dubious on this issue as well, and the better view is that the private banking records required by 31 C.F.R. section 1010.420 lack sufficient "public aspects" to satisfy the

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required records exception to the Fifth Amendment.

CONSTITUTIONAL IMPLICATIONS OF IN RE M.H.

In re M.H. ignores another key instruction from Grosso and Marchetti. As the Marchetti Court observed, a finding that the required records exception is applicable in a given case is not tantamount to a finding that its application is constitutional.[66] Application of the required records doctrine to records required by section 1010.420 tests the outer constitutional limits of the doctrine.

In appreciating the constitutional significance of In re M.H.'s holding, it is worth recalling the circumstances in which the Ninth Circuit held that the required records doctrine was satisfied. M.H. was investigated for failing to report a foreign bank account. If M.H. were subpoenaed to testify as to his ownership interest in a foreign account, under Hubbell he clearly would have been able to assert his Fifth Amendment right to refuse to answer such questions.

Instead, the government used its subpoena power to force him to admit his ownership in the foreign account indirectly by compelling the production of his foreign bank records. The government justified this by resorting to a regulation, 31 C.F.R. section 1010.420, which required him, under the threat of criminal punishment, to not only maintain the bank records but also to maintain them in a form that identified him as the owner. This regulation to which the government resorted was motivated, at least in part if not primarily, to assist law enforcement in this very sort of situation, i.e. in detecting and prosecuting individuals with undisclosed foreign bank accounts.[67]

This scenario sounds eerily similar to the "eventuality" posed by Justice Jackson's dissent in Shapiro, quoted at the beginning of this article, in which he admonished that the majority's holding might one day be extended to "the limits of its logic" to the point where "Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who then can use it to convict him."

It is hard to overstate the significance of In re M.H.'s holding. For instance, Section 6001 requires taxpayers to "keep such records ... as the [IRS] may from time to time prescribe" and, pursuant to that authority, Reg. 1.6001-1(a) mandates that taxpayers "keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown ... in any return...." Previously,

the general assumption among the courts and the government was that such records are subject to the act-of-production privilege and that, at a minimum, the government would need to confer act-of-production immunity on the holder of such records in order to compel their disclosure.[68]

It was these very sorts of personal financial records that were at issue in Hubbell, in which the Supreme Court reaffirmed the validity of the act-of-production privilege.[69] Taken to the "limits of its logic," the holding of In re M.H. runs headlong into Hubbell, threatening to eviscerate the act-of-production privilege, removing virtually all personal financial (and other) records from the scope of Fifth Amendment scrutiny by virtue of the fact that they are required to be kept by a federal statute, such as the Internal Revenue Code.

CONCLUSION

The Ninth Circuit's decision in In re M.H. has placed the required records doctrine on the slippery slope envisaged by Justice Jackson in Shapiro. It is a decision that cries out for Supreme Court review in light of the divergence of views among the district courts and the vital constitutional importance of this issue. If the Ninth Circuit's holding is permitted to stand, it would not be farfetched to fear that it signals the beginning of the end of the Fifth Amendment privilege as applied to personal records.

[1] The doctrine announced by the Court is alternatively referred to as the "required records exception" and the "required records doctrine." This article also uses both formulations.

[2] Emphasis by the Ninth Circuit.

[3] This article will refer to the regulation by its current citation.

[4] Until recently, 31 C.F.R. section 1010.350 was located at 31 C.F.R. section 103.24. This article will refer to the current citation.

[5] 31 U.S.C. section 5311.

[6] See 31 U.S.C. section 5322. There are also substantial civil penalties for willfully failing to file an FBAR; see 31 U.S.C. section 5321.

[7] Fisher, 37 AFTR 2d 76-1244 425 US 391 48 L Ed 2d 39 1976-1 CB 411 (1976), and Doe, 57 AFTR 2d 86-1270 465 US 605 79 L Ed 2d 552 (1984).

[8] See, e.g., Hubbell, 83 AFTR 2d 99-632 167 F3d 552 (CA-D.C., 1999), aff'd 530 US 27 147 L Ed 2d 24 (2000) (the act of production communicates at least four statements: (1) that responsive documents exist; (2) that they are in the possession and control of the subpoenaed party; (3) that they are authentic; and (4) that the party producing them believes them to be responsive to the subpoena); In re Grand Jury Subpoena Dated April 18, 2003, 383 F3d 905 (CA-9, 2004) (Fifth Amendment protection applies where the act of producing documents has "incriminating, testimonial aspects"); In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992, 1 F3d 87 (CA-2, 1993) (the act of producing a document is tantamount to testimony that the document exists).

[9] See also Beattie, 36 AFTR 2d 75-5619 522 F2d 267 (CA-2, 1975) ("A subpoena demanding that an accused produce his own records is taken to be the equivalent of requiring him to take the stand and admit their genuineness"), vac'd 37 AFTR 2d 76-1454 425 US 967 (1976).

[10] Grosso, 21 AFTR 2d 554 390 US 62 19 L Ed 2d 906 1968-1 CB 495 (1968).

[11] Section 14(a) of Maximum Price Regulation 426, 8 Fed. Reg. 9546 (1943), quoted in Shapiro, fn. 3.

[12] Justice Jackson was not alone in his concern. In a stinging dissent, Justice Frankfurter harshly criticized the majority for its "facile treatment of the grave constitutional question" surrounding the required records exception. In language similar to that use by Justice Jackson, Justice

Frankfurter posited that "the notion that whenever Congress requires an individual to keep in a particular form his own books dealing with his own affairs his records cease to be his when he is accused of a crime, is indeed startling."

[13] Given that Shapiro, Grosso, and Marchetti all predated the Supreme Court's recognition of the act-of-production privilege in Fisher and Doe, supra note 7, it has been argued that the required records exception does not apply in the context of an assertion of the act-of-production privilege. Those arguments have been rejected by courts that have considered them. See U.S. v. Lehman, 887 F2d 1328 (CA-7, 1989) (the required records exception applies to the act-of-production privilege); In re Grand Jury Subpoena Duces Tecum Served Upon Underhill ("In re Underhill"), 781 F2d 64 (CA-6, 1986) (same).

[14] See, e.g., In re Underhill, supra note 13 (noting that, where the exception applies, "the information must be forthcoming even in the face of potential incrimination") (emphasis in original).

[15] Id. (referring to the required records doctrine as a "narrow exception" to the Fifth Amendment privilege); In re Grand Jury Subpoenas Dated June 27, 1991, 772 F Supp 326 (DC Tex., 1991) (referring to "the narrow required records exception to the Fifth Amendment"); In re Sambrano Corp., 107 AFTR 2d 2011-457 441 BR 562 (Bkrptcy. DC Tex., 2010) (citing Underhill, supra note 13, in recognizing the "narrow parameters" of the doctrine); In re Grand Jury Proceedings, 119 BR 945 (Bkrptcy. DC Mich., 1990) (required records doctrine is a "narrow exception" to the Fifth Amendment; quoting Underhill).

[16] Edgerton, 54 AFTR 2d 84-5016 734 F2d 913 (CA-2, 1984), fn. 4 ("[t]here is precedent for holding that W-2s and Forms 1099 are required records") (citations omitted); Nugyen, 107 AFTR 2d 2011-2221 (DC Tex., 2011) (tax returns and tax forms are required records); AAOT Foreign Economic Ass'n (VO) Technostroyexport v. International Devel. and Trade Servs., Inc., 1999 WL 970402 (DC N.Y., 10/25/99) (tax returns, W-2s, 1099s, and K-1s all fell within the required records exception).

[17] See Rajah v. Mukasey, 544 F3d 427 (CA-2, 2008) (requirement that immigrants maintain I-9s and other immigration forms as a condition of remaining in the country rendered the forms public documents in aid of the government's civil regulatory need to enforce the immigration laws).

[18] In re Doe v. U.S., 711 F2d 1187 (CA-2, 1983) (physician records required to be maintained under New York State law satisfied required records exception); In re Kenny, 715 F2d 51 (CA-2, 1983) (patient medical records required to be maintained pursuant to state law aimed at protecting public through "rigorous ongoing review of medical professionals" satisfied the exception).

[19] U.S. v. Spano, 21 F3d 226 (CA-8, 1994) (also applying the required records exception to tax returns, W-2s, odometer statements, and automobile licensing, title, and purchase/sale records).

[20] See In re Underhill, supra note 13 (the government could compel production of odometer statements under the required records exception).

[21] See Porter, 52 AFTR 2d 83-5511 711 F2d 1397 (CA-7, 1983) (the required records exception did not apply to various personal financial records required to be maintained by IRS Regulations). Cf. Lehman, supra note 13 (business records properly fell within the required records exception while personal bank records did not).

[22] See In re Grand Jury Subpoenas Dated January 3, 2011, Case No. 10-403-073 (DC Fla., 3/4/11) (the compelled production of foreign bank records did not implicate the Fifth Amendment due to the applicability of the required records exception).

[23] In re Grand Jury Subpoena, Case No. H-11-174 (DC Tex., 9/21/11) (holding that the BSA was not an "essentially regulatory" statute and that the sought-after foreign bank records did not have "public aspects").

[24] Quoting U.S. v. Des Jardins, 747 F2d 499 (CA-9, 1984), vac'd in part on other grounds 772 F2d 578 (CA-9, 1985).

[25] 31 U.S.C. section 5316, which was enacted as part of the BSA, requires that persons transporting more than $10,000 in monetary instruments across U.S. borders file a form with the U.S. Customs Service providing certain information concerning the currency and its travels.

[26] Quoting Shapiro for the proposition that "if the government's purpose in imposing the regulatory scheme is essentially regulatory, then it necessarily has some 'public aspects.'" The Ninth Circuit also noted that section 1010.420 possesses public aspects because "the documents in question are required to be kept to aid in the enforcement of a valid regulatory scheme."

[27] See 18 U.S.C. section 3282 (establishing five-year statute of limitations for federal offenses).

[28] See 31 U.S.C. section 5322.

[29] Id.

[30] The government conceivably could argue that information concerning the account's holder would aid in a civil audit of the FBAR requirement, as there are civil penalties associated with willful failure to file an FBAR; see 31 U.S.C. section 5321. It would seem nearly impossible to distinguish the two motives in this regard, however, especially given that the willfulness standard is the same under the BSA for both civil and criminal violations. See CCA 200603026 (the same willfulness standard applies to both civil and criminal FBAR violations and is one that requires actual knowledge). In light of this, it is hard to understand why the government would enjoy the benefit of the doubt on this question, given both the enormous consequences of finding the Fifth Amendment inapplicable and the multiple other indications that 31 C.F.R. section 1010.420 was

driven by a criminal law enforcement objective.

[31] See, e.g., Porter, supra note 21 (distinguishing Shapiro as involving an essentially regulatory scheme because the defendant was required to keep such records as an ongoing condition of operating his business under a comprehensive government regulatory scheme); In re Grand Jury Subpoena, supra note 23 ("[u]nlike the Price Control Act [at issue in Shapiro], foreign account holders are not required to have a federal license in order to invest overseas").

[32] See, e.g., Sheppard, "District Court Rules That Where There's No Will, There's a Way to Avoid FBAR Penalties," 113 JTAX 293 (November 2010) (observing that "before the public scandal centered on UBS in Switzerland, the FBAR was an obscure form with little significance to most taxpayers and practitioners"). See also In re Grand Jury Subpoena, supra note 23 ("[o]ther than gathering data to confirm whether its citizens are evading taxes through overseas accounts, the [BSA] has no substance—not in having its own regulatory function nor in assisting other regulators").

[33] See H. Rep't No. 91-175, 91st Cong., 2d Sess. 10 (1970), reprinted in 1970 U.S.C.C.A.N. 4394, 4404, 1970 WL 5667. The Finance Committee largely echoed the House's stated objectives. See S. Rep't No. 91-1139, 91st Cong., 2d Sess. (1970) (the purpose of the BSA was to provide "law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime").

[34] See H. Rep't No. 91-175, supra note 33.

[35] Id.

[36] Prior to its rejection by the Supreme Court in Brogan v. U.S., 522 US 398 139 L Ed 2d 830 (1998), the "exculpatory no" doctrine applied exclusively to prosecutions under 28 U.S.C. section 1001 and held that, in light of the protections of the Fifth Amendment, a defendant could not be prosecuted under section 1001 for providing "mere negative responses" to compelled questions on governmental forms which are investigative in nature (i.e., intended to facilitate criminal law enforcement). See Hajecate, 51 AFTR 2d 83-1282 683 F2d 894 (CA-5, 1982).

[37] See also In re Grand Jury Subpoena, supra note 23 ("[t]he government instituted the reporting requirement not to regulate its citizens with business abroad but to catch crooks").

[38] The Ninth Circuit cited Shultz for its observation that, while the enforcement of the criminal laws was "undoubtedly prominent in the minds of legislators" in promulgating the BSA, "Congress seems to have been equally concerned with civil liability which might go undetected by reason of transactions of the type required to be recorded or reported."

[39] The Supreme Court also noted that "concern for the enforcement of the criminal law was undoubtedly prominent in the minds of the legislators who considered the [BSA]."

[40] In Shultz, the Supreme Court remarked that Congress was equally concerned with civil and

criminal enforcement of regulations concerning overseas financial activities. Other cases that have pointed out the civil goals behind the BSA also have had to concede the criminal law enforcement motives behind the legislation. See U.S. v. Dichne, 612 F2d 632 (CA-2, 1980) ("While Congress clearly intended the Act's disclosure requirements to be of some use in criminal proceedings, we regard [the] non-prosecutorial interests [behind the Act] as substantial").

[41] California v. Byers, 402 US 424 29 L Ed 2d 9 (1971) (a state law requiring drivers to stop and provide identifying information at the scene of an automobile accident did not violate the Fifth Amendment as it did not arise in an "area permeated by criminal statutes" or target a "highly selective group inherently suspect of criminal activity"); Marchetti, 21 AFTR 2d 539 390 US 39 19 L Ed 2d 889 1968-1 CB 500 (1968) (striking down reporting requirements for individuals involved in business of wagering as having been promulgated in an area "permeated by criminal statutes"); Haynes, 21 AFTR 2d 1781 390 US 85 19 L Ed 2d 923 1968-1 CB 615 (1968) (invalidating firearms registration law); Des Jardins, supra note 24 (reporting requirements of BSA satisfied standard of Albertson v. Subversive Activities Control Board, 382 US 70 15 L Ed 2d 165 (1965)); Dichne, supra note 40 (same).

[42] See Des Jardins, supra note 24; Dichne, supra note 40.

[43] See Albertson, supra note 41; see also Dichne, supra note 40 ("Later Supreme Court cases utilized [the Albertson] criteria in striking down various disclosure statutes") (emphasis added). Accord, Des Jardins, supra note 24.

[44] See Des Jardins, supra note 24; Dichne, supra note 40.

[45] In re Underhill, supra note 13.

[46] Registration as being in the business of accepting wagers was effectively an admission of having violated various state criminal statutes.

[47] Registration as member of the Communist Party was tantamount to a confession of engaging in criminal activity.

[48] Invalidating a firearms registration law.

[49] The court noted that "the information which an individual must provide under the reporting requirements generally will not ‘prove a significant "link in a chain" of evidence tending to establish guilt.’"

[50] U.S. v. Sturman, 951 F2d 1466 (CA-6, 1991) (upholding the constitutionality of the requirement to report foreign bank accounts on an FBAR).

[51] See Hajecate, supra note 36 (noting that the legislative history of the BSA evidenced "a

presumption by Congress that secret foreign bank accounts and secret foreign financial institutions are inevitably linked to criminal activity in the United States"); In re Grand Jury Subpoena, supra note 23 (the BSA's purpose is "to catch crooks").

[52] Section 14(b) of Maximum Price Regulation 426, supra note 11, quoted in Shapiro, fn. 3.

[53] In fact, Switzerland does not recognize tax evasion as a crime.

[54] As the government's probe into UBS has uncovered, many holders of Swiss foreign accounts are Holocaust survivors or their kin, who established the secret offshore accounts as a protected, potentially life-saving, source of money in the event of another Holocaust-type event.

[55] See San Juan, 37 AFTR 2d 76-810 405 F Supp 686 (DC Vt., 1975) (the required records exception did not apply to the defendant's Fifth Amendment challenge to the BSA but the government's regulatory interest in the reporting requirement at issue overcame the defendant's Fifth Amendment concerns).

[56] Quoting Davis v. U.S., 328 US 582 90 L Ed 1453 (1946).

[57] Shapiro noted that "the privilege which exists as to private papers cannot be maintained" in relation "to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established." See also In re Grand Jury Subpoenas Dated January 3, 2011, supra note 22 ("there is persuasive authority for the proposition that documents which must be maintained pursuant to regulation necessarily have 'public aspects' and thus fall within the 'required records' exception").

[58] See, e.g., Shapiro (in holding that the records possessed "public aspects," noting that "the transaction which [the required sales record documented] was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute"); In re Kenny, supra note 18 (patient medical records had "public aspects" when required as part of a legislative scheme designed to protect the public through "rigorous ongoing review of medical professionals"). Cf. Rajah v. Mukasey, supra note 17 (the requirement that resident aliens maintain, and present for government inspection on request, certain documents relating to their residency status was a reasonable contingency of being granted the privilege of remaining in the U.S.).

[59] See, e.g., Shapiro (records necessary for the proper functioning of the EPCA, an emergency wartime statute intended to protect the public from inflation and price gouging, possessed "public aspects"); Lehman, supra note 13 (records of cattle sales and purchases by cattle dealers had "public aspects" when required by legislation motivated by protecting "the keen health, safety, and economic interests of consumers, dealers, and regulators"); In re Doe, supra note 18 (the requirement that physicians maintain prescription records was part of a comprehensive regime designed to regulate the dissemination of dangerous drugs); Silverman, 28 AFTR 2d 71-5899 449 F2d 1341 (CA-2, 1971) (a state law requirement that attorneys maintain records of

contingency fee arrangements which are subject to court review was held to have "public aspects").

[60] In re Doe, supra note 18 (citing Shapiro in holding the Form W-2, which is required by law to be attached to one's tax return and filed with the federal government as part of the IRS "regulatory scheme," has "public aspects"). Cf. Rajah, supra note 17 (immigration documents such as passports and I-94s were held subject to production under the required records exception as records essential to the enforcement of the immigration laws).

[61] See Porter, supra note 21; Cianciulli, 90 AFTR 2d 2002-5203 (DC N.Y., 2002).

[62] See also Cianciulli, supra note 61 (the required records exception did not apply to various business and personal records, including bank statements, requested by IRS summons even though such records were required to be maintained under IRS Regulations).

[63] 12 U.S.C. sections 3401-3422 (1978).

[64] See, e.g., Sharma v. Skaarup Ship Mgmt. Corp., 699 F Supp 440 (DC N.Y., 1988) (noting that New York recognizes a duty of confidentiality between a bank and its customers); Bond v. Slavin, 851 A2d 598 (Md. App., 2004) (recognizing a duty of confidentiality between a bank and its customers); McGuire v. Shubert, 722 A2d 1087 (Pa. Super., 1998) (banks have an implied duty of confidentiality to their customers); Roth v. First Nat. State Bank of N.J., 404 A2d 1182 (N.J. Super. App. Div., 1979) (acknowledging a "generally recognized obligation of confidentiality in respect of a depositor's financial relationship with a bank").

[65] See Marchetti (the government's desire for particular records does not convert them into public documents). See also Shapiro (Frankfurter, J., dissenting: "If records merely because required to be kept by law ipso facto become public records, we are indeed living in glass houses").

[66] See the quote from Marchetti in the text preceding note 13, supra.

[67] Although, as discussed above, different sources disagree with the degree to which the BSA was motivated by law enforcement objectives, no one disputes that law enforcement objectives were a significant motive behind the statute. See, e.g., Shultz, 33 AFTR 2d 74-1041 416 US 21 39 L Ed 2d 812 1974-1 CB 393 (1974) (noting that the enforcement of the criminal laws was "undoubtedly prominent in the minds of legislators" who enacted the BSA).

[68] See Porter, supra note 21; Cianciulli, supra note 61. Cf. the Supreme Court's affirmance in Hubbell, supra note 8 (act-of-production privilege protected personal financial records); Fox, 52 AFTR 2d 83-6169 721 F2d 32 (CA-2, 1983) (citing DOJ Tax Division, Manual for Criminal Tax Trials (1973), page 103, for the proposition that the DOJ "has not embraced" the required records doctrine in tax cases).

[69] "[W]e have no doubt that the constitutional privilege against self-incrimination protects the

target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That constitutional privilege has the same application to the testimonial aspect of a response to a subpoena seeking discovery of those sources."