UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE GRAND JURY SUBPOENA	)	**NO. 4:11mc174**
	)	
	)	**UNDER SEAL**
DATED FEBRUARY 11, 2011	)	
	)	
(NAME REDACTED)	)	
	)	

RESPONSE IN OPPOSITION
TO THE GOVERNMENT'S MOTION TO COMPEL

COMES NOW, NAME REDACTED, by and through undersigned counsel, and hereby files his Response in Opposition to the Government's Motion to Compel testimony and the production of documents ("Motion") pursuant to a Grand Jury subpoena issued on February 11, 2011. NAME REDACTED, who is the target of the Grand Jury's investigation, cannot be compelled to testify or produce documents because the Fifth Amendment to the United States Constitution guarantees that he shall not be compelled in a criminal case to be a witness against himself. The government's Motion, therefore, must be denied.

OVERVIEW

The government's Motion hinges on the proposition that all private records which Congress or a regulatory agency may require individuals to keep are necessarily "public records" and thereby, *ipso facto*, fall outside the protection of the Fifth Amendment. Citing the "required records" doctrine established in

Shapiro v. United States, 335 U.S. 1, 33-34 (1948), the Government argues that the record keeping requirements of the Bank Secrecy Act ("BSA") and its implementing regulations automatically transform private foreign bank account records into public records exempt from Fifth Amendment protections.

Record-keeping laws and regulations, however, do not render otherwise private documents public. Unlike the substantive and comprehensive regulatory schemes at issue in *Shapiro* and in other appellate court decisions applying the "required records" doctrine, the BSA and its implementing regulations: (1) do not require foreign account holders to keep records in order to obtain a government issued license or to transact business with the public; (2) do not impose substantive restrictions on foreign account holders; and, (3) do not grant the government unconditional access to foreign account records. The relationship between foreign account holders and the government, therefore, is limited as the government does not positively regulate the substantive activities of foreign account holders in any manner, much less in a manner sufficient to create a *Shapiro*-type interest in unconditional access to those records.

The lack of any substantive restrictions of foreign account holders raises the obvious question – if the government imposes no restrictions on foreign account activity, for what purpose did Congress impose record keeping requirements on foreign account holders? The legislative history of the BSA leaves no doubt.

Congress imposed the record keeping requirements in order to aid law enforcement authorities in fighting crime.

If, as the government asserts, record keeping requirements imposed to aid criminal law enforcement can strip individuals and private records of any Fifth Amendment protections, then the Constitution can be abolished by legislative or regulatory fiat. Of course, that cannot be the case. Contrary to the government's assertions, constitutional provisions such as the Fifth Amendment impose real limits on federal power and cannot be trumped by acts of Congress or by regulations promulgated by unelected government employees. *See Marbury v. Madison*, 1 Cranch 137, 138, 2 L.Ed. 60 (1803) (opinion for the Court by Marshall, C.J.) ("An act of congress repugnant to the constitution cannot become a law."); *Illinois v. Krull*, 480 U.S. 340, 352, 107 S.Ct. 1160, 1168 (U.S. 1987) ("[T]he greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes."). Therefore, the government's untenable interpretation of the BSA must be rejected, and its Motion to Compel must be denied.

PROCEDURAL BACKGROUND

NAME REDACTED is not merely a witness. Rather, he is the target of the Grand Jury's investigation regarding potential tax crimes and potential crimes related to an alleged failure to file reports related to foreign bank accounts with the

Internal Revenue Service. NAME REDACTED received the Grand Jury subpoena on or about February 25, 2011. *See* Exhibit A. The subpoena requires NAME REDACTED to produce personal documents.[1] It also requires NAME REDACTED to appear before the Grand Jury and testify – presumably regarding the requested personal documents as well as other aspects of the investigation.

In response to the subpoena, on March 16, 2011, NAME REDACTED, through counsel, advised the government of his assertion of his Fifth and Fourth Amendment privileges. *See* Exhibit B. Pursuant to government policy, NAME REDACTED – because he is the target of the investigation – was not required to actually appear before the Grand Jury to assert his Fifth and Fourth Amendment privileges. *See* United States Attorney's Manual, ¶ 9-1154 (Exhibit C).

As the target of the investigation, NAME REDACTED faces a substantial and real hazard of criminal prosecution, not merely a trifling or imaginary one, if he testifies before the Grand Jury or produces documents. If he testifies that he maintained a foreign bank account and he produces documents related to any such account, both his testimony and his act of producing documents are self-incriminating as, without question, the government will seek to use his testimony and documents to either directly support a conviction or provide a link in the chain of evidence supporting a conviction. If he testifies that he maintained a foreign

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[1] The subpoena is directed to NAME REDACTED in his individual capacity, not as a records custodian for any business or corporate entity. *See* Exhibit A.

bank account but that he did not keep the requested records, the government is also likely to use his testimony to seek a conviction for failure to maintain records under 31 U.S.C. § 5322.

Contrary to the government's Motion, NAME REDACTED need not "establish the precise manner in which he will incriminate himself by responding." Such a requirement would make the Fifth Amendment privilege against self-incrimination useless. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("[I]f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."). "To sustain the privilege, it need only be evident from the implications of the question, ***in the setting in which it is asked***, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 487 (emphasis added).[2]

The risk of incrimination to NAME REDACTED in this setting – and Grand Jury investigation in which he is the target – is obvious. Not only will his

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[2] Tellingly, none of the case-law cited in the government's Motion stands for the proposition that an individual must assert his or her Fifth Amendment privilege with specificity involved the target of a criminal investigation. Rather, all of the cases relied on by the government involved witnesses in criminal investigations or civil litigation matters. It is perfectly understandable that a mere witness might be required to demonstrate that the fear of self-incrimination is real rather than imagined, but the target of a Grand Jury investigation need make no such showing.

testimony pose significant risk of incrimination, the mere act of producing the requested documents also poses a real and substantial risk of incrimination. *See United States v. Hubbell*, 530 U.S. 27, 36-38 (2000) ("[W]e have also made it clear that the act of producing documents in response to a subpoena may have a compelled testimonial aspect. . . . By 'producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.'") (citations omitted).[3]

The government's assertion, therefore, that NAME REDACTED's claim of privilege lacks the requisite specificity, is wholly without merit. Any response whatsoever can have incriminating effect.

ARGUMENT AND AUTHORITIES

A. Government Regulations Cannot Abrogate Constitutional Protections Simply by Requiring Individuals to Maintain Records.

The Fifth Amendment declares in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5. This guarantee against testimonial compulsion, like other provisions of

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[3] In its Motion, the government makes a passing reference to the "foregone conclusion" exception to the Fifth Amendment. Gov't Motion, p. 7. For the foregone conclusion exception to apply, the government must establish its independent knowledge of three elements: (1) the documents' existence; (2) the documents' authenticity; and, (3) possession or control of the documents by the recipient of the summons or subpoena. *See United States v. Hubbell*, 530 U.S. 27, 40-41 (2000). The government bears the burden of proving all three elements and must have had the requisite knowledge before issuing the summons or subpoena. *See In re Grand Jury Subpoena*, 383 F.3d 905, 910 (9th Cir. 2004). In its Motion, however, the government does not even attempt to meet its heavy burden. Any assertion that the foregone conclusion exception applies in this matter, therefore, must be rejected.

the Bill of Rights, "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." *See Feldman v. United States*, 1944, 322 U.S. 489, 64 S.Ct. 1082, 1083, 88 L.Ed. 1408. The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard." *See Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). The privilege is fulfilled only when an individual is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence." *See Mallory v. Hogan*, 378 U.S. 1, 8 (1964). Lastly, the Fifth Amendment privilege against self-incrimination "must be accorded liberal construction in favor of the right it was intended to secure." *See Hoffman v. U.S.*, 341 U.S. 479, 486 (1951) (citation omitted).

The United States Constitution, of course, is the supreme law of the land, and constitutional protections cannot be trumped by acts of Congress or by administrative regulations. *See Marbury v. Madison*, 1 Cranch 137, 138, 2 L.Ed. 60 (1803) (opinion for the Court by Marshall, C.J.) ("An act of congress repugnant to the constitution cannot become a law."); *Illinois v. Krull*, 480 U.S. 340, 352, 107 S.Ct. 1160, 1168 (U.S. 1987) ("[T]he greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes."); *Speiser v. Randall*, 357 U.S. 513, 518, 78 S.Ct. 1332, 1338 (U.S.

1958) (finding state tax law, which denied exemption to individuals who engaged in certain forms of speech, to be a constitutionally invalid restriction of free speech); *Marchetti v. United States*, 390 U.S. 39, 60-61 (1968) (holding Fifth Amendment privilege against self-incrimination was a complete defense to prosecution for failure to comply with federal wagering tax statutes).

The government asserts – as if it were self-evident – that because a Treasury Regulation requires foreign account holders to keep records, those records are legally considered public records that may be demanded by the government at any time regardless of constitutional protections. In analogous contexts, however, numerous courts have held otherwise. For example, 26 U.S.C. § 6001 requires every person liable for a tax to keep records mandated by the Secretary of the Treasury, and requires "any person" to keep records the Secretary mandates sufficient to demonstrate whether that person is liable for a tax. Regulations issued by the Secretary pursuant to § 6001 require "any person subject to tax . . . or any person required to file a return . . . [to] 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 by such person in any return of such tax or information." *See* 31 C.F.R. § 1.6001-1(a). The Secretary's regulations also require "individuals whose gross income includes salaries, wages, or similar compensation for personal services rendered . . . to keep

such records as will enable the district director to determine the correct amount of income subject to the tax." *See id.* § 1.6001-1(b). And the Secretary's regulations require the records to be "kept at all times available for inspection by authorized internal revenue officers or employees, and shall be retained so long as the contents thereof may become material in the administration of any internal revenue law." *See id.* § 1.6001-1(c).

These tax record keeping requirements far exceed the record keeping requirements imposed on holders of foreign bank accounts. Contrary to the government's assertions, however, numerous courts have held that record keeping requirements imposed pursuant to the federal government's taxing power do not abrogate the Fifth Amendment and do not justify compelled self-incrimination. *See United States v. Porter*, 711 F.2d 1397, 1404-05 (7th Cir. 1983) (reversing district court order requiring production and explicitly rejecting the government's assertion that the taxpayer's Fifth Amendment privilege was eclipsed by the record keeping requirements of 26 U.S.C. § 6001; "[W]e decline to carve such a radical exception to the right against self-incrimination . . . ."); *Smith v. Reichert*, 35 F.3d 300, 303-05 (7th Cir. 1994) (reversing conviction for failure to permit examination of tax records required to be maintained under state law where taxpayer refused to produce the records on Fifth Amendment grounds and holding that "[a] statute that merely requires a taxpayer to maintain records necessary to determine his liability

for personal income tax is not with in the scope of the required records doctrine"); *Hill v. Phillpott*, 445 F.2d 144, 146 n.2 ("It seems apparent however, that records maintained by an individual taxpayer exceed the constitutional limits of the required records doctrine."); *United States v. Grable*, 98 F.3d 251, 256 (6th Cir. 1996) (reversing district court order finding taxpayer in contempt for refusing to comply with IRS summons where documents sought by summons, including "Forms W-2 (wages) and 1099 (interest and dividend income)" are "quintessentially personal documents, the production of which by a taxpayer may be protected by the Fifth Amendment privilege"); *United States v. Remolif*, 227 F.Supp. 420, 423 (D.Nev. 1964) (rejecting government's contention that federal tax record keeping requirements abolish Fifth Amendment protections with respect to such records).[4]

Thus, contrary to the government's claims, not all records required by law to be maintained constitute "required records." Instead, only those records which meet the specific and stringent requirements set forth in *Shapiro v. United States* constitute "required records" sufficient to overcome Fifth Amendment protections.

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[4] In numerous cases where the Internal Revenue Service has sought court enforcement of its summonses, courts have held that a taxpayer may refuse production of books and records by assertion of his privilege against self-incrimination. *See, e.g., Stuart v. United States*, 416 F.2d 459, 463-64 (5th Cir. 1969) (reversing district court order compelling production of tax records in criminal tax investigation and noting "the Government's concession . . . that, had the papers been in the hands of the taxpayers upon service of the summons, they could have successfully asserted their privilege against self-incrimination, and refused production."); *United States v. Cohen*, 388 F.2d 464, 468 (9th Cir. 1967); *United States v. Kleckner*, 273 F.Supp. 251, 252-53 (S.D.Ohio 1967).