In the

Supreme Court of the United States

CALIFORNIA BANKERS ASSOCIATION,	)	No. 72-985
and	)	
FORTNEY H. STARK, JR., et al.,	)	No. 72-1196
Appellants,	)	
v.	)	
GEORGE P. SHULTZ, Secretary of the Treasury, et al.,	)	
Appellees.	)	
GEORGE P. SHULTZ, Secretary of the Treasury, et al.,	)	No. 72-1073
Appellants,	)	
v.	)	
CALIFORNIA BANKERS ASSOCIATION, et al.,	)	
Appellees.	)	

Washington, D.C.
January 16, 1974

Pages 1 thru 85

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA BANKERS ASSOCIATION, Appellant, v. GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al., Appellees.	No. 72-985
GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al., Appellants, v. CALIFORNIA BANKERS ASSOCIATION, et al., Appellees.	No. 72-1073
FORTNEY H. STARK, JR., et al., Appellants, v. GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al., Appellees.	No. 72-1196

Washington, D. C.,

Wednesday, January 16, 1974.

The above-entitled matters came on for argument at

1:22 o'clock, p.m.

BEFORE:

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

APPEARANCES:

JOHN M. ANDERSON, ESQ., Landels, Ripley & Diamond, 450 Pacific Avenue, San Francisco, California 94133; for California Bankers Association.

CHARLES C. MARSON, ESQ., American Civil Liberties Union, Foundation of Northern California, Inc., 593 Market Street, Suite 227, San Francisco, California 94105; for Fortney H. Stark, Jr., et al.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; for George P. Shultz, Secretary of the Treasury, et al.

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-985, 1073, 1196.

Mr. Anderson, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN M. ANDERSON, ESQ.,

ON BEHALF OF THE CALIFORNIA BANKERS ASSOCIATION

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

My name is John M. Anderson, and I represent in these consolidated cases the California Bankers Association.

These consolidated cases entail a challenge to an Act of Congress passed late in 1970 that has come to be known as the Bank Secrecy Act.

And in our discussions today I think it's initially important to distinguish, as much as we can at all times, between the two aspects of that Act.

One aspect of that Act entails and requires the banks, uninsured and otherwise, of this nation to microfilm and copy virtually every piece of paper that flows through the domestic banking system, and to keep that paper microfilm for a period ranging from two to five years.

The second part of the Act, Title II, requires banks to make reports of certain kinds of designated currency transactions, domestic and foreign.

With that background in mind, and in June of 1972,

the private litigants in this case initiated an action in the United States District Court for the Northern District of California, seeking to enjoin enforcement of both the recordkeeping and the reporting sections of the Bank Secrecy Act.

With one judge dissenting, a three-judge court denied motions to enjoin enforcement of the recordkeeping section of the Act, but granted an injunction enjoining enforcement of the automatic reporting provisions of the Act.

The government has appealed from that portion of that order, enjoining enforcement of the reporting provisions.

The private litigants have appealed from that portion of the order refusing to enjoin the so-called recordkeeping section.

Let me begin with a very brief summary description of just what those records -- excuse me -- reporting provisions entail.

The Act compels reports of all domestic currency transactions found by the Secretary to, quote, "have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings."

The implementing regulation currently in force require banks, among others, to report automatically all $10,000 currency transactions.

And I should interject here that when I say currently

in force, I use the phrase advisedly, because the Act authorizes, and the regulations following through on that authorize a change in that dollar amount, or, in fact, the definition of transaction, at any time by the Treasury Secretary.

The transaction report of the currency transaction requires disclosure of a wide variety of information, including the name, address, and business or profession of the party involved in the transaction; the name, address, and business of the party or business entity for whom it may have been conducted; --

QUESTION: Ordinarily what form does the transaction take? Just cashing a check?

MR. ANDERSON: No. This is a currency transaction, Mr. Justice Brennan, which is defined in the regulation as being cash or near cash, monetary instruments. It does not entail, for example, a situation in which a person would go into a bank and simply deposit a check and not take out any currency.

QUESTION: No, no. I mean does he cash -- suppose he cashes a check for $15,000?

MR. ANDERSON: That would be included, and, as a matter of fact, in listing the requirements that must be reported at the time of the designated transaction, it requires a description of the nature of the transaction,

whatever that means, together with the type, amount, and denomination of the currency involved, and a description of any check involved in the transaction.

QUESTION: So that if I came in and wanted to cash a check for $15,000, before it was cashed the teller, or whoever it was, would have to get all this information from me; is that it?

MR. ANDERSON: That is correct.

QUESTION: And then he'd also have to note down how many fifty-dollar bills, how many hundred-dollar bills, and that sort of thing?

MR. ANDERSON: That is also correct.

QUESTION: Unh-hunh, and what else? What else has to be done?

MR. ANDERSON: And it also requires a description, as I say, of the check involved; also a description of the I.D. that is presented by the party seeking to engage in the transaction.

QUESTION: What's that mean?

MR. ANDERSON: This presumably means something like a driver's license or a birth certificate, or some other form of identification that would be acceptable to the banking entity.

Now, there is an exception --

QUESTION: Description of the check would be, I

expect, on what bank it was drawn, and that sort of thing?

MR. ANDERSON: That is not further defined in the regulations, Mr. Justice; however, I would like to interject at one time, there is an exception to the reporting requirements, the exception itself is the basis for one of our challenges to the constitutionality of this Act. And it reads in words and effect to the following proposition:

That if the bank, in its judgment, decides that this transaction is normal and regular for the person engaging in it, i.e., perhaps of a store which deals in a large amount of cash, that it need not be reported.

However, we submit that the description is so vague as to leave the banks in the position of not knowing when, in fact, a prescribed transaction has occurred. And since, in fact, there are criminal penalties attendant refusal or failure to give the report, it raises a due process notice problem in our minds.

QUESTION: I suppose, on the fact of it, that would mean, if I came in twice a week with checks for $15,000 to be cashed, the time might come when the bank would think there was no reason any longer to take that information from me?

MR. ANDERSON: That is --

QUESTION: Because it's a regular -- even though I might be kingpin of the lottery racket and that sort of thing?

MR. ANDERSON: That is correct, Mr. Justice Brennan.

However, it has to be said that the regulation is couched in terms of regular and normal for the business or profession involved.

QUESTION: It would more likely be that if they knew that the particular person ran a machine shop with a payroll of about $15,000 a week, that they could then conclude that this was normal, for payroll purposes, and not make a report.

MR. ANDERSON: That is true.

QUESTION: But, let's assume that, on the other hand, if it's widely reputed to be a number of some one of these organized crime groups, do you think the bank could safely make that decision, in that way?

MR. ANDERSON: I don't know, frankly, Mr. Chief Justice.

QUESTION: Well, what would you advise them if they asked you?

MR. ANDERSON: My advice to the bank in that particular instance would be: In view of the fact that criminal penalties attach failure to make a report, as required by the Act, that it is in your best interest to act cautiously and to make the report if you have any reason to believe that this is not normal and regular for this particular party.

QUESTION: I suppose you'd weigh in the equation

the fact that I mentioned hypothetically, that the man is engaged, or widely reputed to be engaged in unlawful activity, and, unlike the other gentleman, did not have a machine shop with a $15,000 payroll every week.

MR. ANDERSON: Yes, I think we certainly would. Yes, I think that would --

QUESTION: Doesn't your answer to the Chief Justice's question solve at least a good part of your vagueness problem, since, if you don't want to try to come within the exemption, the bank is perfectly free to report all transactions. It doesn't have to rely on the normal exception.

MR. ANDERSON: Yes, the banks, of course, are free to report all transactions. However, our objection to the reporting requirement is not vagueness, as such; our objections run to the Fourth Amendment problems, which I'll get to if I may in just a moment.

QUESTION: Well, doesn't that at least solve your vagueness argument so far as the exception is concerned?

MR. ANDERSON: Well, it is simply to say that in every instance, that whenever a $10,000 currency transaction occurrs, of which there are, in the case of large commercial banks, presumably, many hundreds a day, that a report would be required to be filed.

And I think my brothers in the Solicitor General's office would agree, that's not what the Treasury Department

wants. It wants reports of transactions which, in the judgment of the bank, are unusual for that particular depositor.

The result, otherwise, would be a simple inundation of the Treasury Department, with reports which it presumably couldn't use and would be useless to the extent of 95 percent.

So I think, as a practical matter, I'd have to answer in that fashion.

The summary with respect to the reporting obligation, I think can be put as simply this:

That when the transaction occurs, the banks, by some fashion, are obligated to obtain a wide variety of information about that transaction, which, in the absence of the compulsion under this Act, they would under no circumstances need for their own banking purposes. This is an obligation imposed by the government.

Now, turning to a very brief summary description of the recordkeeping, the Act makes a finding of adequate records, "have a high degree of usefulness in" -- the same words -- "criminal, tax or regulatory investigations or proceedings."

It makes a further finding that microfilm or other copies of bank records are highly useful. And the Act then provides that, and I'm quoting now, "where the Secretary of the Treasury determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax or regulatory

investigations or proceedings, he shall prescribe regulations to carry out the purposes of the Act."

Now, the regulations and alleged implementation of the foregoing purposes of the Act have required the banks of the United States to copy and to retain, as I have said, for a period of from two to five years, virtually every single piece of paper that finds its way into the American domestic banking system, with two exceptions:

One exception has to do with payroll checks emanating from a large payroll. The catch at this point, of course, is that although they're not recorded at the issuing point, they would be recorded as they go into the, presumably, account of the payee.

The second exception is for checks of under $100 in amount. The catch here is, first, that the bank microfilming equipment, as a matter of common knowledge -- and although we had no chance to prove this at the District Court, because this amendment was made after this District Court decision -- but the obligation not to copy checks under $100 is of little or no practical use to the bank, because the microfilm equipment simply can't distinguish between $100 checks and $1,000 checks.

Now, I will not read for the Court at this point all of the documents that are required to be copied. I submit, however, that a reading of the regulations, quoted on

pages 38 and 39 of the Appendix, will confirm our contention that this Act requires banks to copy and to retain for a period of from two to five years every single piece of paper that is submitted into the American domestic banking system in any formal sense, including such things as deposit slips, withdrawal slips, and other advices to the bank.

Now, the next --

QUESTION: What page are you talking about?

MR. ANDERSON: I'm referring to pages 38 and 39 of the Appendix in the red-colored brief or in the blue-colored brief.

QUESTION: On the appendix to a brief?

MR. ANDERSON: Yes. That is the section of the regulations that are set forth, both in the blue-colored and in the red-covered brief.

The purposes of the Act are not in dispute. The main undisputed purpose of the Bank Secrecy Act was to aid in the detection of what the government calls white-collar crime, and the government has repeatedly describe the Act in that language --

QUESTION: Could I ask you what the bank's policy is, anyway, aside from regulations, with respect to keeping these documents?

MR. ANDERSON: With respect to copying of documents the bank practice, as alleged in the District Court, uncontro-

verted, varies very widely. Some banks keep an enormous number of records for a short time, other banks keep a small number of records for a long time, and there are all numerous in-between positions occupied by the bank.

The uncontroverted evidence in the District Court was that the Bank of America, as an example, which is commonly regarded as America's largest bank, did not keep more than half of the newly prescribed documents; for example, did not keep checks for a period of two years, did not keep various other documents for five years, and so forth.

QUESTION: Aren't checks microfilmed routinely in major banks, like Bank of America?

MR. ANDERSON: Mr. Justice Powell, I think that was the question Mr. Justice White was just asking, and the evidence in the District Court was that the practice varied enormously from bank to bank, and that, for example, in the Bank of America, to which you refer and to which there was some little evidence in the District Court, the evidence was that, yes, they did microfilm some checks, but they only kept them for a period of from ten to thirty or forty days, for their own convenience, and for purposes of dispute with depositors with respect to payment amounts and so forth.

The regulations under this Act require the banks to film, first of all, all checks, and second, to keep them for a minimum of two years.

So that's the case with the Bank of America.

But I think the central point that has to be made at this point is this: that absent these requirements of recordkeeping, the practice among the banks of the United States vary very widely, some keep --

QUESTION: Oh, is that true? I thought you were talking about California banks.

MR. ANDERSON: No. No, I'm referring to the practice nationally; it is certainly the case in California, also.

QUESTION: But do you think, then, or are you stating that the practice nationally is as varied as you indicated just now for California?

MR. ANDERSON: Mr. Justice Blackmun, my information is that it is quite broad, and, as a matter of fact, one of the --

QUESTION: But that isn't in the record, is it?

MR. ANDERSON: There's nothing in evidence on that on the record, that is correct. The --

QUESTION: At least you surprised me by your answer. I had assumed, as I think Mr. Justice Powell assumed, from our part of the country, that all banks kept microfilms of all checks. Maybe California is different.

MR. ANDERSON: That is not -- that is simply not the case. As a matter of fact, one of the primary reasons for this

legislation given by the government at the time it was being proposed was that banks did not keep the records, and therefore they found it difficult when subpoenaing records in the investigation of certain alleged crimes to obtain the record in question. And that was part of the purpose or motivation for this.

QUESTION: Now, you said a little while ago that the Bank of America kept microfilm of some checks. How did they distinguish between those they kept and those they do not keep?

MR. ANDERSON: No, I may have misspoke, Mr. Justice Blackmun. I believe I said that they keep microfilms of checks for a short period of time, ranging from ten to thirty-some-odd days. There is an affidavit in the appendix describing the Bank of America's practice on this point, as an example. And it's cited in our brief.

QUESTION: Well, does the Bank of America keep the original check for a longer period of time than that?

MR. ANDERSON: No. Mr. Justice Rehnquist, the practice, as I understand it, and as evidenced by an affidavit uncontested in the record, is that they microfilm the check and the original is returned to the payor in the normal course of banking operations.

QUESTION: Oh, that's right, the drawer, sure, the drawer gets the check.

QUESTION: And any checks they get in, drawn on some other bank, they send on.

MR. ANDERSON: Yes. They're returned to the bank on which it was drawn --

QUESTION: But they do keep microfilms of those for a short time?

MR. ANDERSON: Yes, that's correct. That's right. All checks.

QUESTION: So the question is whether it's really -- whether it's reasonable to have them keep it as long as this regulation would have them do?

MR. ANDERSON: No, I don't think -- I think there's a substantial difference, legal difference between a compulsion to keep checks under order of law, as under a statute, and the records or checks that are kept in the ordinary course of banking business for the bank's own purposes.

QUESTION: Unh-hunh.

MR. ANDERSON: And secondly, although we've talked mainly about checks, I again respectfully invite the Court's attention to that exhaustive list of documents which are required to be kept, and which are listed on pages 38 and 39 of the appendix in either the red or the blue-colored brief.

Now, as I have said, the undisputed --

QUESTION: May I ask, assuming it's all as onerous

as you suggest to require the banks to do this, what is the bearing of that on the issue we have to decide?

MR. ANDERSON: Well, first of all, that turns to the real question, which are our basic legal objections, the recordkeeping, of course, is --

QUESTION: Well, now, don't get to it if you're not ready to yet.

MR. ANDERSON: Well, I'm watching the time, because we have a good argument, Mr. Justice Brennan.

QUESTION: Yes.

MR. ANDERSON: Let me move to that, because I do think it bears some discussion here.

The recordkeeping is, in our judgment, unconstitutional for three rather specific reasons:

First of all, in a quick summary, an analysis of those cases which this Court has considered dealing with compulsory or required recordkeeping will show that they have been an aid of a specific legislative, to use a broader word, national goal.

For example, Wage and Hour laws, Emergency Price Regulation, or the tax laws are classic examples in which there's a specific congressional purpose, in which the Congress has approved recordkeeping. Recognizing, I would suppose, that the recordkeeping as such imposes some burden on the citizenry; so the question always, in looking at the

statute, is: does this recordkeeping requirement commensurate with the legislative objective?

Here, the Court will respectfully note, that this is not in aid of any specific congressional goal or any congressional policy, it is in aid of all government policy: criminal, civil, tax, regulatory, investigating or proceeding, which presumably means administrative rule-making.

It is --

QUESTION: What is the argument -- what constitutional provision is violated if it falls under that first attack that you make?

MR. ANDERSON: I think it's violated in two specific instances, Mr. Justice Rehnquist.

First of all, it removes the ability of this Court to weigh the recordkeeping against a specific government need. Therefore, --

QUESTION: Well, I know, but what provision of the Constitution does that violate?

MR. ANDERSON: Well, there is a requirement beginning with the first recordkeeping case of consequence, Morton Salt vs. the United States, in which the Court said that you can be required to keep records, providing that it is reasonable and they bear some reasonable relation to a legitimate congressional or government goal.

Now, I submit to this Court there is --

QUESTION: What is that, a due process argument?

MR. ANDERSON: No, that's the Fourth Amendment.

QUESTION: That's connected with your Fourth Amendment.

MR. ANDERSON: That is correct. That is correct.

QUESTION: So it isn't separate from what you're going to get to, namely, the Fourth Amendment --

MR. ANDERSON: I think, Mr. Justice White, I am at it. I think I have gotten to it by coming to this --

QUESTION: Yes, you are. So you are going to end up with one constitutional objection?

MR. ANDERSON: Well, it is a Fourth Amendment objection, that is correct.

QUESTION: Yes.

MR. ANDERSON: But it refers both to the record-keeping and the reporting.

If I may return to the question Mr. Justice Rehnquist raised with respect to what's wrong with that kind of recordkeeping as such. I submit to the Court that when the Congress has said: our objective is all-purpose, namely, all government business, criminal, civil, regulatory, and otherwise; and you cannot weigh that against the recordkeeping objection, that is no way that you can follow the test or the benchmark given in the Morton Salt case, namely, that has some reasonable relationship.

Because, for example, if Congress were to pass a new criminal statute next year, you wouldn't know what it was and you wouldn't be able to equate it against the record-keeping obligation which is imposed today.

Now, the second thing, which I believe to be more serious, is that an analysis of the recordkeeping cases approved by this Court would show that they serve one of two purposes: either for the purpose of regulating the record-keeper. A classic example would be a requirement that employers report wages and hours paid, so that the Wage and Hour law could be enforced -- labor law could be enforced.

Price control is another example in which the vendor is required to indicate what prices he's charging for his items. These are essential to regulate the record-keeper.

The second category, which this Court has considered, have been that kind of recordkeeping required to regulate a particular business.

Two examples: firearms dealers, in which there is a requirement that the record be kept for the purpose of regulating that particular business, which is deemed by the Congress to be dangerous, or to have some import beyond the normal sale of wares.

Another example would be the sale of dangerous drugs, in which there is a recordkeeping requirement. Again,

because the nature of the business is such that it seems to call for this kind of recordkeeping.

Here, the recordkeeping, by the statement of the Congress and by the government's own admission, has absolutely nothing to do with the regulation of the recordkeeper. It has nothing to do with the regulation of America's financial institutions.

It is, by its own design, an enlistment of those institutions for the purposes of monitoring the people with whom those institutions deal.

QUESTION: Well, how about the IRS requirement, that you notify the government of everybody you've paid dividends to, and that sort of thing?

MR. ANDERSON: Yes. That, Mr. Justice Rehnquist, is, in my judgment, a good example of a situation in which it is necessary for the purposes of regulating the record-keeper or, in this case, the reporting entity. Because those dividends are presumably deductible as an expense by the reporting entity; and secondly, and in this particular instance, that is a classic example, at least in my judgment, of a reporting that is done in aid of a specific legislative congressional objective, namely, the collection of internal revenue.

And I don't think that this statute --

QUESTION: But that's not -- you're mistaken, I

think, if you say that dividends are deductible by the corporation; they're not. And that's enlisting the services of the corporation to monitor taxpayers, is it not?

MR. ANDERSON: Yes. I stand corrected, Mr. Justice Stewart.

The second part of the argument, however, I think holds; namely, that the reporting in that instance is in aid of a specific government goal, which is the collection of internal revenue. But it is not --

QUESTION: But it is enlisting a corporation --

MR. ANDERSON: To the extent that --

QUESTION: -- to check on the tax returns of its shareholders, is it not?

MR. ANDERSON: I stand corrected. To the extent it is not deductible, that is correct. That is correct.

QUESTION: Unh-hunh.

MR. ANDERSON: The special -- I find myself talking about the recordkeeping, I wanted --

QUESTION: Do you think if that's all right, that if the purpose is not to enforce one law but several, it might even be more justified?

MR. ANDERSON: Well, Mr. Justice White, I think that the difficulty with that is twofold.

First of all, in the case in which Congress has compelled reporting or recordkeeping for the purpose of

enforcing a specific law, Congress has gone through the process of deciding whether the recordkeeping in that case is justified, warranted, and so on and so forth. There's been some weighing of its utility in a particular instance.

Secondly, this Court, I would submit, would find it extremely difficult to test the reasonableness of this recordkeeping, when the objective is not against a particular criminal statute, or not against a particular civil law, but is in aid of all government interests, however defined.

The special evil, it seems to me, particularly with respect to the recordkeeping is that there appear to be any number of alternatives available, which are not explored, and unlike the case, for example, the tax laws, or some of the other civil regulatory laws in which recordkeeping or reporting by the entity involved appears to be absolutely essential to its enforcement. The sheer arrest records that are available and, to some extent, quoted in our brief would suggest that this is not the only way in which the criminal and civil and regulatory laws of the United States could be enforced.

They happen to be, at least in our judgment, essential to those other laws, but not in this case.

QUESTION: Mr. Anderson, in the colloquy between you and Mr. Justice Stewart, does this imply that in so far as these recordkeeping requirements are an aid of the Internal

Revenue laws, you don't object to them?

MR. ANDERSON: No, I object to the recordkeeping, because I believe -- excuse me, I see that my time has --

QUESTION: No, I know. It extends to more than just tax, but among those things that you recited was tax.

MR. ANDERSON: That is correct.

QUESTION: Well, do you suggest that even to that extent this requirement is invalid?

MR. ANDERSON: I suggest it's invalid, not because it's not specifically related to a purpose, but for the other reasons that I mentioned; namely, that there is no way, given the breadth of the obligation, that this Court can perform its historic function of testing whether that record-keeping obligation is reasonable, under the Fourth Amendment.

QUESTION: Unh-hunh.

QUESTION: Your objection seems to go to the fact that the statute has many objectives and targets, instead of just one, and perhaps your colleague will enlarge on that a little bit, if he's covering some of those points.

MR. ANDERSON: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Marson.

ORAL ARGUMENT OF CHARLES C. MARSON, ESQ.,

ON BEHALF OF FORTNEY H. STARK, JR., ET AL.

MR. MARSON: Thank you, Mr. Chief Justice.

And may it please the Court:

I would be happy to enlarge on that point.

There is one essential difference between all of the recordkeeping and reporting statutes mentioned so far in the Bank Secrecy Act, and that is that this one is in aid of criminal law enforcement, and all the others are in aid of civil law enforcement.

Perhaps, first, I should say --

QUESTION: Well, doesn't the dividend reporting aid, isn't that in aid of criminal? What if a man receives a lot of dividends and never reports them, deliberately?

MR. MARSON: It can be tangentially useful to the criminal law.

QUESTION: I'd say I think it's pretty direct.

MR. MARSON: But its basic purpose is to enforce the civil tax.

In Shapiro vs. Thompson, for example, the required records were primarily in aid of the civil regulatory system. In Shapiro they were used for a criminal purpose. But they were primarily in aid of a civil system.

In United States vs. Sullivan, in 1927, this Court held that one could not refuse to give a tax return on the

grounds of self-incrimination, because its purpose was to collect -- it was neutral, it was directed to the population at large, its purpose was to collect civil information for the tax.

QUESTION: Don't you think the Social Security reporting requirements have more than one purpose?

MR. MARSON: Certainly they do, but not a primarily and almost exclusively criminal one, no.

If this Court permits reports and records to be kept and compelled in aid of the enforcement of the criminal law, it abolishes its supervisorial duty over subpoenas and summonses, and the power of the government to compel documents from anybody.

QUESTION: What about those reporting requirements with respect to sale of firearms and the like?

MR. MARSON: Well, that's an example of the regulation, both of the seller and of the buyer. My interpretation of what Mr. Anderson -- the categories in which Mr. Anderson put these previously existing laws, where -- is a little bit different, I would say that all of these preexisting laws regulate other than the recordkeeper the recordkeeper's customer, or the recordkeeper's customer's tax liability, for example, in his relationship to the recordkeeper.

The Donaldson case is a good example, where they subpoenaed the record of the employee's former employer and

the former employer's accountant in order to check on the tax liability of the employee.

That was a record kept by the recordkeeper, which was relevant to tax liability of the subject of the record, but only out of the relationship between the two.

Whereas the record kept of Mr. Justice Brennan's hypothetical $15,000 check is a record directed to the relationship between him and him and some other party, of whom criminality may be suspected.

I think I should back up a little bit and identify the somewhat --

QUESTION: Well, it might also tend to produce some evidence of criminality on the part of the person who was going into a bank and buying $20,000 worth of drafts on a Swiss -- payable in a Swiss bank every week, wouldn't it?

MR. MARSON: It might tend to do that. Any record-keeping requirement might tend in some cases to evidence criminality. But one which is for, quote, "the purpose", end quote -- and I'm quoting the government's brief -- of enforcing the criminal law is a wholly different animal than one which is for the primary purpose of enforcing the civil law, and has tangential criminal consequences.

The government doesn't disagree that compelling a report, as opposed to -- or the keeping of a record is a search and seizure governed by the Fourth Amendment.

It doesn't disagree that it is the criminal law for which these reports are largely compelled. But it does not explain why the warrant requirement has no application here, why there is no judicial supervision whatsoever over these reports. It doesn't explain why it has abolished not only the requirement of probable cause, but even --

QUESTION: What standing have you got to object to that?

MR. MARSON: To which?

I'm afraid I don't under you, sir.

QUESTION: Well, the warrant requirement to enforce -- you're saying the warrant requirement would apply in the enforcement of the criminal law against somebody else. And this just runs around the warrant requirement.

MR. MARSON: Now, I think I should inform the Court as to who it is that I represent here. I represent Congressman Stark, a bank customer, other foreign and domestic bank customers, the Security National Bank, and the American Civil Liberties Union.

QUESTION: So you're really objecting to the bank keeping records of your affairs, of your clients' affairs?

MR. MARSON: Yes. I also represent one foreign -- or for foreign investors who must affirmatively report their holdings and their transactions across the border.

And analytically, we feel that the foreign and

domestic reporting requirements are --

QUESTION: So you're arguing the reporting requirements more than the recordkeeping?

MR. MARSON: We're arguing them both. Frankly, from a constitutional point of view, we think the recordkeeping requirements are a little more frightful even than the reporting requirements.

QUESTION: They may be frightful, but I don't know about -- what about the Fourth Amendment?

MR. MARSON: Well, let me --

QUESTION: You may -- you, as the bank's customer, are objecting to the bank having to keep records?

MR. MARSON: I, as a lawyer representing clients who must report, object to the reports. I, as representing bank customers whose records are kept under the coercion of the Act, object to the keeping of the records.

QUESTION: Unh-hunh.

MR. MARSON: Because they violate the Fourth Amendment, the Fourth and Fifth Amendments combined, and --

QUESTION: Well, don't you think a bank has a right to keep a record that will protect itself in case of a suit?

MR. MARSON: Certainly it does, and it already does that --

QUESTION: Well, why can't it keep those reports?

MR. MARSON: It does, and we have no complaint

directed to any record which a bank keeps in its own business judgment.

QUESTION: Well, I thought you said you objected to the keeping of the records.

MR. MARSON: We do when it is coerced by the government and not relevate to the business purposes of the bank, then and only then.

QUESTION: Do we have to have both, coercion and relevancy? Because I can find relevancy without any problem.

MR. MARSON: If but for the Act the record would not be made or kept, then we object to it.

QUESTION: On what grounds?

MR. MARSON: Because the bank acts as agent of the government in doing that, because it's irrelevant to the regulatory purpose, and because it constitutes a search.

QUESTION: That's the reason for the reports, but the bank might not turn the reports over.

MR. MARSON: The bank, as a matter of practice --

QUESTION: Well, if a bank has been keeping reports for the last 75 years, would you still have a case?

MR. MARSON: Yes, we would, because the banks --

QUESTION: Because you just found out.

MR. MARSON: No. No. Because the banks are not keeping as many records as long as the Bank Secrecy Act coerces

them to do.

QUESTION: Well, suppose they had been?

MR. MARSON: We have no objection to records kept in the ordinary course of business, none at all. These are not kept in the ordinary course of business, they're kept under the coercion of the Act, the Act was passed for the purpose of coercing the --

QUESTION: So you object to the keeping of the reports, because they are given over to the government, that's your point, isn't it?

MR. MARSON: No. It -- it's one of our points.

QUESTION: Well, if you win on that, would you give up the other one?

MR. MARSON: If we win, we'll give up the ones we don't need, yes.

QUESTION: Right.

[Laughter.]

MR. MARSON: We object only to the record that wouldn't be there but for the Act, not for the record that would be there in the exercise of the business judgment of the bank. For example, to protect itself from suit; for example, to verify a statement that came back to the customer.

Those we have no problem with.

Only when we pass the point of business judgment and enter the area of records not made or kept but for the Act

do we have a constituional objection.

We feel that those -- that that enters the area of agency, that once the bank passes out of its business and regulatory function and enters into its unwilling function as keeping records as essentially a surveillance mechanism for the government, then they're acting in an agency role.

The government's only answer to that is to quote Mr. Justice White's opinion in United States vs. White, and say it's just like a willing informant receiving information from a willing confidant and turning it over to the government. We think that analogy has no merit at all.

In the first place, the banks here, as their presence in court testifies, are not willing informants to the government. They object to the requirements. They go to jail if they don't fulfill it.

In the second, it is by no means voluntary for the bank customer to deal with the bank, in the sense it has for Mr. Hoffa to deal with the informant or Mr. White to deal with the informant in those two decisions.

The government basically says that if you know these people are agencies of the government, something not known in Hoffa and White, your choice is to keep dealing with them and we'll call that voluntary, or to give up banking and, for that matter, financial institutions entirely. You may carry your cash to everybody you owe money to, even if it's

the other end of the country, or you may deal voluntarily with the agent, the bank.

We think that that distorts the meaning of the term "voluntary" beyond all recognition. And that is the only answer the government has to our theory, that when a bank makes or keeps a record it would not otherwise make or keep in its business judgment, it acts as an agent of the government.

If it does that, then, analytically, there is no difference between the required reports and the required records, because the search of the records has to be measured as of the time the agent of the government, i.e., the bank, acts and copies the record.

Now, there is solid precedent, aside from this agency theory, for equating the constitutional effects of the recordkeeping and the reporting.

It's found in Marchetti vs. United States. There the Court, on rehearing, asked the parties to brief the question of the effects of Shapiro vs. United States, and the government repeatedly insists in its brief that there was no application to Marchetti of Shapiro, because Shapiro involved records and Marchetti involved reports.

In footnote 14 of Mr. Justice Harlan's opinion in that case, he said the Court finds no meaningful distinction between the two.

Now, in Shapiro, a subpoena was issued for the records there were required to be kept, issued to a party who had an adversary interest in contesting that subpoena.

Here the situation is worse, because the subpoena issues to a bank that has no such adversary interest. The bank, as a matter of general practice, frequently, especially in violation of its higher level policy by lower level employees, gives law enforcement what they ask for without a summons.

Even if they get a summons, they put it in the file and turn the material over.

The government does not deny these facts. The legislative history makes them perfectly plain.

People simply do not get a chance to contest subpoenas directed to their bank accounts in the ordinary course of events. Even if they do, the government's reading of Couch and Donaldson would give no standing to the parties to assert Fourth and Fifth Amendment rights, should that subpoena ever be discovered by them in time to litigate it.

Under our reading, of course, the customer does have Fourth and Fifth Amendment interests in records not otherwise made or kept in the business judgment of the bank, and would, under Couch and Donaldson, have standing to object.

But even that would not avail the customer of very much.

Let's suppose that I am prosecuted on the basis of

a copy of a check subpoenaed from my bank. The government says, well, it will be time enough for you to raise your Fourth and Fifth Amendment objections when you are prosecuted on the basis of the check.

What would I have to prove?

I would have to prove that in the ordinary business practice of my bank, the check would not have been copied, and it was but for the Act that the check was copied.

Now, since ordinary business practice stops in July 1, 1972, when these regulations went into effect, and since they went into effect because of rapid technological change, as the years go by, that burden of proof changes from very difficult, which it is now, to impossible, which it will be in a few years.

Next, the government says, well, you'll have time enough to raise these objections when you're prosecuted or otherwise proceeded against without paying any attention to the relief we ask here. If I successfully suppress that check, all I get is the suppression of one check.

We ask here for the invalidation of the Act.

But finally, and most important, when the government says that it is time enough when the subpoena is served on your bank, should you be lucky enough to find out about it, and litigate it, to litigate these questions; it ignores the difference between the Fourth Amendment and the exclusionary

rule.

As Mr. Justice Rehnquist pointed out quite correctly in his opinion for the Court in U. S. v. Robinson only last month: virtually all of this Court's Fourth Amendment jurisprudence has arisen since Weeks vs. United States, and in the context of the exclusionary rule.

This is one of the rare and happy cases in which you have innocent parties before you asking for the protection of privacy afforded by the Fourth Amendment.

The government's saying that we're premature in this case because we haven't been proceeded against ignores the fact that the Fourth Amendment protects the innocent as well as the guilty, to invert an old phrase; and ignores the fact that the Fourth Amendment protects privacy not guilty secrets.

And so we're not prematuring here, even assuming that we get notice of a subpoena of our bank account, even assuming we could litigate all these questions under Couch and Donaldson, now is the time, perhaps the only time, in which these issues can be decided.

Finally, there is a connection between the Fourth and Fifth Amendments, which makes the separation of them by the government, we think, indefensible in the case.

This Court has not had a majority for what Boyd vs. United States means, with respect to the intimate connection

between the two amendments since Boyd was decided in 1886.

Mr. Justice Marshall's exploration of the several different interpretations of that intimate relationship in his dissent in the Couch case throws some light on the issues here.

But I think, to quote Mr. Justice Frankfurter, when he was writing for the Court in Frank vs. Maryland, later overruled, and some excellent dictum. He said: It is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to understand what lies, not at its periphery but at its core, self-protection; self-protection of a party from being compelled to create and produce evidence against himself.

The central purpose, the purpose, as the government calls it, of the Bank Secrecy Act is to force private citizens to create and deliver to the government, or hold for its later obtaining by means of judicial process or otherwise, evidence of a crime, their own or someone else's.

Now, if the government told everybody, told private citizens to keep watch on their neighbor, record their comings and goings, report anything unusual, that would be different from this case only in the fact that they were speaking to private citizens, not regulated industry.

The government here argues that the difference is constitutionally critical because it has plenary, regulatory

power over banks, it can order banks for purposes foreign to that power to keep watch over its customers and their relation with still other fourth parties, in order to enforce the criminal law.

QUESTION: Mr. Marson, are you now arguing your challenge to the reporting regulations as well as to the recordings, recordkeeping regulations?

MR. MARSON: Yes. In our view they're constitutionally indistinguishable, the reporting requirements are easier because they're an outright seizure.

QUESTION: Well, have any of your clients engaged in transactions which they would be required to report, or have they had the time to file a complaint?

MR. MARSON: They alleged, at the time of the filing of the complaint, which was a few weeks before the effective date of the Act, that they had done so in the recent past and would do so in the immediate future; and therefore were under the effect of the regulation.

I have four clients: Lieberman, Harwood, Bruer, and Durell. All of whom are required to report their foreign holdings.

Lieberman sends monetary instruments in excess of $5,000 across the borader. Lieberman and the three others all have financial interest in or signature authority over foreign bank accounts. As such, they are required affirmatively

to report those to the government, and have been doing so because the District Court declined to enjoin that portion of the Act.

QUESTION: Are you the Marson who is one of the parties to this case?

MR. MARSON: Yes, I am. It was easier to verify the complaint that way.

QUESTION: Unh-hunh.

MR. MARSON: Finally, I might mention a word before my first section of time runs out, about the American Civil Liberties Union.

The government is willing to agree that we have a right to protect our membership list. It is willing to agree that this case creates a membership list; it is willing to agree that it frequently, for law enforcement purposes, has access to bank records without any process at all. It's willing to agree that even if it serves process, that process usually is not learned about by the customer. And still it says that we are prematurely here, that we must again wait for some summons or subpoena to be served upon us.

We submit that a nationwide, known scheme of the collection of membership lists, in the hands of a third party, with no instinct or interest in litigating is too much of an exposure of that membership list to be tolerated under the First Amendment.

The D. C. Circuit's decision in United States Servicemen's Fund turns on exactly that point. It was the lack of a litigative interest in the third party who was holding the record that gave the United States Servicemen's Fund standing to intervene to seek the sort of equitable relief that we seek here.

If it please the Court, if there are no further questions, I'll save the rest of my time for rebuttal.

QUESTION: Do you know of any other organization in the country that couldn't also be a party?

MR. MARSON: The organization would have to be of the type that was controversial and whose members could reasonably plead that they could expect retaliation or exposure. It would have to come under the rules set forth in, for example, NAACP vs. Alabama.

QUESTION: So any group would be able to come in.

MR. MARSON: Any group who had a reasonable interest in the privacy of its membership list would; any group who didn't care about the maintenance of that privacy and didn't care because it wouldn't affect First Amendment rights could not.

QUESTION: Well, in the Civil Liberties Union, if Member Joe Doakes goes in and cashes his bonds and gets a check for $15,000, how does he become -- get on the list as a member of the American Civil Liberties Union by cashing a

check?

MR. MARSON: Because that check goes through our account, and the bank makes pictures of our account.

QUESTION: No, no. No, no. This is his own check.

MR. MARSON: Oh. Well, his own bank takes a picture of his check and it's written out to the American Civil Liberties Union.

QUESTION: Well, how does the American Civil Liberties Union have anything to do with that?

MR. MARSON: Because he knows that his own bank is going to keep a record of the fact that he paid money to the American Civil Liberties Union.

QUESTION: Suppose the man cashes a check for $15,000 from Babies United, payable to him, and he's a member of the American Civil Liberties Union. Does the American Civil Liberties Union have a right to bring an action to stop that?

MR. MARSON: No. Only checks that illustrate on their face that they are payable to us.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Marson.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF GEORGE P. SHULTZ, SECRETARY
OF THE TREASURY, ET AL.

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

The so-called Bank Secrecy Act -- oh, I should say before I begin that I asked the Clerk to distribute a little Xerox copy of the -- because the regulations as they're reproduced in the Appendix to our Jurisdictional Statement and in the Appendices to the California Bankers Association brief omitted some intervening changes, which made them inaccurate in minor respects that don't affect the argument in this case; principally 103.35 is the one that can't really be reconstructed without the aid of this.

But with these in your hands, along with the others, it will be possible to see what all of the regulations currently are. They were amended in both December of 1972 and January of 1973, and the current regulations are reprinted in the Code of Federal Regulations.

The Act was enacted by Congress in 1970, following extensive and detailed hearings concerning the widespread use made by persons in the United States of foreign bank accounts, in Bank Secrecy jurisdictions, for the purpose of concealing violations of United States tax, regulatory and criminal laws, or concealing the fruits of such violations. And concerning

the difficulties in enforcing federal tax, regulatory and criminal laws that had been caused by the failure of some domestic banks and other financial institutions to keep adequate records of checking account transactions and of the identity of their customers.

The purpose of the Act is to make available greater evidence of financial transactions in order to deter the use of the channels of commerce for illicit purposes, or, in the words of the Senate Report, in order to reduce the incidence of white-collar crime, unquote.

Title I and II of the Act, and their implementing regulations were challenged in this case. Title I is the recordkeeping provision, and Title II are the reporting provisions, which basically are in two parts for purposes of our concerns here: reports of domestic currency transactions, and reports of foreign financial transactions.

The Act's provisions are not self-executing, but are designed to be implemented by Treasury regulations, and Congress made clear its intention that those regulations were to focus both the recordkeeping and the reporting requirements on financial information having a, in the phrase of both the House Committee Report and in the Act itself, a high degree of usefulness in criminal, tax or regulatory investigations or proceedings.

And by so focusing the requirements to avoid undue

burdens on the free flow of domestic and international commerce and finance.

After the Act's passage, in keeping with this congressional purpose, a Treasury Department task force undertook detailed study, in consultation with representatives of financial institutions, of trade associations, and of government agencies, to determine the specific categories of records and reports which should be required to implement the Act.

And the regulations emanated from rule-making proceedings involving these task force studies, they were first adopted in April of 1972, and then were amended in December of that year and in January of 1973, after further comment in rule-making proceedings and also in light of further Senate hearings on proposed amendments to the Act that were conducted in August of 1972, and that is why there are sometimes citations to Senate hearings which discuss the regulations that have already been developed under the Act.

Those proposed amendments had to do with proposals to restrict access to the record, which Congress has not enacted, but the amendments to the regulations do specify restrictions on access by others in the government.

The original legislative history made it clear that the recordkeeping provisions did not expand access, from what it was under established legal process.

Turning first to the recordkeeping provisions of Title I as implemented by the regulations, and these provisions were upheld by the District Court, these require financial institutions in the United States to record the identities of their account holders, and require banks to make, to maintain microfilm or other records of checks drawn on them. These are requirements with respect to "on-us" checks only, for sums in excess of $100.

And then there are, in addition to checks for $100 or less, there are other exceptions developed, and these are all in the amended regulations, that are listed on page 22 of the brief. This is our brief for the Appellees. There are a number of briefs in the case, as you know.

In the government brief as Appellee, on page 22, we summarize the other exceptions: dividend checks and payroll checks, and others. So long as they are drawn on an account expected to average at least 100 checks per month.

Altogether, then, those exceptions, coupled with the exception for all checks of $100 or less, add up to a very substantial exception to the microfilming requirements which have been the main focus of the complainants' contentions in the case.

The additional --

QUESTION: Of course it's been represented, as you know, that as a practical matter that exception is virtually

meaningless because microfilming equipment can't distinguish between a check under a hundred dollars and a check over a hundred dollars, and that the manpower required to separate them would not be worth the effort, and that, therefore, as a practical matter, it's a meaningless distinction -- a meaningless exemption, if you will.

And I personally don't know the facts about that, is there anything in the record about it?

MR. WALLACE: There's relatively little in the record that bears on this, these amendments were made to the regulations after the District Court decision in this case.

There is some testimony in the hearings that we referred to, the congressional hearings that we referred to in our brief, in which some representatives of banking institutions made suggestions that indicated that it would be possible -- in one instance that it would be possible by machine to make such separations.

QUESTION: Well, certainly it would be possible to do, I mean a human being could easily do it, but you -- the representation is that that would add so much expense, that it's therefore, as a practical matter, cheaper to microfilm them all.

Nobody could quarrel with the proposition that it's possible.

QUESTION: Well, with the cost of living the way it

is today, you sure shouldn't have many $100 checks.

I mean, unless you're going to buy a pack of cigarettes or something!

MR. WALLACE: The prevalent practice has been for banks to microfilm all of their checks, and of course, for banks that have been doing that, even though they have not been retaining those microfilms as long as is required under the regulations --

QUESTION: That's two years.

MR. WALLACE: -- the -- it's five years for this particular aspect of it.

QUESTION: Five?

MR. WALLACE: It's two years in which to reconstruct entries into demand accounts in the bank. But for the microfilming of "on-us" checks, it's five years.

The hearings did bring out that most banks had been microfilmning their checks, although the period for which they retained them had varied a great deal. And certainly banks that have been microfilming all of their checks would be likely to retain all of their checks for the five-year period rather than have to sort out the microfilms afterwards.

The regulations developing the exceptions were developed in consultation, in light of comments by members of the industry; and while there's nothing in public record, the Treasury Department did include the exception in response

to industry's suggestions that this would be useful and in keeping with the congressional purpose not to cause any unnecessary burdens on the flow of commerce that won't substantially contribute to the purposes of the Act.

There's nothing in the record about what banks are doing since the adoption of the regulations, the Treasury Department has some information, however, that would give us a basis for introducing evidence in a proper proceeding, but this is a useful exception for some institutions. And that it's an exception that they're able to take advantage of.

QUESTION: May I ask you a question, I think it's in the record somewhere, but I can't put my finger on it.

Does this Act draw the line with respect to certain-sized banks?

MR. WALLACE: It does not, with respect to any of these requirements.

QUESTION: How about the regulations in the Act?

MR. WALLACE: Neither do the regulations.

QUESTION: You mean it applies as equally to a $10 million bank in a small town as it would to a $10 billion bank?

MR. WALLACE: That is correct. Of course it doesn't specify that microfilm has to be the process by which a copy of the check is retained. The hearings indicated that it was

only the largest institutions that were getting away from microfilming, not the smaller ones. They were using the microfilming process. That was what the evidence before Congress appeared to indicate.

QUESTION: Well, are you saying a small bank would use something other than microfilm?

MR. WALLACE: Well, if it chose to, it could, under the regulations. The regulations don't specify the form in which copies are to be maintained, but the practice of small banks is to use microfilm.

And the main reason for the need for the record-keeping requirements brought out in the hearing was that a few of the largest banks in the country had decided not to engage in the pervasive photocopying that was common practice in the industry, and there were problems about periods of retention.

There was a great deal of testimony about the need and the usefulness of bank records in aiding investigations, both to determine tax liability; there was testimony by Internal Revenue agents; there was testimony by United States Attorneys, indicating in detail various, sometimes quite intricate criminal schemes that had been investigated through the use of the bank records, and problems that they ran into when bank records were not available.

And there was testimony by the Assistant Attorney

General in charge of the Criminal Division, indicating the importance of having such records available for use in evidence in trials, rather than relying on oral testimony.

QUESTION: This may be irrelevant, but do the banks get any compensation for this service through some federal agency that may involve considerable time and personnel and everything else they have to do?

MR. WALLACE: There is no compensation provided in the Act or the regulations, Your Honor.

The findings made by the congressional committees were that these requirements would not impose an undue burden, indeed, that there would not be a very substantial burden imposed on most banks at all, because they already made copies of these records for their own purposes, and extending the period in which they retained them, considering the easy --

QUESTION: I was just thinking that if they're all stored in warehouses, digging them out, locating them, providing copies, this must be involving expense.

MR. WALLACE: There are expenses. There was testimony in the hearings about the expenses, and, as a matter of fact, the testimony was that the cost had been estimated to range between one-half mill and one-and-a-half mills per check; a mill being a tenth of a cent.

And the Senate Committee specifically said the cost

of microfilming had been estimated in the hearings to range between one-half of a mill and one-and-a-half mills per check, a cost that does not appear to be unduly onerous compared to the normal service charge of ten cents per check.

And a cost which is --

QUESTION: But there's more expense than that involved, isn't there? It's not merely the microfilm, there's the expense of storing for this length of time, the expense of locating what some government agency may want the bank to show up, and I expect making copies of what it is the government may want.

MR. WALLACE: Well, the recordkeeping requirements don't impose any additional requirements on the bank with respect to access to such records as they have, and there wasn't a complete cost breakdown. There was testimony in the hearings by representatives of the banking industry that the cost would not be unduly onerous, and the costs are tax deductible.

We have a quotation in our brief on that precise point.

QUESTION: One could assume, I suppose, in a capitalistic system, that whatever the costs of doing business are, they will be paid for by the bank's customers ultimately, and the bank will continue to make what profit it can make in a competitive economy. Isn't that about right?

MR. WALLACE: I would presume so, although there's no indication that anyone has raised their service cost from ten cents to ten-and-a-half cents a check.

QUESTION: Well, maybe they've been able to economize somewhere else.

MR. WALLACE: Yes, they may have.

QUESTION: To go to the next point, the banks get nothing for this, what's the penalty if they don't comply?

MR. WALLACE: Well, there are provisions for civil penalties, --

QUESTION: Civil penalties.

MR. WALLACE: -- or the possibility of criminal violation. That is correct.

This is a regulation imposed by Congress on them, as something they have to meet in order to engage in their enterprise in interstate commerce.

QUESTION: And I guess the answer is, if they don't want to do it, they can go out of business.

MR. WALLACE: Well, that's right. Congress concluded that in regulating this industry, which provides many opportunities for evasion of other legal requirements, if adequate records are not kept of the identities of customers and what has occurred in their accounts, so that they will be available when legitimate investigatory needs are shown, that this is part of the burden to be borne as a good citizen.

As --

QUESTION: Do you think they could put that on any other business, other than the banking business?

MR. WALLACE: Well, Congress has imposed a great many recordkeeping requirements on numerous businesses, in order to implement various federal programs.

QUESTION: Internal Revenue, for example.

MR. WALLACE: That's correct.

QUESTION: I'm talking about these provisions. On the basis of what you say here, which is that you might want to prosecute them.

MR. WALLACE: Well, that's only one basis. That these provisions are also needed to investigate whether Internal Revenue has been paid adequately.

QUESTION: But would you agree with what the Petitioners said, that your whole thrust in your brief, and I think that that's so many, you keep talking about criminal.

MR. WALLACE: Well, there was a great deal of focus on criminal schemes and the use of secret accounts, to conceal the fruits of criminal schemes.

QUESTION: Secret accounts in domestic banks?

MR. WALLACE: Secret accounts in foreign banks, and getting it there through secret transactions in the United States banks. And transactions that couldn't adequately be

traced, and --

QUESTION: But immediately you say criminal, you --

MR. WALLACE: -- then customers who aren't accurately identified.

QUESTION: Well, I want you to agree with me, Mr. Wallace, that where you say your thrust is criminal, you wave the Fifth Amendment flag, don't you? Automatically?

MR. WALLACE: Are you speaking of the privilege against self-incrimination?

QUESTION: Unh-hunh.

MR. WALLACE: Well, if someone is being required to incriminate himself, and pleads the privilege, that question is raised. I don't think it's raised in this case.

QUESTION: Well, the only pleading I could do at that stage would be to cash my check.

QUESTION: Well, does the bank have any Fifth Amendment privilege, Mr. Wallace?

MR. WALLACE: Well, no, the banks are corporations who don't have a Fifth Amendment privilege, and no one else is being required to keep the record.

QUESTION: I'm talking about poor old $100 man who's got a check for $100.

MR. WALLACE: Well, if he --

QUESTION: He gives up all his rights when he puts that check in the bank.

MR. WALLACE: Well, I haven't said anything about his giving up all his rights. He's communicated to the bank what that check communicates.

QUESTION: And that's all that he meant to communicate -- that's the only person he meant to communicate to, right?

MR. WALLACE: Well, if he has the right to uphold the confidentiality of that communication from disclosure, that would arise, that question would arise when an attempt was made to get the bank to disclose it.

As this Court said in the Couch case, that there is no such privilege.

QUESTION: But he said --

MR. WALLACE: That may be all he meant to communicate it to, but the bank can be compelled to testify as to its knowledge of what he communicated to them.

QUESTION: Yes, but I don't think -- I don't think that the Couch case said that the accountant that was given these Internal Revenue materials was obliged to turn that over to the government. I don't think that's what it says.

MR. WALLACE: Neither does the Act. The Act gives the government no additional access to any records required to be kept, no access --

QUESTION: Well, what makes --

MR. WALLACE: -- beyond the normal legal process of

a summons or a subpoena.

QUESTION: What about the reporting provisions?

MR. WALLACE: Well, the reporting provisions are something else, and I'll turn to those now with just, if I may, one or two closing comments about the recordkeeping provisions.

QUESTION: Okay. Fine.

MR. WALLACE: So that we won't need to return to them, unless there are further questions.

QUESTION: Mr. Wallace, I do have one more question about the recordkeeping provisions.

Do I get the impression from your argument that there was at least some testimony before Congress to the effect that banks were shifting away from retaining these records?

The reason I ask is because my own experience in private practice is just what Justice White and Justice Powell intimated in their questions, that I can't remember ever having any trouble subpoenaing a check, check record from a bank. It seemed to me that in my own little locale they kept them several years.

So, was this, in effect, an effort by Congress to see that what had been an adequate voluntary system was preserved, when there was an impetus to turn away from it?

MR. WALLACE: That was the major thrust of it.

And that was the testimony. It was just a very few of the largest banks that had decided that it wasn't worth their while to photocopy everything and to keep these records as long as they had in the past.

In fact, the House Committee Report said that most banks would be virtually unaffected by this particular aspect of the requirements, and that it was just a few sizable ones, the Bank of America was particularly testified about.

That is correct, Your Honor.

So the principal thrust, as we understand it, of the California Bankers Association argument, that this is an undue burden, whether that's stated as a Fourth or Fifth Amendment objection, is hard for us to see why a recordkeeping requirement is a search or seizure; but it seems to us now it's to be more of a Fifth Amendment objection.

That is answered by the consideration, it seems to us, that Congress gave to the needs that the government had as the necessary and proper means of facilitating enforcement of tax, regulatory and criminal laws. This would not be an undue burden, and I don't think this congressional judgment has been shown by anything presented in the record here not to be an entirely constitutional one.

The other objections that have been raised to the requirements by the individuals, if I can just summarize our position with respect to them quite briefly: we don't see

that there's been any compulsion on the individual with respect to the recordkeeping requirements that would form a predicate for a Fifth Amendment objection, nor have any of the individuals before the Court claimed that anything required would tend to incriminate them, which is the necessary predicate for a Fifth Amendment objection.

There is not basis in the legislative history or purpose or anything that was developed in the course of developing the regulations for belief that the government was going to seek to get the membership lists of any particular organization, and therefore the First Amendment claim seems to us to be too speculative for presentation to the Court a fortiori, on the basis of this Court's decision last term in Laird v. Tatum, since there isn't even any data-gathering by the government yet shown to be taking place in the present case.

And data-gathering was involved in Laird by the government in Laird v. Tatum, although no use of that data for any improper purpose or likelihood of that use has been shown.

The Fourth Amendment claim, it seems to me that there's no search or seizure being made of the customer, because the bank with whom he's doing business is required to keep records of its financial transactions with him and with other customers.

And to the extent that it could be said, and we suggest some reasons why it may not be accurate to say so, that the bank is operating as a government agent, it has never been held by any court, to my knowledge, that the Fourth Amendment is violated when the government keeps records of its dealings with individuals.

QUESTION: It's acting -- or the private bank, company is acting as a government agent when they withhold taxes, social security, and so on.

MR. WALLACE: Well, in the same sense, that is right. And they are required to keep many records.

And the thrust of the argument of the individuals here is that when they have dealings with the government, and the government keeps records of those transactions, that the government has engaged in, assuming that the bank is acting as an agent of the government that somehow raises the Fourth Amendment violation. To us that is merely the government's keeping of records, of information voluntarily disclosed to the government. You know, like someone doing business with it.

We don't really think the analogy of a government agent is the accurate one here, but without that analogy there's no search or seizure with respect to the individual at all here, since there's no access by the government, provided by the Act, to the records that are required to be

kept.

Now, the domestic currency transaction reporting provisions of Title II, or the part of the Act that was struck down by the District Court, this is actually the least innovative feature of the Act, because, since 1945 financial institutions have been providing reports under the Trading with the Enemy Act, and implementing regulations; and also under Section 251 of the Revised Statutes, which was another basis for those regulations.

Of essentially similar information, and these had been of proven efficacy in the enforcement of the Internal Revenue laws, Treasury report indicated, for example, that in 1957 and 1958, alone, 129 fraud cases had been developed, involving -- which led to the generation of $13.5 million in additional taxes and penalties, based directly on information derived from these reports.

And the congressional objective in providing for such reporting requirements in the new Act was to make the standards for such reports by the institutions more definite. The hearings indicated that the criminal use of financial institutions had increased in recent years, and that there was much testimony and findings in the committee report, indicating that large amounts of cash are generated and have to be concealed in illicit transactions, and also have to be converted to assure the ultimate success of those trans-

actions into usable forms of credit.

And so these provisions and their implementing regulations were included in the Act, and these regulations require reports only by the financial institutions of these transactions, not by any individuals; and only of currency transactions in excess of $10,000, not commensurate with the customary conduct of the business of an established customer of the bank.

The information to be reported is summarized in our brief, this time our brief as Appellants, on pages 14 and 15, in the text of the brief. The information is relatively simple. And it's to be secured from the party to the transaction, the other party to the transaction, by the bank, as a condition of the bank's engaging in such transaction.

This is again regulation of the activities of the banks in commerce.

The District Court -- the rationale of the District Court in striking down these provisions of the Act was, as we've contended in detail in our brief, entirely hypothetical. It was based on the speculation that it might be possible to have implementing regulations which would require the reporting of other transactions, other than those specified in the regulations, including the reporting of all transactions by check on personal checking accounts.

QUESTION: Would you clarify for me, at any rate,

what the term "currency transaction" means, Mr. Wallace? Give an example of it.

MR. WALLACE: Well, these are transactions, one example was given by Mr. Justice Brennan, if he should get $15,000 in currency just by presenting a check and asking for that much currency. Although the denominations of the smaller bills do not have to be reported on the reporting form, that would be the only exception I would take to the description that was made. It's only bills of $100 and over that must be mentioned.

QUESTION: Although this mentions" the type, amount and denomination of the currency involved". I'm looking at page 15 of your brief.

MR. WALLACE: Well, yes.

QUESTION: "Type, amount and denomination".

MR. WALLACE: Yes. But the form itself does not require all of that. It's in our Jurisdictional Statement on page 121, and the denomination there -- we were just summarizing it on pages 14 and 15. The amount has to be given, and then the amount in denominations of $100 or higher. The form is relatively concise, but --

QUESTION: Mr. Wallace, what about the corollary to that. If I walk into the bank every week with $15,000 in large bills to buy a draft on a Swiss bank, to transfer my money to them --

MR. WALLACE: That, too, would be a currency transaction, to be reported.

QUESTION: -- that's the same --

MR. WALLACE: And it would be for currency or other bearer instrument transactions, such as a bank check made out to cash, or something of the sort, which anybody could cash.

A bearer instrument that has the same negotiability as currency, virtually the same. That's what these are involved with.

QUESTION: So I gather in Answer 3 on the Currency Transaction Report, if you had in the $15,000, $10,000 in denominations of 100, 500 or 1,000 dollars, you'd just put the number, total: how many 100, how many 500, how many 1,000; which is the total.

MR. WALLACE: It's my understanding that that would be adequate.

These reports have been perfectly kept relatively simple, with the idea that if an Internal Revenue audit is called for, of course they'll be getting into more detail then; if there isn't, there is no point in burdening transactions with onerous requirements.

A great deal of time has been devoted to developing the regulations and forms which the regulations didn't take effect until two years after the Act was paseed, because of

the efforts that were made. There was an overriding congressional purpose not to cause unnecessary burdens on the flow of these transactions.

There is one aspect of the domestic currency transaction reporting provisions that I should devote a few minutes to, because it's a problem that has been raised for the first time in the case in the brief for the Appellees, filed not long ago in the case; and that is a contention that the regulation, the contention made in the red-covered brief by the Bankers Association, that the regulation is invalid, implementing this provision, because it doesn't require a report to be made by the customer as well as the bank.

And the legislative history indicates that Congress did contemplate and, indeed, the Act required the report to be made by both parties in order to assure that the customer would be notified.

This contention, it seems to us, is not before the Court in this case, it's raised by the California Bankers Association. It's on pages 37 through 39 of their red-covered brief.

QUESTION: When was that brief filed? Has it got a date on the cover of it? A stamp.

MR. WALLACE: Well, we received it on January 5th in our office.

QUESTION: A red-covered brief?

MR. WALLACE: Well, there was a white-covered brief that was identical to it, and then a red-covered brief substituted for it.

The brief for the Appellee California Bankers Association.

QUESTION: But it's the same as --

MR. WALLACE: The same as the white-covered brief. It's exactly the same brief.

QUESTION: What pages were you referring to?

MR. WALLACE: It's on pages 37 through 39, yes.

QUESTION: We have a white one, filed January 2nd.

MR. WALLACE: Well, that's the same brief, the printer had been instructed to bind it in red, and he had bound it in white and he sent it, and then he sent substitute copies, but they're all -- there's no change inside.

QUESTION: So what page now?

MR. WALLACE: 37 through 39, a contention is made that the regulation is invalid, because it requires only the financial institution to file the report, whereas the Act contemplated that the regulation would require both the institution and the customer to file the report.

We don't believe this contention is properly before the Court, because it's made here by the Bankers Association, who are obviously not within the zone of interest to be protected under their own contention, which was assurance

that the customer would be notified as the congressionally stated purpose of requiring both to file the report.

There is nothing to stop the members of the California Bankers Association from notifying their customers when they file such reports, either in person at the time the information is secured, or by sending the customer a copy of the report or, indeed, by having the customer countersign the report, which is not required by the Treasury regulations but the report would still be accepted by the Treasury if it were filed that way.

QUESTION: That's a little odd, isn't it? The statute is unambiguous in what it requires, and you say that the Executive Branch has just chosen to disregard it. It's going to be like one of these impoundment cases, isn't it?

MR. WALLACE: When you say the statute is unambiguous, Mr. Justice Stewart, let me look at the statute, at the bottom of page 37:

"The report of any transaction required to be reported under this chapter shall be signed or otherwise made" --

QUESTION: Both.

MR. WALLACE: -- "both" -- well, of course, the information is secured by the bank from the customer, and the "otherwise made" language was believed by the Secretary --

QUESTION: Well, it's the "both" language that we're talking about.

MR. WALLACE: Yes, but there are other -- additional provisions of the Act that have a bearing, namely Section 206 of the Act, which gives the Secretary broad authority -- this is in our Jurisdictional Statement, on page 80, which gives the Secretary broad authority to make exceptions to the requirements of the Act, as he sees fit, in developing the regulations.

QUESTION: Well, that answers my question.

MR. WALLANCE: And another answer is that while the House Committee Report interpreted this language as requiring the report to be made by both, for the reasons stated in the excerpt from that Committee Report, set out at page 38 of the brief; the Senate Committee took exactly the contrary view. This is not set out in the brief, filed by the Appellees. We didn't want to burden the Court with an additional reply brief, because we didn't think the issue was in the case to begin with.

It is my understanding that the individuals in the case don't claim that they engage in any transactions of this type nor are they contemplating engaging in such transactions.

The Senate Committee Report, with respect to exactly the same statutory language, -- I'm quoting now from

page 15 of the brief -- took exactly the opposite view in analyzing the domestic currency reporting requirements.

QUESTION: Page 15 in what brief?

MR. WALLACE: This is not a brief, sir, this is page 15 of the Senate Committee Report, which is not before the Court, but --

QUESTION: Oh. All right.

MR. WALLACE: -- it is available to the Court.

And I'll read the entire paragraph, since it's quite short, and it's the only part dealing with the analysis of the domestic currency reporting provision:

These sections authorize the Secretary to require reports on transactions in currency or other monetary instruments involving domestic financial institutions when the transactions are in such amounts or under such circumstances as the Secretary may prescribe. The reports can be required of the financial institution or the party involved or both. The Secretary is authorized to designate domestic financial institutions as agents of the United States to receive required reports.

That is Section 223 which was never implemented. And that is the analysis given in the Senate Committee Report.

The question is one that the Secretary gave a lot of attention to in developing the regulation. He came to the conclusion that he did based on comments that were made

by the industry as to the cumbersomeness of the process if they had to get their customers to file reports of such transactions.

And, in light of the over-all congressional purpose, of not imposing unnecessary burdens on Congress, the Secretary concluded that the exemption authority given him should be utilized here, and that the purposes of the Act would adequately be served.

QUESTION: But that's not -- one of the purposes of this provision contained in the House Report certainly is not served, because -- am I correct? -- because this does enable the bank to give this information to the Internal Revenue without any knowledge whatsoever on the part of its customers. Isn't that correct?

MR. WALLACE: The regulations --

QUESTION: And that's precisely what the House Report said that the requirement was --

MR. WALLACE: That is precisely what the House Report says --

QUESTION: -- designed to forestall.

MR. WALLACE: That is precisely what the House Report says, and it was contradicted by the Senate Report, dealing with exactly the same language in the Act. And the Conference Report said nothing about it. It just adopted the same language. Both reports are referring to the same

language.

QUESTION: Unh-hunh.

MR. WALLACE: And there's just -- I don't think the issue is before the Court in the case, and for that reason we haven't briefed it. It wasn't even introduced in the proceedings in the District Court. There wasn't an objection raised at that time.

The only basis on which the individuals before the Court claim that they can raise the issue is not that they have engaged or contemplate engaging in these cash transactions, but that the Act as a whole is not severable and that this is invalid, the parts that concern them are invalid.

It seems to us that the concerns expressed by Congress about why they needed to have the various provisions pretty well refute contention that if the Court found one aspect of it to be invalid, tha it should strike down the entire Act. Indeed, the fact that substantially similar domestic reporting provisions antedated the Act under the Trading With the Enemy Act, and stood alone for many years, indicates that Congress didn't think that all of this had to be one package.

Now, I'd like to say just a few words about the foreign transaction reporting provisions of Title II, and their implementing regulations which were upheld by the court

below, and which require reports of the transactions that the individuals here do say they engage in, of transportation of monetary instruments involving more than $5,000 into or out of the United States, and reports by persons in the United States of their relationship with foreign financial institutions.

Much of the testimony developed in the hearings was concerned with the very serious problems caused by the concealing or purifying of fruits of domestic criminal activity, and the concealing of ongoing violations of tax, regulatory and criminal laws by the use of secret bank accounts in Bank Secrecy jurisdictions; accounts over which Congress does not have direct regulatory authority.

The examples given were detailed and varied, of evasions of capital gains taxes, through sales of securities, through illegal trading in gold; of the concealing of securities, manipulations, or the concealing of insider trading in securities; and numerous other examples of a man making a loan to himself from his own secret bank account and then deducting the interest payments is one that I recall from the hearings.

It was testified by Robert Morgenthau, former United States Attorney for the Southern District of New York, that in his estimation thousands of such accounts, involving hundreds of millions of dollars, were being used for

illicit purposes. And the Commissioner of Internal Revenue, Randolph Thrower testified that the integrity of the self-assessment system of taxation itself was being threatened by the use of these accounts.

The objections that have been raised to this are, first of all, a claim that there might be a problem under the self-incrimination provision of the Fifth Amendment. We don't believe that claim is before the Court, because no one in Court has said that filing such a report would tend to incriminate him, which is the prerequisite for raising any claim of privilege under the Fifth Amendment. And, in any event, the claim would be premature. These are reports to be filed with the Internal Revenue return itself.

Under the Sullivan case the claim should be made, if it's going to be made, on the return. And under Marchetti and Grosso, even if there is something so inherently incriminating here that the individual would be justified in not filing any report at all, that would not mean that they're entitled to the kind of relief they've sought in this case, which is invalidating the entire Act, because others might well be able to comply without incriminating themselves.

And, indeed, it's very likely that couriers and others would comply. The Marchetti and Grosso cases both specifically said that the tax there was not being struck down, they were merely upholding a valid claim of privilege made by

someone who showed that he couldn't file the report required without incriminating himself.

And the Fourth Amendment claims that are made with respect to this provisions seem to us to be answered by the cases saying that reports required for valid regulatory purposes are not an unreasonable search and seizure, and the Court said this as far back as Boyd, in the passage that we refer to.

There is under our laws no reasonable expectation of privacy in bringing things into and out of the country, the customs laws indicate quitethe contrary. Nor is there a reasonable expectation of privacy with respect to financial transactions and bank accounts, which are subject to, in this country to the Internal Revenue summons procedures, and to other processes that do not require a search warrant to be issued initially.

QUESTION: Practically everybody in the United States is under that. And yet in this, a large percentage of these people are never going to get involved in any criminal offense, but they still get their name put in.

MR. WALLACE: Well, they have to make a report of their transactions in overseas banks, just as --

QUESTION: I'm not talking about the overseas banks now, I'm talking about the local ones.

With the local ones, the guy that doesn't even know

where Switzerland is.

MR. WALLACE: Yes. If he had a cash transaction --

QUESTION: Well, he had a cash transaction of $230 to buy a washing machine. He goes, too.

MR. WALLACE: It would have to be $10,000 in order to have the reporting requirements apply.

QUESTION: Well, $10,000 to buy a house.

MR. WALLACE: It would have to be in excess of $10,000.

QUESTION: His old grandfather left him ten thousand.

MR. WALLACE: If he did that by cash --

QUESTION: Yes.

MR. WALLACE: -- as a cash transaction, the institution or the bank would file a report of it.

QUESTION: And he wouldn't even know about it.

MR. WALLACE: Well, there's nothing to keep the bank from telling him about it, and the Secretary has publicized these regulations very widely, has held press conferences, has disseminated booklets --

QUESTION: Well, you don't --

MR. WALLACE: -- about them and so forth.

QUESTION: You don't pay the bank to notify them, do you?

MR. WALLACE: No, the government does not.

QUESTION: Can I assume that the bank wouldn't notify them and pay the bill themselves. Could I assume that? From my experience with banks.

QUESTION: The bank might have that charge in with the monthly canceled checks, could they not?

MR. WALLACE: I think one could as reasonably assume that when the bank asks for the information for the report, that the bank will be telling them why they need this information.

QUESTION: Well, the House Committee talked about the risk of the Secretary of the Treasury putting pressure on a bank to give it this information without informing its customers.

MR. WALLACE: That -- the House Committee Report said that. We don't believe that issue is before the Court in this case.

QUESTION: No. But that risk is --

MR. WALLACE: And that issue was --

QUESTION: -- but that risk exists under the regulation, doesn't it?

MR. WALLACE: Under the regulation. That's not --

QUESTION: Well, wouldn't the banks themselves be kind of anxious to supply the information without having the customer cooperate? In other words, it might be a two-sided end run around the customer, so to speak, but the banks

would probably prefer to furnish it without having to serve a copy on the customer, so that the customer doesn't get it, see it, and say, you know, What's my bank done to me.

MR. WALLACE: Well, that wasn't what was indicated in the commentary that the Department received as the reason why the banks thought it would be better for them to be doing it themselves. They claimed that it would be an impediment to the expeditious conduct of business if they had to stop and draw up the whole report so that the customer could sign it while the customer was present.

But that is not in the record. This is information developed in the course of drafting the regulations, which we could have introduced in the District Court, if the issue had been raised in the District Court, which it was not.

And we don't think it's here for decision, in any event.

And unless there are further questions, our submission is that Congress, faced with testimony about various serious problems, adopted a very restrained method of enacting legislation that was necessary and proper to see to it that the channels of commerce were used in a manner to facilitate rather than hinder the enforcement of various tax, regulatory and criminal laws. And it's difficult to see how they could have done anything effective that would be more restrained than what they've done, in the Act and implementing regulations.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Marson.

REBUTTAL ARGUMENT OF CHARLES C. MARSON, ESQ.,

ON BEHALF OF FORTNEY H. STARK, JR., ET AL.

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

The choice of adjectives, such as "restrained" is of course largely up to the user.

We do not think that the surveillance of 200 million bank accounts, which is how many there are in this country, is "restrained".

We do not think that the copying of in excess of twenty billion checks a year, which is how many clear their maker's banks in this country every year, is "restrained".

Even if we assumed that every bank in the country pays the extra money to sort out the checks that are under $100 and not copy them, by the government's own statistic that reduces the number by ninety percent down to two billion checks every year. We do not think that is "restrained", either.

But we do not think that if the Constitution permits the copying of checks over $100 simply because they're over $100, that that makes any difference --

QUESTION: That might have been a little bit more terrifying twenty or thirty years ago, but after the advent

of Social Security and Medicare, to say nothing of the enlargement of the reach of tax laws, those numbers, when you add them up, produce numbers very much like the ones you're talking about.

MR. MARSON: They do, but not in the enforcement of the criminal law.

QUESTION: But often used for that purpose.

MR. MARSON: Often used, yes. And this Court has had occasion to deal with the difficult problem where the tax law and the criminal law meet in a gray area, and it becomes the pleader's option in the hands of the IRS.

This is not such a case. The government began this case. Its opening brief crossed with ours in the mail. Both briefs claimed that the purpose of the Act was the enforcement of the criminal law.

Apparently when -- yes, Mr. Justice Powell?

QUESTION: I just want to be sure of your position, your clients' position. You attack the reporting of foreign currency transactions on the same grounds essentially as you do domestic currency transactions?

MR. MARSON: Yes, we do. We think that the analogy to a Customs Declaration is slightly ridiculous, the form on which these transactions have to be reported require such things as agency. If an instrument is transported not physically across the border but through the first-class mails,

it still has to be reported. And if you do it for someone else, you have to name him, give his address and give his business or occupation.

That's not like a customs declaration. I can bring a bottle of Scotch from Heathrow Airport, and I may have to declare it, but I don't have to say who I'm giving it to.

There's a great deal more information --

QUESTION: But if you carry a gift from London for the accommodation of a friend in London to some young lady who's getting married in New York, you must report that on the customs declaration.

MR. MARSON: That I do it for the purpose of giving it to someone else?

QUESTION: That you do it for the accommodation of someone else, that you're carrying it for the accommodation of another person.

MR. MARSON: I was unaware of that, Your Honor.

Do I have to list the other person's profession or business? I doubt that.

The government says in its own brief that the purpose of these reports is to supply leads to see which record should be subpoenaed or summonsed, which I think puts a slightly different cast on it.

The government and we all claim that criminal law enforcement is the central purpose of this legislation, in our

opening briefs.

Then, in its Appellees brief, the government, as it does here, takes a slightly different position, that this is being done pursuant to the regulatory power of Congress over banks.

Now, everywhere -- the legislative history of course does not support that, and the government doesn't claim that it does -- everywhere the Act exempts transactions that have to do with banks. An intrabank transaction is nowhere required to be reported or recorded.

Transactions between two banks, unless there are customers involved, do not have to be recorded or reported.

A good illustration of how little this has to do with the regulation of banks is this: my client, Security National Bank could, tomorrow, give Mr. Anderson's client, the Bank of America, fifteen billion dollars in used $100 bills; and as far as the Bank Secrecy Act is concerned, they wouldn't even have to write it down, let alone report it.

QUESTION: That's under the ___?___ Act.

QUESTION: That's what I was going to say. They have to report to somebody in government.

MR. MARSON: Well, their own ledger sheets as between them would disclose the transaction, but they would not have to report that under the Bank Secrecy Act, and I don't know that they would have to report it under --

QUESTION: They wouldn't have to report it under any Act?

MR. MARSON: Not to my knowledge.

QUESTION: Well, you better look up some of them. Bank transfers are reported to the government. I'm as sure as I'm sitting here.

MR. MARSON: I was unaware of that, Mr. Justice Marshall.

QUESTION: Not under the Secrecy Act, of course not.

MR. MARSON: No, not under this Act.

My point is that the Bank Secrecy Act, as opposed to some other Act of Congress, has nothing to do with those kinds of transactions. It has nothing to do with the regulation of banks.

So, to support the Bank Secrecy Act, as opposed to the Federal Reserve Act, on the theory that it is a regulation of commerce, is wholly unjustifiable in this case.

Of course, the Federal Reserve Act is a legitimate regulation of commerce, and that is not challenged here. The Bank Secrecy Act has nothing to do with the regulation of banking.

The analogy --

QUESTION: Well, it hadn't been my understanding that you were arguing that this legislation was beyond the

constitutional power of Congress to enact under the commerce power, but, rather, that it violated specific provisions of the Bill of Rights, i.e., the Fourth and Fifth Amendments.

MR. MARSON: That's correct.

QUESTION: Isn't that --

MR. MARSON: Actually it --

QUESTION: I have not misapprehended your argument, have I?

MR. MARSON: In terms of its purpose it ought to be comprehended as an exercise of the police power. It happens to use as a means its plenary regulatory power over the banks.

QUESTION: Well, it isn't any police power in Congress. All of Congress's criminal statutes are based on the commerce power.

QUESTION: Well -- or the taxing power.

QUESTION: Or under their taxing power. Congress doesn't have any police powers.

MR. MARSON: Let me offer this analogy of the interplay of these powers to the Fourth Amendment.

Congress has every bit of the plenary power over the telephone company, as it does over the banks.

QUESTION: Unh-hunh.

MR. MARSON: If, tomorrow, somebody invented the technology to record all calls, and if the day after Congress

passed an Act called the Telephone Secrecy Act, which required them to do so, and then the Solicitor General defended the Act on the ground that the government had plenary regulatory power over the telephone company, and that the parties who were engaged in those calls had no interest in those calls, that they were third-party business records, that they were not reached under Couch and Donaldson, then that theory, which is identical to this theory except the technology isn't here yet, then that theory would wipe out Katz and Berger and U.S. v. U.S. District Court.

QUESTION: But it wouldn't wipe out the Fourth and Fifth Amendment objections. But I don't see that the telephone notion is particularly objectionable on the commerce clause ground.

It seems to me that in response to Justice Stewart's question you say you're arguing Fourth and Fifth Amendments as restrictions rather than lack of a permitive authority under commerce power.

MR. MARSON: I agree with that, Your Honor.

QUESTION: But for purposes of the commerce clause, conceivably, government might want to find out whether the telephone companies were reporting accurately all their long-distance calls by merely measuring them, and under the commerce clause that would not be, probably would not be affected.

MR. MARSON: For the purpose that you stated, it would not.

QUESTION: No.

MR. MARSON: But nobody claims here, except --

QUESTION: Mr. Justice Rehnquist suggested when you get into taking the content of the communication down, then something other than the commerce clause comes into play.

MR. MARSON: Well, certainly the Fourth Amendment does, as this Court has frequently decided.

It is the suggestion of the government that because they serve multiple purposes here, that the criminal law aspect to this legislation can be ignored. Notwithstanding its primacy in the legislative history, in the Act, and in the government's opening brief, the suggestion is that because this Act serves all legal purposes at once it therefore can be justified by reference to all regulatory purposes at once.

It seems to us that that constitutes an abandonment of judicial supervision over the scope of the government's power to require records.

Take, for example, Section 6001 of the Tax Code. That's the section under which the tax authorities already have plenary power to require such records and to require such statements, which is the equivalent of reports, as are necessary to assess the tax liability of any person.

That was not enough to support what has been enacted here.

This Court, in measuring a subpoena under 7602 of the Tax Code, could measure the purpose of the subpoena, i.e., the enforcement of tax liability in the specific context of the purpose of taxation against the scope and necessity and showing made for the subpoena, because there was a referent, there is a specific purpose to be fulfilled.

When specific purposes are abandoned and the whole of enforcible law becomes the end product of a piece of legislation, then that means that the referent, the measuring stick for the reasonableness of a search for an order to produce documents is gone.

If Congress can enforce all purposes at once, it is implicit in the Solicitor General's argument that the enforcement of those purposes knows no limit, because they are all-purpose.

That, we think, is an essentially dangerous notion to the Fourth Amendment.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:13 o'clock, p.m., the case in the above-entitled matter was submitted.]

- - -