IRS v. 4th & 5th Amendments

by

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I. Background

In or before 2013, the ACLU filed a Freedom of Information Act request on the IRS, and for which a response was returned by IRS in late spring of 2013.

In the response, it was popularly reported that the IRS believed that it had the right to obtain e-mails that were more than 180 days old, without a search warrant, & without any 4th Amendment finding. This finding alone was the basis for some sensational news exposure.

In addition to the more formal and "legal" ways for units of the government to "reach out", the news has picked up stories of the Special Operations Division (SOD) which has been monitoring emails and telephone calls, supposedly to pass information on to law enforcement. In some cases, law enforcement has been "tipped" to locations without knowing the details of how the information was collected or transmitted. The government's prosecution files may have a similar lack of origin information. After all, when information is surreptitiously gathered, transmitted and received, there is nothing to measure probable cause against.

The above developments have occurred against the backdrop of the use of the dangerous "Required Records Doctrine," 5th Amendment exception that is improperly used not for public investigation, but against grand jury targeted taxpayers accused of not reporting offshore bank accounts, with the grand jury being used to force those taxpayers to turn over records to match with the records the IRS may likely already have.

II. Semi-Voluntary Information Gathering

A. It is well known that many people are prone to maliciously report others in to the IRS. The IRS even has an IRS Whistleblower Office, which was established by the Tax Relief and Health Care Act of 2006, to process tax cheater tips received from individuals who spot tax problems in exchange for an award worth between 15 and 30 percent of the total proceeds that IRS collects. (See also Notice 2008-4) IRS even has a reporting form: Form 211, "Application for Award for Original Information"

B. For individuals willing to be interviewed by IRS voluntarily, there are provisions in the Internal Revenue manual.

1. In addition to an attorney, a summoned party is permitted to have other persons present during the interview. Written authorization from the taxpayer is required for consenting to or requesting such disclosure. Note, however, that when a witness appears pursuant to a summons and is accompanied by a person (other than the taxpayer) who does not represent the individual witness, such person may be excluded from the interview. This can sometimes be cured with the ever-dangerous waiver of conflict for joint representation. IRM 25.5.5.4.8.

2. Third-Party Witness's Choice of Representative: Any witness, including a third-party witness, has the right to have counsel present at a summoned interview. 5 U.S.C. 555(b). The taxpayer has no right to be present himself or to

have his counsel present during questioning of a third-party witness. If a witness's counsel appears to represent persons with conflicting interests, refer to IRM 25.5.5.5, Dual Representation, and consult Associate Area Counsel. A summoned third party may choose to be represented by the taxpayer's attorney at the interview. In that case, consider dual representation problems & whether an attorney should be disqualified on conflict of interest grounds.

Further rules include: A summoned witness may choose to have observers present at the interview so long as (1) the observers are silent and do not participate in or disrupt the interview, (2) the taxpayer being investigated provides written consent allowing the disclosure of return information to all attending the interview, and (3) the disclosure of that return information would not seriously impair Federal tax administration. IRM 25.5.5.5.7

III. The IRS Subpoena Mechanism: IRC § 7602(a)

A. Main provisions in the Internal Revenue Manual: 25.5 (collection) & 5.17.6 (collection) Summonses. Selected Provisions:

1. More detailed guidance is found in the Summons Handbook at IRM 25.5.

2. Policy considerations:

   (a) Summons should be used only when the taxpayer (or other witness) will not produce the desired records or other information voluntarily.
   (b) Summons should be used when IRS is prepared to seek judicial enforcement if the summoned party fails to fully comply.
   (c) Long Term policy considerations: Before issuing any summons, the Service should consider: (-1-) The possibility that judicial enforcement will be required, and (-2-) The adverse effect on future voluntary compliance if enforcement [of the summons] is abandoned.
   (d) The summons should not require no more of the witness than appear on a given date to give testimony or produce existing books, papers and records or both.

3. Limitation: A summons cannot require a witness to prepare or create documents, including tax returns, that do not currently exist. Requirement to appear and give testimony that would allow a revenue officer to obtain answers to all the questions or blanks on a Collection Information Statement for that taxpayer.

4. Limitation: Pursuant to IRC § 6331(g), the Service may not levy on a person's property on the day that person (or that person's officer or employee) is required to appear in response to a summons issued by the Service for the purpose of collecting any tax.

B. Purpose of a Summons: (-1-) to ascertain the correctness of a return; (-2-) to prepare a

return where none has been made; (-3-) to determine the liability of a person for internal revenue tax; (-4-) to determine the liability at law or in equity of a transferee or fiduciary of a person in respect of any internal revenue tax; (-5-) to collect any internal revenue tax liability; or (-6-) to inquire into any offense (civil or **criminal**) connected with the administration or enforcement of the internal revenue laws. (Treas. Reg. § 301.7602-1),

C. Summons signed by the following officers and employees have the authority to issue summonses to (-1-) the taxpayers being investigated and (-2-) to third-party witnesses but only when the employee's manager, or any supervisory official above that level, has given prior approval:

1.	Internal Revenue Agents	2.	Estate Tax Attorneys
3.	Estate Tax Examiners	4.	Tax Auditors
5.	Tax Law Specialists	6.	Compliance Officers
7.	Revenue Officers, GS–9+	8.	Tax Resolution Representatives

9. Revenue Service and Assistant Revenue Service Representatives
10. Property Appraisal and Liquidation Specialists GS-12 and above
11. Bankruptcy Specialists GS-09 and above (only for TFRP determinations)

Official electronic signatures are permitted. Alternatively, the issuing employee may write and sign a statement on the summons indicating that he or she had prior authorization to issue the summons and identifying the name and title of the approving supervisor and the date of the approval. This statement may be written manually or electronically in the 'Signature of Approving Officer' blank space on the front of the original summons and all copies. (This more generous mandate is a relaxation of earlier case law which required the presence of signatures to appear or else give the taxpayer ability to quash the summons.)

D. Activities relating to the summons:

1. IRC § 7602 authorizes the Service to summon a witness to testify and to produce books, papers, records, or other data that may be relevant or material to an investigation. United States v. Powell, 379 U.S. 48 (1964).

2. Any noticee may intervene in any proceeding brought by the Government to enforce the summons. The summoned third-party has the right to intervene in any proceeding brought by a noticee to quash the summons. IRC § 7609(b).

3. When a third-party summons is issued, section § 7609(a) requires notice be given to the taxpayer identified in the heading of the summons & any other person (whether individual or entity) identified in the description of summoned records.

E. General Purposes relating to the summons. In United States v. Powell, 379 U.S. 48, 57-58 (1964), the Supreme Court set forth the standards that the Service must meet to have its summons enforced. The Service must show that:

1. The investigation will be conducted pursuant to a legitimate purpose;

2. The inquiry may be relevant to the purpose;

3. The information sought is not already within the Service's possession; and

4. All administrative steps required by the Code have been followed.

5. IRC § 7601 authorizes the Service to inquire about any person who may be liable to pay any internal revenue tax without a summons.

6. IRC § 7602 authorizes the Service to summon a witness to testify and to produce books, papers, records, or other data that may be relevant or material to an investigation. United States v. Powell, 379 U.S. 48 (1964).

7. No "improper purposes." including: (-1-) harassment, (-2-) pressuring the taxpayer into settling a collateral dispute; or (-3-) any other purpose adversely reflecting on the "good faith" of the investigation.

F. Who may be summoned under the authority of IRC § 7602(a)(2):

1. the person liable for the tax or required to perform the act (prepare a return);

2. any officer or employee of such person who has information that may be relevant to the investigation;

3. any person having possession, custody, or care of books, papers, records, or other data that may be relevant to the investigation; and

4. any other person the Secretary deems proper.

G. Prohibition on summons when case has “officially” become “criminal”. IRC § 7602(d)(1) prohibits a summons from being issued or enforced with respect to any person if a Justice Department referral is in effect with respect to such person. A "referral" is in effect, as defined by IRC § 7602(d)(2), when either:

1. The Service has recommended to the Justice Department a **grand jury investigation** of, **or** the **criminal prosecution** of, such person for any offense connected with the administration or enforcement of internal revenue laws; or

2. The Justice Department requests, pursuant to IRC § 6103(h)(3)(B), the disclosure of return or return information relating to such person, as when the Justice Department requests the Service’s criminal investigators to join an ongoing federal grand jury investigation of the person for **non-tax crimes**, such as narcotic trafficking or racketeering, to investigate potential tax charges.

3. Note: The limitation of IRC 7602(d)(1) applies only when the Service has

referred to the Justice Department the taxpayer whose liabilities are at issue. The Service is not barred from summoning a third-party witness when the Service has referred the third-party witness to the Justice Department. Khan v. United States, 548 F.3d 549 (7th Cir. 2008); Treas. Reg. § 301.7602-1(c)(1).

H. Exception to 3rd party summons protections for criminal matters: § 7609(2)(E) provides that the protections for 3rd party summons do not apply if (1) it was issued by a Criminal Investigator of the IRS in connection with the investigation of an offense, and (2) the person served was NOT a 3rd Party Record Keeper (defined in §7603(b)) and which includes:

1. Banks / Savings & Loans / Credit Unions
2. Any broker
3. Credit Card Co. (Treas. Reg. § 301.7609-2(a)(3)).
4. Any attorney
5. Any §IRC 6045(c)(3)) barter exchange
6. Any accountant
7. Any regulated investment company
8. Any enrolled agent
9. ANY 7603(b)(2)(J) owner or developer of a 7612(d)(2) software source code

I. Another Exception to the formal established 3rd party notice and protection rules is suspended where the summons is to aid collection. Also known as the Collection Summons Exception of, it pertains to an assessed liability, transferee liability, or a liability reduced to judgment. IRC § 7609(c)(2)(D); Ginsburg v. United States, 90 AFTR 2d 2002-6555 (D. Conn. 2002).

J. Issuance and service of Summons do not invoke compliance automatically. It is up to the issuer to determine if the summons is to be further enforced, and such enforcement is an action to determine the propriety of and to test the principles surrounding the facts of the matter for which the summons was issued. Predominantly, the Internal revenue code sections used to test propriety include 7603-7605, 7609-7612, 7402 & 7210. A short sampling of matters which may be raised include:

- legitimate purpose
- Inquiry relevant to the legitimate purpose;
- Administrative steps followed
- Info not already in IRS possession
- Non harassing purpose
- Proper Service
- Waiver of Formality Defects
- Time and Place for Appearance

K. Timing and the Forced wait. In civil cases generally, a person having the sought after information may be generally willing to turn over the information, but requiring a summons in order to avoid civil liability. The result is often that the giving of the summons and receipt of the material may occur instantly, thus preventing a party to the case from the ability to quash the summons. IRC § 7609(d)(1) prohibits premature examination of the records at issue, not physical acceptance. However, this provision does not always work.

1. In Conner v. United States , 434 F.3d 676 (4th Cir. 2006), the taxpayer appealed the district court's finding with respect to Powell's fourth prong, asserting that by accepting the records from a third party prior to expiration of the twenty-three days in which he, the affected taxpayer, could seek to quash the third-party

summonses, the revenue agent did not follow IRC § 7609(d)(1) nor the IRM. Despite this, the Fourth Circuit held the taxpayer's argument was without merit. Although the IRM had directed the revenue agent not to physically accept records prior to expiration of the twenty-three day period in which the affected taxpayer could seek to quash the summons, **such violation, while relevant to the bad faith inquiry, did not constitute proof by itself of the IRS's bad faith in issuing the challenged summonses.** Therefore, this mechanism does not always protect. It may be good to contact the person served to inform them (1) that the party intents to object, (2) that any "quick turnover" would destroy that party's effective ability to object, & (3) that any premature release of information may subject the discloser to liability to that party for violating that party's rights.

2. There is a special procedure should the IRS receive records from a third party before the expiration of the twenty-third day after notice is given: The received records are to be (a) immediately sealed in an appropriate container; (b) the container marked with the date and time sealed; & (c) the sealed records container is to be secured until either (1) any noticees have failed to file a petition to quash the summons within twenty-three days after notice or (2) the conclusion of legal proceedings addressing noticee's petition to quash the summons.

L. Tolling:

1. Under IRC § 7609(e)(1) , a petition to quash brought by the taxpayer suspends the period of limitations for assessment under IRC § 6501 (Limitations on Assessment and collection) OR under IRC § 6531 (**Limitations for criminal prosecutions**) .

2. Since the limitations period for Assessment and Collection under IRC § 6501 is tolled, above; a petition to quash (especially since Bankruptcy Law & Procedure generally does not block assessment), the tolling of the 3-year and 240 day periods of 11 U.S.C. 507(a)(8) hanging paragraph following paragraph (G) may or may not occur depending upon the nature of the summons.

   Using the analogy provided by the Internal Revenue Manual 5.17.6.24, Summonses Issued to Debtors in Bankruptcy will violate the automatic stay provisions of 11 U.S.C. § 362(a)(6) that prohibit "any act to collect, assess or recover a claim that arose before the commencement of the case under this title" by the issuance of a **"collection summons"** as an "act to collect" and should not be issued while the automatic stay is in effect. (IRM 5.17.8.10(2), Automatic Stay - 11 U.S.C. §. 362.) However, summonses issued as part of Delinquent Return Investigation (DEL RET), or any other investigation where the liability at issue has not been assessed or determined through a court judgment, are not considered collection summonses. Accordingly, these **"investigation summons"** would not violate the automatic stay provision of 11 U.S.C. § 362(a). Thus, the automatic stay provisions of 11 U.S.C. § 362(a) should not bar the issuance of exam purpose summonses.

As a result, it may be that an action to quash a "collection" summons or a summons which includes both "collection" and "investigation" parameters may be viewed as "tolling +30 day" events. Conversely, action to quash a pure "investigation summons" may not to be a tolling event. Issuance of a multiple year summons might also mix "collection" and "investigation" functions.

3. If a summoned party's response to a third-party exam summons (such as to determine TFRP liability) has not been resolved, the **period of limitations for** assessment under IRC § 6501 (civil), or § 6531 (**criminal**) with respect to the taxpayer whose liability the summons is issued, is suspended beginning on the date which is 6 months after the service of the third-party summons. IRC § 7609(e)(2). An exception is made for persons taking action under IRC § 7609(b) (right to intervene or a proceeding to quash).

   The suspension ends upon final resolution of the summoned party's response. Final resolution occurs when (a) the summons or any order enforcing all or part of the summons is fully complied with and (b) all appeals or requests for further review are disposed of or the period in which appeal can be taken or further review can be requested has expired. Treas. Reg. § 301.7609-5(e)(3). Thus, a record keeper who is uncooperative where further proceedings to quash are not undertaken, may open and leave open the taxpayers civil and **criminal liability**.

IV. The Traditional Boundary Between Civil and Criminal Proceedings

A. IRC § 7602 (d)(1) and (d)(2)(A) blocks the summons mechanism when there is a "Justice Department Referral." The last phrase includes secretary of the treasury recommendation for (-1-) a grand jury investigation, or (-2-) criminal prosecution.

B. IRC § 7602 (d)(2)(B) re-enables the summons mechanism upon:
   1. Attorney general notifies the treasury secretary that it will not prosecute
   2. Attorney general notifies the treasury secretary that it will not authorize a grand jury investigation
   3. Attorney general notifies the treasury secretary that it will discontinue a grand jury investigation
   4. Attorney general notifies the treasury secretary that criminal proceedings have reached a final disposition
   5. Attorney general notifies the treasury secretary that it will not prosecute anyone

V. IRS policy on its Forced Gathering of Information

A. Excerpts from the produced documents, most of which were written consistently with public documents, rules, & statutes, but which are summarized into guides which often interpret and draw conclusions on the law which is somewhat pro-government:

   1. A. Reasonable Expectation of Privacy: The analysis of an individual's expectation of privacy with respect to a computer depends on the location and

ownership of the computer and the extent to which it may be accessed by others in the public domain. (Search Warrant Handbook, Office of Chief Counsel, Criminal Tax Division page 56)

2. Like files shared over a network, emails and other transmissions generally lose their reasonable expectation~ privacy and thus their Fourth Amendment protection once they have been sent from an individual's computer. (Ibid)

3. In general, the Fourth Amendment does not protect communications held in electronic storage, such as email messages stored on a server, because internet users do not have a reasonable expectation of privacy in such communications, Further, because the Fourth Amendment applies to government searches rather than searches by private actors, it does not appear to limit the ability of internet service providers ("ISPs") to obtain customer information and disclose it to the government; To fill this gap, the Stored Communications Act ("SCA"), 8 U.S.C. §§ 2701-11,19 establishes certain protections for customer information in the possession of ISPs. *See* 18 U.S.C. § 2703, Specifically, if the government seeks to compel disclosure of the contents of electronic communications and other information without prior notice to customers or subscribers, the SCA requires that a valid search warrant be obtained. *See Guest v. Leis*, 255 F.3d 325, 339 (6th Cir. 2001). (Search Warrant Handbook, Office of Chief Counsel, Criminal Tax Division pages 56 & 57)

4. 9.4.6.7.1.1 (09-05-2008) Restrictions on Electronic Surveillance Techniques: (2) The use of transmitters or other devices used to assist in trailing vehicles or personal property is permitted (see subsection 9.4.6.7.5 and 18 U.S.C. §3117). (March 4, 2009 transmittal of revised IRM 9.4.6, Surveillance and Non-Consensual Monitoring.)

5. 9.4.6.7.2.2 (09-05-2008) Access to "Real-Time" Oral Communication - Wiretap; (2) The following are not covered by the wiretap statute: [and are therefore permitted]:

   e. electronic tracking devices, also called transponders or beepers (18 U.S.C. §3117)

   f. marine and aeronautical communication systems per 18 U.S.C. §2511 (2)(g)(ii)(IV)

   i. electronic communications which are readily accessible by the general public

6. 9.4.6.7.3.1 (09-24-2003) **Stored Electronic Communication/ Transactional Information/Subscriber Information**
   (1) Stored electronic communications (defined in 18 U.S.C. §2510) includes those electronic messages temporarily stored by an electronic communications service provider prior to delivery to the intended recipient or stored as a backup. The term also includes information stored with a " remote computing service".

The term includes display data stored in digital-display pagers and cell phones, stored electronic mail, stored computer-to-computer transmissions stored telex transmissions, stored facsimile data, and private video transmissions.

(2) The statute applies only to data stored with an electronic communications service provider. The real-time interception of transmissions to tone-and-voice pagers is governed by the wiretap statute. (A tone-and-voice-pager enables callers to transmit short voice messages to a subscriber's pager). The acquisition of transmissions to or from display pagers and facsimile transceivers during the transmission(s) requires the approval of the Deputy Commissioner, IRS, an affidavit, an application (which must be approved by the Department of Justice), and a court order obtained in accordance with 18 U.S.C. §2516 and §2518 (see IRM 9.4.6.7.2.7).

7. 9.4.6.7.3.2 (09-05-2008) Disclosure of Stored Communications

(1) Title 18 U.S.C. §2702 prohibits disclosure of electronic communications by providers of electronic communication services or remote computing services unless one or more of the following conditions is met:

a. the information is given to its intended recipient or addressee

b. the information is given to the government pursuant to a court order, search warrant, or subpoena

c. the subscriber/customer gives consent

d. the disclosure is to a facility used to forward the communication

e. the disclosure is incident to testing equipment or quality of service

f. the information was obtained inadvertently and specifically refers to a crime

8. 9.4.6.7.3.3 (09-05-2008) Judicial Process for Obtaining Stored Electronic Communications, Transactional Information, and Subscriber Information

(1) Title 18 U.S.C. §2703 specifies the means by which a governmental entity may obtain access to stored electronic communications. The statute prohibits electronic communications providers from voluntarily providing information to a governmental entity, and requires law enforcement to use either a search warrant, court order, or subpoena (as described below in paragraphs 2, 3, 4, and 5) in order to obtain the following classes of information:

a. The contents of electronic communication in electronic storage with an electronic communication service (such as unopened e-mail) or with a

remote computing service (such as records in off-site archives).

b. Basic subscriber information; including the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity (such as temporarily assigned Internet Protocol (IP) addresses); length of service; and types of services the customer or subscriber utilized.

c. Transactional information, which includes all other records or information pertaining to a subscriber or customer that are not included in a) or b).

(2) If the contents of a wire or electronic communication have been in storage for 180 days or less, the government **must obtain a search warrant**, based on probable cause, to obtain access to the contents. Notice to the subscriber or customer is not required. Because the statute requires the use of a search warrant to obtain this class of information, it is not necessary to prepare an Enforcement Action Approval Form or to justify the use of the warrant as the least intrusive means to obtain the Information. Form 9809, Request for Stored Electronic Information is used to obtain the appropriate authorization for the search warrant application and execution.

(a) The government may obtain the contents of an electronic communication that has been in storage for more than 180 days **using a search warrant, a court order issued under 18 U.S.C. §2703(d), or a grand jury subpoena or administrative summons**.

(b) Notice need not be given to the subscriber if a search warrant is used to obtain the information. The statute requires that the customer or subscriber to whom the information pertains be notified if the government obtains a court order or issues a subpoena or summons for the information. That notice may be delayed for up to ninety days pursuant to 18 U.S.C. §2705. (This initial 90-day period can be extended for an additional 90-day period upon application to the court for an extension under 18 U.S.C. §2705(4).) Exhibit 9.4.6 - 1 is a sample of a 18 U.S.C. §2703(d) Order.

(4) Basic subscriber information may be obtained with any of the means described in (3) above [omitted here] or with a grand jury **subpoena or administrative summons, without providing notice to the subscriber.**

9. For opened e-mail or e-mail stored for more than 180 days, a § 2703(d) court order, grand jury subpoena, or administrative summons is needed. (PDF, Page 17/34 pages, entitled "Internet Surveillance & Tracking Electronic Data CPE 2008")

10. Pursuant to 18 U.S.C. § 2705(b), agents can apply for a court order directing

network service providers not to disclose the existence of compelled process whenever the Government itself has no legal duty to notify the customer of the process. (PDF, Page 28/34 pages, entitled “Internet Surveillance & Tracking Electronic Data CPE 2008”)

11. Email correspondence regarding the 180 day rule:
Jim,
I have not heard anything related to this opinion. We have always taken the position that a warrant is necessary when retrieving e-mails that are less than 180 days old.
Martin E. Needle
Special Counsel, Criminal Tax
202-622-7193
From= Ruger James W [mailto:James.Reger@ci.irs.gov]
Sent," Monday, January 10, 2011 3:02 PM
To= Needle Martin E - CT; Erwin Deborah K - CT
C¢= Ruger James W; Winsten David A (CI)
Subject; US v. Warshak
Martin and Debbie,
In US v. Warshak, 2010 U.S. App. LEXIS, Dec 14, 2010, the 6th Circuit held the government violated the SCA or that parts of the SCA were unconstitutional. It dealt with the government seizing defendants’ emails from the ISP with a subpoena and a court order, rather than with a warrant. Have you heard of any fallout from this opinion.
The convictions were upheld based on good faith reliance.
Thanks - Jim

12. 38.1.1.5.2.1 (08-11-2004) Stored Electronic Communications- 18 U.S.C. § 2701 (Also Known as Title II)(Transmittal is August 7, 2008)

    (3) If the data has been stored for 180 days or less, a probable cause search warrant is required.
    (4) If data has been stored for more than 180 days or data is stored in a Remote Computer Service:
        a. A probable cause search warrant is required, and notice is not required to the subscriber, or
        b. A disclosure court order or grand jury/administrative trial subpoena is required, and notice is required to the subscriber.

    (5) The subscriber is usually notified of government access, unless, upon a showing of good cause, the court delays notice for not more than 90 days. The Government will reimburse computer service for reasonable expenses.

13. SURVEILLANCE HANDBOOK, CRIMINAL TAX DIVISION OFFICE OF CHIEF COUNSEL INTERNAL REVENUE SERVICE (12-94)

B. Access.
18 U.S.C. § 2703 sets forth the requirements for government access to electronic communications in storage and in a remote computing service. This includes data stored in a display pager. In United States v. Meriwether, 917 F.2d 955 (6th Cir. 1990), the sixth Circuit ruled that the seizure of the defendant's telephone number stored in a display pager was within the scope of the search warrant for telephone .numbers of the drug dealer/target's customers, suppliers, and couriers.

If the contents of an electronic communication have been in storage for 180 days or less, the government must obtain a search warrant in order to have the carrier disclose the contents. The search warrant must be based upon probable cause and notice is not required. As with any federal search warrant, it must comply with Fed. R. Crim. P. 41. See 18 U.S.C. S 2703(a).

If the contents of an electronic communication have been in storage for more than 180 days or if the contents are stored in a remote computing service, 18 U.S.C. §2703(b) sets forth the following requirements for obtaining access:

1. Without notice to the subscriber or customer, the government must obtain a Fed. R. Crim. P. 41 search warrant. See 18 U.S.C. §.2703(b)(i).

2. With notice to the subscriber/customer, the government can use:
   (a) An administrative or trial or grand jury subpoena. See 18 U.S.C. § 2703(b)(1)(B)(i);
   (b) A Rule 41 search warrant. See 18 U.S.C. 2703(c) (i) (B) (ii) ; or

   (c) A disclosure court order. See 18 U.S.C. 2703(d).

14. Slide presentation in 2010, page 9/9 contains an erroneous statement that there is no privacy rights to emails

"Emails - Generally No Privacy. United States v. Lifshitz, 369 F.3d 173 (2nd Cir. 2004)

However, the Lifshitz case regarded an appeal of a probation condition in a child pornography case in which "defendant shall consent to the installation of systems that will enable the Probation office or its designee to monitor and filter computer use on a regular or random basis and any computer owned or controlled by the defendant. The defendant shall consent to unannounced examinations of any computer equipment owned or controlled by the defendant". Defense attorney wanted a provision which included only "reasonable suspicion for probationary searches." The use of this case as a basis for stating "no privacy" is grossly incorrect.

VI. Required Records Doctrine

A. Background: The Required Records Doctrine's origin can be traced to Shapiro v.

United States, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948). In Shapiro, a fruit wholesaler invoked his Fifth Amendment privilege in response to an administrative subpoena that sought various business records. Id. at 4-11, 68 S.Ct. 1375. The records were required to be maintained under the Emergency Price Control Act (EPCA), passed after World War II to prevent inflation and price gouging.

B. There have been four circuit court decisions (5th, 7th, 9th, & 11th Circuits) which have held that the Required records doctrine can be used to deny grand jury targets the right to remain silent. It is believed that all four cases involved the government already having the information it needed, & used at grand jury proceedings to force the citizen targeted to "admit to their crimes" on record both by testifying and by producing the same records already in the government's possession. Recall (above) that the usual limitation on pre-possession of the evidence don't apply to grand jury proceedings.

What makes the use of the Required Records Doctrine so absurd is that it is being used to defeat the 5th amendment in the main scenario for which the 5th amendment was needed, the government's forcing a criminal defendant to testify about potential crimes. The Required Records Doctrine was formulated to enable data gathering by a government that needed to keep itself informed, even if the data gathered may or may not have been harmful to a non-target data source. This principle was not intended for use in a single target criminal proceeding to simply force the citizens accused to testify against themselves to in effect become their own prosecutor against themselves.

C. The appeals court cases with brief factual synopsis:

1. In Re: Grand Jury Subpoena, 696 F.3d 428, 432–36 (5th Cir. 2012) No. 11-20750 (09/21/2012) a grand-jury investigation in which the target of the investigation (the "witness") was subpoenaed to produce any records of foreign bank accounts he was required to keep under Treasury Department regulations governing offshore banking. The subpoena requires the witness to produce, for the years 2005 to 2008, [a]ny and all records required to be maintained pursuant to 31 C.F.R. § 103.32 relating to foreign financial accounts.

   Citing the Fifth Amendment, the witness argues that requiring him to produce the records sought would compel him to (1) **admit the existence** of the account, (2) **admit his control over it**, and (3) **authenticate the records**. These admissions would force him to admit to a violation of the Act's record-keeping provisions.

2. In re Special Feb. 2011-1 Grand Jury Subpoena Dated Sept. 12, 2011, 691 F.3d 903, 905–09 (7th Cir. 2012), petition for certiorari denied May 13, 2013. Appellee T.W. (T.W. stands for target witness) learned in October 2009 that the IRS had opened a "file" on him, and that two investigators — an IRS special agent and DOJ tax division prosecutor — were assigned to investigate whether he used secret offshore bank accounts to evade his federal income taxes. About two years into the investigation, a grand jury issued T.W. a subpoena requiring that he produce, any and all records required to be maintained pursuant to 31 C.F.R. § 103.32 [subsequently relocated to 31 C.F.R. § 1010.420] relating to

foreign financial accounts in certain years. T.W. filed a motion to quash the subpoena on the grounds that producing the demanded records would violate his Fifth Amendment privilege against self-incrimination; and that complying with the subpoena may, for instance, reveal that T.W. has not reported bank accounts that should have been reported or that he has reported inaccurate information. On the other hand, if T.W. denies having the requested records, he still risks incriminating himself because failure to keep those records is a **felony** under the Act. The Government argued that the Required Records Doctrine overrides T.W.'s Fifth Amendment privilege because the records were required to be kept pursuant to a valid regulatory program. The district court quashed the Grand Jury's subpoena, concluding that the required records doctrine did not apply because the act of producing the required records was testimonial and would compel T.W. to incriminate himself. The Government appeals that order. Held Reversed, 5th Amendment does not apply.

3. In re Grand Jury Investigation M.H., 648 F.3d 1067, 1071–79 (9th Cir. 2011), cert. denied, 133 S. Ct. 26 (2012) Appellant M.H. is the target of a grand jury investigation regarding whether he used secret Swiss bank accounts to evade paying federal taxes. The district court granted a motion to compel M.H.'s compliance with a grand jury subpoena. duces tecum demanding that he produce certain records related to his foreign bank accounts. The court declined to offer immunity, and under 28 U.S.C. § 1826, held M.H. in contempt for refusing to comply. M.H. appealed.

   The foreign bank account information the Government seeks is information M.H. is required to keep and maintain for inspection under the Bank Secrecy Act of 1970 (BSA), 31 U.S.C. § 5311, and its related regulations. M.H. argues that if he provides the sought-after information, he risks incriminating himself in violation of his Fifth Amendment privilege. The Court agreed that, under the Required Records Doctrine, the Fifth Amendment does not apply.

4. In Re: Grand Jury Proceedings, No. 4-10, 707 F.3d 1262 (11th Cir. 2012) This appeal concerns a grand jury investigation and the issuance of subpoenas duces tecum to a target (the "Target") and his wife, which required the production of records concerning their foreign financial accounts. The Target and his wife refused to comply with the subpoenas by producing their records, asserting their Fifth Amendment privilege against self-incrimination. Held: affirmed the district court's grant of the government's motion to compel. The government's investigation focused on the Target and his wife's failures to: (1) disclose on their tax returns their ownership of or income derived from their foreign accounts; and (2) file, with the U.S. Department of the Treasury, Forms TD F 90-22.1, Reports of Foreign Bank and Financial Accounts ("FBAR"). Subpoenas fell within the Required Records Exception because: (1) federal law required the Target & wife to maintain and make available records of foreign financial accounts; (2) that record keeping requirement were "'essentially regulatory' and not criminal in nature"; (3) the records were of the sort that "bank customers would customarily keep"; and (4) the records had "public aspects." The district

court ordered the Target and his wife to produce the subpoenaed foreign financial account records "or be subject to contempt." Affirmed.

D. Observations.

1. The origins of the Required Records doctrine were never intended as an exception to our country's most fundamental freedoms. There is nothing significantly different regarding "foreign" bank accounts, especially in an age where globalization of business is encouraged. What is the point of denying 5th amendment rights in the case of a crime of omission, where the same 5th amendment rights are guaranteed to citizens to act deliberately perpetrate the most heinous of crimes?

2. It should be remembered that all four of the above cases were not investigatory in nature, and that the grand jury system was used as an afterthought once the specific citizens were precisely targeted for FBAR crimes (presumably associated with tax evasion). Does this mean that any time that the government seeks to pursue criminal charges that the citizen accused can be forced to testify against himself if a foreign financial entanglement is established?

3. The four circuits cited, the 5th, 7th, 9th and 11th have all fallen into line to create an exception to 5th amendment right for citizens not to be forced to testify against themselves where FBAR reporting is concerned. Given the extreme and diffuse subpoena and summons power of multiple agencies and the effect of 9/11, how many other "foreign entanglements" will be found to form an exception to the 5th amendment right not to testify against one's self?

4. Is this improper use of the Required Records Doctrine to create a serepindipitous distinction between criminal defendants who just happen to move money to an overseas location and those that don't? More interestingly, can the "planting"/ "establishment" of an overseas account of a criminal investigation target enable the government to strip the accused citizen of his 5th amendment rights?

5. Where the government already has the records in their possession, the only advantage in forcing the target / citizen accused to testify is for the purpose of insuring an easier, slam-dunk prosecution. Once it is realized that refusal to testify, court orders to testify, a show cause hearing and imprisonment for contempt does not make the prosecution easy enough, will the Required Records Doctrine be similarly used to vitiate the 4th amendment as well?

VII. Other 4th & 5th Amendment Crossovers

A. Internet Data Gathering by the U.S. government, both inside and outside of the U.S.

1. Recent news items included verification by the U.S. government that online data is gathered from overseas. As a technical practical matter the location of the tap

or data re-direction may not be relevant to the limitation of "overseas".

2. A news item from 7/26/13 it was reported that Verizon had received a secret court order compelling them to provide data on ALL of its customer's calls. (http://news.nationalpost.com/2013/06/07/u-s-defends-secretly-gathering-data-on-foreign-nationals-from-internet-companies-such-as-google-and-facebook/)

B. "The Cloud" & Administrative summons as a ticket to federal prison.

1. Administrative subpoenas and criminal law go hand-in-hand. It may be a crime or contemptible to fail to comply with an agency subpoena (perhaps followed by an enforcing court action), some internal criminal laws such as perjury may be related to operations within or under the agency. Administrative subpoenas form a first step in a series of actions which may lead to a full blown criminal investigation which generates evidence that will end in criminal convictions.

2. Examples of administrative subpoena authorizing statutes:
   - 21 U.S.C. 876. (1970 Controlled Substances Act)
   - 5 U.S.C. App.III, 6. (Inspector General Act of 1978)
   - 18 U.S.C. 3486. (health care investigations)
   - 12 U.S.C. 3414 (financial institution records)
   - 18 U.S.C. 2709 (communications provider records)
   - 15 U.S.C. 1681v. (counter terrorism)(credit agency records)
   - 15 U.S.C. 1681u. (FBI for counterintelligence)(credit agency records)
   - 50 U.S.C. 436. (authorized investigative agencies)
   - 18 U.S.C. 2332b(g)(5) (federal terrorism crimes)

3. According to 50 U.S.C. § 438 (Title 50. War and National Defense; Chapter 15. National Security; Access to Classified Information), the term "authorized investigative agency" means "an agency authorized by law or regulation to conduct a counterintelligence investigation or investigations of persons who are proposed for access to classified information to ascertain whether such persons satisfy the criteria for obtaining and retaining access to such information." The number and existence of many more "authorized investigative agencies" is wide open. Examples of some of these agencies include: OPM, FBI, Citizenship and Immigration Services (CIS), CIA, DOD, & NSA. OPM (Office of Personnel Management) contracts with the other agencies to handle some of their investigation. Some of the more perfunctory employee searches may include:

   - National Agency Check (NAC)
   - National Agency Check and Inquiries (NACI)
   - Child Care National Agency Check and Inquiries (CNACI)
   - ANACI (Access National Agency Check with Inquiries)
   - NACLC (National Agency Check, Local Agency Checks, Credit Checks)

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