


# News Analysis: Saving the Fifth Amendment From an Aging Loophole

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The required records doctrine gives the government an easy way to collect information on offshore bank accounts from reticent individuals. Numerous courts have deferred to the government's requests, but tax controversy professionals have pointedly argued that the maneuver tramples their clients' constitutional protection against self-incrimination. Despite the repeated judicial losses taxpayers have suffered, practitioners remain optimistic that their argument may prevail if the Supreme Court grants a newly filed petition for certiorari .

At issue is whether the government is constrained by the Fifth Amendment protection against individuals making self-incriminating statements. That constitutional principle has been enshrined in Supreme Court case law for centuries, although the form and scope of the privilege has shifted over time. Decades ago the Court held that individuals are not required to produce materials (the "act of production") that are testimonial and incriminating. But with the required records doctrine, lower courts have negated that protection if an administrative regime imposes a record-keeping requirement on the individual.

Taxpayers with offshore bank accounts are seemingly faced with a Fifth Amendment privilege question. Under the Bank Secrecy Act, individuals must honor government requests for records of interests in foreign financial accounts, but taxpayers believe that to the extent the IRS doesn't know about the accounts or the extent of the financial interests therein, complying with requests is akin to declaring themselves guilty.

## The Required Records Doctrine

Although production privilege protects individuals from being compelled to produce papers that could reveal incriminatory information, the government has successfully claimed in a number of cases that the required records doctrine supersedes that privilege. In *Shapiro v. United States*, 335 U.S. 1 (1948), the Supreme Court held that the Fifth Amendment privilege against self-incrimination did not prevent the government from acquiring business records that a licensed fruit wholesaler was required to keep under the government's price control scheme.

In the case that is the subject of the cert petition, an unnamed individual was under IRS criminal investigation for offshore tax evasion. At the IRS's request, the grand jury issued to the individual a subpoena for records regarding foreign bank accounts he may have held, even though the government had no information indicating that the individual directly had any such interests. In preparation for the grand jury investigation, the taxpayer claimed that providing the demanded records would incriminate him because it would reveal unreported foreign bank accounts of which the IRS was unaware.

The district court had quashed the subpoena because production was testimonial and would compel the taxpayer to incriminate himself, but the Seventh Circuit disagreed. In a unanimous panel opinion, the circuit court held that the required records doctrine overrode the Fifth Amendment protection. (*In re: Special February 2011-1 Grand Jury Subpoena*, No. 11-3799 (7th Cir. 2012) [📄](#).)

The court summarized the three requirements for applying the required records doctrine: Seeking the records serves a governmental regulatory purpose; the target party customarily had the responsibility of keeping the records; and the records had a public aspect. Satisfying those requirements provides the government with an exception from the Fifth Amendment privilege, the court wrote.

"The government or a regulatory agency should have the means, over an assertion of the Fifth Amendment Privilege, to inspect the records it requires an individual to keep as a condition of voluntarily participating in that regulated activity," the court held. The panel did not elaborate on how a taxpayer's private endeavor to hold a foreign bank account implies "voluntary choice" that "carries consequences" because of a universal record-keeping requirement focused on criminal prosecution.

The Seventh Circuit summarily concluded that the Ninth Circuit's reasoning in a similar case was adequate to show that "records under the Bank Secrecy Act fall within the exception." (*M.H. v. United States*, 648 F.3d 1067 (9th Cir. 2011) [📄](#).)

### **Petition for Certiorari**

The Supreme Court's rejection of a petition for certiorari [📄](#) in *M.H. v. United States* may not mean that the *In Re Special* petition faces a similar fate. The new petition is supported by Paul Clement, a former solicitor general in the George W. Bush administration, and Michael Garcia, a former U.S. attorney for the Southern District of New York, both of whom participated in writing the petition.

The petition cites a law journal article Justice Samuel Alito wrote in the 1980s while serving as a deputy assistant attorney general at the Justice Department, in which he questioned the vitality of the required records doctrine. Alito noted that the required records doctrine developed when the Court focused on a document's content as the basis for applying privilege, while the new act of production standard that the Court developed in *Fisher v. United States*, 425 U.S. 391 (1976), drew upon the idea that producing records in response to a subpoena can have a communicative aspect. That "the act of producing records may amount to testimonial self-incrimination . . . is no less true for required records than for records of any other type," Alito wrote.

A central question is to what extent the Supreme Court's iteration of the required records doctrine in *Shapiro* remains binding precedent. The petitioners argue that *Shapiro* has long ceased to provide a compelling reason for elevating a record-keeping requirement above a constitutional privilege. The required records doctrine as outlined in *Shapiro* never existed as an exception to the Fifth Amendment but "was merely a means of deciding whether records were 'public' or 'private' for purposes of determining whether their contents were protected by the privilege in the first place," according to the petition. Changes in the Supreme Court's Fifth Amendment jurisprudence since

1948 have obsoleted the required records doctrine because the foundation for the privilege lies in the "testimonial character of the act of production" rather than a basis for a document's content, the petition says.

The IRS's crusade against offshore tax evasion involves circumstances different from what the *Shapiro* Court grappled with, the petition argues. The required records doctrine was accepted because it provided access to publicly available materials of which the government already had knowledge because the individual was participating in a regulated commercial industry, but the Bank Secrecy Act regime covers every taxpayer and is a tool for enforcing criminal laws. "The government is attempting to force citizens to reveal the presence or absence of records, in circumstances in which the very act of production will reveal incriminating facts not otherwise public that will serve as the lynchpin of the contemplated prosecutions," the petition argues.

Without Supreme Court intervention, the government will continue to aggressively invoke "the required records doctrine in hundreds of cases like this one to compel individuals to disclose their private foreign banking activities in the hope of uncovering criminal violations," the petition says.

### Dueling Interpretations

Practitioners have assailed the government for its uncompromising position. "The whole scheme is a criminal trap," Mark E. Matthews of Caplin & Drysdale said during a December criminal tax fraud and tax controversy conference in Las Vegas sponsored by the American Bar Association Section of Taxation and Criminal Justice Section. While the government is entitled to use criminal traps, the question in the defense bar is whether the government is then permitted to overwhelmingly convict taxpayers entirely by occasion of their own acts, he said. (Prior coverage [here](#).)

At the same conference, Larry A. Campagna of Chamberlain, Hrdlicka, White, Williams & Aughtry said that the circuit courts have misconstrued the cases they have relied on when upholding the required record exception to the Fifth Amendment, because judges haven't recognized that the precedents arose from wartime situations predating other precedents regarding individuals' rights in the act of production.

Government officials characterize the required records doctrine as a potent and necessary tool in the fight against tax evasion. Ronald Cimino, deputy assistant attorney general in the Justice Department's Tax Division, acknowledged in Las Vegas that the government has several hundred ongoing investigations in which the required records exception is in play but said that the government is applying the doctrine narrowly. "It's not being taken beyond that limited area where there is [judicial] history for its use," he said.

Nanette Davis, assistant chief of the northern criminal enforcement section at the DOJ Tax Division, noted that the government doesn't have the ability to use grand jury summonses for international cases, and the required records exception fleshes out the government's arsenal.

Speaking on an ABA tax section webcast the week of January 14, Matthews, who was counsel in the Seventh Circuit case and helped draft the petition, said that the circuit courts have so far failed to adequately reconcile the decades of potentially conflicting jurisprudence on the required records doctrine with the act of production privilege. "This may be one of the last chances that the [Supreme Court] will look at this," he said.

The IRS often uses a subpoena to obtain most of the evidence necessary to convict a taxpayer for failing to report an offshore bank account as a result of that compelled act, Matthews said, adding that it may be an extreme application of the doctrine because taxpayers aren't acting in a regulated commercial industry. Consequently, not curtailing the government's power raises the possibility that the IRS could add questions to any tax form -- encompassing even nontax information -- that would result in new admissions, he said. "It's hard to see under the current cases where that line would stop," Matthews said.

John McDougal, special trial attorney and division counsel in the Small Business/Self-Employed Division, said during the webcast that the required records exception is necessary when the IRS doesn't know about the account. If the government is already aware of the account's existence and the taxpayer's control of it, the IRS can rely on the foregone conclusion doctrine to compel production of relevant records, he said.

With a constitutional right at stake, even if the Supreme Court eventually upholds the circuit courts that have decided the issue in the government's favor, taxpayers would benefit from a serious discussion of the issues by the Court, which hopefully will grant cert.