



Robert W. Wood

THE TAX LAWYER

TAXES | 5/23/2013

IRS Takes The Fifth, But You Can't

IRS and Treasury officials surely don't like to appear before the [House Committee on Oversight and Government Reform](#), chaired by [Rep. Darrell Issa](#) (R-CA). Who would? But despite all the hoopla and hearings, the IRS scandal just keeps on rolling. Remember Schulz on the old [Hogan's Heroes](#) TV show? "I know nothing!"

But Lois Lerner of the IRS—a key player in the [IRS Tea Party scandal](#)—must know a little more. She read a statement saying she did nothing wrong, but also invoked her constitutional rights under the Fifth Amendment. Isn't that like declining lunch but then bellying up to the table?

Sort of, and the Committee sure didn't like it. Yet unless she was promised full immunity, it was a cautious move to invoke her rights. After all, Fifth Amendment protection is fundamental to our system.

Yet consider a recent string of IRS cases in which **taxpayers** could **not** take the Fifth. In sniffing out foreign bank accounts, the IRS and Department of Justice issue [John Doe summonses](#), indict foreign nationals, and more. The



IRS Director of Exempt Organizations Lois Lerner is sworn in before testifying to the House Oversight and Government Reform Committee on May 22, 2013 in Washington, DC. The committee is investigating allegations that the IRS targeted conservative non-profit organizations with the words 'tea party' and 'constitution' in their names for additional scrutiny. (Image credit: Getty Images via @daylife)

law requiring [FBARs](#) gives the government a hook to subpoena a taxpayer suspected of having an undisclosed offshore account.

You can take the Fifth Amendment and refuse to testify, but can you take the Fifth on the bank records? You might think so. After all, the “act of production” privilege is **part** of the Fifth Amendment guarantee. That way the government can’t compel you to produce incriminating documents. Clearly, bank records or FBARs would incriminate you.

Nevertheless, the [Fifth](#), [Seventh](#), [Ninth](#), and [Eleventh](#) Circuits say the Fifth Amendment provides no protection. The government victory hinges on an old case, [Shapiro v. United States](#), holding that you **can** be forced to produce “essentially regulatory” records if the conduct was not “inherently criminal” and the records are not purely personal. You might think foreign bank records are such hot buttons that The Fifth applies. Nope.

You might think your foreign bank records are purely personal too, especially today. Nope, the government **can** make you incriminate yourself. Lawyers [petitioned](#) the U.S. Supreme Court for certiorari, but the Court just said no [here](#). So, some people are being forced to produce bank records that will land them in jail. It’s a head-scratcher, since The Fifth that protects us from being compelled to testify against ourselves should arguably prevent compelled production of records that do the same thing.

Of course, maybe the comparison is unfair. The required records debate is quite separate from the question whether Ms. Lerner upset Congress and citizens by invoking her Fifth Amendment right. Whether you like it or not, it was her **right**. Yet you have to admit it presents an interesting juxtaposition. An IRS official can take the Fifth. A taxpayer?

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.