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## Why Every American Should Worry About Bank Record Subpoenas

Few can claim ignorance of the IRS push for full transparency of foreign bank accounts and income. Since the shot heard round the world that brought UBS to its knees, billions in taxes and penalties have been paid. Tens of thousands of U.S. taxpayers sheepishly stepped forward to declare overseas bank accounts.

UBS avoided ruin and indictment, the smaller Wegelin private bank did not, and many other banks are not out of the woods.

Meanwhile, account holders of Israel's [Bank Leumi le-Israel Ltd.](#) who thought they were approved for IRS amnesty were just told otherwise. See [IRS Yanks Criminal Amnesty Deal From Taxpayers With Secret Bank Leumi Accounts](#). And FATCA, the Foreign Account Tax Compliance Act, is changing the world even more. See [IRS Implements FATCA, Ramps Up Tax Evasion Battle](#). By 2014, banks worldwide must report on American account holders or face sanctions.

The IRS and Department of Justice have had a remarkable string of victories, from [John Doe summons](#) proceedings to indictments of foreign nationals for



U.S. tax crimes. But what may be the most insidious battle is hardly a blip on most radar screens. It is about [FBARs](#), the once obscure reporting forms, required since 1970. Few knew about FBARs until recently, and enforcement was nearly nil.

Yet now four cases have upheld the IRS in an extraordinary action: serving a subpoena on a taxpayer suspected to have an undisclosed offshore account. The **sole** reason for the subpoena is to prosecute the recipient. The recipient can take the Fifth Amendment and refuse to testify as is our constitutional right, but can the recipient take the Fifth on the documents? You might think so.

Plainly, producing bank documents or FBARs would be incriminating. Yet four Courts of Appeal, the [Fifth](#), [Seventh](#), [Ninth](#), and [Eleventh](#), have held the Fifth Amendment provides no protection. Up until now the government has not been able to compel you to produce documents that incriminate yourself. This “act of production” privilege is part of the Fifth Amendment guarantee.

But some documents—the question is exactly which ones—are outside this documentary privilege. A 1948 case, [Shapiro v. United States](#), says the government **can** require you to produce certain records. The case involved “essentially regulatory” records where the conduct was not “inherently criminal” and the records have “public aspects” rather than being purely personal.

You might think it would be obvious that your foreign bank records are purely personal, especially today. Apparently not. You might think it would be obvious that the government couldn’t make you incriminate yourself when the sole reason for the subpoena is to prosecute you for having an undisclosed foreign account. Apparently not.

Amazingly, these are pending criminal investigations where the target is forced to hand over incriminating documents of purely private bank records. Yet so far four Circuit Courts of Appeal have said they are fair game. The Fifth Amendment, it turns out, isn’t much help if you have a foreign bank account.

Lawyers have [petitioned](#) the U.S. Supreme Court for certiorari, but as with all cert petitions, it is a long shot. It may seem unimportant too. Who cares if a few people (who are almost certainly cheating on their taxes) are forced to produce bank records that will land them in jail? Yet it is worrisome that it is the same constitutional principle that protects us all from having to testify against ourselves.

The view that the Fifth Amendment should prevent compelled production of these records for this specific purpose seems, well, compelling. Even the Justice Department recognizes the sensitivity of this issue, stating that it isn't going to push its records retention theory beyond foreign bank accounts. "Trust us," they seem to say, which is unsettling. See Shamik Trivedi, No Intention to Expand Required Records Doctrine, Keneally Says, 2013 TNT 44-3 (3/6/13).

After all, the tax law is chock full of record retention rules. Many other areas of our increasingly complex lives are too. If they are **all** required records and **all** have somehow taken on public aspects, isn't every record now fair game? It would seem to be a hard door to close.

Hopefully the U.S. Supreme Court will agree to hear both sides argue this important issue. If the Justices do not, Fifth Amendment protection may never be the same.

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