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THE TAX LAWYER

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# IRS Official Lerner Could Face 11 Years In Prison For Tea Party Scandal

On [Hogan's Heroes](#), the TV classic, sergeant Schulz was always saying, "I know nothing!" Many Republicans think former IRS official Lois Lerner knows a lot. Even "I know nothing!" might be preferable to her taking the Fifth Amendment. Now, the powerful House Ways and Means Committee [voted 23-14 to send a criminal referral](#) accusing her of "extreme bias" in scrutinizing conservative groups seeking tax-exempt status.

The [14-page letter](#) to U.S. Attorney General Eric Holder outlined the case saying Lerner "may have violated multiple criminal statutes." It accuses her of using her position to improperly target conservative groups, impeding an investigation with misleading statements, and risking the disclosure of confidential taxpayer information. They are serious charges. However, the Department of Justice is not obligated to act.



Tea Party flag (Photo credit: futureatlas.com)

But if it does, the case could be quite serious. A conviction could carry up to 11 years in prison. Of course, at this stage she hasn't even been charged. She may never be.

Yet the letter accuses Lerner of showing extreme bias and prejudice in overseeing nonprofits. She allegedly flagged the tax-exemption applications of conservative organizations such as Crossroads GPS and turned a blind eye to liberal groups like Priorities USA. The controversy over Lerner's testimony before the House Oversight and Government Reform Committee is itself noteworthy.

She read a statement saying she did nothing wrong, but also invoked her constitutional Fifth Amendment right. The seeming inconsistency can be viewed as a waiver of that right. Whether it was a waiver or not, the Committee sure didn't like it.

Clearly, the nuances matter. The Committee recently [voted 21-12](#) to hold her in [contempt of Congress](#) for refusing to testify about the IRS Tea Party scandal. In a string of IRS cases, **taxpayers** could **not** take the Fifth, and that seems to invite a comparison.

In sniffing out foreign bank accounts, the IRS and DOJ issue [John Doe summonses](#), indict foreign nationals, and more. The 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 bank records?

You might think so, since the “act of production” privilege is **part** of the Fifth Amendment guarantee. The government can’t compel you to produce incriminating documents. Clearly, bank records or FBARs could incriminate you.

Nevertheless, the [Fifth](#), [Seventh](#), [Ninth](#), and [Eleventh](#) Circuits say the Fifth Amendment provides no protection. The government victory in these cases hinges on [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.

You also 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 review, but the Court said [no](#).

As a result, some people are being forced to produce bank records that may land them in jail. Conversely, a retired IRS official with government pension can take the Fifth about official duties that go to the heart of taxpayer perceptions of a fair tax system. Admittedly, these are quite distinct issues. Arguably they are entirely unrelated.

But taxpayers may still scratch their heads, especially as they are writing big checks to the IRS to pay their taxes.

*You can reach me at [Wood@WoodLLP.com](mailto: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.*