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With Offshore Accounts, Fifth Amendment Protections Don't Apply

You might think your bank records—especially foreign banks—are personal and confidential. Yet the government can make you hand over your bank records, even if they incriminate you. It turns out not even the Fifth Amendment can protect you. With FATCA, the pace of foreign account disclosures is frantic, and the stakes have never been higher. The IRS still has two programs running—the OVDP and the Streamlined programs—but it is important to get to the IRS before it gets to you.

That lesson is underscored by another bank records case, [United States v. Chabot](#). In this case, the Third Circuit Court of Appeals added its voice to the many courts that have already said you cannot claim Fifth Amendment protection for bank records. When the IRS issued a summons to the Chabots for their bank records, they refused to comply, citing their Fifth Amendment privilege against self-incrimination.



The Chabots argued that producing the records would incriminate them, and that sounds like a pretty good argument. Even so, they lost in district court. And they lost on appeal too. Imagine getting a summons or subpoena to produce your *own* offshore bank records. The [Fifth Amendment](#) says you cannot be forced to incriminate yourself. It turns out there's an *exception* for "required records." The cases are now quite consistent, and consistently in the favor of the IRS and prosecutors. Under the Required Records Doctrine, it doesn't violate your rights if:

- The government's inquiry is essentially regulatory;
- The information is a preserved record of a kind customarily retained; and
- The records have taken on public aspects making them analogous to a public document.

The matters unfold something like this. Suppose the IRS and Department of Justice are investigating, trying to determine if you used offshore bank accounts to evade taxes. You get a summons or subpoena demanding records you are required to keep under the Bank Secrecy Act of 1970—that's the law requiring [FBARs](#). You refuse to comply based on your Constitutional privilege against self-incrimination, since handing over the records clearly would incriminate you.

But the courts have said that the Required Records Doctrine trumps your Fifth Amendment privilege. The government has to establish the three elements of the Required Records Doctrine. But once they do, you have to hand over the documents no matter how incriminating they are. The Fifth Amendment doesn't allow you to refuse to produce them.

In sniffing out foreign bank accounts, the IRS and Department of Justice issue [John Doe summonses](#), and indict foreign nationals. The law requiring [FBARs](#) gives the government a hook to subpoena a taxpayer suspected of having an undisclosed offshore account. You might assume that you could take the [Fifth](#), since 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 victories hinge 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 Amendment applies. Nope. In one case, lawyers [petitioned](#) the U.S. Supreme Court for certiorari, but the Court said no [here](#).

The result is that some people are being forced to produce bank records that will land them in jail despite Fifth Amendment protections. Meanwhile, remember the IRS official, Ms. Lois Lerner? She upset Congress and citizens by invoking her Fifth Amendment right and refusing to testify. Her refusal was viewed as proper, with prosecutors declining to prosecute her for contempt.

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