Subpoenas Duces Tecum and the Fifth Amendment

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The Fifth Amendment privilege "protects a person only from being incriminated by his own compelled testimonial communications." *Fisher v. United States*, 425 U.S. 391, 409 (1976). Business records are, generally speaking, voluntarily prepared documents, and thus the law does not comprehend any compulsory component to a grand jury subpoena directed at the contents of internal records. This is so even if those records were never meant to see the light of day.

The courts did not always construe the Fifth Amendment so narrowly, however. Indeed for almost one hundred years from the latter part of the Nineteenth Century until the last quarter of the Twentieth Century, the Fifth Amendment was read to protect the contents of private papers against disclosure to the government. The Supreme Court's 1976 decision in *Fisher* withdrew that protection and ushered in an era of greater prosecutorial access to the contents of all manner of business and private papers. With the disappearance of content-based protection. Now, instead of resisting a subpoena on the grounds that disclosure of the *contents* of the requested documents has a tendency to incriminate the witness, a witness may resist on the basis that the *act of producing* the unprotected documents itself constitutes a testimonial communication within the meaning of the Fifth Amendment. *United States v. Doe*, 465 U.S. 605 (1984). Accordingly, if production of documents would disclose to the government the existence of documents in the hands of witness, or the witness' opinion as to the documents' responsiveness to the subpoena (and there is more than speculative possibility of incrimination in revealing such information) an act of production privilege applies to protect the witness from such disclosure. Unless the government grants immunity for the act of production, a witness may withhold the documents from the government and achieve the functional equivalent of the pre-*Fisher* content-based protection.

Despite its obvious usefulness, many practitioners do not invoke the act of production privilege when confronted with a subpoena duces tecum. This may be due to the common misperception that *Fisher* stripped documents of all Fifth Amendment protection and that all that remains in its wake are quashal motions premised on overbreadth, undue burden, oppression and the like. In this article, we explore life after *Fisher*, and the development of the act of production privilege which was firmly established in *Doe*. We review the history and current application of the privilege in the case law and discuss the benefits of it vigorous invocation.

The Erosion of Content-Based Protection

The Supreme Court has considered the application of the Fifth Amendment to document production on several occasions. See, e.g., *Fisher*, 425 U.S. 391; *Doe*, 465 U.S. 605; *Boyd v. United States*, 116 U.S. 616 (1886).

In 1886, the Supreme Court in *Boyd v. United States*, held that the Constitution protects an individual's private business paper from government-compelled production. *Id*. 116 U.S. at 631-32. The *Boyd* analysis rested partially on the view that the Fourth and Fifth Amendments work together to protect privacy interests. *Id*. at 630. It took nearly a century after its decision in *Boyd* for the Supreme Court to retrench from the privacy-bases underprinnings of the decision/ For instance, in *Couch v. United States*, 499 U.S. 322 (1973) the Court held that the Fifth

Amendment did not entitle a taxpayer to prevent her accountant from complying with an IRS subpoena for her tax records. While the Court's decision rested in part on the theory that there was no legitimate expectation of privacy in taxpayer documents handed to an accountant, "knowing that mandatory disclosure of much of the information therein is required in an income tax return" (*Id*. at 334), the primary rationale of the holding lay in the Court's view that "[i]t is the extortion of information from the accused himself that offends our sense of justice." *Id*. at 328. Accordingly, the Court placed great reliance on the fact that because the subpoena in question was directed to the accused's accountant. "there was no enforced communication of any kind from any accused or potential accused." *Id*. at 329.

Three years after *Couch*, in the seminal case of *Fisher v. United States*, the Court explicitly rejected that part of *Boyd* which premised protection of documents on privacy grounds. *Fisher, supra*, 425 U.S. at 401. The Court in *Fisher* established that the Fifth Amendment does not shield documents simply because their contents are incriminating. The Court clarified that "the Fifth Amendment protects against 'compelled self-incrimination, not (the disclosure of) private information.'" *Id*. at 401.

In Fisher, an accountant and a lawyer confronted with Internal Revenue Service summonses of document relating to clients' tax returns asserted a claim of privilege on the grounds that the documents might incriminate the taxpayer/client. The Court rejected the claim of privilege where the taxpayers themselves could not assert such privilege, stating that. "the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communication." *Fisher*, 425 U.S. at 409.

Content-Based Protection May Have Survived *Fisher*, But its Contours are Unclear

Notwithstanding the broad language of Fisher, the Supreme Court in that case explicitly declined to reach the issue of whether the Fifth Amendment privilege nonetheless protects the contents of an individual's tax records in his possession, i.e. his "private papers." *Id*. at 414. In *Doe*, 465 U.S. 605, the Court answered this question in the negative, holding that the Fifth Amendment does not protect the contents of an individual's business records in his own possession. Emphasizing that the Fifth Amendment "protects the person asserting the privilege only from compelled self-incrimination" (*Id*. at 610) the Court held that because the documents at issue were prepared voluntarily, they " ' cannot be said to contain compelled testimonial evidence' in and of themselves." *Id*. at 612, n.9 (citation omitted).

A question remained even after Doe, however, as to whether Boyd nonetheless extended any residual protection to private papers such as diaries, letter and other items which disclosed the "contents of one's mind." *Fisher*, 425 U.S. at 420 (Brennan, J., concurring). In a separate concurrence to *Doe*, Justice O'Conner sought to end this debate, declaring that the *Fisher* decision "sounded the death-knell for *Boyd*." 465 U.S. at 618 (O'Conner, J., concurring). Justice O'Conner stated the "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." *Id*. In contrast, Justice Marshall with whom Justice Brennan joined in *Doe* (concurring in part and dissenting in part), wrote that "[w]ere it true that the Court's opinion stands for the proposition that 'the Fifth Amendment provides absolutely no protection

for the contents of private papers of any kind,' I would assuredly dissent. I continue to believe that under the Fifth Amendment "there are certain documents no person ought to be compelled to produce at the Government's request." *Doe*, 465 U.S. at 619 (Marshall, J., concurring) (quoting *Doe*, 465 U.S. at 617 (O'Conner, J., concurring).)

The current Supreme Court has not spoken on the question of Fifth Amendment protection for private, personal or even business records and there remains a split in the Circuits on this issue, with the Ninth Circuit adopting Justice O'Conner's restrictive view. *In re Grand Jury Proceedings on February 4, 1982*, 759 F.2d 1418 (9th Cir. 1985) (contents of documents not privileged unless creation compelled, regardless of whether subpoenaed documents properly characterized as personal records or business records). Compare *United States v. Davis*, 636 F.2d 1028 (5th Cir. Unit A), *cert. denied*, 454 U.S. 862 (1981) (Fifth Amendment privilege provides content-based protection for all papers written by the accused or under his or her supervision and held in actual or constructive possession in any individual capacity, "regardless of whether they are business-related or more inherently personal in content.") *Id*. at 1043.

The Testimonial Character of the Act of Production

After fastening the Fifth Amendment privilege firmly to its moorings as a "protection against compelled self-incrimination, not [the disclosure of] private information," in *Fisher*, 425 U.S. at 1401, (citation omitted), the Supreme Court recongized that "[t]he act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of the papers produced." *Id*. at 410. The Court went on to prescribe the conditions under which the Fifth Amendment protects the *act of production* of documents as follows: If the act of producing them constitutes tacit testimony concerning: (1) "the existence of papers demanded," (2) "their possession or control by the [witness]," or (3) "the [witness'] belief that the papers are those described in the subpoena [protection with apply]." *Id.*

In *United States v. Doe*, *supra*, 465 U.S. 605, the Supreme Court reaffirmed the act of production privilege, noting that *Fisher* stands for the proposition that even when "the contents of a document may not be privileged, the act of producing the documents may be." *Doe*, 465 U.S. 605 (1984). Accordingly, while the Court has retrenched on content-based protection of documents, it has highlighted the protection due the act of production. As one commentator has noted,

> After *Fisher*, attention focuses not on the ownership, private nature, or incriminating character of the documents themselves, but on whether the claimant will incriminate himself, by admitting each document exists, is in his possession or control, and is responsive to the subpoena. Conceivably, innocuous documents may now be suppressed and highly incriminating documents compelled; the key is whether the judge considers the admissions implied from submitting the documents sufficiently testimonial and incriminating. That the government only wants the documents and is not interested in using the implied admissions is immaterial.

Heidt, *The Fifth Amendment Privilege and Documents – Cutting Fisher's Tangled Line*, 1984, 49 Mo.L.Rev. 439, 473.

The protection accorded the testimonial act of production of documents may be overcome only by a grant of judicial immunity which is coterminous with the reach of the Fifth

Amendment. *Doe*, 465 U.S. at 617, n.17. In *Doe*, the Supreme Court recognized that the government could have made a statutory request for use immunity under 18 U.S.C. §§ 6002 and 6003 to protect the witness from use of the potentially incriminating documents. 465 U.S. at 614-15. Despite the government's repeated assurances in the *Doe* case that it would not use the witness's act of production against him in any way, the Court nonetheless refused to order production of the documents. *Id*. at 615. The Court held that "[the act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of use immunity pursuant to 18 U.S.C. §§ 6002 and 6003." *Id*. at 617.

In *In re Grand Jury Proceedings on February 4, 1982*, 759 F.2d 1418 (9th Cir. 1985) the Ninth Circuit, after vacating submission of the case pending the issuance of the *Doe* decision, promptly followed *Doe* in reversing a district court's ruling denying protection to taxpayer documents held by the taxpayer's lawyers and accountant. The Ninth Circuit held that "[w]e cannot conclude on the basis of the record before us that the act of production would involve only 'trifling and imaginary' incrimination." The Court remanded the case to the district court for a determination as to whether the act of production would relieve the government of the burden of proving the existence, possession, or authenticity of the records. *Id*. at 1421.

The Privilege is Personal and Only Nature Persons or Sole Proprietors May Invoke It

Corporations and partnerships are not sheltered from subpoenas by the act of production doctrine. Because the Fifth Amendment privilege is personal, a corporation may not assert the privilege through its officers, directors, or counsel even if the production might incriminate the owners of the corporation. *Braswell v. United States*, 487 U.S. 99 (1988); *Wilson v. United States*, 221 U.S. 361 (1911). The same holds true for most unincorporated associations, including unions. In *Braswell*, the Court explained that any collective entity, regardless of size, in which financial records are held in a representative capacity, cannot assert the Fifth Amendment. 487 U.S. at 108.

Custodians of records employed by corporations cannot assert their personal Fifth Amendment privilege as a way of protecting corporate documents, even if the act of producing the documents could incriminate them personally. *Braswell*, 487 U.S. at 109-10. The custodian's act of production is an act of the corporation, not a personal act. Id. at 110. However, if the custodian may be able to assert the privilege. See Molly James, et al., *Fifth Amendment: Production of Documents*, 28 American Criminal Law Review 723, 728-29 (1991). At least one court has held that where the subpoena does not make clear whether it is requesting documents held in a custodian's person or representative capacity, and where the act of production would involve testimonial incrimination, the courts should treat the subpoena as a personal subpoena and allow the custodian to assert the Fifth Amendment. *In re Grand Jury Subpoenas Duces Tecum, August 1986*, 658 F.Supp. 474, 481 (D.Md. 1987). Some courts will also allow the custodian to assert the privilege if he can show that the documents are owned by him personally rather than by the corporation. See In re Three Grand Jury Subpoenas, Dated January 5, 1988, 847 F.2d 1024, 1030 (2d Cir. 1988).

It appears that, alone among business entities, the sole proprietor retains Fifth Amendment privileges. See *Braswell*, 487 U.S. at 104.

The Privilege Applies where the Witness Faces a Substantial Hazard of Incrimination

In order to be protected under the act of production doctrine, the act of production must have a tendency to incriminate the subpoenaed party. *Fisher*, 425 U.S. 410. This not a particularly high standard and various courts have stated the standard in terms of the mere possibility of prosecution. For example, in *In re Master Key Litigation*, 507 F.2d. 292 (9th Cir. 1974), the Ninth Circuit stated that the right to assert one's privilege against self-incrimination at oral deposition does not depend on the likelihood, but upon the possibility of prosecution. (Cited in Wright & Miller, *8 Federal Practice and Procedure Civil* (Second Edition), § 2018 at page 20). In *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 871 (7th Cir. 1979), the Seventh Circuit held that when a witness can demonstrate any possibility which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster. Moreover, the Supreme Court has held that '[t]he burden of overcoming as assertion of the Fifth Amendment privilege . . . is one which prosecutors would rarely be able to meet in the early states of an investigation." *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

The possibility of prosecution must not be speculative or remote, however, but rather must present a "real" danger. *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972). While a witness is not required to prove that the information will actually be used against him in a criminal prosecution, he must show that he has a reasonable basis for fearing incrimination. *Hoffman v. United States*, 341 U.S. 479, 486. It is enough to show that the evidence would "furnish a link in the chain of evidence" in order to demonstrate potential incrimination. *Id*. Indeed, it is enough if the material would merely provide a *lead or clue to evidence having a tendency to incriminate. United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir. 1980). *In re Katz*, 623 F.2d 122 (2d Cir. 1980), a Second Circuit case, is instructive on the potentially incriminatory potential of the act of production in a business context. In *In re Katz*, the Court recognized that production by attorney Katz of "all documents" relating to companies owned or controlled by his client would contribute "to the sum total of the Government's information" because "if the corporations [were] somehow linked to the scheme under investigation by the grand jury, production may well be highly incriminatory of appellant." *Id*. at 126.

If a court were to find a prima facie showing of substantial hazard of incrimination insufficient, the Ninth Circuit holds that this is not the end of the inquiry. At that point, the witness must make a more specific showing. *Neff*, supra, 615 F.2d at 1240. "This does not mean that the defendant must confess the crime he has sought to conceal by asserting the privilege. The law does not require him "to prove guilt to avoid admitting it.'" *Id*. (quoting *Marchetti v. United States*, 390 U.S. 39, 50 (1968). The appropriate procedure to examine the witness' claim of hazard of incrimination is via an *in camera* submission to the court. See, e.g., United States v. Argomaniz, 925 F.2d 982 (11th Cir. 1991) (remand for in camera hearing to determine existence of privilege).

Virtually Any Document can be Protected under the

Act of Production Privilege if the Fact of its Production Has a Communicative Aspect

The key inquiry in an act of production case is not whether the document is personal in nature but rather whether "[t]he act of producing evidence in response to a subpoena . . has communicative aspects of its own, *wholly aside from the contents of the papers produced*." *Fisher v. United States*, 425 U.S. 391, 410 (1976) (emphasis added). If the act of producing the documents constitutes tacit testimony regarding 1) the mere existence of the papers demanded, or 2) their possession or control by the witness, or 3) the witness's belief that the papers are those described in the subpoena, then, assuming substantial hazard of incrimination, the recipient of a subpoena has a Fifth Amendment privilege protecting him or her from being compelled to turn over the documents to the government. Id. Accordingly, the privilege clearly is not limited to personal papers, great case should be taken in discussions with the United States Attorney so as to avoid waiver of the privilege, as we will discuss below.

1. The Privilege Protects Against Discovery of the Very Existence of the Documents

If the government possess knowledge of the existence of the documents in the possession of the subpoenaed party, then a good argument lies that production of the documents would add little to the government's existing information, and therefore would have no significant testimonial impact. Practitioners should be aware however, that the extent of the government's knowledge as to the existence of documents is to be distinguished from *imputed knowledge* derived from publicly filed documents or the practices of others similarly situated. *United States v. Fox*, 721 F.2d 32 (2d Cir. 1983). In *Fox*, the Second Circuit held that the Government did not have specific knowledge of the existence of the documents sought pursuant to an IRS summons sufficient to overcome the likelihood that the witness would incriminate himself by production where the scope of the subpoena was overbroad (all books and records of taxpayers for the tax years in question) and where the government had no knowledge of the existence of any records other than what could be inferred from the filed tax returns and the practices of other taxpayers. *Id*. at 36-37. Similarly, as the Third Circuit stated in the *Doe* case,

> In the matter sub judice, however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist - or that the appellee even is somehow connected to the business entities under investigation - is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself.

United States v. Doe, 4695 U.S. at 614, n. 12 (emphasis added). Accordingly, if for example, the government declines to grant the act of production immunity on the basis of ignorance of the nature and scope of the documents in the witness' possession, such a position goes a long way to establishing that production would force communication in violation of the Fifth Amendment.

(a). The Risk of Waiver

Because act of production privilege protects only basic pieces of information such as the very existence of documents, the risk of unintentional waiver is high and the witness and the attorney must be careful not to waive the Fifth Amendment privilege. If, for example, the attorney discusses the existence or location of records with the government, she may by waiving the act of production privilege. See, Rosenblatt, *The Production of Business Records After Braswell: Where We've Been, Where We Are, Where We May Be Going*, 67 Taxes 231, 237 (April 1989). Similarly, if the witness produces documents voluntarily, he will have waived his act of production privilege when a subpoena issues. See *Garner v. United States*, 424 U.S. 648, 654 (1976).

A witness can also waive his privilege by relinquishing control of the documents to a third party before the third party is served with a subpoena. For example, a witness who turned documents over to his accountant before a subpoena issued has waived the act of production privilege. Because the accountant would not be incriminated by the act of producing the documents, the Fifth Amendment privilege protecting production no longer applies. Therefore, whenever the witness is no longer in actual or constructive possession of the subpoenaed documents, the witness may not invoke the privilege. Constructive possession has been defined quite narrowly; it must be "so clear or the relinquishment of possession . . . so temporary and insignificant" for the witness still to be able to claim the privilege. *Couch v. United States*, 409 U.S. 322, 333 91973). Where the third party is the witness's attorney, the documents still may be protected under the attorney-client privilege, albeit not under act of production. However, the witness must be able to show that the documents were transferred to the attorney for the purpose of obtaining legal advice. *Fisher*, 425 U.S. at 402; see also *James, et al.* at 731-32.

2. The Privilege Protects against Disclosure of Possession or Control by the Witness or the Witness's Belief that the Documents are Responsive

In *Fisher*, the Supreme Court recognized that the prevailing rationale for Fifth Amendment protection of documentary evidence rests in the implicit authentication involved in their production. Id., 425 U.S. at 412, n.12. The reasoning of the Third Circuit as cited in the Doe opinion is instructive here:

> The record contains no explanation by the United States as to how documents of this sort could be authenticated without the appellee's explicit or implicit participation. As the district court observed in this connection,
>
> > 'the government can give no assurances that the act of turning over the documents will not constitute incriminating admissions against [the appellee] either before the grand jury or at a subsequent trial, if he is indicted. The government argues that the existence, possession and authenticity of the documents can be proved without [the appelle's] testimonial communication, but it cannot satisfy this court as how that representation can be implemented to protect [the appelle] in subsequent proceedings.'

United States v. Doe, 465 U.S. at 620 (Stevens, J., concurring and dissenting.)

(i) No Privilege Exists where Possession by the Witness is a Foregone Conclusion

Where a witness's possession of the documents is a "foregone conclusion" that would add "little or nothing to the sum total of the Government's information," the act of production privilege will not apply. Fisher, 425 U.S. at 411. For example, since most businesses are presumed to maintain telephone records, a court found that it was a foregone conclusion that a sole proprietor would possess the telephone records subpoenaed by the government, and the privilege therefore did not apply. *In re Grand Jury Subpoenas Dated Oct. 22, 1991 and Nov. 1, 1991*, 959 F.2d 1158, 1163 (2d. Cir. 1992).

(ii) No Privilege Exists where the Witness is Required by Regulation to Maintain the Records exception

Where a person is required by some noncriminal regulatory regime to keep records for public inspection, "the custodian has no privilege to refuse production although their contents tend to incriminate him." *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990). For example, in In re Grand Jury Subpoena (Spano), 21 F.3d 226 (8th Cir. 1994), the Eighth Circuit held that the act of production doctrine does not protect a sole proprietor from having to respond to a subpoena duces tecum demanding business records that are required by the law to be kept. A grand jury investigating odometer tampering issues a subpoena to a sole proprietor who ran an auto dealership. Because the auto dealer was required by federal and state law to keep various records, including odometer records, the court found he could not resist the subpoena under the act of production doctrine. The court noted that an individual admits little by producing documents he is required to maintain, and that by doing business in a field where record keeping is legally required, he effectively waives his Fifth Amendment privilege regarding the production of the documents.

Immunity

As with any assertion of the Fifth Amendment privilege, the government can force production of documents by granting immunity for the act of production. Because the grant of immunity will have "removed the dangers against which the privilege protects," *Kastigar v. United States*, 406 U.S. 441, 449 (1972), the witness can no longer refuse to testify. Where the only basis for asserting the Fifth Amendment is the act of production, the government needs only to immunize the witness for that act. See United States v. Doe, 465 U.S. 605, 617 n. 17 (where privilege extends only to act of production, grant of immunity need not extend beyond that act).

Conclusion

Despite its limitations, the act of production privilege is a powerful tool in the hands of a witness. It adds a potentially conclusive layer of protection to the more common (but less comprehensive) strategies of challenges based on insufficient particularity, overbreadth or undue burden. It also supplements other protections such as those premised on the attorney-client

privilege, attorney work product doctrine, or common law privileges.

Another great benefit of invocation of the act of production privilege is that it can often lead to fruitful negotiations with the government for more general immunity for the witness. If the government wants to use the documents, it often will want testimony or other cooperation from the witness in an effort to fully understand the documents. Accordingly, invocation of the act of production privilege can springboard negotiations with the United States Attorney to the point where transactional immunity may be obtainable. At the very least, the existence of the privilege levels the playing field somewhat for witnesses confronted with often oppressive and burdensome subpoena duces tecum.