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*A Sketch of Supreme Court Recognition of Fifth Amendment
Protection for Acts of Production*

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Abstract. The Fifth Amendment to the United States Constitution declares in pertinent part that, No person... shall be compelled in any criminal case to be a witness against himself. The United States Supreme Court has pointed that acts of production may fall within of the Fifth Amendment privilege against self-incrimination under some circumstances. To do so they must satisfy the privileges general demands that require a (1) personal, (2) governmentally compelled, (3) incriminating, (4) testimonial, (5) communication. The Supreme Court has recognized a claim of privilege in two act of production cases, Doe I and Hubbell. Both cases involved sweeping subpoenas which demanded that individuals engage in the mental exercise of identifying, collecting, and organizing documents that incriminated them or that lead to incriminating evidence.

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A Sketch of Supreme Court Recognition of Fifth Amendment Protection for Acts of Production

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Summary

The Fifth Amendment to the United States Constitution declares in pertinent part that, “No person . . . shall be compelled in any criminal case to be a witness against himself.” The United States Supreme Court has pointed that acts of production may fall within of the Fifth Amendment privilege against self-incrimination under some circumstances. To do so they must satisfy the privilege’s general demands that require a (1) personal, (2) governmentally compelled, (3) incriminating, (4) testimonial, (5) communication.

The act of production doctrine is easily misunderstood for a number reasons. First, the protected communication is most often implicit. The privilege covers an individual’s actions rather than his speech or writing, yet many incriminating actions such as providing a blood sample or a handwriting sample are ordinarily not protected because they are not testimonial. Second, no bright line divides communications that are testimonial from those that are not. Third, the privilege sometimes protects the act of producing existing documents which by themselves are not protected because they were originally prepared voluntarily. Fourth, the privilege protects not only intrinsically incriminating communications but also those that form a link in the chain of incrimination. Some of the uncertainty can be dissipated by a close examination of the facts and views of the Court in the cases where the issue has arisen.

The Supreme Court has recognized a claim of privilege in two act of production cases, *Doe I* and *Hubbell*. Both cases involved sweeping subpoenas which demanded that individuals engage in the mental exercise of identifying, collecting, and organizing documents that incriminated them or that lead to incriminating evidence. This report is an abridged version – without footnotes – of CRS Report RL32184, *Supreme Court Recognition of Fifth Amendment Protection for Acts of Production*.

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within of the Fifth Amendment privilege against self-incrimination under some circumstances. To do so they must satisfy the privilege's general demands that require a (1) personal, (2) governmentally compelled, (3) incriminating, (4) testimonial, (5) communication.

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The act of production first comes into focus in two cases in which the Court rejected its application, *Schmerber v. California*, 384 U.S. 757 (1966), and *Fisher v. United States*, 425 U.S. 391 (1976). *Schmerber* is a blood alcohol case. Schmerber had claimed a privilege against self-incrimination in an effort to bar the results of his blood alcohol test, conducted over his objections, following a serious traffic accident.

The Court was unconvinced. It repeated Justice Holmes' reminder that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it is material," 384 U.S. at 763, quoting, *Holt v. United States*, 218 U.S. 245, 252-53 (1910). Schmerber's claim was fatally defective, "since the blood test evidence, although an incriminating product of compulsion, was neither [Schmerber's] testimony nor *evidence relating to some communicative act or writing by [him]*," 384 U.S. at 765 (emphasis added).

Although no more beneficial to its claimants, the act of production doctrine became clearer with *Fisher*. Fisher invoked the privilege in response to an Internal Revenue Service demand served on his attorney for documents prepared by Fisher's accountant. The accountant's papers had been prepared voluntarily and consequently lacked the element of government coercion required for application of the privilege. The content of the papers aside, the "act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own," the Court pointed out. "Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena," 425 U.S. at 410.

Unfortunately for Fisher his act of production came up short on two other elements. It was neither incriminating nor testimonial. Implicit assertions of the existence and control of an accountant's papers relating to one's taxes are by themselves hardly self-incriminating. For, "surely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver to the taxpayer," 425 U.S. at 412. Neither did the Court consider Fisher criminally imperilled by any implicit authentication of the papers. For, "production would express nothing more than the

taxpayer's belief that the papers are those described in the subpoena. . . . The taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible against the taxpayer without authenticating testimony." 425 U.S. at 412-13.

In *Fisher* and elsewhere, the testimonial element turns on whether production asserts the existence, control or authentication of an item and on the extent to which an individual's implicit evidentiary assertion relieves the prosecution of burden it might otherwise find difficult to bear. In *Fisher*, the Court considered "[i]t doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. ... Surely, the Government is in no way relying on the 'truth-telling' of the taxpayer to prove the existence of or his access to the documents. 8 Wigmore §2264, p.380. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers," 425 U.S. at 412-13.

Fisher's authentication argument proved no more robust. As the Court observed in the context of the incrimination element, Fisher "did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible against [him] without [independent] authenticating testimony." 425 U.S. at 413.

Finally in *United States v. Doe (Doe I)*, 465 U.S. 605 (1984), the Court encountered a case where the act of production was appropriately claimed. A federal grand jury investigating possible corruption relating to municipal contracts served a sweeping series of five subpoenas upon Doe demanding business records of five sole proprietorships under which Doe apparently did business. The lower courts held that Doe's privilege against self-incrimination shielded him from punishment for failure to produce the subpoenaed documents. The trial court declared that, "With few exceptions, enforcement of the subpoenas would compel [Doe] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [Doe's] Fifth Amendment rights The government argues that the existence, possession and authenticity of the documents can be proved without [Doe's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect the witness in subsequent proceedings," 465 U.S. at 613, quoting, *In re Grand Jury Empanelled March 19, 1980*, 541 F.Supp.1, 3 (D.N.J. 1981).

The Court of Appeals concurred, adding that, "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," 465 U.S. at 613, quoting, *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 335 (3d Cir. 1982).

The Supreme Court agreed. In fact, it declined to conduct an independent analysis of whether Doe had established the testimonial and incrimination elements of his claim.

It simply deferred to the District Court’s finding, affirmed by the Third Circuit, that compliance with the subpoenas “would involve testimonial self-incrimination,” 465 U.S. at 613.

There followed in fairly rapid succession three cases in which the Court confirmed the vitality of the action of production doctrine but found its benefits beyond the reach of the claimants before it.

In *Braswell v. United States*, 487 U.S. 99 (1988), the Court held that the president and sole shareholder of a corporation could not interpose the act of production to avoid the commands of a grand jury subpoena for corporate records, even if their *contents* would incriminate him, 487 U.S. at 102. Corporations and other “collective entities” like partnerships or labor organizations enjoy no privilege against self-incrimination, 487 U.S. at 107-8. The privilege stands as no impediment to demands for entity records addressed to their custodial representatives, although the act of production may afford the custodial individual protection.

In *Doe v. United States (Doe II)*, 487 U.S. 201 (1988), the Court encountered a situation akin to *Schmerber* when Doe’s signature was taken from him over his objections. Doe contested a court order that directed him to sign a form authorizing any bank in the Cayman Islands or Bermuda to disclose to the grand jury information concerning any accounts Doe might have in any of the banks. Using the words once again of Dean Wigmore, the Court declared that, “Unless some attempt is made to secure a communication – written, oral or otherwise – upon which reliance is to be placed as involving [the accused’s] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one” and consequently outside the privilege, 487 U.S. at 211, *quoting*, 8 WIGMORE ON EVIDENCE §2265, at 386 (1961 ed.)[at 375 (1940 ed.)] .

In *Doe II*, the execution of the form “is analogous to the production of a handwriting sample or voice exemplar: it is a nontestimonial act. In neither case is the suspect's action compelled to obtain any knowledge he might have,” at 217. Moreover, “[b]y signing the form, Doe makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over such account. Nor would his execution of the form admit the authenticity of any records produced by the bank,” 215-16.

In *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990), Bouknight had maintained custody of her child subject to supervisory restrictions imposed as consequence of serious child abuse, but was held in contempt for failure to produce the child at a custody hearing. The Supreme Court denied her claim of the act of production as defense, confirming that the act of production does not excuse otherwise required compliance with a regulatory scheme, 493 U.S. at 555-56, although it may curtail the government's ability to use compliance for prosecutorial purposes.

Most recently, the Court found the act of production applicable notwithstanding the fact the witness had been granted immunity, *United States v. Hubbell*, 530 U.S. 27 (2000). In *Doe I*, the Court took special note of the government’s failure to secure statutory immunity in the face of an act of production claim; in *Hubbell* the government secured a statutory immunity order that required Hubbell to surrender the subpoenaed documents,

but that necessarily guaranteed that their production would not be used directly or indirectly to incriminate him.

Hubbell had entered a plea agreement under which he pled guilty to tax evasion and fraud and promised to fully cooperate with the Independent Counsel's Whitewater investigation. Concerned that Hubbell was not being completely candid, the Independent Counsel served him with a far reaching grand jury subpoena.

Hubbell responded by asserting his privilege against self-incrimination and was made the subject of a statutory use immunity order. The documents he subsequently supplied and evidence derived from them resulted in his prosecution for crimes apparently unrelated to either his first conviction or Whitewater. The District Court described the government's effort as a "quintessential fishing expedition," and dismissed the indictment, 530 U.S. at 32, *quoting, United States v. Hubbell*, 11 F.Supp.2d 25, 37 (D.D.C. 1998). The Supreme Court essentially agreed.

Content aside, the mental exercise required for Hubbell to gather, sort, and organize the thousands of pages of documents, which he then testified fully complied with the subpoena's demand (other than for a documents privileged on other grounds), handed the prosecution a road map to crimes about which until then it was clueless.

In doing so, the Court felt Hubbell had become an essential or at least valuable witness against himself within the understanding of the Fifth Amendment:

What the District Court characterized as a "fishing expedition" did produce a fish, but not the one that the Independent Counsel expected to hook. It is abundantly clear that the testimonial aspect of [Hubbell's] act of producing subpoenaed documents was the first step in a chain of evidence that led to his prosecution. The documents did not magically appear in the prosecutor's office like "manna from heaven." They arrived there only after [Hubbell] asserted his constitution privilege, received a grant of immunity, and ... took the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena. It was only through [Hubbell's] truthful reply to the subpoena that the Government received the incriminating documents of which it made substantial use in the investigation that led to the indictment.

... It was unquestionably necessary for [Hubbell] to make extensive use of the contents of his own mind in identifying the hundreds of documents responsive to the request in the subpoena. The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox. The Government's anemic view of [Hubbell's] act of production as a mere physical act that is principally nontestimonial in character and can be entirely divorced from its implicit testimonial aspect so as to constitute a legitimate, wholly independent source ... for the documents produced simply fails to account for these realities. 530 U.S. at 42-3

The Independent Counsel argued to no avail that like the *Fisher* tax records, the existence of the *Hubbell* business and tax documents should be considered a "foregone conclusion" and therefore the act of revealing their existence lacked testimonial weight.

The Court simply considered *Doe I*, with its sweeping, minimally particularized commands, a more apt comparison.