

# The Fifth Amendment's Act of Production Doctrine: An Overlooked Shield Against Grand Jury Subpoenas Duces Tecum

By Peter Thomson

Criminal Law & Procedure Practice Group

## About the Author:

Peter Thomson is a Member of the law firm Stone Pigman Walther Wittmann LLC in New Orleans. He previously served for 23 years as a federal prosecutor with the U.S. Department of Justice.

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When asked whether a company can assert the Fifth Amendment and refuse to produce documents demanded by grand jury subpoena, most criminal defense attorneys would answer, “No.” And they would be right: a company—any legal entity such as a corporation, partnership, or L.L.C. (collectively “company”)—has no privilege against self-incrimination under the Fifth Amendment, regardless of whether the contents of the subpoenaed documents incriminate the company.<sup>1</sup> Furthermore, except in some cases involving sole proprietorships,<sup>2</sup> an individual who produces documents on behalf of a company generally also has no Fifth Amendment protection, even where the contents of subpoenaed documents incriminate the individual personally. In either situation, the corporate representative must produce the incriminating documents to the government.

Similarly, when asked whether an individual has a Fifth Amendment right to refuse to produce *private* documents demanded by grand jury subpoena, issued to the individual in his personal capacity, many criminal defense attorneys also might answer, “No.” But they would not be entirely correct. Although the Fifth Amendment generally does not shield the incriminating *contents* of private documents, criminal practitioners often overlook, and sometimes misunderstand, a somewhat elusive jurisprudential rule called the “act of production doctrine.” Under the doctrine, an individual can assert his Fifth Amendment privilege against self-incrimination and refuse to produce subpoenaed documents where the *act* of producing them is incriminating in itself, regardless of the contents of the documents. The doctrine is based on the concept that, in certain situations, the very act of disclosing documents to the government can have a testimonial aspect which, if compelled and incriminating, is equivalent to compelled incriminating oral testimony, which *is* protected by the Fifth Amendment.

## I. THE FIFTH AMENDMENT

The government violates the Fifth Amendment when it seeks to compel an individual to testify to information that can be used to prosecute the individual for a crime or which provides a link in the chain of evidence needed to prosecute. The Fifth Amendment provides, in pertinent part, that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>3</sup> The privilege against self-incrimination extends not only “to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would

1 *Braswell v. United States*, 487 U.S. 99, 107-08 (1988).

2 *See Braswell*, 487 U.S. at 118 n.11 (1988) (leaving open the question of whether the agency rationale supports compelling a custodian to produce documents where the custodian establishes that he is the sole officer and employee of the entity and the jury would inevitably conclude he produced the records).

3 U.S. CONST. amend. 5.

furnish a link in the chain of evidence needed to prosecute . . . [an individual] for a federal crime.”<sup>4</sup> The mere possibility of criminal prosecution is all that is needed to properly invoke the privilege.<sup>5</sup> In fact, a witness may properly assert the Fifth Amendment while simultaneously maintaining his innocence. This is true because the privilege protects even “*innocent* men . . . who otherwise might be ensnared by ambiguous circumstances.”<sup>6</sup>

In order to successfully assert the privilege against self-incrimination, a witness must demonstrate that the information sought by the government is 1) compelled, 2) incriminating, and 3) testimonial.<sup>7</sup> The first two elements—compelled and incriminating—are rarely at issue. “Compelled” simply means not voluntarily given. “Incriminating” means that the information demanded tends to show guilt or furnishes a link in a chain of evidence needed to prosecute. However, the meaning of the third element—testimonial—is not so clear and has been the focus of much debate by scholars and in the courts.

Although the Supreme Court has yet to establish a bright line rule for determining when a witness’ statement is “testimonial,” the Court nevertheless has provided important guidance by holding that a statement is testimonial when it relates to an assertion of fact.<sup>8</sup> Thus, in order to qualify as testimonial, a witness’ “communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a ‘witness’ against himself.”<sup>9</sup> For example, when the government compels a witness “to use the contents of his own mind” to communicate something factual, the communication is equivalent to testimony and the Fifth Amendment bars the government from compelling its disclosure.<sup>10</sup> Certain types of communications or acts, however, though incriminating, have been held not to relate to an assertion of fact, and therefore to be nontestimonial. For example, “a suspect may be compelled to furnish a blood sample; to provide a handwriting exemplar, or a voice exemplar; to stand in a lineup; and to wear particular clothing.”<sup>11</sup> Even though these acts communicate information, none are considered to be “testimonial” within the meaning of the Fifth Amendment. None require a person to use the contents of his own mind to assert a fact.

With respect to government demands for documents, the Supreme Court, in an early landmark case addressing privacy rights, held that the Fifth Amendment’s privilege against self-incrimination protects against the compelled production of *any*

incriminating documents.<sup>12</sup> However, twenty years later, in 1906, the Supreme Court declined to extend the privilege to corporations responding to grand jury subpoenas.<sup>13</sup> It is now settled law that the Fifth Amendment does not protect the contents of business records,<sup>14</sup> which are, for the most part, voluntarily prepared documents and therefore not compelled. Furthermore, under what is known as the “collective entity doctrine,” a company has no Fifth Amendment privilege against self-incrimination. Except in some cases of sole proprietorships, which do not exist independently of the persons who comprise them,<sup>15</sup> the right to resist compelled self-incrimination is a “personal privilege,” which companies and other collective entities do not share.<sup>16</sup> This is true regardless of whether a document produced incriminates the company or its records custodian.<sup>17</sup> Thus, a custodian who produces records on behalf of a company “may not resist a subpoena for corporate records on Fifth Amendment grounds.”<sup>18</sup>

Likewise, the contents of privately held documents are not protected by the Fifth Amendment, unless the government compels their creation or requires the witness to endorse the truth of their incriminating contents.<sup>19</sup> Otherwise, the government may compel the production of private papers.<sup>20</sup> For example, if a document was voluntarily prepared prior to the issuance of a subpoena, it must be produced in response to the subpoena because it is not a compelled statement within the meaning of the Fifth Amendment. Previously created personal calendars, appointment books, day planners, personal journals, diaries, or other similar personal documents or papers, as well as documents prepared to comply with state or federal regulations, such as tax returns, are all examples of private documents and papers the contents of which generally are unprotected by the Fifth Amendment.<sup>21</sup> As the Supreme Court has summarized, the “Fifth Amendment protects against ‘compelled self-incrimination, not (the disclosure of) private information.’”<sup>22</sup>

However, a grand jury’s subpoena power is not unlimited and may not “violate a valid privilege, whether established by the Constitution, statutes, or the common law.”<sup>23</sup> In evaluating whether a grand jury subpoena might violate the Fifth Amendment, courts often examine the objects and scope of the

4 Hoffman v. United States, 341 U.S. 479, 486 (1951).

5 In re Seper, 705 F.2d 1499, 1501 (9th Cir. 1983).

6 Ohio v. Reiner, 532 U.S. 17, 21 (2001) (emphasis in original) (citing Grunewald v. United States, 353 U.S. 391, 421 (1957)).

7 Hübel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177, 189 (2004); see Fisher v. United States, 425 U.S. 391 (1976) (discussed *infra* at section II.A.).

8 Doe v. United States, 487 U.S. 201, 220 (1988).

9 *Id.* at 210.

10 *Id.*

11 *Id.*

12 Boyd v. United States, 116 U.S. 616 (1886).

13 Hale v. Henkel, 201 U.S. 43, 74-76 (1906).

14 United States v. Doe, 465 U.S. 605 (1984) (discussed *infra* at section II.A.).

15 *Braswell*, 487 U.S. at 104.

16 Bellis v. United States, 417 U.S. 85, 90 (1974).

17 *Braswell*, 487 U.S. 99.

18 *Id.* at 113.

19 *Fisher*, 425 U.S. 391.

20 United States v. Hubbell, 530 U.S. 27, 35-36 (2000).

21 See, e.g., United States v. Wujkowski, 929 F.2d 981, 983 (4th Cir. 1991); Grosso v. United States, 390 U.S. 62, 67-68 (1968).

22 *Fisher*, 425 U.S. at 401.

23 United States v. Calandra, 414 U.S. 338, 346 (1974).

demand as well as the method of production requested by the government.

## II. THE ACT OF PRODUCTION DOCTRINE

Although an individual cannot assert the Fifth Amendment's privilege against self-incrimination to shield the *contents* of pre-existing, voluntarily created documents, the act of production doctrine recognizes that the Fifth Amendment protects an individual from being compelled to produce documents (i.e., any written materials, including emails and text messages) in response to a subpoena *where the act of production itself implicitly has a testimonial aspect*.<sup>24</sup> Depending on the facts of a given case, the compelled production of documents may communicate "statements of fact" that incriminate the person producing them, including that the documents (1) exist, (2) are in the person's possession or control, and (3) are authentic.<sup>25</sup> Thus, by merely delivering subpoenaed documents to the government, a witness might effectively be "testifying" to factual information that could be used by the government against that witness, either directly or through the development of investigative leads. In determining whether an act of production is testimonial, federal courts tend to focus on whether the existence of the documents at issue was known to the government at the time of the subpoena's issuance, in which case the witness would merely be "surrendering" them as opposed to testifying to their existence, location, or authenticity. The act of production doctrine is not available to companies because the Fifth Amendment privilege is a personal one.

### A. The Doctrine's Development

The act of production doctrine derives principally from the Supreme Court's 1976 decision in *Fisher v. United States*.<sup>26</sup> In that case, Fisher asserted the privilege against self-incrimination after the Internal Revenue Service (IRS) served a summons on his lawyer for certain tax records prepared by his accountant. The Supreme Court held that the contents of the subpoenaed records, though possibly incriminating, were not protected because they had been voluntarily prepared before the subpoena was issued and thus were not "compelled" within the meaning of the Fifth Amendment.<sup>27</sup> Hence, Fisher could not prevent the records from being produced solely because they contained incriminating evidence against him, regardless of whether the records belonged to him or someone else.<sup>28</sup>

However, the Court recognized that the Fifth Amendment *is* implicated when the act of complying with a subpoena is both "testimonial" and "incriminating."<sup>29</sup> The Court explained that "[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the

subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer."<sup>30</sup> Although Fisher implicitly admitted to the existence and possession of the records by disclosing them, the Court concluded that the disclosure was not "testimonial" because the existence and location of the records sought by the government was a "foregone conclusion."<sup>31</sup> Thus, because the IRS already knew of the existence of the records, and where to find them, their disclosure did not communicate any new information that incriminated Fisher. According to the Court, "the taxpayer add[ed] little or nothing to the sum total of the Government's information" by conceding that he in fact had the records at issue.<sup>32</sup> Compliance with the summons therefore was a question "not of testimony but of surrender."<sup>33</sup> *Fisher*, accordingly, instructs us to ask 1) whether the act of production communicates the existence, control, or authenticity of the document produced and 2) whether the incriminating factual information communicated provides the government with evidence it might otherwise not have. If both elements are met, then the act of production is testimonial.

In a subsequent landmark case, *United States v. Doe*,<sup>34</sup> the Supreme Court held that Doe validly invoked the privilege against self-incrimination in refusing to produce documents subpoenaed by a federal grand jury because his compliance "would involve testimonial self-incrimination."<sup>35</sup> The subpoenas, which were drafted in sweeping terms, demanded the production of business records of a sole proprietorship through which Doe conducted business. The trial court held that Doe's compliance with the subpoenas would infringe on his Fifth Amendment rights because it would require him to admit that the records existed, were in his possession, and were authentic. The Court of Appeals agreed, finding no proof in the record that the government knew that the records were in Doe's possession or control prior to issuing the subpoenas.<sup>36</sup> In fact, the Court accused the government of trying to compensate for its lack of information by demanding that Doe be an informant against himself.<sup>37</sup> The Supreme Court agreed, holding that Doe's act of compliance would necessarily involve testimonial self-incrimination, against which he was protected by the Fifth Amendment.<sup>38</sup>

In *United States v. Hubble*,<sup>39</sup> the Supreme Court expounded on *Fisher*'s "foregone conclusion" analysis in the context of the infamous Clinton Whitewater investigation. Hubble was served with a subpoena demanding the production of a vast number of

<sup>24</sup> *Hubbell*, 530 U.S. at 36.

<sup>25</sup> *Id.*

<sup>26</sup> 425 U.S. at 408.

<sup>27</sup> *Id.* at 409-10.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 410.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 411.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (quoting *In re Harris*, 221 U.S. 274, 279 (1911)).

<sup>34</sup> 465 U.S. 605.

<sup>35</sup> *Id.* at 613.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 530 U.S. 27.

documents spanning a several-year time period. After he asserted the Fifth Amendment privilege and refused to comply with the subpoena, the government granted him immunity, obtained the documents, and then indicted him based on the *contents* of the documents. The Supreme Court held that Hubbell could not be prosecuted based on the contents of the documents because the government had made derivative use of the testimony implied by their production during its investigation that led up to the criminal charges.<sup>40</sup> Thus, the government was unable to demonstrate that the evidence it used to obtain the indictment was “wholly independent” of (i.e., not derivatively sourced from) Hubble’s immunized testimonial act of subpoena compliance.

In dismissing the indictment, the Court reasoned that the existence and locations of the documents sought by the government were not a “foregone conclusion” at the time the subpoena was issued to Hubble. The Court stressed that the government cannot prosecute individuals based on incriminating materials obtained through “fishing expeditions” conducted using grand jury subpoenas *duces tecum*—subpoenas for the production of evidence.<sup>41</sup> When a subpoena is so expansively worded, the Court explained, the testimonial aspects of production can be consequential. Hubble’s assembly and production of the records, the Court added, was tantamount to answering a series of interrogatories asking a witness to identify and disclose the existence and locations of specific documents fitting certain broad descriptions. In order to respond to the subpoena, the Court explained, Hubbell was required to make extensive use of “the contents of his own mind” for the purpose of identifying the documents and, in doing so, was assembling pieces of the government’s case against himself. This, according to the Court, clearly made his compliance with the subpoena “testimonial” within the meaning of the Fifth Amendment.

### *B. Raising the Doctrine as a Shield in Practice*

Under the right circumstances, the act of production doctrine can be a formidable shield against government compelled disclosure of private documents where the production would lead to the government’s discovery of the existence of documents, the subpoenaed party’s possession of them, or the belief by the witness that the documents are responsive (i.e., authentic). Nonetheless, when faced with subpoenas *duces tecum*, many criminal defense attorneys do not consider—much less raise—the act of production doctrine. Most motions to quash subpoenas are based on the grounds of vagueness, overbreadth, unreasonableness, and/or undue burden on the responding witness. As a practical matter, however, most of those types of challenges have limited success, largely due to the wide latitude given to federal prosecutors and grand juries by the courts.

There are several possible reasons criminal practitioners might neglect to invoke the act of production doctrine as a shield against grand jury subpoenas. First, it might be due to a misunderstanding of the Supreme Court’s decision in *Fisher*, which declined to extend Fifth Amendment protection to private tax records held by an individual. Second, it might be due to a

misunderstanding of how the mere production of documents can be protected under the Fifth Amendment when the contents of the same documents are not. Distinguishing the *act* of producing the records from their incriminating *contents* as the basis of the Fifth Amendment claim can be difficult, particularly since invoking the act of production doctrine with respect to documents also may effectively shield their incriminating contents. Third, in situations where an act of production would provide the government with a link in the chain of evidence needed to prosecute the witness, an even more complicated picture can arise. Because the doctrine is grounded in the Fifth Amendment, it protects not only acts of production which are intrinsically incriminating to the subpoenaed witness, but also productions which provide the government with a link in the chain of evidence needed to prosecute. Finally, because of the lack of judicial clarity regarding the meaning of “testimonial,” criminal practitioners might find it difficult to discern the circumstances under which an act of production is protected by the Fifth Amendment, particularly since no bright line test has been established by the Supreme Court.

Notwithstanding the lingering ambiguity, since *Hubble* it appears that the determination of whether an act of production qualifies as a “testimonial communication” turns on the foregone conclusion test, which asks whether the government knew of the existence and location of the subpoenaed documents prior to their production.<sup>42</sup> Categorical requests for documents the government believes are likely to exist are not sufficient.<sup>43</sup> Although the government apparently does not have to show “actual knowledge” of the existence of each and every document described,<sup>44</sup> it nevertheless must establish its knowledge with “reasonable particularity,”<sup>45</sup> not merely infer that the documents exist and are in the control of the subpoenaed party. Only where the government can make such a showing is the production not considered to be compelled testimony protected by the Fifth Amendment.<sup>46</sup>

Nonetheless, grand jury subpoenas sometimes are drafted so broadly that they encompass almost all conceivable written materials under a person’s control. For example, a subpoena might demand that an individual produce any and all emails and texts in his possession, or call for the production of “any and all documents” related to a certain entity or subject matter where the term “document” is defined in excessively broad if not almost limitless terms. But such expansively worded subpoenas are classic examples of the type of fishing expeditions that have been

<sup>40</sup> *Id.* at 43.

<sup>41</sup> *Id.*

<sup>42</sup> See *United States v. Ponds*, 454 F.3d 313, 320 (D.C. Cir. 2006).

<sup>43</sup> *United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d 1335, 1347 (11th Cir. 2012).

<sup>44</sup> *In re Grand Jury Subpoena Dated April 18, 2003*, 383 F.3d 905, 910 (9th Cir. 2004).

<sup>45</sup> *Id.*; *Ponds*, 454 F.3d at 321.

<sup>46</sup> *Hubbell*, 530 U.S. at 44–45; *Hoffman*, 341 U.S. at 486; *In re Grand Jury Subpoena*, 383 F.3d at 910 (“[I]t is the government’s knowledge of the existence and possession of the actual documents, not the information contained therein, that is central to the foregone conclusion inquiry.”).

struck down time and again as unconstitutional.<sup>47</sup> Complying with such an exhaustive list of demands, in some cases, can be “tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions,”<sup>48</sup> which was condemned by the Court in *Hubble*. Further, the fact that a demand might be limited to documents or records related to a specific entity or subject matter does not necessarily cure its unconstitutionality where a response might reveal the existence, location, or authenticity of documents unknown to the government.<sup>49</sup>

Moreover, the more broadly a subpoena is written, the more likely the government is unable to identify specific information that both exists and is in the individual’s possession. In such instances, the government might not merely be asking for the surrender of documents actually known to it, but instead might be employing the subpoenaed party to help unearth additional evidence against that party.<sup>50</sup> The government cannot subpoena the “testimonial aspect” of a person’s production of information to use it as a road map to uncover evidence which can be used against him.<sup>51</sup>

Finally, grand jury subpoenas also sometimes actually demand that witnesses generate certain types of documents, including compilations. A subpoena might demand a list of information predicated, or not, on the contents of preexisting written materials in the witness’ possession. These could be lists of all bank accounts, certain items, relationships with other persons, interests in certain investments, or names of legal entities the witness has an interest in. In all of these examples, the act of producing the subpoenaed information would be testimonial in character and, if potentially incriminating, protected under the Fifth Amendment.

### III. CONCLUSION

In order to successfully assert the Fifth Amendment, a subpoenaed party must show that the information sought by the government is compelled, incriminating, and testimonial in character. The meaning of “testimonial” often is at issue, particularly in the context of producing documents demanded by a subpoena *duces tecum*. In determining whether an act of producing documents has a testimonial aspect protected by the Fifth Amendment, courts now seem to focus on the foregone conclusion test, which prohibits categorical demands for documents the government *believes* but does not *know* exist. The pivotal question under the foregone conclusion test is whether

the existence and location of the documents at issue were known to the government with reasonable particularity at the time the subpoena issued. If not, then the witness’ act of producing the documents could communicate information that the government did not have, such as the existence, possession, and authenticity of the subpoenaed documents. The government cannot try to use the witness’ testimony—inherent in the act of complying with the subpoena—against him in violation of the Fifth Amendment. In such instances, the act of production doctrine can be raised as a shield against government compelled disclosure of private documents.

<sup>47</sup> See, e.g., *Hubbell*, 530 U.S. 27; *Doe*, 465 U.S. 605; see generally N.J. Legislative Select Comm. on Investigation v. Kelly, 2014 N.J. Super. Unpub. LEXIS 3109, 2014 WL 1760028 (N.J. Super. Ct. Law Div., Apr. 9, 2014).

<sup>48</sup> *Hubbell*, 530 U.S. at 41-42; see also *Stettin v. Gibraltar Private Bank & Trust Co.*, No. 09-34791-BKC, 2011 Bankr. LEXIS 5005, at \*12 (Bankr. S.D. Fla. June 7, 2011) (denying motion to compel production of “all documents” and “all communications” relating to a Ponzi scheme).

<sup>49</sup> *Stettin*, No. 09-34791-BKC, 2011 Bankr. LEXIS 5005, at \*29.

<sup>50</sup> *Doe*, 465 U.S. at 614 n.12.

<sup>51</sup> See *Hubbell*, 530 U.S. at 42.

