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Self-Incrimination Privilege in Actions Involving Government Regulated Enterprises

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The Self-Incrimination Privilege in Actions Involving Government Regulated Enterprises

Amato v. Porter is one of several recent federal court cases dealing with the privilege against self-incrimination in actions for treble damages under the Emergency Price Control Act.[1] Appellant was a wholesale distributor of bananas, and the administrator instituted the action alleging overcharges on banana sales.[2] Evidence upon which the District Court allowed recovery for the government was secured from records which the administrator had ordered appellant to keep.[3] The dealer claimed the privilege against self-incrimination as to those records.[4] The Circuit Court ruled for the government on the grounds that the evidence was taken from quasi-public records which were beyond the privilege and that since the action was remedial rather than penal the privilege did not apply.

The Fifth Amendment provides that no person can be compelled to be a witness against himself in a criminal proceeding.[5] But a brief background illustrates the soundness of the court's position in the *Amato* case. Only he who possesses the privilege can claim it.[6] As to corporations, therefore, the Supreme Court has emphasized that an official cannot invoke the privilege as to corporate records although they are in his custody and may incriminate him.[7] Nor can it be claimed by the corporation itself.[8] But if the corporate records are in reality personal ones, the privilege applies.[9] The same reasoning is relevant as to the records of labor unions.[10] The test is whether the organization is such that it can be said to embody common or group interests as contrasted to purely private or personal interests of its constituents.[11]

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[1] 157 F. (2d) 719 (C.C.A. 10th, 1946).

[2] Emergency Price Control Act of 1942, §205(e), 56 Stat. 34 (1942), 50 U.S.C.A. Appendix, §925(e) (1944). Under this provision, the buyer within one year of the violation may sue the seller for treble damages; however, if a qualified buyer fails to institute an action within thirty days of the violation, the administrator may institute such action on behalf of the United States within such one year period.

[3] Emergency Price Control Act of 1942, §202(b), 56 Stat. 30 (1942), 50 U.S.C.A. Appendix, §922(b) (1944). Administrator may require anyone subject to the Act to furnish information and keep various records, and he may subpoena them. See 7 Fed. Register 10708 and 8 Fed. Register 5408 for such orders. §1499.12 of General Maximum Price Regulation, in short, said that commodity or service sellers subject to regulation should keep the customary records as to prices.

[4] The Court considered the question of whether appellant was immune from prosecution under immunity provisions of the statute: Emergency Price Control Act of 1942, §202(g), 56 Stat. 30 (1942), 50 U.S.C.A. Appendix, §922(g) (1944) which incorporates the immunity provisions of the Compulsory Testimony Act of February 11, 1893, 27 Stat. 443 (1893), 49 U.S.C.A. §46 (1946). That this is merely another way of posing the scope of the privilege against self-incrimination see: Brown v. Walker, 161 U.S. 591 (1895).

[5] U.S. Const. Amend. V.

[6] Wigmore, Evidence (3rd ed. 1940) §2259.

[7] Wilson v. United States, 221 U.S. 361 (1911); Oklahoma Press Pub. Co. v. Walling, 66 S.Ct. 494 (1946).

[8] Hale v. Henkel, 201 U.S. 43 (1906); Wigmore, Evidence (3rd ed. 1940) §2259a. This is accepted by most courts.

[9] McAlister v. Henkel, 201 U.S. 90 (1906); Wigmore, Evidence (3rd ed. 1940) §2259b.

[10] United States v. White, 322 U.S. 694 (1943).

[11] *Ibid.*

Another principle is available in the situation where Congress constitutionally regulates business enterprise; namely, that designated records of the regulated activity do not come within the privilege against self-incrimination.[12] This does not mean, however, that the government has complete freedom of access to those records. At this point, the corollary problem of illegal search and seizure must be met.[13] Generally, access is secured either by permission or through use of the administrative subpoena power which is a common provision in modern statutes.[14] Such subpoenas are judicially enforceable, but the judiciary may restrict the scope of the subpoena issued by the administrative agency. The Supreme Court has indicated that Fourth Amendment objections may be encountered when records are indiscriminately subpoenaed.[15] The evidence called for must be material to the investigation.[16] More recent cases, however, have phrased a liberal rule in favor of the administrator. It becomes a question of whether the evidence requested "relates or touches" upon the matter under investigation;[17] and in a 1946 decision involving a subpoena issued under the Fair Labor Standards Act, the Supreme Court held that the administrator was not to be restricted by a forecast of the probable results of his investigations.[18] Under the Emergency Price Control Act of 1942, the administrator may subpoena records which he has ordered to be kept.[19] But his subpoena power is subject to those judicial restraints already indicated.[20] Of course, if the party consents to a perusal of his records, the illegal search and seizure objections may be avoided.[21]

Assuming consent or the issuance of a judicially enforceable subpoena, the holding of the *Amato* case that the privilege against self-incrimination does not apply as to quasi-public records, i.e. those required to be kept by law, is a logical one.[22] Certainly, there was never any doubt as to public records which were the property of the state.[23] The same problem was early encountered under the Inter-

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12 Amato v. Porter, 157 F. (2d) 719 (C.C.A. 10th, 1946).

13 U.S. Const. Amend. IV.

14 Emergency Price Control Act of 1942, §202(b)(e), 56 Stat. 30 (1942), 50 U.S.C.A. Appendix, §922(b)(e) (1944); Fair Labor Standards Act of 1938, §§9, 11(a), 52 Stat. 1066 (1938), 29 U.S.C.A. §§209, 211(a) (1942); Federal Trade Commission Act, §§9, 10, 38 Stat. 722 (1914), 15 U.S.C.A. §§49, 50 (1941).

15 Federal Trade Commission v. American Tobacco Co., 264 U.S. 305 (1924).

16 Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894).

17 Cudahy Packing Co. of La. v. Holland, 315 U.S. 357 (1942).

18 Oklahoma Press Pub. Co. v. Walling, 66 S.Ct. 494 (1946).

19 Emergency Price Control Act of 1942, §202(b)(e), 56 Stat. 30 (1942), 50 U.S.C.A. Appendix, §922(b)(e) (1944).

20 Bowles v. Beatrice Creamery, 146 F. (2d) 774 (C.C.A. 10th, 1944); Bowles v. Cherokee Textile Mills et al, 61 F. Supp. 584 (E.D. Tenn. 1945).

21 Davis v. United States, 66 S.Ct. 1256 (1946), noted 37 J. Crim. L. & Criminology 406 (1947): consent cannot be secured through undue duress, but duress will not be so readily implied where public documents kept at the place of business are involved.

22 Accord. Bowles v. Glick Bros. Lumber Co. et al, 146 F. (2d) 566 (C.C.A. 9th, 1945), cert. denied, 325 U.S. 877 (1945); *Cf.* Zap v. United States, 66 S.Ct. 1277 (1946), noted 37 J. Crim. L. & Criminology 406 (1947): Court held that petitioner waived his rights as to search and seizure objections when he agreed to permit inspection of his accounts and records in order to obtain government business.

23 Wigmore, Evidence (3rd ed. 1940) §2259c.

state Commerce Act, and the Supreme Court said that records of transactions which were subject to the regulation of Congress could not be refused on self-incrimination grounds.[24] When the law is constitutional, therefore, the reasoning excluding the privilege is that the duty to keep the records rises anterior to the crime; and the citizen is on notice that at some future time, a report must be made.[25] Practically speaking it is difficult to see how a law could be effectively administered and violations of it punished if the rule were to be otherwise.[26]

If the second grounds for the holding in the *Amato* case be correct; namely, that an action for treble damages is remedial rather than penal, it is immaterial whether the records upon which the recovery was based were private or quasi-public. This follows under the Fifth Amendment as facts involving a civil liability are not within the privilege.[27] Here the action was thought to be remedial because its primary purpose was ". . . to protect the public and effectuate a public policy sought to be accomplished by the Act."[28] Thus phrased the test as to the nature of the action ignores the sanction of treble damages and looks essentially to the intent of Congress. Congressional reports suggest that this provision was viewed as a policing aid in that it would deter initial violations of the Act and mitigate the enforcement duties of the government.[29] The history of the double damages section of the Fair Labor Standards Act was before the Congress together with the knowledge that actions thereunder had been held to be civil rather than criminal.[30] Similarly, such actions under the Sherman and Clayton Anti-Trust Acts are civil rather than criminal.[31] The size or seeming severity of the recovery is no conclusive clue if, indeed, a clue at all. In *Marcus v. Hess*,[32] for example, a sizable recovery was had in a *qui tam* proceeding after the respondent had been indicted and fined for defrauding the government. It was held, however, that the forfeiture and double damages provision of the defrauding statute involved did not constitute a criminal action placing the respondent in double jeopardy. Although a restitutional element was present in that the government got part of the recovery, the Court indicated that Con-

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[24] Baltimore and Ohio Railroad Co. v. I.C.C., 221 U.S. 612 (1911).

[25] Wigmore, Evidence (3rd ed. 1940) §2259c.

[26] United States v. White, 322 U.S. 700 (1943): the Court said: "Basically, the power to compel the production of records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records."

[27] Wigmore, Evidence (3rd ed. 1940) §2254. Conversely, it follows that if quasi-public records are beyond the privilege, it is immaterial whether the action be penal or remedial.

[28] Amato v. Porter, 157 F. (2d) 721 (C.C.A. 10th, 1946).

[29] S. Rep. No. 931, 77th Cong. 2d Sess. p. 9 (1942).

[30] Fair Labor Standards Act of 1938, 52 Stat. 1062, 1069 (1938), 29 U.S.C.A. §§206(a), 216(b) (1942); Robertson v. Argus Hosiery Mills, Inc., 121 F. (2d) 285 (C.C.A. 6th, 1941).

[31] Sherman Act as amended, 38 Stat. 731 (1914), 15 U.S.C.A. 15 (1941); United Copper Securities Co. v. Amalgamated Copper Co., 232 F. 574 (C.C.A. 2nd, 1916), Roseland v. Phister Mfg. Co., 125 F. (2d) 417 (C.C.A. 7th, 1942).

[32] 317 U.S. 537 (1942).

gressional intent and statutory construction were the essential criteria as to the nature of the action.

The Congressional intent standard is clear enough in those cases which do not transcend constitutional limitations; but on the other hand, the mere description in the statute cannot make a civil action out of one which is in reality a criminal one.[33] In *Huntington v. Attrill*, the Court said that the action was criminal if its purpose were to punish an offense against the public justice of the state and civil if designed to compensate a private party for an individual wrong.[34] Such tests, however, are difficult of application in penumbral situations.

Under the Emergency Price Control Act, the offender may be both criminally indicted and sued for treble damages.[35] One case holding a treble damage action to be penal said by way of dictum that it, nevertheless, would not constitute a bar to a later criminal prosecution by the government.[36] Legislation providing for two sanctions for the same misconduct by criminal indictment and a civil action for damages was common at the time of the adoption of the Fifth Amendment.[37] Although one senses that these civil actions are penal in nature because of the heavy recoveries allowed,[38] the existence of a special damage to the individual aside from a general wrong to the public seems adequate grounds for an action distinct from the criminal one. The private wrong appears more clearly when the individual brings the action for treble damages. But the price control cases have made no distinction on this ground.[39] Statutory treble damages are punitive damages. Thus punitive damages to the injured plaintiff may be considered as an award for bringing the wrongdoer to justice.[40] It is also said that the plaintiff is securing a gratuity from other members of the state because a wrong to the state has been committed.[41] A rationale of the *Amato* case where the administrator brought the action could be that he is suing as a representative of the consuming public which public, as an entity, is incapable of bringing the action. The essential purpose is not changed because the administrator presses the action. The public wrong can be vindicated by independent criminal proceedings.

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[33] Huntington v. Attrill, 146 U.S. 657 (1892). *Cf.* Everly v. Zepp, 47 F. Supp. 303 (E.D. Pa. 1944) wherein emphasis placed on statutory designation as "damages."

[34] 146 U.S. 657 (1892).

[35] Emergency Price Control Act of 1942, §205(b)(e), 56 Stat. 34 (1942), 50 U.S.C.A. Appendix, §925(b)(e).

[36] Bowles v. Trowbridge, 60 F. Supp. 48 (N.D. Cal. S.D. 1945).

[37] Marcus v. Hess, 317 U.S. 537 (1942).

[38] Marcus v. Hess, 317 U.S. 537 (1942); L. P. Steuart & Bros., Inc. v. Bowles, 322 U.S. 398 (1944) wherein a suspension of a retail oil dealer's operations was held to be remedial.

[39] Miller v. Municipal Ct., 22 Cal. (2d) 818, 142 P. (2d) 297 (1943): contrary to Amato case, the Court held the action to be penal whether brought by administrator or a private party.

[40] Neal v. Newburger Co., 154 Miss. 691, 123 So. 861 (1929).

[41] McCormick, Law of Damages (1935) 277.