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FIFTH AMENDMENT: COMPULSORY PRODUCTION OF INCRIMINATING BUSINESS RECORDS

Since the 1886 decision of *Boyd v. United States*,¹ the fifth amendment² has been read to accord an individual the right to limit the compulsory production of incriminating private papers. Until recently, this special right to privacy established in *Boyd* has been limited only to the extent that it has not protected against the production of records of corporations,³ business associations⁴ and partnerships.⁵ An individual who holds documents in a representative capacity for one of these organizations cannot resist the mandatory production of these types of records.⁶ However, a sole proprietor, so long as his business is not recognizable apart from himself, has been allowed to use the fifth amendment to protect himself from having incriminating private business documents subpoenaed.⁷

Recently, the judicial trend has been to restrict even the sole proprietor's fifth amendment rights. The Supreme Court, in *Fisher v. United States*⁸ and *Andresen v. Maryland*,⁹ strictly interpreting the fifth amendment, held that the privilege against self-incrimination did not prevent disclosure of documents prepared by an accountant¹⁰ or documents seized in a warrant-supported search.¹¹ In these cases the Court ignored privacy considerations and relied solely on the fact that the businesses' records were obtained without literally compelling an individual to testify against himself. In *In re Grand Jury Empanelled*¹² the Third Circuit held that the government could acquire business records indirectly from the employees of a sole proprietor without infringing the sole proprietor's right against self-incrimination. In both *Fisher* and *Grand*

Jury Empanelled the courts refused to adopt the argument that the fifth amendment should apply since the individual whose records were in question was in constructive possession of the documents even though they were in the hands of others.¹³

I

The fifth amendment states that no person "shall be compelled in any criminal case to be a witness against himself." In *Boyd v. United States*¹⁴ the amendment was found to apply to protect against the compulsory production of incriminating private papers. The Supreme Court viewed the fifth amendment as protecting "the sanctity of a man's home and the privacies of life."¹⁵ Since the *Boyd* decision, the fifth amendment protection afforded business records has been continually restricted. The Supreme Court has held that the fifth amendment right of an individual will not preclude the compulsory production of the books of a corporation¹⁶ or of an unincorporated association.¹⁷ In *Bellis v. United States*¹⁸ the Court stretched this corporate exception to fifth amendment protection to cases where the organization has "a recognizable juridical existence apart from its members."¹⁹ In *Bellis* one of three lawyers who were partners was found to be holding the partnership records in a representative capacity and thus could not assert his fifth amendment right to protect against disclosure of the partnership's documents.²⁰

Recently, in *Fisher v. United States*,²¹ the Supreme Court abandoned its consideration of invasion of privacy in business record cases²² and adopted a more objective analysis.²³ The Court decided that

¹ 116 U.S. 616 (1886).

² The fifth amendment, in pertinent part, provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

³ See *Wilson v. United States*, 221 U.S. 361 (1911).

⁴ See *United States v. White*, 322 U.S. 694 (1944).

⁵ See *Bellis v. United States*, 417 U.S. 85 (1974).

⁶ See *id.* at 101.

⁷ See *In re Grand Jury Investigation*, 483 F.2d 961, 962 (3d Cir. 1973), *aff'd sub nom. Bellis v. United States*, 417 U.S. 85 (1974).

⁸ 425 U.S. 391 (1976).

⁹ 427 U.S. 463 (1976).

¹⁰ *Fisher v. United States*, 425 U.S. 391 (1976).

¹¹ *Andresen v. Maryland*, 427 U.S. 463 (1976).

¹² 597 F.2d 851 (3d Cir. 1979).

¹³ See 425 U.S. at 398; 597 F.2d at 862.

¹⁴ 116 U.S. 616 (1886).

¹⁵ *Id.* at 630.

¹⁶ See *Wilson v. United States*, 221 U.S. 361 (1911).

¹⁷ See *United States v. White*, 322 U.S. 694 (1944).

¹⁸ 417 U.S. 85 (1974).

¹⁹ *Id.* at 87 (quoting the lower court opinion, 483 F.2d at 962).

²⁰ 417 U.S. at 101.

²¹ 425 U.S. 391 (1976).

²² As recently as 1973 in *Couch v. United States*, 409 U.S. 322 (1973), the Court spoke of a "legitimate expectation of privacy" which an individual is accorded by the fifth amendment. *Id.* at 336.

²³ 425 U.S. at 400.

the only factor subject to consideration is whether an individual "is compelled to make a *testimonial* communication that is incriminating."²⁴

In *Fisher* the Internal Revenue Service was conducting an investigation of a taxpayer for possible criminal liability under the federal tax laws. The taxpayer had obtained copies of his accountant's workpapers that had been used in the preparation of tax returns and turned them over to his attorneys to aid them in the preparation of his defense. The IRS served a summons upon the lawyers for the production of these documents. The Supreme Court found that the fifth amendment did not protect the documents from disclosure because the taxpayer himself was not compelled to do anything. It was the attorneys who were producing the documents while "the taxpayer [was] the accused and nothing [was] being extorted from him."²⁵ Additionally, it was the accountants who had prepared the statements, so the taxpayer was not compelled to communicate anything.²⁶

The *Fisher* decision further held that the fact that the attorney may have been the agent of the taxpayer made no difference. The Court relied on *Couch v. United States*²⁷ where it held that the fifth amendment did not protect against production of business records when they were subpoenaed from the individual's accountant.²⁸ Similarly, the Court refused to recognize fifth amendment protection in *Fisher* based upon a claim of attorney-client privilege. The Court held that the attorney-client privilege would only apply where the records that were in the hands of the attorney would be protected if they were in the hands of the client.²⁹ The Court found that the attorney-client privilege would not apply in *Fisher* since the documents in question, accountant's workpapers prepared from an analysis of the taxpayer's business records, would not be protected if the taxpayer himself was in possession of them. The Court stated:

A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his posses-

²⁴ *Id.* at 408 (emphasis in original). The *Fisher* Court left open the question of whether truly "private papers" would be protected, *id.* at 414, and mentioned that it "has never suggested that every invasion of privacy violates the privilege," *id.* at 399. This language implies that perhaps a privacy argument would be relevant under certain circumstances, namely, where business records are not involved.

²⁵ *Id.* at 398.

²⁶ *Id.* at 409.

²⁷ 409 U.S. 322 (1973).

²⁸ *Id.* at 329.

²⁹ 425 U.S. at 402-03.

sion without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore 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 communications. . . . The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and contain no testimonial declarations by him.³⁰

In a case decided the same term as *Fisher*, the Supreme Court further eroded the privacy protection available in business-records-disclosure situations. In *Andresen v. Maryland*³¹ the accused objected to the introduction into evidence of business records which were obtained by the government during a legal search of the business premises. The Court held that although "the records seized from petitioner's offices and introduced against him were incriminating . . . [and] that some of these business records contained statements made by petitioner,"³² he was not compelled to testify as to any matter.

The literal reading of the fifth amendment applied in the *Fisher* and *Andresen* cases may at first seem shocking. Historically, the fifth amendment was read to allow an individual a privacy interest in his personal business papers.³³ Now the Court has interpreted the fifth amendment to allow the government to obtain indirectly the information that it cannot obtain directly from the individual, if the information leaves the individual's possession or is seized pursuant to a search warrant. When viewed in light of the Court's previous decisions denying protection to corporate-type records, the decision does not seem so harsh. The Court has balanced the benefits and harms of protecting business records and has decided against their protection.³⁴ Weighing heavily in support of the Court's decision is the fact that doing business is a decision to be in the public domain. Thus, the Supreme Court has now removed completely much of the constitutional protection for business records.

II

The Third Circuit in *In re Grand Jury Empanelled*³⁵ further restricted the fifth amendment right of a

³⁰ *Id.* at 409 (citations omitted).

³¹ 427 U.S. 463 (1976).

³² *Id.* at 471.

³³ See *Boyd v. United States*, 116 U.S. at 630.

³⁴ See *Fisher v. United States*, 425 U.S. at 400.

³⁵ 597 F.2d 851 (3d Cir. 1979).

sole proprietor by allowing a subpoena requiring an employee to produce the business records to be enforced upon an employee. By not recognizing the sole proprietor's fifth amendment right as constructive possessor of the documents, the decision limits the operation of the right against self-incrimination to circumstances where the sole proprietor himself prepares and maintains the records, a circumstance unlikely to be found in any but the smallest business.

In the *Grand Jury Empanelled* case a sole proprietor who ran an excavating and trucking business was under criminal investigation. The business had been in existence for twenty years and had developed into a large organization with many employees. The office manager was in charge of preparing and maintaining records of billings and correspondence with clients. The sole proprietor himself may or may not have made entries into the records.³⁶ The government served subpoenas on both the proprietor and his employee for the production of the business records. The sole proprietor asserted that his fifth amendment right against self-incrimination prohibited compulsory disclosure of the documents by either himself or his employee. In reversing the district court, which had quashed the subpoena, the Third Circuit found that the fifth amendment right of the sole proprietor did not protect the records from disclosure by process upon his employee.

The government first contended that the fifth amendment was not applicable because the sole proprietorship had "by virtue of its longevity and size, taken on the character of an 'organized institutional activity.'"³⁷ The court in *Grand Jury Empanelled* found that the sole proprietorship in question did not fit within that category but rather was "wholly owned by and [had] no existence at law apart from [the proprietor]"³⁸ and that "such records may be protected from disclosure by the Fifth Amendment."³⁹

The *Grand Jury Empanelled* court realized that "unless the employment relationship between the person subpoenaed . . . and the person asserting the privilege . . . presents circumstances not involved in *Fisher*,"⁴⁰ it would be bound under that decision to find for the government since the sole proprietor

was not compelled to produce the documents himself. The sole proprietor tried to distinguish his case from *Fisher* by claiming that he was in "constructive possession" of his documents. This argument had been used successfully in several cases⁴¹ and was alluded to by the Supreme Court in *Couch v. United States*.⁴²

In *Couch*, the taxpayer, who was a sole proprietress of a restaurant, had annually given her accountant the business records so that he could prepare income tax returns. The Court recognized that the doctrine of constructive possession may apply in certain situations⁴³ but that it was not applicable in *Couch* because "the accountant himself worked neither in petitioner's office nor as her employee."⁴⁴ The Court noted further that it had been the practice of the Internal Revenue Service not to issue summons upon full-time employees who were in possession of the records upon the premises of the business.⁴⁵

The *Grand Jury Empanelled* court was faced with a situation, unlike that in *Couch*, where the subpoena was served in the proprietor's office upon one of his employees. The court responded to the *Couch* Court's reasoning by stating: "While we might find [the sole proprietor's] constructive possession argument of more interest if *Couch* was the Supreme Court's definitive decision regarding this concept, we observe that the discussion in *Couch* was dictum, and the Supreme Court formulated no standard for bringing constructive possession within the Fifth Amendment privilege."⁴⁶ The court responded with similar disregard to the decisions of other circuits which have recognized the doctrine of constructive possession.⁴⁷

In *United States v. Guterma*⁴⁸ the Second Circuit applied the constructive possession theory when an individual who kept his files in the safe of a corporation asserted his fifth amendment right as a shield against the subpoena served upon the corporation. The *Grand Jury Empanelled* court distinguished the two cases by noting the fact that in *Guterma* it was the individual's personal records that were concerned as opposed to the business

⁴¹ See text accompanying notes 47-50 *infra*.

⁴² 409 U.S. 322, 333-35 (1973).

⁴³ *Id.* at 333.

⁴⁴ *Id.* at 334.

⁴⁵ *Id.* at 334 n.18.

⁴⁶ 597 F.2d at 862.

⁴⁷ The *Grand Jury Empanelled* court found it significant that the Supreme Court in *Couch* did not expressly approve constructive possession claims upheld in previous circuit court decisions. *Id.* at 862 n.31.

⁴⁸ 272 F.2d 344 (2d Cir. 1959).

³⁶ See text accompanying note 53 *infra*.

³⁷ 597 F.2d at 859 (quoting *Bellis v. United States*, 417 U.S. at 92).

³⁸ 597 F.2d at 859.

³⁹ *Id.* (emphasis in original).

⁴⁰ *Id.* at 861.

records in *Grand Jury Empanelled*.⁴⁹ The *Fisher* Court specifically left open the question of whether the result in that case would be different if an individual's private papers were involved.⁵⁰

The Ninth Circuit, in *United States v. Osborn*,⁵¹ held that business documents such as "corporate financial statements, an agreement for sale, telephone records, billing records, and a few business letters—are business documents analogous to the accountant's workpapers in *Fisher*"⁵² and would not be protected by the fifth amendment even if they were in the hands of the sole proprietor.

The business records involved in the *Grand Jury Empanelled* case were job folders containing all correspondence and billings involved with the business. It was clear that an employee prepared and maintained these records, but the facts also stipulate that the sole proprietor himself may have made entries.⁵³ Upon final analysis, however, the court interpreted the facts as though the sole proprietor made no entries into the records.⁵⁴

The practical effect of the *Grand Jury Empanelled* decision is to extend the *Bellis*⁵⁵ holding, even though the court found *Bellis* not applicable to the *Grand Jury Empanelled* case.⁵⁶ *Bellis* held that the fifth amendment would not apply to protect disclosure of records if the business had a separate existence apart from its owners. *Grand Jury Empanelled* serves to extend this doctrine to all but the most private organization. The decision has this effect because its holding allows the government to obtain business records of a sole proprietorship from the employees of the business who are in possession of such records. In all but the smallest business the proprietor must, by necessity, delegate various duties to his employees including the handling of business documents.

CONCLUSION

The judicial trend has been to decrease fifth amendment rights in the area of business records, and the courts are well on their way to extinguishing shields against the production of business records altogether, whether prepared and maintained by the proprietor or not. As long as the records are

seized pursuant to a valid search, the *Andresen* decision indicates that any business records will be admissible into evidence.

The objective fifth amendment analysis used by the courts in the business records cases may not be logical when applied to a constructive possession argument of a sole proprietor. Certainly, all records made and kept by an employee are made under the direction and control of the sole proprietor. Additionally, "a sole proprietorship has no legal existence apart from its owner."⁵⁷ That being so, it seems rather anomalous to say that a subpoena served upon an employee of a sole proprietorship for production of company records does not compel disclosure from the proprietor. The proprietor is legally responsible for the actions of the business, and he is in control of the business records when they remain on the business premises.

It remains to be seen whether the constructive possession theory will be similarly discarded in a case where the proprietor himself prepared and maintained the records and only temporarily relinquished possession to an employee. However, the issue will be moot if the courts continue the trend and remove fifth amendment protection from business records altogether.

Six years ago, Justice Douglas, in his dissenting opinion in *Couch*, was fearful about the ever-diminishing fifth amendment right in the business realm. Justice Douglas feared that the future would bring ingenious methods of obtaining private information including compelling trusted employees to disclose information.⁵⁸ In light of the *Andresen*, *Fisher* and *Grand Jury Empanelled* decisions, it appears that the worst of Justice Douglas' fears have

⁴⁹ *Id.* at 859.

⁵⁰ Justice Douglas wrote:

The majority, by the seeming implications of its opinion, has cleared the way for investigatory authorities to compel disclosure of facets of our life we heretofore considered sacrosanct. We are told that "situations may well arise where . . . the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." I can see no basis in the majority opinion, however, for stopping short of condemning only those intrusions resting on compulsory process against the author of the thoughts or documents. Are we now to encourage meddling by the Government and even more ingenious methods of obtaining access to sought-after materials? The premium now will be on subterfuge, on bypassing the master of the domain by spiriting the materials away or compelling disclosure by a trusted employee or confidant.

409 U.S. 341-42 (Douglas, J., dissenting) (quoting *id.* at 333 (majority opinion)) (footnote omitted).

⁴⁹ 597 F.2d at 862.

⁵⁰ 425 U.S. at 414.

⁵¹ 561 F.2d 1334 (9th Cir. 1977).

⁵² *Id.* at 1338.

⁵³ 597 F.2d at 861.

⁵⁴ *Id.* at 861 n.24.

⁵⁵ See text accompanying notes 18-20 *supra*.

⁵⁶ 597 F.2d at 861.

come true. He believed that

[i]nvariably, this would lead those of us who cherish our privacy to refrain from recording our thoughts or trusting anyone with even temporary custody of documents we want to protect from public disclosure. In short, it will stultify the exchange of ideas that we have considered crucial to our democracy.⁵⁹

The court in *Grand Jury Empanelled* had an opportunity to counter the judicial trend limiting the fifth amendment privilege against self-incrimination with regard to the compelled production of business records. Instead, by not recognizing the

doctrine of constructive possession in favor of a sole proprietor of business records in the hands of an employee on the premises, the court gave every indication that the trend will continue. The courts may not be ready to apply the literal reading of the fifth amendment to purely personal records of an individual,⁶⁰ but given the rapid restriction of the fifth amendment right, it is not an altogether unlikely prospect. A person who truly cherishes his privacy may be safe only if he keeps written documents solely within his own possession and under lock and key.

⁵⁹ *Id.* at 342.

⁶⁰ *See Fisher v. United States*, 425 U.S. at 414.