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The Erosion of Constitutional Privileges

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by
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The Fifth Amendment Privilege against self-incrimination, once an impregnable bastion freely conceded to an individual taxpayer and his business records, has long played a dominant role in protecting the embattled taxpayer during a fraud investigation. By a narrow and literal construction, however, four recent Supreme Court decisions have drained much of the former vitality from this constitutional bulwark. The full impact of these decisions can be understood only by an analysis of their underlying rationale and consideration of the questions left unanswered by the Court.

THE POSSESSION REQUIREMENT

Couch v. United States[1] signalled the narrow construction of the privilege that was to be applied in subsequent decisions. In *Couch,* the Court held that an individual taxpayer could not prevent the production of business records of a proprietorship found in the accountant's possession when the IRS summons was served. The taxpayer contended that her personal ownership of the records, which she customarily left with the accountant, was sufficient to provide protection by reason of her privilege against self-incrimination. The Court replied, however, that possession, rather than ownership, "bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment." [2] The opinion emphasized that compulsion against the person of the accused is one of the privilege's essential prerequisites. Noting that the summons and the enforcement order were directed to the accountant, the Court concluded that he, not the taxpayer, was the only one compelled to do anything.

Although *Couch* held that possession is essential, the Court conceded that the privilege might still be invoked in situations where the individual clearly retains "constructive possession", or where his relinquishment of possession is merely "temporary and insignificant".[3] The opinion did not explain these rather abstruse exceptions, but cited cases holding that personal records stored in corporate offices remain in the constructive possession of the individual and may not be reached by subpoenas directed to the corporation.[4] Although *Couch* raises seri-

* Some of the views expressed herein parallel the position taken by the author in litigation pending in the Court of Appeals for the Fifth Circuit.

[1] 409 U.S. 322 (1973).

[2] *Id.* at 331.

[3] *Id.* at 333.

[4] Schwimmer v. United States, 232 F. 2d 855 (8th Cir. 1956); United States v. Guterma, 272 F. 2d 344 (2d Cir. 1959).

ous problems concerning the closeness with which possession of personal records must be guarded, the question may have been resolved by a subsequent decision of the Supreme Court.

In *Fisher v. United States*,[5] the Court advanced the unique theory that the act of producing records, rather than the contents of the records themselves, is the only testimonial communication which the privilege protects. *Fisher* holds in essence that only the person performing the physical act of production may claim the privilege. The prudent taxpayer, therefore, will maintain sufficient possession and control of records so that he is the only individual to whom a summons could be directed. However, the taxpayer may safely relinquish possession of the records to his attorney, provided this is done in the course of seeking legal advice. In such an instance, *Fisher* holds that the attorney-client privilege prohibits compulsory production from the attorney if the records would have been protected in the hands of the taxpayer.[6]

LOST PRIVILEGE FOR PARTNERSHIP RECORDS

For many years, it had been well-established that the privilege against self-incrimination does not apply to corporations, labor unions, and similar artificial organizations that do not represent the purely private or personal interests of their members.[7] It was equally clear that the custodian of records belonging to such organizations is not privileged from producing the records even though he personally might be incriminated by their contents. In *Bellis v. United States*,[8] however, the protection afforded by the privilege was seriously eroded by the holding that the records of the traditional partnership are not protected.

In *Bellis*, the Court held that the privilege against self-incrimination does not apply to the records of any organization which represents "organized, institutional activity".[9] Such a finding is appropriate, the

[9] *Id.* at 98.

Court indicated, in all instances where the organization is recognized as an independent entity from its individual members. However, it must be a relatively well-organized and structured group, not merely a loose, informal association of individuals. Moreover, the organization must maintain a distinct set of records and recognize rights in its members of control and access thereto.

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[5] 425 U.S. 391 (1976).

[6] *Id.* at 404-405. Wigmore treats the attorney simply as the agent of the owner and states that the amenability of pre-existing documents depends "upon the other privileges of the client" 8 Wigmore, *Evidence*, § 2307, p. 591 (McNaughton rev. 1961).

[7] For a review of the cases, see Lipton and Petrie, *Constitutional Safeguards and Corporate Records*, 23rd Annual N.Y.U. Institute on Federal Taxation 1315 (1965); also, Lipton, *Constitutional Protection for Books and Records in Tax Fraud Investigations*, 29th Annual N.Y.U. Institute on Federal Taxation 945 (1971).

[8] 417 U.S. 85 (1974).

The Court examined the three-man law firm in *Bellis* and concluded that the partnership had an institutional identity independent of its individuals. The opinion noted that the partnership was not an informal association or a temporary arrangement for the undertaking of a few, short-lived projects. The law firm, the Court observed, had been in business for nearly fifteen years, had six employees, filed separate tax returns, had its own records and bank account, and was regarded by state law as a distinct entity for numerous purposes.

The Court also noted that Bellis was holding the partnership records in a representative capacity. Rejecting the argument that Bellis had a substantial and direct ownership interest in the records, the Court declared that they were partnership property and that his interest in such property was a "derivative interest" subject to significant limitations. The opinion emphasized that the other partners at all times had a right of access to the records under state law and were entitled to inspect and copy them.

The small size of the *Bellis* partnership, as well as the Court's statement that size of the organization is not itself determinative of the privilege issue, would seem to foreclose future arguments based solely on that factor. The Court did suggest, however, that there might be other exceptions to its general holding. The opinion concluded with the statement that this might have been a "different case if it involved a small family partnership" or if there "were some other preexisting relationship of confidentiality among the partners." [10]

The "Small Family" Exception

One district court case cited in *Bellis* as an example of the small family partnership exception was *United States v. Slutsky*,[11] which held that large economic size alone may not preclude the partners from claiming the privilege. In *Slutsky*, two brothers operated a country resort that had been in business more than 70 years. It had a sales office in New York, 325 guest rooms, facilities on a 1,000 acre tract, buildings worth about $4,400,000, a payroll of about $1,000,000, and both a full-time bookkeeper and accountant. The court held that the Slutsky records were privileged. The court declared that the partnership's economic "size . . . is not determinative," but rather that the focus must be "placed on the extent and nature of the ownership group." The opinion concluded that a "two man partnership consisting of two brothers is . . . as small as possible." [12]

The Third Circuit, however, refused to apply the small family exception to a four-brother law firm, stating enigmatically that "whatever the full import of the quoted statement [from *Bellis*] may be, we do not

[10] *Id.* at 101.
[11] 352 F. Supp. 1105 (S.D. N.Y. 1972).
[12] *Id.* at 1108.

think it applicable in the present context." [13] The Tax Court also rejected the exception in the case of a father and son-in-law partnership,[14] and a district court recently denied protection to the records of a partnership consisting of a man and his spouse.[15] The Fifth Circuit, however, apparently would apply the *Bellis* exception under appropriate circumstances. In *United States v. Greenleaf*,[16] the Court held that a partnership consisting of unrelated members "did not qualify as the type of small family partnership protected in" the *Slutsky* case.

The "Confidential Relationship" Exception

The second exception mentioned in *Bellis*, a preexisting relationship of confidentiality among the partners, is of little significance. Taking the statement at face value, a partnership agreement seemingly could be framed in such a manner as to safeguard the privilege by requiring confidentiality. In *Greenleaf*, however, the Fifth Circuit stated that a partnership agreement cannot create the type of confidentiality referred to in *Bellis*. That confidentiality, the appellate court said, is one that traditionally creates a testimonial privilege, such as the attorney-client privilege.

Acquisition of Exclusive Ownership

Another question left unanswered by *Bellis* relates to the status of the records of a dissolved and fully terminated partnership where sole ownership of the assets, including the partnership records, has been acquired by one of the former partners. *Bellis* held that privilege may not be claimed with respect to organizational records which are being held in a "representative capacity." [17] In concluding that Bellis was not holding records in his personal capacity, the Supreme Court emphasized that the records were partnership property in which he had no direct ownership interest and which were subject to the rights of his former partners to inspect and to have a formal accounting. However, when one partner acquires exclusive ownership of the records of a terminated partnership by purchasing the assets or remaining interests, it is well-settled that the other partners give up all their former rights to inspect the records or to have a formal accounting.[18] Thereafter, the records are no longer being held in a representative capacity.

The mere dissolution of a partnership, however, without termination

[13] United States v. Mahady & Mahady, 512 F. 2d 521, 524 (3d Cir. 1975).

[14] Harry Gordon, 63 T.C. 51, 69-71 (1974).

[15] Matter of September, 1975 Special Grand Jury, 435 F. Supp. 538 (N.D. Ind. 1977).

[16] 546 F. 2d 123, 128 (5th Cir. 1977).

[17] 417 U.S. at 97-98, 101.

[18] Sanderson v. Cooke, 175 N.E. 518, 521 (N.Y. Ct. App. 1931); Kelly v. Kelly, 411 S.W. 2d 953, 955 (Tex. Civ. App. 1967); 60 Am. Jur. 2d *Partnership* §§ 265, 267, 296 (1972).

and lawful acquisition of the records by one partner, does not bestow upon a partner a greater claim to privilege than existed during the firm's active life. *Bellis,* in fact, involved a dissolved partnership that was in the process of winding up its affairs. As the Court recognized, the other partners still retained the right to inspect the records and to an accounting, and Bellis continued to hold the records in a representative capacity.

In a footnote to *Bellis,*[19] the Court noted that the dissolution of a corporation does not give the custodian any greater claim to the Fifth Amendment privilege and suggested that the same should be true of records of a dissolved partnership. The two early Supreme Court cases cited in support of this comment involved corporate records, title to which had been conveyed to former officers after dissolution.[20] If there were no distinctions between the two types of entities, the cited authorities apparently would preclude a claim of privilege as to partnership records even though exclusive ownership had been acquired by one of the former partners.[21]

There are, however, significant differences between corporations and partnerships. A corporation is a creature of the state and is presumed to be incorporated for the benefit of the public. The state retains a visitorial power to examine the affairs of the corporation. This power "of necessity reaches the corporate books, without regard to the conduct of the custodian."[22] Hence, corporate records always remain subject to inspection and examination by the state under its retained visitorial power. The owner-custodian continues to hold such records in a representative capacity even after dissolution.

A partnership, however, is merely a contract, or the relationship arising out of a contract, between two or more persons.[23] Since a partnership is not created by the state, the right of access to, and inspection of, its records is conferred only upon the partners. When exclusive title to partnership records is acquired by one of the partners, such rights of the other partners terminate. Because the records no longer are being held in a representative capacity, they should be protected by the owner's privilege against self-incrimination.

A NEW PRIVILEGE THEORY—THE ACT OF PRODUCTION OF RECORDS

One redeeming feature of the *Bellis* decision was its reaffirmation that the Fifth Amendment privilege "applies to the business records

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[19] 417 U.S. at 96, n.3.

[20] Wheeler v. United States, 226 U.S. 478 (1913); Grant v. United States, 227 U.S. 74 (1913).

[21] One district court has so held. See United States v. Hankins, 424 F. Supp. 606, 615 (N.D. Miss. 1976), *on appeal* 5th Cir.

[22] Wilson v. United States, 221 U.S. 361, 385 (1911).

[23] 68 C.J.S. *Partnership* § 1 (1950).

of the sole proprietor . . . as well as to personal documents containing more intimate information".[24] However, the broad implications of this encouraging statement have been undermined by subsequent Supreme Court decisions discussed below.

In *Fisher v. United States*,[25] the Supreme Court adopted a new rationale delineating the circumstances under which the Fifth Amendment privilege precludes the compulsory production of records or other documents. In substance, the Court held that the only compelled, testimonial communication involved in producing records or papers, in response to an official demand, is the act of production itself. Under this unique approach, the contents of the documents themselves may be of no consequence, regardless of how intimate or private they may be. Even though the writing or contents may be incriminating and testimonial, the Court explained that such writing is "wholly voluntary" and does not constitute "compelled testimonial evidence".[26] Unless the Government compels the subpoenaed person to write the document, the Court noted, the fact that it was written by him affords the paper no greater protection under the Fifth Amendment.

Wholly apart from the contents of the papers, however, Justice White noted that the act of producing them in response to a subpoena involves two basic communicative aspects of its own. First, compliance with the subpoena "tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer". Second, such compliance also would "indicate the taxpayer's belief that the papers are those described in the subpoena." The latter communicative act was variously described by the Court as "implicit authentication" of the records or an admission of their genuineness.[27]

The opinion conceded that the essential element of compulsion is clearly present when records are subpoenaed. However, the opinion states that the more difficult issues are whether the tacit averments or implicit admissions incidental to compliance are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. Admitting that these questions do not lend themselves to categorical answers, the Court cautioned that their resolution may depend on the "facts and circumstances of particular cases or classes thereof."[28]

In *Fisher,* the taxpayer had obtained possession of his accountant's workpapers and had turned them over to his attorney shortly after he had been interviewed by a revenue agent. Subsequently, an IRS summons for the papers was served on the attorney. At the outset, the Supreme Court held that the Fifth Amendment rights of the taxpayer

[24] 417 U.S. at 87-88.
[25] 425 U.S. 391 (1976).
[26] *Id.* at 409-410.
[27] *Id.* at 410.
[28] *Id.* at 410.

were not implicated inasmuch as the subpoena was not directed to him. However, the opinion concluded that the papers turned over to the attorney would be protected by the attorney-client privilege if such papers would have been privileged in the hands of the taxpayer by reason of the Fifth Amendment. The Court then proceeded to determine the status of the accountant's papers as though they had in fact been in the possession of the taxpayer.

Implicit Authentication

Examining the possibility that the taxpayer's act of production might constitute implicit authentication of the accountant's workpapers, *Fisher* emphasized that the taxpayer did not prepare the papers and was not competent to authenticate them. The Court concluded that production would express nothing more than the taxpayer's belief that the papers are those described in the subpoena and would not represent a substantial threat of self-incrimination. The opinion, moreover, compared the taxpayer's position as mere possessor of his accountant's workpapers to the custodian of corporate, union or partnership books. In those cases, the Court noted, the custodian must respond to a subpoena even though he kept the books and his production would itself be sufficient authentication to permit their introduction against him.[29]

Tacit Admission of Existence and Possession

The *Fisher* opinion also held that the admission of existence and possession of the accountant's papers, implicit in their production by the taxpayer, would not rise to the level of testimony protected by the Fifth Amendment. Stressing the fact that the papers "belong to the accountant", the Court declared that the Government was in no way relying on the "truth telling" of the taxpayer to prove the existence of, or his access to, the documents. The opinion makes the very significant observation, however, that the existence and location of the papers was "a foregone conclusion".[30] Thus, tacit concession that the taxpayer had the papers added little or nothing to the Government's information, the Court reasoned.

In considering this question, the Court emphasized that the taxpayer was a mere possessor of the workpapers and did not own them. The opinion equates the taxpayer's bare possession of the papers with that of a custodian in the possession of corporate, union or partnership records. In none of these situations, the Court concluded, is there any question regarding the existence and possession or control of the subpoenaed records, and the custodian or mere possessor must produce

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[29] *Id.* at 413, n. 14.
[30] *Id.* at 411.

the incriminating documents despite the fact that such production admits their existence and location in the hands of the possessor.[31]

The Significance of Ownership

Although the rationale adopted in *Fisher* may raise more questions than it answered, it is reasonably clear that the taxpayer's bare possession of records owned by someone else will not provide a successful basis for invoking the Fifth Amendment privilege. Similarly, there is some doubt that privilege will be extended to records previously prepared and owned by a third party, even though the taxpayer acquired exclusive title and possession prior to any demand for their production by the IRS.

Regarding the protection that might be available to the taxpayer with respect to the records maintained by him as a sole proprietor, the Court commented in *Fisher* that this was "a question not involved here".[32] Despite this gratuitous concluding remark, it is reasonably clear that the *Fisher* rationale would serve to protect the sole proprietor against compulsory production of his records in response to a subpoena *dues tecum* or IRS summons.[33]

The taxpayer's act of producing his own business records is a clear admission that they are genuine and that they are the records described in the summons. Unlike *Fisher*, the records belong to the taxpayer, and he unquestionably is competent to authenticate them. This conclusion is not altered by the fact that someone else, such as an accountant or bookkeeper, also would be competent to attest to the genuineness of the tax records. So long as the testimony elicited from the taxpayer is incriminating, a claim of privilege is not negated by the availability of a third party with similar knowledge of the facts. The denial of privilege in *Fisher* was based on the inability of the taxpayer to authenticate the accountant's workpapers, not the fact that the accountant also was available to offer such testimony.

The taxpayer's act of producing his own records also would constitute an incriminating admission of their existence and possession. As in the case of authentication, moreover, this conclusion is not affected by the availability of third-party testimony regarding existence of the records and the taxpayer's possession and control. Recently, a district court refused to compel the production of telephone tape recordings owned by a witness despite the testimony of another individual as to the existence, authenticity, and the witnesses' possession of the tapes.[34]

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[31] *Id.* at 411-412.

[32] *Id.* at 414.

[33] See United States v. Plesons, 560 F. 2d 890 (8th Cir. 1977), holding that the records of a physician are protected by the Fifth Amendment, but that the doctor waived his rights by failing to invoke his privilege in response to a Grand Jury subpoena.

[34] In re Bernstein, 425 F Supp. 37 (S.D. Fla. 1977).

The Court held that the Fifth Amendment privilege was properly invoked where there exists "this tripartite unity over ownership, possession and self-incrimination." [35]

The entire thrust of the opinion in *Fisher* is directed at the compulsory production of records in the mere possession of a custodian who is not the owner. Implicit in all custodian and simple possessor cases is the valid legal presumption or, as the Court said, the "foregone conclusion" that the records are in existence and in the possession of the holder. This is consistent with the limited rights of the custodian. He is not the owner and has no recognized legal rights to dispose of, or to destroy, records belonging to others. No such presumption or conclusion, however, attaches to the sole owner of records. He may or may not maintain a variety of records, and he may retain or dispose of them at any time and in any manner he deems appropriate. Accordingly, there can be no "foregone conclusion" with respect to the existence, possession or custody of personally owned records. Therefore, under the rationale of *Fisher,* the compelled production of records from the hands of the individual owner constitutes a testimonial communication that should be protected by his Fifth Amendment privilege.

The foregoing analysis would seem to apply with equal force where the taxpayer acquires ownership of records that originally were prepared or owned by someone else. Thus, compulsory production of former partnership records or an accountant's workpapers, sole title to which has passed to the taxpayer, may be protected by the privilege. In such instances, the tacit admission of existence and possession may rise to the level of incriminating testimony. Whether implicit authentication of the records also is involved would depend on whether the taxpayer is competent to vouch for the accuracy and genuineness of the records. Production of an accountant's workpapers, even if owned by the taxpayer, probably would not involve such incriminating authentication.

The promise of the *Fisher* theory, as Justice Marshall indicated in his separate opinion, lies in its "innovative discernment that production may also verify the documents' very existence and present possession by the producer." [36] This testimonial aspect of producing records offers the brightest prospect for protection of records owned by the subpoenaed party. Nevertheless, a recent Ninth Circuit opinion, relying on *Fisher,* suggests that even the taxpayer's ownership of an accountant's workpapers would not preclude compulsory production.[37] The Court, however, did not consider or discuss the incriminating admission of existence or possession that is implicit in the act of production. The opinion merely holds that the act of compliance would not compel the

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[35] *Id.* at 39.

[36] 425 U.S. at 432.

[37] Matter of Fred R. Witte Center Glass No. 3, 544 F. 2d 1026 (9th Cir. 1976).

taxpayer to authenticate or affirm the truth of the contents of the records.

SEIZURE PURSUANT TO A SEARCH WARRANT

Section 7608(b) of the Code authorizes a special agent to execute and serve search warrants. Rule 41 of the Federal Rules of Criminal Procedure prescribes the requirements and procedures for the issuance of such a warrant. Paragraph (b)(1) of the Rule, adopted in 1968, provides that a warrant may be issued to search for and seize any property that constitutes evidence of the commission of a criminal offense. The new rule was prompted by the Supreme Court's decision in *Warden v. Hayden*[38] approving the seizure of "mere evidence". Previously, only contraband and the fruits or instrumentalities of crime were subject to search and seizure.

Prior to the 1968 enactment, search warrants were rarely used in income tax investigations. Their subsequent use engendered litigation, a conflict among the circuits, and some articles highly critical of the utilization of such drastic process to seize a taxpayer's books and records.[39] In *Andresen v. Maryland*,[40] however, the search warrant was approved as an appropriate instrument for the forcible seizure of papers, records and documents which would not be amenable to compulsory production by a subpoena duces tecum. At the same time, the Supreme Court denied certiorari in tax cases pending in the appellate courts.[41]

In the light of the *Fisher* rationale, the Supreme Court's subsequent approval of the search warrant as a permissable means of forcibly seizing private records was clearly predictable. In *Andresen,* the Court held that a search authorized by warrant involves neither compulsion upon the individual nor any self-incriminating, testimonial act. The opinion noted that the statements contained in the documents had been voluntarily committed to writing and that the individual was not required to perform any act which aided in the discovery, production, or authentication of the incriminating evidence.

Fortunately, the opinion in *Andresen* states that the Fifth Amendment may protect an individual from complying with a subpoena for the production of personal records in his possession, noting that the very act of production may constitute a compulsory authentication of incriminating information.[42] Resort to the search warrant presumably will be strictly limited, and the necessity of establishing "probable

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[38] 387 U.S. 294 (1967).

[39] See, *e.g.*, Lipton, *How Valid is IRS Use of Search Warrants to Find and Seize Evidence of Fraud in Tax Cases,* 41 J. of Tax. 95 (Aug. 1974); Lyon, *Tax Investigation Revisited,* 29 Tax Lawyer 477 (Spring, 1976).

[40] 427 U.S. 462 (1976).

[41] Truitt v. Lenahan, 529 F. 2d 230 (6th Cir. 1976); Shaffer v. Wilson, 523 F. 2d 175 (10th Cir. 1975).

[42] 427 U.S. at 473-474.

cause" that a crime has been committed normally provides a formidable safeguard against the use of search warrants. Nevertheless, the result in *Andresen* has seriously diminished the protection available under the Fifth Amendment for the records of the sole proprietorship.