

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-786

TITLE UNITED STATES, Petitioner v. JOHN DOE

PLACE Washington, D. C.

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C O N T E N T S

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1 recdrds not to use the act of production against him in
2 any way in any subsequent criminal case.

3 QUESTION: Mr. Alito, did the government ever
4 explain to the court that it would give the statutory
5 kind of use immunity?

6 MR. ALITO: The government never made an offer
7 of statutory immunity for a number of --

8 QUESTION: Why not?

9 MR. ALITO: For at least two principal
10 reasons, Justice O'Connor. First of all, both of the
11 lower courts in this case rejected the very concept of
12 act of production immunity. The district court held
13 that even if such immunity were given and the evidence
14 could not be used in any way against respondent in a
15 criminal trial, he would nevertheless inevitably be
16 incriminated in the eyes of the grand jury.

17 QUESTION: Well, as I read the record, the
18 government was just never clear at all that it would
19 give statutory use immunity, and I wondered whether your
20 position is that that's the appropriate way to proceed,
21 if it is covered, if the act of production is covered at
22 all.

23 MR. ALITO: Well, Justice O'Connor, our
24 position is that the non-statutory constructive act of
25 production immunity that was offered in this case is

1 sufficient, but we also believe that statutory immunity
2 would be available for the act of production and would
3 also be sufficient in this area, and if the Court were
4 to make clear in deciding this case that such statutory
5 immunity would obviate any Fifth Amendment objection,
6 then I think we would have no serious objection to such
7 a holding.

8 QUESTION: Mr. Alito, is one of your
9 submissions that production wouldn't incriminate at all
10 in this case?

11 MR. ALITO: We believe that here, as in
12 Fisher, the act of producing the documents would not
13 amount to testimonial self-incrimination.

14 QUESTION: Is that one of your submissions
15 here?

16 MR. ALITO: That is one of our submissions,
17 but, Justice White, we are not interested and never have
18 been interested in the act of production, and therefore
19 we are quite happy to give respondent immunity from any
20 use --

21 QUESTION: What do you mean, you weren't
22 interested in the act of production?

23 MR. ALITO: We have no interest in using the
24 act of production in evidence or any evidence --

25 QUESTION: But you are interested in the

1 materials.

2 MR. ALITO: We are interested in the
3 materials, and we are interested in the issue of act of
4 production only if it helps us get the materials.

5 QUESTION: Well, both courts below thought the
6 act of production would incriminate in this case.

7 MR. ALITO: Well, we respectfully disagree
8 with them, but I think --

9 QUESTION: Well, we have to decide that issue
10 here, don't we, whether it would incriminate or not? We
11 can't decide that you must offer statutory immunity
12 unless it is incriminating.

13 MR. ALITO: I don't believe it's necessary to
14 reach that issue.

15 QUESTION: Why?

16 QUESTION: Doesn't the statute require that
17 there be some threat of self-incrimination before the
18 government can grant immunity or some claim made?

19 MR. ALITO: Well, there certainly was a claim,
20 and a colorable claim. I don't believe --

21 QUESTION: Here is the United States saying
22 that the predicate for immunity is not present in this
23 case, namely, incrimination, unless you are going to
24 withdraw that.

25 MR. ALITO: We don't withdraw that submission,

1 and if the Court wishes to reach that before reaching
2 the issue of immunity --

3 QUESTION: Wishes. I would suppose we would
4 have to.

5 MR. ALITO: Well, I don't believe that when
6 statutory immunity, for example, is offered, it is
7 necessary to fully adjudicate the legitimacy of the
8 Fifth Amendment claim before immunity can be conferred,
9 and I would suppose --

10 QUESTION: Do you think the United States is
11 free in the District Court to say, well, we are quite
12 sure that there is no incrimination in this case, but
13 even if there isn't, we will offer statutory immunity?

14 MR. ALITO: When there is a Fifth Amendment
15 claim, I believe that is essentially what happens.

16 QUESTION: Well, I guess the government could
17 say, we are not sure whether there is a Fifth Amendment
18 protection here, but if there is, we offer the immunity
19 under the statute.

20 MR. ALITO: That is my --

21 QUESTION: That is fine, but that isn't your
22 submission here. You are sure there is no
23 incrimination. That is your submission.

24 MR. ALITO: That is our submission. I think
25 that because the lower courts found the colorable claim,

1 the immunity issue could be reached first, but we have
2 absolutely no objection to the Court reaching the issue
3 of self-incrimination by means of the act of production
4 first, because we firmly believe that that is not
5 self-incriminating, for the same reasons, as in Fisher.
6 We think that the existence, possession, existence and
7 possession of standard business records is not
8 testimonial, and does not pose a real and substantial
9 danger of self-incrimination in the case of sole
10 proprietorships just as that is true in the case of
11 corporations and partnerships.

12 QUESTION: You would concede that it could be
13 in some cases, would you not?

14 MR. ALITO: Certainly, in special
15 circumstances it could, but it is up to the claimant of
16 the privilege to make it appear to the judge that those
17 circumstances are present.

18 QUESTION: Well, he did. He did. Both courts
19 agreed with him.

20 MR. ALITO: Well, he did, but we would submit
21 that that was incorrect.

22 QUESTION: I am a little puzzled by one thing.
23 Three times now you have, perhaps without emphasis, but
24 at least I detected an emphasis, you have referred to
25 the act of production. Now, are you distinguishing

1 between the act of producing and then the content of
2 what is produced?

3 MR. ALITO: Yes, we draw a very clear
4 distinction between that --

5 QUESTION: Of course, the only thing he is
6 interested in protecting is the content of what is
7 produced. The act of producing doesn't -- couldn't
8 possibly incriminate him.

9 MR. ALITO: That is our submission, and I
10 think it is crystal clear in these cases that the
11 practical concern of the witnesses is solely the
12 contents of the documents.

13 QUESTION: But you concede that in some cases
14 where, for instance, merely identifying the person who
15 had the records and was able to produce them might cast
16 suspicion on that person which hadn't existed before,
17 that it is at least abstractly possible that the act of
18 production might incriminate.

19 MR. ALITO: It is abstractly possible, but I
20 think when you are talking about standard business
21 records, the kind of records that every company has,
22 that it will seldom be the case that the act of
23 production will amount to testimonial
24 self-incrimination.

25 QUESTION: Well, what of his uncertainty about

1 who owns the company?

2 QUESTION: Yes.

3 QUESTION: Maybe you don't -- The subpoenas
4 themselves are not in the record. At least I haven't
5 seen them, I don't think. Are they?

6 MR. ALITO: The subpoenas are in the appendix
7 to the petition.

8 QUESTION: And do they identify the name of
9 the person and the names of the companies?

10 MR. ALITO: They do in their original form.
11 They are redacted in the petition.

12 QUESTION: Suppose the government knows there
13 is a silent partner involved in some shady enterprise
14 but doesn't know who it is. They know it may be one of
15 ten people, and they know that the silent partner is
16 reputed to have the records, so they simply issue
17 subpoenas for the records to each of the ten suspects.

18 MR. ALITO: I think this is possible in
19 certain cases, but there is no question in this case
20 about who owns these companies. When this case was
21 first argued in District Court, respondent came in and
22 said, these are my companies, and they are sole
23 proprietorships, and the government and the District
24 Court accepted that for purposes of argument. So there
25 is no issue here about who owns the companies and who is

1 in control of the records.

2 QUESTION: But if he produces them, if he
3 produces them and you want to use them at trial, would
4 you have to further authenticate them?

5 MR. ALITO: Yes, if --

6 QUESTION: Why would you? He produced them.
7 And isn't the inference that they are his records, and
8 were prepared under his authority?

9 MR. ALITO: Well, I believe they could easily
10 be authenticated by numerous other means.

11 QUESTION: That is not my question. Would you
12 have to offer further authentication?

13 MR. ALITO: We would have to authenticate them
14 in some way at trial.

15 QUESTION: Well, would it be enough to say he
16 produced them in response to our subpoena?

17 MR. ALITO: It would be sufficient to
18 authenticate them. It would not --

19 QUESTION: Exactly. It would.

20 MR. ALITO: It would not necessarily be
21 sufficient for their admission as an exception to the
22 hearsay rule.

23 QUESTION: Well, that is another question.

24 QUESTION: Typically, that would be stipulated
25 to, if it has been produced under a subpoena. You don't

1 go through a long formality about authentication, do
2 you?

3 MR. ALITO: No, I don't believe you do. I
4 think that is just our point. Authentication is not a
5 substantial barrier under modern law to the admission of
6 standard business records, and it is essentially a
7 fiction to argue that the unprivileged contents of these
8 records should be blocked, that the grand jury's access
9 to these unprivileged contents should be blocked based
10 upon this largely academic argument that the act of
11 production would amount to tacit authentication, and
12 would result in self-incrimination of the sole
13 proprietorship.

14 QUESTION: Well, if it is largely academic,
15 why don't you just tender him immunity for any use of
16 the act of production?

17 MR. ALITO: Well, that's what we attempted to
18 do, Justice Stevens.

19 QUESTION: Well, you didn't attempt to do it.
20 You made no tender in a formal way. You didn't ask for
21 statutory --

22 MR. ALITO: We did not ask for statutory --

23 QUESTION: What in the record supports what
24 you are telling me, that you actually made a clear --
25 The district judge, as I read it, was trying to figure

1 out what the government was willing to do and never got
2 a clear, unambiguous statement.

3 MR. ALITO: The district judge felt that our
4 immunity offer was insufficient because he believed that
5 incrimination in the eyes of the grand jury was
6 sufficient to invoke the Fifth Amendment privilege. We
7 disagree with that, and for that reason, he disagreed
8 with the entire concept.

9 QUESTION: But you never offered immunity from
10 that particular exposure. You thought it was
11 unnecessary. You may be right, but -- If your position
12 is that this is all academic, it seems to me you can
13 solve the problem by giving him statutory immunity.

14 MR. ALITO: If the Court were to make it clear
15 that we could do that on remand, we would be entirely
16 satisfied. We believe that non-statutory immunity here
17 is appropriate because of the special circumstances of
18 act of production, but if the court were to make it
19 clear that statutory immunity would obviate respondent's
20 Fifth Amendment claims, that would be wholly
21 satisfactory to us.

22 QUESTION: But why wouldn't it? I mean, in a
23 direct Fifth Amendment case, doesn't that solve the
24 problem?

25 MR. ALITO: I think it --

1 QUESTION: I just don't understand the
2 position at all, I confess.

3 QUESTION: Do you think the District Court --
4 As I understand your submission, even if you had
5 formally offered statutory immunity, the District Court
6 would not have required the records to be produced
7 because the immunity wouldn't effectively replace the
8 privilege. Is that right?

9 MR. ALITO: That was certainly the logic of
10 his position.

11 QUESTION: It was the logic, except that he
12 didn't have to rule on that against the -- in the face
13 of an offer of statutory immunity.

14 MR. ALITO: Well, we did not offer statutory
15 immunity.

16 QUESTION: That's right.

17 MR. ALITO: We did not offer it in large
18 measure because it was unclear that either of the courts
19 below would have construed an offer of statutory
20 immunity as limited to the act of production, because
21 both courts felt that there were serious problems with
22 the concept of act of production immunity.

23 QUESTION: Wouldn't it have been easier to
24 have offered it and had it refused?

25 MR. ALITO: In retrospect, Justice Marshall,

1 it might have been. It might have been easier. We
2 didn't --

3 QUESTION: Well, you want us to retrospect you
4 back and give you another bite.

5 On this question of the act, you say that
6 simply because these are ordinary business records, the
7 act of production doesn't involve anything?

8 MR. ALITO: I think that's correct, Justice
9 Marshall.

10 QUESTION: Well, do you know of any IRS cases
11 that were decided solely on regular business records? I
12 mean, how many millions, do you think?

13 MR. ALITO: I am not sure I understand the
14 question.

15 QUESTION: Many IRS cases are decided solely
16 on payrolls, for example.

17 MR. ALITO: That's true.

18 QUESTION: So the act of production does
19 incriminate you, doesn't it?

20 MR. ALITO: Well, perhaps I am not making --

21 QUESTION: I mean of producing ordinary
22 records.

23 MR. ALITO: The act of producing certain
24 documents in certain situations may well be
25 incriminating. Our position is I think essentially what

1 you said in concurrence in Fisher. You said that the
2 existence of corporate records is not in doubt, and
3 therefore conceding the existence and possession of
4 those records is not testimonial, and the same must be
5 true of partnership records in light of Bellis, and we
6 would argue the same would be true of the standard
7 business records of a sole proprietorship.

8 There simply is not a rational basis for
9 drawing a distinction between these forms of business
10 units on this ground. If it is a foregone conclusion
11 that corporations have general ledgers, for example, it
12 is equally a foregone conclusion, I would submit, that a
13 sole proprietorship has such document, and the logic of
14 that position means that in the case of a subpoena for
15 standard business records, regardless of the form of
16 company involved, this -- the act of production would
17 not amount to testimonial immunity -- it would not
18 amount to testimonial self-incrimination.

19 QUESTION: Well, it wouldn't be necessary to
20 prove that it had some general ledgers, but it would be
21 necessary to show that these were the particular general
22 ledgers that this company had. Quite a difference, it
23 seems to me.

24 MR. ALITO: But in honoring the subpoena, the
25 witness is not vouching for the accuracy of the contents

1 of the documents. He is simply saying, I have these
2 documents --

3 QUESTION: Well, he is saying, these are the
4 documents described in the subpoena, and then up until
5 now they have been in my custody. That is what he is
6 saying. So you are not going to argue about that after
7 the documents are produced.

8 MR. ALITO: If there is some question about
9 whether he has possession of the documents, then I
10 suppose the act of production would be incriminating,
11 but in the case of standard business records, where it
12 is a foregone conclusion that the company has those
13 records, I don't think it amounts to testimonial
14 self-incrimination.

15 But in any event, that was not the point that
16 I intended to press here this morning. The point that
17 we want to make clear is -- that we would like the Court
18 to address is that a person in respondent's position has
19 no basis for asserting a Fifth Amendment claim based on
20 the act of production when act of production immunity is
21 tendered.

22 Now, if that argument is self-evident, that --

23 QUESTION: I take it you hope that this is the
24 only trouble we are going to have with your submission.

25 MR. ALITO: I certainly hope so.

1 QUESTION: Well, you don't need the Supreme
2 Court of the United States to tell you that.

3 MR. ALITO: Well, many of the lower courts
4 have had difficulty with that problem. In this case,
5 the Court of Appeals held that the contents of these
6 documents were privileged.

7 QUESTION: That is the major issue here, I
8 take it.

9 QUESTION: And that is really what you want
10 reversed, isn't it?

11 MR. ALITO: That is the principal thing that
12 we want reversed.

13 QUESTION: I guess we should let you argue
14 that.

15 MR. ALITO: All right.

16 (General laughter.)

17 MR. ALITO: On the question of the contents,
18 whether the contents of the records are privileged, we
19 are really asking the Court to do nothing more than
20 follow its reasoning and its holding in Fisher. The
21 Fifth Amendment, the Court has held, applies only when a
22 witness is compelled to make a testimonial communication
23 that is incriminating.

24 As the Court made clear in Fisher, when a
25 document is voluntarily prepared before a subpoena is

1 issued, obviously, no one compells the production of the
2 document. A subpoena that is later issued for the
3 document may compell the witness to turn over the
4 document, but it does not compell the witness to restate
5 or reaffirm the contents of the document, and therefore
6 the contents of the document as distinct from the act of
7 production do not constitute compelled testimony, and
8 they fall outside the privilege.

9 Now, I would quickly add that there are
10 undoubtedly certain highly personal documents -- a diary
11 is perhaps the best example -- that may well be
12 protected by other provisions of law, the Fourth
13 Amendment or the First Amendment, but not by the Fifth
14 Amendment privilege against self-incrimination, which
15 applies only when a witness is compelled to make a
16 testimonial communication that is incriminating.

17 The Court of Appeals and respondent attempted
18 to distinguish Fisher on two grounds, authorship and
19 ownership of the papers, and we think neither of these
20 distinctions make sense either under Fisher's reasoning
21 or under a protection of privacy rationale taken from
22 Boyd.

23 Under Fisher, of course, what matters is
24 whether the documents were voluntarily created, not who
25 created them and not who owned them. Fisher expressly

1 rejected the idea of authorship as a distinguishing
2 factor, and the idea of ownership as a sufficient basis
3 for claiming the privilege had earlier been rejected in
4 Couch, where the Court wrote, "To tie the privilege
5 against self-incrimination to a concept of ownership
6 would be to draw a meaningless line. It would make the
7 privilege turn on fine distinctions of property law."

8 Even under a protection of privacy rationale
9 taken from Boyd, these ideas of authorship and ownership
10 don't make sense. A person may well have a far greater
11 privacy interest in a document he did not write than in
12 one he did write. A letter written by a relative or
13 close friend may be far more private to the witness than
14 a cancelled check that he himself wrote to pay last
15 month's gas bill.

16 QUESTION: Would there be anything left of
17 Boyd for a diary or private letter?

18 MR. ALITO: We believe that certain highly
19 private documents might well be protected by other
20 provisions of law, but not by the Fifth Amendment, and
21 insofar as Boyd stands for the proposition that private
22 papers voluntarily created are protected by the Fifth
23 Amendment, there would be nothing left of that -- of
24 that rule, which, as we tried to argue in our brief was
25 never the rule of Boyd in the first place.

1 The same thing that is true for authorship is
2 true for ownership. One does not necessarily have a
3 greater privacy interest in something that one owns than
4 in something else. A diary belonging to a relative or
5 close friend may be far more private than a document of
6 a relatively trivial nature belonging to the witness
7 himself.

8 And even if the Fifth Amendment privilege did
9 protect private papers, as Justice Brennan argued in his
10 concurrence in Fisher, it is abundantly clear that most
11 of the documents in this case are not private papers.
12 They are papers of a wholly business, non-personal
13 nature, and they are not papers that respondent kept
14 private. They are papers that were exposed to other
15 persons at various times.

16 QUESTION: May I ask you a question about -- I
17 must confess, I had some difficulty following part of
18 the government's brief. I just don't read the Court of
19 Appeals as having held, as I think you seem to assume,
20 that these business records are protected themselves.
21 There were no testimonial act in the producing of them.
22 Do you think that they held that all of these documents
23 are protected by the privilege?

24 MR. ALITO: I think they did, Justice Stevens.
25 If you --

1 QUESTION: Where in the opinion do you find
2 that? As I understood them, they were rejecting the
3 argument that a private sole proprietor is totally
4 outside the Fifth Amendment just as a representative of
5 a corporation or partnership is, and that's all they
6 held.

7 MR. ALITO: On 14A of the Appendix, Gould,
8 which is one of their prior cases, then stands for the
9 proposition that an individual's business papers cannot
10 be subpoenaed by a grand jury.

11 QUESTION: I am sorry, 14A?

12 MR. ALITO: Fourteen A of the Appendix, the
13 last sentence of the first partial paragraph at the top
14 of the page. The Appendix of the petition.

15 QUESTION: They are describing what they think
16 Gould --

17 MR. ALITO: Gould is one of their prior
18 cases. Gould stands for the proposition that an
19 individual's business papers as well as his personal
20 records cannot be subpoenaed by a grand jury, and there
21 is a footnote in which they discuss --

22 QUESTION: But that is in the section of the
23 opinion in which they are addressing the question
24 whether the act of production is a testimonial act.
25 That is in Part B of the opinion.

1 MR. ALITO: I don't think that's true, Justice
2 Stevens.

3 QUESTION: You don't think it's in Part B of
4 the opinion?

5 MR. ALITO: They are continuing to discuss
6 their holding in the Johansen case, which held that the
7 contents of an office diary were protected by the
8 privilege, and they extend that --

9 QUESTION: Well, there they are talking about
10 whether the act of producing those papers is protected,
11 I respectfully submit.

12 MR. ALITO: Well, if they held that the
13 contents are privileged, we would argue that they are
14 wrong.

15 QUESTION: Yes, if they held that, they would
16 obviously be wrong.

17 MR. ALITO: If they did not hold that, then I
18 think it was certainly not clear to us --

19 QUESTION: If they didn't hold it, there isn't
20 anything we need to decide. That is all I am
21 suggesting.

22 MR. ALITO: Well, I think that it is unclear,
23 and certainly respondent believes that they held that
24 the contents are privileged, so --

25 QUESTION: If I were respondent, I would be so

1 arguing, of course.

2 MR. ALITO: In any event, our position is then
3 that the contents are not privileged, and the only issue
4 remaining is whether our offer of act of production
5 immunity was sufficient. We believe that non-statutory
6 act of production immunity here was adequate, and I
7 believe that our position finds support in Murphy versus
8 Waterfront Commission, which held that testimony given
9 under a state grant of immunity may not be used in any
10 other jurisdiction, including in federal court. This
11 means in effect that state courts are empowered to give
12 non-statutory federal use immunity.

13 No federal statute confers upon them the
14 authority to do that, and their state statute, I would
15 think, could give such authority. They compelled the
16 witness over objection to testify, and his testimony
17 thereafter is automatically immunized.

18 We think it would be appropriate for the
19 federal courts to do this in the limited area of act of
20 production immunity. On the government's motion, the
21 courts would order witnesses to produce documents over
22 objection if the act of production would be
23 incriminating, and the act of production thereafter
24 would be immunized. This would be essentially what
25 takes place now, when state courts grant immunity under

1 their own statutes or procedures.

2 QUESTION: Why wouldn't the government feel it
3 had to follow the statutory procedure? I guess that's
4 what I don't understand.

5 MR. ALITO: We don't have serious objections
6 to following the statutory procedure, but we don't think
7 it is necessary. We think the non-statutory procedure
8 is more convenient since subpoenas for documents are an
9 everyday occurrence, unlike requests for testimonial
10 immunity.

11 QUESTION: Will you refresh my recollection,
12 Mr. Alito, on the source and nature of non-statutory
13 immunity? Is it just the right of every assistant U.S.
14 Attorney to tell the judge that is trying the case that
15 the government won't use this person's testimony if he
16 is ordered to testify over the claim of privilege?

17 MR. ALITO: I think that the executive has the
18 authority to seek the admission of relevant evidence. I
19 don't think there is anything in the immunity statute
20 that rules out non-statutory act of production
21 immunity.

22 QUESTION: Why did you ever need a statute?

23 MR. ALITO: I think --

24 QUESTION: The reason was, I suppose, that the
25 courts kept excluding the evidence, absent a grant of

1 immunity.

2 MR. ALITO: I think there were two reasons for
3 the long string of statutes for immunity for actual
4 testimony. One was that when these first started to be
5 enacted beginning, I think, in 1863, most of the
6 questions that have now been answered about immunity
7 were still unanswered, about the scope of immunity, the
8 circumstances in which a witness was required to claim
9 the Fifth Amendment privilege, and so forth, and so the
10 statutes were an attempt to address those questions, and
11 of course it took a long time to sort out the answers.

12 The other reason is that in the case of
13 immunity for testimony, at least the procedures that
14 have almost invariably been built into the statute
15 worked to protect the government, because of the serious
16 taint problems that can arise when immunity is given for
17 testimony. The statutes require --

18 QUESTION: It certainly leaves the witness in
19 some quandary, doesn't it?

20 MR. ALITO: I don't see --

21 QUESTION: If he doesn't have to be offered
22 immunity, and he just has to guess whether his testimony
23 could be used against him in a criminal case?

24 MR. ALITO: I don't think he is in any more
25 uncertainty than he is when a state court orders him to

1 testify under a state immunity.

2 QUESTION: So the government really wouldn't
3 object if a judge just said, don't worry, Mr. Witness, I
4 guarantee you that any of these -- any of your testimony
5 or none of these papers can be used against you in a
6 criminal --

7 MR. ALITO: We would have serious objection in
8 that case, because --

9 QUESTION: I would think you would. I would
10 think you would.

11 MR. ALITO: -- it was not done upon our
12 motion.

13 QUESTION: I would think you would want to be
14 in control on immunity issues.

15 MR. ALITO: We are equally in control whether
16 we request non-statutory immunity or statutory immunity.

17 QUESTION: You say a judge can't do it on his
18 own without the government requesting it.

19 MR. ALITO: No, this is not a case like
20 Goldsbury versus Convoy last term, where immunity --
21 where the court was asked to give immunity without the
22 government's participation. We asked for it here.
23 There is no question of --

24 QUESTION: Well, would that estop him from
25 changing --

1 QUESTION: So if a judge says, I am not going
2 to pay any attention to you, Mr. Attorney General, until
3 you -- if you come up here and offer statutory immunity,
4 that is another question. That may be all right. But --

5 MR. ALITO: Well, District Court judges
6 generally do not require the Attorney General to appear
7 in person to --

8 QUESTION: No, I know that, but I can call the
9 U.S. Attorney the Attorney General if I want to.

10 MR. ALITO: No, but my point, Justice White,
11 was that this is purely a matter of internal management
12 in the Justice Department. In any event --

13 QUESTION: There is quite a difference between
14 granting the immunity and accepting a U.S. Attorney's
15 prediction that this testimony would not be admissible.

16 MR. ALITO: I would submit it is not a
17 prediction if the judge orders the witness to testify
18 over a Fifth Amendment objection, and I think it is
19 settled, and I think you said it more clearly than
20 anyone else in Manness versus Meyers, that the testimony
21 thereafter may not be used. In fact the term
22 "functional immunity" was taken from your concurring
23 opinion in Manness versus Meyers.

24 QUESTION: Yes.

25 MR. ALITO: We felt that under Third Circuit

1 precedent especially statutory immunity was not
2 necessary here, but as I said, and can't make too clear,
3 we think the important question is the principle of act
4 of production immunity, and if the Court were to make it
5 clear that that is sufficient in a case like this, that
6 would be wholly satisfactory.

7 I would like to reserve the rest of my time.

8 CHIEF JUSTICE BURGER: Mr. Philips.

9 ORAL ARGUMENT OF RICHARD T. PHILIPS, ESQ.,
10 ON BEHALF OF THE RESPONDENT

11 MR. PHILIPS: Mr. Chief Justice, and may it
12 please the Court, I would submit that this case boils
13 down to an impermissible attempt by the government to
14 use investigative techniques that are not
15 constitutionally sanctioned. What the government has
16 done in this case is rather than go out and do the
17 footwork necessary to conduct an investigation, to
18 secure the documents necessary in the course of that
19 investigation, they have served on the target of the
20 investigation a grand jury subpoena requiring him to
21 produce his personal financial records as well as the
22 financial records of several sole proprietorships which
23 the government intends to use against him at a later
24 date in a criminal trial.

25 I suggest to the Court that this is

1 impermissible, and the Court should not sanction this
2 type of investigative technique. These five subpoenas
3 served upon my client were immediately objected to in
4 the District Court by a motion to quash. In the
5 District Court, the government made several major
6 concessions.

7 First, they stipulated that my client was a
8 target of the grand jury investigation, and second, they
9 stipulated that the documents that they sought would or
10 may incriminate my client. The District Court quashed
11 the subpoenas, using the rationale of this Court's
12 decision in Fisher, finding that the subpoenas compelled
13 a testimonial communication --

14 QUESTION: Mr. Philips, do you have at your
15 fingertips the citation in the record before us to the
16 stipulation of the government as to the incriminating
17 nature?

18 (Pause.)

19 QUESTION: If you don't have it, I didn't mean
20 to interrupt your argument to that extent.

21 MR. PHILIPS: It is at Page 21 of the Joint
22 Appendix, Your Honor.

23 QUESTION: Thank you.

24 MR. PHILIPS: The court asked the government,
25 "Do you also concede that the documents which you seek

1 will or may incriminate my client?" The Assistant
2 United States Attorney answered, "Yes, Your Honor."

3 So the stipulations that the government made
4 in the District Court, Number One, that my client was a
5 target of the investigation, and Number Two, that the
6 documents sought would or may incriminate him, I suggest
7 to the Court are extremely important. The District
8 Court quashed the grand jury subpoenas using this
9 Court's rationale in the United States versus Fisher,
10 finding that the subpoenas compelled a testimonial
11 communication that was in fact incriminating.

12 There was little discussion about compulsion,
13 and little discussion about the incriminating nature of
14 the testimonial communications, since the --

15 QUESTION: Was the ruling of the District
16 Court, Mr. Philips, based on the notion that the act of
17 production would incriminate as opposed to the contents
18 of the documents?

19 MR. PHILIPS: That is correct, Your Honor.
20 That was the ruling of the District Court. When the
21 case got to the Third Circuit, I believe the Third
22 Circuit expanded and discussed the protection of papers
23 rationale as set forth in this Court's opinions from
24 Boyd to the present.

25 QUESTION: I don't take it the government

1 denies that the contents of the documents would
2 incriminate.

3 QUESTION: It is just not compulsory.

4 MR. PHILIPS: No, I don't believe the
5 government denies that the contents would incriminate.

6 QUESTION: Exactly. So the stipulation, I
7 would -- if you just ask, will these papers incriminate,
8 I would think you would say yes, which is exactly what
9 the government says.

10 MR. PHILIPS: Yes, I believe that's correct.

11 QUESTION: So you still have the question,
12 though, would it be compulsory self-incrimination, and
13 the government's argument is that when you produce
14 papers pursuant to subpoena that have already long
15 before the subpoena issued been compiled, the subpoena
16 doesn't compell you to record what you record in those
17 papers because you recorded it beforehand.

18 MR. PHILIPS: I understand that, but the
19 subpoena does compell you to produce those records, and
20 I don't understand how the government can separate the
21 contents of the records from the act of production. If
22 we discuss the immunity that the government offers as to
23 the act of production --

24 QUESTION: Let's go back just a minute to the
25 act of production, because I understood the earlier

1 discussion between Mr. Alitc and members of the bench to
2 focus on the idea of the act of production as being a
3 separate incriminating act quite apart from the contents
4 of the papers. The mere fact that you had these
5 records, whatever the records may have said, might tend
6 to incriminate you.

7 Now, I gather from what you just said that you
8 look upon the act of production as being able to relate
9 back to the contents of the papers in some way. Do you?

10 MR. PHILIPS: Yes, I do, Your Honor. I don't
11 see how you could separate the contents of the papers
12 where the government says the contents are
13 incriminatory.

14 QUESTION: Under Fisher, that is just not
15 compulsory self-incrimination. Maybe it is
16 self-incrimination, but it is not compulsory, because
17 the papers were compiled long ago.

18 MR. PHILIPS: But it is not the compulsory
19 self-incrimination. It is the compulsion to produce
20 those records which we object to. It is the
21 self-incrimination that the government stipulates is
22 contained within the contents of the documents.

23 QUESTION: Mr. Philips, what if you were given
24 statutory immunity, your client was, that nothing could
25 be -- no adverse inference of criminal conduct could be

1 drawn from the act of producing these documents?

2 MR. PHILIPS: If statutory immunity were
3 offered in this case, if it were conferred, I believe we
4 would be at a different stage. First, I would argue --
5 First, I would have no legal objection to the conference
6 of immunity. The District Court would grant the
7 immunity as requested by the government. The only
8 objection that possibly could be made is, is the
9 immunity that is being offered under the statute
10 coextensive with my client's Fifth Amendment privilege.

11 QUESTION: Well, supposing it clearly covered
12 everything relating to the production, but did not cover
13 the government's ability to use what was found within
14 the documents. In other words, it would allow them to
15 treat them as though they found them out in the park
16 somewhere.

17 MR. PHILIPS: Then I would argue that that is
18 not coextensive with my client's privilege.

19 QUESTION: And my question is, why not?

20 MR. PHILIPS: It is not coextensive with the
21 privilege because I cannot separate the contents of the
22 documents from the act of production. If the government
23 is seeking to immunize the act of production in a case
24 like this where the existence of the documents has not
25 in any way been demonstrated by the government, the

1 immunity must also extend to the fact that those
2 documents are in existence, and if it extends to the
3 fact that those documents are in existence, it must
4 necessarily extend to the contents of the documents.

5 I don't understand how the government can
6 separate them. If the documents are in existence, and
7 if the government has no -- if the documents are in
8 existence, the government has no indication that they
9 are in existence, then the immunity must extend to the
10 existence of the documents, which necessarily has to
11 cover the contents. So therefore --

12 QUESTION: Isn't it true that the Fifth
13 Amendment only protects compelled testimony concerning
14 the existence of the documents? There is nothing in the
15 Fifth Amendment about existence of evidence that is
16 protected.

17 MR. PHILIPS: I believe the Fifth Amendment
18 protects compelled production of incriminatory
19 documents, and where the existence of the document is
20 unknown to the government, to immunize only the act of
21 production without immunizing the fact that the
22 documents are in existence is not coextensive with my
23 client's Fifth Amendment privilege. You must immunize
24 also the contents. The use and derivative use of the
25 act of production must cover the contents of the

1 documents in order for the immunity to be coextensive
2 with the privilege.

3 QUESTION: That certainly isn't what Fisher
4 was based on. I just don't see how you can make that
5 argument.

6 QUESTION: I don't either.

7 MR. PHILIPS: That is my understanding as to
8 the testimonial nature of the act of production as
9 discussed in Fisher. In Fisher, the Court found that
10 the act of production was non-testimonial, because there
11 the documents were -- it was a foregone conclusion that
12 the documents were in existence. Here there has never
13 been any conclusion or indication that these documents
14 are in existence. In fact, the Third Circuit found that
15 this is an attempt by the government to link up my
16 client with these proprietorships, and that the
17 government has no indication and has come forward with
18 no evidence that these documents are in existence.

19 QUESTION: But that shifts over again to the
20 act of production type of self-incrimination compelled
21 that we were talking about during the government's
22 case. Why don't you go back to Justice Stevens' example
23 of what if the government agreed in this case that all
24 connection between the production and location of these
25 documents and your client would be immunized, but

1 nonetheless the government would be free to use the
2 contents of the documents against your client.

3 MR. PHILIPS: Only if they agreed that the
4 existence of the documents, the very existence of the
5 documents would be immunized would I then say that the
6 immunity that they are offering is coextensive with --

7 QUESTION: Well, why would your client say
8 that the very existence of the documents would tend to
9 incriminate him?

10 MR. PHILIPS: Because of the government's own
11 stipulation that the contents tend to incriminate him. I
12 cannot separate the contents from existence.

13 QUESTION: That is just contrary to Fisher, in
14 my view, your position.

15 MR. PHILIPS: In any event, the point is that
16 the government never did use the statutory immunity
17 which they had the right to in the District Court, and I
18 suggest to this Court that the reason they did not use
19 that statute was because they themselves were unsure of
20 what was to be immunized.

21 My argument today, briefly outlined, is that
22 first of all, my client is entitled to the privilege on
23 the protection of papers rationale based on this Court's
24 cases from Boyd through Fisher and including Andresen.
25 If not under the privacy rationale and the protection of

1 papers rationale of those cases, then the compelled
2 production of these documents in this case would amount
3 to a compelled testimonial communication which is
4 incriminatory as the Third Circuit and District Court
5 found, and that based on that, his Fifth Amendment
6 privilege would be valid.

7 The government rests their argument completely
8 on Fisher. They pick and choose language from Fisher
9 and disregard the context that that language is used.
10 The government ignores the factual background of Fisher
11 that there, the documents that were being sought were
12 being sought from attorneys, they were not the
13 taxpayers' records. There was no compulsion upon the
14 taxpayer in that case, and in fact the records were not
15 his, but they were the work papers of the accountant.

16 In numerous cases, this Court has recognized
17 that the privilege belongs to the individual. In
18 Wilson, the Court held that a corporation had no
19 privilege, but the Court carefully distinguished the
20 situation where an individual was involved. In White
21 and Bellis, I suggest the same distinction between a
22 separate entity and an individual was made.

23 In each of those cases, the Court was very
24 careful to distinguish that the rights of an individual
25 not to be compelled to produce incriminating private

1 papers.

2 I suggest to the Court in those cases the
3 Court was faced with a policy decision of whether there
4 was an overriding governmental interest that the
5 government had to seek access during the course of its
6 investigations to the records of a collective entity.
7 The Court found that there was because of the scope of
8 the economic activity of a corporation or a labor union
9 or a partnership.

10 Here, the Court is faced with a somewhat
11 similar policy question, but here, there is no
12 overriding concern or governmental interest to seek the
13 records of a sole proprietor. There is no mass
14 abandonment of a -- or there would be no mass abandonment
15 of the corporate form of doing business or the
16 partnership form of doing business to become a sole
17 proprietor.

18 There is no large scope of activity of sole
19 proprietors that -- The government makes a distinction
20 between business and personal records. I submit to the
21 Court that that distinction is invalid, that the only
22 distinction that this Court has that finds support in
23 the cases of this Court is the distinction between an
24 individual and a representative of a collective entity.
25 There can foresee endless litigation over particular

1 documents whether they are business or whether they are
2 personal.

3 In summary, I would urge this Court to affirm
4 the decision of the Third Circuit.

5 Thank you.

6 CHIEF JUSTICE BURGER: Do you have anything
7 further, Mr. Alito? You have three minutes remaining.

8 ORAL ARGUMENT OF SAMUEL A. ALITO, ESQ.,

9 ON BEHALF OF THE PETITIONER - REBUTTAL

10 MR. ALITO: I have just two very brief
11 points. The first is to emphasize that in this case we
12 are not asking enforcement of the subpoenas. The
13 subpoenas were quashed below, and if the Court were to
14 vacate that decision or otherwise make clear that we
15 would be free on remand to grant statutory immunity, our
16 interests would be substantially served.

17 And the second point is just a point of
18 clarification. We are not pressing the argument of
19 non-statutory immunity in the case of immunity for
20 testimony, but only in the very limited area of act of
21 production immunity, where we think that the argument
22 about the incriminating nature of the act of production
23 is essentially academic, and where there are no serious
24 taint problems.

25 QUESTION: May I -- I am puzzled. You are not

1 asking for enforcement of the subpoenas?

2 MR. ALITO: No, the order below -- the
3 District Court quashed the subpoenas. The Court of
4 Appeals affirmed --

5 QUESTION: And you say -- Well, then why isn't
6 the case moot?

7 MR. ALITO: The case is not moot because what
8 we are -- we are not asking for anyone to be held in
9 contempt. I suppose that is what I am attempting to
10 say.

11 QUESTION: Are you asking for enforcement of
12 the subpoenas?

13 MR. ALITO: We are asking for the judgment to
14 be vacated below, and the judgment below merely quashed
15 the subpoenas. It didn't enforce them.

16 QUESTION: Well, if you vacate a judgment but
17 refuse to enforce the subpoena, presumably you have to
18 write something about why you are vacating the judgment,
19 and when you write that, ought the Court to discuss
20 whether the subpoena should have been enforced or not?

21 MR. ALITO: Yes, and what I am saying is that
22 if it is made clear that on remand a grant of statutory
23 immunity would obviate Fifth Amendment objections, that
24 would satisfy our position, although we continue to
25 maintain that in the limited area of act of production

1 immunity, this non-statutory functional immunity would
2 be sufficient.

3 QUESTION: It sounds to me like you are asking
4 for an advisory opinion. What order do you ask us to
5 direct the District Court to enter?

6 MR. ALITO: To enter an order vacating the
7 quashing of the subpoenas.

8 QUESTION: And therefore enforcing the
9 subpoenas?

10 MR. ALITO: Well, my understanding is that
11 those would not be equivalent. There would still be
12 other procedures that would have to be followed before
13 the subpoenas were enforced.

14 QUESTION: What you really want is for us to
15 say, you made a mistake, you are not asking for
16 immunity, and we will vacate and send it back so you can
17 do what you should have done before.

18 MR. ALITO: Well, we are making alternative
19 arguments, Justice Marshall. We believe --

20 QUESTION: Are you making that one?

21 MR. ALITO: We believe that our offer of
22 non-statutory immunity was satisfactory, but if that --
23 if the Court disagrees and makes clear that an offer of
24 statutory immunity would have sufficed, that would be --
25 that would serve our interests.

1 QUESTION: Well, how did this case get into
2 the District Court? You issued some subpoenas, and
3 there was a motion to quash, wasn't there?

4 MR. ALITO: That's correct.

5 QUESTION: What if there hadn't been a motion
6 to quash?

7 MR. ALITO: The witness would have been
8 ordered to comply, I presume, and if he had refused to
9 comply, he might have been held in contempt, but that
10 never occurred.

11 QUESTION: I know, but did the -- What would
12 the government have to do to secure compliance?

13 MR. ALITO: Well, in --

14 QUESTION: Suppose there had been no motion to
15 quash, he just didn't -- he just didn't produce.

16 MR. ALITO: We would have gone to the District
17 Court and asked for an order of enforcement.

18 QUESTION: That he be ordered to produce.
19 Now, do you still have to do that?

20 MR. ALITO: Yes.

21 QUESTION: Mr. Alito, are you telling us that
22 the government will grant -- wishes to grant statutory
23 immunity as to the contents of these documents?

24 MR. ALITO: No, absolutely not.

25 QUESTION: So we still have to address that

1 issue, I take it.

2 MR. ALITO: That's correct. Absolutely not.
3 We don't -- We do not intend to grant immunity as to --

4 QUESTION: That is the principal issue, you
5 think, here?

6 MR. ALITO: That is one of the principal
7 issues, yes.

8 Thank you.

9 CHIEF JUSTICE BURGER: Thank you, gentlemen.
10 The case is submitted.

11 (Whereupon, at 10:47 o'clock a.m., the case in
12 the above-entitled matter was submitted.)

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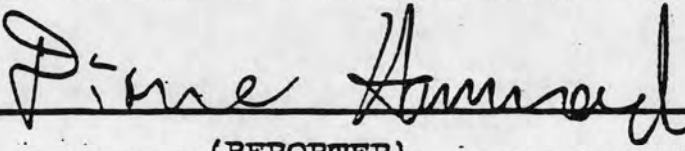
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