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SUPREME COURT OF THE UNITED STATES

In the Matter of:

JOHN DOE,

Petitioner,

v.

UNITED STATES.

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No. 86-1753

Pages: 1 through 55

Place: Washington, D.C.

Date: March 2, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN DOE, :

Petitioner, :

v. : No. 86-1753

UNITED STATES :

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Washington, D.C.

Wednesday, March 2, 1988

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

RICHARD E. TIMBIE, ESQ., Washington, D.C.,; on behalf of the
Petitioner.

CHARLES A. ROTHFELD, ESQ., Assistant to the Solicitor General,
Department of Justice, Washington, D.C.,; on behalf of the
Respondent.

C O N T E N T S

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ORAL ARGUMENT OF:

PAGE:

RICHARD E. TIMBIE, ESQ.

On behalf of the Petitioner

3

CHARLES A. ROTHFELD, ESQ.

On behalf of the Respondent

25

RICHARD E. TIMBIE, ESQ.

On behalf of the Petitioner - Rebuttal

52

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument first
4 this morning in Number 86-1753, John Doe against the United
5 States.

6 Mr. Timbie, you may begin whenever you wish.

7 ORAL ARGUMENT OF RICHARD E. TIMBIE, ESQ.

8 ON BEHALF OF THE PETITIONER

9 MR. TIMBIE: Mr. Chief Justice, and may it please the
10 Court:

11 This case involves the Fifth Amendment implications
12 of a court order requiring a Grand Jury target to waive foreign
13 bank secrecy requirements.

14 The facts can be stated simply. John Doe is under
15 Grand Jury investigation for tax offenses. The Grand Jury knows
16 that Doe has bank accounts in the Cayman Islands and Bermuda
17 and believes that the records of those accounts would provide
18 evidence sufficient to bring an indictment.

19 The Grand Jury has tried to get those records by
20 serving subpoenas on the U.S. branches of those foreign banks,
21 but has been unsuccessful because the banks have objected on
22 the ground of foreign bank secrecy laws that prohibit
23 disclosure of bank information without the consent of the
24 customer.

25 The United States Attorney, therefore, filed this

1 action in the District Court.

2 QUESTION: Excuse me. Is that binding on the United
3 States authorities?

4 MR. TIMBIE: The --

5 QUESTION: The foreign bank secrecy laws?

6 MR. TIMBIE: No, Your Honor, it's not binding, and,
7 in fact, it may not even be pertinent, but the Government feels
8 that it would be helpful in obtaining the records in a show
9 cause proceeding against the banks in the United States.

10 QUESTION: But you could seek to compel the banks to
11 do it despite those foreign laws and take some action against
12 the domestic subsidiaries of the bank?

13 MR. TIMBIE: Yes, Justice Scalia. That is precisely
14 what was done in the Bank of Nova Scotia case, and it is what
15 the Government acknowledges in a footnote in its brief. It
16 proposes to do in this case. It simply wants this consent as a
17 sort of thumb on the scale in that balancing test that will be
18 used in that proceeding.

19 The District Court originally denied the Government's
20 motion for an order requiring John Doe to sign the consent
21 directive, and the U.S. Attorney appealed the denial to the
22 Fifth Circuit which reversed and remanded.

23 On remand, Doe was ordered to sign the document and
24 refused to do so, was held in civil contempt, and sanctions
25 were stayed pending this appeal.

1 The directive that Doe has been ordered to sign by
2 the court below makes four statements. It says that Doe
3 directs any bank to disclose records of accounts over which he
4 has signatory authority. Excuse me. Over which he has the
5 right of withdrawal.

6 That that direction is irrevocable. That that
7 direction is given pursuant to a court order, and that that
8 direction is intended to constitute consent for purposes of
9 Bermuda and Cayman law.

10 We contend that that order below violates Doe's Fifth
11 Amendment rights because the consent directive, once signed,
12 would be a compelled communication and its contents would be
13 used to incriminate Doe.

14 Now, the Government concedes compulsion and
15 incrimination, and we feel there is no serious doubt that what
16 we are dealing with here is a communication. After all, once
17 signed, the document will be a statement by Doe to the banks
18 that he directs them to disclose records, that he won't revoke
19 his direction, and that he will not later argue that it's not a
20 valid consent.

21 QUESTION: But what's the testimonial about that?

22 MR. TIMBIE: Mr. Chief Justice, our contention is
23 that the Fifth Amendment test is not whether the statement is
24 testimonial in the narrow sense that the Government argues;
25 that is, that it gives the Government information that is

1 directly relevant to the case or could be used as leads; but
2 the test that this Court has used in every case and that is the
3 rational in every case is whether the compelled statement is
4 testimonial or communicative as opposed to a non-communicative
5 act or, in the case of a handwriting exemplar or voice print, a
6 statement that isn't intended to be used for its content in any
7 way.

8 QUESTION: Mr. Timbie, if the scene were changed,
9 say, to the State of Colorado, would these records be
10 available?

11 MR. TIMBIE: Absolutely, Your Honor.

12 QUESTION: Suppose Colorado passed a law saying they
13 passed a bank secrecy act, would it be constitutional?

14 MR. TIMBIE: I would assume not. I simply don't
15 know. I would assume there would be a supremacy problem.

16 QUESTION: So, it's foreign venue that really is the
17 sticker here. What was the -- does the record disclose any
18 business reasons for having accounts in the Cayman Islands?

19 MR. TIMBIE: The record discloses that Doe was
20 involved in international oil trading business.

21 QUESTION: If one walks down the streets of Nassau,
22 which is foreign bank after foreign bank, and I haven't been in
23 the Cayman Islands, but I suppose it's the same reason, is --
24 are they there because they are refugees for what, tainted
25 money?

1 MR. TIMBIE: Mr. Justice Blackmun, they are there for
2 all sorts of reasons, of course, but we feel that the problem
3 -- there is obviously a concern that the Government has in this
4 case that it is unable under certain circumstances to obtain
5 records of those foreign accounts.

6 We feel that the pertinent issue here is whether the
7 means that they've chosen in this case to obtain the records
8 offends the Fifth Amendment. That is, whether when they want
9 to obtain those records, they can compel an unwilling,
10 unimmunized defendant or accused to speak on the Government's
11 behalf and then use the content of that speech to obtain the
12 records.

13 I would point out that there's no question that, as
14 Justice Scalia mentioned, there's no question that the
15 Government has an alternative means of getting these records
16 that would involve no Fifth Amendment problem, which would
17 simply be a show cause order against the banks that have
18 already been served subpoenas, and then a contempt hearing in
19 which the banks can be made to provide the records, unless they
20 could persuade the judge that the Cayman Islands interest in
21 the enforcement of its bank secrecy laws outweighs the U.S.
22 interest in the enforcement of its criminal tax laws.

23 And so far, very few banks have been able to win that
24 balance of test.

25 QUESTION: Mr. Timbie, taking Justice Blackmun's

1 question about a Colorado bank one step further, supposing your
2 client had a safe deposit box in the Colorado bank and the
3 Government wanted the key, could they get it from him?

4 MR. TIMBIE: That's an interesting question. I would
5 argue that the act of producing the key might have testimonial
6 aspects --

7 QUESTION: Very similar to this case.

8 MR. TIMBIE: -- in John Doe, but setting that aside,
9 yes, they could, and they could because they were using a means
10 --

11 QUESTION: But would you set that aside? Would you
12 set aside the testimonial significance of delivering the key?

13 MR. TIMBIE: Oh, no, I certainly wouldn't, but I
14 thought you were asking a more general question as to --

15 QUESTION: Whether they could require him to deliver
16 the key.

17 MR. TIMBIE: They could certainly give him acts of
18 production immunity and require delivery.

19 QUESTION: No, no.

20 MR. TIMBIE: Or if they knew --

21 QUESTION: Without giving any kind of immunity.

22 MR. TIMBIE: If they knew to a certainty that the key
23 existed and they had it, they could make him give it and that's
24 because he would not be required to communicate in any way in
25 order to fulfill the order of the court.

1 QUESTION: They could just subpoena the key and he'd
2 have to respond to the subpoena by delivering it?

3 MR. TIMBIE: Unless he could establish in a Huffman
4 hearing that the Government would be learning of the existence
5 of the key or of his possession of it and that fact would be
6 incriminating under the Fisher rational. He would have to give
7 it.

8 QUESTION: Well, don't we assume here the Government
9 already knows about the accounts?

10 MR. TIMBIE: Yes.

11 QUESTION: Yeah. Okay.

12 MR. TIMBIE: Excuse me, Your Honor. May I clarify
13 that answer?

14 QUESTION: Yes.

15 MR. TIMBIE: The Government knows about eleven
16 accounts. It has told the court below that it knows of a
17 twelfth account that is not in John Doe's name, but that it
18 believes was controlled by Doe and used in connection with
19 these illegal activities, and that one of the purposes of this
20 consent procedure is to obtain the records of that account,
21 assuming that they are, in fact, controlled by Doe.

22 The Government also wants records of any accounts of
23 which it knows nothing that would fall within the scope of the
24 consent.

25 QUESTION: What if the Government -- let's say

1 nothing is as esoteric as this situation, it's a murder
2 investigation, the Government issues a subpoena to a
3 prospective indictee, subpoena all the guns in your possession,
4 now can he defend against that on the grounds that producing
5 guns might incriminate him?

6 MR. TIMBIE: The answer to your question lies not in
7 -- I don't think lies in the issue before the Court today, but
8 in the extent to which the Court would extend Fisher and how
9 the court views the act of production rational, I could argue
10 that if the Government didn't know to a certainty that he
11 possessed any guns, and the fact that he possessed any gun
12 would be incriminating under the circumstances, that Fisher
13 should be extended to that.

14 QUESTION: But Fisher didn't hold that there was any
15 significance to the act of production. It was debated in
16 Fisher, but it wasn't decided.

17 MR. TIMBIE: Excuse me. It was in Doe that it was --

18 QUESTION: And Doe devoted about one paragraph to it.

19 MR. TIMBIE: My reading of Doe -- I'm not sure I
20 understand the point that you're making.

21 QUESTION: Well, my question is that the idea you're
22 pumping for may not be as well established as you think it is.

23 MR. TIMBIE: We don't feel that it's established by
24 Fisher and Doe. We simply don't feel it's been taken away by
25 Fisher and Doe. We --

1 QUESTION: Prior to Fisher, where did it exist?

2 MR. TIMBIE: It existed in the so-called physical
3 evidence cases in which, beginning with the Holt case back in
4 1910, Justice Holmes announced a boundary to the Fifth
5 Amendment in terms of a requirement that the Government not
6 compel a witness or an accused to provide any form of testimony
7 or conduct that would be testimonial or communicative, and, in
8 fact, Justice Holmes' word was "communicative conduct" as
9 opposed to a demonstration of physical characteristics, and
10 subsequent cases, like Schmerber and Dionisio, Gilbert and
11 Wade, have all applied that line and, in fact, have described
12 protected conduct as conduct that is testimonial or
13 communicative in any way.

14 QUESTION: Don't you think they mean communicative to
15 the fact-finder at the trial and not communicative to anyone in
16 the world? If I may pursue Justice Stevens' hypothetical, you
17 think that the difference between this case and the key case,
18 where you say he can -- the Government can compel the
19 production of the key to the safe deposit box, assuming they
20 give immunity for the fact of the production of the key, right?

21 MR. TIMBIE: Right.

22 QUESTION: But you would say that even if they gave
23 immunity, they could not require him to tell the guard it's all
24 right to let these investigators in to get into my safe deposit
25 box. If he has a private guard who will only let people in

1 with his consent, he can give the key but he can't tell the
2 guard, let these people in. That's the line you're drawing
3 here.

4 MR. TIMBIE: The line I'm drawing --

5 QUESTION: Because that's communicative.

6 MR. TIMBIE: -- is that he cannot be made to speak
7 such that the Government would use the content of his speech to
8 obtain incriminating evidence unless that compelled speech is,
9 in fact, immunized. That is the line, and --

10 QUESTION: You think that's a reasonable line between
11 giving the key and telling the guard, let these people in?

12 MR. TIMBIE: The key hypothetical is an extraordinary
13 one. I should think that the genuine analogy in this case
14 would be to sign a directive instructing anyone, if they have
15 custody of the key that will allow access to incriminating
16 evidence, to turn it over to the U.S. Attorney and if the
17 Government feels that it could use that document somehow to
18 cause a third party to release the key to --

19 QUESTION: No, not to use at trial. Not to use at a
20 trial anyway.

21 MR. TIMBIE: Well, no, not to use at a trial, but if
22 there's a potential for using it at trial, obviously that's an
23 independent basis for finding Fifth Amendment violations.

24 If I may, there has not been a case, and we don't
25 contend there's been a case, in which this Court has directly

1 addressed a communication that was not testimonial in the sense
2 that the Government asserts.

3 We acknowledge that. On the other side, there has
4 never been a case in which this Court has drawn the line that
5 the Government suggests and that line has somehow been relative
6 to the holding. That is, there is no case in which this Court
7 has allowed a compelled communication on the ground that it did
8 not communicate facts about an offense or disclose information
9 that might lead directly or indirectly --

10 QUESTION: Well, may I ask another question then?
11 Supposing the Grand Jury subpoenaed somebody and asked them to
12 provide them with a handwriting sample of the person's
13 signature, which I guess they can do if they are just trying to
14 compare it with the pre-existing signature, but are you saying
15 that they could not take that signature and go to other parties
16 and say, have you ever seen a signature like this one?

17 MR. TIMBIE: Oh, absolutely. There's no question
18 they could do that. The reason they could do that is set forth
19 in Gilbert. The reason they could do that is that it is the
20 physical characteristics of the signature and not the content
21 of the words that they're after. Therefore, there's no Fifth
22 Amendment issue. They can use it against him in any way they
23 choose.

24 QUESTION: Not only -- they could use it to gather
25 evidence that might incriminate him. That's what I'm saying.

1 Take that signature around and ask people, have you seen --

2 MR. TIMBIE: That's what Gilbert -- that's what
3 Schmerber says, certainly. Schmerber says that although the
4 logic of the underlying principles of the Fifth Amendment would
5 suggest that you can't even compel assistance from a defendant
6 in the form of turning over physical evidence, this Court
7 declines to extend the Fifth Amendment beyond testimony or
8 communication, and, therefore, in Gilbert, the Court said the
9 handwriting exemplar could be compelled specifically because it
10 was not the content, it was not any form of testimony or
11 communication out of the defendant's mouth that was the purpose
12 or use of the exemplar.

13 And, in fact, I would certainly argue that if, in the
14 guise of taking a handwriting exemplar, the Government were to
15 make Joe write out a document, write these words, I consent to
16 disclosure of my foreign bank records, and they were then to
17 take that handwriting exemplar to the bank and attempt to pass
18 it off as a consent, I would certainly argue that it would be a
19 communication.

20 QUESTION: Mr. Timbie, what actual potential use of
21 the form do you say is testimonial here?

22 MR. TIMBIE: There are two uses and, in fact, there
23 are principal and alternative arguments in the case. The first
24 use is taking the form to the bank and presenting it to the
25 bank as a communication of Doe's consent and an assurance from

1 Doe that he won't revoke that consent and won't later argue
2 that it was invalidly granted.

3 QUESTION: Well, why isn't that much like taking
4 blood or getting the handwriting sample?

5 MR. TIMBIE: In the words of Schmerber, blood and
6 handwriting samples are sought for their physical
7 characteristics, not for any compelled communication they might
8 entail, whereas that is sought for a compelled communication,
9 and I recognize that there's no direct authority that can be
10 cited that would cause the Court to choose between the
11 Government's line and our line, but I would --

12 QUESTION: Direct authority meaning physical evidence
13 in a sense?

14 MR. TIMBIE: Surely.

15 QUESTION: Mr. Timbie, in the absence of any direct
16 authority, maybe we're compelled to fall back upon the language
17 of the Fifth Amendment.

18 QUESTION: That's a drastic step.

19 QUESTION: Yes. I hate to suggest it, but the -- it
20 does not read that no one shall be compelled to communicate in
21 such fashion as to harm his case. It says no one shall be
22 compelled to be a witness against himself.

23 Now, how is this action here causing this individual
24 to be a witness against himself?

25 MR. TIMBIE: Justice Scalia, I would submit,

1 respectfully, that if this Court were to fall back on the
2 language of the Fifth Amendment, it would have to overrule a
3 great deal of precedent in addition to not following --

4 QUESTION: Why is that?

5 MR. TIMBIE: Because the language of the Fifth
6 Amendment suggests that what we're concerned about here is
7 compelled confessions, and the reason -- the initial reason
8 that compelled confessions were considered inappropriate was
9 that they're untrustworthy and unseemingly.

10 QUESTION: But it's easy to extend it to any
11 testimonial utterance by the defendant that can be used against
12 him at trial. That can be used for its truth against him at
13 trial.

14 MR. TIMBIE: Well, and then the Court has then gone
15 on to say that under Kastigar, the Fifth Amendment would
16 require that in addition, any leads that came out of the
17 testimony would have to be protected and any evidence derived
18 directly or indirectly from it.

19 Perhaps I could come at your question from the other
20 direction.

21 QUESTION: Once you establish the violation, there
22 are all sorts of fruits of the tree that also fall out. Why
23 isn't it enough to say the violation has to be some testimony,
24 some assertion of a fact or the truth that he makes which is
25 used at trial against him?

1 MR. TIMBIE: I can't argue that there is a compelling
2 logical reason why the line has to be drawn where we suggest.
3 I would like, if I may, to come at the answer to your argument
4 from the other direction and suggest some types of compelled
5 communication that would apparently be allowable under the
6 Government's rule that I feel would not be within the spirit of
7 the Fifth Amendment and certainly would not be within the
8 traditional scope of the Fifth Amendment as it has been applied
9 over the last hundreds of years.

10 Let me take, if I may, the Government's own rational
11 for why, in their words, the document Doe is being asked to
12 sign is a non-assertive document and, therefore, the Government
13 would divide the universe of communications, of course, into
14 assertive communications that continue to be protected and so-
15 called non-assertive communications that aren't protected, and
16 the rational for putting this consent directive in the non-
17 assertive title under the Government's view, there are three of
18 them offered.

19 One is that it is an imperative statement issued to a
20 third party and should be simply treated as a verbal act. Now,
21 the corollary it seems to me of that rational is that any
22 imperative statement is outside the Fifth Amendment, so long as
23 the Government is not using it as an admission of fact.

24 Does that mean that in a bank robbery investigation,
25 the Government could get a court order that the first suspect

1 arrested call up or write to an alleged accomplice and tell
2 him, bring the loot to the corner of Fifth and Main, we'll go
3 some place and divide it up and then wait and see what happens?

4 I would contend that that is not faithful to the
5 command of the Fifth Amendment or the policy of the Fifth
6 Amendment, that the Government will shoulder the entire load in
7 an investigation and not --

8 QUESTION: Well, Mr. Timbie, don't you suppose the
9 due process clause addresses some of your concerns about other
10 potential uses to which the Government's logic might lead?

11 MR. TIMBIE: There may well be an overlap between due
12 process --

13 QUESTION: Yeah. There may be some protection there,
14 and I would appreciate it if you'd answer my question.

15 MR. TIMBIE: Pardon me, ma'am. I'm sorry.

16 QUESTION: I wanted to know what testimonial use of
17 the consent form you're relying on here.

18 MR. TIMBIE: I am very sorry.

19 QUESTION: Well, you were interrupted. It's not your
20 fault, but I would like to know. You said --

21 MR. TIMBIE: I said, in our view, the mere
22 presentation of the document to the bank is a testimonial use
23 because it's a use of content.

24 In the alternative, if the Government -- if the Court
25 adopts the Government's view that this is -- that there is a

1 difference between assertive and non-assertive communications,
2 then I think it would still be a testimonial use and it is the
3 use identified in Ranauro which, in the First Circuit's
4 decision in Ranauro, which held this procedure to be
5 unconstitutional, Ranauro presented a hypothetical that framed
6 the issue in which a consent directive was signed and presented
7 to a foreign bank and the bank produced records of an account
8 that wasn't in the name of the person who signed the consent
9 directive, and it seems clear that under those circumstances,
10 the statement in the consent, I authorize disclosure of records
11 of accounts over which I have the right of withdrawal, becomes
12 testimonial evidence that he has the right of withdrawal, and
13 it would be evidence that could be used in a criminal trial
14 against him unless he were given immunity from the act of
15 signing the document.

16 QUESTION: Well, I assume the Government could take
17 care of that by simply redrafting the order.

18 MR. TIMBIE: I am not sure how that would be
19 possible.

20 QUESTION: Well, we could play around with the words,
21 I suppose, but it would say without acknowledging that I have
22 control, you are authorized to release any accounts over which
23 I do have control.

24 MR. TIMBIE: No. I believe the document was
25 redrafted once in order to do exactly what you're suggesting.

1 That is, make it at the time it is signed not an
2 acknowledgement of control of ready accounts, but what the
3 Ranauro court said is that no matter how hypothetically it's
4 drafted and vaguely it's drafted, the process server who went
5 to the bank could then get on the stand, -- the Brown decision
6 in the Second Circuit says that you can authenticate and get
7 admission of records by putting on the process server who
8 served the subpoena and say this is what I asked for and here's
9 what I got, and that's authentication.

10 In this case, the process server could say or the
11 Government attorney or an agent who delivered the consent could
12 say, I went to the bank and demanded the records, they said no
13 because the customer has to consent. I went to the bank with
14 Doe's consent, this is what they gave me.

15 I'm not sure that would be adequate to authenticate
16 the records, but it would be some evidence of a link between
17 Doe and those accounts, and the Government explicitly refuses
18 or at least does not deny that that document would be usable in
19 a trial for that purpose. Their argument at the end of their
20 brief on the last page simply --

21 QUESTION: Well, we can argue about that.

22 MR. TIMBIE: -- says it wouldn't have probative
23 value.

24 QUESTION: It seems to me that that's the act of the
25 bank.

1 Let me ask you just one other question. You've
2 argued the case so far in order to show that there's a
3 testimonial component to this statement.

4 Does your case rise or fall on that? If we were to
5 rule that there is no testimonial component, does your case
6 necessarily fail?

7 MR. TIMBIE: That is --

8 QUESTION: That's another way of asking whether or
9 not the Fifth Amendment has another ingredient and that is that
10 the accused simply can't be asked to do too much to make the
11 case against him.

12 MR. TIMBIE: I would have to say that in our view,
13 the traditional Fifth Amendment rule is that too much and
14 communication are the same thing, that the Court has said too
15 much in terms of production of physical evidence, giving blood
16 samples, being forced to speak in your own voice in a line-up
17 and repeat what was said, that's a lot.

18 But the bright line the Court has drawn in case after
19 case is between physical evidence, acts that have no
20 communicative content, and communication, and I think that in
21 my view, too much and that line are the same thing.

22 Having already given the hypothetical -- excuse me. I
23 only ended up giving one of the explanations that the
24 Government uses to show that this is a non-assertive
25 communication under its rule, and there are two others that

1 suggest two other categories of communications that it would
2 view as unprotected.

3 One is the Government argues in its brief that this
4 is a non-assertive communication because the Government put the
5 words in Doe's mouth, and the Court ordered him to say it, and,
6 therefore, it wouldn't be right to treat them as words of Doe
7 or as communications from Doe.

8 Now, the Government is clearly trying to have it both
9 ways there. It wants to take this document to the bank and say
10 to the bank, this is Doe's consent, only he can give it,
11 there's his signature. On the other hand, it comes to this
12 Court and says, you should treat it as an act devoid of content
13 because we told him what to say.

14 If the Government's right there, then presumably
15 unimmunized witnesses could be made to cooperate in an
16 investigation so long as the Government told them what to say.

17 For example, if you imagine a complex conspiracy
18 investigation in which, as is often true, the prosecutor knows
19 what went on and knows who the players were, but can't because
20 it doesn't have a cooperating witnesses establish these
21 conspiratorial links that are necessary for the conspiracy
22 indictment, it would theoretically under the Government's view
23 be proper to have a court order an unimmunized alleged co-
24 conspirator to call up other parties and make statements
25 calculated to cause the other parties to incriminate themselves

1 and if that were to work, then the incriminating statements
2 might equally well incriminate the person doing the calling out
3 of his own mouth.

4 QUESTION: I'm not sure the Government -- that it
5 would be all right to do that. I think they would argue that
6 that order might not itself violate the Fifth Amendment.

7 MR. TIMBIE: That's correct, and then they would
8 order that the defendants in the ultimate indictment would have
9 to come up with some trickery rational to preclude it.

10 My point is that it seems to me that is making him
11 convict himself out of his own mouth and if it's a question of
12 what is too much, that that should be too much.

13 QUESTION: It seems to me that, too, Mr. Timbie, but
14 are you sure it's the Fifth Amendment that makes it bad? I
15 don't think the Government could ask John Doe out on the street
16 to do that either.

17 MR. TIMBIE: You're suggesting there's a jurisdiction
18 problem?

19 QUESTION: I am saying there's some limit to what the
20 Government can do to enlist anybody in its investigations. I
21 don't think the reason it can't do it is necessarily that this
22 person is under indictment. I don't think you could ask
23 anybody to go and assist -- compel anybody to assist this
24 investigation in that fashion.

25 MR. TIMBIE: If you're suggesting that there would be

1 a jurisdiction problem in a District Court issuing such an
2 order, I would agree and we made that argument below and the
3 Fifth Circuit ruled there was jurisdiction for this prosecutor
4 or John Doe to assist the Government in its investigation in
5 that way, even though the controversy was between the banks and
6 the Government.

7 If you're suggesting that setting aside jurisdiction,
8 there's some per se rule why that is improper, I don't know
9 what the rule is. I think in order to police that kind of
10 conduct, you need a Fifth Amendment rule that encompasses all
11 communications.

12 QUESTION: Mr. Timbie, do you have any comment on the
13 amicus brief that was filed by Rex Lee?

14 MR. TIMBIE: My only comment is, as I said earlier in
15 the argument, the issue -- there's a sham quality to what's
16 going on here, and I think that that is pointed out in the
17 amicus brief. The Cayman Islands have ruled, the high court of
18 the Cayman Islands has ruled that a compelled consent is not a
19 consent for purposes of its law.

20 So, what the Government is trying to obtain is on its
21 face an invalid document, and the Government has said we want
22 to use that document nonetheless in a U.S. court in the
23 balancing test in hopes that it will be thrown on our side of
24 the scale, notwithstanding its patent invalidity in the Cayman
25 Islands.

1 I don't think the issue of whether it is a valid
2 document is determinative of the Fifth Amendment question in
3 this case, and I believe what the Cayman Islands were saying is
4 that that's an issue that ought not be addressed in this
5 proceeding because it hasn't been framed in the record below.

6 I'd like to reserve the balance of my time for
7 rebuttal.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Timbie.
9 We'll hear now from you, Mr. Rothfeld.

10 ORAL ARGUMENT OF CHARLES A. ROTHFELD, ESQ.

11 ON BEHALF OF THE RESPONDENT

12 MR. ROTHFELD: Thank you, Mr. Chief Justice, and may
13 it please the Court:

14 I think it's helpful at the outset to make clear
15 exactly what is not controverted in this case. Both sides
16 agree that the bank records sought by the Government are not
17 themselves privileged under the Fifth Amendment. Both sides
18 agree that the banks that hold the documents can't assert the
19 Fifth Amendment in declining to turn them over.

20 Both sides agree that the Petitioner has no Fifth
21 Amendment right to keep the banks from disclosing the
22 documents. Both sides agree the Government has to find the
23 banks where Petitioner has his accounts through its own
24 investigation and once the Government does find those accounts,
25 both sides agree that the only thing that will keep the banks

1 from surrendering the account records are foreign bank secrecy
2 laws that have no force in the United States.

3 I think Mr. Timbie acknowledged all these points in
4 his argument.

5 Nonetheless, Petitioner insists that the Fifth
6 Amendment somehow gives him a constitutional right to continue
7 to enjoy the protection of the foreign bank secrecy laws, even
8 though the act of waiving that protection, the consent form
9 itself, concededly does not give the Government any information
10 that will advance its investigation.

11 QUESTION: It really doesn't waive the protection as
12 was just pointed out. I mean, and even if the amicus brief had
13 not been filed, it's obviously the simplest thing in the world
14 for any foreign country who has these bank laws and, indeed, it
15 would be idiotic if they didn't, once this case is decided the
16 way you want it decided, for them to simply say, moreover,
17 compelled consent is not sufficient. That will be in the bank
18 contract and then you can do these proceedings forever and it
19 will never get you the information you want.

20 MR. ROTHFELD: Well, let me say several things in
21 response to that, Justice Scalia.

22 Idiotic or not, the fact does have some effect. It
23 is true that a court in the Cayman Islands has concluded that
24 as a matter of Cayman laws, these consent forms are in effect
25 if that decision was not appealed. So, Cayman law, I think, is

1 not settled.

2 But there are other jurisdictions that have, even
3 assuming that that settles Cayman law for all time, there are
4 other jurisdictions that have bank secrecy provisions either by
5 statute or by common law, including Bermuda and the United
6 Kingdom, Bermuda is involved in this case, and my understanding
7 is although there are no reported cases from those
8 jurisdictions, in fact, banks in those jurisdictions comply
9 with these compel consents because they interpret their common
10 law bank secrecy protections as having an exception for when
11 compel consent forms of this kind are used.

12 So, I think that they are useful and, of course,
13 there are a great many other jurisdictions that have widely
14 varying kinds of bank secrecy laws. So, this is not a sham
15 proceeding, and I should say, in addition, to the extent that a
16 consent form won't be useful for us, that's our problem. That
17 is not a solution to the Petitioner's case here. It doesn't
18 have any bearing on the Fifth Amendment question of whether it
19 can be compelled to execute the consent, which we can then try
20 to use in a foreign jurisdiction.

21 So, I think it is extremely useful proceeding. I
22 should add one additional practical point. To the extent that
23 Mr. Timbie suggested that we can simply obtain these records
24 easily enough by serving subpoenas on the domestic branches of
25 foreign banks, that's not entirely true because those banks can

1 contest subpoenas and argue that under comity principles, they
2 should not be required to surrender the records, and I'm sure
3 that the banks, and Mr. Timbie if he were in a position to do
4 so, would argue that they should not surrender those records.

5 So far as banks that don't have branches in the
6 United States are concerned, in which you must attempt to
7 obtain records by going to foreign nations, under comity
8 principles, foreign courts are often reluctant to help other
9 countries enforce their revenue laws. So, these consent forms
10 may be the only way for us to obtain this information.

11 QUESTION: Mr. Rothfeld, do you take the position
12 that the Government can introduce into evidence for any purpose
13 whatever the consent form?

14 MR. ROTHFELD: Let me answer that question in two
15 parts, Justice O'Connor.

16 We think, first of all, if the Government --

17 QUESTION: Against the person signing it?

18 MR. ROTHFELD: We think that if the Government were
19 to do so, it would not present any Fifth Amendment problem, and
20 I'll explain that later on. My short answer to your question
21 is we do not think that this would be admissible.

22 We think, as we explained in our briefs, that --

23 QUESTION: You take the position that it could not --

24 MR. ROTHFELD: Not for Fifth Amendment reasons. We
25 think that it doesn't have any significant evidentiary value.

1 QUESTION: But the Fifth Amendment doesn't prohibit
2 introduction --

3 MR. ROTHFELD: That's right.

4 QUESTION: -- in your view?

5 MR. ROTHFELD: That's correct.

6 QUESTION: Even for authentication?

7 MR. ROTHFELD: Well, as I suggest, we don't think it
8 would happen, but, no, we do not think the Fifth Amendment
9 would prohibit if someone could possibly imagine a situation in
10 which the bank consent form were introduced, and I think that
11 that comes clear from the nature of the Fifth Amendment
12 guarantee that the Petitioner is trying to call upon here.

13 We think the Court has already settled the principles
14 that control this case and has settled them against the
15 Petitioner. The Court has made it very clear, we think, that,
16 and I'll return to your question and address it in detail when
17 I set out the background which I think provides the answer to
18 your question, but the Court has made it quite clear that the
19 Fifth Amendment can be asserted only when the Government tries
20 to compel someone to do something that is incriminating and
21 testimonial, and we think the Court has made equally clear time
22 and again that something is testimonial only as that word
23 suggests, it has the nature of testimony. That is, when it
24 tells the Government something about the crime.

25 The only question in this case is whether the consent

1 form, that is at issue here, and requiring the Petitioner to
2 put his signature on a consent form, requires him to perform a
3 testimonial act within the meaning of this Court's decisions,
4 and we think that it quite clearly does not.

5 There should not be any controversy about the meaning
6 of the word testimony in the Fifth Amendment setting. The
7 Court, in its opinion in Fisher, we think, made it quite clear
8 that something is testimonial when it involves, in the Court's
9 words, "'truth telling'" by the witness, by the suspect, and
10 the Court has made it quite clear, made it quite clear the
11 kinds of things that are not testimony.

12 QUESTION: But if the consent form were to be offered
13 to establish that these are the records, the bank records,
14 belonging to the Defendant, I find it hard to understand why
15 that wouldn't be testimonial.

16 MR. ROTHFELD: Well, if a bank produces records in
17 response to a subpoena accompanied by a consent form, the bank
18 may be making an implicit statement that it thinks the records,
19 as Justice Kennedy suggested, that it thinks the records belong
20 to the suspect. But the suspect himself isn't making any
21 statement and he has no right to keep the bank silent.

22 The suspect in that case is --

23 QUESTION: But if the Government introduces the
24 consent form, then perhaps it is the suspect who is making the
25 statement.

1 MR. ROTHFELD: Well, I don't think so, Justice
2 O'Connor. The Court has made quite clear the kinds of things
3 that are not testimonial. Something is not testimonial simply
4 because it makes the suspect the source of incriminating
5 evidence. That was the holding in Schmerber, where a suspect
6 was required to provide incriminating blood samples.

7 The Court has made quite clear that something is not
8 testimonial, a witness' act is not testimonial, but simply
9 because it may lead to the production of incriminating evidence
10 by the third party, that was the holding in Holt and in Wade,
11 where suspects were required to put on clothing worn by the
12 perpetrator of the crime to facilitate witness identification.

13 QUESTION: Do you have to resort then to saying this
14 is a verbal act to say it isn't testimonial?

15 MR. ROTHFELD: We don't think we have to resort to
16 it. We think it is quite clear that it is a verbal act. We
17 certainly acknowledge -- if the consent form set out
18 information, if it said I have accounts in the Bank of Nova
19 Scotia in account number XYZ, and I'm telling you this, and you
20 can now take this information and go get my records, certainly
21 that would be testimonial. It would be telling the Government
22 something and providing information. The consent form doesn't
23 do that.

24 QUESTION: Supposing that instead of getting a court
25 order, you'd lock him up for long enough to persuade -- the

1 police had locked him up long enough to persuade him to sign
2 this document, didn't beat him up, but just used a course of
3 tactics to get him to sign it, would that violate the Fifth
4 Amendment?

5 MR. ROTHFELD: Well, I don't think it would violate
6 the Fifth Amendment, Justice Stevens.

7 QUESTION: Could they do it?

8 MR. ROTHFELD: Probably not.

9 QUESTION: Why not?

10 MR. ROTHFELD: I think that one of the problems --

11 QUESTION: Why couldn't they do it?

12 MR. ROTHFELD: Well, I would think that there would
13 be potentially due process problems. I'm not sure precisely.

14 QUESTION: I didn't hear your answer. You think
15 there are?

16 MR. ROTHFELD: I think there may be due process
17 problems in locking someone up until they --

18 QUESTION: Well, it's done all the time.

19 MR. ROTHFELD: If the Government were to take someone
20 without any court process whatsoever and simply throw them in
21 jail for months on end until they did sign it.

22 QUESTION: No. Justice Stevens is correct, it seems
23 to me, in what he suggests because this is done all the time.
24 If it's a valid court order, it can be enforced. If it's
25 invalid, it can't be.

1 MR. ROTHFELD: That's --

2 QUESTION: You're saying it's valid. So, we can
3 enforce it.

4 MR. ROTHFELD: That's quite right. Maybe I
5 misunderstood Justice Stevens' question. My -- let me take a
6 step back.

7 Petitioner has offered this parade of horrors of
8 the various things the Government might do if it prevails in
9 this case, and I think that those are really red herrings.
10 They're not horrors.

11 The only issue in this case is what the Fifth
12 Amendment prevents the Government from doing, and that's the
13 only question presented in the petition.

14 QUESTION: Well, what would prevent the Government
15 from doing the parade of horrors suggested?

16 MR. ROTHFELD: Well, there are a variety of things.
17 One horror that they suggest that the Government might compel
18 people to consent to searches of their homes. Well, obviously,
19 the Fourth Amendment would prevent that.

20 One horror they suggest is the Government might
21 compel people to direct their attorneys to disclose
22 confidential communications. Well, the attorney-client
23 privilege, which is recognized by American law, unlike the bank
24 secrecy privilege, would prevent the Government from doing
25 that.

1 Various other things might be prevented by the due
2 process clause, and even apart from that, the Government,
3 before it compels someone to do something or, more
4 particularly, the District Court, before it compels somebody to
5 do something on pain of contempt which is what's going on here,
6 must have jurisdiction and authority to do it. Must have a
7 grant of jurisdiction from somewhere.

8 The lower courts in this case held correctly that the
9 All Writs Act provides jurisdiction for the entry of due order
10 here, but there are limits to the extent to which the statutes
11 like the All Writs Act can provide jurisdiction.

12 QUESTION: Let me ask you this question, counsel, and
13 then I hesitate to introduce a new hypothetical, but suppose in
14 the routine criminal misdemeanor case involving a traffic
15 offense, where the ownership of the vehicle is clearly
16 established and admitted, and the defendant's custody of the
17 key is admitted, the court says that tomorrow, on the second
18 day of the trial, you drive your car down here so we can
19 inspect it, is that permissible?

20 MR. ROTHFELD: I would think so. I mean, --

21 QUESTION: Have you ever heard of an order such as
22 that?

23 MR. ROTHFELD: Well, I think this is harking back to
24 the Justice Stevens safe deposit box hypothetical, and I think
25 that if the possession of the material, the evidence, whatever,

1 in the suspect's hands is a foregone conclusion in the words of
2 Fisher, requiring the suspect to perform the act of producing
3 it is not incriminating.

4 I think that a better -- to introduce yet another
5 hypothetical, a better --

6 QUESTION: Just stick with so far as the one I gave
7 you. You see nothing wrong with that and you want us to write
8 an opinion to say that that is correct procedure? That there's
9 no constitutional privilege?

10 MR. ROTHFELD: It may be that I'm not understanding.

11 QUESTION: And we're assuming that there's no issue
12 of his ownership, there's no issue of his possession of the
13 key.

14 MR. ROTHFELD: Our position is compelling someone to
15 produce something when there is leaving aside of the
16 testimonial aspects attendant upon the act of production.
17 There is no Fifth Amendment problem. And to the extent that
18 Petitioner had in his possession a bit of evidence and it was
19 conceded that the evidence was in his possession, he was not
20 disputing -- he was not saying there will be any testimonial
21 component to his turning over to the Government, there is no
22 Fifth Amendment privilege because the Fifth Amendment, the
23 Court has said time and again, can be asserted only when the
24 suspect is compelled to do something which has a testimonial
25 component, which involves his truth telling, and the simple

1 fact that it will lead to -- well, the Court held -- it made it
2 quite clear that the simple fact that the suspect is required
3 to manufacture incriminating evidence does not by itself make
4 it testimonial.

5 That was the holding in Gilbert and in Wade and in
6 Dionisio. Suspects were required to produce incriminating --

7 QUESTION: Would you acknowledge that orders such as
8 the one I have hypothesized are not routine and, in fact, are
9 almost unknown in our jurisprudence in the United States?

10 MR. ROTHFELD: Orders requiring the accused to
11 produce --

12 QUESTION: Orders requiring the accused to produce
13 evidence over which he has control where his control and
14 ownership is not disputed.

15 MR. ROTHFELD: Well, I think typically there are
16 disputes as to whether or not the act of production will lead
17 to courts drawing -- will have any testimonial component that
18 is incriminating. I think that people typically don't
19 stipulate that they have possession of stolen property and that
20 may be an explanation as to why this sort of thing typically
21 doesn't happen.

22 Now, I should take a step back from that
23 hypothetical, if I can, and say that this case doesn't present
24 any problems such as that because there is no testimonial
25 component to what the Petitioner is being asked to do, conceded

1 or otherwise. He is not being asked to turn over anything in
2 his possession.

3 He is simply being asked to sign a piece of paper
4 which may or may not have a legal effect in the Cayman Islands
5 and Bermuda and will allow banks to turn over documents in
6 their possession permitting the banks to make their implicit
7 statements that they believe these records to belong to the
8 Petitioner.

9 QUESTION: Well, Mr. Rothfeld, if there is no
10 testimonial component and you're satisfied that the Government
11 would not offer it for any testimonial purpose, why not give
12 limited use immunity to protect against any testimonial
13 component that might be thought to be present?

14 MR. ROTHFELD: Well, I am not sure that I can give
15 you a compelling answer to that, Justice O'Connor. I think
16 that our view has been that this is simply not the testimonial
17 sort of thing which is going to appear in evidence. Therefore,
18 the issue of whether or not immunity has to be provided against
19 use of the consent form in evidence, whether or not that should
20 be granted.

21 I think that there may be concerns of granting
22 immunity and if that is imagined to be a concession that there
23 is a testimonial component may lead to fruits arguments when
24 records are produced.

25 We think that there is no necessity for the grant of

1 immunity because there is no testimonial component. There is
2 no Fifth Amendment --

3 QUESTION: On that point, let me be sure I understand
4 your position. Supposing instead of the document he was asked
5 to sign, there was a document that said To Whom It May Concern,
6 if there are any bank accounts controlled by Mr. Doe under your
7 control, please reveal the contents to them, you don't claim
8 that would be permissible or do you?

9 I mean, here you know in advance which accounts -- I
10 guess there's a twelfth account, but assume you really weren't
11 sure, you wanted a kind of broad document like that and then
12 you take it around to all the different banks in the Cayman
13 Islands until you found the right one? Could you do that?

14 MR. ROTHFELD: Well, we have to -- in any
15 investigation of this sort, we have to have some idea of where
16 those records are. We have to serve the banks with subpoenas
17 which lead to the production.

18 QUESTION: Well, what about my hypothetical?

19 MR. ROTHFELD: Well, if we just simply had a general
20 idea --

21 QUESTION: You know he has a bank account in the
22 Cayman Islands and there are fourteen banks there, so you ask
23 him to sign a general consent that would be given authority to
24 go in any one of the fourteen.

25 MR. ROTHFELD: Well, I don't think that would be a

1 Fifth Amendment problem in that. Again, whether or not the
2 court would have jurisdiction to enter that order --

3 QUESTION: Well, his execution of that document would
4 certainly lead to the discovery of evidence he couldn't
5 otherwise get.

6 MR. ROTHFELD: That's true, but I don't think -- the
7 court has made quite clear that is not the problem under the
8 Fifth Amendment. It --

9 QUESTION: Tell us what it's a problem with because
10 I'm troubled with some of these hypotheticals, too. I'm
11 troubled with Justice Kennedy's hypothetical.

12 You wouldn't feel any better about Justice Kennedy's
13 hypothetical if you got -- if you granted him immunity before
14 you told him drive the car down to the courthouse, would you?
15 It would still give you trouble.

16 So, it seems to me there's something wrong with it,
17 but it may not be the Fifth Amendment. Do you have any idea
18 what makes us feel bad about it?

19 MR. ROTHFELD: Well, I'm not sure why you feel bad
20 about it, Justice Scalia. I think that there are a variety of
21 protections in the law against either arbitrary use of the
22 court's power to compel people to do things or against
23 government intrusion.

24 The Fourth Amendment provides protections. The due
25 process clause provides protection.

1 QUESTION: Yes, but the objection that the man would
2 make in Justice Kennedy's example, you go get the car yourself,
3 I don't have to make -- you cannot compel me to help try your
4 lawsuit.

5 MR. ROTHFELD: Well, --

6 QUESTION: That's basically what he's saying. I
7 don't want to drive it down for you. I don't want to produce
8 my car.

9 MR. ROTHFELD: Well, again, --

10 QUESTION: That's a Fifth Amendment kind of argument.

11 MR. ROTHFELD: Well, I don't think so, Justice
12 Stevens. The other -- and let me give you two answers to that.

13 The one immediate answer is the other limitation on
14 government power and the power of the District Court to compel
15 people to do things is that there must be a grant of authority
16 somewhere. Clearly, here, to effectuate a properly-issued
17 subpoena, the court under the All Writs Act, we think,
18 effectuated the enforcement of the subpoena by requiring this
19 compulsion, this signing of the compelled consent. But that is
20 not necessarily going to be the case where the District Court
21 simply says I want you to do something, suspect, that will
22 assist the Government.

23 QUESTION: Could a court compel his aunt to drive his
24 car down? Can his aunt have the car?

25 MR. ROTHFELD: Well, --

1 QUESTION: Issue an order compelling his aunt to
2 drive the car. His aunt isn't under indictment or anything.
3 Do you think that that would be --

4 MR. ROTHFELD: Well, all --

5 QUESTION: You don't have to admit it's bad. Would
6 you feel funny about it if it was his aunt or aunt, however you
7 say it?

8 MR. ROTHFELD: Whether or not I would feel funny
9 about it, Justice Scalia, I don't think provides the answer to
10 the Fifth Amendment question in this case.

11 Now, in answering Justice Kennedy, all I meant to
12 suggest is there is no Fifth Amendment --

13 QUESTION: The real testimony, all you want is for
14 the bank to testify that the Petitioner has blank dollars on
15 deposit.

16 MR. ROTHFELD: All we want is for the bank to give us
17 something, Justice.

18 QUESTION: Is that testimony?

19 MR. ROTHFELD: If --

20 QUESTION: That is testimony.

21 MR. ROTHFELD: That is testimony, but that is the
22 bank's testimony.

23 QUESTION: Sir?

24 MR. ROTHFELD: It is the bank's testimony, if
25 anyone's.

1 QUESTION: But it is testimony. That is what you
2 want.

3 MR. ROTHFELD: Well, whether or not the bank records
4 --

5 QUESTION: Tell me the difference in effectiveness
6 before a jury as to whether the bank says it or he says it.

7 MR. ROTHFELD: Well, there is a profound difference
8 in the Fifth Amendment. The Fifth Amendment only --

9 QUESTION: Would the jury have any trouble if it was
10 the bank's statement and not his?

11 MR. ROTHFELD: Well, --

12 QUESTION: Would you have any trouble as the
13 prosecutor?

14 MR. ROTHFELD: The Court has made clear, Justice
15 Marshall, that the crucial point is whether or not the witness
16 is compelled to do something that is testimonial in nature. If
17 the bank produces these records and the bank makes its
18 statement that these are the records that belong to the
19 Petitioner, that is the bank statement and we are free to use
20 it.

21 The fact that the Petitioner has done something that
22 allows us to obtain the evidence, and I think this answers
23 questions that were posed by Justice Scalia and Justice Kennedy
24 and Justice Stevens, that does not raise a Fifth Amendment
25 problem. It is quite clear in a case where the suspect

1 provides a handwriting exemplar or voice exemplar. The suspect
2 is required to do something that would lead other parties to
3 produce very incriminating evidence.

4 The suspect provides a handwriting exemplar and the
5 Government obtains handwriting experts who develop complex
6 analyses and produce evidence and testify themselves. The
7 suspect has been required to do something that facilitates the
8 Government's case, that allows the Government to produce
9 incriminating evidence from third parties, but that not raise
10 the Fifth Amendment problem.

11 The Court made that clear eighty years ago in Holt
12 and has repeatedly reaffirmed that principle. It is only when
13 the suspect is required to do something himself that is
14 testimonial that Justice Scalia pointed out in some sense makes
15 him a witness against himself.

16 A witness does not take the stand and as Petitioner
17 has been ordered to do in this case, ask a third party to
18 produce evidence. A witness takes the stand and testifies. He
19 tells a story. He explains what happened, and the suspect here
20 is not being required to do anything like that.

21 Now, to return very briefly to the hypothetical, I'm
22 not sure which number hypothetical it is, but one of the
23 hypotheticals offered by Justice Stevens or Justice Scalia, if
24 the aunt is ordered to drive a car in, that may offend us but
25 that is not a Fifth Amendment problem. Whether or not the

1 Court's power under the All Writs Act, even assuming it had the
2 power to compel the suspect to drive the car, extends to the
3 aunt may be a difficult question, but it's not presented here.

4 The only issue raised by the Petitioner is the Fifth
5 Amendment.

6 QUESTION: On the aunt question, I'm not sure it
7 would offend. If she had custody of the vehicle and you
8 subpoenaed the vehicle and ordered her to produce it, I don't
9 know why that would offend me. Maybe if she has to hire
10 somebody else to do the driving, but I think she'd have to
11 bring it into court.

12 MR. ROTHFELD: Well, I think that involves a meeting
13 of the All Writs Act or other jurisdictional provisions that I
14 don't want to get into. It may turn on whether or not the
15 Government had other means of effectuating the subpoena.

16 But that is not a question here. The question here
17 is the Fifth Amendment problem, and Petitioner has not offered
18 any reason to believe that what he is required to do here
19 implicates the language, the policies of the Fifth Amendment or
20 any decision of this Court.

21 Now, the Court, as I said before, has made very clear
22 that it's only when there is a testimonial component to the
23 compelled action, compelled statement, that there's a Fifth
24 Amendment problem.

25 QUESTION: We have also said that the Fifth Amendment

1 stands for the fact that we have an accusatorial system and not
2 an inquisitorial system, but you think that's all dictum and
3 there must be a testimonial component to the Act.

4 MR. ROTHFELD: Well, I don't think -- I wouldn't
5 characterize it as dictum. I think that that is the rational
6 for the line the Court has drawn in requiring testimonial
7 component.

8 The Court has taken the view that when a suspect is
9 required to speak his guilt and disclose the contents of his
10 mind to the Government, that becomes an inquisitorial type of
11 proceeding.

12 QUESTION: Yes, but you know, it's a very interesting
13 question. I'm not sure we've focused on it very often. Say the
14 police beat some prisoner up and force him to give a
15 confession, then they never produce it into evidence, they just
16 put it in the file somewhere, have they violated the Fifth
17 Amendment or haven't they? No testimonial use. They made him
18 talk against himself.

19 MR. ROTHFELD: Well, offhand, I'm not aware of any
20 authority directly addressing that question, Justice Stevens.
21 Unfortunately, that is certainly not anything close to the
22 issue in this case.

23 I mean, there is no doubt in the case, in your
24 hypothetical, the witness has been -- the suspect has been
25 compelled to say something testimonial, to disclose what he

1 knows about the crime, to make factual assertions that are true
2 or false. That is not true here.

3 QUESTION: Mr. Rothfeld, are you asserting on behalf
4 of the Government the power to get this individual to do
5 because he's a defendant anything that you couldn't get the
6 private individual to do who is not a defendant? That is, to
7 put it in the context of this case, could you have made --
8 could you have gotten a similar order directed against someone
9 who is not a defendant in the case?

10 Suppose the bank accounts were held in the name of a
11 third party, totally innocent third party, who is not
12 implicated in the conspiracy at all, could you have gotten this
13 order against that third party?

14 MR. ROTHFELD: Well, once again, I have to fall back
15 on the proposition that that is not a question that's presented
16 in this case because we think that in that situation, there
17 would not be a Fifth Amendment problem.

18 QUESTION: I want some limitation upon what you can
19 do to this defendant.

20 MR. ROTHFELD: Excuse me, Justice Marshall.

21 QUESTION: Isn't one of these accounts in this case
22 in another party's name?

23 MR. ROTHFELD: They may be in the names of other
24 parties, but we believe that they are controlled by the
25 Petitioner and that's an important point.

1 I think to answer your question, Justice --

2 QUESTION: You don't understand the point of my
3 question. I'm looking for some limitation on what we can get,
4 what we can allow you to do to a defendant. If all you're
5 coming in and saying, we can ask this defendant to produce
6 anything we can ask anyone else to produce, so long as it is
7 not testimonial, that's one position.

8 If what you're arguing on the other hand is some
9 broader proposition, we can ask defendants to do things that we
10 couldn't ask non-defendants to do, that's something quite
11 different.

12 Now, which of the two is your position here?

13 MR. ROTHFELD: It is the first. We are not saying
14 that his status as a target of -- he's not a defendant, he's a
15 target of the Grand Jury, puts him in any different position so
16 far as the Fifth Amendment is concerned.

17 We think the limitation on -- the Fifth Amendment
18 limitation on what we can do is the same in either case,
19 whether or not someone is compelled to incriminate themselves.

20 Now, there are distinctions in the All Writs Act, for
21 example, in grants of authority to the courts, as to the
22 relationship between the person who is being compelled to
23 produce something at the proceeding. The court in the New York
24 Telephone case talks about whether or not that makes any
25 difference.

1 So, it may be, Justice Scalia, that there are things
2 that the District Courts have authority to do.

3 QUESTION: You have gotten this order issued to
4 someone who is not a defendant, yes or no, do you think?

5 MR. ROTHFELD: I'm not sure that I can answer that
6 question, Justice Scalia, because that involves the meaning, I
7 think, of the All Writs Act, which grants the Court
8 jurisdiction to enter orders of this sort, which simply has not
9 been addressed by the parties to this point.

10 I would think that it would be a closer question
11 under that statute than the case in which --

12 QUESTION: Can't you get an order for a landlady to
13 open the door that has property belonging to the defendant, and
14 if this much different from that, getting someone who controls
15 the bank account to issue, if you think that there are illegal
16 funds in the account?

17 MR. ROTHFELD: In Fifth Amendment terms, I don't
18 think that there is any distinction between -- I understand the
19 problem you are having, Justice Scalia, is that we concede
20 there are all sorts of limitations on what the Government can
21 do that are found elsewhere in the Constitution, elsewhere in
22 the statutes and by negative implications, the lack of
23 authority granted to the District Courts to compel people to do
24 things, and it may be that in all of the hypotheticals that are
25 presented by the Court, the Government won't be able to do it

1 because it has no authority to do it or because some other
2 constitutional provision keeps us from doing it.

3 QUESTION: I am not inclined to say that you can do
4 more to this defendant than you can do to an innocent third
5 party by reason of the fact that he's a defendant. Maybe you
6 can do less, but I'm certainly not going to say that you can
7 make him do it if you can't make his aunt do it.

8 QUESTION: Yes, but your problem is -- I didn't catch
9 this before, but the jurisdictional foundation of this order is
10 the All Writs Act, isn't it?

11 MR. ROTHFELD: That was --

12 QUESTION: And that's really a little different than
13 it might be if it were a state case. The state court might
14 have general jurisdiction to do this sort of thing, whether
15 it's a defendant or not. But a federal court has to find a
16 jurisdictional basis and the jurisdictional foundation here is
17 the All Writs Act.

18 MR. ROTHFELD: That was the foundation.

19 QUESTION: And that's not before us.

20 MR. ROTHFELD: That is not presented in this case.

21 QUESTION: It may mean that the federal court has
22 less authority in this area than the state court of general
23 jurisdiction.

24 MR. ROTHFELD: That may well be the case, Justice
25 Stevens.

1 So far -- once again, to return to the question that
2 concerns Justice Scalia, so far as the Fifth Amendment is
3 concerned, it creates a general bar, a limited but general bar
4 on what the Government can do to people and compel them to do,
5 whether or not they are defendants or targets or whatever.

6 So far as grants of authority to the District Court
7 can exercise jurisdiction over people, there may or may not be
8 distinctions granted in the jurisdictional statute, but that is
9 not the question here. The Petitioner has chosen to present
10 only one question and that is the Fifth Amendment question, and
11 as I said before, he offers no reason to believe that the Fifth
12 Amendment prohibits the Government from doing what it did in
13 this case.

14 All he says is this is a communication and,
15 therefore, it must be testimonial, but that is clearly not
16 true. The Court has used the word "communication" in its
17 opinions as a synonym for factual assertion for communication
18 of evidence to the Government. The Court's actual language in
19 Schmerber, which Petitioner relies upon, is that the Fifth
20 Amendment only prohibits accused when compelled to testify
21 against himself or provide evidence of a testimonial or
22 communicative nature.

23 Petitioner has not provided any evidence of any sort
24 to the Government. He has simply authorized other people to
25 provide evidence. He is in no different situation than a

1 suspect who is linked to a handwriting -- to a ransom note in
2 the Government's possession by a handwriting exemplar that he
3 was forced to produce and that was then analyzed by a
4 Government expert. He allowed for the production of evidence
5 by other people, but the Court has said that does not create an
6 inquisitorial system.

7 Inquisitorial is when the suspect is required to
8 disclose the contents of his own mind. Petitioner has
9 suggested that this form does somehow disclose his own mind
10 because it reveals that he actually consents to the release of
11 his documents. That is simply not the case.

12 The form says on its face that it was entered
13 pursuant to a court order. It doesn't say anything about
14 whether Petitioner actually wants his banks to release his bank
15 records. Once again, in that situation, in that sense, the
16 Petitioner is in no different situation than a suspect or
17 defendant who is required to write out a ransom note to produce
18 a handwriting exemplar for the Government.

19 The suspect simply has not done anything that is
20 testimonial, and the Court has said again and again that having
21 a testimonial component is the essence of the sort of thing
22 that is prohibited by the Fifth Amendment. The Government
23 obtains bank records, uses them against the Petitioner, it will
24 not relieve its burden of establishing its own case because he
25 has spoken his guilt in some sense because he hasn't said

1 anything about his guilt or about what went on in this case.

2 It would not be a situation in the language by the
3 Court thirty years ago in its Ullmann decision in which the
4 accused was convicted because of disclosures from his own
5 mouth. He hasn't made any disclosures. All he has done is
6 permit the Government to obtain evidence from a third party and
7 to return to Justice Stevens' -- one of the many hypotheticals
8 Justice Stevens' safe deposit hypothetical, it's simply a
9 situation similar to the one that would be presented if a
10 suspect required not to lock his safe deposit box, so that
11 people could get into it.

12 This is simply permitting the Government to obtain
13 evidence that can be used against him at trial. The evidence
14 that will be provided by third parties.

15 Now, there's nothing in the language, certainly in
16 the purposes of the Fifth Amendment, or in any of this Court's
17 decision as Petitioner concedes that requires the Court to rule
18 for him in this case. The Court of Appeals recognized that and
19 we think this Court should affirm its decision.

20 If there are no further questions, thank you.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rothfeld.

22 Mr. Timbie, you have two minutes remaining.

23 ORAL ARGUMENT OF RICHARD E. TIMBIE, ESQ.

24 ON BEHALF OF THE PETITIONER - REBUTTAL

25 MR. TIMBIE: Thank you, Mr. Chief Justice.

1 Mr. Rothfeld took issue with our waiver of the
2 attorney-client privilege hypothetical, saying that, of course,
3 the attorney-client privilege is self-policing because any
4 lawyer in his right mind isn't going to accept the compelled
5 consent directive as a valid waiver.

6 But the Government offers a broader rationale here,
7 even in the waiver area. What it is saying there is that it
8 can force an unwilling, unimmunized witness to sign any waiver
9 that would merely be -- would allow it to overcome a non-
10 constitutional impediment to access the third party records.

11 There are other statutory privileges that this
12 procedure could be used for that would not give rise to self-
13 policing mechanisms through --

14 QUESTION: Immunity wouldn't be any -- you wouldn't
15 say if the Government were to compel him to consent to a waiver
16 of his attorney-client privilege, that would be all right if he
17 were immunized? I mean, that is bad, but for a reason quite
18 apart from the Fifth Amendment.

19 MR. TIMBIE: I wholeheartedly agree, but what the
20 Government is saying in this case is that you shouldn't look at
21 this through a Fifth Amendment lens because it will be policed
22 elsewhere.

23 What we're saying is the Government shouldn't be able
24 to give it a try by forcing you to sign that document. Think
25 of, for example, a state evidentiary privilege. The

1 accountant-client privilege. Spousal privilege, for example.
2 It may well be the Government could get a consent directive,
3 get a spouse or accountant to go into a Grand Jury and talk to
4 the police, never introduce the testimony in evidence, so there
5 would never be a suppression hearing, but use the fruits.

6 We contend that the only way to police that is with
7 the Fifth Amendment, not with some Fourth Amendment notion.

8 Getting back to Justice O'Connor's question, she
9 asked the Government whether they felt they could use this
10 document in evidence, and the Government said yes. No Fifth
11 Amendment problem, and we don't -- but we wouldn't try.

12 We state that that is constructive use immunity which
13 is not allowed in this Court.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Timbie.

15 The case is submitted.

16 (Whereupon, at 11:03 o'clock a.m.,, the case in the
17 above-entitled matter was submitted.)

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REPORTERS' CERTIFICATE

DOCKET NUMBER: 86-1753
CASE TITLE: John Doe v. United States
HEARING DATE: March 2, 1988
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: March 2, 1988

Margaret Daly
Official Reporter

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