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Constitutional Law: Should Privilege against Self Incrimination Be Available to Sole Shareholder Regarding Corporate Books and Records

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from interference with union organizational and economic activities. In other sections such as 8(b)(4)(B) and the proviso to 8(b)(4), picketing is protected if conforming to certain conditions. In addition, there is a strong federal policy against the capricious exercise of state injunctive power over labor disputes.[16] That danger is clear if states were permitted to exercise such power over pre-agreement activities. The result is that state remedial power over pre-agreement activities would collide with too many express federal considerations.

Nonetheless, a situation in which unions are permitted to apply economic pressures for illegal ends should not persist. An aggrieved employer should be granted recourse to the Board to prevent these abuses of union prerogatives when such activity occurs. A Board finding of an unfair labor practice would effectively mediate the competing federal and state policies.[17] Although the Board must make an initial interpretation of state law on the question of violation of state right-to-work prohibitions, it is preferable to the situation in which a state may compromise strong federal policies through the implementation of state remedies.

Schermerhorn is a faithful reading of section 14(b). Perhaps it will lead to an expansion of Board jurisdiction into pre-agreement activities consonant with the federal and state policies underlying the decision.

Constitutional Law: Should Privilege Against Self Incrimination Be Available to Sole Shareholder Regarding Corporate Books and Records?

A special agent of the Internal Revenue summoned the president and sole shareholder of a corporation and demanded the

16. It must be noted that one of the reasons for the expression of federal anti-injunction policy rests in the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958), which removes such injunctive power from the federal courts. State courts are not so bound.

17. Of course, a Board determination entails some delay during which the unions' purposes may be accomplished without injunctive relief. If this is the case, the Board should implement the § 10(j) injunctive power vested in it. The Board has never made extensive use of the section, but a situation in which the unions' motivations are clear should warrant its application. Section 10(j) reads: "The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order. . . ."

production of corporate books and records[1] in the shareholder's possession. The president was personally under criminal income tax investigation and refused to produce the documents on the grounds that they might incriminate him.[2] On the agent's application for a contempt attachment,[3] the district court decided that the records belonged to the corporation and that the fifth amendment was not applicable.[4] On appeal the Ninth Circuit reversed and sustained the president's claim.[5] On rehearing, however, the court changed its position and *held* that the stockholder of a wholly owned corporation, personally under investigation for criminal fraud, could not invoke the privilege against self incrimination as to his corporation's records. *Wild v. Brewer*, 329 F.2d 924 (9th Cir. 1964).

The privilege against self incrimination excuses the individual, whether a witness or the accused,[6] from testifying in judicial proceedings[7] to matters which might incriminate him; nor can the claimant be compelled to produce private books and papers if

1. INT. REV. CODE OF 1954, § 7602 gives the Secretary or his delegate authority to examine "books, papers, records, or other data which may be relevant . . . ."

If the taxpayer wishes to claim the privilege against self incrimination, he must submit them to the judge who determines whether they will tend to incriminate. However, the taxpayer can claim the privilege only if the records might subject him to criminal sanctions. If he will be subject only to civil liability such as paying a deficit or penalty, he cannot claim the privilege. Normally, when a special agent rather than a revenue agent is making the investigation, the taxpayer will be justified in refusing access to his books, since the function of a special agent is to seek evidence of crimes. See Balter, *When Should the Taxpayer Refuse to Give His Books to the IRS?*, 8 J. TAXATION 130 (1958); Redlich, *Searches, Seizures, and Self-Incrimination in Tax Cases*, 10 TAX L. REV. 191 (1955).

2. The following records of Air Conditioning Supply Co. were demanded: general ledger, general journal, cash receipts journal, cash disbursements journal, sales journal, purchase journal, accounts receivable ledger, accounts payable ledger, copies of all sales invoices and credit memoranda, paid checks and bank statements, minute book and stock ledger. Brief for Appellee, p. 4 n.1, Wild v. Brewer, 329 F.2d 924 (9th Cir. 1964).

3. INT. REV. CODE OF 1954, § 7604(b) provides: "Whenever any person summoned under section . . . 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, . . . the Secretary or his delegate may apply to the judge of the district court . . . for an attachment against him as for a contempt."

4. Brief for Appellant, p. 4.

5. Wild v. Brewer, No. 18860, 9th Cir., March 17, 1964.

6. Emspak v. United States, 349 U.S. 190, 197 (1955); Quinn v. United States, 349 U.S. 155, 161 (1955); Blau v. United States, 340 U.S. 159 (1950); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

7. Brown v. United States, 356 U.S. 148, *pet. for rehearing denied*, 356 U.S. 948 (1958); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

they are incriminating.[8] However, only an individual can claim the privilege and only if he himself would be incriminated.[9] With respect to documents the claimant must also have some personal relationship to them. A personal relationship appears to require that they be his private property or at least that he have possession of them in a personal capacity.[10]

The policies underlying the privilege, though a product of history and humanitarianism, have current vitality.[11] Nevertheless, throughout its history critics of the privilege have said that its rationale is nonsensical.[12] Bentham argued that the privilege protects only the guilty and deprives investigators of useful evidence.[13] This position has been answered by examples in which innocent persons are protected by the privilege.[14] Even if Bentham's criticisms have merit, society is interested in preserving individual dignity as well as in punishing for crime. The privilege helps delineate the individual's relationship to his government.[15] The individual, who is presumed to be innocent, can refuse to aid the state when it seeks to sanction him criminally; "the American system of criminal prosecution is accusatorial, not inquisitorial,

8. Boyd v. United States, 116 U.S. 616 (1886); 8 WIGMORE, EVIDENCE § 2264 (McNaughten rev. 1961).

9. Rogers v. United States, 340 U.S. 367, 371 (1951); Hale v. Henkel, 201 U.S. 43, 69–70 (1906).

10. By personal capacity the Court meant to distinguish holding in a representative capacity. If the latter, the claimant is not entitled to withhold the documents. To determine whether the possessor holds in a personal capacity the "White test" is applied. See note 36 *infra* and accompanying text.

In a few cases an agent, in possession of documents which are his principal's private property, has been permitted to claim the privilege for his principal. See United States v. Judson, 322 F.2d 460 (9th Cir. 1963) (attorney-client), for a discussion of those cases.

11. Malloy v. Hogan, 378 U.S. 1 (1964), held that the privilege against self incrimination was binding on the states via the fourteenth amendment. Murphy v. Waterfront Comm'r, 378 U.S. 52 (1964), held that one state cannot compel testimony that would incriminate the witness under the laws of another state unless effective immunity is given.

For a good discussion of the privilege and its history see GRISWOLD, THE 5TH AMENDMENT TODAY (1955); 8 WIGMORE, *op. cit. supra* note 8, § 2250; Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

12. 5 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 207–20 (1827); TRAIN, COURTS, CRIMINALS AND THE CAMORRA 19 (1912).

13. 5 BENTHAM, *op. cit. supra* note 12, at 210, 216.

14. See GRISWOLD, *op. cit. supra* note 11, at 10–22.

15. "The privilege contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." 8 WIGMORE, *op. cit. supra* note 8, § 2251, at 317; see Fortas, *The Fifth Amendment; Nemo Tenetur*

and . . . the Fifth Amendment privilege is its essential mainstay."[16] Any attempt to prosecute for thought or opinion is stifled since proof would be difficult. Privacy is protected to the extent that the accused is not subject to judicial inquisition.[17] The individual is not forced to the choice of incrimination, contempt, or perjury. The result is a recognition that the individual is sovereign in some respects and that government is limited. Though it should not be a goal of the privilege to make law enforcement difficult, implementation of its purposes should take precedence over the resulting difficulties caused in the areas of government regulation and law enforcement.[18]

A corporation may not claim the privilege on its own behalf.[19] This denial is based on the necessity of access to corporate records in order to effectively regulate corporate conduct. Certainly, it would be equally useful to require individuals to produce their records in order to regulate their conduct. However, since corporate activity may have a potentially greater effect on the public, there is a greater need for governmental regulation.[20] More importantly, the privilege is designed to protect personal rights rather than those of a legal creature.[21] Similarly, a corporate officer may not refuse to produce corporate documents when ordered to do so even though they tend to incriminate him personally.[22] This rule was established in *Wilson v. United States*.[23]

Prodere Seipsum, 25 CLEV. B.A.J. 91 (1954); Kenealy, *Fifth Amendment Morals*, 8 LOYOLA L. REV. 93 (1956); Martin, *The Privilege Against Self Incrimination Endangered*, 5 CAN. B.J. 6 (1962); *The Privilege Against Self-Incrimination: An International Symposium*, 51 J. CRIM. L., C. & P.S. 129 (1960).

16. Malloy v. Hogan, 378 U.S. 1, 7 (1964).

17. Martin, *supra* note 15, at 9; Nutting, *The Fifth Amendment and Privacy*, 18 U. PITT. L. REV. 533 (1956).

18. 322 U.S. at 698.

19. *E.g.*, United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Hale v. Henkel, 201 U.S. 43 (1906). See generally 8 WIGMORE, *op. cit. supra* note 8, § 2259a; Annot., 120 A.L.R. 1102 (1939).

20. Many people may deal with a corporation if its business activities are extensive. Also, a corporation may have a large group of shareholders who have money invested in it but who are not in close contact with it. Individuals dealing with a corporation and those who buy shares in it may not be able to protect themselves sufficiently without government regulation.

21. United States v. White, 322 U.S. 694, 699 (1944).

22. See, *e.g.*, Essgee Co. of China v. United States, 262 U.S. 151 (1923); Grant v. United States, 227 U.S. 74 (1913); Wheeler v. United States, 226 U.S. 478 (1913); Drier v. United States, 221 U.S. 394 (1911); United States v. Fago, 319 F.2d 791 (2d Cir.), *cert. denied*, 375 U.S. 906 (1963); United States v. Guterma, 272 F.2d 344 (2d Cir. 1959). See generally Fraser, *The*

Wilson was relied upon by the court in *Wild* and therefore needs examining. The *Wilson* Court justified its denial of the privilege to a corporate officer personally under indictment[24] on two grounds. First, the recognition of the official's personal privilege would hamper regulation of the corporation by making the records unavailable.[25] Second, the records belonged to the corporation and the official held them in a representative capacity only;[26] his personal interest in the documents was insufficient to justify extending the privilege to him. Since the corporation was not being investigated in *Wilson*, the first justification seems insufficient. It would be easy to extend the privilege with respect to corporate records when the official himself is under indictment and deny it when the corporation is being investigated. Thus the second ground is considerably more important. The decision depended on the Court's resolution regarding "the nature of the documents and the capacity in which they are held."[27]

The privilege applies only to the personal property of the claimant or those documents the claimant holds in a personal capacity.[28] If the records are not the claimant's, it is not inconsistent with the desired relationship of the individual to his government to compel the production of such records.[29] The documents

Privilege Against Self-Incrimination as Applied to Custodians of Organizational Records, 33 WASH. L. REV. 435 (1958); Note, 112 U. PA. L. REV. 394 (1964); Annot., 152 A.L.R. 1208 (1944).

23. 222 U.S. 361 (1911).

24. The grand jury had returned two indictments against Wilson before they issued a subpoena for the records. *Id.* at 367.

25. *Id.* at 384–85.

26. *Id.* at 377–78.

27. *Id.* at 380.

28. In Boyd v. United States, 116 U.S. 616 (1886), the landmark case on privileged documents, the Court did not limit the privilege to private documents; however, the *Wilson* Court concluded that *Boyd* clearly implied that the papers must be personal. 221 U.S. at 380. In *White* the Court said "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." Although the concept of holding in a "personal capacity" is not clear, the Court meant at least to exclude holding in a representative capacity. 322 U.S. at 699.

29. See text accompanying notes 15–18 *supra*. It may also be argued that though the claimant owns the documents there ought to be a distinction between documents relating to personal affairs and those of the individual's business. The Government may have a greater interest in regulating business and economic affairs than personal affairs. Also, in terms of limited government, individual dignity and privacy, and the accusatorial system, the privilege is more important with respect to matters which affect the private lives of individuals. See Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 715 (1951).

sought in *Wilson* recorded group activity and belonged to the incorporated group. Wilson held the documents as agent for the group and was duty bound to produce them for members' scrutiny upon request.[30] The Court reasoned that just as a public servant must produce public records on demand, so must a corporate custodian produce corporate records.[31] In *Wild*, however, the documents recorded the claimant's private business affairs; no one but Wild had a direct interest in them. Wild held the records in the purely personal capacity of sole owner, not as agent for a group. Thus, the nature of the documents and the capacity in which they were held were personal, not corporate. The corporation was his personal business, just as it was before incorporation; there were no public or group interests involved.[32] The result in *Wilson*, therefore, does not control *Wild*, because Wild's relationship to the documents and to the corporation is analogous to that

30. 221 U.S. at 384.

31. *Id.* at 382.

32. Other sole stockholder cases are Nilva v. United States, 352 U.S. 385 (1957); Grant v. United States, 227 U.S. 74 (1913); United States v. Guterma, 272 F.2d 344 (2d Cir. 1959); United States v. Hoyt, 53 F.2d 881 (S.D.N.Y. 1931); *In re* Greenspan, 187 F. Supp. 177 (S.D.N.Y. 1960); Application of Daniels, 140 F. Supp. 322 (S.D.N.Y. 1956).

In *Nilva*, the records were subpoenaed in connection with a trial for conspiracy to violate the Federal Slot Machine Act. Petitioner, who was vice-president of a slot machine distributing corporation wholly owned by a co-defendant, had been found guilty of contempt for failure to comply with the subpoena for the records. Although the codefendant who owned the corporation had been denied his self incrimination claim in the lower court, petitioner in his case before the Supreme Court was not claiming the privilege of the fifth amendment. Rather, he was maintaining that he had complied with the subpoena in good faith and that the contempt conviction should be reversed. The Court relied on *Wilson* in saying that petitioner had to produce the records, but it never had to consider whether the sole stockholder could claim the privilege since he was not a party to the appeal.

In *Guterma*, petitioner kept his personal records and the records of his wholly owned corporation in the corporation's safe. The Court of Appeals held that he had to produce the corporate records but not his personal records.

In *Hoyt*, a receiver in bankruptcy took possession of the books of petitioner's corporation. They were then subpoenaed from the receiver. The court said that petitioner could not claim the privilege as to the records because he waived the right when he became bankrupt and because he had voluntarily relinquished possession of the records when he attempted to claim the privilege.

In re Greenspan held that the corporate president and sole stockholder was not privileged in relation to the Commissioner of Internal Revenue's subpoena of the records to ascertain the tax liability of a party who had sold spark plugs to his corporation. The court relied on *Wilson*.

In *Application of Daniels*, the lone case holding the records to be privileged, the court distinguished *Wilson* on the grounds that a foreign corporation was not subject to the regulatory powers of federal or state government.

of a proprietor,[33] not to a public servant in possession of public records.

The court on rehearing accepted the Government's argument that under *Grant v. United States*,[34] neither Wild nor his corporation could claim the privilege with regard to "corporate records." But *Grant*, although purporting to follow *Wilson*, did not consider the nature of the documents or the capacity in which they were held.[35] The term "corporate records" is a general term which conceals the merits of whether or not Wild should have the protection of the privilege. With unincorporated associations the Supreme Court has recognized that the test should not be "mechanical"; instead, the character of the organization should be considered to determine whether the organization embodies group interests or purely personal interests.[36] Under this analysis, as under the *Wilson* analysis, the *Wild* case comes within the meaning and policy of the privilege. Permitting Wild to claim the privilege in an action against the corporation, if corporate books or records would incriminate him, would certainly impede regulation of the corporation. But the need to regulate Wild's corporation is no greater than the need to regulate sole proprietorships or

33. A business may be incorporated for a number of reasons such as tax consequences or limited liability. Permitting the one-man corporation may stimulate business because it permits the small businessman to compete with the large corporation. With the addition of subchapter "S", INT. REV. CODE OF 1954, §§ 1371-77, proprietorships and partnerships may be induced to incorporate since the subchapter permits a corporation which meets certain requirements to elect to have its income taxed directly to the shareholders rather than to the corporation. See Willis, *Subchapter S: A Lure to Incorporate Proprietorships and Partnerships*, 6 U.C.L.A.L. REV. 505 (1959). See generally *The Incorporated Individual: A Study of the One-Man Company*, 51 HARV. L. REV. 1373 (1938). In United States v. Kimmel, 274 F.2d 54 (2d Cir. 1960), the business was incorporated in response to a demand of a creditor for 30% of the interest of the corporation in exchange for further advances.

The fact that a corporation, as contrasted with a sole proprietorship, has limited liability and special tax advantages is not relevant in the determination of the applicability of the self incrimination privilege. To argue that one who receives these benefits cannot be heard to claim the privilege is to beg the question. The applicability of the privilege ought to be determined by applying its policies to the particular facts.

34. 227 U.S. 74 (1913).

35. See Wild v. Brewer, 329 F.2d 924, 928 (9th Cir. 1964) (dissenting opinion).

36. United States v. White, 322 U.S. 694, 701 (1944). The *White* test is:

> whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interest of its constituents but rather to embody their common or group interests only.

partnerships, which are protected by the privilege.[37] There are no investors or shareholders in Wild's corporation who need protection. A proprietorship or partnership may have dealings with the public which are equally as extensive as those of a solely owned corporation. In addition, since Wild holds the records in a "purely personal capacity," his claim of the privilege is similar to an individual's.[38] The Government should respect the claimant's rights regarding the documents; in order to prosecute, the Government should seek evidence elsewhere; if the public need for the records transcends the interest in prosecuting the individual, the state can grant immunity.[39] Since the corporation embodies only Wild's personal business and he holds the records in a personal

Cases in which the *White* test has been applied are: McPhaul v. United States, 364 U.S. 372 (1960) (Civil Rights Congress); Rogers v. United States, 340 U.S. 367 (1951) (dictum) (Communist Party); Communist Party of the United States v. Subversive Activities Control Bd., 223 F.2d 531 (D.C. Cir. 1954), *rev'd on other grounds*, 351 U.S. 115 (1956) (Communist Party); United States v. Field, 193 F.2d 92 (2d Cir. 1951) (a declared trust). *Compare* United States v. Silverstein, 314 F.2d 789 (2d Cir.), *cert. denied*, 374 U.S. 807 (1963) (partnership), *with In re* Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Cal. 1948) (partnership).

37. Two cases granting the privilege to partnerships are United States v. Onassis, 125 F. Supp. 190 (D.D.C. 1954), and *In re* Subpoena Duces Tecum, *supra* note 36.

38. Since the case of Shapiro v. United States, 335 U.S. 1 (1948), which held that a statutory requirement that records be kept renders the required records of an individual unprivileged, it has not been clear whether this required records doctrine would apply to tax investigations. See Meltzer, *supra* note 29. INT. REV. CODE OF 1954, § 6001 provides:

> Every person liable for any tax imposed by this title . . . shall . . . comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary . . . it is necessary, he may require any person, by notice served upon the person or by regulations . . . to keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

Although this is a statutory requirement to keep records, the text of the section seems to require the records for civil liability only and not for criminal liability. See Spilky, *Have We Lost Our Civil Rights in Tax Matters?*, 37 TAXES 603 (1959).

INT. REV. CODE OF 1954, § 7602, also embodies rights of the Government to examine and subpoena records. However, except for Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), 32 TEXAS L. REV. 453 (1954), the courts have not extended the required records doctrine into the tax field. See Redlich, *supra* note 1; Note, 42 B.U.L. REV. 227 (1962); Note, 14 U. FLA. L. REV. 74 (1962.).

39. Immunity has to be granted by statute. For a list of federal immunity statutes, see 8 WIGMORE, *op. cit. supra* note 8, § 2281, at 495 n.11. See also Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 446 (1954).

capacity as sole owner, the policies of the privilege should take precedence over incidental difficulties in regulation.[40]

Wild's claim of self incrimination is the type which the fifth amendment should protect. The *Wilson* and *Grant* decisions do not compel the "mechanical" rejection of Wild's constitutional privilege merely because of incorporation. Since Wild's claim fits the spirit and policy of the privilege, he should not be compelled to give up the records, whether he or his corporation is being investigated, if they tend to incriminate him.

Administrative Law—Criminal Law—Inspections Without a Warrant Made Under Public Health, Safety, and Welfare Laws Held Unconstitutional for Purpose of Criminal Prosecutions

Defendant had been convicted of violating a zoning ordinance of the village of Laurel Hollow, New York, which made it a crime to conduct a business in a nonbusiness zone.[1] Building inspectors had entered defendant's premises, over his objections, under authority of section 10.1 of the village Building Zone Ordinance, which authorized the building inspector "to enter any building or premises at any reasonable hour." Evidence was thereby obtained that defendant was using his mansion, in a residential area, for the business of design and fabrication of furniture, fabrics, wall coverings, and similar materials. On appeal the New York Court of Appeals, by a divided court, reversed and *held* that a search by public officials without a warrant was unconstitutional when done for the purpose of obtaining criminal prosecutions. *People v. Laverne*, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964).

The leading case on administrative search is *Frank v. Maryland*,[2] in which the United States Supreme Court held, by a divided court, that the power of health inspectors to search did not depend upon a search warrant.[3] In *Frank*, a city health in-

40. A test to determine which types of corporations are such that the custodian should be permitted to claim his personal privilege as to the documents is difficult to state with precision. Perhaps the *White* test, now used for unincorporated associations, is a start. See note 36 *supra*.

1. Laurel Hollow, N.Y., Building Zone Ordinance art. x, §§ 50, 10.2, referred to in the instant case.

2. 359 U.S. 360 (1959).

3. A number of earlier state cases, not relied on in *Frank*, allowed health and safety inspections of public or quasi-public places without warrants. Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914 (1910) (hotel); Keiper v. City of Louisville, 152 Ky. 691, 154 S.W. 18 (1913); City of St. Louis v. Evans, 337