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CONSTITUTIONAL LAW-PRIVILEGE AGAINST SELF-INCRIMINATION-USE AGAINST DEFENDANT OF RECORDS REQUIRED TO BE KEPT BY FEDERAL LAW

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CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—USE AGAINST DEFENDANT OF RECORDS REQUIRED TO BE KEPT BY FEDERAL LAW—Petitioner Shapiro, a produce wholesaler, was served under the authority of the Emergency Price Control Act with a subpoena duces tecum ordering him to produce certain duplicate sales invoices required to be kept by government regulation.[1] The petitioner produced the records but claimed a constitutional privilege. When subsequently tried in the district court on charges of making tie-in sales in violation of the price regulations, petitioner pleaded immunity under section 202(g) of the Emergency Price Control Act.[2] His plea was overruled; conviction followed and was affirmed by the circuit court of appeals.[3] On certiorari to the Supreme Court, *held*, affirmed. Since records required to be kept under a valid regulation are public documents, these were not included within a statutory immunity which Congress intended to be co-terminous with the constitutional privilege against self-incrimination. *Shapiro v. United States*, (U.S. 1948) 68 S.Ct. 1375.

The privilege against self-incrimination which has been incorporated into the Federal Constitution[4] and the constitutions of all but two states,[5] prevents the use in a criminal proceeding of documents produced from the accused. The privilege is a personal one, so that the papers must be the private property of the person

[1] Maximum Price Regulation 426, § 14, 8 FED. REG. 9546 (1943).

[2] 50 U.S.C. (1946) Appx., § 922 (g). "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 . . . shall apply with respect to any individual who specifically claims such privilege."

The Compulsory Testimony Act, 49 U.S.C. (1946) § 46. "No person shall be excused from attending and testifying or from producing . . . documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena. . . ."

[3] United States v. Shapiro, (C.C.A. 2d, 1947) 159 F. (2d) 890.

[4] U.S. Const., Amend. V. The common law origins of the privilege are examined in Corwin, "The Supreme Court's Construction of the Self-Incrimination Clause," 29 MICH. L. REV. 1, 191 (1930).

[5] In Iowa and New Jersey the privilege is based on common law. State v. Height, 117 Iowa 650, 91 N.W. 935 (1902); State v. Zdanovicz, 69 N.J.L. 619, 55 A. 743 (1903).

claiming protection, or at least be in his possession in a private capacity.[6] Thus, in a criminal action against a corporation, the corporation papers may not be withheld on the ground that the corporation is privileged.[7] Nor can the officer of a corporation invoke the privilege as to corporate records which are in his possession and may incriminate him,[8] unless they are personal records.[9] This restricted scope of the privilege as to corporations is also applied to labor unions.[10] Because of the personal nature of the privilege, the owner of incriminating evidence is not protected if the papers reach a third party's hands,[11] or if they are public records.[12] As a corollary of the non-privilege of public records, there has been a tendency, culminating in the instant case, to designate as public those records which the government may constitutionally require to be kept in connection with private business.[13] The accepted starting point for this proposition is the dictum in *Wilson v. United States*.[14] There is little question that if the records are public in the sense of being publicly owned or governmental, nonprivileged status follows.[15] The disputed issue is whether or not records required to be kept by law are *ipso facto* public records. Justice Frankfurter bases the second part of his dissent in the instant case on the argument that they are not public records except in a question-begging sense, and distinguishes the decisions relied on by the Court as cases involving true public records.[16] However, numerous federal

[6] Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886); Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914); United States v. Hoyt, (D.C. N.Y. 1931) 53 F. (2d) 881.

[7] Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370 (1906); Essgee Co. v. United States, 262 U.S. 151, 43 S.Ct. 514 (1923).

[8] Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538 (1911); Wheeler v. United States, 226 U.S. 478, 33 S.Ct. 158 (1913); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494 (1946).

[9] McAlister v. Henkel, 201 U.S. 90, 26 S.Ct. 385 (1906).

[10] United States v. White, 322 U.S. 694, 64 S.Ct. 1248 (1944); noted in 20 N.Y. UNIV. L.Q. 364 (1945); 13 FORDHAM L. REV. 238 (1944).

[11] Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574 (1921).

[12] Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256 (1946) (public records, being the property of the state, must be produced, and may be used to incriminate the officer who keeps them). 8 WIGMORE, EVIDENCE, 3d ed., § 2259 C (1940); 30 COL. L. REV. 1160 (1930).

[13] B. & O. R.R. v. I.C.C., 221 U.S. 612, 31 S.Ct. 621 (1911); United States v. Mulligan, (D.C. N.Y. 1920) 268 F. 893; Marron v. United States, (C.C.A. 9th, 1925) 8 F. (2d) 251. The extension of this public record idea is usually based on a bargain theory, that the individual is deemed to know the terms offered by the state and to assent to them by his conduct in keeping the records. The duty to keep the records rises anterior to the crime, and the individual is then on notice that at some future time a report must be made. 8 WIGMORE, EVIDENCE, 3d ed., § 2259 C (1940).

[14] 221 U.S. 361 at 380, 31 S.Ct. 538 (1911). "The principle [non-privilege] applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of government regulation, and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."

[15] Principal case at 1402.

[16] Justice Frankfurter dissented on two grounds: (1) The court should not decide a constitutional issue of basic civil liberty when this is unnecessary and the statute in

lower court decisions since the *Wilson* case have followed the "quasi-public records" doctrine in its limitation on the self-incrimination privilege.[17] In balancing the disadvantage of this privilege to the efficient prosecution of crime, against the benefit it affords to the protection of individual liberty, the Court in the instant case has furthered the tendency to limit the scope of the privilege against self-incrimination.[18] It also seems to have given Congress a device by which it may legislate away the constitutional privilege.

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question permits another construction. Sec. 922(g) was not intended to be equated with the constitutional privilege, and petitioner should have been granted immunity under the statute. (2) Assuming the premise that the statutory immunity is co-terminous with the constitutional privilege, petitioner should be immune from prosecution, for these records are not the "public records" which are non-privileged.

[17] United States v. Jones, (D.C. Miss. 1947) 72 F. Supp. 48; Bowles v. Misle, (D.C. Neb. 1946) 64 F. Supp. 835, reviewing many of the cases at pp. 838-842; Amato v. Porter, (C.C.A. 10th, 1946) 157 F. (2d) 719.

[18] 20 N.Y. UNIV. L.Q. 364 (1945); 37 J. CRIM. L. 524 (1947).