10-1982

United States v. Rylander

Lewis F. Powell Jr.

John has C.R. may be a grant. - 2/5/82

David will watch for this

SG requests Grant & ~~set~~ consolidate - or set in tandem with 81-1063

Resp. Received (OVER)

Docum Could join 3 or Grant. Possibly set with

4/15

PRELIMINARY MEMORANDUM (Excellent Memo)

February 19, 1982 Conference
List 5, Sheet 3

No. 81-1120-CFX

O/C UNITED STATES, et al. Cert to CA9 (Wallace, Fletcher; Norris, concurring)

v.

O/C RYLANDER, et al. Federal/Civil Timely (w/ext.)

1. SUMMARY: The SG asks the Court to grant this petn and consolidate it (or set it in tandem) with No. 81-1063 United States v. Meeks [February 19, 1982 Conference, List 7, Sheet 2] on the following question: whether a party who has failed to produce records pursuant to a court order enforcing a summons may carry his burden of production in the subsequent contempt proceeding by denying possession of the records, then relying on

Justice Stevens has called for a response. This may be a grant although I am not sure. I suspect that the panel was concerned that the IRS not be permitted to use civil enforcement proceedings in order to obtain evidence to be →

his Fifth Amendment privilege against self-incrimination to defeat further inquiry.

2. FACTS and PROCEEDINGS BELOW: The IRS conducted a civil investigation of resp's tax liabilities for the years 1973-1976. In January, 1979, the IRS issued summonses to resp in his capacity as president of two companies, seeking testimony and production of corporate books and records. Resp failed to comply. Petrs then petned in ED Cal for enforcement of the summonses under 26 U.S.C. §§7402(b), 7604(a).

Resp did not appear at the enforcement proceeding. In response to the order to show cause, resp submitted an unsworn written declaration that he was not the president of the subject corporations and therefore had been served improperly. Petrs then made offers of proof showing that resp was the president of the subject corporations. On January, 1980, the DC (Karlton) issued an order enforcing the summonses and ordering resp to appear before the IRS with the requested records and documents. For the first time, resp appeared, but claimed that he had none of the records called for by the summons.

Petrs successfully petned for orders to show cause why resp should not be held in contempt. Although attempts at personal service failed, the DC determined that constructive service had been accomplished, and that petr was avoiding personal service. The DC issued a bench warrant, which led to resp's arrest in July 1980. The DC found that resp was in civil contempt because he had failed to comply with a valid court order. The DC ordered resp into the custody of the attorney general until he purged himself

of the contempt, either by complying with the production order or testifying why he could not produce the records.

Resp then submitted a sworn statement that he did not have any of the records. A hearing was held, where resp took the stand and so testified; when asked where the records were, however, he declined to answer on Fifth Amendment grounds. He was again held in contempt and his incarceration suspended pending appeal.

3. DECISION BELOW: The CA9 reversed and remanded. Judge Fletcher, writing for the panel, first rejected the government's claim that resp's failure to appear at the enforcement proceeding estopped him from claiming at the later contempt proceeding that he was unable to produce the requested records. The enforcement proceeding was a summary action at which the question of resp's ability to comply was not actually litigated; nor did the DC make an express finding that resp in fact was able to comply with the summons. Thus, res judicata did not bar resp from later raising the defense of inability to comply at the contempt proceeding.

The CA then specified the allocation of burdens of production and persuasion at the civil contempt proceeding. Under NLRB v. Trans Ocean Export Packing, Inc., 473 F.2d 612, 616 (CA9 1973), a deft's failure to comply with a valid court order ordinarily places a burden of production on the deft to show "categorically and in detail" why he is unable to comply. The CA held, however, that "when the defendant has made a bona fide fifth amendment claim, his statement that the documents are not

in his possession or under his control is sufficient to satisfy his burden of production." Pet. App. 10a.

The CA then remanded to the DC for a finding on the question whether resp's Fifth Amendment claim was in fact bona fide. If it was, the CA held, resp's sworn denial of possession coupled with his Fifth Amendment claim would satisfy his burden of production; the government would then have the burden of producing evidence showing that the documents in question actually existed and were in the defendant's possession or under his control.[1]

Judge Norris, concurring separately, argued that the majority unnecessarily decided the Fifth Amendment issue. By itself, resp's sworn statement denying possession of the requested records was sufficiently detailed to satisfy his burden of production on the issue of his inability to comply with the summons. Thus, Judge Norris argued that the case should be remanded so that the government might carry its burden of proving that resp had the ability to produce the records.

4. CONTENTIONS: The SG argues that the CA9's decision in this case, together with the CA5's decision in United States v. Meeks, [February 19, 1982 Conference, List 7, Sheet 2] provides "a roadmap" for evasion of IRS enforcement proceedings. The two decisions, while slightly different in their facts and rationales, both involve situations where a corporate official, called upon to produce corporate books and records, initially

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[1]The CA further stated that "[a]lthough relevant, inferences that the records sought are of a type ordinarily kept by corporations, and that a person in the defendant's position would ordinarily have control over such records are not adequate to meet the government's burden of proof." Pet. App. 10a.

resists production of those records on grounds other than his inability to comply. Here, resp alleged that he was not president of the corporation; in Meeks, resp hinted that he was able to comply, but sought transactional immunity. After a final appealable order compelling production, both Rylander and Meeks were directed to show cause why they should not be held in contempt. Both then asserted for the first time in a written submission that they could not produce any of the records, and that any further statement might incriminate them.

The SG then raises specific challenges to the CA's rulings on three issues: estoppel, the burdens of proof in a civil contempt proceeding, and waiver of Fifth Amendment privilege.

The SG notes first that resp's failure to appear and adduce proof at the enforcement proceeding that he was unable to comply with the summons led to entry of a final, appealable enforcement order against him. Res judicata therefore barred him from litigating at the subsequent contempt proceeding the question whether he possessed or controlled the summoned records at the time of the enforcement order. By holding that resp was not foreclosed from raising the "inability to comply" defense at the contempt proceeding, the CA's decision conflicts with this Court's decision in Maggio v. Zeitz, 333 U.S. 56, 75-76 (1948), and the decisions of the CA2 and the CA6 in United States v. Secor, 476 F.2d 766 (CA2 1973) and United States v. Peter, 479 F.2d 147 (CA6 1973). The CA's holding on this point also ignored the DC's order enforcing the summons -- an implicit determination that resp had the records sought -- and the presumption that a

corporate officer has a continuing ability to produce corporate books and records. See Lopiparo v. United States, 216 F.2d 87, 91 (CA8 1954), cert. denied, 348 U.S. 916 (1955).

Second, the CA improperly carved out a "Fifth Amendment" exception to established rules regarding burdens of proof at contempt proceedings. When an alleged contemnor fails to comply with a court order, the burden shifts to him to prove by clear and convincing proof why he should not be held in contempt. The contemnor should not be able to carry that burden by a self-serving uncross-examined statement that he does not have the requested records, coupled with assertion of the Fifth Amendment privilege. The CA's ruling on this point conflicts with McPhaul v. United States, 364 U.S.372 (1960), and decisions by the CA2, CA5, and CA8. See United States v. Johnson, 247 F.2d 5 (CA2 1957); United States v. Hankins, 565 F.2d 1344 (CA5 1978), cert. denied, 440 U.S. 909 (1979); Lopiparo v. United States, 216 F.2d 87, 91 (CA8 1954), cert. denied, 348 U.S. 916 (1955) (all suggesting that contemnor may not meet his burden of proof at contempt proceeding by denial of possession coupled with assertion of the Fifth Amendment privilege). By also requiring the government to make an affirmative showing at the contempt hearing that resp had possession and control of the corporate records, the CA9 imposed an obligation on the government which conflicts with the burdens of proof specified in United States v. Bryan, 339 U.S. 323 (1950) and United States v. Fleischman, 339 U.S. 349 (1950).

Third, the SG argues that the CA should not have accepted resp's uncross-examined statement that he could not produce the records as credible evidence establishing his inability to comply. Since the CA found that this statement was competent evidence, it should also have found that resp had waived his Fifth Amendment privilege against self-incrimination. On this point, the SG claims, the CA's holding conflicts with the CA5's decision in United States v. Hankins, supra (holding that a statement by a contemnor that he could not comply with a summons is not credible evidence unless it is cross-examined).

The SG concludes by arguing that the CA's decision hampers the IRS's ability to collect the information necessary to assess tax liabilities. A recipient of a summons can refuse to produce records, raise specious defenses, then deny possession of records and assert the Fifth Amendment privilege and thereby gain immunity from contempt, all the while knowing that the statute of limitations is running.

5. DISCUSSION: The question presented seems substantial. The SG persuasively argues that the CA's decision will have serious practical consequences, allowing recipients of IRS summonses to withhold information indefinitely with hopes of delaying an investigation until the applicable statute of limitations runs out. The CA's res judicata holding allows defts to withhold some defenses, such as inability to comply, until after an enforcement order has been entered and affirmed on appeal, and then to raise such defenses at the subsequent contempt proceeding. Furthermore, under the CA's analysis, if

the deft submits an uncross-examined statement denying that he ever possessed the documents and asserts the Fifth Amendment privilege to avoid testimonial cross-examination, he will have satisfied his burden of production. The burden of proving that resp is in contempt would then shift to the government, which would have to prove that resp was in possession of the records and therefore able to comply with the enforcement order. The government may find that burden difficult to carry, especially since the facts that the government must prove are peculiarly within deft's knowledge. See note 1, supra.

The SG suggests three possible grounds upon which the Court could reverse. First, the Court could hold that resp must raise and litigate all defenses, such as inability to comply, at the enforcement proceeding or be estopped from raising those defenses at the contempt proceeding by res judicata. Second, it could hold that an uncross-examined statement denying possession of requested records, coupled with an assertion of the Fifth Amendment privilege, is not enough to carry a contemnor's burden of production on the issue of inability to comply. Third, it could hold that admission of the uncross-examined statement into evidence constitutes waiver of resp's Fifth Amendment privilege against self-incrimination.

These three issues are presented more clearly by this petn than by the petn in No. 81-1063 United States v. Meeks. Thus, if the Court wishes to grant only one of these petns, while holding the other, this case seems to me a better candidate for plenary review than Meeks. On the other hand, I see no reason not to

grant and consolidate the two petns and hear them together for one hour. Consideration of the different factual settings of the two cases might help the Court in formulating a coherent rule to govern the assertion of the Fifth Amendment privilege against self-incrimination in the context of civil contempt proceedings.

6. RECOMMENDATION: Justice Stevens has already called for a response in this case. I recommend that the petn be granted, and the case consolidated for argument with No. 81-1063 United States v. Meeks.

02/11/82 Koh Opns in petn

used in a subsequent criminal proceeding.

When the response appears I will read the CA9 opinion

SL

Response not helpful

The SG has a pretty strong argument that CA9's decision will encourage delay & hamper enforcement, CA9 conflicts with CA5

You might join 3 or grant

April 16, 1982

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 81-1120

UNITED STATES

vs.

RYLANDER

Also motion of respondent Richard W. Rylander, Sr. for leave to proceed ifp.

Grant & consolidate with 81-1063

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓										Recused	
Brennan, J.			✓										
White, J.		✓										for B, RW	
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											

to see whether we need take both cases

April 22, 1982

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 81-1120

UNITED STATES

vs.

RYLANDER

Also motion of respondent for leave to proceed ifp.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											
.....													

GRANT
Schlueter

G

May 27, 1982 Conference
List 1, Sheet 6

No. 81-1120

Motion of Respondents for Appointment of Counsel

UNITED STATES, et al.

v.

RYLANDER, et al.

SUMMARY: On April 26, 1982, the Court granted cert to the CA 9 and also granted ifp status to resp. His counsel, Mr. Joseph F. Harbison, III, now requests to be appointed as resp's[1] counsel for oral argument.

FACTS AND CONTENTIONS: Resp's case initially arose from enforcement of an IRS subpoena in the DC (ED Calif.). Movant was appointed by that court to represent resp and he later perfected resp's appeal to the CA 9. Cert was granted to that court on April 26.

Movant states that through handling resp's case he has prepared five separate appellate briefs (including the brief in opposition), and has presented oral argument. To date he estimates that he has spent approximately 300 hours in research, writing, and oral argument. He is currently scheduled to serve as

[1]Representation would apparently extend only to Mr. Rylander and not his corporation.

Grant

JL

resp's defense counsel in an upcoming federal criminal trial. Movant is agraduate of the McGeorge School of Law. He does not state whether he is a member of this Court's Bar[2] but he does point out that he has argued on numerous occasions before the CA 9 on both civil and criminal matters.

DISCUSSION: Although movant does not indicate that the resp (Mr. Rylander) wishes to be represented by him, it seems safe to conclude that resp would join in the request--movant is now serving as his defense counsel in a pending criminal trial. In view of movant's extensive involvement, his motion to be appointed as counsel should be granted.

There is no response.

5/26/82 Schlueter

PJC

[2]The Clerk's Office advises that movant was admitted to this Court's Bar on March 1, 1982.

May 27, 1982

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 81-1120

UNITED STATES

vs.

RYLANDER

Motion of respondents for appointment of counsel

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Received 1/17

mfs 01/16/83 Don't understand some of Mike's reasoning. There is an area of law in which my knowledge is limited. Briefs are not helpful. Discuss with Mike, & take second look at briefs.

BENCH MEMORANDUM

No. 81-1120

United States v. Rylander

Michael F. Sturley January 16, 1983

Questions Presented

(1) What burden may be placed on the respondent in a civil contempt proceeding consistent with his claim of Fifth Amendment privilege?

(2) If the burden is on respondent to establish his inability to comply with a court order, may he sustain this burden by (i) submitting a sworn statement that he is unable to comply, and (ii) refusing to explain further on the ground that an explanation would tend to incriminate him?

Outline of Memorandum page

I. Background

A. Statutory Background

Under 26 U.S.C. §§7402(b) and 7604(a), a DC has jurisdiction "by appropriate process" to compel a person to produce books and records when summoned to do so under the internal revenue laws.

B. Facts

Resp Richard W. Rylander, Sr., ~~is~~ was the president of two companies: Rylander & Co. Realtors, Inc., and Affiliated Investments & Mortgage Co. As part of an investigation into the companies' tax liabilities, the IRS issued summonses to resp on January 4, 1979, that required him to testify and to produce certain corporate records. When resp refused, the IRS petitioned the DC (ED Cal; Karlton) for enforcement of the summonses under 26 U.S.C. §§7402(b) and 7604(a). Between August and November, the DC issued four sets of orders to show cause why the summonses should not be enforced. Service was finally effected in November, and a hearing was scheduled for January 14, 1980. Resp did not appear at this hearing, but returned the orders to the DC with a letter denying that he was the president of the companies. The DC nevertheless held the hearing. It concluded that resp was the president and enforced the summonses. Resp did not appeal this order.

Resp did not appeal DC's finding he was president

On February 4, 1980, resp appeared before an IRS agent and stated that he did not possess the corporate records he was required to produce. He refused to answer further questions.

The IRS then petitioned the DC for enforcement of its order and the DC directed resp to show cause why he should not be held in contempt. On October 8, the DC held a show cause hearing and resp offered no evidence. The DC accordingly found him guilty of civil contempt and ordered him imprisoned

> unless and until he purges himself of the civil contempt charge by either: (1) Complying with the Court Order to produce the documents; or (2) Testifies [sic] why he cannot produce the documents.

Petn app 3a-4a. When resp indicated he would testify, the DC adjourned the hearing. On October 9, in an attempt to purge himself, resp submitted a sworn statement entitled "Oath in Purgation of Contempt and Release of Records." This statement declared, in part:

> I swear on oath that I have no such records as called for in the Court's order of January 16, 1980 .... I further swear on oath that I know not the location of any such records, if any there be, or that any such record if any there be, are in anyway under my control or supervision or that I have in anyway placed any such records, if any there be, in the hands of any other person to hold for me. I further swear on oath that I have no intent plan or purpose to withhold any such records, if any there be, from the Court as called for in the Court's order of January 16, 1980, and I hereby release any such records, if any there be, which anyone may in anyway deem to require my release to this court.

J.A. 91-92. On October 23, the DC reconvened the hearing. Resp took the stand and testified that he did not have any of the records called for in the IRS summons. Asserting his Fifth Amendment privilege, he declined to answer any further questions. The DC reinstated its October 8 contempt order.

C. Decision Below

On appeal, CA9 (Wallace, Fletcher; Norris concurring) reversed and remanded. The majority noted that the inability to comply with a court order is a complete defense to a "compulsory" civil contempt charge, such as the one at issue here. The principal questions were: (i) which party has the burden of proof, and (ii) whether that burden has been met.

The majority first rejected the Government's contention that resp was barred by principles of res judicata from asserting that he did not have the documents in question. The January 1980 hearing, and the resulting DC order enforcing the summonses, did not address this issue. Under United States v. Powell, 379 U.S. 48, 57-58 (1964), the Government was not required to show that resp had the documents. The only issues litigated were resp's position with the companies, and the applicability of the Powell conditions.

CA9 - burden on govt

On the burden of proof issue, the majority concluded that the initial burden in a case such as this is on the Government, which must show that the defendant has failed to comply with a valid court order. The burden then shifts to the defendant to show why he is unable to comply. This, however, is only a burden of production. Once "the defendant produces sufficient evidence of his inability to comply to raise a question of fact," the Government has the "burden of persuading the court that the defendant is actually able to comply." Petn app 8a. The majority concluded that "[w]hen the defendant has made a bona fide [F]ifth [A]mendment claim, his statement that the documents are

not in his possession or under his control is sufficient to satisfy his burden of production." Id., at 10a. CA9 accordingly remanded the case to the DC to determine the validity of resp's Fifth Amendment claim.[1]

Judge Norris concurred separately. He accused the majority of deciding "a novel Fifth Amendment question" unnecessarily, since it was possible to dispose of the case on the basis of a nonconstitutional issue. He concluded that resp's "detailed statement" was "sufficient to put into issue [his] 'inability to comply' defense, shifting the burden of going forward back to the government." Id., at 12a-13a. Requiring more would run a serious risk of imprisoning a defendant for his inability to prove a negative.

II. Discussion

I find this a close and difficult case. The CA9 reasoning is probably wrong, so even if the judgment should be affirmed, it should be affirmed on different grounds. The key issue is whether the choice offered resp is permissible in light of his claimed Fifth Amendment privilege.

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[1]It is not clear what happened to the SG's usual ripeness argument. Applying the SG's standard doctrine, this case would not be ripe for review until after the remand, since there is a possibility that the DC will find that resp's Fifth Amendment claim is invalid. Under those circumstances, the Government's cert petn would be moot. If the DC upholds resp's Fifth Amendment claim, on the other hand, the Government can appeal at that time. Resp is presumably unfamiliar with this argument, since it was not raised in his opposition brief. I assume the SG finds it less convincing when the Government is the petr.

A. The Res Judicata Claim

I am totally unconvinced by the SG's res judicata contention. What his argument esentially comes to is that resp should have raised his current defense ("I do not have the documents") at the enforcement stage rather than saving it for the contempt stage. While this generally may be a sensible policy, resp was not required to raise his defense then. Since the defense was not in fact litigated, and since rejection of the defense was not a necessary element of the DC's enforcement of the summonses, resp is not barred from raising the defense now.[2]

The res judicata contention also strikes me as a poor strategy for the SG, for if the judgment below is reversed on res judicata grounds, the Government will win an empty victory. It may succeed in coercing resp, but that hardly seems necessary in view of the material it already has against him. Under such a decision, the next tax evader will simply know to make his sworn disclaimer and Fifth Amendment claim at an earlier stage, and the Government will be in little better position to deal with it. CA9, at least, would simply cite its earlier decision in this case and note that it was "reversed on other grounds." The Government will gain some time in these circumstances, but the underlying problem will remain.

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[2]If the SG's res judicata contention were taken seriously, the results could be absurd. Resp would not be allowed to claim that he never had the documents even if he could now prove that assertion. The Government thus could imprison resp until he produces the documents despite his provable inability to do so.

B. The Fifth Amendment Problem

(1) The CA9 Views. I am unconvinced by the reasoning of either CA9 opinion. Judge Norris warns of the dangers of forcing a defendant to prove a negative, but that is not at issue here. The burden on resp was to explain his inability to produce the documents. His mere assetion that he does not have the records and does not know their location is not enough, however detailed that assertion may be. Assuming (as Judge Norris does) that the Fifth Amendment is irrelevant, resp is required to offer some explanation why he does not have the records and does not know their location. If the truth is actually the negative that cannot be proven, i.e., if resp did not keep such records and never knew anything about them, he must explain that fact before the burden shifts back to the Government.

The majority reasoning is also suspect. It basically says that resp's sworn statement, which is inadequate standing alone, is adequate when coupled with a claim of Fifth Amendment privilege. I find this unconvincing, for I do not think that a claim of privilege supports resp in meeting his burden. At most it prohibits the DC from assuming the worst about potential testimony.[3] It does not require the DC to assume the best. In oth-

[3] If resp simply had testified about his sworn statement and refused to be cross-examined, the DC would have been entitled to assume the worst about what the cross-examination would have revealed and strike the testimony. Since resp claimed a Fifth Amendment privilege, however, the DC could not assume that the testimony he might have given would be bad. Accordingly the sworn statement is allowed to stand for what little it is worth on its face.

er words, the privilege neither adds not detracts from resp's other testimony. Since the testimony with the Fifth Amendment claim is no different from the testimony without it, the majority's analysis fails for the same reason that Judge Norris's does. There simply is not enough there to overcome the burden placed on resp.

(2) The Propriety of the Burden. The rejection of CA9's reasoning does not necessarily mean that the decision below must be reversed, for there remains the issue--slightly different from that addressed by the CA9 majority--whether the Government is entitled to place the burden on resp at all. Resp's strongest argument is that, although it may be permissible to require defendants to establish their inability to comply with court orders under normal circumstances, the Fifth Amendment prohibits such burdens when a defendant asserts his right not to incriminate himself.

It is well recognized that the Fifth Amendment protects individuals from being compelled to give testimony. It is also well recognized that an individual is never compelled to give testimony in a literal sense, for he always can stand mute and brave whatever consequences the Government devises. The true power of the Fifth Amendment, therefore, is in prohibiting the Government from improperly requiring individuals to make choices when one of those choices is testifying against himself. For example, in South Dakota v. Neville, No. 81-1453, I explained in my bench memo, at p. 10, that it would be improper for the State

to offer Neville a choice between refusing to take a blood alcohol test (i.e., testifying against himself) and submitting to a test that involved extreme pain or could result in medical complications. But it was acceptable for the State to offer him a choice between refusing to take a test and submitting to a safe test administered by a nurse, since there was then a reasonable choice available.

Here there are, in theory, four choices available to resp: (1) he can turn over the documents to the IRS; (2) he can explain why he is unable to produce the documents; (3) he can provide nontestimonial evidence or third-party testimony supporting his claimed inability; or (4) he can remain in jail indefinitely. If all four of these choices (or any three of them) are in fact available to resp, there has been no impermissible burden placed on him. The problem is that there is a strong possibility that only choices (2) and (4) are available.[4] If that is so, resp faces the classic "cruel trilemma of self-accusation, perjury, or contempt," Murphy v. Waterfront Commission, 378 U.S. 51, 55 (1964), that the Fifth Amendment prohibits. I therefore conclude that the Government may not force the choice on resp. When resp claimed the right not to incriminate himself, he did not meet the burden that had been placed on him (as CA9 concluded), but the Fifth Amendment requires that the burden be removed.

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[4]My personal guess is that resp has destroyed the records at issue, thus precluding choice (1). If he had sufficient discretion when he destroyed them, there is no independent evidence supporting his claimed inability, thus precluding choice (3).

(3) Distinctions. This would be a different case if the Government could prove that choice (1) or choice (3) is available to resp.[5] On remand, for example, the DC could take the IRS's evidence and conclude from it that resp has access to the records that he is required to produce. Once the DC has properly made this factual finding, it would be justified in holding resp in contempt. Under those circumstances, resp would not face an impermissible choice.

The Government's strongest argument against the CA9 judgment is based on the analogy to McGautha v. California, 402 U.S. 183 (1971), but the analogy is imperfect. In McGautha, the defendants were being punished for the murders that they had committed rather than for their refusal to testify. A simple hypothetical illustrates this distinction more clearly. Suppose that a defendant is charged with assault--an accusation that he could disprove on grounds of self defense. Under the governing law, he has the burden of proving self defense. In order to plead it, however, he must give testimony that incriminates him on some more serious charge. He thus faces a choice between being punished for assault or incriminating himself. Under McGautha, this choice is not prohibited by the Fifth Amendment, since the defendant would be punished for the assault rather than for his refusal to raise the self defense issue. Resp, in contrast, would be

[5]As a practical matter, of course, the Government is unlikely to prove that choice (3) is open to resp. If independent evidence exists, the Government will simply rely on it directly.

imprisoned under the DC's order precisely because he has refused to incriminate himself by explaining his inability to produce the records sought by the IRS.[6] That is the entire point of "compulsory" (as opposed to "compensatory") civil contempt.

III. Conclusion

I find this a difficult case, but conclude that under the Fifth Amendment the Government cannot place the burden it has on resp unless it can demonstrate that resp has the ability to produce the records it seeks. Accordingly, the judgment of CA9 should be affirmed on different grounds.

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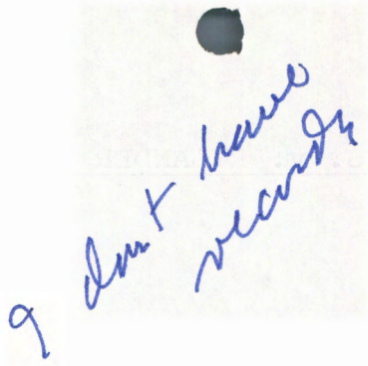
[6]This would be a different case if these circumstances were governed by a strict liability crime based on a custodian's refusal to turn over corporate records. Then the Government could punish resp for violating that crime unless he presented an adequate (possibly self-incriminatory) defense. The difference is that resp would be sentenced to a definite term for violating a statutory offense rather than an indefinite term for continuing to violate a court order.

81-1120 U.S. v. RYLANDER

Argued 1/18/83



Wallace (SG)

Show cause order issued why didn't produce records.

Finally ~~appeared~~ hearing was set. Resp did not appear, but sent letter denying he was Pres.. DC ~~[illegible]~~ found he was Pres & ~~he~~ had records

John said SG position is contrary to Curcio, 354 US 113

Principle: When Gov't has ~~[illegible]~~ made prima facie case of entitlement to records, burden of production shifts to Δ to ~~rebut~~ by some reason for not being able to comply with subpoena. Burden of persuasion remains with Gov't.

Resp. here submitted no evidence at all.

If a witness chooses to offer testimony, this is a waiver of priv. & he may be X-Examined.

SG'c said this statement should be stricken

Δ's statement that he doesn't have records is nothing more than a pleading if he declines X-Exam by then taking the 5th

Δ could have remained silent & taken 5th at outset, & used 3rd party to testify Δ ~~[illegible]~~ did not have records

Harbison (Resp)

can't X-Exam and

Once Δ says he doesn't have records, he may take 5th. Gov't then must prove he did have records. The statement "I don't have records" meets Δ's burden of production. The burden of persuasion ~~of~~ then requires Gov't to disprove his statement. That is what Curcio holds.

At least, Gov't has to prove that records were in Δ's possession at some time.

Relies primarily on Curcio & Powell.

I Gov't proves by other ev. that a Δ had poss. of documents at one time, & if Δ takes stand & says I don't have them now — & takes 5th as to X-Exam, counsel agrees — responding to G & P's — Δ could be held in civil contempt. Gov't., in these circumstances, had proved by "clear & convincing" ev that Δ once had records.. Standard re "clear & convincing"

Check correctness of this.

Wallace (Reply)

All the Govt need do is to show by "inference" that D normally has possession - e.g. comp. president. The DC found a fact that records were in existence.

In Curcio, unlike this case, the D had been called to stand to testify. Curcio is not applicable here.

mfs 01/20/83

To: JUSTICE POWELL

From: Michael

Re: No. 81-1120, United States v. Rylander

In many situations the Government places a burden on a citizen to perform some act. A witness to a crime, for example, may be required by subpoena to testify. This effectively means that he is given two choices: testifying or being punished for contempt. The Government is generally allowed to force this choice on the witness because he has a reasonable option--testifying. If the witness claims a Fifth Amendment privilege, however, this is no longer true. What had been a reasonable choice becomes, with the assertion of the privilege, an impermissible burden.

A purported custodian of corporate records generally may be required to produce those records or explain why he is unable to do so. This effectively means that he is given three choices: (1) producing the records, (2) testifying as to his inability to produce them, or (3) being punished for contempt. Even if the purported custodian does not have the records, the Government is still allowed to force this choice on him because he has a reasonable option--explaining why he does not have the records. When the purported custodian claims a Fifth Amendment privilege, however, as Rylander did here, explaining is no longer an option the Government reasonably can offer. What had been a reasonable choice becomes, with the assertion of the privilege, an impermissible burden.

81-1120 Rylander (Rule of Notes)

Close & difficult case - not at rest & will await Corp. decisions. These are very tentative notes.

1. Resp, when properly subpoenaed, has options: he has them.

(a) May produce document if $\wedge$.

(b) If not, he may establish it by a third person that he doesn't have possession.

(c) If, however, he merely denies himself that he has control of documents, he may be X-Examined.

2. Problem: If no 3rd party is available, can he say nothing & take the 5th? If so, this is an "out" that dishonest people always could use. If not, how does one protect his 5th Amend right?

Rev 6
Affirm - 2
Pass - 1

No. 81-1120, U.S. v. Ryland~~er~~ Conf. 1/21/83

The Chief Justice Rev

CA9 ignored dist. bet. civil & criminal contempt.
CA9 did remand to DC to "explore" the good faith & validity of 5th claim.

No court must accept the ~~bare~~ mere statement that a party doesn't have records.

This case involves "records" of a corp. – not of Resp. ~~Th~~.

? Resp. failed to comply with subpoena. Could ~~doubt~~ decide on this ground.

Justice Brennan Pass

Troubled by this case. Resp. had "some burden" to explain her failure. Govt showed Resp. was Pres. of Co. About some explanations, Govt normally is entitled to hold in contempt.

5th Amend doesn't say can't put a witness in a "difficult" position. In this & other kinds of situations, Resp. probably had a duty

Justice White Rev.

If U.S. established prima facie case of possession, Resp's ~~a~~ simple statement is not enough. U.S. is right here.

Resp. took stand & reaffirmed her statement that she didn't have them – tho this is not controlling.

Justice Marshall Affirm

No finding by DC that Resp had possession. But all one has to do is take 5th at any time & this is a witness right.

Justice Blackmun Rev.

Resp is in a dilemma. But agree with BRW

Justice Powell Rev

Not entirely at rest but here Resp did answer & then declined X-Exam. — There was no explanation.

There were not Resp's documents.

This may be a Catch 22 situation but this is not unique in the balance bet - ~~[illegible]~~ D's rights & societal interests

Justice Rehnquist Rev.

CA9's op. in not enlightening.

SG in right.

Justice Stevens Affirm

Q re whether burden can be shifted back to Govt when Resp took 5th. John Hunker it down

Justice O'Connor Rev.

Resp. had to respond.

Cuevas can be distinguished - but also could ~~reverse~~ overrule it