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Fisher v. United States: Compelled Waiver of Foreign Bank Secrecy and the Privilege Against Self-Incrimination

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FISHER V. UNITED STATES: COMPELLED WAIVER OF FOREIGN BANK SECRECY AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

INTRODUCTION

The Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition[1] recently investigated the possible diversion to the Nicaraguan contra resistance[2] of money from arms sales to Iran.[3] The committee believed that the funds were diverted through a bank account in a foreign jurisdiction and that retired Major General Richard V. Secord controlled the alleged account.[4] After General Secord refused to cooperate with the committee and authorize the release of records from the alleged account,[5] the committee attempted to gain access to the records by seeking a court order compelling him to sign a consent directive.[6]

The government uses consent directives in an attempt to circumvent the restrictive bank secrecy laws of certain foreign jurisdictions.[7] Gener-

1. The Select Committee was created by Senate resolution. *See* S. Res. 23, 100th Cong., 1st Sess., 133 Cong. Rec. S89 (daily ed. Jan. 6, 1987).

2. The "contras" is a counter-revolutionary insurgency group attempting to overthrow the Sandinista government in Nicaragua. *See* Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. Rep. No. 100-433, S. Rep. No. 100-216, 100th Cong., 1st Sess. 3 (1987) [hereinafter Iran-Contra Report].

3. *See* New York Times, Nov. 26, 1986, at A13, col. 1. For the findings of the Senate committee, see Iran-Contra Report, *supra* note 2.

4. N.Y. Times, Mar. 20, 1987, at A11, col. 3; *accord* Iran-Contra Report, *supra* note 2, at 4.

5. *See* N.Y. Times, Mar. 20, 1987, at A11, col. 3.

6. *See* Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F. Supp. 562, 563 (D.D.C.), *vacated as moot*, No. 87-0090 (Nov. 16, 1987); *see also* S. Res. 170, 100th Cong., 1st Sess., 133 Cong. Rec. S3555-56 (daily ed. Mar. 19, 1987) (authorizing Committee to seek court order).

Compulsion, for the purposes of this Note, differs from coercion, which occurs in police interrogation cases. In interrogations, testimony is compelled by means of physical or psychological coercion. *See* Miranda v. Arizona, 384 U.S. 436, 448 (1966). Consent directives are obtained through judicial process, with attendant sanctions of contempt for noncompliance. *See infra* notes 65-68 and accompanying text.

7. *See, e.g.*, United States v. Cook, 678 F. Supp. 1292 (N.D. Ohio 1987) (government obtained records from a Cayman Islands bank). Certain foreign jurisdictions are notorious for their highly protective bank secrecy laws. *See* R. Blum, Offshore Haven Banks, Trusts, and Companies 23-28 (1984) (listing, among others, the Bahamas, the British Antilles, and Switzerland); *see also* Crime and Secrecy: The Use of Offshore Banks and Companies: Hearings Before the Permanent Subcommittee on Investigations of the [Senate] Committee on Governmental Affairs, 98th Cong., 1st Sess. 7-8 (1983) (testimony of Glenn L. Archer, Ass't Att'y Gen., Tax Div., Dep't of Justice) (discussing use and growth of offshore banking jurisdictions). Banks in such foreign jurisdictions may release information to United States authorities if the individual controlling the account authorizes such a release. *See, e.g.*, United States v. Davis, 767 F.2d 1025, 1032 & n.14 (2d Cir. 1985) (citing the Cayman Confidential Relationships [Preservation] Law); United States v. Ghidoni, 732 F.2d 814, 816 n.2 (11th Cir.) (same), *cert. denied*, 469 U.S. 932 (1984). The fact that a witness signs a directive, however, does not make the release of records certain because, for example, a foreign jurisdiction might refuse to recognize a

ally, consent directives authorize any bank to which they are presented to release records from any account over which the subscriber has signatory authority.[8] General Secord argued that compelling him to sign the consent directive would violate his fifth amendment privilege against self-incrimination.[9] The court agreed with General Secord and refused to issue the order.[10]

Lower courts considering whether the compelled signing of a consent directive violates a witness' fifth amendment privilege against self-incrimination[11] apply the standard articulated by the Supreme Court in *Fisher v. United States*.[12] The Court in *Fisher* held that when the government

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directive. *See, e.g., In re* Confidential Relationships (Preservation) Law, Law 16 of 1976, Cause No. 269 of 1984 (Grand Ct. Cayman Islands July 24, 1984).

8. Consent directives usually contain qualified language, authorizing the release of documents only if they exist, and may or may not name the bank from which the records are sought. *See, e.g., In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 796 app. (1st Cir. 1987); United States v. Ghidoni, 732 F.2d 814, 815 n.1 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); *In re* Grand Jury Investigation, Doe, 599 F. Supp. 746, 748 n.4 (S.D. Tex. 1984), *rev'd sub nom.* United States v. Doe, 775 F.2d 300 (5th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). The consent directive at issue in United States v. A Grand Jury Witness, 811 F.2d 114 (2d Cir. 1987), provides a good example:

> I, [witness], of the State of New York in the United States of America, do hereby authorize and direct any bank, trust company, or other financial institution located outside of the territorial United States at which I have or have had an account of any kind, or at which any corporation has or has had an account of any kind upon which I am or have been authorized to draw, to disclose all information and deliver copies of all documents of every nature in the possession or control of such bank, trust company, or other financial institution which relate to any such accounts, together with a certificate attesting to the authenticity of any and all such documents, to any agent or employee of the United States Government who presents a copy of this Consent Directive which has been certified by the Clerk of the United States District Court for the Northern District of New York to such bank, trust company, or other financial institution, and this Consent Directive shall be irrevocable authority for doing so.

Id. at 115.

9. *See* Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F. Supp. 562, 564 (D.D.C.), *vacated as moot*, No. 87-0090 (Nov. 16, 1987). The fifth amendment states, in pertinent part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege may be invoked in grand jury proceedings and by witnesses. *See* Counselman v. Hitchcock, 142 U.S. 547, 559 (1892); *see also* Levy, *The Right Against Self-Incrimination: History and Judicial History*, 84 Pol. Sci. Q. 1, 20 (1969).

10. *See* Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F. Supp. 562, 564, 566 (D.D.C.), *vacated as moot*, No. 87-0090 (Nov. 16, 1987). The banks eventually released the records after the Swiss government gave its approval. *See* N.Y. Times, Aug. 21, 1987, at A1, col. 2.

11. Generally, this issue arises in grand jury investigations when a subpoena or court order is directed at the target of the investigation. *See, e.g.*, Two Grand Jury Contemnors v. United States, 826 F.2d 1166, 1168 (2d Cir.) (subpoena), *petition for cert. filed sub nom.* Coe v. United States, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517); *In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 792 (1st Cir. 1987) (court order); *In re* United States v. Cid-Molina, 767 F.2d 1131, 1132 (1985) (subpoena and court order). For the purposes of this Note, "witness" denotes witnesses or defendants in criminal prosecutions, as well as targets of grand jury investigations.

12. 425 U.S. 391 (1976). *Fisher* dealt with the production of a preexisting document,

seeks to obtain existing documents from a witness, the privilege against self-incrimination is violated only if, in producing those documents, the witness is "compelled to make a testimonial communication that is incriminating."[13]

Although lower courts considering the constitutionality of consent directives agree that the act of producing a consent directive is compelled,[14] they reach conflicting conclusions whether the act rises to a testimonial communication.[15] Furthermore, they also disagree whether the act of producing a consent directive is incriminating.[16]

This Note argues that the act of producing a consent directive does not violate a witness' fifth amendment privilege against self-incrimination. Part I discusses the three components of fifth amendment analysis under the *Fisher* standard—compulsion, testimonial communication, and in-

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not the compelled creation of a document. *See infra* notes 23-27 and accompanying text. *Fisher* is not, however, inapposite. The Court in *Fisher* drew support from cases concerning the creation of physical exemplars, such as writing samples. *See Fisher*, 425 U.S. at 409; *see also* infra note 26 and accompanying text (discussing creation of documents).

13. *Fisher*, 425 U.S. at 408, 410 (emphasis omitted); *accord* United States v. Doe, 465 U.S. 605, 611 (1984).

14. *See, e.g., In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 792 (1st Cir. 1987); United States v. A Grand Jury Witness, 811 F.2d 114, 116 (2d Cir. 1987); *In re* United States v. Cid-Molina, 767 F.2d 1131, 1132 (5th Cir. 1985); United States v. Ghidoni, 732 F.2d 814, 816 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); Senate Select Comm. on Secret Miltary Assistance to Iran v. Secord, 664 F. Supp. 562, 564 (D.D.C.), *vacated as moot*, No. 87-0090 (Nov. 16, 1987); United States v. Pedro, 662 F. Supp. 47, 48 (W.D. Ky.), *aff'd on rehearing*, 662 F. Supp. 49 (1987).

15. Several courts hold that producing the directive is not testimonial because it makes no assertions regarding the existence or location of the bank records or the witness' control over those records. *See* United States v. A Grand Jury Witness, 811 F.2d 114, 117 (2d Cir. 1987); United States v. Cid-Molina, 767 F.2d 1131, 1132 (5th Cir 1985); United States v. Ghidoni, 732 F.2d 814, 818 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); United States v. Browne, 624 F. Supp. 245, 248 (N.D.N.Y. 1985); United States v. Quigg, 48 A.F.T.R.2d 81-5953, 5955 (D. Vt. 1981).

Other courts hold that the act is testimonial because it adds to the sum total of the government's knowledge by confirming both the existence of the bank records and the witness' control over those records. *See In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 793 (1st Cir. 1987); Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F. Supp. 562, 565 (D.D.C.), *vacated as moot*, No. 87-0090 (Nov. 16, 1987); United States v. Pedro, 662 F. Supp. 47, 49 (W.D. Ky.), *aff'd on rehearing*, 662 F. Supp. 49 (1987). Two courts hold that the act of consenting is itself a testimonial communication. *See Ranauro*, 814 F.2d at 793; *Secord*, 664 F. Supp. at 565.

16. Courts holding that a consent directive is not testimonial generally do not reach the question of incrimination. *See* United States v. Davis, 767 F.2d 1025, 1039-40 (2d Cir. 1985); United States v. Ghidoni, 732 F.2d 814, 817 n.4 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984). Others do and hold that a consent directive is not incriminating. *See* United States v. Cid-Molina, 767 F.2d 1131, 1132 (5th Cir. 1985); United States v. Browne, 624 F. Supp. 245, 249 (N.D.N.Y. 1985). Still others hold that a consent directive incriminates the witness because it provides a link in the chain of evidence establishing that the witness knew of or controlled the accounts. *See In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791 (1st Cir. 1987); Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F. Supp. 562, 565-66 (D.D.C.), *vacated as moot*, No. 87-0090 (Nov. 16, 1987); United States v. Pedro, 662 F. Supp. 47, 48 (W.D. Ky.), *aff'd on reh'g*, 662 F. Supp. 49 (1987).

crimination—and considers each separately. Part II applies the *Fisher* standard to consent directives to determine whether they are unconstitutional. This Note concludes that the act of producing a consent directive does not violate the fifth amendment because the act neither manifests a testimonial communication, nor incriminates the witness.

I. *FISHER V. UNITED STATES*

In *Fisher v. United States*,[17] the Supreme Court propounded a standard for evaluating an alleged violation of a witness' fifth amendment privilege against self-incrimination.[18] The Court stated that the privilege attaches when a witness is compelled to make an incriminating, testimonial communication.[19] In considering whether the production of documents violates the privilege, the Court rejected a formalistic approach that looked to the nature of the documents produced.[20] Rather, the Court focused its analysis on the conduct that the government sought to compel—the act of producing documents.[21] Lower courts, consequently, must examine the act of production itself, and not necessarily the contents of the under-

17. 425 U.S. 391 (1976).

18. *Id.* at 408; *accord* United States v. Doe, 465 U.S. 605, 611 (1984).

19. *Fisher*, 425 U.S. at 408; *accord* Doe, 465 U.S. at 613.

20. Prior to the *Fisher* decision, fifth amendment analysis derived from Boyd v. United States, 116 U.S. 616 (1886), holding that an individual is privileged from producing his private papers. *See id.* at 630. *Boyd* spawned several refinements based upon its implicit private-public distinction. *See, e.g.*, Bellis v. United States, 417 U.S. 85, 92 (1974) (documents belonging to a partnership not privileged; documents belonging to sole proprietorship are); United States v. White, 322 U.S. 694, 698 (1944) (privilege applies to individuals, not unincorporated associations); Wheeler v. United States, 226 U.S. 478, 489-90 (1913) (corporation has no claim to privilege). This formalistic approach conceivably could defeat the accusatorial system and its goal of obtaining the truth, *see* Brown v. United States, 356 U.S. 148, 156 (1958); *infra* note 49, when, for example, courts cannot compel a witness to produce relevant documents simply because they are private papers.

The Court in *Fisher* reformulated fifth amendment analysis, *see* Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 Va. L. Rev. 1, 3 (1987), and apparently repudiated *Boyd*, *see* United States v. Doe, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring); Heidt, *The Fifth Amendment Privilege and Documents—Cutting* Fisher's *Tangled Line*, 49 Mo. L. Rev. 439, 471 (1984). Whether the various exceptions and refinements to the holding in *Boyd* remain valid has been the subject of debate. *See, e.g.*, Note, *Fifth Amendment Privilege and Compelled Production of Corporate Papers After* Fisher *and* Doe, 54 Fordham L. Rev. 935 (1986) (discussing the privilege of a custodian of corporate records); Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 Harv. L. Rev. 640 (1986) (discussing personal and corporate documents); Note, *Fifth Amendment Privilege for Producing Corporate Documents*, 84 Mich. L. Rev. 1544 (1986) (discussing documents held in a representative capacity). Moreover, the Court in *Fisher* reserved consideration of whether private papers are protected. *See Fisher*, 425 U.S. at 414.

21. *See* Fisher v. United States, 425 U.S. 391, 410-11 (1976); *accord* United States v. Doe, 465 U.S. 605, 612-13 (1984). In so doing, the Court in *Fisher* rejected both an analysis based on the nature of documents, *see supra* note 20, and privacy as the policy supporting the fifth amendment, *see Fisher*, 425 U.S. at 409. The prevailing policy supporting the fifth amendment, then, is the maintenance of an accusatorial system of justice, with elimination of an inquisitorial system. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); *see also* O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Her-*

lying documents,[22] to determine if it is compelled, testimonial, and incriminating.

A government request for documents, however, may involve two different types of production. The government may request the production of an existing document.[23] In this type of case, any communications conveyed by the contents of the document are irrelevant to the fifth amendment analysis because the government did not compel the creation of the contents.[24] Consequently, a court must examine only the act of producing or delivering the requested document to determine if that act contains any compelled, incriminating, and testimonial admissions.[25] The government also may request that the witness first create, and then deliver, a document.[26] Because the compelled act includes not only deliv-

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mits and the Burger Court, 54 Notre Dame Law. 26, 55 (1978) (discussing accusatorial system).

An accusatorial system of justice demands that "the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460 (1966). Forcing the witness to provide evidence against himself shifts the burden to that witness and contradicts the accusatorial system. *See* Geyh, *The Testimonial Component of the Right Against Self-Incrimination*, 36 Cath. U.L. Rev. 611, 618 (1987).

22. *See* Fisher v. United States, 425 U.S. 391, 409-11 (1976); *accord* United States v. Doe, 465 U.S. 605, 612-13 (1984). In other words, there must be "a causal link between the act of compulsion and the *creation* of testimonial evidence." Webb & Ferguson, United States v. Doe: *The Supreme Court and the Fifth Amendment*, 16 Loyola U. Chi. L.J. 729, 738 (1985); *see also infra* notes 26-27 and accompanying text (detailing situations where act of production relevant).

23. *See, e.g.*, United States v. Helina, 549 F.2d 713 (9th Cir. 1977); United States v. Beattie, 541 F.2d 329 (2d Cir. 1976); *In re* Grand Jury Empaneled on Jan. 17, 1980, 505 F. Supp. 1041 (D.N.J. 1981). In *Fisher*, the Court considered two such cases: in each, attorneys had been asked to produce documents they held for their clients. *See* Fisher v. United States, 425 U.S. 391, 394 (1974).

24. *See id.* at 409-10; *accord* United States v. Doe, 465 U.S. 605, 610-11 (1984); *see also* C. McCormick, McCormick on Evidence 305 (E. Cleary, et al., revs. 3d ed. 1984) ("[O]nce information is voluntarily placed in written form, the privilege provides no protection against the use of compulsion by the government to obtain access to the document and its informational contents.").

25. *See Fisher*, 425 U.S. at 410. The Court argued that

> [t]he act of producing evidence in response to a subpoena . . . has communicative aspects . . . wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena.

Id. (citing Curcio v. United States, 354 U.S. 118, 125 (1957)).

26. *See, e.g.*, California v. Byers, 402 U.S. 424, 426 (1971) (involving statute requiring reporting of accidents by leaving name and address of drivers involved at scene); Marchetti v. United States, 390 U.S. 39, 42-43 (1968) (involving statute requiring registration of illegal wagering activities by completion and filing of tax forms); Gilbert v. California, 388 U.S. 263, 266-67 (1967) (requiring creation and production of handwriting exemplar); *In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 792 (1st Cir. 1987) (requiring creation and production of consent directive); *see also* C. McCormick, *supra* note 24, at 305 ("The act of placing information in written form is probably testimonial . . . . [A] witness could not be compelled to write out rather than orally articulate self-incriminating information." (footnote omitted)).

ery of the document to the government, but creation of its substance as well, the contents of the document must be analyzed as part of the act of production.[27]

The three-pronged standard created by the Court in *Fisher* for analyzing the production of documents has engendered confusion in the lower courts. Of the three prongs, the testimonial communication prong has proven the most problematic to apply;[28] compulsion is usually obvious,[29] and the parameters of what constitutes incrimination are well-settled.[30] Despite the manner in which the Court segmented the analysis,[31] some lower courts and commentators seem to make the fulfillment of the prongs interdependent.[32] To apply the analysis in *Fisher* properly, however, careful distinction must be made between the three prongs that comprise the standard, considering each on its own.

A. *The Compulsion Requirement*

Fisher requires that the act of production be compelled in order to implicate the fifth amendment.[33] Compulsion occurs whenever a witness who is requested to produce a document must choose either to produce that which is demanded or to face a sanction of contempt for failure to comply.[34] Because the privilege is personal,[35] possession, not ownership, of the documents sought to be produced serves as the axis upon which

27. *See, e.g., In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 794 (1st Cir. 1987); Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F. Supp. 562, 565 (D.D.C.), *vacated as moot*, No. 87-0090 (Nov. 16, 1987); *cf.* Fisher v. United States, 425 U.S. 391, 410 n.11 (1976) ("[U]nless the Government has compelled the [witness] to write the document, (citations omitted), the fact that it was written by him is not controlling with respect to the Fifth Amendment issue.").

28. *Compare, e.g.*, United States v. Campbell, 732 F.2d 1017, 1021 (1st Cir. 1984) (compelling a person to write out what is dictated to him held testimonial when sought to determine how witness spells a particular word) *with, e.g.*, United States v. Pheaster, 544 F.2d 353, 372 (9th Cir. 1976) ("The manner of spelling a word is no less an 'identifying characteristic' than the manner of crossing a 't' or looping an 'o'. All may tend to identify . . . the author of a writing without involving the content or message of what is written. No protected communication is involved."), *cert. denied*, 429 U.S. 1099 (1977).

29. *See, e.g.*, cases cited *supra* note 14.

30. *See infra* notes 57-60 and accompanying text.

31. The Court in *Fisher* separated the testimonial communication and incrimination requirements. *See* Fisher v. United States, 425 U.S. 391, 408 (1976). Failure to meet one requirement destroys any claim of the privilege. *See id.* at 408. For example, a physical exemplar has an incriminating effect because it might be used to link the witness with an event or condition, yet it does not violate the privilege because it lacks testimonial character. *See* Schmerber v. California, 384 U.S. 757, 765 (1966).

32. *See, e.g.*, United States v. Schlansky, 709 F.2d 1079, 1084 (6th Cir. 1983) (confusing the testimonial requirement with the incrimination requirement by stating that testimonial character depends upon whether the act "supplies a necessary link in the evidentiary chain"), *cert. denied*, 465 U.S. 1099 (1984); Geyh, *supra* note 21, at 638 (arguing that an act must be incriminating on its face to be testimonial).

33. *See Fisher*, 425 U.S. at 396-97.

34. *See* New Jersey v. Portash, 440 U.S. 450, 459 (1979); *see also* United States v. Doe, 465 U.S. 605, 612 (1984) ("[a] government subpoena compels the holder of the document to perform an act").

the question whether a witness has a valid claim turns.[36] The act of producing documents belonging to another involves no compulsion of the owner; only the one actually compelled to perform the act possesses a colorable objection.[37] Thus, despite the fact that the compulsion requirement is an essential element of the privilege against self-incrimination, it is relatively easy to satisfy.

B. *The Testimonial Communication Requirement*

After establishing the compelled nature of an act of production, *Fisher* requires that a court determine whether the act manifests a *testimonial* communication.[38] Although the Court did not delineate explicitly what it considered to be sufficiently testimonial to bring a communication within the purview of the privilege,[39] it did establish guidelines that offer a framework for a concise definition: a testimonial communication must assert or admit a fact of evidentiary significance.[40]

An act of production becomes a communication when it makes an implicit factual admission.[41] For example, producing documents pursuant to a subpoena "tacitly concedes the existence of the papers demanded and their possession or control"[42] by the witness. Furthermore, when

35. *See* Couch v. United States, 409 U.S. 322, 328 (1973); United States v. White, 322 U.S. 694, 699 (1944).

36. *See* Fisher v. United States, 425 U.S. 391, 397-98 (1976); *White*, 322 U.S. at 699.

37. *See, e.g.*, California Bankers Ass'n v. Schultz, 416 U.S. 21, 55 (1974) (party incriminated by evidence produced by a third party suffers no fifth amendment violation); Couch v. United States, 409 U.S. 322, 329 (1973) ("The basic complaint of petitioner stems from the . . . divulgence of the possibly incriminating information. . . . Yet such divulgence, where it does not result from coercion of the suspect herself, is a necessary part of . . . law enforcement. . . ."); *see also* Andresen v. Maryland, 427 U.S. 463, 474 (1976) (holding warranted search and seizure of documents by the police, without assistance from the possessor of the documents, presents no compulsion).

38. *See* Fisher v. United States, 425 U.S. 391, 408 (1976); *accord* United States v. Doe, 465 U.S. 605, 611 (1984).

39. *See* Fisher v. United States, 425 U.S. 391, 410 (1976) ("These questions . . . do not lend themselves to categorical answers; their resolution may . . . depend on the facts and circumstances of particular cases . . . ."); *see also* Geyh, *supra* note 21, at 635 ("The Court's failure to offer any guidance . . . leaves the impression that its decisions . . . are purely arbitrary.").

40. Geyh, *supra* note 21, at 614; Mosteller, *supra* note 20, at 15-16; *see* Rogers v. United States, 340 U.S. 367, 372-74 (1951); McCarthy v. Arndstein, 262 U.S. 355, 359 (1923), *aff'd on reh'g*, 266 U.S. 34 (1924); Two Grand Jury Contemnors v. United States, 826 F.2d 1166, 1173 (2d Cir.) (Newman, J., concurring), *petition for cert. filed sub nom.* Coe v. United States, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517).

Fisher does not limit admissions of evidentiary significance to admissions of fact. This reading, however, comports with the policy of preventing disclosures relied upon to show the witness' truth telling. *See* Geyh, *supra* note 21, at 637; *see also infra* notes 48-49 and accompanying text (discussing fifth amendment requirement of "truth-telling"). The specter of perjury arises only when the government requires the witness to disclose factual information. *See* Webb & Ferguson, *supra* note 22, at 745-47.

41. *See* Fisher v. United States, 425 U.S. 391, 410 (1976); *accord* United States v. Doe, 465 U.S. 605, 612-13 (1984).

42. *Fisher*, 425 U.S. at 410; *see also* Curcio v. United States, 354 U.S. 118, 125 (1957)

the government requires a witness to create a document, the contents of the document also may make factual admissions.[43] In either case, the fact admitted becomes testimonial only when it has evidentiary significance.[44]

An admission made in the act of production has evidentiary significance if it adds to the sum of the government's knowledge.[45] If the act contains admissions that are "foregone conclusion[s],"[46] the act does not rise to a testimonial communication.[47] The essence of the foregone conclusion theory is that the act of production violates the fifth amendment only when the government must "rely[] on the 'truthtelling' of the [witness]."[48] In other words, the privilege is violated if the government has

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(production implicitly represents that documents produced are those requested by the subpoena); Mosteller, *supra* note 20, at 12-13 (same).

43. *See, e.g.*, California v. Byers, 402 U.S. 424, 426 (1971) (reporting requirement compelled the factual admission of participation in an accident); Marchetti v. United States, 390 U.S. 39, 48-49 (1968) (tax filing requirement compelled the factual admission of illegal wagering activity).

44. *See Fisher*, 425 U.S. at 411.

45. *See* Fisher v. United States, 425 U.S. 391, 411 (1976); Mosteller, *supra* note 20, at 32. This argument assumes that the government will ignore an admission if they already possess equivalent information, and not introduce into evidence those relevant, but duplicative, admissions. *See id.* at 32.

46. *Fisher*, 425 U.S. at 411. Foregone conclusions are admissions made by the act of production which add "little or nothing to the sum total of the Government's information." *Id.*

47. *See id.* For example, an act of production becomes a testimonial communication when that act serves to establish the previously unknown existence or location of the documents requested. *See id.*; *see, e.g.*, United States v. Doe, 465 U.S. 605, 613 & n.11 (1984) (upholding district court decision that stated that " 'enforcement of the subpoenas would compel [the witness] to admit that the records exist, that they are in his possession, and that they are authentic.' ") (quoting *In re* Grand Jury Empanelled March 19, 1980, 541 F. Supp. 1, 3 (D.N.J. 1981), *aff'd*, 680 F.2d 327 (3d Cir. 1982), *aff'd in part, rev'd in part, sub nom.* United States v. Doe, 465 U.S. 605 (1984)); *In re* Katz, 623 F.2d 122, 126 (2d Cir. 1980) (disclosure of certificates of incorporation of evidentiary significance because it shows witness' connection with corporation).

48. Fisher v. United States, 425 U.S. 391, 411 (1976); *see also* J. Wigmore, Evidence § 2264, at 379 (McNaughton rev. 1961) (privilege protects against forms of "*process relying on [the witness'] moral responsibility for truthtelling*"). Thus, even a communication that does not disclose a fact might be testimonial if that communication makes a disclosure that is used for the truth of its contents. For instance,

> [s]ome tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

Schmerber v. California, 384 U.S. 757, 764 (1966).

In essence, disclosures, or even omissions, that reveal something about a person's memory, or the state or operation of his mind, are testimonial if the government relies upon the truth of those disclosures and omissions. *See, e.g.*, Estelle v. Smith, 451 U.S. 454, 465 (1981). In *Estelle*, the government introduced at trial the opinion of a psychiatrist regarding the accused's propensity to commit violent acts. *See id.* at 459-60. The assessment of the accused was based, in part, upon his failure to evince any guilt or remorse. *See id.* at 464 nn.8 & 9. The Court stated that the introduction of the psychiatrist's

no means of verifying the accuracy of the admission other than by relying upon the fact that the witness made it.[49]

Under the truth-telling rubric, however, not all admissions supplying new information are testimonial. For example, merely by producing that which is requested, the witness admits he is able to comply with the request.[50] However, the ability to comply, although not a foregone conclusion, usually is a self-evident fact that does not require the government to rely upon the "truth-telling" of the witness.[51]

Similarly, when the government compels a witness to create a document, merely writing or repeating its contents does not rise to the level of a testimonial communication.[52] The compelled creation of a document

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statements into evidence violated the fifth amendment because the government "used as evidence against [the accused] the substance of his disclosures during the pretrial psychiatric examination." *Id.* at 465.

49. This emphasis upon truth telling is consistent with the policy of "preventing the unfairness that results when a person must face 'the cruel trilemma of self-accusation, perjury or contempt'. . . . Vindicating that policy would lead to a requirement that a statement must assert the truth of something in order to be within the privilege." Two Grand Jury Contemnors v. United States, 826 F.2d 1166, 1174 (2d Cir.) (Newman, J. concurring) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)), *petition for cert. filed sub nom.* Coe v. United States, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517). One commentator points out that this focus on what he terms the "trustworthiness of the evidence" prevents the compulsion of false testimony, and thereby maximizes the "efficacy of the criminal process by enhancing protection of the innocent and detection of the guilty." Geyh, *supra* note 21, at 618-19. The testimonial requirement, then, "prevents the government from compelling potentially unreliable communications, while enabling it to obtain a variety of probative nontestimonial evidence." Id. at 619; *see also* C. McCormick, *supra* note 24, at 287 (compelled, self-incriminating evidence inherently unreliable). This comports with the policy of preserving the accusatorial system of justice. *See supra* note 21.

50. *See* Geyh, *supra* note 21, at 638.

51. *See* Fisher v. United States, 425 U.S. 391, 411 (1976); *see, e.g.*, California v. Byers, 402 U.S. 424, 431-32 (1971) (act of stopping and leaving an address is "an essentially neutral act," not a testimonial communication). Thus, a handwriting exemplar, for example, would become a testimonial communication only when the government seeks to ascertain if the witness can write. Although it is not evident before the act of production, admission of ability to comply would not be testimonial in such a case because it is obviously taken for granted—it is a "truism." *Fisher*, 425 U.S. at 411.

52. *See, e.g.*, Gilbert v. California, 388 U.S. 263, 266-67 (1967) (holding handwriting exemplars nontestimonial); United States v. Dionisio, 410 U.S. 1, 7 (1973) (permitting compulsion of voice recordings because they "were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said").

The mere fact that a witness must assist or cooperate with the government in its search for evidence is irrelevant to the issue of testimonial communications. The Court has upheld the government's acquisition and use of exemplars without regard to whether the individual simply needs to sit passively while a blood sample is taken, *see, e.g.*, Schmerber v. California, 384 U.S. 757, 761 (1966), or whether the defendant actively must assist the government by speaking, *see, e.g.*, *Dionisio*, 410 U.S. at 7, writing his name, *see, e.g.*, Gilbert v. California, 388 U.S. 263, 266-67 (1967), or putting on clothing, *see, e.g.*, Holt v. United States, 218 U.S. 245, 252-53 (1910). Phrased in terms of truth telling, "[t]he veracity of nontestimonial evidence [such as an exemplar] . . . is normally going to be unaffected by whether such evidence is obtained with the active assistance of the accused." Geyh, *supra* note 21, at 618; *see, e.g.*, Schmerber v. California, 384 U.S. 757, 765

manifests a testimonial communication only when the witness "restate[s], repeat[s], or affirm[s] the truth of the contents."[53] Otherwise, the government does not rely upon the witness' "truth-telling" in repeating the substance of the document.

An act of production has evidentiary significance and therefore manifests a testimonial communication, regardless of whether it is a foregone conclusion, if the act authenticates the documents produced.[54] To be admissible into evidence for authentication purposes, the act must establish that the document genuinely is what it purports to be.[55]

C. *The Incrimination Requirement*

After establishing the compelled and testimonial character of an act of production, *Fisher* requires that a court determine whether the act incriminates the witness.[56] Incrimination occurs when a witness is compelled to provide information that, when placed in the chain of evidence, helps to prosecute him.[57] Such incriminating information includes disclosures that provide evidence of a crime[58] or that lead to further evidence.[59] These disclosures, however, must threaten the witness with "substantial and 'real,' and not merely trifling or imaginary, hazards of

(1966) (petitioner's "participation, except as a donor, was irrelevant to the results of the [blood] test, which depended on chemical analysis and on that alone."). In essence, an exemplar usually does not involve any conscious action of the witness' mind other than performing certain physical motions. Reliance upon the witness does become an issue, however, when the witness might wilfully alter the substance of the exemplar, such as by altering his voice. *See* Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence From a Suspect*, 43 S. Cal. L. Rev. 597, 623-24 (1970); *see also supra* note 48 (discussing Estelle v. Smith, 451 U.S. 464 (1981)).

53. Fisher v. United States, 425 U.S. 391, 409 (1976); *accord* United States v. Doe, 465 U.S. 605, 611-12 (1984); *see* United States v. Dionisio, 410 U.S. 1, 6-7 (1973) (voice recordings).

54. *See Fisher*, 425 U.S. at 412-13 & n.12; *accord Doe*, 465 U.S. at 614 n.13; *see also* United States v. Schlansky, 709 F.2d 1079, 1083 (6th Cir. 1983) (authenticating use adds testimonial value to otherwise non-testimonial acts), *cert. denied*, 465 U.S. 1099 (1984). *See generally* Fed. R. Evid. 901(a) (defining authentication as "evidence sufficient to support a finding that the matter in question is what its proponent claims").

55. *See* Fed. R. Evid. 901; Mosteller, *supra* note 20, at 16. In *Fisher*, the Court stated that the act of production would not serve to authenticate the documents produced because "production would express nothing more than the [witness'] belief that the papers are those described in the subpoena. The [witness] would be no more competent to authenticate the accountant's workpapers by producing them than he would be to authenticate them if testifying orally." Fisher v. United States, 425 U.S. 391, 412-13 (1976) (footnote omitted).

56. *See id.* at 408; *accord* United States v. Doe, 465 U.S. 605, 613 (1976).

57. *See* Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159, 161 (1950). In *Hoffman*, the Court ruled that questions "designed to draw information as to petitioner's contacts and connection with the fugitive . . . would . . . forge links in a chain of facts imperiling petitioner with conviction." *Hoffman*, 341 U.S. at 488.

58. *See id.* at 486-87.

59. *See* Kastigar v. United States, 406 U.S. 441, 445 (1972) (citing *Hoffman*, 341 U.S. at 486).

incrimination"[60] at the moment of production.

II. CONSENT DIRECTIVES

In applying the *Fisher* standard to consent directives, courts must consider the contents of the directive as part of the act of production.[61] Although the witness does not draft the consent directive, his signature indicates his adoption or affirmation of its contents.[62] Those words assume significance because both the government and the foreign bank officials must rely upon them as a statement by the witness that he is waiving his right to bank secrecy.[63] Application of the *Fisher* standard to the act of producing a consent directive reveals that such production does not violate the fifth amendment.[64]

A. *Compulsion*

The act of producing a consent directive clearly meets the compulsion requirement. The government attempts to obtain a signature on a consent directive either by seeking a court order directing the witness to sign[65] or by attaching the directive to a subpoena duces tecum.[66] Failure to comply with either subjects the witness to a sanction for contempt,[67]

60. Marchetti v. United States, 390 U.S. 39, 53 (1968); *see Hoffman*, 341 U.S. at 486; C. McCormick, *supra* note 24, at 32 (Supp. 1987); *see, e.g.*, California v. Byers, 402 U.S. 424, 431 (1971) (statute requiring drivers involved in accidents to leave their name and address at the accident scene does not "entail . . . substantial risk of self-incrimination" despite the potential of forming a link in the chain because no admission of liability is involved).

61. *See supra* notes 26-27 and accompanying text.

62. *See* Black's Law Dictionary 1239 (5th ed. 1979) ("sign" defined as "[t]o affix one's name to a writing . . . for the purpose of authenticating or executing it, or to give it effect as one's act. . . . [T]o *ratify* by hand or seal") (emphasis added).

63. *See supra* notes 7-8 and accompanying text.

64. Witnesses have argued that the compelled signing of a consent directive violates due process because it forces the witness to make a false statement that he "consents." *See, e.g.*, Two Grand Jury Contemnors v. United States, 826 F.2d 1166, 1171 (2d Cir.), *petition for cert. filed sub nom.* Coe v. United States, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517); *In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 795 (1st Cir. 1987); United States v. Ghidoni, 732 F.2d 814, 818 n.7 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984). Courts facing the issue, however, have agreed that if the directive states that it is signed under protest or court order, no due process violation exists. *See Contemnors*, 826 F.2d at 1171; *Ghidoni*, 732 F.2d at 818 n.7.

65. *See, e.g.*, Two Grand Jury Contemnors v. United States, 826 F.2d 1166, 1167 (2d Cir.), *petition for cert. filed sub nom.* Coe v. United States, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517); *In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 792 (1st Cir. 1987); United States v. Ghidoni, 732 F.2d 814, 816 (11th Cir. 1984).

66. *See* United States v. A Grand Jury Witness, 811 F.2d 114, 115 (2d Cir. 1987); *In re* Grand Jury Proceedings (Thier), 767 F.2d 1133, 1134 (5th Cir. 1985); United States v. Cid-Molina, 767 F.2d 1131, 1132 (5th Cir. 1985).

67. *See* Two Grand Jury Contemnors v. United States, 826 F.2d 1166, 1167 (2d Cir.), *petition for cert. filed sub nom.* Coe v. United States, 56 U.S.L.W. 3327 (U.S. filed Sept. 30, 1987) No. (87-517); *In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 792 (1st Cir. 1987); United States v. A Grand Jury Witness, 811 F.2d 114, 116 (2d Cir. 1987); United States v. Ghidoni, 732 F.2d 814, 816 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984);

the sine qua non of compulsion.[68]

B. *Testimonial Communication*

The act of producing a consent directive, however, fails to rise to the level of a testimonial communication. At the threshold level, the act of production analysis limits courts to examining whether the act itself, at the time of production, violates the fifth amendment.[69] Thus, the contents of any bank records released are irrelevant to the testimonial aspect of the witness' claim because the act the witness is required to perform involves neither creating nor producing bank records.[70] The act of producing the consent directive does, however, require the witness to write the exact words the government wants him to write.[71] Although the government intends this act to assist in obtaining information that is damaging to the witness,[72] merely being compelled to assist the government in its search for evidence does not violate the fifth amendment.[73] Despite the fact that the act of producing a directive ultimately may result in the release of information damaging to the witness, that fact does not make the act testimonial because release of this information results from a sequence of subsequent, extrinsic events.[74]

Under *Fisher*, an act must make an admission of fact to be testimo-

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In re Grand Jury 84-2 (Doe), No. 86-2663, slip op. at 3 (5th Cir. Feb. 13, 1987) (unpublished opinion reported at 812 F.2d 1404), *cert. granted*, 108 S. Ct. 64 (1987).

68. *See supra* note 34 and accompanying text.

69. *See supra* notes 21-22 and accompanying text.

70. *See* United States v. Davis, 767 F.2d 1025, 1039 (2d Cir. 1985).

71. *See, e.g.*, United States v. Ghidoni, 732 F.2d 814, 820 (11th Cir.) (Clark, J., dissenting), *cert. denied*, 469 U.S. 932 (1984); Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F. Supp. 562, 565 (D.D.C.), *vacated as moot*, No. 87-0090 (Nov. 16, 1987).

72. *See, e.g.*, United States v. Lehder-Rivas, 827 F.2d 682, 683 (11th Cir. 1987) (sought to gain access to bank records connected to alleged cocaine distribution); United States v. A Grand Jury Witness, 811 F.2d 114, 115 (2d Cir. 1987) (sought to gain access to deposited proceeds of alleged extortion and kickback scheme); United States v. Ghidoni, 732 F.2d 814, 816 (11th Cir.) (sought to gain access to records of income allegedly diverted in avoidance of federal income taxes), *cert. denied*, 469 U.S. 932 (1984).

73. *See supra* notes 50-52 and accompanying text.

74. *See* United States v. Ghidoni, 732 F.2d 814, 818-19 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); United States v. Browne, 624 F. Supp. 245, 248 (N.D.N.Y. 1985); *see also* United States v. Davis, 767 F.2d 1025, 1039 (2d Cir. 1985) ("Since the only communication [the witness] was compelled to make was the direction to the bank, that direction is the only possible source of a Fifth Amendment violation."); *cf.* Schmerber v. California, 384 U.S. 757, 765 (1966) ("participation [in a blood test], except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone").

A hypothetical serves to illustrate the reasoning involved. Suppose Major General Secord was compelled to utter the words "open sesame" into a tape recorder. Production of this voice exemplar would not violate his fifth amendment privilege. *See* United States v. Dionisio, 410 U.S. 1, 7 (1973). Suppose further that certain types of bank vaults open upon the voice identification of the individual controlling the contents of the vault. The government could then use Secord's voice exemplar to open a vault and obtain bank records establishing his role in criminal activities. Despite being compelled and incrimi-

nial.[75] The act of producing a consent directive, however, neither explicitly nor implicitly admits, confirms, or denies the existence of,[76] or control over,[77] any bank accounts or records. The language of the consent directive is speculative,[78] stating that documents are to be released only if they exist.[79] Moreover, the potential effectiveness of any consent directive is uncertain. Foreign banks cannot release records if they do not exist, nor will they release records if the bank or jurisdiction refuses to recognize the directive.[80] Thus, the act of producing a consent directive does not admit tacitly that the consent directive will be effective.

An act also may manifest a testimonial communication if it compels

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nating, the exemplar, by such use, would not be transformed into a testimonial communication. *See infra* note 87 and accompanying text.

The consent directive Major General Secord was to sign does not differ from the hypothetical voice exemplar. Neither the directive nor the exemplar makes any admission apart from the disclosure of self-evident truisms. *See supra* notes 50-51 and accompanying text.

75. *See supra* note 40 and accompanying text.

76. *See* United States v. Cid-Molina, 767 F.2d 1131, 1132 (5th Cir. 1985); United States v. Ghidoni, 732 F.2d 814, 818 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); United States v. Browne, 624 F. Supp. 245, 248 (N.D.N.Y. 1985).

77. The release of bank records in response to the presentation of a consent directive does not actually prove control over an account by a witness. *See* United States v. Ghidoni, 732 F.2d 814, 818 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); United States v. Browne, 624 F. Supp. 245, 248 (N.D.N.Y. 1985). Indeed, the release by the bank of records is not part of the witness' act of producing a directive. *See* United States v. Davis, 767 F.2d 1025, 1039 (2d Cir. 1985).

78. *See* Two Grand Jury Contemnors v. United States, 826 F.2d 1166, 1170 (2d Cir.), *petition for cert. filed sub nom.* Coe v. United States, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517); United States v. Browne, 624 F. Supp. 245, 248 (N.D.N.Y. 1985); *see, e.g., In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 796 app. (1st Cir. 1987); United States v. A Grand Jury Witness, 811 F.2d 114, 115 (2d Cir. 1987); United States v. Ghidoni, 732 F.2d 814, 815 n.1 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984).

79. *See* Two Grand Jury Contemnors v. United States, 826 F.2d 1166, 1170 (2d Cir.), *petition for cert. filed sub nom.* Coe v. United States, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517); *In re* Grand Jury Proceeding (Ranauro), 814 F.2d 791, 797 (1st Cir. 1987) (Breyer, J., dissenting); United States v. Ghidoni, 732 F.2d 814, 818 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984).

If, however, the consent directive specifically names a bank or account, without any qualifying or speculative language, the directive would rise to the level of a testimonial admission of the account's existence. *See* United States v. Cook, 678 F. Supp. 1292 (N.D. Ohio 1987).

Moreover, the government's argument that the directive's speculative language creates no threat of the release of records is disingenuous because the government would not seek the signing of a directive unless it thought that records existed. *See, e.g., supra* notes 4-5 and accompanying text (discussing the Iran-Contra affair).

80. *See, e.g., In re* Confidential Relationships (Preservation) Law, Law 16 of 1976, Cause No. 269 of 1984 (Grand Ct. Cayman Islands July 24, 1984) (refusing to recognize compelled consents). *See generally*, Note, *Compelled Waiver of Bank Secrecy in the Cayman Islands: Solution to International Tax Evasion or Threat to Sovereignty of Nations?*, 9 Fordham Int'l L.J. 680 (1986) (discussing the comity and conflict of laws problems regarding consent directives). The existence of other means to obtain bank records, *see* Honegger, *Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C.J. Int'l L. & Com. Reg. 1 (1983), also creates a possibility that compelled consents will not be recognized.

the witness to "restate, repeat, or affirm the truth"[81] of the contents of the created document.[82] Compelling the execution of a consent directive requires the witness to affirm or adopt the contents of the directive.[83] That minimal communication, however, does not entail the disclosure of a fact that requires the government to rely upon the witness' truth-telling.[84] Restating or affirming the contents of a directive admits nothing that, under the foregone conclusion theory, adds to the sum of the government's knowledge.[85] A directive merely contains words with the legal effect of release;[86] those words are neither true nor false.[87]

Some courts, however, hold that the mere utterance of the words "I consent" rises to the level of a testimonial act.[88] Although the witness grants consent by signing the directive,[89] this grant of consent does not assert a fact that requires reliance by the government upon the witness' "truth-telling,"[90] because the ability to grant consent by signing the directive is self-evident.[91]

Furthermore, a consent directive contains no significant authenticating value. The act of signing and delivering a consent directive to the government authenticates only that which was produced—the directive;[92]

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81. Fisher v. United States, 425 U.S. 391, 409 (1976).

82. *See supra* note 53 and accompanying text.

83. *See supra* note 62 and accompanying text.

84. *See In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 797-98 (1st Cir. 1987) (Breyer, J., dissenting); United States v. Ghidoni, 732 F.2d 814, 818 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); United States v. Browne, 624 F. Supp. 245, 248 (N.D.N.Y. 1985). Nor does that communication make a disclosure of the witness' memory or state or operation of mind. *See supra* note 48.

85. *See supra* notes 76-77 and accompanying text.

86. The consent directive simply "remove[s] an obstacle to [the production of records] created by [foreign] law." United States v. Quigg, 48 A.F.T.R.2d 81-5953, 81-5955 (D. Vt. 1981).

87. *See In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 798 (1st Cir. 1987) (Breyer, J., dissenting). The use to which a consent directive is put will not make the act of producing that communication testimonial. *See supra* notes 32, 70-74.

88. *See Ranauro*, 814 F.2d at 795; Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F. Supp. 562, 565 (D.D.C.), *vacated as moot*, No. 87-0090 (Nov. 16, 1987).

89. *See Ranauro*, 814 F.2d at 795.

90. *See id.* at 798 (Breyer, J., dissenting). Grammatically, this argument is supported by the distinction between transitive and intransitive verbs. Transitive verbs express "an action that carries over from an agent or subject to an object." Webster's Third New International Dictionary 2428 (1976). Intransitive verbs express an action or state "as limited to the agent or subject or as ending in itself." *Id.* at 1186. "To assert" is a transitive verb defined as "to state or affirm positively" or "to demonstrate the existence of (an attribute)." *Id.* at 131. "To consent," on the other hand, is an intransitive verb defined as "to express a willingness." *Id.* at 482. When a witness "consents," that action is limited to itself and has no "object." Consent is not, then, the same as "assert," which has a fact, thing, or other information, as an object. It is that object that makes the act testimonial because it provides the referent raising the testimonial characteristics relating to facts and truthfulness.

91. *Cf.* Fisher v. United States, 425 U.S. 391, 411 (1976) (ability to submit a physical exemplar is a truism and self-evident).

92. *Cf.* Fisher v. United States, 425 U.S. 391, 412-13 & n.12 (1976) (discussing how

the act of signing does not authenticate any bank records produced as a result of the consent directive because the directive does not assert that any records exist.[93] Furthermore, in the event that the government eventually obtains any records using the directive, only the source bank would be qualified to authenticate them.[94]

C. *Incrimination*

Despite some courts' holdings that a directive forms a link in the chain of evidence by proving control over a bank account,[95] a consent directive does not present a real or substantial risk of incrimination. According to these holdings, the government will introduce a consent directive into evidence to prove, inferentially, control by the witness over the account because any records obtained were released in response to presentation of the directive.[96] This argument is flawed, however, because the directive merely authorizes the bank to release records over which the bank *believes* the witness has control.[97] Moreover, this inference does not amount to testimony authenticating the bank records,[98] because only the bank can authenticate its own records.[99] No act of a witness would be competent to authenticate records created by and belonging to another.[100] Without direct testimony from the bank, the evidentiary value of the directive is inherently suspect. It represents only weak, circumstantial evidence of the witness' control of and link to the bank records.[101] Thus, a consent directive will not be sufficiently probative of

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act of producing personal papers would authenticate them, while producing papers created by another would not, because "the [witness] did not prepare the papers and could not vouch for their accuracy.").

93. *See supra* notes 76-79 and accompanying text.

94. *See* Two Grand Jury Contemnors v. United States, 826 F.2d 1166, 1174 n.5 (2d Cir.) (Newman, J., concurring), *petition for cert. filed sub nom.* Coe v. United States, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517); United States v. Ghidoni, 732 F.2d 814, 818-19 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); United States v. Browne, 624 F. Supp. 245, 248 (N.D.N.Y. 1985); *see also* Fisher v. United States, 425 U.S. 391, 412-13 (1976) (where government was seeking from taxpayer records prepared by an accountant, taxpayer could not authenticate those papers by producing them). *But see In re* Grand Jury 83-8 (MIA) Subpoena Duces Tecum, 611 F. Supp. 16, 19 (S.D. Fla. 1985) (act of production was the "sole means of authenticating the documents"). For example, the language of one directive requests authenticating documentation from the bank, thus indicating the government's recognition that the directive possesses little authenticating value. *See* United States v. A Grand Jury Witness, 811 F.2d 114, 115 (2d Cir. 1987).

95. *See In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791, 793 (1st Cir. 1987); Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F. Supp. 562, 566 (D.D.C.), *vacated as moot*, No. 87-0090 (Nov. 16, 1987).

96. *See Ranauro*, 814 F.2d at 793; *Secord*, 664 F. Supp. at 566.

97. *See* United States v. Ghidoni, 732 F.2d 814, 818 & n.8 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); United States v. Browne, 624 F. Supp. 245, 248 (N.D.N.Y. 1985).

98. *See supra* notes 92-94 and accompanying text.

99. *See supra* note 94 and accompanying text.

100. *See supra* note 94 and accompanying text.

101. The records produced might not be truly responsive to the directive if, for example, the bank misreads the account numbers and releases documents not properly relating to the witness. *Cf.* United States v. Ghidoni, 732 F.2d 814, 818 & n.8 (11th Cir.) (bank

control to be admissible into evidence as a link in the chain.[102]

The argument that a consent directive incriminates the witness by forming a link in the chain of evidence presumes that records will be released by a bank in response to the presentation of the directive. The act of producing a consent directive does not violate the fifth amendment privilege, however, unless this presumption is established at the time of execution.[103] Uncertainty at that time makes the threat that the consent directive will lead to other evidence too attenuated to present a real and substantial risk of incrimination.[104]

The conclusion that the compelled signing of a consent directive does not violate the witness' fifth amendment privilege comports with the outcome of a balancing of the government's need for accurate information[105] against the witness' desire to keep his bank records private.[106] The truth-telling orientation in *Fisher* meshes neatly with the notion that courts are charged with finding the truth[107] and that they must make accurate determinations of guilt and innocence.[108] To this end, according to a familiar maxim, the government is entitled to "every man's evidence."[109] Furthermore, the Supreme Court has rejected the argument that there is a privacy expectation regarding foreign bank records.[110] The Court has

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will release documents that *it believes* belong to the witness; this release does not necessarily contradict the witness' contention that no records belonging to him exist), *cert. denied*, 469 U.S. 932 (1984); United States v. Browne, 624 F. Supp. 245, 248 (N.D.N.Y. 1985) ("the release permits the banks to make their own determination of whether defendant exercises control over any accounts").

102. *See* Two Grand Jury Contemnors v. United States, 826 F.2d 1166, 1171 (2d Cir.), *petition for cert. filed sub nom.* Coe v. United States, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517); *see also* Mosteller, *supra* note 20, at 17 (authenticating tendency of an admission must have substantial value in establishing a document's admissibility, else any incrimination would be so trivial as not to implicate the privilege). A consent directive may assist in the authentication of bank records if it is used to compare signatures. That alone, however, probably would not suffice to authenticate the records, and would have to be corroborated by testimony from a more competent source. *See supra* notes 92-94, 101 and accompanying text.

103. *See supra* note 74 and accompanying text.

104. *Cf.* California v. Byers, 402 U.S. 424, 431 (1971) (disclosure of involvement in an accident may not be incriminating, despite the fact that it may form a link in the chain); Marchetti v. United States, 390 U.S. 39, 54 (1968) ("prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination").

Even if the directive is inadmissible into evidence as authenticating testimony, *see supra* note 102, it, however, may incriminate if the government obtains incriminating bank records through its use. *See* Kastigar v. United States, 406 U.S. 441, 445 (1972).

105. *See* Geyh, *supra* note 21, at 619.

106. *See infra* note 114. Compulsion of the signing of a consent directive does not turn the accusatorial system of justice into an inquisitorial one, because it involves no admissions that may be used against the witness. *See supra* notes 21, 74-94.

107. *See* Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 Geo. L.J. 185, 197 (1983).

108. *See* Webb & Ferguson, *supra* note 21, at 755; *see also supra* note 49 (discussing the "truth-telling" rubric and reliability of evidence).

109. Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

110. *See* United States v. Payner, 447 U.S. 727, 732 n.4 (1980). Moreover, *Fisher* re-

held that no fourth amendment privacy expectation in bank records located in the United States exists.[111] Foreign banks doing business in the United States may be subpoenaed for their records.[112] That the government may eventually obtain foreign bank records through diplomatic channels[113] indicates that the privacy expectation regarding such records should be laid to rest as too illusory.[114] All of these factors militate against a finding that the act of producing a consent directive is unconstitutional.

CONCLUSION

Application of *Fisher v. United States*[115] to the act of producing a consent directive reveals that it does not violate a witness' fifth amendment privilege against self-incrimination. Although the act of production is compelled, it makes no testimonial communication. The act of produc-

jected the argument that a claim of privilege is supportable by the desire for privacy. *See* Fisher v. United States, 425 U.S. 391, 409 (1976).

111. *See* United States v. Miller, 425 U.S. 435, 442-43 (1976); *see also* California Bankers Ass'n v. Shultz, 416 U.S. 21, 52 (1974) (in upholding constitutionality of the Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified at 12 U.S.C. §§ 1730d, 1829b, 1951-1959, and 31 U.S.C. §§ 1051-1062, 1081-1083, 1101-1105, 1121-1122), Court ruled that Act's requirement that domestic banks maintain certain records of transactions does not infringe any privacy expectation).

112. *See* United States v. Bank of Nova Scotia, 691 F.2d 1384, 1391 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); *see also* United States v. Field, 532 F.2d 404, 408 (5th Cir.) (Cayman Islands bank's officer subpoenaed), *cert. denied*, 429 U.S. 940 (1976). The courts considering whether a foreign bank may be compelled to produce records generally undertake a balancing of the court's need for evidence against the bank's interest in not violating any laws of its country. *See* United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 345 (7th Cir. 1983); *see, e.g., In re* Sealed Case, 825 F.2d 494, 498-99 (D.C. Cir. 1987) (per curiam) (although foreign banks may be subpoenaed, instant bank may not, because it was not a party to the action and had acted in good faith throughout proceedings), *petition for cert. filed sub nom.* Roe v. United States, 56 U.S.L.W. 3326 (U.S. Sept. 4, 1987) (No. 87-395); *cf.* United States v. Vetco, 691 F.2d 1281, 1288-89 (9th Cir. 1981) (listing factors to be balanced).

113. *See* Honegger, *supra* note 80, at 8-9.

114. This conclusion does not penalize the depositing of funds in offshore banks. Depositors may have innocuous and justifiable reasons for maintaining foreign accounts. *See id.* These reasons might derive from certain privacy interests, such as a legitimate desire to control the flow of public information about oneself, *see* Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. Rev. 1063, 1123 (1986), or as a means of checking the intrusiveness of modern society, *see* M. Berger, Taking the Fifth 230 (1980). Illegitimate reasons for depositing assets offshore, however, also exist, including the "laundering" of unclean or ill-gotten money, *see* Nadelmann, *Unlaundering Dirty Money Abroad: U.S. Foreign Policy and Financial Security Jurisdictions*, 18 Inter-Am. L. Rev. 33, 34-35 (1986), or avoidance of income taxes, illegal manipulation of securities markets, insider trading, circumvention of stock margin requirements, and illegal takeovers of domestic industries, *see* Foreign Bank Secrecy: Hearings on S. 3678 and H.R. 15073 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 1 (1970) (statement of William Proxmire, Chairman, Senate Subcommittee on Financial Institutions). When the maintenance of overseas bank accounts is suspected to be for illegitimate purposes, any privacy expectation properly should succumb to the need to ascertain the truth.

115. 425 U.S. 391 (1976).

ing a directive, primarily because of its speculative wording, asserts no facts of evidentiary significance. Moreover, the threat of incrimination, although present, is too insubstantial to invoke the fifth amendment. Although the government can use the consent directive to forge inferential links in the chain of evidence helping to prosecute the witness, the resulting chain is too weak to support the incrimination requirement of *Fisher* and traditional fifth amendment analysis.

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