No. 99-166

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
WEBSTER L. HUBBELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE UNITED STATES

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1. The most salient feature of respondent's brief is its conspicuous failure to grapple with the questions presented by the analysis of the court of appeals. That failure is most evident in respondent's persistent emphasis on Section 6002 and on *Kastigar v. United States*, 406 U.S. 441 (1972). Respondent's fundamental position (*e.g.*, Resp. Br. 11-12, 16-17), echoed by amicus National Association of Criminal Defense Lawyers, seems to be that *Kastigar* directly bars the government from prosecuting respondent after compelling respondent to produce documents under Section 6002. Read literally, that suggests the obviously false idea that Section 6002 confers transactional immunity. *See Kastigar*, 406 U.S. at 453 (interpreting Section 6002 to grant use immunity and finding the statute constitutional on that basis).

More generously, respondent's argument rests on the implicit premise that the product of compulsion under Section 6002 is the documents themselves. That premise, however, reflects a complete misunderstanding of the operation of Section 6002. As the *Kastigar* Court explained, the immunity that accompanies compulsion under Section 6002 is precisely limited to the constitutional minimum: The immunity extends only to incriminating testimonial communications that the government otherwise could not obtain. 406 U.S. at 453. With respect to an order compelling the production of documents, that immunity applies not to the production generally, but only to the testimonial component of the production, the implicit admission of the respondent that certain documents responsive to the subpoena exist in the respondent's possession or control and that those documents are the ones delivered in response to the subpoena. *See Fisher v. United States*, 425 U.S. 391, 410, 413 (1976).

Thus, the immunity under Section 6002 does not directly extend to the documents at all. Rather, it is quite narrow, limited to those testimonial communications that might be implicit in the act of production. Any application to the contents of the documents themselves must be justified by some theory as to how the previously recorded documents can be treated as derived from the after-the-fact implicit testimonial communications.

It is that point, of course (which respondent more or less ignores), that is the center of this case: From what are the contents of the produced documents derived? Because *Kastigar* did not deal with document production, it offers nothing to assist the Court in determining when the contents of documents are derived from those privileged implicit testimonial communications rather than from the unprivileged physical act of production itself. For that question, the Court must turn to its cases analyzing the production of documents specifically and, more generally, distinguishing between testimonial and non-testimonial communications. Thus, respondent's refusal to go beyond *Kastigar* itself—respondent's brief does not even attempt to explain the dispositive portion of *United States v. Doe*, 465 U.S. 605 (1984)—leaves respondent with a position no more persuasive than the automatic-taint view of the court of appeals. *See* Resp. Br. 31 n.33 ("Our position is that where the 'testimony' compelled by the act of production is that the responsive documents exist, the documents are tainted.").

For the reasons explained in our opening brief (U.S. Br. 17-32), two strands of this Court's existing jurisprudence strongly support our view that the contents of the produced documents are derived from the unprivileged physical act of production itself rather than the privileged communications implicit in that act. The first (U.S. Br. 26-32) is the long line of cases which builds on *Schmerber v. California*, 384 U.S. 757 (1966). These cases emphasize the importance of limiting the privilege against compelled self-incrimination to testimonial communications and recognizing the ability of the government to use other types of compulsion in the course of criminal investigations. The second (U.S. Br. 12-17) is the emphatic rejection in *Fisher* of the doctrine of *Boyd v. United States*, 116 U.S. 616 (1886). Respondent's automatic-taint view is inconsistent with both of those lines of authority.

The central analytical flaw of respondent's presentation is his conflation of the tangible documents with respondent's tacit testimony as to what documents he had. *See, e.g.*, Resp. Br. 16 (arguing that the compelled disclosure of "what documents he had" barred the government from "us[ing] those documents to build a criminal case against him"). The problem with that analysis is that it denies

the existence of a physical component of the act of production, unprotected by the constitutional privilege. As the Department of Justice aptly explained in its amicus brief on the merits, this Court's decision in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), illustrates the fallacy of respondent's reasoning: The Court permitted the use of the nontestimonial results of the compelled activity, but required suppression of the information derived from testimonial components of the compelled activity. DOJ Br. 23-24. Because respondent does not even acknowledge the existence of the nontestimonial component of the act of production, he offers nothing to rebut our explanation of why the government's access to the contents of the documents should be treated as derived from the unprotected physical component—the act of delivering the documents—rather than the implicit testimonial component—the admission of the document's existence.

2. Respondent also contends (*e.g.*, Resp. Br. 34) that this case reflects a rare investigative practice, pointing to the paucity of reported decisions analyzing the propriety of similar investigative practices. We reject the implication that acceptance of the analysis of the court of appeals would have no significant effect on important prosecutorial interests.

Respondent's argument rests on the mistaken premise that the Court can obtain an accurate picture of prosecutorial practice by reviewing the facts of reported privilege cases. For several reasons, the universe of reported decisions is unlikely to provide an accurate picture of the universe of prosecutions as a whole. Among other things, in many cases the compelled information will not be sufficiently incriminating to warrant prosecution; in many cases in which a prosecution is brought, the defendant (for the reasons explained in our opening brief) will assume that any assertion of the privilege will fail; and

even if an objection is raised, in many cases the prosecution will be resolved by a guilty plea without any trial or reported disposition. Thus, the limited discussion of cases like this one in the reporters does not suggest that the procedures followed in this case are unusual.

A better guide to the importance of the questions presented comes from the views of the Nation's central prosecutorial authority. On that point, as the Department of Justice stated in its brief supporting rehearing en banc in the court of appeals (and in its motion for divided argument in this Court), the appellate court's decision implicates important and common practices. The Department explained that the ruling of the court of appeals would be "likely to impose significant burdens on the prosecution of a specific category of criminal investigations, [particularly document-heavy cases such as] a tax or health care fraud investigation [in which it may be appropriate to] seek all of the records of a physician who runs his practice as a sole proprietorship." DOJ Reh'g Response 9.

3. Respondent also contends (Resp. Br. 36-37) that the government has waived the second question on which the Court granted review—the applicability of the foregone-conclusion doctrine. For three separate reasons, that contention should not concern the Court. First, and most obviously, it is too late in the day for respondent to present that kind of procedural objection. If respondent thought the question was not properly part of the case, the time for bringing that point to the Court's attention was when respondent filed his brief in opposition. *See South Central Bell Tel. Co. v. Alabama*, 119 S. Ct. 1180, 1186 (1999); S. Ct. R. 15.2. Furthermore, it is plain that the government pressed the question in the court of appeals and that the court of appeals actually decided the question. Hence, whatever the merits of respondent's

claims about the state of the record, the question is now properly before this Court. *See United States v. Williams*, 504 U.S. 36, 40-45 (1992).

Finally, respondent's objection mischaracterizes the state of the record. As respondent's own quotations illustrate (Resp. Br. 36-37), the most that respondent can say is that the government acknowledged the obvious truth that respondent is entitled to assert a privilege. That is vastly different from waiving any particular argument the government might have for overcoming respondent's assertion of the privilege. The government expressly claimed in the district court that the act of production in this case was insufficiently incriminating to warrant suppression. R. 37, at 15, *reprinted in* C.A. App. 310 ("If the [testimony implicit in production] is not self-incriminating testimony, there are no Fifth Amendment implications, the records cannot be tainted, and no hearing is required. Such is the case here."). As the court of appeals recognized by proceeding to address the point, that argument adequately preserved the foregone-conclusion question presented by the petition.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the district court for implementation of the plea agreement.

Respectfully submitted,

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