

Even Privilege Logs Can Be Privileged Under the Fifth Amendment

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On January 28, 2025, the U.S. Court of Appeals for the Ninth Circuit issued a significant ruling reinforcing the Fifth Amendment’s protection against self-incrimination and clarifying the attorney-client privilege in the context of grand jury subpoenas.

In *In Re Grand Jury Subpoena*, 127 F.4th 139 (9th Cir. 2025), the Ninth Circuit held that counsel cannot be compelled to provide a privilege log delineating all documents a client previously sent to counsel for the purpose of obtaining legal advice unless and until the court conducts an in camera review of the documents at issue to determine whether the Fifth Amendment right against self-incrimination, as announced in *Fisher v. United States*, 425 U.S. 391 (1976), applies.^[1]

The decision further defines the limits of government subpoenas in criminal investigations and clarifies when privilege logs themselves may be shielded from disclosure. This ruling has far-reaching implications for attorneys, clients, and government investigations, particularly in white-collar, tax fraud and corporate compliance matters.

***Fisher v. United States*: Fifth Amendment Protections for Document Production**

The Ninth Circuit’s ruling relied upon the Supreme Court’s decision in *Fisher v. United States*, which laid the foundation of the “act of production” doctrine, governing the Fifth Amendment’s protection against self-incrimination in the context of document production.^[2]

In *Fisher*, the Court held that, while the Fifth Amendment protects against compelled testimonial communication, it does not automatically shield pre-existing documents from disclosure. The Court reasoned that documents voluntarily created before a subpoena is issued are not “compelled testimonial” communication because they were not prepared under government coercion.^[3]

The Court also clarified that attorney-client privilege does not extend to pre-existing documents that a client could have been forced to produce had they remained in the client's possession.^[4] Although attorney-client privilege protects confidential communications between a client and their lawyer, it does not transform otherwise discoverable records into privileged material.

However, the Supreme Court recognized that the act of producing documents *can* be "testimonial" if it forces a person to admit the existence, authenticity, or control of the documents.^[5] In such cases, the Fifth Amendment may protect against compelled production, and the attorney-client privilege extends that protection to attorneys who possess documents on behalf of their client. Despite this protection, the Court also introduced the "foregone conclusion" exception, which allows the government to compel the production of documents if it can independently prove their existence, authenticity, and the individual's possession of them.^[6]

The Ninth Circuit's Decision: When Privilege Logs are Protected

In *In Re Grand Jury Subpoena*, the Ninth Circuit clarified that *Fisher* extends beyond the production of documents to the content of privilege logs delineating documents withheld on the basis of privilege.^[7]

The case arose from a grand jury investigation into an alleged tax evasion scheme. The government subpoenaed an individual, who declined to testify or produce documents, citing the Fifth Amendment. The government then subpoenaed a law firm that had previously represented the individual in connection with tax matters, demanding that the law firm produce documents related to its representation and prepare a privilege log listing any documents the firm withheld from its production. The law firm refused, asserting that production of the privilege log would violate the client's Fifth Amendment rights. The district court disagreed and ordered the firm to comply.^[8]

On appeal, the Ninth Circuit reversed, holding as a matter of first impression that a privilege log is protected under the Fifth Amendment if its production would confirm incriminating details about the existence, authenticity, or control of the documents.^[9] The court reasoned that a privilege log can confirm facts the government cannot independently prove, making it potentially self-incriminating and protected under the Fifth Amendment. Because *Fisher* shields attorneys from producing *documents* their clients could not be compelled to provide, the court ruled that a privilege log—which would effectively reveal and confirm the existence and client's custody of those same documents—may also be protected.^[10]

The Ninth Circuit also rejected the government's argument that the privilege log could be compelled under the "foregone conclusion" exception.^[11] The government failed to independently establish the existence, authenticity, and control of the documents, meaning that compelling the privilege log would improperly force the client to provide self-incriminating testimony. To ensure courts properly apply *Fisher*, the Ninth Circuit further held that a district court must conduct an *in camera* review—a private judicial examination of the withheld documents—before ordering the production of the privilege log.^[12]

Practical Implications

- By recognizing that privilege logs can be testimonial, the decision strengthens Fifth Amendment protections and ensures that attorneys cannot be compelled to indirectly confirm the existence of incriminating documents.
- The government is prevented from using privilege logs as a backdoor method to obtain

knowledge of incriminating evidence that it could not otherwise access.

- This case reiterates the importance of closely monitoring attorney-client privilege obligations and potential Fifth Amendment privilege issues when responding to a government subpoena.

ENDNOTES

[1] *In Re Grand Jury Subpoena*, 127 F.4th 139 (9th Cir. 2025).

[2] *Id.* at 142–43 (citing *Fisher v. United States*, 425 U.S. 391, 404–05 (1976)).

[3] *Fisher*, 425 U.S. at 409–10.

[4] *Id.* at 404–05.

[5] *Id.* at 410–11.

[6] *Id.* at 411.

[7] 127 F.4th at 143–44.

[8] *Id.* at 142.

[9] *Id.* at 144–45.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 145–46.

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